IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA (Civil) No. 20 of 2018
(Civil Cause No. 93 of 2016)

BETWEEN

1. **H.E.B. ENTERPRISES LTD**
2. **HENRY E. BODDEN JR.**

Appellants/Defendants

AND

ANTHONY RICHARDS

Respondent/Plaintiff

Before:

The Rt Hon Sir Bernard Rix, JA
The Hon Sir John Martin QC, JA
The Rt Hon Sir Alan Moses, JA

Appearances: Mr Hector Robinson QC and Mrs Angelique McLoughlin for the Appellants.
Mr Jack Watson instructed by Mr James Kennedy of KSG Attorneys for the Respondent.

Date of hearing: 2 November 2018

Judgment delivered: 14 November 2019

JUDGMENT

Sir Bernard Rix JA

1. The issue in this appeal is concerned with the restitutionary accounting between a seller and a buyer of land when their contract fails because of the default and repudiation of the buyer in possession under a long-term contract for the purchase of the land. The contract involves instalments of principal and interest pending completion and transfer of title at the end of the instalment period. When the seller accepts the repudiation of the buyer in default so that title never passes, is there a total failure of consideration, despite the possession over many years by the buyer? If there is a total failure of consideration, does that entail the recovery by the buyer of all principal and interest, even though in some sense the interest

reflects the value over time of the buyer's possession? Is a distinction therefore to be made between the buyer's right to recover principal on the one hand and interest on the other? Or is the value of that possession over time, which might be referred to as mesne profits, to be accounted for as part of the overall restitutionary adjustment which befalls the parties on the failure of their contract? And how might provisions of their contract affect the common law position?

The contracts

2. Mr Henry E Bodden Jr, the second defendant and in this court the second appellant, together with his wife developed a shopping complex in George Town, Grand Cayman, known as the Caymanian Village. The complex was developed as a strata development comprising 22 shops each with its own individual strata title. Whatever role in the development was undertaken by H.E.B. Enterprises Ltd (the first defendant and in this court the first appellant), the title to each shop and all dealings regarding the sale of the shops were in the name of Mr Bodden, and the contracts with which this court is concerned were made by H.E.B. Enterprises Ltd, albeit described therein as the "Vendor", as agent for Mr Bodden.

3. This dispute concerns the sale of two shops in the Caymanian Village to Mr Anthony Richards, the plaintiff and in this court the respondent.

4. I shall refer to the defendant appellants as the **Sellers** and to the plaintiff respondent as the **Buyer**.

5. Shop 10, Block B, Caymanian Village, registered as Registration Section George Town, Block 14C Parcel 296H10 (**Shop 10**) was sold under a contract dated 28 December 1994.

6. Shop 11, Block B, Caymanian Village, registered as Registration Section George Town, Block 14C Parcel 296H11 (**Shop 11**) was sold under a contract dated 11 July 1997.

7. Both contracts (the **Contracts**) were made pursuant to an "owner-financed" arrangement whereby, in each case, a small deposit was paid, the Buyer took possession of the shop, and made instalments of principal and interest over a period of 20 years.

8. In the case of Shop 10, the purchase price was CI$ 120,000, with a deposit of CI$ 3,000 and the balance of CI$ 117,000 payable over 20 years, with interest at 12% per annum, generating monthly instalments of CI$ 1,290. In the case of Shop

11, the purchase price was CI$ 150,000, with a deposit of CI$ 7,500 and the balance of CI$ 142,500 payable over 20 years, with interest at 12% per annum, generating monthly instalments of CI$ 1,321. (However, although the price of Shop 11 was stated to be CI$ 150,000, the Interest Worksheet for that shop was based on a starting figure of CI$ 120,000 (see para 12 below).

9. Both Contracts were signed during the pre-construction phase and the purchase price and payment terms were on pre-construction terms: clauses 1 and 2 of the Contracts refer.

10. The material terms of the Contracts were in identical terms (save for the price and the other figures reflecting the price). I set out the most important terms as follows:

> 3. PRICE
> The total purchase price of the Strata Lot will be the sum of CI$ [120,000] [CI$ 150,000]. The purchase price will be paid to the Vendor as follows:
> (a) On execution and exchange hereof the sum of CI$ [3,000.00] [CI$ 7,500] [("the deposit") receipt whereof is hereby acknowledged by the Vendor:
> (b) The balance, being the sum of CI$ [117,000] [CI$ 142,500] shall be paid over 20 years with interest at 12% per annum on the 1st day of each month by monthly instalments of $ [1,290.00] [CI$ 1,321], the final instalment falling due on the day of 19 .
>
> 4. CLOSING
> Closing shall take place on payment of the final instalment due on the purchase price and all interest thereon. At closing the Vendor shall deliver to the Purchaser a valid transfer of title free from incumbrances but subject always to the provisions of the By-Laws.
>
> 5. VACANT POSSESSION
> Vacant possession of the Strata Lot shall be given by the Vendor to the Purchaser on closing, unless the Vendor gives it's [sic] express consent in writing to earlier possession and subject to such terms as shall then be agreed.
>
> 6. DEFAULT
> If the Purchaser fails to complete this Agreement at the times and as provided for in paragraph 3 hereof (in respect of which time shall be of the essence) the Vendor may at it's option rescind this Agreement by written notice to the Purchaser and forfeit and keep absolutely as liquidated damages the deposit hereof and all or any interest accrued thereon and may in addition keep absolutely out of any further sum paid by the Purchaser such amount as is sufficient to compensate the Vendor for any work done to the Strata Lot by the Vendor at the request of the Purchaser which involves a deviation or amendment to the basic plan for the Strata Lots or any substitution requested by the Purchaser in respect of the fixtures and fittings installed in the Strata Lot and no further rights of action shall arise in respect thereof nor shall any party hereto have any further rights, demands, actions, claims or damages the one against the other and the Vendor may resell the Strata Lot and keep the full sale price absolutely.

The history of the Contracts

11. Although the Contracts did not give possession to the Buyer pending closing, it was contemplated under clause 5 that possession might be given by "express consent in writing…and subject to such terms as shall then be agreed". It appears, however, that possession was in each case granted informally to the Buyer, on the understanding that he would pay strata fees on the two shops. There is no document evidencing such agreements, but the judge makes brief findings about them at paras 5 and 56 of his judgment. It appears that the Buyer's obligation to pay strata fees (a form of service charges) was only finally accepted by the Buyer during the trial.

12. The Buyer paid the deposits required and entered into possession in the case of Shop 10 on 1 August 1995, and in the case of Shop 11 on 14 December 1997. In each case the Buyer received from the Seller an "Interest Worksheet" setting out the amortised payments of principal and interest from the date of possession to the date of completion. Clause 3(b) of the Contracts did not specify from which date the twenty year periods for the payment of instalments of the price were to run, or when they were to end. In the event, however, the Parties agreed that the periods would only start to run with possession. The Interest Worksheets demonstrated very slightly different monthly instalments from the figures stated in the Contracts, being CI$ 1,288.27 in the case of Shop 10, and CI$ 1,321.30 in the case of Shop 11. For reasons of which I am unaware, but which appear to have something to do with some special provisions in manuscript asterisked on to the end of clause 6 in the Contract for Shop 11, the Interest Worksheet for Shop 11 speaks of a principal sum remaining due at the beginning of the twenty year period of only CI$ 120,000, not CI$142,500. The monthly payment of CI$ 1,321.30 appears to be consistent with a total principal due of CI$120,000. There appears to have been a special provision for the balance of CI$ 22,500 as being "due in 5 years at no interest". These details do not affect this appeal.

13. Although Mr Bodden began well, his payments lapsed into the irregular and sporadic. He issued cheques which were dishonoured by his banks. He made unfulfilled promises to pay after repeated forbearance by the Seller. In February 2015 he ceased payments towards Shop 10. Payments for Shop 11 limped on. In March 2016 the Buyer's attorneys proposed a settlement whereby the Shops would be sold and the proceeds used to pay the amounts due. The parties failed to reach agreement on this proposal, however, as the Buyer was at that time still

maintaining that he was not liable to pay outstanding strata fees due on the Shops (although he had paid such fees in the past).

14. In April 2016 the Buyer sent to the Sellers a cheque for CI$ 1,321 saying that it was all he could afford at the time. The Sellers returned the cheque together with the printed text of an email dated 18 April 2016 which stated:

> It would appear that you do not fully grasp the concept of breach of contract. Your after-the-fact payment, even if it were accepted (which is being sent back to you) still leaves you in breach/default of both our sale agreements. Accordingly, we are NOT accepting any more payments on either #10 (which you have stopped payments on and are fourteen months behind) or #11(in which you habitually pay months late). Therefore I will post a check back to you if you make future default payments. The attached check has been mailed back to National House Bakery today.

15. The Buyer's attorneys responded by letter dated 28 April 2016 in which they asserted that the Sellers' 18 April 2016 email was a rescission of both Contracts under clause 6 thereof: "Whilst not explicitly referenced it is clear that you have invoked clause 6 of the Agreements by rescinding the agreements by written notice". Their letter demanded that the Sellers repay to the Buyer the full amount of all principal and interest paid by the Buyer (less the deposits) in the total sum of CI$ 594,067.80. The letter concluded by remarking that the Buyer would "need a reasonable period of time to vacate the properties".

16. The judge records however that a year later the Sellers had to issue a summons for possession on 19 May 2017. On 20 October 2017 a consent order for possession by 30 November 2017 was entered, extended by consent by further orders dated 30 November 2017 and 24 January 2018 until 30 January 2018 on payment of rent for December 2017 in the sum of CI$ 3,000 and for January 2018 in the sum of CI$ 4,000.

17. In the event, as the judge found, the Buyer had made principal payments of CI$ 110,747.47 and CI$ 96,156.35 on the two shops, and interest payments of CI$ 191,996.17 and CI$194,530.39 respectively.

The proceedings

18. Meanwhile, on 24 May 2016 the Buyer had issued proceedings to recover his payments. His statement of claim claimed an "account of all sums due and owing" pursuant to clause 6 of the Contracts. By their defence and counterclaim, the Sellers pleaded the oral agreements by the Buyer to pay the strata fees; referred

to their 18 April 2016 email as an acceptance of the Buyer's repudiation of both Contracts; denied rescission under clause 6; denied the Buyer's claim for an account; and counterclaimed outstanding instalments and strata fees as of 18 April 2016, and mesne profits at CI$2,400 per month for each of the Shops throughout the period of the Buyer's possession and until possession was delivered up.

The judgment

19. The trial was held on 7-8 February 2018, and there were further written submissions from the parties in July 2018. The judgment of the Hon Justice Richard Williams was delivered on 2 August 2018. On 10 August 2018 the order of Justice Williams awarded CI$ 593,430.37 to the Buyer on his claim, and CI$ 135,896.29 to Mr Bodden on his counterclaim, the latter to be set off against the claim.

20. In his judgment, Justice Williams held that the Buyer was entitled to the return of all principal and interest paid to the Sellers, less only the deposits and any interest thereon. He also held that the Sellers were entitled to set off (a) strata fees paid by them or outstanding from the Buyer (and small amounts of interest), in the agreed sum of CI$ 58,297.30 "which should be deducted and retained" by the Sellers from the return of principal and interest (at paras 57-58); and (b) mesne profits from 19 April 2016 to 30 November 2017 at the rate of CI$ 4,000 per month for both Shops (a rate adopted from the evidence of Mr Uche Obi, MA FRICS, the Sellers' expert chartered valuation surveyor, whose evidence the judge preferred to that of the Buyer's expert), in the sum of CI$ 77,598.99 which "should be deducted from the sums that are returnable" (at paras 59-61). Those two sums amount to the CI$ 135,896.29 awarded to the Sellers by the judge's order. It is not known why the mesne profits went only to 30 November 2017 and not to 30 January 2018, but no point arises on that on this appeal.

21. The judge dealt with the various issues raised before him. Thus he held that: (i) clause 6 was the Contracts' definitive disposition of the consequences of termination for the Buyer's default; (ii) the rescission ("the vendor may at it's option rescind this Agreement") spoken of in Clause 6 referred to the Sellers' acceptance of a repudiation by the Buyer, not to rescission *ab initio* (see *Johnson v. Agnew* [1980] AC 367 at 392-394; (iii) the Sellers' email of 18 April 2016 was an exercise of that option to rescind, ie to accept the Buyer's repudiation, and not something at common law outside clause 6; (iv) upon such termination, and since title therefore never passed to the Buyer, there was a total failure of consideration which entitled the Buyer to the return of all moneys paid under the Contracts save

for “the deposit hereof and all and any interest accrued thereon” referred to in Clause 6 as forfeit to the Sellers by way of liquidated damages (see *Mayson v. Clouet* [1924] AC 980 (PC)); (v) no distinction was to be made between principal and interest for the purposes of the Buyer’s recovery of the price paid, despite some Australian authority to the effect of such a distinction; and (vi) the last few lines of Clause 6 excluded any other claims, and, in any event, the Sellers had at the close of the case abandoned their counterclaim for mesne profits during the period of the Buyer’s possession down to termination (see para 54 of the judgment).

The parties’ submissions on appeal

22. In their submissions, the Sellers emphasised what they referred to as the remarkable result whereby a defaulting buyer who had enjoyed possession of the Shops for nearly twenty years nevertheless was held entitled to the return of almost everything that he had paid. The Sellers accepted that the option to rescind mentioned in clause 6 referred to an acceptance of a repudiation, but submitted that the Sellers’ email, which had made no mention of clause 6 or an option to rescind, amounted to a common law acceptance of repudiation for prolonged and persistent failure to pay, rather than the exercise of clause 6’s option based upon time for payment of any instalment being made of the essence. Therefore, clause 6 did not apply and the position was entirely one at common law.

23. At common law, a distinction should be made between the return of principal, to reflect the failure of any passing of title, on the one hand, and the non-return of interest on the other hand, to reflect, broadly speaking, the use that the Buyer had enjoyed over the better part of the unfinished 20 year period of the instalment programme. This distinction had been worked out in Australian jurisprudence because of the use of such long term instalment contracts for the purchase of land in Australia. Cayman Islands practice in the use of such contracts reflected the Australian experience. The answer therefore was to be found in Australian rather than English jurisprudence.

24. An alternative submission explored at the oral hearing of the appeal was that the failure of the Contracts required the application of restitutionary principles. On this basis, the Buyer had to give credit for the enrichment that he received, in the form of possession of the shops, by reference if not to the interest payable over the period of his possession, then to the mesne profit value of that possession. A difficulty in the Sellers’ path was the concession at trial that a counterclaim for mesne profits in the form of damages had been abandoned. Moreover, by concession the Sellers were only seeking a restitutionary credit up

to the quantum of the interest involved (some CI$380,000), not by reference to the larger quantum of mesne profits over the period. However, the restitutionary principles explored at the hearing of the appeal were said to allow for a working out of the appropriate quantum of unjust enrichment, as distinct from a counterclaim for damages for breach of contract.

25. The Sellers submitted that clause 6, even if it prevented a counterclaim for damages for breach, did not affect the common law principles of restitution.

26. On the Buyer's side, however, it was submitted that the judge had been right, for the reasons which he had given. There had been a total failure of consideration. The Buyer was entitled to the return of principal and interest (subject to the express provision for minor amounts in relation to the deposit). The Contracts had come to an end pursuant to clause 6, and clause 6 allowed for no further remedies. Indeed, it was submitted that since the Sellers had had the benefit of the instalments of price and interest over a long period, and since the shops were available to the Sellers for resale, there would be a windfall in their favour were it otherwise.

Discussion

27. The English jurisprudence is limited, but I will refer to three principal authorities.

28. The leading case on the failure of an instalment contract for the sale of land is the Privy Council decision in *Mayson v. Clouet* [1924] AC 980, on appeal from Singapore. The land was sold for $250,000: there was a 10% deposit of $25,000 payable immediately on signing, a further 10% of the balance payable within 3 months, a second instalment of 10% of the reducing balance payable within a further 3 months, and the balance was to be paid on completion of the building. Clause 13 of the contract provided:

> If the purchaser shall neglect or fail to comply with the above conditions his deposit may be treated as forfeited and the vendor shall be at liberty with or without notice…to re-sell the property…and all expenses attending such re-sale…and any deficiency in the price obtained on a re-sale shall immediately thereafter be made good…as liquidated damages.

29. The deposit and the two instalments were paid, the building was completed, but the purchaser did not pay the balance. The vendor terminated the agreement. The purchaser sought recovery of the two instalments. The Privy Council held:

the two instalments were part-payment, and not a further deposit; therefore they were not forfeit, but returnable, despite the purchaser's default. Clause 13 was consistent with the law, since it provided for loss of contract damages, but not for the loss of the instalments as damages.

30. In that case there were no complications caused by the purchaser entering into possession, nor by the payment of interest. The decision reflects the straightforward approach of the common law that, despite the breach by a purchaser, instalments (as distinct from a deposit) paid as part-payment towards a contract which is never completed must be returned, and that damages for breach are a separate question.

31. *Dies v. British and International Mining and Finance Corporation, Limited* [1939] 1 KB 724 concerned a sale of goods, not land. The defendants sold to the plaintiff for £270,000 a quantity of rifles and ammunition. The plaintiff paid £100,000 but thereafter reneged on the contract. The goods were never delivered. The plaintiff sued to recover the £100,000. The contract stated (in French) that in the event of its being "rendered impossible" for any reason whatsoever independent of the seller's volition, the seller would refund everything paid save for £13,500 (5%) by way of liquidated damages. Stable J held: (i) that the clause was concerned with frustration, not breach; (ii) therefore there was no provision for a deposit, and the whole of the £100,000 was a part-payment, and returnable on failure of the contract, despite the purchaser's breach; but (iii) the seller was entitled to recover damages to be assessed. *Mayson v. Clouet* was relied on.

32. Stable J added this (at 744):

> I was, however, quite satisfied that in the present case the foundation of the right, if right there be, is not a total failure of consideration. There was no failure of consideration, total or partial. It was not the consideration that failed but the party to the contract.
>
> The objection, in my judgment, really goes to a question of form not of substance, for if under the present circumstances there is a right in the buyer to recover a payment he has made in part, it is wholly immaterial in point of form whether the basis of right depends on a total failure of consideration, or something else. In my judgment, the real foundation of the right which I hold exists in the present case is not a total failure of consideration but the right of the purchaser, derived from the terms of the contract and the principle of law applicable, to recover back his money.

33. The principle of law to which Stable J referred appears to be an action for money had and received (at 741), founded on the principle expressed by Lord Denman CJ in *Palmer v. Temple* (1839) 9 Ad & E 508, 519 (cited by Stable J at 742) that "But the very idea of payment falls to the ground when both have treated

the bargain as at an end; and from that moment the vendor holds the money advanced to the use of the purchaser". This is what is now recognised as the language of restitution, or what in modern times is called unjust enrichment. *Goff and Jones, The Law of Unjust Enrichment*, 9th ed, at para 3-38, explains, with some criticism of Stable J's language as causing confusion, that the concept of "failure of consideration" in the contractual sense is not appropriate, and that the modern concept of "failure of basis" is to be preferred. This preference is more fully explained by *Goff and Jones* at paras 12-10 to 12-15, and by *Chitty on Contracts*, 33rd ed, at para 29-057.

34. In *Dies* too, the buyer never entered into possession of the goods, and there was no complication caused by any interest payable on the price. However, it may be noted that the judge did not award any interest to the buyer on the return of the £100,000 (at 747).

35. *Stockloser v. Johnson* [1954] QB 476 (CA) is perhaps the best known of the English authorities. It was another case of sale of goods, and of particular interest because in this case the buyer did obtain possession of the goods. The contract was for sale of plant and machinery for use in quarries, where the purchaser charged out their use on a royalty basis. The purchase price was to be made in instalments, and if there was a 28 day default in payment the seller was entitled to "rescind" the contract, forfeit the instalments and retake possession. The purchaser was in default and repudiation, but claimed relief against forfeiture, and even offered to pay the purchase price. He was refused relief.

36. Lord Justice Somervell was the least discursive in his judgment and said (at 484):

> Where instalments are to be paid over a period in which the plaintiff has the use or benefit of the subject-matter the burden of showing unconscionability is not a light one.

37. Lord Justice Denning's judgment ranged more widely. He said this (at 489/490):

> …It seems to me that the cases show the law to be this: (1) *When there is no forfeiture clause.* If money is handed over in part payment of the purchase price, and then the buyer makes default as to the balance, then, so long as the seller keeps the contract open and available for performance, the buyer cannot recover the money; but once the seller rescinds the contract or treats it as an end owing to the buyer's default, then the buyer is entitled to recover his money by action at law, subject to a cross-claim by the seller for damages: see *Palmer v. Temple* [(1839) 9 Ad & El 506]; *Mayson v. Clouet*; *Dies v. British and International Co.;* Williams on Vendor and Purchaser, 4th ed., p.1006. (2) *But when there is a forfeiture clause or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause),* then the buyer who is in default cannot recover at

> law at all. He may, however, have a remedy in equity, for, despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on such terms as the court thinks fit. That is, I think, shown clearly by the decision of the Privy Council in *Steedman v. Drinkle* [[1916] 1 AC 275], where the Board consisted of a strong three, Viscount Haldane, Lord Parker and Lord Sumner.

38. Lord Justice Denning continued speaking of what he called the equity of restitution (at 492):

> These illustrations convince me that in a proper case there is an equity of restitution which a party in default does not lose simply because he is not able and willing to perform the contract. Nay, that is the very reason why he needs the equity. The equity operates, not because of the plaintiff's default, but because it is in the particular case unconscionable for the seller to retain the money. In short, he ought not unjustly to enrich himself at the plaintiff's expense. The equity of restitution is to be tested, I think, not at the time of contract, but by the conditions existing when it is invoked. Suppose, for instance, that in the instance of the necklace, the first instalment was only 5 percent of the price; and the buyer made default on the second instalment. There would be no equity by which he could ask for the first instalment to be repaid to him any more than he could claim repayment of a deposit. But it is very different after 90 per cent has been paid. Again, delay may be very material. Thus in *Mussen's* case [[1938] Ch 253] the court was much influenced by the fact that the purchaser had allowed nearly six years before claiming restitution. He had already had a good deal of land conveyed to him and, during his six years of delay, values of money had so changed that it may be that he had had his money's worth. At any rate it was not unconscionable for the defendant to retain the money.

39. Lord Justice Farwell was not as circumspect as Denning LJ in being prepared to assist a defaulter who had agreed to forfeiture (at 501/502). Indeed, he doubted that it was a true case of "forfeiture in any real sense" (at 502).

40. Thus far the cases are not directly helpful for our problem, in that they either concern a buyer who was never in possession or, in the one case where the buyer was in possession, the case is complicated (for our purposes) by an express provision for forfeiture. Even so, the factor of possession was clearly highly relevant to the question of relief against forfeiture.

41. I therefore turn to the Australian cases, which are concerned with contracts where the buyer is in possession over a long period, pays interest on his prolonged payments by instalment of the price, and is not subject to forfeiture (other than for a standard deposit).

42. *Voumard, The Sale of Land*, 6th ed, 2009 is a leading treatise in Australia. It deals with the current problem at para 12.280, as follows:

> Where the vendor elects to rescind the contract upon the ground of the purchaser's default, what is the position of the parties as to instalments of principal moneys paid by the purchaser if the contract does not provide for forfeiture thereof to the vendor? If the purchaser has not been in possession of the property, there is a clear entitlement at common law to recover those instalments from the vendor [*Mayson v. Clouet*]. Is the position any different if he or she has had possession under the terms of the contract? Notwithstanding earlier doubts, it now appears to be settled law that where the purchaser has been in possession he or she is still entitled, upon the adjustment of rights with the vendor, to be credited with instalments of principal paid, but not with interest already paid. The ground upon which this view is based is that the consideration for the payment of the instalments of principal money has wholly failed, and the purchaser is thus entitled to recover them at common law as money had and received to her or his use. The soundness of this view has been questioned in three learned articles in the *Australian Law Journal*, the view there put being that as the purchaser has had possession of the land under the contract, it cannot be said that there has been a total failure of consideration for which he or she has contracted. In substance this contention is that a contract for sale on terms, the purchaser being entitled to possession before paying the whole of the purchase money, is an entire *contract* for use and occupation for a specified period and a transfer of the freehold at the end of that period in return for a principal sum with interest thereon. If it is correct to regard such a contract as entire, it may be conceded that this particular argument is sound; for, in the circumstances under consideration, the rule applicable is that money paid upon a consideration which is entire, cannot be recovered unless there has been a total failure of consideration. It is submitted, however, that the consideration is not entire, but divisible, and that a contract such as we are considering is, from the point of view of failure of consideration, properly regarded as a main contract for the transfer of the freehold in return for the principal sum, and a subsidiary contract under which the purchaser is entitled to possession pending execution of the transfer, in consideration of the payment of interest on the balance of purchase money from time to time unpaid…

43. I have cited that passage at length for it efficiently covers a wealth of Australian jurisprudence and learning. Broadly speaking, the choice discussed is between the academic view, that both principal and interest are irrecoverable because the basis of an entire contract, involving possession meanwhile, has not gone; and the judicial view, that a division is to be made between the principal, which represents the price, the basis for paying which has gone, and the interest, which represents the possession, the basis for paying which has not gone.

44. In my judgment, there are difficulties with either view, both in principle and for technical reasons; and neither view may be said to achieve absolute fairness.

45. Thus, it is not easy to see such a contract as divided between a price for the property, and interest for possession. Thus, interest will be a factor of the price and interest rates at the time of contract, rather than a way of pricing possession (as the judge below remarked). That goes to the Australian solution as a matter

of principle. In any event, most of the interest will be payable in the earlier period, and less of it in the later period, so that it is unlike rent which is priced more evenly, and if anything is as likely as not to rise over time. That goes to the solution in technical or functional terms.

46. That said, however, the jurisprudence shows that considerations of justice in cases where the defaulting buyer has been in possession during the period of the contract push the court to find a solution which reflects the commercial situation. The buyer is entitled in restitution to recover the payments he has made towards the transfer to him of the property, in circumstances where the transfer is never made. The seller is protected (absent an exception clause such as is found in the present case) by his right to claim loss of contract damages for the buyer's default. However, how is the buyer's possession meanwhile to be brought into account as a matter of law, in the absence of special provision?

47. It appears from footnote 7 to the passage from *Voumard* that I have cited above that there is some older English jurisprudence where the problem of the buyer's possession had to be considered. The footnote reads in relevant part as follows:

> …In *Hunt v Silk* (1804) 5 East 449, and in *Blackburn v Smith* (1848) 2 Ex 783, the plaintiff, who had taken possession of land under a contract, sought to recover money paid by him thereunder, but in each case he failed. In each case it was said the plaintiff failed on the ground that, as he had been in possession, the parties could not be placed in statu quo (see 5 East at 452, 453; and 2 Ex at 792). This view of the law has long since been abandoned (see *Brown v Smitt* (1924) 34 CLR 160), but each of these cases may be supported on the ground that there was not a total failure of consideration.

48. In *Hunt v. Silk* the plaintiff paid £10 to the defendant under a contract whereby the defendant promised to repair the premises and to give the plaintiff a lease of them; but the defendant defaulted. The plaintiff sued to recover the £10, but failed, on the ground that, because of his possession, the status quo could not be restored, and thus the contract could not be "rescinded". In *Blackburn v. Smith* the buyer sought to recover the price he had paid in advance for some land on the basis that the seller had failed to provide a proper abstract of title. The Exchequer Chamber held that the buyer had acquiesced in the abstract provided, but went on to state, applying *Hunt v. Silk*, that the claim to recover money had and received could not in any event have succeeded, since the buyer had had possession.

49. Of course, the reasoning of such cases reflects earlier views of the law, no longer extant, (a) that the acceptance of a repudiatory default was akin to a case of rescission, and (b) that an action in restitution could not succeed at all unless the parties could be restored to their status quo: see *Goff and Jones* at paras 3-

18/19. Nevertheless, in my judgment, the cases also reflect the underlying intuition that a full recovery of an advance payment in restitution is not compatible with a situation where in the meantime the plaintiff had enjoyed a real benefit under the contract while it existed. As *Goff and Jones* observes (at para 3-19):

> If the same facts arose today, the courts would be likely to focus on whether the basis for the claimant's payment had failed – for instance, was the payment made, at least partly, in exchange for the initial period of 10 days' occupation?

50. That intuition nowadays can, as it seems to me, be accommodated under the modern law of unjust enrichment, which has come to be sufficiently flexible to take account of such situations. The buyer of property who pays in advance for a title which is never completed can recover the price paid (other than a deposit), but, if he has enjoyed possession in the meantime, he should not be entitled to recover more than would eliminate unjust enrichment on the part of the seller. There is no reason why, in the pursuit of avoiding unjust enrichment on the part of the seller, the buyer should on his side be left unjustly enriched by his possession.

51. I refer in general to the discussion in *Goff and Jones* at paras 12-16 to 12-27. The abstract choice lies on the one hand between two kinds of formulaic response which *either* gives total recovery of everything paid by the buyer on the ground of a total failure of basis *or* gives the buyer nothing in restitution on the ground that possession was contemplated as part of the transaction; and on the other hand in distinguishing title and possession and granting restitution of the price but subject to a debit in respect of the possession enjoyed. I prefer the latter solution.

52. How is that possession to be valued? The Australian jurisprudence seeks to do that in a rough and ready way by distinguishing between price and interest. However, a short possession at the beginning of the period would give rise to a correspondingly high level of interest (since most of the price remains outstanding). It seems to me that there is a well-known way of valuing possession in the absence of contract, and that is in the form of mesne profits, of which the judge had evidence. Such a solution makes it unnecessary to adopt the practice of the Australian solution.

53. I would therefore be inclined, as a matter of principle, to limit Mr Richards' recovery in restitution by the easily assessed value of his possession.

54. The question then arises whether such a solution is compatible with the parties' Contracts.

55. There are two considerations. One is the effect of clause 6, which the Buyer submits is inconsistent with his being held in any way liable for his possession. The other is the fact that, under the terms of clause 5, possession is to be given to the buyer "on closing", ie at the end of the twenty year period of instalments, "unless the Vendor gives it's express consent in writing to earlier possession and subject to such terms as shall then be agreed". The Buyer therefore submits that possession was granted under an entirely separate contract and thus cannot affect his untrammelled right to recover the entirety of price and interest paid meanwhile.

56. As for clause 6, I see nothing there to exclude the effect of the principles of restitution. There are express provisions for the forfeiture of "the deposit and all and any interest accrued thereon" and also for the retention (out of further sums paid by the Buyer) of sufficient to compensate the Sellers for work done on the property at the Buyer's request. But there is no express provision for the return to the Buyer of part payments other than the deposit. That is left to the general principles of law, assumed rather than expressly spoken[1]: and that is despite the further language of the clause that *neither* party shall "have any further rights, demands, actions, claims or damages the one against the other". It was common ground, at any rate on the appeal, that this provision did not stand in the way of the Buyer's right to recover what the law permitted by way of restitution. The question then arises, what does the law allow by way of restitution? In my judgment, the law does not allow more than a figure which takes account of the value to the Buyer of his possession, which of course will vary with the time of the default.

57. It is true that the Sellers cannot claim damages for the Buyer's default under the final few lines of clause 6. That, however, is not the issue for present purposes. The Sellers do not have to claim anything by reference to the Contracts. It is the Buyer who has to claim, to recover his payments, and the question is the value of that claim in restitution.

58. In any event, the Sellers on appeal do not counterclaim for anything beyond what they have already been awarded, save for the interest payments (on the hypothesis that those would otherwise have been recoverable by the Buyer). In my view, however, the accounting between the parties has to be done as a matter of the Buyer's claim in restitution, not by way of a counterclaim by the Sellers as damages for breach or as anything else. In the circumstances, I do not have to decide whether the Contracts ended as a result of a common law acceptance of

[1] As so often occurs: see the comment of *Burrows, The Law of Restitution*, 3rd ed, at page 356: "…it will be very unusual for them to deal with restitution to each other. Quite simply, the parties' intentions run out on this issue and one needs to turn to the imposed obligations of unjust enrichment…"

the Buyer's repudiation entirely outside clause 6, or by way of the Sellers' exercise of their option to "rescind" under clause 6. That said, I agree with the judge that the effect of the Sellers' email was to terminate the Contracts under clause 6.

59. As for clause 5 (headed "Vacant Possession"), the question is whether that provides for an entirely separate contract. In my judgment, it does not. The Contracts, although not themselves providing for vacant possession, contemplate that it will be given. I say that because by providing for interest on the payment price, the Contracts contemplate that, although the price will be paid in instalments over twenty years, the addition of interest means that the Buyer will ultimately pay, and the Sellers will receive, the equivalent of full (and not time depreciated) payment of the price as of the time of contract. It is as though the Sellers had themselves financed the Buyer's purchase by means of a mortgage, save that in place of taking a charge over property transferred into the ownership of the Buyer, the Sellers retain title until completion at the end of the twenty year period, when the Sellers will have been paid in full. The whole arrangement only makes sense, however, on the basis that the Buyer takes possession, rather than that the Sellers retain possession, in order to enjoy the properties and/or their value over the coming decades.

60. In such circumstances, the provisions of clause 5 can either be viewed as providing for a collateral exercise in fulfilment of what the Contracts already contemplate; or as an entirely separate arrangement, a separate contract. The reference to the need for express consent in writing to "earlier possession and subject to such terms as shall then be agreed" may suggest the latter. However, in my judgment the former is the better view: the structure of the transaction makes it plain that possession by the Buyer is intended; that said, first the development has to be completed before the Buyer can be let into possession; and secondly, there may be marginal matters to agree at the time for possession, such as regarding who will pay for strata fees (or will insure?). As it was, the Buyer's possession was so much part and parcel of the transactions that there was no written consent, and the Buyer's agreement to pay strata fees was not even recorded in writing.

61. In my judgment, therefore, there is nothing in the Contracts which are inconsistent with the just application of principles of restitution and unjust enrichment. On the contrary, the very structure of the transactions, or what might be called their basis, is that the Buyer will (on completion of the development) obtain possession (subject to some fine-tuning regarding fees and so on), in return for the price, payable with interest over twenty years, at the end of which there will be a closing and passing of title.

62. The Buyer submits that anything less than a full recovery of his payments of principal and interest will give a windfall to the Sellers, since they retain the shops for the future and further exploitation. However, that submission is not understood. The shops have always belonged to the Sellers. The only windfall is that which the Buyers are seeking, which is to have retained possession of the shops for nearly two decades without any cost (save for the payment of strata fees).

63. In these circumstances, I would allow the Sellers' appeal to this extent: that from the sum of CI$ 593,430.37 awarded on the Buyer's claim I would deduct mesne profits during the period of the Buyer's possession in a sum which (but for the appellants' concession to limit their claim to the amount of the interest paid by the Buyer) would have been higher. As it is, the debit is thus limited to the sum of CI$ 191,996.17 and CI$ 194,530.39 or in total CI$ 386,526.5, and the Buyer's total recovery in restitution is therefore limited to CI$ 206,903.87. Because of the Sellers' successful counterclaim in the sum of CI$ 135,896.29, judgment in favour of the Buyer is reduced on appeal to CI$ 71,007.58.

64. It might be observed that the Contracts in this case are also in another respect unlike straightforward contracts of sale, in that they contemplate that the Sellers will develop and construct the shops which are the subject-matter of the sales (see clauses 1 and 2 of the Contracts). I note in passing the division of opinion regarding such a contract to be found in *Hyundai Industries v. Papadopoulos* [1980] 1 WLR 1129 (HL), and the application of the majority's view in the subsequent case of *Stocznia Gdanska SA v. Latvian Shipping Co* [1998] 1 WLR 574 (HL). However, these cases were not cited to our court. Indeed, subject to some exploration of the doctrine of restitution at the oral hearing, and to the deployment of the English and Australian jurisprudence mentioned in earlier paragraphs above, there were no detailed submissions from the parties as to the law of restitution or unjust enrichment. In these circumstances, I have felt it inappropriate to enter more deeply into further jurisprudence such as is covered in *Goff and Jones* at paras 12-17 to 12-32, in *Chitty* at para 29-058 to 29-061, or in *Burrows, The Law of Restitution*, at chapters 14/15[2]. However, I am satisfied that the solution I have adopted in this judgment is not inconsistent with the run of that jurisprudence, even though fine distinctions may sometimes be observed there. It might also be said that, although the distinction between principal and interest adopted in the Australian jurisprudence has not been adopted in terms, nevertheless the need to separate and distinguish between title and possession,

[2] It may be observed that *Burrows* advocates a move from total failure to partial failure of consideration, but also due recognition of valuing the benefits conferred on a claimant in restitution. It is also interesting that *Burrows* at 342-344, in discussing *Rowland v. Divall* [1923] 2 KB 500 (CA), a well-known case but not cited to us, finds it to be an unsatisfactory authority in taking an artificial view of total failure. In any event, *Rowland v. Divall* is a different case, where the seller never had title and therefore could never give the buyer lawful possession.

accounting for one by reference to the price, and the other by reference to mesne profits, reflects the principles and functional justice of the law of unjust enrichment.

Conclusion

65. In sum, I would allow the Sellers' appeal to the extent of curtailing overall judgment in favour of the Buyer to the sum of CI$ 71,007.58.

John Martin QC, JA

66. I agree.

Sir Alan Moses JA

67. I also agree.