

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
TERRITORY OF ANGUILLA
(CIVIL)
AD 2008**

CLAIM NO. AXA HCV 2005/0015

BETWEEN:

**JAMES RONALD WEBSTER
CLEOPATRA WEBSTER**

Claimants

AND

HOTEL DE HEALTH (CARIBBEAN) INC

Defendant

APPEARANCES:

Ms P. Nicola Byer with Mrs. Joyce Kentish for the Claimants

Mr. Mark Brantley for the Defendant.

**Date: 2008: 16th September,
2nd, 28th October**

JUDGMENT

[1] **GEORGE-CREQUE, J.:** On 26th April, 1996, Mr. and Mrs. Webster entered into an agreement with Hotel De Health (Caribbean) Inc, (a "Hotel De Health") whereby Hotel de Health agreed to purchase from the Websters various parcels of land in Anguilla for a price of US\$1,090, 000 (' the Agreement"). The purchase price was to be paid by installments in accordance with a schedule to the Agreement over a period of 12 years which with accrued interest over that period would have netted to the Websters a total sum of US\$3.3m. The Agreement however, contained in Clause 7 an early repayment clause

which permitted Hotel De Health to prepay without penalty the balance of the purchase price.

- [2] The Websters had in late 1998 filed an action in which they sought rectification of the Agreement to show the purchase price of the lands as being US\$3m with nominal interest of US\$300,000. The trial Judge agreed with the Websters and ordered rectification but the Court of Appeal agreed with Hotel De Health that the purchase price was as set out in the Agreement. The Agreement in the current form (un-rectified) remained valid and binding as between the parties. Accordingly, the Agreement remained to be performed in accordance with its original terms. This first action took some five (5) years to conclusion. Clause 7 featured in this action as Hotel De Health's case was that they were entitled to prepay with reference to the Purchase price as stated in the Agreement namely, \$1,090,00, whereas the Websters' case was that this clause required rectification to show a purchase price of \$3.3m.

The Action

- [3] In this second action the Websters, having accepted the ruling of the Court of Appeal, seeks recovery under the Agreement on the whole sum of principal and interest on the basis that Hotel De Health has defaulted in making the installment payments when due by invoking Clause 12 of the Agreement. Hotel De Health contends that the Websters are not so entitled on the basis that it was prevented by the Websters from exercising its right to prepay.

The Issue

- [4] The single issue which arises for the court's determination is whether the Websters prevented Hotel De Health from exercising its right to prepay. This calls for a finding of fact based on the evidence.

Payments made under the Agreement

- [5] It is common ground that Hotel De Health made payments under the Agreement. An initial down payment of \$10,000 was made. On closing of the Agreement a further

\$170,000 was paid. Thereafter, further payments in the sum of \$37, 500 were required to be paid on a quarterly basis commencing on 31st January, 1997. \$37,500 due on 31st January '97 was paid on 14th February, 1997. \$37,500 was due to be paid on 30th April, 1997 but only \$10,000 was paid on 4th November, 1997; and of the \$37,500 due on 31st July, 1997, only \$20,000 was paid on 24th November, 1997. On 22nd May, 1998 a cheque in the sum of \$157,500 was tendered against the outstanding arrears and which is said to have brought payments current under the Schedule - that is up to 30th April, 1998. The next installment payment was to become due on 31st July, 1998. It is also common ground that no further payments of any kind have been made by Hotel De Health since then. Hotel De Health contends that they were not obliged to make any further payments having been, it says, prevented from making prepayment by virtue of the Websters launching of the first action in which they attacked the efficacy of the Agreement and the right to prepay.

The first and second actions

- [6] Much has been said on the part of Hotel De Health in respect of the first action and this second action being inextricably connected with the first action. It is necessary that these actions be viewed in their proper perspective. While I accept that both actions are in connection with the Agreement, the issues which have arisen for determination are quite different. In the First action the Websters were, in essence, challenging the very Agreement in terms of its efficacy as written and sought as the main issue its rectification in respect of the purchase price so as to show the purchase price for the purposes of the Agreement in particular Clause 7 thereof as being, in essence \$3.3m. They failed. In this second action there is no such challenge. Rather, they are relying on the Agreement in accordance with its terms as written and are seeking to have Hotel De Health perform the Agreement in accordance with those terms. There is no dispute as to the meaning or purport of any of the terms of the Agreement. Suffice it further to say that the first claim was fully defended (much as in the instant case) with Hotel De Health being vindicated in its view that the Agreement as written, was valid and binding.

The Agreement

- [7] I now set out certain clauses in the Agreement which are directly relevant to the matter in issue. Clause 1 stated the purchase price of the lands as US\$1,090,000. I now set out Clause 7 in its entirety being the Clause which gave to Hotel De Health the power or right to prepay:

*“The Balance of the Purchase Price of Nine Hundred and ten thousand dollars United States Currency (US\$910,000.00) will be paid to the Sellers in accordance with the terms set forth in Schedule 2 attached hereto and incorporated herein. The Purchaser agrees to pay interest at the rate of 10% per annum on the outstanding balance of the Purchase Price until the final payment **with power to repay (sic) without penalty**”.* (my emphasis)

- [8] It is also useful to set out Clause 12 of the Agreement being the Clause on which the Websters rely in claiming payment of the entire principal and interest:

“If default be made in the payment when due of any part or installment of principal or interest, then the whole sum of principal and interest shall become immediately due and payable at the option of the Sellers without notice. Notwithstanding any other provision of this Agreement, if default be made in the payment when due of any part or installment of principal and interest, the Purchaser agrees to pay a delinquency charge for each installment in default of ten (10) days in an amount equal to five percent (5%) of each installment and any amount payable at the same time.”

- [9] It bears note that this Clause does not speak of the purchase price or the balance of the Purchase price as was spoken to under Clause 7 but rather contemplates the application of wholly different considerations on a default by the Purchaser. Comparing both, it would appear that if the Purchaser was not in default and paid out early he got the benefit of doing so and needed only be concerned as to the balance due on the purchase price. This, no doubt, acted as an incentive not to default but make early payment. Clause 12, on the other hand, also acted as an incentive to the Purchaser not to default on the installment payments as the penalty for such default attracted not the balance of the purchase price so fixed but the *“whole sum of principal and interest”* as per the Schedule contained in the Agreement.

Did Hotel De Health exercise its right to repay or prepay?

[10] Mr. Webster says that a dispute arose in late 1997 regarding the arrears and that a dispute also arose concerning the purchase price. Pleading at paragraph 7 of his Statement of case and in paragraph 27 of his witness statement he says ***“within that dispute the Defendant asserted that it intended to invoke Clause 7 of the Agreement and make early repayment of the purchased price without having to pay any further interest payments except those already due.”*** He also recalled a meeting in July, 1998, between Mr. Talbot representing Hotel De Health, Mr. Bergner, Ms. Bernice Lake, himself and a secretary. In that meeting he said that they were dealing with rectification and default and the matter of accelerated payment. He maintained that since May, 1998, he received no further monies and that he fully expected Hotel De Health to continue making installment payments during the course of the litigation. In answer to the suggestion that all Hotel De Health owed was the amount had it been allowed to pay out early Mr. Webster said: ***“I did not refuse any money from Mr. Talbot.”***

[11] Mr. Talbot, at paragraph 8 of his witness statement said: ***“From in or about July, 1998, the company sought to pay out the principal outstanding early and without penalty pursuant to Clause 7 of the Agreement. The Plaintiffs objected to the company seeking to exercise its power to pay out early under the Agreement”*** This is the crux of the matter yet it is this very paragraph that Hotel De Health wished to amplify so as to set out the manner in which it says it sought to pay out early. Mr. Talbot in amplification said: ***“I sought to pay out by giving them notice that we were going to do an early payment without penalty pursuant to Clause 7.”*** He went on further to say that he gave this notice verbally in the offices of Lake & Kentish. In cross examination, notwithstanding his own lawyer’s letter of 22nd May 1998 enclosing the \$157,500 payment which payment was stated as bringing it ***“current with the Schedule,”*** he disagreed that he was in default not having been put on notice that he was in default of payments under the Schedule. He conceded, however, that in the July 1998 meeting the manner in which the installment payments were being made was raised. He refuted the suggestion that the question of prepayment was discussed earlier than the July 1998 meeting. In respect of the letter from his Canadian lawyer dated May 26th 1998, which spoke of clarifications to the original agreement, Mr. Talbot stated that this was a reference to a rental agreement and purchase of another

property at Long Path. He accepted that since the payment made in May 1998, no further payments had been made to the Websters. With regard to his verbal indication to make early payment, Mr. Talbot said: ***“When I gave that notice I knew I had to repay around \$900,000. Then he said: Mr. Webster never said anything. I gave notice and I got up and left the meeting.”*** He did not send any letter from himself or his lawyers confirming his wish to prepay. When asked the basis on which he stated that Mr. Webster objected or stopped him from making prepayment he answered thus: ***“They filed an action against me. I had no idea at the time if the contract was valid. If Clause 7 was valid.”*** The First action, however, was commenced in November, 1998, and from July to November, 1998, Hotel De Health took no further steps in respect of its verbal notice to prepay. Mr. Talbot stated that he had a price in mind as given by his accountants but he never presented a cheque for that amount neither to the Websters, his lawyers, nor paid such sum into court. Between July to November, 1998, he never sent any communication setting out the sum he considered was payable under the early payout clause. After the decision of the Court of Appeal it still did not tender the sum it said was due to the Websters. Mr. Talbot said that after the First action was filed any businessman would have taken the course he did. He accepted that there is no evidence that Mr. Webster rejected or stopped him from tendering a payment according to the figures he (Mr. Talbot) calculated. In re-examination, Mr. Talbot said this: ***“I did not understand Clause 7 of the Agreement as placing an onus on me to tender payment.”***

Evaluation of the evidence

- [12] Having heard and observed Mr. Webster and Mr. Talbot in the witness stand, my observations are that although both men are businessmen, Mr. Talbot's demeanor and responses in cross examination has led to me to believe that he is much more astute than Mr. Webster. It was clear to me that the amplification of paragraph 8 of his witness statement on so vital an area at the heart of his case, for the first time to describe the manner in which he considered he exercised his right to early payment rings hollow. It is inconceivable that he could insist that Hotel De Health, prior to May 22nd 1998 was not in default of installment payments under the Schedule merely because he had received no notice of it. Why else was it necessary to make a payment of \$157,500 and his lawyer

speak of such payment bringing the payments current under the Schedule if the payments were not in arrears. Counsel for Hotel De Health urged that I find Mr. Webster as not being forthright. However, I find Mr. Talbot even less forthright than Mr. Webster. Mr. Webster's constant refrain was the defaults under the Agreement. It is reasonable to conclude, given the manner in which the payments were being made – late and short-, that there was good reason to be concerned and to raise the issue of defaults as he said he did in the July meeting.

- [13] Clause 7, to my mind, is not a difficult clause. It simply ends by saying ***“with power to repay without penalty”***. Indeed it does not stipulate that any notice, verbal or written, was required to be given before exercising the power. It seems to me that it called for a simple exercise of that power by a simple act - that is **payment** of the balance of the purchase price. The Agreement itself provides no other means for the exercise of that power. Mr. Talbot says that he did not understand this clause as placing an onus on him to make payment. To my mind, it is difficult to comprehend what else it could possibly mean. Hotel De Health admittedly never made payment of the balance or in any amount it calculated as being the balance. Accordingly, I find that the power was not exercised in the first place and thus there could be no issue of the Websters having prevented him from so doing. There is not a scintilla of evidence from which it can be inferred that the Websters either refused or returned any payment, as Mr. Webster said in his evidence ***“I did not refuse any money from Mr. Talbot.”*** Mr. Talbot accepts this as being so. In my view, merely to have stated your intention to make early payment and then do nothing further is in the circumstances wholly inadequate. The vital element necessary to complete the exercise of the power is completely missing. It is noted that the intention to prepay was expressed as early as July, 1998. Yet up to November no payment was made. By August, 1998, Hotel De Health was once more in default not having paid the installment payment due on 31st July, 1998. I do not accept that the Websters launching of the first action in any way prevented or blocked Hotel De Health from pre paying. Indeed, Hotel de Health remained consistent in their view of the legal efficacy of the Agreement as drafted and prevailed. I do not accept that the first action created any uncertainty or confusion whatsoever. It was very much aware and argued forcefully its position. At best, had it prepaid then the

Websters could claim no more. At worst, had the Websters prevailed then credit for the sums so prepaid would have to be taken into account in adjustment of the balance of principal and interest due under the Agreement. Counsel for Hotel De Health is to be commended for putting up a valiant fight. However, at the end of the day the matter is a simple and straightforward one. Further, the case of **Barratth –v- Gough-Thomas**¹ cited by counsel is more supportive of the Websters rather than Hotel De Health. In that case even though the mortgagor had served a notice to redeem the mortgage by a certain date he was only able to do so at a later date. The court held there was no tender and that in the absence of evidence that any money had been set aside and was available for payment of the mortgage on the date on which notice to redeem expired or during the period subsequent thereto, then he was liable to pay interest on the mortgage monies for which he had use during that period. In my view, the Websters' case, though different from the facts in that case, is on a stronger footing as here no date at all was ever given as to when payment was to be made. It remained at best simply an oral expression of a mental intention and nothing more. It seems to me that Hotel De Health has remained content to forestall payment to the Websters for as long as possible.

- [14] I do not consider it necessary to enter upon a discourse as the principles regarding formal tender or payment into court. Having arrived at the conclusion that power to prepay was not exercised nor had the Websters prevented its exercise, it follows that Hotel De Health has been in default of making the installment payments under the Agreement as from 1st August 1998 and has continued in default. This default triggers the operation of Clause 12 of the Agreement which provided that the whole sum of principal and interest has now become due and payable. The Websters have calculated this sum, having taken into account payments made, as being US\$2,895,000. In addition, each installment payment remaining in default for 10 days after becoming due attracts a delinquency charge at the rate of 5% of each default installment. This figure they have calculated to be US\$144,750.00.

¹ [1952] 2 All ER 48

The charge for commission

- [15] The Websters also claim the sum of \$303,975.00 as collection commission. Under Clause 13 of the Agreement, Hotel De Health agreed upon a default to pay apart from the Sellers' legal cost '*any other costs of collection by way of commission ... **paid** by the Sellers*'. Hotel De Health contends that there is no evidence that such commissions have actually been paid. Further, no rate of commission is stipulated in the Agreement and says this is impermissible. I observe that it is not pleaded that such commission has in fact been paid. It is said to be solicitors' commission. The question is: Does it make a difference in the context of the Agreement. Reliance is placed on **Watts & Associates v- George Knowles**². In that case arising in the High Court of Antigua and Barbuda Mitchell J³ set out the history of the charging of fees and commissions in Antigua and Barbuda and referred to the scale of fees adopted by the constituent bar associations in the various states comprising the Organization of Eastern Caribbean States. He concluded that commissions were recognized and chargeable in the various states and Territories. In that case, however, commission was denied as the client had not agreed with his solicitor to pay such sum. The instant case is not one of solicitor and client but is based on the Agreement between the parties whereby the Purchaser agreed in the event of a default to pay such fees to the Seller. Counsel bases his objection mainly on the word "paid" and in essence argues that unless such commissions had in fact been paid by the Seller (The Websters) then the claim cannot be sustained. I do not consider that it is open to Hotel De Health to pry into any fee or commission arrangements in place between the Websters and their solicitors. Further, the flaw in this argument, as I see it, is that there is nothing preventing the solicitor upon obtaining judgment from charging a sum by way of commission on collection of the judgment debt as contemplated by the Agreement. I take judicial notice of the fact that for many years a collection fee has been the norm throughout the OECS jurisdiction usually based on 10% of the amount of the debt claimed. I can see no good reason for disallowing the claim for commission once the amount claimed is in keeping with the approved rate and practice of the Anguilla Bar Association. It is certainly contemplated by the Agreement.

² ANU HCV 1995/0037 (Antigua & Barbuda)

³ (as he then was)

Conclusion

[16] For the reasons advanced above, judgment is given in favour of the Websters and I make the following declarations and orders:

- (1) The Claimants are entitled to be paid the full balance of the principal and interest by reason of the Defendant's default pursuant to section 12 of the Agreement, said principal and interest amounting to the sum of US\$2,895,000. This sum shall be paid by the Defendant to the Claimants forthwith together with interest on the said sum at the rate of 5% per annum from 1st August, 1998 until payment.
- (2) The Claimants are entitled to be paid delinquency charges equal to 5% of each default installment pursuant to Clause 12 of the Agreement calculated in the total sum of US\$144,750. The Defendant shall pay this sum to the Claimants forthwith.
- (3) The Claimants are entitled to such sum by way of commission as accords with the approval and practice of the Anguilla Bar Association and as contemplated by Clause 13 of the Agreement.
- (4) Costs shall be paid by the Defendants to the Claimants in accordance with the prescribed scale under CPR 65.5 (2) Appendix B.

[17] Finally, I am grateful for the assistance rendered to the court by counsel. This dispute in in one form or another has engaged the parties for at least ten years. Both sides have fought vigorously. I trust this brings some finality to the disputes.



Janice M. George-Creque
High Court Judge