24.11.94

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

ON 21ST NOVEMBER 1994 CAUSE 465/93

BETWEEN	DAVE ERIC RILEY AND MERVILEE RILEY	PLAINTIFFS
AND	GRAND CAYMAN GOLF RESORTS LIMITED	DEFENDANT

For the plaintiffs: Mr. Conor Griffin
For the defendant : Mr. Steve McField

HARRE C.J.

JUDGMENT

This is a claim and counterclaim arising from a contract to purchase a lot in a development known as Patrick's Island on Grand Cayman. The pleadings are brief and by referring to them by direct quotation I can most conveniently describe the issues.

The following appears in the special endorsement to the writ -

> "1. On or about the 14th of April 1992 the Defendant agreed with the Plaintiffs to sell to them a plot of land at Spotts Registration Section Grand Cayman, Block 24, part of a development to be known as Patrick's Island and Patrick's Lagoon.
>
> 2. The said agreement provides (inter alia) for the Defendant to refund to the Plaintiffs any money paid under the agreement in the event of the Defendant's failure to deliver a registerable title together with the benefit of planning permission by the 1st January 1993. This is covered by clause

#9 of the said agreement.

3. The defendant has failed to deliver a registerable title by the 1st January 1993, and the Plaintiffs have demanded the return of the sum of CI$21,000.00 paid by way of deposit under the said agreement. The Plaintiffs therefore now claim the said sum of CI$21,000.00 together with interest at 10% pursuant to the Judicature Law and costs.".

Particulars showing a sum claimed at the date of the writ of CI$22,539.00 follow.

The defence admits the agreement on or about 14th April 1992 and continues as follows -

"2. The Defendant denies any agreement with the Plaintiffs that the 1st day of January 1993 was the date agreed to deliver a registerable title together with the benefit of planning permission.

3. The defendant repeats paragraph 2 of the Defence and states that the Plaintiffs were duly notified that the Defendants are willing and able to transfer title to the Plaintiffs on payment of the balance of the purchase price of CI$21,000.00.

4. The Defendant states that date for the delivery of a registerable title with the benefit of planning permission was left blank in the contract as the parties were not agreed as to such date. Subsequently, the Defendant became aware that such date may have been filled in when the Plaintiffs made demands for refund of their deposit.

5. If the date of the 1st January 1993 is or was inserted into the said contract the Defendant states that it was done without his agreement, knowledge, acquiescence and or consent.

AND BY THE WAY OF COUNTER CLAIM

6. The Defendant repeats paragraphs 1 to 5 of the Defence.

7. On or about 2nd August 1993 the Defendants, by registered post, notified the Plaintiffs that the Defendants were in a position to transfer title to

the plaintiffs.

> 8. By letter dated on or about 21st September 1993 the Plaintiffs notified the Defendant that they "would like our deposit of CI$21,000.00 returned to us immediately...."
>
> 9. In breach of the said agreement the Plaintiffs have refused to complete the said agreement by taking title and paying to the Defendants the balance of the purchase price of CI$21,000.00"

and the defendant counterclaims CI$21,000, the balance of the purchase price, interest and costs.

The issues in the case, both of fact and law arises from two clauses in the agreement dated 14th April 1992. Clause 9 in the proforma contract of the defendant reads as follows -

> "9. In the event the Vendor is unable to deliver a registerable title, together with the benefit of planning permission for the subdivision of the lot by the 1st day of ________ 19___ the Purchaser may demand the return of all money paid pursuant to clause 2a hereof and as specified in the Fourth Schedule hereto. In which event, the Vendor agrees to return all money forthwith; and in such case, neither party shall have any further rights or obligations whatsoever in respect of this agreement.".

and clause 11 reads as follows -

> "11. Any notice given hereunder shall be by registered mail (registered air mail if the Purchaser resides outside the Cayman Islands) and shall be deemed to be served seven (7) days after the posting thereof, and shall be addressed to the Vendor, the attorneys at law of the Vendor, or the Purchaser at the addresses given herein, or such other address as may be notified by either party to the other from time to time.".

With regard to clause 9, the 1st plaintiff and his two

witnesses, who were the real estate agents who acted for each party stated unequivocally that the defendant was present, with them and the 1st plaintiff, at the signing of the agreement and that all 3 copies had "January...93" hand written in the blank spaces underlined, so as to complete the expression "1st day of January 1993". I attach no significance to the discrepancy between this and the 4th January which appeared in the original offer to purchase. That was, by reason of the New Year holiday, the first working day of that month. Crighton, the defendant's agent, said he wrote the words in himself and identified his handwriting. I shall now deal in some detail with the evidence given on behalf of the defendant denying this. This evidence was given by Mr. Huig Zuiderent (a.k.a. Hugo) the defendant's only witness.

In support of his denial Mr. Zuiderent had to deal with certain correspondence passing between him, acting on behalf of Grand Cayman Golf Resorts Ltd., the plaintiff and his attorney. The plaintiff had written in the following terms on the 26th July 1993 -

"July 26 1993
Patrick's Island
P.O. Box 1320 GT
Grand Cayman Island
B.W.I.

Attention: Hugo Zuiderent

This letter is in reference to the purchase of lot #124.

In March of 1992 an agreement to purchase the lot was written up and agreed by both parties that I would put down a deposit of $21,000.00 and the remaining balance to be paid upon completion. Also the agreement stated that the land needed to be completed by January 4, 1993. In June of 1993 I decided that I could not wait any longer for a

house so I purchased a house already completed. Therefore I can not afford to purchase the land and sit on it for several years.

After several attempts to reach you to discuss this situation I finally had to call Eric Bosch who was the Real Estate Agent. Mr. Bosch said he spoke to you and you said I needed to give you two weeks notice in writing. That is why I am writing this letter to inform you tht I have decided to cancel our agreement and I need to get my deposit back.

I will be away for several weeks but you can either mail it to P.O. Box 612 G.T. or drop it off at Tri-Star Cayman Ltd. to Jeff Pouchie.

P.S. I may be interested in a canal lot at a later time and I hope that there will be no hard feeling over this situation.

Sincerely
Dave Riley.".

That was a registered letter and the receipt indicated the addressee as Hugo Zuiderent and the date of arrival as 29th July 1993. This was signed by one Hunter as addressee and the signature of the agent of the office of destination (apparently the Post Office) appears as the unidentified initials YM. An issue of law with which I shall have to deal later is whether the letter constituted a valid notice to the vendor as required by clause 11. The defendant's evidence was that P.O. Box 1320 GT, the address shown in that clause was that of a management company called International Corporate Management Services.

The defendant denied having seen this letter, but on 2nd August 1993 he signed a letter to the 1st plaintiff on paper headed with the corporate name of Grand Cayman Golf Resorts Ltd ("GCGR") and a P.O. Box number which was not that shown in clause 11 of the

contract of 14th April. It conveyed the information that GCGR was in a position to transfer title to the lot at Patrick's Island and that the balance of the purchase price outstanding was CI$21,000.

The 1st plaintiff's evidence was that he was away from Cayman at that time. His response came in the form of a letter from his attorney dated 2nd September referring to the 1st plaintiff's letter of 26th July which was described as "demanding the return of the part payment of CI$21,000 because of your failure to complete the transaction by the 1st January 1993 in accordance with clause 9 of the purchase agreement". In fact the plaintiffs' letter had referred to 4th January 1993, the date inserted in the original offer to purchase.

The defendant's response was by fax dated 6th September and read as follows -

> "We are in receipt of your faxed letter dated September 3 (sic) 1993.
>
> With regard to the letter of July 28, 1993 to which you are referring to, we can inform you that we have not received this letter at our offices.
>
> We are surprised that Mr. Riley now wish to cancel his sales agreement with us, some 9 months after the date inserted in Clause 9 of our sales agreement.
>
> It is correct that Mr. Riley did speak to us in June 1993 and indicated that he might have to cancel the agreement due to personal reasons. Our contracts, however, call for any notices to be sent by registered mail and we never received a notice. We did sent out notices to complete.
>
> We would appreciate if you could send us a copy of the letter, and indicate to us who collected it at the post office.

The correspondence resumed with a letter dated 21st September signed by both plaintiffs, and sent to GCGR at the P.O. Box number shown on the defendant's letter of 2nd August. The material part reads as follows -

> "This letter is to inform you that Dave and Mervilee Riley would like our deposit of CI$21,000.00 returned to us immediately due to clause 9 which states that the land had to be completed by January 1993. Since the land was not completed we decided in July 1993 to purchase a home. I have made several attempts to discuss this situation with you over a period of ten weeks and since you have made no attempt to resolve this matter I have had to seek legal advice".

That is consistent with the oral evidence which Mr. Riley gave at the trial. I accept it, and it is common ground that this letter was received by the defendant.

I also accept that as late as April or May the 1st plaintiff was discussing the possibility of buying another adjoining lot at Patrick's Island, but that fact shows no more than he was not yet seeking to withdraw from his contract with the vendor at that time. It carries little weight as an indication of what the terms of clause 9 were.

There was swift exchange of correspondence between the plaintiffs' attorney and the defendant between 21st and 30th September. A writ was threatened by the plaintiff's attorney on 21st. A fax dated 22nd from the defendant, signed, as always, by Mr. Zuiderent, contained the following passage of importance in

relation to the terms of clause 9. -

> "We have received from you a copy of the registration slip, however we do not see our signature on this, although the letter was addressed to the undersigned personally.
> We also have checked a copy of the sales agreement, which we have in our possession and we do not see that Clause 9 has been initialled. Could you please send us a copy of the relevant page of Mr. Riley's contract. Upon receipt we will immediately contact you.".

The attorney's response dated the following day, 23rd September included the following observation on this -

> "Clause 9 of agreement has not been initialled but there is no particular requirement for this: is Grand Cayman Golf Resorts Limited denying the date specified in that clause?"

The defendants' response came the same day. It was this -

> "With reference to your fax of today's date, we wish to clarify our fax of yesterday with regard to clause 9. Clause 9 in our agreement does not show any date at all and therefore not initialed. We had not checked our agreement till September 22, 1993.
>
> This complicates the issue as far as we were concerned. There is apparently a date in Mr. Riley's contract, that is why we were asking if it was initialed, just for clarification. It was not us who filled out the agreement, these are filled out by the Realtors and are then presented to us after the client has signed the agreement, after this we do sign and initial the agreement.
>
> If you look at the agreement, clause 2b has been initialed by all parties to the agreement.
>
> We have served notice to complete, if Mr. Riley needs some more time, we might be willing to listen to his proposal.".

Further argument ensued in correspondence as to contractual procedure and the agency position. I need not refer to it. A writ was issued on 14th October.

Acceptance of the defendant's version of events would involve the following propositions -

That the 1st plaintiff and his two witnesses are all wrong in saying that Mr. Zuiderant was present with them at the signing of the contract dated 14th April.

That they (and in particular Crighton, the defendant's realtor who said that the handwritten element in clause 9 was inserted by him) were equally wrong in saying that the date was in clause 9 at the signing.

That Mr. Zuiderant, having accepted (as he said) on 6th September in reliance of what was said by the plaintiffs' attorney on the 2nd that a date some 9 months earlier had been inserted in clause 9 of the sales agreement said in his letter of 22nd September only that his copy of clause 9 had not been initialled by reason of the explanation he gave on 23rd to which I have referred.

I find it incredible that if Mr. Zuiderent had discovered on 22nd September that no date was inserted in clause 9 of his copy of the contract he would not have said so in his letter of that day and I reject his evidence that this was so. I also find it

incredible on more general grounds that both parties and their real estate agents would have let such an important matter go by default at the time when the agreement was concluded.

I now turn to the question of notice. My view is that the provisions of clause 11 of the contract apply to a demand under clause 9 and indeed the opposite view has not been relied upon with any conviction before me. The question is whether the 1st plaintiff's letter of 26th July constituted notice to the vendor in accordance with clause 11.

The correct postal address of the company as set out in that clause was used. Mr. Zuiderant gave evidence of his belief that that was at the time the postal address of the registered office but it matters not. From the receipt slip I infer that the envelope was addressed to Hugo Zuiderent, the controlling director and shareholder of the company and that the name of GCGR did not appear on that envelope. It certainly did not appear on the letter itself. "Patrick's Island", the name of the development, which is described on the cover of the sales contract as "a development by Grand Cayman Golf Resorts Ltd" did so appear.

The following general proposition with regard to the requirements of notice to a company are well established. See _Halsbury's Laws of England 4th Edition Vol 7 (1)_ paragraph 990 -

(a) In order that notice to a company may be effected it

should either be given to the company through its proper officers or received by it in the course of its business.

(b) Notice to a director or other officer of the company in that character is sufficient.

(c) Even an oral notice given to a managing director or the secretary in the course of his duties as such suffices.

(d) The notice which a company receives through its officers or other agents is not properly called constructive notice but is actual notice.

Relating this to clause 11 of the contract, I find that, as a general proposition of law, notice to the vendor company could be sufficiently given if addressed to Hugo Zuiderant, its controlling director and shareholder. It is trite, and common ground, to say that if a contract contains a provision that one of the parties thereto may determine it by notice, notice must be given in accordance with the terms of the contract. But the contractual requirement of clause 11 - that notice should be sent by registered mail to the address given in the contract - was complied with. P.O. Box 1320 George Town, was that address and the demand was actually received there on 29th July.

The contents of the 1st plaintiff's letter dated 26th July are a quite unambiguous notice of his demand under clause 9 of the contract for the return of the money paid under clause 2a and as specified in the Fourth Schedule even though the corporate name of the vendor was not mentioned.

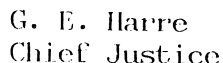
So in the light of all that have said I make the following findings of fact and law -

The contract made between the parties and dated 14th April 1992 included in the third line of clause 9 the date 1st day of January 1993. The fact that this date appeared in manuscript did not raise a legal requirement that it should be initialled as agreed. It was not a deletion or alteration but something which had to be there to give the clause any meaning at all.

Due notice under clause 11 of the plaintiffs' demand under clause 9 was given to the company by the plaintiffs' letter dated 26th July 1993 and actually received by registered post on 29th at the address specified in the contract.

Accordingly, the claim for the return of the plaintiff's deposit of $21,000 as set out in the special endorsement to the writ of summons succeeds and the defendant's counterclaim fails. The plaintiffs have also claimed interest at 10% in accordance with S 62 (2) of the Judicature Law and I have seriously considered awarding that. On balance, however, I think that post judgment interest at 7 1/2% in accordance with S 62 (1) properly meets the justice of the case.

Costs in favour of the plaintiffs. Verbal notice of appeal given. By consent, money paid into Court will remain there until determination of the appeal.



G. E. Harre
Chief Justice

24th November 1994.