IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. G 45 OF 2021

BETWEEN:

JEREMY BECK

Plaintiff

AND

MV CAYMAN LTD.

Defendant

OPEN COURT

Before:	Hon. Mrs. Justice Ramsay-Hale
Appearances:	Mr. Ben Tonner QC and with him, Ms Sally Bowler of McGrath Tonner for the Plaintiff
	Mr. Rupert Wheeler and Ms Alexandra Murphy of KSG for the Defendant
Heard:	9, 10 and 11 June 2021
Draft Judgment Circulated:	16 November 2021
Judgment Delivered:	19 November 2021

Headnote

Contract Law - action for specific performance - purchaser having option to re-sell units back to vendor - defence of impossibility to claim for specific performance

JUDGMENT

Introduction

1. In 2016, a redevelopment and a rebranding of the former Treasure Island Hotel on West Bay Road was undertaken by HHG Cayman Ltd. ("HHG"), a property development company incorporated in 2015. The hotel was converted into strata lots and the redevelopment was funded by borrowings from a bank and from shareholders in exchange for equity as well as by the sale of strata units.

HHG acquired a license to operate the hotel under the Margaritaville brand, named after Jimmy Buffet's hit song "Margaritaville."

2. The Plaintiff, Mr. Jeremy Beck ("Mr. Beck"), purchased ten studio units as an investment in the resort on the West Bay Road formerly known as the Margaritaville Beach Resort ("the Resort") from HHG who operated the Resort under that brand under a license agreement with Margaritaville of Grand Cayman LLC.

3. Prior to executing the agreement for the sale and purchase of the studio units, Mr. Beck negotiated an Option Agreement with HHG which provided that if HHG lost the Margaritaville branding within 10 years of the sale and purchase of the ten units, and the replacement branding for the Resort was not of equivalent calibre to the Margaritaville branding, then Mr. Beck could give written notice requiring HHG to repurchase the units within a reasonable time at the price originally paid if he were satisfied, acting reasonably, that the replacement branding was not of equivalent calibre to the Margaritaville brand. HHG's name was subsequently changed to MV Cayman Ltd., which is the Defendant in these proceedings ("MV Cayman").

4. In August 2020, the license agreement was terminated and the Resort ceased using the Margaritaville brand. In September 2020, before the Resort had been rebranded, Mr. Beck gave notice to the Defendant that he was exercising his right under the Option Agreement and required MV Cayman to repurchase the nine studio units that he still owned. Subsequent to that Notice, the Resort was rebranded as the "Palmar Beach Resort". In December 2020, Mr. Beck, being satisfied that Palmar was not a globally recognised brand of equivalent caliber to Margaritaville, sent a second Notice to MV Cayman that he was exercising the option agreement. MV Cayman failed to pay.

These Proceedings

5. On 11 March 2021, Mr. Beck filed an Originating Summons in which he seeks an Order for specific performance of the written option in respect of nine of the ten units purchased by him. More particularly, he seeks, inter alia, the payment of the sum of US$2,005,000, being the aggregate of the purchase prices of each of the nine studio units, by MV Cayman within 7 days of an Order made by the Court and that MV Cayman execute Transfers and file Transfers for stamping and registration at the Land Registry together with a Certificate of Good Standing of the Defendant, the Register of Directors of the Defendant, a Resolution of the Directors of the Defendant authorizing the purchase of the units, and any other documentation or fees whatsoever, and take all required action to transfer the units to itself at its own costs.

6. MV Cayman's primary defence is, in short, that specific performance of the option agreement is impossible as MV Cayman does not have US$2,005,000 and cannot raise the sum within 7 days of an Order or at all. In the alternative, MV Cayman asserts that damages are an adequate remedy

given the commercial nature of the transaction and because there is no mutuality of obligations in the Option Agreement.

7. MV Cayman also contends that Mr. Beck's exercise of the Option was not validly exercised as there was an implied obligation to act reasonably to allow sufficient time for the Defendant to obtain replacement branding and that Mr. Beck's exercise of the option was unreasonable in the circumstances where the loss of the Margaritaville branding occurred after the Cayman Islands borders were closed to tourists as part of the Cayman Government's response to the global pandemic. MV Cayman says further that the Option was not validly exercised for the reason that the parties intended that replacement branding would be in place, and therefore capable of being assessed, before the Option was exercised. As the rebranding exercise is ongoing, Mr. Beck's exercise of the option was premature.

8. If the Court finds the Option was validly exercised, then MV Cayman says that a 'reasonable time' has not yet elapsed since the date the Option was exercised for MV Cayman to purchase the units.

The Option Agreement

9. Mr. Tonner QC describes the Option Agreement as a *"Put Option"* by reference to an extract from UK practicallaw.com which defines a Put Option as an option which enables a landowner to give notice requiring the developer to buy the property. The Landowner may be able to give notice at any time during the period or only when certain conditions precedent have been met.

10. The Privy Council considered option agreements in an appeal from the Court of Appeal of the Cayman Islands in the matter of *Francis and Anr v Vista Del Mar Development Ltd* [2019] UKPC 14 Lady Arden, giving the opinion of the Board, noted in the opening paragraph that:

> *"When one person gives another (the option holder) a conditional option to buy her land, the option holder will be entitled to exercise the option when the conditions for exercising it are fulfilled by following any procedural requirements set by the terms of the option. A new contract then arises between the parties and their relationship changes from one of option giver and option holder to one of vendor and purchaser."*

Specific Performance

11. The application of the doctrine of specific performance of an option to repurchase property was considered by the Grand Court in *Vista del Mar Development Limited v Francis and Clarke* 2016(2) CILR 84 (Mangatal J). The option in that case required the purchasers of property sold for the purpose of development to sell the property back to the vendor if the purchasers either failed to commence construction by a particular date or to complete such construction within 18 months. The purchasers had failed to commence construction as they were unable to raise funding and the learned Judge granted the vendor's claim for specific performance of the option agreement.

12. With respect to the vendor's claim for specific performance, Mangatal J observed at p 125 that the claim was concerned with,

> *"specific performance in its narrower sense i.e. the execution of an in specie contract which requires some definite thing to be done, as opposed to specific performance in the wider sense…of enforcement in specie of any contractual obligation to perform an act".*

13. At paragraph 106 of her judgment, the learned Judge referred to **Spry, Principles of Equitable Remedies** (7th ed.) Ch 3 paragraphs 51-52 where the distinction was explained:

> *"The term 'specific performance' is commonly used in two senses. In the first place, it sometimes refers to what may be called specific performance in the narrow sense. Here a court with equitable jurisdiction compels the* ***execution in specie*** *of a contract that requires some definite thing to be done in order that the legal rights of the parties be settled and defined in the manner intended. So if it has been agreed by the parties that a formal deed or conveyance be executed or that delivery be completed of a particular property, specific performance in the narrow sense may be ordered … In [the] second sense specific performance refers to the* ***enforcement in specie*** *of any contractual obligation to perform an act, whether by settling or defining the rights of the parties, or by enforcing those rights in any way. Precisely the same principles are applied by a court of equity whether it is with specific performance in the wider or in the narrower sense that it is concerned, but as will be seen hereafter, particular factual circumstances are often found in cases of specific performance in the wider sense that give rise to a different application of those principles. So difficulties of enforcement or in determining whether performance has duly taken place are usually not as great where what is in question is specific performance in the narrower rather than in the wider sense. Hence in all cases it is necessary to distinguish carefully between the principles that are applied, on the one hand, which do not vary and their application, on the other hand, which varies according to the particular circumstances."* [Emphasis added]

14. The learned authors cite *Australian Hardwoods Pty. Ltd v Commission for Railways* [196] 1 WLR 425 at pp 433-434 in the footnote to this passage from which they extract the principle that it will thus be *"less likely the plaintiff seeks execution of a deed, than where he seeks performance of its terms, that it will appear on the application of equitable principles that it is not an appropriate occasion for the grant of relief."*

15. Specific Performance was developed by the Courts of equity in response to the inadequacy of legal remedies at common law and, in particular, the inadequacy of damages.

16. In the following extract from ***Spry*** (pages 61-62) on which Mr. Tonner QC relied in his submissions on behalf of Mr. Beck, the learned author states that,

> *"the precise question that has been asked is whether the relegation of the plaintiff to such remedies as he has in damages or other legal remedies would leave him in as favourable a position in all material respects as would exist if the obligation in question were performed in specie. So it was said by Lord Redesdale, 'Unquestionably the original foundation of those decrees was simply this, that damages at law would not give the party the compensation to which he is entitled: that is, would not put him in a situation as beneficial to him as if the agreement were specifically performed'..."*

17. The extract (page 62) includes the following statement of principle on which Mangatal J relied in *Vista Del Mar* (paragraph 108), to wit:

> *"unless damages would give rise to the identical consequences for the plaintiff to relief in specie the court should proceed to consider where its discretion should be exercised in favour of the latter remedy."*

18. In *Vista del Mar,* Mangatal J concluded that damages were not an adequate substitute for the vendor's right to repurchase the property and given that the vendor was seeking specific performance of the purchasers' contractual obligation to execute a conveyance of the property to the vendor - specific performance in the narrower sense - it was appropriate to grant specific performance.

19. While the case is not on all fours with *Vista Del Mar*, as Mangatal J was considering an order for execution in specie of a contractual obligation and not the performance in specie of a contractual obligation as Mr. Beck seeks here, the principles distilled by the learned Judge are relevant to the issues arising for resolution in this case.

Impossibility as a Defence

20. As an equitable remedy, an award of specific performance is not made as of right, but is in the discretion of the Court. The discretion to refuse specific performance, *"while not acting capriciously or arbitrarily"* is a wide one: see *Titanic Quarter Ltd. v Rowe* [2010] NICh 14.

21. MV Cayman contends that it would be impossible for it to comply with an order for specific performance resulting from its impecuniosity.

22. The "impecuniosity defence" has been recognised by the UK Court of Appeal in *North East Lincolnshire BC v Millennium Park (Grimsby) Ltd.* [2002] EWCA CIV 1719 ("*Millennium Park*") on

which Mr. Wheeler relied in developing his submissions on behalf of MV Cayman that specific performance should not be ordered in this case. The judge at first instance, though declaring himself to be in no doubt that in a case of actual impossibility of compliance, the court will not make an order, granted an application for summary judgment against a defendant whose defence was that it was impossible for him to conclude the contract as he could not obtain funding. His decision was reversed on appeal, the Court of Appeal holding that he had not considered the question arising on a summary judgment application which is *"whether he was satisfied that there was a real or reasonable prospect of success in a defence against the remedy of specific performance based on a case of impossibility"* (at paragraph 14). Mr. Wheeler contends that it follows, by necessary implication, that the Court of Appeal considered the defence of impecuniosity to be available to the defendant.

23. In *Matila Ltd. v Lisheen Properties Ltd* [2012] EWHC 1832 (Ch) Stephen Davies J held, at paragraph 248, citing *Millennium Park* that,

> *"if the court is satisfied that a defendant against whom an order is sought is simply not in a position to comply, then it would be inequitable to order him to comply nonetheless and thus put him at risk of committal, even if in fact an order for committal should not be made unless the court was satisfied that the defendant was able to comply but had chosen not to do so."*

24. Mr. Wheeler also drew the Court's attention to the decision of the High Court in Northern Ireland in *Titanic Quarter Ltd. v Rowe* [2010] NICh 14 which also acknowledged the impecuniosity defence. The Court, noting that *"the court should not make an order that will beat upon air"* refused a decree of specific performance, being as it stated at para 22, *"satisfied that impossibility of performance is a ground in law for refusing the remedy of specific performance whether approached on first principles or on the authorities."*

25. In the Irish case of *Aranbel Ltd. v Darcey & Ors* [2010] IEHC 272 on which Mr. Wheeler also relies, Mr. Justice Clarke observed that the only point in the court ordering specific performance is if there is some realistic possibility that the sale may complete and that, at paragraph 2.5, if there was *"no realistic possibility of the sale closing,"* specific performance should not be ordered.

26. The learned Judge stated further at paragraph 2.9 that,

> *"In order for a purchaser to be able to say that completion is impossible, it is necessary for such a purchaser to demonstrate that the purchaser has not realisable assets or borrowing capacity that could be brought to bear to pay the contracted purchase price."*

27. Although MV Cayman also sought to argue that the specific performance ought not to be granted because it was impossible for MV Cayman to raise the funds within 7 days (as sought by Mr. Beck

in the Draft Order appended to the Originating Summons), the position is as Clarke J observed that if there is some realistic prospect of the purchaser coming up with the purchase price within whatever timeframe might appear appropriate, the Court is at liberty to make an order for specific performance and the purchaser will be obliged to try to overcome the problems that may exist in raising the funds to make the order effective.

The Facts

28. Although it was contended by MV Cayman, in an interlocutory application, that there was a substantial dispute of fact, and MV Cayman applied to have the matter continue by way of Writ, it appeared to the Court that there was not much in dispute and that the primary issues of fact for resolution were whether the Resort's new brand was equivalent in caliber to the Margaritaville brand and whether MV Cayman was unable to perform its obligations under the Option Agreement.

29. Despite MV Cayman's apparent contention that the Resort's new brand, "Palmar," is of equivalent caliber to Margaritaville, the fact is that the brand is unknown and was developed for the Resort by MV Cayman's consultants. Insofar as I'm required to do so, given the origin of the Palmar brand, I say I am satisfied and find that it is not a brand of equivalent caliber of Margaritaville. Margaritaville is aptly described by Mr. Beck as a globally recognized brand, with numerous island-themed restaurants and bars in the USA and Caribbean, operating under the brand including a Margaritaville restaurant and bar - unrelated to the Resort – which, until recently, operated on the George Town waterfront.

30. My view of the matter is not affected by the assertion by MV Cayman's financial controller to the effect that a significant factor in the failure of the resort to generate a profit pre-COVID was the poor performance of the Margaritaville branding which was costly and brought little revenue. The fact is the brand was well known and associated internationally with Resorts in the Caribbean and elsewhere. I also place no weight on the evidence of Mr. Jonathan Murphy ("Mr. Murphy"), a Director of MV Cayman, that the Resort can be as successfully marketed in an equivalent manner as Palmar as it was as Margaritaville.

31. It is clear that it was the name recognition of the brand that was important to Mr. Beck and that was the reason that he negotiated the Option, as was recognised in the parties' letter agreement where HHG records:

> *"We understand you have a concern regarding the loss of the Margaritaville branding during and after the expiry of the initial ten (10) year term of the Licence agreement."*

32. The branding was what was at the heart of the agreement, not whether the hotel would perform as well with any other branding.

33. Was Mr. Beck "acting reasonably" in giving MV Cayman notice that he wanted them to repurchase the nine units he still owned? On the objective evidence available to Mr. Beck, the Resort had lost its brand in August 2020 and had no replacement branding at all when he sent the notice dated 19 September 2020. I can't say such an approach was unreasonable in light of MV Cayman's evidence that the closure of the borders was catastrophic for the Resort. Mr. Beck would have been well aware, as the manager of a smaller resort on West Bay Road, of the consequences for the Resort and would reasonably have believed that the Resort could not successfully re-brand. In any event, the evidence is that Mr. Beck acceded to MV Cayman's request for more time to re-brand the business before exercising the option. Having allowed the Resort more time and the Resort choosing to re-brand with an unknown brand, I am satisfied and find that Mr. Beck acted reasonably.

34. Mr. Murphy's evidence was that the Palmar brand was developed in order to market the hotel in an *"equivalent manner"* and to allow MV Cayman to attach the Palmar name to a soft-branded property, for example, "Palmar by Tapestry Hilton" or "Palmar by Tribute Marriott". He said further that MV Cayman had determined, following conversations with the Hilton and the Marriott, that a soft branded product was the most viable option for the Resort. Whatever the merits of soft branding which Mr. Murphy sought to extol in his evidence, the fact is that none of this proposed soft branding with recognised hotel chains like the Hilton or the Marriott ever materialized before the notice was sent by Mr. Beck that he was exercising the option or even at the date of the hearing of Mr. Beck's summons. In any event, the issue was not whether the Resort could be operated with an unknown brand but whether the brand was equivalent to the well-established Margaritaville brand, notwithstanding the brand's failure to generate strong revenues and I am satisfied, as I have said, that it is not.

35. It is not disputed that MV Cayman is in financial difficulties. Mr. Murphy's evidence was that following the closing of the borders, the Resort has struggled to stay afloat financially. It generates revenue by renting out "quarantine rooms", providing limited food and beverage operations and it has entered into a small number of long-term rentals. The revenue streams from these activities have not been enough to cover operating costs or generate a profit for MV Cayman and the shortfall is made up by the shareholders so the Resort can remain a going concern. In his words, the closing of the borders has been *"catastrophic"* and MV Cayman does not have the means to buy back Mr. Beck's shares.

36. Mr. Murphy said further that MV Cayman has secured creditors whose permission is required to enter into additional loan facilities and/or give further security, and no such permission will be forthcoming rendering it impossible for MV Cayman to raise any additional loans in the market. He also said there was no possibility of securing further loans from the shareholders whose investment in the Resort has grown from $5 million to $18 million and who have no appetite to lend to MV Cayman the money to repurchase the nine units given the challenges facing the Resort and the hospitality industry at present.

37. Mr. Murphy also spoke about his efforts to refinance the hotel which he said all failed because of what he described as the *"equity gap"*, by which I take him to mean the debt-to-equity ratio, and no cash flow support and his efforts, in particular, to obtain financing to repurchase Mr. Beck's units which also failed for the same reasons, which all failed to bear fruit. I accept his evidence.

Discussion

38. Having considered all the evidence of impecuniosity offered by MV Cayman, I do not consider the fact that MV Cayman cannot raise the US$2,005,000 in the short term to complete the purchase of the units, renders the performance of the agreement impossible. While I accept Mr. Murphy's evidence that MV Cayman has been unable thus far to access new borrowing to purchase Mr. Beck's units outright, Mr. Murphy's evidence does not exclude the possibility that MV Cayman may still be able to refinance the Resort as a going concern as the position on the ground changes and the borders reopen. One can assume that this was part of the rationale for the shareholders continued investment in the Resort in order to *"keep on the lights so the hotel isn't mothballed'* as Mr. Murphy colourfully put it in his evidence. If MV Cayman can refinance the Resort, the addition of Mr. Beck's units to MV Cayman's portfolio of rooms may make it a more attractive investment for a third-party.

39. The fact that the shareholders have no appetite for increasing their investment in the Resort by purchasing Mr. Beck's units is not the same thing as it being impossible for MV Cayman to access more funds through shareholder loans. It simply says that the shareholders are exercising their own commercial judgment as to what is in their best interests and that could change.

40. It is apparent that MV Cayman cannot perform the contract immediately and may not be able to do so the short-term if they have to raise funding from third- party lenders, but this should not, in my judgment, deprive Mr. Beck of the remedy he seeks, as it is possible that MV Cayman, if given time, could meet its obligations under the agreement. Indeed, Mr. Murphy in his evidence suggested that MV Cayman was on the brink of establishing a highly valuable branding partnership. There is no evidence to suggest that it may not still do so as things change on the ground and the restrictions imposed in response to the pandemic are eased.

41. What is manifestly clear is that damages would not be an adequate remedy. If Mr. Beck could sell his units on the open market, then the measure of his loss would be the difference between the sum of US$2,005,000 that MV Cayman agreed to repurchase the units from him for and the price he could obtain by selling the units on to other purchasers. The reality is, however, that he is unlikely to be able to resell the units he owns either individually or *en bloc* given that the Resort's current position does not make the purchase of units within the Resort an attractive investment to individual purchasers or small investors like Mr. Beck. The hardship that would flow from leaving Mr. Beck to his remedy in damages for losses that would be suffered if he were required to sell the units to others is readily apparent.

42. Mr. Beck would plainly be in a better position if the order were made and the transfer executed. Even if the monies were not paid immediately or in the short-term, the order would not be an exercise in futility - equity would not be acting in vain - as Mr. Beck would cease to be liable for any of the costs associated with his ownership of the units and he would have an unpaid vendor's lien in the sum of US$2,005,000 on the units in the event there was a sale of the Resort.

43. Mr. Beck required the Option Agreement be concluded before he invested in the Resort and MV Cayman agreed to his terms in order to secure his proposed investment of over US$2,000,000. It was a commercial transaction and MV Cayman took the risk in order to access funds for the redevelopment of the Resort. I do not think it would be right to refuse specific performance on evidence which demonstrates that securing the monies to repurchase the units will be difficult but does not rise to the level of impossibility. In my judgment, the just result is that MV Cayman be kept to its bargain.

ORDER

44. Specific performance of the contract for sale and purchase of the nine units at the Resort owned by Mr. Beck by MV Cayman is hereby ordered.

45. I will hear Counsel on the form of Order and on costs.

DATED THE 19 NOVEMBER 2021

RAMSAY- HALE J