

**IN THE SUPREME COURT OF GRENADA  
AND THE WEST INDIES ASSOCIATED STATES**

**HIGH COURT OF JUSTICE**

**SUIT NO. GDAHCV 2010/0252**

**BETWEEN:**

**BRUCE JOHN McNESS  
SUZANNE VICTORIA McNESS**

Claimants

**and**

**SPICELAND LIMITED**

Defendant

**Appearances:**

Mr. Douglas Mendes SC, instructed by Delany & Associates for the Claimants  
Dr. Francis Alexis QC, instructed by Messrs Joseph & Joseph for the Defendant

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2013: October 7,8 and 9  
2014: February 26  
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**DECISION**

- [1] **MOHAMMED, J.:** The Claimants are a professional trustee and a barrister-at-law respectively who both reside in London, England. The Defendant is a private company which invests in real estate, real estate development and tourism development in Grenada. They entered into an agreement on 14<sup>th</sup> November 2007, the Standard Lot Purchase Agreement ("the Agreement") where the Claimants agreed to purchase Villa 8 which forms part of the Defendant's larger acreage situate at Mt. Cinnamon Morne Rouge, St. George's Grenada ("Mt. Cinnamon"). By 25<sup>th</sup> February 2008 the Indenture was executed by the parties whereby the Claimants became the owner of Villa 9 ("the Villa"), instead of Villa 8.

- [2] In 2010 a disagreement arose between the parties on the interpretation of Stipulation 4 in Schedule D of the Agreement (“ Stipulation 4”). Stipulation 4 states :
- “It is the intention of the Club proprietor to start construction or cause construction to be started of a hotel at Mt. Cinnamon by the end of the third quarter of 2008. At the option of the Purchaser the Vendor will repurchase the Villa at The Purchase Price and pay legal costs capped at US \$50,000.00 if no hotel has been commenced within two years or completed within five years from the completion date.”
- [3] As a result of this disagreement, the Claimants instituted the instant action against the Defendant for specific performance of the Agreement; damages for breach of contract in addition to specific performance, interest on the purchase price of US \$972,500.00 at the rate of 7.5% from the 13<sup>th</sup> April, 2010 until payment; costs and any other relief.
- [4] The Claimants interpretation of Stipulation 4 is the Defendant was supposed to commence construction of a hotel by the end of the third quarter of 2008 and if it failed to do so within two years of the Completion Date of 12<sup>th</sup> July, 2008 (“the Completion Date”) they were entitled to exercise their option to call upon the Defendant to repurchase the Villa upon the terms in Stipulation 4. The Claimants called upon the Defendant to repurchase the Villa by notice dated 13<sup>th</sup> April, 2010 (“the First Notice”). The Defendant having failed to do so, the Claimants then issued the notice dated 30<sup>th</sup> April, 2010 (“the Second Notice”) to the Defendant. The Claimants are clear in their position that Stipulation 4 could not have intended to refer to structures existing at the time of contracting since it would be superfluous if it did.
- [5] The Defendant has denied that it has failed to comply with Stipulation 4 of the Agreement. Its position is based, on the laws of Grenada, and in particular the Hotels Aid Act (“the Act”) it commenced construction and did build a hotel at Mt.

Cinnamon within two years of the Completion Date. It denies that there is a binding obligation for it to repurchase the Villa pursuant to Stipulation 4. It contends that the First Notice and Second Notice are void since it has not breached the Agreement; the Agreement is unenforceable against the Defendant as it terminates upon its completion since there is no expressed provision for survival of Stipulation 4; and that the damages claimed by the Claimants are unreasonable or not reasonably foreseeable.

[6] At the trial both Claimants gave evidence in support of their case. The Defendants witnesses were Mr. Peter De Savary, director of the Defendant, Mr. Robin Chapman, the Defendant's attorney-at-law who was involved in the drafting of the Agreement and Mr Russ Fielden, a former President of the Grenada Hospitality and Tourism Association.

[7] The issues which arise for determination are:

- (a) What is the applicable law for the interpretation of the Agreement?
- (b) Does Stipulation 4 survive the Agreement?
- (c) Did the Defendant fail to construct a hotel at Mt Cinnamon within the meaning of Stipulation 4?
- (d) Was there a binding obligation for the Defendant to repurchase the Villa under Stipulation 4?
- (e) Did the Defendant breach the Agreement by not immediately repurchasing the Villa as demanded by the Claimants?
- (f) Are the damages claimed by the Claimants reasonable or reasonably foreseeable?
- (g) Whether interest is awardable and if so in what amount?

**What is the applicable law for interpretation of the Agreement?**

[8] Clause 25 of the Agreement provides that *"This agreement shall be governed by and construed in accordance with the laws of Grenada"*. The Claimants contends

that the Agreement is a contract and since there is no statute governing the construction of contracts in Grenada the appropriate law is the common law of Grenada. The Defendant's position is the word "construction" used in Stipulation 4 of the Agreement is to be interpreted within the meaning assigned to the Hotels Aid Act<sup>1</sup> ("The Act") of Grenada. Section 2 of the Act defines "construct" as "includes erect, repair, alter, reconstruct or extend". The word "hotel" is defined to mean "a building or group of buildings containing or intended to contain when complete not less than ten bedrooms for the accommodation of guests for reward, and includes the curtilage thereof and all structures within such curtilage, or any other building or group of buildings accepted by the Minister to fill the purpose of an hotel".

[9] I agree with Counsel for the Claimant that there is nothing in the Act which extends its application to the interpretation of contracts. The Act's application is limited to hoteliers who are granted concessions and to persons who invest in and develop the hotel industry in Grenada. The long title of the Act sets out the purpose of the Act which is "An Act to encourage the hotel industry by granting certain relief in respect of customs duties to persons who expend moneys upon the construction or equipment of hotels in Grenada, and for connected purposes." To facilitate this mandate section 3 of the Act empowers the Minister to grant licences to "a person desiring to construct or equip a hotel a licence to import free of customs duties, or to purchase in Grenada subject to drawback of customs duties, such building materials and articles of equipment for use in connection with the construction and equipping of the hotel as may be specified in the licence".

[10] I do not accept the Defendant's submission that the word "construction" in Stipulation 4 of the Agreement is to be given a purposive construction and given the same meaning as the word "construct" in the Act. Section 16 of the Act clearly provides that the provisions of the Act do not apply "to a hotel in respect of which a licence has not been granted" and there was no evidence when the

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<sup>1</sup> Chapter 138

Defendant's licence was obtained. In any event, if it was obtained after the Agreement was executed by the parties the Act would be inapplicable and the Defendant would not be able to rely on the meaning of the word "construct" in the Act.

- [11] I therefore find that the applicable law for the interpretation of Stipulation 4 of the Agreement is the common law of Grenada and not the Act.

**Does Stipulation 4 survive the Agreement ?**

- [12] Clause 14 of the Agreement provides :
- "14: SURVIVAL: Except to the extent that any provision hereof expressly survives Completion, this agreement shall terminate upon Completion unless earlier terminated as provided herein".
- [13] The Defendant contends that there is no expressed provision which makes Stipulation 4 survive the Agreement and accordingly it terminated with the rest of the agreement and is therefore unenforceable.
- [14] The events set out in Stipulation 4 namely, the commencement of construction of a hotel by the end of the third quarter of 2008 and the option by the Purchaser for the Vendor to repurchase the Villa at the purchase price and pay legal costs capped at US \$50,000.00 if no hotel is commenced within two years or completed within 5 years from the Completion date all concern matters beyond the completion of the Agreement. In my view, this expressed intention concerning matters beyond the completion of the Agreement is sufficient for the Court to accept that even in the absence of any specific words stating that Stipulation 4 survived the Agreement, it is only reasonable to interpret Stipulation 4 as surviving the Agreement.
- [15] I therefore find that Stipulation 4 survives the Agreement.

**Did the Defendant fail to construct a hotel at Mt. Cinnamon within the meaning of Stipulation 4?**

- [16] The Claimants contend that the “hotel” referred to in Stipulation 4 is the one depicted on a plan (“the Master Plan”) at Mt. Cinnamon, situated on Grand Anse Beach, which they were provided when they were first introduced to Mt Cinnamon. The Defendant’s position is it has built a hotel at Mt. Cinnamon which was opened in July 2008. The hotel consists of the refurbishment of the buildings which existed at the time of the completion of the Agreement i.e 12<sup>th</sup> April 2008, new buildings, additional rooms and additional hotel facilities such as beach cabana, restaurant and bar, integrated gift shop, spa, gym, tennis court, leisure building and yoga centre.
- [17] It was not in dispute that prior to 2006 there was a hotel at Mt. Cinnamon; it was shut down sometime in or about April 2006, the same year the Defendant purchased Mt. Cinnamon; at the time of the completion of the Agreement there was no functioning hotel at Mt. Cinnamon; there is a functioning hotel at present and there is no hotel on the beach at Grand Anse at Mt. Cinnamon. In order to determine the meaning of Stipulation 4 the Court is obliged to ascertain the parties intention at the time they executed the Agreement.
- [18] While the position taken by the parties on the approach the Court must take in interpreting Stipulation 4 are diametrically opposite, there was some consensus on the law to be applied by the Court. The Claimants are of the view that the background facts are relevant and material in ascertaining the parties intention. The Defendant on the other hand, insists that the expressed exclusionary provision at Clause 12 of the Agreement prevents the Court from examining any information obtained by the Claimants during the negotiations and prior to the execution of the Agreement in determining the intention of the parties.

[19] The Defendant pleaded in its Defence that it relies on the expressed exclusionary Clause 12 of the Agreement which limits the material which the Claimants can rely on in seeking to interpret any of the Clauses in the Agreement. Clause 12 of the Agreement expressly provides:

“12. ENTIRE AGREEMENT: This agreement, together with all exhibits referenced in this agreement and attached, embodies the entire agreement between the parties and cannot be waived or amended except in a written instrument signed by both parties. The Purchaser agrees that the Purchaser has not been induced by or relied upon any information, representation, warranties or statements, whether oral or written, expressed or implied, made by the Vendor or any person representing or purporting to represent not expressly set forth or provided for in this agreement.”

[20] In **Karsales (Harrow) Ltd v Wallis**<sup>2</sup> Denning LJ was of the view that a party who has contracted to do one thing and does another has failed to perform his contractual obligation and cannot be protected by the exclusionary clause<sup>3</sup>.

[21] I agree with the Defendant that Clause 12 is clear and unambiguous. However I do not agree that Clause 12 shuts out the Claimants from relying on relevant objective representations made prior to the execution of the Agreement since the Claimant is contending that the Defendant has failed to perform its obligation under the Agreement. In my view, in such circumstances, the Defendant cannot now rely on Clause 12 to limit its liability.

[22] In construing Stipulation 4 the test which the Court must apply is “what the parties using those words against the relevant background would reasonably have understood to mean”. After reviewing the approach to be adopted by the Court Lord Hoffman in **Investors Compensation Scheme Ltd v West Bromwich Building Society**<sup>4</sup> summarized the general rule as:

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<sup>2</sup> [1956] 2 AllER 866 at 869

<sup>3</sup> **Karsales (Harrow) Ltd v Wallis** [1956] 2 All ER 866

<sup>4</sup> (1998) 1WLR 896 at pages 912-913

- “ (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
- (2) The background was famously referred to by Lord Wilberforce as the “matrix of fact”, but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
- (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
- (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax; see *Manni Investments Co. Ltd v Eagle Star Life Assurance Co. Ltd* [1997] A.C. 749.
- (5) The “rule” that words should be given their “natural and ordinary meaning” reflects the common sense proposition that we do not easily accept that

people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v Salen Rederierna A.B.*[1985] A.C 191,201:

“ if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must yield to business commonsense.”

[23] While as a general rule previous negotiations between the parties are to be excluded Lord Hoffman in **Chartbrook Ltd v Persimmon Homes Ltd** <sup>5</sup> drew a distinction on the admissibility of such previous negotiations based on relevance of the issue to be determined. In his view, all previous negotiations are potentially relevant background but should only be excluded from consideration on the basis that they are irrelevant to the issue to be determined by the Court. He summed out the position as:

“I do... accept that it would not be inconsistent with the English objective theory of contractual interpretation to admit evidence of previous communications between the parties as part of the background which may throw light upon what they meant by the language used. The general rule, as I said in *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251,269 is that there are no conceptual limits to what can properly be regarded as background. Prima facie, therefore, the negotiations are potentially relevant background. They may be inadmissible simply because they are irrelevant to the question which the court has to decide, namely, what the parties would reasonably be taken to have meant by the language which they finally adopted to express their agreement. For the reasons given by Lord Wilberforce, that will usually be the case. But not always. In exceptional cases, as Lord Nicholls argued, a rule that prior negotiations are

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<sup>5</sup> [2009]1 AC 1101 at para 33

always inadmissible will prevent the court from giving effect to what a reasonable man in the position of the parties would have taken them to have meant.”

- [24] The challenge which the Court faces in distinguishing between “objective facts” and “other statements made during the course of negotiations” which would fall into the excluded “subjective facts” was outlined by Lord Hoffman at para 38 in

**Chartbrook :**

“Whereas the surrounding circumstances are, by definition, objective facts, which will usually be uncontroversial, statements in the course of pre-contractual negotiations will be drenched in subjectivity and may, if oral, be very much in dispute. It is often not easy to distinguish between those statements which (if they were made at all) merely to reflect the aspirations of one or other of the parties and those which embody at least a provisional consensus which may throw light on the meaning of the contract which was eventually concluded.”

- [25] In light of the leading authorities, in interpreting Stipulation 4 this Court must refrain from interpreting the meaning of the words but rather strive to arrive at an interpretation which a reasonable person with the objective background information which the parties had at the time of contracting would have intended it to mean. In doing so the Court must not attribute to the parties an intention which they plainly could not have had.

- [26] In my judgment the relevant objective background facts to ascertain the parties intention at the time they executed the Agreement are: (a) the Defendant’s agreement with the Government of Grenada which was executed on 11<sup>th</sup> January 2007 (“the January 2007 agreement”); (b) the Defendant’s application for planning approvals from the Government of Grenada to develop Mt. Cinnamon; (c) the Master Plan which was part of the Defendant’s application for planning approvals and which was also given to Mrs. McNess; (d) the Brochure produced by the

Defendant to market Mt. Cinnamon which was also given to Mrs. McNess and; (e) the emails between the parties and their solicitors.

[27] In the January 2007 agreement the Defendant's intention at that time can be gleaned from the preamble which states "The intention of the Developer (the Defendant) is to construct and subsequently market for sale or lease residential development comprising of apartments, townhouses and villas commercial and retail offices and a hotel". In Clause 3.1 Spice Land Trading undertook to complete construction of "the hotel" no more than six years after the signing of the January 2007 agreement. At paragraph 14 of Mr. De Savary's witness statement he confirmed that at the time of the January 2007 agreement the buildings at Mt. Cinnamon were dilapidated and not habitable for a hotel purpose and he set out developing the site including construction of a hotel within the meaning of the January 2007 agreement, the laws of Grenada and the Hotel Aids Act. He stated under cross-examination that in his business as a tourism/hotel/real estate developer where he has 36 years experience, "refurbishment" of buildings amount to "construction" and he started construction of a hotel at Mt. Cinnamon in late 2006 which he completed in 2008. The Court notes that based on the January 2007 agreement there is a clear distinction by the Defendant between the villas on site and "the Hotel" which was to be construed.

[28] The Defendant's application for planning approval was dated 23<sup>rd</sup> April, 2007 approximately one year before the completion of the Agreement. Outline permission was granted on 3<sup>rd</sup> October, 2007. The application states that the Defendant applied for approval for "the development of a Hotel & Condo Apartments". In that same application the Defendant acknowledged that "The site is currently used for: (1) Hotel & Living accommodations (2) Restaurant & Bar facilities". On the last page of the application, reference is made to a Site Plan which is to be attached. It was not disputed that this was the Master Plan which was a large colour depiction of Mt Cinnamon which showed a "Luxury Hotel/Club on Grand Anse Beach with all resort amenities" marked "I" on the Master Plan. On

the face of this application to the relevant authorities it is reasonable to assume that the intention by the Defendant in April 2007 was to offer two different types of accommodation at Mt. Cinnamon, Hotel on the beach and Condo Apartment.

[29] However Mr. De Savary's evidence under cross-examination on the Defendant's stated intention as reflected in the said application was at best tenuous and inconsistent. He first stated that in the application for planning approval he may or may not have been intending to develop a hotel. Then he said he could not explain what "Hotel" is being referred to in the application for approval for "the development of a Hotel". Yet he later admitted that in part he was applying to the authorities for permission to put a hotel on the beach which he called "Hotel" as depicted on the Master Plan but he then stated that the application for planning approval for "Hotel and living accommodation" was an error.

[30] If I am to accept Mr. De Savary's explanation that it was an error, then I have to accept that the Defendant misled the relevant authorities in its application for planning approval but there was no evidence presented by the Defendant to indicate that it attempted to correct this error with the planning authorities such as an amended application. Indeed there was no evidence to demonstrate that it was an error since it was based on this very same approval that the Defendant proceeded with the refurbishment of the buildings and additional construction at Mt. Cinnamon.

[31] I do not accept the weak explanation proffered by Mr De Savary that the application for "Hotel and living accommodation" was an error. Mr De Savary appeared to me to be a shrewd businessman with extensive experience in the area of tourism/hotel/real estate development for the last 36 years. In my view, any shrewd businessman who was about to undertake such an extensive project would have taken all the appropriate steps to ensure that the proper application was made in terms of the type of accommodation which the Defendant intended to provide at Mt. Cinnamon.

[32] The Master Plan was given to Mrs. McNess in March-April 2007. According to Mrs. McNess, Guy Gittens showed her the area on the beach which was earmarked for the luxury hotel. He told her that the Defendant had begun discussions with the Marriott Group and that as an owner of a villa she would have access to the hotel and its up-market facilities. This was in part consistent with Mr. De Savary's evidence that the Claimants were informed by representatives from the Defendant that it was in discussions with owners of hotel brands but that these were only exploratory discussions. Mr. De Savary was adamant that his representatives, Guy Gittens, Mark Scott and Robin Chapman all told him that they did not represent the "precise nature of a hotel to be constructed" to the Claimants but this was inconsistent with Mrs. McNess' evidence that Guy Gittens showed her the area on the beach which was earmarked for the luxury hotel. In the absence of Mr. Gittens being present to refute Mrs. McNess' assertion I accept Mrs. McNess evidence. I cannot accept Mr. De Savary's assertion since he simply was not part of that conversation.

[33] Mrs. McNess stated that at the time the Agreement was executed, the word "Hotel" in Stipulation 4 was not the existing structures at Mt. Cinnamon but the construction of a new five star hotel situated on Grand Anse Beach as depicted as "I" on the Master plan. Under cross examination she admitted that the words "new hotel" were not stated in Stipulation 4 and that in the Agreement there is no reference to two hotels. She acknowledged that there was a "Note" on the Master Plan which stated "This master plan is for illustrative purposes and may be modified as necessary" and in her interpretation of "modify" was small, positive changes.

[34] Mr. De Savary acknowledged that the Claimants were given the Master Plan. At paragraph 22 of his witness statement Mr. De Savary explained the purpose of the plan which was "... to openly and clearly let buyers realize that the present gardens would be sufficient to a building density in the future of some sort". However under cross-examination Mr. De Savary admitted that some of the

facilities which were stated on the plan such as the pavilion, gym, horticultural shed, beach club, spa and restaurant were all built subsequently.

[35] I do not accept Mr. De Savary's explanation for the purpose of the plan. In my view, the purpose of the plan had to be more than Mr. De Savary's explanation since it was used as an important supporting document in the application to the relevant authorities for planning approval and to market Mt. Cinnamon to prospective buyers. It illustrated the proposed layout of Mt. Cinnamon, the types and location of accommodation to be provided i.e villas, condominiums, apartments, cottages and luxury hotel/club on Grand Anse Beach with all resort amenities, fractional units for fractional ownership, the location of the gardens, fish pond, pools, beach club, gym, tennis court, spa, restaurant and pool and the other facilities which it intended to build and offer. It was not coincidental that the construction of the said facilities were done just as illustrated on the Master Plan. While I accept that the proviso to the Master Plan was clear and that it was subject to modification, in my view the failure to construct a Hotel on the Grand Anse beach at Mt Cinnamon was not just a modification but a substantial alteration to a plan which was used by the Defendant to attract prospective purchasers.

[36] The Brochure given to Mrs. McNess contained a photograph of the buildings which now comprise the hotel referred to by the Defendant. The Brochure contained a plan of the site with the luxury hotel located on the beach. It referred to "21 turn-key fully furnished villas and apartments" which were then available for sale, and promised that purchasers would have available to them "all the benefits of the resort facilities including a hosts of recreational activities including beach cabanas, boats, diving, snorkeling, tennis, gymnasium, spa treatments and a private swimming pool and sun decks". It also referred to a "trendy, indoor/outdoor Italian style restaurant and bar" which would be at the purchaser's disposal. It promised that purchasers would also benefit from "a full management service and the opportunity to enter their homes into a rental pool." There was also listed all

the services and facilities which an owner would be provided including concierge services and a business centre.

[37] Mr. De Savary admitted that the Brochure which was given to Mrs. McNess was produced in 2007 to market Mt. Cinnamon. He stated that at the time the Brochure was produced Mt. Cinnamon did not have facilities such as a gym, tennis court or any structures on the beach. He confirmed that his original intention was to renovate the buildings at Mt. Cinnamon, to sell and then walk away. His intention was not to run a hotel comprising the existing villas, apartments, swimming pool, reception area, tennis court and restaurant since he claimed that in order for a facility to comprise a hotel the quality of everything on the property had to be of a higher standard such as there had to be a 24 hour service, rental of rooms for one day or a part of a day, intensive housekeeping, the provision of toiletries which are not provided in a rental pool. He intended to provide a rental unit programme under resort operations as opposed to a hotel. He stated that the “we” and “we take care” stated in the Brochure were referring to whoever owned Mt. Cinnamon and at the time he authorized that statement he was hoping that his partner would be the Ritz/Carlton. He admitted that there are facilities in existence at Mt. Cinnamon in 2013 which were not stated in the Brochure such as spa treatment on beach, beach club, yoga and dance studio and beach lounges.

[38] In my view Mr. De Savary’s evidence was inconsistent and cannot be reconciled with the information contained in the application for planning approval where it was stated that the site was “currently” used as a hotel. I therefore do not accept Mr. De Savary’s evidence that his intention when the Brochure was produced and given to Mrs. McNess was not to run a hotel. Indeed I find that this was indeed his intention.

[39] In an email dated 26<sup>th</sup> June, 2007 Mrs. McNess caused her solicitor to write to Mr Robin Chapman, the Defendant’s solicitor requesting that a condition be included in the Agreement that if the hotel was not opened in the next two years they would

have the option to sell the Villa back to the Defendant. According to Mrs. McNess the basis for such a request was that a hotel at Mt. Cinnamon would make "her investment all the more attractive". Mr. Chapman responded by email dated 29<sup>th</sup> June 2007 where he stated:

" We can give no assurances as to the timing of the opening of the hotel. A hotel is included in our plans. We are and have been in discussions with major hotel operators known to us one of whom (Marriott/Ritz Carlton) operates on our affiliated property in the Bahamas. A hotel makes commercial sense and that is your clients best assurance that there will be one. But we cannot reasonably be expected to be subject to a put option within two years. There is simply not enough time to build one. What we will do is at the option of the Purchaser, repurchase the Villa and pay legal costs capped at US \$50,000.00 if no hotel has been commenced within two years or completed within 5 years."

[40] However, Mr. Chapman's position appeared to be different in paragraph 9 of his witness statement where he stated:

"It is not usual to include such a clause in the Special Conditions as Stipulation 4 in our standard documents. No one else had it. But in this case, comfort was required by the buyers and Mr. De Savary instructed me that based on the ongoing, and anticipated construction on the site the company should reasonably meet those expectations. The hotel would be like some other De Savary hotels, partly old built" and "partly new built".

[41] Under cross-examination, Mr. Chapman admitted that he received the instructions from Mr. De Savary before he wrote the 29<sup>th</sup> June, 2007 email since he was not familiar with the activities on the site at Mt. Cinnamon. If I am to accept that Mr. Chapman was working with instructions from Mr. De Savary before he dispatched the 29<sup>th</sup> June, 2007 email to Mrs. McNess' Solicitor, then I have to conclude that since June 2007 when there was construction already going on at the site that it was Mr. De Savary's intention at that time to use the existing villas, reception building, restaurant and other facilities for a hotel which once in operation would be

the hotel being referred to in Stipulation 4. It therefore follows that if this was the position then I must find that Mr. Chapman misled Mrs. McNess in his email that the Defendant was going to construct a hotel on the beach which they were in discussion with Marriott and which he did not think could be built in two years. In my view if he was not referring to the hotel on the beach and he knew that construction was ongoing in June 2007 then he would not have expressed reservation about the time of two years to build the hotel.

[42] In subsequent emails the Defendant's intention to build a hotel on the beach which were separate and apart from the existing buildings was also evident. In a response to a query from Mrs. McNess about a reference in the First Schedule to the draft Standard Lot Agreement to "The Architectural Guidelines" which Mrs McNess had not seen, Mr. Chapman stated in his email dated 12<sup>th</sup> September 2007<sup>6</sup> that:

"The Architectural Guidelines are not completed yet. Mark Scott (Director) is drafting. They are not in point in the case of the Mount Cinnamon 21 units. The units are already built. The development is mature."

[43] Even in 2012, by an email dated 13<sup>th</sup> July, 2012<sup>7</sup> Mr. Mark Scott stated: "We have always made it abundantly clear that the beach site would be developed, initially when you purchased we were contemplating a 250 bedroom hotel."

[44] It is clear from the January 2007 agreement, the application for planning approval, the Master Plan, the Brochure and the emails between the parties and/or their legal representatives that it was the Defendant's intention to construct a new building on the Grand Anse Beach which was to be used for the purpose of a hotel. This structure was separate and apart from the refurbishment of the existing structures at Mt. Cinnamon which from the aforesaid documents were intended to be used as the villa hotel accommodation.

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<sup>6</sup> Document 31 of Claimants Bundle of Documents

<sup>7</sup> SVM 1

[45] Even if I accept Mr. De Savary's evidence that he started construction of a hotel at Mt Cinnamon in late 2006 which he completed in 2008, I still have to agree with the Claimants interpretation of Stipulation 4 because of the timeline established from the evidence of Mr. De Savary. The Defendant agreed in Stipulation 4 to commence construction of a hotel by the end of the third quarter of 2008, which Mr. De Savary agreed under cross-examination to be September 2008. Therefore it could not have been the same hotel which Mr. De Savary said he built and opened in July 2008 because according to the term agreed to in Stipulation 4 construction of the hotel was supposed to start in September 2008. In my view, this timeline points to the structure identified as "I" on the Master plan described as "Luxury Hotel/Club on Grand Anse Beach with all resort amenities".

[46] I therefore find that Stipulation 4 meant that at the time of the execution of the Agreement it was the Defendant's intention to construct a hotel which was not from the existing structures but a new building situated on the Grand Anse beach.

**Was there a binding obligation for the Defendant to repurchase the Villa under Stipulation 4 ?**

[47] At paragraph 7 of the amended Statement of Claim the Claimants pleaded that the binding obligation on the Defendants to repurchase the Villa upon the terms mentioned in Stipulation 4 came into effect on 13<sup>th</sup> April, 2010 when the First Notice was served on the Defendant. The completion date of the Agreement being 12<sup>th</sup> April, 2008. The material part of Stipulation 4 which deals with the obligation by the Defendant to repurchase the villa is:

"... At the option of the Purchaser the Vendor will repurchase the Villa at The Purchase Price and pay legal costs capped at US \$50,000.00 if no hotel has been commenced within two years or completed within 5 years from the Completion date."

[48] Having determined that the Defendant failed to construct a hotel within the meaning of Stipulation 4 of the Agreement, I have no difficulty in finding that upon the receipt of the First Notice the Defendant was bound to repurchase the Villa upon the terms mentioned in Stipulation 4.

**Did the Defendant breach the Agreement by not immediately repurchasing the Villa as demanded by the Claimants?**

[49] It was not in dispute that upon receipt of the First Notice the Defendant did not immediately repurchase the Villa. Even when the Defendant was served the Second Notice which gave it twenty one days from the 30<sup>th</sup> April, 2010 to repurchase the Villa it still failed to do so. I also find that the Defendant breached the Agreement by not immediately repurchasing the Villa.

**Are the damages claimed by the Claimants reasonable or reasonably foreseeable?**

[50] The Claimants have claimed damages for breach of contract. They have pleaded special damages for :

- (a) Concierge charges representing management and maintenance fees in the sum of \$24,080.00 for management and internal maintenance in respect of the Villa for the period June 2010 to September 2010 inclusive and continuing.
- (b) Property taxes in the sum of EC \$5,902.38 levied by the Government of Grenada for the Villa for the years 2010 to 2011 and which continued to accrue and billed annually.
- (c) Common parts charges representing utilities and insurance charges for the Villa and common areas and maintenance of common areas in the sum of US \$27,106.22 levied by Spice Land Trading Limited, pursuant to the Agreement for the period June 2010 to the end of the third quarter of 2011 and continuing.

- (d) Legal fees, stamp duty and charges paid pursuant to purchase of the Villa in the sum of US \$22,996.25.
- (e) Bank commitment fees levied by RBTT in respect of the negotiating a mortgage with the Bank for the acquisition of the Villa in the sum of EC\$15,000.00.

[51] In support of the aforesaid pleading, at paragraph 69 of Mrs. McNess witness statement she sets out the maintenance charges for the period May to November 2010 as EC \$8,928.63 and for January to March 2011 as EC \$15,152.35. Mrs. McNess also stated that further charges as stated in an email dated 30<sup>th</sup> October, 2011 in the sum of \$US 27,106.22 and the property taxes for 2010 and 2011 was EC \$2,951.19 for each year. In the closing submission filed by the Claimants they ask that any charges and property taxes paid subsequent to the date of Mrs. McNess witness statement which was made in January 2011 also be awarded.

[52] The measure of damages to be awarded for a breach of contract was set out by Justice Parke B in **Robinson v Harman**<sup>8</sup> where he stated:

“ the rule of the common law is, that where a party sustains loss by reason of a breach of contract, he is, so far as money can do it be placed in the same situation, with respect to damages, as if the contract had been performed.”

[53] However this broad rule is subject to the rule of remoteness as set out in **Hadley v Baxendale**<sup>9</sup> which limits the amount of damages to a reasonable sum :

“ Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie; accordingly to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the

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<sup>8</sup> (1848) 1Ex Rep 850 at 855

<sup>9</sup> [1854] 9 Exch 341

contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.”

[54] I will now deal with each item of special damages claimed by the Claimants. Under cross-examination Mrs. McNess admitted that her guests at Mt. Cinnamon have used all except two of the facilities at Mt. Cinnamon since they are not part of the rental pool. She stated that when the Claimants and guests are not in residence they ensured that the Villa is maintained. She also reiterated that the Claimants do not object to paying verifiable and accountable maintenance costs. However she has not set out any sum which she deems to be verifiable and accountable costs.

[55] In my view the Claimants are not entitled to be compensated for the concierge charges and the common parts charges since the evidence of the Second Claimant is the Claimants and their guests did enjoy some benefit. If they had paid these charges and they failed to benefit then in my view they would have suffered a loss. In this case I was not satisfied that the Claimants had proven that they had suffered any loss with respect to these items.

[56] Similarly, I do not award the Claimants claim for property taxes since they have continued to own, occupy and enjoy the benefits of the Villa during the period for which they have claimed. I also agree with the Defendant that the claim for property taxes is too remote from the breach of the Agreement to be awarded.

[57] The legal fees of US \$22,996.25 as claimed is awarded since it is covered under Stipulation 4.

[58] The Bank commitment fees in the sum of \$15,000.00 levied by RBTT on the Claimants when they were negotiating the mortgage to acquire the Villa are not awarded. These fees were incurred by the Claimants while they were fulfilling their obligation to complete the Agreement and is not linked to the breach of the

Agreement. In **Galoo Ltd and Others v Bright Grahame Murray**<sup>10</sup> Lord Justice Gildwell stated at page 1369:

“...I do not understand how the acceptance of a loan can, itself, be described as a loss causing damage. If anything it is a benefit to the borrower. Of course, a loss may result from the use to which the loan monies are put, but no such resultant loss is pleaded, and even if it were it might very well be difficult to attribute it to BGM”.

### **Whether interest is awardable and if so in what amount?**

[59] The rationale for the award of interest was enunciated by Lord Denning MR in **Jefford v Gee**<sup>11</sup> where he stated:

“Interest should not be awarded as compensation for the damage done. It should be awarded to a Plaintiff for being kept out of money which ought to be paid to him.”

[60] Having found that the Defendant had breached the Agreement the Court is satisfied that interest is awardable on the damages to be paid by the Defendant to the Claimants.

[61] At paragraph 3 of the Claimants Amended Statement of Claim the Claimants pleaded that : “the Claimants financed the said purchase in part by way of a loan from the RBTT bank in Grenada which loan carries interest at the rate of 7.5% per annum”. They have claimed interest at the rate of 7.5% per annum from 13<sup>th</sup> April, 2010 until payment on the purchase price of US \$972,500.00. At paragraph 44 of Mrs. McNess witness statement she explains that the Claimants took a mortgage to purchase the Villa and the rate of interest on the repayment of the mortgage is 7.5% per annum. I do not agree with Counsel for the Defendant that the Claimants have failed to specifically plead a special rate of interest. In my view they have

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<sup>10</sup> [1994] 1 WLR 1360

<sup>11</sup> [1970] 1 All ER 1202 at 1208

specifically pleaded this special rate of interest claimed at paragraph 3 of the amended Statement of Claim. Further, it is because of the Defendant's breach of the Agreement by failing to repurchase the Villa has resulted in the Claimants having to continue to repay the loan at the pleaded rate of interest.

- [62] In the circumstances, the Court awards interest as claimed which is 7.5% per annum from the 13<sup>th</sup> April, 2010 until payment.

**Order**

- [63] The Defendant is to repurchase the villa at the price of US \$ 972,500.00.
- [64] The Defendant is to pay interest on the sum of US \$972,500.00 at the rate of 7.5% per annum from the 13<sup>th</sup> April, 2010 to the date of payment.
- [65] The Defendant is to pay the Claimants legal fees, stamp duty and charges paid pursuant to the purchase of the Villa in the sum of US \$22,996.25.
- [66] The Defendant to pay the Claimants prescribed costs to be calculated by the parties.

**Margaret Y. Mohammed**  
High Court Judge