Raffey v Reef Village Estates Ltd

Jurisdiction: Belize

Judge: Legall J.

Judgment Date: 14 September 2009

Reported In: BZ 2009 SC 16

Court: Supreme Court (Belize)

Docket Number: 754 of 2008

Date: 14 September 2009

Supreme Court

Legall, J.

754 of 2008

Raffey
and
Reef Village Estates Ltd

Appearances:

Mr. Aldo G. Reyes for the claimant.

Mr. Arthur Saldivar for the defendant.

Contract - Contract for sale of real property — Claimant entered into a contract with defendant to purchase a condominium unit in defendant development — Claimant paid a deposit but no other sums due under the contract because of the defendant's failure to provide evidence of good title to the development — Whether requirement to provide such title an implied term of the contract — Court found failure to provide title a fundamental breach of the contract — Parties subsequently agreed that defendant would sell the unit to someone else and be paid commission by claimant — Whether agreement to pay commission on deposit or on sales price in dispute — Claimant sued for return of deposit — Question for court to determine what portion of deposit to be returned — Court preferred evidence of claimant that the agreement was to pay 5% of the deposit.

POINT IN LIMINE

Legall J.

1 Before any evidence was led in this case, learned counsel for the claimant raised a point in limine. He submitted that at a case management conference in this matter, it was ordered that the parties — the claimant and the defendant — file and serve witness statements on or before 30th April, 2009. He submitted that the defendant filed and served witness statements, but not within the date specified by the order. On perusal of the pleadings, it is clear that the defendant did not comply with the order with respect to the filing and serving of the witness statements within the date specified; and the defendant did not submit that the statements were filed and served within the date specified.

2 Rule 29 (11) of the Supreme Court (Civil Procedure) Rules 2005 states as follows:

> 29.11 (1) “If a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court, the witness may not be called unless the court permits.
>
> (2) The court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under Rule 26.8.”

3 According to this Rule, although the witness statement is not filed and served within the date specified, the court has a discretion, which must be exercised reasonably, to permit the witness to be called. The court has a further discretion under Rule 29.11 (2), whether or not to grant such permission. Rule 29.11 (2) does not say the court shall not give permission unless a good reason is advanced for not seeking relief under Rule 26.8. Rule 29 11 (2) states that the court may not give permission; thus, in my view, giving the court a discretion, which has to be exercised reasonably, to allow the witness to be called, although a good reason for relief is not advanced under Rule 26.8.

4 Rule 26.8 (1), in effect, requires a prompt application by the defendant, supported by affidavit, asking for the witness, whose statement was served late, to be called at the trial. The defendant has not complied with this rule; and cannot at this stage satisfy the requirement of promptness, because almost four months have elapsed since the date — 30th April, 2009 — when the defendant was to serve witness statements. As I have said above, I think the word “may” in Rule 29.11 gives the court a discretion to allow a witness to be called at the trial, although an application under Rule 26.8 was not made.

5 Moreover, certain relevant facts must be considered. This matter was set for trial. All the witnesses are present in court. The defendant witness statements were filed and served; but late. The claimant is therefore not caught by surprise as to the contents of the defendant's witness statements. I believe the intention of Rule 29.11 is to prevent one party from springing surprise evidence on the other party. This is not the case here. The claimant was well aware of the contents of the defendant's witness statements months before the date of the trial.

6 In addition, the overriding objective of the Rules is to deal with cases justly; and justice, especially in circumstances where all the parties are present in court, requires hearing the evidence of the parties. Moreover, Rule 26.9 (2) and (3) state:

> 26.9 (2) “An error of procedure or failure to comply with a Rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.
>
> (3) Where there has been an error of procedure or failure to comply with a Rule, practice direction, court order or direction, the court may make an order to put matters right.”

7 For the above reasons, I overruled the point in limine and I ordered that the trial be commenced forthwith.

THE CONTRACT

8 The claimant and the defendant made a written contract. It was dated 18th January, 2007. Jeff Pierce, director of the defendant company, signed on behalf of the company. The claimant signed on his own behalf.

9 The subject matter of the contract was the purchase by the claimant of a condominium unit No. J-301 located at a place known as Reef Village situate at lot 1 San Pedro, **Ambergris Caye**, Belize. According to the contract, the property agreed to be purchased was described as follows:

> "All that condominium Unit J-301 located on the third floor of the building J and further located in the subdivision known as Reef Village in parcel — Lot No. 1 of San Pedro, **Ambergris Caye**, Registration section."

10 It must be noted that the parcel number is not given in the above clause. At the date of the contract, the construction of the unit had not begun. Clause A 1 of the contract stipulated that the construction was to begin within twelve months of the date of the contract. The purchase price of the unit, according to the contract, was US $169,900. The claimant, by cheque dated 2nd May, 2007, paid a deposit to the defendant of US $16,990. representing 10% of the purchase price. The contract contained clauses that the balance of the purchase price was to be paid as follows:

> 5. The Balance of the purchase price is to be paid according to the following schedule:
>
> Ground Breaking 25% $42,475. Completion of Second floor Walls
>
> (3 months later) 20% $33,980. Completion of Rough-In plumbing Electricity
>
> (4 months later) 30% $50,970. Upon Completion or Possession or Occupancy (whichever is first)
>
> (3 or 4 months) 15% $25,485.

11 The claimant did not pay any of the amounts stated above. He stated that he requested the defendant, on numerous occasions, to produce the defendant's title to the property on which the Reef Village development, and in particular the Unit, were situated; but was not successful

in getting the title. He said that the defendant failed to produce any title or proof that the defendant was the owner of the property on which the unit was situated. The claimant relied for the request, on clause A2 of the said contract which reads as follows:

> "The vendor agrees to perform the following obligations and services to the above mentioned real property.
>
> 1 .....
>
> 2. To warrant good and clear title, free and clear of all liens and encumbrances to the premises to the buyer."

12 What does the word "premises" in the above clause mean? Does it mean the Reef Village development, which is about 22 acres in size; or does it mean the condominium Unit J-301, referred to above, which is a unit situated as part of the Reef Village development?

13 The word "premises" appears in the second paragraph of the contract and is defined as "all that condominium Unit J-301," and continues as quoted above. The third paragraph of the contract begins with these words: "The purchaser(s) shall be and is entitled to full possession of said premises on closing date or upon the unit's completion ...." The parties could not have meant from these paragraphs the whole 22 acres of the Reef Village development, because the purchaser was not entitled to the whole 22 acres of the Reef Village development, but only Unit J-301 which was part of the development. For these reasons, I interpret the word "premises' in clause A2 as meaning condominium Unit J-301. I accept the evidence of the defendant that title to the unit is issued to the purchaser upon the completed construction of the unit. The evidence at the date of trial in this matter is that the construction of the unit has not yet been completed.

14 I believe that the claimant wanted the general title to Reef Village development in order to satisfy himself that the defendant was the owner of the land on which the unit was situated, and that there was no encumbrance of any kind on the land. It seems also that one of the purposes the claimant requested a copy of the defendant's title to the property was to obtain financing, perhaps a mortgage, to complete the sale. The defendant resisted this request on the main ground that there was no expressed provision in the contract to supply the title for financing or mortgage purposes. It is true that there was no such expressed provision under the contract. But should there be implied in the contract a term that the general title to the Reef Village development, not the Unit, should be made available to the claimant purchaser for purposes of satisfying himself that it was valid and that there was no encumbrance or lien or mortgage on the said title?

15 The claimant, in purchasing of the unit, would want to know, it seems to me, whether or not the general property — Reef Village development — on which the Unit is located, is encumbered by mortgage or in any other way, because such an encumbrance may result in him suffering loss of the Unit he agreed to purchase. The principles to guide the court as to under what circumstances an unexpressed term can be implied, were eloquently given by Lord Hoffman in the Privy Council decision of *AG v. Belize Telecom Appeal No. 19 of 2006* as follows:

> "An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, form part of the contract which the parties made for themselves."

16 In *Ellis v. Rogers* 1882 29 Ch.D. 661, Cotton, L.J. says that a purchaser is entitled to require a good title and that in "contracts for sale of real estates an agreement to make a good title is always implied unless the liability is expressly excluded." Apart from financing and mortgage purposes, it seems to me that the purchaser would want to know that there is a good and clear and unencumbered title to the general property, on which the Unit J-301 is located. The parties must have intended that the defendant would produce to the claimant a good title to the general property; and that a right to investigate the general title for encumbrances and to ascertain its validity, be parts of the contract. The failure of the defendant to produce the general title to the claimant, so that he would be able to ascertain whether it is a good title in my view, amounted to a fundamental breach of the contract.

17 The defendant said that the claimant never requested the general title to the property. This is what the defendant, through its agent Jeff Pierce, said in cross-examination:

> Reef Village always had title to the general property. I did not produce the title because he never asked for it. I do not remember whether he asked for the general title. I now say he never asked for the general title."

I believe the claimant that he did request from the defendant the general title to the property, and that it was never produced to him.

18 This breach gave the claimant the right to elect whether to treat the agreement as at an end and sue for damages, or waive the breach and affirm the agreement. The claimant elected to treat the agreement as at an end by informing the defendant on 7th October, 2007 that he was terminating the contract.

19 But the finding of the breach loses, perhaps, some significance, because the parties subsequently orally agreed that the defendant, through its agent Jeff Pierce, would sell to some other person the said unit J-301; and, in return for the said sale, the claimant agreed to pay to the defendant a commission of 5%. The oral agreement was that a commission would be paid to the defendant by the claimant out of the deposit, to sell the Unit J-301. The consideration for this agreement was that the defendant acquired a new purchaser for the said unit the claimant had previously agreed to purchase, who signed a new contract and paid a deposit. There is no mistake that there was agreement to pay a 5% commission. The question for the court to determine is whether that commission relates to the sale price of the unit or to the deposit; and the court, in order to make that determination, would have to consider the evidence and the credibility of the witnesses. In my judgment, therefore, there was a valid oral agreement to pay a 5% commission to the defendant for the resale of the Unit-J-301.

20 In pursuance of the new oral agreement, the defendant entered into a contract dated 3rd April, 2008 with Alvin Cader and Nadia Mohamed (husband and wife) for the sale to them of the said Unit J-301. The claimant agreed to pay a commission of 5% to the defendant for the resale of the said Unit 301; but the dispute that arose between the claimant and defendant was this: Does the 5% commission relate to the deposit which the claimant paid as a down payment, or does it relate to the sale price of the unit J-301?

21 The sale price of the unit was $169,900 US and 5% of this amount would be $8,495.00 US. The deposit was US $16,990 and five percent of the deposit, would be US $849.50. The claimant insisted that the 5% commission he agreed to pay was 5% of the deposit he paid. The defendant through its agent Jeff Pierce, on the other hand, insisted that the 5% commission was the 5% of the sale price.

22 The claimant therefore issued a claim dated 13th November, 2008 against the defendant as follows:

> 1. The claim is for the sum of US $16,990.00 (BZ $33,980.00) being the deposit paid by the claimant to the defendant pursuant to a written agreement for the purchase of a condominium unit which has been terminated by the claimant due to the default of the defendant.
>
> 2. Interest pursuant to Section 166 of the Supreme Court of Judicature Act.
>
> 3. Costs.
>
> 4. Such further or other relief as the Court sees fit.

23 On 22nd January, 2009, the defendant admitted before the Registrar, who has authority to exercise some functions of the Supreme Court, to judgment for the claimant in the sum of $16,990. The admission order however, does not state the currency of the sum admitted to — whether US or Belize dollars. I am going to assume that the judgment by admission is in Belize dollars, which is equivalent to $8,495.00 US.

24 As can be seen, this amount of $8,495. US is 5% of the sale price of the property. In effect, the defendant consented to give back to the claimant half of his deposit and retained the other half as 5% commission on the sale price of the property. The claimant's case is that since he never agreed to 5% commission on the sale price of the property, he wants the return of the other half of his deposit retained by the defendant. This is the main issue in this case.

25 It is clear from the facts of this case, that the claimant and defendant through its agent Jeff Pierce, had agreed to the return to the claimant of some portion of the deposit. The question is what portion of the deposit is to be returned to the claimant. The defendant's case is that half should be returned; and he did so by virtue of the judgment by admission.

26 The claimant in his witness statement said that “It was expressly agreed that the 5% commission would be 5% of the deposit being US $849.50.” The claimant's case, therefore is that he agreed to the return of the deposit, less 5% thereof — that is to say 5% of $16,990. US which is $849.50 US. When the amount of $849.50 is deducted from the deposit of $16,990 US there is a balance of $16,150.50 US. Since he was awarded by the admission judgment the amount of $8,495 US ($16,990 Belize), when this amount is subtracted from US $16,150.50 the balance of his deposit namely US $7,655.50 remains.

27 The defendant's evidence is to the effect that the practice in Belize is that estate sales have a range between 6% and 10% of the sale price, and the claimant was requested a lower rate of 5% of the sale price.

But it must be remembered that the unit J-301 was not owned by the claimant when the defendant contracted to sell it to Cader and Mohammed. At the time of the contract to sell the Unit J-301 to Cader and Mohammed on 3rd April, 2008, the contract with the claimant had already come to an end.

28 The practice in real estate transactions in San Pedro or in Belize is, in my view, not the determining factor in this case. The determining factor, if I may repeat, is this: What was the agreement between the claimant and the defendant in relation to the 5% commission? Was the agreement 5% of the sale price of the unit or 5% of the deposit paid? The defendant through its agent Jeff Pierce, gave evidence as follows:

> "I advised him we most likely will sell it and there would be a 5% commission on the price of the condominium."

He also testified that it was his desire, based on the practice, that the 5% would be on the sale price. In his witness statement he said that the claimant was "informed in writing that the defendant would sell the unit for a (5%) percent commission or (US $8,495.00) based on the sale price." In his evidence he is not claiming that the claimant agreed to pay 5% commission on the sale price of the unit. He is saying that he advised and informed the claimant of the 5% commission on the sale price and that this was his desire. But there is evidence from the claimant, in paragraph 8 of his witness statement, that it "was expressly agreed that the 5% commission would be 5% of the deposit being US $849.50." I accept this evidence of the claimant. There is therefore no contractual basis on which the defendant could deduct 5% of the sale price of the unit from the deposit paid by the claimant.

THE COUNTERCLAIM

29 The defendant counterclaimed against the claimant for the amount of $8,495.00 US for breach of contract. The amount of the counterclaim is the half of the deposit retained by the defendant, as we saw above. The breach of contract alleged by the defendant is based on clause 5 of the contract which, as we saw above, states as follows:

> "5. The balance of the purchase price is to be paid according to the following schedule.
>
> (a) Ground breaking: 25% $42,475.
>
> (b) Completion of second floor wall (3 months later) 20% $33,980.

30 The allegation of the defendant is that the claimant breached the contract when he failed to pay the above mentioned ground breaking amount of $42,475. First of all, the contract does not stipulate a date or a period for the payment of the ground breaking amount, as it does in relation to the other items mentioned in Clause 5, as we saw above. We know that from the evidence the contract came to an end on 7th October, 2007, about ten months after the date of

the contract. According to the said contract, construction of the unit was to start within twelve months from the date of the contract. There is no evidence that the ground breaking or the construction of the unit started, before the contract came to an end.

31 Because there is no date or period mentioned in the contract for the ground breaking, and there is no evidence that the construction or ground breaking started before the contract came to an end, I am not satisfied, on a balance of probability, that the claimant breached that clause. Moreover, the counterclaim refers to an invoice demanding payment of the amount of the counterclaim; but the invoice, receipt of which is denied by the claimant, was not tendered in evidence, nor were its full particulars. I find there is no merit in the counterclaim.

CONCLUSION

32 The written contract dated 18th January, 2007 came to an end because of a breach by the defendant. The parties entered into a subsequent oral contract to resell the unit and to return a portion of the deposit paid by the claimant under the written contract. A dispute arose as to the amount of that portion. The defendant claimed $8,495.00 US, half of the deposit or 5% of the sale price of the unit. The claimant, on the other hand, claimed that the portion was $849.50 US or 5% of the deposit. I accepted the evidence of the claimant that there was agreement to pay 5% of the deposit.

33 The defendant filed a counterclaim against the claimant for breach of contract. I find no merit in the counterclaim. I therefore make the following orders:

> 1. Judgment for the claimant against the defendant in the sum of $7,655.50 US dollars or its equivalent at the date of payment in Belize dollars.
>
> 2. Defendant to pay interest to the claimant on the said sum of $7,655.50 US at the rate of 6% per annum from 7th October, 2007 until the sum is fully paid.
>
> 3. The counterclaim is dismissed.
>
> 4. The defendant to pay to the claimant costs in the sum of $2,000.00.

Oswell Legall

JUDGE OF THE SUPREME COURT