IN THE SUPREME COURT OF BELIZE, A. D. 2016

CLAIM NO. 231 OF 2016

BETWEEN	**(DR. MARK WEIRICH**	**CLAIMANTS**
	(DR. ANGELA WEIRICH	
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	(AND	
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	(LANDTRUST LTD.	**DEFENDANT**

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

Mr. Nigel Ebanks of Barrow and Williams for the Applicants/Claimants

Mr. Estevan Perera of Glenn Godfrey and Co. for the Respondent/Defendant

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J U D G M E N T

1. This is an application for summary judgment brought by the Applicants/Claimants against the Respondent/Defendant, asking that the Defence be struck out, and that costs of this application and costs of the Claim be granted to the Applicants/Claimants. The Applicants/Claimants,

Drs. Mark and Angela Weirich aka "the Weirichs", are husband and wife medical practitioners living in the United States of America. The Respondent/Defendant, Landtrust Ltd., is a limited liability company incorporated under Chapter 250 of the Laws of Belize engaged in real estate development with registered office at 35 New Road Belize City; it is the Developer of a condominium project known as "*Sapphire Beach Resort"*. The substantive Claim arises from a Sale Agreement between the parties which the Weirichs say has been breached Landtrust Ltd. The Agreement was for the Claimants to buy and for the Defendant to sell Unit 22D at Sapphire Beach Resort, together with the exclusive rights to possession, use and enjoyment of the same for a consideration of US$310,000. The Weirichs have made two payments totaling US$93,000.00 to Landtrust Ltd. between April and June 2010. Unit 22D remains incomplete to date. The Applicants/Claimants say that under the terms of the Agreement, the unit was to be completed in an expeditious, timely and workmanlike manner and the entire project was to be done on or before December 31st, 2010. The Respondent/Defendant says that the Applicants/Claimants have failed to pay the balance of the purchase price, more particularly the stage payment which next falls due, resulting in the Respondent/Defendant's

failure to perform its obligations under the Agreement. The Weirichs now seek summary judgment against Landtrust Ltd. on the grounds (i) that the Respondent/Defendant has no prospect of successfully defending the Claim; and (ii) the Respondent/Defendant has failed to put forth any viable and/or plausible defence to the Claim. The Court now decides the application.

Submissions on behalf of the Applicants/Claimants in support of the Application for Summary Judgment

2. Mr. Ebanks on behalf of the Applicants/Claimants argues that the Respondent/Defendant breached all the terms of the contract on account of which the Applicants/Claimants say they are entitled to damages in the sum paid or an order for the return of the sum of US$ 93,000 paid. He argues that the Weiriches lawfully terminated the contract since 2014, and it is only at this very late time, some 6 or7 years after that termination, that Landtrust Ltd. now seeks to argue that its failure to complete the unit is due to the Applicants/Claimants' failure to make further payment. He makes the point that the Respondent/Defendant has not issued a Stage Completion Certificate as required under Clause 4.2.2 of the contract. The Claimants have produced several pictures in evidence which all confirm that very little

of Unit 22D is complete, and in fact only a few concrete blocks have been laid to start construction of the base of the Unit's walls. Under Clause 7.2 of the Agreement, the Respondent/Defendant was obligated to obtain strata title for the Sapphire Beach Condominium Development. By Clause 9.8 of the contract, the Respondent/Defendant was also obligated to complete construction of the entire project on or before December 31st, 2010. To date, almost 7 years after entering the agreement the project remains incomplete. By Clause 15e, Landtrust Ltd was obligated to complete construction of the project expeditiously and in a timely and workmanlike manner. The Weirichs say that Landtrust Ltd. has failed to fulfill all of the above obligations and in any event, the time for doing so has long since expired. Landtrust Ltd. does not deny that it has failed to complete the project and fulfill its contractual obligations; however, it says that it is the Weirichs' failure to pay the balance of the purchase price which has caused Landtrust's inability to perform its obligations under the contract. The Weirichs say that they have dutifully performed all of their obligations under the agreement and that Landtrust Ltd. has never demanded that they pay further sums. The Weirichs say that Landtrust Ltd. is admittedly in default of its obligations, and its breaches of the contract are inexcusable,

and its effort to shift the blame to them is plainly an ignoble reaction to this claim in an effort to avoid liability.

3. Mr. Ebanks further argues that the fundamental principles on the exercise of the Court's power to grant summary judgment or alternatively to strike out statements of case have been distilled into a few clear statements. He cites Lord Woolf MR in the *locus classicus* of ***Swan v Hillman*** [2001] 1 All ER 91:

> *"Under CPR 24.2a, the court has the power to dispose summarily of claims and defences which have "no real prospect" of being successful. The word "real" directs the court to the need to see whether there is a realistic as opposed to a fanciful prospect of success. It is important that judges in appropriate cases should make use of the power contained in Pt. 24. In doing so, they will give effect to the overriding objectives contained in Pt. 1. It saves expense, achieves expedition, avoids the court's resources being used up on cases where that serves no purpose and is in the interest of justice. If a claimant has a case which is bound to fail, it is in his interest to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible. However, it is important that the power under Pt. 24 is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at trial. The proper*

disposal of an issue under Pt. 24 does not therefore involve the judge conducting a mini trial."

4. Mr. Ebanks also cites George-Creque JA in *St. Lucia Motor & General Insurance Co. Ltd. v. Peterson Modeste* (HCVAP 2009/2008) as referred to in ***Sagicor Finance Inc v. Glenis Remi*** [Claim No. SLUHCV 2015/0860] where Her Ladyship reasoned thus:

> *"The principle distilled from these authorities by which a court must be guided may be stated thus: Summary Judgment should only be granted in cases where it is clear that a claim on its face obviously cannot be sustained, or in some other way is an abuse of the process of the court. What must be shown in the words of Lord Woolf in Swain v. Hillman is that the claim or the defence has no "real" i.e. realistic as opposed to a fanciful prospect of success. It is not required that a substantial prospect of success be shown. Nor does it mean that the claim or defence is bound to fail at trial. From this it is to be seen that the court is not tasked with adopting a sterile approach but rather to consider that matter in the context of the pleadings and such evidence as there is before it and on that basis to determine whether the claim or the defence has a real prospect of success. If, at the end of the exercise, the court arrives at the view that it would be difficult to see how the claimant or the defendant could establish its case, then it is open to the court to enter summary judgment."*

5. Mr. Ebanks submits that this court ought to grant summary judgment in favour of the Applicants/Claimants for the following reasons:

    i) On the pleadings the Weirichs have established that:

        a) They entered into an Agreement;

        b) They paid the consideration required of them;

        c) They advanced the sum of US $93,000 to the Defendant;

        d) They gave the Defendant more than ample time to perform it obligations under the Agreement;

        e) When the Defendant's performance of its obligations was not forthcoming, the Claimants validly terminated the Agreement.

    ii) Central to the Court's determination there is no dispute on all material aspects of the case.

    iii) In the circumstances the Defence raised by the Defendant is not viable:

        a) The Defendant has, as a matter of fact, committed all the breaches mentioned;

        b) The Defendant has not given any good reason that can lawfully justify its failure to deliver the Unit on time;

c) The Defendant's complaint that its own failure is attributable to the Claimant's breach of the Agreement has no basis in fact or law:

i) The Claimants have never been required to pay and the Defendant has never demanded any further stage payment from the Claimants;

ii) The evidence is that several years passed before the Claimants took the positive step of seeking to have the Defendant fulfill the terms of the Agreement or otherwise the Claimants would have to terminate it in accordance with its terms;

iii) The Claimants so terminated the Agreement when no compliance was forthcoming;

iv) At the time of termination, the Defendant did not dispute the validity of the termination, nor did it say that its failure to perform was on account of Claimants' failure to pay further sums. The evidence shows that the Defendant only raises this position in response to this Claim;

v) Lastly, the Defendant's obligations to complete the entire project and obtain strata title for the project are the Defendant's own obligations. The undisputed fact is that the Defendant has done neither, which cannot be

the Claimants' fault as they are but one joint purchaser in a whole scheme.

6. In conclusion, Mr. Ebanks strongly urges the court to carefully consider key opening words in the Affidavit of Sally Reed filed on behalf of Landtrust Ltd. in response to this application:

> *"The previous owners and Directors stole a great deal of money from the project and were imprisoned in the United States. However, this does not affect the Claimants' unit since they are to make staged payments for their construction."*

Mr. Ebanks argues that this evidence from the Defendant is the best evidence of where the Claimants' money went and why construction of the Unit has not progressed. It also evinces a crucial gap in the Defendant's failure to appreciate that it is not only responsible to complete the Unit, but it is obligated to complete the entire project. The Agreement does not simply provide for the Claimants to purchase a Unit; it entitles them to the "*enjoyment, use and possession*" of that Unit as a part of an entire resort development complete with all the aesthetics and amenities that such a development will have. He further contends that it is the Defendant, and not its former owners or directors, which is liable for the Claimants' loss and

liable to restore them to their previous position. The theft by the previous owners affects the Claimants gravely, as it is submitted that there is now serious reason to doubt that the project will ever be completed. Justice therefore requires that the Defendant returns the Claimants' money. All the evidence on which the parties intend to rely is already before the court. There is no reason to speculate that any further evidence would come to light later on. The case is not fit for a trial and its just disposal does not require one as the case is neither technical nor complex. Further time and costs necessary for a full trial would not be justified. The Claimants ask that the relief it seeks by this application be granted.

Submissions on behalf of The Respondent/Defendant in opposition to Application for Summary Judgment

7. Mr. Estevan Perera on behalf of Landtrust Ltd. strenuously resists this application for summary judgment. He argues that it is the Claimants who have breached the Agreement by not paying the second stage payment of US$62,000 after the floor was completed and the construction of the walls commenced. He submits that there are several issues that need to be resolved at a full trial:

   i) Did the Claimants breach the Construction/Sale Agreement?

ii) Did the Defendant breach the Construction/Sale Agreement?

iii) What damages if any are the Claimants entitled to for the purported delay (if any)?

iv) Did the Claimants frustrate the Construction Agreement?

v) Is the Defendant entitled to suspend work for non-payment as per the term of the Construction Agreement?

vi) Can a Claimant claim compensation for his US Attorneys Legal Fees as consequential loss?

8. Mr. Perera says that it is the Defendant's position that it did not breach the Agreement since it cannot proceed with construction of the unit without the Claimants providing the funds pursuant to the terms of the Agreement. He says that it is for the Claimants to show that they have paid for a stage of construction that has not been done and cites Chitty on Contracts at page 850:

> *"Where the contractor fails to build at all or in part, then the normal measure of damages is the cost to the employer of completing the building works in a reasonable manner less the contract price. The leading authority on the point is still Mertens v. Home Freeholds. The employer may also(though not on the facts of Mertens) recover in respect of increased costs*

arising through delay in completion following the contractor's failure to build."

Mr. Perera argues that in this case, the Defendant has constructed the first stage of the condominium unit and has not constructed the second stage since it has not been paid for the second stage. He also argues that there is no section of the agreement that states that time was of the essence.

9. Mr. Perera says that the court must consider whether the Claimants have frustrated the contract. It is trite law that the courts will not allow a claim for liquidated damages by an employer who has effectively prevented completion. In this case, the Defendant says that it is the Claimants who have effectively prevented completion of the sale agreement and of the construction and as such damages should not be allowed, and the Claimant should not be allowed to terminate the agreement based on a delay resulting from its own doing. The wording and design of the contract make it clear that the obligation to pay the stage payment is a condition precedent to the Defendant's obligation to perform. Where both parties are simultaneously in breach of contract, there is authority for the proposition that neither party is entitled to terminate the contract ***Bremen Vulkan***

Schiffbau Und Maschinenfabrik v South India Shipping Corp [1981] 1 ALL ER 289.

10. Mr. Perera says that time was not of the essence in the construction/sale agreement. Even if time had been made of the essence, the Claimants would have had to provide reasonable time for the parties to move forward and the necessary payment would have had to be made for the construction of the second stage to begin. He relies on ***HDK Ltd v Sunshine Ventures Ltd*** (2009) EWHC 2866 (QB) where the court held that where the party seeking to give notice so as to make time of the essence has by its conduct previously waived the right to rely on a stipulation as to time in the original contract, in order to be effective the notice must make clear the consequences that will follow from a failure to comply with its provisions and the time by which compliance is required; and there must be a reasonable time between the service of such notice and the date required for compliance. Learned Counsel further states that the Defendant was entitled to suspend construction of the unit because the Claimants failed to make payment for the second stage of construction to begin. The contractor's entitlement to be paid (both in timing and amount) will be derived from the terms of the construction contract and failure to pay will

amount to a breach. If there is no express provision relating to time for payment, then payment is to be made within a reasonable time. He also argues that according to Chitty on Contracts, where one party so acts or expresses himself as to show that he does not mean to accept the obligations of the contract any further, then this may, depending on the circumstances amount to a repudiatory breach of contract. Generally, a breach of contract will only give rise to a claim for damages and the innocent party will be obliged to continue its outstanding performance of the contract notwithstanding the breach. However, where there is a breach of a condition, which amounts to a refusal to perform going to the root of the contract, then there will be a repudiatory breach, entitling the innocent party on acceptance of the repudiation, to treat the contract as at an end. It is the Defendant's position that the Claimants cannot repudiate the contract since the Claimants are not innocent parties since they refused to pay for the second stage of construction to continue, and at no point did they indicate that their failure to pay was because they required a certificate of completion. What will amount to repudiation of a contract will depend on the terms which the parties have agreed and the relative importance which they have placed on them. Unless time is of the essence,

delay may amount to repudiation only where the delay gives rise to the inference that the defaulting party does not intend to be bound by the terms of the contract. Mr. Perera says that in this case, the Defendant has always respected the contract and has always stood ready willing and able to complete the construction so long as the next stage payment is received. To the contrary, a failure of the Claimants to pay the Defendant could amount to repudiation depending on the terms as to payment and the circumstances of the refusal. Since it is the very inaction of the Claimants that caused the delay, the delay should not be seen as sufficient to be considered a repudiatory breach ***Mayhaven Healthcare Ltd. v. Bothma & Bothma*** (2009) EWHC 2634**.**

11. Finally, Mr. Perera contends that the Defendant has a very strong Defence to this Claim, and the court therefore ought not to strike out its Defence. Summary Judgment under the CPR may be ordered where the court finds that the dispute can be justly resolved by those means. On the issue of costs, the Claimants should not be allowed to claim US$10,000 as special damages for US attorneys' fees as those fees would be considered remote. This is not a complex case involving cross border litigation, and the CPR provides for the amount of costs to be allowed in a claim. The contract itself

states that the contract would be governed by the Laws of Belize. The cost of taking technical and legal advice in the preparation of a claim was held not to be recoverable as damages in ***Johnston v. W. H. Brown Construction (Dundee) Ltd.*** [2000] BLR 243. The application for summary judgment should be dismissed, and the matter should be allowed to proceed to a full trial.

Submissions in Reply in support of Application for Summary Judgment

12. Mr. Ebanks in his brief reply to the Respondent/Defendant's submissions says that the Respondent's submissions are unsustainable as they rest on the basis premise that Landtrust Ltd. is not liable because the Weirichs failed to make any further payments under the Agreement. He argues that the Applicants/Claimants were in fact not obligated to make any further payments under the Agreement because the Defendant failed to issue any Stage Completion Certificate as per Clause 4.2.2 of the Agreement. The issuance of a stage completion certificate is a necessary pre-condition to the Respondent requiring the Applicants to make any further payments under the Agreement. The Court of Appeal of Belize expressly adopted that position with respect to a similar claim where a construction contract required issuance of a similar certificate before a contracting party could

lawfully require payment from another contracting party Civil Appeal No. 14 of 2016 ***Bella Vista Development Ltd. and anor. v. Imer Hernandez Development Co. Ltd.*** (Del. March 24th, 2017)

13. Secondly, the Respondent seeks to make a case that at law, no damages are available for delay in the performance of construction contracts. However, Mr. Ebanks says that this case is not about delay or a "*suspension"* as the Respondent states; the case is about the Respondent's failure to perform the Agreement. On account of this, the Claimants terminated the Agreement as they were entitled to do. The Defendant failure to perform the contract was seven years which is longer than the limitation period for actions based on breach of contract (six years). There has been no simultaneous breach of the Agreement. The Applicants' case is that the Respondent is in breach of the Agreement, as the Applicants have not refused to pay any sum lawfully required of them. Finally all reasonable costs incurred in the matter are recoverable, including pre-litigation costs. It doesn't matter whether those fees were incurred within or without the jurisdiction. What is necessary is that the costs incurred arise from the Applicants' efforts to deal with the issue which has given rise to the claim, ***Olive Capital Group v. Mayhew*** Claim No. BVHC (Com) 2015/115 Del.

29/04/2016. The Respondent did not reject the Applicants' termination of the Agreement in 2014, and only raises the allegation of breach by the Applicants in response to this Claim. The Applicants stress that the Respondent does not dispute that it has failed to perform the Agreement.

Decision

14. I am grateful to both counsel for their extensive submissions on this application to strike out claim which have been invaluable in assisting the court in determining this application. Having reviewed the submissions in their entirety, and the evidence before the court, I find that this is a case which indeed lends itself to a summary disposal. The Applicants say that the Respondent has not performed its obligations under the contract, and the Respondent does not deny this, so there is no substantial dispute as to the facts. What the Respondent says is that the Applicants are to blame for their non-performance because the Applicants have refused to pay for the next stage of construction. The parties agree that the contract governs the manner, amount and frequency of payments between them. So what does the contract say about payments? Clause 4.2 specifically reads as follows:

"4.2 The stages of construction identified in clauses 4.1.1, 4.1.2., 4.1.3 and 4.1.4. shall be deemed completed upon the issue of a stage completion certificate signed by the designer or engineer supervising the construction of Sapphire Beach Resort East, such person to be selected and engaged by the Vendor in its sole discretion."

There has been no compliance by the Respondent with the requirement that a Stage Completion Certificate be presented to the Applicants before further payment is made. Contrary to the position taken by Learned Counsel Mr. Perera in his oral arguments before this court, such a certificate is not an insignificant little piece of paper. That is the document which both parties have agreed will determine when and how and on what basis, payments under the contract will be made. That document certifies (thru the designer or engineer) that a certain stage of this building has been completed and therefore the next stage payment is due and I agree with Mr. Ebanks' characterization of the certificate of completion as a necessary pre-condition for further payment to be made under the terms of the contract. I also fully agree with the position of Mr. Ebanks that the

Applicants were entitled to terminate the contract due to the Respondent's non-performance of its obligations, as that non-performance clearly amounted to a breach. I must also say that I find little merit in Mr. Perera's arguments that the contract did not require time to be of the essence. A perusal of the contract reveals that Clause 9.8 stated that the Respondent was to *"make all reasonable effort to ensure that construction of all buildings with adjoining swimming pools of the condominium project was to be completed by December 2010"*. The contract was signed by the parties on April 21st, 2010, so clearly, time was of the essence. Further clauses such as Clause 15(e) headed "Warranties" requires that "*the Vendor shall use all due diligence to complete construction of the condominium project expeditiously and in a timely and workmanlike manner"*. I am further buttressed in my view that this application for summary judgment should succeed, by the evidence from the Defendant itself, where its Director Ms. Joy Reed has sworn to an affidavit expressly stating that the Landtrust Ltd.'s previous owners swindled considerable sums of money from the Defendant company and they are presently incarcerated in the United States. I find that the Applicants have been extremely patient with the Respondent in all the circumstances and they are entitled to the relief

which they seek. The Defence is not likely to succeed, and in these circumstances there is no point in expending further time and resources in a full trial. The Defence is struck out, and summary judgment is ordered in favour of the Applicants/Claimants. Prescribed costs awarded to the Applicants/Claimants to be paid by the Respondent/Defendant for this application and for the substantive claim as set out in the Civil Procedure Rules. I also find the costs of the US attorneys requested by the Claimants to be reasonable in these circumstances as part of pre-litigation costs and the court so orders.

Dated this Friday, 1st day of December, 2017

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Michelle Arana

Supreme Court Judge