Hilary Term
[2019] UKPC 14
Privy Council Appeal No 0074 of 2017

JUDGMENT

Francis and another (Appellants) *v* Vista Del Mar Development Ltd (Respondents) (Cayman Islands)

From the Court of Appeal of the Cayman Islands

before

Lord Reed
Lord Carnwath
Lady Black
Lady Arden
Lord Kitchin

JUDGMENT GIVEN ON

8 April 2019

Heard on 27 November 2018

Appellant	*Respondent*
M Georgia Gibson Henlin QC	Mac Imrie
Andrew De La Rosa	Gemma Freeman
(Instructed by Blake Morgan LLP)	(Instructed by Janes Solicitors)

LADY ARDEN:

Issues for determination on this appeal

1. When one person gives another (the option holder) a conditional option to buy her land, the option holder will be entitled to exercise the option when the conditions for exercising it are fulfilled by following any procedural requirements set by the terms of the option. A new contract then arises between the parties and their relationship changes from one of option giver and option holder to one of vendor and purchaser. This appeal concerns the consequences for their relationship, in the context of proceedings for specific performance, if the option holder delays in exercising her option rights or in enforcing her rights under that new contract to which exercise of the option has given rise. The appeal is against the order dated 8 June 2017 of the Court of Appeal dismissing an appeal from the order for specific performance dated 20 September 2016 made by Mangatal J in the Grand Court.

Creation of the repurchase option over the appellants' building plot

2. The option in this case is a repurchase option under a contract to develop a building plot. The appellants, Ms Janet Francis and Mr Dwight Clarke, purchased a building plot from Vista Del Mar Development Ltd ("VDM") at Parcel 290 Block 10A West Bay Beach North ("the Property") for US$462,460 by an agreement in writing dated 6 March 2009 ("the Agreement for Sale"). The Property forms part of the Vista Del Mar development and it is located near the Yacht Club and Salt Creek in West Bay, Grand Cayman. As Sir Richard Field JA explained in his judgment, the Property forms part of a larger residential development, and there were related covenants imposed on the appellants in favour of other purchasers of lots in the development to commence construction of a residence on the Property:

> "The VDM residential development is a gated community comprising ocean front and canal front lots. The owners of the lots (save in the case of VDM's former majority shareholder, Mr Freytag, who owns two lots) are bound by reciprocal covenants, some restrictive and some positive. The restrictive covenants are set out in a separate document from the Agreement for Sale signed by each purchaser and are referred to in the Agreement for Sale as "the Restrictive Agreements". These covenants include obligations to have constructed on the lots houses of approved design, architectural style, size, building materials and colour. By Clause 5 of the Agreement for Sale the appellants agreed that they

> were under an obligation pursuant to the Restrictive Agreements to commence and diligently proceed with the construction of a residence and ancillary buildings, landscaping and other development works on the Property in all respects subject to and in accordance with the Restrictive Agreements." (para 3)

3. Under the Agreement for Sale, the appellants agreed with VDM that, if they defaulted in performing their obligations regarding the construction of a residence, VDM would have the right to call for the sale to it of the Property. By a Deed of Variation dated 11 April 2011, amending the Agreement for Sale, the parties varied the arrangements. The relevant clause setting out the option, as so varied, provided as follows:

> "6.1 The Purchaser acknowledges and agrees that the Property comprises part of the development and that it is or will be subject to various restrictions, guidelines and regulations from time to time in force which the Purchaser agrees are necessary for the upkeep and management of the development ...
>
> 6.2 The Purchaser agrees, so that the same shall survive completion, that if, save for reasons beyond its control (including acts of God), it has failed either to commence construction of a residence on the Property by 9 January 2012 or to complete such construction by eighteen (18) months thereafter, then in either case it will upon receipt of written notice from the Vendor requiring it to do so sell the Property back to the Vendor at a price equal to the Purchase Price plus the value of the Construction Works (if any) on it as at the date of receipt by it of the Vendor's notice. For the purpose of this clause, the value of the Construction Works shall mean the sum actually paid by the Purchaser for the Construction Works before its transfer of the Property back to the Vendor pursuant to this Clause 6.2."

4. So Clause 6.2 was precise about the manner and consequences of exercising the option: the appellants were obliged to sell the Property to VDM pursuant to the option as soon as they received written notice from VDM requiring them to do so. The parties also provided a clear formula for working out the price which VDM would have to pay.

5. The Deed of Variation also provided that, if there was any inconsistency between the Agreement for Sale and the Deed of Variation, the latter should prevail:

> "3.2 The Agreement and this Deed shall be read in conjunction and in the event of an inconsistency between the provisions of the Agreement and this Deed, then the provisions of this Deed shall prevail but only to the extent of such inconsistency."

Failure to start construction, exercise of the option and subsequent actions

6. The appellants have never suggested that they ever commenced construction on the Property. Their case is that they always intended to do so, and still intend to do so. Nor do the appellants suggest that they did not duly receive a notice in the terms required by Clause 6.2. Their case is that the notices they received were not valid for other reasons arising from their interpretation of the totality of the contractual arrangements and VDM's subsequent actions, which the Board will next outline. However, the Board has only seen a selection of the correspondence that was before the Grand Court and the Court of Appeal.

7. After the Agreement for Sale was executed, the appellants gave assurances that they would be able to commence construction in time and continued to do so up to November 2011. At that point they indicated that construction would start by or before Easter 2012. In February 2012 they indicated construction would start in about eight weeks.

8. The appellants did not disclose that as from March 2012, if not before, they were seeking to redesign their house and had given instructions to their architects to that effect. This would have necessitated new planning approvals and so the building could not go ahead within the timetable envisaged. On the contrary, Ms Francis's witness statement in these proceedings explained that her position between May 2011 and April 2013 was that she was regularly off island to attend to her mother who was terminally ill in Houston and died during this period. She stated that after her mother's death she was heavily involved in winding up her mother's affairs in the US and Jamaica, but that nonetheless progress had been made by the architect and other professional advisers.

9. On 2 October 2013, Mr Arek Joseph, an architect who acted as a consultant to VDM sent an email to the appellants explaining that VDM was considering whether to exercise its option in the light of the appellants' delay. The appellants replied that they were well on their way to commencing construction.

10. In the event, VDM gave notice to exercise the option on two occasions in essentially the same form. The Board will refer to these notices as the First Notice and Second Notice respectively.

11. VDM gave the First Notice on 14 October 2013 and the appellants personally received it on 23 October 2013. The formal parts of the First Notice stated:

> "We refer to previous correspondence in relation to this matter and in particular to:
>
> - Agreement for the sale of the Land between VDM and you dated 6 March 2009 ('Agreement');
> - Deed of variation of the Agreement dated 11 April 2011 ('Variation'); and
> - Recent correspondence with Arek Joseph of VDM ('Joseph Correspondence').
>
> Pursuant to Clause 6.2 of the Agreement (as varied by Clause 4.1 of the Variation) you had until 9 January 2012 to commence the construction of a residence on the Land. Additionally, and pursuant to that clause, you both agreed that failure to do so would constitute a right of VDM to purchase the Land back from you at a price equal to the purchase price (being US$462,460.00). This letter serves as a notice by VDM pursuant to Clause 6.2 of the Agreement (as varied by the Variation) to purchase the Land back from you at the purchase price of US$462,460,00. VDM wishes to effect the transfer of the land within 30 days of the date of this letter. In this regard, VDM will shortly provide you with a form of transfer to effect the conveyance of the Land for you to both sign. We will also be in contact shortly to arrange for the completion of the re-purchase of the Land."

12. By email dated 30 October 2013, Ms Francis acknowledged receipt of the notice. She recalled that VDM was primarily concerned to see that purchasers developed their plots and assured VDM that the appellants were well on their way to commencing construction. She also provided a further construction schedule, though it was apparently not clear to VDM from this when construction was to commence. Ms Francis requested a meeting which eventually took place in January 2014. At that meeting the appellants gave further assurances that they would be able to commence the construction of a residence on the Property. A further meeting took place between the parties' professional advisers at which the appellants' architect promised to send an updated schedule for the works to VDM.

13. In February 2014, Ms Francis confirmed that, subject to receipt of building permits, the appellants would commence construction in June or July 2014.

14. On 29 April 2014 and 18 June 2014 Mr Joseph asked what progress had been made in obtaining the necessary finance. On 19 June 2014, Ms Francis replied that Butterfield Bank required a quantity surveyor's report and that that would be available on 20 June 2014. She did not give VDM any confirmation following that report that funding would be available and so VDM served the Second Notice on 10 July 2014.

15. The appellants acknowledged receipt of the Second Notice by an email dated 23 July 2014. The appellants again asked for more time. They mentioned that VDM had extended courtesies to them. They asked for more time to complete the application process with their bank for funding for the construction project and said that they expected that this process would be completed shortly. Having heard nothing more, on 19 August 2014 VDM requested the appellants to complete a deed of exercise of option and release. The appellants declined to do so.

16. VDM then began these proceedings for specific performance. In its statement of claim it relied only on the Second Notice. The appellants seized on the service of two notices. The First Notice, on their case, became invalid because (among other points) it was not pursued, and the Second Notice was ineffective because the option had already been exercised.

VDM's specific performance action and trial before Mangatal J

17. As explained, in its statement of claim as originally filed, VDM relied on a notice of exercise of the option dated 10 July 2014. In their defence in these proceedings, the appellants admitted that they had not commenced construction of a residence on the Property but contended that it is not open to VDM to exercise the option. Moreover, they alleged that with full knowledge of its rights VDM had affirmed any breach of the Agreement for Sale as varied. Furthermore, they contended that the option was neither valid nor enforceable and that in any event it had lapsed because VDM had not exercised it promptly on the date on which the right arose or within a reasonable time after that date. Additionally, they pleaded laches and absence of any consideration and a number of other defences which it is unnecessary to mention.

18. VDM denied these allegations and positively asserted in its reply that it was induced to extend any temporary forbearance it gave in exercising its rights under the Agreement for Sale by the appellants' repeated assurances that they were about to commence construction.

19. In her judgment, Mangatal J recorded that in his closing submissions counsel for the appellants (not counsel appearing on this appeal) acknowledged that the appellants could not rely on affirmation or waiver (Judgment, para 27).

20. The appellants argued at trial that the option had lapsed after its exercise on 14 October 2013 because the First Notice had stated a completion date, which passed without completion taking place and without completion being rescheduled, and because the notice had also stated that VDM would provide a form of transfer, which it did not do. Nor did it tender the purchase price. The same applied to the Second Notice dated 10 July 2014, which was in precisely the same form as the first. The appellants contended, however, that the option could only be exercised once and so VDM could not effectively exercise the option again by serving the Second Notice.

21. The judge rejected the argument that VDM did not issue the First Notice within a reasonable time of the right to exercise the option becoming exercisable:

> "88. Further and in any event, the 'end date' for construction was 9 July 2013. I accept the evidence of VDM that on 31 July 2013 it sought an update from the defendants and on 2 October 2013 indicated that it was considering whether to exercise its rights under the option. The notice exercising the option was issued on 14 October 2013 and received by the defendants on 23 October 2013. I accept Mr Imrie's submission that VDM acted reasonably, and promptly, having regard to the circumstances, including the communications and correspondence between the parties. There are numerous pieces of correspondence which show that the defendants understood that VDM intended to exercise its rights, including the email from Ms. Francis to Mr Joseph in which she thanked him for the kind courtesies extended, and the email from Ms Francis to Mr Joseph, after receipt of the 14 October 2013 notice, requesting a meeting between the parties and reassuring VDM, as the defendants had done many times in the past, that the defendants had every intention of commencing construction in short order."

22. The judge also rejected the argument that the Second Notice was invalid:

> "89. In relation to Issue 4(2) [ie whether the option had lapsed because VDM failed to comply with the timetable specified for the exercise of the option in the First Notice], in my judgment, the evidence clearly demonstrates that VDM in good faith, based upon the defendants' continuing assurance that they would soon start

construction, and requests for understanding, in forbearance did not act upon the timetable referred to in its notice of October 2013.

90. This can be seen from the discussions and numerous correspondence between the parties, including by way of example, two emails from Mr Joseph to Ms Francis, both dated 4 February 2014. In one email Mr Joseph writes to Ms Francis stating: "When we met during Charlie's visit, we had made a diary note of 3 February 2014, which represented the 30 days you needed to write to Vista Del Mar *demonstrating your intent, and wherewithal to commence construction of your residence on Parcel 290.*" [Emphasis supplied.] Ms Francis then responded on the same 4 February 2014 saying the defendants' architect was to deliver a revised plan, based upon modifications which the defendants had asked him to make, and that Apec, the defendants' engineers, had already started the process of finalizing the construction and engineering drawings. She said that she hoped to also provide a fairly accurate schedule of works shortly. Mr Joseph responded, saying amongst other matters that 'whatever the challenges you have been having, it seems that things have not moved forward since our last meeting. I note that the plans are still to be revised to reduce the square footage, but, this conflicts with your advice that Apec has started finalising construction/engineering drawings. Clearly this cannot happen without them having the revised/reduced design drawings on which to base their work.' There is a string of emails going right up to late June 2014 which in my view support VDM's position on this issue.

91. In my view, the defendants cannot take advantage of VDM's good faith forbearance and are estopped from relying on any such delay as a means to avoid the enforcement of the agreement for sale as amended by the deed of variation of agreement. The court has to assess the situation in light of all of the circumstances, including the correspondence and communications between the parties. In any event, VDM was entitled to rely upon the 'no waiver' clause."

23. The judge rejected the defences raised on the basis of lack of clean hands and laches. On the former, the judge did not accept that the appellants had been treated differently (Judgment, para 123). She found on the basis of the evidence of Mr Joseph, whom she described as "a very credible and forthright witness", that VDM had sought to enforce covenants against other purchasers in the development and had allowed some purchasers to themselves resell the land, but that the appellants had not asked to do this (Judgment, para 122). In any event the judge considered that VDM would be entitled to

take a different approach with respect to different properties in appropriate cases. She found that the parties' correspondence did not show any impropriety or improper purpose. In conclusion, the judge made an order for specific performance in favour of VDM.

Appellants' unsuccessful appeal to the Court of Appeal

24. The appellants argued that, on the true construction of Clause 6.2, there could only be one exercise of the option. Moreover, they argued that failure to complete the construction within eighteen months only gave rise to a second "trigger date" for the option if construction commenced before 9 January 2012. In agreement with the judge, the Court of Appeal (the Hon John Martin JA, the Hon Sir Richard Field JA, and the Hon C Dennis Morrison JA) rejected that argument (Judgment of Sir Richard Field JA, para 21, with which the other members of the Court agreed). That argument was not renewed before the Board.

25. Next the appellants argued that the First Notice was not served within a reasonable time of the failure to commence construction by 9 January 2012. The principal basis for this submission was the delay up to 9 July 2013 rather than the period between that date and service of the First Notice. Nonetheless, Sir Richard Field JA rejected it on the footing that even if the option became exercisable on the failure to commence construction by 9 January 2012 he would have found that the First Notice had been served within a reasonable time:

> "25. In my judgment, even if the end date for the commencement of construction had been 9 January 2012, VDM would have been entitled to a finding that the 14 October Notice had been received by the appellants within a reasonable period of time. I say this because it is clear from the evidence that throughout the period from 9 January 2012 down to 9 July 2013 the appellants intended to construct a residence on the property and VDM was prepared to allow the appellants considerable latitude as to the timing of such construction, whilst at the same time making the odd enquiry as to when construction would take place. It would accordingly be wholly unjust to hold that, in giving the appellants this latitude, VDM was acting at its risk that the option would lapse. On the contrary, the effect of the conduct of the parties during this period was to extend the time by which VDM was obliged to exercise the option, notwithstanding that the appellants did not make an express request for an extension of time."

26. The appellants contended that the option was exercisable only once. Clause 6.2 did not permit successive exercises of the option so the Second Notice was invalid. The parties' relationship became that of vendor and purchaser after the First Notice was received. That notice, however, ceased to have any effect because of VDM's failure to reschedule the completion date and the issue of the Second Notice. VDM had effectively waived its rights under the First Notice by giving more time when the appellants asked them to do so. VDM had not reserved its rights to enforce the option (see Judgment of Sir Richard Field JA, para 27).

27. Sir Richard Field JA noted that, if this argument was right, VDM had lost its right to enforce the option by granting a series of indulgences while the appellants had freed themselves from their obligation to construct a residence:

> "28. I cannot accept this argument. If it were soundly based the result would be that, by reason of a series of indulgences granted in good faith by VDM over a lengthy period, the appellants had become free of the obligation to construct a residence on the property whilst VDM had lost its right to purchase the property if no such construction was undertaken."

28. The reason why Sir Richard Field JA did not consider that the argument was soundly based was because in his judgment after the First Notice the parties had proceeded on the basis that the appellants continued to be bound to construct a residence whilst VDM continued to have "a right under amended Clause 6.2 to purchase the property if things dragged on over long." So, he concluded:

> "There was therefore in my view an estoppel by convention to this effect from which the appellants cannot depart, with the consequence that the 10 July Notice was an effective exercise of the option." (Judgment, para 29)

29. Moreover, the appellants had not argued before the trial judge that the service of a notice exercising the option changed the parties' relationship to that of vendor and purchaser, but this did not make any difference anyway because of the convention estoppel between the parties that the option would continue to be exercisable after that date if construction was unduly delayed (Judgment of Sir Richard Field JA, paras 30, 31).

30. The Court of Appeal rejected the appellants' challenge to the judge's conclusions on "clean hands" in the light of the judge's factual findings.

Submissions on further appeal to the Board

31. The appellants are represented before the Board by Georgia Gibson Henlin QC and Mr Andrew De La Rosa. On the submissions summarised in this judgment, Mr De La Rosa addressed the Board.

32. Mr De La Rosa submits that at para 28 of its judgment the Court of Appeal took the erroneous view that the appellants' case was that the obligation to build and the right to repurchase had been extinguished. By contrast, the appellants' case was that there was a development scheme whereby restrictions would be observed. That meant that the adjoining landowners could enforce the restrictions. Moreover, VDM had sold its interest in the land and its only interest in enforcing the option was a financial one because exercise of the option would enable it to purchase a plot at the original purchase price. Enforcement should, therefore, be left to the adjoining owners. It must be remembered, submits Mr De La Rosa, that purchasers would have bought their plots with bank loans and that the value of their land had increased by some 50%. What the Court of Appeal should have said in para 28 of its judgment was that, if the appellants were right, the land was free of any obligation to *VDM*.

33. The appellants further contend that VDM applied sanctions for non-compliance with these restrictions selectively and in a discriminatory manner against the appellants because they were the only parties against whom proceedings were taken for failure to commence construction. Therefore it did not have "clean hands" and so the judge should not have made an order for specific performance at its instance.

34. Mr De La Rosa submits that the First Notice exhausted the right to exercise the option to repurchase the Property because the option did not confer any right to make successive exercises of it. Moreover, it had to be exercised within a reasonable time of January 2012 because the appellants had not commenced construction by that date. The exercise in October 2013 more than 18 months later was plainly not within a reasonable time. Likewise, if, contrary to Mr De La Rosa's submission, the trigger date was the failure to have completed construction by 9 July 2013, the exercise of the option in July 2014 was likewise not within a reasonable time.

35. Mr Mac Imrie, who with Gemma Freeman appears for VDM, addressing the question whether the option was duly exercised, contends that there were two cumulative opportunities to exercise the option. The first arose if construction did not commence prior to 9 January 2012. The second arose if the building had not been completed by July 2013. He submits that this is how the Grand Court had interpreted the option right in Clause 6.2 of the Agreement for Sale. Mr Imrie accepts that VDM had not pleaded that the First Notice was effective and that the Second Notice was "writ in water" and could be ignored. Mr Imrie submits that it is clear even on the limited

selection of correspondence before the Board that both the First Notice and the Second Notice were served within a reasonable time of the appellants' default in commencing construction. The price had to be finally worked out and a deed of transfer sent. These matters did not occur following the First Notice, nor did VDM extend the time set for completion by the First Notice, because of the appellants' assurances, but these omissions did not undermine the efficacy of the Notices.

36. In those circumstances the way in which Mr Imrie put VDM's case is that there was a second opportunity to exercise the option, that is, within a reasonable time of 9 July 2013 if the construction had not been completed by that date, and that there was an implied agreement or understanding that the respondent would be free to issue a further option notice if matters were unduly delayed after the issue of the First Notice.

37. Mr Imrie relies in support of this argument on VDM's pleaded response to the appellants' allegations, by an amendment made shortly before the trial, that, by virtue of the terms of the First Notice and VDM's failure to reschedule completion, VDM, with knowledge of its legal rights, acknowledged the facts that gave rise to the appellants' breach of their obligations under the Agreement for Sale but affirmed that Agreement without fixing any new date for commencing or completing construction of the residence at the Property so that the appellants were no longer under any time restrictions. In fact, at trial, counsel for the appellants, in his closing submissions before the judge, withdrew that argument but before that happened VDM had pleaded in reply that the appellants were estopped from relying on their delay as a ground for avoiding enforcement of the agreement for sale. In the particulars of this allegation, VDM set out various assurances which the appellants had given right up to August 2014. However, the Board notes that at no stage did VDM argue that the First Notice was effective and that therefore the Second Notice was of no legal effect or, to use the term used in Scots law, it was *pro non scripto.*

38. The Court of Appeal took the view that the option had to be exercised within a reasonable time of 9 July 2013 (not 9 January 2012) and so it was satisfied that the First Notice had been received in time. It was also satisfied that the First Notice had been received within a reasonable time if the trigger date was 9 January 2012 (Judgment, paras 23 to 27). On the Court of Appeal's convention estoppel analysis, any delay after October 2013 was immaterial.

VDM's post-hearing application to amend its statement of claim

39. In the course of the hearing, the Board gave directions allowing VDM to apply for permission to amend its statement of claim to plead that the First Notice was valid. VDM took the opportunity at the same time to formulate its case on convention estoppel and in addition to plead that the effect of service of the First Notice was to create a

binding contract for sale enforceable by specific performance. It applied to amend paragraphs 13 and 14 of the statement of claim by adding the words italicised below:

> "13. On *13 October 2013, the plaintiff sent a first notice to the defendants (the 'First Notice') and on* 10 July 2014 the plaintiff sent a *second* notice *(the 'Second Notice')* to the defendant exercising its right to re-purchase the Property.
>
> 14. The defendants acknowledged receipt of the […] *Second Notice* of exercise of option by email dated 23 July 2014 which email did not dispute the contents of notice of exercise of option. […] *This* email noted the courtesies extended to the defendants to date (which was based on constant written and oral assurances from the defendants that construction would take place) and requested further time to complete the application process with their bank for funding for the construction project and that they expected that this process would be completed shortly.
>
> *14A. In the circumstances, an implied agreement or assumption or understanding was reached between the parties that the plaintiff was not to be prevented from serving the Second Notice if the defendants were unable to demonstrate their readiness to commence construction.*
>
> *14B. Further or alternatively, if the First Notice was effective to enforce the option or create an agreement for sale and purchase, service of the Second Notice did not invalidate the First Notice.*
>
> *14C. Further or alternatively, any agreement for sale and purchase coming into existence as a result of the service of the First Notice was similarly subject to a stay or delay by way of estoppel by convention.*
>
> *14D. Further or alternatively, the effect of service of the First Notice was to create a binding contract for sale enforceable by specific performance.*"

40. In response, the appellants filed detailed written submissions in which they opposed the grant of permission to amend and proposed amendments to their defence. A major point which the appellants made is that the amendment would result in a volte-face in the way VDM had hitherto put its case.

Discussion of the submissions and the Board's conclusions

(1) The relevant law on options

41. It is common ground that an option will only be effectively exercised if it is exercised in strict conformity with its terms: *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, 929.

42. Where (as in the case of Clause 6.2) the parties have not provided a specified time within which the option holder must exercise his repurchase option, it must be exercised within a reasonable time. What is a reasonable time is a question of fact to be determined in the light of all the circumstances (see *United Scientific Holdings*, above, per Lord Simon of Glaisdale at p 946).

43. Moreover, as Lord Simon of Glaisdale also held in that case, at p 945, once an option is exercised, a new contract comes into existence between the parties to the option:

> "An option is a type of unilateral contract. When, as is usual, it is supported by consideration it constitutes an irrevocable offer which turns into a bilateral contract by an acceptance in strict compliance with its terms: see Lord Denning MR in *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 WLR 74, 81C. It is apt to be misleading to say that time is of the essence of an option, since that may give the impression of a bilateral contractual term. The legal reality is that this type of unilateral contract never matures into a bilateral contract at all unless the option is exercised in time. But, as Diplock LJ pointed out in the *United Dominions Trust case* (p 84G), it is quite possible to have this sort of unilateral obligation in an otherwise bilateral contract. An option in a lease to terminate or to renew the tenancy or to purchase the reversion will be such a term. In each such case the parties, on the exercise of the option, are brought into a new legal relationship."

44. Where an option gives the right to acquire land, as a matter of law its exercise changes the relationship between the parties in a fundamental way. This is because, once the new relationship arises, the option holder as purchaser becomes in equity the owner of the property. As Lord Cairns held in *Shaw v Foster* (1872) LR 5 HL 321 at p 338:

> "Under these circumstances I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of a court of equity between the vendor and the purchaser. The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner in the eye of a court of equity of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and *cestui que trust* subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property."

(2) VDM's post-hearing application to amend its pleading

45. The application to amend crucially affects the precise issues which arise on this appeal and so the Board will start by determining it.

46. It follows from the propositions about options in paras 41 to 44 above that, in the events which happened, the First Notice is potentially the effective exercise of the option. The application to amend in that regard (draft amended paragraphs 13, 14 and 14B above) is made very late indeed and the Board agrees with the appellants that that is a powerful reason to reject it. VDM could have made an application in the Court of Appeal, particularly as the Court of Appeal pointedly drew Mr Imrie's attention to the fact that the First Notice had not been pleaded.

47. However, the contention that the First Notice was effective is not new in these proceedings. Until the appellants filed their amended draft defence in response to VDM's application under consideration, they had positively asserted before the Board that, if the option was exercisable at all by VDM, it was effectively exercised by the First Notice. Moreover, the Court of Appeal concluded in VDM's favour that it would have been entitled to a finding that the First Notice was served in time, even if the trigger date had been 9 January 2012 (Judgment, para 25 above). The appellants have not sought to appeal the Court of Appeal's finding in para 25. Any grant of permission is without prejudice to any costs application which the appellants may make. The point is one which the local courts have had sufficient opportunity of considering since it does not require the Board to make any new finding of fact or to apply any new principles of law. For these reasons, the Board considers that it would not be unjust to the appellants to allow the amendment by the addition of paragraph 14B and the consequential amendments to paragraphs 13 and 14, and the Board grants permission accordingly.

48. The Board does not give permission for any further amendments. VDM's draft paragraphs 14A and 14C are (as the appellants submit) outside the terms of the application which the Board invited VDM to make, and the Court of Appeal has already made a holding on these matters. Paragraph 14D is a proposition of law and it does not need to be pleaded.

49. The appellants seek leave in response to VDM's draft amended paragraph 14B to amend their defence to plead that the First Notice was withdrawn following their request in October 2013 for further time, setting out full particulars of the preparatory work that they did after VDM agreed to a further meeting in January 2014. The Board does not give leave for these matters to be pleaded. These matters were fully considered by the judge and she made clear findings. The Board has already set out para 89 of the judge's judgment (para 22 above). The judge found that VDM did not act upon the timetable set out in the October letter because it in good faith accepted the appellants' assurances that they would soon commence construction of a residence on the Property, which did not occur. This finding of forbearance is inconsistent with the appellants' newly-formulated and unparticularised allegation that there was a "clear agreement and understanding" between the parties "that the First Notice would not be relied upon and was withdrawn and further that the Respondent would no longer pursue its right to purchase the property" (Appellants' draft amended defence paragraph 11D(5)).

50. The appellants have not appealed the judge's findings in para 89 (set out in para 22 above). Nor do they suggest that some cogent, or any, new evidence has come to light supporting their new draft allegations. On the contrary, the Board notes that, on 3 October 2013, following Mr Joseph's warning that VDM wished to exercise its option, the second appellant in terms recognised in an email to the appellants' architect that VDM wished to preserve their rights, and that, as the judge noted, the appellants accepted in their letter of 30 October 2013 that VDM was concerned to ensure that the purchasers of the plots complied with their obligations to build on their plots. Finally, the appellants have not addressed the effect of the no-waiver clause in the Deed of Variation (Clause 18) which the judge held would have prevented them from relying on any act of waiver following the service of the First Notice (see Judgment, para 91 above).

51. The Board determines this appeal on the basis of the amended allegation that the First Notice was an effective exercise of the option.

(3) Key Conclusion: First Notice valid and subsequent delays justified

52. In the Board's judgment, the circumstances were clearly such that the First Notice was validly given in view of the judge's findings and those of the Court of Appeal. The only substantial ground on which it could be said to have been invalidly

exercised is that it was too late, but the Court of Appeal found that it was exercised within a reasonable time, whether the trigger date was 9 July 2013 or 9 January 2012. The appellants' argument that the First Notice was invalid therefore does not get off the ground.

53. Moreover, there is no finding to substantiate an argument that the contract of sale to which exercise of the option by the First Notice gave rise was then abandoned or the right to enforce it waived. The most that can be said is that the respondent, by giving further time, must be taken to have agreed that if construction took place within a time frame which it approved, the contract for repurchase would be abandoned. Its forbearance, and failure to refix a schedule when that fixed by the First Notice expired, cannot be construed as an unconditional release of the appellants' construction obligations or as a promise by VDM that there should be an indefinite timetable for construction. That would have required an express agreement. In those circumstances, although the Court of Appeal came to their conclusion by a different route, in the opinion of the Board, their order cannot be faulted.

54. Moreover, any question of a convention estoppel falls away and with it the appellants' complaint that the Court of Appeal allowed VDM to succeed on this point although it had not been pleaded. On the judge's findings, which the appellants cannot refute, VDM delayed taking steps to implement the transfer not because it withdrew the First Notice but because it was induced to do so by the assurances it received from the appellants.

55. No doubt VDM might not have started these proceedings if the appellants satisfactorily proceeded with construction, but it reserved the right to act as it did. The appellants reaped the benefit of a further opportunity to meet their contractual obligations. They were not prejudiced because the construction costs that they incurred meanwhile, if actually paid before the date of the transfer, could be recouped from VDM under Clause 6.2. For the same reason, the fact that to the knowledge of VDM they incurred such costs does not mean that they were reasonably led to believe that the option would not be enforced.

56. The mere fact that the owners of other plots could enforce the restrictions against the appellants does not mean that it is unfair or inequitable for VDM to seek to enforce its separate rights under Clause 6.2 or that the Court of Appeal was in error in para 28 of its judgment.

57. The appellants' contention that they are entitled to resist specific performance because VDM exercised its rights against them in a discriminatory manner was rejected by both the judge and the Court of Appeal. The judge found that it was not made out on the facts. There is no basis on which the Board could come to a contrary conclusion.

58. A number of other points have been argued. Both sides raised issues on the proper interpretation of Clause 6.2, for instance whether the option could, as Mr De La Rosa submits, be exercised once and once only or whether, as Mr Imrie submits, it gave rise to cumulative rights to give notice to repurchase. In the light of the Board's key conclusion explained above, the Board does not have to resolve those matters.

Conclusion

59. In those circumstances the Board will humbly advise Her Majesty that this appeal should be dismissed.