IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO G 247 of 2014

BETWEEN

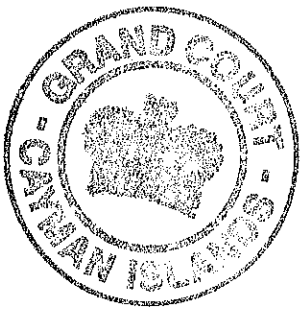
VISTA DEL MAR DEVELOPMENT LTD

Plaintiff

AND

(1) JANET FRANCIS

(2) DWIGHT CLARKE



Defendants

IN OPEN COURT

Appearances:	**Mr. M Imrie and Ms. G Freeman of Maples and Calder representing the Plaintiff** **Mr. H Robinson of Mourant Ozannes representing the Defendants**
Present:	**Mr. Charles Robinson and Mr. Arek Joseph – Representatives of the Company** **Ms. Janet Francis and Mr. Dwight Clarke – Defendants.**
Before:	**The Hon. Justice Ingrid Mangatal**
Heard:	**4, 5, 6 and 7 April 2016**
Draft Judgment Circulated:	**13 September 2016**
Judgment Delivered:	**20 September 2016**

HEADNOTE

Contract - Sale of Land - Specific Performance - Agreement by Purchasers to Commence and Complete Construction within a Specific Time - Deed of Variation - Vendor's Option to Re-Purchase in the Event of Purchaser's Breach - Whether Option Valid and Enforceable - Whether Void for uncertainty - Whether Option Clause imposed primary or secondary obligation - Whether Penalty Clause - Whether Option void for perpetuity - Perpetuities Law (1999) Revision - Whether discretionary Bars, to remedy of Specific Performance – Laches, Unclean Hands.

JUDGMENT

1. The Plaintiff Vista Del Mar Limited ("VDM") is a duly incorporated company, carrying on the business of land developers.

2. VDM entered into an Agreement for Sale dated 6 March 2009 ("the Agreement for Sale") with the Defendants Janet Francis ("Ms. Francis") and Dwight Clarke ("Mr. Clarke") (together referred to as "the Defendants") whereby, amongst other matters, VDM agreed to sell, and the Defendants agreed to purchase from VDM a parcel of land, namely Block 10A parcel 290 in registration section West Bay Beach North ("the Property"). The Property forms part of the Vista Del Mar Development located near the Yacht Club and Salt Creek, in West Bay, Grand Cayman.

3. This is a claim by VDM for specific performance of the Agreement for Sale, as amended by the Deed of Variation of Agreement, the terms of which will be discussed below.

VDM'S CLAIM

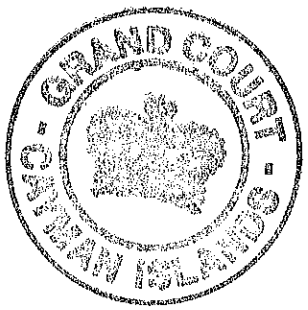
4. The Agreement for Sale contained the following express terms, amongst others:

"Clause 5:

The Purchaser acknowledges and agrees that it is 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 ("the Construction Works"). In relation to the Construction Works, the Purchaser hereby acknowledges and agrees:

Clause 5:1:

GRAND COURT CAYMAN ISLANDS



that it will engage a reputable local building contractor ("the Building Contractor") to undertake the Construction Works, whose appointment will be subject to the Vendor's prior written approval (which shall not be unreasonably withheld or delayed or subject to any unreasonable conditions);

Clause 5.2:

That it will submit to the Vendor a draft of the building contract which it proposes to enter into with the Building Contractor ("the Building Contract") and will not execute same or otherwise allow the Building Contractor to commence the Construction Works until its terms have been approved in writing by the Vendor, such approval not to be unreasonably withheld, delayed or subject to conditions provided such terms comply with the Restrictive Agreements in all respects;

Clause 5.3:

that the Construction Works will be carried out with all reasonable speed and in all respects in accordance with the Restrictive Agreements; and

Clause 5.4:

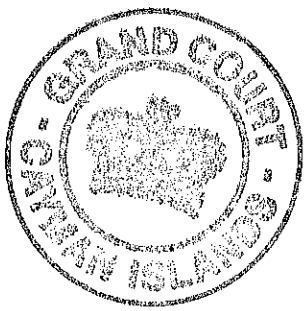
That the Building Contractor will undertake the Construction Works as principal under the Building Contract and not in any way as the Vendor's or any other person's agent, and therefore for the avoidance of doubt that the Purchaser will have no recourse or cause of action against the Vendor whatsoever in connection with the Construction Works notwithstanding the Vendor's approval of them.

Clause 6.1:

The Purchaser acknowledges and agrees that the Property comprises part of the Development and that it is or will be subject to various restrictions, guidelines and regulations from time to

time in force which the Purchaser agrees are necessary for the upkeep and management of the Development....

Clause 6.2:



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 within eighteen (18) calendar months of Completion or to complete such construction by the date of being the third anniversary of the Completion Date, both pursuant to the Restrictive Agreements, then in either case it will upon receipt of the 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.

Clause 6.3:

The Purchaser will not transfer the Property to any third party without that third party having first entered into an agreement with the Vendor in similar terms to Clauses 6.1, 6.2 and this Clause 6.3 and further consents to the Vendor registering a caution in the Land Register after completion regarding the agreement herein contained, which the Vendor agrees to remove immediately upon the completion of the Construction Works.

Clause 7.1:

The Purchaser acknowledges that it will be deemed to have examined or had the opportunity to examine the Property and obtain such legal and other expert advice as it considers appropriate and the Purchaser purchases the Property in its

existing condition and state of repair (including any faults or defects whether latent or patent) and relying on its own enquiries, inspections and investigations.

Clause 7.2 The Purchaser acknowledges that:

(a) no representations, inducements, assurances, warranties or conditions (other than those contained in this Agreement) have been made by the Vendor or its agent or representatives relating to the Property;

(b) if any such representation, inducement, assurance or warranty has been made or if any information or reports have been provided to the Purchaser by the Vendor or its agent or representatives, the Purchaser has not relied on it but has relied on its own independent enquiries, inspections and research and received its own independent expert advice.

Clause 19:

In this Agreement time is of the essence."

(Underlining emphasis mine)

5. The Restrictive Covenants Agreement included the following express covenant, which VDM argue reinforced the requirements of Clauses 5 and 6 of the Agreement for Sale:

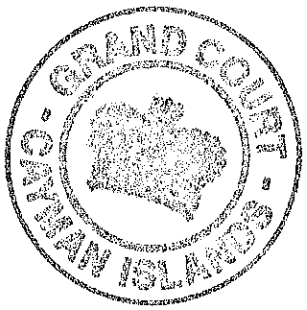
"Clause 5:

...the Property shall not remain unbuilt on for more than eighteen months from the date of registration of these covenants, and construction shall be completed and the Dwelling ready for occupancy within a reasonable length of time thereafter, and in any event within eighteen months from the date of commencement of construction."

6. At paragraph 7 of the Statement of Claim, VDM states that it performed its obligations under the Agreement for Sale, completing the Agreement, and transferred the Property to the Defendants, in accordance with the Agreement for Sale.

7. VDM alleges that in breach of the express terms, the Defendants failed to either commence construction of a residence on the Property within eighteen calendar months of Completion, or to complete such construction by the third anniversary of the Completion Date.

8. On 11 April 2011, VDM and the Defendants entered into a written Deed of Variation to Agreement. The Deed of Variation to Agreement contained, amongst others, the following express terms:



Recital A:

VDM entered into an agreement with Francis & Clarke on 6 March 2009 (which agreement is for the purposes of this Deed called the "Agreement") agreeing to sell to the Purchaser the whole of the land comprised in Parcel 290 Block 10A West Bay Beach North ("Land") for the consideration of Four Hundred and Sixty Two Thousand Four Hundred and Sixty United States Dollars (US$462,460.00).

Recital B:

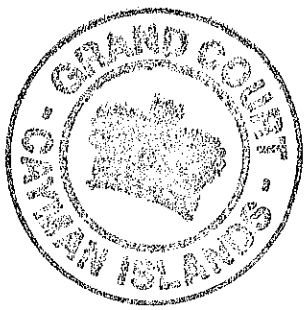
Pursuant to the Agreement, completion of the Agreement (and the transfer of the Land) was effected on or around 8 May 2009.

Recital C:

The Agreement contains various post-completion obligations on the part of Francis & Clarke including (but not limited to) the timing of the commencement and completion of the construction of a residential dwelling on the Land (to the intent that the provisions of the Agreement do not merge on completion) ("Post-Completion Obligations").

Recital D:

Francis & Clarke have requested an extension of time from VDM in relation to the Post-Completion Obligations: VDM has agreed to that extension on the terms and conditions set out in this Deed.



Recital E:

VDM and Francis & Clarke have agreed to enter into this Deed to record the variations to the Agreement agreed between them.

.....

3. *Variation*

.....

3.2 *The Agreement and this Deed shall be read in conjunction and in the event of an inconsistency between the provisions of the Agreement and this Deed, then the provisions of this Deed shall prevail but only to the extent of such inconsistency.*

.....

4. *Variation to the Agreement*

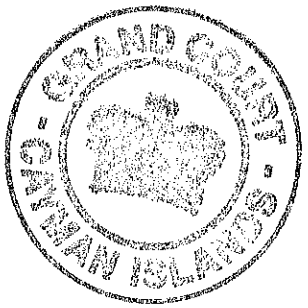
The parties acknowledge and agree that:

Clause 4.1:

The contents of Clause 6.2 are deleted and the following inserted in its place:

> *"Clause 6.2 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."



Clause 4.2:

The contents of Clause 18 are varied by the inclusion of the following new Clause 18.10:

"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."

5. *Confirmation*

The parties acknowledge and agree that the Agreement is deemed to have been executed incorporating the variations set out in this Deed and that in all other respects, the terms and provisions of the Agreement are hereby confirmed.

...."

9. VDM aver, that in breach of the Deed of Variation to Agreement, the Defendants failed to:

a) Commence construction of a residence on the property by 9 January 2012, and

b) Complete such construction by 18 months thereafter.

10. VDM assert that, as at the date of filing the Writ of Summons and Statement of Claim in the instant matter, the Defendants have failed to commence any construction at all.

11. The claim is that at various times between 2 October 2013 and the date of commencement of this action, VDM reserved its entitlement to exercise its right to re-purchase the Property pursuant to Clause 4.1 of the Deed of Variation to the Agreement (the amended Clause 6.2).

12. VDM pleads that on 10 July 2014, the Plaintiff sent a Notice to the Defendant exercising its right to re-purchase the Property. The Defendants acknowledged receipt of the Notice of exercise of option by email dated 23 July 2014, which email did not dispute the contents of the Notice of exercise of option. The Defendants' email noted the courtesies extended to the Defendants to date (which VDM aver was based on constant written and oral assurances from the Defendants that construction would take place) and requested further time to complete the application process with their bank for funding for the construction project and that they expected that this process would be completed shortly.

13. VDM says that nothing further was heard from the Defendants, and on 19 August 2014, it requested the Defendants to complete a Deed of Exercise of Option and Release, containing the following terms:

"3 *Option terms*

The parties agree that closing for the Option is to be exercised on the following basis:

3.1 VDM will pay the Purchase Price to the Proprietor by way of Banker's draft or cashier's cheque drawn on a Class A Licensed Cayman Islands Bank:

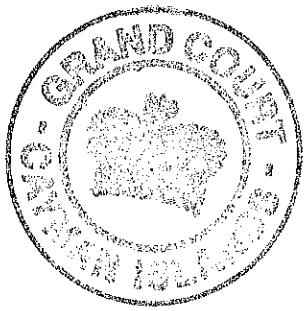
3.2 The Proprietor will deliver to VDM a valid executed instrument of transfer in the form of the transfer in the appendix to this Deed (the "Transfer")

3.3 The Proprietor will deliver to VDM a valid statutory discharge of charge executed by Butterfield Bank (Cayman) Limited in respect to registered charge number 6608/09, together with a cheque payable to CI Government for CI 100.00 in respect of that discharge; and

3.4 Within forty five (45) days of the Date of this Deed, VDM will execute and file the Transfer for stamping and registration at the Land Registry,

(collectively the "Exercise of the Option").

4 Additional Terms



4.1 The Stamp Duty Amount and Registration Fees shall be [sic] *by VDM.*

4.2 In the event that the Valuation Office of the Lands & Survey Department determines that the market value of the Property is higher than the Purchase Price, then VDM agrees to pay for all additional stamp duty which is assessed on the Property over the Purchase price."

14. On 15 September 2014 the Defendants by their attorneys refused to complete the Deed of Exercise of Option and Release.

15. On 5 November 2014, a further Notice was delivered by hand to the Defendants' address (as per the Agreement) in accordance with clause 17 of the Agreement. A copy of the Notice was sent by email to the Defendants' attorneys.

16. VDM allege that, notwithstanding a further request from its attorneys by way of a letter dated 30 October 2014 to complete the purchase of the Property, the Defendants have neglected and refused to take any steps to complete same.

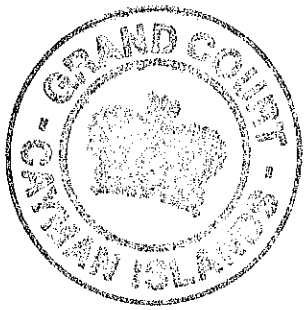
17. VDM claim to have suffered loss and damage as a result of the Defendants' default, namely the costs of enforcing the Agreement and the Deed.

18. The Statement of Claim closes with a claim for the following relief:

"And the Plaintiff claims:

(1) Specific performance of the Agreement for Sale, as Amended by the Deed of Variation to Agreement, in the following manner:

1. Within 7 days, the Plaintiff will pay to the Defendants by way of banker's draft or cashier's cheque drawn on a Class A Licensed Cayman Islands bank, an amount equal to the purchase price of the Property plus the value of the



Construction Works, if any, (as defined in the Deed of Variation of Agreement);

2. *The Defendants will deliver to the Plaintiff a valid executed instrument of transfer;*
3. *The Defendants will deliver to the Plaintiff a valid statutory discharge of charge executed by Butterfield Bank (Cayman) Limited in respect to registered charge number 6608/09, together with a cheque payable to CI Government for CI $100 in respect of that discharge;*
4. *Thereafter, the Plaintiff will execute and file the Transfer for stamping and registration at the Land Registry;*
5. *The Stamp Duty Amount and Registration Fees shall be [sic] by the Plaintiff; and*
6. *In the event that the Valuation Office of the Lands & Survey Department determines that the market value of the Property is higher than the Purchase Price, then the Plaintiff agrees to pay for all additional stamp duty which is assessed on the Property over the Purchase Price.*

(2) Damages

(3) Interest

(4) Costs."

THE DEFENCE

19. The Defence and Counterclaim were amended a number of times; indeed, the final amendment took place on the second day of trial. As it turns out, although a Counterclaim was pleaded, Mr. Robinson, Counsel for the Defendants, candidly conceded that no evidence regarding alleged damages had been forthcoming, and therefore essentially, no Counterclaim arises for adjudication.

20. The Defendants admit that they did not commence construction of a residence on the Property within 18 months of the date of Completion. However, they make no admission that they were under an obligation to do so. They deny that their failure to commence construction of a residence within 18 months of the date of Completion constitutes a breach on which the Plaintiff can now rely at all. They say that in any event, by written Deed of Variation to Agreement dated 11 April 2011, Clause 6.2 of the Agreement for Sale was varied to the effect that the words '*by 9 January 2012*' were inserted to replace the words '*within eighteen (18) calendar months of completion*'.

21. The Defendants admit that they have not commenced construction of a residence on the Property as at the date of their Defence and Counterclaim. They further deny that their failure to commence construction constitutes at present a breach of the Deed of Variation to Agreement, to the extent that it is being alleged that the Deed of Variation to Agreement created an obligation on the Defendants to commence construction, or, if it is being so alleged, a breach of the Agreement for Sale.

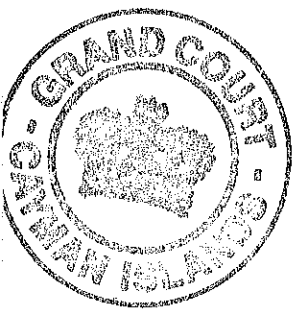
22. The Defendants also deny that the Plaintiff had a right to re-purchase the Property as at 2 October 2013, or at any time between 2 October 2013 and the date of commencement of this action, whether created by Clause 4.1 of the Deed of Variation to Agreement as alleged or otherwise. The Defendants make no admission that the particulars provided constitute an effective reservation of rights if, which is denied, any such rights existed.

23. The Defendants admit that VDM's attorneys-at-law sent to Ms. Francis by registered post a letter dated 10 July 2014. However, they deny that the Plaintiff had a right to re-purchase the Property on 10 July 2014 or at any time subsequent to that date.

24. The Defendants deny that 'nothing was heard from the Defendants' subsequent to the letter dated 10 July 2014. They aver that subsequent to the letter, the Defendants communicated with the Plaintiff's attorneys-at-law with respect to steps being taken by the Defendants preparatory to commencement of construction on the Property.

25. The Defendants admit that on 19 August 2014, the Plaintiff's attorney-at-law sent an email to Ms. Francis attaching a document titled ' Deed of Exercise of Option and Release' ("the Deed of Exercise of Option") containing the terms quoted and an Instrument of Transfer in respect of the Property requesting that the Defendants sign and return the documents.

26. The Defendants admit that by letter from their attorneys-at-law dated 15 September 2014, they refused to sign and return to VDM's attorneys-at-law the Deed of Exercise of Option and the Instrument of Transfer. The Defendants in paragraph 13 of the Re-Amended Defence say that they were entitled to refuse to sign and return the Deed of Option and Instrument of Transfer on the following grounds:



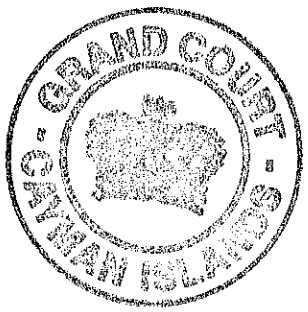
"13.1 The Agreement for Sale as varied by the Deed of Variation to Agreement created no valid or enforceable option in favour of the Plaintiff to re-purchase the Property; since-

13.1.1 The terms of the Agreement for Sale as varied by the Deed of Variation to Agreement are ineffectual to create a valid or enforceable option to re-purchase the Property; and

13.1.2 The Plaintiff provided no consideration to the Defendants for the grant of the alleged option to re-purchase the Property.

13.2 If, which is denied, a valid and enforceable option to re-purchase the Property has been created by the Agreement for Sale as amended by the Deed of Variation to Agreement, by the date of the purported exercise of the alleged option such an option had lapsed, since-

13.2.1 By clause 19 of the Agreement for Sale, time was expressly made of the essence of the contract. Further, the nature and circumstances of the contract and the nature of the subject matter of the contract implied that any stipulations as to time ought to have been strictly complied with.



13.2.2 The Plaintiff was therefore under an obligation to exercise any right to re-purchase the Property promptly upon the date that any such right arose or, in the alternative, within a reasonable time thereafter, but in any event, well before the first date of any request by the Plaintiff that the Defendants re-sell the Property to the Plaintiff.

.....

13.2.4 The Plaintiff failed to comply with the timetable specified for the exercise of the option in its notice dated 14 October 2013.

....."

27. In the Re-Amended Defence, the Defendants had pleaded that further, or alternatively, if, which they did not admit, they were under an obligation by virtue of the Agreement for Sale as amended by the Deed of Variation to Agreement, to commence construction of a residence on the Property by 9 January 2012 and to complete such construction within 18 months thereafter, and if, (which they also did not admit), their failure to commence and complete construction constituted a breach of contract, VDM, with full knowledge of its legal rights, acknowledged the facts giving rise to the alleged breach, and affirmed the contract without fixing by agreement with the Defendants a new date by which the Defendants ought to have commenced and/or completed construction of a residence on the Property. Particulars of this averment were set out in paragraph 16 of the Re-Amended Defence and written submissions by both sides originally addressed this issue. However, in the course of his closing arguments, Mr. Robinson conceded that this averment should be abandoned. He conceded that whilst the Defendants have not pleaded waiver, in his view they would nevertheless have been entitled to plead affirmation, which would in principle be a separate consideration from waiver. However, Counsel conceded that on the facts of this case, the Defendants could not make out either of these matters. I therefore have not addressed the issue of affirmation since it no longer forms a part of the Defendants' case.

28. The Defendants make the further or alternative averment in paragraph 17 that, the enforcement of any obligation on their part to re-sell the Property to VDM at this time would constitute a penalty, and that clause 6.2 of the Agreement for Sale, as amended, to the extent that it gives rise to such an obligation is, on that basis, unenforceable. The pleading develops the penalty point as follows:

"17.1 The Plaintiff has sold all the lots it previously owned in the Vista Del Mar development scheme, and has transferred all the common property it previously held to Vista Sur Maintenance Co. Ltd., (the Guarantee Company), the company limited by guarantee established to take title to, maintain and upkeep the common property with the development after the Plaintiff, as developer, has sold all its lots.

17.2 Having sold all its lots, the Plaintiff is not, and is not entitled to become, a member of the Guarantee Company, and has no proprietary interest in the development.

17.3 The Plaintiff therefore has no legitimate commercial or other benefit to be derived from the defendants' performance of any obligation to construct a residence on the Property.

17.4 The value of the Property has increased significantly since the Completion of the Agreement for Sale. The Defendants have also incurred significant costs and expense preparing for construction of a residence on the Property, and also in interest payments on the loan to finance the purchase of the Property.

17.5 The benefit to the Plaintiff from re-purchasing the Property at the present time, would constitute a massive windfall to the Plaintiff, entirely out of proportion to any loss, no such loss being admitted, which the Plaintiff has suffered by virtue of the Defendants' failure to commence construction.

17.6 Further, the enforcement of Clause 6.2 of the Agreement for Sale would, at this time, impose a detriment on the Defendants entirely

out of proportion to any legitimate commercial or other interest which the Plaintiff has, any such interest being denied, in the enforcement of the provision.

....."

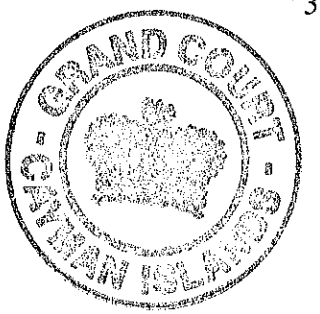
29. The Defendants also deny that the Plaintiff is entitled to specific performance as alleged at paragraph 19 (1) of the prayer in the Statement of Claim, whether in the terms claimed or at all. In particular, at paragraph 19 of the Re-Amended Defence, the Defendants say-

> *"19.1 The purported option to re-purchase the Property in the absence of consideration would constitute an entirely gratuitous bargain unenforceable by specific performance.*
>
> *19.2 Further, or alternatively, the Court should in its discretion refuse to grant specific performance on the grounds of:*
>
> *19.2.1 Laches arising from the Plaintiff's delay in seeking specific performance from the date on which any right to specific performance would have first arisen;*
>
> *19.2.2 The Plaintiff's lack of clean hands by failing to impose the obligation to construct a residence on all owners of lots within the development scheme, and by failing to enforce the covenant to commence and complete construction against other owners within the development scheme notwithstanding the fact that the time agreed by such owner or owners to have commenced or complete construction had also elapsed."*

VDM'S REPLY

30. In its Reply, VDM denies that it failed to act in a timely manner, and makes reference to Clause 4.2 of the Deed of Variation of Agreement. VDM state that if, which is denied, it did not act in a timely manner in the exercise of its rights under the Agreement for Sale as amended by the Deed of Variation of Agreement, such a delay cannot constitute a waiver by the Plaintiff of its right to enforce clause 4.1 of the Deed of Variation of Agreement.

31. At paragraph 3.4 VDM pleads as follows, and provides detailed Particulars of Forbearance:



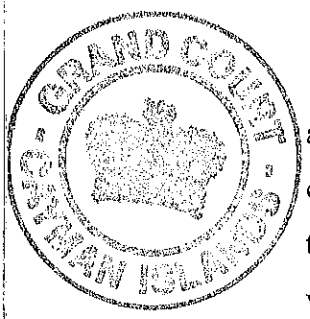
> *"3.4 Further or alternatively, any temporary forbearance by the Plaintiff in exercising its rights under the Agreement for Sale was solely the result of the Defendants' repeated statements and assurances that commencement of construction was imminent. In the premises, the Defendants cannot take advantage of the Plaintiff'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, as more particularly pleaded below.*
>
> ……"

32. At paragraph 6, VDM responds as follows:

> *"6. As to paragraph 13.1, the Plaintiff's primary position is that no consideration was required because the amendment to the Agreement for Sale was achieved by way of a deed. Further or alternatively, if any consideration was required, the mutual consideration for the Deed of Variation of sale included the Plaintiff's forbearance in enforcement of the Plaintiff's rights to exercise its option to re-purchase the property and the mutual exchange of promises as set out in the Deed of Variation of Sale."*

THE WITNESSES

33. Mr. Arek Joseph, an architect by profession, employed to VDM, and a consultant to Mr. Guillermo Freytag, principal of VDM, and to VDM at material times, gave evidence on behalf of VDM. Ms. Francis gave evidence on behalf of herself and Mr. Clarke. Mr. David Groves, Chartered Surveyor, of DDL Studio, was called as a witness on behalf of the Defendants to give evidence about the market value of the property. Both Mr. Joseph



and Ms. Francis signed witness statements which served as evidence in examination in chief. Mr. Groves produced an Expert Report dated 20 January 2016. He gave evidence that the market value of the property as at January 2016 was US$664,000. All witnesses were cross-examined.

34. There are numerous issues that arise for consideration in this case, many of them having been raised by the Defendants, in the pleadings and in submissions. Some appear to involve mainly points of Law. It is in my view convenient to discuss and resolve this matter by addressing these issues.

ISSUE NO.1:

WHETHER THE DEFENDANTS WERE, BY VIRTUE OF THE TERMS OF THE AGREEMENT FOR SALE, UNDER AN OBLIGATION TO COMMENCE CONSTRUCTION OF A RESIDENCE ON THE PROPERTY WITHIN 18 MONTHS OF THE COMPLETION DATE IN THE AGREEMENT FOR SALE OR TO COMPLETE SUCH CONSTRUCTION BY THE THIRD ANNIVERSARY OF THAT COMPLETION DATE – WHETHER THEIR ADMITTED FAILURE TO DO SO CONSTITUTED OR WAS CAPABLE OF CONSTITUTING A BREACH OF THE AGREEMENT FOR SALE.

ISSUE NO.2:

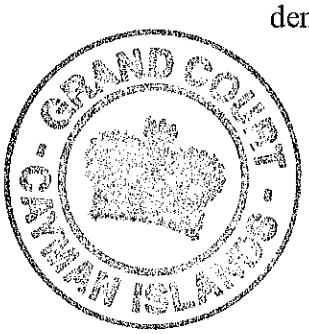
WHETHER THE DEFENDANTS WERE, BY VIRTUE OF THE TERMS OF THE DEED OF VARIATION OF AGREEMENT UNDER AN OBLIGATION TO COMMENCE CONSTRUCTION OF A RESIDENCE ON THE PROPERTY BY 9 JANUARY 2012 OR TO COMPLETE SUCH CONSTRUCTION BY 18 MONTHS THEREAFTER-WHETHER THEIR ADMITTED FAILURE TO DO SO CONSTITUTED OR WAS CAPABLE OF CONSTITUTING A BREACH OF THE DEED OF VARIATION OF AGREEMENT

35. It is in the pleadings, in the Re-Amended Defence and Counterclaim, that most of these issues have been raised by the Defendants.

36. It seems convenient to deal with these two issues together. Mr. Imrie, Counsel for VDM describes the Vista Del Mar Development as a luxury residential neighbourhood located near the Yacht Club and Salt Creek, West Bay, Grand Cayman. Owners of properties in the development, the submission continues, are bound by various covenants to ensure that their properties meet a high standard. He submitted that neighbours have rights and

obligations in respect of each other, including that the appearance and value of all properties in the community be preserved.

37. Mr. Imrie submits that the Recitals to the Deed of Variation merit consideration by the Court, especially in light of the arguments being put forward by the Defendants. Recitals A-E (inclusive), are set out at paragraph 8 above. It was submitted that the Recitals demonstrate that the Defendants:

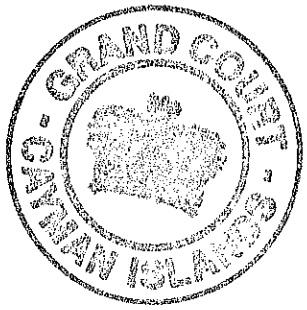


1) accepted that the obligations to commence and complete construction were enforceable;
2) were in breach of those obligations;
3) requested an extension of time from VDM; and
4) obtained that extension by way of an amendment to clause 6.2 of the Agreement for Sale.

38. I note that although the pleaded Defence raised these points in paragraphs 7-9, the written skeleton submissions on behalf of the Defendants, do not really seem to address the matters set out in Issues No. 1 or 2. However, VDM's written skeleton submissions have discussed these matters and thus I have considered them.

39. In her Witness Statement, at paragraphs 5-7 (inclusive), Ms. Francis, in particular at paragraph 7, seems to raise another allegation. She claimed that certain oral representations were made by Mr. Freytag, which in part, she alleged, induced her to enter into the Agreement for Sale. Mr. Imrie correctly observes that these matters are not a pleaded defence. However, this is what Ms. Francis said in her Witness Statement, at paragraph 7:

> "....
>
> 7. *After Dwight and I decided to purchase the property (Parcel 290), I again wrote to Mr. Joseph by letter dated 4 February 2009, and pointed out that we would not be able to commence construction*



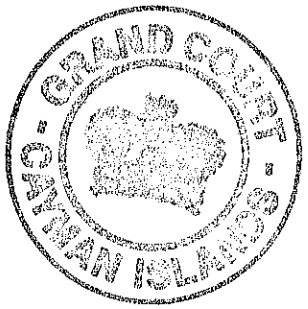
within 18 months of completion. At Mr. Joseph's suggestion, I met with the former principal of VDM, Mr. Guillermo ('Gil') Freytag, to discuss the issue. I made it clear to Mr. Freytag that I would not be able to proceed with construction within 18 months of completion. He specifically told me that though I would be required to sign the Agreement for Sale in the form proposed, the requirement would be relaxed or not enforced. I got the impression that strict compliance with this requirement was not a high priority for VDM. In fact, Mr. Freytag advised me that VDM had only enforced the construction covenant once prior, in circumstances where the purchaser in question took absolutely no steps whatsoever to proceed to construction such as to prepare plans and engage professionals. Further, Mr. Freytag advised me that the purpose of the covenant was to prevent persons speculating on the lots and the important issue was that progress was being made towards development. According to Mr. Freytag, merely filling the land would constitute commencement of construction. I signed the Agreement for Sale on this basis."

40. Mr. Imrie referred to Clause 7.2 and 20 of the Agreement for Sale, which state as follows:

"7.2. The Purchaser acknowledges that:

(a) no representations, inducements, assurances, warranties or conditions (other than those contained in this Agreement) have been made by the Vendor or its agent or its representatives related to the Property, or

(b) if any such representation, inducement, assurance or warranty has been made or if any information or reports have been provided to the purchaser by the vendor or its agent or representatives, the purchaser has not relied on it, but has relied on its own independent enquiries, inspections and research and received its own independent expert advice.



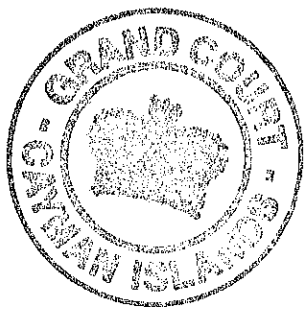
.....

20. Any variation, modification, waiver or consent pursuant to this Agreement must be made in writing"

41. In cross-examination, Ms. Francis indicated that she is an experienced Corporate and Commercial Attorney. Mr. Clarke is a Manager of Corporate Quality Assurance and Regulatory Compliance with Cayman Airways. Ms. Francis also indicated that, in addition to Vista Del Mar, she owns three other properties. Her evidence was that Mr. Clarke owns at least three properties. As regards her own purchases, Ms. Francis indicated that her purchases were all done using financing from banks. She agreed with Counsel that based upon her participation in these property purchases, she has a good knowledge of Cayman property law.

42. In cross-examination, Ms. Francis was referred to the relevant Clauses by Mr. Imrie. This is what transpired in relation to Clause 7.2 in cross-examination on 5 April 2016:

> *"M.IMRIE: Now could you turn back to page 13 please? That should have Clause 7.2 at the top of the page. There's 7.2 (a) and (b). I'm just concentrating on those clauses. Let me know when you've had a chance to read them.*
>
> *J. FRANCIS: I have.*
>
> *M.IMRIE: Would you agree, based on your experience as an attorney that these types of clauses are commonly found in commercial agreements?*
>
> *J. Francis: Yes.*
>
> *M.IMRIE: And would you accept that this type of clause is intended to restrict the terms of the agreement to the four corners of the document and prevent arguments about oral representations, inducements or assurances?*
>
> *J. Francis: Yes.*



M IMRIE: So would you agree then, that if indeed Mr. Freytag had made any oral representations or assurances to you, as you've alleged, you had agreed in Clause 7.2(b) not to rely on them?
J. Francis: Yes. "

43. In cross-examination, Ms. Francis also agreed that the intention of Clause 20 is to prevent allegations of oral or implied or inferred variations or amendments. She also accepted that when the parties did agree to vary the dates for compliance it was done by written deed in April 2011 and that it was a matter of good commercial practice to make variations in writing.

44. It would therefore in my view, seem clear that it is the written Agreement for Sale and the written Deed of Variation of Agreement that this Court will be required to construe.

DISCUSSION AND ANALYSIS OF ISSUE NOs. 1 AND 2

45. In my judgment, having regard to the clear terms of the Agreement for Sale, and the Deed of Variation to Agreement, in particular Clause 6.2, 7.2, and 20, the Recitals to the Deed of Variation to Agreement, and Clauses 3.2 and 4.2 of the Deed of Variation to Agreement, there was plainly an obligation on the Defendants to commence and complete construction, as required firstly by the Agreement for Sale, and then subsequently the Deed of Variation to Agreement.

46. In my judgment, failure to carry out this obligation was clearly capable of amounting to a breach of contract. The fact that Clause 6.3 would have allowed the Purchaser to transfer the Property to a third party, (but only with the same stipulations as to construction), does not in my view, as argued by Mr. Robinson, render a failure on the part of the Defendants to construct as stipulated, incapable of constituting a breach of contract. This is because there was plainly a primary obligation on the Defendants to carry out construction. This was in keeping with one of the objectives of VDM, accepted by the Defendants and agreed to by them, of maintaining a certain standard for this Development. The question

of selling to a third party only arose if the Defendants breached their obligation to construct. In any event, the sale to a third party could only take place on the basis of the new purchaser entering into an agreement with VDM in similar terms to Clauses 6.1, 6.2 and 6.3 of the Agreement for Sale. Further, it is also the case that the Defendants did not in fact so transfer the Property to any third party; they made no such request of VDM. The Defendants by virtue of Clause 6.3 had agreed to VDM registering a caution in the Land Register after completion, in relation to this agreement, and VDM had agreed to remove the caution immediately upon the completion of the construction works. (My emphasis). Thus, I accept Mr. Imrie's submission that a transfer to a third party would have to take place with VDM's knowledge, and agreement. It is with VDM itself that Clause 6.3 requires the third party to enter into an agreement. Thus in my view, the terms of Clause 6.3, properly construed, cannot and do not mean, purport or suggest that the failure to commence or to construct as required, was incapable of amounting to a breach or default.

ISSUE NO. 3:

WHETHER THE AGREEMENT FOR SALE AS VARIED BY THE DEED OF VARIATION TO AGREEMENT CREATED A VALID AND ENFORCEABLE OPTION IN FAVOUR OF VDM TO RE-PURCHASE THE PROPERTY.

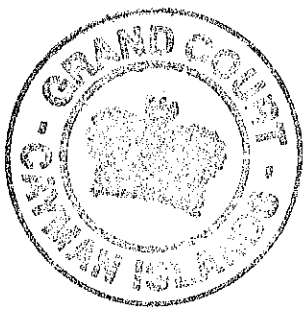
- **(1) Whether the terms of the Agreement for Sale as varied by the Deed of Variation of Agreement were ineffectual to create a valid or enforceable option to re-purchase the Property.**
- **(2) Whether VDM provided no consideration to the Defendants for the grant of the alleged option to re-purchase the Property.**

47. In its written submissions, VDM states that in its view, in relation to Issue 3(1), the terms and language of Clause 6.2, both in its original form, and as amended, are plain and precise. Further, it is argued that the Defendants acknowledged the effect of the Clause in Recital C to the Deed of Variation to Agreement and therefore they should be estopped from denying it now. As regards the format of the option, it was submitted that there is no requirement that an Option Agreement be contained in a separate document.

48. In relation to Issue 3(2), Mr. Imrie submitted that there is no requirement that an option must be the subject of separate consideration. Here, Counsel points out, the Option formed part of the original Agreement for Sale and thus the requirement for consideration is met by the mutual rights and obligations of the bargain which the parties entered into. He submitted that an undertaking to sell back to the original seller will be enforceable even though the consideration for the option may be only nominal. So long as there is a binding contract to keep the option (i.e. offer to sell) open, it is enforceable.

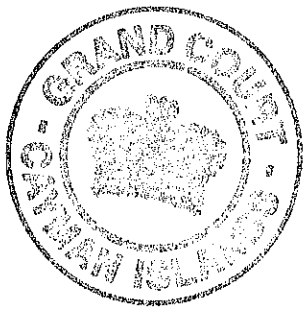
49. The submission continues that in any event, the option being enforced was amended by the Deed of Variation. Counsel submitted that no consideration is required for an agreement entered into by way of deed.

50. Nevertheless, Mr. Imrie posited that there was mutual consideration for the Deed of Variation as follows:



A. VDM's extension of the time for compliance, and the restatement of new dates for the Post-Completion Obligations (as defined in the Deed of Variation) in exchange for the Defendants' promise to commence construction by 9 July 2012; and
B. The Defendants' mutual agreement that no exercise or lack of exercise of a right constitutes a waiver by the VDM of any other right or remedy.

51. In relation to Issue 3(1), Mr. Robinson, on behalf of the Defendants submitted that the elements of an option are not present and he argued that Clause 6.2 does not create an option. Reference was made to *Halsbury's Laws of England*, 5th Edition, (Volume 23(2013), where at paragraph 159, the definition of an option is set out as follows:



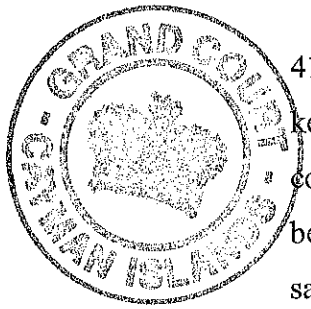
"An option to purchase is, in effect, an offer to sell which is irrevocable for a stated period or until a stated event, made by the grantor of the option to the grantee. The grantee is entitled to convert the offer into a concluded contract to buy on giving the prescribed notice and complying with the conditions on which the option may be exercisable in any particular case. There must be a binding contract to keep the offer open which requires either a deed or valuable consideration."

52. Counsel submitted that there is nothing in the nature of an option in clause 6.2; it has no stated time period of operation. Had there been a valid option to purchase, Counsel suggests, the Defendants would have been obliged to keep the offer open and could not sell the property to any other purchaser. The Defendants were under no such obligation. Reference was also made to paragraph 23.2 of Mr. Joseph's Reply Witness Statement, where Mr. Joseph stated:

> *"23.2 Lots 248 and 286 are currently undeveloped but the owners (having received notices informing them of VDM's right to buy back to [sic] Property) have decided to put these lots up for sale on the open market of their own accord. Any subsequent buyers will be subject to the same exact clause and covenant in its contract for sale* [clause 6.3] *and will be treated as every lot owner has been with respect to enforcement of their obligations in this respect .Lots 248 and 286 had extended their build start dates with VDM. Lot 244 is currently not developed-this is the owner's third lot at VDM."*

53. Mr. Robinson contends that what this means is that VDM clearly acknowledges that purchasers under agreements subject to similar conditions were entitled to place the property for sale on the open market.

54. In relation to Issue No. 3(2), it was argued that specific performance will not be granted of a voluntary contract, even if effected by deed. Reference was made to ***Jeffers v Jeffers***



41 ER 443 DAB Vol1, Tab 8. It was posited that the consideration is the price for keeping the offer open until it is exercised, or until it lapses. Counsel submitted that the consideration for the option is separate from the consideration for the Agreement for Sale because, an option would constitute a separate agreement even if it was contained in the same document.

55. In response to VDM' s assertion that no consideration was necessary since the variation was effected by Deed, it was Mr. Robinson's submission that the Deed of Variation created no new obligation; it merely extended the time within which the Defendants could commence construction as provided in Clause 6.2.

56. In relation to VDM's reliance upon acts of "forbearance", Counsel submitted that at their highest, those alleged acts of forbearance related to the agreement to extend time, not to the alleged grant of the option. It is the Defendants' stance that there were no acts of forbearance at the time clause 6.2 was entered into, and further, that to be relevant, the consideration relied upon must be referable to the making of the offer to sell, not the time as to when the offer might be accepted.

57. Mr. Robinson also argued that the option is void for uncertainty and that the purported option breaches the Rule against Perpetuities. These matters, as Mr. Imrie pointed out, were not expressly pleaded. Mr. Robinson took the view that since he had pleaded that the terms are ineffectual to create a valid option, he could argue the uncertainty and perpetuity point under those heads. Mr. Imrie has responded to those points, as I understand it, because he is not minded to take an objection on the basis of an insufficiency of pleading. I have therefore addressed them.

58. Mr. Robinson submitted that in any event, even if there is deemed to have been valuable consideration for the grant of an option, Clause 6.2, if it were intended to be an option, would be void for uncertainty. It was Counsel's submission that the time within which an option may be exercised is an essential term of an option and must therefore be certain. It was posited that the Court will refuse to enforce a contract which is vague and uncertain

and incapable of enforcement without the addition of further terms. Reference was made to the decision of ***Scammel v. Ouston*** [1941] AC 251and to the case of ***Australian Blue Metal Ltd. v Hughes*** [1963] AC 74.

59. Mr. Robinson argued that Clause 6.2 prescribes no time as to when, after the date for commencement of construction has passed, the purported option may be exercised by VDM. There is no objective basis, he submitted, which the Court may use to determine within what time the parties intended that the claimed option may be exercised.

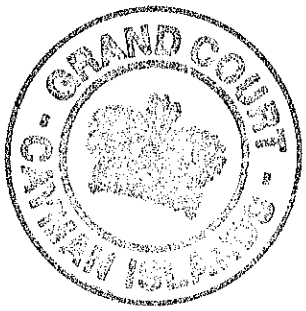
60. As regards, the rule against perpetuities, it was Counsel's initial submission that an option to purchase without any time limit for its exercise would breach the common law rule against perpetuities. Reference was made to *Halsbury's Laws of England*, Volume 23, paragraph 159, and ***London and South Western Railway Company v Gomm*** (1882) 20 Ch. 562. However, Counsel subsequently appreciated that the submission had to address the ***Perpetuities Law (1999 Revision)***. It was Mr. Robinson's submission that, to the extent that the alleged Option in Clause 6.2 did not state a period within which it ought to be exercised, it is void.

DISCUSSION AND ANALYSIS OF ISSUE NO. 3

61. I agree with Mr. Imrie's submission that the fact that the Defendants could have sold the Property to a third party does not render unmet the requirement that an option to sell be irrevocable. This is because the option could be brought to an end in one of two ways; either the completion of construction, or the Defendants could transfer the Property to a third party in accordance with Clause 6.3 - the Defendants ability to sell was subject to preservation of the option in Clause 6.2. As stated in the passage from *Halsbury's* cited above, an Option to Purchase is in effect an offer to sell which is irrevocable until a stated event. I accept that the stated event is completion of construction or the transfer to a third party in accordance with Clause 6.3.

62. However, in any event, as to there being no stated time in the option, whether the option is void for uncertainty, and as to certain aspects of the perpetuities point, and as to the

issue of consideration, the case of ***Hutton v Watling*** [1948] 1 Ch. 26, cited by Mr. Imrie is very useful and has assisted me in coming to my conclusions. The Headnote states as follows:



"An agreement in writing, dated September 6, 1937, in which the vendors sold to the purchaser a dairy business, contained the following provision: "In the event of purchaser wishing at any future date to purchase the property in which the business is situated, she had the option of purchase at a price not exceeding 450 l." In 1944 the purchaser purported to exercise the option, but the vendors resisted her claim to have effectually done so on the ground (inter alia) that the option provision was void as infringing the rule against perpetuities. The purchaser having commenced an action for specific performance against the vendors:-

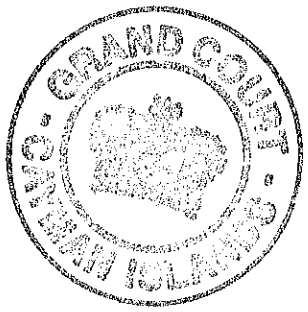
Held, that the rule against perpetuities afforded no bar to the relief by way of specific performances[sic] *claimed by one of the original parties to the agreement against the other.*

..."

63. Having at page 28 observed that the provision conferring the option on the plaintiff imposed no time limit within which it was to be exercised. Jenkins J then went on to examine, at pages 30 and 35-36, issues of consideration, validity and enforceability, as follows:

Page 30:

"... Secondly, it was contended on behalf of the defendants that as a matter of construction of the document of September 6, 1937, the provision conferring the option on the plaintiff was an independent stipulation, which formed no part of the agreement for sale of the goodwill, stock and fixtures, and it was submitted on this additional or



alternative ground that the option was unenforceable for want of consideration to support it.

In my judgment this contention is untenable. One has only to look at the document to see that the option provision was clearly one of the terms of the agreement of sale and purchase as therein recorded, and was therefore by no means without consideration for its support. I hold, accordingly, that the second ground of defence must also be rejected.

Thirdly and finally, it is alleged in para.5 of the defence that the option provision (which it will be remembered imposed no limit as regards the time within which the option was to be exercised) is void as infringing the rule against perpetuities, and Mr. Bowyer contended before me that the option provision was wholly void on this ground even as between the plaintiff and the defendants, although themselves the actual parties to the agreement by which the option was conferred."

....

Pages 35-36:

"The Associated Portland Cement Manufacturers case therefore, appears to me to provide clear authority, which is, of course, binding on me, to the effect that an option to purchase land without limit as regards time is specifically enforceable as a matter of personal contract against the original grantor of the option, and that the rule against perpetuities has no relevance to such a case, as distinct from a case in which such an option is sought to be enforced against some successor in title of the original grantor, not by virtue of any contractual obligation on the part of the successor in title, but by virtue of the equitable interest in the land conferred on the grantee by the option agreement.

I was referred to passages in certain well known text-books from which it appeared that the learned authors had doubts as to the correctness of the exposition of the law on this topic contained in the Associated Portland Cement Manufacturers case, so far as it involves the conclusion that an option agreement unlimited in point of time is specifically enforceable

against the original grantor, notwithstanding the rule against perpetuities (see Williams on Vendor and Purchaser, 4th ed., pp. 366 and 367). These doubts appear to me to be ill-founded, as I understand the jurisdiction to grant specific performance of a contract for the sale of land to be founded not on the equitable interest in the land which the contract is regarded as conferring upon the purchaser, but on the simple ground that damages will not afford an adequate remedy; in other words, specific performance is merely an equitable mode of enforcing a personal obligation with which the rule against perpetuities has nothing to do...."

(Underlining emphasis mine)

64. In my judgment, the reasoning of Jenkins J is plainly sound. In the instant case, the plaintiff is seeking specific performance against the Defendants, who are the original grantors, and the relief is being sought in the equitable mode of specific performance of a personal obligation, which has nothing to do with the rule against perpetuities. This is because the jurisdiction is not founded on the equitable interest in land which the contract is regarded as conferring on the purchasers, but rather upon the discretion of the Court to grant equitable remedies where damages will not be an adequate remedy.

65. However, in any event, I will now turn to examine briefly the relevant provisions of the ***Perpetuities Law*** to which I have been referred. Section s 3, 4, sub-section 5(1) and section 17 provide as follows:

> *"Application of this Law.*
>
> *3. Except where it is otherwise expressly provided, this Law applies only in relation to dispositions made by instruments coming into effect on or after the 1st August 1995, other than dispositions made in exercise of special powers of appointment created before the 1st August, 1995.*

Rule against perpetuities

4(1) Subject to the other sections of this Law-

(a) A disposition creating a non-vested interest in property becomes void for perpetuity if the interest fails to vest by the end of the perpetuity period;

(b) Where a disposition consists of the creation of a general power of appointment, the power becomes void for perpetuity if it does not become exercisable by the end of the perpetuity period;

(c) Where a disposition consists of the creation of a special power of appointment, the power becomes void for perpetuity insofar as the power is not fully exercised by the end of the perpetuity period; and

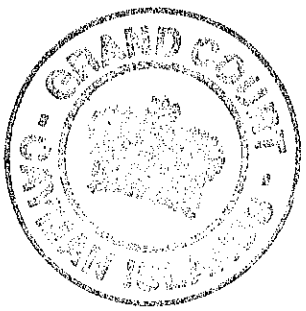
(d) Where a disposition is made of an interest in property subject to a provision for divesting or determination, the provision becomes vow [sic] *for perpetuity at the end of the perpetuity period unless it then is certain to take effect or its taking effect would serve only to accelerate possession of a vested interest, not being an interest by way of resulting trust;*

(2) Until the end of the perpetuity period, a disposition shall be treated as if it were not subject to the rule against perpetuities; and its becoming void for perpetuity shall not affect the validity of anything previously done in relation to the interest disposed of by way of advancement, application of intermediate income or otherwise.

(3) Save as provided in this Law, no disposition or any provision of a disposition is void for perpetuity or liable to become void for perpetuity.

Perpetuity period

5(1) Subject to subsections (2) to (4), the perpetuity the perpetuity period applicable to a disposition is the period of one hundred and fifty



years commencing at the effective date of the instrument by which the disposition is made.

.....

....

Abolition of the modern rule against perpetuities

17. Subject to section 3, the rule of the common law sometimes known as the modern rule against perpetuities and any rule of the common law prohibiting-

(a) the limitation, after a life interest to an unborn person, of an interest in land to the unborn child or other issue of an unborn person; or

(b) a trust of excessive duration,

are hereby abolished without prejudice to the other provisions of this Law."

(Underlining emphasis mine)

66. In my judgment, even if the ***Perpetuities Law*** applies to the instant case, which for reasons previously outlined above, in relation to the jurisdiction of specific performance I say it does not, unlike the common law position, a disposition only becomes void if there is a failure to vest by the end of the perpetuities period, which under the legislation is 150 years. Plainly the option under consideration could not fail by reason of the Law as set out in the ***Perpetuities Law***.

67. As regards Issue 3(2), it is clear to me that there was consideration for the option based upon the plain words of the Agreement for Sale. In any event, the option which it is sought to be enforced was amended by the Deed of Variation and no consideration is required for an agreement entered into by way of deed. Further, the Defendants plainly acknowledged the effect of Clause 6.2 in Recital C to the Deed of Variation, and at Recital D it was expressly recorded that the Defendants had requested an extension of time in relation to the post-completion obligations. Further, that VDM had agreed to that

extension on the terms and conditions recorded in the Deed, which included the terms of the amended Clause 6.2.

68. As regards the issue raised in relation to whether the Defendants are pure volunteers, and in respect of which reliance was placed upon the case of ***Jeffers v Jeffers***, it is clear that that case is distinguishable because here the Defendants cannot be described as mere volunteers; they are participants in a commercial transaction. That point would therefore also fall away with the consideration argument.

69. In my judgment, there was therefore a valuable and enforceable option in favour of VDM to repurchase the Property.

ISSUE NO. 4:

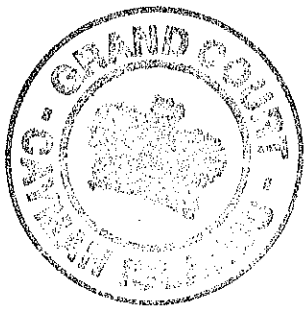
ALTERNATIVELY, IF A VALID AND ENFORCEABE OPTION TO RE-PURCHASE THE PROPERTY DID EXIST, HAD SUCH AN OPTION BY THE DATE OF THE PURPORTED EXERCISE OF IT BY VDM LAPSED.

- **(1) Because of the Time of the Essence Clause in the Agreement for Sale.**
- **(2) Because VDM failed to comply with the timetable specified for the exercise of the option in its Notice dated 14 October 2013.**

70. In relation to Issue No. 4(2), the Defendants argue that even if VDM had a valid right to repurchase the Defendants' property, such right lapsed before 10 July 2014, the date of the notice relied on by VDM in the pleadings, and in any event, it was submitted, well before this action was filed.

71. It was argued by Mr. Robinson that the Agreement for Sale expressly provides that time is of the essence of the contract and that it is trite that such a provision applies to the obligations of both the vendor and the purchaser. In any event, he submitted, even in the absence of a clause making time of the essence, the court will imply that time is of the essence of a unilateral contract, in the nature of an option to purchase. Reference was

made to ***United Scientific Holdings v Burnley Borough Council*** [1978] AC 904, where, at page 928, Lord Diplock stated:



> *"Both in the Court of Chancery and in the courts of common law the rules that have been developed about particular stipulations not being of the essence of the contract or not being 'conditions precedent" applied to synallagmatic contracts only. They did not apply to unilateral or "if contracts", of which the most germane to the instant appeal is an option."*

72. Mr. Robinson refers to the fact that VDM first served notice of its intention to purchase the property by letter from Maples and Calder dated 14 October 2013. The letter states that "*VDM wishes to effect the transfer of the Land within 30 days of the date of this Letter*", that is, by 13 November 2013. The letter further stated that VDM would provide a Form of Transfer. However, Mr. Robinson points out that no form of Transfer was provided, and neither was there a tender by VDM of the purchase price. The argument continues that, with the date for completion specified in VDM's Notice having passed without VDM taking further steps to complete, the Notice lapsed, and with it any right VDM had to purchase the Property.

73. Mr. Robinson argued that Clause 6.2 does not provide for the service of multiple notices. It provides for the service of a single notice. He therefore submitted that VDM cannot thereafter seek to revive any right to purchase the property by serving multiple Notices.

74. Reference was made to VDM's second notice in the form of a letter from Maples and Calder dated 10 July 2014. The letter was in the same terms as the letter of 13 October 2013. Counsel avers that the 30 day period stipulated in this Notice expired on 9 August 2014. VDM, the submission continues, failed to provide a form of transfer before the expiry date. It was not until 19 August 2014 that Maples and Calder sent a form of Instrument of Transfer, together with a draft Deed of Exercise of Option. Maples and Calder also sent another Notice on 5 November 2014.

75. Counsel submitted that any right VDM had to purchase the Property lapsed on 13 November 2013 and that VDM cannot revive such a right by serving multiple additional notices.

76. In respect of Issue No. 4(1), Mr. Imrie argued that in relation to option agreements, time is of the essence only with respect to any time limits with which the grantee (i.e. the party to whom the option is granted - VDM) must comply. The submission is that here, the only party required to act within a certain time was the Defendants. Counsel argues that it is obvious why there was no stated time limitation in which the option was required to be exercised. The reason suggested is that, upon exercising the option, VDM would have to repay the purchase price for the land and also the value of any Construction Works (as defined in the Agreement for Sale). Therefore, whether to exercise the option, and if so, when, were VDM submitted, matters of commercial judgment over which any developer would wish to retain some flexibility. It follows, it was argued, that the time for exercising the option, would not necessarily be immediate upon default, nor could a limit on the timing be easily estimated when the option was entered into.

77. Mr. Imrie submitted that whilst the first day on which the option could be exercised was the 9th January 2012 if construction had not been commenced, the long-stop date for its exercise was if the construction had not been completed 18 months thereafter, the long-stop date being 9th July 2013. It was submitted that the time of the essence clause only applies in relation to specific time stipulations. There is no time specified for the giving of the Notice for the exercise of the option. Mr. Imrie concedes that if a time had been specified, for example, within 30 days, and VDM missed a day, that would have been a problem for VDM, based upon the time of the essence clause.

78. Reference was made to *Halsbury's Laws of England Volume 22,Contract,* 5th Edition, paragraph 504, and its footnote, which state as follows:

"504. Options

Prima facie, an Option to be exercised by a specified date[3] must in all cases be exercised strictly within the time limited for the purpose; otherwise it will lapse. A notice of an intention to exercise the option given without authority within the time limited cannot be made effective by ratification after the time has expired. Where an option fixes a time payment this must, in the absence of a contrary intention, be as strictly complied with as the stipulation relating to time for election."

"[3] *But the contract may provide expressly or by implication that the option is to be exercised within a reasonable time:"*

79. Counsel also referred to <u>*Chitty on Contracts*</u>, 32nd Edition, Volume 1, 32nd Edition, paragraph 21-021, which states as follows:

*"**Where no precise time for performance is specified***

Where a party to a contract undertakes to do an act, the performance of which depends entirely on itself, and the contract is silent as to the time of performance (or merely uses indefinite words such as "with all dispatch") the law implies an obligation to perform the act within a reasonable time having regard to all the circumstances of the case....."

80. It was Counsel's submission that the Court should therefore look at the period between the 9th July and 13th October 2013, approximately 3 months. It was submitted that the Notice was prompt, but in any event, having regard to all of the circumstances, including correspondence, including the email of 31st July 2013, and other correspondence, the Notice was issued within a reasonable time. Reference was made to the contents of an email from Ms. Francis on 14 October 2013, in which she spoke of appreciating VDM's kind courtesies, and made reference to recent developments which VDM would not have been aware of, because she had been off the island for the previous few months attending to unexpected personal crises.

81. It was further submitted that the reason why the Notice was not enforced in the manner suggested in the letter of 14th October 2013, was that the parties were having dialogue. The Defendants requested a meeting, and this led to forbearance on the basis that the Defendants would provide certain proof and information, within a certain time, with a view to commencing construction in July 2014. In any event, Mr. Imrie submits that Clause 4.2 regarding "no waiver" applies.

82. In relation to the 10th July 2014 Notice, Mr. Imrie pointed out that this was issued after considerable correspondence had ensued, described by VDM in the Notice as the Defendants "*on-going correspondence with Vista Del Mar in which you have made continued assurances about commencing construction on the land, which construction has not commenced.*" Mr. Imrie submits that the evidence clearly shows that VDM were ready and willing to perform.

83. In response to Mr. Robinson's submission as to ***United Scientific Holdings v Burnley***, Mr. Imrie submitted that this is a contract of reciprocal obligations and therefore the concerns raised in that case do not apply here.

84. In relation to Issue No 4(2), VDM argued that any temporary forbearance by VDM in exercising its rights under the Agreement for sale was solely the result of the Defendants' repeated statements and assurances that commencement of construction was imminent.

85. It was VDM's position, that, notwithstanding its contention that it is entitled to exercise its valuable commercial right upon a breach of clause 6.2 by the Defendants, it has not acted in a cavalier, capricious, ruthless or unconscionable manner. It claimed to the contrary,(in paragraph 21 of its written submissions) that, it is uncontroversial that:

> *"21.1 VDM granted the Defendants' only request to extend time for completion by entering into the Deed of Variation;*

21.2 The Defendants were aware that they had delayed commencement of construction to the point that they were out of time, and were appreciative of (in the First Defendant's own words) "the kind courtesies extended throughout the process";

21.3 VDM's representative, Mr. Arek Joseph (who was the Defendant's prime point of contact), was "always cordial and understanding of the factors which faced" the Defendants.

21.4 The correspondence between VDM and the Defendants and the Defendants and their service providers shows examples of acknowledgements of VDM's rights under the Agreement for Sale (as varied).

21.5 At the time of exercising its rights under the option the Defendants were unable to commence construction because they had no funding for the construction costs."

86. VDM submits that its good faith forbearance of the Defendants' delays and the granting of additional opportunities to commence construction (or even demonstrate an ability to do so) did not (and, in light of the "no waiver" clause, could not) prejudice its ability to exercise the option at any time it wished after the Defendants' breach (es) had occurred.

DISCUSSION AND ANALYSIS OF ISSUE NO. 4

87. In my judgment, in relation to Issue No 4(1), VDM is correct that the general time of the essence clause did not apply to the exercise of the option by VDM and could not operate as a complete bar to enforcement of rights in a similar manner as if it were, to use Mr. Imrie's words, "*a short-fuse version of the doctrine of laches*". Further, I am of the view that VDM were entitled to rely upon the "no waiver" clause which expressly states that "*no exercise or lack of exercise of a right constitutes a waiver by the Vendor of any other right or remedy.*"

88. Further, and in any event, the "end date" for construction was 9 July 2013. I accept the evidence of VDM that on 31 July 2013, it sought an update from the Defendants and on 2

October 2013 indicated that it was considering whether to exercise its rights under the option. The Notice exercising the Option was issued on 14 October 2013 and received by the Defendants on 23 October 2013. I accept Mr. Imrie's submission that VDM acted reasonably, and promptly, having regard to the circumstances, including the communications and correspondence between the parties. There are numerous pieces of correspondence, which show that the Defendants understood that VDM intended to exercise its rights, including the email from Ms. Francis to Mr. Joseph in which she thanked him for the kind courtesies extended, and the email from Ms. Francis to Mr. Joseph, after receipt of the 14 October 2013 Notice, requesting a meeting between the parties, and reassuring VDM, as the Defendants had done many times in the past, that the Defendants had every intention of commencing construction in short order.

89. In relation to Issue No 4(2), in my judgment, the evidence clearly demonstrates that VDM in good faith, based upon the Defendants continuing assurance that they would soon start construction, and requests for understanding, in forbearance did not act upon the timetable referred to in its Notice of October 2013.

90. This can be seen from the discussions and numerous correspondence between the parties, including by way of example, two emails from Mr. Joseph to Ms. Francis, both dated 4 February 2014. In one email Mr. Joseph writes to Ms. Francis stating "*When we met during Charlie's visit, we had made a diary note of February 3 2014, which represented the 30 days you needed to write to Vista Del Mar demonstrating your intent, and wherewithal to commence construction of your residence on Parcel 290*". Ms. Francis then responded on the same 4 February 2014 saying the Defendants' architect was to deliver a revised plan, based upon modifications which the Defendants had asked him to make, and that Apec, the Defendants engineers, had already started the process of finalizing the construction and engineering drawings. She said that she hoped to also provide a fairly accurate schedule of works shortly. Mr. Joseph responded, saying, amongst other matters that: "*Whatever the challenges you have been having, it seems that things have not moved forward since our last meeting. I note that the plans are still to be revised to reduce the square footage, but, this conflicts with your advice that Apec has*

started finalising construction/engineering drawings. Clearly this cannot happen without them having the revised/reduced design drawings on which to base their work." There is a string of emails going right up to late June 2014 which in my view support VDM's position on this issue.

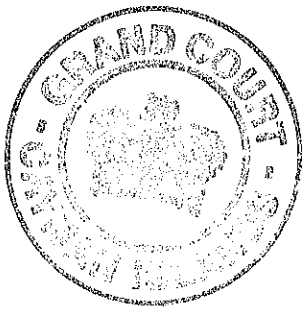
91. In my view the Defendants cannot take advantage of VDM's good faith forbearance and are estopped from relying on any such delay as a means to avoid the enforcement of the Agreement for Sale as amended by the Deed of Variation of Agreement. The Court has to assess the situation in light of all of the circumstances, including the correspondence and communications between the parties. In any event, VDM were entitled to rely upon the "no waiver" clause.

ISSUE NO 5:

WHETHER THE ENFORCEMENT OF ANY OBLIGATION ON THE PART OF THE DEFENDANTS TO RE-SELL THE PROPERTY TO VDM AT THIS TIME WOULD IMPOSE A DETRIMENT ON THE DEFENDANTS OUT OF PROPORTION TO ANY LEGITIMATE COMMERCIAL OR OTHER INTEREST WHICH VDM HAS IN THE ENFORCEMENT OF THE PROVISION, AND IS ON THAT BASIS UNENFORCEABLE. WHETHER CLAUSE 6.2 IS A PENALTY CLAUSE

92. Mr. Robinson submitted that the enforcement of any obligation on the Defendants under clause 6.2 to re-sell the property to VDM would, at this time, constitute the imposition of a penalty on the Defendants out of all proportion to any legitimate commercial interest that VDM has in the enforcement of the construction covenant. On that basis, he posited, the Court should refuse to enforce Clause 6.2.

93. Reference was made to the recent decision of the UK Supreme Court in ***Cavendish Square Holding BV v. Talal El Makdessi*** [2015] UKSC 67. Reference was made to the speech of Lord Neuberger and Lord Sumption (with whom Lord Carnwath agreed), where the applicable test as to whether a clause amounts to a penalty, is stated at paragraph 32, as follows:



"The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the obligation. The innocent party can have no proper interest in punishing the defaulter. His interest is in performance or some appropriate alternative to performance."

94. It was recognized in the leading Judgment in ***Cavendish*** that the principle may be applied in cases other than those involving a clause for the payment of liquidated damages. Mr. Robinson also referred to ***Jobson v Johnson*** [1989] 1 WLR 1026, (EWCA) which is a decision which, although criticized on other grounds in ***Cavendish*** also recognized that the principle may be applied in relation to transfers of property.

95. Counsel submitted that in the present case, the Defendants' primary obligation is to commence construction on the lot. The persons, he submitted, entitled to benefit from that obligation are specifically identified in the preamble to the covenants. This provides that the intention is to *"benefit the Development and each and every part thereof....."*.

96. Counsel referred to the fact that VDM has already sold all of its lots in the Development and to the fact that it has transferred the common property to Vista Sur. Vista Sur is now therefore, completely responsible for the maintenance of the development. The argument continued that, under the terms of the Agreement for Sale, and under the covenants, either Vista Sur or any proprietor within the Development may enforce the covenants. VDM, Counsel suggested, has no benefit or interest to be derived from the enforcement of the Defendants' construction covenant. It is argued that that is a matter for the proprietors and Vista Sur. The only benefit that will accrue to VDM if clause 6.2 were to be enforced would be the windfall profit it would derive from either reselling the Property or developing it. That benefit, it was submitted, is unrelated to the objective of the primary obligation to commence construction.

97. Counsel's argument continued that the Defendants will suffer significant detriment if they were required to resell the Property to VDM for $462,460. According to the expert valuation report of Mr. Groves, the property in its undeveloped state has increased in value by over US$200,000 or over 40% since 2009, with a further increase in equity of over US$240,000 if the Defendants were to develop the property according to their current plans. In addition, the Defendants say that they have incurred approximately US$185,000 in pre-construction expenses and interest charges since acquiring the Property.

98. On the other hand, it was Mr. Imrie's contention that the concept of options within property deals is not uncommon. To the contrary he opines, various common law courts have upheld them in accordance with the trite principle that where the parties have included in their agreement an express provision, they should be able to rely with certainty on the fact that it will be enforced. A basic principle of the common law of contract, he points out, is that parties to a contract are free to determine for themselves what primary obligations they will accept.

99. VDM maintained that the commercial reasons for the option are very clear, from both the Agreement for Sale and the Restrictive Covenants, which place great emphasis upon the development of the Property to a high standard within a reasonable time, and that that is why VDM retain the option to re-purchase the Property if the condition is not met. Mr. Imrie further submitted that Clause 6.2 imposes a primary obligation, not a secondary obligation, and is therefore not subject to the rule on penalties. Alternatively, Counsel submitted that if it was a secondary obligation, it is not a penalty.

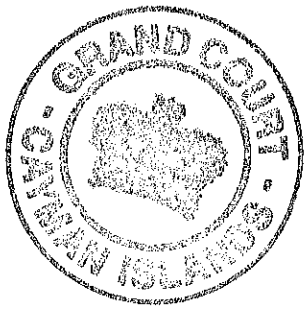
100. Reference was made by Mr. Imrie to the Clifford Chance summary of the decision in ***Cavendish,*** issued 4 November 2015, as well as to the case itself. Mr. Imrie contends that one of the key points about the ***Cavendish*** case is that it established or confirmed, that whether a clause is a penalty or not is assessed at the time when the agreement is made. Mr. Imrie's argument was that, at the time when the Agreement was made, the Defendants agreed to pay US $462,460 and agreed to receive back US$462,460. There

were potential upsides or down sides to either party and it was a commercial transaction. The fact that the Defendants say that several years later, the Property is now worth more does not help them, it was submitted, because whether or not it is a penalty is assessed at the time of agreement. Mr. Imrie goes on to develop his argument by saying, even if he is wrong about that, VDM exercised its rights in October 2013 and exercised forbearance until July 2014. There is evidence, he posited, that the value of the land at the dates when VDM made the offer is lower than it is now, thus, no loss, no penalty.

101. ***Cavendish*** is quite a long and involved judgment - the Report is over 100 pages long. Seven Judges of the Supreme Court heard the matter, and there was unanimity on some points, but not on others. The judgment really concerns two cases, i.e. ***Cavendish Square Holding BV v Makdessi***, and ***ParkingEye Ltd. v Beavis***. The first of the two, ***Cavendish***, is of the most relevance to the instant case. Some of the critical issues involve the difference between what are primary and secondary obligations, the relationship to breach of contract, and the guidance as to the constituents of a penalty clause.

102. I think it is useful to refer to portions of the Headnote and the following passages in the Judgment:

> *"In the first case, following extensive negotiations in which both sides were represented by highly experienced commercial lawyers, the defendant agreed to sell to the claimant a controlling interest in the advertising and marketing company which he had founded. The claimant agreed to pay up 147m, depending on a calculation of profits, in instalments, with a large amount reflecting goodwill. The agreement provided that for a period after the sale the defendant was not to compete with his old business and that, if he did, he would not be entitled to any further payments (clause 5.1) and the claimant would acquire an option to buy his remaining shares at a price which disregarded goodwill(clause 5.6). When the defendant breached the non-competition provision, the claimant sought a declaration that he was not entitled to further payments and was obliged to sell his shares to it. The judge, rejecting the defendant's contention that*

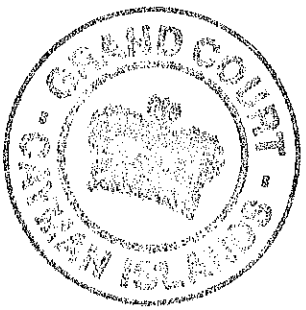


clauses 5.1 and 5.6 were penal and therefore unenforceable, made the declarations sought. The Court of Appeal allowed the defendant's appeal, holding that the clauses were not genuine pre-estimates of loss but rather their function was to act as a deterrent, and that, therefore, both clauses were unenforceable penalties. The claimant appealed, contending that the clauses were not penal and that, in any event, the common law rule that contractual penalty clauses should be abolished or at least restricted so as not to apply to commercial transactions where the parties were of equal bargaining power and each acted on skilled legal advice.

.....

On the appeals-

Held, (1) that the common law rule that a term in a contract which constituted a penalty was unenforceable should not be abolished or restricted, since it was a long-standing principle of English law, common to almost all major systems of law, and had a useful role to play in protecting people against some categories of oppressive bargain which were not subject to statutory regulation; but that the rule should not be extended to cover clauses which impose onerous obligations on a party on certain contingencies which did not involve a breach of contract, since the courts had no power at common law to regulate the parties' primary obligations; that the rule applied not only to provisions requiring the payment of money on breach of contract but also to clauses providing for the withholding of payments of money or the transfer of property; that a provision was penal if it was a secondary obligation which imposed a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation; that, therefore, the fact that a provision did not provide for a pre-estimate of loss, or that it was a deterrent, did not necessarily mean that it was penal, since the legitimate interest of the innocent party might well extend beyond the recovery of compensation for his loss; and that, in a negotiated contract between properly advised parties of comparable



bargaining power, the strong initial presumption had to be that the parties themselves were the best judges of what was legitimate in a provision dealing with the consequences of breach....

(2) Allowing the appeal in the first case, that, although clauses 5.1 and 5.6 had no relationship with the measure of loss attributable to the breach, the claimant had a legitimate interest in the observance of the non-competition provisions which extended beyond the recovery of that loss, since the goodwill of the business was critical to its value and the loyalty of the defendant was critical to that goodwill; that the parties, who were, on both sides sophisticated, successful and experienced commercial people bargaining on equal terms over a long period with expert legal advice, were the best judges of the degree to which each of them should recognize the proper commercial interests of the other; and that, accordingly, the judge had been right to conclude that clauses 5.1 and 5.6 were enforceable....

Per Lord Neuberger of Abbotsbury PSC, Lord Clarke of Stone-cum-Ebony, Lord Sumption, Lord Carnwarth, Lord Toulson and Hodge JJSC.

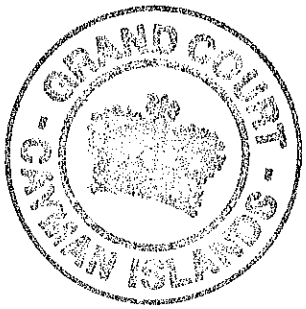
> *(i) The classification of terms for the purpose of the penalty rule depends on the substance of the term and not on its form or on the label which the parties have chosen to attach to it...*
>
> .....

Per Lord Neuberger of Abbotsbury PSC, Lord Sumption and Lord Carnswarth JJSC. Clauses 5.1 and 5.6 are in reality price adjustment clauses which are among the provisions that determine the parties' primary obligations and, therefore, the penalty rule is not engaged....

Lord Neuberger and Lord Sumption (with whom Lord Carnwath agreed)

...

(9). The distinction between a clause providing for a genuine pre-estimate of damages and a penalty clause has remained fundamental to the modern law, as it is currently understood. The question whether a damages clause is a penalty falls to be decided as a matter of construction, therefore as at



the time that it is agreed...This is because it depends on the character of the provision, not on the circumstances in which it falls to be enforced.

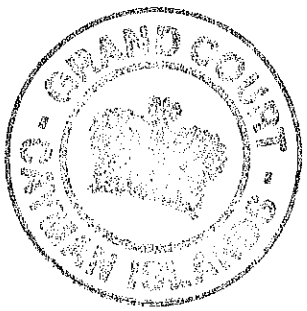
.....

(13). This principle is worth restating at the outset of any analysis of the penalty rule, because it explains much about the way in which it has developed. There is a fundamental difference between a jurisdiction to review the fairness of a contractual obligation and a jurisdiction to regulate the remedy for its breach. Leaving aside challenges going to the reality of the consent, such as those based on fraud, duress or undue influence, the courts do not review the fairness of men's bargains either at law or in equity. The penalty rule regulates only the remedies available for breach of a party's primary obligations, not the primary obligations themselves.....

(14). This means that in some cases the application of the penalty rule may depend on how the relevant obligation is framed in the instrument, i.e. whether as a conditional primary obligation or a secondary obligation providing a contractual alternative to damages at law. Thus, where a contract contains an obligation on one party to perform an act, and also provides that, if he does not perform it, he will pay the other party a specified sum of money, the obligation to pay the specified sum is a secondary obligation which is capable of being a penalty; but if the contract does not impose (either expressly or impliedly) an obligation to perform the act, but simply provides that if one party does not perform, he will pay the other party a specified sum, the obligation to pay the specified sum is a conditional primary obligation and cannot be a penalty.

.....

(16). Payment of a sum of money is the classic obligation under a penalty clause and, in almost every reported case involving a damages clause, the provision stipulates for the payment of money. However, it seems to us that there is no reason why an obligation to transfer assets (either for nothing or at an undervalue) should not be capable of of constituting a



penalty. While the penalty rule may be somewhat artificial, it would heighten its artificiality to no evident purpose if it were otherwise……

.....

(32). The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance.

.....

(55). The two provisions of central relevance for present purposes were included in clause 5, which was headed "Default". Clauses 5.1 and 5.6 provided:

> *"5.1. If a seller becomes a defaulting shareholder [which is defined as including 'a seller who is in breach of clause 11.2'] he shall not be entitled to receive the interim payment and/or the final payment which would other than his having become a defaulting shareholder have been paid to him and [Cavendish]'s obligations to make that payment shall cease.*
>
> *5.6.Each seller hereby grants an option to [Cavendish] pursuant to which, in the event that such seller becomes a defaulting shareholder, [Cavendish] may require such seller to sell to [Cavendish] all...of the shares held by that seller (the defaulting shareholder shares). [Cavendish] shall buy and such seller shall sell...the defaulting shareholder shares... within 30 days of receipt by such seller of a notice from [Cavendish] exercising such option in consideration for the payment by [Cavendish] to such seller of the defaulting shareholder option price [defined as 'an amount equal to the [NAV] on the date that the relevant seller becomes a defaulting*

shareholder multiplied by [the percentage which represents the proportion of the total shares the relevant seller holds]."

....

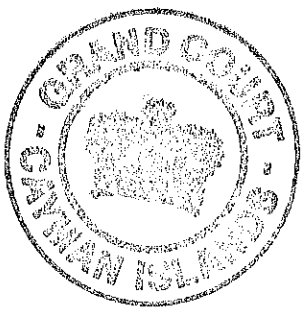
(83). More fundamentally, a contractual provision conferring an option to acquire shares, not by way of compensation for a breach of contract but for distinct commercial reasons, belongs as it seems to us among the parties' primary obligations, even if the occasion for its operation is a breach of contract. This may be tested by asking how the penalty rule could be applied to it without making a new contract for the parties. The Court of Appeal simply treated clause 5.6 as unenforceable, and declared that Mr. Makdessi was not obliged to sell his shares whether at the specified price or at all. That cannot be right, since the severance of the shareholding connection was in itself entirely legitimate, and indeed commercially sensible. If the option to acquire the retained shares is to stand, the price formula cannot be excised without substituting something else. Yet there is no juridical basis on which a different pricing formula can be imposed. There is no fallback position at common law, as there is in the case of a damages clause.

.....

LORD HODGE JSC

....

(230) ***Clauses requiring the transfer of property on breach****: Again I see no reason in principle why the rule against penalties should not extend to clauses that require the contract-breaker to transfer property to the innocent party on breach. There is authority in both English law and Scots law supporting this approach. In Jobson v Johnson [1989] 1 WLR 1026 the Court of Appeal considered a clause that required a purchaser of shares to re-transfer shares to the vendor for a fixed consideration if he defaulted on payment of installments of the price. The clause was treated as a penalty because it fixed the re-transfer price at a modest figure regardless of the number of the much larger installments which the*



purchaser had paid before his default. The case was an unusual one and the approach of the court to a remedy was influenced by the absence of a counterclaim for relief from forfeiture. I do not accept the conclusion in that case that the court had power in English law to modify a penalty: see paragraph 283 below. But that does not, in my view, call into question the court's unanimous conclusion that the clause was caught by the rule against perpetuities.....

.....

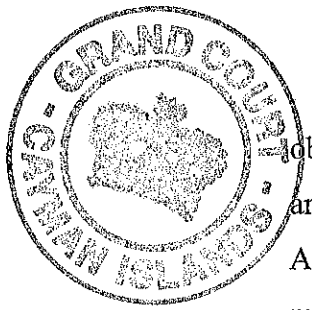
(249). When the court makes a value judgment on whether a provision is exorbitant or unconscionable, it has regard to the legitimate interests, commercial or otherwise, which the innocent party has sought to protect....

....

(255). I therefore conclude that the correct test for a penalty is whether the sum or remedy stipulated is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract. Where the test is to be applied to a clause fixing the level of damages to be paid on breach, an extravagant disproportion between the stipulated sum and the highest level of damages that could possibly arise from the breach would amount to a penalty and thus be unenforceable. In other circumstances the contractual provision that applies on breach is measured against the interest of the innocent party which is protected by the contract and the court asks whether the remedy is exorbitant or unconscionable."

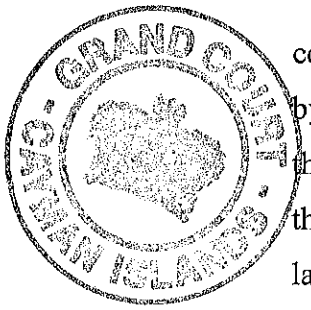
(Underlining emphasis mine)

103. Applying the principles of law that I glean from that decision, I am of the view that the Defendants' obligation under the Deed of Variation of Agreement (in the same vein as was the obligation under the Agreement for Sale) to sell the property back to VDM if they failed either to commence construction of a residence on the property by 9 January 2012 or to complete such construction by 18 months thereafter, was a conditional primary



obligation. This is in my view consistent with the analysis at paragraph 14 of ***Cavendish*** and indeed, the view of Lords Neuberger, Sumption and Carnwath , that Clause 5.6 of the Agreement in that case (which contained an Option), were in reality price adjustment mechanisms, and that a contractual provision conferring an option to acquire shares, not by way of compensation for a breach of contract, but for distinct commercial reasons, belongs among the parties' primary obligations, even if the occasion for its operation is a breach of contract. In my judgment, there are legitimate commercial, and other interests that VDM had as developer in ensuring that purchasers carried out the construction obligations *"to the benefit and protection of the development and each and every part thereof"* – see the Schedule of Covenants. If the Defendants did not comply with those obligations, which would be a breach of the contract on their part, VDM would have a legitimate interest, commercial or otherwise, in preserving and maintaining the standard, quality, value and amenity of the Development. I accept Mr. Joseph's evidence that VDM is still the parent company for the Development in so far as VDM owns a wholly owned subsidiary, Spanish Colonial Properties Limited, which is the sole member of Vista Sur. Vista Sur is the company limited by Guarantee, which owns, and is responsible for, the common property in the Development. I also accept Mr. Imrie's submission that in any event VDM had its own legitimate reason for enforcing the option because the right to repurchase the property at a fixed price is a valuable commercial right.

104. In the event that I am wrong on that point, and in fact, the option to re-sell at the price at which the Defendants bought the Property is a secondary obligation, in my judgment, although Clause 6.2 has no necessary relationship with the measure of loss attributable to the breach by not constructing as required, the obligation does not impose on the Defendants as contract-breakers a detriment out of all proportion to any legitimate interest of VDM in the enforcement of the primary obligation of constructing as required upon the Property. The terms of the option are not exorbitant or unconscionable. The Defendants will receive back the very amount they paid VDM for the Property, unlike, for example, other situations when forfeiture of a certain percentage of a deposit has been held to be a penalty. The "losses" the Defendants point to being a consequence of the exercise of the option are amounts they chose to spend as a precursor to commencing



construction. I accept Mr. Imrie's submission that these costs were not forced upon them by VDM and that this was an agreement freely entered into. I accept the argument that at the time of the transaction, there were potential upsides or down sides to either party, and that it was a commercial transaction. The fact that the Defendants say that several years later, the Land is now worth more does not help them, because whether or not it was a penalty stands to be assessed as at the time when the agreement was made. Indeed, at the time when the agreement was made, there would be no certainty whether the value of the Property would have gone up or down.

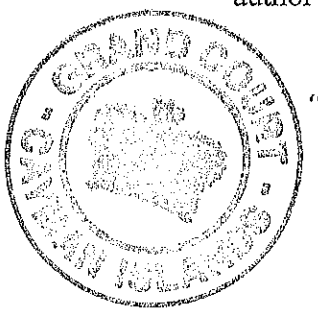
105. In my judgment, the purpose of the Clause was not to punish. It was on the evidence, clearly part of a carefully constructed contract between VDM and the Defendants. VDM was for its part, a property developer, and Ms. Francis was herself an experienced commercial and corporate lawyer, familiar with conveyancing and property Law. Ms. Francis and Mr. Clarke were experienced property owners, owning between them at least seven properties. The parties on both sides of this transaction were experienced commercial people, who were the best judges of the degree to which each of them should recognize the proper commercial interests of the other. In any event, by virtue of Clause 7.1 of the Agreement for Sale, the Defendants were deemed to have obtained such legal and expert advice as they considered appropriate. The argument that Clause 6.2 constitutes a penalty therefore fails.

ISSUE NO. 6:

THE REMEDY OF SPECIFIC PERFORMANCE - WOULD AN AWARD TO VDM IN DAMAGES PROVIDE IDENTICAL BENEFITS TO SPECIFIC PERFORMANCE OF THE CONTRACT ON THE FACTS OF THIS CASE?

106. In this regard, I wish to refer to some very useful Extracts from *Spry on Equitable Remedies*, 7th Edition, (published 2007) cited by Mr. Imrie. Counsel pointed out that in this case, VDM's claim is concerned with specific performance in its narrower sense, i.e. the execution in specie of a contract which requires some definite thing to be done, as opposed to specific performance in its wider sense, in the sense of enforcement in specie

of any contractual obligation to perform an act. At Chapter 3, pages 51-52 the learned author Spry, explains the distinction well:



" THE SPECIFIC PERFORMANCE OF CONTRACTS

The General Nature of Specific Performance

The term "specific performance" is commonly used in two senses. In the first place, it sometimes refers to what may be called specific performance in the narrow sense. Here a court with equitable jurisdiction compels the execution in specie of a contract that requires some definite thing to be done in order that the legal rights of the parties be settled and defined in the manner intended. So that if it has been agreed by the parties that a formal deed or conveyance be executed, or that a delivery be completed of particular property, specific performance in the narrow sense may be ordered....In [the] *second sense specific performance refers to the enforcement in specie of any contractual obligation to perform an act, whether by settling or defining the rights of the parties, or by enforcing those rights in any way. Precisely the same principles are applied by a court of equity whether it is with specific performance in the wider or narrower sense that it is concerned, but, as will be seen hereafter, particular factual circumstances are often found in cases of specific performance in the wider sense that give rise to a different application of those principles. So difficulties of enforcement or in determining whether performance has duly taken place are usually not as great where what is in question is specific performance in the narrower rather than in the wider sense. Hence in all these cases it is necessary to distinguish carefully between the principles that are applied, on the one hand, which do not vary, and their application, on the other hand, which varies according to the particular circumstances.4"*

107. At the end of the passage above, there is a very pertinent footnote (4), as follows:

*"See **Australian Hardwoods Pty. Ltd. v Commissioner of Railways** [1961] 1 W.L.R. 425. Thus it is less likely where the plaintiff seeks the execution of a deed, than where he seeks performance of its terms, that it will appear on the application of equitable principles that it is not an appropriate occasion for the grant of relief."*

108. At pages 59-61, under the Head "The Inappropriateness of Damages", the learned author Spry, discusses the remedy of specific performance as follows:

> *"The Inappropriateness of Damage*
>
> *Historically, the basis for the grant of specific performance by courts of equity has been the inadequacy of legal remedies, and particularly of damages, in the material circumstances. The precise question that has been asked is whether the relegation of the plaintiff to such remedies as he has in damages or other legal remedies would leave him in as favourable a position in all respects as would exist if the obligation in question were performed in specie.*
>
> .....
>
> *Recently however two tendencies have become more evident. First, the occasions on which courts decline to consider specific performance, on a jurisdictional or threshold basis, by reference to the adequacy of damages have been becoming progressively fewer. Anomolous prior decisions have been accorded less weight, and the view has been gradually prevailing that unless damages would give rise to identical consequences for the plaintiff to relief in specie the court should proceed to consider whether its discretion should be exercised in favour of the latter remedy. Secondly, there has been a growing tendency by the courts to treat a jurisdictional or threshold analysis as unnecessary, so that it is simply asked as the ultimate question whether it would be more just to grant specific performance than to award damages. The better view is*

that unless damages and specific performance provide identical benefits this latter test should now be applied.

....

Whether remedies at law are adequate is determined on the same principles, whether realty or personalty, such as a chattel is involved. But land is property of a fixed location and a special value, and ordinarily at least damages are not to be regarded as an adequate substitute for the right either to acquire or dispose of an interest in it. Even indeed if the purchaser intends to purchase the land in question merely in order to be able to sell it later at a profit, damages will not be regarded as an adequate remedy for him.

....."

(Underlining emphasis mine).

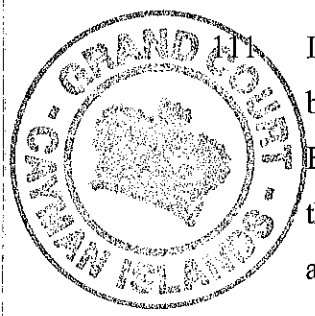
109. In my judgment, there are two bases that point to the remedy of damages not being appropriate, and not providing identical benefits to specific performance. The first is that VDM here seeks specific performance in its narrow sense, i.e. it seeks the execution in specie of a contract that requires some definite thing to be done; it seeks to exercise the option to repurchase the land as set out in Clause 6.2. Further, damages are not ordinarily an adequate substitute for the valid right (which I have held that VDM has), to repurchase the Lot from the Defendants. This is so, even though VDM may repurchase in order to re-sell. This is the bargain that the parties freely entered into, and without more, VDM would be entitled to seek enforcement of the contract and its rights.

ISSUE NO. 7:

WHETHER THE COURT SHOULD IN ITS DISCRETION, REFUSE TO GRANT THE REMEDY OF SPECIFIC PERFORMANCE ON THE GROUND OF LACHES/ DELAY OR UNCLEAN HANDS ON THE PART OF VDM.

110. Mr. Robinson's submission under this head, was presented on a number of bases:

Equity will not assist a volunteer



111. It was submitted that the Court will refuse specific performance of an entirely gratuitous bargain, even if created by Deed. Reference was again made to ***Jefferys v Jefferys*** 41 E.R. 443. I have already rejected the argument that no consideration passed from VDM to the Defendants for the claimed Option to Purchase and correspondingly, I reject the argument under this head.

Lack of Clean Hands

112. It was also Mr. Robinson's contention that the court will refuse specific performance where the party seeking specific performance is guilty of some misconduct, impropriety or breach related to the relief sought. Reference was made to numerous authorities, including ***Royal Bank of Scotland v Highland Finance Partners*** [2013] EWCA Civ 328, ***Grobbelear v News Group Newspapers Ltd.*** [2002] 1 WLR 3024, ***Duchess of Argyll v Duke of Argyll*** [1967] 1 Ch. 302, ***Moody v Cox*** [1917] 2 Ch. 71, ***Greater Sydney Development Association v Rivett*** (1929) 29 SR (NSW) 356, ***Coatsworth v Johnson*** [1886-90] All ER Rep. 547, ***E.E.Smith v J.D.Smith*** [2004-05 CILR 225], ***Cayman Arms (1982) Limited v English Shoppe Ltd.*** [1990-91 CILR 299].

113. Counsel argued that it was essential to a building scheme that there be reciprocity of obligations and benefits arising from the covenants which govern it. It was submitted that the Defendants are just as entitled to the benefit of the covenants as they are required to bear the burden arising from them. Reference was made to *Megarry & Wade, The Law of Real Property*, 8th Edition, Chapter 32, para. 32-077 and, ***Jamaica Mutual Life Assurance Society v Hillsborough Ltd.*** [1989] 1 WLR 1101.

114. It was also submitted that whilst VDM had the responsibility for enforcing the covenants, it ought to have been more even-handed in its approach. It was submitted that VDM has acted quite to the contrary. It was alleged that VDM has failed to impose the covenants against the title to parcels which are clearly within the development and which are benefiting from covenants imposed on other properties, including that of the Defendants. Further, that this also includes two lots owned by VDM's principal Mr. Freytag.

115. Counsel made the submission that VDM has also permitted and facilitated various artificial schemes and devices by which a number of owners have been allowed to circumvent the covenant to commence construction. These were said to include allowing the proprietor to transfer the property to a related party which is then used as a basis for re-setting the clock for commencing construction; and allowing owners to landscape their parcels as so-called "garden lots" without any construction as envisaged by the covenant being undertaken. In some instances, it was posited, VDM has simply not enforced the covenant for several years.

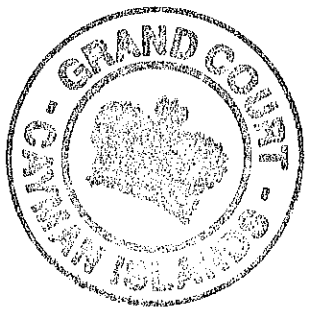
GRAND COURT · CAYMAN ISLANDS ·

Laches

116. In relation to the contention of laches, Counsel submitted that the Court will refuse specific performance where the party seeking that remedy has not shown himself to be "*ready, desirous, prompt and eager*", especially where the value of the subject-matter of the contract is likely to change over time: ***Mills v Haywood*** (1877) 6 Ch. D. 196.

117. It was submitted that a related principle is that the Court will refuse specific performance to a party who, by his delay and by his representations or conduct, with knowledge of his rights, leads the other party to act to his detriment such that it would no longer be just or reasonable to permit the party seeking relief to assert his rights. Reference was made to a number of authorities, including ***Lindsay Petroleum Company v Hurd*** (1873-74) L.R. 5 P.C. 221, where, at pages 239- 240, Sir Barnes Peacock expressed the matter in this way:

> "*Now the doctrine of laches in Courts of Equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put another party in a situation in which it would be unreasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are*



most material. But in every case, if an argument against relief, which otherwise would be just, is founded on mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking one course or the other, so far as relates to the remedy."

118. The Defendants propose that both the length of the delay, and VDM's conduct, with respect to dealing with the Defendants, and in actively permitting the breach of covenants by the other proprietors, should move this Court to refuse to exercise its discretion in VDM's favour.

119. Mr. Imrie, on the other hand, submitted that the type of behaviour necessary to establish a lack of clean hands typically includes: (i) fraud; (ii) misrepresentation; (iii) an illegality; (iv) abuse of process; and (v) misrepresentation to the Court. On this latter reference was made to *Spry, Equitable Remedies*, Seventh Edition pages 79-80. Further, that some allegation amounting to unconscionable conduct (meaning a dishonest purpose) is necessary for an absence of clean hands to be pleaded.

120. VDM say that, however, the Defendants' case on lack of clean hands is not put on any such basis. VDM rounds off its submissions on this score by declaring that it is the Defendants who have not conducted themselves with "clean hands", because, amongst other reasons, they misrepresented to VDM that construction and finance for the construction was imminent and VDM asserts that the Defendants have also improperly attempted to blame VDM for their failure to obtain bank finance.

121. In relation to laches, VDM argued that this principle is wholly inapplicable in the circumstances of this case.

DISCUSSION AND ANALYSIS OF ISSUE NO.7

122. In my judgment, the Defendants have failed to make out a case of unclean hands. There is evidence, which I accept, that VDM has sought to enforce covenants against other lot owners in the development. I also accept Mr. Joseph's evidence that, in some circumstances, some other purchasers who were unable to comply with the covenants re-sold the land, but that in this case the Defendants did not ask to do this.

123. Further, even if it were correct to say that the Defendants were being treated differently (which it has not been established that they have been), I accept that VDM would be entitled to take a different approach with respect to different properties. There might be good reason, as Mr. Imrie argued, to exercise an option in respect of one property at a particular time, but not in respect of another. I accept that VDM had commercial rights to act in such a manner. In my judgment, it also cannot be said that the correspondence between the parties shows any impropriety on the part of VDM or any improper purpose. I found Mr. Joseph, who acted for VDM throughout the transaction, to be a very credible and forthright witness. My impression was that he acted throughout with complete fairness and reasonableness towards the Defendants, indeed, even with a marked degree of understanding. By wishing to enforce its rights, VDM could not be said to have acted improperly.

124. Furthermore VDM's reliance upon the well-known authority of ***Moody v Cox*** [1917] 2 Ch. 71, pages 85-86, for the proposition 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*" is in my judgment apposite here. No authority has been provided in support of what I regard as a fairly novel proposition that VDM's dealings with other parties with whom it has entered into separate agreements has any impact on, or relevance to its dealings with the Defendants, or that taking different decisions in respect of different properties at different times can provide the necessary "dirt" or connection.

125. In relation to laches, or unreasonable delay in bringing these proceedings, there is in my view no proper basis for raising this concept as a bar to relief. The action was commenced promptly, in any event, within a reasonable time, in November 2014, only three months after the third request to the Defendants to re-sell the Property in accordance with the option. Prior to that, I find that the Defendants had been requesting that VDM should not take action to enforce its rights. Between the issue of the Notice in October 2013 and July 2014, the Defendants had been seeking further extensions of time in which to commence construction, proffering varying different reasons. There was nothing unconscionable in the way in which VDM acted. Indeed, it seems to me, that without relinquishing its rights, VDM, particularly through Mr. Joseph presented the Defendants with every opportunity to carry out construction. In my judgment, VDM's temporary forbearance was solely as a result of the Defendants' repeated statements and assurances that the commencement of construction was imminent, and it cannot at all be said that it would be unreasonable for the Defendants to be put in a position where VDM now asserts its claim to relief by way of specific performance.

126. In my judgment, VDM is entitled to specific performance of the Agreement for Sale, as Amended by the Deed of Variation to Agreement, in the manner set out in sub-paragraph 19(1) of the Statement of Claim. There will therefore be Judgment for the Plaintiff on the Claim, with costs to the Plaintiff on the standard basis, to be taxed if not agreed. I will treat the Counterclaim as withdrawn, with no order as to costs.

HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT