IN THE SUPREME COURT
TURKS AND CAICOS ISLANDS

CL 41/22

BETWEEN:

MYLANDE ALFRED **Plaintiff**

AND

VANS AUTO LTD. **Defendant**

JUDGMENT

Before: **The Hon. Mr Justice Anthony S. Gruchot**

Appearances: **Mr Wendall Swann of Swann & Swann for the Plaintiff.**
Ms Chloe McMillan of F Chambers for the Defendant.

Hearing Date: **24th January 2023**

Venue: **Court 5, Graceway Plaza, Providenciales.**

Introduction

1. This is a matter commenced by originating summons filed on 12th May 2022 ('the Originating Summons') seeking the following relief:
    a. That the Defendant cease and desist immediately their (sic) trespass on parcel 61111/28, Long Bay Hills, Providenciales ('the Property');
    b. That the land is restored to the condition it was before 1st March 2022;
    c. Damages for any loss resulting from the trespass; and

d. Removal of a caution registered against the land by the Defendant.

Background

2. At all material times, the Defendant conducted its affairs by its director, Mr Stavano Roper. On 8th November 2022, I ordered that the matter be continued as a writ action and that the Defendant was to file a counterclaim, which it had sought to bring by way of a responsive affidavit to the Originating Summons sworn by Mr Roper.

3. The claim arises from an extended payment agreement dated 17th July 2020 between the parties for the Defendant to purchase the Property for the sum of US$110,000.00 ('the Agreement'). The purchase price was to be paid as follows:
   a. US$10,000.00 on the execution of the agreement;
   b. US$50,000.00 on or before 31st July 2020; and
   c. US$50,000.00 on closing, which was set for 7th December 2020.

4. It is agreed that the payment of the initial US$10,000.00 was made to the Plaintiff's mother before signing the Agreement. It is not clear who made the payment, Mr Roper or the Defendant, the pleadings and other documents refer to Mr Roper and the Defendant interchangeably, but that is academic for the purposes of this action.

5. A draft agreement was prepared by Mr Don-Hue Gardiner, the Defendant's then attorney and was given to the Plaintiff who subsequently engaged the services of Mr Swann of Swann & Swann, attorneys. On 13th July 2020, the Plaintiff's attorney responded with some minor amendments to the draft agreement, inconsequential to this action, which amendments were accepted.

6. Contracts were exchanged on or around 16th July 2020.

7. The 2nd payment due under the Agreement was paid late on 13th August 2020.

8. The Agreement was registered at the Land Registry on or around 28th October 2020, seemingly in breach of the Purchase of Land (Extended Payment Agreements) Ordinance (Cap. 9.06) ('the Ordinance') which requires the Agreement to be submitted for registration within 1 month of its execution. Pursuant to section 4.2 of

the Ordinance a caution was to be submitted to the Registrar with the Agreement. Either this was not done or the Registrar would not accept it.

9. The final payment was not made and the transaction did not close. On 30th December 2020, the Plaintiff served the Defendant with a notice to complete, requiring the default (payment of the closing monies) to be cured by 13th January 2021. The notice was sent by email on 29th December 2020 and therefore gave 14 days to close the transaction.

10. Clause 5.1 of the Agreement provided that:

> *"Should the Purchaser fail to make any of the payments provided for herein, refuse to execute the instruments required to complete this transaction or otherwise default hereunder and shall fail to correct such default within Twenty-one (21) days after the Vendor has given (or sent) the Purchaser a written notice of such default, then the Vendor may declare this agreement terminated and retain all monies paid by the Purchaser as liquidated and agreed damages which the Vendor shall have sustained as a result of the Purchaser's default, and thereupon the parties hereto will be relieved from all obligations hereunder."*

11. Issue was taken with the notice period given and so on 12th January 2021 a further notice to complete was served on the Defendant requiring the default to be remedied by 3rd February 2021.

12. On 24th January 2021 Mr Roper, on behalf of the Defendant, swore an affidavit in support of an application to lodge a caution over the property. That caution was registered on 2nd February 2021 as instrument number 242/21 but for some unexplained reason, was re-registered on 4th May 2021 as instrument number 1173/21.

13. On 28th April 2021, closing still not having taken place, the Plaintiff served a notice of termination on the Defendant, forfeiting the monies paid, in accordance with clause 5.1 of the Agreement.

14. The Defendant asserts that it was the Plaintiff who was in breach of the Agreement and as a result, it was not required to complete and claims back the $60,000.00 paid under the Agreement or alternatively, a fair and reasonable sum as the Court may judge fit.

15. On or around 28th March 2022 the Plaintiff entered into a new sale and purchase agreement for the sale of the Property to an unconnected 3rd party. The Plaintiff has been unable to close that transaction due to the caution being registered against the Property. It does not appear that any application has been made by the Plaintiff to the Registrar of Lands to have the caution removed.

The Defendant's Reasons for Failing to Complete the Agreement

Consent to the Registration of a Caution

16. Clause 8.1 of the Agreement provided:

> *"The purchaser shall be entitled to register a caution against the property and the vendor shall execute upon the date of signing hereof a consent to the lodging of such caution."*

17. The Defendant asserts that the Plaintiff was in breach of contract by failing to give her consent to a caution being registered and uses this as one of his reasons for failing to comply with the default notice. No notice of default was served by the Defendant in respect of this alleged breach. For the following reasons, I find that the Plaintiff did provide her consent to the registration of the caution as requested and there was no breach by the Plaintiff in this respect.

18. The Plaintiff in her affidavit in support of the Originating Summons states: "*I had executed documents consenting to the registration of caution*." Her affidavit was proved at the trial and submitted as her evidence in chief without objection. Having heard from the Plaintiff in cross-examination, I found her to be truthful, but not sophisticated. I do not accept that it is likely that she would have remembered signing a specific document some 2 years before signing her affidavit as, in answer to a question from the Court, she said that she did not know what a caution was. I am of the view, based on her oral evidence, that she did not know whether she had signed

a consent to the caution or not. She no doubt just signed whatever documents Mr Swann, her attorney, asked her to sign. Likewise, I do not find that her affidavit was written in her own words and it was no doubt drafted on her behalf and she was asked to sign the same. In essence, the Plaintiff placed her trust in her attorney and I do not criticise her for so doing.

19. Notwithstanding my doubts about the Plaintiff's recollection, I am persuaded the Plaintiff provided her consent as on 14th July 2020, Mr Gardiner emailed Mr Swann asking: "*Have you seen the draft caution?*". Mr Swann replied saying: "*No, I have not seen the Draft Caution, but I'm not concerned about it, since it is a prescribed form*."

20. On 15th July 2020 Mr Gardiner sent a further email saying: "*The caution is now attached hereto. Hopefully when we exchange, you will be able to provide us with the signed copies for registration with the Extended Payment Agreement as well*."

21. Exchange of contracts took place on 16th July 2020. The Defendant's assertion that the Plaintiff did not give the required consent is belied by a) my not being directed to any complaint or comment regarding the same passing between the respective attorneys at that time and, b) on 3rd September 2020, Mr Gardiner emailed Mr Swann saying "*The Caution in this matter needs to be **resigned**. See the Form attached. Could you please print three (3) copies of the Form, have your client sign the same, and let me know when I might call around to collect them please?*" (My emphasis)

22. No explanation was tendered as to why the document required re-executing but Mr Swann suggested that the form of caution that was sent to him on 3rd September 2020 was different to that sent on 15th July 2020 and hypothesises the reason for this is that the original may have been rejected by the Registrar of Lands. Insofar as it is relevant, that is a plausible explanation, and it was not challenged by the Defendant.

23. It is unclear if the document sent on 3rd September was ever signed by the Plaintiff. I was not directed to any further correspondence concerning the caution until an email from Mr Swann on Friday 5th December 2020 to Mr Gardiner enquiring what time he should attend at Mr Gardiner's office for the closing of the transaction, due to take place on 7th December 2020. Mr Gardiner replied saying: "*I will take instructions and*

let you know. I never got the signed caution back as yet though. Whatever happened to that?" Mr Swann replied: "*More than likely the caution is just sitting in the file. Waiting to hear from you.*"

24. Accordingly, insofar as the Plaintiff may have not given consent to the revised form of caution, as Mr Swann submits and I agree, it cannot amount to a breach preventing the Defendant from closing as:

    a. No evidence was led to suggest that the Plaintiff refused to give her consent, it appears that it was just not pursued; and

    b. The purpose of the caution is to protect the purchaser's interest in the Property pending the final payment and closing. It has no purpose post-closing, assuming that the transfer is promptly lodged for registration at the Land Registry. The Defendant agreed as much in his evidence when he said that the effect of a caution was "*to protect a purchaser's investment*". There is nothing for the caution to protect once the purchaser is registered as the proprietor.

25. I am not of the opinion that any failure to furnish the revised executed caution, if indeed there was any such failure, in the circumstances amounted to a *bona fide* reason not to make the final payment. In any event, as is apparent from the evidence, the Defendant registered a caution against the title on 2nd February 2021, for which he did not have, or need the Plaintiff's consent.

The Existing Structure

26. The second argument put forward by the Defendant for not closing the transaction was that the Plaintiff was in breach of the Agreement by not providing the plans and approved planning consent for apartments, construction of which had been commenced on the Property to a significant degree. Again, no notice of default was served by the Defendant.

27. It transpired that the Plaintiff had applied for planning consent to construct 6 one-bedroom apartments on the Property in a 2-storey building. Planning consent for the

2-storey building was not forthcoming and the design had to be changed to 3 apartments in a single storey.

28. The Defendant asserts that the incomplete structure did not have approved building plans which he further asserts were required to be handed over as part of the closing documents. Whether this was the case or not is unclear, as certain documents were sent by Mr Swann to Mr Gardiner by email on 23rd February 2021 stating, "*Please find attached the Detailed Development Permission, and Building Permit issued by the Department of Planning regarding the development on the land, based on the plans attached. The signed plans are supposed to be available for collection on Friday*."

29. In her closing submissions, Ms McMillan says:

> *"At the time of the execution of the EPA [extended payment agreement], there was an incomplete structure on the said property that did not have any approved building plans nor was the structure in compliance with the Homeowners Association (HOA) guidelines.*
>
> *The existence of this structure in contravention of the Planning and HOA guidelines/restriction presented a serious barrier to completion as the Defendant could not be expected to close the transaction with what may have been an unauthorized (sic) or illegal structure in place."*

30. In Mr Roper's affidavit he makes the following comments:

> *"Further, Clause 6.9 of the Agreement covenanted that the property is undeveloped and uninsured,* ***and this was the Defendant's understanding at all material times. However, after the execution of the Agreement*** *and making inquiries,* ***it was discovered that there was a development on the Property*** *in breach of this Clause which was not sanctioned by the Department of Planning.*
>
> *That the Defendant requested building plans prior to the closing of the sale as* ***part of the documents contemplated by Clause 4.2.7 of the Agreement****, however, to date, the plaintiff did not provide the building plans nor approval.*

Given that the Plaintiff was unable to provide the relevant building plans and approval the Defendant did not pay the balance due on closing in the sum of $50,000.00 in accordance with clause 4.2 of the Agreement. This clause provides that on completion, in exchange for payment to the Plaintiff, the Plaintiff shall deliver to the Defendant the documentation necessary to close."

31. The question that arises is, was the Plaintiff obliged to provide approved plans and/or homeowner association approval for the construction on closing? Alternatively, were these documents 'necessary to close'?

32. Clause 4.2. of the Agreement provides:

*"4.2. On Completion, in exchange for payment of all monies payable to the Vendor pursuant to the terms hereof, the Vendor shall deliver to the Purchaser or its attorneys the following documentation (hereinafter also "**the Closing Documents**"), which shall be executed by the Vendor and the Purchaser where applicable:*

4.2.1. Duly executed and registrable Transfers of absolute title to the Property in triplicate.

4.2.2. Duly executed and registrable Discharge of all legal charge(s) (if any) registered against the title to the Property as at the Completion Date with all Land registry (sic) Fees payable thereon.

4.2.3. The original Land Certificate to the Property (if issued).

4.2.4. A Certificate from a Licensed Surveyor that all boundary markers are in place with respect to the Property and that there is no encroachment onto the Property from any adjoining properties, and no development on the Property encroaches upon any adjoining property.

4.2.5. Proof of Easement(s) providing pedestrian and vehicular access and egress from the Property to and from a public roadway.

4.2.6. A declaration from the Vendor to the effect that there are no overriding interest (sic) known to the Vendor affecting the Property such as are pursuant

to Section 28 of the Registered Land Ordinance …

4.2.7. Any such other document that may be needed to complete the transaction contemplated by this Agreement."

33. Clause 4.2 (and its sub-clauses) does not refer to the provision of plans and consents. The Defendant asserts that the provision at clause 4.2.7. should be interpreted as being a requirement to provide approved plans and consents on closing.

34. It is noteworthy that specific detail has been provided concerning the normal documents expected to be provided on completion. I was not directed to any suggestion that those documents had been provided, either in draft for approval or duly executed, but no issue has been taken with respect to the specifically listed documents.

35. It is also noteworthy that the Agreement makes no mention of any construction having been commenced on the Property. This would be consistent with the Defendant's evidence in his affidavit set out in paragraph 30 above if that evidence was not belied for the following reasons:

    a. The Defendant had taken possession of the Property before the Agreement was executed on 17th July 2020, which is evidenced by Mr Swann's email of that date to Mr Gardiner in which he states:

        "I see that you (sic) client has already dumped material on the land, paid the $10,000 to my client, and there is no provision for an escrow period, so I suppose we're going to proceed regardless."

    b. On 15th July 2020 Mr Swann again emailed Mr Gardiner asking:

        "Do you know what your client plans to use the property for? I ask because of the existing structure and planning involvement."

    c. Mr Gardiner replied:

        "I am not sure what my clients (sic) plan to do with the property, indeed I was not aware there was a structure on the property. I will inquire and revert to you."

d. In his counterclaim the Defendant pleads:

> *"Prior to executing the agreement, the Plaintiff provided the Defendant with plans that were defective as the structure on the property did not have proper approvals from the Homeowners association as they were not in compliance with the Homeowners guidelines. After this discovery by the Defendant after execution of the agreement the Plaintiff through her attorney made several attempts to have a new application for the granted building permission approved for a completely different structure. This was only received by the Defendant's attorney on the 26th of March 2021, being after the date for closing."*

e. In his oral evidence, Mr Roper, on behalf of the Defendant stated "*I agreed to purchase the property after I had gone to view it*." In response to the question from his attorney as to what was on the Property when he went to view it he replied "*I saw a building and blocks. A single floor.*"

36. For the above reasons I find that it is beyond peradventure that the Defendant knew there was a partially completed building on the Property before he entered into the Agreement.

37. The answer to the question posed at paragraph 31 above is that I am not of the view that provisions of plans and consents were a requirement under the Agreement for the following reasons:

a. If this had been a concern of the Defendant it would have discussed the same with its' attorney and a specific provision would have been included in the Agreement to provide the same at closing. I do not think it was of any concern because:

i. The Defendant was aware that there was a building on the property before the Agreement had been drafted, let alone executed.

ii. It would have been reasonable for the Defendant to have asked for plans and consents before entering into the Agreement. It did not as its' attorney was unaware of any construction on the Property until 15th

July 2020. If it had been a concern then the purchaser's attorney, who drafted the Agreement, would have made enquiries or made provision.

iii. The 1st correspondence that was before the Court regarding the provision of plans was 1st February 2021[1], after the 1st notice of default had been served.

b. The Defendant seeks to rely on clause 4.2.7 of the Agreement to establish an obligation to provide approved plans. That clause provides for the delivery of:

> *"Any such other document that may be needed to complete the transaction* ***contemplated by this agreement****." (Emphasis added.)*

In his affidavit, Mr Roper, states that the Defendant requested plans "*as part of the documents contemplated by Clause 4.2.7* …" but there was no evidence of when such a request was made.

c. The documents that were required to be handed over on closing were listed in sub-clauses to clause 4.2 of the Agreement and are the normal documents that transfer the title to the property and remove any impediment to that transfer being registered at the Land Registry. Other documents required by the purchaser confirming rights and unregistrable interests are also listed.

d. The Defendant has not averred that the sale of the property was conditional on approved plans being either obtained or handed over and no such provision was included in the Agreement.

e. I am not of the view that clause 4.2.7 is intended to catch any document which the purchaser at some date after execution of the Agreement may decide he then wants. In my view, the purpose of the clause is for the provision of any supplemental documents that may, for example, be requested by the Registrar of Lands in order to register the purchaser's title. It is a post-contract provision

[1] From the 1st February 2021 correspondence it appears as though the issue may have been raised earlier in correspondence from the Defendant's attorney on 7 January 2021, in response to the service of the 1st notice of default, but that correspondence was in the judgment of Hylton J delivered on 26 August 2022, deemed privileged and removed from the Court bundle.

to provide documents not contemplated by the Agreement but "*needed to complete the transaction contemplated by [the] agreement*".

f. Approved plans and consents may be sought by a prudent purchaser, but they are not **required** to complete the transaction as contemplated by the Agreement. The Defendant's title could have been registered without them[2].

38. In my judgment, on the construction of the Agreement the provision of approved plans and consents was not a contractual requirement, and a requirement for the provision of the same cannot be implied by clause 4.2.7. Accordingly, not providing these documents did not give rise to a valid reason for the Defendant not to complete the transaction.

Notice of Termination

39. The Defendant takes issue with the Notice of Termination and asserts that it was defective. By way of letter from the Defendant's present attorneys dated 27th July 2021, the Defendant asserted:

> *"The grounds for the said Notice of Termination is that our client has failed to complete the Agreement of Purchase and Sale, however based on clause 5.1 as referenced above, that is not grounds for termination of the Agreement.*
>
> *Our client has not acted in breach of any of the requirements of clause 5.1 so as to necessitate termination of the Agreement. Our client has made the requisite payments as required by the Agreement. In fact, we have instructions that our client has paid Sixty Thousand Dollars ($60,000.00) to your client in accordance with the Agreement.*
>
> *Our client has not refused to execute the instruments required to complete the sale transaction. The Agreement which bears our client's signature was duly executed. We have instructions that it is in fact your client who has refused to execute a caution documentation as required by clause 8.1 of the agreement.*

[2] It appears that there were some discussions between the parties to the effect that the Defendant was trying to negotiate a price reduction due to the planning issue, but this was not an issue canvassed at trial.

Our client is not otherwise in default of the Agreement and as such the Notice is null and void."

40. Clause 5.1 of the Agreement is set out at paragraph 10 above.

41. The Defendant's reasons for asserting that the Notice of Termination was invalid are unclear. That notice was served after 2 default notices had been served. The 1st notice of default was dated 30th December 2020 (although it appears from the documents that it was sent by email on 29th December 2020). That notice cited the default as being that of the Defendant failing to complete the transaction.

42. It was accepted by the Plaintiff that this notice was defective in that it only gave 14 days to rectify the default rather than the 21 days as required by clause 5.1. Accordingly, the Plaintiff served a 2nd notice of default dated 12th January 2021 requiring the Defendant to complete the transaction before 3rd February 2021. The default under the 2nd notice was again the failure to complete the transaction and gave the requisite 21-day notice.

43. The Defendant asserts that it was not in default of the Agreement and argues that failing to complete the transaction is not a ground for termination. I come to that conclusion from the cited extract from the Defendant's attorney's letter of 27th July 2021 at paragraph 39 above. That argument defies logic. Clause 5.1 provides "*Should the purchaser fail to make any of the payments provided for herein, refuse to execute the instruments required to complete this transaction or* ***otherwise default hereunder*** *…".* (Emphasis added)

44. The Agreement provided for the transaction to complete on 7th December 2020. Clause 6.3 of the Agreement made time of the essence. I find that the Defendant was in breach of its obligations under the Agreement by failing to complete. Further, the Defendant failed to rectify its default following the service of the 2nd (valid) notice of default. Accordingly, I find that the Plaintiff was entitled to terminate the Agreement and the service of the Notice of Termination on 28th April 2021 brought the Agreement to an end, having given the Defendant very nearly 3 further months to remedy his default.

The Dispute

45. Notwithstanding all of the above, no application has been made by either party for specific performance of the Agreement and they have both conducted themselves in this action as if the Agreement had been validly terminated[3]. Importantly, as will be seen below, the Defendant has not sought any extension of time to make payment.

46. The Plaintiff in the originating application is seeking the following relief:
    a. That the Defendant cease and desist immediately their (sic) trespass on parcel 61111/28, Long Bay Hills, Providenciales ('the Property');
    b. That the land is restored to the condition it was before 1st March 2022;
    c. Damages for any loss resulting from the trespass; and
    d. Removal of a caution registered against the land by the Defendant.

47. The Originating Summons was issued on 12th May 2022. In his closing submissions Mr Swann concedes that the claim for trespass has been abandoned "*…upon the defendant's claim that he had ceased to trespass in March 2022.*"[4]

48. The Defendant does not deal with the allegation of trespass either in Mr Roper's responsive affidavit filed on 21st June 2022, which affidavit is repeated in the counterclaim, or anywhere else, but in his oral evidence he stated that he took occupation of the Property around the 20th to 23rd December 2020 and had vacated around the 3rd or 4th of January 2021.

49. The Plaintiff issued a claim for possession notwithstanding that the Defendant had been let into possession of the Property by the Plaintiff and had already vacated its occupation before the service of the notice of termination. The Plaintiff also pursued that claim, only abandoning the same at trial.

50. Likewise, the claim for restoration of the Property was abandoned as the minor

[3] In the event, any claim for specific performance would have faced considerable difficulty, the Agreement stipulating that time was of the essence.

[4] The Defendant entered into occupation of the Property with the consent of the Plaintiff. The alleged trespass arises from the allegation that the Defendant remained in occupation of the Property after the 28th April 2021, the date of the notice of termination, which the Plaintiff conceded was not the case. It is unclear from where the March 2022 date is derived.

modifications to the Property, had already been removed before the issue of proceedings. It naturally follows that the claim for damages arising from the trespass must fail, *a fortiori*, given that no loss has been pleaded or any evidence led to support the claim.

51. Although the Plaintiff through Mr Swann in his closing submissions, maintains a claim for damages, she does so as damages arising from the registration of the caution. Mr Swann submits that the damages arise pursuant to section 131 of the Registered Land Ordinance (Cap. 9.01) which provides:

> *"Any person who lodges or maintains a caution wrongfully and without reasonable cause shall be liable,* ***in an action for damages at the suit of any person who has thereby sustained damage,*** *to pay compensation to such person."* (My emphasis)

52. This was not a pleaded claim and therefore there is no 'action at the suit of the Plaintiff'. Further, no particulars of damage have been identified. Although the Plaintiff states that she has entered into a contract for the sale of the Property to a 3rd party, and as a result of the caution being entered has been unable to close that transaction, she does not identify any damage arising as a result. The Plaintiff's claim for damages is dismissed.

53. What remains of the claim, although not pleaded as such, is an application for a declaration that the Defendant is not entitled to maintain the caution over the Property and an order for its removal.

54. The Defendant's counterclaims for:
    a. The sum of $60,000.00; or alternatively
    b. A fair and reasonable sum as the Court may judge fit; and
    c. Damages.

55. The claim for damages is easily disposed of. Neither the affidavit of Mr Roper nor the counterclaim detail any losses incurred by the Defendant save for an unparticularised plea in the counterclaim that the Defendant incurred costs and expenses in registration of the disputed caution. Whilst I have not accepted that the Plaintiff failed

to provide consent to the registration of a caution, as it is the Defendant's case that such consent should have been provided, it naturally follows that the costs of registration of the caution would have been incurred by the Defendant in any event. It would only be in circumstances where the Agreement was terminated on a breach by the Plaintiff that such costs if incurred, could be claimed as a loss by the Defendant. The Defendant's claim for damages is dismissed.

56. As I have held, the Plaintiff was entitled to serve notice of termination of the Agreement as a result of the Defendant's default in failing to complete the transaction.

57. The Plaintiff relies on clause 5.1 of the Agreement as set out at paragraph 10 above. The crux of the dispute is whether the Plaintiff is entitled to retain the 2 instalments paid under the Agreement in the total sum of $60,000.00 as agreed liquidated damages and/or otherwise and if not what, if anything, is she entitled to.

58. The Defendant argues that he is not bound by that part of clause 5.1 as it amounts to a penalty, and as such, it is not enforceable and he is entitled to have his money returned. In response, the Plaintiff avers that pursuant to clause 5.1 the instalments paid contractually may be retained as a genuine pre-estimate of loss.

Discussion

59. Ms McMillan refers me to the Privy Council decision in **Workers Trust & Merchant Bank Ltd. -v- Dojap Investments Ltd**.[5] The brief facts of that case were that Dojap Investments Ltd ('Dojap') had at auction, contracted to purchase a property being sold by the bank. The contract provided that a deposit of 25% of the purchase price was to be paid on the signing of the contract. This was done and Dojap failed to complete. The bank claimed forfeiture of the deposit. Dojap sought relief from forfeiture. At 1st instance, Dojap's claim was dismissed. An appeal was allowed in part, the court holding that there was no justification for a deposit of 25% and awarded relief from forfeiture to the extent of 15%, having held that a reasonable deposit by way of earnest money was 10%. On appeal to the Privy Council, the Court of Appeal judgment was overturned on the basis that as the bank had not sought a reasonable

[5] [1993] A.C. 573.

deposit, the amount of 25% being held as unreasonable, the monies held were not a deposit at all and gave relief for the total amount[6].

60. Although the obiter is of assistance, **Workers Trust** is distinguishable as it involved the forfeiture of a purported deposit, ultimately held to be a penalty intended to act *in terrorem* of default. That is not the case here. What is seeking to be enforced is a contractual provision for the forfeiture of instalment payments made under the Agreement. The purchase price and the terms of payment are set out in a schedule to the Agreement. The schedule provides:

> *"The Purchase Price of the Property is ONE HUNDRED AND TEN UNITED STATES DOLLARS (sic) (USD110,000.00).*
>
> *The purchase price shall be payable as follows:*
>
> 1. *TEN THOUSAND UNITED STATES DOLLARS (USD10,000.00) shall be paid by the Purchaser to the Vendor upon execution Agreement (the Deposit).*
> 2. *FIFTY THOUSAND UNITED STATES DOLLARS (USD50,000.00) shall be paid by the Purchaser to the Vendor on or before July 31, 2020.*
> 3. *The Balance of the Purchase Price (being the sum of FIFTY THOUSAND UNITED STATES DOLLARS (USD50,000.00) shall be paid by the Purchaser to the Vendor at the Closing on the Completion Day (December 7, 2020) against receipt of the Closing Documents."*

61. Whilst the 1st instalment is defined as being a 'Deposit' in the schedule, there is no reference in the Agreement to the payment of a deposit. Further, there is no provision in the Ordinance for a deposit to be paid on an extended payment agreement. The 1st payment is not applied to the purchase price or in any way described differently to the 2nd and 3rd payments.

62. In **Workers Trust**, Lord Browne-Wilkinson, delivering judgment for the Panel stated:

[6] Less an amount in respect of any damages incurred by the bank as a result of the breach by Dojap.

"In general, a contractual provision which requires one party in the event of his breach of the contract to pay or forfeit a sum of money to the other party is unlawful as being a penalty, unless such provision can be justified as being a payment of liquidated damages being a genuine pre-estimate of the loss which the innocent party will incur by reason of the breach. One exception to this general rule is the provision for the payment of a deposit by the purchaser on a contract for the sale of land. Ancient law has established that the forfeiture of such a deposit (customarily 10 per cent. of the contract price) does not fall within the general rule and can be validly forfeited even though the amount of the deposit bears no reference to the anticipated loss to the vendor flowing from the breach of contract."

63. He goes on:

"The special treatment afforded to such a deposit derives from the ancient custom of providing an earnest for the performance of a contract in the form of giving either some physical token of earnest (such as a ring) or earnest money. The history of the law of deposits can be traced to the Roman law of arra, and possibly further back still: see Howe v. Smith *(1884) 27 Ch.D. 89, 101-102*, per *Fry L.J. Ever since the decision in* Howe v. Smith*, the nature of such a deposit has been settled in English law. Even in the absence of express contractual provision, it is an earnest for the performance of the contract: in the event of completion of the contract the deposit is applicable towards payment of the purchase price; in the event of the purchaser's failure to complete in accordance with the terms of the contract, the deposit is forfeit, equity having no power to relieve against such forfeiture."*

64. In **Scott -v- McKinley**[7] the plaintiff and the defendant entered into a contract for the sale of a property on Cayman Brac. The purchase price was to be paid as an initial 'deposit' of 48% of the price, followed by monthly instalments over six years and a final payment of the outstanding balance by a specified date. The contract contained

[7] [1999] CILR 287.

a provision allowing the plaintiff, in the event of any default by the defendant, to serve notice on the defendant requiring her to pay within 14 days, failing which the plaintiff would be entitled to keep the deposit and any instalments already paid (which was stated in the contract to be a reasonable estimate of the plaintiff's loss and not a penalty), the contract would terminate, and the plaintiff would be entitled to vacant possession of the land.

65. The defendant failed to make any payments other than the initial 'deposit'. The plaintiff applied for possession of the property and the defendant applied for relief from forfeiture of the monies paid, relying on **Workers Trust**.

66. Smellie CJ held that the payment was in the nature of a down-payment made by the defendant and not a deposit held in escrow by the plaintiff, which would be retained as a penalty for non-performance. The plaintiff could retain the monies paid to her since when the contract was formed, the forfeiture of those monies had been intended to operate as compensation for loss arising from a breach of the contract, rather than as a penalty (which would be enforceable only to the extent of the actual loss sustained by the plaintiff). This forfeiture clause, in contrast to a penalty clause, did not impose any additional liability beyond the retention of monies already paid.

67. Furthermore, he held the court would not exercise its equitable discretion to grant relief from forfeiture of the down-payment, since this remedy was available only if, viewed with hindsight, the provision was penal in effect and it would be unconscionable to allow the plaintiff to retain the money.

68. I disagree with the parties' characterisation of the 1st instalment as being a deposit. In my view what was paid on the signing of the Agreement was the 1st instalment under an Extended Payment Agreement and simply labelling the 1st instalment a deposit, does not afford that payment the 'special treatment' described by Lord Browne-Wilkinson.

69. If I am wrong in the above view then the error is academic as if the 1st payment was a deposit, it is then forfeit as it is an amount of less than 10% of the purchase price and

as such is a reasonable sum as earnest money and the reasoning in **Workers Trust** does not arise.

70. The trial in this matter was adjourned after the evidence to allow for written closing submissions. I invited the parties to consider and address me on the joint appeals in **Cavendish Square Holding BV -v- Talal El Makdessi; ParkingEye Ltd -v- Beavis**[8] in which the Supreme Court of England and Wales considered the principles underlying the law relating to contractual penalty clauses ('the Penalty Rule') giving a comprehensive exposition of the law[9]. Unfortunately, that offer was not taken up to any helpful degree and the Court has been left to ascertain the applicable law.

71. To sum up the parties' positions, Mr Swann submits that the registration of the caution, was wrongful, as the right to register the caution had been lost by the service of the notice of termination.

72. With respect to clause 5.1 of the Agreement, Mr Swann submits that the forfeiture provision is not penal in nature and is a genuine pre-estimate of loss arising in the event of a breach. Further, Mr Swann urges upon me "*It cannot be over-emphasised that the contract was **drafted by the Defendant** and **accepted by the Plaintiff**.*" He further submits that "*There is nothing in the contract that is unfair towards the defendant. And if there was, **that unfairness could not be ascribed to the plaintiff, who had very minimal input to the language of the contract***". (My emphasis)

73. Mr Swann directed me to **Dunlop Pneumatic Tyre Co Ltd -v- New Garage and Motor Co Ltd**[10] referring to Lord Dunedin's 4-stage penalty test which I do not need to consider given the consideration of **Dunlop** in subsequent authorities and, my finding below that the provision does not amount to a penalty clause.

74. As noted above, Ms McMillian relies on **Workers Trust**. She submits that the retention of the monies paid would be an unreasonable sum and would unjustly

[8] [2015] UKSC 67

[9] Per Neuberger and Sumption LLJ "*These two appeals raise an issue which has not been considered by the Supreme Court or by the House of Lords for a century, namely the principles underlying the law relating to contractual penalty clauses, or, as we will call it, the penalty rule*."

[10] [1915] AC 79 – Discussed in *Cavendish Square*.

enrich the Plaintiff. She suggests that *"[T]he retention of the deposit and the second payment of $50,000.00 is unconscionable and unreasonable given it is not a reasonable sum or a genuine pre-estimate of loss and it should be returned to the Defendant*."

75. Ms McMillan's submission that the facts of this case are distinguishable from those in **Cavendish Square**, rather misses the import of my invitation which was to elicit submissions on the law applicable to this matter. She submits that clause 5.1 does not impose any secondary obligation. That is rather the point which, in my judgment takes clause 5.1 out of the realm of being in the nature of a penalty, for the following reasons.

76. Per Lord Diplock in **Scandinavian Trading Tanker Co AB -v- Flota Petrolera Ecuatoriana (The "Scaptrade")**[11]

> *"The classic form of penalty clause is one which provides that upon breach of a primary obligation under the contract* ***a secondary obligation shall arise*** *on the part of the party in breach to pay to the other party a sum of money which does not represent a genuine pre-estimate of any loss likely to be sustained by him as the result of the breach of primary obligation but is substantially in excess of that sum. The classic form of relief against such a penalty clause has been to refuse to give effect to it, but to award the common law measure of damages for the breach of primary obligation instead."* (My emphasis)

77. As per Lords Neuberger and Sumption (Lord Carnworth agreeing) in **Cavendish Square**:

> *"The question whether a damages clause is a penalty falls to be decided as a matter of construction, therefore as at the time that it is agreed: Public Works Comr v Hills [1906] AC 368, 376; Webster v Bosanquet [1912] AC 394; Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79, at pp 86-87 (Lord Dunedin); and Cooden Engineering Co Ltd v Stanford [1953] 1 QB 86, 94 (Somervell LJ). This is because it depends on the character of the provision, not on the circumstances in which it falls to be enforced. It is a species of*

[11] [1983] 2 AC 694 at 702.

agreement which the common law considers to be by its nature contrary to the policy of the law."

78. The starting point for the consideration of the law is **Stockloser -v- Johnson**[12] which concerned agreements for the Plaintiff to purchase plant and machinery. The contracts provided that payment of the purchase price should be made by instalments, and that should the purchaser default in any instalment for a period exceeding 28 days the vendor was entitled to rescind the contract, forfeit the instalments already paid and retake possession of the plant and machinery. The purchaser having made default in payment of an instalment, the vendor rescinded the contract and forfeited the instalments paid. The purchaser, who was financially unable or unwilling to complete the contracts, claimed the return of the paid instalments on the grounds that the effect of the forfeiture clause was penal and unconscionable and in equity he was entitled to relief. Relief from forfeiture was refused[13].

79. **Stockloser** was discussed in **Workers Trust** and has been referred in almost all subsequent authorities.

80. In **S. Jared Properties Limited -v- Personal Representative of N. Simpkins III, C.Z. Simpkins and Bruce Campbell and Company**[14] the Court of Appeal of the Cayman Islands considered an appeal from the decision of Harre CJ refusing relief from forfeiture. In that matter, the Defendant had agreed to purchase a parcel of land from the Plaintiff. The agreement called for payment of the purchase price by an initial deposit of US$65,000 (or 10% of the total). This amount was duly paid by the purchaser to the vendors and no question arose as to the retention of that amount by the vendors. The remainder of the price was to be paid in four further instalments each in the amount of US$146,250 at six-monthly intervals.

[12] [1954] 2 WLR 439.
[13] Somervell and Denning LLJ giving the majority judgment, Romer LJ agreeing the order but for different reasoning.
[14] [1996] CILR 149.

81. Clause 4 of the contract was in the following terms:

> *"In the event of the purchaser's default in making any of the payments in cl. 2 [the payment provision clause] hereof the whole balance of the purchase price shall immediately become due and the vendors may without prejudice to any other available remedy serve written notice on the purchaser requiring the purchaser to complete the purchase contemplated by this agreement within twenty-eight (28) days after service of such notice and in the event that the purchaser shall fail to complete this agreement within twenty-eight (28) days after service of such notice as aforesaid (in respect of which time shall be of the essence) the vendors shall be entitled without prejudice to any other available remedy to forfeit and keep absolutely the payment of the deposit and all other payments paid under cl. 2 hereof whereupon this agreement shall be automatically terminated and rendered null and void."*

82. The first and second of the four contemplated instalments were paid by the purchaser, although not upon the dates stipulated in that clause, and interest at 15% per annum was also paid by way of a fresh agreement between the parties upon these two amounts of US$146,250 during the periods when they were respectively overdue. The remaining two instalments were never paid.

83. Collet JA, giving judgment for the Court put the difference between penalty clauses and genuine pre-estimates of damage as:

> *"The law as to penalty clauses has been well settled for many years. Where parties to a contract stipulate for the payment of a specified sum in the event of breach, that sum may be classified either as a penalty or as liquidated damages. It is a penalty if it is stipulated as* in terrorem *of the offending party; that is, if it bears no relationship to the extent of the damage which the breach is likely to cause to the other party. It is liquidated damages if it can be perceived as a genuine pre-estimate of such damage, which the parties have agreed upon to obviate the difficulty and expense of proving the extent of the damage actually suffered. Whether a particular clause is in the nature of a*

penalty or is a genuine pre-estimate of damage is to be determined in the light of circumstances that prevail at the date of the execution of the contract: see generally Treitel, The Law of Contract, 9th ed., at 899 (1995) and Chitty on Contracts, 27th ed., at 1251–1253 (1994)."

84. In **Stockloser** Denning, L.J. stated:

"There is, I think, a plain distinction between penalty cases, strictly so called, and cases like the present. It is this: when one party seeks to exact a penalty from the other, he is seeking to exact payment of an extravagant sum either by action at law or by appropriating to himself monies belonging to the other party…. The claimant invariably relies, like Shylock, on the letter of the contract to support this demand, but the courts decline to give him their aid because they will not assist him in an act of oppression…. In the present case, however, the seller is not seeking to exact a penalty. He only wants to keep the money which already belongs to him. The money was handed to him in part payment of the purchase price and as soon as it was paid, it belonged to him absolutely. He did not obtain it by extortion or oppression or anything of that sort and there is an express clause—a forfeiture clause, if you please—permitting him to keep it."

85. In **Else (1982) Ltd -v- Parkland Holdings Ltd**[15] the issue concerned the sale of a majority shareholding in Sheffield United Football Club[16]. The sale price was £2,750,000.00 payable as to £50,000.00 on signing the agreement, a further payment of £300,000.00 and thereafter monthly payments of £100,000.00. Completion was to take place on payment in full, but pending completion the share certificate was lodged in escrow. Clause 6 of the sale agreement provided that if the defendant fell more than £300,000 into arrears, the plaintiff was entitled to recover the share certificate and retain half of the sums received from the defendant under the agreement.

[15] [1994] 1 BCLC 130.
[16] The share ownership came with the privilege of being the football club's chairman.

86. The defendant had made payments of £1,750,000 but it fell into more than £300,000 of arrears. The defendant claimed that clause 6 was unenforceable as it was a penalty clause. The parties entered into a settlement agreement under which the defendant agreed to pay £860,000.00 by a certain date in final settlement of all sums due under the first agreement. By clause 4(1) of the 2nd agreement, the defendant agreed that if it failed to pay the £860,000.00 by the due date, the plaintiff would be entitled to the return of the share certificate and to retain £875,000, being half the sum, the defendant had paid under the first agreement, and that the sum represented liquidated damages and was not a penalty.

87. The plaintiff sought a declaration that clause 4(1) was valid and enforceable. The defendant claimed that it was a penalty and therefore unenforceable and, in the alternative, counterclaimed for relief from forfeiture. Kay J found in favour of the plaintiff. On appeal, the court held:

> *"Clause 4(1) was not a penalty clause. Under the contract for the sale of the shares, the plaintiff retained legal title to the shares until the defendant discharged its payment obligations and cl 4(1) merely confirmed the plaintiff's right as a vendor to rescind the contract for breach by the defendant of an essential term. It did not impose an obligation upon the defendant to transfer to the plaintiff property to which it was both legally and beneficially entitled. It should be regarded as a clause permitting the plaintiff to forfeit half the sums paid by the defendant on account of the purchase price. The court would relieve against such forfeiture if it was satisfied that the forfeiture would be penal in effect and it would be unconscionable for the vendor to enforce it. W had enjoyed the privileges of being chairman of the club for two years and on this ground and on all the other facts, Kay J was correct not to grant such relief. Accordingly, the appeal would be dismissed."*

88. The Court of Appeal unanimously approved the majority decision in **Stockloser** as to the circumstances in which the court will grant relief from forfeiture. As per Hoffmann LJ:

"The Stockloser v. Johnson discretion to relieve against forfeiture of instalments requires that not only should the forfeiture be penal in effect but also that it should be unconscionable for the vendor to enforce it… As Lord Radcliffe said in Bridge v Campbell Discount Co Ltd [1962] 1 All ER 385, [1962] AC 600 'unconscionable must not be taken to be a panacea for adjusting any contract between competent parties when it shows a rough edge to one side or the other.'"

89. In **Jared** the Court held that:

"Clause 4 of the present contract is not a penalty clause of this variety. It does not call in the event of breach for the payment of any further specified, or indeed unspecified, amount by the defaulting purchaser but rather entitles the vendors to retain for their own benefit the instalments of the purchase price already paid to them notwithstanding the termination of the contract and extinction of the purchaser's right to acquire the land. It is rightly to be regarded as a forfeiture clause and the distinction between such a clause and one in the nature of a penalty is well recognized (sic) by the authorities."

90. More recently, Eder J in **Cadogan Petroleum Holdings Ltd v Global Process Systems LLC**[17] held the penalty doctrine was inapplicable to forfeiture of prepayments made towards the acquisition of property in the form of two gas plants. The contract provided for a series of such pre-payments, not all of which GPS completed making. It never therefore acquired the gas plants, and Cadogan relied on a contractual clause forfeiting all pre-payments that GPS had made.

91. As per Hoffmann LJ in **Else**:

"The penalty rule looks at the position when the contract is made and asks whether the clause is a stipulation for payment on breach intended to operate in terrorem *or whether it is a genuine pre-estimate of damage. If the former, the clause is enforceable only to the extent of the actual damage: see Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79, [1914–*

[17] [2013] EWHC 214 (Comm).

15] All ER Rep 739. The rule is mechanical in effect and involves no exercise of discretion at all. The forfeiture rule looks at the position after the breach when the innocent party is enforcing the forfeiture. It asks whether in all the circumstances it would be unconscionable to allow the forfeiture to take effect. This is an exercise of discretion to grant equitable relief."

92. In **Cadogan**, Eder J took the view that "*any suggested unconscionability that might arise by the exercise of the right of rescission and the possibility of Cadogan retaining the sums paid and obtaining recovery of the payments outstanding at the date of rescission as well as keeping title to the Gas Plants can be addressed adequately by granting relief against forfeiture in such terms as might be just*."

93. The court therefore upholds a forfeiture clause and then applies a conscionability test to determine what relief, if any, should be granted.

94. Additionally, in **Cadogan**, an argument was run that the recission of the contract amounted to a failure of consideration and as such the pre-payments were recoverable as part of the law of unjust enrichment[18]. Eder J rejected that argument, stating[19]:

"… in a contractual case, if a contract provides that one party can obtain or retain a benefit even if a contractual provision for termination is exercised, there has been no relevant failure of consideration: see Goff and Jones on the Law of Unjust Enrichment, para 12–19. Further, in any event, where the contract has explicitly provided for the circumstances in which benefits will be or will not be returned, its provisions govern: see Goff and Jones on the Law of Unjust Enrichment, para 3–28. Here, for the reasons given above, it is my conclusion that the contract expressly governed the matter and provided that accrued rights should not be affected by rescission under clause 22."

95. I regard the character of clause 5.1 of the Agreement to be a forfeiture clause and not a penalty clause. What then is the approach the court should take in considering

[18] The issue of unjust enrichment was touched upon by Ms McMillan in her closing submissions.
[19] At para. 27 *et seq*.

whether to grant relief from forfeiture to the party who falls foul of such a clause?

96. In **Stockloser**, the court was of the view that for there to be relief from a forfeiture clause, "*Two things are necessary: first, the forfeiture clause must be of a penal nature, in this sense, that the sum forfeited may be out of all proportion to the damage: and second, it must be unconscionable for the seller to retain the money*."

97. The question that arises then is what amounts to unconscionability? In **Jared** the court described unconscionability as being fraudulent conduct or sharp practice or some other unconscionable conduct, no doubt taking the same from **Stockloser**, and that definition has been carried through the authorities.

98. Ms McMillan submits that if the plaintiff is allowed to retain the monies paid it would be an unconscionable outcome, as the Plaintiff would be unjustly enriched and the sum does not reflect a genuine pre-estimate of loss, but that is not in my view the test of unconscionability as derived from the above authorities. Unconscionability in this context is referable to the party seeking to forfeit and not to the effect of the provision.

99. There is no suggestion of any sharp practice or fraudulent conduct by the Plaintiff[20] and I have found against the Defendant with respect to any alleged breach of contract by the Plaintiff. As per Lord Justice Romer in **Stockloser**:

> *"There is, in my judgment, nothing inequitable* per se *in a vendor, whose conduct is not open to criticism in other respects insisting upon his contractual rights to retain instalments of money already paid. In my judgment there is no sufficient ground for interfering with the contractual rights of a vendor under forfeiture clauses of the nature which are now under consideration, while the contract is subsisting, beyond giving the purchaser who is in default, but who is able and willing to proceed with the contract, a further opportunity of doing so; and no relief of any other nature can properly be given, in the absence of some special circumstances such as fraud, sharp practice or other*

[20] Such as in *Steedman -v- Drinkl* (1916, Appeal Cases, page 275) where the purchaser tendered the amount of the instalment late, **but the vendor refused to accept it**. (My emphasis).

unconscionable conduct of the vendor, to a purchaser after the vendor has rescinded the contract."

100. Whilst Somervell and Denning LLJ were of the view that the above was a too narrow interpretation, Denning stated:

> *"I have had the advantage of reading the Judgments which will be delivered by my brethren. My brother Romer comes to the conclusion that after rescission by the vendor relief would only be given if there were some special circumstance, such as fraud, sharp practice, or other unconscionable conduct, and that before rescission a buyer would only get relief if willing and able to complete. In other words, the only relief would be further time. I think the statements of the law in the cases to which I will refer indicate a wider jurisdiction. I think they indicate that the Court would have power to give relief against the enforcement of the forfeiture provisions, although there was no sharp practice by the vendor, and although the purchaser was not able to find the balance.* ***It would, of course, have to be shown that the retention of the instalments was unconscionable, in all the circumstances***." (My emphasis)

101. Whilst the conflicting obiter in **Stockloser** has yet to be resolved, I am not of the view that in the instant case, there is anything unconscionable in the Plaintiff relying on the terms of the Agreement, particularly as I am mindful that the Agreement was drafted by the Defendant's attorney and that both parties were legally represented in the transaction and so were on equal footing.

102. Additionally, the Plaintiff has entered into a new sale agreement which had a closing date of 13th April 2022. The sale price under the new agreement is $80,000.00 and there is therefore a *prima facie* loss to the Plaintiff of $30,000.00 and she has been put out of her money for some 2 ½ years.

103. I find that the Defendant is not entitled to the relief he seeks and as such the counterclaim is dismissed. In consequence, the Defendant's interest in the Property came to an end with the service of the notice of termination of the Agreement on 28th

April 2021. I, therefore, declare that the Defendant is not entitled to maintain the caution over the Property and pursuant to section 129(1) of the Registered Land Ordinance (Cap.9.01) order that the same shall be removed.

104. I will hear counsel on the issue of costs.

7th September 2023

The Hon. Justice Anthony S. Gruchot
Judge of the Supreme Court