[2017] JMCA Civ 12

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 28/2011

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA (AG)

BETWEEN	**EPSILON GLOBAL EQUITIES LIMITED**	**APPELLANT**
AND	**PAUL HOO**	**1ST RESPONDENT**
AND	**IAN LEVY**	**2ND RESPONDENT**
AND	**JANETTE STEWART**	**3RD RESPONDENT**
AND	**SUPREME VENTURES LIMITED**	**4TH RESPONDENT**
AND	**MARTYN VIERA**	**5TH RESPONDENT**

John Vassell QC, Miss Cindy Lightbourne and Jonathan Morgan instructed by DunnCox for the appellant

John Graham and Miss Peta-Gaye Manderson instructed by John G Graham & Company for the 1st respondent

Michael Hylton QC and Kevin Powell instructed by Hylton Powell for the 2nd respondent

Walter Scott QC and Ms Dianne Edwards instructed by Dianne A Edwards for the 3rd respondent

Miss Annaliesa Lindsay instructed by John G Graham & Company for the 4th respondent

Walter Scott QC and Miss Anna Gracie instructed by Rattray Patterson Rattray for the 5th respondent

20, 21, 22, 23, 24, 29 April 2015 and 30 May 2017

PHILLIPS JA

[1] This appeal sought to challenge the decision of Jones J delivered on 21 January 2011, refusing to grant the appellant's claim for *inter alia*, specific performance with respect to forward sale of shares agreements (FSAs) in 2002 and 2004 (hereinafter referred to as the "2002 FSA" and the "2004 FSA"). Epsilon Global Equities Limited (the appellant) contended that *inter alia*, the learned judge erred in refusing the orders it had sought because upon a proper construction of the 2002 FSA it is evident that a sale and transfer of 17% of the shares in Supreme Ventures Limited (the 4th respondent) ought to have been made to the appellant and an additional 1.2874% of the shares in the 4th respondent ought to have been made to the appellant pursuant to the 2004 FSA. However, the respondents (not including the 3rd respondent) argued that the appellant's failure to acquire the shares in the 4th respondent occurred as a result of the appellant's failure to pay the purchase price for the shares, and execute and deliver the undated instruments of transfer upon the occurrence of the acquisition date as required by the agreements. The grant or dismissal of this appeal is dependent upon *inter alia*, an analysis of whether the learned judge's interpretation and construction of those agreements was correct. In order to make such a determination it is necessary to outline the important background facts underpinning this case.

Background

The parties

[2] The appellant stated that it is "part of a global family of related entities", under the Epsilon Group. The Epsilon Group is engaged in "sourcing, structuring, managing,

and monitoring investments for a family of investment funds whose strategies are credit oriented". Epsilon Group provides direct loans to high risk borrowers who do not qualify for, or are unable to access business loans from commercial banks. The appellant also claimed to be a "special purpose entity" that was created specifically, by the Epsilon Group, to acquire 18.2874% subscription shares (which will be referred to interchangeably as "shares") in the 4th respondent pursuant to the FSAs.

[3] Mr Paul Hoo and Mr Ian Levy (the 1st and 2nd respondents respectively) and Mr Peter Stewart (deceased, as at 28 March 2004) are the founding shareholders of the 4th respondent, which has its principal business in online lotteries services. The 4th respondent was formed in 1995 but commenced operations in January 2001, upon receipt of a 10 year licence issued by the Betting, Gaming and Lotteries Commission. The 3rd respondent is the widow of the late Mr Peter Stewart and beneficiary under his estate. The 5th respondent is the executor of the estate of the late Mr Peter Stewart.

The loan transactions

[4] In 2002 and 2004, the following loans were disbursed by entities under the Epsilon Group:

a) US$29,500,000.00 to Atlantic Marketing Services Limited (hereinafter referred to as "AMSL") a company incorporated pursuant to the laws of Saint Lucia and in which Mr Paul Mouttet was a director, which provided marketing and strategic management consultancy services to the 4th respondent pursuant to

a marketing services agreement dated 30 September 2001 (in 2002);

b) US$500,000.00 to the 4th respondent (in 2002); and

c) US$2,270,000.00 to AMSL (in 2004).

[5] A loan agreement related to the disbursement of US$29,500,000.00, dated 28 August 2002, was entered into by Epsilon Global Master Fund LP (EGMF I), Epsilon Global Master Fund II LP (EGMF II), and AMSL. Mr Paul Mouttet executed that agreement on behalf of AMSL.

[6] In respect of US$500,000.00, a loan agreement dated 28 August 2002, was executed between EGMF I and the 4th respondent. The 1st and 2nd respondents executed the agreement on behalf of the 4th respondent.

[7] As it relates to the loan of US$2,270,000.00, a loan agreement was entered into between Westford Special Situations Master Fund LP and AMSL and was executed on 27 February 2004. Mr Paul Mouttet and Mr Colin Mouttet signed that agreement on behalf of AMSL.

The forward sale of shares agreements (FSAs)

[8] The appellant entered into two FSAs, which concerned the sale of shares in the 4th respondent to the appellant at a future date (acquisition date). The 2002 FSA was between the founding shareholders, the 4th respondent and the appellant, and was entered into on 28 August 2002. However, the 2004 FSA, executed on 27 February 2004, was between the 1st and 4th respondents, and the appellant.

[9] Under the 2002 FSA, an obligation was placed on the founding shareholders to call an extraordinary general meeting to increase the number of subscription shares in the 4th respondent by 204,820 ordinary shares at a par value of J$1.00 per share. The founding shareholders were to have caused a board meeting to be held in which the newly subscribed shares would be issued to them as follows:

"Paul Hoo	84,350
Peter Stewart	84,329
Ian Levy	36,141"

Two representatives of the appellant were also to have been appointed to the board of directors of the 4th respondent. Subsequently, the founding shareholders, pursuant to the 2002 FSA, executed undated instruments of transfer, in relation to their respective portion of the newly acquired subscription shares, in favour of the appellant, and caused the 4th respondent to issue 17 share certificates in favour of the appellant. Thereafter the appellant, under the said FSA, prior to the acquisition date, was to be entitled to all dividends and distributions declared and paid. Also, the appellant agreed not to execute or take steps to execute the instruments of transfer or to take possession of the share certificates until the acquisition date. The appellant further agreed to an obligation that required it to, upon the occurrence of the acquisition date, pay the founding shareholders the consideration of J$1.00 per subscription share for the transfer of such shares, as well as, to deliver the instruments of transfer, duly completed and stamped, to the 4th respondent for registration of the said transfers.

[10] 'Acquisition date' under the 2002 FSA, is defined to mean any of the following dates, whichever is earliest in time:

> "5.1 One (1) month prior to the date of change of control of the [4th respondent] (control shall have the same meaning as is set out in the definition for 'Affiliate').
>
> 5.2 One (1) month prior to the date of an initial offering of the share capital of the [4th respondent] or its Affiliates to the public in Jamaica or elsewhere.
>
> 5.3 One (1) month prior to the date of completion of the sale of any portion of the shares which are held by the Founding Shareholders on the signing of this Agreement (i.e. any portion of 1,000,000 ordinary shares).
>
> 5.4 The Maturity Date of the Loan [in the sum of US$500,000.00] which is the earlier of (i) the repayment of all principal and accrued interest of the Loan or (ii) August 31, 2005."

[11] The 2004 FSA provided that the 1st respondent should cause an extraordinary general meeting to be held to pass a resolution to transfer 15,510 subscription shares in the 4th respondent at a par value of J$1.00 per share. Thereafter, he was to execute an undated instrument of transfer with respect to the 15,510 subscription shares, in favour of the appellant, and cause the 4th respondent to issue two share certificates to the appellant. The appellant under the said FSA, prior to the acquisition date, was to be entitled to all dividends and distributions declared and paid, in respect of those subscription shares. The appellant agreed not to execute or take steps to execute the instrument of transfer or to take possession of the share certificates until the acquisition date. The appellant further agreed to an obligation that required it to, upon the occurrence of the acquisition date, pay the 1st respondent the consideration of J$1.00

per subscription share for the transfer of the subscription shares, as well as, to deliver the instrument of transfer, duly completed and stamped, to the 4th respondent for registration of the said transfer.

[12] Under the 2004 FSA, the term "acquisition date" is defined to mean any of the following dates, whichever is earliest in time:

> "5.1 One (1) month prior to the date of change of control of the [4th respondent] (control shall have the same meaning as is set out in the definition for 'Affiliate').
>
> 5.2 One (1) month prior to the date of an initial offering of the share capital of the [4th respondent] or its Affiliates to the public in Jamaica or elsewhere.
>
> 5.3 One (1) month prior to the date of completion of the sale [of] any portion of the shares which are held by the [1st respondent] to any Person other than the [appellant].
>
> 5.4 One (1) month prior to the date of any increase in the authorized number of shares of the [4th respondent] or any allotment of additional shares by the [4th respondent].
>
> 5.5 The earlier of (i) the date on which principal and interest under any loan to the [4th respondent] become due or (ii) August 30, 2005."

The option agreement

[13] On 7 July 2005, the appellant entered into an option agreement with St George's Holdings Limited (a company incorporated under the laws of Saint Lucia and of which Mr Paul Mouttet was a director), with the 4th respondent being a party to that agreement. The 1st respondent and Mr Brian George, president and chief executive officer of the 4th respondent, were signatories to the option agreement on behalf of the

4th respondent. The option agreement was to provide St George's Holdings Limited with the option to acquire the rights and obligations of the appellant under the 2002 FSA in respect of shares in the 4th respondent. The option agreement, pursuant to clause 4, was to expire on 6 December 2005. Clause 2(4) stated that:

> "The Option may only be exercised upon the full repayment of all obligations owed to [EGMF I], [EGMF II], and Westford Special Situations Master Fund L.P. by the [4th respondent], [AMSL], and AmeriServices Company, Inc."

The claim

[14] Based on *inter alia*, the respondents' failure to transfer the shares in the 4th respondent to the appellant pursuant to the 2002 and 2004 FSAs, the appellant filed an amended claim form against the respondents on 20 April 2009, seeking *inter alia*, the following orders:

> "1. Against the [1st, 2nd and 4th respondents], specific performance of the 2002 Agreement.
>
> 2. Against the [1st and 4th respondents], specific performance of the 2004 Agreement.
>
> 3. Against each of the [1st, 2nd, 3rd, 4th and 5th respondents], a declaration that on a proper construction of the 2002 Agreement, and against each of the [1st and 4th respondents], a declaration that on a proper construction of the 2004 Agreement, and in the events which have occurred the [1st, 2nd and 3rd respondents] are severally obliged to transfer the following shares to the [appellant] and the [4th respondent] is obliged to register the [appellant] as proprietor of the said shares and issue to the [appellant] share certificates in respect of them.
>
> | | |
> |---|---|
> | Paul Hoo | 175,313,560 |
> | Ian Levy | 63,448,904 |
> | Janette Stewart | 152,82,778 [sic] |

391,584,242

> 4. A Declaration against the [3rd respondent] that 152,815,778 shares of the [4th respondent] registered in her name are subject to the full beneficial interest of the [appellant] therein and that, accordingly, she holds the said shares on trust for the [appellant] and is, further, liable to account to the [appellant] for all dividends paid in respect of the said shares.
>
> 5. An Order that the [1st respondent] transfer and procure the registration of 175,313,560 shares in the [4th respondent] to the [appellant].
>
> 6. An Order that the [2nd respondent] transfer and procure the registration of 63,448,904 shares in the [4th respondent] to the [appellant].
>
> 7. An Order that the [3rd respondent] transfer, and procure the registration of 152,821,778 shares in the [4th respondent] to the [appellant].
>
> 8. An Order that the [4th respondent] register the [appellant] as proprietor of the said shares.
>
> ..." (Underlining as in original)

[15] The matter was heard between 29-30 June, 1-2 July, 1-2 September and 12 November 2010 by Jones J. The various pleadings, oral and documentary evidence that had been filed and/or adduced before him are summarised below.

The appellant's case

[16] The appellant's case was contained in the further amended particulars of claim filed 7 April 2010, in support of its amended claim form and in witness statements and oral testimony from Mr Amir Emami (vice president of Epsilon Investment Management LLC (EIM) in August 2002) and Mr Steve Stevanovich (the president and director of EIM

and Westford Asset Management LLC and director of Epsilon Global Asset Management).

[17] It was the appellant's contention that Mr Gerry Mouttet, a director and treasurer of the 4th respondent, acted on behalf of the founding shareholders and the 4th respondent to negotiate "as part of [a] global transaction, loans totalling US$30m". The loan, it explained (at paragraph 6 of its particulars of claim), was allocated as follows:

> "…
>
> US$500,000 by EGMF to the [4th respondent]…to be used for 'general corporate needs of the [4th respondent] and of the shareholders of the [4th respondent]'.
>
> US$29,500,000 by EGMF I and EGMF II to Atlantic Marketing Services Inc. ('AMSL'), an entity…owned or controlled by Mr. Gerry Mouttet for 'the purposes of the borrower and the shareholders of the borrower' (hereafter referred to as the 'Atlantic I Loan').
>
> …
>
> (c) The execution of the Agreement for the loan by EGMF to the [4th respondent]…is, by the terms of the Atlantic I loan, a condition precedent to that loan.
>
> (d) …
>
> (e) The Forward Sale of Shares Agreement 2002 and the Atlantic I and the [4th respondent] loans were negotiated by Mr. Mouttet as part of one transaction and the said loan agreements are part of the matrix of facts which fall to be examined when the Forward Sale of Shares Agreement is construed." (Underlining as in original)

[18] The appellant claimed that pursuant to the 2002 FSA, the founding shareholders had an obligation to sell and transfer shares of 17% in the 4th respondent to the appellant at par value upon the occurrence of the acquisition date which was either the

date the loan was repaid, or 31 August 2005, or December 2005 (which would have been one month prior to the initial public offering). However, in cross-examination, Mr Emami indicated that he believed the earliest acquisition date, under the 2002 FSA, occurred by June 2005. Upon the occurrence of the acquisition date, the appellant would pay the founding shareholders the selling price for the shares of J$1.00 per share, and it would then be entitled to date and deliver the undated instruments of transfer, to the 4th respondent for registration.

[19] The appellant claimed that during 2004 and 2005, it became apparent that the 4th respondent was not generating sufficient cash flow to repay balances on its loans. Accordingly, the Epsilon Group, the founding shareholders and Mr Gerry Mouttet began exploring restructuring strategies to facilitate the repayment of balances on the loans of the 4th respondent. Several strategies were contemplated which included a private placement followed by an initial public offering and an option agreement. Mr Emami stated that the private placement and subsequent initial public offering resulted in a repayment of US$7,247,942.04 towards obligations on the AMSL loan. The 2nd respondent, he claimed, also made a repayment of US$2,410,691.85, on 23 June 2006, to satisfy his "individual obligation" under the AMSL loan. The Epsilon Group made a further investment by way of a loan in the sum of US$2,270,000.00 from Westford Special Situations Master Fund LP to AMSL, with the primary consideration being an equity participation of 1.2874% in the 4th respondent under the 2004 FSA.

[20] The appellant stated that, in or about May 2005, the 4th respondent converted to a public company and increased its share capital from 2,000,000 ordinary shares to

100,000,000 ordinary shares at J$1.00 per share, which were converted to shares without par value. The 4th respondent also subdivided its issued shares into 3,000,000,000 ordinary shares, converted its ordinary shares into ordinary stock units, and made a private placement of 500,715,405 ordinary shares to raise funds. Accordingly, the appellant contended that it would become entitled to 391,584,242 shares.

[21] The appellant also indicated that the execution of the option agreement, dated 7 July 2005 and described at paragraph [13] herein, would, *inter alia*, only be exercisable upon the full repayment of all obligations owed to EGMF I, EGMF II and Westford, by the 4th respondent, AMSL and AmeriServices Company Limited. The option agreement was set to expire on 6 December 2005, but it averred that the parties agreed to extend the expiry date to January 2008, which was further extended to March 2008. The appellant claimed that the 1st, 2nd, 3rd and 4th respondents were aware of the option agreement and they expressly or impliedly waived objection (provided the option agreement was in force) to any delay by the appellant to take the formal steps to have the appellant registered as the owner for the shares under the 2002 FSA.

[22] The appellant claimed that the consideration for the acquisition of the shares under the option agreement showed that the sum of J$1.00 per share under the 2002 FSA "was merely a token sum" which was not the true consideration for the shares, given the true value of the shares was significantly higher than that designation. In fact the true consideration for the shares under the 2002 FSA was the loan of US$30,000,000.00. The appellant noted that it had never contemplated that the

stipulation of payment of J$1.00 per share by a certain date prior to the transfer of the shares "would be a condition to the validity or enforceability" of the 2002 FSA.

[23] The appellant claimed that by letters, dated 17 and 27 October 2008, it sought to complete the process of the transfer of the shares to it. However, it contended that the respondents refused or neglected its demands. The appellant further stated that its request to have Mr Geoffrey Tirman appointed to the board of directors of the 4th respondent was not complied with, although Mr Emami in cross-examination acknowledged that since the 4th respondent is a public company such an appointment was subject to certain stipulations. Additionally, the 5th respondent breached the 2002 FSA when he transferred the shares to which the appellant was entitled to the 3rd respondent. The failure to effect the transfer of shares in the 4th respondent to the appellant resulted in the claim.

The 1st respondent's case

[24] The 1st respondent's case is set out in his further amended defence filed 5 May 2010, and evidence was adduced by his witness statement, supplemental witness statement (filed 8 March 2010 and 20 May 2010, respectively) and by his oral testimony.

[25] The 1st respondent stated that Mr Gerry Mouttet was a director of the 4th respondent, but Mr Mouttet was not a treasurer nor was he acting on the 1st respondent's behalf in the negotiation of any loans in the amount of US$30,000,000.00. He however accepted that Mr Gerry Mouttet and all the founding shareholders were a

part of the negotiation for the loan of US$500,000.00 to the 4th respondent. He denied that there was a related loan of US$29,500,000.00 to AMSL and he also refuted the argument that AMSL was an entity related to the 4th respondent. The 1st respondent admitted that the 2002 FSA was negotiated and concluded contemporaneously with the loans to the 4th respondent and AMSL, respectively, but refuted that the loan agreements were part of the matrix of facts to be considered when construing the 2002 FSA. He further denied that the loan of US$2,270,000.00 to AMSL was executed as "part of one transaction" or that there was any connection between the 2004 FSA and the loan agreement between AMSL and Westford Special Situations Master Fund LP.

[26] In cross-examination, the 1st respondent stated he had not received a portion of the US$29,500,000.00 loan to AMSL. However, while he acknowledged that the 4th respondent entered into a contract with AMSL for the provision of marketing services in the lottery business for a management fee of 3.85% of the gross revenue of the 4th respondent, he did not know that the management fee went to service the US$29,500,000.00 loan.

[27] The 1st respondent contended that under the 2002 FSA, the appellant was obligated to pay the selling price for the shares and deliver the duly completed instruments of transfer to the 4th respondent for registration immediately upon the occurrence of the acquisition date, which was "either 27 June 2005 or 30 July 2005", but not 31 August 2005 or December 2005." However, he agreed that under the 2002 FSA, there was no "specific contemplation" by the 4th respondent as to whether or when a change of control of or an initial public offering in the 4th respondent would take

place. He also accepted that any event related to the sale of any portion of the 1,000,000 ordinary shares held by the founding shareholders could happen at any time. The 1st respondent stated that under the 2002 FSA, it was of no commercial importance to him, if the acquisition date was to be triggered by the sale of the shares and the payment of J$1.00 per share by the appellant. He went on to explain that the 2002 FSA was devised to protect the appellant, and since the 4th respondent had no real assets at the time, it had adhered to the terms of that FSA.

[28] The 1st respondent stated that he was unable to explain why the shares under the 2004 FSA were not reflected in the statement in lieu of prospectus dated 7 July 2005, to which the 1st respondent acknowledged being a signatory. He did however acknowledge that the equivalent to the shares under the 2002 FSA was 175,335,060 shares, and he believed the same were being held in escrow.

[29] The 1st respondent acknowledged receipt of the demand letters, dated 17 and 27 October 2008, but stated that the appellant had breached the terms of the 2002 FSA when it failed to pay the purchase price for the shares and to deliver the duly executed instruments of transfer upon the acquisition date and so his obligations to preserve the interest of the appellant, and pay over dividends to the appellant were negated. Additionally, he claimed that the appellant was not entitled to the increased shares following the subdivision of the issued shares into 3,000,000,000 ordinary shares since the appellant had not complied with its obligations upon the occurrence of the acquisition date, which he said discharged him of any further obligations under the 2002 FSA.

[30] The 1st respondent admitted to performing his obligations under the 2004 FSA and contended that the acquisition date in that agreement had "occurred on or about April 2005", at which time the appellant had breached the 2004 FSA, having not complied with its obligations. Accordingly, he stated that he treated his further obligations under the 2004 FSA as being discharged, and so the appellant was not entitled to receive from him any dividends paid after the acquisition date. He did however concede, contrary to his pleadings and witness statement, that the 2004 FSA was related to the loan of US$2,270,000.00 from Westford Special Situations Master Fund LP, which Mr Gerry Mouttet had asked him to collateralize.

[31] The 1st respondent contended that he had agreed to the execution of the option agreement, which would give an option to St George's Holdings Limited to acquire the appellant's rights under the 2002 and 2004 FSA, but denied that all parties to the option agreement agreed to extend the expiry date to ultimately March 2008. He also denied, that he expressly or implicitly waived objection to any delay by the appellant to take any formal steps to acquire the shares, while the option agreement subsisted.

[32] The 1st respondent conceded that the sum of $84,350.00 was a small sum of money in 2002 and if he had not received the same, upon the repayment of the loan, financially that would not have been of much significance. He also agreed with Mr Vassell that he signed the letter of transfer wherein he claimed to have received payment of the sum because it was "an insignificant amount", not relevant to the transaction, given the "substance of the transaction was the loans".

The 2nd respondent's case

[33] The 2nd respondent's case is set out in his amended defence filed on 4 May 2010, and evidence adduced by his witness statement, supplemental witness statement (filed on 8 March and 19 May 2010 respectively) and by his oral testimony.

[34] He admitted that Mr Gerry Mouttet was a director and treasurer of the 4th respondent, but denied that Mr Mouttet acted on his behalf in any "global transaction". Under cross-examination, the 2nd respondent admitted however that the 2002 FSA was "related to an overall transaction where Epsilon had loaned [AMSL] some funds". He stated that AMSL received US$29,500,000.00 and the 4th respondent US$500,000.00. He further stated that he received 15% of the US$29,500,000.00 loan, and the 1st respondent and Mr Peter Stewart were to receive 42.5%, respectively, but he could not say if they took their portion. He was unable to make any admissions in relation to the terms of the loan of US$29,500,000.00 to AMSL. He also asserted that he had fully repaid his share of the money advanced by the [appellant] (per confirmation letter dated 22 June 2006). The 2nd respondent acknowledged that the agreement for the loan of US$500,000.00 was "entered into around the same time" as the 2002 FSA and he believed the same to have been repaid.

[35] Since he was a party to the 2002 FSA, he took no issue with the appellant's description of the rights and obligations under that FSA. However, he contended that on the true construction of the 2002 FSA, the appellant was obligated, immediately upon the occurrence of the acquisition date, to pay the selling price for the shares and deliver the duly completed instruments of transfer for registration by the 4th respondent. The

acquisition date for him "occurred on or about June 28, 2005 and in any event, not later than August 31, 2005". Since the appellant failed to pay the selling price of the shares and deliver the instruments of transfer for registration upon the occurrence of the acquisition date, the appellant, he contended, was only entitled to the dividends paid prior to the acquisition date and was not entitled to the increased shares resulting from the subdivision of issued shares into 3,000,000,000 ordinary shares. Accordingly, he was entitled to and did treat the 2002 FSA as at an end, and he was discharged from any further obligations under that FSA.

[36] The 2nd respondent conceded that the 17% shares which the appellant was to receive was "part of the overall structure of the deal", but vehemently disagreed that the J$1.00 for the shares was merely a "token sum" to give legal effect to the overall transaction. He instead asserted that the J$1.00 per share was the "real value". He further indicated that when he received the letter from Mr Emami that he had "no further obligations", this "obviously meant in relation to the shares".

[37] The 2nd respondent denied knowledge of the said option agreement or that he had waived any rights under the 2002 FSA. He contended that the option agreement should not affect the interpretation of the 2002 FSA, in the light of the fact that he was not a party to the former agreement. He also denied receiving letters, dated 17 and 28 October 2008, requesting completion of the transfer of shares to the appellant.

The 3rd respondent's case

[38] The 3rd respondent's case was detailed in her amended defence filed 5 May 2010, a witness statement and supplemental witness statement, filed on 12 March and 11 June 2010, respectively. The third respondent did not give oral testimony.

[39] The 3rd respondent in her witness statement stated that upon the death of her late husband, Mr Peter Stewart, on 28 March 2004, she became the beneficiary of all his shares held in the 4th respondent. However, she indicated that at no time after the shares of her late husband were transferred to her, did she appoint Mr Gerry Mouttet to act as her agent or negotiate on her behalf with the appellant. She further contended that at no time did she ratify any unauthorized act which may have been misrepresented as having been authorized by her. She further averred that she had no knowledge of the issues raised in the further amended particulars of claim, by the appellant, because the matters thereunder predated her husband's death, and she only learnt of the appellant's claim of entitlement to her husband's shares upon the receipt of certain letters which had been adduced in evidence.

The 4th respondent's case

[40] The 4th respondent's case is set out in its further amended defence filed 5 May 2010, the witness statement and supplemental witness statement of Mr Brian George (filed on 15 March and 20 May 2010), and his oral testimony.

[41] The 4th respondent accepted that Mr Mouttet was a director of the 4th respondent, but denied that he was a treasurer and also indicated that Mr Mouttet had

resigned on 7 June 2007. The 4th respondent admitted that Mr Mouttet along with the founding shareholders negotiated the loan of US$500,000.00 on its behalf, but not the loan to AMSL for US$29,500,000.00. It averred that it had no interest in the latter loan and there was no reference of that loan in its loan agreement for US$500,000.00.

[42] The 4th respondent contended that the words of the 2002 FSA are "clear in and of itself" and the obligations of the parties under that agreement are "clearly discernable [sic]". The 4th respondent accepted that the appellant was obligated under the 2002 FSA to pay the selling price for the shares immediately upon the occurrence of the acquisition date, which it claimed occurred on or about 27 June 2005 or no later than 30 July 2005 since the loan of US$500,000.00 was repaid "either 27 June 2005 or 30 July 2005". However, since the appellant had failed or neglected to pay the selling price of the subscription shares, and to deliver the duly completed instruments of transfer for registration by the acquisition date, it had breached the terms of the 2002 FSA. Consequently, the 4th respondent contended that it was not obligated to pay dividends and distributions declared on the subscription shares after the occurrence of the acquisition date in favour of the appellant, and averred that no dividends were paid prior to the occurrence of the acquisition date.

[43] It agreed that it had increased the authorized share capital from 2,000,000 ordinary shares to 100,000,000 without par ordinary shares and subdivided its issued shares into 3,000,000,000 ordinary shares, but denied that the appellant was entitled to the resultant changes to the subscription shares.

[44] The 4th respondent admitted to signing the option agreement, but denied that it had agreed to extend the expiry date of that agreement to 31 January 2008 and subsequently March 2008. Mr George in his oral testimony could not remember if he had been authorized by the board to sign the option agreement of 2005, or if he had circulated, or provided information to the board, on that agreement. The 4th respondent also contended that it had not expressly or implicitly waived objection to any delay by the appellant to take the necessary steps to become the registered owner of the shares under the 2002 FSA. Mr George further disagreed with the appellant's allegations that the consideration for the shares under the option agreement demonstrated that the sum of J$1.00 per share under the 2002 FSA was "merely a token sum".

[45] The 4th respondent acknowledged that it had received letters dated 17 and 27 October 2008, accompanied with duly completed instruments of transfer for the subscription shares, as subdivided. Mr George however agreed under cross-examination that he had rejected them without consultation of all the parties to the 2002 FSA. In respect of the 2004 FSA, the 4th respondent admitted to being a party to the same, but denied that the loan to AMSL for US$2,270,000.00 and that FSA were negotiated as "part of one transaction".

The 5th respondent's case

[46] The case for the 5th respondent was outlined in his defence filed on 22 June 2009, his witness statement filed 11 March 2010 and his oral testimony.

[47] He contended that in accordance with his obligations as the executor of the estate he executed the transfer of 152,821,778 shares to the 3rd respondent who was the sole beneficiary of Mr Peter Stewart's estate. He further stated that at no time prior to being served with documents in the claim brought by the appellant did he have knowledge of the existence of the 2002 FSA, given same was not mentioned in Mr Peter Stewart's Will.

[48] The 5th respondent agreed that the parties entered into the 2002 FSA, but contended that the true construction of that agreement required the appellant to pay the selling price for the shares upon the occurrence of the acquisition date. He averred that the acquisition date "occurred on or about 28 June 2008 [sic] and in any event, not later than 31 August 2005". He contended that the late Mr Peter Stewart had an obligation under the 2002 FSA to preserve the interest of the appellant, but this obligation was dependent on the strict observance by the appellant of the terms of that FSA. He rejected the suggestion that the appellant had an entitlement to the increased shares resulting from the subdivision of the subscription shares.

[49] The 5th respondent also stated that he recalled that the late Mr Peter Stewart held 425,000 shares in the 4th respondent, but he could not recall reference to 84,000 shares. He also stated that he had not spoken to the 4th respondent in respect of the shares held by Mr Peter Stewart.

Documents before the court

[50] The agreed documents that were before Jones J for consideration included: (i) marketing services agreement dated 30 September 2001, between AMSL and the 4th respondent; (ii) loan agreement dated 28 August 2002 between EGMF I and the 4th respondent for US$500,000.00; (iii) the 2002 FSA; (iv) instruments of transfer duly executed by the founding shareholders in respect of the 2002 FSA; (v) the 2004 FSA; (vi) the option agreement dated 7 July 2005; (vii) demand letter to 1st, 2nd, and 3rd respondents dated 17 October 2008 for the remittance of dividends received; and (viii) demand letter to 4th respondent dated 27 October 2008.

[51] The documents that were tendered and admitted into evidence included: (i) letter dated 22 June 2006 from Mr Emami (Epsilon Global Asset Management Ltd) to the 2nd respondent (discharge of any further obligation owed to Epsilon); (ii) loan agreement dated 28 August 2002 between EGMF I and EGMF II and AMSL for US$29,500,000.00 and the amendments thereto; (iii) loan agreement dated 27 February 2004 between Westford Special Situations Master Fund LP and AMSL for US$2,270,000.00; (iv) offer for subscription by way of private placement dated 11 July 2005; and (v) statement in lieu of prospectus delivered for registration of the 4th respondent dated 7 July 2005.

Trial judge's reasons for judgment

[52] The learned judge delivered a written judgment in the matter. He identified the main issues before him as follows:

"i) Did full beneficial interest in the shares under the 2002 and 2004 Agreements pass to the [appellant] at the time of signing?

ii) Is time of the essence of the contract with the result that the failure of the [appellant] to pay the $1 per share referred to in the 2002 and 2004 Agreements and to return of the Instrument [sic] of Transfer operate to discharge the contract?

iii) Did the [respondents], through the Option Agreement between St. George's Holdings Limited and the [4th respondent] expressly or implicitly waive objection to any delay by the [appellant] in taking the formal step, required for [the] registration as owner of the shares under the 2002 and 2004 Agreements."

[53] In respect of issue (i), the learned trial judge found, at paragraph [21] of his judgment, that the beneficial interest in the shares under the 2002 FSA did not pass to the appellant upon the execution of that agreement for the reason that the essence of the said FSA, upon interpretation, was to allow the appellant to obtain, at a future date (the acquisition date), the shares in the 4th respondent. He accordingly distinguished the facts of the case before him from those in the case of **Wood Preservation Ltd v Prior (Inspector of Taxes)** [1969] 1 All ER 364, the authority on which the appellant relied, to show that beneficial interest in the shares had passed in 2002.

[54] With regard to issue (ii), the learned judge appreciated, at paragraph [22] of his judgment that the construction of the 2002 and 2004 FSAs, within the commercial context was necessary to determine whether time was of the essence under those agreements. In looking at the case of **Hare v Nicoll** [1966] 2 QB 130, [1966] 2 WLR 441, he accepted that the rights given under the case before him were not an option to re-purchase shares, but recognized that all the judges in **Hare v Nicoll** "were of the

view that even if the contract did not involve an option, time would nonetheless be of the essence, given the subject matter" (paragraph [32]). He concluded that the nature of the business carried on by the 4th respondent and its track record of, *inter alia*, sustained losses from inception to 2002, made the shares in the 4th respondent "of a highly speculative nature" (paragraph [37]). Accordingly, the learned judge found, at paragraph [40], that time was of the essence in both the 2002 and 2004 FSAs for the reasons that (a) the shares in the 4th respondent were not to be acquired by the appellant in exchange for the loans, but instead in exchange for "the consideration" of the payment of the purchase price of J$1.00; (b) the parties had agreed that the purchase price would be paid at the acquisition date as defined in the FSAs; and (c) the appellant was not authorized to use the blank instruments of transfer executed by the founding shareholders until the acquisition date, at which time it would be required to present the said instruments duly completed and stamped to the 4th respondent for registration.

[55] As it concerns matters raised under issue (iii), the learned judge, in applying the principle from **Plasticmoda Societa Per Azioni v Davidsons (Manchester) Ltd** [1952] 1 Lloyd's Rep 527, accepted that in order for the principle of waiver to be applicable, all the parties to the 2002 and 2004 FSAs ought to have been aware of the option agreement (paragraph [45]). He however found, at paragraph [48], that insofar as the option agreement constituted a waiver by the 1st and 4th respondents, "it would only have operated until December 30 [sic], 2005", when it expired. He also commented that the appellant in October 2008 "cannot now rely on the [1st and 4th

respondents'] waiver of its obligations under the 2002 and 2004 Agreements by way of the Option Agreement as that had already expired".

[56] The learned judge found that in respect of the 2nd respondent, "there is no evidence from the [appellant] or otherwise" that he was aware of the option agreement and there was no evidence that he waived any of his rights under the 2002 FSA (paragraph [53]). As it related to the 3rd and 5th respondents, he found, at paragraph [56], that there was no evidence that they had "expressly or impliedly waived" their rights to insist on compliance with the terms of the 2002 FSA.

[57] The learned judge however, did not specifically make a ruling as to whether the failure by the appellant to pay the purchase price of J$1.00 per share and to confirm its intention to acquire the shares by returning the instruments of transfer for registration by the acquisition date, operated to discharge the 2002 and 2004 FSAs. This was so although he had (at paragraph [42]) addressed his mind to it prior to dealing with issue (iii) in the judgment.

[58] The learned judge gave judgment for the respondents against the appellant, with costs to the respondents, to be agreed or taxed, and ordered that there should be a stay of execution of the costs order for six weeks.

The appeal

[59] Aggrieved by this judgment, the appellant filed notice and grounds of appeal on 1 March 2011, which challenged various findings of fact and of law, and highlighted seven grounds of appeal. The grounds are stated as follows:

"a. The Judgment is against the weight of the evidence and ought to be set aside.

b. The learned Judge misapprehended the facts before him and the law applicable thereto and construed the 2002 and 2004 Forward Sale of Shares Agreements without having any or any proper or adequate regard to the commercial context in which the said Agreements were entered into and thereby reached the erroneous conclusion that time was of the essence of the obligations under the said Agreements to pay the sum of $1.00 per share and to submit the executed Transfers for registration.

c. The learned Judge's finding that the shares in the [4th respondent] were not acquired by the Appellant in exchange for loans is erroneous, unsupported by the evidence, and inconsistent with other evidence accepted by the Judge including the evidence recited by him at paragraph 2 of the written Judgment that the 17% shareholding interest in the [4th] Respondent for which the Appellant bargained under the 2002 Forward Sale of Shares Agreement was in return for the loan of $29,500,000.00 [sic] to Atlantic Marketing Services Limited and the loan of US$500,000.00 to the [4th] Respondent.

d. The learned Judge failed to appreciate that, even if time was of [the] essence of the said Agreements the said Agreements were not discharged prior to the tender of performance by the Appellant, since there was no evidence before him that the Respondents, or any of them, had acted to rescind the Agreements.

e. The learned Judge erred in reaching the conclusion that if time was of the essence of the Appellant's obligations under the said Agreements, same had not been waived by any of the Respondent parties to the Agreements.

Further, the learned Judge wrongly excluded admissible evidence that the Option Agreement was extended to March, 2008.

f. The learned Judge erred in reaching the conclusion that the beneficial interest in the shares, subject to the Forward Sale of Shares Agreements, did not pass to the Appellant upon execution of the said Agreements. The reasoning which led the learned Judge to this conclusion, viz., that the 2002 Forward Sale of Shares Agreement was not an agreement to buy and sell shares but an agreement for the forward sale of shares under which the Appellant was to obtain the shares in the [4th] Respondent at a future date reflected a failure to appreciate the true nature and effect of the Forward Sale of Shares Agreement and is, additionally, based upon attributing the words 'Forward Sale' which appear only in the title of the said Agreement, a meaning and weight not justified by the rules of construction of contracts.

g. Generally, the learned Judge failed to identify or appreciate all the material facts and issues in the case and reached a determination in the action without any proper adjudication upon the said issues whereby his said decision was erroneous and unsupportable."

[60] During oral submissions before this court, Mr John Vassell QC, on behalf of the appellant, truncated these grounds of appeal into three main issues on the appeal:

1) Whether time was of the essence in respect of the appellant's obligation under the 2002 and 2004 FSAs to pay the sum of J$1.00 per share and submit the executed and stamped instruments of transfer of the shares to the 4th respondent for registration upon the occurrence of the acquisition date (the repayment of the loan in June or July 2005).

2) In the alternative, if time was of the essence, did all or some of the respondents waive time being of the essence.

3) Alternatively, if time was of the essence, did the failure of the appellant to pay the J$1.00 per share and submit the executed and stamped instruments of transfer operate as a repudiatory breach of the 2002 and 2004 FSAs, and whether the repudiatory breach was accepted by all or some of the respondents, so as to rescind the FSAs.

Submissions on issue 1) (grounds a, b, c, f and g)

Appellant's submissions

[61] Mr Vassell submitted that in order to determine whether time was of the essence, in respect of the appellant's obligations under the 2002 and 2004 FSAs, the context within which the FSAs were executed must be considered. He argued that the context to be considered can arise from the FSAs themselves or as stated in **Turner v Forwood and Another** [1951] 1 All ER 746, from material evidence outside of the FSAs. He urged the court to consider, *inter alia*, the following:

1. The FSAs did not expressly make time essential.
2. Though the FSAs defined a time, namely the acquisition date, when the appellant was required to pay the J$1.00 per share, that date could not be

"established with precision and it [was] potentially unknowable". Also, the importance placed on the initial public offering as an event triggering the acquisition date is unrealistic.

3. The substance of the 2002 FSA was not for the sale of shares, but a loan transaction related to a large sum of money (US$30,000,000.00) which included the transfer of 17% of the subscription shares in the 4th respondent to the appellant. Further, the 2nd respondent in his evidence under cross-examination admitted that the transaction was an overall transaction given in exchange for loans.

4. The 2002 FSA was a component of a "global transaction" and accordingly distinguishable from the free-standing agreements for sale and purchase of shares dealt with in **Hare v Nicoll**. Also, in that case, Winn LJ opined that the presumption of time being of the essence was only "in the absence of any contrary indication".

5. The cases of **Re Schwabacher Stern v Schwabacher Koritschoner's Claim** (1907) 98 LT 127, and **Grant v Cigman** [1996] BCLC 24 are not

applicable to the commercial context of the FSAs in the instant matter.

6. The statement in lieu of prospectus dated 7 July 2005, which referred to the 2002 FSA being in existence.

7. Despite the fact that the date for the acquisition of the shares had expired, in October 2008 when the appellant submitted the transfers for registration there was no unreasonable delay given the appellant's participation in the option agreement dated 7 July 2005 which was known to at least the 1st and the 4th respondents.

8. The sum of J$1.00 per share was a "nominal consideration", a "token sum" to give legal efficacy to the FSAs.

[62] Mr Vassell indicated that the learned judge had erred when he failed to address his mind to the issue of the credibility of the evidence offered by the 1st respondent, in respect of the 2004 FSA, which conflicted with his sworn witness statement and his evidence under cross-examination. The learned judge, he said, also erred with his contradictory findings in paragraphs [2] and [40] of his judgment. Mr Vassell further submitted that Jones J's finding that the beneficial interest in the shares under the 2002 FSA did not pass to the appellant upon the execution of that agreement (although

learned counsel argued that such a finding would not affect the matters before the court) is "plainly unsustainable" because: (i) the learned judge ought to have followed the principle in **Wood Preservation Ltd v Prior**, instead of purporting to distinguish it; and (ii) the founding shareholders performed all the requisite acts that divested them of all beneficial interest in the shares and they only retained the bare legal title, of which the appellant, by its conduct, under the FSAs would acquire.

[63] In reliance on **Rainy Sky SA and others v Kookmin Bank** [2011] UKSC 50; **John Thompson v Goblin Hill Hotels Ltd** [2011] UKPC 8; **Chartbrook Ltd v Persimmon Homes Ltd and others** [2009] UKHL 38; and **Prenn v Simmonds** [1971] 3 All ER 237, learned Queen's Counsel argued that had the learned judge given proper regard to the commercial background in the interpretation of the FSAs, he would have found that the shares were to be transferred as consideration for the loans, and as such consideration had been given, rendering time not being of the essence with respect to the payment of J$1.00 per share. Queen's Counsel further reasoned that it would flout "business common sense" that the Epsilon Group, having completed its obligation, would stand to lose its interest and not enjoy its rights because of a failure to pay J$1.00 per share upon the acquisition date. Accordingly, he asserted that a draconian sword ought not to have been placed over Epsilon's head.

1st respondent's submissions

[64] Learned counsel for the 1st respondent, Mr Graham, reviewed the pleadings of the appellant, filed on 7 April 2010, and highlighted certain matters which Jones J would have considered, and asserted that the learned judge had resolved all the issues

before him. He argued that the appellant's pleadings did not indicate that: (i) the 17% shares, in the 4th respondent, in favour of the appellant, were to be given in consideration for the loans; and (ii) that any receipt of monies under the AMSL loan (US$29,500,000.00) was an issue to be dealt with in the trial, nor did the 2002 FSA make any reference to that loan. Indeed, learned counsel argued that no document in the factual matrix made any connectivity between the 2002 FSA and the AMSL loan.

[65] Mr Graham also directed the court to peruse the consideration referred to under clause 2 of the FSAs and contended that the fact that the FSAs provided for the appellant to enjoy certain benefits (such as voting rights, knowledge of the affairs of the 4th respondent and pre-emptive rights to purchase additional shares) that was not indicative that beneficial interest in the shares had passed to the appellant. Mr Graham contended that the nature of the events stipulated under the FSAs to trigger the acquisition date, constituted an "elaborate mechanism", by the parties thereby making time of the essence. He argued that when the 4th respondent became a public company that had implications for the procedures and requirements governing the appointment of a director to the board, and the acquisition of shares which have changed significantly from what had originally obtained.

[66] Learned counsel asserted that Jones J's interpretation of the FSAs, in keeping with the principles enunciated in **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 All ER 98, gave adequate consideration to the factual matrix surrounding the execution of the FSAs. He submitted that the learned judge, having relied on **Hare v Nicoll**, **Schwabacher Re Stern v Schwabacher**

Koritschoner's Claim and **British and Commonwealth Holdings plc v Quadrex Holdings Inc** [1989] 3 All ER 492, correctly found that time was of the essence under the FSAs having regard in particular to the subject matter of the agreements (shares). He argued that there was no ambiguity in the language of the FSAs, and so it could not be said that those documents made no commercial sense. He further submitted that the weight of the evidence supported Jones J's finding that the shares were not to have been acquired by the appellant in exchange for loans, but were to be purchased at the par value as contemplated by the agreement, given no evidence was led that that provision ought to be ignored.

2nd respondent's submissions

[67] Mr Hylton QC, for the 2nd respondent, also submitted that the learned judge's application of the principle in **Hare v Nicoll** was correct in determining whether time was of the essence. It was argued, by Mr Hylton that though the 2002 FSA was not a true option, the principles applicable to an option were relevant to it. Learned Queen's Counsel further submitted that in finding that time was of the essence, Jones J gave consideration to the subject matter of the FSAs — the shares — when he reflected on the nature of the business of the 4th respondent, its recent acquisition of a licence to carry on the business and the fact that the 4th respondent had not made a profit prior to 2002. Additionally, in reliance on **British and Commonwealth Holdings plc v Quadrex Holdings Inc**, learned Queen's Counsel contended that time was of the essence because the 2002 FSA specified an acquisition date for the payment of the purchase price of the shares, which "was identifiable and capable of exact

determination by the parties" and so, "Epsilon could hardly complain that this date was 'unknowable'".

[68] On the issue of whether beneficial interest in the shares had passed upon the execution of the 2002 FSA, Mr Hylton submitted that the learned judge was correct to find that there had been no transfer of beneficial interest in the shares to the appellant on the execution of the FSA, since the terms of the FSA made it clear that it was not an agreement for sale and purchase of shares, but an agreement envisioning a future sale and purchase of shares.

[69] In replying to the assertion of the appellant that there was a "single global transaction" in respect of the 2002 FSA, Queen's Counsel submitted that there were a series of separate but related transactions, but not a single transaction. While Mr Hylton agreed with the case for the 2nd respondent that the other agreements are relevant background and that the court should consider all the agreements in construing the matter, he nonetheless contended that in construing the obligations of the 2nd respondent, under the agreements, the option agreement dated 7 July 2004 was irrelevant.

[70] Queen's Counsel submitted that the conclusion of the learned judge that the consideration for the shares was the purchase price of J$1.00 per share was supported by the evidence because the 2002 FSA stated that the consideration for the shares thereunder was J$1.00 per share. He pointed out that none of the loan agreements indicated that the consideration for the loans was the 17% shares in the 4th respondent

and further indicated that no contemporaneous documents had stipulated that the shares were consideration for the loans. On the point of reference to the sum of J$1.00 per share being a "token sum", Mr Hylton directed the court's attention to clauses 3.1 and 3.2 of the 2002 FSA to show that the price the founding shareholders paid for the newly acquired shares, which were the subject matter under the FSA, was J$1.00, and the appellant was being given an opportunity to purchase those shares for the price the founding shareholders paid for them. Accordingly, he asserted that the sum of J$1.00 per share was "not an arbitrary sum" and Mr Emami, in cross-examination, admitted that the J$1.00 per share was the agreed purchase price for the shares, "the par amount per share".

[71] With regard to the inconsistency in the judgment highlighted by Mr Vassell, in paragraphs [2] and [40] of the judgment of Jones J, Mr Hylton submitted that at paragraph [2] the learned judge was merely outlining the allegations in the claim, whereas at paragraph [40] he was articulating his findings of fact.

[72] Mr Hylton argued that if time was not to be of the essence, and the appellant would acquire the shares in any event, the agreement could have easily achieved that by making the transfer of the shares effective upon signing. He also argued that the loans, on which the appellant placed reliance, were "loans, not gifts", and neither of the loan agreements (the US$500,000.00 or the US$29,500,000.00) identified the shares as collateral for those loans. Accordingly, he submitted those circumstances indicate that it would not be "against commercial common sense" for the appellant to lose its rights in

acquiring the shares, if it failed to acquire same upon the occurrence of the acquisition date.

3rd and 5th respondents' submissions

[73] Queen's Counsel, Mr Scott, for the 3rd and 5th respondents, indicated that he would adopt Mr Hylton's submissions on time being of the essence, the passing of the beneficial interest in the shares and the rules of construction of the 2002 FSA as stated in **Investors Compensation Scheme v West Bromwich Building Society**.

[74] Mr Scott asserted that the 2002 FSA was an agreement made in the present, to acquire shares in the future, on either a fixed date or an ascertainable date, at a fixed price. He explained, in commercial terms, it is a hedge contract and "highly speculative". He directed the court to the recitals of the 2002 FSA which he stated set out the background leading to the FSA. He argued that it stipulated the acquisition date and made it clear that the loan referred to thereunder was the loan of US$500,000.00 to the 4th respondent. He also contended that clause 2 of the 2002 FSA made it clear that the consideration under the FSA was the mutual agreements and undertakings contained therein.

[75] Mr Scott contended that the learned judge in his conclusive findings of fact, based on the construction of the 2002 FSA and the oral evidence (under cross-examination) of Mr Emami (which supported the case for the 3rd and 5th respondents), cannot be said to be "plainly wrong". Queen's Counsel asserted that when the 4th respondent went public (an event the parties contemplated as a trigger of the

acquisition date under the 2002 FSA), this resulted in the splitting of shares and the creation of 3,000,000,000 shares. Accordingly, he stated that the shares that were recorded under the signed, undated instruments of transfer, pursuant to the 2002 FSA, no longer existed "in specie".

4th respondent's submissions

[76] Counsel Ms Annaliesa Lindsay, for the 4th respondent, adopted the stance taken by her colleagues in their submissions and relied on her written submissions. She submitted to the court that under the 2002 and the 2004 FSAs, the 4th respondent's role was to facilitate the registration of the transfer of the shares — a purely "administrative role". She also directed the court's attention to clause 10 (swap rights) of the FSA which speaks to the parties' intention to have the shares of the 4th respondent listed on the Jamaica Stock Exchange or an internationally accepted stock exchange and the option of the appellant to purchase the subscription shares in exchange for those to be listed in the initial public offering.

[77] Miss Lindsay urged that the learned judge's opinion (at paragraph [41] of the judgment) that the appellant may have opted not to pursue its investment in an otherwise unsuccessful venture, the loan having been repaid, should be accepted. Accordingly, she argued that the learned judge properly concluded at paragraph [42] that time was intended to be of the essence and that the appellant had an obligation to pay the purchase price for the shares, irrespective of whether the amount was "peanuts", on the acquisition date. She reminded the court that the 2nd respondent,

under cross-examination, gave evidence that the purchase price of the shares "was a real value".

Submissions on issue 2 (ground e)

Appellant's submissions

[78] Mr Vassell submitted that the learned judge erred in finding that all parties to the 2002 FSA had to be aware of the option agreement in order to waive time being of the essence, in the light of the fact that their obligations were several. He also submitted that the learned judge erred in stating that the waiver operated in respect of the 1st and the 4th respondents up until 30 December 2005. He relied on the judgment of Windeyer J in **Mehmet v Benson** (1965) 113 CLR 295 for the proposition that once time of the essence had been waived, it could only be re-imposed by a notice to that effect.

1st respondent's submissions

[79] The 1st respondent denied that the above rule was absolute. Mr Graham submitted that the facts in **Mehmet v Benson** were distinguishable from the instant case, as the former concerned instalment agreements which were not time sensitive, whereas the latter showed that time was relevant. Indeed he referred to and relied on a passage in the judgment of Barwick CJ on page 9 in **Mehmet v Benson**, where he stated:

> "...A mere extension of time where a new date for performance is substituted for the contracted date does not result in time ceasing to be of the essence either for performance of the obligation in respect of which the

> extension is granted or in respect of the performance of other obligations...The extent of the waiver will be a question of fact in the circumstances of each case."

[80] He therefore submitted that the learned judge was correct in finding that if the option agreement acted as a waiver it only did so up and until the expressed expiry date of the option agreement, namely 6 December 2005. He also submitted that the issue of waiver was not applicable to the 2004 FSA because there was no reference in the pleadings in that respect and the option agreement only related to the 2002 FSA.

2nd respondent's submissions

[81] Mr Hylton submitted that the learned judge was correct to have found that the option agreement did not operate as a waiver of time being of the essence under the 2002 FSA in respect of the 2nd respondent, as he was not a party to nor a beneficiary under the agreement and there was no evidence that he had taken part in any negotiations in relation to that agreement.

[82] With regard to the 2002 FSA being referred to in the statement in lieu of prospectus, dated 7 July 2005, Mr Hylton argued that the reference to the 2002 FSA in the statement was indicative of the uncertainty as to whether the acquisition date had arisen, and accordingly was an act out of an abundance of caution.

[83] Although Mr Vassell had challenged this position being posited by the 2nd respondent, Mr Hylton responded that the appellant had not pleaded reliance on the statement as a waiver of time being of the essence under the 2002 FSA and so the 2nd respondent had no obligation to respond thereto. In any event Mr Hylton pointed out

that the 2nd respondent had never been challenged on this issue and so no adverse inference should be drawn against him regardless of any position which may have been taken by the 1st respondent.

3rd and 5th respondents' submissions

[84] Mr Scott, submitted that the learned judge was correct in finding that the 3rd and 5th respondents had not waived time being of the essence, as Mr Emami had testified that he had not had any discussion with them with regard to the option agreement.

4th respondent's submissions

[85] Miss Lindsay submitted that the learned judge was correct in stating that the operation of the purported waiver of time being of the essence under the option agreement, ended with the expiry of that agreement. Any extension of time by that agreement did not affect time being of the essence. In any event, learned counsel submitted, the 4th respondent had no rights to waive under the FSAs as its only obligation was to register the transfer of the shares.

Submissions on issue 3 (ground d)

Appellant's submissions

[86] Mr Vassell submitted that in the alternative, the learned judge, having found that time was of the essence, failed to deal with the issue of whether the FSAs had been discharged prior to tender of performance by the appellant. There was no evidence that the respondents had acted to rescind the FSAs when the appellant had

failed to pay the purchase price by the acquisition date. He cited a passage from The Law of Contract, by Sir Guenter Treitel, Eleventh Edition, at page 844, where the learned author stated:

> "A breach which justifies rescission does not automatically determine the contract. It only gives the victim the option either to rescind the contract or to affirm it and to claim further performance."

[87] He relied on **Sea Havens Inc v John Dyrud** [2011] CCJ 13 (AJ) to submit that the FSAs remained on foot and undischarged when the appellant indicated its willingness and ability to complete the transfer of shares in 2008. He also relied on the Privy Council judgment of **Jagdeo Sookraj v Buddhu Samaroo** [2004] UKPC 50, submitting that the failure by the appellant to pay the purchase price was a repudiatory breach of the FSAs and the respondents had not acted to unequivocally accept and communicate repudiation in the instant case. Mr Vassell referred to Lord Steyn's judgment in **Super Chem Products Ltd v American Life and General Insurance Co Ltd and Others (No 2)** (2004) 64 WIR 345, for the position that notwithstanding the breach, the obligations under the contract survive until there is an acceptance of the breach by the innocent party which terminates the contract. He also relied on the note in respect of the claim form for a claim for damages for repudiation of contract in Bullen & Leake & Jacob's Precedents of Pleadings, Thirteenth Edition, pages 276-277, which states that the acts and conduct which represent the breach must be clearly pleaded as also the fact that the repudiation was accepted timeously. The learned judge had failed to deal with this issue, he submitted, and the judgment entered by Jones J should therefore be set aside with costs to the appellant.

1st respondent's submissions

[88] Counsel submitted that the learned judge was correct in rejecting the appellant's claim for specific performance due to the appellant's failure to pay the purchase price for the shares, and to deliver the instruments of transfer, and to hold that the agreements were discharged, as time was of the essence to do so. He relied on the leading cases of **Watt or Thomas v Thomas** [1947] AC 484, **McGraddie v McGraddie (AP) & Anor** [2013] UKSC 58 and **Carlyle v Royal Bank of Scotland PLc** [2015] UKSC 13 for the principle that the Court of Appeal ought not to interfere with the judgment of the learned judge in the court below unless it was found to be palpably wrong.

2nd respondent's submissions

[89] Learned Queen's Counsel submitted that the 4th respondent paying dividends to the founding shareholders and who retained them were unequivocal acts of acceptance that the FSAs were discharged. Additionally the letter of 26 June 2006, from Mr Emami indicating that the 2nd respondent had no further obligations or debts due to the appellant was an act inconsistent with the 2002 FSA being extant. In any event, learned Queen's Counsel submitted that specific performance is an equitable remedy which in the circumstances of this case ought not to be granted to the appellant, as "vendors should not be kept on a string" in the light of modern commercial realities, and to date there had been no tender by the appellant of the agreed purchase price for the shares.

3rd and 5th respondent's submissions

[90] Queen's Counsel, Mr Scott, argued that the 3rd respondent's acceptance and retention of the dividends paid in May 2008 and the occurrence of the stock split due to the 4th respondent's public offering, which rendered the shares recorded under the signed undated instruments of transfer "worthless" were unequivocal steps evidencing acceptance of the repudiated breach by the appellant of the 2002 FSA.

4th respondent's submissions

[91] Learned counsel submitted that the failure by the appellant to honour time under the FSAs, in circumstances where the learned judge had found that time was of the essence, discharged the FSAs.

Appellant's response

[92] Needless to say Mr Vassell submitted that the submissions by the respondents' counsel in relation to the unequivocal communication of repudiation were flawed. He argued that the letter referred to by Mr Hylton and the fact that the founding shareholders retained the dividends paid by the 4th respondent was not sufficient evidence of unequivocal communication of the acceptance of repudiation. Additionally, Mr Vassell submitted that the non tender of the purchase price was not fatal to the claim for specific performance. It was sufficient to demonstrate a readiness and willingness to pay at the date of the hearing and he relied on **Sea Havens Inc v John Dyrud**. Learned Queen's Counsel also confirmed that the appellant had pleaded that readiness and willingness to pay.

Reconciliation of clause 20 with clause 5 of the 2002 FSA

[93] Mr Graham, in response to the query of Brooks JA on how he would reconcile the provisions under clauses 5, 6 and 20 of the 2002 FSA, stated that clauses 5 and 6 impose obligations in respect of the occurrence of the acquisition date for the founding shareholders to sell and the appellant to purchase the relevant shares, as well as, the requirements for the payment of the purchase price of the shares and the tendering of the instruments of transfer. However, he argued that clause 20 deals with rights, powers and privileges, which would include the appointment of directors (deferred right), voting rights to the appellant and the entitlement to dividends declared and paid. He explained that where the appellant failed to exercise such rights, powers or privileges, immediately, it would not have been deemed to have waived the same.

[94] Learned Queen's Counsel, Mr Hylton, adopted this approach taken by Mr Graham and articulated that the absence of reference to the word "obligation" under clause 20 is indicative that the parties had not intended for that to apply to the appellant's obligation to pay the purchase price of the shares pursuant to clause 6.

[95] Mr Vassell, in reply to Brooks JA's query, argued that the principal purpose of the 2002 FSA was to confer a right on the appellant to acquire 17% shares in the 4th respondent. Accordingly, he submitted it would be wholly artificial to not construe that the right to the shares was not included under clause 20. It therefore follows, he argued, that clause 20 makes it clear that a delay, by the appellant, to exercise its right to acquire the shares would not waive or otherwise defeat that right. He further

contended that this was in accordance with the commercial intention of the parties, thereby rendering time not being of the essence.

Submissions on the procedural issue

[96] Mr Vassell, during and after the submissions by counsel for the respondents, raised the procedural issue of whether the respondents could properly raise the issue of rescission of the FSAs on appeal, not having filed a counter-notice, and not having pleaded their acceptance of the repudiatory breach by the appellant.

[97] During Mr Graham's submission that the respondents could do no further performance under the FSAs given that the 4th respondent was now a public company, Mr Vassell objected to the introduction of what he considered to be fresh evidence, in that the submission with regard to the rescission of the FSAs on that basis, had not been argued in the court below. He argued that the respondents' failure to file a counter-notice of appeal precluded them from arguing grounds other that those relied on by the court below.

[98] Mr Hylton, sought and obtained leave to respond to Mr Vassell's procedural point. He asserted that the fact that the respondents had not filed a counter-notice did not preclude them from advancing an argument in their favour. In support of his assertion he cited the case of **Gordon Stewart and Others v Merrick (Herman) Samuels** (unreported), Court of Appeal, Jamaica, SCCA No 2/2005, judgment delivered on 18 November 2005, in which Harrison JA in his judgment, at pages 12 to 14,

addressed the implications of rules 2.3(3) and 1.16(2) and (3) of the Court of Appeal Rules 2002 (CAR).

[99] Mr Vassell, in response to Mr Hylton's submissions, argued that rule 2.3(3) of the CAR is clear that if the respondents were seeking to affirm the decision of the trial judge on a ground other than those relied on by the trial judge, they must file a counter-notice. In respect of rule 1.16 of the CAR, Mr Vassell submitted that that rule is not applicable in the instant case, because that rule applies only where a notice of appeal and a counter-notice have been filed, and he argued further that the skeleton arguments had not been contained in such a notice. In reliance on **International Hotels (Jamaica) Limited v Proprietors Strata Plan No 461** [2013] JMCA Civ 45, Mr Vassell submitted that paragraphs [95] and [96] of that judgment make it clear that a respondent must file a counter-notice if he intends to support the decision of the court below on grounds other than those which that court relied on.

[100] Accordingly, Mr Vassell argued, that the respondents cannot properly claim that the acceptance of the appellant's repudiation effectively discharged the FSAs in the absence of a counter-notice. He submitted that at paragraph [42] of the judgment Jones J found that the failure of the obligation, by the appellant to pay the purchase price at par value, would operate to discharge the FSAs, but this would be dependent upon the determination of the issue of waiver. He also argued that the learned judge did not deal with the evidence of the letter dated 22 June 2006, stating that the 2nd respondent had no further obligations to Epsilon, as an obligation that was inconsistent with the continuation of a contract and that it was evidence of discharge from the 2002

FSA. Mr Vassell further asserted that the submissions, by Mr Hylton, that to date there had been no tender of the purchase price should not be considered by the court in the absence of a counter-notice. Similarly, the submissions on the purchase price for the shares not having been tendered had not been pleaded in the court below, and without a counter-notice, were not open for consideration by this court.

[101] Mr Kevin Powell, for the 2nd respondent, in response to Mr Vassell's submissions on rules 1.16 and 2.3(3) of the CAR, submitted that in **International Hotels (Jamaica) Limited v Proprietors Strata Plan No 461**, Morrison JA did not refer to **Gordon Stewart and Others v Merrick Samuels** and even after outlining the principles under rule 2.3(3) of the CAR, in paragraph [95] of the judgment, he went on to consider the subject of the objection on the basis that there had been some evidence on the point in the proceedings in the court below. He further argued that the interpretation proffered by Mr Vassell in respect of rules 1.16 and 2.3(3) of CAR would be counterintuitive. He said that that interpretation, in essence, would allow a party that had filed a counter-notice and specified the grounds therein to argue entirely different grounds, but bar a party who had not filed a counter-notice from advancing arguments. The party who has filed a counter-notice, he reasoned, would be more likely to be held strictly accountable. Mr Powell also asserted that rule 1.16(3) of the CAR should apply even in the absence of a counter-notice; particularly he argued as sufficient notice had been given by way of both written and oral submissions.

[102] Mr Hylton argued that the 2nd respondent, in his amended defence at paragraph 21, made it clear that he did "treat the 2002 [FSA] as at an end, and the 2nd

[respondent] was thereby discharged from any further obligations under that Agreement". This was in response to the appellant's demand, at paragraphs 29 and 31 of its further amended particulars of claim, for the transactions under the FSA to be completed. Mr Hylton also criticized reliance on the note in Bullen & Leake & Jacob's Precedents of Pleadings, by Mr Vassell (see paragraph [89] above), in support of the objection that the acceptance of repudiation by the respondents had not been pleaded. He argued that the court should be cautious on this reliance, given that Bullen & Leake & Jacob's Precedents of Pleadings predated the advent of the Civil Procedure Rules 2004 (CPR). This caution, he stated is necessary, in light of the decision of the Privy Council in **Charmaine Bernard (Legal representative of the Estate of Reagan Nicky Bernard) v Ramesh Seebalack**, [2010] UKPC 15, which cited the words of Lord Woolf MR at page 729J of the judgment in **McPhilemy v Times Newspapers Ltd** [1993] 3 All ER 775, which indicates that under the new rules pleadings should make clear the general nature of a party's case, which has been codified in Part 10 (rule 10.5) of the CPR but that greater details can be provided in witness statements and evidence.

[103] Mr Graham indicated that the 1st respondent, in his further amended defence at paragraphs 25 and 35, had denied the appellant's assertion that he had breached the agreements, and stated that it was the appellant who had breached the agreement and whose breach has thereby discharged the [1st respondent] from any further obligation under the said FSAs.

[104] Mr Scott accepted the submissions of Mr Hylton, but submitted that there was no pleading on behalf of the 3rd and 5th respondents as to the discharge of the 2002 FSA.

[105] Mr Vassell rejected the submissions on behalf of the respondents that mere repudiation of the FSAs was enough to effect discharge of those agreements. He cited the case of **Sookraj v Samaroo** to support his argument that repudiation without more does not determine the contract and that what is necessary to determine the contract is an unequivocal acceptance of the repudiation, which must be communicated to the party in breach.

Issues

[106] I have read and heard the submissions of learned counsel in this matter and I am of the view that the issues to be determined by this court are as follows:

1) What is the true and proper interpretation to be accorded to the 2002 FSA and the 2004 FSA?
    (i) Whether the 2002 FSA was a free-standing agreement or a component of a single global transaction and whether the 2004 FSA was a stand-alone agreement or part of a loan transaction.
    (ii) Whether upon the execution of the 2002 and the 2004 FSAs, the appellant acquired beneficial interest in the subscription shares in the 4th respondent.

(iii) Whether time was of the essence under the 2002 and 2004 FSAs.

2) If time was of the essence, whether there was a repudiatory breach of the FSAs by the appellant.

3) Whether, time being of the essence, the option agreement of 7 July 2005 operated to waive time being of the essence under the FSAs.

4) Whether time being of the essence, in the 2002 and 2004 FSAs if there was a repudiatory breach by the appellant, was there acceptance of the breach by the respondents which could amount to a rescission or discharge of the FSA's by the respondents, prior to the tender of performance by the appellant.

Another issue which arose during the hearing of the appeal which has to be resolved by this court was whether the respondents could rely on their arguments that the FSAs had been rescinded by them and thereafter discharged without the filing of a counter-notice.

Issue 1: What is the true and proper interpretation to be accorded to the 2002 FSA and 2004 FSA?

(i) Whether the 2002 FSA was a free-standing agreement or a component of a single global transaction and whether the 2004 FSA was a stand-alone agreement or a part of a loan transaction

[107] It is clear that in order to resolve the issues between the parties a contextual analysis of the transactions is necessary. The first contention between the parties is whether there was one single global transaction, with the 2002 FSA being a component of the single global transaction or was it a free-standing agreement for the forward sale and purchase of shares, or were there a series of separate but related transactions, but not a single transaction. The second contention is whether the 2004 FSA was a part of one transaction which included the loan of US$2,270,000.00, or a stand-alone agreement for the forward sale and purchase of shares.

[108] I agree with the learned judge that we ought to be guided by the dictum of Lord Hoffmann in **Investors Compensation Scheme Ltd v West Bromwich Building Society**, at pages 114-115, where he laid down five principles of contractual interpretation. It may be useful to set them out here:

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of

> practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352, [1997] 2 WLR 945.
>
> (5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1984] 3 All ER 229 at 233, [1985] AC 191 at 201:
>
> > '… if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.'"

[109] In summary, Lord Hoffmann was of the clear opinion, with which the House of Lords agreed (save for Lord Lloyd of Berwick dissenting), that the interpretation of any document was to be given the meaning that a reasonable person would give to it having all the background knowledge, reasonably available to the parties at the time of

the contract. As indicated, these background facts had become known as the matrix of facts, being such facts which would affect the interpretation to be given to the document by the reasonable man. Previous negotiations which may be indicative of the parties' subjective intent remain inadmissible, save in certain exceptional circumstances. So the document bears the meaning the parties intended it to have, which would have been conveyed to the reasonable man, given the relevant background that the parties would have had available to them. Generally, unless it was clear that the parties could not have had that intention, the words would be given their "natural and ordinary meaning".

[110] **Chartbrook Ltd v Persimmon Homes Ltd** is a case dealing with the development of a site in Wandsworth acquired by Chartbrook. The arrangement was that Persimmon would obtain planning permission, construct a mixed residential and commercial development and sell the properties on long leases, granted by Chartbrook at the direction of Persimmon. Persimmon would receive the proceeds for its own account and pay Chartbrook for the land at an agreed price. The case related to the dispute over the price which became payable.

[111] In the opening paragraphs of the speech of Lord Hope of Craighead, he indicated that the point argued by Persimmon that the House should take account of pre-contractual negotiations raised an important issue as to whether those remained inadmissible. He then stated that ever so often that rule came under scrutiny, which, he said, "is as it should be", as the common law took a look at itself in order that it could keep pace with changing circumstances. In the final analysis, Lord Hope was of the

opinion, in agreement with the reasons stated by Lord Hoffmann, "that the arguments for retaining the rule have lost none of their force since *Prenn v Simmonds* [1971] 1 WLR 1381 demonstrated, as Lord Wilberforce put it at p 1384, the disadvantages and danger of departing from established doctrine". He endorsed the statement made by Lord Gifford in his dissenting opinion in **Inglis v Buttery** (1877) 5 R 58, 69-70, which he indicated was later specifically and completely approved by Lord Blackburn when that matter came before the House. Lord Hope of Craighead summarized the essence of Lord Gifford's statement as follows:

> "[T]he very purpose of a formal contract is to put an end to the disputes which would inevitably arise if the matter were left upon what the parties said or wrote to each other during the period of their negotiations. It is the formal contract that records their bargain, however different it may be from what they may have stipulated for previously."

[112] In paragraph 14 of the judgment, Lord Hoffmann acknowledged that the principles of contractual interpretation are those summarized in **Investors Compensation Scheme Ltd v West Bromwich Building Society** which he said were well known, viz, "[i]t is agreed that the question is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean".

[113] In reviewing however the disputed contentions of Chartbrook and Persimmons of how the price payable to Chartbrook was to be calculated, Lord Hoffmann commented, at paragraph 20, that although:

> "...a contract may appear to be unduly favourable to one of the parties is not a sufficient reason for supposing that it does not mean what it says. The reasonable addressee of the instrument has not been privy to the negotiations and cannot tell whether a provision favourable to one side was not in exchange for some concession elsewhere or simply a bad bargain."

[114] In that case, Lord Hoffmann concluded that the court could view the documentation and the background to it in its context, and decide what had gone wrong with the language and what a reasonable person would have understood the parties to have meant. Although that should have disposed of the appeal, in interpreting the particular term in respect of the calculation of the price, Lord Hoffmann stated that Persimmon had raised two important issues that, in his view, the House ought to give consideration, which was whether the House should have taken into account the pre-contract negotiations with regard to the construction of the agreement and if Persimmon failed on construction of the agreement, whether it should have been rectified.

[115] With regard to the first issue, which is relevant to the case at bar, Lord Hoffmann reiterated the well-known and accepted principle that pre-contract negotiations are inadmissible. He pointed out in more detail, at paragraph 29, the oft-cited passage of Lord Blackburn in **Ingliss v Buttery**, mentioned earlier, where Lord Blackburn referred to the opinion of Lord Gifford, at page 577, where he stated:

> "Now, I think it is quite fixed - and no more wholesome or salutary rule relative to written contracts can be devised - that where parties agree to embody, and do actually embody, their contract in a formal written deed, then in determining what the contract really was and really meant, a Court must look to the formal deed and to that deed alone.

> This is only carrying out the will of the parties. The only meaning of adjusting a formal contract is, that the formal contract shall supersede all loose and preliminary negotiations - that there shall be no room for misunderstandings which may often arise, and which do constantly arise, in the course of long, and it may be desultory conversations, or in the course of correspondence or negotiations during which the parties are often widely at issue as to what they will insist on and what they will concede. The very purpose of a formal contract is to put an end to the disputes which would inevitably arise if the matter were left upon verbal negotiations or upon mixed communings partly consisting of letters and partly of conversations. The written contract is that which is to be appealed to by both parties, however different it may be from their previous demands or stipulations, whether contained in letters or in verbal conversation. There can be no doubt that this is the general rule, and I think the general rule, strictly and with peculiar appropriateness applies to the present case."

[116] Lord Hoffmann commented further that to allow evidence of pre-contractual negotiations to be used in aid of construction would "require the House to depart from a long and consistent line of authority" (paragraph 30). Indeed he referred, at paragraph 31, to and affirmed the powerful dictum of Lord Wilberforce in **Prenn v Simmonds** [1971] 1 WL 1381, at page 1384, as being justification for the above rule:

> "The reason for not admitting evidence of these exchanges is not a technical one or even mainly one of convenience, (though the attempt to admit it did greatly prolong the case and add to its expense). It is simply that such evidence is unhelpful. By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter, are changing and until the final agreement, though converging, still divergent. It is only the final document which records a consensus. If the previous documents use different expressions, how does construction of those expressions, itself a doubtful process, help on the construction of the contractual words? If the same expressions are used, nothing is gained by looking back: indeed, something may

> be lost since the relevant surrounding circumstances may be different. And at this stage there is no consensus of the parties to appeal to. It may be said that previous documents may be looked at to explain the aims of the parties. In a limited sense this is true: the commercial, or business object, of the transaction, objectively ascertained, may be a surrounding fact."

[117] After further discussion and analysis, he concluded and accepted, in paragraph 33 of the judgment, that:

> "...it would not be inconsistent with the English objective theory of contractual interpretation to admit evidence of previous communications between the parties as part of the background which may throw light upon what they meant by the language they used. The general rule...is that there are no conceptual limits to what can properly be regarded as background. Prima facie, therefore, the negotiations are potentially relevant background..."

[118] Lord Hoffmann was therefore of the opinion that previous negotiations may be relevant as part of the background but recognized that this may provide difficulties to third parties, who, for instance, may have taken assignments or advanced sums and who may not have been privy to those negotiations. He stated however that that could be avoided by restricting the admissible background to not only that which would be available to the contracting parties but also to those to whom the document could be treated as having been addressed.

[119] Ultimately, the court concluded, at paragraph 41, that there was no "clearly established case for departing from the exclusionary rule". As indicated, the rule excludes evidence of what was said or done during the course of negotiations but nonetheless that could be admissible evidence of the background to the contract.

[120] In the instant case, therefore, one must examine the documents finally concluded and executed between the parties. What may have been discussions and negotiations between the parties relating to the matter previously, but not specifically noted in the documentation and signed by them, should be excluded from the court's consideration on the interpretation of the parties' agreement.

[121] In **Attorney General of Belize and others v Belize Telecom Ltd and another** [2009] 2 All ER 1127, [2009] UKPC 10, Lord Hoffmann, on behalf of the Board, addressed the issue of whether in construing a document (in this case the articles of a company), if there could allegedly be an absurd result, ought the document to be given an interpretation by implication in order to avoid that result. In paragraphs [16] to [21], the Board made some general observations about the process of implication. At paragraph [16], Lord Hoffmann opined:

> "...The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see *Investors' Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at 114-115, [1998] 1 WLR 896 at 912-913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument."

[122] Lord Hoffmann also indicated that the issue really arises when the instrument does not expressly provide for what is to happen when some event occurs. Is it that nothing is to happen as the document is silent, and it would have said so if it were otherwise? And so the document would be read as is and operate undisturbed, so that if there is loss to any party it "lies where it falls"? However, he pointed out that a party may insist that it means something else which is consistent with the relevant background, and something therefore is to happen which will affect the rights of the parties, and so, although not expressly stated, it meant just that, and it ought to be so interpreted. The learned Law Lord made it clear, at paragraph [18], that:

> "...In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means."

[123] The Board then, at paragraph [19], endorsed the speech of Lord Pearson, with whom Lord Guest and Lord Diplock agreed, in **Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board** [1973] 2 All ER 260 at 267-268, [1973] 1 WLR 601 at 609, where he stated:

> "[T]he court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted

> by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves."

Lord Hoffmann referred to the statement of Lord Steyn in **Equitable Life Assurance Society v Hyman** [2000] 3 All ER 961 at 970, [2002] 1 AC 408 at 459, when he underscored the principle thus:

> "If a term is to be implied, it could only be a term implied from the language of [the instrument] read in its particular commercial setting."

[124] He therefore concluded in paragraph [21] of the judgment:

> "It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. It will be noticed from Lord Pearson's speech that this question can be reformulated in various ways which a court may find helpful in providing an answer - the implied term must 'go without saying', it must be 'necessary to give business efficacy to the contract' and so on - but these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?"

[125] In applying the law to the facts, I am cognizant that the court's role, as stated in **Investors Compensation Scheme Ltd v West Bromwich Building Society**, **Chartbrook Ltd v Persimmon Homes Ltd**, and **Attorney General of Belize v Belize Telecom Ltd**, in analysing whether the 2002 FSA was a component of a single global transaction, is to ascertain what the reasonable man armed with the relevant background reasonably available to the parties at the time of the transaction,

understood it to mean. The appellant has argued that the 2002 FSA was a part of a single global transaction which included the loan transactions for US$500,000.00 and US$29,500,000.00 and urged the court to look at the overall transaction when interpreting that agreement.

[126] Accordingly, I must, as Jones J agreed, at paragraph [22] of the judgment, examine the 2002 loan agreements to determine whether or not they form a relevant background to the 2002 FSA. The loan of US$500,000.00 was between the 4th respondent and Epsilon Global Master Fund LP and the loan of US$29,500,000.00 was between AMSL and Epsilon Global Master Fund LP and Epsilon Global Master Fund II LP, whereas the 2002 FSA was between the appellant, the founding shareholders and the 4th respondent. Though the parties to the three transactions are somewhat related or connected, they are separate entities and persons. The appellant, Epsilon Global Master Fund LP and Epsilon Global Master Fund II LP are different entities under the Epsilon Group; AMSL and the 4th respondent are only connected by a marketing services agreement dated 30 September 2001; and the founding shareholders are shareholders of the 4th respondent and not of AMSL.

[127] Indeed, all three transactions were executed on the same date, 28 August 2002, but two were loan transactions and the third, a future sale and purchase of shares agreement (2002 FSA). The purpose of the US$500,000.00 loan, as can be discerned from that agreement, was to support the 4th respondent's general corporate needs, whereas the loan agreement of US$29,500,000.00 stated that that loan was to support AMSL's general corporate needs and that of its shareholders. The latter agreement

appears, by its provisions, to make a distinction between the "founding shareholders" and shareholders of AMSL. That agreement provides (at clause 1.9) a definition which identifies who are the "founding shareholders", but there was no evidence that the founding shareholders were the shareholders of AMSL. The evidence of Mr Emami (page 89 of Volume 2 - Notes of Evidence) seems to suggest that the shareholders of AMSL were Haven Holdings Limited and St George's Holdings Limited. Further, where the provisions under the loan agreement (US$29,500,000.00), intended to refer to the shareholders of AMSL, as against the founding shareholders, the provisions clearly did so (see for instance the provisions under clauses 4.1(c) and 7.1(a) of the loan agreement for US$29,500,000.00).

[128] The enabling document of each transaction (ie the loans and the 2002 FSA) explicitly restricts the operation of the parties thereunder to the terms and conditions of the respective document. However, it is interesting to note that a condition precedent of the loan agreement of US$29,500,000.00 was the engagement of the loan agreement for US$500,000.00, and the repayment of the former loan was by management fees collected under the marketing services agreement between AMSL and the 4th respondent (dated 30 September 2001). Thus, it would appear, to the reasonable man, that those loan transactions may have been connected, but there was, interestingly, no such substantial connection between the loan agreements and the 2002 FSA. In fact, the 2002 FSA acknowledged that "the parties [sic] have concluded negotiations for the loan". The loan was defined in the 2002 FSA to refer solely to the

loan of US$500,000.00 and thereafter, any relevant reference to the loan was only made in respect of the acquisition date.

[129] Also, it was the agreed evidence of the 1st, 2nd and 4th respondents and the appellant that the acquisition date had occurred. Reference to the acquisition date was in respect of the full repayment of the loan of US$500,000.00, which would, to the reasonable man, debunk the contention that the loan of US$29,500,000.00 was a part of the 2002 FSA. From the unrefuted evidence, the loan of US$29,500,000.00 was still subsisting up to 4 January 2007 (see the agreement to further amend loan agreement, dated 4 January 2007, between Capital Strategies Fund Ltd and AMLS) and so repayment of that loan in respect of the acquisition date, it would appear to the reasonable man, was not contemplated under the 2002 FSA.

[130] Further, the 2002 loan agreements specifically provided for the collateral to be used as security for the loans in the event of default, and the loan agreement in respect of US$29,500,000.00 had an additional protection whereby the interest rate of 12% per annum would automatically increase to 15% per annum in the event of default (clause 6). Interestingly, also under the loan agreement of US$29,500,000.00, apart from the assignment of the marketing fees to Epsilon Global Equities Master Fund LP and Epsilon Global Equities Master Fund II LP, as a condition precedent to the loan, the interpretation of the word "collateral", per clause 1.5, included a requirement for AMSL to, and it did, execute a charge over 83% of its outstanding and issued capital in favour of Epsilon Global Equities Master Fund LP and Epsilon Global Equities Master Fund II LP (see Charge Over Shares agreement dated 28 August 2002 between Haven Holdings

Limited and AMSL and Epsilon Global Master Fund LP and Epsilon Global Master Fund II LP). Further, amendments to the definition of "collateral" under the loan agreement in respect of US$29,500,000.00 (as dated 7 July 2005 and 5 December 2005) expressly excludes the shares that were subject to the 2002 FSA. Under the loan agreement for US$500,000.00, the term collateral was defined as, "(a) the Floating Charge against the assets of the [4th respondent] in the form of a Debenture and (b) the 4th respondent Reserve [the sum of US$2,300,000.00 to be held in an escrow account]" (clause 1.3).

[131] The foregoing, to the reasonable man, therefore raises the question, on what basis was the 2002 FSA a part of a single global transaction, which included the loan agreements of 2002. Mr Vassell, in his written submissions filed on 19 March 2015 (at paragraph 13(b)), argued that the shares under the 2002 FSA were "additional compensation". The submission would appear flawed to the reasonable person given the disconnect between the 2002 loan agreements and the 2002 FSA.

[132] Mr Vassell also argued that the consideration under the 2002 FSA of J$1.00 per share was a "mere token sum" to give efficacy to the FSA and that a significant part of the consideration for the FSA was the loan of US$29,500,000.00.

[133] It would appear from those submissions that the appellant would wish for this court to imply into the 2002 FSA the term "additional compensation" to cure the lacuna, it is contending, which may have been created in the understanding that the FSA was part of a single transaction. However, the law, as stated above, appears clear that the court's role is to interpret and apply the contract which the parties made themselves, if

the express terms are perfectly clear and free from ambiguity, irrespective of whether the court thinks some other terms would have been more suitable. An unexpressed term can be implied if the court were to find that the parties intended it to form a part of the contract and, as Lord Hoffmann in **Attorney General of Belize v Belize Telecom Ltd** stated, the implied term must "go without saying" and be "necessary to give business efficacy to the contract".

[134] The preamble of the 2002 FSA specifically states, without ambiguity or absurdity, that the founding shareholders and the 4th respondent have been in negotiations with the appellant "for an investment in the [4th respondent] by the [appellant]" and both were desirous of entering into a further agreement to address the future acquisition of shares in the 4th respondent by the appellant. It would thus appear to the reasonable man with the relevant background, I think, that the parties were clear on the purpose of this agreement, which was for the appellant to invest in the 4th respondent, by way of a sale and purchase of shares upon the occurrence of a future date. The provisions of the 2002 FSA and the 2002 loan agreements would not indicate to the reasonable man that the parties to those respective agreements intended for the appellant's acquisition of future shares in the 4th respondent to be understood as "additional compensation" for the disbursed loans, for which interest was attached and collateral secured in the event of default.

[135] Consideration for the acquisition of the shares under the 2002 FSA was clearly stated as J$1.00 per share. The appellant's contention that the J$1.00 per share was a mere token sum would therefore, in my view, be rejected by the reasonable man.

There was evidence that prior to May 2005, ordinary shares had been issued at J$1.00 per share. And, there was evidence that in July 2005, when the 4th respondent was seeking to raise additional funds, the shares issued at the private placement was J$3.80 per share. Further, Mr Emami, in his evidence, testified that the price of the shares fluctuated from as high as J$4.81 per share to as low as J$1.72.

[136] Accordingly, implying the term "additional compensation" into the 2002 FSA, a reasonable man, reasonably informed of the relevant background information at the time of the contract, I am persuaded, would not reasonably conclude that implying that term would "go without saying" or that it was "necessary to give business efficacy" to the 2002 FSA. Thus, I am in agreement with the finding of the learned judge, at paragraph [40] of the judgment, that the shares which were to have been acquired under the 2002 FSA by the appellant were not in exchange for the loans of US$500,000.00 and US$29,500,000.00, but in exchange for the consideration of the payment of J$1.00 per share.

[137] Notwithstanding the foregoing, I am cognizant of the evidence of the 2nd respondent, who stated, in cross-examination and contrary to his evidence in his witness statement, that the 2002 FSA was "related to an overall transaction where Epsilon had loaned Atlantic Marketing some funds" and that he received 15% of the US$29,500,000.00 loan. This evidence, though it appears to support the appellant's position, I believe flies in the face of what the reasonable man reasonably informed of the relevant background, at the time of the agreements, would have understood the transaction to mean, because:

(i) that assertion is not reflected in the final consensus of the parties to the 2002 FSA or the final consensus of the parties to the loan agreement of US$29,500,000.00;

(ii) of the 1st respondent's evidence to the contrary;

(iii) of the disconnect between the US$29,500,000.00 loan agreement and the 2002 FSA;

(iv) of the provision of the loan agreement of US$29,500,000.00 that the purpose of the loan was to support the general corporate needs of AMSL and its shareholders, not the founding shareholders;

(v) the absence of evidence that the founding shareholders were shareholders of AMSL;

(vi) of the absence of any provision under the loan agreement to suggest that anyone, other than AMSL, was obligated to repay the loan of US$29,500,000.00;

(vii) of the unambiguous pronouncement of the parties to the loan agreement for US$29,500,000.00 and their obligations under that agreement, to which the 2nd respondent was not a party and could therefore be under no obligations in relation thereto;

(viii) of the letter from Epsilon Global Asset Management Ltd to the 2nd respondent, dated 22 June 2006, confirming that he did not have "any outstanding obligations or debts owed to Epsilon", without any reference to any "individual obligation" under the AMSL loan; and

(ix) of the reference of the interest rate ("19.5% and 21%" per annum), in respect of the debt owed by the 2nd respondent, in email sent on 21 June 2006 by the 2nd respondent to Mr Gerry Mouttet, which does not correspond with that stated in the AMSL loan agreement for US$29,500,000.00 (namely, 12% per annum, or in the event of default, 15% per annum).

[138] In respect of whether the 2004 FSA formed a part of the loan agreement for the sum of US$2,270,000.00, I recognized that both transactions were completed on the same date, with each document containing its own terms and conditions. However, I have noted that the parties to the respective transactions are different, though somewhat related. The parties to the loan agreement were Westford Special Situations Master Fund LP and AMSL and those to the FSA were the 1st and 4th respondents and the appellant. Westford Special Situations Master Fund LP and the appellant are separate entities under the Epsilon Group. The 1st respondent is a shareholder of the 4th respondent.

[139] The sole purpose of the 2004 FSA was to deal with the desire of the parties to that agreement to enter into an agreement to address the future acquisition by the appellant of certain shares owned by the 1st respondent in the 4th respondent. The FSA of 2004 does not acknowledge any negotiation for the loan of US$2,270,000.00 to AMSL nor does it make any reference to such a loan. The 2004 FSA does not contain a definition for the word "loan", though it makes mention of "any loan" to the 4th respondent that may become due on a date that may be considered the acquisition date for the payment of the subscription shares. And as stated, interestingly, the loan of US$2,270,000.00 is not a loan to the 4th respondent. This divide between the 2004 loan agreement and the 2004 FSA ought, in my view, to suggest to the reasonable man that there was no interconnected relationship between these transactions.

[140] Nonetheless, it is incumbent on me to reconcile the documents with the evidence of the 1st respondent, who stated in cross-examination contrary to his pleadings and witness statement that the 2004 FSA was related to the loan of US$2,270,000.00 from Westford Special Situations Master Fund LP, which Mr Mouttet had asked him to collateralize. As this assertion is not reflected in the final consensus of the 2004 loan agreement, which merely refers to collateral as "the Assignment" (which refers to a portion of fees collected under the marketing services agreement dated 30 September 2001), in my opinion, the reasonable man could only surmise that it may have been part of a negotiation for the shares under the 2004 FSA to form collateral for the loan of US$2,270,000.00.

[141] In keeping with Lord Hoffmann's speech above in **Chartbrook Ltd v Persimmon Homes Ltd** relating to the exclusionary rule, given the clear and unambiguous terms of both agreements, I am of the view that the reasonable man would be inclined to find that as that information is absent from the final consensus of the parties under the 2004 FSA and the 2004 loan agreement, it is not therefore relevant background to those agreements.

One contract in two documents

[142] There was another point in law that was raised by Queen's Counsel for the appellant and that is that if there are two documents contemporaneous with each other, in fact executed on the same day and if made to secure the same debt and both given as part of the same transaction, and thus there is one contract in two documents, then the court would have to refer to the two documents as one (see opinion of AL Smith LJ in **Edwards v Marcus** [1894] 1 QB 587 referred to by Sankey LJ in **Stott and another v Shaw and Lee Ltd** [1928] 2 KB 26 at 42), which submission was made to support the contention that there was just the single global transaction in the instant case.

[143] Indeed Sankey LJ in **Stott v Shaw and Lee Ltd** referred to **Counsell v London and Westminster Loan and Discount Co** (1887) 19 QBD 512, where the English Court of Appeal held with reference to this principle and with particular reference to the Bills of Sale Act, that:

> "if there is one contract in two documents, and there is anything in either which sins against the Bills of Sale Act, the

> contract in two documents cannot stand, and the bill of sale must be set aside."

[144] In my opinion, if it is pursuant to the above principle that learned counsel asks this court to view the matter as a single global transaction and act accordingly, I wish to state at this point, in agreement with the submission of Queen's Counsel, Mr Hylton, that in the instant case, there was not one contract in two or more documents but a series of related transactions in more than one document.

[145] I therefore find that: (i) the 2002 FSA was not a part of a single global transaction, and that though the 2002 FSA and the loan agreement of US$500,000.00 were related in some way, there was a complete disconnect between the 2002 FSA and the US$29,500,000.00 loan agreement; and (ii) the 2004 FSA was clearly not a component of the loan agreement for US$2,270,000.00.

Issue 1 (ii): Whether upon the execution of the 2002 and the 2004 FSAs, the appellant acquired beneficial interest in the subscription shares in the 4th respondent

[146] A further argument raised by learned Queen's Counsel for the appellant was the issue of the interpretation to be accorded the FSAs with particular regard to whether the beneficial interest of the shares passed on the signing of the instruments. On the basis of the above-mentioned authorities, this must be answered by what a reasonable person would conclude on reviewing the respective FSAs with the relevant background information available to the parties at the time of the execution of each. In **Wood Preservation Ltd v Prior**, the Court of Appeal had to decide the effect of an

execution of the agreement for the sale of shares on the beneficial interest in the shares. Harman LJ had this to say on page 368 A-D:

> "By the offer of 25th March 1960 British Ratin Ltd., through its director, Mr. Burgin, made an offer for the shares owned by Silexine, Ltd. That offer was accepted on 30th or 31st March (it does not matter which) by the latter. The acceptance was an absolute acceptance. The acceptor did not make any conditions: he agreed to part so far as he could with all his interest in the shares. It is true that in order to be able to enforce his rights he must obtain a letter (which LORD DONOVAN has described) and abide by the other conditions imposed by the purchasers; but the vendor, if one looks at him, has parted with everything at that point: he has not got anything left. True, there is a defeasance—i.e., if he cannot get the letter, and British Ratin, Ltd., insists on it, he may find the property come back to him. But until one of those events happens he has parted with every title, right and interest which he has, except the legal ownership which follows from the fact that he is the registered owner of the shares on the books.
>
> Now s. 17 of the Finance Act 1954 deals with 'ownership'. It then goes on to say that where the word 'ownership' is used it means 'beneficial ownership'. That means, I think, an ownership which is not merely the legal ownership by the mere fact of being on the register but the right at least to some extent to deal with the property as one's own. After accepting this offer Silexine, Ltd., was not able to deal with the property in any way at all, as has already been pointed out by LORD DONOVAN. Therefore it seems to me to be a contradiction in terms to talk about beneficial ownership in Silexine, Ltd. There was no benefit at all in its ownership; it was a mere legal shell...."

Donovan LJ commented thus on page 366 E-G:

> "The issue turns entirely on the effect of the contract of 25th March 1960. By that contract a company called British Ratin, Ltd., offered to buy the whole of the share capital of the taxpayer company, and the offer, slightly amended by the agreement as to price, was accepted on 31st March

> 1960, by all the shareholders in the taxpayer company. If that were all there were to the case, it is clear and undisputed that the beneficial ownership would have passed out of the hands of the previous owners of the shares in the taxpayer company (and of these Silexine, Ltd., was the largest with over 75 per cent) into the hands of British Ratin, Ltd., with the consequence that the taxpayer company would not have been able to carry forward for tax purposes the previous trading losses of Silexine Ltd."

[147] Although this authority was relied on by Mr Vassell to support the submission that the beneficial interest in the shares had passed on execution of the FSAs, I must state that on a perusal of the FSAs, the provisions are distinctly different from those addressed in **Wood Preservation Ltd v Prior**. As the learned judge stated, at paragraph [21] of the judgment, the FSAs do not disclose an agreement for the sale and purchase of shares, but an agreement to sell and purchase shares in the future. On a detailed perusal of the FSAs, the following are observed:

i) under the preamble of the 2002 FSA, the founding shareholders, the 4th respondent and the appellant, who had been in negotiations for an investment by the appellant into the 4th respondent, expressed that they were "desirous of entering into a further agreement to address the **future** acquisition of shares in the [4th respondent]" by the appellant, whereas under the preamble of the 2004 FSA, the 1st and 4th respondents and the appellant also indicated

their desire to enter into an agreement to address the **future** acquisition of shares in the 4th respondent;

ii) under clause 4.3 of the 2002 FSA and clause 4.3 of the 2004 FSA, respectively, the appellant gave an undertaking not to take steps to execute or have the undated instruments for transfer issued by the founding shareholders and the 1st respondent, respectively, executed on its behalf or to take possession of the respective share certificates issued for the subscription shares until the acquisition date;

iii) in accordance with clause 5 of the 2002 FSA, upon the acquisition date, the founding shareholders were obliged to sell and the appellant was obliged to purchase the subscription shares at par value, and similarly, per clause 5 of the 2004 FSA, upon the acquisition date, the 1st respondent was obliged to sell and the appellant was obliged to purchase the subscription shares at par value; and

iv) clause 6 of the 2002 FSA and clause 6 of the 2004 FSA, respectively, directed that the appellant "shall be obliged" to, upon occurrence of the acquisition date, pay the founding shareholders J$1.00 each per

> subscription shares and deliver to the 4th respondent the undated instruments of transfer (duly executed and stamped) and the share certificates in order to complete the sale of the same shares.

[148] In the light of those provisions under the 2002 FSA and the 2004 FSA, the learned judge, in my view, was correct to have held, at paragraph [21] of his judgment, that **Wood Preservation Ltd v Prior** was distinguishable on the facts from the case before him. The provisions of the FSAs make it abundantly clear that the FSAs were not an agreement to buy and sell shares, instead they were agreements for the future sale and purchase of shares. Consequently, on the facts of this case, the beneficial interest in the shares would not have passed to the appellant upon the execution of the FSAs on 28 August 2002 and 27 February 2004, respectively, and I concur with the learned judge's conclusion, at paragraph [21], that the appellant's claim that beneficial interest had passed must fail. In my opinion, in order for the beneficial interest in the shares to have passed to the appellant, it was required to satisfy its obligations under the FSAs by paying the purchase price of the shares.

Issue 1 (iii): Whether time was of the essence under the 2002 and 2004 FSAs

Issue 2: If time was of the essence, whether there was a repudiatory breach of the FSAs by the appellant

Issue 3: Whether, time being of the essence, the option agreement of 7 July 2005 operated to waive time being of the essence under the FSAs

[149] In **Hare v Nicoll**, the Court of Appeal was considering whether a clause in an agreement made under seal for the purchase of 50,000 shares with an option to

repurchase 25,000 shares made time for the performance thereof, the essence of the contract. The main aspect of the relevant provision, clause 2, read as follows:

> "... if the vendor shall before May 1, 1963, give notice in writing to the purchaser of his desire to repurchase 25,000 of the said shares at the price of £4,687 10s. and on payment of the said sum of £4,687 10s. before June 1, 1963, to the purchaser the vendor may at any time thereafter by deed revoke the trusts hereby declared..."

[150] The vendor gave notice on 1 May 1963 of his intention to repurchase but failed to pay the sum to repurchase the shares on 1 June 1963. He did so on 7 June 1963. By letter dated 1 June 1963, however the purchaser's solicitors had indicated that the option had been terminated. The vendor contended that the contract to repurchase the shares had come into being upon giving the purchaser notice of his intention to do so, and so when the payment was tendered a few days after 1 June 1963 it ought to have been accepted. Willmer LJ rejected that contention and stated, at page 141, 446:

> "It is well established that an option for the purchase or repurchase of property must in all cases be exercised strictly within the time limited for the purpose. The reason for this, as I understand it, is that an option is a species of privilege for the benefit of the party on whom it is conferred. That being so, it is for that party to comply strictly with the conditions stipulated for the exercise of the option."

[151] In his Lordship's view there were two specific dates (the requirements for the notice to be given before 1 May 1963 and payment to be made before 1 June 1963) that had to be met strictly, and were considered conditions precedent, both of which had to be fulfilled before the vendor could be held entitled to the privilege conferred by the option. However he stated that there were other reasons for holding that the

stipulated time for payment was of the essence of the contract. He approved, at page 142, 447, the statement of Turner LJ in **Roberts v Berry** (1853) 3 DE G M & G 284 where Turner LJ stated, at page 291, that;

> "Time may be made to be of the essence of a contract by express stipulation between the parties, by the nature of the property, or by surrounding circumstances, showing the intention of the parties that the contract was to be completed within a limited time."

[152] Wilmer LJ pointed out that in his opinion in the case before him both the nature of the property and the surrounding circumstances required consideration. Indeed he stated, at pages 142-143, page 447:

> "As to the nature of the property, the subject-matter of the option consisted of shares of a highly speculative nature, liable to considerable fluctuation in value. Even without the assistance of authority, I should have been disposed to say that that of itself was a reason for holding that time was of the essence of the contract."

[153] The learned judge of appeal also rejected the submission, that cases in which it has been held that the speculative nature of shares, the subject of an option, was a reason for holding that time was of the essence, was really only due to the fact that the risk remained with the vendor as opposed to where the risk in respect of the subject matter had passed to the purchaser, as not being the ratio of any of the three cases brought to the attention of the court. In fact, he opined that in his view the decision in **Re Schwabacher** had been made on general grounds with which he agreed. He indicated, at page 143, 448, that Parker J in **Re Schwabacher** had stated:

> "With regard to contracts for the sale of shares, I think that time is of the essence of the contract both at law and in equity. Shares continually vary in price from day to day, and that is precisely why courts of equity have considered such a contract to be one in which time is of the essence of the contract, and not like a contract for the sale and purchase of real estate, in which time is not of the essence of the contract."

[154] Danckwerts LJ in making his contribution alluded to clause 2 of the agreement mentioned earlier and stated that it was quite clear that the provision created an option to repurchase 25,000 of the shares at a stated price before a certain time. He referred to Halsbury's Laws of England, Volume 8 (1954), 3rd Edition, page 165, for the correct statement of the law, and stated, at page 450, that:

> "An option for the renewal of a lease, or for the purchase or re-purchase of property, must in all cases be exercised strictly within the time limited for the purpose, otherwise it will lapse."

[155] Winn LJ, having rejected out of hand that the notice of intention to purchase meant that the purchaser became the owner of the shares, stated the construction of the document must be done against the background of the nature of the transaction and the characteristics of the subject matter of the same which were not only shares in a company but shares of "a highly speculative and volatile character".

[156] He continued thus, at pages 147-148 and 452:

> "In my judgment, where there is a provision for the purchase of shares upon payment by a stated date, it is to be presumed, in the absence of any contrary indication that the parties to such a contract have impliedly stipulated and mutually intend that the time of payment shall be of the essence of the contract. It is not, I think, irrelevant to recall that when a rights issue is made to existing shareholders of

> a company, it is virtually universal practice to provide that, upon failure to pay any of the fixed instalments by due date, the right to take up the new shares shall wholly lapse.
>
> Parties to any contract to transfer property in goods or other personalty may by express terms, or by the use of language which indicates an intention on their part so to stipulate, provide that property in the subject-matter of the contract shall not pass before payment. In my judgment the provision in the relevant clause that payment should be made before the appellant revoked the trusts in whole or in part and declared fresh trusts (albeit possibly nugatory and superfluous, a point which I do not think it necessary to pronounce upon) is a very clear indication that the parties to the contract now falling to be construed provided and intended that property in the 25,000 shares, unallocated save in so far as they were to be half of a block of 50,000 shares originally issued to the plaintiff, should not pass until after payment by the appellant of the price fixed by the contract, and should only pass upon such payment being made if the payment were made before June 1, 1963. The whole provision represented a restraint or clog upon the respondent's freedom to dispose for her own advantage of property sold to her in the initial stage of the transaction up to the end of April, 1963, capable of being extended throughout May, 1963, by a duly given notice. It was of manifestly essential importance to her that she should know precisely the duration of that restraint, and should be free from it unless the conditions upon which it was accepted by her were strictly compiled with."

[157] Winn LJ also indicated that the case was one of privilege and not one of an option but if the provision was regarded as an option, the failure to comply with the conditions expressed rendered the option and the rights conveyed by it ineffectual.

[158] Although the learned judge, in the case at bar, was demonstrably influenced by the decision of **Hare v Nicoll**, and in my view correctly so, that case dealt with the question of the exercise of what was described as an option, or a privilege and how the

court interpreted the construction of it, its efficacy and operation in the circumstances of that case.

[159] On appeal, Mr Hylton relied on the English Court of Appeal case of **Samuel Properties (Developments) Ltd v Hayek** [1972] 3 All ER 473 for the principle that where a contract gives rights similar to an option the courts may apply the principles similar to those applicable to an option. In that case the court grappled with the proper construction to be accorded certain provisions in a 21 year lease, which granted the lessors the power to increase the rent at intervals of seven and 14 years. Notices of the increases were to be given two quarters (ie six months) before that specified period. The lessors gave the notice (in respect of the first interval) out of time. They contended to the contrary, and in the alternative that time was not of the essence, and so the notice had been given within a reasonable time, and in the further alternative, if the time for giving the notice was strict, equity ought to relieve them of the consequences of their mistake.

[160] The court found that on a true construction of the relevant clause, the notice had been given out of time; the time requirements under the lease were "inflexible and mandatory", as the right to exact an additional rent was a part of the bargain between the parties expressed in an option, and which would only be effective if the condition precedent (the notice) had been complied with. The court found that there was no distinction with respect to time limits which could be drawn between options, options to determine, or to renew, or to acquire the reversion. The court also held that it had no jurisdiction to relieve the lessors of the consequences of their failure to observe the

time requirement, which was not due to a mistake. The court opined that it had jurisdiction to grant relief, where the consequence of a mistake of a person who failed to comply with a covenanted obligation could result in a forfeiture of the lease, but stated that that jurisdiction did not extend to cases where the person seeking the relief had the opportunity to improve his financial position, and he had failed to take the necessary steps to do so, with reasonable diligence. The lessors, the court found, had failed to comply with the condition precedent to the exercise of the power conferred on them, and therefore could only be granted relief if the lessees had been guilty of unconscionable conduct which had led the lessors to believe that strict compliance to the provision would not be insisted on, which had not occurred in this case.

[161] Russell LJ, at page 478 e-g, seemed to equate the right and privilege to exact the additional rent pursuant to the bargain of the parties as an express option, which would be effective on the condition precedent (the giving of the notice) being complied with. In any event, the exercise of the power lay, he said, within the lessors to bring it about, and having failed to do so, they were responsible for the somewhat drastic consequences, namely that no increase of rent could take place throughout the entire period of the lease.

[162] Edmund Davies LJ, having also noted that the lessors could not obtain any relief in the above-mentioned circumstances, made the additional instructive comment (relevant to the discussion in the instant case), at page 484 a-b:

> "Again, where a conditional agreement for the sale of land stipulates that completion is to take place by a specified

> date, that date must be strictly adhered to, and the time cannot be extended by reference to equitable principles (*Aberfoyle Plantations Ltd v Khaw Bian Cheng*, citing with approval the decision of Maugham J in *Re Sandwell Park Colliery Co*)."

[163] I am of the view that the issue of whether the provisions to pay the share price and deliver the undated instruments of transfer for registration, upon the occurrence of the acquisition date in the FSAs, in the instant case, were an option or a privilege, is of no moment and would not affect the resolution of the issues in this case, because even if the relevant provisions could not be described as an option, time would nonetheless be essential, given the subject-matter of those agreements—shares—and the surrounding circumstances - namely an unprofitable business. As noted by Willmer LJ in **Hare v Nicoll**, and accepted by the learned judge in the instant matter (at paragraph [37] of his judgment), and with which I concur, shares are of a "highly speculative nature, liable to considerable fluctuation in value".

[164] At paragraph [37] of the judgment, the learned judge opined, and I agree, that it was "hard to resist the conclusion that given the nature of the [4th respondent's] business and the fact that it had no previous track record, its shares were 'of a highly speculative nature'". It was the evidence of Mr Emami (in cross-examination) that the 4th respondent operated an unprofitable business between 1995 (time of its inception) and 2002 (see page 132 of Volume 2 of the Record).

[165] I observe from the evidence that there was considerable transformation (in the complexion and value) of the ordinary shares of the 4th respondent over the period 2002-2006. Prior to May 2005, 1,204,820 of the 2,000,000 ordinary shares (at par

value) had been issued at J$1.00 each. Also in 2005, with the advent of the Companies Act, the evidence indicated that the 4th respondent transferred the 2,000,000 ordinary shares with par value to 2,000,000 ordinary shares without par value.

[166] Thereafter, the 4th respondent, by resolution passed, on 30 May 2005, increased its authorized share capital from 2,000,000 ordinary shares (without par) to 3,000,000,000 ordinary shares (without par). Thus, an additional 2,998,000,000 ordinary shares (without par) were created. Of that amount of ordinary shares (without par), 500,715,405 were offered by way of a private placement (on 11 July 2005) at J$3.70. The annual report (for the year ended 31 October 2006) also showed that ordinary shares were being issued at J$4.81 per share under the initial public offer (IPO). In his evidence, as indicated previously, Mr Emami, in cross-examination, stated that the price of the shares fluctuated from as high as J$4.81 per share (in February 2006) to J$1.72, and at the time of his evidence, the price was at J$2.50 per share.

[167] The Court of Appeal case of **British and Commonwealth Holdings plc v Quadrex Holdings Inc** is very important in relation to the issues raised in the instant appeal. It involved rather complicated facts. Essentially, it related to a public company (B & C) making a bid for another company (MMH) which had a wholesale broking division which largely comprised of two money broking companies. B & C engaged in the money markets could not retain the wholesale broking division of MHH even if its bid was successful and so it intended to sell it. Quadrex, itself, engaged in the money broking field, made a competing bid for the whole of MHH, hoping to obtain control of the wholesale broking division. It bought shares of MMH on the open market. B &C

entered into an agreement for Quadrex to withdraw its bid for MMH and B & C, if its bid was successful, would sell the wholesale broking division to Quadrex for £280,000,000.00 and any inter-company indebtedness. This agreement was the subject matter of the action and appeal.

[168] Clause 3 of the agreement required the agreement to be implemented as soon as reasonably practicable after B & C had acquired MMH. Quadrex was to obtain funding to do so from its bankers on certain conditions. B & C's bid was successful, and so the agreement became operative, but Quadrex had difficulties obtaining funding as it had not satisfied the conditions specified by the bankers. B & C gave formal notice to complete the agreement, and then a further notice indicating that the failure to complete was being treated as a repudiation of the agreement and thereafter, it filed an action for damages for breach of contract and claimed summary judgment. B & C claimed that time was of the essence of the contract and Quadrex had failed to complete. Quadrex denied that it was in breach in that, *inter alia*, it had not been reasonably practicable to purchase MMH as it could not obtain the funding to do so.

[169] It may be prudent to simply set out the findings of the court, in paragraphs (1) and (2) of the headnote, as any summarizing on my part may not do justice to the rulings stated therein:

> "(1) On the true construction of cl 3 of the agreement completion was to take place, in accordance with normal commercial practice, as soon as [MHH] had been acquired by the plaintiff and the scheme for the shares in [MMH] to be vested in holding companies prior to being transferred to the defendant was in place and could be implemented,

regardless of whether it was then reasonably practicable for the defendant to raise the necessary finance. Furthermore, since the moneybroking businesses which were the subject of the agreement traded in a volatile sector it was unlikely that the parties intended that the sale should be held up indefinitely while the defendant obtained the necessary finance (see p 503 *b* to *f*, and p 512 *f g*, post).

(2) There was no general concept that time was of the essence of a contract as a whole and the question in each case was whether time was of the essence of a particular term of the contract. Accordingly, it could not be said that time was originally of the essence of the agreement when it did not specify a date for completion but merely provided for completion to take place as soon as reasonably practicable. However, in the case of a hazardous or wasting asset where in a real commercial sense time was of the essence, so that if a time for completion had been specified in the contract time would have been of the essence, one party could make time of the essence by serving a reasonable notice to complete and, moreover, could do so even though the other party had not been guilty of improper or undue delay. Applying that principle, since the agreement concerned the sale of shares in unquoted private companies trading in a volatile sector, if a completion date had been named in the agreement time would have been of the essence. Therefore as soon as the scheme was prepared and completion could take place it was open to the plaintiff, if it was not itself in breach of contract, to give notice to complete specifying a reasonable time for completion. Moreover, in the absence of a contractual obligation on a seller requiring him either to assist the purchaser in finding the purchase money or to stay his hand until the purchase money was found, it was solely the responsibility of the purchaser to find the purchase money and his difficulties in that regard were not relevant in considering the reasonableness of the time limited by the notice to complete. In the circumstances, the period limited for completion by the plaintiff's letter of 25 January 1988 was a reasonable notice. However, since the defendant had shown an arguable case that the plaintiff was in breach of its obligations under cl 12 of the agreement the appeal against the order for summary judgment would be allowed and the defendant would be given conditional leave to defend (see p 504 *c d*, p 505 *d* to *g*, p 506 *f g*, p 508 *f*

> and p 512 *f g*, post); *MacBryde v Weekes* (1856) 22 Beav 533 applied; *Re Barr's Contract, Moorwell Holdings Ltd v Barr* [1956] 2 All ER 853 doubted."

[170] The instant case is not one in which the innocent party (the respondents) had sent a notice to complete the transaction. In this case, there was a specific time, set out in clause 5 of the 2002 FSA and clause 5 under the 2004 FSA, namely the acquisition date, for the purchase of the shares, although a particular date was not named. The date, however, was readily identifiable by events which were clearly named. It was not a situation that the FSAs were to be completed on a date "as soon as [was] reasonably practicable".

[171] Additionally, the respective FSAs did relate to the forward sale of shares quoted in a private company trading in a rather unstable sector (on-line lottery services) and which had been unprofitable and so, as the time for completion of the agreement had been stipulated, time was of the essence. Once the earliest of the events named as the "acquisition date" had occurred, the appellant was simply to pay the sums agreed for the shares, nominal or otherwise, and tender the executed transfers for registration. The appellant having not done so meant that it was clearly guilty of a repudiatory breach of the respective FSAs. There was no need for the respondents to give a notice to complete as time was of the essence of the contract and the founding shareholders and the 4th respondent, respectively, had done all that the agreements required of them to do. They were not in breach of any obligations stipulated in the agreements, and so could be considered "the innocent party".

[172] The instant case is to be distinguished on the facts from **Mehmet v Benson**, where a contract (dated 20 December 1956) for the sale of land provided that time was of the essence of the contract, giving the vendor the right to rescind the contract if the purchaser should fail to comply with its conditions, as well as the right to require immediate payment of the full balance of the price in the event that there was a default in payment of any instalment. Payment of the purchase price was to be made in instalments. The purchaser paid the first two instalments, but only a part of the first instalment had been paid by its due date in 1958. The purchaser then paid the sum in respect of the balance later and paid the interest up until a certain date. However, an instalment became due and owing on 28 February 1959 and further interest falling due was not paid, but the vendor accepted certain sums in the interim, made recurrent requests for payments on the outstanding principal and interest and discussions were held with regard to the amount to be paid on full settlement. Subsequently, a notice (dated 9 November 1959) to rescind the contract was sent by the vendor for failure to pay the instalment, which had fallen due in February 1959 and interest which was also due. Additionally, within six months of that notice, the purchaser had committed an act of bankruptcy and a petition for sequestration of his estate was pending, although it was later dismissed in September 1960. Approximately one year later (November 1961), the purchaser filed an action for specific performance.

[173] The court held, *inter alia*:

> "(1) That the right to rescind for failure to pay the 1959 instalment on the due date had been lost by the time the notice to rescind was given.

> (2) That the available act of bankruptcy did not justify the giving of the notice, payment within time being no longer essential.
>
> (3) That the purchaser was not called upon to institute any proceedings straightway upon receipt of the invalid notice of rescission and the purchaser could not be said to have acquiesced in the notice of rescission.
>
> (4) That payment of the instalments of 1960 and 1961 on the stipulated dates was not in the circumstances an essential term of the contract.
>
> (5) That the purchaser was not guilty of laches in not commencing the suit sooner.
>
> (6) That the purchaser's default in payment of instalments of the price and interest on the unpaid balance, time not being of the essence, did not establish that the purchaser was not in the relevant sense ready and willing to perform the contract.
>
> Per Barwick C.J.: The question whether or not a plaintiff has been and is ready and willing to perform the contract is one of substance not to be resolved in any technical or narrow sense. It is important to bear in mind what is the substantial thing for which the parties contracted and what in a suit for specific performance are the plaintiff's obligations.
>
> (7) That on the facts the purchaser was not unready or unwilling to perform the contract in its essential terms and specific performance ought to have been granted."

[174] In that case, Windeyer J stated that notwithstanding that instalments were due, the vendor considered the contract to be still on foot. The learned judge noted that almost weekly throughout the year (1959) the vendor had asked the purchaser to pay what was owing, and the purchaser responded saying that he was not then able to do so. As a consequence the learned judge found that on those facts the vendor had by his

conduct waived a strict compliance with the provisions of time for payment. He stated further, at pages 310-311:

> "These repeated requests for payment of amounts long overdue were, in the circumstances, inconsistent with the contractual stipulations as to time being still essential. This case is not like one in which there was an extension of time for payment of a particular instalment until some specified date. Nor is it like one where the purchaser could rely upon nothing more than the acceptance of some payments after their due dates as displacing an obligation to pay instalments on time. It is one in which the vendor by his conduct–by continued failure, however induced, to insist upon payment at the stipulated times and continued assertions of a readiness to accept payment out of time–must be deemed to have waived the condition that time was to be essential: cf. Tropical Traders Ltd. v. Goonan (1); and see Carr v. J. A. Berriman Pty. Ltd. (2) per Fullagar J. (3). The vendor had thus by his conduct precluded himself from abruptly rescinding. He could, of course, have given notice that he would rescind unless the overdue amounts were paid within some limited time and future instalments on their due dates. Had he done that, he would have put a period to leniency and limited the consequences of past latitude, and made time again essential. It seems from an affidavit made by the vendor's solicitor–not in these proceedings but in those for the removal of the purchaser's caveat–that in June 1959 the purchaser's solicitor was told that the vendor would withhold any action to enforce payment for six weeks, as the purchaser proposed to sell another property and from the proceeds to discharge the whole debt. Direct evidence of this conversation was not given in these proceedings. In any event it did not, I think, in the circumstances make time again of the essence of the contract. The six weeks elapsed and negotiations continued still on the basis that the contract was on foot; and nothing more was said to suggest that time was essential. I consider, therefore, that the notice of rescission and of forfeiture was not effective to put an end to the contract."

[175] Based on the above facts and the dicta in this case, it is clear that, questions will always arise in contracts between vendor and purchaser whether initially time was stated to be of the essence of the contract? Were payments of instalments of the price or the price itself an essential term of the contract? Were any stipulations of the contract waived by express words or conduct of a party to the contract in order to ascertain whether any notice to rescind the contract would be effectual?

[176] In the instant case, there was no notice to rescind the FSAs. But as I have already stated, based on the nature of the contracts (the forward sale and purchase of shares being a volatile commodity), the surrounding circumstance (an unprofitable business being operated by the 4th respondent) and the terms set out in respect of the acquisition date, along with the evidence of the founding shareholders which had not indicated that they had done anything to mislead the appellant to believe that the terms of the agreements had been waived and that the contract was still on foot, time was clearly of the essence under the FSAs. Additionally, there certainly had not been any request on the evidence of the appellant for payment of sums by the founding shareholders or the 4th respondent after the stipulated time for payment had passed. (I will deal with the option document later in this judgment).

[177] Learned Queen's Counsel for the appellant referred to the case of **Graham v Pitkin** [1992] 2 All ER 235, a Privy Council case arising from a decision of this court which dealt with a purchaser's action for specific performance, which was granted by the judge at first instance and upheld on appeal. Both the vendor and the purchaser had employed the same solicitor in an agreement for the sale and purchase of

registered property subject to the purchaser obtaining a mortgage. Difficulties arose when the mortgagee, Victoria Mutual Building Society, would not disburse the mortgage money as certain breaches of restrictive covenants had been discovered. The vendor was not prepared to take the steps to rectify the breaches and so the purchaser indicated that she would endeavour to obtain cash to settle the outstanding balance. Delay was experienced in her doing so and the vendor purported to rescind the contract. Lord Templeman, in his speech on behalf of the Board in response to submissions on behalf of the vendor/appellant, stated that the condition in the contract for sale of the property, that the sale was subject to the purchaser obtaining a mortgage, was not a condition precedent, as it solely benefitted the purchaser and therefore could have been waived by her. Equally, the court ruled, that the argument that the contract had been rescinded by the consent of both parties could not succeed as the purchaser had not consented to anything, in fact to the contrary, she was anxious to complete the purchase. Their Lordships rejected the argument that the unreasonable delay of the purchaser entitled the vendor to treat the contract as having been repudiated. Lord Templeton stated that, at page 237:

> "...It is common ground that time is not of the essence of a contract for the sale of land in the absence of an express term to that effect or in circumstances which imply that time is of the essence: see *Stickney v Keeble* [1915] AC 386, [1914-15] All ER Rep 73. If a vendor serves a valid notice requiring completion within a reasonable time and the purchaser fails to complete in accordance with the notice, the failure can be treated by the vendor as a repudiatory breach which the vendor is entitled to accept by rescission: see *United Scientific Holdings Ltd v Burnley BC* [1977] 2 All ER 62 at 85, [1978] AC 904 at 946 per Lord Simon of

> Glaisdale. In the absence of a valid notice to complete a purchaser is entitled to specific performance unless his conduct has been such as to render it inequitable for specific performance to be granted. In the present case the silence or delay of the purchaser after 28 April 1981, when she intimated that she would try and find the balance of the purchase price and would report back in about seven days, did not constitute conduct which entitled the vendor to rescind on 9 July 1981."

[178] The law is clear and that case can therefore be distinguished from the case at bar as generally time is not of the essence for the sale of land, and in the instant case the agreement was for the forward sale of shares. There were no express words in **Graham v Pitkin** making time of the essence and so any intention to rescind the contract would have required a notice to do so. In the instant case, the nature of the transaction made the difference. Once the time stipulated had not been compiled with, the appellant committed a repudiatory breach and the respondents could either accept the same and rescind the contract or affirm the contract and if desirous of so doing, sue for damages.

[179] In the light of the foregoing, there can be no doubt, given the various metamorphoses of the shares, in nature and value, and the unprofitable operation of the 4th respondent that the parties to any agreement relating to those shares would have intended for time to be of the essence, and that time was, in fact of the essence for the future acquisition of shares under the FSAs and so, the learned judge's finding on this point was plainly correct and cannot be faulted.

[180] It is an important part of the appellant's case that the option agreement dated 7 July 2005 operated as a waiver of the obligations of the appellant under the 2002 FSA. It was clear that the dictum of Lord Denning in the English Court of Appeal case of **Plasticmoda Societa Per Azioni v Davidsons (Manchester) Ltd** resonated well with the leaned judge in the court below. That case concerned the sale by English sellers (defendants) to Italian buyers (plaintiffs) of about 100 tons of cable strippings, to be shipped in two consignments of 50 tons each, one immediately and the other in about 60 days later. Payment was to be made by letter of credit against shipping documents. Issues arose as to whether there had been delay by the parties; had the terms of the contract been varied; what was the effect of the conduct of the parties; had the terms of the contract been waived; what were the legal consequences.

[181] As stated by Denning LJ, it has been settled by the case of **Pavia & Co S P A v Thurmann-Nielsen** [1952] 1 All ER 492, that when nothing is said, the letter of credit should be established at the beginning of the shipping period. In **Plasticmoda Societa Per Azioni v Davidsons (Manchester) Ltd**, he opined there was no shipping period, but there was a specified date for shipment, which was originally 9 March 1950 but which was subsequently changed to 15 May 1950. The letter of credit ought to have been established therefore in a reasonable time before that date as a condition precedent, but that did not occur. It was eventually issued for 30 tons and not the contractual amount of 100 tons. The evidence however showed that the seller, by his conduct, led the buyer to believe that he would not insist on the credit being established until the goods were ready. There was initially an oral conversation just

after the contract was signed wherein it was orally agreed that as soon as the seller had given notice that the goods were ready the buyer would provide the letter of credit. Then, there were a series of letters from the buyers to the sellers trying to ascertain whether the goods were ready, but those letters went unanswered. Finally, there was a conversation wherein the seller indicated that they were having difficulties with some machinery and so the goods were not ready. As a result, it was due to that conduct why the buyer never established the letter of credit for the 100 tons. Indeed Lord Denning put it bluntly:

> "He was never told the goods were ready. So he never established the letter of credit."

[182] The argument of the seller that the effect of their conduct in law, was that it was nothing but an oral variation of a written contract which must be in writing and therefore must be disregarded, was rejected by the court as being inapplicable to the above facts. Lord Denning said that the requirement of writing was overridden by the broad principle of "fair dealing and justice" which was laid down in the House of Lords in **Hughes v Metropolitan Railway Company** (1877) 2 App Cas 439 and other later authorities which make it clear that:

> "If one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards, be allowed to insist on the strict rights when it would be inequitable for him so to do."

As a consequence, the court concluded that the sellers could not insist on the strict condition precedent of the letter of credit unless they had first given the buyers notice

that the goods were ready, which they never gave. The goods were never supplied. The buyers were therefore entitled to damages.

[183] In the instant case, there was no evidence before the court that the founding shareholders led the appellant to believe that the acquisition date and the strict compliance therewith was no longer applicable, and that the contract remained on foot for many years after the appellant ought to have paid the purchase price for the shares and tendered the instruments of transfer for registration. In fact, the evidence was entirely to the contrary.

[184] The evidence showed that under the 2002 FSA, the founding shareholders complied with all that was required of them, respectively, but for those requests that the appellant was entitled to make (for the appointment of a representative to the board of directors of 4th respondent and the payment of dividends declared), which were not made until October 2008, after the acquisition date had occurred in 2005. In 2002, they had caused the subscription shares and share certificates to be issued by the 4th respondent. Thereafter, they had caused undated instruments of transfer to be delivered to the appellant, along with respective powers of attorney, wherein they each appointed the appellant to deal with the subscription shares (for which they were the registered holders) contained in the 2002 FSA. It may be prudent to note here that no dividends had been declared by the 4th respondent before the acquisition date.

[185] Similarly, the 1st respondent under the 2004 FSA had done all that he was required to do, so that upon the acquisition date once the appellant had satisfied its

obligations under the agreement, interest in the shares would have passed to it. He caused the subscription shares and share certificates to be issued by the 4th respondent, and also caused the undated instruments of transfer to be delivered to the appellant.

[186] The appellant, on the other hand, upon the acquisition date under the FSAs, failed to pay the J$1.00 per subscription share and to deliver the instruments of transfer for registration. There is no indication by the respondents (orally or in written communication) of forbearance by them with regard to the stipulated date for payment of the shares by the appellant in the FSAs or encouragement by the respondents that the delay in payment by the appellant will be condoned. The failure to pay the purchase price, as was mentioned above herein, constituted a repudiatory breach. It was not until 17 and 27 October 2008, by way of letters, that the appellant, having acknowledged that the acquisition date had occurred, purported to perform its end of the FSAs. It requested the appointment of Mr Tirman to the board of directors, the payment of dividends paid on 20 June 2008 and for the dividends to be paid on 30 October 2008. Up to the later of those dates, the appellant had not paid the J$1.00 per share as required, though it expressed its willingness and ability to pay under the FSAs, via the letter of 27 October 2008.

[187] In the light of the appellant's argument that even if time was of the essence under the FSAs, the option agreement acted as a waiver of the appellant's obligations thereunder, as promised above, I will now examine whether the option agreement, which the 1st respondent signed on behalf of the 4th respondent, acted as a waiver of

time being of the essence in the 2002 FSA. It is important to note that the 4th respondent, and not the 1st respondent, was a party to the option agreement. The purpose of the 4th respondent being a party was to acknowledge the grant of the option, and agree that it would comply with and be bound by the terms of the option insofar as they related to the 4th respondent. Accordingly, I find that the 1st respondent, not acting in his personal capacity and not being a party to the option agreement, would not have been bound by the option agreement, so as to waive time being of the essence under the 2002 FSA. Furthermore, it is of even greater significance that whereas the 1st respondent signed the option agreement on behalf of the 4th respondent, the other parties to the 2002 FSA were not signatories. In fact, Mr Stewart was, by that time, deceased. In order to waive time being of the essence in my view, the learned judge correctly held at paragraph [45] of the judgment that all the parties to the 2002 FSA would have to have been aware of the option agreement. There is no doubt that all the parties to the 2002 FSA were not aware of the option agreement. The learned judge found that there was no evidence that the 2nd, 3rd and 5th respondents were aware of it.

[188] The 1st respondent, as a signatory on behalf of the 4th respondent, would have been aware of the option, and I am cognizant of the evidence of the 1st respondent that he was, at any time up to 6 December 2005, prepared and willing to transfer the shares the subject of that agreement to St George's Holdings Limited were that company to stand in the shoes of the appellant. In those circumstances, the question could arise

therefore as to whether and to what extent the option agreement was sufficient to constitute a waiver, in respect of the 1st respondent up and until 6 December 2005.

[189] However, before I seek to answer that question, it is necessary to examine the effect and force of clause 2(4) of the option which makes it clear that the option was only exercisable "upon the full repayment of all obligations owed to [EGMF I], [EGMF II], and Westford Special Situations Master Fund L.P. by the [4th respondent], [AMSL], and AmeriServices Company, Inc". In the light of that provision and the strict interpretation of the option under the principles set out in **Investor Compensation Scheme v West Bromwich Building Society**, I find that, the option was a conditional agreement subject to a condition precedent, which as at the date of execution (7 July 2005) and at the date of determination (6 December 2005), was not operative, given the unrefuted evidence that the loan of US$29,500,000.00 to AMSL was still subsisting as at 4 January 2007. Thus, if the option was not operative, it would not be capable of constituting a waiver with regard to time being of the essence, in respect of the shares that were the subject matter under the 2002 FSA, as the option would have been of no force or effect. It therefore follows that the assertion of the 1st respondent, given in evidence, that he was ready and willing to transfer the shares up until 6 December 2005, would be of no weight, as on the true and proper interpretation of the option it would not have been enforceable.

[190] As it relates to whether time being of the essence was waived under the 2004 FSA, it must be noted that the option agreement is silent in relation to that contract. However, it may be arguable, on a perusal of the schedule to the option agreement,

that the shares stated therein in respect of the 1st respondent could include those referable to the shares in the 2004 agreement, given the cumulative amount of shares mentioned.

[191] Consequently, I find that the appellant, not having fulfilled its obligations as at the acquisition date, and time being of the essence of the contract, the appellant could not in 2008 insist that the founding shareholders under the 2002 FSA and the 1st respondent under the 2004 FSA (they not having acted contrary to time being of the essence of the agreement), were in breach of the respective FSAs. I am of the view that the option agreement did not operate as a waiver in respect of the 1st respondent under the 2002 FSA nor did it operate in respect of the 2004 FSA up to 6 December 2005 or at all. It is of note that there is no sufficient evidence to conclude that the option agreement was extended beyond its expiry date of 6 December 2005. However, in the light of the foregoing, to the extent therefore that the learned judge found that if effective against the 1st respondent it was so only up until December 2005, that finding ought not to be deemed detrimental to the final disposition of this appeal.

Issue 4: Whether time being of the essence, in the 2002 and 2004 FSAs if there was a repudiatory breach by the appellant, was there acceptance of the breach by the respondents which could amount to a rescission or discharge of the FSA's by the respondents, prior to the tender of performance by the appellant.

[192] It was a further complaint by learned Queen's Counsel for the appellant that the learned judge having found that time was of the essence of the contract had failed to address the issue of whether the contract had been discharged prior to the tender of performance by the appellant. Mr Vassell further relied on the procedural point that the

respondents had not pleaded that they had acted to rescind the contracts and, as the learned judge had not dealt with the matter, it required a counter-notice to be filed by the respondents in order that they could make submissions on appeal with regard thereto. As previously indicated, the respondents argued that there had been unequivocal acts of acceptance that the FSAs had been repudiated, and that that fact had been pleaded (at least by the 1st and 2nd respondents), and as there had been submissions made in the court below with regard thereto, they ought to be permitted to do so on appeal also.

[193] The Privy Council case from the Court of Appeal of Trinidad and Tobago, **J Sookraj v Samaroo**, is instructive in deciding the issue raised in respect of rescission in the instant appeal. In that case Mr Sookraj and Mr Samaroo each claimed to be the purchasers of certain land in Trinidad at Eastern Main Road, El Dorado, Tacarigua having entered into a contract of purchase with the owner of the land, one Mr Ramute. Mr Samaroo was the first in time and he dealt with Mr Ramute personally. He had signed an agreement but had not paid the deposit. It was later paid, but as a receipt had to be drawn up for the lender of those funds, on legal advice from Mr Ramute's attorney, a further contract was prepared and signed by the parties with the same terms and conditions of the earlier contract but it bore a later date and had a later time stated therein for completion. In the interim, the agent of Mr Ramute, by duly executed power of attorney, had entered into a contact with Mr Sookraj for the purchase of the said land. Mr Sookraj paid the full deposit forthwith. Mr Sookraj sued initially for specific performance, and lodged a caveat forbidding registration of any instrument affecting

the land, but did not proceed with that action. Instead, he launched a claim for a declaration that he was the beneficial owner of the land, and for damages for waste, Mr Ramute having transferred the land to Mr Samaroo.

[194] One of the several issues before the Board, Mr Samaroo, having succeeded at first instance and in the Court of Appeal, was whether Mr Samaroo had given consideration for the earlier agreement. The Board found that he had. The contract had been agreed between the parties with a specific purchase price stated. A further issue was whether the later contract signed by Mr Samaroo replaced and discharged the earlier contract or was simply a variation of it. The Board found that the earlier contract was valid. Their Lordships also found that Mr Sookraj did not have the prior equity although having paid sums under the contract first. Another question was whether the failure of Mr Samaroo to pay the deposit on the signing of the contract or soon thereafter was a repudiatory breach of the agreement, which would have entitled Mr Ramute, or his agent to accept the repudiation and put an end to the agreement. The fact is that Mr Samaroo had tried to pay the deposit to the agent but he had been reluctant to accept the same, and that was only done when Mr Ramute cleared the way. The Board rejected the contention that Mr Samaroo's failure to pay the $50,000.00 deposit constituted a repudiatory breach. They stated in paragraph 17 of the judgment:

> "In any event, a repudiation does not of itself determine the contract. It gives a right to the innocent party, by accepting the repudiation, to determine the contract. If the innocent party does not accept the repudiation, the contract remains in existence for the benefit of both parties. The acceptance

> of a repudiation requires no particular form. But it must be unequivocal and it must be communicated to the party in breach. (See Chitty on Contracts 29th Ed. Vol 1 para 24-013)..."

[195] In that case, Mr Ramute evinced an intention to complete the contract with Mr Samaroo. Their Lordships found that there was no evidence that even if the agent had been acting in a manner which Mr Samaroo viewed as being inconsistent with the agreement made with him, accepting that the registration of the power of attorney was communication to the whole world, then the question remains was there any communication of acceptance of repudiation of the agreement to Mr Samaroo.

[196] With regard to the specific issue of whether the later agreement had rescinded the earlier agreement, their Lordships, at paragraph 21 of the judgment, accepted the explicit finding of the Court of Appeal as stated on page 153 of the record:

> "On the evidence it is indisputable that there was never any intention on the part of Ramute and [Mr Samaroo] to rescind the first agreement; rather there was every intention to keep it on foot."

Indeed, at paragraph 19, their Lordships adopted the general principle expressed in Chitty on Contract, 29th Edition, Volume 1, at paragraph 22-028, which states thus:

> "A rescission of the contract will also be implied where the parties have effected such an alteration of its terms as to substitute a new contract in its place ... it is necessary to distinguish a rescission of the contract from a variation which merely qualifies the existing rights and obligations. If a rescission is effected the contract is extinguished; if only a variation it continues to exist in an altered form. The decision on this point will depend on the intention of the parties to be gathered from an examination of the terms of

> the subsequent agreement and from all the surrounding circumstances."

[197] In that case, the court found as a proven fact that it was clear that there was no intention of Mr Ramute and on the part of Mr Samaroo, to treat the contract as at an end. It therefore remained on foot. Mr Ramute intended to complete the contract and did so. There was no evidence of any repudiatory breach of contract by Mr Samaroo or any communication of any unequivocal acceptance of it. However, in the instant case, prior to and at time of the IPO, the complexion and the value of the respective shareholding in the 4th respondent had been so altered that one could not imply a simple variation of the subject matter (shares) under the FSAs but a substantial alteration of them. The rights and obligations under the FSAs were not only slightly different but substantially so. In my opinion, there was no evidence by the parties of an intention to complete the contract, subsequent to the acquisition date, save many years later by the appellant. So in the interim, there was no evidence that the contract remained on foot and on any examination of all the surrounding circumstances there would have been a repudiatory breach of the contract by the appellant, accepted by the respondents, which effectively rescinded the contract and discharged the respondents from any further obligations under it.

[198] In fact, as previously stated, at the time the appellant, via letters dated 17 and 27 October 2008 to the respondents requested the remittance of dividends paid and the transfer of shares, respectively, it had not paid the purchase price of J$1.00 per share (though in the later of the two letters it had expressed a willingness and ability to pay), although the appellant had acknowledged that the acquisition date had passed. That

having been said, I am cognizant that under the 2002 FSA, prior to the acquisition date, the appellant was entitled to appoint two representatives to the board of the 4th respondent (clause 3.3.2) and the payment of dividends made and declared in respect of the shares (clause 4.1). The appellant failed to exercise these rights and when in October and November 2008, it sought to exercise them, as also stated previously, the time to do so had lapsed, the contract was at an end and the relevant respondents, by their conduct, declined to facilitate the appointment of Mr Tirman as a member to the board of directors and refused to pay the dividends declared to the appellant. Additionally, I accept the submissions of Mr Scott, that the occurrence of the stock split due to the 4th respondent's public offering, rendered the shares that were recorded under the signed undated instruments of transfer pursuant to the FSAs "worthless" and no longer existing in specie. In my view, these were all unequivocal acts evidencing acceptance of the repudiated breaches by the appellant of the FSAs. As a consequence, there was evidence which indicated that the respondents had accepted the repudiatory breach of the appellant, and the FSAs were duly discharged.

[199] However, this court still had to resolve whether this issue could be raised on appeal, no counter-notice having been filed.

Procedural issue

[200] It was Mr Vassell's contention that since no counter-notice had been filed, the respondents could not raise any of the following issues, namely:

(1) having not pleaded that the respondents had accepted the repudiatory breach by the appellant, that the contract had been rescinded; and

(2) whether on the facts of the case the contract had been rescinded.

[201] In paragraph 30 of the further amended particulars of claim, filed on 7 April 2010, the appellant pleaded and relied on its letters dated 17 and 27 October 2008 to the 4th respondent submitting the instruments of transfer for the subscription shares, the subject of the FSAs, and demanding registration as proprietor of the said shares. The appellant claimed, at paragraph 31, that the 1st and 2nd respondents had, in breach of contract, and the 3rd respondent, in breach of trust, failed, refused and or neglected to comply with the appellant's demands. In response, the 1st respondent in his further amended defence, filed on 5 May 2010, in paragraph 25, denied the allegations made by the appellant and pleaded that it was the appellant who had breached the contract by its failure to perform according to its terms, and whose breach had thereby discharged the 1st respondent from any further obligations under the 2002 FSA. In paragraph 35 of the said further amended defence the 1st respondent reiterated that position and stated that the appellant having failed to comply with its obligations under the 2004 FSA, the 1st respondent "was entitled to and did treat his further obligations under the Agreement as discharged".

[202] With regard to the 2nd respondent, in his amended defence filed on 4 May 2010, in paragraph 21, he denied being in breach of the 2002 FSA and pleaded that the

appellant had failed to pay the selling price of the shares and to deliver the instruments of transfer to the 4th respondent for registration on the acquisition date or at all. He stated further that as a consequence "the 2nd [respondent] was entitled to and did treat the 2002 Forward Share Sale Agreement as at an end, and the 2nd [respondent] was thereby discharged from any further obligations under that Agreement".

[203] So, there is no doubt that the question whether the FSAs were discharged or rescinded was a matter in issue between the parties, stated in the pleadings in the court below. In paragraph [42] of the judgment, in concluding on what the learned judge had described as issue 2, namely:

> "[i]s time of the essence of the contract with the result that the failure of the [appellant] to pay the $1 per share referred to in the 2002 ad 2004 Agreements and for the return of the Instrument[s] of transfer [operate] to discharge the contract?",

he stated that time was intended to be of the essence in both the 2002 and 2004 FSAs and that required the appellant to have paid the purchase price at par value and confirm its intention to acquire the shares, upon the occurrence of the acquisition date, by returning the instruments of transfer for registration. He completed the paragraph, by making the following comment, that "[w]hether this failure operated to discharge the 2002 and 2004 Agreement depends on the determination of the next issue".

[204] Issue three which followed, related to whether the option agreement could act as a waiver of the delay by the appellant in complying with its obligations under the agreements. As indicated the learned judge found, at paragraph [48], that in so far as

the option agreement could have operated as a waiver in respect of the 1st respondent that would only have operated until 6 December 2005. With regard to the 2nd respondent, the learned judge found that he knew nothing about the option agreement and with regard to Mr Peter Stewart, he could not have waived any conditions of the 2002 FSA as he was deceased at the time of execution of the option agreement. The learned judge however having dealt with the option agreement and waiver omitted to specifically address in the judgment, whether the failure of the appellant to comply with the obligations to pay the par value for the shares, had discharged the agreements although he had stated that he would have dealt with it after having dealt with the matters the subject of issue three.

[205] The issue therefore arises whether the respondents ought to be permitted to argue "discharge" or "rescission" of the agreements without a counter-notice, the learned judge having not made a specific ruling thereon and so it would not have appeared to have formed part of the basis for his judgment.

[206] There are two relevant provisions of the CAR on this point. They are rules 1.16 and 2.3. Rule 1.16 of CAR, which is accompanied by the marginal note, "Hearing of appeals", reads as follows:

> "(1) An appeal shall be by way of re-hearing.
>
> (2) At the hearing of the appeal no party may rely on a matter not contained in that party's notice of appeal or counter-notice unless-
>
> (a) it was relied on by the court below; or

(b) the court gives permission.

(3) However-

(a) the court is not confined to the grounds set out in the notice of appeal or counter-notice, but

(b) may not make its decision on any ground not set out in the notice of appeal or counter-notice unless the other parties to the appeal have had sufficient opportunity to contest such ground.

(4) The court may draw any inference of fact which it considers is justified on the evidence."

[207] Rule 2.3 states:

"(1) Any party upon whom a notice of appeal is served may file a counter-notice form A2.

(2) The counter-notice must comply with rule 2.2.

(3) A respondent who wishes the court to affirm the decision of the court below on grounds other than those relied on by that court must file a counter-notice in form A3 setting out such grounds.

(4) The counter-notice must be filed at the registry in accordance with rule 1.11 within 14 days of service of the notice of appeal.

(5) The party filing a counter-notice must serve a copy on all other parties to the proceedings in the court below who may be directly affected by the appeal."

[208] A case out of this court, **Gordon Stewart and Others v Merrick Samuels**, examined the particular and relevant rules of the CAR. It dealt with the question as to whether the learned judge in the court below was correct in refusing an order for summary judgment in circumstances where the respondent claimed damages for severe personal injuries as a result of an accident involving him and a ski boat whilst in the sea

in the vicinity of Sandals Montego Hotel, which was owned and managed by the 3rd appellant. The 2nd appellant was the servant and or agent of the 3rd appellant and the operator of the boat, which was owned by the 3rd appellant. The 1st appellant, Gordon Stewart, had been dismissed from the claim.

[209] The respondent was hospitalized for a year as a result of the injuries he sustained. The real controversy between the parties on appeal, was whether the respondent having executed a release which acknowledged receipt of certain sums and a cellular phone in final settlement of all liability on the part of the appellants, without independent legal advice, although he was at the time represented by an attorney (allegedly known to the appellants), had been subjected to undue influence, and had thereby entered into an unconscionable bargain. The affidavit of the respondent had stated that representatives of the appellants had visited him at the hospital and had been very friendly to him so he thought that they were at all times acting in his best interests.

[210] At the hearing of the appeal, the record had not disclosed that the issue of unconscionable bargain had been raised by the respondent at the trial, and therefore it appeared that he, having not filed a counter-notice, would have needed the court's permission to advance that issue, and the court could consider it, only if the other party to the appeal had had sufficient opportunity to contest such ground.

[211] Paul Harrison JA (as he then was) having referred to rule 2.3(3) in the CAR stated, on page 12 of the judgment, that:

> "Where no counter-notice is filed by the respondent, he is not precluded from advancing an argument in his favour."

[212] For that proposition he referred specifically to rule 1.16(2) of the CAR. He then referred further to the skeleton arguments filed on behalf of the respondent, which stated as follows:

> "12. The Courts have held that even in the absence of duress and undue influence the courts will interfere, in the exercise of its equitable jurisdiction to strike down an agreement where the terms are harsh and unconscionable. The court's jurisdiction extends to all persons under pressure and without adequate protection. No Court will countenance or will allow a party to rely on an unconscionable bargain. ***See Halsbury's Laws of England 4th ed. Vol. 9(i) para 716***."

[213] He therefore rejected counsel for the appellants' reliance on the failure of the respondent to file the counter-notice, on the basis that the appellants had been served with the skeleton arguments of the respondent which referred to the issue of unconscionable bargain. He stated that the submissions had been advanced and the appellants had had ample opportunity "to contest such ground" and the court could therefore make a decision on it. There was, he said, a real prospect of success that the respondent had been a party to an unconscionable bargain.

[214] Panton JA (as he then was) did not address this issue, but Harris JA (Ag) (as she then was) also on reliance on the interpretation of rule 1.16(4), at page 40 of the judgment, stated that the classes of undue influence are expansive and it would have been up to the learned judge to consider whether the principle of unconscionable

bargain fell within the context of undue influence. She found (at page 40 of the judgment) in the circumstances that the counter-notice was unnecessary, as :

> "On the hearing of an appeal, under Rule 1.16(4), the court is entitled to draw inference of facts which, in its view, the evidence justifies. In light of the evidence, this court could consider whether the doctrine of 'unconscionable bargains' could avail the respondent."

[215] In **International Hotels (Jamaica) Limited v Proprietors Strata Plan No 461**, Morrison JA (as he then was) made a comment, *en passant*, with regard to the interpretation of rule 2.3(3) of the CAR. There was no detailed discussion on the same and rule 1.16 was not mentioned at all. This case concerned possessory titles, boundary disputes related to a narrow strip of land immediately to the north and west of lands owned by the hotel and adjoining lands owned by PSP 461, which were comprised in the registration of title for the property owned by PSP 461, but were in use by the hotel and enclosed by a fence as part of the hotel lands. The argument posited by PSP 461 which found favour with the learned trial judge was that time would not run in favour of the hotel in support of a claim for adverse possession, once the predecessor in title for both properties were owned by the same entity in this case the Urban Development Corporation (UDC), and thereafter equally, time could not run for the benefit of the hotel in circumstances where it claimed through successive ownership of subsidiaries to the parent company the UDC.

[216] The court held that the subsidiaries were separate legal entities with separate legal personalities and corporate structures, and time running during their ownership, in

respect of the claim for possessory title and in respect of possessory rights of the hotel's predecessors in title would enure to the benefit of the hotel.

[217] The contention of PSP 461 that there had been acknowledgements of title by the hotel in certain items of correspondence was objected to by counsel for the hotel on appeal on the basis that that point had not been relied on by Brooks J (as he then was) in his judgment in the court below, and so it would not be open to PSP 461 to argue the same on appeal, no counter-notice having been filed. Morrison JA accepted right away that argument as being correct, as pursuant to rule 2.3(3) of the CAR, he said one must file a counter-notice if one wished to affirm the decision of the court below on grounds other than those relied on by the learned judge, by filing a form A3 setting out those grounds. However, Morrison JA went on to address the issue raised, as he said that counsel was relying on a position allegedly mentioned in a certain item of correspondence to which the learned judge below had given "some consideration".

[218] As indicated, Morrison JA made no mention of rule 1.16 of the CAR nor did he refer to the earlier decision of this court. It appears that once a notice of appeal is served on a party he may file a counter-notice on form A2, but if filed it must detail the information required as set out in rule 2.2 of the CAR which would, *inter alia*, set out specifically the detail of the orders sought (new trial, fresh evidence etc) or the power the appellant wishes the court to exercise and the grounds on which it is requesting those orders and attach a copy of the judgment appealed from. If a party on whom a notice of appeal has been served is desirous of affirming the judgment on grounds other than those relied on in the court below that party must file a counter-notice on

form A3. But, although at the hearing a party can only rely on the grounds contained in the notice of appeal or counter-notice, unless argued in the court below or with the permission of this court, the court is not confined to those grounds, but can only give the decision on other grounds if the other parties have had sufficient opportunity to contest such grounds. However, if the counter-notice was required and not filed, the court could still rely on material which was in the court below and contained in the submissions in this court, suggesting that these issues were in controversy between the parties.

[219] In the instant case, it would appear on the face of it that a counter-notice ought to have been filed. The learned judge had indicated that he would deal with the issue of discharge of the contracts and then omitted to do so expressly, so the respondents would be endeavouring to affirm the ruling on grounds other that those specifically relied on by him. However, one could say that the learned judge inferentially did do so and in that case it would not have been necessary to file the counter-notice. It is of significance that, when he referred to issue two in the judgment, that is whether time was of the essence of the contract with the result that the failure to pay the J$1.00 per share referred to in the 2002 and 2004 FSAs operated to discharge the contract, it was dependent upon issue three, namely whether or not there had been a waiver of the delay by the appellant, and the learned judge having ruled that there was no applicable waiver and having ruled ultimately in favour of the respondents, one could conclude, that in his opinion, the contracts had been discharged.

[220] In any event in keeping with the dictum of P Harrison JA in **Gordon Stewart and Others v Merrick Samuels**, the appellant had been made aware of the reliance by the respondents on the rescission of the contracts through the skeleton arguments filed, and so would have had had ample time to "contest such ground".

[221] I do not accept that rule 1.16 of the CAR should be interpreted to apply absolutely and only in circumstances where a counter-notice has been filed, as this court has already impliedly interpreted it as being applicable in certain circumstances when no counter-notice has been filed.

[222] The issue of the discharge and rescission of the contracts was one raised and argued in the court below. The appellant, at paragraph 22 of its written skeleton submissions, dated 19 March 2015, acknowledged that the issue of the discharge and rescission of the FSAs "was fully argued" by the appellant and advanced arguments as to why it claimed the contracts remained on foot and undischarged. The 2nd respondent in his written skeleton submissions (dated 7 April 2015) in response to the appellant's submissions advanced arguments as to why he refuted that the 2002 FSA was undischarged (paragraphs 68-77). The appellant was therefore not taken by surprise that at least the 2nd respondent continued to adopt that stance with regard to the 2002 FSA, and could not and did not claim that they were suffering any prejudice as a consequence thereof.

[223] At all times, the court must act in the interests of justice, and endeavour to be fair to the parties and to deal with the true and clearly articulated controversy between

them. In my view therefore, given the interpretation accorded the rules by this court in **Gordon Stewart and Others v Merrick Samuels**, with which I concur as stated above, I would grant leave to the respondents to argue the issue of rescission it having been pleaded by the 1st and 2nd respondents, argued generally in the court below and referred to in the reasons for judgment of the learned judge, and also in the skeleton arguments filed in this court. As a consequence, I have addressed those arguments in this judgment.

Conclusion

[224] In the light of the foregoing, I find that on a true and proper interpretation of the FSAs, the FSA 2002 was not a part of a single global transaction and the 2004 FSA was not a component of the loan agreement for US$2,270,000.00. I find that the FSAs were each documentation representing a transaction in a series of related transactions. I find that on the signing of the 2002 and 2004 FSAs the appellant did not acquire the beneficial interest in the shares the subject of the same. I find that time was of the essence of the agreement of the 2002 and 2004 FSAs that the option agreement was ineffectual and did not waive time being of the essence of the agreements. I find that the appellant failed to comply with the strict requirement to pay the purchase price, viz J$1.00 per share, under the respective agreements which was a term in respect of which time was of the essence and failure to do so was a repudiatory breach which was accepted by the respondents which discharged their respective obligations under the agreements. I find that the respondents were entitled to argue the issue of rescission

on appeal, inspite of a counter-notice not having been filed. As a consequence, the appeal ought to be dismissed with costs to the respondents to be agreed or taxed.

BROOKS JA

[225] I have had the privilege to have read in draft the comprehensive judgment of Phillips JA. I agree with her reasoning and conclusion and have nothing to add.

MCDONALD-BISHOP JA (AG)

[226] I too have read the comprehensive and well reasoned judgment of Phillips JA. I agree with her reasoning and conclusions and there is nothing useful to add.

PHILLIPS JA

ORDER

1. Appeal dismissed.
2. Costs to the respondents to be taxed if not agreed.