IN THE SUPREME COURT **ACTION NO. CL 23/06**
TURKS AND CAICOS ISLANDS

BETWEEN

(1) PRECISION DEVELOPMENTS LTD.

(2) MANDALAY RESORTS LTD. **Plaintiffs**

-and-

JEANETTE CARIBBEAN COMPANY LIMITED **Defendant**

Mr. James Thom QC and Mr. Stephen Wilson for the Plaintiffs
Mr. James Corbett QC and Mr. Tim Prudhoe for the Defendant

Hearing: 30 November - 1 December 2006
10 January - 13 January 2007

JUDGMENT

1. Precision Developments Ltd. (Precision) seeks specific performance of an Agreement (the Agreement) entered into with Jeanette Caribbean Company Limited (JC) on 6 August 2004, to purchase two adjacent plots of beach front land on Grace Bay, Providenciales, comprising 17.1 acres, and to develop a substantial condominium complex thereon in two Phases, known as Mandalay, through its wholly owned subsidiary, Mandalay Resorts Ltd.

2. This claim has generated some 62 pages of pleadings and 139 pages of affidavits (Bundle A), 628 pages of documents (Bundle B), four bundles containing some 86 authorities (Bundles C1, C2, D1, D2), and 161 pages of written submissions. Reference, where necessary, to authority and affidavit will be by Bundle letter and tab number and, where a document, by Bundle and page number. The hearing lasted some 6 days.

3. Originally Mr. Thom, Queen's Counsel for the Plaintiffs, identified some 16 issues raised on the pleadings, but he and Mr. James Corbett, Queen's Counsel for the Defendant, who had been instructed by JC by the time of the resumed hearing in January 2007, very sensibly reduced these, so that I have to decide four essential issues. I am very grateful to counsel for their careful arguments, both written and oral.

4. In summary, Precision asserts that the Agreement constituted a mutually binding agreement in which time was not of the essence, that it effected payment on the due date, alternatively was willing and able, and remains willing and able, to complete, but was prevented from doing so by JC's insistence that it complied with Conditions, which JC was not entitled to do as, on a proper construction, such were not made Conditions Precedent to completion. JC asserts that the Agreement was an option to purchase and develop in which time was of the essence, that in any event the Agreement expressly made time of the essence, and that Precision failed to pay and comply with Conditions Precedent to completion by the due date, so that Precision never exercised its option.

5. The essential issues can, therefore, be tabulated as follows:

A. Is the Agreement an option to purchase, in which time would be of the essence, or an immediately binding agreement?

B. Even if the latter, was time made of the essence in the Agreement?

C. Did Precision fail to pay by 31 March 2006?

D. What was the effect of Precision's failure to perform the Conditions Precedent by 31 March 3006?

6. The answer to these questions depends essentially upon construction and analysis of the Agreement as a whole, having considered its individual clauses. In doing this, both Leading Counsel accepted that I should adopt the five principles of interpretation set out by Lord Hoffmann in his speech in Investors Compensation Scheme Ltd. v West Bromwich Building Society (1998) 1 WLR 896, (C1, tab 15) at 912. I accept, therefore, that the references to pre-contractual negotiations and subsequent conduct contained in the affidavits are essentially irrelevant. In any event in the Agreement the second paragraph of Clause 9.1 states: *"This Agreement contains the entire agreement of the Parties and no prior agreements not contained herein shall be of any force or effect."* The Agreement also makes one stipulation as to interpretation in Clause 10 which states:

"10.1.1. Headings/Subdivisions/Paragraphs-Paragraph headings, subdivisions and paragraphs herein are for reference only and shall have no legal effect respecting the scope, meaning or intent of the provisions of this Agreement."

A. Is the Agreement on its proper construction an Option to Purchase?

7. It was accepted that the Agreement was either an option, in which event time was of the essence, or an immediately binding agreement, and the fact that either might be more properly described as a hybrid, made no difference to its legal effect.

8. Mr. Thom argued that it was not an option, even of a hybrid variety. Nowhere is it described as such. Further, its drafters actually used the word “option” when referring to JC’s option to purchase three condominium suites in Clause 8, which is a strong indication that, when using the description “exclusive right” in Clause 1.1, they meant something different. He argued that the manner in which an option is exercised has to be precise, and the machinery for acceptance is usually set out in the option, such as the giving of notice, as it is in relation to the option in Clause 8.2, so that the parties know when they are moving from option to bilateral contract. No such machinery exists here. He also stressed that the language of the Agreement was essentially mandatory rather than permissive.

9. He accepted that the reference to *“grant”* and *“grants”* in paragraphs B and Clause 1.1 respectively, were consistent with an option, but submitted that the mandatory subdivisions in Clauses 2.1 and 2.2 were consistent with an immediately binding agreement, as was the obligation to pay in Clause 5.1. Precision is made solely responsible for the Proposed Development under Clause 3.1 and for disclosure and liability to prospective purchasers under Clause 7, which, he said, were contrary to the notion of an option, as was the immediate authorization given to Precision to effect removal of incumbrances under Clause 6.3.

10. He submitted that consideration in an option normally moves from the grantee only and that, once exercised, the mutual promises in the bilateral contract are sufficient consideration for each party. However, in this Agreement, consideration moves in both directions, which indicates a bilateral agreement at inception. In relation to this submission, although it was accepted that a dollar never was passed back and forth across the table, the submission of failure of consideration was abandoned, and I do not consider that this provision assists in determining the true nature of the Agreement.

11. He pointed out that under the Agreement Precision had to do a number of things prior to completion, such as effecting mutation, removing incumbrances, and making disclosure to prospective purchasers of condominium suites. Further, JC had obligations under Clause 3, such as providing consent to the mutation and to planning applications, and authorizing removal of incumbrances. This mutuality of obligation, together with the fact that Precision would be involved in significant expenditure prior to completion, was inconsistent with an option, but was consistent with JC being obliged to sell and Precision to purchase the land. Had the value of the land fallen, JC could, if necessary, have sought specific performance of the Agreement. Nowhere does the Agreement say that Precision is not bound to purchase, or had the legal right to walk away at any stage. It would make no commercial sense for JC to tie up the sale price for almost 18 months if there was no comeback if Precision failed to proceed.

12. Why, Mr. Thom asked, if this was an option, which could not be exercised save on payment and satisfaction of the Conditions Precedent, was Clause 5.2 included to expressly extinguish Precision’s rights and entitlements under the Agreement in the event of such failures?

13. He also submitted that Mr. Prudhoe's action in serving default notices, and his apparent willingness to accept payment at a later date in his letter of 3 April 2006 (B295), were inconsistent with his assertion, in earlier correspondence, that the Agreement was an option. Even if this was evidence that I could have regard to, which I am far from satisfied that I can, it cannot be determinative as to the nature of the Agreement, which is essentially to be discovered from its content.

14. Mr. Corbett countered that nowhere is the Agreement described as an agreement for sale and purchase. An option is a right to execute or relinquish a transaction on fixed terms within a prescribed period (see: Barnsley's Land Options, 4th Ed, D2, tab 1), and an option to buy land can properly be described as a contract for the sale of that land conditional on the exercise of an option (see Hoffmann J in Spiro v Glencrown Properties Ltd. (1991) Ch 537 at 541; D2, tab 2). He denied that the Agreement created any obligation upon Precision to buy the land, but only a right to purchase. The obligation on JC, the grantor, was to preserve a right for Precision to do that until 31 March 2006. Therefore JC was bound, and Precision was free. Precision was under no obligation to exercise its right under the Agreement and JC had no remedy if Precision decided not to do so. A machinery for acceptance was contained in Clause.5.1(i), namely payment and compliance with the Conditions Precedent. The fact of mutation did not give any right to, or impose any obligation on, Precision.

15. I was referred to a decision of the Supreme Court of Canada in Politzer v Metropolitan Homes Ltd. 54 D.L.R. 376 (D1, tab 18) in which Dickson J. held that the label given to an agreement by the parties is not necessarily determinative. It is the substance of the document, collected from its entirety, rather than form, which must determine its character. Mutuality of obligation was held to be the determining factor for a binding agreement, which is lacking if no one is bound to buy.

16. Bearing these judicial dicta and the submissions of counsel in mind, I turn to the wording of the Agreement itself (B140). Having described the land, the Agreement then states:

> *"B. Whereas JC has agreed to grant to Precision the exclusive right to purchase and develop the Entire Property as a condominium development.*

NOW THEREFORE *in consideration of one dollar (US$1) given by each of the Parties to the other and other good and valuable consideration (the receipt and sufficiency whereof being hereby acknowledged)* ***IT IS AGREED AS FOLLOWS****:*

> *1.0 Right to Develop and Purchase*
>
> *1.1 JC grants to Precision the exclusive right to purchase and develop the Entire Property as a beachfront condominium development (hereinafter "the Proposed Development") subject to the terms of this Agreement."*

17. As I have indicated, Mr. Thom accepts that the reference to the grant of an exclusive right is the language of an option. It is difficult to see how it could be construed otherwise. Not only is Precision granted a right, but an exclusive right, to purchase and develop. No one suggests that this is open-ended and it is accepted that, if time is of the essence, payment had to be made in relation to Phase 1 on or before March 31 2006. The exercise of that right is fundamental to the Agreement. I do not consider that the nature of this exclusive right is compromised by the use of the word option elsewhere in the Agreement in relation to the purchase of three condominium suites in each Phase. I derive no assistance from the heading of the Agreement as a licence.

18. In my view it is essential, when construing this Agreement, to keep in mind that the Agreement grants an exclusive right, not only to purchase the land, but to develop it. One could not have one without the other. Clause 9.2 states in terms that JC is entering into the Agreement because of its reliance and belief in the ability of Precision and its principal owner, Sean Reid, to perform all of the obligations and duties of Precision thereunder, which could not be assigned. In other words, JC had placed personalized reliance on Precision to be able to carry out JC's objectives, which were not simply the sale of the land but the development that was to take place thereafter, and I consider that these two objectives are fundamental to the construction and understanding of the Agreement.

19. Having considered the Agreement in its entirety, I have been quite unable to find any obligation upon Precision to purchase or to carry out any of the measures that were necessary if it wished to complete, nor any remedy given to JC if it failed to do so. I cannot accept the suggestion that such an obligation exists unless the contrary is stated. It is true that the Agreement contemplates that Precision has to do certain things if it wants to exercise its right to purchase and develop, such as mutation, but there is no obligation upon it to do so if it decides not to exercise that right. Further, the so called obligations upon JC were simply to facilitate Precision in being able to put itself in a position to exercise its right to purchase and develop. I accept that some of the things that Precision had to do involved expenditure, the benefit of which would be lost if it did not, or was unable to, exercise its right, for example if it could not raise the money to pay the purchase price on the due date; but that was one of the risks that Precision had to take, and it knew that that would be the effect of such a failure at the time it incurred such expenditure.

20. If one stands back and considers what the Agreement would convey to a reasonable person with the same background as the parties, it is surely this. JC, the grantor, is saying to Precision, or more realistically what Mr. Coggins is saying to Mr. Reid: I have a prime piece of land on Grace Bay. I want it developed into a condominium complex, without entering into a joint venture. I want to give you the opportunity to do that. You can do that in two Phases, and the land can be mutated to that end, but you have got to successfully complete the first to be able to move on the second. You cannot do either unless you can pay for the part you are going to develop, and be ready to get on with the development as soon as you do so. I will keep open your option to do this until

31 March 2006. Time is of the essence and, if you are unable or unwilling to exercise your option by the due date, then I am free to get myself another purchaser/developer.

21. JC was, therefore, making an irrevocable offer to Precision to contract, and Precision had a choice as to whether or not to accept that offer within a specified period of time, which Mr. Thom accepted was the essence of an option. It is not for this Court to go behind the Agreement and ask why JC would want to tie up its land, and its price, in this way. Taking steps to make payment in relation to Phase 1 would give the grantor notice of an intention by the grantee to exercise the option, enabling the grantor to seek assurance that the Conditions Precedent had been satisfied.

22. In the result, I am quite satisfied that this Agreement constituted an option to purchase and develop, which gave Precision a choice, namely to exercise or not exercise its right within a certain time, and gave no recourse against Precision if it did not exercise it.

B. Is time made of the essence by Clause 9.1?

23. If I am wrong about that, and the Agreement was immediately and mutually binding, the Court has to decide whether time was made of the essence by the words "*Time is of the essence in this Agreement"* (B147) in Clause 9.1.

24. Mr. Thom accepts that such words would usually mean what they say. However, if they meant that in this case, what is the point, he asks, of having detailed default provisions in Clause 9.5 (B148)? A party is entitled, under Clause 9.5(a) to serve a notice on the defaulting party in relation to failure to perform a financial obligation, which would include a failure to pay by the due date under Clause 5.1(i), and give 21 days in which to cure the default. Such default provisions are inconsistent with time being of the essence. Therefore, he argued, the Court should construe the Agreement as intending to prefer those detailed default provisions, rather than the brief sentence in 9.1.

25. Mr. Corbett explained that the default provisions apply only to default of an obligation, and therefore do not apply to the exercise of a right. In any event Clause 9.5(a) referred to other financial obligations, which were not Conditions Precedent to the inception of the Agreement, such as that in Clause 4.2. He submitted, therefore, that the stark inconsistency contended for by Mr. Thom did not exist. He referred to Yien Yieh Commercial Bank Ltd v Kwai Chung Cold Storage C. Ltd. (1989) 2 HKLR 639 (D1, tab 13), in which Lord Goff of Chieveley at 645 stressed that the rewriting of a contract, by rejecting one clause as inconsistent with another, can only be justified where they are in truth irreconcilable. Mr. Corbett urged that this was not the case here. In order to escape the plain words of Clause 9.1, Precision would have to show that the Clause was included in error, and seek rectification.

26. In my view the words of Clause 9.1 are incapable of being any clearer, and I am unable to accept that any inconsistency with 9.5 is such as to give the Court a basis for

putting a line through them which is, in effect, what Mr. Thom is inviting me to do. The Court is driven to infer that the parties intended precisely what they said, namely to make time of the essence, and such a clear indication of intention must prevail over any arguably inconsistent default provisions. Therefore, even if this was an immediately binding Agreement, I find that time was expressly made of the essence.

C. Did Precision fail to pay by 31 March 2006?

27. Mr. Thom accepted that the provision in Clause 5.1(i) as to payment had to be complied with if time was of the essence. But what was meant by payment? He contended that, in reality, the purchase money was going to have to be borrowed, and everyone knew that. No one was going to lend $13m without security. Hence the practice in the TCI, of payment being by way of an undertaking, and the incorporation of an implied term to that effect into such agreements. Without such an implied term, the method of closure was not commercially viable, and that cannot have been the intention of the parties. He submitted that such an implied term would not fall foul of the entire agreement Clause 9.1, as there is no reference therein to usage, unlike the clause in Exxonmobile Sales and Supply Corp v Texaco Ltd. (2004) 1 All ER (comm.) 435 (C1, tab 17). Had Mr. Prudhoe accepted the undertaking, his client would have retained a vendor's lien until paid in full, and so would have been fully secured. Further, an attorney's undertaking was as secure as cash. Indeed an undertaking is irrevocable, whereas a cheque could be stopped. Such a cheque could not have been cashed until the Monday. How is an undertaking to release funds on the Monday, following registration, any different?

28. Mr. Corbett submitted that payment by 31 March 2006 meant to put JC in bankable funds by 31 March 2006, so that it had unconditional control of them. He described this as the milkman test. Was the milkman paid? No he was not, although Precision had had plenty of time to do so. An undertaking to pay cannot be the payment. He did not contend that this required delivery of cash but, if the payment device was to be by cheque or an undertaking, that cheque had to be delivered in time for the same to be cleared, and that undertaking had to be made in time for JC to be put in funds, by 31 March 2006. Any device used as to payment which had conditions attached, had to be unencumbered so as to effect receipt of the funds by JC to deal with as it wished by 31 March 2006. He referred to Emmett on Title, 19th Ed, at 8.013 (D2, tab 6), where the editors state that strictly cash should be used on completion, and that the vendor is not bound to accept a cheque, or any other negotiable instrument, in payment of the purchase money. The vendor may waive objection to the form of tender, such as agreeing to payment by cheque, although the editors caution an attorney from doing so without his client's authority as, if it bounces after the title deeds and conveyance have been handed over, he will be liable for the loss.

29. Where time is of the essence, Mr. Corbett submitted, precise compliance with the manner in which the option is to be exercised, includes payment by the due date: see Lord Ranelagh v Melton (1864) 2 Drew. & Sm 278 (D1, tab 23); Benito Di Luca v

Juraise (Springs) Limited and Others Ch D October 6, 1997 (D1, tab 24); and Union Eagle Ltd. v Golden Achievement Ltd. (1997) A.C. 514 (D1, tab 4). What Clause 5.1(i) required was that payment should occur on or before March 31 2006. Precision's action on that date, putting it at its highest, was a tender of payment. That was not payment, and did not constitute an exercise of Precision's right to purchase and on the due date.

30. Here counsel agreed that it is permissible for the Court to have regard to the factual evidence as to how such payment/tender came to be made, and to expert evidence as to local custom and usage, upon which reliance is placed by Precision.

31. In his third affidavit (A, tab 12), Mr. Reid states that his intention was to raise sufficient funds to purchase the entire parcel of land on 31 March 2006, but his anticipated source of those funds let him down on 15 March. He then approached Mr.Twa, a local attorney, who represented a local mortgage fund, Equity Ltd. As a result, on 21 March, Mr. Reid received a draft loan agreement for $13m (B369), which was executed on 29 March, with a charge over Mandalay's interest in the Phase 1 land as security. This sum was considered sufficient to cover the purchase price, stamp duty, the charge and other related fees.

32. $3.15m of the loan was provided by a licensed trust company associated with Mr. O'Sullivan of Miller Simons O'Sullivan, the Plaintiffs' attorneys. On 30 March he wrote two letters to Mr. Twa. In one (B353) he stated that such funds were being invested on the express basis that they would not be released from Equity Ltd. unless and until the transfer from JC to Mandalay and the charge to Equity Ltd. had been registered. The second (B414) informed him that he would send him a cheque in the sum of $3.15m. the next day, which would be immediately cleared on presentation.

33. In paragraph 10 of his affidavit (A, tab 14), Mr. O'Sullivan states that he then spoke with Mr. Twa, who requested him not to send the funds, as he was uncomfortable issuing a cheque prior to the documents being registered, and preferred to deal with the matter by way of the usual undertaking.

34. Mr. Reid states that he then made an appointment with the Acting Registrar of Lands to attend at the Land Registry in Grand Turk on Friday 31 March or on Monday 3 April 2006, to effect immediate registration. Griselda Smith, the Acting Registrar of Lands, in her affidavit (A, tab 15), confirms that Mr. Reid contacted her to be able to effect immediate registration on the same day as closing or as soon as possible thereafter, but does not say that an actual appointment for 31 March or 3 April was made.

35. On 30 March Mr. Reid wrote a letter to Mr. Coggins (B234), enclosing a number of documents, including a letter from Mr. Twa to JC (B238), in which Mr. Twa confirmed that he had $11.520m cleared funds in his client's trust account, and gave a formal attorney's undertaking to pay that sum by way of a trust account cheque upon confirmation of a first charge in favour of Equity Ltd. Mr. Reid, in his covering letter, said that he understood that this form of undertaking was relatively standard now in the TCI, as it was unsafe for banks and other institutions to release monies until the transfer

and charge are registered. He was unable to deliver this letter and undertaking personally on 30 March, and so faxed them to Mr. Coggins' attorney. He did, however, deliver them to him personally the next morning, and was told that it was too late.

36. On 31 March Mr. O'Sullivan received a fax from Mr. Prudhoe (B253), asserting that an irrevocable letter of undertaking would not be sufficient. It referred to his earlier letter of 28 March (B230), in which he had made the same assertion. Mr. O'Sullivan sent two letters in response. In the first (B256) he asserted, wrongly, that $11.520m had been deposited in Twa's trust account. He said that such would be paid to JC immediately upon registration. He said that Precision was ready, willing and able to complete and, having tendered the purchase price, required JC to complete forthwith. In the second (B257), he asserted that Precision was in a position to complete the transfer today, and threatened proceedings for specific performance if JC refused to accept the tender. It is to be noted that, in neither of these letters, did Mr. O'Sullivan make any reference to such a tender being a form of payment that JC was obliged to accept under local custom and usage.

37. Further, when he received Mr. Prudhoe's fax of 31 March in response (B259), again asserting the insufficiency of an undertaking under the Agreement, but asking whether Precision had an immediately negotiable cheque which he could make available by close of business, Mr. O'Sullivan's reaction was not to assert that such a request was unacceptable because the undertaking constituted payment according to custom in the TCI. It was to ask Mr. Twa for such a cheque, and to follow up that request with an e-mail attaching a draft letter which he considered "would be very useful for you to send to Tim Prudhoe" (B263). This offered to deliver a cheque for $11.520 m, which may be immediately negotiated, but the funds could not be released until registration had been confirmed. He concluded with the words: "As you are aware, we have used this method of closing many times in the past and I trust this will be satisfactory to you."

38. Mr. Twa was not willing to do this and in his letter, delivered to Mr. Prudhoe's office at 4.55pm. on 31 March (B266), he offered to deliver a client account cheque against delivery of executed deeds in registrable form and registration of Equity's charge. He retained Mr. O'Sullivan's concluding words in quotes above. He made no reference to an obligation to accept this offer by reason of usage.

39. Mr. Twa, in his affidavit (A, tab 13) states that he had been able to raise just short of $10m, and $3.15 m. had been raised by Mr. O'Sullivan through his contacts. He took Mr. O'Sullivan's letter, offering to send a cheque for that amount, to be an attorney's undertaking to make payment on demand, and this was confirmed orally. He does not explain, however, how he felt able to confirm in his letter to JC of 30 March (B238) that he had $11.520 m. cleared funds in his client's account, when such was not true.

40. In paragraph 16 of his affidavit, Mr. Twa describes closing by way of an attorney's undertaking as to payment as a common practice, which he had never previously had refused. Be that as it may, this goes nowhere near to establishing a custom or usage obliging the vendor to accept payment in this way. Nor does Mr. O'Sullivan's

assertion that he has successfully carried out this method of closing large transactions on a number of occasions in the past, or that undertakings have been used in many sale and purchase agreements where there was no express provision for them (see his second affidavit: A, tab 20).

41. Mr. Barry Dempsey, another local attorney, in his affidavit (A, tab 17), describes an undertaking as sometimes being necessary but, in his experience, it is not a common practice. A vendor's agreement to such cannot be comfortably inferred, and he would never accept it without cleared funds being available (see his second affidavit: A, tab 22).

42. In this case it is difficult see how Mr. Prudhoe could comfortably have done so, where the Agreement itself provided for payment prior to registration under Clause 6.1, which states:

> *"Subject to removal of the incumbrances as provided to in 6.3, upon receipt of payment in accordance with paragraph 5.1(i) hereof JC shall provide executed Land Transfer forms for Phase 1 Property in registrable form sufficient to transfer title free and clear of incumbrances …to a wholly owned subsidiary of Precision."*

43. Mr. Thom submitted that the expert evidence established that a custom had developed in the TCI in which completion was by attorney's undertaking, because it can take weeks here for registration to take place, during which time the purchaser would have no title and his lender would have no security. During this period there would be the risk of intervening applications for the registration of conflicting interests.

44. Mr. Corbett submitted that s.42 (2) Registered Land Ordinance would have given protection without the need for an implied term/protection of custom. Although the protection is only for a period of 14 days from the time the application for the search is made, repeated applications could be made until registration had taken place. Mr. Thom disagreed. He pointed out that a purchaser of land is deemed under s.30 of that Ordinance to have actual notice of every entry in the register (C1, tab 10). Accordingly it would be reckless to pay away the money without a certificate of search in hand.

45. Mr. Corbett also submitted that an attorney's undertaking is personal to that attorney, and you have to factor into the equation the individuality, standing and resources of the individual attorney when determining if such is acceptable, which is not possible in a custom that applies to all transactions. A custom, if it exists, gives the vendor no say in the matter, and the Court has therefore to be careful not to elevate a common practice into an obligation. To be binding the usage must be notorious, certain and reasonable and more than a mere trade practice (see Chitty on Contracts, 29th Ed. at 13-018, D2, tab8, and Ungoed-Thomas J in Cunliffe-Owen v Teather & Greenwood (1967) 1 WLR 1421 at 1438; D2, tab 9).

46 Having considered these submissions, whereas I can quite understand that lending institutions do not like to release their funds until the transfer of the land, and their charge

upon it has been registered, and I can also understand a vendor not wishing to effect a transfer until he has the funds in his possession and control, the simple fact is that such were not going to occur simultaneously, and one side or the other had to take a chance. I am quite satisfied that, if it is the grantor of an option to purchase who has to take that chance, and to effect registration prior to receipt of the purchase monies, then that must be made clear in the Agreement when the method of payment is stipulated. If the parties refer only to payment, then I am unable to interpret payment other than as being put in funds, as I am quite unable to find on the evidence a usage that obliged acceptance of an attorney's undertaking as to such payment.

47. I also reject the contention that, even if such was not a custom, the incorporation of such an implied term satisfied the touchstone of strict necessity to give the contract business efficacy. I consider that such a principle should be sparingly and cautiously used, as Lord Hoffmann cautioned in Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd. (1997) AC 191 at 212, and that such a term can only be incorporated if compliance with the contract is impossible without it. Here it was possible for Precision to have sent a cheque and to permit it to be negotiated. That did not happen, and any argument as to waiver arising from Mr. Prudhoe's suggestion that a cheque be delivered to him by close of business on 31 March, does not arise. I also do not accept that it can be argued, on the basis of the Court of Appeal decision in Quadrangle Development and Construction Co. Ltd. v Jenner 1 W.L.R 68 (C1, tab 28) or the modern conveyancing practices in England (see: Patel v Daybells (2001) EWCA Civ 1229, C1, tab26), that an obligation to accept an undertaking here arose under any duty upon JC to cooperate with completion

48. In the event, I am unable to find that payment as required to exercise the option under Clause 5.1(i) was made.

C. What was the effect of Precision's failure to comply with the Conditions Precedent?

49. I now turn to Clause 4, which exercised both Leading Counsel at length. Mr. Thom argued that, unless the Clause is construed by reference to the construction of the development, its provisions are nonsense/impossible, in which event the Clause fails. If they are so construed, they were not precedent to closing.

50. I deal first with Clause 4.2 which neither Counsel suggested was a Condition Precedent to the inception of the Agreement. It states:

> *"4.2 Upon and subject to the successful completion of Phase 1 of the Proposed Development and payment of all sums due in connection therewith in accordance with paragraph 5.1(i) hereof Precision shall have on deposit in a banking institution agreed in writing by JC sufficient funds, being not less than US$1,500,000 on or before 31st of March 2006 to pay in full the cost of Final Approved Plans for complete construction of the condominium suites in Phase 2*

> *and also cover all marketing expenses anticipated in marketing such condominium suites for sale."*

51. Mr. Thom submitted that the "*successful completion*" here must mean the successful completion of the construction of Phase 1. This would make sense, he said, as it would mean that Precision had to satisfy JC that it had the funds to pay for the Final Approved Plans and anticipated marketing expenses for Phase 2 before commencing its construction, which did not have to be until November 30, 2007, under Clauses 5.1(ii) and 4.3(j). Therefore, the words "*on or before 31st of March 2006*" cannot fit with this, being the last date for closing in relation to Phase 1, and should be struck through.

52. Mr. Corbett contended that the words "*successful completion*" had to be interpreted as meaning completion of purchase/closing, in which event no deletion of the date is necessary, which would be a drastic and unjustified use of the blue pencil. Interpreted in this way, the Clause is capable of performance, and performance must have been the intention of the parties. In any event, if it meant successful completion of construction, there was no yardstick by which this could be measured.

53. I consider that the key to the interpretation of the word *"completion"* in this Clause is again the emphasis placed on the development in the Agreement. The intention behind Clauses 4.1 and 4.2 is to ensure that each Phase of the development could proceed expeditiously. Clause 4.1, although subsequently waived, required Precision to satisfy JC by 30 November 2004 that it had $1.5m on deposit to pay for the Final Approved Plans and the anticipated marketing expenses of Phase 1. If Precision had successfully completed the purchase of Phase 1, and wanted, in due course, to be able to move on to Phase 2, it had to have a similar sum on deposit to pay for the final Approved plans and marketing expenses for that second Phase by 31 March 2006.

54. I accept that, because the last date upon which the money had to be on deposit for Phase 2 was also the last date for payment/closing of Phase 1, if that date remains in the Clause the words *"Upon and subject to the successful completion of Phase 1"* in Clause 4.2 could not sensibly be construed as a reference to the completion of construction of Phase 1. The only other "completion" that the Clause could be referring to is completion of purchase/closing. Mr. Thom asked, why would JC have wanted Precision to have to tie up $1.5m of its monies earmarked for Phase 2 before it had even commenced construction of Phase 1, if JC wanted Precision to develop that Phase 1 as soon as possible following purchase? However, it is important to remember that the Agreement was entered into in August 2004, and completion of purchase of Phase 1 could have taken place well before, rather than on, the very last date for payment of that Phase. In any event, I see no reason why JC should not have wanted an indication of Precision's ability and resolve to proceed with Phase 2 at the time of completion of closing in relation to Phase 1, and I have no problem with the selection of the last day for purchase of Phase 1 as the date by which monies had to be on deposit for the plans and marketing of Phase 2.

55. I therefore construe the word *"completion"* in Clause 4.2 as meaning completion of purchase/closing, and am not willing to delete the reference to the date.

56. Turning finally to the Conditions Precedent, Clause 4.3 commences:

> *"4.3 Subject to paragraphs 4.1 and 4.2, as applicable, and prior to commencement of construction on either the Phase 1 Property or the Phase 2 Property as the case may be the following pre-conditions (hereinafter "the Conditions Precedent) shall have been met in respect of the applicable Phase:"*

57. Counsel accept that this Clause means what it says, and that the Conditions are Precedent to the commencement of construction. The issue is whether the same were elevated to Conditions Precedent to the completion of purchase of Phase 1 by Clause 5.1(i), which states:

"(i) *Precision shall pay to JC the price for Phase 1 in the sum of Eleven Million Five Hundred and Twenty Thousand Dollars (US$11,520000) upon satisfaction of all of the other Conditions Precedent for Phase 1 which shall occur on or before March 31, 2006."*

58. Mr. Thom accepts that a literal interpretation of these words is that all the Conditions Precedent had to be satisfied on or before 31 March 2006, and so were made Conditions Precedent to closing. However, that is not the meaning that the parties can have intended, because it was either extremely difficult, although he conceded that the Court will not rewrite a hard bargain, or impossible for some of them to have been complied with prior to closing. He stressed the view of Lord Hoffmann in ICS Ltd. that the law does not require judges to attribute to parties an intention they plainly could not have had. Therefore, he submitted, the Court is driven to find some alternative meaning as, where the language of the parties in a commercial contract leads to a conclusion that flouts common sense, it must yield to common sense (see Antaios Compania Naviera S.A. v Salen Rederierna A.B. (1985) A.C. 191 at 201). He also relied on Lord Hoffmann's comments in ICS Ltd. and Mannai Investment Co. Ltd. v Eagle Star Life Assurance Co. Ltd. (1997) A.C. 749 at 774 (C1, tab14), that the Court can decide, short of rectification, that the parties must have made mistakes of meaning or syntax; and on Lord Reid's view that, where a particular construction leads to a very unreasonable result, this must be a relevant consideration when the Court is searching for some other possible meaning (F.L.Schuler A.G. v Wickman Machine Tools Sales Ltd. ((1974) A.C. 235 at 251; C1, tab 5). The Court was only being asked to, and only needed to, construe, and not to rectify, and this extended to deleting or adding words in order to make the contract work (see Little v Courage Limited (1994) 70 P & CR 449, C2, tab16).

59. He submitted that, to make commercial sense, the Court was justified in putting a blue pencil through the words "*upon satisfaction of all the other Conditions Precedent for Phase 1 which shall occur*" in Clause 5.1(i). The reference to *"other"* was to exclude Condition 4.3(h) from this, which required payment for Phase 1 by 31 March 2006, which Mr. Thom accepted had to occur.

60. Both Leading Counsel made detailed submissions as to the purport of some of the remaining Conditions Precedent, and as to whether they could or could not be satisfied before payment of the purchase price for Phase 1, which are fully set out in their written submissions, and I will only summarise them, setting out first those of Mr. Thom:

4.3(c): although it may not be impossible to enter into a fixed price construction contract before purchase, how could anyone realistically be expected to do so, when they did not even own the land? How can a builder be expected to go out on such a financial limb? If completion did not in fact take place, Precision would be open to a substantial claim for damages from such contractor, who would have had to earmark equipment, materials and labour for the contract.

4.3(d): similarly, expecting a financial institution to commit itself to financing the construction before the land had been purchased.

4.3(f): the reference to obtaining written approval from relevant Government authorities in respect of the transfer is impossible to understand. No such approvals are required, and it is quite unclear from whom they had to be obtained. Similarly the payment of stamp duty and Land Registry fees as part of the costs of such approvals, when such expenses are only relevant after closing.

4.3(g): the audit of pre-construction sales for the purposes of release of deposits can only happen on commencement of construction, and therefore after closing.

4.3(i): the submission of duly executed Land Transfer forms, under Clause 6.1, only have to be handed over on payment. Therefore, Clauses 5.1(i), 6.1 and 4.3(i) create an unbreakable circularity; namely, JC can refuse to accept payment under 5.1(i) until the transfer has been lodged under 4.3(i), and under 6.1 JC does not have to hand over executed Land Transfer forms because it will not have been paid, having refused to accept payment. Therefore JC is able to prevent Precision from completing. However, this situation only arises if Clause 4.3(i) is incorporated into Clause 5.1(i). Therefore something has gone seriously wrong by such inclusion, and so such cannot have been the intention of the parties.

61. He submitted, therefore, that the Court was driven to apply the blue pencil, which would not be rectification but an exercise of Lord Hoffmann's modern principles of construction, as otherwise Clause 5.1(i) was incapable of being complied with. It is not possible to pick and choose between the sub-clauses, as they are incorporated into Clause 5.1(i) in a compendious fashion.

62**.** Mr. Corbett submitted that August 2004 could hardly be described as a cold start in view of the earlier agreement of June 2002 (B2), and therefore Precision had had plenty of time to comply with the Conditions Precedent prior to payment. Although it may be difficult to have complied with Clauses 4.3 (c) and (d), it was not impossible to do so, and agreements, conditional upon completion taking place, could have been entered into. Clause 4.3 (f), he conceded, was not readily comprehensible, and he had no

idea what approvals were being referred to. However, if a sub-clause does not make sense, a failure to comply with it does not breach Clause 5.1(i). In 4.3(g) he contended that only the first sentence was a Condition Precedent and was workable if the words "will be" are substituted for the word "are," which Mr. Thom did not contend would be impermissible. These matters, and the circularity complained of in 4.3(i) did not vitiate the whole of Clause 4.3. Further, the last thing that Precision wanted was for the whole Agreement to fail.

63. He submitted that it was perfectly possible for the sub-clauses capable of performance to be incorporated in Clause 5.1(i), which was the clear and stated intention of the parties. It was not a case of entire incorporation or no incorporation. He referred to Chitty at 2-141 (D2, tab13), where the editors state that the Court will make considerable efforts to give meaning to an apparently meaningless phrase, and refer to Nicolene v Simmonds (1953) 1 Q.B. 543, (D2, tab14). At 549 Singleton LJ stated that words that are meaningless can be ignored , and at 551 Denning LJ said as follows:

> "I take it to be clear law that if one of the parties to a contract inserts into it an exempting condition in his own favour, which the other side agrees, and it afterwards turns out that that condition is meaningless, or what comes to the same thing, that it is so ambiguous that no ascertainable meaning can be given to it, that does not mean that the whole contract is a nullity and must be rejected. It would be strange indeed if a party could escape from every one of his obligations by inserting a meaningless exception from some of them"

64. Having considered these submissions with care, my starting point is that the parties clearly intended, in Clause 4.3, that the Conditions Precedent should be carried out prior to the commencement of construction, and no one has sought to argue otherwise. However, I am also satisfied that the literal meaning of the words in Clause 5.1(i) is that the parties intended that the Conditions Precedent should be carried out prior to payment of the purchase price for Phase 1. I cannot accept that the words "*upon satisfaction of all the other Conditions Precedent for Phase 1 which shall occur*" were included as an aberration or total lack of comprehension. Their inclusion was again consistent with JC's intention that Precision should not be able to proceed with the purchase of the Phase 1 land unless it was going to be able to develop it. Nor do I consider that their removal from the Clause would involve a small departure from the words of the Agreement, as Mr. Thom suggests.

65. Condition Precedent 4.3(e), namely mutation, had to occur before completion of purchase. Performance of others, such as 4.3 (b), (c) and (d) may have been onerous, but could be performed by the due date. I accept, for the purposes of my decision, that 4.3(f), and (i) were unclear and/or incapable of performance prior to completion. I do not, however, accept that this results in the performable sub-clauses being excluded from Clause 5.1(i). In line with Denning LJ's view above, I do not accept that the incorporation of the Conditions Precedent, which form separate sub-clauses of Clause 4.3, has to be entire or not at all. Failure to comply with the sub-clauses which were not

capable of being performed at the time required in Clause 5.1(i), would not entitle JC to refuse to complete.

66. In the result, as Mr. Thom accepts that some of the Conditions capable of being performed were not satisfied as at 31 March 2006, I find on this basis also that Precision failed to exercise its option by the due date.

67. These findings dispose of Precision's claim for specific performance.

68. Mr. Thom made a further submission, which gathered momentum towards the end of his arguments. By reason of the findings I have made above, it is essentially a longstop submission, and I do not propose to rehearse the arguments advanced by each side or the authorities relied upon, but, I shall indicate my findings on two matters relating to it.

69. To put those findings in context, I shall seek to summarise the submission. He argued that, if I was wrong in my findings that the Agreement was an option, that payment required JC to be put in funds by 31 March, and that the Conditions were Precedent to closing, then Mr. Prudhoe was not entitled to reject the undertaking or insist that the Conditions be complied with, and such insistence put JC into repudiatory breach. That breach was not accepted by Precision, who tendered payment. Even if payment was not made as required by Clause 5.1(i), the effect of Clause 5.2 was not to automatically terminate Precision's rights under the Agreement, but was to render the Agreement voidable at the option of JC. JC did not elect to rescind the contract, but rather affirmed it by serving default notices. As both parties were in default, time was no longer being of the essence. Precision was ready, willing and able to pay within a few days of the 31 March 2006, particularly as arrangements for immediate registration had been made; whereas the Court can conclude that Precision was not. It did not even have an executed a Transfer Form ready on 31 March. In these circumstances, as Precision is seeking specific performance and remains ready willing and able to complete at the date of trial, it is entitled to that relief.

70. Mr. Prudhoe's letter of 28 March (B230) raised enquiries as to progress of the Conditions Precedent, and asserted that all must be met prior to payment due on 31 March. He also raised serious concerns as to Founder Members and as to a possible breach of Clause 7.3, and stated that JC would require written assurance that no portion of the monies were made up of Founder Member Investment monies, which they were not, and so such assurance could have been given, whether JC were entitled to require it or not.

71. Mr. Prudhoe's first fax of 31 March (B253) was in much the same vein. However, his second fax (B259) is rather different. While rejecting Mr. O'Sullivan's contention that the Conditions were not precedent to completion, he was prepared, for the sake of argument, to leave that aside, and then concentrated on the payment provision of Clause 5.1(i), and went on to, in effect, invite delivery of an immediately negotiable cheque.

72. In these circumstances, I am unable to accept the proposition that, if such a cheque had been delivered, the Court should conclude that Mr. Prudhoe would have refused to accept it, or to complete. To so find would involve the Court in making assumptions and suppositions which I am not willing to take on the balance of probabilities.

73. Further, I do not derive great assistance from the apparent absence of an executed Transfer Form on 31 March. As Mr. Corbett pointed out, such is the work of a moment, and can wait until payment had been made which, according to my finding above, had to come first. Nor do I attach the significance contended for from the service of the default notices the very next day, including that in relation to non payment (B270), without a reservation that such should not be taken as an affirmation of the Agreement; nor the service of notice of termination (B318), in which he refers to "The Option". Mr. Prudhoe had referred to the Agreement as an option throughout in his correspondence but, as an attorney, he was now in the position of having to cover every argument, including that the Agreement was mutually binding, that would be raised in litigation that had already been threatened. In fact no attempt was made by Precision to comply with the default notices, even that relating to payment.

74. As to the ability to pay at trial (see the Judgment of Walton J in Rightside Properties Ltd. v Gray (1975) Ch 72 at 88 (C1, tab 7)), Mr. Reid, at paragraph 77 of his Third Affidavit (A, tab12), states that he was unable to hold his financial arrangements together following failure of completion, and so has secured finance of $13m.on 7 days notice from Northridge Capital, LLC (Northridge), and refers to two letters (B602 and 603). In the former Northridge refers to having the financial wherewithal to fund up to $13m. The latter makes the same comment, but adds that such funds could be made available within 7 days.

75. This prompted Mr. Prudhoe to seek clarification from Northridge and, in its reply to him of 4 January 2007 (B622), it states that it does not have any contractual relationship with Mr. Reid or Precision, but expressed an interest itself in acquiring the land, and offered a $500,000 non returnable deposit upon execution of a sale and purchase agreement to it, stating that it had been interested in identifying an investment transaction in Providenciales for some time. If it was to enter into a joint venture with Mr. Reid in the future, Northridge would be the lead investor and have the controlling interest in the project, including the ongoing negotiation of the land purchase. That, of course, would not be consistent with Precision's rights if specific performance was ordered of the Agreement.

76. This letter provoked a communication between Mr. Prudhoe and Northbridge's attorney and a further letter from Northridge of 11 January 2007 (B625), in which it states that, for the avoidance of doubt, it was willing to honour the terms of its November letters. I frankly find this assertion very unsatisfactory in view of the contents of the 4 January letter, and I am not satisfied that Precision is able to demonstrate a commitment, in the sense of intention and assurance, to complete at the present time.

77. Mr. Thom urged me that, if I had any doubt about that, I should resolve it by giving Precision a short time span in which to complete, as the critical time is within a reasonable time of the Judgment. I am not attracted by this proposition, undermining as it does, the requirement that a party proves its case at trial, which includes being able to satisfy me that it would be able to complete within that time.

78. For the reasons given above, and despite the valiant efforts of their counsel, the Plaintiffs' claim for specific performance fails.

79. A draft Order consequent upon this Judgment should be prepared by the Defendant's attorney and sent to the Plaintiffs' attorney within 14 days hereof, and, if the form thereof is not capable of agreement, should apply within 28 days hereof for the matter to be listed for argument, if necessary by a telephone hearing.

Christopher Gardner QC
Chief Justice
22 February 2007