

BETWEEN

(1) MONTPELIER PENSION TRUSTEES LIMITED  
(2) MONTPELIER PENSION ADMINISTRATION SERVICES LIMITED

PLAINTIFFS

AND

CROWN ACQUISITIONS WORLDWIDE LIMITED

DEFENDANT

IN CHAMBERS

Appearances: Mr. R Jones of Tayler Jones for the Plaintiffs  
Mr. I Huskisson of Travers Thorp Alberga for the Defendant

Before: The Hon. Justice Ingrid Mangatal

Heard: 29 June 2016

Draft Judgment  
Circulated: 3 November 2016

Judgment  
Delivered: 8 November 2016



**HEADNOTE**

*Civil Practice and Procedure - Summary judgment application, Order 14, Order 14A of the Grand Court Rules*

**JUDGMENT**

1. This claim relates to six Agreements of Sale in materially similar form (“the Contracts of Sale”) between the First Plaintiff (“Montpelier”) and the Defendant (“Crown”) by which Montpelier agreed to purchase from Crown six parcels of land (“the lots”) forming part of

the land registered at the Cayman Islands Land Registry as Little Cayman East, Block 92A, Parcel 147 ("Parcel 147").

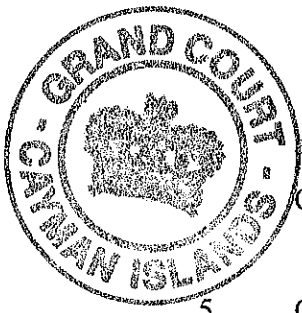
2. The applications before the Court are for summary judgment, under O.14 of the Grand Court Rules 1995, or alternatively for relief under Order 14A.
3. In their Statement of Claim, the Plaintiffs seek in summary:



- "1. Restitution of the purchase price ("the Lot Price") paid in respect of each Lot on the grounds that consideration for the payment has totally failed;*
- 2. Damages for breach of contract;*
- 3. Alternately, a declaration that Clauses 5 and 6 of the Contracts of Sale are penalty clauses and are therefore void;*
- 4. In the further alternative, repayment of the sums wrongfully retained by Crown pursuant to Clauses 5 and 6 of the Contracts of Sale;*
- 5. A declaration that, on the true construction of the Agreement of Purchase and Sale dated 29 September 2010 and made between (1) Crown Acquisitions Worldwide Ltd and (2) Montpellier Pension Administration Services Ltd ("the L10 Contract of Sale"), the "Buyer" under the L10 contract of Sale is Montpellier rather than Montpellier Pension Administration Services Ltd; alternatively rectification of the L10 Contract of Sale."*

### **The Parties**

3. At all material times Montpellier was a company specializing in the provision of pension administration and consultancy services with a registered trading address of 15<sup>th</sup> Floor, Colston Tower, Colston Street, Bristol, UK. It acted as the trustee of five self-investment personal pensions schemes ("the SIPPS") held for the benefit of Carlo Campolucci, ("Carlo"), Gillian Davis Compolucci-Bordi ("Gillian"), Pier Marco Campolucci-Bordi ("Pier Marco"), Catherine Helen Campolucci-Bordi ("Catherine") and Mario Campolucci-Bordi ("Mario"), collectively referred to as "the Campolucci-Bordis" and the Contracts of Sale were entered into on the Campolucci-Bordis' behalf.
4. Montpellier is wholly owned by Curtis Bank Limited ("Curtis Bank"). Curtis Bank at all material times was a company whose principal activity is also the provision of pension



administration and consultancy services with a registered trading address of 15<sup>th</sup> Floor, Colston Tower, Colston Street, Bristol, UK.

5. Curtis Bank initially incorporated as Banks Pensions Plc on 26 November 2008 but changed its name to Curtis Banks Plc on 25 March 2009 and became Curtis Banks Limited on 17 July 2013.
6. The Second Plaintiff, Montpelier Pension Administration Services Ltd, ("Montpelier Pension Administration Services") was a company specializing in the provision of pension administration and consultancy services with a registered address of Suite 3 Battalion Court Colburn Business Park, Catterick Garrison, UK.
7. Crown at all material times carried on the business of selling real estate in the Cayman Islands from their registered address of PO Box 472, 103 South Church Street, Grand Cayman KY1-1106, Cayman Islands.
8. It acted through its employee Darryl Pickthall ("Mr. Pickthall") at all material times.

#### **Purchase of Parcel 147 by Crown**

9. Prior to purchasing Parcel 147, on or around April 2009, Crown applied for and obtained planning permission from the Cayman Islands Planning Department to subdivide Parcel 147 into 10 Lots: L1, L2, L3, L4, L5, L6, L7, L8, L9, L10. On or around 15 June 2010, Crown purchased Parcel 147 from Mr. James Ryan (as administrator of the Estate of Catherine A Ryan) for a purchase price of \$400,000.00. On 16 August 2010, Crown was registered as the freehold proprietor of Parcel 147.
10. After having purchased Parcel 147, Crown obtained a report from a firm of quantity surveyors which recorded that "*[Crown] intends to provide Building Control approved architectural, structural engineering and MEP [mechanical, electrical and plumbing] construction drawings, Building Permit and construction documentation to each typical lot.*"

11. Accordingly, it was resolved by Crown to offer the Lots for sale and on or about 8 October 2010, separate registers of title were opened for each of the Lots.

### **The Sale of Lots to Montpelier**

12. Between 29 September 2010 and 24 January 2011 Montpelier and Crown entered into the Contracts of Sale by which Crown agreed to sell L5-L10 to Montpelier:-

- 1) By Agreements of Purchase and Sale dated 29 September 2010, Montpelier purchased:
- i. L5 on behalf of Carlo from Crown at a "Lot Price" of GBP 82,433.00
  - ii. L9 on behalf of Pier Marco at a Lot Price of GBP 45,150.00.
  - iii. L10 on behalf of Catherine at a Lot Price of GBP 39,165.00.
- 2) By an Agreement of Purchase and Sale dated 29 November 2010 Montpelier purchased L7 on behalf of Carlo at a Lot Price of GBP 39,165.00.
- 3) By an Agreement of Purchase and Sale dated 9 December 2010 Montpelier purchased L8 on behalf of Gillian at a Lot Price of GBP 45,150.00.
- 4) By Agreement of Purchase and Sale dated 24 January 2011 Montpelier purchased L6 on behalf of Mario at a Lot Price of GBP 70,000.00.

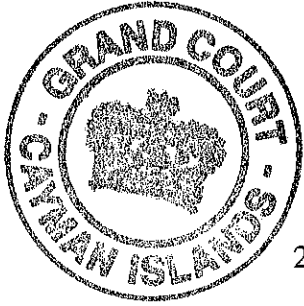
13. The relevant Lot Prices were paid immediately upon execution of the Contracts of Sale, save that in the case of Lot 10 a Lot Price of GBP 37,741.00, was paid to discharge the liability to pay the L10 Lot Price.

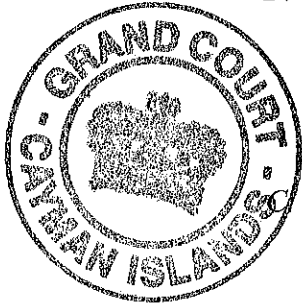
### **The Contracts of Sale**

14. Save as set out at paragraphs 21 to 24 of the Statement of Claim, the Contracts of Sale contained substantially similar terms. The Recitals to the Contracts of Sale provided as follows:-

*"WHEREAS*

- A. The Seller is the owner of land in the Cayman Islands known as Little Cayman LCW Block 92A Parcel 147 ("the property") and has obtained planning permission from the Central Planning Authority of the Cayman*





*Islands to develop the property into a sub-division comprising various residential lots.*

- B. The Seller has also arranged for the preparation of architectural plans and specifications for the consideration of a residential home on the Lot and has further agreed to obtain the necessary approval of these plans and specifications from the Central Planning Authority of the Cayman Islands (the "CPA Approval" also known as HIAB Concept).*

*The Pension Contributor (the SIPP Investor) wishes to obtain the benefit of both the pre development prices on the residential lots to be sold as well as the CPA Approval and has agreed to the Buyer entering into this Agreement with the Seller.*

- D. The Seller has agreed to sell and the Buyer has agreed to buy Lot numbered { } being {size} square feet in size (the "Lot") on the plan attached (for identification purposes only) at the price details in Schedule 4 and on the terms and conditions set out in Schedule 1 to this Agreement.*
- E. The Seller has agreed to pay the costs associated with obtaining the CPA Approval in accordance with Schedule 4.*
- F. The Pension Contributor has agreed to allow his pension contributions to be used by the Buyer to pay all sums due by the Buyer under this Agreement.*
- G. The payment schedule as set out in Schedule 4 is the agreed payment schedule between the Seller and Buyer and governs price, dates of payment and terms relating to the sale of the Lot and the CPA Approval.*
- H. It is hereby agreed and declared that plots purchased via a SIPP must be transferred out of the SIPP before any residential building work commences..."*

## **Terms of Contracts of Sale**

### **Schedule 1**

15. Clause 2 provided that:

#### **"PRICE**

*The Buyer must pay the Seller the Lot Price and the CPA Approval Price as detailed in Schedule 4 in the manner and on the dates set out in Schedule 4. All payments that the Buyer must make under this Agreement must be in cleared funds by the due payment dates."*

16. Clauses 3 and 4 of Schedule 1 dealt with Completion:

### **“3. COMPLETION**

- 3.1 *As soon as the Seller is registered with title to the Lot, the Seller will serve on the Buyer a written notice giving the Buyer twenty-one days to complete the purchase of the Lot with the twenty first day being the “Completion Date”.*
- 3.2 *Fourteen days before the Completion date, the Seller’s attorneys will provide the Buyer with:*
- 3.2.1 *an extract of the title to the Lot as registered in the Land Registry of the Cayman Islands,*
  - 3.2.2 *the unexecuted transfer documents for the Seller and Buyer to execute before the Completion date, and following completion for the Buyer to deliver to the Registrar of Lands in order to transfer the title to the Lot into the name of the Buyer, and*
  - 3.2.3 *a copy of the CPA approval.*
- 3.3 *On the Completion Date the Seller must:*
- 3.3.1 *execute all necessary documents to transfer the title to the Lot into the name of the Buyer and deliver them to the buyer or his attorney for registration, and*
  - 3.3.2 *deliver to the Buyer the original CPA Approval document along with all of the plans and specifications for the residential home as referred to in Recital B, and*
  - 3.3.3 *if applicable, and on receipt of such other payments payable by the Buyer to register the Transfer, and all duly executed documents from the Buyer, cause its attorneys-at-law to complete the registration of the transfer of the lot into the Buyer and deliver to the Buyer an extract of title on completion of the process.*
- 3.4. *On the Completion Date, the Buyer must pay the Seller all sums (if any) payable by the Buyer under this Agreement which are due on or before the Completion Date.*

### **4. POSSESSION AND TITLE AND CAUTION**

- 4.1 *Subject to the Buyer paying the Seller the entire Lot Price, other payments due under this Agreement and any interest on them, the Seller must give vacant possession of the Lot to the Buyer on the*





*Completion Date and the title to the Lot must be absolute, free and clear of all liens, charges, and subject only along with the other proprietors of lots within the Property to such matters, if any, as are required by the Central Planning Authority of the Cayman Islands or any Governmental agency of the Cayman Islands.*

- 4.2 *The Buyer must not lodge a caution against the title to the Property which prohibits any dealings with the Property until the Seller has fulfilled all conditions imposed by the Central Planning Authority and by law to sub-divide the Property and the Land Registry of the Cayman Islands has opened a separate register for the title to the Lot..”*

17. Clauses 5 and 6 provide as follows:

**“5. DEFAULT BY BUYER IN MAKING PAYMENTS**

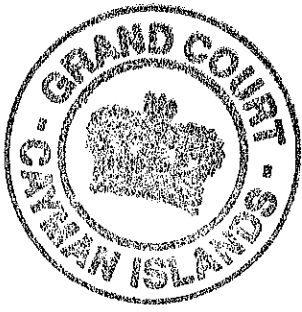
*The Buyer acknowledges that the Seller is selling the Lot at a pre-completion price and that the Seller will be using all payments:-*

- 5.1 *to pay sales commissions which are irrecoverable and*  
5.2 *for the purposes of subdividing and developing the property, and that the Seller will incur loss and damage by reason of any default of the buyer in failing to make payment of a due date.*

*If the Buyer does not make any of the payments set out in Schedule 4 on the due date, the Seller may serve on the Buyer a written notice that the Buyer is in breach of this Agreement and that the relevant payment has not been received. Should the buyer not make such payment within 14 days of the date of posting of the notice, the Seller may, without further demand, forfeit all payments that the Buyer has made up to that date of default in an amount equal to 10% of the lot price and this agreement will terminate forthwith and except as under Clause 6 neither party will have any further rights under this Agreement.*

**6. RELINQUISHING THE RIGHT TO SUE FOR SPECIFIC PERFORMANCE.**

*The Seller agrees to relinquish its legal right to institute proceedings against the Buyer for specific performance. In consideration of the Seller relinquishing that right, the Buyer agrees that if it does not*



*complete this Agreement, the Seller may retain for itself all payments, if any, that the Buyer has made under this Agreement that exceed 10% of the Lot Price up to a limit of 80% of the Lot Price.”*

18. At paragraphs 38-44 of the Statement of Claim, Montpelier claims the following relief:

**“Relief Claimed**

38. *The basis upon which the Lot Prices were paid to Crown was that Crown would transfer the Lots (with the benefit of CPA Approval) to Montpelier. Crown’s failure to carry out such action means that consideration in respect of the payment of the Lot Prices totally failed. Crown was therefore unjustly enriched.*
39. *Accordingly, Montpelier is entitled to and claims restitution of the Lot Prices paid to Crown. Further or alternatively, on a true construction of the Contracts of Sale, Montpelier is entitled to restitution of all or part of the Lot Prices.*
40. *Further or alternatively, as a result of Crown’s breaches of the Duties, Montpelier has suffered loss and damage in that:*
  - (1) *It paid a Lot Price in respect of each Lot to Crown;*
  - (2) *It did not receive title to the Lots with the benefit of CPA Approval.*
41. *Accordingly, Montpelier is entitled to and claims damages representing:*
  - (1) *The Value of the Lots with the benefit of CPA Approval (the precise value of which will be the subject of expert evidence at trial);*
  - (2) *Alternatively, the Lot Prices paid to Crown pursuant to the Contract of Sale.*
42. *Further and alternatively, if the Buyer under the L.10 Contract of Sale is in fact Montpelier Pension Administration Services, it is entitled to and claims damages representing:*
  - (1) *The Value of L10 with the benefit of CPA Approval (the precise value of which will be the subject of expert evidence at trial);*
  - (2) *Alternatively, the Lot Prices paid to Crown pursuant to the L10 Contract of Sale.*

**Penalty Clause**

43. *The effect of Clauses 5 and 6 of the Contracts of Sale is to penalize non-performance of Montpelier’s obligations. Accordingly, Montpelier seeks a declaration that Clauses 5 and 6 are penalty clauses and therefore void.*

**Interest**

44. *Further, Montpelier is entitled to and claims interest on the sums stated above pursuant to s.34 Judicature Law (200& Revision) in such sums and at such a rate and for such time as the court considers just and fair.*

**AND THE PLAINTIFF CLAIMS:**

- (1) *A Declaration that the Buyer under the terms of the L10 Contract of Sale was Montpelier rather than Montpelier Pension Administration Services Ltd;*
- (2) *Alternatively, rectification of Schedule 2 to state that the Buyer under the terms of the L10 Contract of Sale was Montpelier rather than Montpelier Pension Administration Services Ltd;*
- (3) *Restitution of the Lot Prices or alternatively part of the Lot Prices;*
- (4) *Damages*
- (5) *A declaration that Clauses 5 and 6 of Shedule 1 to the Contracts of Sale are unenforceable as penalty clauses and therefore void;*
- (6) *Interest*
- (7) *Costs*
- (8) *Further or other relief.”*

**Crown's Position**

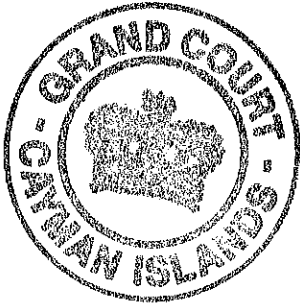
19. In its Defence, Crown pleads that in order to obtain the CPA Approval, it was first incumbent on Montpelier to identify which of three different architectural plans and specifications the Defendant had prepared for the construction of a residential home (“The Plans”) it wished the Defendant to apply for. Without knowing which of The Plans Montpelier required CPA Approval for, it was impossible Crown contends, for it to apply for CPA Approval. A term should be implied into the Contracts of Sale in order to give effect to the intention of the parties and/or commercial efficacy to the Contracts of Sale that Montpelier would owe a duty to identify which of the plans it wished Crown to apply for CPA Approval prior and as a condition precedent to taking any further steps pursuant to the Contracts of Sale.

20. The pleading also asserts that Roberto Compolucci-Bordis (“Roberto”) was related to and all material times acted on behalf of the Compolucci-Bordis. Given his proximity to



them, Roberto's knowledge should be attributed to the Plaintiffs and Campolucci-Bordis. Roberto worked closely with Crown and DDL Studios over a period of several months for the purpose of implementing the Plans and applying for CPA Approval. Roberto and therefore the Plaintiffs knew full well, Crown avers, that it was impossible for Crown to apply for CPA Approval without Montpelier first identifying which of the Plans Crown was to apply for CPA Approval for.

21. It is said by Crown that Roberto and/or companies within his control received substantial commissions upon the Plaintiffs and Crown entering into the Contracts of Sale. Once these payments had been received, they lost motivation, Crown claims, to proceed with the Contracts of Sale and resolved not to comply with their duty to select one of the three Plans and thereby prevented Crown from complying with its duty to obtain CPA Approval as a means of bringing the Contracts of Sale to an end. Crown also reserved the right to amend its pleading following discovery and/or service of interrogatories and to bring counterclaims in due course.
22. Crown concedes that Notices to Complete were sent, but denied they were of any effect, given Montpelier's failure to identify which of the plans it required Crown to apply for CPA Approval of as set out above.
23. In response to paragraphs 29 and 30 of the Statement of Claim, Crown argues that none of the Duties therein alleged had arisen by this time. In the alternative, if, which is denied by Crown, it was in breach then Montpelier was simultaneously in breach of its own duty and accordingly not entitled to terminate the Contracts of Sale. For the avoidance of doubt, Crown asserts that it remains ready, willing and able to comply with the Contracts of Sale and/or register Montpelier as proprietor of the Lots (subject to it paying any applicable stamp duty and other charges) as soon as Montpelier complies with its duty to identify which of the Plans it requires.
24. The Plaintiffs filed a detailed Reply to Defence, in which it was pleaded as follows:



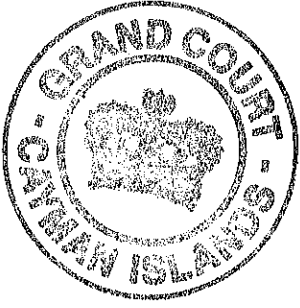
- "(1) The Contracts of Sale contained no reference to the selection by Montpelier of architectural plans and specifications prepared by Crown.*
- (2) At no stage prior to entering into the Contracts of Sale was it suggested to Montpelier that any such selection was required or necessary.*
- (3) At no stage following completion of the Contracts of Sale did Crown ever:-*
- (i) Raise the issue with Montpelier or the Campolucci-Bordis;*
  - (ii) Send copies or details of the alleged plans to Montpelier or the Campolucci-Bordis; or*
  - (iii) Ask them to select an architectural plan or specification for which the Defendant was then to apply for CPA Approval.*
- (4) On 11 January 2011, Ms. Gina Donovan wrote on behalf of Crown to Gillian stating that:*
- House In A Box Type B*  
*Purchase Price £45,150.00*  
*Please find enclosed your "House in a Box" concept brochure and plans...*  
*Each of our villa designs has been dedicated to a specific plot location that can be found on the 'Master Plan' on each site. Included in your freehold building plot of land is a Type 'B' villa."*
- (5) Letters in materially similar terms were sent to each of the Compolucci-Bordis. Each such letter identified a House in a Box "type" that had been dedicated to the relevant plot.*

25. Accordingly the Plaintiffs argued:

- (1) Rather than offering a choice of designs, Crown in fact selected Type 'B' villas for the Lots based upon their location;*
- (2) At no stage was a choice of designs offered to the Campolucci-Bordis or to the Plaintiffs;*
- (3) The first time that the Plaintiffs became aware of any suggestion that CPA Approval could not be obtained without the Plaintiffs' first selection a particular design or specification was upon receipt of the Defence.*

26. Further and alternatively, the Plaintiffs placed reliance upon:

- (1) The fact that at no stage was it suggested that the Plaintiffs were required to select a design or specification*



- (2) *The fact that the contracts of sale did not state that the Plaintiffs were required to select a design or specification;*
- (3) *Crown's subsequent conduct in informing the Campolucci-Bordis that a particular design had been designated to them;*
- (4) *The lack of any indication from Crown that it wished the Campolucci-Bordis to select a design;*
- (5) *Mr. Picktall's statement as set out in the statement of claim at para 26, that the Plaintiff's had already been provided all of the relevant paperwork in order to complete (but no choice of plans or specifications had been provided).*
- (6) *Crown's decision to serve Notices to Complete in respect of the Lots.*

27. Further, it was averred that neither the Plaintiffs nor the Campolucci-Bordis understood that they were required to take any further steps in relation to obtaining CPA Approval and accordingly they neither selected a design nor believed that such a selection was necessary.

28. Accordingly, the Plaintiffs argued that even if, which is denied, the term alleged to be an implied term of the contracts of sale was in fact an implied term, Crown's conduct was such that it would now be unjust for it to rely upon such a term. The parties are therefore estopped by convention, the Plaintiffs assert, from relying upon or enforcing such a term.

29. It was also denied that "proximity" or a familial relationship is sufficient grounds for the attribution of knowledge between the Campolucci-Bordis and further denied that:-

- "(1) Any familial connection between the Campolucci-Bordis would be sufficient grounds to attribute knowledge to the Plaintiffs;*
- (2) Any knowledge held by the Campolucci-Bordis can, without more, be attributed to the Plaintiffs."*

### **The Law**

30. Order 14 Rule 1 provides as follows:

***"Application by plaintiff for summary judgment***

*1(1) Where in any action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of*



*intention to defend the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such claim, or has no defence to such a claim or part except as to the amount of damages claimed, apply to the Court for judgment against the defendant."*

31. Order 14A provides as follows:

***"Disposal of Case on a Point of Law***

*1(1) The Court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that-*

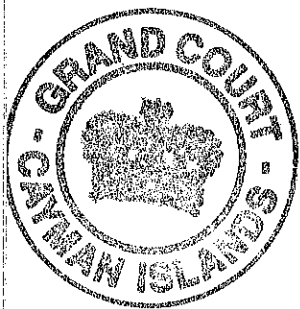
- (a) such question is suitable for determination without a full trial of the action; and*
  - (b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim for issue therein.*
- (2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.*
- (3) The Court shall not determine any question under this order unless the parties have either-*
- (a) had an opportunity to be heard on the question; or*
  - (b) consented to an order or judgment on such determination.*
- (4) Nothing in this Order shall limit the powers of this Court under Order 18, rule 19 or any other provision of these Rules.*

***Manner in which application under rule 1 may be made (O.14A, r.2)***

*2. An application under rule 1 may be made by summons or motion or (notwithstanding Order 32, rule 1) may be made orally in the course of an interlocutory application."*

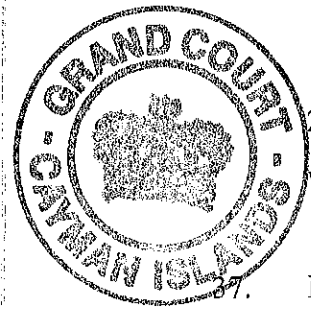
**The Arguments**

32. Mr. Jones, who appeared for Montpelier submitted that this application is plain and obvious and that the Court should not be put off by the fact that there were a number of



documents placed before the Court. Counsel relies upon the fact that there is no mention in the Contracts of Sale of any duty or requirement for Montpelier to identify which plan it wished Crown to apply for, despite the fact that Clause 12 indicates that the Contracts “constitute the entire and complete agreement between the parties”.

33. It was submitted that a review of the contemporaneous correspondence, exhibited to the affidavit sworn in support of the application by Paul Keepin, clearly shows that the Defendant has raised a sham Defence. Mr. Pickthall says that the purchasers in any scheme would identify which of the three designs they liked and Crown would then apply for planning permission. However, Counsel submits that the contemporaneous documentation shows that in the present case, a design for each lot was pre-selected for Montpelier.
34. Mr. Jones states that, although Mr. Pickthall does say that a family member of the Pension Contributors, Roberto, worked for Crown at the material time, and he, Mr. Pickthall repeatedly asked Roberto to make sure his relatives selected which of the three designs they wanted, this is not accepted by Montpelier or the Pension contributors. He goes on to submit that it cannot be said that this “requirement” was ever brought to the attention of the Pension Contributors by Roberto, or by anyone else, muchless to the attention of the other contracting party, Montpelier.
35. Mr. Jones summed up by arguing that, when the whole situation is looked at, the irresistible conclusion the Court should reach is that there is no credible defence to Montpelier’s Order 14 application, much less a defence to its O.14A application, and that the Court should give judgment for the Plaintiff.
36. Mr. Huskisson, on the other hand, who appeared for Crown, argued that whilst the contracts in issue did not contain an express clause requiring Montpelier to nominate one of the three designs, the principles established in case law suggest that such a term should be implied. Reference was made to the judgment of Lord Neuberger in the English Supreme Court’s decision in *Marks and Spencer v BNP Paribas* [2015] UKSC 72, para



21, which Counsel cited as authority for the proposition that a term will be implied if it will give business efficacy to the contract or is so obvious that it went without saying.

Mr. Huskisson pointed to the conflict of evidence as to whether Montpelier were actually asked to choose between the designs and he points to that as a classic conflict of evidence which cannot be resolved on a summary judgment application.

38. Crown also prayed in aid of his opposition to the application for summary judgment, the fact that the primary claim seems to be one for restitution, bringing the law of unjust enrichment into play. He submitted that at trial the Court would be entitled to examine the question of whether Montpelier came with clean hands.

39. Further, that there is an alternative claim for damages based on the value of the properties with planning permission. The Statement of Claim refers to the fact that expert evidence would be required at trial for this aspect of the case.

40. The case also raises issues as to penalty clauses. Counsel referred to the decision of the Supreme Court in *Cavendish Square Holdings BV v. Talal El Makdessi* [2015] UKSC 67, and submitted that the test now is whether the consequences of the breach are out of all proportion to the legitimate interests of the innocent party in the enforcement of the primary obligation. He submitted that this point too would require adjudication at trial.

### Discussion and Analysis

41. It has been accepted in this jurisdiction that, although the equivalent English Rule Civil Procedure Rule 24.2 speaks to summary judgment being granted where “*the defendant has no real prospect of successfully defending the claim*”, and that “*there is no other compelling reason why the case or issue should be disposed of at a trial*”, and therefore, on the face of it, the test under Order 14 of the GCR appears higher, that same test as applied in *Swain v Hillman* [2001] 1 All E.R. 91- see for example *Rankine v Scott, Martin and Ebanks*(2008) CILR Note 9, and the unreported judgment of McMillan J in *Rochester v Glasgow* ( delivered 24 November 2015), applies in the Cayman Islands.

42. It is well-known that a summary judgment application should not involve a minute and protracted examination of evidence as to do this would be to usurp the function of the trial judge. It is also plain, that as quoted by Vos JA at paragraph 5 in *Merren v Cayman National Bank* [2008 CILR 428], cited by Mr. Jones, that as Ackner L.J. stated in *Banque de Paris et des Pays-Bas (Suissa S.A. v Costa de Naray* [1984] 1 Lloyd's Rep, 21:

*"It is of course trite law that O, 14 proceedings are not decided by weighing two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendants' having a real or bona fide defence."*

43. In my view, all told, it cannot be said that a review of contemporary correspondence, makes Crown's evidence so incredible in relation to the assertion that the purchasers were required to select one of the three designs, that there is not a real and bona fide defence. In addition, this matter involves some complex issues of law, which need to be resolved against a factual matrix that can only properly be fleshed out at trial.

44. In addition, the issues of unjust enrichment and whether clauses 5 and 6 of Schedule 1 are unenforceable as being penalty clauses would be best determined at trial.

45. The application for summary judgment filed May 25 2016, and the application for relief under Order 14A is dismissed, with costs to the defendant to be taxed if not agreed.

46. The parties are invited to agree a convenient date with the listing officer for further directions to be made in relation to the trial of this matter.

  
THE HON. JUSTICE MANGATAL  
JUDGE OF THE GRAND COURT

