5

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 17 of 1988

BETWEEN:

JAMES N. THOMPSON - Appellant

and

PAUL A. CORROON
LIEP CORROON - Respondents

Before: The Honourable Mr. Justice Bishop - Chief Justice (Acting)
The Honourable Mr. Justice Moe
The Honourable Miss Justice Joseph (Acting)

Appearances: Dr. F. Ramsahoye, S.C. and R. Francis for the Appellant.
C.O. Phillips, Q.C. and A. Archibald for the Respondent.

1989: Nov. 28,29,
1990: Feb. 26.

JUDGMENT

MOE, J.A.

This appeal concerns an agreement entered into between the appellant and the respondents on 18th July 1985 relating to a parcel of land owned by the respondents and centres around the interpretation to be placed on certain clauses of that Agreement.

Relevant clauses of the Agreement are as follows (the appellant being referred to as the Developer and the respondents as the Owners:-

NOW IT IS HEREBY AGREED:

1) The owners shall grant the Developer an option exercisable within 3 years of the date of this agreement to purchase the said Lot #3, "Lathefield Lodge" for the price of U.S. $1.00

PROVIDED THAT if the option is exercised, any Vendor's liability for Stamp Duty in excess of $7,500.00 U.S. Currency shall be paid by the Developer.

2) The Developer shall have the option to construct approximately 40 multiple bedroom dwelling units on that portion of the Owner's said land comprising approximately

/9 acres....

9 acres and outlined in black on the said map or plan by Jaime Cobas or any other map or plan mutually agreed by the parties.

3) CONDITIONS:

a) The owners shall deliver to the Developer copies of all existing drawings, maps, plans in their possession relating to the land to be developed.

b) The Developer shall at his own cost provide all drawings, designs, maps as he shall further require for the building development of the land.

c) The owners shall at their cost obtain and deliver to the Developer, approval in writing of the appropriate government authority of:-

(i) the proposed approximately 40 unit building development on the said land;

(ii) duty free concessions for all dutiable materials for the building development on the said land.

d) For the purpose of satisfying condition (c) the Developer shall at his own cost deliver with due expediency to the Owners -

(i) the designs, drawings, plans, specification, quantities and whatsoever else is needed by the Owners for the obtaining of Government approval for the development;

(ii) Specification, quantities of all materials needed to be given to the appropriate Government authority to obtain duty free concessions for the approximately 40 multiple bedroom units.

e) The Owners shall within 60 days after being provided with the information contained in (d) satisfy condition (c).

f) Upon the Owners satisfying condition (c) the Owners shall release a part of the land to be developed and the developer shall within 180 days from release begin construction of four units.

g) The Developer will pay to the Owner 10% of the gross sale price (excluding all taxes and legal fees except the 5% vendor's tax) of the developed lots and on

/receipt....

receipt of same the Owners will release another lot. The 10% payment shall continue until a total of US $500,000 has been paid to the Owners. The Developer may pre-pay the US $500,000 or the balance totalling US $500,000 at any time during the three years. When the US $500,000 has been paid the option is then extended indefinitely and the Developer shall pay the Owner US $100.00 per unit for each unit until the project is completed.

h) Additional lots or parcels will be released to the Developer as soon as the Developer pays the Owners 10% of gross developed sale price of that site previously released or any part thereof.

i) The building development will be completed by the Developer within 3 years of the commencement of construction.

j) .....

k) .....

l) If the Owners shall make default in performing their conditions the Developer shall have the further option exercisable during one year from the signing of this agreement to purchase Lot #4 at a price of $25,000.00 U.S. Currency.

4) .....

5) In consideration of the foregoing the Developer shall pay to the Owners the sum of One Hundred and Fifty Thousand Dollars United States Currency ($150,000 U.A.) on the signing of this agreement by both parties.

After the Agreement was signed the appellant paid the respondents the sum of $150,000 U.S. The respondents delivered to the appellant the drawings they had and the appellant made arrangements for further drawings he required to be prepared. He engaged a firm of Architects to prepare material necessary to obtain duty free concessions and provided the respondents with information for the purpose of their obligations under Condition 3(c) of the Agreement. The respondents established a company Lathefield Development Limited in order to comply with their obligations under that clause. When the appellant took drawings he had prepared to the respondents, they raised complaints about the design and as to whether all documents required by the relevant

/authority.....

authority had been prepared. The appellant rejected the respondents' objections, took advice and personally presented the application and drawings to the Development Control Authority in the name of Lathefield Development Limited. Approval was granted by the Authority on 22nd November 1985 and the plans with the Authority's stamp of approval was delivered to the appellant.

The appellant took the position that the respondents had failed to comply with Clause 3(c)(i) of the Agreement because they had not presented the application and the approval was given to Lathefield Development Limited and not the appellant or his nominee. On 7th October 1985 the first-named respondent delivered to the appellant a copy of a letter received from the Ministry of Economic Development in which was set out certain development incentives which would be extended in respect of the the project. The appellant had prepared specifications and quantities of dutiable materials for the building development. The list was submitted to the Ministry which granted approval to part of the list on 20th December 1985 and to the remainder on 25th January 1986.

The respondents allowed the appellant to enter upon the land and take whatever steps he chose to take in relation to the building project. The appellant had soil and topographical tests done, the land cleared and physical layout and staking for four units. There were differences between the parties about the provision of finance for the development and about assistance to the appellant by the respondents in obtaining that finance. The respondents refused to accede to the appellant's demands to turn over the stock and/or control of Lathefield Development limited to the appellant and the relationship between the parties broke down. While the parties were negotiating on these financial matters the appellant instituted proceedings on May 1986. On 3rd December 1987, after close of the pleadings and case set down for hearing, the appellant sent to the respondents $1.00 pursuant to Clause 1 of the Agreement.

The appellant claimed inter alia:- (a) Specific performance of the Agreement, (b) Rescission of the said agreement and damages for breach. The respondents counterclaimed for (a) A declaration that the appellant has repudiated the agreement and that the same has been determined; (b) an order that the appellant forthwith discharge the charge created in favour of the First Bank of Barbuda; (c) Damages for breach of contract.

/The learned...

The learned trial Judge took the view that the agreement required the appellant to pay U.S. $150,000 for two options; one to purchase Lathefield Lodge and the other to construct 40 units on the respondents' land. That the appellant did not agree to purchase or acquire any other interest in the land. That the agreement did not confer on him any right to acquire any interest in the 9 acres of land on which the development was to take place but conferred on him merely a power to build on the land and required the respondents to allow the appellant to build on the respondents' land.

He found that the respondents released the land for the construction of the first units as required by the agreement but the appellant never commenced construction. So that while the respondents as he found complied with Conditions 3(e) and (f) of the Agreement the appellant failed to comply with Condition 3(f) thereof.

He held that the option to purchase Lathefield Lodge in Clause (1) is not severable from the option to build in Clause (2). That in order to exercise either or both the appellants conditions in Clause 3 must be fulfilled. Consequently having failed to satisfy Clause 3(f) the appellant could not exercise the option to purchase Lathefield Lodge.

The learned Judge held the nature of the appellants breach of the Agreement to be such as to entitle the respondents to be discharged from further obligations under the Agreement. He therefore ordered that the agreement has been discharged by the appellants's breach.

The learned Judge also dismissed the appellant's claims, ordered that the cautions placed on the respondents' titles to the land subject matter of the contract be removed and that the appellant pay the cost of the respondents for 2 Counsel.

The appellant's complaints against the decision may be dealt with conveniently in relation to four matters:-

OPTION TO PURCHASE LATHEFIELD LODGE:

Counsel for the appellant submitted that on a proper interpretation of the agreement the appellant acquired two separate and independent rights under the contract:-

(1) The right to purchase Lathefield Lodge for $1.00

/within...

within 1 year of the date of signing of the Agreement; the $1.00 could have been paid the day after the signing of the Agreement.

(2) The right to build 40 multiple units on 9 acres as specified. That the right to purchase was not subject to the performance of the conditions in Clause 3. That the option to purchase was effectively exercised and the appellant entitled to a conveyance of Lathefield Lodge.

Respondents Counsel's submission was that $1.00 was but a nominal consideration stated for the purchase but from a study of the Agreement as a whole it becomes inescapable that the real consideration equivalent to the purchase price for Lathefield Lodge was the exercise of the option to build. He also submitted that the two options are not severable, a matter conceded by Counsel for the appellant before the trial Judge and the appellant was not entitled to ask this Court to act in opposition to Counsel's concession below.

A conclusion that the exercise of the option to purchase Lathefield Lodge was of a separate and independent right may be appropriate if that option is severable from the option to build. But Counsel for the appellant did not leave it as an issue before the trial Judge that the options were severable. He in fact conceded that they were not. He even went further and conceded that the appellant was not entitled to any order of specific performance.

The case argued before us is therefore totally inconsistent with the case presented to the trial Judge for consideration. Of course Counsel before us stated that he was withdrawing all concessions made by Counsel at the trial. But the question would be in issue for the first time as to whether on a proper construction of the agreement the two options are severable.

"When a question of Law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position from the courts below.

/But their....

But their Lordships have no hesitation on holding the course ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated would have supported the new plea". Lord Guest in Warehousing Co. etc. v. Jafferali etc. (1963) 3 All E.R. at A to G 576 quoting Lord Watson in Connecticut Fire Insurance Co. vs. Kavanegh (1892) A.C. 473 at 480.

In my opinion the Agreement drawn up and executed as set out above does not lend towards easy interpretation. Nice questions arise on its construction some of which relate to the very issue now raised. It may be asked if the appellant had the right to pay $1.00 within 1 year of signing of the Agreement, and thus become entitled to a conveyance of Lathefield Lodge, can it be said that that option to purchase is subject to the option to build which was exercisable over a three year period, i.e. for two years after it is stated he may exercise the option to purchase?

There are others and in the circumstances this Court cannot be satisfied that the evidence before it clearly establishes or sustains the new point taken before us. Nothing was urged before this Court to impress upon us that it was in the interests of justice to allow the appellant to take a position different from the one he took before the learned Judge. I am not satisfied he should be allowed to do so and he must fail under this head.

OPTION TO BUILD:

The appellant complained against the interpretation given by the learned Judge to the term "Release" in the Agreement. It was submitted that the word means "Conveying title to or putting in a position with the rights of an owner". That Clause (g) bears on Clause (f) and the appellant had to be in a position to sell the lot concerned. Submission for the respondents was that from the scheme set out in the contract, there was nothing to protect the respondents if they parted with the land. Everything about conveyancing is incompatible with the notion of the respondents parting with the land under the Scheme in the contract. Reference was made also to evidence of the appellant that "It was not defined when the title to the land or the units which were to be built would be transferred to me". "The way I read this contract, the Caroons were to pay the vendors tax. I mean that when they get their 10% they must pay the vendors tax out of that. It does not mean that they were to transfer title to purchaser at that point".

/I see.....

"I see Endorsement #2..... It means that up to time I have paid U.S. $500,000.00 I would not have title to any of the lands. If $500,000.00 U.S. was raised by sale of units, the purchasers would have got their titles. It was not worked out from whom they would have got their title. I had a sale agent. If units were sold I do not know how the purchaser of the units would have got their title. It does not state in Exhibit J.T.1 that I was to have title at anytime".

The ordinary dictionary meaning of 'Release' is "to set free or let go". Giving the word its ordinary meaning does not leave it clear from "Clause G" how the appellant was to be in a position to sell the units concerned. I accept both the submission of the appellant that Clause G bears on Clause 'F' and that of the respondent that the instrument must be looked at as a whole and interpreted to give business efficacy to it. What the parties intended not being clear from the instrument itself, assistance in determining it may be had from outside of it.

It seems to make absurdity of the Agreement to interpret Release to mean conveying title to the land to the appellant. If title is conveyed to the appellant and he does nothing further under the agreement, he does not build, is he left as owner of the land? But apart from this consideration the submission is in distinct contradiction to the appellant's own statement of the intention of the parties and his expectation under the contract. From his own evidence at the time of Release of the land and even at the time $500,000 U.S. would have been paid he would not have title to any of the lands. He did not know how purchasers of the units were to get their titles but clearly not from the appellant.

A consideration of the above is sufficient to show that the trial Judge was correct to find as he did and his finding must be supported.

COMMENCEMENT OF CONSTRUCTION:

The appellant's submission was that the respondents had not fulfilled the conditions required of them under the Agreement, which would give rise to the appellant's obligation with regard to commencement of construction. Further it was contended that the requirements of Clause 3(c) of the Agreement were never satisfied because:-

/(a) The application....

(a) The application made on behalf of Lathefield Development Ltd. was for more than 40 multiple units which suggests the respondents wanted to be in control of the Development and not the Appellant;

(b) Lathefield Development Limited was to have the concessions granted and the appellant would have been beholden to the respondents.

There was evidence given by the appellant himself that the letter of approval for the development was delivered to him and that for concessions relating to the material with which he was concerned. He got partial approval on 20th December 1985 and approval for the balance on 28th January 1986. There being ample evidence on which the learned Judge could have found that Clause 3(c) was satisfied by the respondents I see no justification for interfering.

Another contention was that the appellant's obligation to commence construction cannot be said to have arisen since the respondents did not Release Lot 279 as required. This contention cannot be sustained in view of the meaning to be given to the word Release as indicated above.

A third contention was that while it may be said that construction of the building had not started, one could not say there was not commencement of construction.

On this issue, for the appellant, a Civil Engineer, a Mr. Lewis, expressed the opinion that if the appellant had done and/or had had done certain things as stated to him in Court he would say construction had started. On the other hand, Mr. Wilkin Griffith, a Civil Engineer who had inspected the site, said he saw nothing. The land had been cleared. That was all and he was of opinion that construction had not started. The learned Judge accepted the evidence of Griffith and found as he did. He was entitled to do so. There being evidence on which the Judge could come to his finding I can see no justification for interfering. Accordingly the finding that the appellant was in breach of his obligation under Clause (f) is sustained.

REPUDIATION OF CONTRACT:

Counsel for the appellant submitted that the learned Judge had

/no evidence.....

no evidence on which he could have found that the appellant repudiated the contract. That on the contrary the evidence established to the hilt that the respondents were in breach of the contract to a degree which amounted to repudiation. He maintained that the conduct of the appellant referred to by the Judge was no more than differences/disagreement by the appellant with the respondents on matters, which did not amount to a repudiation of the contract on the part of the appellant. He like the respondent relied on Woodard Investment Development Ltd. v. Wimpey Construction U.K. Ltd., (1980) 1 W.L.R. 277. Counsel for the respondent took the position that the learned Judge did not find repudiation on the part of the appellant but rather held that the agreement was discharged for the default of the appellant in fulfilling his obligation under Clause 3(f) of the Agreement. He submitted that the concept of repudiation which itself involves concepts of anticipatory Breach was not applicable in the circumstances of this case. He referred to a passage from the Judgment of Lord Keith of Kinkel in Woodward v Wimpey (Supra) at pgs. 296 -297.

Cheshire & Fifort (6th Edition) Contract Pgs.502-505.

He also pointed to the order of the Judge that the agreement has been discharged by the breach of the appellant.

The learned Judge said in his judgment "The plaintiff (appellant) had defaulted under Clause (f) of the agreement by failing to begin construction within the time stated or at all. It seems to me that the nature of the default is such as to entitle the defendants to be discharged from further liability to perform any obligations under the said agreement. The plaintiff's breach is accompanied by conduct which implied the renunciation of his contractual obligations, and his failure to begin construction makes it impossible for the defendants to grant the licence or other legal interest that would flow from the exercise of the plaintiff's options.

The defendants have sought a declaration that the plaintiff has repudiated the contract and in my view the defendants are entitled to be relieved from any further obligations under the contract.

The plaintiff defaulted from his liability to commence construction 180 days after the 26th January 1986. So much

/time....

time has passed and the intentions evidenced by the plaintiff are such that in my view I ought to make the order for repudiation".

Woodward v. Wimpey (Supra) was concerned with whether a party to a contract who took action bona fide relying on an express term in the contract could by that fact alone be treated as having repudiated the contract. It was held that a party who took action relying simply on the terms of the contract in question and not manifesting by his conduct an ulterior intention to abandon it was not to be treated as repudiating it; that the whole circumstance, must be looked at and since it had been assumed in those proceedings that both sides would abide by the decision of the Court, the evidence of the purchaser's conduct was insufficient to support a case for repudiation. That decision does not assist the appellant. That case was concerned with a party's conduct which was confined to taking action bona fide relying on a term of the constract.

In the instant case the trial Judge found that the appellant failed to fulfill his obligations under Clause 3(f) of the Agreement and that finding has been sustained. The learned Judge in addition considered other conduct of the appellant. the learned Judge found that the appellant maintained that he had not started construction because he did not get the money he needed. He did not start because he never got his financial arrangements settled. There is no evidence that the appellant did not fulfill his obligations under the contract because he bonafide took a wrong view of his legal position under the contract or was even advised to take any particular position. The trial Judge's finding was that from a consideration of the circumstances, the appellant manifested an intention not to fulfill his obligations under the contract. Enough has been set out to show that the obligation found to be breached by the appellant is of vital importance to the contract. I would sustain the Judge's finding that the appellant had repudiated the contract.

Where a party to a contract manifests an intention to refuse to perform his obligations which are vital to the contract, there is a cause for discharge of the contract. The learned Judge's order was therefore correct. The appellant also fails under this head.

For the reasons set out above, I would dismiss the appeal with costs to the respondents.

/G.C.R. .....

G.C.R. MOE,
Justice of Appeal

E.H.A. BISHOP,
Chief Justice (Acting)

MONICA JOSEPH
Justice of Appeal (Acting)