ANGUILLA

IN THE HIGH COURT OF JUSTICE

CLAIM NO.AXAHCV 0028/2010

BETWEEN:

ELISE MEYER

Claimant

And

SHOAL BAY DEVELOPMENT CORPORATION

Defendant

Appearances:

Mrs. Cora Richardson Hodge and Ms. Sherma Blaize for the Claimant
Ms. Jean Dyer for the Defendant

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2011: October 3, 4, 17, 18

2012: March 1

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JUDGMENT

[1] BLENMAN, J: Ms. Elise Meyer has filed a claim against Shoal Bay Development Corporation (Shoal Bay) in which she says that Shoal Bay has breached the Purchase and Sale Agreements (the Agreements) that were entered into by both of them. She seeks a number of declarations against Shoal Bay including a declaration that the Agreements have been validly terminated. Ms. Meyer also seeks a declaration that she is discharged from further performance of her obligations under the contract.

[2] In addition, Ms. Meyer seeks a number of orders such as an order that she should be refunded the sum of US$162,540 which she has paid to Shoal Bay as a deposit, together with the payment of US$2,000.

[3] Shoal Bay denies that it has breached the Agreements and says that the Agreements are still in force. Shoal Bay says that it is Ms. Meyer who has improperly and unlawfully sought to terminate the Agreements. Shoal Bay has therefore filed a defence and counterclaim in which it seeks a declaration that the Agreements are still valid.

[4] Alternatively, Shoal Bay seeks an order for specific performance of the Agreements.

[5] In the further alternative, Shoal Bay applies to the Court that instead of granting specific performance of the Agreements, it should order Ms. Meyer to pay damages.

[6] Ms. Meyer strenuously opposes the defence and counterclaim.

Issues

[7] There are several issues that arise for the Court to resolve; they are as follows:

(a) What are the terms of the Agreements?

(b) Whether there were any representations before the execution of the Contract.

(c) Whether those representations became terms of the contract.

(d) Whether there was a date fixed for the completion of the contract.

(e) Whether Shoal Bay breached the terms of the Agreements in a way that would entitle Ms. Meyer to terminate the Agreements.

(f) Whether Ms. Meyer affirmed the Agreements after the alleged breach.

(g) Whether Ms. Meyer, having issued notice, provided a reasonable time for completion.

(h) Whether Ms. Meyer is discharged from further performance of the Agreements.

(i) In the circumstances that obtain, whether Shoal Bay is entitled to retain the deposits.

Background

[8] Ms. Meyer is a citizen of the United States of America and she lives there. Shoal Bay is a company that is registered under the laws of Anguilla and is involved in the sale of condominium Units which it agreed to construct.

[9] Ms. Elise Meyer entered into two Agreements with Shoal Bay on 28th July 2007 and 30th July 2007 respectively, in relation to the purchase of two Units, namely: Strata lot No. Condo Emerald IA, Parcel No. 59018B/149SLCE-IA ("Emerald IA") and Strata lot No. Condo Emerald IB, Block and Parcel No. 59018B/149SLCE-1B ("Emerald 1B"). The purchase price for Emerald IA was four hundred and fourteen thousand United States dollars, (US$414,000) while the purchase price for Emerald IB was three hundred and ninety eight thousand, seven hundred United States dollars. (US$398,700).

[10] In furtherance of the terms of the Agreements, Ms. Meyer paid to the Escrow Agent, AXA Agencies Limited, the deposit in the sum of eighty two thousand, eight hundred United States dollars (US$82,800) towards Emerald IA and a deposit in the sum of seventy nine thousand, seven hundred and forty United States dollars (US$79,740), a total deposit in the sum of one hundred and sixty two thousand, five hundred and forty United States dollars (US$162,540).

[11] Paragraph 5(ii) of the Agreements provided that closing shall occur within 45 business days after the Units and buildings are granted certificates of occupancy. Paragraph 5(iii) of the Agreements stated that closing shall take place at a time of day specified by Shoal Bay upon issuance of certificate of occupancy.

[12] Ms. Meyer says that Shoal Bay's director, Mr. Harrigan, as well as its agent, Mrs. Haines, (the latter of Trophy Properties) represented to her that the Units would have been completed and delivered to her within two years of signing the Agreements.

[13] Ms. Meyer says that on 22nd December 2008 she received correspondence from Shoal Bay's agent, Trophy Properties, which attached Shoal Bay newsletter. The newsletter indicated that the anticipated closing date would have been at the end of 2010.

[14] Ms. Meyer says that in summer of 2009 she was advised that there were to be changes to the project and that the building in which her Units were to be built were now to be completed in Phase 2; this was not in accordance with the representations that were made to her at the signing of the Agreements.

[15] Further, Ms. Meyer says that on 26th November 2009 she, through her solicitors, wrote to Shoal Bay and demanded that the Units be completed within 30 days, failing which the deposits were to be returned. Shoal Bay's solicitors did not respond. However, she said that since that date she has not received any correspondence which indicates that the construction of the Units had begun.

[16] On 15th December 2009, Ms. Meyer, through her solicitors, again wrote to Shoal Bay's solicitors demanding the return of her deposits. There was no response. Shoal Bay has failed or neglected to complete construction of the Units and on 16th March 2010, Ms. Meyer wrote to them and demanded a refund of the deposits.

[17] Ms. Meyer maintains that in the circumstances which obtain, Shoal Bay has breached the Agreements by failing to complete the construction of the Units within a reasonable time. Paragraph 19(b) of the Agreements provide that she

was entitled to demand the return of the deposits and that the Agreements would be null and void.

[18] For its part, Shoal Bay says that the Agreements did not give a date nor time for completion of the Units neither did they provide for steps to be taken toward the completion.

[19] Shoal Bay says that it made no representations to Ms. Meyer, neither did it authorise its agents to represent to her that the construction of the Units would have been completed within two years of signing the Agreements. In any event, no representation could have varied the express terms of the Agreements. Further, it never indicated that the end of December 2010 was the date for the completion of the project. Rather, that date was a mere target date for the completion of the project. Shoal Bay asserts that it wrote to its customers and indicated that due to the global financial meltdown the project was affected by the withdrawal of financial commitments.

[20] Shoal Bay is adamant that the Agreements are open contract and there was no fixed date for the completion of the purchase and sale of the Units. The notice which Ms. Meyer sent was premature and, in any event, did not provide Shoal Bay a reasonable period of time within which to construct and complete the Units.

[21] Shoal Bay maintains that it is Ms. Meyer who acted in breach of the Agreements when she sought to terminate them by issuing the relevant notices.

[22] Accordingly, Shoal Bay asserts that it is entitled to have the Agreements specifically performed and has sought this relief. In the alternative, Shoal Bay seeks damages.

Evidence

[23] Ms. Meyer and her husband, Mr. Henry Feuerstein, filed witness statements on behalf of the Claimant and they were cross-examined at length.

[24] For the Defence, Mr. Bevington Harrigan who is the Managing Director and majority shareholder of Shoal Bay filed a witness statement and he too was cross-examined at length. Mrs. Deborah Haines who is the director of Trophy Properties also filed a witness statement on behalf of the defence and she was cross-examined.

Defendant's Submissions

[25] Learned counsel Ms. Jean Dyer submitted that the terms of the parties' agreement with regard to the purchase and sale of Emerald 1A and Emerald 1B are wholly contained in the Agreements executed by them in July 2007. Ms. Dyer said that the Agreements contain no additional oral terms. Further, Ms. Dyer said it is also Shoal Bay's case that it did not (whether by its officers, servants or agents) make any representations prior to Ms. Meyer's execution of the Agreements that completion of the sale and purchase of Emerald 1A and Emerald 1B would occur within two (2) years of the execution of the Agreements.

[26] Ms. Dyer said that it is, in any event, common ground between the parties that the Agreements do not, by their terms, fix a date for completion of the purchase and sale of Emerald 1A and Emerald 1B. Shoal Bay asserts (and Ms. Meyer concedes) that the end of 2010 put forward in its December 2008 newsletter was a mere target date for completion and that it at no material time fixed the end of 2010 as the completion date. Ms. Dyer argued that since the Agreements do not fix the time for completion, the Court ought to reject Ms. Meyer's contention that failure to complete by the non-essential target date was a breach of the Agreements which entitled it to terminate same. Ms. Dyer further stated that even

if the failure to complete by the target date was a breach of the Agreements, which is denied, Ms. Meyer affirmed the Agreements after she received the newsletter and, as such, she was not entitled to give notice until the end of 2010 had passed.

[27] Learned counsel Ms. Dyer therefore argued that Ms. Meyer, in issuing the notice dated 26th November 2009, did not make the time for completion of the sale and purchase of Emerald 1A and Emerald 1B of the essence of the Agreements and as such, she was not entitled to give a notice purporting to make time of the essence. The notice, in any event, did not fix a reasonable time for the completion and, as such, was of no effect. Ms. Dyer maintained that Shoal Bay is entitled to specific performance of the Agreements or to damages in lieu of specific performance for Ms. Meyer's breach or anticipatory breach of the Agreements.

[28] Learned counsel Ms. Dyer urged the Court to accept that the evidence of Shoal Bay's witnesses is vastly preferable to that of Ms. Meyer's witnesses and in particular that of Ms. Meyer. Ms. Meyer did not paint a very good picture under cross-examination as she refused to answer most of the questions posed to her and she also gave conflicting evidence with regard to material points and proved to be most unreliable under cross-examination. Ms. Meyer's evidence is so patently unreliable on material points concerning her case that it ought not be accepted by the Court. By contrast, Mr. Bevington Harrigan and Mrs. Deborah 'Debbie' Haines who testified on behalf Shoal Bay were candid, credible, and reliable witnesses who remained firm and resolute during cross-examination.

[29] Next, Ms. Dyer very clearly addressed the issues.

Issue No. 1: What are the terms of the Contract?

[30] Ms. Dyer submitted that the evidence adduced at trial establishes that the terms of the Contract between the parties for the purchase and sale of Unit Emerald 1A and Emerald 1B were reduced into writing and are wholly contained in the

Agreements. Indeed, Mr. Feuerstein, Ms. Meyer's husband, who played an "*informal role*" in connection with the purchase of Emerald 1A and Emerald 1B, conceded during cross-examination that the Agreements contain the full understanding of the parties. Ms. Dyer urged the Court to find that the terms of the parties' agreement with regard to the purchase and sale of Emerald 1A and Emerald 1B are wholly contained in the Agreements.

Issue No. 2: Whether there were any representations before the execution of the Contract.

[31] Learned counsel Ms. Dyer said that during cross-examination, Ms. Meyer testified that she did not recall whether or not Mr. Harrigan or Mrs. Haines told her that the completion date was sometime in 2010 before she signed the Agreements for the purchase of Emerald 1A and Emerald 1B. Ms. Meyer's pleaded case and evidence in chief is that prior to her execution of the Agreements Mr. Harrigan and Mrs. Haines represented to her that completion of the sale and purchase would occur within two (2) years of the execution of the Agreements.

[32] Mrs. Haines' evidence during cross-examination was that the Project had a target date of 2010 and if she had been asked when the project was expected to be completed that would have been her response, unless she was asked the question after 2010. She also testified that she was not the main point of contact for Ms. Meyer at the time of contract and it would have been unusual for her to tell Ms. Meyer that the Agreements she signed were open contracts unless they sought her out.

[33] Learned counsel Ms. Dyer asked the Court to reject Mr. Feuerstein's evidence in chief that during the reservation party it was made clear to both himself and his wife by Mr. Harrigan and Mrs. Haines that it was "*anticipated*" that the Project would be completed by December 2010 and to find that no representations were

made to Ms. Meyer and/or Mr. Henry Feuerstein prior to the execution of the Agreements.

Issue No. 3: If so, whether those representations became terms of the Contract

[34] Learned counsel Ms. Dyer said if the Court were to find that the alleged representations were made, which is denied, it ought to also find on the evidence before it that they were not intended to have contractual force and, as such, they did not become terms of the Agreements.

[35] Learned counsel Ms. Dyer told the Court that Ms. Myer conceded (when pressed) during cross-examination that the Agreements which she signed contained Clause 21(c) which stated that the Agreements

> "*represent the complete and entire understanding between the BUYER and SELLER with respect to all the matters pertaining to the sale and purchase transaction contemplated herein and supersedes any and all prior or contemporaneous Agreements, whether written or oral. No covenants, Agreements, terms, provisions, undertakings, statements, representations or warranties, whether written or oral, made or executed by any party hereto or any real estate broker or salesman shall be binding upon any party hereto unless specifically set forth in this Agreement."*

[36] Ms. Meyer also conceded that Clause 21(d) of the Agreements stated that the Agreements "*may not be changed, amended or modified in any respect whatsoever except in writing*."

[37] Learned counsel Ms. Dyer advocated that the effect of the entire clause contained in Clause 21(c) of the Agreements is to render inadmissible any extrinsic evidence adduced by Ms. Meyer to prove terms other than the written terms in the Agreements.

Issue No. 4: Whether there was a date fixed for completion of the Purchase and Sale Agreements of Emerald 1A and Emerald 1B

[38] Learned counsel Ms. Dyer said that both Ms. Meyer and Mr. Feuerstein conceded during cross-examination that the Agreements do not fix a date for the completion of the purchase and sale of Emerald 1A and Emerald 1B. It is therefore now common ground between the parties that the Agreements were open contracts and did not fix the time for completion. Ms. Dyer submitted that this issue is therefore not a live issue and does not fall to be determined by the Court.

Issue No. 5: Whether there was a breach of the Purchase and Sale Agreements which would entitle Ms. Meyer to terminate the Contract

[39] Ms. Dyer said that Shoal Bay was not in breach of the terms of the Agreements because the Agreements do not specify a date for completion of the purchase and sale of Emerald 1A and Emerald 1B or fix a time for completion by reference to a formula which subsequently made the completion date capable of exact definition.

[40] Learned counsel Ms. Dyer said that it is, however, Ms. Meyer's pleaded case that she expected completion to occur within two years of her execution of the Agreements. It is also her case that she learnt for the first time that the anticipated closing date for completion would be the end of 2010 (and not 2009) by way of a newsletter she received in December 2008. Ms. Dyer submitted that Ms. Meyer's case in this regard is most inconsistent with the evidence adduced by her. Indeed, it was both Mr. Feuerstein's and Ms. Meyer's evidence during cross-examination that they expected the Purchaser's Information Guide and, in particular, the Frequently Asked Questions to form part of the Agreements and that Frequently Asked Question 16 stated that construction of the Project would be completed in 2010.

Mere target completion date is not of the essence

[41] It is also Ms. Meyer's case that Shoal Bay, in failing to complete within the target completion period of two (2) years and in setting a new target completion date of the end of 2010, was in breach of the Agreements. Ms. Dyer said that this is puzzling because Ms. Meyer conceded, in any event, at paragraph 3 of her Reply that both dates were target dates for completion and were not dates fixed for completion. Ms. Dyer submitted that Ms. Meyer provides no assistance regarding the basis of her assertion that Shoal Bay, in failing to complete by either target completion dates, was somehow in breach of the Agreements.

[42] In any event, Ms. Dyer submitted that the authorities establish that where from the circumstances of the contract, it is clear that the date for completion is no more than a target date put forward by the other, the Court will not hold this date to be of the essence of the matter: Williams v. Greatrex [1956] 3 All ER 705.

[43] Next, Ms. Dyer said that the effect of the Court's refusal to hold target completion dates to be of the essence is that a breach of the date does not repudiate the contract: See Williams v. Greatrex. In the circumstances, Shoal Bay's failure to complete the construction of the Project by the target date was not a breach of the Agreements and, in any event, if it was a breach it was not one which repudiated the Agreements. Ms. Dyer maintained that Ms. Meyer was not entitled to terminate the Agreements on the basis of Shoal Bay's failure to complete by the target completion date.

No breach of implied term

[44] Ms. Dyer reminded the Court that it is now Ms. Meyer's case that the law implied an obligation on Shoal Bay to complete within a reasonable period. If the Court is minded to imply (notwithstanding that it was not part of Ms. Meyer's pleaded case) that the completion of the purchase and sale of Emerald 1A and Emerald 1B was to occur within a reasonable time, Ms. Dyer therefore stated that Shoal Bay was

not in breach of any such implied term. Ms. Dyer urged the Court to find, in such circumstances, that the reasonable period to be implied is, at the very least, 32 months, which was the (target) time estimated in the Frequently Asked Questions for completion once construction commences. Ms. Dyer further argued that when the Notice was issued by Ms. Meyer, 32 months had not passed and as such there was no default by Shoal Bay in the performance of the Agreements. It follows therefore, that Ms. Meyer was not entitled to make time of the essence of the Agreements by the letter of 26th November, 2009.

[45] Ms. Dyer said that her position is borne out by the Privy Council case of ***Chaitlal and Others v. Chanderlal Ramlal*** (2003) 62 WIR 449 which establishes at page 459 that:

> "W*hen time is not originally made of the essence of the contract one of the parties is not entitled by notice to make it so unless the other party is in default. In the case of an open contract where it is implied that completion or the performance of any intermediate obligation will take place within a reasonable time, it is only after the passage of such a time that a notice can be given because, until then, there has been no default in the performance of the contract*".

[46] Ms. Dyer reiterated that it was not open to Ms. Meyer to terminate the Agreements.

Issue No. 6: Whether the Contract was affirmed despite the alleged breach

[47] Ms. Dyer said if the Court were to find that Shoal Bay, in failing to complete within two (2) years of the execution of the Agreements, was in breach of the implied term that completion would occur within a reasonable time, the Court should also find that Ms. Meyer affirmed the Agreements after any such breach, which is

denied, and as such was required to make time of the essence by giving notice for completion within a reasonable period.

[48] It is Shoal Bay's case that if new representations had in fact been made to Ms. Meyer, which is denied, she ought to have immediately given notice of her intention to repudiate the Agreements when she received the December 2008 newsletter. This is because the target completion date stated in the newsletter was at odds with the alleged representations.

[49] The evidence establishes that Ms. Meyer continued to negotiate with Shoal Bay for the purchase of an additional unit or for an upgrade and waited some 11 months and 7 days before she purported to take steps to make time of the essence by issuing the Notice and some 16 months before she filed the instant claim.

[50] Learned counsel Ms. Dyer posited that if the Agreements were avoidable, which is denied, Ms. Meyer did not purport to rescind the Agreements within a reasonable time but, on the contrary, elected to treat the Agreements as still binding and operative. Ms. Dyer further submitted that in so doing, Ms. Meyer was required (based on the authorities) to wait until the end of 2010 had passed and then give Shoal Bay notice requiring it to complete within a reasonable time before it was open to her to treat the Agreements as at the end. On the evidence before the Court, Ms. Meyer issued the Notice in November 2009, which was one year before the target completion date and filed this claim at bar in April 2010.

[51] Ms. Dyer posited that the Court has to consider whether it was open to Ms. Meyer, having affirmed the Agreements, to issue the Notice in November 2009 and if so, whether the time limit therein for completion was reasonable.

Issue No. 7: Whether in the circumstances, Ms. Meyer, having issued notice for completion on 26th November 2009, provided a reasonable time for completion

[52] Learned counsel Ms. Dyer argued that Ms. Meyer, having affirmed the Agreements in December 2008, was not justified in giving the Notice prior to the end of 2010 and, as such, the Notice was of no effect and did not make time of the essence. It follows that it is not open to Ms. Meyer to argue that Shoal Bay's failure to comply with the Notice was her basis for terminating the Agreements.

Notice did not make time of the essence

[53] Next, learned counsel Ms. Dyer said that the time limit by the Notice for completion was unreasonably short and, as such, the notice was of no effect and did not make time of the essence. Ms. Dyer said that Shoal Bay is fortified in this submission as the case of ***Green v. Savin*** [1879] 13 Ch D 589 (which Ms. Meyer seeks to distinguish at paragraph 30 of her Skeleton Arguments) establishes:

> "*That which is not of the essence of the original contract is not to be made so by the volition of one of the parties, unless the other has done something which gives a right to the other to make it so. You cannot make a new contract at the will of one of the contracting parties. There must have been such improper conduct on the part of the other as to justify the rescission of the contract sub modo, that is, if a reasonable notice be not complied with."*

[54] Ms. Dyer maintained that the Agreements did not specify a date for completion of the purchase and sale of Emerald 1A and Emerald 1B or fix a time for completion by reference to a formula which subsequently made the completion date capable of exact definition. Shoal Bay accordingly relies on the case of ***British and Commonwealth Holdings Plc. v. Quadrex Holdings Inc.*** [1989] QB 842 at 857

and contends that the time for completion of the purchase and sale of Emerald 1A and Emerald 1B was not of the essence of the Agreements. Ms. Dyer said that it is noteworthy that while Clause 21(b) of the Agreements states that time is of the essence of the Agreements, it only provides that time is of the essence "*in the performance of all conditions, covenants, requirements, obligations and warranties to be performed or satisfied by the BUYER hereto*." Ms. Dyer submitted that Ms. Meyer's reliance on Clause 21(b) of the Agreements in support of her argument that time was originally of the essence of completion or of any obligation to be performed by Shoal Bay (who is the Seller) is misconceived.

[55] Ms. Dyer advocated that the Notice did not make time of the essence of completion because it did not give a reasonable time for completion. Indeed, it is settled law and common ground between the parties that the time fixed must be reasonable, having regard to the state of things at the time when the notice is given and to all the circumstances of the case. Factors to which the Court will have regard in assessing the reasonableness of the notice period include:

(i) what remains to be done at the date of the notice;

(ii) the fact that the party giving the notice has continually pressed for completion, or has before given similar notices which he has waived; or

(iii) that it is especially important for him to obtain early completion.

What remains to be done at the date of the Notice

[56] Both Ms. Meyer and Shoal Bay testified that when the Notice was issued, in November 2009, the construction of the Project and in particular Emerald 1A and 1B was yet to commence. Ms. Dyer submitted that in the circumstances, 30 days notice was a very short time for the construction to be completed. Ms. Meyer

sought to avoid making this admission under cross-examination by giving the incredible evidence that "*anything is possible.*"

No continuous pressing for completion by the Claimant

[57] Ms. Dyer told the Court that Ms. Meyer maintains that she continuously enquired as to when the Project would have been constructed and completed. Ms. Dyer submitted that, even on her case, there is no hint that she at any time pressed for completion before she issued the Notice. Indeed, she testified during cross-examination that before they issued the Notice they "*were still trying to give the developers the benefit of the doubt in their suggestions. It was still before the completion date. In the spirit of goodwill we continued up until that time*." There is likewise no evidence and Ms. Meyer does not assert that she issued any other notices or that it was especially important for her to obtain early completion. In the circumstances, learned counsel Ms. Dyer asked the Court to find that the time limit for completion by the Notice was unreasonable and that the Notice was therefore of no effect.

Issue No. 8: Whether Ms. Meyer is discharged from further performance of the Agreements

[58] Ms. Dyer submitted that Ms. Meyer is not entitled to be discharged from further performance of the Agreements and she urged the Court to find accordingly.

Issue No. 9: Alternatively, whether Shoal Bay is entitled to specific performance of the Agreements

[59] Learned counsel Ms. Dyer said that Ms. Meyer relies on Halsbury's Law and maintains that Shoal Day is not entitled to specific performance because time is of the essence of the contract and Shoal Bay is unable or unwilling to complete on the completion date. Ms. Dyer submitted in answer, that time was not originally

and is yet to be made of the essence of completion. Further, the Notice issued by Ms. Meyer fixed an unreasonable time for completion and, as such, is of no effect. Consequently, the unilateral termination of the Agreements by Ms. Meyer amounted to an anticipatory breach of Agreements by her and Shoal Bay is therefore entitled to specific performance of the Agreements or alternatively, to be allowed to retain the deposit as part of the liquidated damages due to it for the breach and to recover its costs.

Issue No. 10: Any other reliefs – Costs

[60] Ms. Dyer submitted that where the Court makes an order about the costs of any proceedings, costs follow the event and, as such, the unsuccessful party must pay the costs of the successful party: see Rule 64.6(1) of the CPR 2000. Generally speaking, where the fixed costs regime does not apply and a party is entitled to the costs of any proceedings, those costs must be determined in accordance with Rule 65.5 of CPR 2000 on the basis that the measure of prescribed costs is the value of the claim. The parties have agreed that the costs payable to either Ms. Meyer or Shoal Bay is the sum of EC$53,519.28 or US$19,908.97.

Claimant's Submissions

[61] Learned counsel Mrs. Cora Richardson Hodge said that the evidence before the Court is that Ms. Meyer and Shoal Bay entered into two separate Sale and Purchase Agreements ("Sale Agreements") for the purchase of Unit E1A and Unit E1B located at the Project site. The terms of the Agreements were identical. Paragraph 5(ii) of the Sale Agreements provided that Closing was to occur within 45 business days after the Units and building were granted a certificate of occupancy; while paragraph 5(iii) stated that Closing shall take place at a time of day specified by the Seller upon issuance of a certificate of occupancy.

[62] Paragraph 19(b) of the Sale Agreements provided that if the Defendant failed to perform any of the covenants within the time specified, the deposit and an additional sum of one thousand dollars, United States currency, (US$1,000) shall be returned to the Claimant on demand and upon the return of the Deposit the Agreements would cease and become null and void. Paragraph 21(b) of the Agreements provided that *"Time is of the essence of this Agreement"*. There is no dispute that Ms. Meyer paid a total deposit of one hundred and sixty two thousand, five hundred and forty dollars United States currency (US$162,540) for Unit E1A and E1B.

[63] Ms. Meyer asserts that in conversations held with her husband and herself, Mr. Harrigan and Mrs. Haines were confident that the Project would commence in or about November 2007, with occupancy of all the condominium buildings and villas to be delivered simultaneously sometime in 2010. Shoal Bay's witnesses, however, contend that the Agreements were open contracts which did not fix a date for completion. Shoal Bay's position is that the time for completion of the purchase and sale of the Units was not of the essence and as such Ms. Meyer is not entitled to any relief claimed. Shoal Bay further claimed that the Disclaimers set out in the Agreements and in the Purchaser Information Guide, prevented Ms. Meyer from being able to rely on any oral and/or written representations that were made by Shoal Bay and/or its agents.

[64] Ms. Meyer entered into two Agreements in July 2007 with the understanding, as was represented to her by Shoal Bay, its servants, agents and/or assigns, that closing would occur some two years from the date of execution of the Agreements. It was later represented to Ms. Meyer and her husband (by way of Newsletter) that Shoal Bay anticipated its target completion date for the Units to be the end of 2010. To date, however, the Project has not been constructed and the Units have not been delivered to Ms. Meyer.

[65] Mrs. Richardson Hodge next turned her attention to addressing the issues that are joined.

What are the Terms of the Contract

[66] Mrs. Richardson Hodge said that paragraph 5(iii) of the Agreements provided that Closing shall take place at a time of day specified by Shoal Bay upon issuance of Certificate of Occupancy and gave no fixed date as to when the certificate would be issued or when closing would take place. It is not disputed that to date, almost four years after the execution of the Agreements, no such certificate of occupancy has been issued to Ms. Meyer. In fact, construction on the Project has not even commenced.

Were any representations made to Ms. Meyer before the execution of the contract

[67] Mrs. Richardson Hodge said that Mr. Harrigan and Mrs. Haines say that they made no representations to Ms. Meyer or her husband regarding a completion date. In fact, they say that the Agreements were open contracts which did not fix a date for completion. However, Ms. Meyer says that in conversations held with her husband and herself, Mr. Harrigan and Mrs. Haines were confident that they had received the necessary sales target for the Project to proceed and that they anticipated that the Project would have commenced in or about November 2007, with occupancy of all the condominium buildings and villas to be delivered simultaneously sometime in 2010.

[68] On cross-examination, Mr. Harrigan stated that the purchasers were in fact given certain information which stated that the time to build the villas would be *"32 months overall, starting at the mid-end of 2007, most likely ending early to mid-2010."* This information was contained in the form of a Purchaser's Information Guide which included a document headed "Residence Construction". Mr. Harrigan

further stated that this information was sent to all purchasers to give them an estimated timeline for the completion of the Project. Notwithstanding this, Shoal Bay seeks to rely on disclaimers contained in the Purchaser's Information Guide which was sent to purchasers and which stated *"Except where specifically stated as being a binding commitment, nothing in this Buyer's Information Guide should be viewed as such".*

[69] Learned counsel Mrs. Richardson Hodge posited that the intent of the Purchaser's Information Guide was to provide information to the purchasers with respect to the Project in which they were interested. There had to have been a reasonable expectation on the part of Shoal Bay that purchasers (including Ms. Meyer) would rely on the information in the Purchaser's Information Guide which was sent to them. It can reasonably be inferred that intended purchasers chose to buy into the Project based on the information and assertions contained in the Guide. For Shoal Bay to now say that Ms. Meyer and the other purchasers must now rely exclusively on the four corners of the contracts (which intentionally omitted a closing date) is altogether unreasonable and inequitable.

[70] Even after receipt of the Purchaser's Information Guide, Ms. Meyer and her husband received a newsletter in December 2008 from Shoal Bay in which Shoal Bay represented that it anticipated that the target completion date for the Units to be the end of 2010. Shoal Bay knew that the representations made by it would lead Ms. Meyer to believe that the Units would be completed in 2010. Moreover, when asked on cross-examination as to when he anticipated that the Units would have been constructed, Mr. Harrigan said that he thought it would take 32 months following on the advice of the project manager. It was this time frame that was set out in the Purchaser's Information Guide and in the Newsletter.

[71] The Court has to determine what is the true intention of the parties, opined Mrs. Richardson Hodge. She referred the Court to Chitty on Contracts, Volume 1, 29th Edition, Paragraphs 12-041 to 12-049. Paragraph 12-043 states:

> *"The task of ascertaining the intention of the parties must be approached objectively: the question is not what one or other of the parties meant or understood by the words used, but the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. The presumption is that the parties have intended what they have in fact said, so that their words must be construed as they stand. That is to say the meaning of the document or of a particular part of it is to be sought in the document itself. One must consider the meaning of the words used, not what one may guess to be the intention of the parties. However, this is not to say that the meaning of the words in a written document must be ascertained by reference to the words of the document alone. In the modern law, the courts will, in principle, look at all the circumstances surrounding the making of the contract which would assist in determining how the language of the document would have been understood by the reasonable man."*

[72] Learned counsel Mrs. Richardson Hodge submitted that the Court ought to look at all the circumstances surrounding the Agreements at the time that the parties executed them. Firstly, the information sent to Ms. Meyer by Shoal Bay provided to Ms. Meyer a Purchaser's Information Guide prior to execution of the Agreements. The Guide was intended to provide information to Ms. Meyer as to the Project, including the time within which construction of the Units was expected to be completed. Secondly, Ms. Meyer and her husband both gave evidence that Mrs. Haines and Mr. Harrigan both made representations that the Units would be completed by 2010. This is supported by the fact that Mr. Harrigan himself believed that the Project would be completed within 32 months.

[73] Thirdly, representations contained in the Purchaser's Information Guide and oral representations made were generally confirmed in the Newsletter in which Shoal Bay again advised that construction was expected to be completed by mid to end of 2010. This representation was consistent with the representations made by Shoal Bay when it and Ms. Meyer were entering into the Sale Agreements. This time frame of 32 months was within the contemplation of the parties at the time of execution of the contract. It is with this background knowledge that Ms. Meyer (and indeed any reasonable person) formed the view that closing would take place within 32 months (i.e. by mid to end 2010). There is no doubt, based on the evidence adduced at trial, that Ms. Meyer was led to believe that her Units would have been completed by mid to the end of 2010. To date, some four (4) years later, Ms. Meyer's Units have yet to be constructed.

[74] Even if the Court finds that there is no evidence to support the conclusion that the Units were to be constructed within 32 months, learned counsel Mrs. Richardson Hodge submitted that the Units ought to have been constructed within a reasonable time.

[75] Paragraph 21-020 of Chitty states that:

> *"Where a party to a contract undertakes to do an act, the performance of which depends entirely on himself, and the contract is silent as to the time of performance the law implies an obligation to perform the act within a reasonable time having regard to all the circumstances of the case."*

[76] Learned counsel Mrs. Richardson Hodge referred the Court to *Re Longlands Farm* [1968] 3 All ER 552, Cross J, citing the Privy Council in the case of *Aberfoyle Plantations Ltd. v. Chengy* [1959] 3 All ER 910 said at page 5 that:

> *"Where a contract of sale fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time."*

[77] Mrs. Richardson Hodge reiterated that the Agreements were executed in July 2007. As at the date of providing the closing submissions, the Units have not been constructed. In no way can Shoal Bay's failure to commence construction of the Units four (4) years later be considered reasonable in all the circumstances. It is to be recalled that Mr. Harrigan, when asked as to what he thought was a reasonable time to complete the Project, stated 32 months. The Court is invited to assess Mr. Harrigan's evidence as to what is considered to be a reasonable time for construction of the Units and find that the Units ought to have been constructed within 32 months.

Whether the representations became part of the Agreements

[78] Mrs. Richardson Hodge said that Ms. Meyer, in her evidence, stated that the general information given orally by Shoal Bay at the reservation party to a number of would-be purchasers represented 2010 as the date for completion. As a result, Ms. Meyer and her husband expected that the Units would have been completed and delivered, at least, by Christmas 2010. Both Mr. Harrigan and Mrs. Haines however, deny that those representations were made to Ms. Meyer or her husband. According to Mrs. Haines, she was aware that there were no timelines fixed for completion and she was always mindful of that in her communication with Ms. Meyer and her husband. On cross-examination, Mrs. Haines admitted that she never told Ms. Meyer or her husband that there were no timelines for completion of the Project. She never brought that aspect of the Project to their attention.

[79] Mrs. Richardson Hodge said that it is clear that based on her own admission Mrs. Haines was not very forthcoming in her discussions with Ms. Meyer and her husband. She very well knew that by explaining to Ms. Meyer that her entering into two open contracts with no timelines fixed for completion of her Units would have deterred or, at the very least, delayed Ms. Meyer from entering into contract with Shoal Bay. Instead, representations were made to Ms. Meyer that her Units would

be completed by mid to end 2010, while simultaneously fixing the documents so that Ms. Meyer would not be able to rely on the various representations made by Shoal Bay. There was no benefit for Mrs. Haines to advise purchasers that they were entering into 'open contracts". Trophy Properties, as part of its arrangement, would immediately, upon the execution of a contract between a purchaser and Shoal Bay, receive half (½) of its fees. Mrs. Haines stated on cross-examination that she was paid 5% of the net purchase price of the Units upon purchasers entering into the contracts with Shoal Bay and that she would receive another 5% upon Closing.

[80] Mrs. Richardson Hodge opined that there could be no proper dispute that the oral and written representations made to Ms. Meyer, and for which Shoal Bay claims they had disclaimers, were made to give purchasers an estimated timeline for the completion of the Project and more importantly, an expectation as to when they would have been able to occupy their Units. Shoal Bay, in making these representations, knowingly did so with the expectation that the disclaimers in its documents would protect it from purchasers who they full well knew would have relied on them. Such actions are unconscionable and in bad faith and ought not to be condoned by the Court.

[81] What is worst, says Mrs. Richardson Hodge, is that Shoal Bay has given no evidence of its ability to complete the project at any time in the near future or at all. On cross-examination, Mr. Harrigan stated that financing for the Project has not been obtained and at the date of trial construction had not commenced on the Project. Mr. Harrigan further stated that he could not give a time frame as to an expected date for the Project to be completed. It would be irrational and unreasonable for Shoal Bay to reasonably expect Ms. Meyer to wait (possibly indefinitely) for it (Shoal Bay) to obtain financing to construct and complete the Project, with no idea as to when and how soon such financing will be obtained.

[82] Halsbury's Laws of England, Volume 31, Fourth Edition, paragraph 720 states that:

> *"In contracts of sale, or delivery of property pursuant to a contractual or other obligation, the following implications from acts and conduct may be made: he who assumes to sell property impliedly represents that it exists and has some value."*

[83] It is clear that representations were made to Ms. Meyer and her husband which induced her to enter into the Sale Agreements. Learned counsel Mrs. Richardson Hodge submitted that Shoal Bay misrepresented the true state of affairs with respect to the supposed "openness" of Ms. Meyer's Agreements as it relates to the time for closing.

Breach of Contract/Time of the Essence/Notice to Complete

[84] Turning her attention to the matters in the subheading, Mrs. Richardson Hodge posited that paragraph 21(b) of the Agreements clearly states that *"Time is of the essence of this Agreement*." The *"Time is of the essence"* provision in the Agreements was an essential term of the Agreements and required that Shoal Bay substantially complete and have the Units ready for delivery to Ms. Meyer within the time contemplated by the parties.

[85] Mr. Harrigan stated on cross-examination that based on the information given to him by the project manager, 32 months from the date of execution of the Agreements was a reasonable time for completion of the Units. Mr. Harrigan himself admitted that mid to end 2010 was in fact the expected time that Ms. Meyer's Units ought to have been completed. There is no dispute that to date Shoal Bay has failed to complete the Units by 2010 as was represented to Ms. Meyer or at all. Mrs. Richardson Hodge said that Shoal Bay is thereby in

breach of the Agreements which now has entitled Ms. Meyer to rescind the contracts on the ground of delay.

[86] In the case of ***Stickney v Keeble***, (1915) AC 386, Lord Parker of Waddington stated at Page 9:

> *"in a contract for the sale and purchase of real estate, the time fixed for completion has at law always been regarded as essential. In other words, Courts of law have always held the parties to their bargain in this respect."*

[87] Learned counsel Mrs. Richardson Hodge stated that in contracts for sale and purchase of real estate time is always regarded as being essential.

[88] In addition, paragraphs 21-013 and 21-014 of Chitty make reference to three circumstances where time is of the essence: (1) where the parties have expressly stipulated in their contract that the time fixed for performance must be exactly complied with, or that time is to be of the essence; (2) where the circumstances of the contract or the nature of the subject-matter indicate that the fixed date must be exactly complied with; and (3) where the time was not originally of the essence of the contract but one party has been guilty of undue delay, the other party may give notice requiring the contract to be performed within a reasonable time.

[89] Also, Mrs. Richardson Hodge referred the Court to the dicta of Greer LJ stated in *Harold WoodBrick Co. v. Ferris* [1935] 2 KB 198 at page 5, that:

> *"Parties may say by express words provide that notwithstanding any rule of law or equity to the contrary, time shall be of the essence of the contract."*

[90] In ***Lyra Sewer Collazo v. Percival William,*** Claim No. HCVAP 2007/024 at pages 13 to 14, Carrington JA (AG) stated that:

> *"The express wording adopted by the parties is of paramount consideration it appears to me that the parties intended that the timely performance of this obligation was to be treated as a condition of the Agreements so that any breach would entitle the innocent party to rescind the Agreements, irrespective of the gravity resulting from the breach."*

[91] Learned counsel Mrs. Richardson Hodge submitted that the express wording of paragraph 21(b) of the Agreements is of great significance and intended that Ms. Meyer's Units would have been completed within the time period of 32 months as contemplated. In such circumstances, it would be inequitable for the Court to treat the 'Time is of the essence' provision as a non-essential term of the Agreements. Even if the Court finds that time was not of the essence, learned counsel Mrs. Richardson Hodge submitted that Shoal Bay nevertheless was required to construct the Units within a reasonable time in accordance with paragraphs 21-013 and 21-014 of Chitty.

[92] Mrs. Richardson Hodge reiterated that notwithstanding paragraph 21(b) of the Agreements, Shoal Bay contends that time was not of the essence of the Sale Agreements and asserts in its defence that Ms. Meyer's notice giving it thirty (30) days within which to deliver the Units was not a reasonable time within which to require completion to occur. It must be noted however, that the notice from Ms. Meyer gave Shoal Bay two options: (i) to deliver up the Units within thirty (30) days of the date of the notice; or (ii) to return the Claimant's deposit within the same thirty (30) days. Therefore, if Shoal Bay was unable to complete the Units within the time given then it had the other option of returning Ms. Meyer's deposit. Shoal Bay did neither. Even after the notice, Ms. Meyer continually pressed Shoal Bay for completion of her Units.

[93] According to Halsbury's Laws of England, Volume 9(1), Fourth Edition, paragraph 935:

> *"In cases where time is not originally of the essence of the contract, time may be made of the essence, where there is unreasonable delay, by a notice from the party who is not in default fixing a reasonable time for performance. The time so fixed must be reasonable having regard to all the circumstances of the case."*

[94] What is reasonable will depend upon all the facts and circumstances of the case. Factors to which the Courts will have regard in assessing the reasonableness of the period of notice include what remains to be done at the date of the notice; the fact that the party giving the notice has continually pressed for completion or has before given similar notices which he has waived; or that it is especially important for him to obtain early completion.

[95] In the case of Green v. Savin [1879] 13 Ch D 589, after a delay of two years on the part of the vendor, he gave notice to the purchaser to complete his contract within three weeks, and that, if he did not do so, the vendor would treat the contract as at an end. The Court held that the time limit for completion in the notice was, under the circumstances, unreasonably short, and the notice was therefore of no effect.

[96] Learned counsel Mrs. Richardson Hodge submitted that the above case is not on all fours with the case at bar. The vendor in the Green v. Savin case delayed for a period of two (2) years before sending notice, whereas in the case at bar Ms. Meyer continuously enquired as to when the Project would be constructed and completed. In addition, the notice from Ms. Meyer gave Shoal Bay the option of either delivering up the Units within thirty (30) days of the date of the notice or to return her deposit within the same thirty (30) days. Even if the Court is of the opinion that the time given in the notice to Shoal Bay to complete construction,

(which is almost two years ago) was not reasonable, Shoal Bay has neither constructed or delivered the Units to Ms. Meyer nor did it return her deposits.

[97] Mrs. Richardson Hodge reminded the Court that to date, Ms. Meyer's Units are yet to be constructed and Shoal Bay has given no evidence that it will ever be in a position to commence construction. Mr. Harrigan stated that he anticipated completion to occur as long as financing was in place and in the event that he did not receive financing, then he did not have a time for completion of the Project. Shoal Bay's delay of four (4) years (from the date of execution of the Agreements) is so abnormal that it falls outside what the parties could have contemplated by the Agreements. The Agreements were executed in July 2007 and to not have the Units constructed, much less completed in 2010 and even as at this present date, cannot be considered to be reasonable in all the circumstances.

[98] In the case of *Sir Lindsay Parkinson & Co Ltd v. Commissioners of Works, (1949) 2 K.B., 632, page 18;* Asquith L.J. laid down the following principles:

> "*A contract often provides that in the event of 'delay' through specified causes, the contract is not to be dissolved, but merely suspended, yet such a provision has been held not to apply where the delay is so abnormal, so pre-emptive, as to fall outside what the parties could possibly have contemplated in the suspension clause. In other words 'delay' though literally describing what has occurred, has been read as limited to normal, moderate delay, and as not extending to an interruption so differing in degree and magnitude from anything which could have been contemplated as to differ from it in kind.* "

[99] Paragraph 19(b) of the Agreements provided that if Shoal Bay failed to perform any of the covenants in the Agreements, the Deposit and an additional sum of one thousand dollars United States currency (US$1,000) would be returned to Ms. Meyer on demand and upon such demand and the return of the Deposit the

Agreements would become null and void. Thus, due to Shoal Bay's default, Ms. Meyer is entitled to terminate the contract and the return of not only her deposit but also US$2,000 pursuant to clause 19 (b) of the Agreements.

[100] To put it another way, learned counsel Mrs. Richardson Hodge submitted that due to Shoal Bay's abnormal delay and failure to perform the contract, the Agreements and their Addenda were properly terminated by Ms. Meyer pursuant to clause 19 (b) of the main Agreements and, as such, Ms. Meyer is absolved of further performance of the said Agreements and is entitled to the return of her deposits as well as the additional sum of US$2,000 as per clause 19(b).

Whether the contract was affirmed despite the alleged breach

[101] Shoal Bay states that Ms. Meyer should have immediately given notice of her intention to repudiate the Agreements if the Units were not completed within a reasonable time, however, that she waited some eleven (11) months before she purported to take steps to make time of the essence by issuing a letter and some sixteen (16) months before she filed the instant claim. Shoal Bay asserts that Ms. Meyer did not purport to rescind the Agreements within a reasonable time but treated the said Agreements as still binding and operative and is thus not entitled to rely on the acts and conduct alleged. Shoal Bay contends, therefore, that Ms. Meyer affirmed Shoal Bay's breach. Learned counsel Mrs. Richardson Hodge categorically denied that Ms. Meyer in any way affirmed Shoal Bay's breach. In fact, Ms. Meyer did quite the opposite. As soon as she became aware that Shoal Bay would not have her Units completed by mid to end 2010, as was represented to her, she continually pressed for completion of her Units or the return of her deposit. She did nothing from which it could be inferred that she intended to continue with the contracts and, as such, did not lose her right to rescind the contracts.

[102] Mrs. Richardson Hodge referred the Court to paragraph 24-003 of Chitty, Volume 1, 29th Edition, Sweet & Maxwell, 2004:

> *"Where the innocent party, being entitled to choose whether to treat the contract as continuing or to accept the repudiation and treat himself as discharged, elects to treat the contract as continuing, he is usually said to have "affirmed" the contract. Affirmation may be express or implied. It will be implied if, with knowledge of the breach and of his right to choose, he does some unequivocal act from which it may be inferred that he intends to go on with the contract regardless of the breach or from which may be inferred that he will not exercise his right to treat the contract as repudiated. Mere inactivity after breach does not of itself amount to affirmation, nor does the commencement of an action claiming damages for breach."*

[103] Paragraph 1010 of Halsbury's Laws, Volume 9(1), Fourth Edition, states that:

> *"The prima facie right of the innocent party (B) to rescind for breach by A will be lost if B affirms the contract knowing of A's breach and of his right to rescind. Affirmation must be unequivocal and total, but it may be expressed or implied. Once made B's election to affirm is irrevocable and there is no need to establish reliance on it by A."*

[104] Learned counsel Mrs. Richardson Hodge submitted that there is no general rule that the innocent party to a broken contract loses the right to rescind if she does not elect to do so within a reasonable time after knowledge of the breach. Any lapse of time on the part of the innocent party must be such as to lead the party in default to act on the belief that the contract will not be rescinded and in such circumstances the innocent party will lose the right to rescind. Learned counsel Mrs. Richardson Hodge submitted that Ms. Meyer in no way, either expressly or impliedly, affirmed Shoal Bay's breach of contract. Mrs. Richardson Hodge

submitted that any lapse of time on Ms. Meyer's part in relation to rescission, as alleged by Shoal Bay, and which is denied, did not and could not have led Shoal Bay to act on the belief that the contract will not be rescinded. Mrs. Richardson Hodge said that any such inaction on the part of Ms. Meyer, as alleged and which is denied, does not extinguish Ms. Meyer's right to claim for damages for any loss sustained as a result of Shoal Bay's breach.

Whether Ms. Meyer is discharged from further performance of the Agreements

[105] Learned counsel Mrs. Richardson Hodge reminded the Court that Mr. Harrigan stated that as at the date of trial construction had not commenced on the Project and he could not give a timeframe as to an expected date for the Project to be completed. This in itself is a glaring admission by Mr. Harrigan that Shoal Bay has breached the contract that it entered into with Ms. Meyer. This failure by Shoal Bay to complete and deliver up the Units to Ms. Meyer has resulted in a breach of the Agreements and, as such, the Agreements and their Addenda were properly terminated by Ms. Meyer pursuant to clause 19 (b). In such circumstances, it would be inequitable for the Court to hold Ms. Meyer liable to perform any unperformed obligations under the contracts.

[106] Mrs. Richardson Hodge said that one party to a contract may, by reason of the other's breach, be entitled to treat himself as discharged from his liability further to perform his own unperformed obligations under the contract. Paragraph 24-047 of Chitty refers to the case of Heymans v Darwins Ltd., [1942] A.C. 356, 359, in which Lord Porter pointed out that:

> *"To say that the contract is rescinded or has come to an end or has ceased to exist may in individual cases convey the truth with sufficient accuracy, but the fuller expression that the injured party is thereby*

absolved from future performance of his obligations under the contract is a more exact description of the position."

[107] In Photo Production Ltd. v. Securicor Transport Ltd., [1980] A.C. 827, it is stated at page 13 that where the innocent party elects to terminate the contract, i.e. to put an end to all primary obligations of all parties remaining unperformed,

> *"there is substituted by implication of law for the primary obligations of the party in default which remain unperformed a secondary obligation to pay money compensation to the other party for the loss sustained by him in consequence of their non-performance in the future and (b) the unperformed primary obligations of that other party (i.e. the innocent party) are discharged."*

Therefore, learned counsel Mrs. Richardson Hodge submitted that due to Shoal Bay's breach of contract, Ms. Meyer is discharged of further performance of any unperformed obligations on her part.

[108] Mrs. Richardson Hodge opined that there is no dispute that Clause 19 (b) of the Agreements gave Ms. Meyer the right, in the event of Shoal Bay's failure to perform the covenants and Agreements set forth in the contracts, to terminate the Agreements and to recover her deposits. There is no dispute that Ms. Meyer's Units have not been completed and are yet to be constructed. As such, Shoal Bay is in breach of a fundamental term of the contracts, that is, to have Ms. Meyer's Units constructed and completed within a reasonable time or at all. Due to Shoal Bay's default to perform a fundamental obligation under the contracts, it is liable in damages to Ms. Meyer.

[109] According to Halsbury's Laws of England, Volume 42, Fourth Edition, paragraph 245:

"Where the vendor makes a default in performing his part of the contract which entitles the purchaser to rescind the contract, the purchaser can obtain damages, which will include his expenses to date, the costs of the Agreements itself and the costs of investigating title. The fact that the purchaser has by delay lost the right to specific performance does not prevent him from recovering the deposit."

[110] McGregor on Damages, 17th Edition, Sweet & Maxwell, 2003, paragraph 22-010, states that:

"If the seller delays in effecting a conveyance of the property in circumstances which allow the buyer to regard the breach as discharging the contract and justifying him in refusing the property, then since he will not have the property transferred to him, the situation is the same as with a failure to complete as far as the measure of damages is concerned. In such a situation the measure of damages is properly regarded as damages for delay."

[111] Mrs. Richardson Hodge said that based on the above principles, Shoal Bay is in breach of the Agreements and Ms. Meyer is entitled to damages which include the full refund of her deposits in the sum of US$162,540 plus the additional sum of US$2,000 pursuant to clause 19(b) of the Agreements, along with any interest and costs which she has incurred as a result of Shoal Bay's breach.

[112] Turning her attention to the deposits, learned counsel Mrs. Richardson Hodge referred the Court to Clause 19 (a) of the Agreements which provided that:

"In the event the Buyer fails to perform any of the covenants and Agreements set forth in this Agreement on its part to be performed prior to the Closing, the Deposit shall, at the option of the Seller, be retained by Seller on demand as consideration for its execution of this Agreement and in full settlement of, and as liquidated damages for, any and all claims for

damages occasioned by Buyer's default, and upon such election this Agreement shall terminate, expire, cease and become null and void and, thereafter, Buyer and Seller shall be relieved of any and all further obligations and liabilities to each other under this Agreement."

[113] Learned counsel Mrs. Richardson Hodge said that clause 19(a) entitled Shoal Bay to retain Ms. Meyer's deposits in the event she failed to perform any of the covenants set forth in the Agreements. However, based on the evidence adduced at trial, Ms. Meyer is not in breach of any of her obligations under the Agreements and, in fact, it is Shoal Bay who is so in breach. Mrs. Richardson Hodge posited that there is no dispute that the template Agreements contained in the Purchaser's Information Binder sent to purchasers prior to execution of the contracts and the main Agreements executed by Ms. Meyer were prepared by Shoal Bay. The Agreements contained clause 19(b) which entitled her, upon Shoal Bay's default, to the return of her deposits and an additional sum of US$1,000. This provision clearly contemplated that there could be a circumstance in which the Seller could be required to repay monies. When asked on cross-examination as to how Mr. Harrigan anticipated that the deposits would be returned to Ms. Meyer pursuant to clause 19(b) if the deposits had been released to Shoal Bay, Mr. Harrigan responded that he anticipated that the Project would be funded and so there would be sufficient funds to take care of the purchasers. Mr. Harrigan was further asked as to whether he had a fallback position in the event that Shoal Bay never received financing for the Project and he confirmed that there was in fact no fallback position.

[114] Mrs. Richardson Hodge said that Shoal Bay failed to put a mechanism in place to repay purchasers their monies in the event circumstances occurred which led to default on the part of Shoal Bay, and which in fact it did in this particular case. The fact that Shoal Bay prepared the Agreements promising to return deposits plus US$1,000 in the event of default but having no mechanism in place to abide by the very terms of the Agreements that it created, again shows a lack of bona fides on

the part of Shoal Bay. It appears that the main focus of the Project at that point in time was to get the money from the purchasers, including Ms. Meyer. It is further apparent that no thought was extended to ensuring that Shoal Bay was in a position to comply with its obligations under the Agreements, i.e., to construct, finish and deliver the Units and/or to repay deposits in the event of default of Shoal Bay. Mrs. Richardson Hodge said that what is interesting is that on cross-examination, Mr. Harrigan unequivocally stated that Shoal Bay is prepared to offer Ms. Meyer back her deposits as soon as Shoal Bay receive funding.

[115] The Court ought to have no difficulty finding in favour of Ms. Meyer and ordering that Shoal Bay returns to Ms. Meyer her deposit amount of US$162,540 plus US$2,000 as provided for under clause 19(b) of the Agreements.

[116] In support of her position, learned counsel Mrs. Richardson Hodge referred the Court to Halsbury's Laws of England. At paragraph 234, it is stated that:

> *"A deposit paid under a contract of sale serves two purposes: if the sale is completed it counts as part payment for the purposes of the purchase money, but primarily it is a security for the performance of the contract, and it is usual to provide expressly that, if the purchaser fails to observe the conditions of the contract, the deposit is to be forfeited to the vendor."*

And this is provided for in clause 19(b) of the Agreements.

[117] Paragraph 234 of Halsbury's Laws ibid goes on to say, however, that *such a provision is not necessary, and unless the contract taken as a whole shows an intention to exclude forfeiture, the vendor is entitled, by virtue of the purpose of the deposit, to retain it as forfeited, if the contract goes off due to the purchaser's default*.

[118] Learned counsel Mrs. Richardson Hodge submitted, however, that where a seller is in breach of contract he can in no way be entitled to retain the purchaser's deposit. In *Howe v. Smith* at pages 5 to 6, Cotton LJ stated:

> *"It may not be that in all cases the vendor ought to be entitled to retain the deposit."*

[119] Paragraph 22-003 of McGregor on Damages ibid provides:

> *"Where the seller refuses to proceed with the contract in such circumstances as amount to a repudiation or discharging breach, several remedies are available to the buyer; he may treat the breach as discharging the contract, restore benefits received, if any, and recover back in action of restitution his deposit, any further part of the price he has paid, and the expenses properly incurred in the investigation of title."*

[120] Mrs. Richardson Hodge submitted that for Shoal Bay to be entitled to retain the deposits there must have been a breach of contract on the part of Ms. Meyer which would treat the contract as being repudiated. Mrs. Richardson Hodge said that Ms. Meyer is not in breach of clause 19 (a) of the Agreements or any part thereof and in the circumstances, Shoal Bay is not entitled to retain the deposits. In contrast, however, Ms. Meyer, due to Shoal Bay's breach of the Agreements and to which Shoal Bay itself admits, is entitled to recover the deposits.

Whether Shoal Bay is entitled to Specific Performance

[121] Mrs. Richardson Hodge said that the evidence shows that as at the date of trial construction had not commenced on the Project and there is no time frame as to an expected date for the Project to be completed, however, Shoal Bay, in its Counterclaim, has sought specific performance of the Agreements. The Court must be very confused by Shoal Bay's Counterclaim for specific performance as

Shoal Bay itself has admitted that Ms. Meyer's Units do not currently exist. If Ms. Meyer's Units have not been completed or even constructed, what then does Shoal Bay expect Ms. Meyer to specifically perform? Is Shoal Bay asking the Court to order Ms. Meyer to pay the balance of the purchase price for Units that do not exist or to wait until Shoal Bay receives financing to complete the Project although Shoal Bay is unaware as to when that will be? To require Ms. Meyer to do either of the above is wholly unfair and unreasonable in all the circumstances.

[122] Mrs. Richardson Hodge maintains that Shoal Bay is the one in breach of the Agreements in that it failed to substantially complete the Units within a reasonable time and time was of the essence pursuant to clause 21(b) of the Agreements. Shoal Bay's delay in completing Ms. Meyer's Units has resulted in a fundamental breach of the contracts. In such circumstances, it would be unjust to Ms. Meyer if the Court were to grant Shoal Bay specific performance of the Agreements and their Addenda.

[123] According to Chitty at paragraph 27-004:

> *"The term "specific performance" refers to the remedy available in equity to compel a person actually to perform a contractual obligation. Where a person has under a contract become liable to pay a fixed sum of money, the actual performance of that obligation can be enforced by bringing an action for that sum."*

It is further stated at paragraph 27-044, however, that:

> *"Specific performance may be refused on the ground of mistake, misrepresentation and delay.*"

[124] The Court in the case of ***Annette Phillis Sewell v. Joseph Allain Stephanie Allain,*** Claim No. SLUHCV 528/2005 at page 47 said that it is an established

principle that specific performance is a discretionary remedy which the Court will not grant where the complainant is in default of an essential condition. Also, as was said in the case of *Caribbean Development (Antigua) Limited v. Electronic Technology International (Antigua) Limited* by Justice Michael Gordon QC at page 8:

> *"as far as the parties and this court are concerned, a legal Agreement for consideration was entered into by the parties which Agreement was breached by one party, the respondent. Thus continuing in the language of Binnie J. there is a juristic reason (breach of a valid contract by the respondent) to deny the respondent recovery."*

[125] Mrs. Richardson Hodge said that it is undisputed that Ms. Meyer's Units have not been constructed. If the Court were to grant specific performance it would be acting in vain. Even if granted specific performance, Shoal Bay is not and cannot be in a position to transfer the Units to Ms. Meyer as same are not constructed and there is no evidence that they will be constructed in the near future.

Court's Analysis and Conclusions

[126] I have given careful consideration to the evidence that was adduced and to the very helpful submissions of both learned counsel. I have had the opportunity to observe the witnesses who testified and formed the view that Ms. Meyer and her husband Mr. Feuerstein were very candid and honest. In contradistinction, neither Mr. Harrigan nor Mrs. Haines were forthright with the Court. To the contrary, they both struck me as two witnesses who were less than candid. In their testimony, it was very pellucid that they are persons who are not averse to engaging in practices that may not be very attractive. The following are my findings of facts.

[127] Ms. Meyer was desirous of purchasing two condominium Units and met with an agent of Shoal Bay and Mr. Harrigan, who is the managing director of Shoal Bay, about the purchase of units in a prospective development. The agent then

was Mr. Jacob. She had several discussions with him and subsequently she wired US$5,000 to Mr. Jacob for him to hold a space at the reservation party in relation to the prospective development or Project. She subsequently wired US$174,820 to AXA Agencies Ltd. prior to the first reservation party which represented the deposits payments for the Units.

[128] On 28th and 30th July 2007, Ms. Meyer entered into two Agreements. One was for the purchase of Emerald IA at a cost of US$414,000 and the other for Emerald 1B at a cost of US$398,700.

[129] During the discussions with Mr. Harrigan and Mrs. Haines, the new sales agent, at the reservation party and on other occasions, Ms. Meyer formed the impression that the project would have commenced by November 2007 and be completed in 2010. Her expectation and that of her husband, who had also attended the party, was that all of the Units would have been completed and the occupancy given to the purchasers of the villas and condominium buildings by 2010, including Ms. Meyer.

[130] Sometime during their discussions, both Mr. Harrigan and Mrs. Haines assured Ms. Meyer that funding and construction and engineering matters were all in place for the commencement of the project.

[131] Sometime in August 2007, Ms. Meyer was repaid US$17,280, since it appears as though she had overpaid the deposit. Purchasers, including Ms. Meyer, were required to pay a 20% deposit. In addition, documentation from Shoal Bay indicated that the Units would have been delivered by Christmas 2010. On the payment of the deposit, Mrs. Haines, who was the Agent, received part of her commission and the balance was paid to her on Closing. Also, Shoal Bay sent a newsletter to Ms. Meyer advising of the change of the material that would have been used in the construction of the project at the same time indicating that it would be completed much later.

[132] Several months had passed and the construction of the project was yet to begin. Ms. Meyer was then advised that the project had no financing and, in fact, Shoal Bay was now in the process of accessing funding. Also, the location that she had chosen for her Units was changed. Mrs. Haines now had advised Ms. Meyer that the project would now have been changed to a phased project and that her Units were likely to be constructed in the last batch. Neither Shoal Bay nor Mr. Harrigan clearly did not have the means to finance the project. He had to obtain a loan from a bank and other external financing. In addition, he utilized the deposits that were paid to Shoal Bay. With the global financial crisis, Mr. Harrigan/Shoal Bay was unable to obtain financing. However, he was in possession of Ms. Meyer's deposit.

[133] The Agreements did not fix a date for the completion of the Units but required Shoal Bay to provide closing on the delivery of the certificate of occupancy to Ms. Meyer. Neither did the Agreements fix a date for steps to be taken towards the construction of the Units and no date of completion appeared to have been fixed. I am satisfied that Ms. Meyer was in communication with Mrs. Haines during the intervening period in relation to the construction of her units.

[134] With a few years having elapsed and with no possibility of construction commencing, Ms. Meyer caused her attorney to write to Mr. Harrigan to request that Shoal Bay complete the construction of the Units within 30 days or that her deposit be refunded.

[135] With no response forthcoming and with the 30 days having elapsed, Ms. Meyer caused her attorney to sue Shoal Bay for breach of contract and requested the return of her deposit of US$164,540. She also sought a number of declarations including: that the Agreements have been validly terminated; a declaration that she is discharged from further performance of the Agreements. Shoal Bay says

that Ms. Meyer is in breach of the Agreements and has counterclaimed against Ms. Meyer that she is guilty of anticipatory breach of the Agreements.

[136] Shoal Bay seeks a number of orders and declarations including the following: that the Agreements are valid; an Order granting specific performance of the Agreements. Alternatively, Shoal Bay seeks damages in lieu of specific performance.

I will now address the first issue:

Issue No. 1: What are the terms of the contract?

[137] I am of the view that the position advocated by learned counsel Ms. Dyer represents the true nature of the contract. The full terms of the Agreements were contained in the formal documents. It is impermissible to allow any other informal discussions that were had between the parties to be read as part of the Agreements. However, I do not share the view that Ms. Meyer should be prevented from asserting that there was an implied term of the Agreements that the Units were to be completed within a reasonable time. I specifically note that in paragraph 16 of the Statement of Claim, Ms. Meyer alleged that Shoal Bay breached the Agreements when it failed to substantially complete the Units within a reasonable time. It is pellucid that in addition to saying the Units were to be completed within two years, Ms. Meyer is also complaining that the expectation was that the Units were to be substantially completed within a reasonable time. It is noteworthy that Ms. Meyer has conceded in her Reply that any oral representations could not vary the express terms of the Agreements.

[138] I am therefore of the view that there is nothing to preclude Ms. Meyer from asserting that the Units ought to have been substantially completed within a reasonable time since it clearly was part of her pleaded case. There is no need for her to have used the words “implied terms of the Agreements”. This alternative position was clearly foreshadowed in her pleadings.

[139] The above view is in no way inconsistent with my acceptance that the Agreements are indeed open contracts and no dates are fixed for the delivery of the Units. However, delivery of them is subject only to Shoal Bay delivering a certificate of occupancy which, in the case at bar, now appears to be a very remote possibility.

Issue No. 2: Whether there were Representations before the Execution of the Contracts

[140] As alluded to earlier, I am satisfied that both Mr. Harrigan and Mrs. Haines gave the impression to Ms. Meyer and her husband that the Units would have been completed within two years of signing the Agreements. This was done both by way of conversations and by the newsletter from Shoal Bay. It is approximately five years since the parties entered into the Agreements and Shoal Bay is yet to even commence the construction of Ms. Meyer's Units. What is worst is that Mr. Harrigan was unable to state when, if at all, construction would start. I am of the considered opinion that the parties could never have contemplated or agreed to that.

[141] I have no reason to disbelieve Ms. Meyer and her husband. In fact, I find very attractive that informal representations were made by both Mr. Harrigan and Mrs. Haines to Ms. Meyer and her husband which led them to believe that the Units would have been completed within two years of execution of the Agreements. At the time of the informal discussions, Shoal Bay did not have the financial means to construct the Units.

[142] I do not form the view that Mrs. Haines or Mr. Harrigan were credible witnesses. It is clear to me that they were deliberately leading Ms. Meyer in the wrong path when there was clearly no real possibility of constructing her Units. It was in Mrs. Haines' interest to obtain the sale of the Units since she stood to benefit and did benefit from the commissions. In fact, Mrs. Haines, by her omission, was

complicit with Mr. Harrigan in not informing Ms. Meyer that the Agreements that she had signed were open contracts. To the contrary, I am satisfied that both Mr. Harrigan and Mrs. Haines deliberately, in their informal conversations, conveyed to Ms. Meyer that the Units would have been completed within two years of execution of the Agreements full well knowing that these were not and could not be regarded as terms of the Agreements. However, I am not of the view that their communication rises to the level so as to amount to misrepresentations in law.

Issue No. 3: Whether the Representation became Terms of the Contract.

[143] I have already mentioned that both Mr. Harrigan and Mrs. Haines made general oral representations to Ms. Meyer before she entered into the Agreements. However, I agree with the submission of learned counsel Ms. Dyer, that the representations did not become a term of the contract. I am fortified in the above view, having reviewed clause 21(c) which specifically precluded any such possibility. Importantly, clause 21(d) of the Agreements state that the Agreements "*may not be changed, amended or modified in any respect whatsoever except in writing*."

[144] Nevertheless, there is no doubt that it was the expectation of Ms. Meyer and her husband to obtain completed units based on discussions they had with Mr. Harrigan before the signing of the contracts, the discussions do not rise to the level of representations. They were no more than informal discussions which Mr. Harrigan and Mrs. Haines had with Ms. Meyer that allowed her to conclude that the Units would be completed within two years of the signing of the Agreements. I agree with learned counsel Ms. Dyer that they were not misrepresentations. However, I have no doubt that they were carefully thought out "chats" by Mr. Harrigan and Mrs. Haines who wanted to have many persons buy into the project. Neither of them thought that the Units had a fixed date of completion and so I believe that Mrs. Haines studiously avoided saying so.

However, I am convinced that in true salesman talk they both gave Ms. Meyer and her husband the impression that the project would have been completed at the very latest by 2010. In addition, the documents including the Frequently Asked Question which Ms. Meyer received weeks before her signing of the Agreements also helped to crystalise the impression that the Units would have been completed by 2010. This was reinforced by the information contained in the Purchase Information Guide. I reiterate that all these impressions were conveyed to Ms. Meyer by Mr. Harrigan and Mrs. Haines even though they full well knew that the requisite financing to even commence the construction of the Units was not in place. They were simply over ambitious.

[145] Based on the carefully crafted wording of the open contracts, I am ineluctably driven to conclude that Mr. Harrigan had the contracts so drafted so as to protect himself from liability since he full well knew that there was the real possibility of him not being able to complete within a timely manner, since he did not have the financial means.

[146] It is indeed curious that the Agreements contained a clause that stated that "Time is of the essence", even though there was no date fixed for the commencement much less the construction of the Units. Equally interesting is the fact that the Purchaser's Information Guide contained a disclaimer that no information in the document shall be viewed as a binding commitment except specifically stated. I accept Mr. Harrigan's evidence under strenuous cross-examination by learned counsel Mrs. Richardson Hodge that the Purchaser's Information Guide stated that the time to build the Units would be 32 months overall, start up at the mid end of 2007, most likely ending early to mid 2010.

[147] I am far from persuaded that Mr. Harrigan ever intended for the Units to be completed by 2010. At the highest, he was merely hopeful to receive financing for the project. This is the reason why the Agreements were so drafted and provided protection to him. There was therefore no intention on Shoal Bay's part for the

Units to be completed by 2010 and in any event the representations did not and could not form part of the contract.

Issue No. 4: Whether there was a date fixed for the completion of the Agreements.

[148] Based on my above conclusions, coupled with the concessions that were made both by Ms. Meyer and Mr. Harrigan during skillful cross-examination by Ms. Dyer, I am in total agreement that this issue is otiose.

Issue No. 5: Whether there was a breach of the Sale Agreements which entitled Ms. Meyer to terminate the Contracts

[149] As alluded to earlier, on this issue I find the arguments advanced by learned counsel Mrs. Richardson Hodge more attractive and indeed persuasive than those advocated by learned counsel Ms. Dyer. It could not have been in the contemplation of the parties that four years after Ms. Meyer had paid a substantial deposit towards the contract price the construction of her Units would not even have commenced. Even in the face of the reality of the Agreements being open contract, it could not be anticipated that nearly five years after the signing of the Agreements there would have been no movement in the construction of Ms. Meyer's Units. What is worst is that during Mrs. Richardson Hodge's skillful cross-examination of Mr. Harrigan, it became clear that he had no idea when or if at all he would have been able to commence the construction of the two Units. This could never be fair or just to the purchaser, Ms. Meyer, who has parted with her deposit nearly five years ago. In this regard, I accept the submissions advanced by learned counsel Mrs. Richardson Hodge that the Court must construe the contract as to require Shoal Bay to complete the construction of the Units within a reasonable period of time. See Re ***Longland Farm,*** *in* which Cross J cited the Privy council case of ***Aberfoyle Plantations Ltd. v. Chengy*** *[1959] 3 ALL ER 910.* In the case at bar, the Agreements have fixed no date for the

completion of the Units that Ms. Meyer purchased, and this is so even in the face of Mr. Harrigan's concession that 32 months was a reasonable period within which the Units should have been completed.

[150] I agree with Mrs. Richardson Hodge that it is nothing less than unconscionable for Mr. Harrigan to seek to insist that the Agreements were open contracts and Ms. Meyer should not expect the Units to have been completed within a reasonable time. I have no doubt that on the face of the facts the Agreements provided no fixed date, that the dates discussed were target dates. See ***Williams v. Greatrex*** ibid. This does not negate the fact that Ms. Meyer was entitled to expect the completion of her Units within a reasonable time. It is the law that where time is not originally of the essence of the contract, time may be made of the essence where there is unreasonable delay by a notice of the party who is not in default fixing a reasonable time for performance. I have no doubt that Ms. Meyer consistently required Shoal Bay to commence/complete the construction of her Units. The written notice she sent was so done as a last resort.

[151] In view of the totality of circumstances in the case at bar, I have no doubt that Shoal Bay breached the contract with Ms. Meyer and the substantial breach entitled her to terminate the contract for Shoal Bay's failure to even commence the construction of the Units in excess of two years after the signing of the Agreements. I do not share the view that Ms. Meyer was required to wait until 32 months from the date of signing the Agreements had elapsed before issuing the notice. Each case must turn on its own facts. The case of ***Green v. Savin*** is distinguished.

[152] In the case at bar, approximately 29 months had elapsed and Shoal Bay was not even in a financial position to lay the foundation for the construction of the Units. Ms. Meyer was clearly entitled to conclude that the delay was unreasonable and to even have come to the conclusion that Shoal Bay was simply out of funds and could not even undertake the construction of her Units. I do not accept that she

ought to have waited for 32 months to have expired before sending the notice. She had waited sufficiently long. I have no doubt that more than a reasonable time had elapsed before Ms. Meyer sent the formal notice to Shoal Bay demanding the completion of her Units or there should be a refund of her deposit. See *Chaitlal and Others v. Chanderlal Ramlal ibid.*

Issue No. 6: Whether the contracts were affirmed despite the alleged breach by Shoal Bay

[153] It only bears stating to be rejected; there is not a scintilla of evidence before the Court upon which I could properly conclude that Ms. Meyer had affirmed Shoal Bay's breach of the contract. I do not share the view that when Ms. Meyer received the newsletter of 2008 which indicated that the target date for completion would occur within two years, that she ought to have rescinded the contract. Clearly, a delay of one year without more may well not have been sufficient to justify her termination of the Agreements. I also have no reason to disbelieve her when she said that "she was still trying to give the developers the benefit of the doubt in their suggestions." This, in my view, is not at variance with Ms. Meyer's expectation that her Units would have been completed within a reasonable time. Also, there is no basis upon which I would properly conclude that had the finance been available to Shoal Bay, it would not have been able to expedite the construction of the Units. I believe Ms. Meyer still hoped and wished that Shoal Bay could have delivered her completed Units to her.

[154] There is no evidential basis for me to conclude that she affirmed the Agreements after the breaches in a manner that debars her from now insisting on her legal rights. Before the sending of the notice her conduct at worst was consistent with mere inactivity. The clear inference, based on the facts of the case, is that Ms. Meyer still hoped that Shoal Bay would have made good its commitment and deliver the Units to her within a reasonable time. I am convinced that Ms. Meyer

waited for a reasonable time to expire before seeking to terminate the Agreements. She cannot be faulted for doing so.

[155] On the facts, there is no basis upon which I can properly conclude that she was in any way complicit in the breach. To put the matter beyond pale, Ms. Meyer struck me as a decent person who expected and requested that Shoal Bay would do the honourable thing by fulfilling its contractual obligations. All of this is against the background that she does not reside in Anguilla. I also believe Ms. Meyer when she said that having paid the deposits in 2007, she received minimal communication from Shoal Bay in relation to ongoing activities at the project. Also, Ms. Meyer told the Court that in September 2008, she and her husband were given every assurance by Mrs. Haines that things were on track and that Shoal Bay was just waiting for final approval from the bank to commence the construction. She remained hopeful. They held meetings with Shoal Bay up to February 2009. I believe her. It was only when Mrs. Haines told her that the nature of the project had changed to a "phased project" and that her building would be last that Ms. Meyer lost confidence in the project that it would ever be built. This prompted her to request the refund. This conduct is inconsistent with complicity.

[156] I am therefore not of the view that she, in any way, affirmed the Agreements in spite of the breach. All along she hoped to have had her Units delivered to her and was given flimsy assurances that their construction would have commenced and would have been completed.

Issue No. 7: Whether in the circumstances, Ms. Meyer, having issued notice for the completion, provided a reasonable time for completion

[157] I am guided by the very helpful case of *Green v. Savin*, (a case of some antiquity) that was referred to by both sides. In the case at bar, Ms. Meyer continuously enquired of Shoal Bay's agents about her Units. I am satisfied that the facts in

that case are clearly distinguishable from the case at bar. In the present case, Ms. Meyer was in communication with Mrs. Haines in relation to her Units. I also state that the pronouncements in *Green v. Savin* (1879) 13 Ch D 589 are very instructive, namely:

> *"That which is not of the essence of the original contract is not to be made so by the volition of one of the parties unless the other has done something which gives a right to the other to make it so. You cannot make a new contract at the will of one of the contracting parties. There must have been such improper conduct on the part of the other so as to justify the rescission of the contract sub modo, that is, if a reasonable notice is not complied with."*

[158] I am not of the view that the list of factors which the Court should consider as stated in *Green v. Savin* ibid is in any way exhaustive. The Court must take into account the attitude of the party in default, the likelihood or otherwise of the defaulting party honouring its contractual obligations and the forthrightness or otherwise of the party in default.

[159] I have taken all of the above factors, coupled with those that were stipulated in *Green v. Savin* into account and am not of the respectful position that the notice given by Ms. Meyer was too short and therefore was unreasonable. In hindsight, it must be very disconcerting for Ms. Meyer to have learnt at the trial of the matter in 2011 that Shoal Bay simply has no money to even commence the construction of her Units. Equally alarming is the fact that it has no immediate prospect of obtaining financing for the commencement of the Units. There is no likelihood that she will ever be able to receive her Units in the foreseeable future and Shoal Bay simply was not candid with her, neither was Mrs. Haines.

Issue No. 8: Whether Ms. Meyer is discharged from further performance of the Agreements

[160] There is no general rule that the innocent party to a broken contract loses the right to rescind if he does not elect to do so within a reasonable time after knowledge of the breach.

[161] In view of the above conclusions, this issue becomes a very short one. There can be no doubt that Ms. Meyer is discharged from further performance of her obligations under the Agreements. In view of the incontrovertible evidence that Shoal Bay simply is not and is likely to never be able to commence the construction of the Units in the foreseeable future, Ms. Meyer cannot properly be required to throw more money into what appears to be a bad investment.

[162] To conclude otherwise, apart from being unfair and unwise would, in effect, compel her to treat the Agreements as subsisting in the face of the overwhelming evidence that Shoal Bay never was, nor is ever likely to be in a position to construct her Units. Looking at the matter in the round, I am of the considered view that Ms. Meyer is discharged from the further performance of the obligations under the Agreements. I have no doubt that it would be unreasonable and lawful to hold otherwise. See *Photo Production Ltd. v. Securicor Transport Ltd.* ibid.

[163] I agree with learned counsel Mrs. Richardson Hodge that the posture which Shoal Bay has adopted in this matter is unreasonable in seeking to assert that the notice given was too short and therefore it is invalid. Further, I have no hesitation in concluding that Ms. Meyer has validly terminated the Agreements as a consequence of Shoal Bay's breach of the Agreements. See *Heymans v. Darwins Ltd.* ibid. The injured party who has suffered as a consequence of the breach of contract is entitled to damages.

[164] I agree with learned counsel Mrs. Richardson Hodge that Ms. Meyer is entitled to the refund of the deposit in the sum of US$162,540.00. Also clause 19(b) of the Agreements specifically provide that upon default by the seller, the Claimant is

entitled to the refund of the deposit together with the sum of US$1,000. In relation to the two Agreements, the total will therefore be US$2,000. It is the law that where the seller, by his conduct, either repudiates or breaches the contract, the purchaser is entitled to treat the breach as discharging the contract and is absolved from the performance of obligations under the contract. The purchaser is entitled to be restored the benefits the seller received and to recover back his deposit and any further part of the price he has paid.

Issue No. 9: Whether Shoal Bay is entitled to specific performance of the Agreements

[165] In view of the above determinations, it is unnecessary to address this issue. I will only state that specific performance is an equitable remedy and he who wants equity must do equity.

Conclusion

[166] In view of the premises there shall be judgment for Ms. Elise Meyer against Shoal Bay. Shoal Bay's counterclaim against Ms. Elise Meyer is dismissed.

[167] Accordingly, it is hereby ordered and declared as follows:

(a) The Purchase and Sale Agreements in relation to the Emerald IA and Emerald 1B have been validly terminated by Ms. Elise Meyer.

(b) Ms. Elise Meyer is discharged from further performance of the Purchase and Sale Agreements.

(c) Shoal Bay Development Corporation shall repay Ms. Elise Meyer the sum of US$162,540 which represents the full refund of the deposit.

(d) Shoal Bay Development Corporation shall pay Ms. Elise Meyer the sum of US$2,000 in accordance with paragraph 19(b) of the Purchase and Sale Agreements.

(e) Ms. Elise Meyer is entitled to interest on the above sum at the rate of 3% from the date of filing the claim to the date of judgment.

(f) Ms. Elise Meyer is to have prescribed costs, as agreed, in the sum of EC$52,981.64.

[168] I commend both learned counsel for their helpful submissions.

……
Louise Esther Blenman
Resident High Court Judge
Anguilla