

**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS, FINANCIAL
SERVICES DIVISION**

**C.I.C.A. NO:17 OF 2016
(GRAND COURT CAUSE NO: G0247 OF 2014)**

BETWEEN:

JANET FRANCIS and DWIGHT CLARKE

Defendants/Appellants



-AND-

VISTA DEL MAR DEVELOPMENT LIMITED

Plaintiff/Respondent

BEFORE:

**THE HON JOHN MARTIN, JA
THE HON SIR RICHARD FIELD, JA
THE HON DENNIS MORRISON, JA**

Appearances: Mr Hector Robinson QC of Mourant Ozannes for the Appellants
Mr Mac Imrie and Ms Gemma Freeman of Maples and Calder for the Respondent

Hearing: 6 March 2017
Judgment delivered: 8 June 2017

JUDGMENT

Sir Richard Field, JA

Introduction

1. The appellants, Ms Janet Francis and Mr Dwight Clarke, appeal against the decision of Justice Mangatal ("the Judge") ordering them to perform a contract for the sale of Lot 290 ("the property") in the Vista Del Mar residential development by conveying the title therein to the Respondent ("VDM") in exchange for the price of US\$462,460.

2. The judge held that this contract for sale resulted from the valid exercise by VDM of an option to purchase contained in amended Clause 6.2 of the Agreement for Sale dated 6 March 2009 ("the Agreement for Sale") by which the appellants acquired the property from VDM in the first place. Amended Clause 6.2 reads:

The purchaser agrees, so that the same shall survive completion, that if, save for reasons beyond its control, including acts of God, it has failed either to commence construction of a residence on the property by 9 January 2012 or to complete such construction by [eighteen] (18) months thereafter, then in either case it will, upon receipt of written notice from the vendor requiring it to do so, sell the property back to the vendor at a price equal to the purchase price plus the value of the construction works, if any on it as at the date of receipt by it of the vendor's notice. For the purpose of this clause, the value of the Construction Works shall mean the sum actually paid by the purchaser for the construction works before its transfer of the property back to the vendor pursuant to this Clause 6.2.

3. The VDM residential development is a gated community comprising ocean front and canal front lots. The owners of the lots (save in the case of VDM's former majority shareholder, Mr Freytag, who owns two lots) are bound by reciprocal covenants, some restrictive and some positive. The restrictive covenants are set out in a separate document from the Agreement for Sale signed by each purchaser and are referred to in the Agreement for Sale as "The Restrictive Agreements." These covenants include obligations to have constructed on the lots houses of approved design, architectural style, size, building materials and colour. By Clause 5 of the Agreement for Sale the appellants agreed that they were under an obligation pursuant to the Restrictive Agreements to commence and diligently proceed with the construction of a residence and ancillary buildings, landscaping and other development works on the Property in all respects subject to and in accordance with the Restrictive Agreements.
4. Completion of the Agreement for Sale took place on 8 May 2009 and the original Clause 6.2 of the Agreement for Sale was in the same terms as the amended Clause 6.2 save that the words down to "*then in either case*" in the 6th line read: "*Purchaser agrees, so that the same shall survive Completion, that if, save for reasons beyond its control (including acts of God), it has failed either to commence construction of a residence on the Property within eighteen (18) calendar months of Completion or to complete such construction by the date being the third anniversary of the Completion Date, both pursuant to the Restrictive Agreements, ...*"
5. Under the unamended Agreement for Sale, construction of a residence by the appellants had to commence by 8 November 2010, but this date was missed and on 11 April 2011 the appellants were granted an extension in the terms, inter alia, of the amended Clause 6.2 which was substituted for the original Clause 6.2 by a Deed of Variation to Agreement dated 11 April 2011 ("the Deed of Variation").
6. By Clause 4.2 of the Deed of Variation, Clause 18.10 of the Agreement for Sale was amended by the inclusion therein of the following, "*all rights conferred by this*

Agreement are additional to and without prejudice to all other rights and remedies available to the Vendor and no exercise or lack of exercise of a right constitutes a waiver by the Vendor of any other right or remedy."

7. By letter dated 14 October 2013 ("the 14 October Notice"), VDM informed the appellants that it was exercising the option to purchase contained in amended Clause 6.2 for a price of US\$462,640 with the intention of completing the purchase within 30 days. The letter was received by the appellants on 23 October 2013 by which date no construction of a residence on the property had commenced, the 18 month period following commencement of construction by 9 January 2012 referred to in the amended Clause 6.2 having expired on 9 July 2013.
8. The 14 October Notice had been preceded by an email from Mr Arek Joseph, an architect who acted as a consultant to VDM, to the appellants dated 2 October 2014 in which he stated that VDM was considering whether to exercise its right to re-purchase the property under amended Clause 6.2 due to the appellants' failure to commence construction on time. In her emailed reply dated 14 October 2014, Ms Francis said that she was appreciative of the kind courtesies that had been extended by VDM throughout the process and assured VDM that the appellants were well on their way to commencing construction. She also provided a further construction schedule but it was not clear to VDM from this when construction was to commence.
9. In response to VDM's letter dated 14 October 2013, Ms Francis stated in an emailed letter dated 30 October 2013 that the appellants had every intention of commencing construction in short order; they had been shocked to receive VDM's letter of 14 October 2013 as they had been in communication with VDM throughout both orally and in writing regarding the proposed works and the progress made thereon. She also requested a meeting with VDM's directors.
10. On 7 January 2014, the appellants met with Mr Joseph and Mr Charlie Robinson of VDM. Three days later on 10 January 2014, there was a meeting between Mr Joseph, representing VDM and the appellants' architect, Mr John Doak. Following that meeting, Mr Joseph sent an email dated 10 January 2014 to the appellants stating that his discussion with Mr Doak had been most fruitful, VDM were grateful for Mr Doak's representation of the appellants' situation which had been received with understanding and Mr Joseph had informed Mr Doak that the appellants would be letting VDM have a detailed progress report in 30 days' time and had urged Mr Doak to assist with updated facts relating to dates and schedules leading up to the commencement of construction.
11. There followed in the period February 2014 to June 2014 communication between VDM and the appellants regarding a construction schedule and progress toward starting construction. Thus on 13 February 2014, Mr Joseph requested an updated schedule and timeline to construction and was told by Ms Francis in reply that the engineers had had to make revisions to their structural drawings and a valuation by a quantity surveyor was required to support an application for financing. On 18

February 2014, Ms Francis confirmed that, subject to receipt of building permits, construction would commence in June or July 2014 and on 29 April 2014 and 18 June 2014 Mr Joseph asked what progress had been made in obtaining the necessary finance, to which Ms Francis responded on 19 June 2014 saying that the quantity surveyor's report required by Butterfield's Bank would be available on 20 June 2014.

12. However, no construction having been commenced and no confirmation of financing having been received, VDM sent the appellants a letter dated 10 July 2014 ("the 10 July Notice") in essentially the same terms as its earlier 14 October Notice, informing the appellants that it was exercising the option to purchase the property pursuant to amended Clause 6.2. Again, the appellants asked for more time but on 19 August 2014 VDM sent to the appellants a Deed of Exercise of Option and Release and on 14 October 2014, in the face of the appellants' continuing refusal to accept any obligation to sell the property, VDM issued its writ and Statement of Claim seeking specific performance of the contract resulting from the exercise of the option by the 10 July Notice.

The appellants' case below

13. Briefly, the appellants' case at first instance was as follows:

1. Amended Clause 6.2 did not create an option since under the Agreement for Sale the appellants were free to sell the property to a third party so long as the third party had first entered into an agreement in similar terms to those in Clauses 6.1, 6.2 and 6.3 of the Agreement for Sale.
2. The alleged option was unsupported by consideration.
3. The alleged option was void for uncertainty.
4. The alleged option was void for being in breach of the rule against perpetuities.
5. Amended Clause 6.2 was void by reason of being a penalty clause.
6. The alleged option had lapsed through the effluxion of time before 10 July 2014 or before 13 November 2013.
7. The equitable remedy of specific performance ought not to be decreed because: (i) damages would be an adequate remedy; (ii) the option was unsupported by consideration and Equity would not support a "volunteer"; (iii) VDM came to the court with "unclean hands" in that it had enforced the covenants requiring construction of a residence on other lots in the VDM development in an uneven and discriminatory manner; and (iv) VDM was guilty of laches.

The judge's conclusions

14. The judge rejected all of the above contentions. In this appeal, the appellants do not challenge the judge's conclusions in respect of contentions 1 - 5, 7 (i), 7 (ii) and 7 (iv). It is necessary therefore only to have further regard to those parts of her judgment in which she rejected contentions 6 and 7 (iii).
15. In paragraph 88 of the judgment, the judge held that the "end date" for construction of a residence in amended Clause 6.2 was 9 July 2013 and that VDM had acted reasonably promptly in exercising the option on 14 October 2013, having regard to the circumstances, including the communications and correspondence between the parties which showed that the appellants understood that VDM intended to exercise its rights. This correspondence included the email from Ms Francis to Mr Joseph of 14 October 2013 in which she thanked him for the kind courtesies extended, and the email from Ms Francis, following receipt of the 14 October Notice, requesting a meeting between the parties and reassuring VDM, as the appellants had done many times in the past, that the appellants had every intention of commencing construction in short order.
16. In paragraph 89, the judge held that the evidence clearly demonstrated that VDM had departed from the timetable referred to the 14 October Notice in good faith because of the appellants' continuing assurance that they would soon start construction and their requests for understanding.
17. Paragraph 91 of the judgment reads:

In my view the Defendants cannot take advantage of VDM's good faith forbearance and are estopped from relying on any such delay as a means to avoid the enforcement of the Agreement for Sale as amended by the Deed of Variation of Agreement. The Court has to assess the situation in light of all the circumstances, including the correspondence and communications between the parties. In any event, VDM were entitled to rely upon the "no waiver" clause.
18. The judge rejected the "non-clean hands" contention in paragraphs 122 - 125 of the judgment where she found: (i) that VDM had sought to enforce covenants against other lot owners in the development; (ii) in any event, VDM would be entitled, for a good reason, to take a different approach as to covenants with respect to different properties; (iii) there was no evidence of any impropriety or improper purpose on the part of VDM; on the contrary, Mr Joseph had acted throughout towards the appellants with complete fairness and with a marked degree of understanding; and (iv) applying the approach articulated in *Moody v Cox* [1917] 2 Ch 71 that the absence of clean hands is of no account "unless the depravity, the dirt in question on the hand, has an immediate and necessary relation to the equity sued for," the dealings between VDM and other owners of lots within the development did not provide the necessary "dirt" or connection to constitute a bar to issuing the decree of specific performance sought by VDM .

The appellants' case on appeal

19. Mr Robinson QC for the appellants contended that the option contained in amended Clause 6.2 had to be exercised within a reasonable time from 9 January 2012 and by the time of the receipt of the 14 October Notice more than a reasonable time had elapsed. The judge had erred in proceeding on the basis that the start date for computing a reasonable time was 9 July 2013. Properly construed, the meaning and effect of amended Clause 6.2 was that if construction had not started by 9 January 2012, VDM had only one opportunity to exercise the option and that had to have been taken within a reasonable time of that date.
20. In Mr Robinson's submission, the words "complete such construction by eighteen months thereafter" meant "complete the construction that had commenced on or before 9 January 2012 within 18 months of that date".
21. I do not accept that this is how amended clause 6.2 is to be construed. VDM was in the business of selling lots, not re-purchasing lots from owners and, in my view, the principal, if not sole, purpose of the option was to make sure that residences were built on lots sold by VDM. Construed with this purpose in mind, the words "complete such construction by eighteen months thereafter" do not mean "complete construction already started by 9 January 2012 within 18 months of that date" but mean "complete construction whenever it was begun by 18 months after 9 January 2012". Accordingly, I agree with the judge that the end date for completion of the construction of a residence was 9 July 2013 and that this date was therefore the start of the period of reasonable time in which the option had to be exercised.
22. Mr Robinson went on to argue that the period from 9 January 2012 to 23 October 2013 when the 14 October Notice was received well exceeded the reasonable amount of time in which the option had to be exercised. In making this argument he suggested that a reasonable time would have been no more than 6 months from 9 January 2012, bearing in mind in particular that the value of the property was likely to be increasing, whereas the option price of US\$462,460 remained the same. He accordingly concentrated on the period from 9 January 2012 up to 9 July 2013, submitting that during this time there had been no request by the appellants for an extension of time and, in the absence of such a request, the communications between the parties as to the steps that the appellants were taking towards having a residence constructed were incapable of extending the period in which the option had to be exercised. He accepted, however, that if the start date was 9 July 2013 rather than 9 January 2012, it would be very difficult to argue that VDM had not acted sufficiently promptly by the time the 14 October Notice was received, since during this period there were specific requests from the appellants for an extension of time which were acceded to by VDM.
23. My conclusion that the start date for the relevant period was 9 July 2013 rather than 9 January 2012 is fatal to the success of this part of Mr Robinson's

submissions. The 14 October Notice was received within 15 weeks of 9 July 2013 and since April 2013 (at the latest) the appellants had periodically kept VDM informed of progress towards the commencement of construction, knowing that VDM was becoming concerned about the time it was taking for construction to begin. Thus in an email dated 31 July 2013, the appellants were told by VDM that VDM's Architectural Committee had noticed that several owners who had purchased lots a few years ago had not started construction and VDM now wanted the appellants' latest construction schedule, to which the appellants replied on 4 August 2013 that they had chosen an engineering company and a contractor and would advise as and when they had a finalized schedule.

24. Accordingly, I agree with the judge's finding that the 14 October Notice was received by the appellants within a reasonable time from the start date of 9 July 2013.
25. In my judgment, even if the end date for the commencement of construction had been 9 January 2012, VDM would have been entitled to a finding that the 14 October Notice had been received by the appellants within a reasonable period of time. I say this because it is clear from the evidence that throughout the period from 9 January 2012 down to 9 July 2013 the appellants intended to construct a residence on the property and VDM was prepared to allow the appellants considerable latitude as to the timing of such construction, whilst at the same time making the odd enquiry as to when construction would take place. It would accordingly be wholly unjust to hold that, in giving the appellants this latitude, VDM was acting at its risk that the option would lapse. On the contrary, the effect of the conduct of the parties during this period was to extend the time by which VDM was obliged to exercise the option, notwithstanding that the appellants did not make an express request for an extension of time.
26. Mr Robinson next argued that even if the 14 October Notice had been received within a reasonable time, it was VDM's case that it had exercised the option by the 10 July Notice, not the 14 October Notice, and this case was misconceived and insupportable.
27. Mr Robinson submitted that the option could be exercised once only, and following its exercise the relationship between the parties changed from one of optionee and optionor to one of vendor and purchaser under a contract of sale and purchase. The 10 July Notice was therefore ineffective to give VDM any right to purchase the property in accordance with amended Clause 6.2. Indeed, the effect of the failure to complete within the 30 day period specified in the 14 October Notice, combined with the issuance of the 10 July Notice, constituted an abandonment by VDM of that part of the Agreement for Sale that obliged the appellants to construct a residence on the property. Further, the dealings between the parties after the 14 October Notice in which the appellants sought more time to commence construction and VDM held its hand could not be relied on by VDM because these were not in reference to completion of a contract of sale and purchase and VDM had not reserved its position as optionee.

28. I cannot accept this argument. If it were soundly based the result would be that, by reason of a series of indulgences granted in good faith by VDM over a lengthy period, the appellants had become free of the obligation to construct a residence on the property whilst VDM had lost its right to purchase the property if no such construction was undertaken.
29. In my judgment, it is clear that after the 14 October Notice down to 10 July 2014 the parties proceeded on the basis that there remained an obligation on the appellants to construct a residence on the property whilst at the same time VDM continued to have a right under amended Clause 6.2 to purchase the property if things dragged on over long. There was therefore in my view an estoppel by convention to this effect from which the appellants cannot depart, with the consequence that the 10 July Notice was an effective exercise of the option.
30. Mr Robinson's point that following receipt of the 14 October Notice the parties moved out of the territory of option and into the territory of a contract of sale was not a point he took at trial. Instead, his case below was that VDM could only exercise the option once and, in any event, by the time of the 10 July Notice the option had lapsed by effluxion of time; and in addition, the appellants had been entitled to conclude from the parties' dealings after the 14 October Notice that VDM would not be seeking to invoke amended Clause 6.2. It is perhaps therefore not surprising that the judge did not decide the case on the basis of an estoppel which debarred the appellants from contending that VDM's option right terminated upon the receipt of the 14 October Notice. Instead, without referring to the fact that VDM was contending that the option had been exercised by the 10 July Notice, not the 14 October Notice, she held that the option had been exercised within a reasonable time by the 14 October Notice and that the appellants were estopped from relying on the delay during which VDM held their hand.
31. However, given my conclusion that the appellants are debarred by a conventional estoppel from denying that after the 14 October Notice down to the 10 July Notice the appellants remained under an obligation to construct a residence on the property whilst at the same time VDM continued to have a right to exercise the option contained in amended Clause 6.2, the appellants' challenge to the judge's finding that the option had been lawfully exercised giving rise to an enforceable contract for the sale of the property must be dismissed.
32. Lastly, I deal with the appellants' challenge to the judge's rejection of their case that the contract of sale under the option should not be specifically enforced by reason of VDM coming to the court with "unclean hands". The appellants' case below was that VDM had unfairly not enforced the option to purchase in other cases where a residence had not been constructed within the VDM development. They contended that they were the beneficiaries of the covenants to build to which the other owners were subject and for VDM not to have exercised the option against some of those owners who did not construct a residence while

exercising it in the case of themselves was so inequitable as to constitute "dirty hands".

33. VDM's witness, Mr Joseph, was closely cross-examined about a sizable number of instances falling within one of three categories: (i) permission granted to certain owners to treat some of their lots appurtenant to a residence which fronted on the sea or a canal as landscaped "garden lots" on which no residence needed to be constructed; (ii) permission granted to owners who had not constructed a residence within the specified time to sell their lots to third parties who became subject to a building covenant running from the date of their acquisition of the lot; and (iii) alleged failures to enforce covenants against other others.
34. In respect of category (i) the appellants did not complain that the creation of garden lots appurtenant to a residence amounted to a change in the character of the VDM development. In respect of category (ii) Mr Joseph dealt with each transaction put to him and explained that certain lot owners, perhaps because they could not afford to construct a residence, had sold to a third party who could afford to construct an approved residence and did so; that course of action had been open to the appellants but they had not taken it. There was one transaction where the consideration for the sale was stated to be US\$1.00 but Mr Joseph explained that that this had been treated as a "transfer of ownership" and not a "sale" and the lot in question was up for sale on the open market. There was also a transaction where the lot was transferred from one spouse to another for "natural love and affection" following which an approved residence was constructed. As for category (iii), there were instances where VDM had granted extensions for the construction of a residence and there was evidence of letters and notices being sent by VDM to owners who had not commenced construction within the stipulated period requiring compliance with the covenants and all such owners had either constructed an approved residence, sometimes with an extension of time, or sold their lots to third parties who contracted to comply with the covenant to build.
35. In my judgment, there are no sustainable grounds for overturning the judge's conclusion that the manner in which VDM had dealt with other owners over the building covenant did not afford a ground for refusing the discretionary remedy of specific performance. The judge heard the evidence and was well entitled to reach the conclusion she did. VDM had sought to enforce the building covenants against other owners in the development and where such covenants had been amended or extensions of time or sales to third parties had been granted, VDM had been entitled so to act and in doing so had not acted unfairly or inequitably quoad the appellants.
36. I accordingly reject the appellants' challenge to the judge's finding on the "clean hands" issue.

Conclusion

37. For the reasons I have given, I would dismiss this appeal and order that the appellants pay VDM's costs of the appeal to be taxed on the standard basis if not agreed.

The Hon John Martin, JA

I agree

The Hon Dennis Morrison, JA

I also agree

