**IN THE SUPREME COURT OF BELIZE, A.D. 2009**

**CLAIM NO. 26 OF 2007**

**BETWEEN**

| | |
|---|---|
| **DMV LTD** | **CLAIMANT** |
| **AND** | |
| **TOM L. VIDRINE** | **DEFENDANT** |

**Before: H**on. Justice Sir John Muria

11 December 2009

*Mr. F. Lumor S.C.* with *Mr. M. Chebat* for the Claimant
*Mrs. Magali Marin Young* for the Defendant

**J U D G M E N T**

***CLAIM** – specific performance – contract for sale of land – option to purchase or right of first refusal – consideration to keep option open – context or surrounding circumstances justifying option to purchase rather than right of first refusal – alternative or additional claim for damages for breach of contract – specific performance granted – claim for specific damages not pleaded and not granted*

**1. Muria J:** The claimant is a Belizean private company incorporated under the laws of Belize. The defendant is a businessman and resides at San Pedro on Ambergris Caye, Belize. This case arose out of a disagreement between the parties over the Agreement dated August 31, 2006 for the sale of certain land on San Pedro to the claimant.

2. The claimant's substantive claim in this dispute is contained in the Claim Form dated 17th January 2007 and filed in this Court. That claim is for the following:

   i. Specific performance of an agreement dated 31st day of August 2006, and in particular the sale and transfer of title to the claimant of a parcel of land described in the agreement at "Track 2."

   ii. Alternatively, damages for breach of contract.

   iii. Interest

   iv. Cost

   v. Further or other relief.

***The factual background***

3. Since it will be helpful, let me first deal with the factual background of the case between the parties. On 31 August 2006, the defendant/vendor and the claimant/purchaser entered into a Purchase Agreement. Whereby the vendor "*agrees to sell and the purchaser is agreeing to purchase the property described below for the sum of*

*ONE MILLION THREE HUNDRED THOUSAND US DOLLARS ($1,300,000.00). The purchaser also acquires a 'First Option' as defined below.*" The land concerned is situated at San Pedro Registration Section Block 7, Parcels 5020 and 4181. The description of the property which is the subject of the purchase is:

> *"The land being sold in this Purchase Agreement is identified as four tracts of property shown in the attached survey by William P. Neal. This survey is used to show the location and the dimensions of the specific tracts referred in this sale, and designated in the two parts below and identified in these drawings as Tracts 1, 3, 4, and 9."*

4. The 'First Option' referred to and said to have been acquired by the claimant/purchaser is described as follows:

> *"<u>First Option:</u>*
>
> *Now that this Purchase Agreement has been exercised and the non refundable consideration of $800,000 us (sic) dollars has been paid, the PURCHASER has a First Option of a right of*

*first refusal to purchase Tract 2 in the survey below until December 31st, 2006 at the total price of TWO MILLION TWO HUNDRED THOUSAND US DOLLARS ($2,200,000) including the non refundable consideration. Due to this Tract being the homeplace of the VENDOR, if the option herein is exercised before October, 2006, the VENDOR will have until December 31st, 2006 to vacate. If purchase is made pursuant to the first option after that date and before December 31st, the VENDOR will have until January 31st, 2007 to vacate. During this time, the VENDOR has the right to remove any improvements that have been made since August 31st, 2005, as well as all his contents and possessions."*

5. It is the fate of "Tract 2" that is the main contentious issue between the parties in this case and the subject of this judgment.

***The Issues***

6. On the evidence and submissions by Counsel for both parties, I feel that there are three main issues for the court to determine in this case. These are:

1. Whether the second Purchase Agreement dated 31st August, 2006 gave the claimant an option to purchase or a right of first refusal over Tract 2.
2. Whether the sum of $800,000.00 USD paid was consideration for the option to purchase Tract 2.
3. Whether the Court can award the remedy of specific performance if the court finds that the claimant had an option to purchase Tract 2 or right of first refusal and had so exercised it.

There are, of course, other peripheral issues in this dispute, which the court will also be considering in resolving the case between the parties.

***The Case for the Parties and the Evidence***

7. The case for the claimant is that the second Agreement dated 31st August 2006, gives the claimant the option to purchase Tract 2 and that it had exercised that option before the time (31st December 2006) fixed under the said Agreement. Further, it had paid US$800,000.00 as consideration for the exercise of that option. By failing and/or

refusing to conclude the sale and transfer of title to Tract 2 to the claimant, the defendant is in breach of the said Agreement.

8. The case for the defendant is that pursuant to the August 31, 2006 Agreement, the right of the claimant to exercise its option to purchase Tract 2 has not yet arisen, since the defendant has not offered the said Tract 2 for sale giving the claimant the opportunity to exercise its right of first refusal. Secondly, the defendant's position is also that the US$800,000.00 mentioned in the Agreement was not consideration for any exercise of the option to purchase Tract 2.

9. In the main, evidence to support the case for each side came from David Bane and Vernon Wilson who both gave witness statements and oral sworn evidence for the claimant, and from Mr. Tom Vidrine for the defendant. I do not need to detail their evidence in this case, but I mean no disrespect if I can simply paraphrase the evidence given by each of them. The defendant also called and relied on two other witnesses, Jose Cawich and Charmaine Tolentino.

10. In his evidence, both in court and in his witness statement, Mr. Bane stated that following his interest to develop a Resort and Marina Project, he, together with Mr. Vernon Wilson and Mr. Tom Vidrine (defendant) had several dialogues between 2003 to 2005 over his interest. Their discussions included the claimant's interest to purchase the defendant's two parcels of land Nos. 4181 and 5020 in Block 7, at San Pedro Registration Section.

11. The discussions and negotiations between the parties culminated in the Agreement dated 31st August 2005 ("the First Agreement"). Among other things, that Agreement secured to the claimant Tracts 3 and 9 which they purchased for the sum of US$800,000.00 and a non-renewable lease over Tracts 1 and 4 with a first option to purchase them for US$1.2 million if the option was exercised on or before May 31st, 2006 or for US$1.3 million if the option was exercised after May 31st, 2006 but bef0re August 31st, 2006. The second option also granted in the First Agreement was the option to purchase Tract 2 which could only be exercised if the claimant had exercised the first option.

12. The evidence of Mr. Bane confirmed, and it is not disputed, that the claimant took possession of tracts 3, 9, 1 and 4, after the purchase of the first two mentioned tracts and lease of the latter two tracts, and began developing them. Mr. Wilson, who is the director of the claimant, was on site to oversee the project development.

13. According to oral testimony of Mr. Bane, the defendant gave a broad based authorization to the claimant to develop the whole five (5) acres of land (the approximate total area of Parcels 4181 and 5020). This was approximately about 26th July, 2006. There is evidence that the defendant agreed to what Mr. Bane stated, although Mr. Vidrine added a qualification on his authorization to the effect that it was necessary to enable the claimant to have authority from the owner of the land for construction to be carried out, and also as no subdivision and mutation had been done on the two Parcels of land. (See also Paragraph 15 of Mr. Bane's witness statement and Paragraph 16 of Mr. Vidrine's witness statement and Paragraph 38 of Mr. Wilson's witness statement).

14. Shortly after the claimant started carrying out works on the land following the authorization from the defendant, a dispute arose between them over allegations that Mr. Wilson had been cutting down trees and removing soil from Tract 2 without permission from the defendant. The dispute led to the defendant notifying the claimant that the deal between them was "off" and offering to refund the claimant its money.

15. According to Mr. Bane the dispute between the defendant and Mr. Wilson was leading to much animosity between the parties and so the claimant enlisted the help of Mr. Mark Lizarraga, one of the partners in the claimant's project venture, to broker discussions with the defendant with a view to reaching a compromise between the parties.

16. It appears to be the case that Mr. Lizarraga's "peace" effort paid off. Mr. Bane, Mr. Wilson and Mr. Vidrine all stated in their evidence that following discussions between Mr. Lizarraga and Mr. Vidrine, a compromise was reached. I need only refer to paragraph 25 of Mr. Vidrine' witness statement to this effect:

"25. DMV Limited authorized Mark Lizarraga to take over discussions with me in an effort to avoid the growing animosity between Mr. Wilson and myself in August, 2006 at one point. In a series of emails with Vernon and discussions with Mark, we reached a compromise which allowed Vernon, as an officer of DMV Limited, to complete the purchase of Tract 1 & 4 upon the terms of the new contract. Vernon agreed to re-write the contract replacing the first agreement. The area was re-surveyed by mutual agreement correcting minor areas, and I agreed go ahead and sell Tract 1 & 4, and give the first right of refusal on Tract 2. See No. 27 of Disclosure Bundle."

17. The evidence by both parties confirmed that following the compromise reached between them, the Purchase Agreement dated August 31, 2006 was signed ("the Second Agreement"). It is that Agreement with which we are concerned in this case, and in particular, the construction of the "First Option" clause relating to Tract 2.

***Whether an "option to purchase" or "right of first refusal"***

18. Whilst the resolution of the dispute between the parties in this case is centered on the construction of the "First Option" clause in the Second Agreement, the Court is entitled to, and in my view, bound to take into account the First Agreement between the parties in order to help ascertain the true meaning of the "First Option" Clause in the Second Agreement. The First Agreement, as correctly stated by Counsel for both parties, forms part of the background to or, as Lord Wilberforce referred to, the "matrix of fact" of the Second Agreement. See ***Reardon Smith Line Ltd -v- Hansen-Tangen, Hansen-Tangen -v- Sanko Steamship Co.*** [1976] 3 All ER 570; [1976] 1 WLR 989. See also ***Prenn -v- Simmonds*** [1971] 1 WLR 1381.

19. However, such background or matrix of fact must, as Lord Hoffman pointed out in ***Investors Compensation Scheme Ltd. -v- West Bramwich Building Society*** [1998] 1 All ER 98 AT 114, be the "admissible background," which excludes "previous negotiations of the parties." Lord Hoffman declared that the background "includes anything which would have affected the way in which the language of

the document would have been understood by a reasonable man." That, in our case here, entails looking at the First Purchase Agreement in order to ascertain what the parties intended to achieve under the "First Option" clause in the Second Purchase Agreement.

20. Permission to look at prior contracts as part of the admissible background or matrix of facts of a subsequent contract is also confirmed in ***HIH Casualty and General Insurance Ltd -v- New Hampshire Insurance Co. & Others*** [2001] 2 Lloyd's Rep. 161; [2001 2 All ER (Comm.) 39; [2001 EWCA Civ. 735 where, after distinguishing ***Youell -v- Bland Welch & Co. Ltd.*** (NO.1) [1990] 2 Lloyd's Rep. 423 and ***Punjab National Bank –v- De Boinville*** [1992] 1 Lloyd's Rep. 7; [1992] 1 WLR 1138, Lord Justice Rix (giving the judgment of the Court) said:

> "In principle, it would seem to me that it is always admissible to look at a prior *contract* of the matrix or surrounding circumstances of a later contract. I do not see how the parol evidence rule can exclude prior contracts, as distinct from mere negotiations. The difficulty of course is that, where the later

contract is intended to supersede the prior contract, it may in the generality of cases simply be useless to try to construe the later contract by reference to the earlier one. Ex hypothesi, the later contract replaces the earlier one and it is likely to be impossible to say that the parties have not wished to alter the terms of their earlier bargain. The earlier contract is unlikely therefore to be of much, if any, assistance. Where the later contract is identical, its construction can stand on its own feet, and in any event its construction should be undertaken primarily by reference to its own overall terms. Where the later contract differs from the earlier contract, prima-facie the difference is a deliberate decision to depart from the earlier wording, which again provides no assistance. Therefore a cautious and sceptical approach to finding any assistance in the earlier contract seems to me to be a sound principle. What I doubt, however, is that such a principle can be elevated into a conclusive rule of law.

Where, however, it is not even common ground that the later contract is intended to supersede the earlier contract, I do not

see how it can ever be permissible to exclude reference to the earlier contract. I do not see how the relationship of the two contracts can be decided without considering both of them. In essence there are, it seems to me, three possibilities. Either the later contract is intended to supersede the earlier, in which case the above principles apply. Or, the later contract is intended to live together with the earlier contract to the extent that that is possible, but where that is not possible it may well be proper to regard the later contract as superseding the earlier. Or the later contract is intended to be incorporated into the earlier contract, in which case it is prima facie the second contract which may have to give way to the first in the event of inconsistency. I doubt that it is in any event possible to be dogmatic about these matters."

21. But despite the parties' intention that their subsequent contract is to supercede their prior contract, ***HIH Casualty and General Insurance Ltd. -v- New Hampshire Insurance Co.*** firmly established that the earlier contract can still be looked at for the purpose of construing the later contract.

22. Reference was made by Counsel to the case of ***Punjab National Park Bank -v- De Boinville*** [1992] 1 WLR 1138 for the following proposition:

> ". . if the parties to a concluded agreement subsequently agree in express terms that some words in it are to be replaced by others, one can have regard to all aspects of the subsequent agreement in construing the contract, including the deletions, even in a case which is not, or not wholly, concerned with a printed form."

23. Mrs. Marin Young relied on the above proposition of law to support her client's contention that when the First Purchase Agreement is considered together with the Second Purchase Agreement, one would note the changes in the latter Agreement which alters the position regarding Tract 2. It is submitted by Counsel that in the First Purchase Agreement the defendant had expressly given the claimant options to purchase Tracts 1, 4 and 2. These options are referred to as the "*First Option to Purchase*" and "*Second Option to Purchase*" in

the First Purchase Agreement. However, in the Second Agreement the words "option to purchase" was deleted and replaced with the words "a right of first refusal" to purchase Tract 2. That, says Counsel, indicates the parties' intention to change the option on Tract 2 to a right of first refusal.

24. Mrs. Marin Young further submitted that the ordinary meaning of both phrases, "*option to purchase*" and "*first option of a right of first refusal to purchase*" used in the Second Purchase Agreement are very different: the first phrase clearly gives the claimant an option to purchase Tract 2 in the First Purchase Agreement, and the second phrase gives the claimant the first option to refuse the purchase of Tract 2 in the Second Purchase Agreement if it is offered. That, submitted Counsel, is the meaning that a reasonable man would put upon those phrases.

25. On the question of consideration, Mrs. Marin Young submitted that under the Second Purchase Agreement the defendant was to keep the USD 800,000.00 he had previously received, which was expressly stated not to be part of the Second Purchase Agreement. As such,

says Counsel, no "*consideration*" was paid for the purported option to purchase Tract 2.

26. In Juxtaposing the First and the Second Purchase Agreements, Counsel seeks to impress upon the court the impact of the words "to purchase" which were deleted and "right of first refusal" were expressly used in the latter Agreement.

27. In sum, defence Counsel's submission is that the deletion of the words "to purchase" and replacing them with the words "right of first refusal" demonstrates the intention of the parties to change the option from an "option to purchase" to a "right of first refusal." The claimant could not, as yet, have exercised such right of first refusal in this case since the defendant had not, and still has not yet offered Tract 2 for sale. It follows also, goes Counsel's submission, that the $800,000.00 could not have been a consideration for the option to purchase Tract 2 since such sum has not yet been paid.

28. I will deal with the issue of whether the $800,000.00 USD was paid as "consideration" later. For now let me return to the question of

whether an "option to purchase" or a "right of first refusal" is created in the "first option" clause in the Second Purchase Agreement dated 31st August 2006.

29. I have already set out the contentions by Counsel for each of the parties on the issue. I need only deal with the legal position of the two expressions in the context of the Second Purchase Agreement between the parties in this case.

30. Generally speaking, an option is an offer by the grantor to sell the property concerned to the grantee on specified terms and conditions, coupled with an undertaking not to withdraw such offer or deal with the land in any way inconsistent with the grantee's right to purchase the land within a specified period. ***Arthur Gonzalez & Roberta Gonzalez –v- Eugene Obrigewitsch & Joyce Gustafson*** (17 October 2008) Court of Appeal of Belize, Civil Appeal No. 27 of 2007. See also ***Caribbean Asbestos Products Ltd. –v- Andre Leopold Lopez, Carlos Antonio Lopez, Marcia Rose Zita Brown and Yvonne Therese Elizabeth Lindo*** (1974) 21 WIR 461, 465. A right of first refusal, also otherwise known as pre-emptive right, on the other hand

arises where the owner of land contracts that, if he decides to sell the land, he will first offer it to the other contracting party in preference to any other purchaser. ***Halsbury's Law of England,*** 4th Edition Vol. 42 at para. 26 , page 23.

31. Mr. Lumor SC puts the argument for the claimant firmly on the construction of the "first option" clause under the Second Agreement. Despite the addition of the words "right of first refusal" in the clause, Mr. Lumor submitted that the "first option" clause in the Second Agreement" the option to purchase Tract 2 is given to the claimant. Mrs. Marin Young, on the other hand contended that the words "option to purchase" are replaced in the Second Agreement with the words "right of first refusal" and as such the claimant only has a right of first refusal if the defendant offers the land for sale.

32. I accept the argument by Mrs. Marin Young that there is a distinction between an "option to purchase" and a "right of first refusal." The case law authorities have dealt with the construction and application of the two phrases. Counsel for both parties have referred to a number of the case law authorities including ***Manchester Ship Canal***

***Company -v- Manchester Racecourse Company*** [1900] 2 Ch. 352; ***County Hotel and Wine Company Ltd -v- London and North Western Railway Company*** [1918] 2 KB 251; ***Mackay -v- Wilson*** (1947) 47SR (NSW) 315; 64 WN 103; ***Woodroffe -v- Box*** [1954] 92 CLR 245; [1954] HCA 22; ***Goldmaster Homes P/1 -v- Jonshon and Others*** [2004] NSWCA 144***; and Arthur Gonzalez etal -v- Eugene Obrigewitsch*** (17 October 2008) Court of Appeal of Belize, Civ. Appl No. 27 of 2007; References were also made to ***Halsbury's Laws of England***, 4th edition Vol. 42.

33. The distinction between a right of first refusal and an option that is worth bearing in mind is that an option is an agreement to keep a specific offer open for a certain period, the seller and potential buyer executes a complete purchase contract with all the terms and conditions set out and agreed to, and an agreed amount has been paid for the option. The right of first refusal on the other hand, arises where a bona fide offer to purchase is made to the seller by a third party, and the holder of the right elects to exercise his or her right to purchase the property on the terms of the offer made by that third party. Notably in a right of first refusal, the terms of the transaction

are not known until the owner decided to sell and an offer is made by a third party to purchase the property. See ***Halsbury's Laws of England,*** 4th Edn. Vol. 42 para. 26.

34. In the present case, the suggestion by the defendant is that he is not selling Tract 2 and that if he does he would give the claimant the right of first refusal. In my view the concluded Purchase Agreement dated August 31, 2006, and in particular the language o the "First Option" clause, do not support the defendant's case for such a position in this whole transaction between the claimant and himself.

35. In fact, looking at the whole circumstances surrounding the relationship and transactions between the parties in this case, I form the firm view that this is a business transaction between them, cemented in the first Purchase Agreement dated August 31, 2005 which was subsequently superceded by the second Purchase Agreement dated August 31, 2006. In the words of the Court in ***Woodroffe -v- Box*** (above):

> "There may be found, in any particular case, a context or surrounding circumstances, such as to outweigh the *prima facie* significance of the word "First", and compel the conclusion that a true option is intended to be given."

36. Since this is plainly a business transaction between the parties, I agree with the submission of Counsel for the claimant that a commercially sensible construction must be given to the language of the Agreement with which we are concerned in this case. I would add also that in such a case the strict legal construction of the two phrases, "*option to purchase*" and "*right of first refusal*" must give way to the commercial reality that the parties have intended and agreed to be bound by. See ***Mannai Investment Co. Ltd v Eagle Star Life Assurance Co. Ltd*** [1977] A.C. 749, 771 for the proposition that the law favours commercially sensible construction of the language of commercial contract; See also ***Weardale Coal and Iron Co. v Hodson*** [1894] 1 QB 598.

37. I have to say that the evidence in this case leads me to a firm inclination to accept the submission of Mr. Lumor S.C. on the

construction to be given to the "first option" clause in the Second Agreement. Both in context and in strict construction of the Second Agreement, I accept the claimant's argument that the reality of the transactions between the parties in this case is that in addition to Tracts 1, 3, 4, and 9, the defendant has granted an option to sell Tract 2, to the claimant on specified terms and conditions coupled with the requirement that the claimant must exercise the option to purchase by a specified date, that is to say, the claimant must accept the offer by the specified date, in this case, December 31st 2006, which is the same time line as set out under the First Agreement for the claimant to exercise the option. The defendant's evidence in cross-examination confirms this. ***See page 134 of the Record of transcript of evidence***.

38. The claimant had accepted the offer within the time specified in the Agreement and paid the US$1.4 million for Tract 2. That amount was paid into court on 20 March 2007, since the defendant refused to accept it. Notably, for the timely acceptance and compliance by the claimant of the offer, the defendant kept the offer open to the claimant until 31st December 2006 as agreed. As Street J pointed out in ***Mackay -v- Wilson*** (1947) 47 SR (NSW) 315 at 325:

> "The agreement to give the option imposes a positive obligation on the prospective vendor to keep the offer open during the agreed period so that it remains available for acceptance by the optionee at any moment within that period."

39. This, in reality is an agreement to give the claimant the first option to purchase Tract 2 which must be exercised by 31st December 2006. It is not an agreement giving the claimant a right of first refusal to purchase Tract 2. The claimant had fulfilled its part of the bargain and there is a valid contract for the sale of Tract 2 to the claimant in this case.

40. I respectfully adopt what the High Court of Australia has said in ***Woodroffe –v- Box*** (1954) 92 CLR 245 that it is a question of construction of the particular contract whether an option or a right of first refusal (right of pre-emption) has been created.

41. On the evidence before the court the "First Option" clause, in the Second Agreement, in truth, creates an option to purchase, given to

the claimant to purchase Tract 2, despite inclusion of the words "right of first refusal" in the body of the clause.

***Whether consideration of $800,000.00 paid***

42. On the question of the $800,000.00 consideration, the evidence seems to me to point contrary to defendant's contention that the $800,000.00 was never given as consideration. Indeed in the Second Agreement the parties are clear and unequivocal on their position on the matter when they agreed:

> "Now that this Purchase Agreement has been exercised and the non refundable consideration of $800,000 us dollars has been paid, the PURCHASER has a First Option of a right of first refusal to purchase Tract 2 in the survey below until December 31st, 2006."

43. And further, as to the purchase price and consideration "to secure the option" on Tract 2, the parties agreed:

> "1. The total purchase price for Tracts 1, 3, 4, and 9 is

$1,300,000 us and is to be paid to the Vendor on or before August 31st, 2006,

2. A *consideration* of $800,000.00 us dollars was paid to secure the option on Tract 2.

44. Contrary to the defendant's argument that there was no consideration in this case, the evidence overwhelmingly shows that there was indeed a payment of $800,000.00 by the claimant to the defendant for Tracts 3 and 9 under the First Agreement. Under the Second Agreement, the parties agreed that the purchase price for Tracts 1, 3, 4, and 9 was $1.3 Million and the $800,000.00 previously paid was to be "restructured" to be a "consideration" to "secure option to purchase Tract 2." That is a valuable consideration enforceable at law and in equity. See ***Griffith -v- Pelton*** [1958] Ch. 205; see also ***Halbury's Laws of England***, 4th Edition Vol. 42, paragraph 25 page 20.

45. Apart from the change from "Second Option to Purchase" in the First Agreement to "First option of a Right of First Refusal" to purchase Tract 2 in the Second Agreement, it is also important in my view, when juxtaposing the First and Second Agreement, to note that in the

First Agreement $800,000.00 USD was said to be paid for the purchase of Tracts 3 and 6 (now 9) and in the Second Agreement, $1.3 Million USD was paid for the purchase of Tracts 1, 3, 4, and 9. The oral testimony of the defendant confirmed this. At page 136 of the Transcript of evidence, the defendant's answers to cross-examination by Counsel for the claimant show:

> "Q. Would you tell the Court the parcels that have been sold?
>
> A. The parcels sold in this Agreement were 1, 3, 4 and 9.
>
> Q. Can you tell the Court how much is the purchase price for parcels 1, 3, 4 and 9 from the agreement?
>
> A. One million, three hundred thousand dollars."

46. That evidence from the defendant goes to confirm, in my view, what Mr. Bane stated in his oral evidence when cross-examined by Counsel for the defendant at page 30 of the Transcript of Evidence. Mr. Bane's answers to questions in cross-examination are as follows:

> "Q. So I am reading, Mr. Bane, from the second purchase agreement which is the agreement that is in dispute right

now. They are shown on this Tract 3 at page 2. Tracts 3, 4, 1 and 9. They are shown on page 2 of this agreement, you will agree with me?

A. Yes.

Q. This agreement now under payments, "The total purchase Price for Tracts 1, 3, 4 and 9 is $1,300,000 and is to be paid to the vendor on or before August 31st, 2006. A consideration of $800,000.00 US was paid to secure the options on Tract 2." Now, you controlled monies that were paid towards the purchase price of these Tracts, you will agree with me?

A. Yes.

Q. And you will agree with me, Mr. Bane, that $800,000.00 that is referred to here is the same $800,000.00 that was paid for Tracts 3 and 9?

A. No, I do not agree with that. That was the negotiations.

Q. No, no, no. Did you pay, sir? Did you pay an additional $800,000.00?

A. No, it is the same money but we changed the terms."

47. Throughout the evidence, both from the claimant's witnesses and defendant, it became clear that the tracts sold under the Second Agreement were Tracts 1, 3, 4 and 9 for $1.3 million. The $800,000.00 paid, for Tracts 3 and 9 (formerly 6) under the First Agreement was "restructured" and became "consideration" to secure the option to purchase Tract 2 under the Second Purchase Agreement.

48. I find also on the evidence that the US$800,000.00 paid by the claimant is the consideration for the exercise of the option to purchase Tract 2, whether it was "redefined" or otherwise. The defendant, by his own words and action accepted the $800,000.00 as "consideration" paid "to secure the option to purchase Tract 2" as confirmed in the Second Purchase Agreement.

49. It follows that the claimant is entitled to specific performance of the Purchase Agreement dated 31st August 2006 and it is hereby granted.

50. On the question of damages, the claimant seeks an order that damages be granted to the claimant for breach of contract. There is clearly a

breach of contract in this case. The claimant, however, must establish that it suffers damages, as a result of the breaches.

51. As a general rule, a party who suffers loss as a result of a breach of contract is entitled to damages: Hadley –v- Baxdale (1849) 9 Exch. 341. That general principle, however, also endorses certain qualifications which the claimant must satisfy, namely that the claimant must establish that the damages arise are naturally from the breach. These are discussed in Hadley –v- Baxdale and also in Halsburys Laws 4th edition volume 12(1) Reissue paragraph. 1015, referred to by Counsel for the defendant on the principles of remoteness of damages.

52. In this regard, Mrs. Marin Young was adamant that there is the need to specifically plead the special damages claimed by the claimant. Failure to do so, argued Counsel, would provide the Court with no basis for awarding the claimant damages as set out in the claimant's Exhibits 53 to 58 on the loss of profits.

53. The Claimant, on the other hand, argues that if it is successful and granted specific performance of the contract, the Court can also award damages to be assessed. This, Mr. Lumor S C contended is the natural consequences of the breach or the non-performance of the contract, referring to ***Oakacre Ltd –v- Claire Cleaners Ltd*** [1982] Ch. 197, 202.

54. Having anxiously considered the submissions on this aspect of the case, I respectfully accept the position as contended for by Mrs. Marin Young on behalf of the defendant. In order for the Court to ascertain whether the claimant suffered damages and the quantum of such damages, it is incumbent on the claimant to plead and particularize the specifics of the damages suffered. This is an obligation on the claimant, consistent with its obligation under Part 8, in particular, Rule 8.7 of the ***Supreme Court Civil Procedure Rules 2005*** . This, in turn, will enable the defendant to respond fairly to the facts upon which the quantum of damages claimed by the claimant are based. Without pleading and particularizing the items of loss suffered, the court is unlikely to be in a position to determine whether or not damages have been proved and therefore, not in a position to grant

damages as claimed. See ***Mayne and McGregor on Damages***, 12th Edn. (1961) page 13.

55. The claimant's obligation to plead and particularize the specifics of the special damages it claims has been reiterated in ***McGregor on Damages***, 28th Edition, where the learned author states at paragraph 27-005:

> "Special damages must be specifically pleaded and evidence relevant to it cannot be adduced if only general damages have been pleaded, since the purpose of special damage is to present surprise at trial by not giving the Defendant prior notice of any item in the claim for which a definite amount can be given in evidence ….."

56. Lord Donovan reaffirmed the position in ***Perestrello e Companhia Limitada v United Paint Company Ltd*** [1969] 1 W.L.R. 570 where he said:

> The same principle gives rise to a plaintiff's undoubted obligation to plead and particularise any item of damage which represents out-of-pocket expenses, or loss of earnings, incurred prior to the trial, and which is capable of substantially exact calculation. Such damage is commonly referred to as special damage or special damages but is no more than an example of damage which is "special" in the sense that fairness to the defendant requires that it be pleaded."

57. In the present case, the claimant claims, in the alternative, damages for breach of contract, alleging that it suffered loss and damages. Special damages have not been pleaded, nor particulars thereof have been particularized. Instead the claimant adopted the course of putting into evidence, by way of exhibits, the list of quantified items of loss alleged to have been suffered by the claimant, without giving the defendant the benefit of knowing in advance what those losses are, in a pleading. As pointed out in ***Perestrello e Companhia Limitada v United Paint Company Ltd*** not only that such a course is unfair to the defendant, it is also not open to the claimant to lead evidence of the alleged loss since such loss had not been specifically pleaded.

58. On the issue of damages, I respectfully agree with Mrs. Marin Young of Counsel for the defendant that, having not specifically pleaded the special damages set out in exhibits 53 to 58, the claimant cannot ask this court to award the same to it. The alternative claim for damages for breach of contract is therefore refused.

Consequently, the court need not visit the issue of assessment of damages in this case.

***Conclusion and order***

59. For the reasons set out in this judgment, I find that the claimant has a valid option to purchase Tract 2 granted to it by the defendant under the Purchase Agreement dated August 31, 2006. I also find that the option has been secured by the payment of a consideration of $800,000.00 USD by the claimant to the defendant. The defendant's refusal to execute the option is a breach of contract for which specific performance must be ordered.

60. Since the claimant has failed to specifically plead the loss (special damages) it alleges to have suffered in this case, the alternative claim for damages for breach of contract cannot be granted. It is refused.

61. Despite the refusal of its alternative claim for damages, the claimant succeeds in what I consider its substantive claim in this case. It follows that the claimant is entitled to its costs of these proceedings, and it is so ordered.

There will be judgment for the claimant accordingly.

***Order:***

1. Specific performance of the Purchase Agreement dated August 31, 2006, and in particular the sale and transfer of title to the claimant of the parcel of land described as "Tract 2" in the said Agreement granted.
2. Costs to the claimant, to be taxed, if not agreed.

(Sir John Muria)
Justice of Supreme Court