IN THE COURT OF APPEAL OF BELIZE, A.D. 2009

CIVIL APPEAL NO. 10 OF 2008

BETWEEN:

STANN CREEK DEVELOPMENT LIMITED	**Appellant**
AND	
LIGHTHOUSE REEF RESORT LIMITED	**First Respondent**
NORTHERN TWO CAYES LIMITED	**Second Respondent**
JOHN M. BLACK, JR.	**Third Respondent**

BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**

Mr. E. Andrew Marshalleck for the appellant.
Mr. Michael Young SC for the respondents.

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10 October 2008, 27 March 2009

MOTTLEY P

1. I have read the judgment of Morrison JA in draft. I agree with it and having nothing to add.

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MOTTLEY P

SOSA JA

2) I have read, in draft, the judgment of Morrison JA and concur in the reasons for judgment given, and the orders proposed, in it.

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SOSA JA

MORRISON JA

Introduction

3. This is an appeal from a part of the judgment of the learned Chief Justice given on 29 April 2008, dismissing both the appellant's claim and the first and second respondents' counterclaim, with costs to the respondents to be agreed or taxed.

4. The litigation in this matter arises out of the purported termination by the first and second respondents of an agreement dated 5 February 2004 (the agreement) for the sale by them to the appellant of certain properties, fixed assets and intellectual property rights. The appeal is concerned with the true construction of the agreement and the consequences thereof. The third respondent is a director of both respondent companies and was sued in his personal capacity for an alleged conspiracy with the other respondents to injure the appellant and for inducing a breach of the

agreement by them. There is no appeal from the Chief Justice's dismissal of the claims against him. Further reference in this judgment to "the respondents" is, unless otherwise indicated, to the first and second respondents.

The background

5. The first respondent is the owner of a 16.1 acre parcel of land at Northern Caye Lighthouse Reef and the second respondent is the owner of two islands known as Northern Two Cayes. Both properties are subject of Transfer Certificates of Title (dated 18 January 1980 and 21 November 1980 and registered in the Land Titles Register, Volume 22 Folio 8 and Volume 13 Folio 267 respectively). The first respondent developed and operated a tourist resort known as Lighthouse Reef Resort on the 16.1 acre parcel for some years and on 5 February 2004 the respondents agreed to sell the properties, fixed assets and intellectual property rights to the appellant for a consideration of US$10,000,000.00, payable as follows:

(i) An initial down payment of US$400,000.00 payable by an immediate cash payment of US$250,000.00 and a promissory note due and payable within 90 days for US$150,000.00

(ii) The sum of US$4,000,000.00, payable on or before 6 August 2005, or within 90 days thereafter

(iii) The issue of redeemable preference shares ("preference shares") in the appellant to the respondents, with a face value of US $3,600,000.00 and an annual dividend rate of 13.88%

(iv) Redemption of the preference shares on or before 6 August 2009 (with a proviso for a discount in case of early redemption).

6. The appellant duly paid the down payment of US$400,000.00 in accordance with the agreement. Documents, including copies of the relevant certificates of title, were delivered to the appellant in pursuance of the agreement. An inventory was taken of all the non-land assets, which were delivered into the custody and control of the appellant, and by mutual agreement between the parties leased back to the respondents at an agreed nominal rent. In or around July 2005, the appellant's attorneys-at-law discovered that Sandbore Caye, one of the two islands, had been compulsorily acquired by the Government of Belize ("GOB") on or about 6 November 1999. The appellant's attorneys-at-law advised the respondents of this fact by letter dated 19 July 2005 and made an offer to complete the purchase subject to an abatement of the purchase price of US $1,500,000.00. The respondents declined this offer and decided instead to make efforts to recover the affected land from the GOB. This they succeeded in doing when, by Minister's Fiat Grant No. 1159 of 2005 dated 5 December 2005, the affected land was returned to the first respondent by GOB.

7. The appellant did not make the payment of US$4,000,000.00 or issue the preference shares on or before 6 August or by 4 November 2005 (which, it is common ground, was the outside date for payment under the agreement). However, by letters dated 2 and 5 December 2005, the appellant's attorneys-at-law wrote to the respondents requesting certain documents and information as part of their "due diligence" and pointing out an error in the latitudinal and longitudinal references in the second respondent's title documents.

8. By a Notice of Default and Termination of Agreement ("the notice") dated 12 December 2005, the respondents required that the appellant remedy the breach brought about by its failure to pay the sum of US $4,000,000.00 and issue the preference shares within 30 days of the date of the notice, that is, by 12 January 2006. The consequence of failure to comply with the notice was stated to be that all instalments of purchase price and other sums already paid would be forfeited to the respondents, who would re-enter and retake possession of the land and other assets and that the agreement would be terminated effective 12 January 2006.

9. Despite further discussions between the parties in January 2007, the respondents by letter dated 17 January 2007 declined a request made on behalf of the appellant for an extension of the agreement for an additional 60 days. On 4 May 2006 the respondents entered into an agreement for sale of the properties to a third party.

10. The appellant on 21 June 2006 filed suit claiming:

    (a) A declaration that the agreement was not validly terminated "and continues in full force and effect";

    (b) an order for specific performance of the agreement or, alternatively, damages for breach of contract;

    (c) damages for conspiracy to injure the appellant or, as against the third respondent, damages for inducing breach of contract.

11. The respondents filed a defence and by way of counterclaim sought a declaration that the agreement had been validly terminated and that the

US$400,000.00 paid by the appellant towards the purchase price was duly forfeited as agreed liquidated damages.

12. Conteh CJ, after a trial over two days, gave judgment as follows:

1) The contract dated 5th February 2004 between the claimant and the first and second defendants was validly terminated when the claimant failed to comply with the notice to complete dated 12th December 2005 that expired on 12th January 2006 and is no longer in full force and effect.

2) Accordingly, an order for the specific performance of the said contract is denied.

3) The first and second defendants as well as Mr. Black the third defendant are blameless for any tortious interference with the claimant's aforesaid contract.

4) The counterclaim for forfeiture of the initial downpayment under the said contract in the sum of US$400,000.00 is denied. The said sum to be refunded to the claimant.

5) The costs of these proceedings are awarded to the defendants to be taxed if not agreed.

The appeal

13 Dissatisfied with this result, the appellant filed five grounds of appeal, which were very helpfully summarized by Mr. Marshalleck as the three issues arising on the appeal, as follows:

> (i) Whether or not on the true construction of the agreement the rights of the respondents to terminate the agreement at common law were circumscribed and limited by the express clear and unambiguous terms of clause 11.2(c) of the agreement? ("issue (i)")
>
> (ii) Whether or not on the true construction of the agreement the respondents were entitled to and have terminated the agreement by its notice of Default and Termination of the agreement dated 12th December 2005? (issue (ii)")
>
> (iii) Whether or not the issue of the Minister's Fiat to the respondents settled any outstanding issues the appellant had as to the title to Sandbore Caye. ("issue (iii)")

14. The respondents also filed a notice seeking a variation of Conteh CJ's order that the deposit of US$400,000.00 be returned to the appellant and a declaration that that sum has been forfeited to the respondents as liquidated damages, on the following grounds:

> "(1) That on a true and proper construction and interpretation of the Contract of Sale, once (a) the Appellant defaulted in (i) payment the sum of US

$4,000,000 and/or (ii) the issuance in favour of the First and Second Respondents of Redeemable Preference Shares with a face value of US $3,600,000 and (b) the First and Second Respondents issued a notice to complete consequent or following upon such default and (c) the Appellant failed to comply with the notice to complete then any or all instalments paid towards the purchase price would be forfeited to the First and Second Respondents as occupation rent.

(2) That the Learned Chief Justice erroneously concluded that once the default in payment occurred after the 6th of August 2005, the instalments deposited earlier would not be forfeited."

15. To Mr. Marshalleck's formulation of the issues, which I gratefully adopt, I would therefore add the question raised by the respondents' notice, that is, whether the Chief Justice's ruling against the forfeiture of the first payment of US$400,000 was correct. ("issue (iv)") The first two issues, it will be seen, are in effect really one: that is, whether on the true construction of the agreement, the respondents were entitled to and did terminate it by the notice dated 12 December 2005. Both parties are agreed that the task of the court is to interpret the agreement and it may therefore be helpful, before going to the submissions, to set out the relevant provisions.

The terms of the agreement

16. Nothing now turns on clause 4.1.1 of the agreement, which provided for the initial down payment of US$400,000.00, it being common ground

between the parties that it was paid when due in accordance with the terms of the agreement. As to the balance of the purchase price, however, clause 4.1.2 provides for it to be paid "in the manner set out in the Fourth Schedule hereto." The relevant provisions of the Fourth Schedule are as follows:

> "4-1 The balance of the purchase price is to be paid to the Vendors as follows:
>
> (a) On or before August 6, 2005 or within 90 days thereafter. The sum of **Four Million Dollars in United States currency (US $4,000,000.00)**; and
>
> (b) On or before August 6, 2005 or within 90 days thereafter – Redeemable Preferred Shares of SCDL with a face value of $3,600,000 and an annual dividend rate of 13.889%.
>
> (c) On or before August 6, 2009 – redemption of all shares mentioned in sub-paragraph (b) above.
>
> PROVIDED ALWAYS that the Purchaser shall have a right of early discharge exercisable at any time after the payment of the first installment of the Purchase Price referred to in sub-paragraph (a) above by payment to the Vendors of the sum of **Three Million Six Hundred Thousand Dollars in United States currency (US $3,600,000)** plus accrued dividends if any **("the Right of Pre-Payment")."**

17. Completion of the agreement is dealt with at clause 6 in the following terms:

"6.1 The sale and purchase of the Assets SAVE AND EXCEPT the Lands shall be completed immediately upon payment in full of the initial down payment of the Purchase Price by the Purchaser to the Vendors and when all the matters set out in sub-clauses 6.2 and 6.3 shall be effected.

6.2 Upon receipt by the Vendors of the initial down payment of the Purchase Price, the Vendors shall cause to be delivered or (if so requested by the Purchaser) made available to the Purchaser such documents as are required by the Purchaser' solicitors to complete the sale and purchase of the Assets and vest title to the Assets in the Purchaser;

6.3 The sale and purchase of the Lands shall be completed immediately upon payment in full of the second installment of the Purchase Price by the Purchasers to the Vendor as set our in sub-paragraph (b) of the Fourth Schedule and when all the matters set out in sub-clauses 6.4 shall be effected.

6.4 Upon receipt by the Vendor of the second installment of the Purchase Price in full, the Vendor shall cause to be delivered or (if so requested by the Purchasers) made available to the Purchasers such documents as are required by the Purchasers' solicitors to complete the sale and purchase of the Land and vest title thereto in the Purchasers and the Vendor shall execute or otherwise cause to be executed such proper assurances of title and such other documents

as may be necessary (if any) for the transfer of clear title in *fee simple absolute in possession* free of all liens and encumbrances of the Lands from the Vendors to the Purchasers.

6.5 For the purpose of securing the interests of the Vendors pending the completion of the sale and purchase of the Lands, Mr. John M. Black Jr. shall be appointed to the Board of Directors of SCDL and shall act as Chairman of the Board and in this role he shall work with the Purchaser both to protect the remaining assets of the Vendors and to oversee the use of those remaining assets by the Vendors to the mutual benefit of the Purchaser and the Vendors.

18. And then there is, at clause 11, the provision in the event of default by either party, which is, so far as is relevant, set out below:

"11.1 In case the Purchaser shall fail to pay to the Vendors any of the said instalments of the Purchase Price or any other sum payable hereunder within thirty (30) days after the day upon which the same shall become due the whole of the balance of the Purchase Price then remaining unpaid shall become immediately payable and the Vendors may enter and take possession of the Land or enforce in any other such manner as they may think fit their lien as unpaid Vendors in respect thereof.

11.2 Without prejudice to clause 11.1 above, if the Purchaser shall neglect or fail to perform their

respective part of this agreement the Vendor's rights shall be limited to the following:

(a) the Vendors may give to the Purchaser up to thirty days notice in writing specifying the breach and requiring the Purchaser to make good the default before the expiration of the notice;

(b) in the event of a default occurring on or before August 6, 2005, if the Purchaser does not comply with the terms of the said notice any and all installments of the Purchase Price and other sums paid hereunder shall be forfeited to the Vendors as occupation rent and the Vendors may resell the Land without previously tendering a conveyance or instrument or transfer to the Purchaser;

(c) in the event of a default occurring after August 6, 2005, the parties shall use their best efforts to come to an agreement within (ninety) 90 days, failing which all unredeemed preferred shares issued to the Vendors in accordance with the Fourth Schedule shall be converted to common shares representing in aggregate 51% of the issued share capital SCDL.

11.3 If the Vendors shall neglect or fail to perform his part of this agreement:

(a) the Purchaser may give to the Vendors up to thirty days' notice in writing specifying the breach and requiring the Vendors to make good the default before the expiration of the notice;

(b) if the Vendors does not comply with the terms of the said notice, this agreement may be terminated by the Purchaser with any damages suffered to be determined by way of arbitration in accordance with the Arbitration Act.

11.4 Any resale may be made by auction or private contract, at such time, subject to such conditions, and in such manner generally, as the Vendors may think proper, and the defaulting Purchaser shall have no right to any part of the purchase money thereby arising."

19. Finally, clause 14.1 provides that "Time is of the essence as regards all payments and the terms of this Agreement."

The submissions

20. On issues (i) and (ii), Mr. Marshalleck submitted that it is necessary to construe the agreement as a whole, where possible, and that no part of it should accordingly be treated "as inoperative or surplus." Both clauses 11.1 and 11.2 should therefore be read together and given effect, in particular clause 11.2(c), which should be treated as having "circumscribed and limited any rights the Respondents had to terminate the Agreement." Read in this way, Mr. Marshalleck submitted, neither

clause provided for termination of the agreement or forfeiture of any instalment of the purchase price already paid. The vendors' right was to payment of the balance of the purchase price and "recourse to the land … as security for payment." Mr. Marshalleck invited a distinction between a right of termination of the agreement (for which no provision was made) and the right of an unpaid vendor to take possession of and enforce a lien against the land (which is what clause 11.1 permitted). In the result, Mr. Marshalleck contended that the purported termination of the agreement by the respondents was not sanctioned by its terms and was therefore in breach of the agreement and ineffective to terminate it.

21. On issue (iii) Mr. Marshalleck challenged the Chief Justice's conclusion that "any outstanding issue of title to Sanbore Caye had been settled by the Minister's Fiat in favour of [the respondents]." He submitted that even after 5 December 2005 there remained unanswered requisitions from appellant's attorneys-at-law, with the result that the respondents had failed to discharge their obligations as vendors by demonstrating to the appellant their ability "to convey the whole legal and equitable estate in the land."

22. On issues (i) and (ii) Mr. Young SC for the respondents submitted that the object of interpretation of the agreement was to ascertain the true intention of the parties, to be gathered from the language of the document, and he agreed with Mr. Marshalleck that it was necessary to construe it as a whole. He submitted that the obligation of the respondents to complete the agreement could not arise until the appellant had done its part by making the further payment of US$4,000,000.00 and issuing the preference shares, both steps to be performed "on or before August 6, 2005 or within 90 days thereafter." The appellant having failed to fulfil these two obligations, Mr. Young submitted, clause 11.1 provided that (a) the whole balance became due (b) the respondents were at liberty to re-enter and take possession and to enforce their lien in any manner they

thought fit. Mr. Young relied especially on the statement in Halsbury's Laws (4th edition, volume 28, paragraph 779) that an unpaid vendor's lien "also gives him the alternative right to rescind the contract and recover possession of the land." (Mr. Marshalleck's reply on this point was that a lien is by its nature security for payment of the purchase money and that the authority cited by Halsbury's did not support the breadth of the proposition in the text relied on by Mr. Young).

23. While Mr. Young accepted that clause 11.2 "could introduce some confusion" into this analysis, he pointed out that that clause is expressly stated to be "Without prejudice to clause 11.1", with the result that "in the event of inconsistency, conflict, confusion or doubt the issue is to be determined by clause 11.1." The agreement, Mr. Young submitted further, makes a distinction between events of default before payment of the US $4,000,000.00 and the issue of the preference shares and events of default after payment and the issue of the shares. In the latter situation clause 11.2(c) would apply, while in the former clause 11.1 would apply, on which analysis both clauses are able to sit together. Given that from the evidence the appellant had not only failed to pay the US $4,000,000.00, but was at no time in a position to do so, Mr. Young concluded that the Chief Justice was correct in holding that the respondents were entitled to terminate and had validly terminated the agreement.

24. On issue (iii) (the effect of the Minister's Fiat), Mr. Young directed attention to evidence of the appellant's representative, who had conceded in cross-examination that as of 4 November 2005 the only matter outstanding on the respondents' side was the Sandbore Caye title. This answer, together with other unchallenged evidence in the case, Mr. Young submitted, amply justified the Chief Justice's conclusion that the Minister's Fiat effectively settled any outstanding issues as to the respondents' title.

25. And finally on issue (iv) (the question of forfeiture), Mr. Young submitted that, on its true construction, clause 11.2(b) of the agreement permitted forfeiture of the initial down payment of US$400,000.00 in the circumstances of this case and that the Chief Justice had accordingly erred in concluding otherwise.

26. We were referred by Mr. Marshalleck and Mr. Young to a number of authorities in support of their submissions. My reference in this judgment to some of them only is a reflection of the fact that there was some common ground in the authorities, particularly on the principles of interpretation, rather than any disrespect to the admirable efforts of counsel.

The principles of interpretation

27. In his judgment in this case, Conteh CJ referred with approval to **Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 All ER 98** and to Lord Hoffman's oft-quoted observation that, as a result of recent developments in the law, "Almost all the old intellectual baggage of 'legal' interpretation has been discarded" (page 114). The modern position is accurately summarized in Halsbury's (4th edition, volume 13, paragraph 163), in a passage based almost entirely on Lord Hoffman's celebrated speech in that case.

28. It is therefore not in contention that the correct approach to the interpretation of the agreement in this case is to seek to determine what a reasonable person would have understood the parties to mean by the actual language used in the document, against the background ("the factual matrix", as Lord Wilberforce described it in **Reardon Smith Line Ltd v Hansen-Tangen [1976] 3 All ER 570, 575**), which would reasonably have been available to them at the time and having due regard

to the purpose of the agreement and the circumstances in which it was made. Thus although it remains important that words should be given their 'natural and ordinary meaning', "if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had." **(Investors Compensation Scheme Ltd v West Bromwich Building Society**, per Lord Hoffman at page 115).

29. The document must be construed as a whole, giving effect to all parts of the document, where possible, and no part of it should as a general rule be treated as inoperative or surplus (Halsbury's, paragraph 174 and The Interpretation of Contracts, by Kim Lewison QC, 2nd edition, paragraphs 6.02 and 6.03). But context is all important and, even words whose "natural" meaning might appear to be clear must, in Lord Mustill's memorable formulation, "be set in the landscape of the instrument as a whole" (**Charter Reinsurance Co Ltd v Fagan [1997] AC 313, 384**). In a commercial setting, it is particularly important that the construction should reflect what has been described as "business commonsense" (in **Antaois Compania Naviera v Salen Rederierna A.B. [1985] AC 191, 201**, per Lord Diplock),

30. It might also be noted at this point that there is a clear connection between the process of interpretation of documents, which I have been discussing, and the process of implication of a term in a document. For as Lord Hoffman has recently pointed out (in **Attorney General of Belize and others v Belize Telecom and Innovative Communication Company LLC, Privy Council Appeal No. 19 of 2006**, judgment delivered 18 March 2009, at paragraph 21) "in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the

instrument, read against the relevant background, would reasonably be understood to mean."

The interpretation of the agreement

31. It is in the light of these principles, then, that I come to the agreement in this case. Early in his judgment, Conteh CJ made the comment that "it is common ground between the parties that this agreement is not a model of clarity or draftsmanship", a view which was echoed more than once during the hearing of the appeal and from which I do not dissent. Nevertheless, the court must try to give meaningful effect to the agreement in all the known circumstances of the case.

Payment of the purchase price

32. The agreement fixed the purchase price at US$10,000,000.00, made up of (a) the down payment of US$400,000.00 and (b) a further payment of US $4,000,000.00 and the issue of redeemable preference shares to the value of US$3,600,000.00 at an annual dividend rate of 13.889%, on or before 6 August and in any event no later than 4 November 2005; and (c) redemption of the said preference shares on or before 6 August 2009, subject to a discount for earlier payment of US$3,600,000.00, plus accrued dividends, if any. It will be seen, as Conteh CJ pointed out, that the application of the agreed dividend rate of 13.889% per annum to the share value of US$3,600,000.00 over the agreed four year period yields US$500,000.00 per year which, when added to the initial down payment of US$400,000.00, the amount required to redeem the shares (US $3,600,000.00) and the contemplated cash payment of US$4,000,000.00, would bring the total consideration to the agreed total of US $10,000,000.00.

33. As Conteh CJ also observed the question whether time is of the essence of a contract is a matter of construction of the contract and where, as in this case, it is expressly provided that time is of the essence, then the court will generally give effect to this stipulation by treating it as a condition, breach of which will allow the party not in breach to terminate the contract (see Treitel, The Law of Contract, 12th edition, para. 18-090).

Completion

34. The agreement seeks to distinguish between completion of the sale and purchase of the non-land assets included in the agreement and what it refers to as "the Lands" (clause 6.1). However, when clause 6 is read as a whole, it will be seen that it is in fact an illusory distinction, certainly in terms of the time for completion. For while clause 6.1 states that the sale and purchase of the non-land assets "shall be completed immediately upon payment in full of the initial down payment of the Purchase Price", it directs attention to the subsequent sub-clauses by adding the words "and when all the matters set out in sub-clauses 6.2 and 6.3 shall be effected."

35. Sub-clause 6.2 requires the vendor upon receipt of the initial down payment, to deliver or make available to the purchaser "such documents as are required by the Purchaser's solicitors to complete the sale and purchase of the Assets and vest Title to the Assets in the Purchaser", which seems to follow reasonably from sub-clause 6.1.

36. But sub-clause 6.3, to which completion of the sale and purchase of the non-land assets is also expressly tied, then deals with the sale and purchase of the Lands, which is to be completed "immediately upon payment in full of the second installment of the Purchase Price … as set out in sub-paragraph (b) of the Fourth Schedule and when all matters set out in sub-clauses [sic] 6.4 shall be effected" (emphasis supplied).

37. Finally, sub-clause 6.4 provides that, upon receipt of the second instalment of the purchase price in full, the vendor shall deliver or make available to the purchaser "such documents as are required by the Purchasers' solicitors to complete the sale and purchase of the Land and vest title thereto in the Purchasers … [etc.]."

38. The net effect of all this, it appears to me, is that despite the ostensible distinction between the two, completion of neither the sale and purchase of non-land assets nor the Lands is to take place in any event until payment of the US$4,000,000.00 and the issue of the preference shares, on or before 4 November 2005. In other words, clauses 6.1, 6.2, 6.3 and 6.4 must all be read together. The obligation of the vendors to deliver or make available to the purchaser "such documents as are required … to complete the sale and purchase of the Land and vest title thereto" in the purchaser only arises upon payment in full of the second instalment of the purchase price to the vendor. Therefore, because of the express linkage of the four sub-clauses to each other, in no event can completion of the sale and purchase of either the Lands or the non-land assets take place before that payment is completed.

Default

39. Clause 11 is the all important (and no less challenging) default provision of the agreement. It starts out simply enough by providing in sub-clause 11.1 that, in the event of failure by the purchaser to pay any instalment of the purchase price within 30 days of the due date, the whole of the unpaid balance of the purchase price "shall become immediately payable and the Vendors may enter and take possession of the Land or enforce in any other manner as they may think fit their lien as unpaid Vendors in respect thereof."

40. Clause 11.2 is more difficult. It opens with the words "Without prejudice to clause 11.1 clause …", which I take to mean that what follows is not to be interpreted as cutting down or limiting in any way the rights given in clause 11.1 to the vendor against the defaulting purchaser. The words 'without prejudice' are the usual formula by which a party (to actual or anticipated litigation) invokes privilege against the subsequent tender in evidence of a communication and they generally arise in the context of a negotiation (see the Oxford Dictionary of Law, 6th edition, page 577). However, as Thomas J observes in the Australian case of **Alleyn v Thurect [1983] 2 Qd R 706, 708**, "the phrase is also commonly used (or misused) to convey a reservation of rights. Nowadays it is used in contracts as equivalent to a proviso" (quoted in Words and Phrases legally defined, 3rd ed, volume 4, at pages 449 – 50). Which is the sense in which it is obviously used in opening clause 11.2, that is to say, as a reservation to the party not in breach (the respondents) of the rights conferred by clause 11.1, notwithstanding what follows in clause 11.2.

41. In addition to the rights given by clause 11.1, therefore, clause 11.2(a) entitles the vendors to give to the defaulting purchaser up to 30 days notice in writing specifying the default and requiring that it be made good. Clause 11.2(b) is by its terms ("in the event of a default occurring on or before August 6, 2005 …") plainly inapplicable to this aspect of the case, as it is common ground that the only thing that the appellant was required to do before 6 August 2005 was to pay the down payment of US $400,000.00, and that this was done. However, I will have to return to clause 11.2(b) when I come to consider issue (iv) (the question of forfeiture).

42. Clause 11.2(c), however, provides that in the event of a default by the purchaser after 6 August 2005, "the parties shall use their best efforts to come to an agreement within ninety (90) days, failing which all

unredeemed preferred shares issued by the Vendors in accordance with the Fourth Schedule shall be converted to common shares representing in aggregate 51% of the issued share capital of [the appellant]." In the instant case, where no preference shares as provided for by clause 4.1(b) of the Fourth Schedule, were ever issued to the respondents, the Chief Justice took the view that it was accordingly "not reasonable or practical to apply the provisions of clause 11.2(c) …, for the simple reason that there could be no conversion of the preference shares … when in fact the preference shares were never issued at all."

43. Clause 11.3 deals with default by the vendors, which does not arise on the facts of this case. However, it should be noted that a right of termination of the agreement is expressly given to the purchaser in the event of default by the vendors, upon non-compliance with a notice of default. Clause 11.4 provides for the manner of resale of the property by the vendors in an appropriate case, though it appears from the structure of clause 11 as a whole that this relates specifically to a resale pursuant to clause 11.2(b) (default before 6 August 2005).

44. During the argument I was fleetingly attracted to the view that the intention of clause 11.2(c) could nevertheless be achieved in the circumstances of this case by the appellant issuing 51% of its share capital to the respondents. However, I am satisfied on reflection that that would in fact involve an unwarranted re-writing of what the parties had themselves agreed. What seems to me to be more likely is that, as Mr. Young submitted, the clause was intended to provide the vendors with an alternative remedy in the event of a breach occurring, after the second instalment of US$4,000,000.00 and the issue of payment of preference shares (such as a failure to make an annual dividend payment when due or to redeem the preference shares on the due date). However, the preference shares not having been issued, there is, as in the case of

clause 11.1(b), no scope for the operation of clause 11.2(c) in the circumstances. This remedy was, as the Chief Justice concluded, "plainly illusory" on the facts of this case (a view which was, incidentally, shared by Mr. David Jorgensen, a director of the appellant, who in his evidence stated that the respondents' rights under the agreement "were expressly limited to converting all unredeemed preference shares then held by [them] to common shares …" (emphasis supplied)).

45. The result of all of all of this, it seems to me, is that, the appellant having failed to make the payment of US$4,000,000.00 and to issue the preference shares for the balance on or before 4 November 2005, the respondents were free to avail themselves of the remedies provided by clause 11.1, which, far from being "circumscribed" by clause 11.2(c), were expressly preserved by the use of the words "without prejudice to clause 11.1" in the opening line of clause 11.2. Thus the entire unpaid balance of the purchase price became "immediately payable" and the respondents' rights as an unpaid vendor were also expressly acknowledged and preserved. In addition, the respondents could avail themselves of the provisions of clause 11.2(a), that is, to serve a notice on the appellant specifying its breach and requiring that it be made good within a period of up to 30 days. Which is what they in fact did.

46. But before going to consider the notice and its effect, I need to refer to Mr. Young's submission that the respondents' rights as unpaid vendors, as confirmed by clause 11.1, extended to a right to rescind the agreement. **In Capital Finance Co Ltd v Stokes and Another, Re Cityfield Properties Ltd** [1968] 3 All ER 625, 629, Harman LJ characterized the unpaid vendor's lien as one which arises "in the ordinary course…and it is a creature of the law and does not depend on contract or possession". So that clause 11.1, save for providing that the entire balance of the purchase price shall become due on default, is really confirmatory of the

respondents' right to a lien as unpaid vendor. However such a lien is not enforceable by sale until the right to it has been established "by a judgment of the court binding the persons affected by the lien" (Halsbury's, 4th edition, volume 28, paragraph 576). It is clear from **Lysaght v Edwards** (1876) Ch.D. 499, which is cited by Halsbury's as authority for the proposition that the unpaid vendor's lien "also gives him the alternative right to rescind the contract and recover possession of the land" (see paragraph 22 above), that that result is only achievable by an order of the court. In that case Jessel MR described the process in this way (at page 506):

> "Such a decree has sometimes been called a decree for the cancellation of the contract; time is given by a decree of the Court of Equity, or now by a judgment of the High Court of Justice; and if the time expires without the money being paid, the contract is cancelled by the decree or judgment of the Court, and the vendor becomes again the owner of the estate."

47. It therefore appears to me, in agreement with Mr. Marshalleck on this point, that recourse to clause 11.1 and the unpaid vendor's lien did not without more give to the respondents a right of rescission in this case, as Mr. Young contended that it did.

The notice

48. The notice dated 12 December 2005 recited clauses 11.1, 11.2(a) and (c) (omitting 11.2(b), which was only applicable to a breach occurring before 6 August 2005), and concluded as follows:

> "NOW THEREFORE, the Purchaser not having paid to the Vendors the sum of USD4 million and Redeemable Preferred Shares in SCDL of USD3.6 million on or before August 6th, 2005 or within ninety (90) days thereafter and this default having continued for 30 days after the due date.
>
> TAKE NOTICE that the entire balance of the Purchase Price is now immediately payable and the Vendors will enter and take possession of the Land or enforce in any other such manner as they think fit their lien as unpaid Vendors in respect thereof.
>
> You are therefore required to remedy the said breaches within thirty (30) days of the date of this Notice, that is, by January 12th, 2006.
>
> Should you fail to comply with this Notice all instalments of Purchase Price and other sums paid are forfeited to the Vendors, they will re-enter and retake possession of the Land and the Assets and, the said agreement is hereby terminated effective on expiation [sic] of this Notice."

49. This notice is completely unexceptionable, either in terms of its references to the agreement itself or the precise default which it identified. However, the question is, (leaving aside for the moment the question of forfeiture, to which I must return) whether the respondents could validly stipulate for termination of the contract in the event of non-compliance with the notice. While it is a fact that clause 11.2(a) does not in terms state the consequence of non-compliance in the circumstances of this case, it appears to me to be a reasonable implication as a matter of the proper construction of the agreement as a whole, that it was the intention of the

parties that the party serving the notice should in these circumstances have the like remedy to that afforded to the purchaser under clause 11.3 in the event of a breach by the vendor, that is, to terminate the agreement. To quote Lord Hoffman in **Attorney General of Belize and others v Belize Telecom Limited and Innovative Communication Company LLC** (supra, at paragraphs 17 – 18 of the judgment):

> "17. The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.
>
> 18. In some cases, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out that the instrument means."

50. It appears to me that this case, the entire balance of the purchase price having become due by operation of clause 11.1 and the remedy provided

by clause 11.2(c) not being available to the vendors on the facts of the case, is indeed one in which the implication of a term is necessary "to give effect to the reasonable expectations of the parties" (per Lord Steyn in **Equitable Life Assurance Society v Hyman [2002], AC 408, 459**). It could not in my view have been the intention of the parties that the respondents should remain in possession of the property as unpaid vendors indefinitely, in circumstances in which the evidence was that they were relying on the proceeds of the sale to discharge certain of their liabilities, including a bank loan secured by a mortgage. The evidence of the third respondent was that the resort had in fact been closed in August 2005, after which date it had earned no revenue but was costing "about $5,000.00 per week to maintain the security people." I would therefore regard this as a fit case for the implication of a term to the effect that, in the event that the vendor should have no effective remedy under clause 11.2(c), the consequence of a failure to comply with a notice issued pursuant to clause 11.2(a) would be that the vendor was entitled to terminate the contract.

51. However, as the case was not argued either at trial or in this court on this basis, I will accordingly pass on to how the Chief Justice dealt with the issue of the notice. Conteh CJ treated the notice, although headed 'Notice of Default and Termination', as a notice to complete, failure to comply with which entitled the respondents to terminate the agreement after 12 January 2006. These were his reasons doing so:

> "I therefore find the defendants' notice of 12th December 2005 to the claimant although headed "Notice of Default and Termination" was really, in effect, a notice of completion to the claimant and that it was a valid notice for the following reasons:

a) It was dated 12th December 2005, well after the time stipulated in the contract for payment but within the time for notice as provided for in clause 11.2(a) of the contract;

b) It specified the breaches to be remedied, that is, non-payment of the balance of the purchase price;

c) It specified a date to remedy the breaches (that is, 12th January 2006);

d) It stated the consequences of non-compliance (although I do not agree with the forfeiture point in the notice – more on this later);

e) By the time it was issued any outstanding issue of title to Sanbore Caye had been settled by the Minister's Fiat in favour of the defendants, and they were not in breach of the contract, if they ever were.

f) It made commercial sense of the parties' agreement. It showed that it was not an open-ended agreement to remain in force until such time the claimant could find the balance of the purchase price."

52. It has already been seen that clause 14 of the agreement provided that time was to be of the essence "as regards all payments and the terms of this Agreement", language clearly wide enough to cover both the obligation to make the second payment of US$4,000,000.00 and to issue the preference shares. But despite this, the Chief Justice approached the matter on the basis that the effect of the notice was to make time of the

essence of the agreement. He obviously had in mind that by 12 December 2005 “some 38 days” had already passed after the 4 November 2005 deadline, and also took into account an apparent ”divergence of opinion between the parties’ respective attorneys as to when was really the due date for payment under the contract”. When one adds to this the fact that the return of Sandbore Caye to the first respondent’s ownership was not formally achieved until 5 December 2005, I do not think that the Chief Justice can be faulted for approaching this aspect of the matter in this way. The question is therefore whether the notice can bear the meaning and can have the effect attributed to it by him.

53. Where one party is in breach of a contract for the sale of land, the innocent party may, provided that he is not himself in default and is otherwise ready, willing and able to complete the contract, by notice fixing a reasonable time for performance of his obligations by the party in default, make time of the essence of the contract. Non-compliance with a valid notice to complete is a breach which gives rise to the right in the innocent party to terminate the contract (see **Gogard Pty Limited v Satnaq Pty Limited [1999] NSWSC 1283**, paragraphs 300 – 306, a case referred to by Conteh CJ and cited to us by Mr. Young).

54. It has not been contended by Mr. Marshalleck that the 30 days fixed for compliance in the notice was unreasonable. Quite apart from the fact that clause 11.2(a) does permit the giving of “up to” 30 days notice, by the date of the issue of the notice on 12 December 2005 the appellant had been, as Conteh CJ pointed out, in default for over a month and, in those circumstances, 30 days appear to me to be a more than reasonable further period to enable the appellant to complete.

55. But the further question that arises is whether the respondents were disentitled from issuing the notice by reason of their own default, as the appellant submitted that they were, which is Mr. Marshalleck's issue (iii). The appellant's contention at trial was that the respondents had failed to demonstrate good title and had failed to provide the appellant with necessary information to enable completion of the sale of assets. The Chief Justice found "this claim of non-compliance by the [respondents] unavailing in the circumstances of this case." This was his conclusion on the issue:

> "48. First, on the claim of non-performance regarding good title, this relates to Sandbore Caye which formed part of the lands the claimant was to acquire under the contract. This Caye had earlier been compulsorily acquired by the Government of Belize. The claimant had asked however for an abatement or reduction in the purchase when its attorneys discovered this. (See Doc. No. 3 in the claimant's third bundle). But this evidently was not accepted by the defendants. However, on representation from attorneys for the defendants, the Government of Belize returned Sandbore Caye to the first defendant by Minister's Fiat Grant No. 1159 of 5th December 2005 (see Doc. No. 5 in claimant's third bundle), I am, however, satisfied that at the time the defendants issued the Notice of Default and Termination or as I prefer, the notice to complete of 12th December 2005, title to Sandbore Caye was not a live issue if it ever was. If the claimant had paid the balance of the purchase price, the defendants would have been obligated to pass good title.

49. Secondly, on the claim of non-performance by the failure of the defendants to deliver documents and vesting title in the assets in the claimant which were part of the contract, I am satisfied that on the evidence, this charge cannot be made out. Mr. Black for the defendants in his witness statement dated 30 November 2006, says at paras. 14 and 15 that after the initial downpayment was made by the claimant, an inventory was taken of all the assets and they were delivered into the control and custody of the claimant; and that by mutual agreement between the parties, these assets were leased back to the first and second defendants at an agreed nominal price. This is provided for in clause 9 of their contract. Mr. Jorgensen for the claimant in fact admitted receiving a list of these assets. On balance, I am persuaded that there was no failure by the defendants to deliver lists of the assets or to vest title in these in the claimant. I am satisfied that the assets remained on the property after the mutual agreement between the parties so that the resort business could be carried on until the claimant could come up with the balance of the purchase price as agreed in the contract. I therefore am unable to find any non-performance by the defendants of their obligations as alleged for the claimant."

56. Upon a review of the evidence before the Chief Justice, on what was essentially a question of fact, I do not think he can be faulted in this conclusion. Indeed, there was evidence from Mr. Jorgenson himself that as of 4 November 2005 the only outstanding matter that he was aware of

was the Sanbore Caye title, which was resolved by the issue of the Minister's Fiat Grant on 5 December 2005. I do not therefore think that any basis has been shown upon which to disturb the Chief Justice's findings on this point.

57. I would therefore conclude that the notice and the appellant's failure to comply with it were effective to terminate the contract, in effect for the same reasons as those advanced by the Chief Justice. This conclusion suffices to answer Mr. Marshalleck's issues (i), (ii) and (iii).

Issue (iv) (forfeiture)

58. The Chief Justice found that the respondents' counterclaim to be entitled to forfeit the initial down payment of US$400,000.00 failed because the right of forfeiture given by the agreement was in respect of breaches which occurred before 6 August 2005 (clause 11.2(b)), and there had in the circumstances been no such breach. Further, quite apart from the contractual provisions, the Chief Justice did not think that it would be "fair or equitable" to declare a forfeiture of the US$400,000.00 in the circumstances of the case, given that it was "a not inconsiderable amount" and that the fact that the respondents had entered into a subsequent contract to sell the properties to a third party meant that if the respondents were allowed to forfeit this amount it would provide them with "a gratuitous windfall".

59. We were referred by Mr. Young to the Australian case of **Havin Pty Ltd v Webster [2005] NSWCA 182**, for the proposition that a "vendor's right to retain the deposit upon default is of ancient origin" (per Santow JA at paragraph 131). On a proper reading of the agreement as a whole, Mr. Young submitted, the right of forfeiture was not precluded and, since there is no jurisdiction at common law or in equity to relieve against forfeiture of

a reasonable deposit paid on a contract for the sale of land, the Chief Justice was wrong in disallowing it in this case.

60. In **Workers Trust Bank Ltd v Dojap Ltd [1993] AC 573, 578**, Lord Browne-Wilkinson said this:

> "In general, a contractual provision which requires one party in the event of his breach of contract to pay or forfeit a sum of money to the other party is unlawful as being a penalty, unless such provision can be justified as being a payment of liquidated damages being a genuine pre-estimate of the loss which the innocent party will incur by reason of the breach. One exception to this general rule is the provision for the payment of a deposit by the purchaser on a contract for the sale of the land. Ancient law has established that the forfeiture of such deposit (customarily 10 percent of the purchase price) does not fall within the general rule and can be validly forfeited even though the amount of the deposit bears no reference to the anticipated loss to the vendor flowing from the breach of contract."

61. **Howe v Smith (1884) 27 Ch. D. 89**, the leading older case on the point, establishes that the vendor's right to forfeit a reasonable deposit is not dependent on any express contractual sanction. The basis of the rule in such cases is that the deposit functions as a guarantee (or earnest money) from the purchasers that the contract will be performed. If the sale goes through, then the deposit will go in part payment of the purchase money, but if the contract goes off on the default of the purchaser he will have no right to recover the deposit (see per Cotton LJ at page 95 and per Fry LJ at page 101).

62. However, **Howe v Smith** also makes it clear that the right to forfeit the deposit rests on the implication of a term to permit this, in the absence of anything to the contrary appearing in the contract. In other words, notwithstanding the general rule, it is still necessary "to look to the documents to see what bargain was made" (per Bowen LJ at page 97). An express provision in the contract which is inconsistent with the right of forfeiture will therefore prevail as evidencing the real intention of the parties.

63. In the instant case, it seems to me that the answer to this question is therefore to be sought in the terms of the contract as a whole, and, in particular, clause 11.2(b). The right of forfeiture of "all installments of the Purchase Price and other sums payable hereunder" is expressly given to the vendors by clause 11.2(b), in respect of breaches occurring before 6 August 2005. The fact that clause 11.2(c) provides a significantly different remedy in respect of breaches occurring after 6 August 2005 is a clear indication, it seems to me, that the parties intended to limit the right of forfeiture to breaches occurring before that date.

64. I would therefore conclude that Conteh CJ was entirely correct in holding that, no breach having occurred before 6 August 2005, the respondents did not have a right of forfeiture in respect of the sum of US$400,000.00. In the light of this conclusion it is strictly speaking unnecessary to consider the Chief Justice's view that it might not have been fair or equitable to declare forfeiture of the "not inconsiderable amount" of US$400,000.00. However, I cannot resist observing that, had it been forfeitable, that amount would in fact fall well within the customary 10%, sanctioned by the authorities. (see **Workers Trust Bank Ltd v Dojap Ltd,** supra at paragraph 60).

Conclusion

65. In the result, I would dismiss both the appeal and the respondents' notice and affirm the judgment of the Chief Justice, with costs to the respondents to be agreed or taxed.

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MORRISON JA