

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANTIGUA AND BARBUDA

ANUHCVP2019/0012

BETWEEN:

BETTINI & BRITTO LIMITED

Appellant

and

**[1] DAWN RUN LIMITED
[2] GALLEY BAY CLUB LIMITED**

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Gertel Thom
The Hon. Mr. Paul Webster

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Dane Hamilton, KC with him Mr. Dane Elliot-Hamilton for the Appellant
Mrs. Andrea Roberts-Nicholas and Ms. C. Kamilah Roberts for the Respondents

2022: May 26;
December 20.

Civil appeal – Breach of contract – Appellate court’s review of findings of fact - Time for performance of contract – ‘Reasonable time’ - Whether trial judge erred in law in finding that appellant was in breach of its obligations under clause 2 and 3 of agreement - Whether trial judge erred by failing to find that the respondents were in breach of their obligations under clause 5 of the agreement – Equity - Equity follows the law - Whether trial judge erred in law by not finding that equity would allow appellant to recover damages from second respondent, which failed to lawfully terminate the agreement

In 2005, the appellant, Bettini & Britto Limited (“B&B”) accepted Mr. Steve Barker’s proposal to construct ‘Galley Bay Club’, a development project of high-end homes, condominiums, apartments, and a communal swimming pool in Galley Bay on the island of Antigua.

In July 2006, an agreement was executed between B&B and Dawn Run Limited ("Dawn Run"), a company incorporated in Antigua and Barbuda and owned by Mr. Barker ("July Agreement") for the construction of 'Galley Bay Club'. In August 2006 another company was formed by Mr. Barker called Galley Bay Club Limited and in September 2006, B&B entered into an agreement, in identical terms to the July Agreement, with Galley Bay Club Limited ("September Agreement"). Under both agreements, B&B contracted as the Manager, to *inter alia*, fully complete plans in accordance with the terms, submit a planning application to the Local Planning Authority and use its 'best endeavours' to obtain all planning permissions free from conditions for the 'Galley Bay Club' project. While both Dawn Run and Galley Bay Club Limited, contracted under the agreements to apply for and procure financing from a reputable source to the sum of US\$15,000,000.00 to fund the 'Galley Bay Club' project.

In September 2006, the planning application for the 'Galley Bay Club' project was submitted to the Development Control Authority ("DCA"). However, the Chief Environment Officer noted potential environmental impacts of the project and did not recommend the project for approval at that time. The Chief Environment Officer instead advised that an environmental impact assessment ("EIA") be conducted and submitted it to the Environment Division for review. The EIA was conducted as required and submitted to the Chief Environment Officer. In January 2007, the Environment Division approved Phase I of the project subject to several conditions. In relation to Phase II of the project, the Environment Division noted that there was potential for severe impact on the environment because of the increased run-off and as such, it called for changes in the design. In terms of financing, ABI Bank Limited advised Dawn Run that the banking facility requested had been approved. The amount of the facility listed was US\$7,500,000.00, which was 50% of the funding Dawn Run needed to procure under the July Agreement.

Dawn Run, through its attorney-at-law, sought by letter on 20th April 2007 to terminate the July Agreement pursuant to clause 18.1. Dawn Run stated that fatal flaws within the plans prepared by B&B impacted the project's ability to obtain full planning permission from the relevant authorities. Dawn Run further stated that this lack of planning permission impacted its ability to obtain the whole facility required, that being US\$15,000,000.00 from a financial institution, to finance the project. B&B in response, rejected the purported termination by Dawn Run and denied that the July Agreement had been repudiated by it. B&B filed a claim in the court below, claiming that the respondents' purported termination of the July Agreement was a breach and that it had suffered loss and damages. Dawn Run argued that the agreement was validly terminated pursuant to clause 18.1 of the July Agreement. Galley Bay Club Limited also filed a defence and argued in similar terms to Dawn Run. It also filed a counterclaim that by reason of the termination on account of the breach, Galley Bay Club Limited suffered loss.

The learned judge dismissed the claim against the respondents. In rendering her decision, she held *inter alia* that there was ample evidence of breaches of clauses 2 and 3 of the July Agreement, as certain aspects of the designs in relation to the environment were overlooked by B&B. The learned judge also found no evidence of waiver or variation of the terms of the July Agreement by Dawn Run. The result was that there was a breach of the July Agreement and Dawn Run's subsequent termination was valid. The learned judge therefore dismissed B&B's claim. As it related to Galley Bay Club Limited's counterclaim, the learned judge held that it failed to prove the allegations in the counterclaim and therefore dismissed its counterclaim.

B&B being dissatisfied with the judgment of the learned judge has appealed. The main issues that this Court has to determine are: (i) whether the trial judge erred in law in finding that B&B was in breach of its obligations under clause 2 and 3 of the July Agreement; (ii) whether the trial judge erred by failing to find that the respondents were in breach of their obligations under clause 5 of the July Agreement; and (iii) whether the trial judge erred in law by not finding that equity would allow B&B to recover damages from Galley Bay Club Limited, which failed to lawfully terminate the September Agreement.

Held: dismissing the appeal; and awarding costs in the sum of \$25,000.00 to Dawn Run, that:

1. When a contract is silent as to the time for performance of an act, the law implies that it is to be done within a 'reasonable time', and what period is 'reasonable' is a question of fact which must be determined on a case-by-case basis taking into consideration what would, in ordinary circumstances, be a reasonable time for the performance of the relevant services and to what extent the time for performance was in fact extended by extraordinary circumstances.

Pitt v Shew (1821) 4 B & Ald 208 applied; **Urban 1 (Blonk Street) Ltd v Ayres** [2013] EWCA Civ 816 applied; **British Steel Corp v Cleveland Bridge and Engineering Co Ltd** [1984] 1 All ER 504 applied.

2. There was ample evidence before the learned judge that showed B&B's failure to design adequate plans which took into consideration all the essential factors to commence work on the building design. B&B's failure to provide adequately designed plans caused delays and risks which would have impacted the commercial viability of the project, especially where there was no timely resolution in sight. Given the evidence put before the court below, it cannot be said that the learned judge erred in finding that a project of Galley Bay Club's size and scope should not have been held at a standstill, 9 months after the execution of the July Agreement, unable to obtain the full and complete permissions required. Additionally, considering that B&B's plans needed to be revisited and did in fact cause the delays, it cannot be said its 'best endeavours' would have been taken. There also being no evidence of waiver or variation of clause 18.1, the learned judge was entitled to find that B&B having breached its obligations under clauses 2 and 3 of the July Agreement, the July Agreement was properly terminated pursuant to clause 18.1.
3. The learned judge did not make a finding as it related to clause 5 of the July Agreement as contended by B&B, rather the finding was limited to clauses 2 and 3. Dawn Run had lawfully terminated the July Agreement by letter dated 20th April 2007.
4. The September Agreement, having not been validly terminated by Dawn Run's letter dated 20th April 2007, meant that B&B was in breach of the September Agreement given its identical terms and obligations to the July Agreement. The learned judge made no finding of any breach by Galley Bay Club Limited. The failure to terminate in accordance with clause 18.1 was not a finding of breach of agreement. The learned judge simply found that Galley Bay Club Limited had not engaged clause 18.1 of the September Agreement and could not rely on Dawn Run's letter dated 20th July 2007. B&B having breached the September Agreement was not entitled to any damages in equity. Further, 'equity follows

the law'. This means that equity will not allow a remedy that is contrary to the law as equity treats the common law as laying the foundation of all jurisprudence and does not depart unnecessarily from legal principles.

Stack v Dowden [2009] EWHC 782 (Ch) applied; **Rowland v Blades** [2021] EWHC 426 (Ch) applied.

JUDGMENT

- [1] **THOM JA:** This is an appeal by the appellant, Bettini & Britto Limited ("B&B") against the learned judge's decision to dismiss claims for breach of contract against the first respondent, Dawn Run Limited ("Dawn Run") and the second respondent Galley Bay Club Limited.

Background

- [2] B&B is a company incorporated in Antigua and Barbuda which performs construction services. The directors of B&B are Mrs. Maria Britto-Bettini and Mr. Giancarlo Bettini.
- [3] In 2005, B&B was engaged in a series of meetings with Mr. Steve Barker, the sole shareholder and director of a company called Antigua Estates Real Estates Limited ("AERE"). In these meetings Mr. Barker outlined certain proposals relating to the construction of 'Galley Bay Club', a development project of high-end homes, condominiums, apartments, and a communal swimming pool in Galley Bay on the island of Antigua.
- [4] For this project, Mr. Barker represented to B&B that AERE was possessed of unencumbered title to certain plots of land in Galley Bay. B&B accepted Mr. Barker's proposal and indicated its desire to be given an exclusive contract for the construction of the development. B&B also indicated its willingness to bear the initial costs and risks associated with the project. It was at this stage that Mr. Barker advised B&B that all contracts should bear the name Paradise Retreats Limited and not AERE.
- [5] From January 2006 to April 2006, B&B sent Mr. Barker numerous architectural drawings in relation to the Galley Bay Club project for his consideration. In May 2006, at a meeting with Mr. Barker, B&B was introduced to Mr. Doug Holloway and Ms. Julia Sanchez of OBM

International, both quantity surveyors, charged with reviewing and preparing contracts between the parties. By June 2006, B&B began sending copies of their drawings and designs directly to Mr. Holloway.

- [6] On 25th July 2006, an agreement was executed between B&B and Dawn Run, a company incorporated in Antigua and Barbuda and owned by Mr. Barker ("July Agreement"). Within the July Agreement, B&B is referred to as 'the Manager' and Dawn Run is referred to as 'the Developer'.
- [7] In August 2006 another company was formed by Mr. Barker along with Mr. Danny Faulkner, called Galley Bay Club Limited. It is also known as Galley Bay Antigua Club Limited. On 25th September 2006, B&B entered into an agreement, in identical terms to the July Agreement, with Galley Bay Club Limited ("September Agreement"). Under both agreements, B&B contracted as the Manager, to *inter alia*, fully complete plans in accordance with the terms, submit a planning application to the Local Planning Authority and use its 'best endeavours' to obtain all planning permissions free from conditions while both Dawn Run and Galley Bay Club Limited, contracted under the agreements to apply for and procure financing of the sum of US\$15,000,000.00 from a reputable to fund the Galley Bay Club project.
- [8] On 14th August 2006, B&B submitted the plans for the Galley Bay Club project to Mr. Barker and on 20th September 2006, Mr. Barker submitted the planning application for the Galley Bay Club project to the Development Control Authority ("DCA"), in the name of Galley Bay Club Limited. This was 5 days prior to the execution of the September Agreement.
- [9] By Minute dated 30th October 2006, the Chief Environment Officer, upon review of the planning application noted potential environmental impacts of the project and did not recommend the project for approval at that time. The Chief Environment Officer instead advised that the 'Developer' conduct an environmental impact assessment ("EIA") and submit it to the Environment Division for review. The Chief Environment Officer required that the EIA provide the: (i) impact that the project would have on the natural drainage system in the area; (ii) mitigation measures to ensure that the drainage basin would not be adversely affected; and

(iii) sewage treatment system, location and potential impact on surrounding properties. The EIA was conducted as required and submitted to the Chief Environment Officer.

[10] On 3rd November 2006, B&B informed Mr. Barker that it had obtained approval in principle from the DCA. This was followed by approval in January 2007 by the Environment Division for Phase I subject to the conditions that:

- (i) the construction of channels to accommodate the runoff along the road, the construction of culverts as well as sediment traps.
- (ii) the developer receive permission in writing from the owners of Galley Bay Hotel prior to channeling water into the pond.
- (iii) the developer post a bond of USD\$50,000.00.

[11] In relation to Phase II of the project, the Environment Division noted that there was potential for severe impact on the environment because of the increased run-off. As such, the Environment Division called for changes in the design to facilitate a 10ft. set back on either side of the waterway, and limited vegetation removal. The Environment Division also informed Galley Bay Club Limited that it would contract the service of a trained civil engineer to develop a drainage management plan for the whole basin of the project and for future projects in the area. The Environment Division further informed Galley Bay Club Limited that the expense of this contract for service would be borne by the Government of Antigua and Barbuda with contributions by Galley Bay Club Limited. It was only upon the completion of the engineer's drainage management plan that the Environment Division would grant permission for the completion of Phase II.

[12] In terms of financing, by offer letter dated 15th December 2006, ABI Bank Limited advised Dawn Run that the banking facility requested had been approved. The amount of the facility listed in the offer letter was US\$7,500,000.00, which was 50% of the funding Dawn Run required to procure under the July Agreement.

- [13] On 19th April 2007, the residents of the Galley Bay area held a community meeting together with the Minister of Tourism, the Chief Environment Officer and OBM International to express their concerns surrounding the Galley Bay Club project's impact on the Galley Bay Area.
- [14] Dawn Run, through its attorney-at-law, sought by letter on 20th April 2007 to terminate the July Agreement pursuant to clause 18.1. Dawn Run stated that fatal flaws within the plans prepared by B&B impacted the project's ability to obtain full planning permission from the relevant authorities. Dawn Run further stated that this lack of planning permission impacted its ability to obtain the whole facility required, that being US\$15,000,000.00 from a financial institution, to finance the project. Dawn Run also alleged that as a result of B&B's delays, the cost of completing the development increased to US\$15,198,218.73 as opposed to the fixed sum of US\$11,000,000.00 agreed in clause 6 of the July Agreement.
- [15] B&B in response, by letter dated 27th April 2007, rejected the purported termination by Dawn Run and denied that the July Agreement had been repudiated by it. B&B also indicated that it was capable of performing the terms of the July Agreement.
- [16] B&B filed a claim in the court below, claiming that the respondents' purported termination of the July Agreement was a breach and that it had suffered loss and damages. Dawn Run in its amended defence submitted that there was clear agreement between the parties that the September Agreement would supersede the July Agreement and therefore, there was no agreement between B&B and Dawn Run. Alternatively, even if, there was an agreement between Dawn Run and B&B, the agreement was validly terminated pursuant to clause 18.1 of the July Agreement. Galley Bay Club Limited also filed a defence and argued in similar terms to Dawn Run. It also filed a counterclaim that by reason of the termination on account of the breach, Galley Bay Club Limited suffered loss.
- [17] The learned judge dismissed the claim against the respondents. In rendering her decision, she held that even after the execution of the September Agreement, Dawn Run continued to be identified and function as developer of the Galley Bay Club project and that Galley Bay Club Limited was formed for the purposes of marketing and sales of the

condos. There was no evidence before the court of any intention by the parties to have the September Agreement supersede the July Agreement. The July Agreement was therefore valid and operative. There is no appeal from her finding that the September Agreement did not supersede the July Agreement.

[18] The learned judge also held that there was ample evidence of breaches of clauses 2 and 3 of the July Agreement, as certain aspects of the designs in relation to the environment were overlooked by B&B. These included B&B's failure to plan for the runoff of sewage and stormwater, the fact that the buildings designed straddled a waterway and B&B's failure to obtain permission from the Galley Bay Hotel prior to channeling water into the pond. Additionally, the learned judge considered that B&B's inadequate plans required several corrections which resulted in delays which the learned judge held contributed to the eventual lack of planning approval several months after planning approval was anticipated. In relation to possible waiver by Dawn Run, the learned judge found that while clause 18.1 gave the right to the developer to waive or vary the terms of the agreement, there was no evidence that this was done. The result was that there was a breach of the July Agreement and Dawn Run's subsequent termination was valid. The learned judge therefore dismissed B&B's claim.

[19] As it related to Galley Bay Club Limited's counterclaim, the learned judge held that it failed to prove the allegations in the counterclaim and therefore dismissed its counterclaim.

The Appeal

[20] B&B being dissatisfied with the judgment of the learned judge has appealed. B&B has filed 5 grounds of appeal which I find can be aptly condensed into 3 issues:

- (i) whether the trial judge erred in law in finding that B&B was in breach of its obligations under clauses 2 and 3 of the July Agreement;
- (ii) whether the trial judge erred by failing to find that the respondents were in breach of their obligations under clause 5 of the July Agreement; and

- (iii) whether the trial judge erred in law by not finding that equity would allow B&B to recover damages from Galley Bay Club Limited, which failed to lawfully terminate the September Agreement.

Issue 1: Whether the trial judge erred in law in finding that B&B was in breach of its obligations under clauses 2 and 3 of the July Agreement

B&B's Submissions

- [21] Counsel for B&B, Mr. Hamilton, KC stated that it was clear from the tenor of the judgment that the learned judge found that clauses 2 and 3 of the July Agreement were breached. He submitted, however, that a court in its assessment of whether B&B breached clauses 2 and 3 of the July Agreement was obligated in law to consider whether the actual performance of the contract measured up to the obligation under the contract, especially where there were inconsistent stipulations as to time.
- [22] Learned King's Counsel agreed that where time was not originally of the essence and one party had been guilty of undue delay, the other party was entitled to give notice requiring the contract to be performed within a 'reasonable time'. However, Mr. Hamilton KC strenuously argued that B&B had fulfilled its obligations pursuant to clause 2 of the July Agreement, having submitted plans to Mr. Barker well before time had elapsed under the clause. He also argued that in relation to clause 2 of the contract, B&B had not been in breach. B&B through their 'best endeavours' had provided plans in support of the planning application which was later submitted by Mr. Barker. Mr. Barker, who submitted the planning application to the DCA, had not raised any grievances or concerns with respect to the plans submitted by B&B. Each plan submitted by B&B to Mr. Barker had to be approved by him and his team. Further, any delay in receiving the planning permissions was not lengthy and within the ordinary course of business. Phase I of the project had been approved and approval of Phase II was under consideration.
- [23] Learned counsel for B&B also detailed the impact that the presence of restrictive covenants on certain parcels of the Galley Bay land had on the project. Mr. Hamilton

submitted that parcel 454, was not owned by Dawn Run or Galley Bay Club Limited at the time of the execution of the July Agreement or September Agreement. It was instead owned by Sea Pigeon Ltd. whose principal shareholder is Mr. Barker. Mr. Hamilton argued that on 8th November 2006, Mr. Barker requested the Registrar of Lands to re-register the title to reflect Dawn Run as owner. However, as early as a year prior Mr. Barker was aware of the restrictive covenants and had not communicated this fact to B&B. Learned King's Counsel argued that the learned judge failed to find that it was the duty of Mr. Barker and/or Dawn Run to remove the restrictive covenants.

Respondents' submissions

- [24] Counsel for the respondents, Mrs. Roberts-Nicholas rejected B&B's submissions stating that the learned judge was quite meticulous in sifting through the evidence presented to her. Mrs. Roberts-Nicholas stated that the issue as it related to fatal flaws was dealt with extensively and there was sufficient evidence for the learned judge to be entitled to come to the conclusion that she did.
- [25] Mrs. Roberts-Nicholas conceded that clauses 2 and 3 of the July Agreement and September Agreement were indeed inconsistent. However, where there was such inconsistency, the court should determine the time for the performance of those clauses as "reasonable".
- [26] Mrs. Roberts-Nicholas agreed that the Galley Bay Club project was neither 'big' nor complex and as such its completion should not have experienced such delays. These delays Mrs. Roberts-Nicholas attributed solely to B&B which she argued failed to provide drawings and sewage systems. These drawings also failed to ensure that the restrictive covenants relating to the property were adhered to. Mrs. Roberts-Nicholas further argued that as a result of these failures by B&B, there were fatal flaws in the planning application which only received conditional approval. Further, this conditional approval was only received after numerous delays caused by the ordering and performance of the EIA by the Environment Division. This EIA only being required due to inadequate designs

prepared by B&B which would have had to be redesigned in order to meet the environmental requirements of the project.

[27] Mrs. Roberts-Nicholas argued that another fatal flaw in B&B's drawings related to the lack of panoramic sea views. This she argued was crucial to the marketing of the project. Mrs. Roberts submitted that Mrs. Britto-Bettini agreed in her evidence that the main goal of this project was to supply buyers with these views and admitted that the topographical conditions were overlooked by B&B.

[28] In relation to the restrictive covenants, counsel for the respondents submitted that the restrictive covenants were disclosed to B&B from the onset and that B&B failed to take into account that there were restrictive covenants on the land even though that was pointed out by the Chief Environment Officer. Mrs. Roberts-Nicholas argued that it was the duty of B&B to design the project in keeping with the restrictive covenants running on the land. She also argued that even if B&B was not aware of the restrictive covenants prior to the commencement of the design process, it was reasonable that as part of its initial investigations before the design phase it should have determined what, if any, restrictive covenants were in place.

[29] Mrs. Roberts-Nicholas further submitted that although the learned judge disagreed with the respondents position that the September Agreement was intended to supersede the July Agreement, the learned judge correctly found that the July Agreement was validly terminated under the terms of the agreement by letter dated 20th April 2007.

Discussion

Appellate court's review of findings of fact

[30] The grounds of appeal as developed by learned King's Counsel for B&B in his written and oral submissions, involve challenges to the trial judge's findings of fact in the court below. In **Ming Siu Hung and others v JF Ming Inc and another**,¹ Lord Briggs in delivering the judgment of the Board stated:

¹ [2021] UKPC 1.

“It is necessary at this point to bear in mind the well-settled constraints upon the appellate jurisdiction, when asked to re-exercise a discretion conferred upon the first instance judge. These constraints form part of a package, developed over many years, which ensure that the benefit of finality which should normally follow from the judicial determination of the parties’ dispute is not rendered ineffective by undue appellate activism. The general reasons for appellate restraint are well summarised by Lewison LJ in his well-known judgment in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] FSR 29, para 114, as follows:

“114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] RPC 1; *Piglow v Piglowski* [1999] 1 WLR 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23; [2007] 1 WLR 1325; *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court...”

Breach of clauses 2 and 3

[31] Both counsel for B&B and the respondents in their submissions have agreed that clauses 2 and 3 of the July Agreement are inconsistent with each other.

[32] Clause 2 of the July Agreement states:

“2. The Plans

(i) The Manager shall within twenty (20) days from the date of this agreement fully complete the Plans according to the design drawings and instructions as set out in schedules A & B herein in such a manner as to allow the Planning Application to be submitted to the Local Planning Authority for final approval of the construction of the Development.

(ii) The Manager shall further create and supply to the Developer within twenty (20) days of the approval of the Plans or the securing of financing under paragraph 5 herein, whichever is the sooner, a complete power point presentation in respect of the completed Development, a physical rendering of the overall site plan for the Development and renderings of the clubhouse and individual unit layouts all of the highest standard and quality to be used by the Developer for marketing purposes.”
(emphasis added)

[33] Clause 3 of the July Agreement states:

“3. The approved Planning Application

The Manager shall within one (1) day from the date of this agreement submit to the Local Planning Authority the Planning Application (together with the appropriate fees to be provided by the Developer) and shall then use their best endeavours to obtain all required planning permission for the Development free from conditions or subject only to conditions which are acceptable to the Developer (acting reasonably) and the Developer may appeal against any refusal to grant the consent and will do so if requested by the Manager. The Approved Planning Application shall include application for a right of way/easement from the Development to the Galley Bay beach.” (emphasis added)

- [34] When read together these clauses required B&B to within 20 days of the execution of the agreement, fully complete plans to support a planning application that was required to be submitted 1 day from the date of execution of the agreement. It is abundantly clear that there is an inconsistency as it relates to the timeline of completion of the plans and the submission of the planning application, and if read as is, clauses 2 and 3 would lead to absurdity and therefore silence as to the time stipulations for the performance of the July Agreement.

‘Reasonable time’

- [35] As early as the 1800’s in **Pitt v Shew**,² courts have in contract law held that if a contract is silent as to the time for performance of an act, the law implies that it is to be done within a ‘reasonable time’, and what period is ‘reasonable’ is a question of fact. In construction contracts where there is an absence of a date, the only obligation on the contractor will be to complete the works within ‘a reasonable time’. However, what constitutes ‘a reasonable time’ will depend on all the circumstances of the works.³
- [36] More recently in **Urban 1 (Blonk Street) Ltd v Ayres**,⁴ the English Court of Appeal developed the ‘hindsight’ test for determining ‘a reasonable time’ for completion. The Court of Appeal held that the question whether a reasonable time had elapsed was a broad question depending on all the facts and circumstances known to have occurred with the benefit of

² (1821) 4 B & Ald 208.

³ Construction Law (Journal)/2017/Issue 8, October/Articles/Construction Law Guide to: Time in construction contracts - (2017) 28 8 Cons.Law 14.

⁴ [2013] EWCA Civ 816.

hindsight when the matter comes to be tested. In **Urban 1 (Blonk Street) Ltd** the court accepted that it was an implied term of a building contract that completion would be within a reasonable time, notwithstanding that the developer undertook obligations to ensure that the works were completed in accordance with specified criteria.

- [37] In **British Steel Corp v Cleveland Bridge and Engineering Co Ltd**⁵ the court held that what constitutes a reasonable time can only be decided after the work has been done. Goff J in outlining what constitutes 'a reasonable time' stated:

"I have first to consider what would, in ordinary circumstances, be reasonable time for the performance of the relevant services; and I have then to consider to what extent the time for performance by BSC [the Contractor] was in fact extended by extraordinary circumstances outside their Control."⁶

- [38] It is clear from the principles set out above, that the determination of what is 'a reasonable time' has to be done on a case-by-case basis, taking into consideration what would, in ordinary circumstances, be reasonable time for the performance of the relevant services and to what extent the time for performance was in fact extended by extraordinary circumstances.

Ordinary circumstances

- [39] Crucial to the understanding of what would in ordinary circumstances be reasonable time for the performance of a project of Galley Bay Club's size and scope, would be the evidence of Ambassador Diann Black Layne, the Chief Environment Officer. Ambassador Layne, who reviewed the Galley Bay Club project to determine the extent of the impact the project would have had on the environment, stated under cross-examination that the Galley Bay Club project was a 'small' one and that in her professional experience projects such as 200 room hotels were typically completed in 8 months. Ambassador Layne stated at pages 294-297 of the Transcript of Proceedings⁷ as follows:

⁵ [1984] 1 All ER 504.

⁶ Ibid at 512.

⁷ Record of Appeal Volume II.

Q. Now, looking back at your witness statement - and you have indicated that you are not sure when the division did review the -- draft EIA. Now, based on what you learnt about this proposed project, Ambassador Layne, in your estimation was it supposed to be a project of some magnitude based on what you had seen -- the information that you had had a chance to review. Did you form the view that this was going to be a project of some magnitude? In the sense that you are not building a regular two story house, you are building a series of apartments. You are going to be doing quite a bit based on what had -- would have been presented to you, you would naturally figure this is going to take some doing. Did you form the -- that view?

[Ambassador Layne]. Not really, My Lady. Can I explain?

Q. Sure. Sure.

[Ambassador Layne]. Yes. Well, I am going to put it in context of the types of projects that we normally review. And in the context of the projects we normally review this is considered small.

Q. It's considered what?

[Ambassador Layne]. Small.

Q. Small.

[Ambassador Layne]. Right.

...

[Ambassador Layne]. So if I -- we had a big 200 room hotel development, normally depending on the site there are a lot of different factors that would determine length of time. So depending on the site it shouldn't -- it should take on around eight months on average.

Q. Okay.

[Ambassador Layne]. But for a smaller property it would normally take less.

...

Q. Now, so I think we have accepted that where Phase 1 was concerned you had got full approval but it was subject to these conditions and you have just gone through them on the consensus and I think you have agreed with me that with the exception for the letter from the Galley Bay Hotel which you said may be difficult but not onerous the rest of the conditions were not onerous. That's where I was going with that.

[Ambassador Layne]. In my view they were not onerous.

Q. Exactly.

[Ambassador Layne]. -- and we didn't -- we don't, My Lady, consider whether they are onerous or not. They were required and unless they were met we would not consider full approval would have been granted." (emphasis added)

Extraordinary circumstances

[40] In October 2006 after having received the planning application with plans in support, the Environment Division had serious concerns as it related to the impact of the Galley Bay Club project on the environment. As a result, the Environment Division required that an EIA be performed. After the performance of the EIA, the Environment Division subsequently approved Phase I of the project subject to the conditions as set out in paragraph 10 above. It was counsel for the respondents' submission that it was B&B's plans which failed to take into account the topographical conditions of the area, that resulted in extraordinary delay which derailed the completion of the project. To comply with the conditions of the Environment Division, the plans would have had to be redesigned, further delaying the project.

[41] I am in agreement with counsel for the respondents. There was ample evidence before the learned judge that showed B&B's failure to design adequate plans which took into consideration all the essential factors to commence work on the building design including evidence by Mrs. Britto-Bettini at page 77 of the Record of Appeal Volume I where Mrs. Britto-Bettini admitted the following:

Q. Then on page 154 you said -- it's below half -- halfway down the page.

"MB. Assumptions were made on both our parts. OBM and Bettini Britto. We forgot the views. The key selling point. We kept working without a certified document from OBM even though we constantly asked for it. We repeated ourselves for months."

That is your statement, Mrs. Britto, according to this Minute?

A. The last one.

Q. You found it? It's just below halfway down the page, page 154. You have: "We need to ID where the sea level is so that we can assure the views. We need certified documents from Mr. Kentish.

DH: Doug Holloway. You assumed the sea levels.

SB: Steve Barker. The bottom line is that all the elevations were done on assumptions." And then said: "Assumptions were made on both our parts. OBM and Bettini Britto. We forgot the views. The key selling point. We kept working without a certified document from OBM even though we constantly asked for it. We repeated ourselves for months."

And then further down you said: "MB. We forgot that the determinant of the project was the views." And then I'd like to draw your attention to 1 -- page 155 where at that meeting SB, second to last --

THE COURT: But she never answered your last question; is this your comment?

SIR CLARE ROBERTS: Oh, yes.

BY SIR CLARE ROBERTS:

Q. Mrs. Britto, is that your comment? "MB. Assumptions were made on both parts."

THE COURT: We forgot the views.

BY SIR CLARE ROBERTS:

You forgot the views. You remember that meeting? I think you should forget that.

A. Yes, My lady.

SIR CLARE ROBERTS:

She acknowledges that is her statement.

THE COURT: Okay.

"Q. Mrs. Britto, is that your comment? Assumptions were made on both parts."
"MB. Assumptions were made on both parts.

THE COURT: We forgot the views.

BY SIR CLARE ROBERTS:

Q. You forgot the views. You remember that I think you should forget that.

A. Yes, My Lady."

[42] The learned judge's judgment was robust and adequately took into consideration all the evidence before she arrived at her conclusion. The learned judge's thorough analysis is detailed at paragraphs 47 to 48 of the judgment where she states:

"[47] At a meeting on 19th April 2007, at which the Town and Country Planner and a representative of the developer were present, Mrs Layne, the Chief Environmental Officer, was asked to provide an overview of where the project was with respect to the approval process. She indicated that Phase I was approved with conditions. Still outstanding was a plan for the run off from the sewage and storm water. Again it was mentioned that the developer was required to get permission from Galley Bay Hotel to have the excess tertiary treated sewage effluent to run in the pond on Galley Bay's property. So it seemed that no headway had been made between January and April with regard to the conditions applicable to Phase I. With regard to Phase II she indicated that as yet there was no approval because the buildings were designed to straddle a waterway. The developers were asked to adjust the buildings so that they would be ten feet from the waterway. They were also asked to conduct a study that will reduce the amount of and pace of the water runoff. She noted that this was important since the project may severely affect adjacent and downstream properties.

[48] Prior to the Community Meeting the claimant was said to be seeking to obtain permission. But at the meeting it was revealed that permission was denied. Even if it were possible to start construction with the conditional approval, would it make commercial sense? It was the day following this community meeting that the Notice of Termination was sent to the claimant."

[43] I agree with the learned judge, B&B's failure to provide adequately designed plans caused delays and risks which would have impacted the commercial viability of the project, especially where there was no timely resolution in sight.

[44] Given the evidence put before the court below, it cannot be said that the learned judge erred in finding that a project of Galley Bay Club's size and scope should not have been held at a standstill, 9 months after the execution of the July Agreement, unable to obtain the full and complete permissions required. This is especially extraordinary considering there seemed to be attempts on the part of Dawn Run and Mr. Barker to mitigate delays by having meetings and plans submitted well before the execution of the July Agreement. Considering that B&B's plans needed to be revisited and did in fact cause the delays, it cannot be said its 'best endeavours' would have been taken. One's best endeavours in

these circumstances would have required prudence in taking into consideration the topographical landscape of the project, which evidently did not take place.

- [45] In relation to the restrictive covenants, the learned judge did not make a specific finding that B&B's failure to act in conformity with the restrictive covenants resulted in the delay in getting the plans approved. In her judgment, the learned judge only referenced the restrictive covenants at paragraph 36 of her judgment when outlining the submissions of Dawn Run. Paragraph 36 of the learned judge's judgment reads:

“Dawn Run's position is that although Phase 1 of the plans were [sic] approved by DCA, the approval was conditional and granted on an application based on fatally flawed drawings with no sea view on 16 of the 40 units. Therefore there was no approval agreed by Dawn Run for phase 1. Furthermore, the claimant was also still far away from being approved for Phase 2. Dawn Run submits that the project was out of reach because the claimant's drawings failed to provide for basic essentials. These included providing adequate drainage and sewage systems, ensuring that buildings straddling over a natural water course, and ensuring that the restrictive covenants relating to the land are adhered to.”

As stated early, the learned judge in finding B&B was in breach of clauses 2 and 3, based her findings on aspects of the designs in relation to the environment that were overlooked by B&B, including B&B's failure to plan for the runoff of sewage and stormwater, the fact that the buildings designed straddled a waterway and the failure to obtain the required permission from the Galley Bay Hotel prior to channeling water into the pond.

- [46] In view of the evidence, there being no evidence of waiver or variation of clause 18.1, the learned judge was entitled to find that B&B having breached its obligations under 2 and 3 of the July Agreement, the July Agreement was properly terminated pursuant to clause 18.1. Therefore, this ground fails.

Issue 2: Whether the trial judge erred by failing to find that the respondents were in breach of their obligations under clause 5 of the July Agreement

- [47] Counsel for B&B submitted that the learned judge erred in law in finding that B&B's planning permission obligation was a condition precedent to Dawn Run's ability to

obtain financing in accordance with clause 5. He argued that the duty to fulfill the obligation under clause 5 rested solely with Dawn Run.

- [48] Learned counsel for the respondents submitted that while the learned judge found that there was no evidence adduced by the respondents that Dawn Run obtained the sum of USD\$15,000,000.00 per clause 5 of the July Agreement or indeed made an application to obtain the USD\$15,000,000.00, the learned judge merely noted that without making a finding of fact that the respondents' contention that Dawn Run's approved plans were needed to approve the loan and at the time of the termination, the plans were not approved. There being no such finding of fact the appeal on that basis was unmeritorious. Learned counsel submitted that in any event, Dawn Run was entitled to terminate the July Agreement pursuant to clause 18.1 on the basis that B&B's breached clauses 2 and 3 and not on a finding that B&B's planning obligations were a condition precedent to obtain financing and that the B&B failed to fulfill the obligations.

Discussion

- [49] Clause 18.1 permits Dawn Run to terminate the July Agreement for any of the reasons therein. Dawn Run listed all of them. The learned judge found B&B was in breach of two of the grounds listed in clause 18.1, being clauses 2 and 3.

I agree with Dawn Run's submission that the learned judge did not make findings as contended by B&B, rather the finding was limited to clauses 2 and 3. Dawn Run had lawfully terminated the July Agreement by letter dated 20th April 2007. There is therefore no merit in this ground

Issue 3: Whether the trial judge erred in law by not finding that equity would allow B&B to recover damages from Galley Bay Club Limited, which failed to lawfully terminate the September Agreement.

- [50] Learned King's Counsel in his submissions argued that the learned judge erred in law by failing to allow B&B to recover damages in equity despite finding that the second respondent did not lawfully terminate the agreement.

[51] Counsel for the respondents in reply submitted that the learned judge was correct in so ruling, since the judge found that the breaches by B&B meant that Galley Bay Club Limited could not perform the September Agreement. The learned judge was on strong legal ground in ruling that “under the circumstances equity would not allow the [B&B] to recover based on the second defendant's breach.” Learned counsel also submitted that the learned judge’s dismissal did not solely rest in equity. The learned judge at paragraph 59 of the judgment stated that B&B by its conduct failed to satisfy certain condition precedents going to the root of the contract including its failure to fully complete the plans according to the design. Further, the learned judge took into consideration clause 18.1 which provided the circumstances of breach where the manager’s fee would no longer be payable to B&B. Therefore, the learned judge was correct in her conclusion that it failed in both at law and in equity.

Discussion

[52] The September Agreement, having not been validly terminated by Dawn Run’s letter dated 20th April 2007, meant that B&B was in breach of the September Agreement given its identical terms and obligations to the July Agreement. The learned judge made no finding of any breach by Galley Bay Club Limited. The failure to terminate in accordance with clause 18.1 was not a finding of breach of agreement. The learned judge simply found that Galley Bay Club Limited had not engaged clause 18.1 of the September Agreement and could not rely on Dawn Run’s letter dated 20th July 2007. B&B having breached the September Agreement was not entitled to any damages in equity. Further, ‘equity follows the law’. This means that equity will not allow a remedy that is contrary to the law as equity treats the common law as laying the foundation of all jurisprudence and does not depart unnecessarily from legal principles. This has been affirmed in cases such as **Stack v Dowden**⁸ and **Rowland v Blades**.⁹

[53] I would therefore dismiss this ground of appeal.

⁸ [2009] EWHC 782 (Ch).

⁹ [2021] EWHC 426 (Ch).

Conclusion and Disposal

- [54] For the reasons stated above, there is no basis for overturning the learned judge's decision. Accordingly, I would dismiss the appeal in its entirety and order that Dawn Run Limited shall have costs on this appeal in the sum of \$25,000.00.

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Paul Webster
Justice of Appeal [Ag.]

By the Court

Deputy Chief Registrar