EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV 2016/0111

BETWEEN:

VIRGIN GORDA YACHT HARBOUR HOLDINGS LIMITED

Claimant/Respondent

-AND-

LITTLE DIX BAY HOTEL CORPORATION

Defendant/Applicant

Appearances: Mr. Sydney A. Bennett, QC and Anthea L. Smith, Counsel for the Claimant/Respondent
Claire Goldstein and Mark Rowlands, Counsel for the Defendant/Applicant

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2019: January 23rd

JUDGMENT

[1] Ellis J: By Amended Notice of Application filed on 16th March 2018, the Defendant (Applicant herein) applied to the Court pursuant to Part 15.2 (a) of the Civil Procedure Rules (CPR) and/or the inherent jurisdiction of the Court, for an order that summary judgment be entered in favour of the Applicant requiring the Claimant (the Respondent herein) to pay the costs of this Application and of these proceedings, to be assessed, if not, agreed within 14 days of the date of judgment.

[2] The grounds of the Application are set out in the First and Second Affidavits of Kisha Frett in support of this Application. This evidence sets out the factual background to these proceedings.

BACKGROUND

[3] At the centre of this dispute is a written agreement entered into by the Parties herein on 23rd February 2004 (the "Original Agreement") for the sale of freehold property comprising the yacht harbor in Virgin Gorda (the "Marina") as well as a number of businesses that were operated there. The expressed purchase price was US$12 million. Under clause 8, the time for completion was to be 75 days after date of the Original Agreement (i.e. on or by 8th May 2004) unless the Parties agreed otherwise.

[4] On 9th June 2004, the Parties entered into a variation agreement (the "First Variation"). Under clause 1.1 of the First Variation, the Applicant agreed to grant the Respondent an option to acquire certain lands in Virgin Gorda held by the Applicant on a long lease which had been granted by the Crown (the "Option"). The consideration for the grant of this Option was the sum of US$1.00 and there was a clear proviso that the Option was exercisable by Respondent only if it completed the sale and purchase as contemplated by the Agreement for Sale. The relevant text of the Clause reads:

> "1. ADDITIONAL PROPERTY
>
> 1.1 In consideration of the premises, of the covenants and agreements contained in the Agreement for Sale and of the sum of $1.00 paid by the Purchaser (the receipt of which is hereby acknowledged) the Vendor shall grant the Purchaser a two year option ("the Option") to acquire 10 acres of leasehold land currently leased by the Vendor from the Crown ("the Additional Property") as shown outlined in red (for identification purposes only) on the Plan annexed hereto ("the Plan") provided that the Option shall be exercisable by the Purchaser only if the Purchaser has completed the sale and purchase as contemplated by the Agreement for Sale. If within the above mentioned two year period the Purchaser gives notice in writing to the Vendor exercising the Option then this Variation Agreement and the notice shall constitute a contract for the sale and purchase of the Additional Property upon the terms hereof.
>
> 1.2 It is understood and agreed by the Purchaser that the Additional Property is held by the Vendor on a Crown Lease ("the Crown Lease") and that the consent of the Crown shall be required for any transfer or sublease of the same and the Purchaser further understands and agrees that the risk of consent not being granted shall be that of the Purchaser and, in the event that the Purchaser exercises the Option in accordance with the provisions in this Clause 1, the Vendor shall give all reasonable support and assistance in connection with the Purchaser's application for consent.
>
> 1.3 ……

1.4 The non-exercise by the Purchaser of the Option shall not affect any of the agreements or covenants contained in the Agreement for Sale or in this Variation Agreement, including (by way of illustration and not by way of limitation) the purchase price agreed to be paid under the Agreement for Sale. The parties agree to the following apportionment of the Purchase Price (or such other apportionment as they may otherwise agree): the Property $9,000,000; the Business - $2,000,000; the Additional Property $1,000,000."

[5] Clause 12 of the First Variation provided that the completion date under the Original Agreement and the First Variation would be no later than 30th July 2004, provided that if the Respondent exercised the Option, completion of the sale and purchase and the transfer or sublease of the Option Land could take place at a later date "due to the need to obtain the Crown's consent to such transfer or sublease". The full text of that clause reads:

"12. COMPLETION

12.1 Completion of the sale and purchase agreed pursuant to the Agreement for Sale and to this Variation Agreement shall take place no later than 20th July, 2004 provided that it is understood and agreed that, in the event that the Purchaser exercises the Option in accordance with this Variation Agreement, completion of the sale and purchase and the transfer or sublease of the Additional Property may occur at a later date due to the need to obtain the Crown's consent to such transfer or sublease.".

[6] By a further variation agreement (the "Second Variation") dated 17th September 2004, the date of completion under the Original Agreement was pushed to 16th September 2004. Clause 4 provides:

"4. COMPLETION

4.1 Completion of the sale and purchase contemplated by the Agreement for Sale as varied by the Variation Agreement and this Second Variation Agreement ("Completion") shall occur on or before 16th September, 2004 or such other date as on that date may in writing be agreed by the Parties hereto. Should the Purchaser fail to complete on 16th September, 2004 or such other date as may in writing be agreed by the Parties, the Deposit shall be forthwith paid to the Vendor and neither party shall have any further liability to the other under the Agreement for Sale, the Variation Agreement or the Second Variation Agreement, respectively."

[7] On 21st August 2006, the Applicant received a letter from the Respondent dated 18th August 2006 in which the Respondent purported to exercise the Option. The relevant excerpt of that letter provides:

"Pursuant to Clause 1.1 of the Variation Agreement in the above captioned, Virgin Gorda Yacht Harbour Holdings Limited hereby exercises the Option granted pursuant to the said clause to acquire the Additional Property comprising 10 acres of Leasehold Land at Minton Hill in Virgin Gorda currently leased by Little Dix Bay Hotel Corp. from the Crown which land is shown outlined in red on the Plan annexed to the said Agreement.

> The Option having been exercised, this notice constitutes a contract between Little Dix Bay Hotel Corp. and Virgin Gorda Yacht Harbour Holdings Limited for the sale and purchase of the Additional Property upon the terms set out in the said Clause."

[8] By letter dated 1st July 2009, the Applicant wrote to the Respondent indicating that the exercise of the Option was out of time and of no effect. The relevant excerpt of that letter provides:

> "…Please be advised that the Option provided for in the Variation Agreement was for a two year period from the date of the Variation Agreement and therefore expired on 9th June, 2006. Your letter purporting to exercise the Option is therefore out of time and of no effect."

[9] By letter dated 22nd July 2009, attorneys acting for the Respondent responded as follows:

> "We disagree with your assertion that the two year option over for the Crown leasehold property expired on 9th June, 2006. We refer to Clause 1.1 of the First Variation Agreement dated 9th June, 2004 which provides that "the Vendor shall grant to the Purchaser a two year option". The use of the future tense of the verb "grant" makes it quite clear that the grant of the option was to take place in the future. For your interpretation to be correct the appropriate wording would have been "hereby grants". In addition, Clause 1.1 of the First Variation Agreement states that the option is conditional upon completion of the purchase of the main property having taken place. It follows that the two year option did not commence until the relevant date of completion which was 17th September, 2004. It also follows that our client's written notice to exercise of the option dated 18th August, 2006 fell within that two year period. We would also argue that the fact that your client has not challenged our client's written notice of 18th August, 2006 until nearly 3 years later evidences that it had accepted that the option had been properly exercised."

[10] Almost 7 years later, on 12th April 2016, the Respondent filed the Claim herein in which it seeks the following relief:

i. A declaration that the Option provided for by the First Variation dated 9th June 2004 was duly exercised by the Respondent by letters to the Applicant dated 18th August 2006.

ii. An order that the contract constituted by the First variation and the exercise of the Option be specifically performed.

iii. Further and other relief.

iv. Costs.

THE PARTIES ARGUMENTS

[11] Prior to the hearing of the Application, the Parties filed legal submissions which addressed the following issues:

i. Whether on the facts of the case, the Option was validly exercised.

ii. Whether the Applicant is estopped from denying that the exercise of the Option has been duly performed.

iii. Assuming that the Option had been validly exercised, was the bilateral contract which would have arisen supported by any or any valid consideration provided by the Respondent.

iv. Whether the Respondent is precluded from obtaining the relief of specific performance.

[12] The Applicant asserts that the Respondent's claim has no reasonable prospects of success. First, the Applicant contends that the Option was granted for a period of two years from the execution of the First Variation on 9th June 2004. The Option therefore had to be exercised before 9th June 2006. As the Respondent did not purport to exercise the Option until 18th August 2006, the relevant period had expired.

[13] Secondly, the Applicant asserts that even if the option was valid or validly exercised, the Respondent is not entitled to the equitable relief of specific performance. The Applicant asserts that there was a delay of some ten (10) years between the failed attempt to exercise the Option and the filing the Claim herein. In short, the Applicant argues that the Respondent has no real prospect of overcoming the defence of laches.

[14] The Applicant further contends that an order of specific performance would cause the Applicant to suffer hardship given the significant changes which have taken place since the First Variation. This includes the fact that the Applicant and its eponymous resort have since been purchased by a new owner. The Applicant also points to the changes in the value of the option property (the "Additional Property") and the fading memories of the persons involved in the relevant transactions at the time when the First Variation was negotiated.

[15] The Applicant also pointed out that it could not unilaterally transfer the Additional Property to the Respondent because the First Variation made it clear that the Crown's consent was a pre-requisite to any transfer or sublease. Under the First Variation, the Respondent assumed the risk that the Crown would not consent to the assignment of a sublease in the Option property to the Respondent because it would have been well aware that it could not compel the Crown to consent to this assignment or sublease. As such, the Applicant argues that the most that the Respondent could obtain by way of specific performance was an order requiring the Applicant to provide reasonable support and assistance in connection with a request for the Crown's consent. Any such application would again be subject to the bars to equitable relief already mentioned.

[16] Thirdly, the Applicant also asserts that there was no consideration or no sufficient consideration provided in support of the Applicant's promise to provide all reasonable support and assistance to the Respondent in seeking the Crown's consent to transfer or sublease the option land to the Respondent. The Applicant argued that the sum of US$1 million was notionally apportioned in the Original Agreement and was due and payable under that Agreement in respect of the Marina and the Businesses. The said sum was payable regardless of whether or not the Option was validly exercised and consent of the Crown obtained.

[17] The Applicant further contends that even if the Crown were to give consent to the assignment or sublease, the provisions of the First Variation were not sufficiently certain so as to be capable of being specifically enforced as there was no draft assignment or sub lease and no heads of term or other arrangements as to the terms of such agreement.

[18] Finally, the Applicant also maintains that in any event, the Respondent would have been capable of being adequately compensated in damages and so the relief of specific performance would and should be denied.

[19] In response to the Applicant's argument that there was no consideration or no sufficient consideration to underpin the transfer or sublease of the option land to the Respondent, the Respondent argued that the consideration for the purchase of the property was in fact $1 million. Counsel argued that the Applicant has advanced no reason why the sum of $1 million should be notionally appropriated to the price of the Additional Property. The Respondent submitted that the

only plausible reason why the Parties would have gone to the trouble of expressly breaking down the purchase price of the Marina, the Businesses and Additional Property in the Variation Agreements is because this was the result of their negotiations and agreement. Counsel referred the Court to Clause 1.4 of the First Variation by which the Parties agreed the sum of $1 million to be part of the $12 million purchase price payable for the Additional Property.

[20] The Respondent also argued that Applicant's obligations under the bilateral contract are capable to being specifically performed because there is no uncertainty as to the form of acquisition by the Respondent. Counsel argued that Clause 12 (2) of the First Variation contemplated that the existing lease was to be transferred to the Respondent without any modification of its terms. This Clause provides:

> "Upon completion of the sale and purchase of the Additional Property (the Purchaser having exercised the Option in accordance with this Variation Agreement) the Vendor shall execute and deliver to the Purchaser, or as the Purchaser may direct, an Instrument of Transfer of Lease in the form (R.L.2) prescribed by Section 5 of the Registered Land Rules transferring the Crown Lease to the Purchaser."

[21] Counsel further argued that the courts readily grant specific performance of an obligation to cooperate in obtaining consent in cases where the obtaining of consent is a condition of an agreement for transfer of an interest in property. In that regard, Counsel relied on the judgment in Brown v Heffer[1] where the High Court of Australia held:

> "The specific performance which will be granted before the Minister's consent has been obtained is not specific performance of the obligation to convey or transfer, for that obligation has not yet arisen: McWilliam v. McWilliams Wines Pty. Ltd. (1964) 114 CLR 656, at p 661. As Harvey C.J. in Eq. made clear in Egan v. Ross (1928) 29 SR (NSW) 382, at p 388 the decree that will be made will go no further than directing that the proper steps be taken for the purpose of obtaining the Minister's consent and, "if that is obtained", to transfer the land to the purchaser: see also the more explicit form of order made by this Court in Kennedy v. Vercoe (1960) 105 CLR 521, at pp 530, 531. Accordingly until the consent has been obtained the purchaser's interest, being "commensurate only with what would be decreed to him", does not extend to ownership of the land and the interest of the vendor is not yet converted into a right to receive money in place of the land. Many authorities on the topic are discussed in the valuable judgment of Callan J. in re Rudge; Curtain v. Rudge (1949) NZLR 752 (at p350)."

[1] [1967] 116 CLR 344

[22] The Respondent further argued that it is entitled to seek the equitable relief of specific performance notwithstanding its delay and it relies on the dictum in Re Loftus[2]. In that case, the deceased died intestate in August 1990 leaving an estate comprising real and personal property. The claimants commenced proceedings in January 2003 against the administratrix of the estate on the ground that she had failed to provide any or any adequate accounts, failed to complete the administration of the estate and failed to make distributions. They sought, inter alia, an order replacing her as administratrix and an account of the administration. The administratrix relied on a limitation defence and the doctrine of laches. At trial, the judge held that the 12-year limitation period in section 22 (a) of the *Limitation Act 1980* applied to the claim, but that time did not begin to run under that section until the end of the "executor's year", namely the year following the date of death during which the personal representative was not bound to distribute the estate and that, accordingly, the claim was not statute-barred. He went on to hold that in any event, much of the claim fell within section 21 (1) (b) which displaced the limitation period, and that the doctrine of laches had no application where no limitation period was prescribed.

[23] On appeal by the administratrix, Chadwick LJ noted:

> **"**The modern approach to the defences of laches, acquiescence and estoppel was considered by this court in *Frawley v Neill* The Times, 5 April 1999, to which reference was made in the judgment of Mummery LJ in *Patel v Shah* [2005] EWCA Civ 157 at [32]. After reviewing the earlier authorities-and, in particular, observations in *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221, 229 and *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, 1279-Aldous LJ (with whom the other members of the court agreed) said:
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> "In my view the more modern approach should not require an inquiry as to whether the circumstances can be fitted within the confines of a preconceived formula derived from earlier cases. The inquiry should require a broad approach, directed to ascertaining whether it would in all the circumstances be unconscionable for a party to be permitted to assert his beneficial right. No doubt the circumstances which gave rise to a particular result in the decided cases are relevant to the question whether or not it would be conscionable or unconscionable for the relief to be asserted, but each case has to be decided on its facts applying the broad approach." Emphasis mine

[24] Counsel for the Respondent argued that in determining whether it would in all the circumstances be unconscionable for a party to be permitted to assert his contractual right, the court must take into account the fact that the Respondent has paid and the Applicant has received and retained the full purchase price of $1 million for the Additional Property. He submitted that this is a factor which

[2] [2007] 1 WLR 591

outweighs any equity which the Applicant may claim on account of the Respondent's delay in bringing the claim. The Respondent further argued that it would be unconscionable for the Applicant having received all of the benefits to which it could be entitled under the Original Agreement and the Variation Agreements, to refuse to carry out the agreed transaction while at the same time retaining the purchase price.

[25] With regard to the Applicant's contention that the specific performance would cause undue hardship because of the third party rights, the Respondent argued that there are in fact no intervening third party rights in this case because the so called new owners, is an owner not of the Additional Property nor of the resort but of the Applicant itself.

[26] Counsel further submitted that far from being a hardship, the fact that the prospective transferee of an interest in the land intended to use the land in some way for its own purposes is not a disadvantage to the vendor caused by delay. Rather it is a necessary consequence of the Parties having entered into a contract for the sale of the Property.

[27] The Respondent also submitted that specific performance is granted as a matter of course in contracts for the grant of an interest in land.[3] Counsel for the Respondent also cited the following dictum Mungalsingh v Juman:[4]

> "This statement was made in the context of an action for specific performance of a positive contractual obligation, namely a covenant in a lease to keep the demised premises open as a retail shop for the sale of groceries. In that context, it was clearly apposite. However, the more general rule was stated by Lord Hoffmann at p 11G to be that "specific performance will not be ordered when damages are an adequate remedy". In the context of a contract for the sale of land, damages have traditionally not been regarded as an adequate remedy on the basis that each piece of land is unique – see e.g. AMEC Properties Ltd v Planning Research Systems Plc [1992] 1 EGLR 70, 72. Accordingly, there is nothing in this final point." Emphasis mine

[28] Finally and by way of Reply, the Respondent relied on Clause 1.1 of the First Variation which provided that upon giving notice of the exercise of the Option, that Agreement and the notice would constitute the contract for the sale and purchase of the Additional Property on the terms set out in the Agreement. There was therefore no need for the Applicant to proffer any response to this Notice. However, if the Applicant did not regard itself as bound by the contract, the Respondent

[3] AMEC Properties Ltd v Planning Research Systems Plc [1992] 1 EGLR 70 at page 72
[4] [2015] UKPC 38

submits that it should have said so at the time. The Respondent asserts that it was entitled to assume and did assume that the Applicant regarded itself as bound by the contract for the sale and purchase of the Additional Property constituted by the notice and the First Variation. The delay of over 3 years permitted the Respondent to believe and to expend time and money in the ensuing 3 years, in seeking to obtain the consent of the Crown to the agreed transfer, in reliance of the Applicant's acceptance of the validity of its exercise of the Option. The Respondent argued that the Applicant is therefore estopped by acquiescence from asserting that the Option was not duly exercised.

[29] The Respondent further submitted that it would be unjust and unconscionable to allow the Applicant to resile from its contractual obligation to cooperate with the Respondent in its efforts to secure the consent of the Crown or from its obligation to transfer the Additional Property to the Respondent, when such consent is secured

[30] With regard to the matters raised in the Respondent's Reply, the Applicant argued that in order to succeed on this point, the Respondent would first have to satisfy the Court that the Applicant's failure to respond until 2009 to a positive representation of existing fact (affirming the validity of the Option) and that it did in fact rely to this alleged representation by its silence. The Respondent would also have to prove that the Applicant intended the Respondent to rely and that the Respondent did in fact rely on this representation by silence and that the Respondent suffered substantial detriment as a consequence of its reliance.

[31] The Applicant further argued that whether its failure to respond until 2009 constituted an affirmative representation of an existing fact is a question of law which is concise and discrete and suitable for determination on an application for summary judgment.

[32] The Applicant argued that silence cannot in law be regarded as a representation of an existing fact giving rise to an estoppel, because an omission to speak can only be construed as a positive representation if there is a duty on the representor to speak, either because an obligation to speak exists, whether under contract, in equity or otherwise. The Applicant asserts that no such obligation arose here because the purported exercise of the Option did not have any legal or practical effect, having been made more than two years after the execution of the First Variation

when the Respondent's letter did not disclose any expenditure of time, money and effort other than the fact that it had begun to seek the Crown's consent. Consequently, the Applicant maintains that it cannot be said to have acquiesced in any expenditure or other reliance, detrimental or otherwise, such that it can be said to have remained willfully silent (which is a necessary precondition of any acquiescence argument), because it did not know about them.

[33] During the course of the hearing, the Respondent's case took on an entirely new complexion which was not anticipated by the Applicant. In oral submissions which were reduced into a written speaking note, Counsel for the Respondent argued that the primary question for the Court was whether there was in fact an Option granted at all. Counsel argued that the Court is entitled to disregard the fact the First Variation purported to grant an option, and instead have regard to the terms of the Original Agreement in order to conclude whether or not on its true construction, the two agreements operated to create an option agreement.

[34] Instead, Counsel for the Respondent submitted that the Second Variation provided for a conditional sale of the property and not an option. He argued that the First Variation, in particular clause 1.4, reinforces this point of view, because it is inconsistent with the grant of an option to purchase the property in question and was in fact designed to negate the grant of such an option. Rather, the transaction as carried out by the Parties, operated to effect the completion of a bilateral agreement for the conditional sale of the property, prior to the time that an option to purchase could be exercisable.

[35] Further and in any event, Counsel argued that if the Respondent was required to exercise an option by performing the superfluous task of giving notice of its intent to do that which it had already done, (i.e. enter into and complete a bilateral contract for purchase of the property by payment of the purchase price), it did in fact do so within the option period.

[36] In responding to what was essentially, fresh arguments, Counsel for the Applicant urged the Court not to consider that the same simply as an overture to an amendment of the Respondent's statement of case. Counsel submitted that the Respondent is in effect bringing an entirely new claim some 14 years after the agreements in question were executed and some 12 years after the purported exercise of the Option and 9 years after the Applicant had notified the Respondent that

the Option had not been validly exercised. Counsel argued that there is no excuse for not bringing this claim sooner and that the absence of a cogent explanation indicates that there is in fact no good reason.

[37] Counsel for the Applicant further submitted that not only does the new case contradict all the evidence and current pleadings before the Court, it has no foundation. Counsel argued that this new case has no bearing in the Parties negotiations, agreements or conduct. She described it as a re-rationalization undertaken to salvage some rights for the Respondent in relation to the Additional Property when, in reality, the agreements are not effective in giving it any enforceable rights. Counsel further argued that the new case is not supported by the evidence before the Court and seeks to employ a patent fiction that the Parties must be taken to have objectively intended something that they clearly did not intend or contemplate. Counsel argued that the Court should view with suspicion and should scrutinize the motives of a party who has disregarded its own long standing position and ignore the evidence it has previously put forth in a last minute argument.

[38] In supplemental submissions filed on behalf of the Applicant, Counsel further argued that in any event, the new case has no merit, is an exercise in fiction and is bound to fail. Counsel for the Applicant submitted that the Respondent asks the Court to conclude that the Second Variation superseded the prior agreements with a simple agreement for the sale and purchase of the Marina, Businesses and the Additional Property. The Applicant submitted that the Respondent's reliance on Clause 1.4 cannot withstand scrutiny because the Applicant only holds a leasehold interest in the Property and can only dispose of such interest with the consent of the Crown.

[39] Moreover, Counsel for the Applicant submitted that terms of the Second Variation make it clear that it was intended to supplement the Original Agreement concerning the sale of the Marina and Businesses by adding new terms that had been negotiated and making other variations to *that* sale and purchase. Counsel asserted that it did not vary any arrangements concerning the Property or the circumstances in which the Property might be acquired.

[40] Even if the Second Variation was intended to create a new contract to stand in place of the Original Agreement, then this would present a further problem because the Original Agreement which covered the sale and purchase of the marina land and businesses for the US$12 million had

already been concluded. The Respondent had already agreed to pay the sum of US$12 million for the Marina and Businesses only. If it is purported that the Parties intended to vary this agreement to include the Additional Property, then it would have had to have added additional consideration over and above the US$12 million as consideration for this variation.

[41] Counsel urged the Court not to officiously strive to rescue the agreement by construing it as something that was plainly not within the Parties contemplation. She submitted that the objective intention of the Parties at the time of the contract has to be evaluated in all the circumstances. It cannot be something that never occurred to either of them.

[42] During the course of the hearing, the submissions regarding past consideration were not fully ventilated and so the Parties were permitted to provide supplemental submissions on this issue. The Applicant used this opportunity to flesh out its arguments. In its written submissions, the Applicant reiterated that US$12 million was already due and payable for the Marina land under the sale-and-purchase agreement of the Original Agreement. Nothing additional to the US$12 million was offered for the Additional Property under the First Variation. The Applicant submitted that the sum of US$12 million was therefore past consideration which could not count as good consideration for the transfer of the Additional Property under the purported new bilateral contract.

[43] Counsel for the Applicant further submitted that even if the Court were to conclude that the Option was exercised within the option period, the Respondent is not entitled to specific performance because it did not provide any valid consideration in exchange for the Applicant's promises to provide support and assistance in obtaining the Crown's consent for the transfer of the Additional Property and to transfer the Additional Property, if consent were granted. Counsel submitted that nominal consideration of $1 was provided in exchange only for the grant of the Option. The only consideration the First Variation contemplated which the Respondent would provide on a valid exercise of the Option, was the sum of US$12 million which was already due and owing under the Original Agreement. The Applicant argued that the contract that would arise on the valid exercise of an option must conform to the general requirement of contracts, including the requirement that consideration pass from both sides.

[44] According to the Applicant, the Original Agreement, which was a concluded agreement executed formally by the Parties, did not include any provision concerning the Option Land, and provided that the sum of US$12 million be payable in respect of the sale and purchase of the Marina and the Businesses alone. Moreover, the Respondent's pleadings, the accounts of its witnesses, and its previous legal submissions before this Court, all make it clear that at the time the Original Agreement was executed, the US$12 million purchase price was intended for the Marina and Business only and that no extra consideration was given for the Additional Property. Consequently, any subsequent agreement for the transfer of the Additional Property would have required consideration beyond the original sum of US$12 million in order to be valid.

[45] In responding to these submissions, the Respondent framed the relevant narrative in a fundamentally different way. It submitted that having agreed to purchase the Marina Property and Businesses for US$12 million, it had to produce an appraisal for the purpose of financing the purchase. This appraisal revealed that the Marina Property and Businesses had been significantly overvalued. In those circumstances, it was unable or unwilling to complete the purchase of the Marina and the Businesses at that agreed price. At that point, the choice facing the Applicant was to forfeit the deposit and seek to find an alternative purchaser for property and businesses. However, the problem was that although there was an existing appraisal which showed the same to be overpriced, the Applicant *"…required no less than $12 million because they had a development contract with another party and needed that sum to complete the development on time…"*[5]. Thus, the Applicant had to find a purchaser for those overpriced assets in time to complete its outstanding development obligation to a third party.

[46] It was against this background and "*in order to accommodate them we looked at other properties owned by the Applicant with a view to obtaining sufficient property to justify a purchase price of $12 million…*" and that subsequently, "*After some negotiation it was agreed that, in addition to parcels 506 and 44 and the businesses carried out on those properties, the sale would include 10 acres of leasehold land to be taken from a much larger area of leasehold land held by the Applicant…*". The obvious practical benefit of the variation was that it facilitated and secured the continuing commitment of the Respondent to pay the US$12 million which it had to have within the time frame it was needed to fund the Applicant's commitment to the third party.

[5] Witness Statement of Romney Penn paragraph 3

[47] The Applicant contends that under the Second Variation, the Applicant ensured that completion of the sale and purchase of the Additional Property took place not at some unspecified time subsequent to the sale and purchase of the Property and Businesses (as had previously been contemplated by Clause 12.1 of the Variation Agreement) but on 17th September, 2004 as part of the completion of the rest of the transaction.

[48] Counsel for the Applicant submitted that this was of practical benefit to the Applicant in that at the date of completion of the transaction, it secured payment of the purchase price for the Additional Property prior to the time that any option to purchase the same could have been exercised, thus rendering any grant of an option irrelevant and inconsequential.

[49] In applying legal principle to this narrative, Counsel for the Respondent submitted that if by agreeing to a variation of an agreement, (so as to give additional compensation to the promise for the performance of an existing obligation), the promisor secures a practical benefit which it wants, the Court will treat the requirement of consideration as having been satisfied and will give effect to that agreement. The Applicant placed considerable reliance on the judgment in Williams v Roffey Bros & Nicholls (Contractors) Ltd.[6] which heralded the beginning of a reconsideration of the requirement for valid consideration in variation agreements. In fact, Counsel submitted that the modern trend in commonwealth jurisdictions is to dispense with any requirement for consideration in contracts of variation.

[50] By way of further support, Counsel referred to the New Zealand Court of Appeal judgment in Antons Trawling Company Ltd. v Smith[7]. In that case, Mr. Smith was employed by Antons Trawling as the master of a fishing vessel operated by Antons and engaged in catching orange roughy off the coast of the North Island of New Zealand. Antons held a small quota for orange roughy in respect of which a commercial fishery had yet to be established. The Court of Appeal found that Antons had promised Mr. Smith a ten percent share of any additional quota awarded to Antons as a result of Mr. Smith demonstrating to the Ministry of Agriculture and Fisheries (MAF) the existence of orange roughy in commercial quantities so as to justify the setting of a larger quota. The Court found as a fact that Mr. Smith had indeed demonstrated to MAF that a (small)

[6] [1991] 1 QB 1 (CA)
[7] [2003] 2 NZLR 23

commercial fishery in orange roughy was sustainable, and that MAF had, as a consequence, awarded Antons a small increase in its quota. Antons, however, denied that Mr. Smith was entitled to ten percent of that increase as he had provided no consideration for their promise. Mr. Smith had merely performed his pre-existing duty owed to Antons in establishing a commercial fishery and thus, provided no consideration for their promise. The Court allowed the claim and concluded that although no consideration or practical benefit was involved, a mutually agreed contractual variation is binding.

[51] At paragraph 93 of the judgment, the Court held:

> "We are satisfied that *Stilk v Myrick* can no longer be taken to control such cases as *Roffey Bros, Attorney-General for England and Wales* and the present case where there is no element of duress or other policy factor suggesting that an agreement, duly performed, should not attract the legal consequences that each party must reasonably be taken to have expected. On the contrary, a result that deprived Mr. Smith of the benefit of what Antons promised he should receive would be inconsistent with the essential principle underlying the law of contract that the law will seek to give effect to freely accepted reciprocal undertakings. The importance of consideration is as a valuable signal that the parties intend to be bound by their agreement, rather than an end in itself. Where parties who have already made such intention clear by entering legal relations have acted upon an agreement to a variation, in the absence of policy reasons to the contrary they should be bound by their agreement."

[52] This judgment effectively abandoned the hitherto fundamental rule of contract law which denied that a promise to perform or performance of a pre-existing duty owed to the promisor can ever constitute consideration in return for a new promise from that promisor. In its place, the Court devised a test whereby a variation agreement becomes enforceable on the basis of *reliance*.

[53] This decision represents a bold and radical departure from the fundamental principles of contract law as traditionally conceived. While it is not binding upon English courts, but the Respondent pointed out that English Court of Appeal's decision in Williams v Roffey had already made serious inroads into the established principle with the development of the *practical benefit* test. In addressing the issue of pre-existing duty, Glidewell LJ focused not on whether the promisee suffers a detriment, nor on whether the promisor receives a legal benefit, but on whether the promisor *in practice* obtains a benefit or obviates a disbenefit. Glidewell LJ summarised the law as follows:

> "(i) if A has entered into a contract with B to do some work for, or to supply goods or services to, B in return for payment by B and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will

be able to, complete his side of the bargain and (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time and (iv) as a result of giving his promise B obtains in practice a benefit, or obviates a disbenefit, and (v) B' s promise is not given as a result of economic duress or fraud on the part of A, then (vi) the benefit of B is capable of being consideration for B's promise, so that the promise will be legally binding."

[54] The practical benefit principle as developed in Williams v Roffey has since been applied by the High Court in England and Wales in at least two other cases[8] and more recently in the 2017 judgment in MWB Business Exchange Ltd v Rock Advertising Ltd which was referenced in the Respondent's written legal submissions.[9]

[55] Counsel for the Respondent also submitted that the legal principle has also been endorsed by the Canadian courts. In Rosas Toca[10], the appellant won the lottery and loaned $600,000 interest-free to her friend. Approximately one year after the loan was formed, the appellant's friend told her "I will pay you next year", and the appellant agreed to the extension on payment and declined to bring suit. This request was repeated for several years, but the loan was never repaid. Eventually, the appellant brought a claim against her friend. At trial, the judge found that the original term of the loan was for one year, and, based on the original repayment date, the limitation period had expired. The judge held that the subsequent promises from the friend to repay a year later were unenforceable for lack of consideration as the friend was already under an obligation to pay. The appellant's claim was therefore dismissed as statute-barred. On appeal, the appellant argued that the trial judge erred in finding that the loan was originally repayable within a year, that the subsequent promises were unenforceable, or erred in not finding that the appellant had a property interest in her friend's home through a resulting trust.

[56] The British Columbia Court observed that there has been an evolution in the doctrine of consideration in the context of contract modifications. The Court held that when parties to a contract agree to vary its terms, the variation should be enforceable without fresh consideration, absent duress, unconscionability, or other public policy concerns, which would render an otherwise valid term unenforceable.

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[8] Anangel Atlas Compania Naviera S.A. v Ishikawajima-Harima Heavy Industries Co Ltd (No. 2) [1990] 2 Lloyd's Rep 526; Simon Container Machinery Ltd v Emba Machinery Ltd [1998] 2 Lloyd's Rep 428

[9] [2017] QB 606 at paragraphs 77 – 81 per Arden LJ

[10] [2018] BCCA 191

[57] Chief Justice Bauman observed:

> "The time has come to reform the doctrine of consideration as it applies in this context, and modify the pre-existing duty rule, as so many commentators and several courts have suggested. When parties to a contract agree to vary its terms, the variation should be enforceable without fresh consideration, absent duress, unconscionability, or other public policy concerns, which would render an otherwise valid term unenforceable. A variation supported by valid consideration may continue to be enforceable for that reason, but a lack of fresh consideration will no longer be determinative. In this way the legitimate expectations of the parties can be protected. To do otherwise would be to let the doctrine of consideration work an injustice." Emphasis mine

[58] He later held:

> "In my view, that is the case before this Court. When parties to a contract agree to vary its terms, the variation should be enforceable without fresh consideration, absent duress, unconscionability, or other public policy concerns, which would render an otherwise valid term unenforceable. A variation supported by valid consideration may continue to be enforceable for that reason, but a lack of fresh consideration will no longer be determinative."

COURT'S ANALYSIS AND CONCLUSION

[59] The core of the dispute between these Parties centres on the construction or interpretation of the agreements which govern their relationship. In Melanesian Mission Trust Board v Australian Mutual Provident Society[11], Lord Hope summarized the approach which a court should take in determining the meaning of contractual provisions:

> "The approach which must be taken to the construction of a clause in a formal document of this kind is well settled. The intention of the parties is to be discovered from the words used in the document. Where ordinary words have been used they must be taken to have been used according to the ordinary meaning of these words. If their meaning is clear and unambiguous, effect must be given to them because that is what the parties are taken to have agreed to by their contract. Various rules may be invoked to assist interpretation in the event that there is an ambiguity. But it is not the function of the court, when construing a document, to search for an ambiguity. Nor should the rules which exist to resolve ambiguities be invoked in order to create an ambiguity which, according to the ordinary meaning of the words, is not there. So the starting point is to examine the words used in order to see whether they are clear and unambiguous. It is of course legitimate to look at the document as a whole and to examine the context in which these words have been used, as the context may affect the meaning of the words. But unless the context shows that the ordinary meaning cannot be given to them or that there is an ambiguity, the ordinary meaning of the words which have been used in the document must prevail."

[11] [1996] UKPC 53

[60] So, as a first step, a court must examine the text of the disputed provisions in the context of the contract as a whole. If the disputed provision is unambiguous, the analysis ends and the court enforce the contract according to its terms. If the provision is ambiguous however, the court proceeds to the second step and examines extrinsic evidence of the contracting parties' intent. If this extrinsic evidence still does not resolve the ambiguity, the court will then rely on appropriate maxims of construction.

[61] The application of this approach becomes particularly difficult in the context of an application for summary judgment under Part 15.2 of the Civil Procedure Rules 2000 (CPR). Part 15.2 reads as follows:

> "The court may give summary judgment on the claim or on a particular issue if it considers that the – (a) claimant has no real prospect of succeeding on the claim or the issue; or (b) defendant has no real prospect of successfully defending the claim or the issue. Rule 26.3 gives the court power to strike out the whole or part of a statement of case if it discloses no reasonable ground for bringing or defending the claim."

[62] The Court has considered a number of decided cases dealing with the criteria for granting or refusing an application for summary judgment. Leading among them are the cases of Swain v Hillman[12] and Royal Brompton Hospital NHS Trust v Hammond.[13] At paragraph [15] of Easyair Ltd v Opal Telecom Limited[14] Lewison J, as he then was, summarized the correct approach to be followed by a court considering such an application:

> "The correct approach on applications by defendants is, in my judgment, as follows:
>
> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 ALL ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel [2003] EWCA Civ 472* at [8];
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made,

[12] [2001] 1 ALL ER 91
[13] [2001] 1 ALL ER 91
[14] [2009] EWHC 339 (Ch)

particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725*."

[63] Also, in ED & F Man Liquid Products Ltd v Patel and Anor, the court recognized that the test in a summary judgment application is – no reasonable prospect of success and the burden of proof falls upon the applicant, that is, the person who is attacking the claim or defence. Case law also makes it clear that when deciding whether a respondent has some real prospect of success, the court should not apply the standard which would be applicable at trial, namely the balance of probabilities on the evidence presented. Indeed, by the very nature of the proceeding, the testing

of evidence is not an option. Lord Hobhouse's dicta in Three Rivers District Council v Bank of England (No. 3)[15] provides further elucidation:

> "The important words are "no real prospect of succeeding". It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give a summary judgment. It is a 'discretionary' power, *i.e.* one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is "no real prospect", he may decide the case accordingly. I stress this aspect because in the course of argument counsel referred to the relevant judgment of Clarke J as if he had made "findings" of fact. He did not do so. Under RSC O.14 as under CPR Part 24, the judge is making an assessment not conducting a trial or fact-finding exercise. Whilst it must be remembered that the wood is composed of trees some of which may need to be looked at individually, it is the assessment of the whole that is called for. A measure of analysis may be necessary but the 'bottom line' is what ultimately matters."

[64] And later, the learned Judge made it clear that:

> "The criterion which the judge has to apply under Part 24 is not one of probability; it is absence of reality."

[65] It follows that a respondent to a summary judgment application is not required to prove his case to a high standard. It is enough to demonstrate that his case may succeed even though it is improbable.[16] This approach has been repeatedly endorsed by the Eastern Caribbean Court of Appeal. In Lucita Angeleve Walton (nee Lucita Angeleve De La Haye) et al v Leonard George De La Haye,[17] the Court endorsed that:

> "Summary judgment should only be granted by a court in cases where it is clear that a claim on its face obviously cannot be sustained or is in some other way an abuse of the process of the court. What must be shown is that the claim or defence has no real prospect of success."

[66] Turning to the case at bar, it is clear that even without taking into account the revised submissions advanced by the Respondent, the Parties have apposite views as to the construction of the critical contractual provisions. The Applicant contends that the Option was granted for a period of two years from the execution of the First Variation on 9th June 2004. The Option therefore had to be exercised before 9th June 2006. The Applicant asserts that the text of the relevant contractual

[15] [2001] 2 ALL ER 513
[16] Swain v Hillman; Three Rivers District Council v Bank of England
[17] BVIHCVAP2014/0004 (delivered 14th August 2015, unreported)

provisions is clear and unambiguous. It also asserts that when the pleadings and the evidence in this case are examined, they demonstrate that there is no genuine issue as to any material fact.

[67] On the other hand, in its legal submissions, the Respondent has argued that the position is in no way unambiguous. Counsel submitted that in construing a contract, the Court's task is to ascertain the objective meaning of the language which the parties have chosen to express themselves. Counsel relied on the following dictum in Lukoil Asia Pacific PTE Ltd. v Ocean Tankers (PTE) Ltd.[18]

> "The court must consider the language used and ascertain what a reasonable person, that is a person who has 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, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each." Emphasis mine

[68] The Respondent submitted that if it was required to exercise an option, the option was duly exercised within the time limited for exercise of the same. Counsel argued that the First Variation provided that Applicant "shall grant" a "2 year option" to the Respondent to purchase the Additional Property, but did not expressly state when that option period commenced. He argued that those words imply a future rather than a present grant as would have been indicated by words such as "hereby grants". Counsel submitted that the mere fact of there being a date in the Variation Agreement does not without more establish that that date is the date of commencement of the option period. In support of this contention, the Respondent relies in the case Harvey v Pratt, where the parties entered a written agreement for the lease of a garage. The agreement referred

[18] [2018] EWHC 163 (Comm)

to the length of the term and specified the amount payable in rent. However, no start date was mentioned and the tenant never went into occupation.[19]

[69] Lord Denning MR held:

> "…it has been settled for all my time, that in order to have a valid agreement for a lease, it is essential that it should appear, either in express terms or by reference to some writing which would make it certain, or by reasonable inference from the language used, on what day the term is to commence."

[70] The Court must therefore construe the relevant document in the context of the transaction that it was designed to effect, in order to determine its effective date. The Respondent accepts that the date when an option becomes exercisable may be a factor to be taken into account in determining the date of commencement of the option period, however it contends that there is nothing in the First Variation to indicate the date of commencement of the 2 year option period. Counsel submitted that in all the circumstances, it is reasonable to infer with respect to an option which was to be granted at a future date no later than the date of completion, that the option period commenced when the option could first be exercised. In this case, it would arguably be after the completion date as varied by the Second Variation on 16th September, 2004. The Respondent therefore submits that the option was or would have been duly exercised by notice given 18th August, 2006.

[71] The Respondent points to the singular and unitary nature of the transaction of sale contemplated by the Agreement of Sale and Variation Agreements and says that the objective of coupling the sale of the Additional Property to that of the Marina and Businesses in the Original Agreement would not have been negatively affected if the option period commenced when the Option became exercisable. Having the option period run from the date of the First Variation served no particular purpose and conferred no particular advantage or benefit to either Party. No other aspect of the transaction operated from a date prior to the stipulated completion date and in those circumstances, the Respondent argued that the most reasonable and commercially sensible construction of Clause 1 of the Variation Agreement is that if it completed the sale/purchase of the Businesses and Property in the Original Agreement; and paid in advance the sum of $1 million the purchase price allocated for the Additional Property, it would be granted a 2 year option to have

[19] [1965] 1 WLR 1025

that Additional Property transferred to it if it exercised the option by notice in writing within 2 years of the above mentioned completion and payment; and could secure the consent of the Crown for the transfer to it of that Additional Property upon an application made by it and at its own expense.

[72] Where, as in the case at bar, the substantive claim which is the subject of an application for summary judgment requires the court to construe contractual provisions, a court will generally enforce the contract on summary judgment according to its terms only where the terms are unambiguous. If, on the other hand, the terms of the contract are ambiguous, then courts have frequently suggested that summary judgment is not appropriate. In circumstances where there is relevant extrinsic evidence which may assist in resolving the ambiguity, this creates a triable factual issue which makes the resolution of the meaning of the ambiguous contract on summary judgment inappropriate.

[73] This was most recently reiterated in the Privy Council judgment in Hallman Holding Ltd v Webster and Another.[20] That appeal concerned an attempt to enforce an option to purchase land by an application for summary judgment. At paragraph 17 of the judgment, the Board stated:

> "…that it will often be appropriate to determine a dispute about a short point of law or the construction of a simple contract by summary judgment, where the legal issue between the parties is straightforward and the court is satisfied that there is no need for an investigation into the facts which would require a trial: Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 Ch para 15 Propositions (v) – (vii) per Lewison J. Where, in the absence of any factual dispute, more complex legal issues arise, including difficult issues of contractual construction, they may be determined on an application for a preliminary issue for example by seeking a declaration as to the meaning of the contract, as the Chief Justice suggested at p 664 of the Record." Emphasis mine

[74] The function of the Court is to decide the objective intention of the parties. The question is not what the parties understood the words or document to mean 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.[21]

[20] [2016] UKPC 3

[21] Investors Compensation Scheme Ltd. v West Bromwich Building Society [1998] 1 WLR 896

[75] In the case at bar, the Parties will call upon the Court to determine the time from which the Option Period could be said to run. Given the entire agreement between the Parties and having considered the legal submissions of both sides, the Court is satisfied that this question is not a straightforward one which can de definitively determined on the hearing of a summary judgment application. The Court is satisfied that when all the agreements are read together and in the particular context of this case, that the contract terms are not unequivocal. Moreover, there is sufficient extrinsic evidence advanced by the Respondent and disputed by the Applicant to reveal a triable factual issue which will make the resolution of the meaning of these ambiguous provisions on summary judgment inappropriate. The Court is therefore unable to conclude that the construction advanced by the Respondent is so improbable as to have no reasonable prospect of success.

[76] In what became a fall back argument, the Respondent submitted that the evidence revealed that the Original Agreement contemplated the sale of the land buildings and improvements erected on Block 4840 Parcels 506 and 44 together with the Businesses carried out in this property for a total price of $12 million. The First Variation altered the terms of this transaction in that the Applicant undertook not only to sell the Marina and the Business to the Respondent for the purchase price of $9 million and $2 million respectively, but to grant to the Respondent a two year option to acquire the Additional Property for the price of $1 million, that option being exercisable only if the Respondent completed the sale and purchase of the Property and Businesses. Counsel relied extensively on Clause 1.1 of the Second Variation which explained that the total purchase price payable for the Marina, the Businesses and the Additional Property would be US$12 million. Counsel argued that if there was any ambiguity as to the purchase price of the Additional Property resulting from the First Variation, this ambiguity was resolved by Clause 1.4 of the First Variation.

[77] According to the Respondent, the First Variation was carefully crafted to ensure that notwithstanding the use of the term, the Applicant was placed in the position not of a grantor of an option but of a paid vendor. The Applicant asserts that the use of the term “option” was used in relation to the sale of the Additional Property because of concerns by the Applicant that the mechanics of the transfer, including the requirement for the consent of the Crown might unduly delay or unravel the transaction. The Respondent reiterates that the transaction in question was not a grant of an option to purchase the Additional Property but a conditional sale of the same.

[78] In explaining the relevant contractual provisions, Counsel for the Respondent asserted that the requirement in the Second Variation, that the purchaser complete the purchase of the Additional Property by payment of the purchase price prior to the time that the option could be exercised, raises the question which agreement of sale was purportedly completed by such payment. According to Counsel, payment of the purchase money in those circumstances could not amount to completion of the bilateral contract which would have resulted from the Respondent's exercise of the option; such a bilateral contact had not yet come into existence.

[79] Counsel also argued that on any analysis, the Original Agreement as varied by the Second Variation is inconsistent with the grant of an option. It required the Respondent to complete the purchase of the Additional Property by payment of the purchase price. The requirement for completion of the sale of the Additional Property must consequently be based on a premise that the Respondent had already entered into a bilateral contract with the Applicant for the purchase of the Additional Property. Counsel therefore reasoned that it is that contract which was to be completed.

[80] Counsel further argued that if the option envisaged by Clause 1 of the First Variation is seen as an agreement conditional upon the exercise of the option to sell and purchase the Additional Property, that condition must have been waived by the Applicant's acceptance of the purchase price prior to the exercise of the Option. This acceptance would have created a concluded agreement for the sale of that property to the Respondent subject to the condition that the consent of the Crown be obtained – agreement separate from and prior to any agreement that could have been constituted by the exercise of the Option.

[81] Moreover, the Respondent argued that having paid the purchase price for the Additional Property in full, the requirement for the timely notice of the exercise of the so-called Option would not be applicable.

[82] Counsel relied extensively on the judgment from the Australian High Court in Goodwin v Temple.[22] In that case, T. granted to G. an option in writing to purchase a sugar farm and certain farm chattels for £3,000 on 31st December, 1942. The consideration for the option was £150 but

[22] [1956] 180 CLR 68

that amount was to be applied as the deposit if the option was exercised. From that date that the option was granted G was at liberty to enter on the land and to cultivate the sugar cane at his own expense and to receive "as compensation", if the option were not exercised, the proceeds of all cane supplied to a mill less 22 ½ per cent payable to T. If, however the option was exercised all moneys paid to T were to be or before 30th July, 1943. The agreement was expressly made subject to conditions that upon its exercise (a) G. should enter into a written agreement of purchase "embodying all usual conditions" including an agreement to keep rates and insurance premiums punctually paid and to efficiently plant and cultivate the land; and (b) that G. should obtain the consents of certain authorities, including the Central Sugar Cane Prices Board ("the Board"). On 5th January, 1943 G. told T that he had decided to purchase the farm and paid £150 which was described as a deposit in a receipt given by T.'s agent. Thereafter G. went into possession and cultivated and improved the farm. By 1950, the price had been paid in full and G. was in credit with T. T however continued to receive 22 ½ per cent of the proceeds of the cane. At the end of 1952, T decided to end the arrangement and to retake possession of the farm. His position was that G had not exercised the option and was a mere sharecropper on the land. G in turn instituted proceedings for specific performance of the sale agreement constituted by the exercise of the option notwithstanding that there had been no formal exercise of the option nor had he entered into a written agreement of purchase nor received the consent of the Board.

[83] In upholding his appeal, Dixon CJ., McTiernan J. and Kitto J. held, that the requirement that the parties enter into a written contract for purchase was intended to govern the relations of the parties while the contract subsisted. Upon receiving the entire purchase price, the vendor could no longer insist upon it as an essential condition. In that regard, they stated that:

> "When a vendor sells land the consideration which the contract secures for him is payment of the purchase money for which he stipulated. It is indeed a legal incongruity for the vendor to receive and retain the whole of the purchase money and then complain that conditions of the contract operating pending completion have not been performed and on that ground claim to be relieved of his obligation to transfer the land."

[84] The Respondent's case is that upon receiving the purchase price, the Applicant held its interest in the Additional Property on bare trust for the Respondent subject to obtaining the consent of the Crown. Moreover, the Applicant asserts that it was duty bound to cooperate with and give all reasonable support to the Respondent in any application pursued by it to obtain the consent of the

Crown. This duty to cooperate is specifically enforceable and continues as long as that consent is not refused.[23]

[85] The Respondent also relies on the judgment of Webb J in Goodwin v Temple who dealt and considered one of the critical issues which would concern the court hearing this matter – the import of the Crown's consent to the assignment. At paragraphs 13 and 15 of the judgment, Webb L noted:

> "However if, as the Full Court held, rightly I think, the Board's approval was not a condition precedent, it may still be sought and secured. See as to this Butts v O'Dwyer [4]. This case is a fortiori as the agreement here contains express provision for seeking the Board's approval; whereas the agreement in Butts v O'Dwyer was silent on the point of securing the Minister's approval of the transfer of the Crown lands there dealt with. But whatever the position, Temple has no further interest; he has only the duty to co-operate with Goodwin in making the required application for the Board's approval. As to this, we cannot anticipate, or direct or control the Board's action."
>
> "I would allow the appeal and order specific performance as claimed by Goodwin, including provision requiring Temple to join Goodwin in an application to the Central Board for its approval subject to an increase in the farm peak by the Local Board, which no doubt would be guided by the attitude of the Central Board.

[86] The Court accepts the Applicant's submission that a claim or defence may be fanciful where it is entirely without substance, or where it is clear beyond question that the statement of case is contradicted by all documents or other material on which it is based.[24] In applying legal principle, the Applicant has contended that no aspect of the Respondent's case is not maintainable at law or on the evidence before the Court. However, it is clear to this Court that the Respondent's case has evolved with the passage of time. The Respondent now presents an argument which is multifaceted and which advances contentions which in the Court's view, reflect varying degrees of force.

[87] Before deciding whether or not to grant summary judgment, a judge should take into account the filed witness statements and also consider whether the case is capable of being supplemented by evidence at trial. While it is recognized that on a summary judgment application, a court is entitled to go behind the evidence which is incredible, a court will also disregard fanciful claims and defences.

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[23] Brown v Heffer 116 CLR 344

[24] Three Rivers District Council v Bank of England [2001] 2 ALL ER 513 at paragraph 95

[88] The Court has considered the Parties' pleadings and the evidence advanced in support and in defence of the Claim. A combined reading of the Agreements does not in the Court's view yield a clear and unambiguous interpretation. The provisions of the Agreements have to be construed in order to glean the true intention of the Parties and so the relevant provisions and conditions will have to be considered against a background of the context in which the contract was made and after applying the appropriate rules of interpretation.[25] The relevant context is described in the witness statements filed in support of the Respondent's case which are trenchantly disputed by the Applicant. It is therefore impossible to say that the Respondent has no real prospect of succeeding at trial at this interim stage in the proceedings and prior to the cross-examination of witnesses. The Respondent strongly relies upon the commercial context to support its case. It would be wrong for the court at this stage, prior to trial, and without the opportunity for cross-examination, to accept the Applicant's analysis of what must have been intended and what would be and would not be commercially viable, and to reject the opposing contentions of the Respondent.

[89] The Court has also considered the Applicant's submission that the Respondent's arguments during the course of the hearing of this Application are wholly unsupported by the Respondent's pleaded case and by the evidence filed in support thereof. In that regard, the Court has noted the evidence of Glenn Harrigan, where at paragraphs 3 – 6, he recounts the background to the Parties' Agreements. In particular, he makes it clear that Additional Property was to be transferred at no additional cost because the apportionment of the US$12 million "*previously payable for parcels 506 and 44 and for the Business, that sum was now to be payable for parcels 506 and 44, the Business and the 10 acres of leasehold land at Minton Hill*." This evidence is reiterated by Romney Penn who framed the case in the following terms:

a. The sale of land and businesses by Little Dix Bay Hotel Corp. ("LDB") was presented to me as a development opportunity. I took it to the BVI Investment Club. The initial offer was for the land (parcels 506 and 44) and the Marina and Businesses. We had the property appraised for the purpose of financing the purchase. As a result of the appraisal we came to the conclusion that the purchase price of $12 million was too high, bearing in mind the condition of repair of the structures on the land and of the marina.

[25]General Alarms Ltd and another v Time Rapid Prototyping Solution Ltd and Anor [2005] ALL ER (D) 390 (Apr)

b. LDB's position was that they required no less than $12 million because they had a development contract with another party and needed that sum to complete the development on time. In order to accommodate them we looked at other properties owned by LDB with a view to obtaining sufficient property to justify a purchase price of $12 million.

c. After some negotiation it was agreed that, in addition to parcels 506 and 44 and the businesses carried out on those properties, the sale would include 10 acres of leasehold land to be taken from a much larger area of leasehold land held by LDB. LDB identified 10 acres of leasehold land at Minton Hill which was to be included in the transaction. These 10 acres were in a strategic location. They were located in such a way that if you built anything on the 10 acres it could not be seen from LDB. It was agreed between the parties that the value of the leasehold interest in this land was $1 million and that inclusion of this land in the transaction was necessary to justify the payment of $12 million for the transaction.

d. Our initial intention was to acquire parcels 506 and 44, the businesses and the 10 acres of leasehold land at Minton Hill in the same transaction to be completed at the same date and time. We did not require an option to purchase the 10 acres of leasehold land; the acquisition of that land was an essential part of the transaction, and had it not been included the transaction would not have taken place. We were persuaded to have the sale agreement stated as an option agreement because LDB was concerned that the mechanics of the transfer of the 10 acres of leasehold land would delay the completion of the sale, and hence their receipt of the $12 million purchase price. The reason was that the Minton Hill land had been leased from the Crown and the consent of the Crown was required for any transfer or sublease of the same. This would take some time. Moreover LDB was concerned that the whole transaction might unravel if Government refused consent to the transfer. We assumed the responsibility of getting the consent of the Crown and the risk of such consent being refused. There was never any question as to whether we intended to take title to the 10 acres of leasehold land.

e. We also had our own reasons for acquiescing in the delayed completion of the transfer of lease with regard to the 10 acres of land at Minton Hill. We hoped to be able to persuade the Crown to grant us a freehold title rather than a leasehold title to the land. Also, we intended to take title to the Minton Hill land in the name of a company to be formed for that purpose. For these reasons we agreed that the transfer of the leasehold interest in the Minton Hill property could take place at a date after completion of the other aspects of the transaction. We had agreed to pay, and did in fact pay the purchase price for the Minton Hill leasehold land at the date and time of completion of the sale/purchase of parcels 506 and 44 and the businesses. Our understanding was that we would have 2 years after such completion to finalize negotiations with the Government and to make arrangements for taking over the Minton Hill land.

f. Following the completion of the agreement on 17 September 2004, VGYH made several attempts to exercise the option by verbal communication with LDB and its real estate agent, Smith Gore, in which VGYH indicated that it wanted to get the title to the leasehold land. On 18 August 2006 we put in writing our formal exercise of the option. It was our understanding that the time to exercise the option started running on 17 September 2004 when we paid for Minton Hill land, Parcels 506 and 44 and the businesses, thereby completing the agreement and transaction.

[90] The Respondent however has not sought to address this evidence and its import in its pleadings. It is therefore not surprising that the Applicant has roundly criticized the Respondent's later submissions as a contrivance, a complete departure from its case which is wholly unsupported and intended to avoid the consequences of this summary judgment application. Counsel for the Respondent submitted that the Respondent has not dispensed with its pleaded case but he acknowledges that it does not advance the matters raised in its witness statements or its legal submissions. Instead, Counsel for the Respondent asserts that these evolving arguments are raised in the alternative and that the Respondent is entitled to put forward any argument which may be open to it on the evidence.

[91] In the Court's view, modern litigation practice demands that a defendant set out all the allegations or factual arguments upon which it intends to rely in its defence to a claim.[26] There is no question that the Respondent's pleadings do not at adequately satisfy this requirement and so substantive amendments will be necessary if this case is to proceed to trial. If this Court were to grant summary judgment, it would effectively have ruled on the viability of a possible application for amendment when it has not been argued. Moreover, the Court is persuaded by the following excerpt of the judgment of the English Court of Appeal in P & O Nedlloyd BV v Arab Metals Co[27]:

> "On an application by the claimant for summary judgment under Part 24 the defendant is entitled to file evidence with a view to establishing that he has a real prospect of succeeding in his defence. He cannot be strictly confined to what appears in his existing statement of case (if indeed he has already served one), though no doubt if he has already served a defence and wishes to rely on matters that do not appear in it, the court will have to consider the need for an amendment if the case is to proceed to trial."

[26] CPR Part 10.5 and Part 10.7
[27] [2006] EWCA Civ 1717

[92] In the Court's view, if the evidence of the Parties indicates that there is a factual issue to be tried, which, if proved in favour of the Respondent might result in a decision in the latter's favour, then the preemptive power of the court should not be used. These witness statements set out extrinsic evidence which may support the factual basis for the Respondents assertion that that upon its true construction, the agreement between the Parties reflected in the Original Agreement, First Variation and Second Variation operated to effect an outright sale of the Marina Property and the Businesses and further operated to effect a conditional sale of the Additional Property.

[93] Counsel for the Applicant has submitted a number of reasons why the Court should reject this contention, including the clear wording on the face of the relevant documents and its inconsistency with the pleadings. However, in the Court's view, the plain terms of Clause 1.4 of the First Variation and Clause 1.1 of the Second Variation makes that contention at least arguable and raises sufficient doubt as to the intention of the Parties so as to warrant a full inquiry.

[94] Although the Respondent's litigation strategy thus far is unappealing, it is impossible, on this summary judgment application, to reject, as having no real prospect of success, the Respondent's construction of the relevant provisions even on its pleaded case, in light of the case law advanced by the Respondent. The case is at the least arguable. While the Original Agreement may have presented no difficulty, the Court is satisfied that when read together with Clauses 1 and 12 of the First Variation and Clauses 1 and 4 of the Second Variation gives rise to a sufficient degree of abstruseness that the Court considers that it would be unsafe and unwise for it to reach a final conclusion at this stage on the rival contentions of the Parties on the proper interpretation and effect of the relevant provisions. At this stage in the proceedings, the Court cannot conclude that the Respondent is frivolous, neither is contention claim on the interpretation of the Agreements fanciful.

[95] Complex cases are unlikely to be capable of being resolved in a summary judgment application without conducting a mini-trial on the documents without discovery and without oral evidence. This is clearly not the intention of the CPR Part 15 which was designed to deal with cases that are not fit for trial at all. In the case at bar, the court will be called upon to consider the rivaling arguments on the proper meaning of these facts. In addition, there are in depth legal issues to be dealt with in this matter which make it unsuitable for disposal without a trial.

[96] Further, having considered the legal submissions of both sides, the Court is unable to reject, as having no real prospect of success, the Respondent's case that the Applicant is estopped by acquiescence (set out in at paragraphs 2 – 4 of its Reply and paragraphs 7 – 8 of the witness statement of Romney Penn or the Respondent's legal submissions made in response to the Applicant's submissions on the availability of the remedy of specific performance or its arguments on past consideration. The submissions made are entirely arguable and were not convincingly trumped by the Applicant during the course of the hearing. The Court is satisfied that they disclose complex questions of law which are still evolving in the region and upon which there is a dearth of judicial authorities. The Court recognizes that summary disposal would also be inappropriate if the case discloses a developing field of law.[28]

[97] In light of the findings herein, The Court is satisfied that this Application should be dismissed. Pursuant to CPR part 15.6 (2) the Court will set this matter down for case management on a date to be agreed by both Parties.

[98] The Court's order is therefore as follows:

i. The application is dismissed.
ii. The Respondent will have its costs to be assessed if not agreed.

Vicki Ann Ellis
High Court Judge

By the Court

Registrar

[28] Brooks v Commissioner of Police of the Metroplis and Others (2005) 1 WLR 1495