IN THE SUPREME COURT OF BELIZE, A.D. 2017

CLAIM NO. 365 of 2016

BOB YARI **CLAIMANT**

AND

CAROLYN A. VETTER **1ST DEFENDANT**
JEROME A. VETTER **2nd DEFENDANT**
BORIS MANNSFELD (d.b.a BORIS MANNSFELD & ASSOCIATES) **3rd DEFFENDANT**

BEFORE the Honourable Madam Justice Sonya Young

Hearings
2016
13th December

Decision
15th February, 2017

Mr. Oscar A. Sabido, SC for the Claimant.
Mr. Darrell Bradley for the Defendants`.

Keywords: Civil Procedure – Summary Judgment – Striking Out – Contract – Time is of the Essence Clause – Breach – Rescission – Repudiation – Reason for Terminating

DECISION

1. This decision concerns an application to strike out the claim herein made by the Defendants, as well as cross applications for summary judgment. The

Defendants were the first to launch an attack, urging that the Claimant had no real prospect of succeeding on the claim nor any reasonable grounds for bringing the claim.

2. From the submissions filed, the law relating to striking out and summary judgment appears to be clear to both sides as they both quoted ***Swain v Hillman [2001] 1 All ER 91*** among other decisions. There is no need for discussion here. From the date of hearing the claim against the third Defendant was struck out as it could not be sustained. This decision therefore relates to the first and second Defendants (The Vetters) only.

3. The basic facts are not in contention. The Claimant and The Vetters agreed to the purchase and sale of land. Time was also agreed to be of the essence. Payment was to be made by a first deposit and a final payment.

4. The final payment, by the agreed pleadings of the parties, ought to have been wired into the escrow account by the 8th June, 2016. This was ten days before closing which was to be no later than the 18th June, 2016. On the 10th June, 2016, (after the final payment ought to have been wired) the Claimant wrote (by email) to The Vetters' agent requesting additional time to close. They cited the need for two additional weeks to *"gather funds"*.

5. On 13th June The Vetter's agent responded by denying the application and stating:

> *"The sellers do not agree with any of the earlier proposed extensions of your buyers. The sellers are convinced they have been more then flexible, they took the property of* (sic) *the market for a considerable amount of time and do not trust the buyers are serious. So they have therefor* (sic) *decided to no longer sell it to your clients."*
>
> *We hereby officially cancel the sales contract …"*

6. On the 14th June The Vetters' agent again emailed the Claimant reconfirming that they were no longer selling the property. This time, the failure of the Claimant to pay the purchase price, into the escrow account within the specified time, was cited as a breach. That e-mail continues: *"Our buyer waited till five days prior to closing on which you demanded an extra extension. Seller lost all confidence at this point and sticks with his decision. We are no longer under contract …"*

7. On 18th June the attorney for The Vetters wrote to the Claimant, via email, stating that the Defendants had terminated the offer agreement due to the Claimant's failure to pay the balance of the purchase price within the specified time. Reference was made to the email of 14th June (but not that of 13th June) and it reads:

> *"In light of your several breaches of the offer, you were notified by an earlier email sent to you on the same 14 June, 2016 and sent by Frik De Meyere confirming that the sellers in the above captioned land sale transaction had accepted your repudiation of the offer and had terminated the offer for failure to comply with the payment terms. In particular, reference in the email was made to the contract requirement for you to pay over the balance of the purchase price in the sum of $223,100.00 United States currency ten days prior to closing. I am instructed that at the time of the email sent by Frik De Meyere you had failed to make the required payment, time being of the essence, and you were thereby clearly in breach of contract, and further that you requested several extensions, which were denied by the sellers.*
>
> *Furthermore, the offer was made subject to agreement, and you failed to sign and return to my client the agreement and transfer documents, which were submitted to you for signature on 25 April, 2016.*
>
> *In the circumstances, the contract properly came to an end owing to your repudiation, and my client was thereby within its right to act in the manner it did."*

8. The Claimant says that, notwithstanding what had been communicated, he wire transferred the sum of $235,551.25 on 14th June, 2016 in furtherance of

the agreement and prior to the agreed closing date of 18th June, 2016. Accordingly, he seeks specific performance, damages and costs on his summary judgment application. However, there is an issue of fact in this regard as The Vetters maintain that that sum was never wired into their agent's escrow account ten days before closing as the contract stipulated, or at all. Such an issue needs to be ventilated through trial with evidence and argument in the usual way. The Claimant's application for summary judgment fails and must therefore be dismissed.

9. The matter which remains of concern for the Court is whether The Vetters had a right to terminate the contract as they did. Counsel for the Defendants rested his entire application for striking out and summary judgment on the fact that the time for compliance with the terms of the contract was said to be of the essence:

> *"In complying with the terms of this Agreement, it is agreed by both parties that time is of the essence."*

10. He urged that this term elevated an ordinary contractual deadline to the status of a condition (a fundamental term of the contract) breach of which engages the right to terminate. He relied on ***Maya Island Resort Properties Ltd. v Bel Cuisine Claim No. 216 of 2009*** and its discussion of a number of Privy Council cases and the effect of an expressed contract clause which makes time of the essence. He also presented ***Union Eagle Limited v Golden Achievement Ltd (Hong Kong) [1997] UK PC 2 All ER*** where, not only was there a time of the essence clause, but also consequences provided for failure to comply. That decision makes it clear that unless there is a waiver, when time is of the essence, any delay whatsoever, will amount to a

repudiation, and there is no need to consider whether the term breached goes to the root of the contract.

11. The authors of Commonwealth Caribbean Contract Law seem to be in full agreement when they state at page 70:

> *"Stipulations as to time are not ordinarily construed so as to make time of the essence, and so breach of a contractual deadline will not generally be a fundamental breach. However, where time is specified in the contract as being of the essence, or where the court considers the parties must have intended time to be of the essence, such a failure to meet a deadline will amount to a fundamental breach.*

12. However, counsel for the Claimant insisted that the provision making time of the essence in complying with the terms of the agreement, was far too general to make all the times and dates stated in the contract to be vital and mandatory. He sought to demonstrate, through his submissions (not authorities), the difference between such a general expressed term and one which is allied with a specific performance term and which contains specific consequences for failure to comply, more specifically, termination of the contract. This distinction, he says, is critical, especially where there are a number of time specific performances which may vary in importance. He does not support this contention otherwise.

13. He further contended that any clause which falls short, must be viewed as vague. For the purposes of the present case, he opined that only the closing date was important. Full payment by that date was of the essence, making it a condition of the contract. The other dates were intermediary or innominate terms only, which operate as conditions or warranties according to the seriousness of the breach. Although he offered a number of authorities for this view none dealt with an expressed time is of the essence

clause. He continued, that the Claimant's failure to strictly comply with the timeline for escrow was not an unwillingness or an inability to substantially perform the contract. He cited their wiring the last instalment before closing as solid proof of this.

14. On this issue I must agree with counsel for the Defendants. Equity will not intervene to order specific performance or damages and will regard time of the essence when the parties expressly stipulate that conditions as to time, must be strictly complied with. Moreover, there is nothing in the claim or submissions which even allude to a waiver, by The Vetters, of their right.

15. The parties herein did agree on a set of conditions to be satisfied before the acquisition may be closed. This included a provision that the buyer shall have delivered the purchase price to the escrow agent by wire transfer ten days before the closing. They clarified the importance of timely performance by the inclusion of the time is of the essence clause. Therefore there was to be strict compliance with this timeline and the court cannot interfere with what has been expressly agreed. When the Claimant failed to comply, he breached a fundamental term of the contract, for which the consequences are severe. The Vetters had the right to elect to treat the contract as repudiated and to bring it to an end by their letter of 13th June.

16. The court in ***Union Eagle*** (ibid) explained that this right to rescind is to ensure that the vendor could confidently resell the property, which in the real estate market was *"a valuable and volatile right."* It therefore behoves contracting parties to be well aware of certain terms which they include in agreements, the legal implications of which they may not quite understand or appreciate.

17. Beyond this argument, however, counsel also raised that the contract had not been terminated because of a fundamental breach. That, was an *"after thought."* It had been terminated because of an alleged anticipatory breach. He maintains that the first letter identified no contractual term breached and neither the words nor conduct of the Claimant evinced an intention to no longer be bound by or an inability to perform an essential term of the agreement. His admitted breach did not, in other words, go to the root of the contract - ***Hong Kong Fir Shipping Co Ltd. v Kawasaki Kisen Kaisha Ltd. [1962] 2 QB 26.***

18. A repudiation is not to be inferred lightly and is a question of fact to be determined objectively. So for the court to make such a determination, the entire contract, the parties' conduct and intentions must all be seriously scrutinized to see whether the breach, conduct or accumulation of conduct was repudiatory and would have in fact deprived the innocent party of substantially the whole benefit which had been agreed.

19. Although we need not delve deeply into the evidence, one can appreciate why counsel urges that all that had occurred was what The Vetters considered to be an anticipatory breach. The very wording of the first letter from The Vetters dated 13th June expressed one reason for terminating, that is, that they did not trust that the buyers were serious. They stated nothing of a fundamental breach. Moreover that letter came after the alleged fundamental breach had already occurred and in circumstances where The Vetters later admitted to having waited until five days prior to closing. Counsel for the Defendants on the other hand took the stance that the letter of the 14th June was a mere reconfirmation that The Vetters *"were no longer*

selling the subject property to the Claimant and citing the failure of the Claimant to pay the purchase price within the time specified to do so."

20. The question really is whether it makes any difference what reason is given for termination if in fact there existed a lawful right to terminate. The court considered the UK Court of Appeal case **The *Mihalis Angelos [1971] 1 QB 164*** where on July 17, 1965 a charterer terminated a contract with a charter party on grounds on which they were not so entitled to do. The owners of the charter party accepted the charterer's conduct as repudiatory and sued for damages. It was a fact that the charter party would not have been in a '*ready to load'* position on July 1, 1965 which was found to be a condition of the contract. Such a breach clearly gave the charterer the right to terminate. But this breach had not been relied on at the time of cancellation. A special case stated before Mocatta J held that the owners were entitled to substantial damages. On appeal the charterers contended that their having given another ground for termination was irrelevant, where they were entitled otherwise to lawfully terminate. The court allowed the appeal and held that the charterers were entitled to terminate the contract on any sufficient ground existing at the time of termination. The cancellation had therefore not been wrong or a breach.

21. Lord Denning stated at page 145:

> *"But I think that the principle stated by Lord Summer in **British and Beningtons Ltd v North Western Cachar Tea Co. Ltd. [1923] AC 48** applies here also. If they had a right to cancel on July 17, they can rely on it, even though they gave wrong reason for it."*

22. And Davies LJ at page 200:

> *"I would be for holding that clause 1 in the present case imported a condition. That the owners were in breach of it is common ground. It is equally undisputed that if as I think, the circumstances entitled the charterers to repudiate on July 17, the fact that they did so by reliance or an untenable plea of force majeure does not invalidate their act of cancellation."*

23. The terminating party is therefore entitled to prove his legal right to terminate on any valid ground existing at the time he made his election, regardless to whether he was aware of it or not. The Vetters having been found to have lawfully terminated the agreement on the 13th June, in unequivocal words, have successfully demonstrated that the claim must fail in its entirety. The Claimant has no prospect whatsoever of succeeding.

It is therefore ordered:

1. The Claimant's application for summary judgment is dismissed.
2. The claim is dismissed in its entirety.
3. Costs to the first and second Defendants in the sum of $3,000.00.

SONYA YOUNG
JUDGE OF THE SUPREME COURT