[2012] JMSC Civ. 44

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV 05095

BETWEEN	**ANDREW HARBOUR**	**CLAIMANT**
A N D	**PALMYRA RESORTS & SPA LTD**	**1ST DEFENDANT**
A N D	**PALMYRA PROPERTIES LTD**	**2ND DEFENDANT**

A N D

CLAIM NO. 2009 HCV 03815

BETWEEN	**STRATA INVEST OU**	**CLAIMANT**
A N D	**PALMYRA RESORTS & SPA LTD.**	**1ST DEFENDANT**
A N D	**PALMYRA PROPERTIES LTD.**	**2ND DEFENDANT**

Michael Hylton Q.C. and Sean Jackson for Claimant instructed by Michael Hylton and Associates.

Mrs. Nicole Foster-Pusey and Mrs. Elizabeth Salmon for 1st and 2nd Defendant instructed by Rattray Patterson and Rattray.

Mr. Kevin Cryst present for Defendants.

Heard: June 15, 2010; November 11, 2011, January 23, 2012

AGREEMENT OF SALE – VENDOR – PURCHASER – BUILDER – IMPLIED TERM FOR COMPLETION OF SALE WITHIN REASONABLE TIME – BREACH OF FUNDAMENTAL TERM – REMEDY – RIGHT TO REFUND OF DEPOSIT – RESCISSION OR REPUDIATION OF CONTRACT OF SALE – INTERPRETATION OF EXCEPTION OF LIABILITY CLAUSE FOR DELAY IN COMPLETION – DISCHARGE OF OBLIGATION OF PARTIES TO SALE AGREEMENT DUE TO FRUSTRATION OF CONTRACT

DAYE, J

By consent leave granted to hear claim 2009 HCV 05095 and 2009 HCV 03815 jointly.

[1] Palmyra Resorts and Spa at Rose Hall, St. James was introduced to the tourist market in February 2005 by its developers as the first phase development of a luxury five star beach front condominium hotel.

[2] This development was located on 16 acres of prime land adjacent to the Ritz Carlton Hotel, at Rose Hall, Montego Bay. It was opposite to the Rose Hall Great House, Rose Hall Golf Course, the Montego Bay Convention Centre and off the North Coast section of High Way 2000.

[3] The development was planned to have one – two – and three bedrooms apartments in two condominiums, otherwise called strata towers – Sabal Palm and Silver Palm. Each of these towers were to be built at 12 storey high. The development was also projected to have eleven (11) villas, a club house, spa and fitness centre, two pools and two gourmet restaurants. Owners of apartments and their guest would have access to a private enclosed beach, the Rose Hall Golf Course and other amenities such as shopping in a gated complex.

[4] The development was marketed in Travel and Hotel publications, on the internet and in newsletters posted on a website of the developers. The expected development phases and timetable for their completion were described in a Property Report which was sent to prospective purchasers of units, in the U.S.A. Both towers were scheduled to be completed in the first phase of the development.

[5] The 1st Claimant, Mr. Andrew Harbour of Georgia, U.S.A. who was a Certified Financial Planner received a copy of the Property Report dated December 2005 from the developers in early 2006. This was after he contacted

them on seeing an internet travel publication about the development. He believed it would be a good investment to purchase an apartment in this development. He deponed that the time for completion of this development was important to him. He further deponed that the Property Report he received had a detailed timetable for the completion of the construction of the apartments in the towers, infrastructure and specific facilities and amenities which was set for December 2007 (see paragraph 5 of Affidavit dated 24th September 2009). Based on these assurances he signed a Construction Agreement which stipulated that the construction of the apartment he intended to purchase would be completed by the 4th Quarter of 2007. All the time schedules were estimated date of completion set by the developers.

AGREEMENTS

[6] In fact Mr. Andrew Harbour signed two Agreements for the purchase of an apartment in this development or subdivision. The first is Strata Lot Agreement for Sale dated May 2006 with vendors Palmyra Resorts and Spa Ltd. for the purchase of strata lot Number A58 Unit 506 on the 5 level of the Sabal Palm Towers. He paid a deposit of $US 15,345.07, the equivalent of thirty (30) per cent of the purchase price of US $46,500.00.

[7] Then he signed a second Agreement for the construction of the condominium unit, dated the same May 2006 with builders, Palmyra Properties Ltd., an affiliate company of Palmyra Resorts and Spa Ltd., the first defendant. Under this Agreement he paid what represented a deposit of US $194,550.00. This sum was thirty (30) per cent of the purchase price of US $684,500.00. Thus, the total deposit he paid under both Agreements was US $209,855.00.

[8] Another prospective purchaser Mr. Viido Einer a businessman of Estonia who was visiting Jamaica in February 2008 saw the Palmyra Resorts and Spa development advertised. He was alerted by a representation that the Resort was set to be completed and opened for Autumn 2008. He obtained a brochure from

the sales office in Jamaica. He was impressed with the description of the development and the reviews international industry players gave it.

[9] As a result Mr. Viido Einer paid an earnest deposit of US $5,000.00 on behalf of his company Strata Invest OU. Then on the 13th June 2008 he signed two Agreements for the purchase of one of the apartment units in Palmyra Resort and Spa. The developers sent these Agreements to him in Estonia by post when he returned home. The Agreements are as follows: Strata Lot Agreement for Sale by Vendor Palmyra Resorts and Spa Ltd. of Strata Lot A93 Number 808 on the 8 level of Sabal Palm Towers for US $1,400,000.00. He paid a deposit of US $7,798.00 under this Agreement. The second Agreement was for the construction of the apartment. This was Agreement for Construction of Condominium unit made with the 2nd Defendant, Palmyra Properties Ltd. The estimated time for completion under this Agreement was the 3rd Quarter of 2008. He paid a deposit of US $199,335.00. The total payment under these Agreements was US $217,123.00.

[10] Both these claimants each demanded the full refund of their respective deposits from the 1st and 2nd Defendant. They base their claim on the ground that the respective Agreements with the defendant companies were terminated because each defendant failed to complete the building of the units within the stipulated time of completion. In other words, they contend the companies committed serious breaches of their Agreements with them which went to the root of their obligation. Therefore they contend the Agreements came to an end and they were not under any further obligation to fulfill any term and were entitled to the refund of their deposits. They also contended they were discharged of any further obligation under the Agreement because they were frustrated and consequently they were also entitled to a refund of their deposits.

[11] The 1st and 2nd Defendant companies refused to refund any of the deposits made by these Purchasers. They deny they committed any breach or

breaches of any of the Agreements. They accept there were delays meeting the projected completion dates but such delays did not amount to any breach and or breaches that terminate the Agreements. They assert the Agreements were still on foot and subsisted. They rely on the fact that Certificates of Practical Completion were issued for the apartments on 15th January 2010. Further they say the Architects Certificate of Delay dated December 3, 2009 under the Agreement protected them from any liability.

ISSUES

[12] The issues which arise from these claims are as follows:-

(a) Did the Developer/Vendor and/or contracted builder breach any of their Agreements with these Purchasers?

(b) In the absence of a specific date for the Vendor/Builder to complete the Agreements for Sale should there be an implied term that the Vendor/Builder will complete the Agreements for Sale within a reasonable time?

(c) If there is an implied term that the Agreement for Sale to each Purchaser should be completed in a reasonable time of signing, did the Developer/Vendor and/or Builder breach this term?

(d) If this implied term was breached was this a fundamental breach?

(e) Were the Purchasers entitled at law to terminate the Agreements for Sale and claim the refund of their deposits?

(f) Were the Developers/Vendor and/or Builder protected by any term in the Agreements for the delay or failure to complete the Agreements for Sale within a reasonable time?

(g) In the alternative were the Agreements for Sale terminated or frustrated due to the impossibility of the Developers/Vendor and/or Builder to perform their obligation to complete the Agreements for Sale.

SUBMISSIONS

[13] Mr. Michael Hylton Q.C. submitted in his written Submissions on behalf of each claimant Andrew Harbour and Strata Invest OU as follows:-

> *"… there is only one issue in this case, and that is whether it was a term of the Agreements that the Apartments would be completed by the 4th Quarter 2007 or within a reasonable time thereafter? If this was a term of the Agreements (an important term), … the claimant must succeed."*

[14] On the other hand, Counsel Mrs. Nicole Foster-Pusey submitted on behalf of the defendants in her written submission that:-

> *"2 the central issue for determination…*
>
> *(a) Whether the Defendants have breached the Agreements and further if yes, whether the breach or breaches entitled the Claimant to treat the contract as having been discharged; alternatively,*
>
> *(b) whether the Agreements have been terminated by reason of the operation of the doctrine of frustration.*
>
> *"3 the claimants is not entitled to succeed on either of the bases being pursued."*

The respective submissions of counsel for the parties cumulatively identified the issues as well as those formulated by the court.

THE LAW ON INTERPRETATION OF COMMERCIAL AGREEMENTS

[15] The Agreements for Sale between the parties are commercial contracts made between business persons. The claimants were business men who entered the Agreements for Sale to purchase the apartment Units because they considered them to be good investment. The Developers/Vendor are companies engaged in the business of developing brand name, luxury international properties in the hotel and resorts industry.

[16] In **Goblin Hill Hotel Ltd. v John Thompson** SCCA 57/2007, delivered December 19, 2008 Morrison, J.A. at p. 21 adopted the modern approach on the interpretation of documents enunciated by Lord Hoffman in the House of Lords decision of **Investor Compensation Scheme Ltd. v West Bromwich Building Society** [1998] 1 All ER 98, (at p. 118-115):-

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having the background of 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 facts", but this phrase is, if anything, an under 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 mentioned next, it includes anything which would affect 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 declaration 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…
>
> (4) The meaning which a document (or any other utterances) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of the words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable a reasonable man to choose between the possible meaning 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 **Mannal Investment Co. Ltd. v Eagle Star Life Insurance Co. Ltd.** [1997] A.C. 749.

(5) The "rule" that words should be given their "natural and ordinary meaning" reflect 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 to the parties an intention which they plainly could not have had. Lord Diplock make this point more vigorously when he said in **Antaios Compania Noviera S.A. v Salon Rederierna A.B.** [1985] A.C. 191, 201:

> ***"If detail semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flaunts business common sense, it must be made to yield to business common sense."***

[17] The successful appeal of the Thompsons to the Privy Council did not result in any change of these principles (**Thompson v Goblin Hill Hotels Ltd.** P.C. Appeal 0076 of 2009 delivered 10th March 2011).

SUBMISSION ON INTERPRETATION OF AGREEMENTS

[18] Mr. Hylton Q.C. submits the court ought to apply these principles to the respective Agreements for Sale. He further submits that the principles should be applied in particular to the issue: "Was it a term of the Agreements that the apartments would be completed by the 4th quarter of 2007 or within a reasonable time thereafter?" (Page 6, paragraph 16 of written submissions).

[19] Counsel continue his submission by answering that it must be that a term is implied in the Agreements that it would be completed in a reasonable time

after 4th quarter of 2007 based upon the terms of the Agreement and the "background and context" in which they were made (page 6, paragraph 17 of written submissions). This was consistent, he contends, with a true business common sense interpretation of the Agreements (page 8, paragraph 18 of written submissions). Naturally counsel proceeds to say the term was important and the Developers/Vendors breached it.

IMPLIED TERM

[20] The test to determine whether a term should be applied in a contract or Agreement was also considered by Morrison, J.A. in **Goblin Hill Hotels Ltd.** (supra) at page 29 – 32. He states (at page 32, paragraph 45):-

> ***"…the court in implying a term in a contract is generally seeking to give effect to the presumed intention of these parties" as collected from the words of the Agreement and the surrounding circumstances" (Chitty on Contracts, 29th edition Volume 1, paragraph 13-003).***

Then he added as follows:

> ***"To this extent there is therefore an obvious overlap between the principles of interpretation of, and implications of terms in a contract."***

[21] This judgment accepted that the modern law or test for implication of terms in a contract was formulated in the *ex tem pare* judgment of Bowen L.J. in the **Moorcock** [1889] 14 PD, 64, 68 C.H. who states (at page 68):-

> ***"…the law in raising on implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by implication as must have been intended at all events by both parties who are***

business men; not to impose on one side all the perils of the transaction, or to emancipate from one side all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances."

[22] Before it imply a term in a written contract a court should exercise care (per. Lord Green MR in **Shirlaw v Southern Foundries** (1920) Ltd. [1939] 2 All ER, 12. He stated the test for the implication of a term in written contract as (at p. 124, ibid.):-

"Prima Facie that which in any contract is left to be implied and need to be expressed is something so obvious that it goes without saying. Thus, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their Agreement, they would testily supress him with a common: 'oh of course'."

Morrison, J.A. showed that the Privy Council emphasized that the test for implication of a term was necessity – **Tai Hing Colton Mill Ltd. v Liu Chong Hing Bank Ltd. and Others** [1985] 2 All ER 947.

[23] It means that I will have to determine from the terms and surrounding circumstances if a term must be implied in Agreements of Sale signed by these two apartment unit purchasers that the Vendor and/or Builder would complete them within a reasonable time after 4th quarter of 2007 and autumn 2008 respectively.

[24] The court will then have to decide, if such a term exist, whether the Vendor and/or Builders breached it and if this was a fundamental term that entitled the respective purchasers to terminate the Agreements i.e. repudiate or rescind then and demand the refund of their deposits.

FUNDAMENTAL BREACH – DISCHARGE OF CONTRACT – REMEDY – REPUDIATION – RESCISSION

[25] Mr. Hylton Q.C. submitted and relied on the House of Lord decision **Swiss Atlantique Société d'Armement Maritime S.A. v N.V. Rotterdamache Kolen Centrol** [1996] 2 W.L.R. 944; [1967] 1 A.C. 361 as authority for the law on fundamental breach. Counsel for the Defendants took no issue with this authority.

[26] In this case an issue arose whether delays to load and discharge a vessel in the lay time by charterers who agreed under a charter party to charter a vessel from the ship owners for the carrying of coal from the United Stated (East Coast) to Europe for two (2) years consecutive voyage was a fundamental breach. The ship owners contend the vessel only made eight (8) round voyages at the end of the charter where but for the delay it could have made another six (6) to nine (9) voyages. They claim they were entitled to treat the charter party as repudiated due to delays in loading and unloading.

[27] There was a clause in the charter party that fixed agreed damages for delay of the vessel at the rate of £1000.00 per day. But the ship owner claim to recover damages at large which is at common law, from the charterers on the basis the demurrage clause did not apply as the delay was of such a serious breach that it was not covered by that clause.

DEVIATION

[28] Viscount Dilhorne firstly discussed the effect of deviation upon a contract of carriage by sea. He quoted Lord Atkins' view in **Huin Steamship Co. Ltd. v Tote and Lyle Ltd.** [1936] 2 All ER 597 that:-

> ***"…departure from the voyage contracted to be made is a breach of the ship owner of this contract, a breach of such a serious character that, however slight the deviation, the other party to the contract is entitled to treat it as going to the root***

of the contract, and to declare himself as no longer bound by its contract terms."

[29] His Lordship explained that deviation by a ship owner was treated like a breach of a condition of a contract which constitutes repudiation by one party and entitled the other party to accept the breach and treat the contract at an end and sue for damages or continue with the contract and sue for damages only for breach of it. The Court describes deviation as a fundamental breach or a breach of a fundamental term.

FUNDAMENTAL BREACH/FUNDAMENTAL TERM

[30] Viscount Dilhorne distinguishes fundamental breach and breach of fundamental term as:-

…a fundamental term was "something which underlie the whole contract so that, if it is not complied with, the performance becomes something totally different from that which the contract contemplates"

(Page 393 – 394)

"… a fundamental breach, one has to have regard to the character of the breach and determine whether in consequence of it the performance of the contract becomes something totally different from that which the contact contemplates."

Then Lord Reid at page 397 states:-

…the term "fundamental breach" is of recent origin and I can find nothing to indicate that it means either more or less that the well known type of breach which entitles the innocent party to treat it as repudiatory and to rescind the contract."

And he said (at p. 348):-

> ***"One way of looking at the matter would be to ask whether the party in breach has by his breach produced a situation fundamentally different from anything which the parties could as reasonable men have contemplated when the contract was made. Then one would have to ask not only what had already happen but also what was likely to happen in future."***

Lord Upjohn said of fundamental breach (at p. 421):-

> ***"…there is no magic in the words "fundamental breach", this expression is no more than a convenient short hand expression for saying that a particular breach or breaches of contract by one party is or are of such to go to the root of the contract which entitle the other party to treat such a breach or breaches as a repudiation of the whole contract. Whether such a breach or breaches do constitute a fundamental breach depends on the construction of the contract and on all the facts and circumstances of the case. The innocent party may accept the breach or breaches as repudiation and treat the whole contract at an end and sue for damages generally or he may at his option prefer to affirm the contract and treat it as continuing on foot in which case he can only sue for damages for breach or breaches of the particular stipulation or stipulations in the contract which have or have been broken."***

[31] So the question still remains whether the delays to complete these Agreements for Sale was a fundamental breach by the Developer/Vendor and/or Builder of the completion of the apartments in the Palmyra Resorts and Spa at Rose Hall, St. James. This is a "question of fact and degree in all the circumstances of the case" (per Lord Upjohn at p. 429).

[32] In **Swiss Atlantique** (supra) the House of Lords compared breach of a charter party due to delays for loading and discharging cargoes and breach of a

charter party due to deviation from the contracted route. Viscount Dilhorne concluded that delay in the performance of a charter party may amount to deviation and result in a fundamental breach. He said in an obiter dicta at p. 394:

> ***"Breach of a charter party by the detention of the vessel beyond the lay days by the charterers may, in my view, take on the character of a fundamental breach. If for instance there was a delay of many weeks in the loading of the vessel the consequence would be that the voyages, though in fact consecutive, would be totally different from those contemplated by the contract."***

He pointed out that a deliberate breach may amount to a fundamental breach though it may not lead to the conclusion that the performance of the contract become totally different from that contemplated.

[33] In **Swiss Atlantique** the House of Lord has to consider the ship owners claim that delay by the charterers to load and unload was not a single delay but a series of delays which were "accumulated" or "in the aggregate" or "amounted cumulatively" to a repudiation of the contract which entitled them to elect to treat the contract at an end and sail away. The House of Lords did not reject the claim that such delays could be a fundamental breach of the contract even though delay **per se** was not a serious breach that went to the root of the charter party. The series of extended dates for the completion of the apartment units of the Palmyra Resort and Spa could be similar to an aggregate or cumulative breach that amounted to a fundamental breach. This court must determine if there was such breaches.

[34] In **Dr. Frank Eribo Adekoye jo Odinaige** [2010] EW HC 301 (TCC) the claimants in the High Court Queen Board Division Technology and Construction Court raised the argument that there were several instances of delays to complete the renovation work and the cumulative effect amounted to a serious breach that went to the root of the contract which entitled them to elect to

terminate the contract which they did. The Deputy Judge agreed the claimant was entitled to terminate the contract as a result of the delay among other things. The judge summarized his findings hereunder (at para. 2, para. 67):-

> *"I have already said that the contract did not contain a fixed date for completion (for the purpose of liquidated damages) but …Dr. Lynda Eribo made clear that completion was to be by 26th December 2005 which was the target completion date, that date was missed… Subsequent to that date there were two promised completion dates. Both those dates were missed. But there was nothing that justified delay until September 2006… by autumn of 2006 they [Eribos] were both at the end of their tether. They had endured living apart beyond the target completion date, as extended. They had endured returning to the house some 6 months after the target completion date, but found themselves in an environment where little seemed to work and when it did work was wholly unreliable."*

[35] The judge concluded the claimants acted reasonably in terminating the contract. There is some common features between this case and the claim of Mr. Andrew Harbour and Mr. Viido Einer against the defendants Palmyra Resorts and Spa Ltd. and their affiliate company. Two factors stand out: there was a target completion date, the completion date was extended more than once and the works was still in progress. I am asked to apply the decision of this case to the instant claimants' contracts. Mrs. Nicole Foster-Pusey submitted the case was decided on its particular facts and to not provide any special principle which binds the court to follow.

[36] The case does appear to have features of an aggregate or cumulated delays in the completion of a contract. It is a matter of construction of the individual contract whether this amounts to a fundamental breach. It does appear that after Dr. Eribo returned to her home with her family after the extended completion date the performance of the contract was something

radically different from what the parties contracted. This was the private home of the claimant which she did not and could not have basic reasonable use and comfort or assurance of such comfort after the series of delay to renovate and refurbish her house. To this extent this case, though illustrative of the principle of fundamental breach due to cumulate delays, was limited to its peculiar facts.

[37] The Court of Appeal of England in **Hong Kong Fir Shipping Co. Ltd. v Kawasaki Kisan Keisha Ltd.** [1962] 2 Q.B. 26 had to consider delay due to breach of contract by the ship owners and if this was sufficient to entitle the charterers as innocent parties, that is, in no way to blame for what had happened to elect to terminate it. Counsel for the Defendants Mrs. Foster-Pusey submitted the test when a party can elect to terminate the contract is stated in this authority. She contends the claimants claim to terminate the Agreements for Sale does not meet the standard of this test. The test is that where delay is of such an extent that the breach is so serious as to go to the root of the contract the innocent party is entitled to rescind. The yard stick to measure the delay is whether such delay would frustrate the charter party or contract. Sellars L.J. said that the charterer may terminate the contract if the delay in remedying any breach is so long in fact, or likely to be so long in reasonable anticipation that the commercial purpose of the contract is frustrated. Upjohn L.J. explain frustration of the contract means the further performance of the contract become impossible. He also held that there was a breach of the stipulation by the ship owner to make the vessel sea worthy. He introduces the concept that stipulation of sea worthiness was an intermediate term between condition and warranty and in the present case it was not so serious to entitle the charterers to terminate the contract. Diplock L.J. stated the test as to whether an event will relieve a party of his undertaking to do that which he has agreed to do but has not yet done is if the occurrence of the event deprived the party who has further undertaking still to perform of substantially the whole benefit which it was the intention of the parties he should obtain as the consideration for performing those undertakings.

TERMS OF AGREEMENTS

[38] I now turn to examine the terms of the Strata Lot Agreements for Sale and the Agreement for the construction of condominium units.

STRATA LOT AGREEMENTS FOR SALE

[39] The duty or obligations of the Developer/Vendor Palmyra Resorts and Spa Ltd. to the Purchaser to complete the Units are set out at clause 16(f) and clause 14(e) of the respective Agreements of Mr. Andrew Harbour and Mr. Viido Einer. These terms or obligations are similar but are not the same Section 16(f) reads:-

> *"(i) Construct the Unit to the point that a Certificate of Title may be issued comprising the Unit… this will involve the walls, floor and ceiling of the Unit, and related physical support (…referred to as "the Basic Works") being erected so that the unit is a basic "shell" (that is in an un-rendered and un-painted state, without the electrical and plumbing fixtures and fittings other than conduits and pipes laid in the "shall", and without any other fixture or fittings.*
>
> *(ii) Cause a Certificate of Title for the strata lot comprising the unit to be issued and transferred to the Purchaser or the Purchasers' nominee pursuant to completion."*

FIRST CLAIMANT

[40] Mr. Andrew Harbour signed his Strata Agreement with Palmyra Resort and Spa Ltd. in May 2006. The Agreement commenced with the recital that the Vendor agrees to sell the purchasers a strata lot, called the Unit together with the undivided share in the common property called Unit entitlement. Strata Lot is defined as:

> *"The walls, floor and roof of condominium unit, the interior space within it, and the owner's interest in the common areas of the land upon which it is constructed.*

[41] The Property Report sent to Purchasers represented that the obligation of the Vendor under the Strata Lot Agreement was to build the basic structure and was expressly incorporated into this Agreement (clause 16(j)(viii)). Then part B of Agreement for construction of condominium Unit repeat the duty of Vendor in similar terms as quoted.

[42] Clause 5 of this Agreement provides that completion of the Sale of the Unit takes place when the Vendor send a Notice to the Purchaser that the Certificate of Title is issued, and that the balance of the purchase price is due and that an instrument of transfer is enclosed. There is no specific provision as to date of completion in this Agreement. The only references to date is contained in the clause of the Construction Agreement that estimated completion of construction is "the 4th Quarter of 2007". The Property Report includes a table which estimates December 2007 as the overall date for use of the several recreational facilities which were part of the 1st Phase of the development. The court as a matter of construction will examine the construction Agreement alongside the Strata Agreement to assist it in determining a time for the completion of Sale.

SECOND CLAIMANT

[43] Mr. Viido Einer signed his Strata Lot Agreement on the 14th June 2008 also with Palmyra Resorts and Spa Ltd. Clause 5 of this Agreement provided completion of the Sale of Unit occurs when the Vendor give the Purchaser notice that the Certificate of Title is issued and request the balance of purchase price.
No specific date is fixed for completion in the Strata Lot Agreement.
But an estimated date for completion of the construction of the Unit under the construction Agreement signed also on the 4th June 2008 was described as by the "3rd Quarter of 2008".

[44] There is no express clause in the Strata Lot Agreement that time shall be of the essence for the completion of the Sale of the unit by the Vendor. The inclusion of such a clause by the parties would mean that if it is breached the innocent party can elect to terminate the contract. There is a special condition clause 16(d) in the 1st Claimant's Agreement which provides time is the essence of the terms of Agreement by the Purchaser under the Agreement. It means that if there is a breach of the term to make any payment punctually by the Purchaser the Vendor has the right to terminate the Agreement. The Vendor also can rescind and terminate the Agreement if transfer tax assessed on the value of the property in the Agreement exceed the value given in the Agreement (clause 16(d).

[45] The Vendor is also empowered to terminate the Agreement if the Purchaser breaches any covenant, agreement or other obligation (see clause 16(a)). The Agreement then provides the steps that the Vendor can take to get refund or to forfeit money paid by the Purchaser under an Agreement that is terminated, or cancelled. The Property Report describe these remedies available to the Vendor under the section of the report titled Default.

[46] On the face of the terms contained in the special condition clause (16) of the Strata Lot Agreement with Mr. Andrew Harbour the right to terminate the Agreement was mainly and expressly conferred on the Vendor. In one instance the Purchaser is specifically given the right to terminate the Agreement so long certain conditions are satisfied. Clause 16 (c) deals with this and provides:-

> *"In the event the Vendor fail to comply with or perform any of the conditions to be complied with or any of the covenants, agreements or obligations to be performed by the Vendor under the terms and conditions of this Agreement, then the Purchaser shall be entitled to terminate this Agreement after providing written Notice to the Vendor and twenty-one (21) days after receipt of such notice to cure such default. If such default is not cured, then all such*

deposits with the Vendor shall be immediately returned to the Purchaser, and all further rights, obligations and liabilities created hereunder shall be deemed immediately terminated and of no further force and effect."

[47] Special condition clause 16 in Strata Lot Agreement signed by Mr. Andrew Harbour is similar but not exactly the same to special condition clause 14 in Strata Lot Agreement signed by Viido Einer. There are material differences and these affect the respective rights of the parties to terminate these Agreements.

[48] On the 20th November 2008 Attorney-at-Law in U.S.A. Shapiro Fussell for Mr. Andrew Harbour wrote to the Vendor requesting that the Agreements between them and the Purchaser be rescinded due to delays in completing the construction of unit. But the Vendors refused to entertain this request. Another firm of Attorney-at-Law in the U.S.A., Solomon Harris wrote to the Vendor on the 22nd April 2009 on behalf of Purchaser and notified them that time was of the essence of the Agreement of Sale between the parties. This was the first formal step the Purchaser took to terminate the Sale Agreement and to obtain a refund of his deposit.

[49] Although the special condition clause of the Strata Lot Agreements of Mr. Andrew Harbour and Mr. Viido Einer places similar obligations on the Vendor there are material differences. The special condition clause (14) Strata Lot Agreement of Mr. Viido Einer signed with Vendor is different from clause (16) of Mr. Andrew Harbour Strata Lot Agreement in these respect:-

(a) It has no provision which empower the Purchaser to terminate the Agreement with the Vendor.

(b) It has no clause that if Purchaser terminate the Agreement for sale then the Construction Agreement will be cancelled and the money paid to Palmyra Properties Ltd. shall be refundable.

(c) It has no provision incorporating the Property Report.

(d) It has no liquidated damage clause in favour of the Vendor to retain the deposit of the Purchaser for breach of the obligation to pay punctually.

(e) There is no such clause as 16(j) (i) to (vi) of Strata Lot Agreement of Mr. Andrew Harbour.

(f) There is no clause dealing with Notice and service of notice by Purchaser or Vendor.

(g) There is no clause that the Strata Lot Agreement is the entire Agreement between the parties and the exclusion of any representation made before or after the contract.

[50] The differences between clause 16 and clause 14 of the respective Strata Lot Agreements affect the claim and indeed the right of the claimant Mr. Viido Einer on behalf of his company Strata Invest OU to terminate or repudiate or rescind his Agreement of Sale with Palmyra Resorts and Spa Ltd. The differences also bear on the issue whether the court can find a term in the contract that the Vendor has an obligation to complete the contract within a reasonable time is a fundamental term.

FINDINGS AND APPLICATION OF LAW

[51] From the terms and background of the Strata Lot Agreements a reasonable man would conclude that:-

(a) The Agreements for Sale were Agreements for the purchase of real estate in a strata complex.

(b) The real estate was prime land developed in phases.

(c) The development was a major development by international developers.

(d) The development was introducing luxury tourism to the Jamaican market.

(e) The vendor left the date of completion open.

(f) The Strata Lot Agreements and the construction Agreements were interrelated and inter dependent and should be interpreted together.

(g) The Vendor did not consider the term for completion of the Strata Lot Agreement of the same or greater importance than the terms for payment of monies by the Purchaser.

(h) The Vendor shared the peril of the venture on their side of the Agreement by promising that there would be no escalation cost charged.

[52] Against the background I ask myself what is the meaning a reasonable Purchaser would place on the clause of completion in the Strata Lot Agreement that it would be completed when the Vendor send Notice the Certificate of Title is issued and the balance of purchase price is due. In the absence of a specific date for completion it would not be reasonable to say the date for completion was indefinite. In my view it would be consistent with "business common sense" to look at least at the estimated date set at "4th Quarter of 2007" in Mr. Andrew Harbour's Agreement as the starting point of a reasonable time to complete. I do not share Counsel Mrs. Pusey-Foster's view the estimated date is a mere promise to use best endeavour. The end point must take into account the nature, size of the development, the industry and market conditions.

[53] The development of which unit sale was a part was a luxury condominium hotel. The purchase of the unit was an investment in real estate in the tourism sector. These are all factors to be taken into account in a determination whether there should be implied in the Agreement for Sale a term that it should be completed within a reasonable time after the "4th Quarter of 2007". In my view is reasonable and necessary to imply in this Agreement for Sale so as to give it business efficacy a term that the Agreement would be completed within a reasonable time.

WHAT IS A REASONABLE TIME?

[54] The Firm of Attorney Solomon Harris in their letter to the Vendor claim sixteen (16) months after the "4th Quarter 2007" was beyond a reasonable time.

[55] The winter season in the tourism market in Jamaica commences in December each year and run to the end of March the following year. In my view a purchaser of a real estate such as an apartment or villa in this market would reasonably anticipate it would be ready for use at the beginning or not later than the end of the winter season. If the unit is not used by the owner personally then the owner would let it out to guest to earn rental income. A reasonable man who is informed of the use of properties in the tourism industry and winter season in Jamaica would consider that a reasonable time to complete this Agreement for Sale would not go beyond the next winter season after December 2007. This would translate to no later than March 2009. This would be 12 to 15 months after the first estimated date of completion "4th Quarter of December 2007".

[56] I would apply the same approach to the estimated date set for completion of the Agreement for Sale with Mr. Viido Einer on behalf of his company Strata Investment OU. This date for completion was by "3rd Quarter of 2008". This would be by September 2008. Using this date as the starting point a reasonable time of 12 months to 15 months would translate to between September to December 2009.

BREACH

[57] Mr. Andrew Harbour first complaint that the Vendor had breached the obligation to complete the Agreement for Sale within a reasonable time was November 2008. He deponed the Vendor's scheduled four additional dates to complete the sale after the initial 4th Quarter 2007. These other dates set for completion were spring 2008, June 2008, autumn 2008 and winter 2008. Up to April 2009 when Mr. Harbour's Attorney wrote the Vendor and up to September 2009 when he swore to his Affidavit the Agreement for Sale was not complete.

[58] In other words the Vendors have defaulted to issue to the Purchaser a Certificate of Title and a Notice demanding the balance of the purchase price up to April 2009. Counsel for 1st Defendant Palmyra Resorts and Spa Ltd. agree that no Certificate of Title was issued. But she explained the Certificate of Title could not be issued to a purchaser who seeks to terminate the Agreement. The Agreement of Sale was completed, she submitted becomes the basic shell and interior, wall, floor and roof of the Unit was ready at the time of the Suit and, the contracted builder was dealing with the interior and exterior work and furnishing (skeleton submissions paragraph 15 – 17). In the result Palmyra Resorts and Spa Ltd. deny they breached this Agreement.

[59] Mr. Kevin Cryst agrees in his Affidavit evidence that at the 4th Quarter of 2007 Mr. Harbour's Unit was not completed within the estimated time. The cause of this was, on his evidence, due to circumstances beyond the control of the Defendants which he list (paragraph 27 – 30 Affidavit). He deponed further that:

> *"… I… do verily believe that Unit 506 on 5 Level in the Sabal Palm is now at an advance stage of completion as is evidenced in the photos exhibited … and I do verily believe that the majority of what remains to be done in order to convey title to the Claimant, is administrative in nature and includes final health and safety checks."*

[60] Mr. Cryst answer is really an admission that no Certificate of Title was issued at end of December 2007. Using March 2009 as the end point of what is a reasonable time to complete the Agreement of Sale it means that the 1st Defendant would have breached its obligation to the Purchaser to complete Sale within a reasonable time even though the basic 'shell' may have been completed. I therefore find as a fact that the Vendors breached this Agreement. It is necessary to decide if the 1st Defendant is protected from liability by the exception or exemption clause they rely on under the Agreements.

[61] However, can the breach of an implied term to complete within a reasonable time the Agreement of Sale or the aggregate or accumulated delays in completion of the sale go to the root of the contract to entitle the innocent party to elect to terminate the contract? The answer is that the breach should cause the performance contract to be substantially different from what the parties contemplated. Mr. Andrew Harbour evidence on this is:

> *"11. In the last 2 years, the US economy and economies worldwide have deteriorated significantly and the Apartment would be worth substantially less now than it would have been worth at the end of 2007, had it been completed then as agreed."*

[62] Mrs. Nicole Foster-Pusey submits the nature of breach the Purchaser rely on does not deprive the Purchaser of substantially the whole benefit which the Purchaser should obtain from the further performance of their own contractual undertaking.

[63] Market conditions may have changed between the time the purchaser signed the contract and up to the time he commenced suit. But this fact by itself does not mean the performance of the contract of sale would be substantially different or the commercial purpose of the contract will be frustrated. The Agreement for Sale is for the purchase of real estate to be used for a private residence and which may be let for rental income. The Apartment could be completed by the Vendor for use as a residence and rental. The Purchaser has not adduced any evidence or data to compare the difference in value or the prices of real estate movement between 2007 to 2009 in USA and Jamaica to support any substantial change downwards in the value of the real estate. So I cannot hold that the breach or delay undermines the whole contract. He would not be able to elect to terminate the contract and demand a refund of his deposits only on this ground.

[64] Nor does the breach or delay entitled the Purchaser to terminate the contract due to some event that has occurred without the fault of either party that make performance of the contract frustrated, that is, something different from what the parties contemplated.

[65] Mr. Andrew Harbour served notice making time the essence of the contract and demanded that the Vendor remedy any obligation he has defaulted on. On the 20th April 2009 Mr. Harbour did just that. The Vendor failed to complete the contract within the time specified in the notice so the provision of clause 16(3) in the contract that gave the Purchaser the right to terminate the Agreement and demand a refund of his deposit govern the parties.

[66] This provision give the Purchaser the power to also terminate or cancel the construction contract with the builder Palmyra Resort Properties Ltd. and the Builder is bound to refund all money under the contract.

[67] I apply the same reasoning on the meaning and terms of the Strata Lot Agreement between 1st Defendant and Andrew Harbour to the Strata Lot Agreement between the 1st Defendant and Mr. Viido Einer. I therefore hold that business efficacy necessitate that an implied term that the Vendor complete the Agreement of Sale within a reasonable time of the estimated date of 3rd Quarter of 2008 was contemplated by the parties. Such reasonable time would be 12 months to 15 months and would be by September 2009. There was a breach of this implied term. This breach was not a fundamental breach. This Agreement did not have any contractual terms whatsoever where the Purchaser could serve the Vendor notice and thus make time the essence of the contract. Consequently Mr. Viido Einer would not have the right to elect to terminate this Agreement of Sale and demand refund of his deposit. If there was a breach of this Agreement as I found then the purchaser can sue for damages for breach of contract only.

[68] One would have to look next to the Construction Agreement to see if the Purchaser/Client could terminate that Agreement for breach of the contract due to delays or he was discharged from further performance of the contract as a result of the reason the contracted builder gives for the delay. Mr. Kevin Cryst deponed that the reason for the delay for completing the Agreements with Mr. Harbour and Mr. Einer was beyond the defendant's control. He does not differentiate between the Vendor and contracted builder or which of the two Agreements he was addressing. However his detailed explanation appears to relate to several difficulties the 2nd Defendant was having with the general contractor and sub contractors.

[69] His evidence is that the reasons for delay in completing Unit 506 or the 5th level in the Sabal Palm Tower are:

> "27 … circumstances beyond the control of the Defendants, including but not limited to:
>
> (i) Work stoppage (strikes)
> (ii) Inclement weather
> (iii) Storage of material
> (iv) Delay in arrival of material shipped from China
> (v) Theft of material
> (vi) Non-performance of general contractor
> (vii) Decline in production
> (viii) Unscrupulous sub contractor
> (ix) Insolvency of entity contracted to construct power plant."

Counsel for the Defendants Mrs. Foster-Pusey submitted clause 10(1) of Construction Agreement exempted the contracted builder from liability for the very delays listed. Counsel submitted also that the architect certificate issued explained the delays. She submitted further that the certificate delay fell within clause 10(1) and the Agreement stipulate that the architect certificate was conclusive.

DEFENCE

[70] This defence raises two issues/viz, whether:

> *The construction contract was frustrated due to delay beyond the control of the contracted builder and whether an exception, exemption or limitation clause inserted in a contract to protect one party about the occurrence of an event can excuse liability for a fundamental breach.*

FRUSTRATION

[71] In the House of Lords decision **Davis Contractors Ltd. v. Fareham Urban District Council** (1956) 2 All ER 145 at Lord Radcliff enunciates the modern approach of frustration:

> ***… frustration occurs whenever the law recognizes that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.***

He then added:

> ***… special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which call the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed be a different thing from that contracted."***

[72] Lord Reid's approach was that frustration depends on the construction of the terms of the contract, in light of the nature of the contract and the relevant circumstances when the contract was made and the events which have occurred.

Viscount Simonds opined the doctrine of frustration did not operate where, without the default of either party, there had been an unexpected turn of events which render the contract more onerous than the parties had contemplated. He emphasized that by itself was not a ground for relieving a party of the obligation he has undertaken.

[73] The case was a building contract where a firm of building contractors tender was accepted by the Housing Authority to build 78 houses within 8 months at a fixed price. It took 22 months to complete the construction due to delay as there was inadequate skilled labour available. The contractor claim that he should be paid the fixed price because the contract was terminated due to delay and that he should be paid rather a fair price on **quantum meruit**.

[74] The House of Lords held the delay did not make the performance of the builder's obligation something radically different from what was contemplated nor was the job a different kind of what was contemplated in the contract. It only made his obligation only more onerous and the contractor was not entitled to any additional payment. The court found that a contractor who make a fixed contract undertakes the risk that the cost may increase due to delay without the fault on any party. The delay was not unforeseen or unexpected and contractors can protect themselves by inserting a clause to cover this event. A clause may be inserted that extra time may be required to complete contract. The other party takes the risk of delay but not the risk of the cost being increased by such delay.

[75] Applying the principle to Palmyra Resorts and Properties the 2nd Defendant, it is my view the delays listed by Mr. Kevin Cryst supported by the Architect Certificate did not cause the building of the apartments to be something different from what the Construction Agreement contemplated. The details Mr. Kevin Cryst describes regarding the tardiness and unsatisfactory conduct of the general contractor and sub-contractors only showed the building contract with the Purchaser was more onerous and there was hardship and inconvenience

explained by the builder. This delay does not avail to terminate the contractor's contracts between Palmyra Resorts and Properties with Mr. Andrew Harbour and Mr. Viido Einer.

EXEMPTION, EXCEPTION/LIMITATION CLAUSE

[76] The Privy Council had to consider the effect of a year delay to complete a contract for the sale and purchase of flat by twenty-four (24) purchasers in two tower blocks due to landslip in **Wong Lou Ying and Ors. v. Chinachem Investment Co. Ltd.** 1980 WL 14973 (Privy Council), 13 B.L.R. 81 [1980] HKLR. They also had to consider if the landslip frustrated the contracts whether a particular clause in the contract covered the frustrating event.

[77] The Purchasers wanted the Vendors to complete the flats 2 years after the landslip from a hillside that had destroyed a 13 tower building and the construction works on the land for their building. Lord Scarman held the landslip was a major interruption fundamentally changing the character and duration of the contract performance. In other words the event was an unforeseen natural disaster. The issue was whether the clause in question permitted the Vendor to terminate the contract for this unforeseen natural disaster. The Court found the clause did not make provision for the possibility of this particular unforeseen contingency. They found the clause did not show an intention that the doctrine of frustration should not apply. The Court held the Vendor was relieved of a performance as something radically different from that which he originally undertook was required. The purchaser was entitled to be repaid her money with interest from the date of payment.

[78] Now this Court has to consider if clause 10(1) of the Construction Agreement and the issue of the Architect Certificate about the cause of the delay prevented the Purchaser from terminating the building contract. It is an exemption of liability clause. It contains a wide range of causes for delay. As a matter of construction one has to look at each type of delay and ask whether it

was the intention of the parties that the specific delay is inconsistent with frustration. In other words if the event occurs and make performance of the contract radically different from what the parties intended then the contract can be terminated and they are relieved from further obligation. In other terms did the Vendor and Purchaser intend that the breach should go to root of the contract with the contracted builder so that the Purchaser who is not in default cannot terminate the contract.

[79] The manner in which this clause is drafted is that there was a class of delays caused by acts of God and circumstances beyond the control of the Vendor. There is another class of delay which relates to industrial action. These types of delay are not the same. For example, a delay caused by an earthquake has a different effect from a delay caused by "inclement weather". As a matter of construction of contract an exemption clause inserted for one party's benefit must be unambiguous to include a fundamental breach. Such clauses must be construed strictly and if ambiguous the narrower meaning will be applied. If the terms of the clause are too wide they cannot be taken literally (**Swiss Atlantique** (supra) p. 398, 399, 405, 406 415, 427). The whole contract which contains the clause excluding liability does survive if a party elect to affirm a fundamental breach. But the party in breach cannot rely on the exclusion clause unless it is clear.

[80] Therefore, clause 10(1) of the Construction Agreement has to be construed strictly against the "proferen", which is the builder, where it seeks to exclude liability for breach of a fundamental term.

[81] In construction contracts architects certificate are held to binding. The purchaser did not challenge the claim that certain events listed in the certificate occurred. But a vendor cannot use an architect's certificate to frustrate the commercial purpose of the contract which was to complete the sale within a reasonable time set for its completion. I therefore hold that the architect's

certificate cannot avail the builder for the breach of the implied term to complete the construction within a reasonable time.

CONCLUSION

[82] The Court therefore declares in relation to Claimant Andrew Harbour that:-

1. The Strata Lot Sale Agreement made with the 1st Defendant Palmyra Resorts and Spa Limited on May 10, 2006 for Strata Lot number A58 Unit 506 located in the Sabal Palm Building part of Palmyra Resort and Spa at Rose Hall, St. James has been terminated, consequently upon the Defendant's breaches.

2. The Condominium Construction Agreement made with the 2nd Defendant Palmyra Properties Limited on 10th May 2006 for the construction on Lot No. A58 Unit 506 located in the Sabal Palm Building part of Palmyra Resorts and Spa at Rose Hall, St. James has been terminated consequent upon the Defendant's breach.

3. It is ordered that the 1st Defendant pay to the Claimant the sum of US$15,345.00 being the sum paid by the Claimant as deposit under the said Strata Lot Agreement.

4. It is ordered that the 2nd Defendant pay to the Claimant the sum of US$194,550.00 being the sum paid by the Claimant as deposit under the said Construction Agreement.

5. That the 1st Defendant pay the Claimant interest at the rate of 9% per annum from June 30, 2009 to the date of Judgment.

6. That the 2nd Defendant pay the Claimant interest on the said sum at the rate of 9% per annum from June 30, 2009 until date of Judgment.

7. Costs to the Claimant against the 1st Defendant to be agreed or taxed.

8. Costs to the Claimant against the 2nd Defendant to be agreed or taxed.

[83] In relation to the Claimant Strata Invest OU, it is declared:-

1. That Strata Lot Agreement entered between the Claimant and the 1st Defendant on or about July 8, 2008 in relation to Strata Lot number A93 unit number 808 located on the 8 level of the building designated Sabal Palm has not been terminated.

2. No order that the 1st Defendant pay to the Claimant the sum of US$7,798.00 paid by the claimant as deposit pursuant to the said Agreement.

3. No order that the 2nd Defendant pay to the Claimant the sum of US$199,335.00 paid by the Claimant as deposit pursuant to the said Agreement.

4. That Strata Lot Agreement for Sale made with the 1st Defendant on or about July 8, 2008 in relation to Strata Lot number A93 Unit 808 located on the 8 level of the building designated Sabal Palm subsists.

5. That Condominium Construction Agreement made with the 2nd Defendant on or about June 2008 for the construction of unit 808 located on the 8 level of the building designated Sabal Palm subsists.

6. Costs to the 1st Defendant against the Claimant for Strata Lot Agreement to be agreed or taxed.

7. Costs to the 2nd Defendant against the Claimant on Construction Agreement to be agreed or taxed.