EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV 2016/0111
BETWEEN:

VIRGIN GORDA YACHT HARBOUR

Claimant

And

LITTLE DIX BAY HOTEL Co.

Defendant

Appearances: Mr. Sydney A. Bennett, QC and Ms. Anthea L. Smith of Sabals Law for the Claimant
Mr. John McCarroll SC and Mr. Richard Parchment of Harneys for the Defendant

----
2021: October 19th & 20th
2022: August 17th

JUDGMENT

[1] **ELLIS J:** At the centre of the dispute between the Parties herein is a written contract entered into by the Parties on 23rd February 2004 ("the Original Agreement") for the sale of freehold property comprising of 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 of the Original Agreement, the time for completion was 75 days after the date of the Original Agreement (i.e. on or by 8th May 2004) unless the Parties agreed otherwise.

[2] On 9th June 2004, the Parties entered into a variation Agreement intended to vary the terms of the Original Agreement ("the First Variation"). Under clause 1.1 of the First Variation, the Defendant agreed to grant the Claimant an option to acquire certain additional land in Virgin Gorda held by the

Defendant (qua lessee) on a long lease which had been granted by the Crown ("the Option"). The consideration for the grant of this Option was (1) the performance of the covenants and agreements contained in the Original Agreement and (2) payment of the sum of US$1.00. The relevant 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.

[3] Pursuant to the First Variation, the two year period for exercise of the Option ran from the date of the First Variation i.e. 9th June 2004 terminating on 9th June 2006 ("the Option Period"). In order to exercise the Option, the Claimant had to provide notice in writing.

[4] 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. 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 30th 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 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.”.

[5] By way of a further variation (“the Second Variation”) dated 17th September 2004. The date of completion under the Original Agreement was pushed to 16th September 2004. Clause 4 of the Second Variation 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.”

[6] For a number of reasons, completion did not actually take place until 17th September 2004.

[7] On 21st August 2006, the Defendant received a letter from the Claimant dated 18th August 2006 in which the Respondent purported to exercise the Option. This 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] There was no further communication between the Parties concerning the Option until three (3) years later when, by letter dated 1st July 2009, the Defendant wrote to the Claimant 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 31st July 2009, attorneys acting for the Claimant 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] Following this letter there was no further communication between the Parties until almost 7 years later, on 12th April 2016, the Claimant 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.

[11] Over the course of the next two years, the litigation between the Parties proceeded on the basis that the dispute was solely about the validity of the Option and whether or not Claimant had validly exercised the Option in time - that is - until May 2018, when the Defendant's application for summary judgment in this matter was heard. At that hearing, it became clear that the Claimant had radically changed its case, when it sought and obtained permission to amend its statement of claim. By way of its amended statement of claim, the Claimant now also contends that: (i) the Second Variation somehow superseded the Original Agreement and First Variation/Option, (ii) the Second Variation constitutes a separate and conditional contract for sale, and (iii) the condition (payment) having been

carried out by the Claimant, the Defendant was obliged to transfer the Option Land ("the Conditional Contract Argument").

[12] The Defendant, however, trenchantly asserts that in reality this claim hinges and has always hinged on the validity and the exercise of the Option rather than the primary argument now advanced by the Claimant.

ISSUES FOR DETERMINATION

[13] The following issues therefore arise for determination:

i. Whether the Option is enforceable for the reason that no additional consideration was provided for the sale of the Option Land in the contract for sale (as opposed to the grant of the Option).

ii. In the event that the Option was validly granted, whether the Option was exercised in accordance with the conditions precedent set out in the Option.

iii. Whether the Second Variation constitutes a separate and conditional contract for sale, and

iv. The condition (payment) having been carried out by the Claimant, whether the Defendant was obliged to transfer the Option Land.

v. Should the Claimant succeed in either of its claims the submissions, whether the discretionary equitable remedy of specific performance, should be granted.

i. Whether the Option is enforceable for the reason that no additional consideration was provided for the sale of the Option Land in the contract for sale (as opposed to the grant of the Option).

THE PARTIES' CASES

[14] The Defendant trenchantly disputes that the Claimant exercised the Option in time. Its grounds are twofold. First, the Defendant says it is undisputed that there was no additional consideration provided for the Option. It therefore argues that the Option was not legally created. Second, it contends that even if it were to be determined that the Option was valid, the Claimant failed to exercise it in time.

[15] Counsel for the Defendant submitted that options are subject to the same contract principles as any other contract. Like other contractual arrangements, it is still necessary to provide consideration when exercising an option. This is because an option is simply a unilateral contract which, when exercised, is converted into a concluded bilateral or synallagmatic contract.[1] This new bilateral contract must then itself be a valid contract[2] and as with any other contract this means that consideration must be provided.

[16] Counsel for the Defendant pointed out that in relation to consideration, the normal rules as to what constitutes sufficient consideration also apply. Consideration that is already owed in support of an existing obligation cannot be consideration for a new obligation.[3] If the only consideration provided by the grantee of the option is past consideration, then the grantor's promise to transfer the property is essentially gratuitous.

[17] The Defendant submits that in the case at bar, the Parties had already agreed in the Original Agreement (which by the time of the First Variation was a signed contract which was therefore fully binding) that the Claimant would pay $12 Million for the Marina Land ("the Purchase Price"). In the First Variation, the Option Land was simply added for the same price. No additional consideration was provided. Moreover, the Parties expressly agreed that the Purchase Price was payable by the Claimant regardless of whether it ever exercised the alleged Option. According to the Defendant, this clause was necessary to ensure that the Claimant, (who had threatened not to complete the contract) was held to its obligations.

[18] Counsel for the Defendant submitted that an option is an unusual contract which, if exercised, contains two separate contracts. The first is the unilateral promise to grant the option. That unilateral promise to grant must itself be supported by consideration. In the case at bar, the grant was supported by consideration expressed as US$1.00.

---

[1] Ibid, at 82F, et seq (Diplock LJ) United Dominion Trust v Eagle Aircraft Services [1968] 1 WLR 74
[2] Sudbrook Trading Estate Ltd v Eggleton and others
[3] Bob Guiness Limited v Salomonsen [1948] 2 KB 42

[19] However, if the option is exercised then a synallagmatic (or at least bi-lateral) contract comes into existence.[4] This is a separate contract from the grant and that contract must also be supported by consideration. In this case there was no consideration provided since the US$12 Million was already payable and this was made clear in both variations. Counsel submitted that it therefore follows that as the Claimant was obliged to pay the US$12 Million that the synallagmatic contract was unsupported by consideration. The Option is therefore unenforceable.

[20] This means that even if the Parties intended to create an option, legally, no option was created because there was no consideration contemplated for the transfer of the Option Land. Accordingly, the Defendant submitted that even if the Option had been exercised within time (which is denied), the Parties had failed to conclude a valid binding contract. Accordingly, it concluded that the Claimant cannot claim any relief with respect to the Option.

[21] The Claimant on the other hand submitted that the agreement for the transfer of the leasehold interest in the Additional Property on the terms contemplated is valid and enforceable. Counsel for the Claimant submitted that the Defendant's case ignores the fact that the purpose of the First Variation was to vary the terms of the Original Agreement dealing with the assets to be transferred as well as the prices for those assets. The Claimant further contended that Clause 1.1 of the First Variation contemplates the grant to it of an option to purchase the Additional Property for the part of the total purchase price apportioned to it under the Variation Agreement. It says that the obligation to complete "…the sale and purchase as contemplated by the Agreement for Sale…" means no more than that the option would be not be exercisable separately but only as part of the larger transaction involving the sale of the Property and the Business. The Claimant submitted that this is made clear from a number of factors including the fact that the Parties expressly agreed to apportion the purchase price of US$12 Million as being US$9 million for the Property; US$2 Million for the Business and US$1 Million for the Additional Property. The apportionment was a restatement for all purposes of the purchase price agreed to be paid for each of the component assets included in the sale.

[4] Per Lord Diplock in United Dominions Trust v. Eagle Aircraft Services [1968] 1 WLR 74 page 82 (F – H) and page 83 (D – H) and page 84 (A-C)

[22] This apportionment effectively reduced the purchase price of the Property and Business from US$12 Million to US$11 Million and included the Additional Property valued at US$1 Million in the assets which the Defendant was to transfer to the Claimant for the total price of US$12 Million. Under the terms of that contract, the Claimant agreed to pay at completion the US$12 Million purchase price stipulated for the Property, the Business and the Additional Property. The Defendant in turn agreed to transfer the Property and Business to the Claimant and to grant to the Claimant an 'option' to take title to the Additional Property that it would have already paid for at completion.

[23] Had the purchase price for the assets listed in the Original Agreement remained the same, the apportionment set out in Clause 1.4 of the First Variation would have related to the Property and Business only and would not have included the Additional Property. The Claimant submitted that had the intention been that, notwithstanding the provisions of the First Variation the Claimant would purchase the Property and Business for US$12 Million and thereupon receive an option to acquire the Additional Property for no additional payment then there would have been no need to stipulate in Clause 1.4 of the First Variation that the US$12 Million purchase price would be payable whether or not the option was exercised. According to the Claimant, it was necessary to state this only because the payment required of the Purchaser included US$1 Million allocated to the purchase price for the Additional Property and would otherwise be refundable if the option was not exercised.

[24] Had the intention of the Parties been to transfer the Additional Property to the Claimant by way of gratuitous transfer rather than by sale, then Clause 1.1 of the First Variation would not have made reference to an agreement for sale and purchase of the Additional Property upon exercise of the Option. In any event, Clause 1.1 of the Second Variation confirmed that the US$12 Million purchase price paid on 17th September 2004 included payment of the purchase price for the Additional Property.

[25] Counsel for the Claimant submitted that the agreement for the sale and purchase of the Additional Property was therefore supported by consideration because by specifically apportioning the purchase price as stated in Clause 1.4 of the First Variation, the Parties expressly agreed between themselves that the purchase price to be paid for the Additional Property would be US$1 Million. This is confirmed by Clause 1.1 of the Second Variation. Having accepted payment of the full purchase price, Counsel for the Claimant submitted that the Defendant is precluded from maintaining that the grantees promise

to transfer the Additional Property was gratuitous. The US$1 Million apportioned as the purchase price of the Additional Property out of the US$12 Million total purchase price paid on 17th September 2004 therefore did not constitute past consideration because the Defendant's promise to transfer the Additional Property and the Claimant's promise to pay the purchase price as stipulated was part of the same transaction and governed the same contract as varied.

[26] Counsel for the Claimant further contended in construing the Parties' agreement, it is important that the Court examine the context and the circumstances in which the Parties came to execute the First Variation. In summarizing the same, Counsel submitted the First Variation resulted from negotiations conducted at arm's length between the Parties in consequence of the findings of a due diligence inquiry carried out by the Claimant pursuant to the terms of the Original Agreement. On the basis of those findings, the Claimant had expressed dissatisfaction with the Business in that the value of the Assets was insufficient to rationalize a purchase price of US$12 Million. Discussions took place between the Parties the outcome of which was that they agreed to adjust the prices of the assets included in the Original Agreement and to include Additional Property in the assets being sold.

[27] Counsel for the Claimant argued that the agreement to vary the terms of the Original Agreement to grant the Claimant an additional benefit was therefore supported by consideration and he relied on Clause 1.1 of the First Variation which provided that: "***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")…". Emphasis added*

[28] The term "premises" included recital (8) of the First Variation which confirmed the fact that (having accepted the findings of a due diligence inquiry conducted pursuant to the terms of the agreement for sale) the Purchaser was willing to proceed with the purchase of the property "…*on the terms and conditions herein provided' i.e. on the grant of an option in the terms of Clause 1.1*". Counsel for the Claimant submitted that this recital can be paraphrased as stating that in consideration of, *inter alia*, the Claimant's willingness to proceed with the sale of the property notwithstanding the findings of the

due diligence enquiry the parties had agreed to vary the Agreement of sale in the manner provided for in the First Variation.

[29] Counsel explained that the Claimant was contractually entitled to carry out due diligence investigations and evaluation of the assets being sold under the Original Agreement. Having done so, it determined that the assets had been significantly overvalued and so it was unwilling to complete the purchase of the property and businesses at the price originally provided for in the contract and the Defendant was equally unwilling or unable to accept less than US$12 Million for that transaction. After further negotiation and on the basis of the findings of this due diligence inquiry, the Parties agreed to restructure the transaction by reducing the value of the assets listed in the original Agreement for sale and by adding the Additional Property (which the parties valued at US$1 Million) to those assets so as to justify the purchase price of US$12 Million. The adjustments represented a lowered valuation of the assets comprising the Property and Business and the Additional Property was now included to justify the purchase price of US$12 Million. The fact that the purchase price for the revalued assets, together with the Additional Property was equal to the prior purchase price of US$12 Million did not result from the fact that the Additional Property was thrown in for free, as the Defendant asserts. Rather, it was the result of a revaluation exercise purportedly carried out pursuant to the terms of the contract (Clauses 3 and 9).

[30] Counsel for the Claimant submitted that by agreeing to the variation of the Original Agreement rather than seeking to forfeit the purchaser's deposit for failure to complete, the Defendant therefore secured practical benefits which constituted good consideration for the agreement. Counsel submitted that those benefits included the Claimant's continuing commitment to pay the US$12 Million that the Defendant required within the time frame that the Defendant required it despite the fact that the assets listed for sale in the original Agreement for Sale had been shown by a due diligence investigation conducted pursuant to the Agreement for Sale appraisal to have been significantly overpriced.

[31] In written closing submissions, Counsel for the Claimant then critically assessed the evidence advanced by the Parties respective witnesses, Counsel for the Claimant purported to make short shrift of the evidence advanced by the Defendant's witness Mr. Arthur Carpenter who testified that the values set out in Clause 1.4 as being the apportionment of the purchase price were arbitrary and

made for the purpose of stamp duty only. Counsel for the Claimant submitted that there is nothing to indicate objectively that those amounts were anything other than a genuine estimate of the true value of the properties and businesses subject of the sale. He submitted that the parties were duty bound to base their apportionment of the purchase price on an honest good faith assessment of the value of the assets sold.

[32] In addressing the law, Counsel for the Claimant submitted that the modern position is that if, by agreeing to a variation of an agreement so as to give additional compensation to the promisee 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. In support of this submission, Counsel relied extensively on the judgment in **Williams v Roffey Bros & Nicholls (Contractors) Ltd.**[5] in which Purchas L.J. posited:

> "… I consider that the modern approach to the question of consideration would be that where there were benefits derived by each party to a contract of variation even though one party did not suffer a detriment this would not be fatal to the establishing of sufficient consideration to support the agreement. If both parties benefit from an agreement it is not necessary that each also suffers a detriment. In my judgment, on the facts as found by the judge, he was entitled to reach in those circumstances. This is sufficient to determine the appeal…"

[33] Counsel submitted that the decision in **Williams v Roffey** heralded the beginning of a reconsideration of the requirement for consideration in variation agreements. In the English Court of Appeal case of **MWB Business Exchange Ltd v Rock Advertising Ltd.**[6] Lady Justice Arden summarized the position as follows:

> "…The principle that a benefit can in law be consideration for a promise must logically apply whatever the nature of the contract. It must also apply whether the promisee has at the same time agreed to render the same performance as he originally promised or to render a lesser performance, and whether the promisor has renewed his original promise or, as in the Roffey Bros & Nicholls case, agreed to pay more.

[34] Counsel for the Claimant also commended what he described as the modern trend in commonwealth jurisdictions is to dispense with any requirement for consideration in contracts of variation. He cited the 2002 case of **Antons Trawling Company Ltd v Smith [2003] 2 NZLR 23 (CA)** but he relied on the Canadian case of **Rosas v. Toca [2018] BCCA 191** where Chief Justice Bauman concluded

[5] [1991] 1 QB 1 (CA)
[6] (CA) [2017] QB 606 at paras 79 – 80

> "…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.

[35] However, Counsel for the Claimant conceded that the above statement represents the current state of Canadian law rather than English law on the subject of consideration. However, he submitted that this clearly shows the direction in which the law is developing with regard to the requirement for consideration for the variation of agreements between persons who are already in a contractual relationship and merely wish to change some of the terms of their agreement in order to adjust for ongoing developments. He submitted that more recent decisions of the Courts not only in England and Wales but in the commonwealth have moved away from what has been acerbically described as "*a principle enunciated in relation to the rigors of seafaring life during the Napoleonic wars".* He submitted that the modern tendency is to place less importance on the requirement of consideration in cases of renegotiated contracts and to test their enforceability on the basis of the principles now known as economic duress.

[36] The Claimant contends that in the instant case, the Claimant entered into an agreement for the purchase of listed Property and Business for US$12 Million subject to the carrying out of a due diligence investigation into the Business. The due diligence investigation found that there was a shortfall between the value of the assets agreed to be sold and the purchase price of US$12 Million. Counsel for the Claimant commended to the Court the evidence of Mr. Carpenter to the effect that "the BVI Investment club … were dissatisfied with the results of their due diligence investigation but were willing to look past that if they were granted an option for 10 acres on Minton Hill"[7] and that "the option was a way to bridge the gap and so we, to solve the problem, and so we agreed to it in the terms that are within the First Variation Agreement."[8]

[37] The Claimant communicated its dissatisfaction with the results of the due diligence investigation to the Defendant and expressed its unwillingness in the circumstances to complete the purchase for the price of US$12 Million. The Defendant aware of the possibility that the Claimant could by notice put

[7] Trial Transcript Wednesday October 20 Afternoon proceedings page 125 lines 2 to 6
[8] Trial Transcript Wednesday October 20 Afternoon proceedings page 161 line 25 to page 162 lines 1 to 5

in motion the contractual procedure whereby it could terminate the contract in accordance with its terms and, recover its deposit and having a choice whether to move to forfeit the deposit or to renegotiate the terms of the sale, made a business decision to take the latter course. As a result the Parties agreed to vary the contract in the manner provided for in the first Variation Agreement.

[38] Counsel also submitted that in agreeing to a variation of the contract on those terms, the Defendant was not subject to any type of economic duress and indeed affirmed the variation agreement by word and conduct after completion of the sale at which time it had received the US $12 Million due under the agreement.

[39] Counsel for the Claimant further submitted that in such circumstances it could not be said that the Original Agreement as varied by the First and Second Variation is unsupported by consideration. First, he submitted that the sum of $1 paid by the Claimant is, by itself good consideration for the grant of the option because the value of the consideration need not be proportional, or even related, to the promise or act supplied in return.[9]

[40] Second, Counsel argued that if parties to a contract come to an agreement to settle an issue or potential dispute arising thereunder or to compromise a claim which they believe might otherwise be made this must can constitute valuable consideration even if the potential claim turns out to be unfounded or founded on a misapprehension of the legal position. In light of the fact that one of the "premises" for the First Variation was recital (8) which confirmed the fact that having accepted the findings of a due diligence inquiry conducted pursuant to the terms of the agreement for sale the Purchaser was willing to proceed with the purchase of the property *"…on the terms and conditions herein provided'* i.e. on the terms that it be granted an option to acquire the Additional Property as provided for in Clause 1.1 of that agreement, this in effect means that in consideration of, *inter alia,* the Claimant's willingness to proceed with the sale of the property notwithstanding the findings of the due diligence enquiry, the parties had agreed to vary the Agreement of sale in the manner provided for in the First Variation. A decision by the Claimant to*" look past the problems they had with the due diligence findings"*[10] constituted good consideration for the Defendant's promise to revalue the assets

[9] Mountford v. Scott [1975] Ch. 258
[10] Trial Transcript Wednesday October 30 Afternoon proceedings page 122 lines 8 to 10

subject to the sale and to include the additional property in the assets being sold so as to justify the purchase price. This was good consideration for the variation even if doubt could later be cast on whether the due diligence findings could successfully have been invoked by the Claimant to entitle it to terminate the sale and to recover its deposit.

[41] Counsel for the Claimant submitted that the Parties took all of the circumstances into account including the fact and made the sensible decision to restructure the transaction by including the Additional Property in the assets which were to be transferred to the Claimant so as to bring the value of the assets in line with the purchase price of $12 million which the Defendant needed to receive. The obvious practical benefit of the Variation Agreement to the Defendant was that it facilitated and secured the continuing commitment of the Claimant to pay the $12 million that it had to have within the time frame that money was needed to fund its commitment to a third party and this notwithstanding its dissatisfaction with the findings of the due diligence investigation conducted by it pursuant to the contract.

Economic Duress

[42] Central to this “practical benefit” argument is the Claimant’s contention that Mr. Arthur Carpenter tacitly admitted that the Defendant believed that the Claimant was entitled to exercise its powers under Clause 3 and 9 of the Original Agreement to terminate the agreement, since that is the only way in which the Claimant’s deposit would not be at risk if it failed to complete the sale. If the Claimant ultimately terminated the transaction in purported exercise of its rights under clauses 3 and 9 of that Agreement its entitlement to recover its deposit might become a matter of dispute. Counsel posited that bearing in mind that the Defendant was legally advised at the time, this must have been an informed decision. He posited that the Defendant declined to act to forfeit the deposit because it believed that it was more advantageous to it to complete the sale than to forfeit the deposit. This is especially because had the Defendant chosen to forfeit the deposit so it would have had to find an alternative purchaser for the assets in circumstances where the findings of a due diligence investigation had showed those assets to have been overvalued and therefore difficult to finance.

[43] Not surprisingly, the Defendant sees this scenario very differently. It argued that this purported threat to pull out of the transaction operated as a complete answer to the Claimant's "practical consideration" argument. First, Counsel for the Defendant argued that the decision in **Williams v Roffey** is in doubt as it is inconsistent with the decisions in both **Stilk v Myrick**[11] and **Foakes v Beer**[12] where it was held that performance of an existing duty was not good consideration.

[44] Moreover, Counsel for the Defendant argued that in any event, it is doubtful whether the Claimant's arguments about practical consideration would trump where there appears to have been a threat by the Claimant to resile from its contractual obligations. Counsel noted that the court in **Williams v. Roffey** was careful to carve out from this principle any matter in which pressure or "economic duress" was applied. The following appears in the judgment of Purchas LJ at page 23:

> "In normal circumstances the suggestion that a contracting party can rely on his own breach to establish consideration is distinctly unattractive. In many cases it obviously would be and if there was any element of duress brought upon the other contracting party under the modern development of this branch of the law the proposed breaker of the contract would not benefit…"

[45] Counsel for the Defendant argued that what occurred in the case at bar is far-removed from the facts in **Williams v. Roffey**. He submitted that the facts here fall squarely into the category of cases where the Claimant cannot be allowed to avoid the consequences for the lack of consideration by relying on its own threatened breach of contract. According to Counsel for the Defendant, the evidence clearly reveals that having entered into a binding and executed contract, the Claimant determined not to complete the same without asking for more. He commended to the Court the evidence of Mr. Carpenter's that the Claimant threatened not to complete unless they received something additional. That "sweetener" in question was the Option over the 10 acres. The fact that the negotiations (or indeed the threat not to complete itself) were or might have been cordial does not remove the fact that the Claimant did not observe what it was obliged to do under the Original Agreement and was clearly prepared to press home its advantage for its own benefit.

[11] (1809) 2 Camp 317
[12] (1884) 9 App cas 605

COURT'S ANALYSIS AND CONCLUSION

General Principles of Contract Interpretation

[46] When called upon to construe contractual provisions, it is well established that the starting point for a court is to identify the intention of the contracting parties. This is an objective test; the court is concerned to identify the intention of the parties by reference to "*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean*".[13] In ascertaining the objective meaning of a contractual provision, the courts will look to both the language of the clause and the commercial context in which it was drafted.[14]

[47] The following considerations are relevant to a court's analysis: [i] The natural and ordinary meaning of the clause. The courts "do not easily accept that people have made linguistic mistakes, particularly in formal documents".[15] However, the worse the drafting of a particular clause, the more readily a court will depart from its natural meaning;[16] [2] any other relevant provisions of the contract; [3] the overall purpose of the clause and the contract; [4] the facts and circumstances known or assumed by the parties at the time the contract was executed; [5] commercial common sense.

[48] The extent to which each is used will vary according to the circumstances. Greater emphasis is likely to be given to textual analysis where the dispute concerns complex agreements agreed between sophisticated parties and with the assistance of skilled professionals. Conversely, commercial context will play more of a role where the agreement is more informal, or lacking in detail. However, there are always exceptions and every case will be decided on its own facts.[17]

[13] per Lord Hoffman in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38 at paragraph 14
[14] Wood v Capita Insurance Services Limited [2017] UKSC 24
[15] Investors Compensation Scheme v West Bromwich Building Society [1998] 1 W.L.R. 896 at page 913
[16] per Lord Neuberger in Arnold v Britton [2015] UKSC 36, paragraph 18
[17] Wood v Capita Insurance Services Limited [2017] UKSC 24

[49] The court will not take into account any subjective evidence of either party's intentions. While the court must examine the full background to the contract, it cannot look at prior negotiations[18] or the parties' "declarations of subjective intent".[15] This means that the court cannot look at extrinsic evidence such as antecedent agreements, oral negotiations, exchanges of letters, etc., preceding the contract.[19] However, the Court of Appeal has held that in construing the meaning of an unusual combination of words not defined in the agreement and with no obvious natural and ordinary meaning, the court can "*explore the factual hinterland of the agreement*" to ascertain how the parties understood the phrase.[20] In so doing, the court is not taking into account the parties' "*declarations of subjective intent*", rather it is identifying the meaning shared by the parties and in effect incorporated into their agreement.

[50] Applying these legal principles to the facts of this case, the Court finds that although clause 1.4 of the First Variation provided for an apportionment of the purchase price such apportionment does not alter the fact that consideration for the Agreement was US$12 Million and that irrespective, this amount to be paid. It is worth reiterating clause 1.4 of First Variation in full:

> "The non-exercise of 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, <u>including by way of illustration and not by way of limitation) the purchase price agreed to be paid under the Agreement for Sale</u>. The parties agree 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."

> Clause 1.5 provides that-

>> "The parties acknowledge and agree that the Purchaser shall be responsible for payment of all stamp duty on the transfer or assignment of the Additional Property."

[51] The Second Variation again confirms that the purchase price payable is US$12 Million. At clause 1.4 of the Second Variation. the Parties agreed that there could be no adjustment to the purchase price) under Clause 10 of the Original Agreement in the following terms:

> "No adjustment to the Purchase Price shall be made as contemplated by Clause 10.4 and 10.5 of the Agreement for Sale and the parties hereby agree that the Vendor shall be released

[18] Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL page 38; Arnold v Britton [2015] UKSC 36
[19] Investors Compensation Scheme v West Bromwich Building Society [1998] 1 W.L.R. 896
[20] Rugby Group Ltd v ProForce Recruit Ltd [2006] EWCA Civ 69

> from the obligation to deliver to the Purchaser or at all any of the documents referred to in Clause 10.3 of the same."

Clauses 10.4 and 10.5 of the Original Agreement spoke to the apportionment of sums due for land and house tax and miscellaneous outgoings between the Parties and amounts due in respect of stock and receivables.

[52] It is therefore clear that the Parties expressly contemplated the possibility of the Option not being exercised and expressly stated that the non-exercise of the Option would not affect the purchase price of the assets which were the subject matter of the Original Agreement. In the face of the Parties reiterated, clear and unambiguous language, the Court sees no basis to conclude that the Parties have made some linguistic mistakes in their rather formal contract documents which were clearly drafted with the benefit of legal counsel.

[53] The Court has considered the evidence of the respective witnesses in this case, and as unscrupulous as the motive may be, the Court had no hesitation in accepting Mr. Carpenter's frank evidence that the apportionment was made solely to facilitate the payment of stamp duty that it had nothing to do with the valuation of or appraisals with respect to the property and that the only party affected by valuation was the purchasers who would be required to pay the relevant taxes. Whether this proposal could be maintainable as a matter of law or potentially fraudulent[21] is in the Court's view irrelevant in the context in which this evidence was advanced. It was artless evidence which was advanced in a frank and truthful manner.

[54] It is clear that from the Original Agreement, the Parties had at the forefront of the minds, the relevant tax obligations which this transaction would attract. This evidenced in the express provisions set out at clause 11 of the Original Agreement and clause 1.3 and clause 1.5 in the First Variation whereby the Claimant assumed responsibility for the payment of all stamp duty on the transfer or assignment of the Additional Property just reinforces this evidence and clauses 1.2 and 3 of the Second Variation. Clause 3.1 is particularly telling. It provides that:

> "Without prejudice to the provisions of Clause 11 of the Agreement for Sale and Clause 1.3 of the Variation Agreement, all stamp duty on an all other Government costs and fees associated with (a) the Instrument of Transfer conveying title to the Property to the Purchaser

[21] Saunders and Another v. Edwards and Another [1987] 1 W.L.R. 1116

> or any nominee of the Purchaser and (b) any Instrument of Transfer of Instrument of Sublease or other document relating to the Additional Lands. **The risk of any statement of consideration on any of the documents referred to in this Clause not being accepted by the Inland Revenue Department, the Commissioner of Inland Revenue or any other Government Department, agency, officer or official shall be solely that of the Purchaser. Should any appraisal of the Property of the Additional Lands or any portion of either of the same be required in connection with the stamping of any documents referred to in this Clause 9 of for any other reason whatsoever, the Purchaser shall bear sole responsibility for obtaining the same as well as all fees costs and expenses whatsoever associated therewith**." Emphasis mine

[55] The Court is therefore satisfied that the purpose of the latter was to fix a value of the elements of the deal (in respect of stamp duty) and not to answer a prospective allegation of past consideration. The defect from the Claimant's perspective (that is to say that consideration is past) cannot be cured by pointing to the apportionment mechanism and suggesting that apportionment of a fixed consideration for the purposes of stamp duty can fundamentally change the nature and effect of consideration. The fact is, that at the time of the First Variation, the Parties contemplated that the purchase price could be adjusted to take into account the apportionment of the land and house taxes and outgoings referable to the Property (under clause 10.4) and the amounts due by either party to the other in respect of stock receivables under the completion accounts (under clause 10.5) as at the completion date. It follows that even the purchase price was fluid.

[56] Moreover, it is clear that clause 1.4 of the First Variation (like clause 2.4 of the Original Agreement) is fluid (it provides immediately after the apportionment "*(or such other apportionment as they may otherwise agree")*. The apportionment could change (as was indeed expressly envisaged in the Agreement. Counsel for the Defendant submitted that in fact the apportionment was altered.[22] He pointed out that the documentary evidence discloses that the US$9 Million figure apportioned to the Property (i.e. not the Business nor the Option Land Land) did not make it into the transfer deed. This was changed, at the behest of the Claimant, to US$3.0 Million (some $6m less than the apportioned price). The question then arises as to what part of the purchase price was to be apportioned to the Business and the Additional Property?

[22] 5.32 of the CWS is therefore itself misplaced on a factual basis alone

[57] The assertion, therefore, that US$1 Million (according to the abandoned apportionment in clause 1.4 of the First Variation) magically adjusts the consideration is clearly implausible. It is clear from the Parties that the fixed consideration did not change and could not change. The Court is inclined to accept the Defendant's arguments that purpose of the apportionment was the calculation of stamp duty.

[58] Counsel for the Claimant has suggested that "…*there was nothing to indicate objectively that those amounts were anything other than a genuine estimate of value*" when it is common ground that there is no evidence that the Parties attempted to secure a written valuation in this case. Certainly none was produced by the Claimant. Moreover, the fact that these values were arbitrarily changed for the purposes of stamp duty at the behest of the Claimant rather strikes at the heart of that proposition.

[59] The Court has considered Counsel for the Claimant's arguments advanced at 4.2.3 of written submissions. In the Court's judgment, this imports a complexity into the Agreement that is unwarranted. When all of the relevant contractual provisions are considered in light of the factual background, it is clear that the Option was granted in order to try to move the matter towards completion given the Claimant's purported dissatisfaction and its clear intention to resile from its promises. The clause in question was inserted (with others in the First Variation) so there should be no further relapsing and makes clear that the consideration did not change and should the Claimant not exercise the Option that there would and could be no claim that any part of the consideration would be repaid to the Claimant.

[60] The critical point is that the consideration remained the same whether or not the Option was granted. The US$12 Million purchase price would have been received by the Defendant as the purchase price of the Property and the Business only if the Option was not exercised and as the purchase price of the Property, the Business and Additional Property if the Option was exercised. The only logical conclusion therefore is that the Parties did indeed intend to include the Additional Property as a part of their bargain by way of a gratuitous transfer lumped in as a *sweetener* with the assets which formed the subject matter of the Original Agreement.

Past Consideration

[61] In the event that the Court accepts the very plausible premise that the purported sale of the Additional Property was unsupported by pecuniary consideration, the Claimant submits that the agreement to vary the terms of the original Agreement for Sale to grant to it an additional benefit was in fact supported by valuable consideration. In support of this contention, the Claimant relies extensively on the judgment of the English Court of Appeal in **Williams v Roffey.**

[62] The general legal principles which govern the need for consideration in contracts are now trite and do not require repetition here. These principles are equally applicable in the context where parties have sought to alter their promises by way of subsequent variations. **Williams v Roffey** classically illustrates this. In that case, the appellants, Roffey Bros, were builders who were contracted to refurbish 27 flats belonging to a housing corporation. The contract had a penalty clause for late completion. The appellants subcontracted some work to Williams, a carpenter. When Williams fell behind with his work the appellants offered him bonus payment to finish on time. Williams carried on working until the payments stopped. He sued the appellants for breach of contract. The appellants argued that the agreement to pay extra was unenforceable as Williams had provided no consideration; the appellants only received the practical benefit of avoiding the penalty clause. They did not receive any benefit in law. Williams was only agreeing to do what he was already bound to do.

[63] The appellants relied on **Stilk v Myrick** where it was held that performance of an existing duty was not good consideration. On the other hand, Williams argued that renegotiated prices for contracts should be enforceable where the renegotiated price had been freely agreed to by the parties and was regarded by them as being mutually beneficial. Such a position would recognise the commercial realities of what happened in practice, especially as between main contractors and subcontractors where the original price had been fixed too low.

[64] Counsel argued that there was consideration in the sense of benefit and detriment to both parties because the main contractor obtained a benefit in avoiding penalties or reducing the penalty amount that would otherwise be payable if the subcontractor walked off the job, and the subcontractor might be better off paying damages for the breach and obtaining more lucrative work elsewhere to replace

this contract. This was an argument in favour of recognition of practical benefits. However, he faced a difficulty in establishing the existence of consideration to support the promise to pay more money since the decision in **Stilk v Myrick**, (which had stood the test of time), stated that performance of an existing duty (in this case the carpentry work) could not be a sufficient consideration to support a fresh promise because there was no additional legal benefit to the promisor and no additional detriment suffered by the promisee. Counsel argued that **Stilk v Myrick** since the development of duress, it was no longer necessary to adopt the strict approach to the definition of consideration which had been adopted in **Stilk v Myrick** in order to prevent promises obtained by extortion from being enforceable.

[65] The English Court of Appeal decided that where one party promises to pay more money to secure the original contractual performance by the other party and the result of the promise was that the promisor secured a benefit or avoided a detriment, then provided that the promise was not obtained by duress or fraud, the advantage thereby obtained as a result of the promise could be a good consideration. In other words, the practical benefits to the main contractor (defendants) arising from making the promise would render the promise enforceable. These practical benefits were identified as avoiding the penalty for delay and avoiding the trouble and expense of having to secure a replacement subcontractor if this subcontractor walked off site.

[66] Glidewell LJ concluded that **Williams v Roffey** merely refined and limited the application of the principle in **Stilk v Myrick**, leaving it unscathed. **Williams v Roffey** does not challenge the need to identify consideration to support an alteration promise to pay more. In instances where there is no practical benefit arising to the promisor from making the promise; the principle in **Stilk v Myrick** is still very much applicable.

[67] This Court accepts that other commonwealth jurisdictions have not been as generous in their treatment of **Stilk v Myrick**. The Court of Appeal of New Zealand in **Antons Trawling Co Ltd v Smith,**[23] for instance, considered that in general terms (i.e. in the absence of policy reasons to the contrary) an alteration promise should be enforceable in all cases where there was an intention to be legally bound and reliance despite the absence of any consideration to support the representation or promise. The court considered that "**Stilk v Myrick** *can no longer be taken to control such cases*

[23] [2002] NZCA 331; [2003] 2 NZLR 2; and see: In Rosasv Toca [2018] BCCA 191

as **Roffey Bros***…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 expected to have taken*". This was justified on the basis that any other conclusion would undermine "the essential principle underlying the law of contract, that the law will seek to give effect to freely accepted *reciprocal* undertakings" but, in the absence of traditional consideration the only element of reciprocity must be the reliance.

[68] However, there is no indication that the English courts are prepared to adopt this radical approach and this Court is correspondingly reluctant to follow this dictum and abandon the traditional rules of consideration. Ultimately, the scope of **Williams v Roffey** will depend upon how "practical benefit" is defined. In that regard, Counsel for the Claimant has relied on the English Court of Appeal judgment in **MWB Business Exchange Ltd. v Rock Advertising Ltd.**[24] However, that decision has since been overturned by the English Supreme Court in the **Rock Advertising Ltd v MWB Business Exchange Centres Ltd.** [25] in overturning the Court of Appeal, the Supreme Court ultimately decided the case on the basis that the no oral modification clause was indeed effective. It followed that the contract had not been varied and Rock remained in arrears.

[69] However, in **MWB** it was also argued that there was no consideration for the variation. This argument had been addressed by the Court of Appeal and rejected. The Supreme Court therefore had an opportunity to bring some clarity to the English law on contractual consideration which has been uncertain for some considerable time because of the tension between **Foakes v Beer (1884) 9 App Cas 605** and **Williams v Roffey**. However, at paragraph 18 of the judgment, Lord Sumption who was supported by Lady Hale, Lord Wilson and Lord Lloyd-Jones made the following key observations:

> "That makes it unnecessary to deal with consideration. It is also, I think, undesirable to do so. The issue is a difficult one. The only consideration which MWB can be said to have been given for accepting a less advantageous schedule of payments was (i) the prospect that the payments were more likely to be made if they were loaded onto the back end of the contract term, and (ii) the fact that MWB would be less likely to have the premises left vacant on its hands while it sought a new licensee. These were both expectations of practical value, but neither was a contractual entitlement. In *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, the Court of Appeal held that an expectation of commercial advantage was good consideration. The problem about this was that practical expectation of benefit was

[24] [2017] QB 606
[25] [2018] UKSC 24

> the very thing which the House of Lords held not to be adequate consideration in *Foakes v Beer* (1884) 9 App Cas 605: see in particular p 622 per Lord Blackburn. There are arguable points of distinction, although the arguments are somewhat forced. A differently constituted Court of Appeal made these points in *In re Selectmove Ltd* [1995] 1 WLR 474, and declined to follow *Williams v Roffey*. The reality is that any decision on this point is likely to involve a re-examination of the decision in *Foakes v Beer*. It is probably ripe for re-examination. But if it is to be overruled or its effect substantially modified, it should be before an enlarged panel of the court and in a case where the decision would be more than obiter dictum."

[70] In **Foakes v Bee**r, the respondent, Beer, loaned the appellant, Dr Foakes, £2090 19s. When he was unable to repay this loan she received a judgment in her favour to recover this amount. The pair then entered an agreement whereby 'in consideration' of an initial payment of £500 and 'on condition' of six-monthly payments of £250 until the whole amount was repaid, she would not enforce her judgment against him. Foakes made these regular payments until the entire amount was repaid. However, he had not paid any interest on the judgment debt, which Beer was entitled to under statute. This interest totalled £302 19s 6d. The respondent's case was that the promise not to enforce the judgment was not supported by good consideration because the appellant had only done what he was already contractually bound to do. The respondent relied on the rule in **Pinnel's Case (1602) 5 Co Rep 117** that part payment of a debt could not be satisfaction of the whole. The House of Lords held that the respondent's promise not to enforce the judgment was not binding as Dr Foakes had not provided any consideration. Lord Selborne said that there had to be '*some independent benefit, actual of contingent, of a kind which might in law be a good and valuable consideration'*.

[71] There is therefore an inherent tension between these two authorities because even though they are over a hundred years apart, **Foakes v. Beer** was decided by the English House of Lords, whereas **Williams v. Roffey** was decided by the English Court of Appeal. **Williams v. Roffey** is not considered officially binding precedent in England and Wales until the House of Lords has agreed.

[72] Although **Williams v. Roffey** has been applied by the Eastern Caribbean Court of Appeal in **Mirsand Town Planning And Architects Limited v Samuel S. Conde Associados C. Por A**.[26] It has not had similar regard in the English courts. Some English courts are simply not ready to enforce laws that have not been properly accepted by the House of Lords, or explained by legislation. Some judges

[26] Civil Appeal No.20 of 2000

have recognized Glidewell LJ's statement in **Williams v. Roffey**, but they do not accept it, as they feel it will "render **Foakes v. Beer** redundant." This was demonstrated in **Re Selectmove Ltd**[27] which concerned a company that was promised they could suspend payment to the Revenue. The court in that case decided this as unenforceable, due to the conflict with **Foakes v. Beer**. It follows that while some courts[28] have embraced the principles set in **Williams v. Roffey**, not all of the courts are as willing.

[73] However, **Williams v. Roffey** has been applied by the Eastern Caribbean Court of Appeal, when it is clear that it does challenge the traditional rules and goes against the decision in **Foakes v. Beer (**which was not referenced in **Mirsand Town Planning and Architects Limited)**. Although binding, this Court would venture to say that the position is by no means settled.

[74] What is clear, is that even in **Williams v. Roffey,** the court was careful to carve out from this principle any matter where pressure of economic duress applied. The Court has considered the evidence of the witnesses in this case as well as the Parties' legal submissions. Having observed the witnesses under cross-examination and having considered the Parties' legal submissions, the Court is satisfied that this is "carve out" is not applicable in this case.

[75] The Court's analysis begins with clause 3 of the Original Agreement which provided that:

> "If on or before the expiry of the due diligence period, the purchaser is reasonably dissatisfied with the state of the Business[29] and has given written notice to the Vendor specifying the cause of its dissatisfaction, and the and the Vendor is or will be unable or unwilling to rectify the problem within 30 days, either party may by notice in writing to the other terminate this Agreement and upon such termination the deposit, together with accrued interest, if any, shall be refunded to the Purchaser…"

[76] Counsel for the Claimant has submitted that under the terms of the Original Agreement, the term "due diligence" became a term of art. When read together with clause 3 of the Original Agreement which clearly limits due diligence to the Business[30] which is defined to exclude the Property and clause 7.2

[27] [1995] 1 WLR 474
[28] South Caribbean Trading Ltd. v Trafigura Beheer BV [2004] EWCH 2676 (Com)
[29] Business is precisely defined in recital 2 of the Original Agreement. It excludes the property which is separately and precisely defined. In short a notice under 3.3 could not be served as a result of the due diligence process in respect of the Property.
[30] Specifically defined in the second recital of the Original Agreement as: "managing a marina, boat yard and a retail centre from the Property involving the rental of space to others, granting of concessions (including concessions of fuel and ice), the operation of a

which provided that: "*The Purchaser acknowledges and agrees that it has inspected the Property*[31] *with full knowledge of its actual state and condition and takes the Property…..as it stands…*".

[77] Counsel for the Defendant further submitted that this argument is reinforced by Mr. Romney Penn's evidence that he became concerned after viewing the condition of repair of the Buildings and the Marina and by the fact that the purported "diligence" had been carried out not by professionals but by the members of the BVI Investment Club and by the fact that the Claimant's witnesses could not demonstrate that the notices required under clause 3.3 were ever served within the mandated timeframe or at all. He argued the Claimant's contention that it would have been entitled to rely on clause 3 of the Original Agreement to withdraw from the deal was not tenable because having failed to comply with the procedural provisions of Clause 3, the Claimant would clearly not have had legal grounds to rescind.

[78] These arguments however, ignore the terms of clause 8 of the recital to the First Variation which provided that:

> "The Purchaser has indicated to the Vendor that it is willing to accept the findings of its due diligence enquiry conducted by the Purchaser to the terms of the Agreement for Sale and is willing to proceed with the purchase of the Property on the terms and conditions herein provided."

[79] In the Court's judgment, the variation agreement itself in recital (8) of the preamble of the First Variation evidences the fact that among the matters prompting the entry of the parties into the terms of the variation agreement was *"…the findings of the due diligence inquiry conducted by the Purchaser pursuant to the terms of the agreement for sale"*. In these premises, it is inconsonant for the Defendant to now argue that the purported renegotiation was not in fact prompted by a due diligence process as contemplated by the strict terms of the Parties agreement. The preponderance of the evidence in this case is that the Parties in fact understood and acted on the assumption that the Claimant had cause

---

marine chandlery offering a variety of marine hardware for the serviced slips offered at the marine and overall management of the Property."

[31] Defined in the recitals as "…all that freehold property together with the buildings and other improvements erected thereon situated on the island of Virgin Gorda and which is more particularly described in the Land Register as Parcels 506 and 44 of Block 4840B Virgin Gorda South Registration Section) the said Land and buildings and improvements erected thereon as hereinafter referred to as "the Property").

for reasonable dissatisfaction with the state of the business based on the findings of the due diligence investigation carried out pursuant to clause 3 of the Original Agreement.

[80] While Mr. Arthur Carpenter may not have been aware of the precise nature and source of the Claimant's dissatisfaction, it is clear that the Defendant became aware that the Claimant was dissatisfied and was contemplating either a reduction in the purchase price or a termination of the agreement. It is clear to the Court that when the Claimant communicated its dissatisfaction with the findings of the due diligence inquiry, it also raised the possibility that it might invoke its rights under Clauses 3.3 and 9.1 of the Original Agreement to pull out of the transaction and to recover its deposit must have been an important consideration for the Defendant. From all accounts both parties would have operated on the understanding that the Claimant had a credible prospect of withdrawing from the agreement for sale and recovering its deposit by acting not in breach, but in the exercise of its rights under clauses 3 and 9.1 of the Original Agreement based on its reasonable dissatisfaction with the results of a due diligence investigation.

[81] There can therefore be no doubt that the Defendant secured a practical benefit which was reflected in the First Variation. The Defendant does not appear to dispute that it received practical benefits from the option agreement. It says however that that the instant case is one in which economic duress was applied and so the Claimant cannot be allowed to avoid the consequences for the lack of consideration by relying on its own threatened breach of contract. It refers to the remarks of Purchas LJ in **Williams v Roffey** to the effect that if there was any element of duress brought upon the other contracting party under the modern development of this branch of the law the proposed breaker of the contract would not benefit. Counsel submitted that having signed a binding contract, the Defendant sought to obtain a better bargain and in the course of doing so threatened not to complete its obligations. He submitted that the threat to breach the contract was no less improper because it was cordial since the Claimant was clearly prepared to press home its advantage for its own benefit.

[82] The Claimant however, asserts that there was no threat or economic duress in operation. The evidence clearly discloses that the negotiations were carried out in a cordial manner and without threat or acrimony. Counsel further invited the Court to consider the evidence of the Defendant's witness and to conclude as a matter of common sense that the Defendant was not acting as an entity from

whom illegitimate concessions were being extorted. In that regard he relied on the judgment in DSND Subsea Ltd (formerly DSND Oceantech Ltd) v Petroleum Geo Services ASA[32] where at paragraph 139 Dyson J observed:

> "139. There are a number of features of the case which are very difficult to explain if Mr. Wilson was blackmailed into signing the MOU. First, there is the fact that there was plainly a reasonably amicable atmosphere between the parties. This is most obviously evidenced by the fact that the parties went out to dinner together during their stay in Oslo. Secondly, with one exception there is no entry in any of the voluminous contemporaneous documents which supports the notion that PGS entered into the MOU under duress. There is no protest in any of the many written communications sent at the time by PGS to DSND. Perhaps even more telling, there is no hint of a reference to duress in any of the PGS internal memoranda, or in the diary entries of Messrs. Wilson, Krafft or Darby…"

[83] When the Court has regard to the written and oral evidence advanced by the witnesses in this case, the Court is inclined to agree. When he was cross examined, Mr. Carpenter on cross examination recalled that the Claimant had caused a due diligence investigation to be carried out in order to determine whether they wanted to purchase the property or not" but that Claimant simply made a broad statement advising that they were dissatisfied with what they had found. The following exchange is recorded:

> "Q. But you accept that the findings of the due diligence investigation presented difficulties?
>
> A. Again, as I've said before, the BVI Investment Club wasn't specific about what their problems were on the due diligence period, so I am not in a position to accept or not accept. They simply said that they had, they were not happy with their findings.
>
> Q. And as a result, there was a compromise?
>
> A. Yes.
>
> Q. As a business decision?
>
> A. Yes."

[84] Later, during his re-examination, gave this evidence:

> "Well, I think there was a problem and we wanted to solve the problem and I think the option, based on what Charles Kerins had said, the option was a way to bridge the gap and so we, to solve the problem, and so we agreed to it in the terms that are within the first Variation Agreement."

---

[32] [2000] 7 WLUK 875

[85] The way in which the Defendant went about solving that problem is explained by Mr. Carpenter on cross examination:

> A. Again, I think Little Dix Bay worked with the Virgin Gorda, with the BVI Investment Club to keep the deal on track. It's not a gray area, we wanted the sale to close.
>
> Q. And there was no acrimony, there was no rancor. This was business people sitting down and doing a deal.
>
> A. That's correct.

[86] This evidence is to be looked at in light of the account given in paragraph 8 of Mr. Carpenter's witness statement to the effect that *"After entering into the original agreement the Claimant sought a price reduction for the acquisition of the marina land. Little Dix was concerned that the Claimant would pull out of the transaction if their request for a reduction was not met but, at the same time it was not keen to give a price reduction… The option was therefore clearly included instead of Little Dix being forced to reduce the price"* This seems to accord with Mr. Penn's testimony that the Claimant had sought a price reduction and that the Defendant had proposed to grant Additional Property as an alternative to a reduction in price.

[87] The Parties clearly engaged in meetings aimed at resolving the impasse and in a letter dated 27th May 2004 and sent by the Claimant's attorney Mr. Charles Kerins to Barbara O'Neal of O'Neal Webster the attorneys acting for the Defendant, Mr. Kerins wrote:

> "I am pleased to confirm that the Purchaser would be willing to accept the findings of its due diligence enquiry and would be willing to proceed with the purchase of the property at the purchase price of $12 million if the Agreement for Sale of 23 February is amended as follows:
>
> > "The Vendor would grant the Purchaser a 2 year option for the nominal sum if $1 to acquire an additional 10 acres of land comprising 7.5 acres shown on the plan produced by Mr. Edward Childs at yesterday's meeting with an additional 2.5 acres to be chosen from the available areas indicated by Mr. Childs…."

[88] Taking into account all of the evidence, the Court is satisfied that the negotiations leading to the arrangements for inclusion of the Additional Property did not arise from any attempted extortion by the Claimant effected by any threat to breach the Parties' agreement. Those discussions arose from a genuine attempt by the Parties to resolve a problem that had been identified in the findings of a due diligence investigation conducted pursuant to the agreement and which had been a cause of

dissatisfaction to the Claimant. In the words of Mr. Carpenter on cross-examination they were *"presented. [as]…ideas in an effort to resolve the impasse on the due diligence*". The fact is that the First Variation resulted from the collaboration of the parties in resolving a problem which could have led to the unravelling of the sale and even litigation.

[89] The Court further finds that even if a threat had been made to breach the contract, **Pau On v. Lau Yiu**[33] is authority for the proposition that not all threats to breach a contract amount to legal duress; they will do so only where the party threatened had no realistic alternative but to do what was demanded. Moreover commercial duress makes an agreement voidable not void and if the alleged recipient of the threat affirms the contract either by positive act or by failure to act to have the complained of agreement or variation set aside it will be taken to have affirmed the agreement and to be bound by it.

[90] First, Mr. Carpenter's evidence in this regard is fatal. On re-examination, he explained that when issues arose about the original purchase price, the Defendant did not have to agree to grant the option but it was something they agreed to. The position of VGYH with regard to the negotiations was summed up by him as being *that "….the BVI Investment Club was willing to look past the problems they had with the due diligence findings if they were granted an option to acquire the ten acres on Minton Hill."* With regard to the outcome of the negotiations he said *"Just like any buyer, they said if we can't resolve this issue we won't move forward with the transaction. Then Charles Kerins suggested a solution. We looked at a solution and decided it was acceptable to us and then the first Variation Agreement was prepared. So threatens is just a word, if you don't do something, we are going to do something else. As I remember it was a cordial negotiation between the parties. We were all looking for a solution.*

[91] Asked about whether LDB had ever challenged the validity of the option or sought to set the agreement aside Mr. Carpenter stated emphatically "*…A. Oh no, not at all. We were happy. We agreed to the option and we anticipated the BVI Investment Club would exercise it."* The result of the negotiation was a variation agreement which refers in its preamble that to *"…the findings of the due diligence inquiry conducted by the Purchaser pursuant to the terms of the agreement for sale.*" and

[33] [1980] AC 614

recites the fact that on the basis of the acceptance of those findings the purchaser *"… is willing to proceed with the purchase of the property on the terms and conditions herein provided"* [i.e. the terms and conditions set out in the first variation agreement]. This sets beyond dispute the fact that the variation was arrived at with a view to resolving issues arising out of the findings of *"…the due diligence inquiry conducted by the Purchaser pursuant to the terms of the agreement for sale".*

[92] In the extensive evidence before this Court there is simply no admissible or cogent evidence upon which this Court could conclude that the Defendant entered into the First Variation under duress. There is no protest in the Parties' written communication, internal memorandum or correspondence and certainly neither the witnesses nor Counsel were able to identify the same. It is clear that says that in every sense the Defendant voluntarily entered in to the arrangement without any undue pressure and indeed affirmed it subsequently.

[93] The Claimant's decision to*" look past the problems they had with the due diligence findings"* therefore constituted good consideration for the Defendant's promise to revalue the assets subject to the sale and to include the Additional Property in the assets being sold so as to justify the purchase price. This was good consideration for the variation even if doubt could later be cast on whether the due diligence findings could successfully have been invoked by the Claimant to entitle it to terminate the sale and to recover its deposit. The obvious practical benefit of the First Variation to the Defendant was that it facilitated and secured the continuing commitment of the Claimant to pay the $12 million that it had to have within the time frame that that money was needed to fund its commitment to a third party and this notwithstanding its dissatisfaction with the findings of the due diligence investigation conducted by it pursuant to the contract.

[94] The Court therefore finds for the Claimant that the Option was supported by consideration and would therefore be enforceable.

ii. In the event that the Option was validly granted, whether the Option was exercised in accordance with the conditions precedent set out in the Option.

The Parties' Cases

[95] It considering this issue the clear starting point must be the relevant contractual provisions which established the Option. The operative clause is set out in the Clause 1.1 of the First Variation which was dated 9th June 2004 and provides:

> "…the Vendor shall grant the Purchaser a two year option ("the Option") to acquire 10 acres of leasehold land provided that the Option shall be exercisable by the Purchaser only 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.

[96] The Claimant asserts that because the clause does not expressly say that the Option Period of two years commenced on the date of its grant (i.e. the date of the First Variation) that some other date for the commencement of the period exists. According to the Claimant that date is fixed on the actual date of completion. That is to say the date upon which the Agreement was finally completed not the date upon which the Claimant was obliged to complete the contract in accordance with clause 12.1.

[97] The rationale for this contention is set out at paragraph 10.4 of its written closing submissions and in summary the Claimant contends that the mere fact of there being a date in the variation agreement does not establish that that date is the date of commencement of the option period.[34] Instead a court must construe the relevant document in the context of the transaction that it was designed to effect to determine its effective date.[35]

[98] Counsel for the Claimant argued that in this case, the fact that clause 1.1 of the First Variation Agreement, is the only sub clause which sets out a period for an action but does not indicate when that period is to commence demonstrates that the Parties did not act on the assumption that that time for any activity would automatically run from the date of the agreement and expressly set out the instances in which this was the intended outcome. Had they wished to do so with regard to the option period referred to in the first Variation Agreement they could easily have done so.

[34] Harvey v Pratt [1965] 1 WLR 1025

[35] Ahmed and another v Wingrove [2006] ALL ER (D) 438. See also: Hallman Holding Ltd (Appellant) v Webster and another (Respondents) (Anguilla) [2016] UKPC 3

[99] Counsel for the Claimant further 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. Counsel pointed to what he described as "the singular and unitary nature of the transaction of sale contemplated by the Agreement of Sale and Variation Agreements**"** and submitted that the objective of coupling the sale of the Additional Property to that of the properties and businesses in the Original **Agreement** would not have been negatively affected if the option period commenced when the option became exercisable. The Defendant having received the purchase money in full, from the date of completion, the only purpose that notice would serve as far as it was concerned would be as notice of the commencement of the period during which it might be called upon to assist in the Claimant's application to the Crown for consent and if such consent was given, to execute the necessary transfer of the Additional land. There was no particular reason for that period to begin prior to the Defendant's receipt of the purchase price.

[100] According to Counsel, 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. The most reasonable and commercially sensible construction of **Clause 1** of the First **Variation** as modified by **Clauses 1 and 4 of the Second Variation** is that if the Claimant completed the sale /purchase of the Businesses, Property and Additional Land it would be granted a 2 year option to have that Additional Land transferred to it in consideration of the US$1 Million apportioned to that property out of the US$12 Million purchase price if the Claimant exercised the option by notice in writing within 2 years of the above mentioned completion and payment; and could by an application made by it at its own risk and expense secure the consent of the Crown for LDB to transfer the additional land to it. However, if the option was not exercised or if the Crown refused its consent to the transfer the US$1 Million would not be refunded. Notice exercising the option would with the Variation Agreement constitute a contract for the sale and purchase of the Additional Property.

[101] Accordingly, the Claimant submitted that the option period would commence to run on 17th September 2004 and would expire on 17th September 2006. Accordingly, the option was or would have been duly exercised by notice given 18th August 2006.

[102] The Defendant however, has described this construction as untenable. First, Counsel for the Defendant submitted that the normal rules of construction apply. Words must be given their plain and ordinary meaning. In that regard, he submitted that if it is accepted that the grant was made in the First Variation which it does (which is not disputed by the Claimant), then it follows that the two years runs from the date of the grant.

[103] He submitted that there is no language in the First Variation indicating that the two-year Option Period in which the Option was capable of being exercised commenced at any other time. This is therefore the natural and ordinary interpretation of the timeframe for the two-year Option Period. That is, not only to give the words their plain and obvious meaning but also to give a logical and certain construction to the clause. If the two-year period was intended to run as from a date other than the date of its grant, express words would have been required. There is no such wording.

[104] The Option Period must have commenced on 9th June 2004 and expired on 9 June 2006 (the two-year anniversary of the First Variation). It follows, that when VGYHH sent its letter purporting to exercise the Option on 18th August 2006, the Option Period had ended, and the Option had expired.

[105] Counsel for the Defendant submitted that the Claimant's suggestion that because the completion of the Agreement is a condition precedent to the exercise of the Option that somehow it is to be inferred that the date of completion also governed the commencement of the Option Period has no basis in reality. According to him, the clause is clear. The Option (already granted) can only be exercised if the Agreement has been completed. It is clear from this that completion was simply a condition for the exercise of the Option and had nothing at all to do with the commencement and/or duration of the period in which the Option was able to be validly exercised. It does not provide that the Option Period only starts to run from the date upon which the Agreement is completed. If that is what had been intended, then the Agreement would have needed to say so in terms.

[106] Moreover, such a construction is wholly at odds with the material background. The Option was the sweetener required and was provided to ensure that the Claimant lived up to its obligations. It was given to ensure completion and the completion date was set for 30th July 2004 time being made of

the essence. He submitted that it would be wholly at odds with the purpose of the variation if the completion, at any stage, marked the starting point of a two-year Option Period.

[107] Counsel for the Defendant therefore concluded that it cannot have been intended (and the words used do not permit the construction) that the period was to start at some indefinite date in the future governed only by when the Claimant finally chose to complete the Agreement. Even if it could be argued that the completion date was the start date for the Option Period, that completion date can only have been the contractual completion date of 30th July 2004. Time was made of the essence in the First Variation to ensure that the matter was completed strictly on time.

[108] Accordingly, time expired on the 9th June 2006 and, as set out above, even a slight breach of the time limits is fatal. It is also worth noting that even if the time began to run on the contractual completion date (30th July 2006) the Option Period would have expired on 30th July 2006. Either way the notice served by the Claimant (on 18th August 2006) would be out of time.

[109] In short, the Claimant's construction is forced and does not accord with the natural meaning of the First Variation as to the date upon which the Option expired. As it is clear that the courts consider that the timing provisions in option agreements should be construed strictly, there is no basis for the court to accept a forced construction of the timing provisions in order to assist the Claimant. Indeed, if the reasoning as to why a strict timeframe is required in these types of contract is followed, it is clear the court should be more inclined to accept the period that is of a shorter duration. Alternatively, Counsel for the Defendant argued that if the court is unable to determine the time limit then the option must fail for want of certainty.

COURT'S ANALYSIS AND CONCLUSION

Construing the Option

[110] The dispute between the Parties illustrates the importance of utilizing language which is clear an unambiguous in the drafting of contracts. Good drafting should provide certainty and reduce the risk of disputes arising. Conversely, poor drafting may create obligations that don't work in practice, or don't reflect the commercial deal, requiring the parties to waste time clarifying ambiguity and

significantly increasing the risk and likely cost of litigation. Unfortunately, the mantra of clarity, precision and accuracy was not applied by the relevant drafters in this case. Instead, it is clear to the Court that as time and negotiations progressed; the drafting took on a level of complex ambiguity which made this legal dispute almost inevitable.

[111] Nowhere is this more evident than in the text of clause 1 of the First Variation which purports to grant the Claimant an option to acquire the Defendant's leasehold interest in the Additional Property and clause 12 of the First Variation which extended the completion date under the Original Agreement provided:

> "Completion of the same and purchase agreed pursuant to the Agreement for Sale and to this Variation Agreement shall take place not later than July 30, 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."
>
> 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 …."

[112] Clause 1.1 of the First Variation reflects the Parties' attempt to fix an option period – a period during which the Claimant could exercise the option. This is critical because it is now well established that in order for the optionee to enforce the option, the terms of the option as to time and otherwise have to be strictly observed.[36] The grantor of an option to sell (the optionor) incurs no obligation to sell unless the conditions precedent to the exercise of the option are fulfilled. The rationale behind the need for strict compliance with the exercise conditions is a commercial one-the optionor must be able to tell whether or not an option has or has not been exercised so as to allow free alienation of the subject matter of the option. Only through a requirement for strict compliance is the element of certainty achieved.

[36] per Lord Denning M.R. in United Dominions Trust (Commercial), Ltd. v. Eagle Aircraft Services, Ltd. (1967), [1968] 1 ALL E.R. 104

[113] The courts have been particularly insistent that time requirements in option agreements be strictly construed, such that even where there is no stipulation in an agreement granting an option that time is of the essence, this will be implied. This is because the grantor of an option accepts a fetter on his powers of disposition of his property for the period in which the option may be exercised. In doing so, the grantor needs to know with certainty the moment that the fetter has come to an end. Accordingly, a stipulation as to time in an option agreement is of the essence of the option. The court should therefore be doubly sure to hold parties to the time stipulations contained in their agreements. Moreover, the exercise of an option unilaterally changes the relationship between the parties. In **United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd,** Lord Denning MR said the following:

> "In point of legal analysis, the grant of an option in such cases is an irrevocable offer (being supported by consideration so that it cannot be revoked). In order to be turned into a binding contract, the offer must be accepted in exact compliance with its terms. The acceptance must correspond with the offer."[37]

[114] At the centre of the dispute between the Parties is the question of whether the option was validly exercised by the Claimant in its letter of 18th August 2006. In legal submissions which were not mirrored in its pleaded case, the Claimant argued that the term "shall grant" in clause 1.1 implies a future rather than present grant as would have been indicated by the words "hereby grants". In the Court's judgment, this argument is wholly without merit.

[115] There can be no doubt that the Option was granted in the First Variation. Certainly, it has not been represented by either Party that the actual option was the subject of any subsequent document. Moreover, it would be incongruous for the Claimant to purport to exercise the Option in 2006 when no future grant had been executed. Such an argument would, in the Court's judgment turn the Parties' agreement on its head and render it void for uncertainty.

[116] Exactly what is required to effect the exercise of the option needs to be gathered from the language of the option itself. The time for exercise of the option will also be deduced from the wording used. In the case at bar, it is clear to the Court that in order for the Option to be validly exercised the following the pre-conditions had to be met: [1] the Original Agreement for Sale be have been completed by the

[37] [1968] 1 WLR 74 (CA) at page 81

Claimant (full purchase price to be paid) [2] the Claimant must have given notice in writing of its intention to exercise of the Option and [3] such written notice must be given within a two year period.

[117] Unfortunately, while clause 1.1 of the First Variation specifies a period of time during which the Option is to be operative, it does not expressly prescribe when that period begins. Moreover there is no express default position which prescribes that it begins from the date of the agreement or indeed from any other specified time. A similar uncertainty arose in the case of **Ahmed and another v Wingrove**[38] the court was called upon to construe the meaning and effect of a provision in an agreement which created an option subject to a condition that was to be fulfilled "*within the next twelve months*". The learned judges considered that he was bound by the ratio in **Harvey v Pratt** but he determined that "*each case of this sort must turn on the construction of the agreement in question*." Ultimately, the court in **Ahmed and another v Wingrove** determined that it was implicit that the period for satisfying the option condition should run from the date the agreement was executed by the parties granting the option. The Court determined that that date was clearly the earliest date for the start of the option period.

[118] Having reviewed the terms of the Parties' agreement, the Court is satisfied that it is implicit that the period for satisfying the option condition should run from the date the First Variation. That date is clearly the earliest date for the start of the option period. In arriving at this conclusion, the Court has taken into account and has determined the following:

i. The court should construe the document providing for the option in context of the transaction that it was designed to effect and having regard to the commercial consequences of the parties' rival constructions. On the plain and ordinary reading of clause 1.1 of the First Variation, the completion of the sale and purchase by the Purchaser is plainly a condition precedent for the *exercise* of the Option by the Claimant and not the effective start date or the option period.

ii. In the event that it was Parties' intention that it would also operate as the start of the option period then the Parties' would have needed to say so in express terms. It was certainly open to them to make that position plain, if indeed that is what had been

[38] [2006] ALL ER (D) 438

intended. They did not do so and the Court can find no cogent basis upon which to imply such construction in the face of the plain and ordinary wording of the clause.

iii. At common law, the general position is that time, particularly in respect to the time by which an option has to be exercised (i.e. the option period itself), has been viewed as being of the essence in an option situation.[39] The rationale for this position in the option context is either that the law will not impose a contractual obligation on persons which they themselves have failed to create by proper and timely exercise of the option,[40] or is likewise the need for commercial certainty, as explained by Lord Fraser:

> "There is good reason why time limits should be strictly enforced in relation to an option to purchase or renew a lease, because as long as it remains open the grantor is not free to dispose of his property elsewhere, although the grantee is under no obligation to him. Similarly, where a tenant has an option to break his lease, he can break it or not as he chooses, but the landlord is not free to let his property to anyone else until the time for exercising the tenant's option has expired. It is fair and reasonable, and in accordance with what I would take to be the intention of the parties, that the time limit of restriction on the grantor should be strictly enforced."

iv. Clause 11 of the First Variation puts the position beyond doubt. It provides that: "*With respect of **all provisions** of the Variation Agreement, time is of the essence*." Emphasis added.

v. The relevant background reveals that the Option to acquire the Defendant's leasehold interest in the Additional Property arose out of the need to ensure that the Claimant kept to its contractual obligations under the Original Agreement. Under the First Variation, the Option to acquire the Defendant's leasehold interest was included with no additional increase in the purchase price and in order to motivate completion.

vi. Time being of the essence, it was an essential term that the completion was to take place by 30th July 2004. This date was later extended to 16th September in the Second Variation. It is implausible that the Parties would have intended the option period would run from some future date when complete of the agreement was finally achieved. It would

---

[39] Hare v. Nicoll [1966] 2Q.B. 130, Lamont v. Heron (1970), 126 C.L.R. 239

[40] *per* Lords Simon and Salmon in United Scientific Holdings v. Burnley Council (1977), [1978] A.C. 904

be inconsistent with "*time being of the essence*", if the Parties were to reckon time from the completion date.

vii. The real purpose of taking an option is to obtain a period of time during which the question of its exercise can be considered. It makes sense that the Claimant would have had two years from the date of the First Variation to decide whether it wished to exercise the Option. In order to do so, it was compelled to first complete the agreement and pay the full purchase price. Theoretically, the Option could be exercised immediately upon completion; however, if completion did not take place, then the Claimant would be unable to exercise the Option.

viii. Contrary to Counsel for the Claimant assertion that there was no particular reason for the Option period to begin prior to the completion date and that 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, it is clear to the Court that given the relevant background, there would be a vested interest in ensuring that the Claimant completes the agreement promptly and certainly by the prescribed time.

ix. To the contrary, from the point of view of the Claimant, it seems pointless that having paid the full nonrefundable purchase price that the Claimant would take a further two years to determine whether it wished to acquire that which had already been paid for. Logic and commercial good sense dictated that the Option be exercised immediately upon completion or at the earliest time thereafter. No reasonable premise or purpose has been advanced to explain why the Claimant would require a further two years after completion to exercise the option.

x. The construction of an option period must be informed by a strict approach to time limits. The grantee of the Option is entitled to know with certainty when the period expires. Given that the Option was granted in order to ensure completion, it is implicit that the period for satisfying the option condition should run from the date the First Variation granting the option. It is in the Court's judgment the most natural date.

xi. The judgment in **Harvey v Pratt** therefore need to considered in light of its context. The facts of that case did not involve an option to acquire an interest in land which, by its very nature demands commercial certainty. Given the factual similarity, this Court is more inclined to follow the decision in **Ahmed and another v Wingrove**, and find that it was implicit, that the period for satisfying the option conditions was to have begun from the date the agreement which granted the Option (the First Variation).

[119] Counsel for the Claimant submitted that the requirement for strict observance of the stipulations as to the time within which the option is to be exercised is justified because *"…the grantor, so long as the option remains open, thereby submits to being disabled from disposing of his proprietary interest to anyone other than the grantee, and this without any guarantee that it will be disposed of to the grantee"* see: **United Scientific Holdings Ltd v Burnley BC (1977) 33 P. & C.R. 220 per Lord Diplock**. Counsel argued that where, as in the present case, the grantor has already received all that it has bargained for and has nothing further to gain or to wait for other than to co-operate with the grantee in securing the consent of the Lessor to pass leasehold title to the grantee the situation is entirely different and there is no need for any preferential construction in favour of either party.

[120] Given the unusual but clear wording of the Parties' agreement, this Court does not agree. It was clearly contemplated and agreed by both Parties that the Defendant would have the full payment of the purchase price regardless of whether the Claimant was successful in acquiring the Defendant's leasehold interest in the Additional Property. It seems to the Court that Defendant would be no less interested in bringing a swift end to the fetter on its powers of disposition of its property.

[121] Accordingly, the Court finds that the time period for the exercise of the Option expired on the 9th June 2006. It follows that the notice served by the Claimant on 18th August 2006 was out of time because even a slight breach of the time limits is fatal.

[122] In the event that the Court is wrong on this, then applying the dicta in **Harvey v Pratt** the Court finds the Option would be void for uncertainty and therefore unenforceable. Having expressly set out in the First Variation a period of time during which the Option is to be operative (2 years), the Parties in this case were obliged to also state when that period begins. It is clear that they would not have done so

and it is clear that there is no default position that it begins from the date of the agreement unless otherwise specified.

[123] Counsel for the Claimant has urged that this Court should be reluctant to permit the option to fail for want of certainty but should instead construe the agreement as a reasonable person having regard to all of the relevant background including *inter alia* the fact that the overall objective of the option agreement was to provide the Claimant with sufficient assets to justify the purchase price of $12million and the fact that the Claimant was required to pay the purchase price in full in advance for the Additional Property and had in fact done so.

[124] When the Court has regard to the actual terms of the Parties' agreement, this Court finds no merit in this submission. It is quite clear that the Parties contemplated and fully accepted that the full purchase price of US$12 Million would be payable regardless of whether or not the option was exercised (clause 1.4 of the First Variation); or whether or not the Crown agreed to the transfer or sublease (clause 1.2 of the First Variation). It was clearly contemplated that the Defendant would have the full benefits of its bargain regardless of whether the Claimant was successful in acquiring the Defendant's leasehold interest in the Additional Property.

THE CONDITIONAL AGREEMENT FOR SALE ARGUMENT

The Parties' Cases

[125] By way of its alternative case, the Claimant contends that the nature and true effect of the Original Agreement as amended by the First Variation is to create an agreement for the conditional sale of the Additional Property to Claimant rather than the grant of an option to it to purchase the Additional Property after examining the terms of the Clause 1.1. Counsel for the Claimant submitted in summary that the rights and obligations which the Parties intended to grant each other in respect of the Additional Property was that in exchange for the completion of the Purchaser's obligations on a sale of the Additional Property by payment of the full purchase price of US$ 12 million due on completion for the sale and purchase of the Property, Business and Additional Property, the Defendant would grant to the Claimant a two year option to acquire the Additional Property. If the option was not exercised or if the Crown refused its consent to the transfer no part of the purchase price so paid

would be refunded. Notice exercising the option would with the Variation Agreement constitute a contract for the sale and purchase of the Additional Property the consideration for that sale being the purchase price already paid at completion.

[126] Counsel argued that a requirement for the grantee of an option to pay the purchase money for the optioned property to the grantor on a non-refundable basis prior to and whether or not it chooses to enter into an agreement to purchase the same is antithetical to the concept of an option. Such an 'option' if exercised would not, for practical purposes be an option to enter into a "… contract for the sale and purchase of the Additional Property on the terms hereof" as provided for by Clause 1.1 first Variation Agreement. It would at best be an option to take title to property the purchase of which it had already completed.

[127] Counsel further submitted that the point of the exercise of an option by the giving of notice is to set in train a series of steps leading to the payment of the purchase price and transfer of the property in consideration of such payment. The exercise of the option brings about a relationship of Vendor and purchaser in relation to the optioned property. Parties are free to set any pre-conditions they choose to agree to in relation to the exercise of the option. It is possible for an option for purchase of property to require the grantee to pay the entire purchase price at the time of or as a pre-condition to the exercise of the option. However, it is difficult to imagine any circumstance in which payment of the entirety of the stipulated purchase price in a transaction for the sale and purchase of property would not entitle the payer to any interest in the property in relation to which payment was made. The fact of payment and acceptance of the stipulated purchase price trumps all other considerations.

[128] According to Counsel for the Claimant the form and language of 'option' used in **Clause 1 of the First Variation** was a device employed by the Parties with a view to enabling the Defendant to receive the full purchase price for the Property, Businesses and Additional Property prior to the transfer to the Claimant of the Additional Property. It operated to relieve the Defendant of any adverse consequences or inconveniences that flowed or could flow from the fact that the agreement for sale of the Additional Property was contingent upon consent being given by the Crown.

[129] Counsel submitted that the Original Agreement as varied by the First and Second Variations and the transaction carried out in accordance with the same had none of the attributes of an option agreement. The Defendant received a non- refundable payment of the purchase price up front and in advance and at the same time and manner as it received payment for the Businesses and Properties which were not the subject of any 'option'. Counsel argued that an agreement which provides for the payment of the purchase price for property (i.e. for the purchaser's completion) prior to the giving of notice of the Purchasers intention to enter into a contract to do so does not create an option. Rather, an 'option' is the grantee's contractual right to choose whether or not to accept the grantor's open offer by agreeing to complete the purchase on the terms offered i.e. to pay the option price at the time and in the manner stipulated. It is only if the grantee exercises the option by notice that it comes under an obligation to complete the resulting bilateral contract of sale and purchase. Where the grantee has already paid the purchase price prior to the creation of a bilateral contract there is no 'option' to be exercised: the grantee has already done all that is required of it to complete the sale and has foreclosed its option not to do so.

[130] The legal consequence of the receipt and retention by a proprietor of land of money paid to him as purchase price for that land is that the proprietor holds the land upon bare trust for the payer**.** Payment and acceptance of the purchase price amounts to part performance of an asserted agreement for transfer and such an unwritten agreement will be specifically enforceable at the instance of the payer. So that upon receiving payment of the purchase price, the Defendant held its legal interest in the Additional Property on bare trust for the Claimant subject to the exercise of the option and the obtaining of consent from the Crown for the transfer of such interest to the grantee.[41] Moreover, the Defendant was bound not only expressly by contract, but by a duty implied by law to co-operate with and give all reasonable support and assistance to the Claimant in any application pursued by it to obtain the consent of the Crown for the transfer.[42] Having received and accepted payment of the

[41] Goodwin v Temple (supra); Frawley v. Neill [2000] C.P. Rep. 20
[42] Brown v Heffer 116 CLR 344; Dougan v Ley [1946] 71 C.L.R. 142

purchase price for the Additional Property, by necessary implication the requirement for the exercise of an option to contract for the purchase of the property was thereby dispensed with and fell away.

[131] Counsel concluded that the arrangements set out in the Original Agreement as varied by the Variation Agreements were not in substance an agreement to grant an option to purchase the Additional Property. Rather, the legal effect of those agreements as so varied and of acceptance by the Defendant of payment of the stipulated purchase price for the Additional Property was to bring about a conditional sale of the leasehold interest comprising that property, the condition being the obtaining of consent from the Crown for the transfer of leasehold title to the Additional Lands to the Claimant.

[132] It is not surprising that this alternative case was robustly opposed by the Defendant. Counsel for the Defendant argued that the fundamental flaw in the Claimant's arguments is that it is wholly inconsistent with the clear and express terms of the Agreement. He submitted that it is clear that the Parties agreed an Option and that the Option contained certain conditions. The fact that if it was exercised (assuming it to have been validly granted) no further consideration needed to be paid is irrelevant. Counsel argued that having asked for and received an Option, the Claimant cannot now be heard to simply ignore the clear provisions of the contract and claim that the true nature of the Agreement was something else. The Claimant cannot ask this Court to pretend that the Option was never granted at all and that its terms don't matter.

[133] Counsel for the Defendant further submitted that the suggestion that the need to give notice had been "*by necessary implication*" dispensed with is directly contradicted by that well-established legal principle that clear express words of a contract cannot be overborne by implied terms. The Parties agreed the terms for its exercise and also expressly agreed that if the Option was not exercised none of the other terms would be affected. The purchase price did not change (see both clause 1.4 of the Variation and 1.1 of the Second Variation). It was expressly envisaged that the Option might not be exercised, in which case the Claimant clearly had no come back nor indeed did it have any recourse in circumstances where the consent of the Crown could not be obtained and which would have put an end to the transaction and any remaining obligation of the Vendor. It follows that simply by signing the agreement there was no completion of the Option. If that had been the intention, then there would have been no Option. Rather, the Option still had to be exercised.

[134] Counsel also refuted the suggestion that as the purchase price had "been paid" meant that the Defendant held the title on bare trust is simply unsustainable given that it is wholly contrary to the express terms of the Option. He pointed out that equity will not impose a trust in circumstances which are contrary to the agreement of the parties. According to him, the Claimant was obliged to pay the purchase price of $12 million and sought to obtain an extra benefit in the circumstances already set out. In failing to properly exercise the Option, it was not deprived of any benefit it merely failed to collect on its ill-gotten gains.

COURT'S ANALYSIS AND CONCLUSION

[135] The Court is guided by the now classic discourse on the law governing the construction or interpretation of contracts which is set out by Lord Hoffman in **Investors Compensation Scheme.** These principles must be at the forefront of this Court's mind as it considers the Claimant's amended case that:

> "The Claimant…will contend that the Agreement for Sale, as varied by the Variation Agreement and subsequently by the Second Variation Agreement operated to effect an agreement for a conditional sale of the Additional Property to the Claimant. The Claimant will further contend that the said payment constituted completion of the purchaser's obligation with regard, not only to the sale of the Property and Business but also the sale of the Additional Property."

[136] The Claimant seeks to persuade this Court that by its unconditional agreement in Clause 4.1 of the Second Variation Agreement to complete the sale and purchase of the property including the Additional Property the Claimant rendered the exercise of the option superfluous. Instead, by executing that Second Variation the Claimant effectively entered into a bilateral contract for the purchase of the Additional Property because there was no commercial or other purpose for it to give notice of its intention to do what it had already done, that is, to enter into such an agreement.

[137] This argument requires the Court to adopt a construction which would disregard the clear words of the Parties' agreement in order arrive at what it described "the nature and true effect" of the Parties agreement. Counsel commended to the Court the judgments in **A1 Lofts Ltd v HM Revenue and Customs**[43] where **Lewison J observed at para [40]:**

[43] [2009] EXHC 2694

"…The court is often called upon to decide whether a written contract falls within a particular legal description. In so doing the court will identify the rights and obligations of the parties as a matter of construction of the written agreement; but it will then go on to consider whether those obligations fall within the relevant legal description. Thus the question may be whether those rights and obligations are properly characterised as a licence or tenancy (as in *Street v Mountford* [1985] AC 809); or as a fixed or floating charge (as in *Agnew v Commissioners of Inland Revenue* [2001] 2 AC 710), or as a consumer hire agreement (as in *TRM Copy Centres (UK) Ltd v Lanwall Services Ltd* [2009] 1 WLR 1375). In all these cases the starting point is to identify the legal rights and obligations of the parties as a matter of contract before going on to classify them."

[138] Counsel for the Claimant also relied on the following extract from the judgment of Lord Templeman in **Agnew v Commissions of Inland Revenue**[44] where at page 825 he stated:

"At the first stage [the Court] must construe the instrument of charge and seek to gather the intentions of the parties from the language they have used. But the object at this stage of the process is not to discover whether the parties intended to create a fixed or a floating charge. It is to ascertain the nature of the rights and obligations which the parties intended to grant each other in respect of the charged assets. Once these have been ascertained, the court can then embark on the second stage of the process, which is one of categorisation. This is a matter of law. It does not depend on the intention of the parties. If their intention, properly gathered from the language of the instrument, is to grant the company rights in respect of the charged assets which are inconsistent with the nature of a fixed charge, then the charge cannot be a fixed charge however they may have chosen to describe it".

[139] In the court's judgment, the relevant factual context of these judgments is highly relevant and indicative their reasoning and application. In both these cases, the courts were called upon to determine whether the parties' contractual arrangements fall within a particular legal description set out in particular tax or insolvency legislative schemes. These were not cases where the courts were called upon adjudicate between parties to a contract who were advancing rival constructions of its terms. In **A1 Lofts Ltd v HM Revenue and Customs** Lewison J made this distinction clear in the following summary of the legal position. Having analsyed the relevant case law the learned judge went on to state:

"…
(i) …
(ii) …
(iii) The starting point for determining the true relationship between A, B and C is an analysis of the contractual arrangements between them (*Kieran Mullen* (s 34); *Ringside* (s 34); *Debenhams* (s 34));

---

[44] [2001] 2 AC 710

(iv) Where the contractual arrangements are contained wholly in written agreements, this will be a question of construction of the agreements. But a contract may be partly written and partly oral, in which case what the parties said and did may throw light on the extent of their contractual obligations (*Carmichael v National Power plc* [1999] 4 ALL ER 897, [2000] IRLR 43, [1999] 1 WLR 2042);

(v) The apparent contractual arrangements will not represent the true relationship between A, B and C if the contractual arrangements are a sham; or if the parties have failed to operate the contractual arrangements; or if the evidence is wholly inconsistent with the apparent contract (*Kieran Mullen* (s 36); *Ringside* (s 34); *Music and Video Exchange* (p 223));

(vi) **The identification of the true rights and obligations of the parties will be the same, whether the question arises in the context of VAT or in the context of an action for breach of contract; and is the same whether the question arises in a domestic or a European context (*Music and Video Exchange* (p 223); Debenhams (s 10));**

(vii) **Having identified the true rights and obligations of the parties, it will then be necessary to decide how those rights and obligations should be classified for the purposes of VAT (*Reed* (p 595));**

(viii) **Sometimes this will be concluded by the terms of the contract themselves; but it may not be (*Reed* p 595). If it is not then the classification of the parties' rights and obligations for the purposes of VAT may involve the application of particular deeming provisions of the VATA (*Eastbourne Town*); or deciding whether the nature of the supply falls within a particular description (*Reed*); whether there is one contract or more than one (*Debenhams*); or in some cases deciding whether on the true construction of a single contract there is one supply or more than one** (as in Customs *and Excise Commissioners v Plantiflor* Ltd [2002] UKHL 33, [2002] STC 1132, [2002] 1 WLR 2287);

(ix) Depending on the true relationship between A, B and C the conclusion might be that A makes a supply to B, who makes an overall supply to C; or A and B may make separate and concurrent supplies to C (*Kieran Mullen* (s 32)).” Emphasis mine

[140] Within the peculiar regulatory context it is not surprising that a court would not deem the words used on the agreement or the labels which the parties would have used to described their relationship as conclusive. It makes perfect sense that a court would need to go further. In a similar case - **Secret Hotels v Revenue and Customs Commissioners**[45] - the Supreme Court was asked as to: ‘the liability for Value Added Tax of a company which markets and arranges holiday accommodation

[45] [2014] UKSC 16

through an on-line website. The outcome turns on the appropriate characterisation of the relationship between the company, the operators of the hotels, and the holiday-makers or their travel agents, and the impact of certain provisions of the relevant EU Directive on that relationship once it has been characterized. The court determined that when assessing the VAT consequences of a particular contractual arrangement, the court should, at least normally, characterise the relationships by reference to the contracts and then consider whether that characterisation is vitiated by any relevant facts. Lord Neuberger said:

> "31. Where parties have entered into a written agreement which appears on its face to be intended to govern the relationship between them, then, in order to determine the legal and commercial nature of that relationship, it is necessary to interpret the agreement in order to identify the parties' respective rights and obligations, unless it is established that it constitutes a sham.
>
> 32. When interpreting an agreement, the court must have regard to the words used, to the provisions of the agreement as whole, to the surrounding circumstances in so far as they were known to both parties, and to commercial common sense. When deciding on the categorisation of a relationship governed by a written agreement, the label or labels which the 17 parties have used to describe their relationship cannot be conclusive, and may often be of little weight. As Lewison J said in A1 Lofts Ltd v Revenue and Customs Commissioners [2010] STC 214, para 40, in a passage cited by Morgan J:…"

[141] However, where, as in the case at bar, a court is called upon to construe contractual provisions where the parties are advancing divergent or conflicting interpretations, the Court is more inclined to follow the approach adopted in **Australian Broadcasting Commission v. Australasian Performing Right Association Ltd.**[46] where Gibbs J stated:

> "It is trite law that **the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied**. Of course **the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another. If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust.** On the other hand, **if the language is open to two constructions, that will be preferred which**

[46] (1973) 129 CLR 99

will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, "even though the construction adopted is not the most obvious, or the most grammatically accurate", to use the words from earlier authority cited in Locke v. Dunlop (1888) 39 Ch D 387, at p 393 , which, although spoken in relation to a will, are applicable to the construction of written instruments generally; see also Bottomley's Case (1880) 16 Ch D 681, at p 686 . Further, **it will be permissible to depart from the ordinary meaning of the words of one provision so far as is necessary to avoid an inconsistency between that provision and the rest of the instrument.** Finally, the statement of Lord Wright in Hillas &Co. Ltd. v. Arcos Ltd. (1932) 147 LT 503, at p 514 , that the court should construe commercial contracts "fairly and broadly, without being too astute or subtle in finding defects", should not, in my opinion, be understood as limited to documents drawn by businessmen for themselves and without legal assistance (cf. Upper Hunter County District Council v. Australian Chilling and Freezing Co. Ltd." Emphasis mine

[142] What is clear is that a court may not under the guise of interpreting a contract attempt to rewrite it. In **Kazakstan Wood Processors (Europe) Ltd v Nederlandsche Credietverzekering Maatschappij NV**[47] Peter–Gibson L.J. said:

> "In the circumstances it is not surprising to find Mr. Spearman insisting that the clear words of Article 13 should be given their natural and ordinary meaning while Mr. Mildon submits that an over literal approach is inappropriate where the consequences can be seen to be so extravagant. **The court is entitled to look at those consequences because the more extreme they are, the less likely it is that commercial men will have intended an agreement with that result. But the court is not entitled to rewrite the bargain which they have made merely to accord with what the court thinks to be a more reasonable result, and the best guide to the parties intentions remains the words which they have chosen to use in the contract**." Emphasis mine

[143] When the Court construes the Parties' Original Agreement as well as the First and Second Variations thereto, the following is clear:

i. Under the plain and ordinary wording of the Original Agreement the Parties agree to the sale and purchase of the Defendant's freehold property described in the Land Registry as Parcels 506 and 144 of Block 48408 Virgin Gorda South Registration Section together with the improvements situate therein and the marina business, boatyard retail centre, marine chandlery and other businesses carried on by the Defendant on those parcels for the purchase price of US$12 Million.

ii. In clear an unambiguous terms, the First Variation modified the Original Agreement and in consideration of the sum of $1.00, the Defendant granted option to acquire the Defendant's leasehold interest in the Additional Property (either through an assignment

[47] [2000] Lloyd's Rep IR 371

or sublease). In clear and unambiguous terms the Parties agreed the conditions under which the Claimant could successfully exercise that Option.

iii. The First Variation makes it clear that at the time the Parties well understood that the Defendant could not legally transfer its leasehold interest in the Additional Property unless the Crown (the head lessor or reversioner) consented to the assignment or sublease. It was not at all certain that the Crown would in fact consent to such a transfer and the Claimant acknowledged the risk of that in clause 1.2 of the First Variation. In the event that the Crown did not consent, then the Defendant would not have been able to convey any legal or equitable interest in the Additional Property to the Claimant.

iv. Moreover it is clear from Clause 1.2 that it was where the Claimant chose to exercise the Option that the Defendant assumed any obligation to give all reasonable support and assistance in connection with securing the approval and consent of the Crown.

v. Notwithstanding this risk and with inexplicable conviction, the Parties agreed to include the Additional Property as part of their bargain without increasing the agreed purchase price.

vi. Importantly, the Parties agreed that in the event that the Claimant elected not to exercise the Option, this would not affect the terms of the Original Agreement including the purchase price of US$12 Million which was agreed.

vii. According to the plain wording of clause 1.1 of the First Variation if the Claimant gave valid notice in writing exercising the Option then the Notice would constitute the contract for the sale and purchase of the Additional Property.

viii. Under clause 12 of the First Variation, it was also clear that if the Claimant were to exercise the Option then completion of sale and purchase and the transfer or sublease would be pushed back to a later date (than the agreed 30th July 2004) because of the need to obtain the Crown's approval of the transaction. Once the sale and purchase of the Additional Property was completed then the relevant instrument of transfer would be executed and delivered by the Defendant.

ix. The Second Variation in no way revised, modified or revoked the Option granted under the First Variation. The Second Variation in no way revised or modified the agreed purchase price.

[144] In the Court's judgment, the language of the First and Second Variation is clear, unambiguous and therefore open to only one construction. The relevant background discloses that the *possibility* of acquiring the Defendant's leasehold interest in the Additional Property was added or included as part of the Parties original bargain as a means of averting a possible repudiation of their agreement. It is clear that the means by which the Parties choose to effect this was to create an option to acquire the Claimant's leasehold interest.

[145] Clause 1.1 of the First Variation was a binding contract but the performance of the Defendant was suspended until the Claimant exercised the Option in accordance with the terms. Such exercise was a condition precedent because under clause 1.2 of the First Variation, it was only in the event that the Option was exercised that the Defendant would be obliged to give all reasonable support and assistance to secure the approval of the Crown. The Defendant's obligation to perform which becomes enforceable on the fulfilment of the contingency, namely, the exercise of the option by the Claimant.

[146] The effect of clause 1.1 if that even before the exercise of the option, the Claimant has an equitable interest because the fulfilment of the condition depended on the election of the Claimant. The Claimant was legitimately entitled to expect that the Defendant would not do anything inconsistent with the Claimant's contractual interest in the property. Had the option been exercised the Defendant would be bound to perform its obligations unless the period during which the option must be exercised has expired, or the terms of the option agreement have not been complied with. In the Court's judgment there is nothing capricious, unreasonable, inconvenient or unjust about this.

[147] The Parties' bargain was complicated by the fact that the sale and purchase (assignment or sublease) of the Defendant's leasehold interest required the approval of the Crown/head lessor. The Parties fully acknowledged this and accepted that there was a risk that such consent or approval would not be forthcoming. In such a case, the purported agreement would surely fail for frustration with no recourse open to the Claimant. Again, in the Court's judgment, there is nothing capricious, unreasonable, inconvenient or unjust about this.

[148] As required, the Court has considered the factual background which discloses the clause 1.1 of the First Variation was a negotiated compromise; the clear wording of the contractual provisions and the implications of the rival constructions. In the case at the bar, the consequence is that the Claimant would not have secured the leasehold interest in the Additional Property and would have, to its mind, grossly overpaid for the assets which were acquired under the Original Agreement. But it is clear that the Claimant understood and agreed to this. The fact is that the Parties acknowledged and agreed that the purchase price of US$12 Million would be payable regardless of whether the Claimant chose to exercise the Option or not and regardless of whether the Parties were able to successfully complete the sale and purchase of the Defendant's leasehold interest in the Additional Property.

[149] The only logical construction to be drawn from this is that the Parties intended that the US$12 Million purchase price would have been received by the Defendant as the purchase price of the Property and the Business only if the option is not exercised and as the purchase price of the Property, the Business and Additional Property if the option was exercised. The Claimant has advanced this construction is untenable because it would involve two alternative apportionments of the purchase price one of which would be contradicted by the provisions of the Agreement of sale as amended by clause 1.4 of the First Variation and would amount to a deception of the revenue authorities. For the reasons already indicated, this Court is satisfied having that the chance of observing all of the witnesses in oral examination that as legally repugnant as it maybe, Arthur Carpenter's evidence on this issue (offered against self-interest), was true and credible. The very wording of the clause makes clear that the Parties contemplated that the so called apportionment was flexible or variable subject to agreement by the Parties. So that rather than indicating a true estimate of the value of the respective assets being transferred or true purchase price of those assets, this was an arbitrary sum ascribed for the benefit of the revenue authorities and which could be adjusted at the whim and convenience of the Parties. This is reinforced by clause 1.2 of the Second Variation which provided that "*the portion of the Purchase Price allocated to the Assets other than Property shall be equal to the vendor's adjusted tax basis in such Assets on the date of completion*."

[150] Counsel for the Claimant has advanced that the proposition that the US$12 Million purchase price had been received by the grantor as the purchase price of the Property and the Business only would be inconsistent with clause 1.1 of the Second Variation Agreement which states that sum to be the total purchase price for the Property, the Business and the Additional Property. This submission goes against the Claimant's own argument that the Original Agreement and the Variations are singular and unitary transaction of sale which must be read and construed together. The provisions of clauses 1.1 – 1.4 of the First Variation are still operative and not inconsistent with clause 1.1 of the Second Variation or with the Defendant's construction.

[151] The Court therefore does not accept the Claimant's suggestion that the purported exercise of the Option was superfluous as it amounted to the giving of notice of the grantees' intention to do what it has already done, that is to complete the sale of the optioned property by payment of the purchase price. The suggestion that there was some collateral contract that would be inferred from the fact of

the payment and acceptance of the purchase money is not supported by its plain wording of the Parties' agreement or by the evidence advanced in this Court. Clause 1.1 put the position plainly:

> "…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**." Emphasis mine

[152] In this case, completion of the sale and purchase agreement was a condition precedent for the exercise of the Option. This meant that the Claimant was required to pay the entire purchase price before it could exercise the Option. This is not at all unusual.[48]

[153] The terms of the Parties bargain are clear and it is not open to this Court to disregard the Parties' clear words. Certainly, the Court has no power to remake the contract for the purpose of avoiding the bargain because the Claimant considers the result unjust or unfair. The Claimant clearly agreed to waive any pecuniary claim regarding the purchase price and there is no legal basis upon which it can be advanced that it would nevertheless have secured a beneficial interest in the Additional Property simply by virtue of the payment and acceptance of the purchase price.[49] Certainly, the Claimant could not become the equitable owner of the land until the Defendant was in a position to give a 'clear' title in the sense that it was able to transfer the Additional Property effectively at law: that is, all requirements imposed by law for a valid transfer have been satisfied.

CONCLUSION AND ORDER

[154] For the reasons set out the Court is satisfied that Claimant's claim has not been made out on a balance of probabilities and that judgment should be entered for the Defendant. Given the findings herein the Court does not need to go on to consider the question of remedies and will decline to do so.

[155] In accordance with the usual rule costs will follows in the event and so the Defendant will have its costs to be quantified on a prescribed basis.

[48] Lord Ranelagh v Melton (1864) 2 Dr. & Sm. 278 Barnsley's Land Options Seventh Edition
[49] McWilliam v McWilliams Wines Pty Ltd (1964) 114 CLR 656 at pages 660 – 661; Brown v Heffer (1967)116 CLR 344

[156] For the reasons set out herein the Court's order is therefore as follows:

i. **Judgment is entered for the Defendant.**

ii. **The Claimant's claim is dismissed.**

iii. **The Defendant will have their costs to be quantified on a prescribed basis.**

Vicki Ann Ellis
High Court Judge

By the Court

Registrar