

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

CLAIM NO: 479 of 2016

BETWEEN

**RICHARD BABJAK
MARGARET BABJAK**

CLAIMANTS

AND

SITTEE RIVER WILDLIFE RESERVE

DEFENDANT

Keywords: Contract for the Sale of Land; Breach of Contract; Restitution;
Account; Damages for Breach of Contract; Negligent
Misrepresentation;
Restrictive Covenants; Unilateral Variation of Restrictive
Covenants;
Constructive Trust; Account;

Before the Honourable Mr. Justice Courtney A. Abel

Hearing Dates: 27th June 2017
28th June 2017
19th July 2017
28th July 2017.

Appearances:

Mrs. Magali Marin Young SC, and Mr. Allister T. Jenkins for the Claimants.

Mr. Rodwell Williams SC, and Ms. Lissette V. Staine for the Defendants.

WRITTEN JUDGMENT

Orally delivered on the 28th day of July 2017

Introduction

- [1] This is a disputed commercial claim for breach of a written Memorandum of sale of land.
- [2] The claim was brought by the Claimants, a husband and wife, as purchasers of approximately 0.44 acres of a lot of land, against a Corporate Defendant (“SRWR”), being the developers of a development known as “Sanctuary Belize” located in the Sittee River area, Stann Creek District of Belize.
- [3] The land in question (“Lot SR054”), was, by agreement, to be purchased for US\$502,550.00.
- [4] The Claimants duly paid the contractual down payment and then commenced paying the agreed installments towards the purchase price of Lot SR054, in the amount of US\$160,316.95, but abruptly, on the 30th June, 2016, stopped paying.
- [5] The Claimants are now reclaiming all that they have paid, by alleging that the Defendant made negligent misrepresentations in the course of negotiating the sale and purchase of Lot SR054 and then breached the written Memorandum of Sale by unilaterally varying the terms of agreed Restrictive Covenants to their detriment; that they failed to provide, as agreed, promised amenities as well as a budget relating to Sanctuary Belize for the common area expenses and a report of collected revenues; and that the Claimants are thereby entitled to recover and/or to have an account for sums in excess of the US\$160,316.95, which they paid.
- [6] The Defendant is denying the claim and is defending the claim by alleging that it was the Claimants who, as a matter of law and fact, indeed breached the agreement by not paying the purchase price and that as a consequence, by and under the contract, they have forfeited the down payment and any and all payments made by installment towards the purchase price.

Issues

- [7] The specific issues of fact and/or law raised by the pleadings are the following:
- (i) Whether the Defendant negligently misrepresented to the Claimants that they could not record the Memorandum until the full purchase price was paid, and if so, whether the Claimants are entitled to damages for negligent misrepresentation?
 - (i) Whether the Memorandum dated the 17th November, 2013 is legal, binding and enforceable, not having been recorded and the appropriate stamp duty not having been paid thereunder?
 - (ii) Whether the Defendant unilaterally varied the terms of the Restrictive Covenants (Attachment 1) without the required two-thirds vote of the Members and without the consent of the Claimants? Whether the Defendant thereby breached the Memorandum dated the 17th March, 2013, when it introduced the new restrictions by the RCC&E and whether the RCC&E are inconsistent with the Restrictive Covenants (Attachment1)?
 - (iii) Whether the Claimants are entitled to the recovery of the US\$160,316.95 in restitution or alternatively, whether the Defendant holds the said sum as a constructive trustee for the Claimants?
- [8] A number of these issues may be summarily determined in the following background facts.
- [9] The central question for determination is who has breached the Agreement the Claimants or the Defendants.

Background

- [10] The Claimants are respectively a businessman and his wife, a homemaker, both of Illinois, United States of America.
- [11] The Defendant is a not for profit company duly incorporated in Belize on the 16th April, 2003 as a Domestic Company pursuant to the laws of Belize.
- [12] The Defendant was established to develop Sanctuary Belize.

- [13] Sanctuary Belize started out as a project which originally comprised about 14,000 acres of land in Sittee River area, Stann Creek District. It comprised three primary areas, namely; Residential Community Area, exclusively for residential purpose, a Special Development Area, exclusively for commercial enterprises and businesses, and a Nature & Conservation Reserve Area, exclusively for the advancement, preservation and conservation of flora and fauna of “Sanctuary Belize”.
- [14] On the 25th January, 2008 the Articles of Incorporation of SRWR were amended to provide for two types of membership, provisional and full members.
- [15] In 2010 SRWR started offering guided tours of Sanctuary Belize to prospective purchasers.
- [16] In November, 2013 The Claimants attended a tour of Sanctuary Belize and the overall project of SRWR.
- [17] The Claimant and his wife, as testified by the Claimant, were clearly mesmerized by the idea of Sanctuary Belize and everything it seemed to offer any of the members of SRWR.
- [18] Issues arise about the nature of the negotiations between the Claimants and the Defendant and whether actionable misrepresentations were made by those representing the Defendant.
- [19] On the 17th November, 2013, the Claimants entered into a Memorandum of Sale, (“the Memorandum”), with the Defendant and Eco-Futures Belize Limited, the Developer of “Sanctuary Belize” project, believing the same to be binding and enforceable, for the purchase of Lot SR054, for the purchase price of US\$502,550.00.
- [20] There was no mention in the Agreement, as the Property being sold, of anything other than the parcel of land and admission to membership of SRWR (the type of which membership was not mentioned) being purchased by the Claimants; and the price in relation to each was not specifically identified.

- [21] The Memorandum was for the sale of Lot SR054 which was within the Residential Community Areas of "Sanctuary Belize".
- [22] Under the Memorandum, the purchase price was to be paid by the Claimants as follows:
- (1) A down payment of US\$50,255.00 plus the GST in the amount of US\$6,281.88.
 - (2) The financed balance of US\$452,295.00 with the interest at a rate of 5.9% per annum to be paid as US\$3,214.34 per month plus the general sales tax for 240 months, commencing on December 30th, 2013, until payment in full.
- [23] Provision was therefore made in the Memorandum for the payment of the balance of the down payment and included forfeiture of all monies paid in default of the payment of the down payment but not for the balance of the purchase price.
- [24] Under the Agreement:
- (a) The Claimants were entitled to enter into possession of the property on the date of the agreement (but they never did).
 - (b) Upon payment of the purchase price in full or in such other day or date as the parties may agree, whereupon SRWR would convey and transfer title to the property to the Claimants or their nominee at the cost and expense of the Defendant.
 - (c) The purchaser, expressly, was liable to pay Stamp duty "as may be charged by the Government" along with Registration fee "variable – aprox. 1% of purchase price" GST of 12% and Legal Fees.
 - (d) As a "Special Condition" the property was sold subject to the Restrictive Covenants attached, the terms of which included that it could be changed by a two-thirds (66 2/3%) vote of Members.
- [25] Thus in accordance with the Memorandum, Lot SR054 was to be sold free and clear of all encumbrances, but otherwise subject to a Code of Covenants, Conditions, Restrictions, Easements and Building Guidelines ("Restrictive Covenants (Attachment 1)"), which the Claimants and the

Defendant mutually agreed would govern the residential development of Lot SR054.

- [26] The Claimants claim that under the contract, and by paying the purchase price, they were buying into this entire development, but the evidence for this is on balance not sustainable as what was being purchased was a lot of land, and a membership in SRWR, the objects of which was stated to include the establishment, maintenance and operation of a wildlife sanctuary, nature reserve and conservation part. Thus indirectly the lot of land and membership was included in the property sold but the respective cost of each was not specifically demarcated.
- [27] The Memorandum, which was prepared by the Defendant, and who had carriage of the same, was not recorded at the Land Titles Unit, nor was it apparently in registrable format. The Claimants have taken no step to register the same.
- [28] The Claimants, believing the Memorandum to be binding and enforceable, at first duly made payment towards the purchase price of Lot SR054, in the amount of US\$160,316.95, being the down payment of US \$50,255.00 plus the GST amount of US\$6,281.88, and the monthly payments plus GST up to the 30th June, 2016.
- [29] By virtue of their purchase of property within the Reserve, the Claimants, like over 800 lot owners, would have become members of the Defendant Company. But such membership consisted of two types namely full and provisional; of which no mention was made in the Agreement but with due diligence could have been found out by the Claimants.
- [30] According to the Restrictive Covenants (Attachment 1), a two-thirds vote of members is required to change the Restrictive Covenants (Attachment 1).
- [31] In or about January, 2016, the Sanctuary Belize Property Owners Association ("SBPOA") was formed.
- [32] On the 3rd March, 2016, the Defendant, the Developer and SBPOA, by Deed, introduced and recorded over all lands within the Sanctuary Belize

Development, new Restrictive Covenants, Conditions and Easements ("RCC&E"), replacing the original Restrictive Covenants (Attachment 1).

- [33] On the 23rd May, 2016 the Claimants, however, unilaterally, stopped making payments towards the purchase price.
- [34] On the 1st December, 2016 Eco-Futures Development sent a letter to the Claimants informing them of the default in making payments towards the purchase price.
- [35] A dispute has arisen between the Claimants and the Defendant as to whether the Claimants are entitled to the recovery of the US\$160,316.95 because of all that has happened.

The Court Proceedings

- [36] The Claimants filed a claim form together with a Statement of Claim against the Defendant on the 1st September 2016.
- [37] The Claim Form was eventually amended on the 5th December 2016.
- [38] In the Amended Claim Form the Claimants alleges the following:
 - (i) The Memorandum was subject to a Code of Covenants, Conditions, Restrictions, Easements and Building Guidelines ("Restrictive Covenants Attachment 1"), to which the Claimants represented and agreed would govern the residential development of Lot SR054.
 - (ii) That in breach of the Memorandum, the Defendant, without the required two-thirds vote of the Members, unilaterally varied the terms of the Restrictive Covenant (Attachment 1), without the consent of the Claimants, introducing new restrictions by the Restrictive Covenants, Conditions and Easements which are inconsistent with the Original Restrictive Covenants (Attachment 1) and which change the nature of the residential development, detracting from the benefits that the Claimants were to enjoy as the owners of Lot SR054.
 - (iii) That in breach of Restrictive Covenants 1, the Defendant failed to provide the Claimants with a budget for the common area expenses and a report of the collected revenues 60 days before each fiscal year.

- (iv) The Defendant negligently misrepresented to the Claimants that the Memorandum could not be recorded until the full purchase price of Lot SR054 was paid.
- (v) The Defendant negligently misrepresented, in the Memorandum, that stamp duty to be charged by the Government, is approximately 1% of the purchase price.
- (vi) The Memorandum, prepared by the Defendant who had carriage of the same, was not recorded at the Land Titles Unit, nor was it in registrable format.
- (vii) Because of the negligent misrepresentations of the Defendant, the Claimants having made payments pursuant to the Memorandum which is void and of no effect, which having not been registered, and the stamp duty payable not having been paid, have suffered prejudice and damages.
- (viii) The Claimants are entitled to recover the sum of US\$160,316.95, plus any loss suffered as a result of the value of money plus any costs incurred by them.
- (ix) Further or alternatively, the Defendant is liable to account to the Claimants for the sum of US\$160,316.95, as constructive trustee, on the ground of the Claimants have mistakenly advanced such moneys under the mistaken belief that the Memorandum was legal and enforceable.
- (x) Further or in the alternative, by reason of the Defendant's breach of contract, the Claimants have suffered damages in the sum of US\$160,316.95, representing the purchase price that they paid.

[39] The Defendant alleges in its Amended Defence, filed on the 19th December 2016, the following:

- (i) That the restrictive covenants attached to the Memorandum was by contract only, did not run with the land was incapable of being enforced between all lot owners, but that at all times, the parties had intended the same to be recorded, and enforceable between all lot

owners, to attach and run with all the lands in “Sanctuary Belize” and to be integrated in a more comprehensive scheme comprising all three of components of “Sanctuary Belize”.

- (ii) That a comprehensive set of Restrictive Covenants, Conditions and Easements by Deed dated March 3rd, 2016 between the Defendant, as owner of “Sanctuary Belize”, the Developer as the party undertaking the development project and Sanctuary Belize Property Owners Association (“SBPOA”), as the entity comprising and representing all lot owners in “Sanctuary Belize”, was registered so as to run with all the lands in “Sanctuary Belize” and to regulate the relationship between all three components of “Sanctuary Belize” and also between lot owners of all such components for the benefit and enhancement of the value of “Sanctuary Belize”, including all property owners, the Defendant and the Developer.
- (iii) That the contractual restrictive covenants attached to the Memorandum is now subsumed under, and forms a part of the said Deed comprising the Restrictive Covenants, Conditions and Easements in substantially the same form and content as those attached to the said Memorandum all of which now runs with all the land, is now enforceable between all lot owners and is consistent, uniform and beneficial to all lot owners, including the Claimants by the SBPOA, the Defendant and the Developer.
- (iv) That due to the vast number of purchasers with memoranda comprising varying covenants not totally uniform in every respect, but in pit and substance, the same in nature, benefit and effect, it was impractical to have each and every one enter into the said Deed of Restrictive Covenants, Conditions and Easements, and so the SBPOA, as the representative entity of all lot owners including the Claimants, the Defendant and the Developer then entered into the comprehensive scheme of Restrictive Covenants, Conditions and Easements under which the contractual covenants are subsumed

and remain in substantially the same form and substance as to the Residential Community Areas.

- (v) The Defendant denies that it acted in breach of the Memorandum or indeed unilaterally varied the terms of the contractual restrictive covenants, or that the same is now inconsistent in any way, or that the said Deed with the Claimants' representative body changed, in any material way, the covenants governing the Residential Community Areas and or detracted or diminished the benefits to be enjoyed by the Claimants under the "Sanctuary Belize" Restrictive Covenants, Conditions and Easements scheme in any way or at all. The Defendant maintains that the same is now enhanced by the registration of the Deed of Restrictive Covenants, Conditions and Easements governing the building scheme and so made to run with all lands in "Sanctuary Belize".
- (vi) The Defendant informed the Claimants that the transfer of title, and not the Memorandum, would be filed upon full payment of purchase price of Lot SR054.
- (vii) The Defendant informed the Claimant that the registration fees is variable and may amount to approximately 1% of the purchase price.
- (viii) That it did not make any representation that the Memorandum would be recorded.
- (ix) That the Memorandum is valid, binding and enforceable in accordance with its terms.
- (x) That the Claimants are not entitled to the claimed loss and damage which are both rejected and denied.

[40] On the 5th January 2017 the Claimant filed a Reply finally creating the below issues.

[41] The Claim has been case managed resulting in significant disclosure of documents and the Claimant filing and serving the following two witness statement of:

- (1) The 1st Claimant on the 3rd March 2012.

(2) Thomas Herskowitz, an owner in and member of the Defendant and resident of Sanctuary Belize.

[42] The Defendant filed and served three witness statements of:

(1) Peter Baker, a Director and Chairman of the Board of the Defendant, on the 2nd March 2017

(2) Chadwick Harting, a Consultant, previously employed by Global Property Alliance, Inc, (“GPA”) a tour director and manager acquainted with the Sanctuary Belize project, on the 21st March 2017,

(3) Mario Navarrete, a Consultant, previously employed by Global Property Alliance, Inc, (“GPA”) a tour director and manager acquainted with the Sanctuary Belize project, on the 28th March 2017.

[43] The claim was referred to mediation but was not settled and the parties, in preparation of this trial were ordered to agree a Pre-trial memorandum which was filed on the 12th April 2017.

[44] The court had the benefit of hearing and seeing the 1st Claimant and Peter Baker both of whom were subjected to cross-examination, as well as substantial written and oral submissions from Counsel representing the parties.

[45] Overall the Court found the witnesses for the Defendant more persuasive than the witness for the Claimants. Indeed the court was singularly not impressed by the witness for the Claimant.

[46] I also found the legal and other arguments of the Defendants far more persuasive, indeed compelling.

Whether the Defendant Made Negligent Misrepresentations to the Claimants?

[47] Generally, having seen the 1st Claimant, who gave evidence for the Claimants, and heard his evidence, and seen the publicity material with which they were presented, and considered the other evidence to which they referred, this court is able to summarily arrive a certain conclusions.

- [48] Such materials included matters listed on the Sanctuary Belize website, www.sanctuarybelize.com, the full particulars of which were not given in evidence.
- [49] I do not consider such publicity materials to be material representations, but indeed sales puff by Mr. Luke Chadwick, the representative of SRWR.
- [50] I also am not in a position to conclude, and summarily do not conclude, that there was any actionable representation; but instead I have determined that the Claimant and his wife were otherwise seduced by the possibilities which Sanctuary Belize offered, and that they then therefore decided that they would become a part of the same, as members of SRWR.
- [51] Having seen and heard the Claimant and the witness for the Defendant, I am also generally not satisfied that the Defendant, or any of its representatives, represented that the reserve project would remain under the control of SRWR as a non-profit corporation.
- [52] This conclusion was arrived at even if such representation was made by those representing SRWR that the wildlife, the reserve property and the environment would be protected. This is because as it happens, and as submitted by the Defendants, this was indeed done by SRWR by the Restrictive Covenants which they registered over Sanctuary Belize, which had the result of protecting the wildlife, reserve property and environment of Belize Sanctuary.
- [53] Specifically having read all the documents and heard the witnesses in the case, this court is not satisfied, as testified by the 1st named Claimant, that there was any actionable representation to the Claimant and his wife that SRWR would include other amenities for the benefit of owners such as:
- (1) A 250 slip world-class marina managed by the internationally known marina management company IGY Marinas headquartered in New York, New York;
 - (2) A marina village with restaurants, beach bars, entertainment venues and cultural activities. Included in the village would be a boutique hotel

and church on the hill along with a grocery store, gas station and other sundry stores to serve the residential community;

- (3) The Pura Maya Spa and Fitness Center;
- (4) The Sanctuary Belize Residential Beach Club and Restaurant;
- (5) A private air strip for Sanctuary Belize residents;
- (6) A medical clinic and hospital located within the Sittie River Wildlife Reserve;
- (7) Membership in the Sanctuary Belize Adventurer's League;
- (8) An 18 hole professionally designed golf course by Jack Nicholas Association; and
- (9) The Sanctuary Belize Equestrian Center.

[54] In arriving at such a conclusion I consider as very material that there was no timeline for implementation of any such amenities.

[55] Also considered as highly relevant by me is the fact, which I find, that the allegation relating to the amenities, which the 1st Claimant testified that SRWR promised, were never specifically pleaded by the Claimants in their pleadings, as a part of their claim; this was even after they had been permitted to amend the same; but was merely introduced as part of their case in the witness statement of the 1st Claimant.

[56] I have concluded therefore that any such representations by SRWR were mere expressions of intention, hope, or possible future plans, which did not form part of the agreement between the parties; and nor did they amount to actionable representations which could be pursued in the present proceedings.

[57] In any event I do not consider that there was established by the Claimants, any special skill possessed by the representatives of the Defendant, such that any special relationship existed between the Claimants and the representatives of the Defendants giving rise to any duty of care by the Defendant owed to the Claimants.

[58] Nor do I consider that the Claimants trusted, or ought to have relied on any such skill, or indeed ought to have trusted the Defendant, such as to give

rise to an action for damages for any financial loss suffered by the Claimants.

- [59] The Claimants, in all the facts and circumstances of the case, ought to have carried out their own due diligence, and not have relied on anything the Defendant's representatives may have said.

Whether the Written Agreement is legal, binding and enforceable?

- [60] This court is also able to summarily determine that it has heard nothing to suggest that the Memorandum is not legally binding and enforceable, even though it has not been recorded and the appropriate stamp duty not having been paid.
- [61] This court is of the view that if there has been a breach of contract in relation to the completion of the sale of, or failure to record the transfer of Lot SR054, it is due to the Claimant's breach of contract in paying the balance of the purchase price and discharging its obligation to pay stamp duty, Registration fee, GST and Legal Fees.

Whether the Defendant unilaterally varied and/or are in breach of Agreement in relation to its Restrictive Covenants?

- [62] This court has no hesitation in summarily determining that on the 3rd March, 2016, the Defendant, the Developer and SBPOA, by Deed, introduced and recorded over all lands within the Sanctuary Belize Development, new Restrictive Covenants, Conditions and Easements ("RCC&E"), replacing the original Restrictive Covenants (Attachment 1).
- [63] The Defendant, if the terms of the Memorandum of Sale had been complied with by them, and the sale completed, may arguably have been accused of having varied the terms of the restrictive covenant, as the contractual term subjecting Lot SR054 to the terms of the Restrictive Covenants (Attachment 1) indeed would have been different, as there was a different Restrictive Covenant registered on the Claimant's land. But since the Claimants have indeed failed to complete the terms of the Agreement by the payment of the purchase price in full, or by the payment of the cost and expenses, the

Claimants are not in a position to complain about Lot SR054 being subject to a changed Restrictive Covenants, as they are not contractually entitled to have conveyed or transferred to them, or their nominee, title to this property.

- [64] The question of whether the change in the Restrictive Covenants was unilaterally done (without the consent of the Claimants) or lawfully done (with the required two-thirds vote of the Members) is therefore a moot one. It is indeed highly questionable whether the Claimants are even entitled to admission to membership of SRWR until completion of the agreement, by the payment of the purchase price in full as well as the costs which they had agreed to pay. It appears that all that the Claimants may have been entitled to is to take possession of Lot SRO54 upon signing the Agreement, which they have failed to do.
- [65] The Defendant has submitted, which is accepted by this court, that the Articles of Association of the Defendant, prior to the Memorandum being entered into between the parties, had established two types of memberships (provisional and full) and therefore the Claimants were well aware, or ought to have been aware of this, or ought not to have been taken by surprise that they may have been only provisional members and not entitled to vote on resolutions to change the Restrictive Covenants.
- [66] This court, accepting the submissions of Counsel for the Defendant, has heard nothing which leads it to plausibly entertain the possibility that any such variation in the Restrictive Covenants, involving the votes of full members, would not have thereby made the change unilateral.
- [67] In any event, and on balance, this court has determined that such variation was not unilateral. As a consequence this court has reached the conclusion that the RCC&E, replacing the original Restrictive Covenants (Attachment 1), prior to the sale of Lot SR054 to the Defendant, and before completion of the agreement of sale, may have been binding on the Claimants.

Whether the Claimants are entitled to the recover the US\$160,316.95 in restitution or as a constructive trustee for the Claimants?

[68] In view of the determinations which I have made, including that the Claimants indeed breached the terms of their Agreement with the Defendant, and not the other way around, I find that the Claimants are not entitled to recover the amounts claimed, whether as restitution or damages, or indeed is not entitled to any reliefs claimed.

[69] This court is merely able to determine that the Claimants indeed did pay to the Defendants, towards the purchase price of US\$502,550.00 for Lot SR054 and membership in SRWR, the sum of US\$160, 316, 95 as already stated.

[70] As there was not a counterclaim this court is not able to find that the Claimants have indeed forfeited the sum of US\$160, 316. 95 which they paid.

[71] In any event this court is prepared to entertain arguments that the Claimants be granted time to be allowed to complete the payment of the purchase price in full, and all contractual cost and expenses (including interest).

Costs

[72] As the Claimants have wholly failed in their claim against the Defendant, this court will order costs in the sum of \$30,000.00 as agreed by the parties to be paid by the Claimants to the Defendant.

Disposition

[73] The Claimants' claim is dismissed in its entirety with costs to be paid by the Claimants to the Defendant in the sum of \$30,000.00 as agreed by the parties.

The Hon. Mr. Justice Courtney A. Abel

10th August 2017