JAMAICA

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IN THE COURT OF APPEAL

CAYMAN ISLANDS CIVIL APPEAL NO. 2/1980

BEFORE: THE HON. MR. JUSTICE ROBINSON - PRESIDENT
THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE CAREY, J.A.

BETWEEN BEACH CLUB ENTERPRISES LTD. - APPELLANT/DEFENDANT

AND HORIZON MANAGEMENT LTD. - RESPONDENT/PLAINTIFF

Mr. R. Mahfood, Q.C. and Mr. Ian Miller for Appellant.

Mr. R. D. Alberga, Q.C. and Mr. Dougherty for Respondent.

June 16, 17, 18, 1981; and
June 7, 1982.

ROBINSON, P.:

I have had the opportunity of reading in draft the judgment of Carey J.A. herein and concur in the reasoning contained therein.

CARBERRY, J.A.:

This appeal was concerned with the claim made by the respondent/plaintiff, hereinafter for convenience called the Purchaser, to recover from the appellant/defendant, hereinafter called the Vendor, a sum of $235,000 paid by the purchaser to the vendor in the course of attempts by the former to buy from the latter certain freehold property in Grand Cayman known as the Beach Club Colony.

The decision of the Court of Appeal and its order was made as long ago as the 18th June, 1981, immediately following on the ending of the argument herein. We promised to put our reasons into writing, and the main judgment in this matter, written by Mr. Justice Carey was available in draft as long ago as November. However, in deference to the careful judgment of the Chief Justice, which we had differed from, and to the incisive judgment of Mr. Justice Carey, with whose main conclusions I agreed, save for a point hereafter noted, and also to the expressed desire of the parties to test our decision elsewhere, as is their right, I thought it desirable to add a few words of my own, and I express my regret at my delay in doing so, due to the pressure of work in our own appellate jurisdiction.

If I may say so, the points in dispute were not in themselves difficult, as we saw them, but they did fall within the overlap of three difficult fields of law, difficult in one instance, the forfeiture of deposits and recovery of instalments of purchase price, because of the multiplicity of cases thereon; in the other instance, the effect of repudiation of contract and acceptance thereof, where the difficulty has been caused by the confusion attendant in using the word "rescission" to describe the acceptance of the repudiation; and finally in the third field, the possibility of equitable relief from forfeiture, where the difficulty has been due to attendant growing pains of the principles in this field of law.

I set out briefly the situation as it appeared to me, so that such remarks as I may make may have a setting. As the Chief Justice remarked in his judgment, both the Purchaser and the Vendor are locally incorporated companies. Mr. Stenson was for all practical purposes the owner and operator of the Purchaser, while Mr. Smatt filled a similar role with regard to the Vendor. Mr. Stenson, for the purchaser, was assisted by legal advisers at all significant stages; Mr. Smatt for the Vendor had similar assistance on his side.

The story began when on the 21st March, 1979 the Purchaser bought for $25,000 (all sums are in U.S. dollars) a thirty day option to purchase from the Vendor the Beach Club Colony for the sum of $2,600,000. If the option was exercised, the price of the option would go towards payment of the price, and what was then contemplated was completion on or before the 15th May, 1979, by paying the balance in cash, or its equivalent. The object of the purchase was to take over the hotel as a going concern, and this intent appears in all the subsequent course of dealings. I emphasize this point because though time is not usually of the essence (unless specially made so) in sale of land transactions, as Harman, J. remarked in the leading case of Smith v. Hamilton (1951) Ch. 174 at 179:

> "There are circumstances in which time can be said to be of the essence of the contract from the beginning. It is well known that time may be of the essence on a sale of licensed premises, or of a shop as a going concern....."

The option was exercised, and the parties entered into what may be called the principal agreement on the 11th April, 1979. I am content to take the outline of that agreement as it appears in the judgment of the Chief Justice. It shows that the parties were buying the hotel and its goodwill as a going concern. Completion was to take place on or before the 1st June, 1979. As to payment this was governed by Clause 4, set out in full in the judgment of Carey, J.A. and I do not repeat it, save to note that it stated that a "deposit" of U.S. $25,000 had been paid to the Vendor, and to quote:

"... the balance of the purchase price shall be paid as follows:-

(a) U.S. $235,000.00 on or before 20th April, 1979;

(b) the balance on completion."

The contract contained a Clause 7:

"7. Time shall be of the essence in respect of this agreement."

Curiously enough the principal agreement did not contain any express provision for the payment of a deposit, usually 10% of the price. The only so called "deposit" was the $25,000, mentioned in Clause 4, and which was the price already paid for the option to purchase, which was to go towards the sale price if the option was taken up. Perhaps this was due to an atmosphere of euphoria: the Purchaser confident in his resources, and the Vendor confident in being paid in full on the 1st June, some six weeks away. The only note of caution that was struck was that as the running of the hotel would require various licences to be issued to its operators by the Government of the Cayman Islands, the agreement was made conditional on the Purchaser obtaining those licences prior to completion.

At this stage of the proceedings I agree that the $235,000.00 the subject matter of this action was an instalment of the purchase price, though I note that by what may be more than an odd coincidence the total of both sums, $235,000.00 plus $25,000. add up to $260,000.00 or 10% of the $2,600,000.00 quoted in the option as the original price. Set against that however is that some minor adjustments had taken place. The original option had provided in Clause 4 for the Vendor to retain a room, this disappeared, and the price was adjusted upwards by $70,000.00 and $50,000.00 and became $2,720,000.00 as against the original $2,600,000.00.

The $235,000.00 was duly paid, and acknowledge by a receipt which refers to it as a "deposit". I agree that this alone would not convert an "instalment" into a "deposit", but it is some indication as to what the Vendor's agents thought.

Two weeks after the priacipal agreement of the 11th April, the parties made on the 25th April, 1979, their first variation of the terms of the principal agreement. It appears that the obtaining of the necessary licences did not now seem so easy.

The relevant Clauses are set out in the judgment of the Chief Justice, and I do not repeat them save to note the following points:

(a) The 1st June, 1979 date for completion is extended, or made more flexible; it is to be 14 days after the date on which all the necessary licences referred to earlier have been formally approved. (See Clause 1: 26th April).

(b) There is however a provision that if any of these licences are still outstanding by the 1st September, 1979, either the Vendor or the Purchaser shall have the right to cancel the agreement; if the Vendor cancels he shall "pay to the Purchaser all deposits paid by it under the agreement, but with interest earned thereon accruing to the Purchaser." (See Clause 2(a) 26th April).

(c) There is a further provision that if by the 15th August, 1979 any of the licences are still outstanding, the purchaser may waive his right to terminate and complete the purchase on giving 14 days notice. (See Clause 2(b) 26th April).

(d) Though the completion date had in a sense been moved from the 1st June, 1979, the 1st variation of the 26th April still provides, expressly, that the balance of the purchase price is to be paid on the 1st June, 1979 "in escrow" to Guiness Mahon Cayman Trust Ltd. who will hold it as stakeholder and pending completion are to invest it pro tempore. (See Clause 4: 26th April).

Two comments may be made: it was clearly of importance to the Vendor that the balance of the purchase price should come into Cayman and be paid to a stakeholder by the original completion date, the 1st June, 1979. Secondly, consciously, or unconsciously, both parties are now referring in their contract to both the $25,000.00 and the $235,000.00 as "deposits," and the Vendor has promised to return them if he cancels the agreement; nothing is said as to what would happen if the purchaser cancels.

A new factor now enters the stage: The Purchaser was having difficulty in raising the balance of the purchase price. Up to now we have a Vendor relatively unprotected: there is no express forfeitable deposit. True he has two sums of $25,000.00 and $235,000.00 in hand, but as shown in (b) above he may have to return them (see Clause 2(a) 26th April). All that he has is a promise to pay the balance of the price into stakeholders by the 1st June, 1979. And now the Vendor confesses this difficulty.

The only reasonable inference in this situation is that the parties approached their 2nd variation agreement of the 31st May, 1979 with the Vendor determined to safeguard his position and a Purchaser trying to play for both extra time and better terms of payment.

The relevant Clauses of the 2nd variation of the 31st May, 1979 are set out in the judgment of the Chief Justice and Carey, J.A. and I refrain from repeating them, save to note the following points: Once again the variation takes the form of a letter from the Purchaser, to be agreed to by the Vendor. Once again both sides went armed with their respective lawyers, and for my part I must assume that the actual wording used is that agreed to by the lawyers on both sides, and that our prime consideration must be the language that they used.

(i) The 1st June completion date, in its flexible form, is now put to the 1st July, 1979; but the provisions referred to in para. (b) and (c) above dealing with Clauses 1, 2 and 5 of the 26th April letter are still preserved. These are the provisions dealing with whether or not the necessary licences have been secured by the 1st September, if they have not, the previous options still exist. (See para. 1 of the 31st May).

(ii) For this extension, the true effect of which was to put off the Purchaser having to pay the balance of the purchase money in by the 1st of June, the Purchaser pays $25,000.00 more, which is expressly made non refundable. (See para. 2 of the 31st May).

(iii) As to the payment of the balance of the purchase money previously due on 1st June, Purchaser asks for a mortgage in the sum of $1.7 million U.S. to be given him by the Vendor, i.e. the Vendor is to allow this to remain outstanding. The arithmetic of this would mean that of the price of $2,720,000.00

cash, less $1,700,000.00 mortgage, a balance of $1,020,000.00 would be left to be paid in cash. The Vendor already had in hand $260,000 (being the original $25,000 and the $235,000) so the Purchaser must find $760,000.00 in cash as his balance of the purchase money, assuming the mortgage. (See para. 4 of 31st May letter).

(iv) The Purchaser then offers further sums to the Vendor to secure the mortgage, (see para. 5 of the 31st May letter).

(v) Payment of the balance of $760,000.00 is dealt with: though it does not say so clearly, this sum is apparently to be paid to the stakeholder on the 1st July, (instead of 1st June), and to be held by the stakeholder pending completion.

(vi) There are some adjustments to para. (b) and (c) above, that is the provisions dealing with the possibility of any of the licences being outstanding at the 1st September. The Vendor is to repay "the deposit of $260,000 and the further payment of $760,000 ..." Though it is not clearly said, this also means that if the Purchaser cancels because the licence is outstanding, the same result is to follow. This time however the interest on these sums is to go to the Vendor, not the Purchaser.

(vii) There are Clauses dealing with the operation of the hotel as a going concern in this interim period.

(viii) The letter ends with a Clause that deserves to be quoted verbatim:

> "10. In the event that all the licences are granted by not later than 1st September but we (i.e. the Purchaser) fail to complete by that date, you (i.e. the Vendor) shall be entitled to forfeit and retain the deposit of $260,000 paid by us."

I would note that by the time of this second variation of the 31st May, 1979, the $260,000 (which consisted of the sum of $25,000 and $235,000 originally a part payment or instalment of the purchase price) is now being called in two Clauses of this document a "deposit": See Clause 8(b) and 10 of the 31st May letter. The document, carefully prepared by and with the advice of the legal advisers on both sides, represented a radical alteration of the original agreement, particularly as to payment of the purchase price, and to a lesser extent as to the completion date.

In my view when in the second variation the parties refer to the $260,000 as a "deposit" they meant exactly what they said. Our prime consideration must be the language that they used. There had been

no provision before in their agreement for a "deposit", apart from the fact that the $25,000 originally paid for the option had been styled a "deposit" in the principal agreement. As I have said earlier, it may be that the prospect of collecting over two million dollars in six or seven weeks had disarmed the Vendor. But it is quite clear that by the 31st May that that situation no longer obtained. The cash prospect has shrunk to $760,000, and some 60% of the price is to remain outstanding on mortgage. The Vendor is made to offer various sums of $25,000 non refundable for various concessions, and in that situation I must respectfully differ from both the Chief Justice and from Carey, J.A. as to whether the $235,000 had been altered in character from part payment to deposit. I cannot, with respect, regard it as a "misdescription" as the Chief Justice does, or a failed "Metamorphosis" as does Carey, J.A. Though the $235,000 had originally been a part payment or instalment, in my opinion the parties in their second variation had clearly converted it, with the $25,000 originally described as a "deposit", into a "deposit of $260,000" and I cannot believe that the negotiating lawyers, trained in the English Common Law system and experienced in negotiations for the buying and selling of land did not know exactly what they were doing when they used those words, and in the context of the stage at which their negotiations had reached.

I differ therefor from Carey, J.A. on this point. In my opinion the $260,000, or rather the $235,000, for there is no dispute as to the fate of the $25,000, had been altered from being a part payment into being a deposit, with all the consequences that that entails in the events that happened. Clause 4 of the original agreement dealt with arrangements for the payment of the purchase price, both interim and as to the outstanding balance. The main thrust of the 2nd variation of the 31st May dealt with arrangements regarding both payments on account and the payment of the balance, together with the securing of a Vendor's mortgage as to the major part of that balance. The arrangements were such that Clause 4 of the original agreement in effect disappeared.

With respect I cannot accept the comment of the Chief Justice on page 15 of his judgment to the effect that had there been an intention to vary that Clause and convert the instalment paid into a deposit in the sense of being an earnest one would have expected an item expressly to that effect, such as ..... and he illustrates what he would have expected the parties to say:

> "It is hereby agreed that the sum of $25,000 and $235,000 paid pursuant to Clause 4 of the original agreement shall for all purposes be treated as a deposit."

As a result of the negotiation and new agreement of the 31st May Clause 4 had for all practical purposes disappeared. What

the parties did was to insert a new Clause 10, set out earlier above, thatexpressly provides for the two sums, totalling $260,000 to be forfeited and retained in the event that the licences were granted by 1st September and the Vendor still failed to complete.

This is not very different to the Clause that it is suggested that they might have made! The effect of that Clause is that if the licences have been granted and the Purchaser still fails to complete by that date, the Vendor "shall be entitled to forfeit and retain the deposit of $260,000 paid by us."

A final comment on the negotiations that had ensued. It is clear above all that time was of the essence of the contract. Not only did the parties say so originally, but every variation that they made was conditioned on this, particularly the time frame with regard to the payment in of the balance of the purchase money.

To continue the broad outline of the story, it is clear that at some time before the new completion date of 1st July 1979 the necessary licences had been obtained and as the Chief Justice remarks "there has been no suggestion that any of the licences had not been obtained by that date."

Further, as the 1st of July fell on a Sunday, with a public holiday on Monday the 2nd, the 1st July completion date became the 3rd July, 1979. On that date the Purchaser was expected to attend and pay over to the stakeholder the reduced outstanding cash balance of $760,000. What took place is set out in the judgment of the Chief Justice, and has been accepted by both sides to this appeal. It appears at pages 7 and 8 of the judgment. Mr. Stenson for the Purchaser told Mr. Smatt for the Vendor that his backers had withdrawn, that he did not have the money to complete or to pay the $760,00 due that day, and it is clear that he was not likely to be able to raise that money in any relevant period. Instead he introduced to the Vendor a new prospective Purchaser, a Mr. Cook, who was going to make his own contract with the Vendor, and was in no sense acting with or on behalf of the Purchaser. As the Chief Justice put it:

> "Mr. Cook made it clear that he was acting on his own behalf, or on behalf of his company. There was no question of this being a joint venture with Mr. Stenson, or of Mr. Stenson's payments operating as the initial deposit by Mr. Cook, and I do not accept the suggestions to the contrary."

There was inconclusive discussions to the effect that Mr. Stenson might, ex gratia, be given back some of the money he had advanced if sale resulted with the new Purchaser. It did not. Discussions continued with the new Purchaser, and are reflected in a letter of the 5th July, 1979 by Bruce Campbell & Co. to Mr. Smatt's lawyer Mr. D. Myers. It is of interest to note that they envisaged a price of $3 million (U.S.) and that a deposit of 10% was to be paid, non-refundable in the event that the present Purchaser does not proceed.

As the Chief Justice put it:

> "At no stage after 3rd July 1979 did Mr. Stenson, or the plaintiff, make any further attempt at completion or make any offer of the $760,000.00 or any further proposal."

He adds that it was clear that Mr. Stenson would not have stood by with knowledge that the Cook - Smatt negotiations were going on if there was any intention on the part of the plaintiff to complete.

As I understand it, it is clear that Mr. Stenson on behalf of the plaintiff/purchaser had repudiated the contract.

Whether this be regarded as an actual present breach of the duty to complete on the appointed day in a contract in which time was of the essence, or whether it be regarded as what is sometimes called anticipatory breach does not appear to me to be of major importance in this context. It was the breach of the Purchaser's fundamental duty, to pay the price. I quote as apt a short quotation from Treitel's Law of Contract, 5th Edition (1979) at page 633, in Chapter 19: Breach: What amounts to Breach? After dealing with failure or refusal to perform, the author turns to considering the standard of duty, and under "Cases of strict liability" remarks:

> "Many contractual duties are strict. The most obvious illustration of this principle is provided by the case of a buyer who cannot pay the price because his bank has failed or because his expectation of raising a loan has not been fulfilled. There is no doubt that he is liable; the point is taken so much for granted that it has hardly ever been litigated."

In Hochester v. De La Tour (1853) 2 E & B 678; 118 E.R. 922, Lord Campbell, C.J. giving the judgment of the Court remarked: (p. 927):

> "The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured: and it seems reasonable to allow an option to the injured party either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding....."

To the same effect is the dictum of Cockburn, C.J. in Frost v. Knight (1971) L.R. 7 Exch. 111 at p. 113:

> "On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

In the case of what is sometimes called anticipatory breach as in the case of an ordinary breach, which justifies rescission, the victim has an option to treat the contract as determined, or to affirm it and to claim further performance. Unfortunately, due to the poverty of current legal terminology, the word "rescission" used in this connection suffers from an ambiguity that has best been explained by Dixon, J. in the Australian case McDonald v. Dennys Lascelles Ltd. (1933) 48 C.L.R. 457 at pp. 476-7. Though a little long, it is worth quoting in full:

> "When a party to a simple contract upon breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected.

> "When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be, to the position they occupied before the contract was made. But when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only, and the party in default is liable for damages for its breach .... "

The passage above was cited and approved by Lord Wilberforce in Johnson v. Agnew (1980) A.C. 367 at 396. This case, the most recent in a long line of cases dealing with repudiation, and the effect of accepting it, and the remedies of the parties thereon, contains from page 392 et seq. a series of what Lord Wilberforce calls "uncontroversial propositions of law". I cite the first:

> "First, in a contract for the sale of land, after time has been made or has become, of the essence of the contract, if the purchaser fails to complete, the vendor can either treat the purchaser as having repudiated the contract, accept the repudiation, and proceed to claim damages for breach of the contract, both parties being discharged from further performance of the contract; or he may seek from the court an order for specific performance with damages for any loss arising from delay in performance."

See too a passage by Lord Diplock in his judgment, in Moschi v. Lep Air Services Ltd. (1973) A.C. 331; (1972) 2 All E.R. 393 at pages 402 h - 403 c, in which he discusses the acceptance of the wrongful repudiation of the contract by the other party, distinguishes it from "rescission" and points to the rights of the victim arising from that acceptance of repudiation.

And see also Buckland v. Farmer & Moody (1978) 3 All E.R. 929 (C.) Buckley L.J. at page 938 b-c; and Goff L.J. at page 943 e.

In the result then, in this case, the Vendor acquired, as a result of the repudiation of the Purchaser, the right to accept that repudiation, and consequent on that a right to damages, or alternatively to forfeit the deposit, if there was a deposit; or to exercise any of the rights given him by the contract or at law, or in equity. Acceptance of the repudiation was by letter from the

Vendor's attorney on the 1st August, 1979.

I must confess to being somewhat disturbed by the learned Chief Justice treating this letter as a rescission, and then speaking of the Purchaser's reply of the 10th August as "accepting the rescission." The failure to sharply distinguish the senses in which rescission is used has on occasion caused error in assessing its true significance and effect. Here the acceptance of the Purchaser's repudiation left the Vendor, to quote Dixon J above, with rights not divested or discharged which have already been unconditionally acquired.

Both letters are set out in the judgment of the Chief Justice. That of the Vendor of the 1st August, announced acceptance of the repudiation, in effect claimed to forfeit the deposit, but softened it by offering to make an ex gratia payment from it if the sale to Mr. Cook went through. The Purchaser in his letter acknowledged failure to make the payment due on 1st July, agreed that the contract had come to an end, and formally demanded return of the $235,000.00 and two other payments. As to these claims it is to be observed that the Purchaser's action was commenced by action filed in the Grand Court on the 28th August, 1979, before the "cut off" date of the 1st September.

I have already indicated that by virtue of the second variation of 31st May, the $235,000.00 (part of the $260,000.00) became a deposit, forfeitable in the normal way on the Purchaser withdrawing from the sale, or repudiating it as he did.

It is also my opinion, as it is that of Carey J.A., that in the events that happened this sum was properly forfeited on a proper construction of Clause 10 of the variation of 31st May. If I may say so with respect to the Chief Justice, the analysis made by Carey J.A. of the meaning and effect of Clause 10 is to be preferred, and I accept it without repeating it here.

So far as the law with respect to the forfeiture of deposits goes, I hazard a few what I hope are uncontroversial propositions:

a) When a sale goes off, as this one did, the fate of

payments that have been made by the purchaser are to be determined by what the court perceives to be the intent of the parties in the original contract. This without prejudice to their rights of action, save that forfeiture of the deposit may reduce or on occasion eliminate the damages that the disappointed vendor may have suffered.

b) Over the course of the years, particularly in cases in which the parties have failed to expressly state in their contract what is to happen to such payments, the courts have attached to the description of a payment as a "deposit" the implication that this means it was given as an earnest, or as a guarantee of performance by the purchaser, and is to be forfeited in case the sale goes off by reason of his default. If however it goes off by reason of the vendor's default, it is returnable. While if the sale goes through to completion it will be counted as a portion of the purchase price. See Howe v. Smith (1884) 27 Ch. D. 89 (C.A.); Soper v. Arnold (1889) 14 App Cas 429 (H.L.) and see Stickney v. Keeble (1915) A.C. 386 (H.L.) (Vendor's default, deposit returned).

c) Parties often stipulate that a given sum, (usually 10%) is to be a "deposit" and then go on to expressly provide what is to happen to it. Naturally, effect is given to their declared intent. Sprague v. Booth (1909) A.C. 576 (Pr. C).

d) In general payments by the purchaser that are intended to be instalments of the price, and are not intended to be forfeitable, are returnable to the purchaser, no matter how the sale goes off, whether it be due to his fault or not; though if it be due to the purchaser's fault, the vendor will have his claim for damages for breach and

may be able to set the damages off against the returnable instalment. See Mayson v. Clouet (1924) A.C. 980 (P.C.) and Dies v. British Internation Mining & Finance Corprn. Ltd. (1939) 1 K.B. 724,

e) There have been occasions on which payments made as instalments of the price have been expressly declared nevertheless to be forfeitable if the purchaser defaults in completing the sale. There is no reason why parties should not be able to make their own bargain in this respect, but the disproportion between the sum involved and that of the normal deposit has been such as to invite equitable intervention directed to examining whether the provision does not amount to either a "penalty" or to a "forfeiture" against which equitable relief should be given. This has happened in sales of land by instalments: See Re Dagenham (Thames) Dock Co. ex parte Hulse (1873) 8 Ch App 1022; Cornwall v. Henson (1900) 2 Ch 298 (C.A.); Kilmer v. British Columbia Orchard Lands Ltd. (1913) A.C. 319 (P.C.)(relief given by allowing instalment missed to be paid late); Steedman v. Drinkle (1916) 1 A.C. 275 (P.C.); (relief uncertain); Brickles v. Snell (1916) 2 A.C. 599 (relief uncertain?); Mussen v. Van Diemen's Land Co. (1938) Ch 253; (1938) 1 All E.R. 210 (Farwell J. refused relief, purchaser had got some of the land conveyed to him).

f) The forfeiture of instalments of the purchase price already paid has happened fairly often in hire-purchase agreements, and has invited equitable relief: see Cooden Engineering Co. Ltd. v. Stanford (1953) 1 Q.B. 86; (1952) 2 All E.R. 915 (C.A.) Stocklosser v. Johnson (1954) 1 Q.B. 476 (C.A.) (No relief granted: where Denning and Somervell L.JJ. took a more liberal view of the situations in which equity would grant relief, than Romer L.J. who

preferred the view of Farwell J. in Mussen's case).

Galbraith v. Mitchenall Estates Ltd. (1965) 2 Q.B. 473; (1964) 2 All E.R. 653 (Sachs J. refused relief).

As a general comment, relief has seldom been actually granted in the hire-purchase cases. As to the land cases, the form of relief most often granted has been to permit the defaulting purchaser to make the missing payment late, and subject to that, to restore him to his position under the contract.

I have cited the cases above in the general propositions suggested, because they were all cited to us, and the counsel for the respondent in particular, fearing loss on the question of the effect of clause 10, prayed in aid equitable relief from penalties, or forfeiture.

The Chief Justice did not of course express any view on this matter, as having found that the $235,000 was not forfeited, it was unnecessary to cover this point.

I agree with Carey J.A. that equitable relief is not available to the purchaser here, and I do not repeat the valuable citations that he has made from the judgment in Stocklosser v. Johnson (ante).

It is to be noted that unlike most of the land purchasers who have successfully sought equitable intervention, the purchaser here does not seek to make his payment out of time and ask to be restored to his position under the contract. While this is not now considered an indispensable condition for relief, it continues to be an important and significant factor.

In any event it could not be successfully contended that forfeiture of a sum rather less than the customary 10% deposit constitutes a sum which it is unconscionable for the vendor to retain. The sum is large it is true, but then so was the purchase price, and on the evidence so was the value of the property which the purchaser hoped to obtain. There is uncontroverted evidence that the new purchaser, Mr. Cook, whom the respondent introduced, himself offered US. $3 million and a 10% deposit on this price, non refundable: see

the letter of 5th July, 1979, at page 46 in the brief.

In my opinion the appeal must be allowed, as in the Order made on the 18th June, 1981.

I am sure that all the members of the Court would wish to thank both leading counsel for the assistance that they gave to the Court. I have referred to few cases not cited, and have, I think, mentioned every single case that was cited to us; have read them all, and many more. Some of the cases have been difficult, but none that I have read have caused me to alter the views formed at the end of the argument. I would also express thanks to Carey J.A. for his acute analysis of the meaning of clause 10 of the May 31st variation in the context of the agreement as a whole.

CAREY J.A.

This appeal is concerned with the true construction of a forfeiture clause contained in a letter varying an agreement for the sale of a hotel, the Beach Club Colony in Grand Cayman, by the appellants to the respondents. The agreement is to be gathered from the original agreement for sale dated 11th April 1979, and variation agreements contained in letters exchanged between the parties dated 26th April, 1979 and 31st May, 1979 respectively. The forfeiture clause which is numbered 10, is to be found in the letter of 31st May, 1979.

The original agreement for sale recited, so far as is relevant for the purposes of this appeal, as follows:

> "4. A deposit of US$25,000.00 has been paid to the vendor (the receipt whereof the vendor hereby acknowledges) and the balance of the purchase price shall be paid as follows:
>
> (a) US$235,000.00 on or before 20th April, 1979,
>
> (b) the balance on completion.
>
> 5. Completion shall take place on or before 1st June, 1979 at the office of Guiness Mahon Cayman Trust Limited George Town Grand Cayman."

The letter dated 26th April, 1979 (which I will refer to hereafter as "the first variation") inter alia, extended the completion date, introduced provisions regarding the grant of licences and linked completion date to the grant of licences. The material terms are these:

> "1. The completion date be extended to a date fourteen days after the date on which all the licences required under clause 17 have been formally approved.
>
> 2. (a) Subject to the provisions of 2 (b) below and if for any reason that in the event that by the 1st September, 1979 one or more of the licences are still outstanding either the vendor or Purchaser shall have the right to cancel the Agreement and upon cancellation, the vendor shall then pay to the Purchaser all deposits paid by it under the Agreement but with interest thereon accruing to the Purchaser.

"2. (b) In the event that one or more of the licences are still outstanding on 12th August, 1979, the Purchaser may waive his right to terminate and may elect to complete despite the absence of such licence or licences upon giving 14 days notice to the vendor."

The learned Chief Justice found that the respondent who was experiencing difficulty in raising the remainder of the financing necessary proposed further amendments which in the event were accepted by the appellants. These were contained in a letter of the 31st May, 1979 which I will hereafter refer to as the "second variation." The clauses so far as they are material, are as follows:

"1. The date of completion shall be extended to 1st July, 1979 subject however to the provisions of items 1, 2 and 5 of the second paragraph of the said letter but in any event shall not be later than 1st September, 1979.

8. In the event that one or more of the licences are still outstanding at September 1, 1979 and the sale has not been completed by that date.

(a) (not relevant)

(b) You will repay to us the sum of $1,020,000.00 being the deposit of $260,000.00 and the further payment of $760,000.00 paid under the said agreement and the said letter.

10. In the event that all licences are granted by not later than 1st September 1979, but we fail to complete by that date you shall be entitled to forfeit and retain the deposit of $260,000.00 paid by us."

The agreement for sale showed the purchase price as US 2.7 million dollars. The purchaser paid the deposit of $25,000.00 and subsequently the sum of $235,000.00 required by virtue of clause 4 of the "original agreement", but never paid the balance of the purchase price despite the several extensions, already noticed, which were allowed.

In an action before Summerfield C.J. in the Grand Court of the Cayman Island the purchasers (the respondents in the appeal) claimed (inter alia) that they were entitled to be refunded this $235,000.00.

The vendors (the present appellants) contended that this sum was forfeited under clause 10 of the "second variation". The learned Chief Justice in a considered judgment, rejected the defence contention holding that on the true construction of this clause, it was designed for a set of circumstances altogether different from those which actually came about, consequently the clause could not be invoked so as to be applied to the events which occured. He accordingly ordered that that sum should be refunded, entering judgment for the purchasers (the respondents)

Before us, learned counsel for the appellants advanced the argument which was also pressed in the court below, that the $235,000.00 which began life as "balance of purchase price" i.e. a part payment had undergone a **metamorphosis**, and become a "deposit" so that it would be forfeited in the event of non-completion on the part of the purchaser. The main basis of this argument rested on two references in the "second variation" to "the deposit of $260.000.00 paid by us". In the use of the unambiguous term "the deposit", so it was said, both parties were at arm's length and had the benefit of legal advice; indeed the variations were drafted by lawyers. This argument was rightly rejected by the Chief Justice. I do not propose to deal with this argument except to say that in my view this appeal is concerned with an express forfeiture clause relating to $260,000.00 in which event, it matters not whether the payment of $235,000.00 was expressed as a deposit or "a further payment" or "a part-payment." Indeed, if the amount was a deposit a forfeiture clause would be wholly unnecessary and its inclusion would be the clearest and most cogent indication, that the parties regarded the $235,000.00 as a part-payment and not a deposit. It is trite law that deposits are liable to be forfeited in the event of non-completion by the purchaser, while sums paid as part-payment, are not. Like the learned Chief Justice I would hold that but for the forfeiture clause the amount of $235,000.00 would not be liable to forfeiture. However for reasons which will emerge hereafter in this judgment, I am impelled to differ from his conclusion that the sum is at all refundable.

In construing the original agreement and the two variations, I accept it as settled law that contract documents must be read as a whole in order to ascertain the true meaning of their several clauses, and the words of each clause must be so interpreted as to bring them into harmony with the other provisions of the instrument if that interpretation does no violence to the meaning of which they are naturally susceptible. (Paragraphs 638 Halsbury (3rd Ed.) Volume II.) So that although clause 10 is now the focus of our attention in the interpretation of its meaning to derive the intention of the parties, all the other clauses so far as they bear on the matter must be harmonized so that a reasonable result is attained.

Clause 10 of "the second variation agreement" stipulated forfeiture in the case of non-completion by 1st September, 1979 on the part of the purchasers. That clause however does not stand alone. When "the first variation agreement" was made it amended "the original agreement" as regards the completion date by stipulating a date 14 days after the approval of the necessary licences. At the time of "the second variation agreement", which itself again extended the completion date, there was included a term which required that the new completion date was subject to the stipulation just set out. The effect of this stipulation is that it governed any construction of clause 10. The completion date by the time of "the second variation" was now any date between the 1st July, 1979 and the 1st September subject to the provisions regarding the approval of all licences. It is worth noting that "the first variation" provided what should occur if licences were still outstanding at 1st September, 1979.

What did occur, as the Chief Justice found, was that all licences had been obtained by the end of June. Completion should have taken place to accord with the agreement on 1st July or 14 days after the approval of all licences. When the several variations were drafted no one presumably knew when the licences would be approved. Once however the licences had been approved by June's end, 1st September 1979 no longer remained as a

to complete
date for completion. Indeed the parties met on 3rd July, 1979, 1st July being a "dies non". The plainest evidence of a party's intention is to be inferred usually from their actions. According to the evidence, at the purchaser's suggestion completion was set for 2.15 p.m. on 3rd July, 1979. At this meeting the purchaser intimated that he was unable to complete. He also put forward another purchaser in his stead.

The appellant wrote subsequently to the respondents rescinding the agreement for sale and advised that the $260,000.00 i.e. $25,000.00 paid as a deposit and the further sum of $235,000.00 was forfeited.

I have detailed these facts because the Chief Justice found that the impugned clause did not provide for the events which occured. He expressed himself in this way at p. 107 of the Record:

> "What item 10 provides for is the contigency:
>
> (a) All Licences have been granted by not later than 1st September, 1979:
>
> (b) failure of the plaintiff to complete by 1st September 1979.
>
> What in fact happened was:
>
> (a) All licences had been granted by not later than 1st September, 1979 (indeed, before 30th June, 1979),
>
> (b) rescission of the agreement by the defendant by letter of 1st August 1979, the termination being accepted by the plaintiff by letter of 10 August, 1979, thereby putting an end to any right or possibility of the plaintiff completing between the date of the rescission and 1st September 1979 specified in item 10."

The judge in setting out his conclusion of law said this:

> "By rescinding the agreement the defendant put an end to the operation of a provision (item 10) which would have operated in the defendant's favour had rescision been defferred to a date after 1st September, 1979 and completion had not taken place by that date. The item clearly envisaged the possibility of completion on a date not later than 1st September, 1979, the licences having been obtained some time before that date. It provides for failure to complete by that date. In those circumstances only is the whole sum of $260,000.00 payable to

> "them. It was the defendant's own action of rescission which deprived the plaintiff of the right, by completing on a date not later than 1st September, 1979 to save forfeiting the $260,000.00 whether the defendant's action was justified (as it was) or not is immaterial. Likewise, whether the plaintiff could have completed between the date of the rescission and 1st September, 1979 is immaterial. The defendant's own act put an end to the operation of the contigent provisions of item 10."

With all respect to the learned judge, I am quite unable to accept this analysis as valid. I am of opinion that in construing clause 10 scant attention was paid to clause 1 of "the first variation" or to clause 1 of "the second variation" which itself was expressly made subject to the former. In other words the contract documents were not read as a whole.

The contract in my view contemplated completion on 1st September, 1979, if and it would seem only if the licences had been approved 14 days before the 1st September. In the event that the licenses were not approved prior to 1st September, then by clause 2 (a) either party had the right to cancel the agreement in which case all deposits were refundable to the purchaser, except that, if by 15th August, 1979 any licences were outstanding the purchaser had the right to waive his right to terminate.

Attention should also be called to clause 8 of "the second variation agreement" which provided for the repayment of $1,020,000 being the earlier payments amounting to $260,000.00 and the further sum which was required to be paid by 1st June in escrow to the purchaser, in the event that any of the licences required to be obtained were still outstanding. It was thus plain that the whole agreement was conditional on the approval of the necessary licences on some date not being later than 1st September, 1979. In the event, the licences were approved by the end of June.

It is difficult to understand how 1st September could then remain a date for completion, having regard to the provisions of the agreement read as a whole. The purchasers would not be entitled in the circumstances which occurred to wait until 1st September to pay the balance of the purchase price nor would the vendors be required to wait until that date.

Plainly the reason why 1st July 1979 or in the event 3rd July was the appropriate date for completion was because the licences having been obtained, clause 1 of the second variation agreement stipulated as at 31st May, 1979, that completion was extended expressly to 1st July, 1979. The situation which came about, was therefore this. All the licences had been approved by the end of June, 1979 and completion which should have taken place in accordance with the express terms of the agreement on 1st July, 1979 (read 3rd July, 1979) i.e. on or before 1st September, had not resulted. Thus the respondent had not completed by 1st September. He could not have done so. Not only had the respondents' representatives stated that they could not complete on the relevant date, they had substituted or rather put forward another prospective purchaser. They had been guilty of a fundamental breach and this relieved the appellants of any further obligation to perform what they had, for their part, undertaken. If delaying until 1st September was regarded as an obligation under the contract then, the appellants were relieved of waiting until 1st September. But I do not rest my decision on any such view of the law.

This clause if given its ordinary grammatical meaning and if read together with the other clauses to which attention has been called makes it plain that completion was to take place not on the 1st September but by the 1st September. There is a clear distinction between them. In the circumstances which occured, the respondents did not complete by 1st September. More importantly, there was the significant finding that he could not have done so. The conduct of the respondents' representative demonstrated beyond a preadventure an implied repudiation of the contract. There was not the least likelihood of the respondents performing any further obligations under the contract. It seems to me highly unreal and artificial to hold as the Chief Justice did, that "the defendant's (respondent's) own act put an end to the operation of the contigent provision of item 10." It is not in the least improbable that had the appellants delayed until 1st September, 1979, it would have been urged against them, that time being the essence, 1st July had passed, and accordingly the respondents had waived the provisions in the original

agreement which made time of the essence.

In my judgment there is nothing ambiguous about the clause which would require the "contra proferentem rule" to be invoked. All the licences had been obtained before 1st September and completion accordingly should have taken place before 1st September, not on 1st September. The circumstances which the clause were meant to provide had occured, and accordingly the forfeiture sanction operated. I cannot agree that by rescinding the agreement, the appellant put an end to the operation of clause 10. Where there has been a fundamental breach, as occured in this case, the contract is not put out of existence; further performance of the agreement ceases. Clause 10 could not fairly be said to call for any "further performance". The clause merely prescribed the measure of the liability for damages. It would be more accurate to say that the respondent by his own act viz. failing to complete by 1st September enabled the forfeiture term to become operational. See Heyman v. Darwins Ltd (1942) 1 All E.R, 337.

In sum I would hold that the learned Chief Justice's construction of clause 10 failed to harmonize the other relevant clauses in the agreement with clause 10. His interpretation plainly ignored these other provisions, and treated clause 10 as if it stood alone in the agreement. In this, in my judgment his conclusions cannot be supported.

The next question is whether granted the forfeiture clause holds good, there can be relief against this forfeiture. Mr. Alberga for the respondents submitted that the amount forfeited was in the nature of a penalty because no damage had been suffered, and equity granted relief against forfeiture.

It should be pointed out at once that the amount involved was approximately 1/10 of the purchase price, a figure which usually represents the deposit in sale of land transactions. I am not persuaded that this sum could be regarded as a penalty. But the argument advanced by Mr. Alberga fails for a more fundamental reason. There is a clear distinction between penalty cases, strictly so called, and forfeiture

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cases, such as the instant case. Lord Denning M.R. in Stockloser v. Johnson (1954) 1 Q.B. 477 at 488 - 489 said this:

> ".... when one party seeks to exact a penalty from the other, he is seeking to exact payment of an extravagant sum either by action at law or by appropriating to himself moneys belonging to the other party, as in Commission of Public Works v. Hills (1906) A.C. 368. The Claimant invariably relies, like Shylock, on the letter of the contract to support his demand, but the courts decline to give him their aid because they will not assist him in an act of oppression: see the valuable judgments of Sommervell and Hodson L. JJ in Cooden Engineering Co. v. Stanford (1953) 1 Q.B. 86. In the present case the seller is not seeking to exact a penalty. He only wants to keep money which already belongs to him. The money was handed to him in part payment of the purchase price and as soon as it was paid, it belonged to him absolutely. He did not obtain it by extortion or oppression or anything of that sort, and there is an express clause a forfeiture clause if you please permitting him, to keep it. It is not the case of a seller seeking to enforce a penalty, but a buyer seeking restitution of money paid. If the buyer is to recover it, he must, I think have recourse to somewhat different principles from those applicable to penalties strictly so called."

Two of their Lordship's adhered to the view that equity could intervene in certain circumstances to grant relief against a clause such as clause 10. It is perhaps not without some significance that this view was held by two common law judges Lord Denning M.R. and Sommervell L.J. while Romer L.J. an equity judge, maintained that there is no equity in favour of a purchaser who has failed to complete his contract through no fault of the vendor. It is quite unnecessary to determine which school of thought should prevail for the reason that the conditions which the majority considered as applicable in the grant of relief, can afford no help to the respondents in this appeal. According to Lord Denning at p. 490:

> "Two things are necessary: first, the forfeiture clause must be of a penal nature, in this sense, that the sum forfeited must be out of all proportion to the damage and secondly, it must be unconscionable for the seller to retain the money."

The deposit of 10% of the purchase price is, as already noticed, usual and normal. The damage which a vendor suffers in the normal course of events on non-completion is the loss of his bargain, the full purchase price has not been paid. The 10% which as a deposit becomes automatically forfeited, has always been accepted as reasonable in the trade. That acceptance the court could hardly fail to recognize and give effect to. For the same reasons, it can hardly be said with any degree of candour that an amount of 10% of the purchase price which is the amount customarily paid in sale of land transactions would be unconscionable for the vendor to retain. Equity will not come to seccour the respondents in this case.

It is for these reasons that I concurred in the order of the President that the appeal should be allowed with costs both here and below.