**IN THE EASTERN CARIBBEAN SUPREME COURT**
**IN THE HIGH COURT OF JUSTICE**

**SAINT LUCIA**

**SLUHCV 2011/0293**

**(1) EDUARDO IRIBARREN**
**(2) OMAR MONTESINOS**

Claimants

**AND**

**DCG PROPERTIES LIMITED**

Defendant

**Consolidated with –**
**SLUHCV 2011/0294**

**(1) EDUARDO IRIBARREN**
**(2) ANDREINA ROBAINA**

Claimants

**AND**

**DCG PROPERTIES LIMITED**

Defendant

**Appearances:**
Mr. Geoffrey Du Boulay and with him Ms. Sardia Cenac for the Claimants
Mr. Colin Foster and with him Mr. Duane Jn Baptiste for the Defendant

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2015: February 9th

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**JUDGMENT**

[1] **WILKINSON J.:** On March 21st 2011, the Claimants filed their respective claim forms and statement of claims. Therein they prayed for the following relief:

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i. the return of deposits in the total sum of US$222,750.00/EC$605,189.48;

ii. liquidated damages in the sum of US$40,500.00/EC$110,034.45 pursuant to article 1387 of the Civil Code of Saint Lucia;

iii. interest pursuant to article 1009A of the Civil Code of Saint Lucia on US$263,250.00/EC$715,223.93 at the statutory rate of 6 percent per annum or the daily rate of US43.27/EC$117.57 from December 30th 2010 to March 2nd 2011, that is US$2,726.23/EC$7,406.91 and continuing at the rate of 6 percent per annum or at the daily rate of US$43.27/EC$117.57 until date of payment.

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iv. the return of deposits in the total sum of US$236,500.00/EC$642,546.85;

v. liquidated damages in the sum of US$43,000.00/EC$116,826.70 pursuant to article 1387 of the Civil Code of Saint Lucia;

vi. interest pursuant to article 1009A of the Civil Code of Saint Lucia on US$279,500.00/EC$759,373.55 at the statutory rate of 6 percent per annum or the daily rate of US$45.94/EC$124.83 from December 30th 2010 to March 2nd 2011, that is US$2,894.58/EC$7,864.29 and continuing at the rate of 6 percent per annum or at the daily rate of US$45.94/EC$124.83 until date of payment.

Both also claimed costs and further or other relief as the Court deemed just.

[2] The Claimants pleaded in their statements of claims (identical save for Homesite description numbers, sale/purchase price of the Homesite and deposits paid) that the Defendant was in breach of the express and implied terms of their respective agreement as it failed to close the transaction as required or at all. That pursuant to section 13(b) of the agreements written notices (identical save for Homesite description numbers and deposit paid) dated December 8th 2010, giving the Defendant 21 days to cure its default and making time of the essence were issued. The default not being cured then pursuant to sections 13(b) and 40 of their respective agreements the Claimants by letters (identical save for Homesite description and deposits paid) dated January 7th 2011, accepted the Defendant's

repudiatory breach, rescinded the agreements and demanded the return of their deposits together with the payment of liquidated damages.

[3] The Defendant filed its identical defences to the 2 suits on July 5th 2011. The Defendant's defence in essence was that: (a) the stated closing date referred in section 2 of the agreement was at all times subject to sections 9 and 10, (b) section 9 acknowledged and it was agreed that the closing date in section 2 was an estimated period provided for convenience only, (c) the period under section 2 was not an obligation of the Defendant, (d) time was not binding on the Defendant as a date of closing,(e) pursuant to section 9 it was agreed that the Defendant could change time periods from time to time without creating any liability for the Defendant, (f) the Defendant's only obligation was to give the Claimants 1 month notice of the closing and which could only occur on the completion of specified events, (g) the application of section 13(b) was denied, (h) it was the intention of the Defendant to complete construction of the resort (i) the Claimants' action was contrary because they had prior elected to treat the agreement as still binding and operative, (j) the 21 days granted in the Claimants' letter making time of the essence was unreasonable, (k) delay in construction was brought about by delay in getting financing from CLICO Investment Bank Limited, and (l) the Defendant had taken all necessary and reasonable steps to meet its obligations.

**Issue:**

[4] There being certain natural consequences that would follow if the Court finds that termination of the contract was reasonable, the sole issue is:

i. Whether in all of the circumstances it was reasonable for the Claimants to deem that the Defendant had repudiated the agreements and in doing so they were entitled to the relief of rescission.

**Evidence**

[5] The evidence of the Claimants was largely uncontested.

[6] Mr. Iribarrren gave evidence on behalf of all of the Claimants. The Claimants are residents of Venezuela, Ms. Robina was the girlfriend of Mr. Iribarren, Mr. Montesinos was a mutual friend and they were altogether business associates.

[7] The Claimants were interested in purchasing holiday homes in the Caribbean and after reviewing several options they decided to purchase homes in the proposed "Le Paradis Resort" at Praslin in the Quarter of Micoud at Saint Lucia. In this regard at December 2007, Mr. Montesinos and Mr. Iribarren signed an agreement to purchase a .52 acre homesite known as 'Homesite 11 for US$405,000.00, and Mr. Iribarren and Ms. Robaina also signed an identical agreement to purchase a .55 acre homesite known as "Homesite 15" for US$430,000.00.

[8] Pursuant to the agreements, deposits on the purchase prices were to be paid to the escrow agent Stewart Title Eastern Caribbean Ltd. (hereinafter "Stewart Title"). Mr. Montesinos and Mr. Iribarren paid US$222,750.00 pursuant to their agreement and Ms. Robaina and Mr. Iribarren paid US$236,500.00. The deposits were paid in a timely manner to Steward Title. Both deposits save 5 percent being US$11,138.00 in respect of Homesite 11 and US$11,825.00 in respect of Homesite 15 were paid over to the Defendant shortly after payment to Stewart Title. The 5 percent according to a statement from Stewart Title was retained in escrow accounts for the Claimants. The deposits for Homesite 11 were paid between July 30th 2007 and October 2nd 2008, and the deposits for Homesite 15 were paid between August 13th 2007 and October 2nd 2008.

[9] The Claimants say that they were looking forward to their vacation homes being completed and obtaining ownership by the end of 2008, but instead they received correspondence from the Defendant which indicated that there would be a delay in completion because of funding issues. Assurances were given to them that funding would be forthcoming. They continued to receive updates from the Defendant stating that funding was eminent. They were promised compensation for the delay but never received any.

[10] Mr. Iribarren said that at first he was patient about the delays but after 14 months of waiting his tolerance started to wear thin. As far as he was aware, there had been absolutely no further progress at the development and in particular to the Claimants' homesites.

[11] Mr. Iribarren said that things came to a head when in or about February 2010, he obtained copies of site plans which appeared to reflect changes to the layout of the homesites without consulting the Claimants. He wrote to the Defendant expressing all of his concerns and he was then assured that the changes were minor. At this juncture he was no longer interested in any more excuses and he began to really doubt that there was any truth in the assurances given to him over the years about forthcoming funding.

[12] At December 2010, it now being 2 years after the promised and anticipated date of December 2008, for completion and closing the transaction, Mr. Iribarren was of the view that he had given the Defendant more than a reasonable opportunity to complete their Homesites, transfer ownership and close the transaction. He consulted with the other Claimants and they all agreed it was time to terminate the agreements with the Defendant. The Claimants consulted their Counsel and on Counsel's advice a notice was issued dated December 8th 2010, giving the Defendant 21 days to cure its default pursuant to the agreements. Upon failure to cure the default, the Claimants through their Counsel issued termination notices dated January 7th 2011. The termination notice demanded a refund of the deposits and liquidated damages.

[13] All notices were sent via registered mail. There was no response from the Defendant to either of the notices. Thereafter the Claimants filed suit for breach of contract and to recover their deposits, damages, interest and costs.

[14] The Court did peruse a number of emails exchanged between Mr. Iribarren and Mr. Dolby and which complained of delay in completion despite patience being exercised by Mr. Iribarren and the change of size of one (1) of the Homesite lots being purchased.

[15] The witnesses for the Defendant were Mr. Wendell Skeete and Mr. Michaelangelo Andrew.

[16] Mr. Skeete is the managing partner of PKF Professional Services Inc.(hereinafter PKF). He says that at the time of making his witness statement in 2012, that he had known Mr. Kierron Dolby, the managing director and major shareholder of the Defendant for a period of 12 years. He knew him to be a person of very good repute and integrity and to the best of his knowledge and belief he believed that Mr. Dolby conducted his business affairs in an honest and sincere manner. PKF he said had served as auditor of the Defendant and conducted financial audits up to the year 2008.

[17] Mr. Andrew by 2012, had been employed with the Defendant for approximately 7 years. He was initially the finance executive reporting directly to the chief financial officer and then later directly to the managing director Mr. Dolby. He was part of the management team. At the date of the trial he was the Defendant's accountant.

[18] Mr. Andrew said that during the course of his employment he was responsible for preparation and maintenance of all accounts, conducting of audits and preparation of financial statements.

[19] The evidence of Mr. Skeete and Mr. Andrew painted the picture from the Defendant's point of view. According to them the Defendant is still operating. The problem of the Defendant not being able to complete construction of the development started when shortly after negotiation and commitment by CLICO Investment Bank Limited to lend the Defendant US$100 million CLICO went into

receivership at January 2009; the Government of the Republic of Trinidad & Tobago was the receiver. This brought a halt to construction works at the Defendant's development. The Defendant entered into negotiations with the Receiver in 2009, the process took 9 months. (The Court was not informed of the results of the negotiations.)

[20] Continuous efforts, challenging though they were, were being made by the Defendant to secure funding and on occasion Mr. Andrew attended meetings between Mr. Dolby, potential investors and others.

[21] According to Mr. Andrew, the Defendant was unable to go into the marketplace and source new funding because its financial statements could not be completed without the full and final settlement amounts of the asset in order to develop cash flows and an understanding of the breakeven and exposure points for investment. The condition of the markets were and still were at present very challenging due to the direct collapse and global financial meltdown and the continued instability of the markets globally.

[22] Mr. Andrew said that sometimes after the Defendant had come to believe that it had secured funding that the sources proved futile as some investors were merely trying to secure the development with minimal capital injection.

[23] The Defendant's directives were to continue to relentlessly try and locate a viable source of funding, finalize a new financial structure, re-start the project, build out the vision of the development and meet the commitments to all the stakeholders.

[24] Under cross-examination Mr. Andrew admitted that (i) the closing of the contracts was estimated to be conclude during the last quarter of 2008, (ii) that CLICO Investment Bank Limited went into receivership post the estimated closing date of the last quarter of 2008, and (iii) that at 2012, being 3 years post CLICO's receivership, the Defendant was still looking for financial resources.

[25] The Court inquired of Mr. Andrew as to when would financing become a reality. He responded that the last he had heard was that funding was to be closed within 6-8 weeks away from trial day.

**The contract**

[26] As stated prior, the agreements between the Claimants and the Defendant were identical save for the matters noted, and so the Court need only site one set of provisions from the agreements. On both agreements no date of execution was set out under the signature of the Claimants but under the signatures of the Defendant's director the date recorded was December 10th 2007. Further to these agreements, the Parties executed an identical addendum which clauses have no bearing on the suits but which show the Claimants as executing the addendum on September 20th 2007, and the Defendant executing on December 10th 2007.

[27] The relevant sections of the agreements for consideration by the Court are:

> " 1. Purchase and Sale. Buyer or his or their Nominees ... agrees to buy, and Seller agrees to sell (on the terms and conditions contained in this Agreement). Homesite 15,[1], acreage 0.55[2] ("Homesite") in the proposed LE PARADIS RESORT ("Resort")....
>
> 2. Payment of the Purchase Price. Buyer agrees to make the following payments against the Purchase Price...
> All deposit payments are collectively referred to as the 'Deposits". Deposits must be wire transfer to the Escrow Agent (defined in Section 4). The balance due at Closing must be paid by wire transfer in United States Dollars....
>
> The Deposits will be held by the Escrow Agent and released to the Seller in accordance with the terms and conditions of Section 4 of this Agreement.
>
> Subject to the provisions of Section 9 and Section 10 of this Agreement, Closing on the purchase and sale of the Homesite is estimated to occur on or about the last quarter of 2008.

[1] In the other agreement the reference is to Homesite 11.
[2] In the other agreement the reference is to .52 acreage.

9. Closing Date. Subject to the provisions hereof, Closing on the purchase and sale of the Homesite will occur on or about the date indicated in Section 2 of this Agreement: however, Buyer acknowledges and agrees that this estimate is given to Buyer for convenience only and is subject to change from time to time by Seller for any reason and without creating a liability of Seller to Buyer. Seller shall provide Buyer with at least one(1) months' notice of the Closing.

Closing shall occur when each of the following events has occurred: (1) Seller has registered the Resort Declaration in the St. Lucia Land Registry; (ii) Seller has registered a survey of the Homesite in the St. Lucia Land Registry and (iii) if Buyer is not a St. Lucian resident, Buyer has obtained an Alien Landholding License in strict compliance with the requirements of Section 39 of this Agreement. Seller is hereby authorized by Buyer to postpone the Closing for any reason (on not less than three (3) days prior written notice to Buyer) and Buyer will close on the new date, time and place specified by Seller.

If Seller agrees in writing, in its sole and absolute discretion, to reschedule Closing at Buyer's request, or if Buyer is a corporation or other entity and Buyer fails to produce the necessary documentation Seller requests and as a result, Closing is delayed, or if Closing is delayed for any other reason (except for a delay desired, requested or caused by Seller), then, whether or not Buyer is actually in default as a result of such delay, Buyer agrees to pay at Closing a late funding charge equal to interest, at a rate equal to eight percent (8%) plus the prime lending rate per annum then applicable in St. Lucia on that portion of the Purchase Price not then paid to Seller (and cleared), from the date Seller originally scheduled Closing under this Section to the date of actual Closing. All prorations will be made as the originally scheduled date. Buyer understands that Seller is not required to reschedule or to permit a delay in Closing at Buyer's request....

10. Closing. The term "Closing" refers to the time when Seller delivers the deed of sale to the Homesite to Buyer and ownership changes hands. Buyer's ownership is referred to as "title'. Seller promises that the title Buyer will receive at Closing will be good, marketable and insurable (subject to the permitted exceptions listed or referred to below)....

13. Pre-Closing Default

(a) Buyer Default....

(b) Seller Default. Prior to Closing, if Seller defaults under this Agreement, Buyer will give Seller twenty-one (21) days written notice of such default and if Seller has not cured the default within such period, Buyer will have

such rights as may be available in equity under and/ or under applicable law, including the return of the Deposits and other pre-Closing advance payments (including and without limitation, payments with respect to options, extras, upgrades and the like) Buyer has made, provided, however, that absent an intentional and wilful default of Seller, Buyer shall not be permitted to seek to specifically enforce the Agreement.

23. Time of Essence. The performance of all obligations by Buyer on the precise times as described in this Agreement is of absolute importance and failure by Buyer to so perform on time is a default, time being of the essence as to Buyer's obligations hereunder.

37. Entire Agreement. This Agreement is the entire contract for sale and purchase of the Homesite and once it is signed, it can be amended only by a written instrument signed by both Buyer and Seller which specifically states that it is amending the Agreement...."

**The 2 Letters**

[28] On December 8th 2010, the Claimants' Counsel wrote identical letters save for the amounts of deposit and Homesite reference stated. The letters read as follows:

"8th December 2010

Mr. Kierron Dolby
Director
DCG Properties Limited
P.O Box 376
CASTRIES

Dear Sir,

Re: Le Paradis Resort Homesite Sale and Purchase Agreement – Homesite 11

We act herein for our clients, ...
By Sale and Purchase Agreement dated 10th December, 2007 ("the Agreement") between our clients and DCG Properties Ltd. ("the Company"), our clients agreed to purchase and the Company agreed to sell Homesite 11 in the proposed Le Paradis Resort for the sum of US$...
Pursuant to the Agreement, our clients have paid deposits in the sum of Two Hundred and Twenty-Two Thousand, Seven Hundred and Fifty United States Dollars (US$222,750.00).

To date, your company has failed and/or refused to complete or satisfactorily complete homesite 11 in consequence of which no closing date has been scheduled as required by the Agreement. The Company is

accordingly in default by failing and/or refusing to close within a reasonable time.

In the circumstances and in accordance with section 13(b) of the Agreement, you are hereby given notice of such default and an opportunity to cure within the agreed period of twenty-one days.

Yours faithfully
..."

[29] On January 7th 2011, the Claimants' Counsel wrote identical letters save for the amount of deposit stated and Homesite reference The letters read as follows:

"7th January, 2011

Mr. Kierron Dolby
Director
DCG Properties Limited
P.O Box 376
CASTRIES

Dear Sir,

Re: Le Paradis Resort Homesite Sale and Purchase Agreement - Homesite...

Our letter of 8th December, 2010 refers.
As therein stated, the Company is in default under the Agreement, which default has not been cured as required or at all. Our clients accordingly accept your repudiatory breach of contract and rescind the Agreement.
As a consequence thereof, our clients hereby demand payment of:

(1) the total deposits paid to date in the sum of Two Hundred and Twenty-Two Thousand, Seven Hundred and Fifty United States Dollars (US$222,750.00); and

(2) the additional sum of Forty Thousand Five Hundred United States Dollars
(US$40,500.00) by way of liquidated damages to be paid no later than 31st January 2011.
Our clients reserve all rights and remedies available at law and in equity.

Yours faithfully
...."

**The law**

[30] The Defendant's case is that closing was only to occur after they had served the Claimants 1 months' notice fixing the closing date and that reference to the date in section 2 and which was that closing was estimated to occur on or about the last quarter of 2008, was qualified by section 9 which provided that it was only given for convenience. In effect the Defendant says the estimated date in section 2 is a nullity. This raises the question of whether it was reasonable 2 years after the passage of that date of convenience there could have been implied a term that it was time to fix a reasonable closing date as surely it could not be that the agreement would remain open indefinitely or for even say 10 years to build what was essentially a house as part of the development and under circumstances which had the Defendant in possession of substantial sums of money from the Claimants and paying them no penalty such as interest.

[31] Bearing in mind the Defendant's position on closing time, then the questions were how to fix time and make time of the essence in those circumstances. **Halsbury's** provides:

> "**929. Where no time specified.** Where no time for performance is fixed by the contract, the law implies an undertaking by each party to perform his part of the contract within a time which is reasonable having regard to the circumstances of the case, as in the case of the carriage of goods, the sale of an interest in land, the sale of goods, or the opening of a letter of credit or guarantee. The position is the same where the contract merely uses indefinite expressions as to the time of performance, but not where the act requires the concurrence of both parties[3].
>
> **930. General stipulations as to time.** Where the contract provides that it is to be 'as soon as possible' or 'forthwith' or uses similar expressions, the particular stimulation will be construed by reference to what is reasonable in the circumstances. What is reasonable time in a particular case is a question of fact....

[3] Each Party must then use reasonable diligence in performing his part of the contract: See Ford v. Cotesworth (1868) 4 QBD 127; on appeal (1870) 5 QBD 544.

In contracts for the sale of goods delivery must be tendered at a reasonable hour; but a stipulation for delivery 'by a certain date is not met by delivery the next day. In a building sub-contract, where there is no express agreement as to dates, there is an implied term that the work will be begun and competed within a reasonable time.[4]

**931. Time not generally of the essence.** ...
The modern law, in the case of contracts of all types, may be summarised as follows. Time will not be considered to be of the essence, except in one of the following cases: (1) the parties expressly stipulate that conditions as to the time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence; or (3) a party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence.

**935. Notice making time of the essence.** In cases where time is not originally of the essence of the contract, or where a stipulation making time of the essence has been waived, 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 and stating that, in the event of non-performance within the time so fixed, he intends to treat the contract as broken. The time so 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....

Even if the party not in default gives no notice, he may still be entitled to rescind if he proves that the other party would anyway not have been able to perform within a reasonable time. This may be true even where the contract contains an express provision for the service of notice. (My emphasis)

[32] On the issue of when would a right accrue to a party to give notice, the Court found Privy Council 36/2001 **Joyce Chaital and Ganga Persad Chaital et al v. Chanderlal Ramlal** helpful. Therein Sir Martin Nourse cited **Green v Sevin** (1879) 13 CHD 589, where Fry J. said:

"It is to be observed that the contract for purchase had limited no time for completion, and that, therefore, according to the rule in this country, each party was entitled to a reasonable time for doing the various acts which he had to do. What right then had one party to limit a particular time within

[4] Aries Powerplant Ltd. v. ECE Systems Ltd. (1997) 45 Con LR 111.

which an act was to be done by the other? It appears to me that he had no right so to do, unless there had been such delays on the part of the contracting party as to render it fair that, if steps were not immediately taken to complete, the person giving the notice should be relieved from his contract." (My emphasis)

[33] As to the matter of discharge of the agreements, the Court has to consider the way the agreement can be discharged whereas here, it has not been fully executed. **Halsbury's** also guides the Court in this regard. It provides:

> "**920. Methods of discharge.** The ways in which a contractual promise may be discharged may be classified under two basic headings. (1) discharge in accordance with the contract; and (2) discharge 'against' the contract.
>
> The former covers: (a) discharge by performance; and (b) discharge as a result of an event stipulated in the contract. The latter covers: (i) discharge by rescission for such matters as breach or misrepresentation or by subsequent agreement:..."

[34] On the issue of when can a party rescind a contract **Halsbury** states:

> "**989. General rule.** Where one party (A) to a contract has committed a serious breach of contract by a defective performance or by repudiating his obligations under the contract, the innocent party (B) will have the right to rescind the contract de future; that is, to treat himself as discharged from the obligation to tender further performance, and to sue for damages for any loss he may have suffered as a result of the breach. Such a breach by A does not usually itself automatically terminate the contract. B has the right to elect to treat the contract as continuing or to terminate it by rescission.
>
> In a case where it is alleged that B has the right to rescind for breach, it must be determined (1) whether there has been a breach by A of a term of the contract or a mere misrepresentation; (2) whether the breach is sufficiently serious to justify rescission de future of the contract by B, as well as to a claim for damages; and (3) whether B has instead elected to affirm the contract.
>
> Where a contract has been so rescinded de future, it has been said that all the primary obligations of the parties under the contract which have not yet been performed will terminate. This termination does not prejudice the right of the party so electing (B) to claim damages from the party in repudiatory breach (A) for any loss sustained in consequence of the non-

performance by A of his primary obligations under the contract, set off, damages for any past non-performance by B of B's own primary obligations, due to be performed before the contract was rescinded. A party may be entitled to a declaration that he is no longer bound by the contract."

[35] From the authorities it is to be gleemed that a notice to make time of the essence may not always be necessary in certain circumstances. In **Establissements Chaninbaux S.A.R.L. v. Harbourmaster Ltd.** [1955] Q.B. Vol.1 p303 Mr. Justice Devlin said:

> "I ought perhaps to say that I have looked at the most recent case on this topic, which is the case of **Charles Richards, Ltd. V. Oppenhaim** [1960] 1 K.B 616, in which the leading judgment was given by Lord Justice Denning. There he lays down the law on this point and summarizes all the authorities. I hope that I have stated the principles correctly, but, as I was saying, the notice is not always essential. If the seller, or the defendant, fails to give it, it is still open to him to prove that if he had given reasonable notice it would have been of no use to the plaintiff. That, I think, must follow as a matter of the application of the principles in the case to which I just referred, although it is a point that goes beyond those principles. But it has always been held to be so in the corresponding cases, where the similar equitable doctrine has been considered in the case of the sale of land...
>
> ..., but the broad principle seems to me to be this, that if the defendant can show that if he had granted a reasonable time it would have availed the plaintiff nothing at all, then the omission to make provision for reasonable time in the contract becomes irrelevant and does not defeat the defendant's claim that it is a good notice terminating the contract." (My emphasis)

[36] The Claimants have claimed not only the refund of their deposits but also damages and interest pursuant to the Civil Code of Saint Lucia. The Civil Code provides:

> "1009A. In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment....

1387. If a promise of sale be accompanied by the giving of earnest, each of the contracting parties may recede from it; he who has given the earnest by forfeiting it, and he who received it, by returning double the amount."

**Findings and analysis**

[37] The facts being uncontested, the stark reality was that at even up to the date of trial at October 2012, some 3 years and 10 months post the last quarter of 2008, the development was at a standstill, a point arrived at according to the Defendant's witnesses when CLICO went into receivership at January 2009, and it loss the US$100 million that had been committed to the development. Mr. Andrew did admit under cross-examination that even prior to January 2009, construction at the Defendant's resort had ceased. It is with the utmost respect to Mr. Andrew who said at trial that the Defendant was approximately 6-8 weeks away from closing a transaction for funding, that the Court finds that it cannot accept such a bald statement without more and particularly so after his own description of the Defendant's struggles for funding.

[38] Going to the issue at hand, as the Court pointed out earlier, section 9 circumscribes section 2 and it further gives the Defendant the power to issue a notice giving the Claimant 1 months' notice of closing, it in effect puts the Defendant in the 'driver's seat.'

[39] It is the Court's view that the agreements were commercial in nature and this is supported by the fact that there was substantial money involved and the agreements provided for what the Court would describe as stiff penalties for the Claimants if they were the cause of any delay, and such delay had to be sanctioned by the Defendant.

[40] If the Defendant is correct that only it could fix a notice of closing with 1 months' notice then surely since the contract was a commercial contract then the contract should be fixed to close within a reasonable time. It could not be reasonable for

the contract to remain open indefinitely. Unlike the Defendant which could call for interest during delay, during all of the time post the estimated time there was no benefit such as interest on the deposits accruing to the Claimants.

[41] The Defendant overtly admits that it was not in a state of readiness because of its financial woes to complete construction and so it could never issue the notice fixing the time for closing.

[42] With time just running away and no movement on construction of the Homesites from the Claimants' point of view, they by their letters of December 8th 2010, some 2 years after the conveniently estimated closing date, sought so to speak, rein in time and put a time frame for completion since the Defendant had not done so. Was this reasonable? Was it reasonable for the Claimants to make time of the essence? The authorities in **Halsbury** clearly support that the Claimants could by the issuance of a notice make time of the essence and fix a time for completion. The position is also buttressed by Privy Council 36/2001 **Joyce Chaital and Ganga Persad Chaital et al v. Chanderlal Ramlal**.

[43] It is noteworthy that the Defendant did not acknowledge or respond to the letters in any way, not even to ask to an extension of the period proposed and yet post facto it says that the period of 21 days was too short and unrealistic.

[44] As to the matter of the time being granted in the notice making time of the essence being too short, the Court believes that Mr. Andrews answers this question. Up to the time of trial according to Mr. Andrews, funding was still 6-8 weeks away, this was now some 22 months post the notice making time of the essence. So it would appear to the Court that no amount of time be it 21 days or 1 year would have assisted the Defendant. The Court is supported in its conclusion by **Establissement Chaninbaux S.A.R.L. v. Harbourmaster Ltd.**[5] and wherein Lord Denning is cited as saying that notice making time of the essence is not

[5] Ibid.

always essential where it is reasonable for a party to believe that such notice would have been of no use.

[45] The Court holds that having regard to all the circumstances, the Claimants' rightly served a notice making time of the essence and so in effect fixing a closing date.

[46] The Court also holds that in all the circumstances and which include that up to the date of trial the Defendant was not in a position to restart construction at the site, the Defendant is in breach of the agreements for failing to complete within a reasonable time. The time in the notice making time of the essence was not too short because it was clear that no amount of reasonable time it appears would have been sufficient. By time of trial it was 5 years since the agreements had been signed.

[47] The Court further holds that having regard to all the circumstances that the Defendant has defaulted under the agreement and the default being sufficient so that the Claimants are entitled to the discretionary remedy of rescission and the relief sought i.e. refund of all deposits paid, liquidated damages pursuant to article 1387 of the Civil Code and interest at the rate of 6 percent per annum pursuant to article 1009A of the Civil Code. The agreements are rescinded.

[48] **Court's order:**

1. SLUHVC 2011/0293 :–

    i. Return of deposits totalling US$222,750.
    ii. Liquidated damages in the sum of US$40,500.
    iii. Interest on the deposits and liquidated damages at the rate of 6 percent
    per annum from December 30th 2010, until payment in full of both sums.
    iv. Prescribed costs.

2. SLUHCV 2011/0294 :–
    i. Return of deposits totalling US$226,500.00.

ii. Liquidated damages in the sum of US$43,000.00.

iii. Interest on the deposits and liquidated damages at the rate of 6 percent per annum from December 30th 2010, until payment in full of both sums.

iv. Prescribed costs.

**Rosalyn E. Wilkinson**
**High Court Judge**