IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. G93 OF 2016

BETWEEN:

ANTHONY RICHARDS

Plaintiff

AND

H.E.B. ENTERPRISES LTD.

1st Defendant

AND

HENRY E. BODDEN JR.

2nd Defendant

Appearance:	**Mr. James Kennedy of KSG Attorneys for the Plaintiff** **Mr. Hector Robinson, QC of Mourant Ozannes for the Defendant**
Before:	**Hon. Justice Richard Williams**
Heard:	**7-8 February 2018**
Written Supplement Submission Defendants:	**9 February 2018**
Written Supplement Submission Plaintiff:	**12 February 2018**
Further Written Submissions:	**10 July 2018**
Draft Judgment:	**31 July 2018**
Perfected Judgment:	**2 August 2018**

HEADNOTE

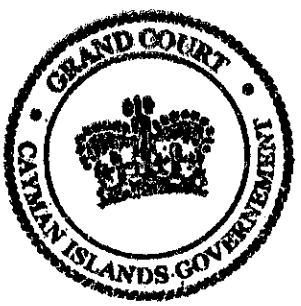
Instalment contract for sale of land – contract terminated by defendant vendor on plaintiff's breach – rescission/repudiation - effect of default clause – vendor's damages – retention by vendor of deposit payment and interest thereon claim of vendor for retention of interest payments made by the purchaser.

JUDGMENT

Background

1. On 28 December 1994 the Plaintiff ("P") entered into an Agreement for Sale ("the First Agreement') with the 1st Defendant ("D1") for an uncompleted strata lot within a commercial strata development known as Caymanian Village. It is agreed that D1 acted at all times through the 2nd Defendant ("D2"). D2 signed the First Agreement "*for H.E.B Enterprises*" and he sent the email communication dated 18 April 2016[1] that grounds P's claim. The properties, which the First Agreement and the Agreement mentioned in paragraph 3 below ("the Second Agreement") refer to, are both held in the name of D2[2]. Each property was used as a shop in a complex comprising 22 shops, each with their own separate title.

2. Pursuant to Clause 3 of the First Agreement the total price for the strata lot known as George Town Central Block 14C Parcel 296H10 ("Parcel 296H10") was CI$120,000. The $3,000 deposit was to be paid on the execution of the First Agreement and the balance of CI$117,000 over 20 years with interest at 12% per annum by monthly instalments of CI$1,290. Title to Parcel 296H10 would pass once the final payment was made. D claim that at that time the parties entered into an oral agreement to pay the strata fees on the parcel.



[1] See paragraph 15 herein.
[2] It is agreed that although the First Agreement named D1 as the vendor, that the Agreement was being entered into by D1 on D2's behalf, and for his benefit, as the registered proprietor of the parcels. The bundle contains written agreements relating to the Parcels dated 28 June 2008, albeit signed only by P, which are consistent with the parties accepting that the contracting vendor is D2.

3. P entered into the Second Agreement[3] in July 1997 for a second property within the same strata development from D1, this time for the sum of CI$150,000 with CI$7,500 to be paid on execution of the Second Agreement and the balance of CI$142,500 over 20 years with interest at 12% per annum by monthly instalments of CI$1,321[4]. Title to this property would also pass once the final payment was made. This property is known as George Town Central Block 14C Parcel 296H11 ("Parcel 296H11"). D claim that at that time the parties entered into an oral agreement to pay the strata fees on the parcel.

The phrase "the Parcels" will be used when referring collectively to Parcel 296H10 and Parcel 296H11 herein. The phrase "the Agreements" will be used when referring collectively to the First Agreement and to the Second Agreement herein.

5. The purchases of the Parcels were both at preconstruction prices, with possession being upon closing[5] and with the provision of owner-financing over a lengthy period of time. By the end of the hearing it was accepted that it was also later agreed that P, as may be ordinarily expected of a purchaser who is occupying a property, would be responsible for paying the strata fees over the owner-financed period. After P had paid the deposits he commenced making the contracted payments including the strata fees.

6. Clause 6 in each Agreement, under the heading "Default", provided that the Defendants ("D") *"may at its option rescind"* that Agreement by written notice to P if P failed to

[3] P and D also entered into a third sale agreement for a third property and that agreement was fully honoured and the title transferred to P in 2005 after all contracted payments had been made.
[4] Pursuant to Clause 3 of the Second Agreement.
[5] Despite this provision appearing at Clause 5 of each Agreement and Clause 4 defining "closing" to be upon payment of the final instalment due on the purchase price and all interest thereon, P was able to occupy Parcel 296H10 on 1 July 2015 and Parcel 296H11 after payment of the relevant deposit but before closing.

complete that Agreement as provided for in Clause 3 of the Agreement and at the specified times. Clause 6 went on to provide that D may then:

> *"... forfeit and keep absolutely as liquidated damages the deposit hereof and all or any interest accrued thereon and may in addition keep absolutely out of any further sum paid by the (Plaintiff) such amount as is sufficient to compensate the (Defendant) for any work done to the Strata Lot by the (Defendant) at the request of the (Plaintiff) which involves a deviation from or amendment to that basic plan for the Strata Lots or any substitution requested by the (Plaintiff) in respect of the fixtures and fittings installed in the Strata Lot and no further right of action shall arise in respect thereof nor shall any party hereto have any further rights, demands, actions, claims for damages the one against the other and the (Defendant) may resell the Strata Lot and keep the full price absolutely."*

GRAND COURT
CAYMAN ISLANDS GOVERNMENT

7. Clause 6 provides that if the purchaser fails to complete the Agreement at the times and as provided for in Clause 3, the vendor may exercise its option to rescind the Agreement. All parties agree that the purchaser had failed to make the payments in compliance with Clause 3 and that the contract stipulates that time shall be of the essence. It is clear that, where time is of the essence a failure to pay one or more instalments of purchase money under a contract providing for payment on extended terms, the vendor will be entitled to rescind immediately the default occurs. If time is not of the essence, the mere failure to pay an instalment will not give the vendor a right to rescind. I will return to analyse the wording of this key clause later herein.

8. D state that P was provided with detailed "Interest Worksheets" showing the amortised payments of principal and interest on each parcel from the date of possession to the date of completion. If all the payments had been made as and when they fell due in relation to

(i) Parcel 296H10, the final payment for that parcel would have been on 1 July 2015, and (ii) in relation to Parcel 296H11, the final payment date for that parcel would have been 30 November 2017.

9. Regretfully, P failed to strictly adhere to the payment schedule, making sporadic and irregular payments on the Parcels which sometimes involved cheques being dishonored by the bank due to insufficient finds. P states that when he fell behind it was not from a *"desire to skip payment"*, but because he simply did not have the available funds. It is clear that he did not have the means to adhere to and complete the Agreements. P said that D2 would threaten to *"rescind the agreements"* as can be seen from; (i) D2's fax message of 17 August 2010 in which he said that *"the option of rescinding the two contracts will be looming"*; (ii) his message of 21 May 2010 when he referred to the *"remedy for default on our contract"*; (iii) his letter of 4 March 2015 when he stated that *"You are hereby served notice that you are in serious breach/default of contracts and agreement dates.... and are in the hands of an attorney pending litigation."* and; (iv) his fax message dated 15 February 2000 in which he stated that:

> *"It is with a very heavy heart that we have to refer to the contract and enforce #6 (Default) clause by using our option to rescind our agreement by this written notice as described. Contrary to what the contract states we are willing to give you back what you have paid into the shop. This means that you would be credited your down payment and principal paid up to January 2000."*

GRAND COURT
CAYMAN ISLANDS GOVERNMENT

10. P said at times the relations with D2 *"became very poor"* However, it is evident that there was an acceptance that D2 had been patient towards him. P's wife wrote in 15 February 2008 that she felt "*guilty*" about the payment situation and stated that:

"words cannot express the thanks and gratefulness in my heart for the way that you have helped us over the years."

The last payment of principal and interest in relation to Parcel 296H10 was made by P in February 2015. P has made principal payments of CI$110,747.47 and interest payments of CI$191,996.17 (total CI$302,743.63) in relation to that parcel. As of February 2015 a balance of CI$6,252 remained due towards the purchase price[6]. P completely stopped paying the strata fees on the parcel in February 2010, when P wrongly contended that there was no agreement for him to make those payments.

12. In relation to Parcel 296H11, P has made principal payments of CI$96,156.35 and interest payments of CI$194,530.39 (total CI$290,686.74). P completely stopped paying the strata fees on this parcel in February 2010, when P wrongly contended that there was no agreement for him to make those payments.

13. By April 2016 P was behind payment in relation to both Parcels. No payment had been made by P towards Parcel 296H10 for 14 months, no payment towards the strata had been made since 2010 and the payments on Parcel 296H11 were sporadic and not made when as and when they fell due. In March 2016 P had received an offer to purchase the Parcels from another owner in the strata complex, with closing due on 8 April 2016. P offered that, if permitted to sell the Parcels, he would, upon closing, pay all the sums

[6] Excluding interest and any late charges.

owed under the contracts to D and "*a portion*" of the strata fees. D2, as he was arguably entitled to do in law especially when there was an unresolved dispute about the responsibility for P to pay strata fees, refused to accept this offer.[7] By letter dated 29 March 2016 P's attorney wrote to D threatening legal action if consent to the sale was not forthcoming within 7 days. By letter dated 11 April 2016 P's attorney, with reference to a letter from D2 dated 31 January 2014, stated that to prevent the need to apply to Court to obtain an order for the sale of the Parcels, agreement could be reached on the conditions set out therein by D2.

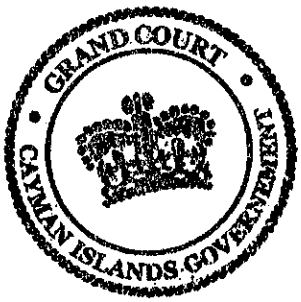
14. P sent a cheque "*for all*" he "*could afford*" to D in the sum of CI$1,321 towards the principal and interest on Parcel 296H11.

15. With the backdrop of P threatening legal proceedings to force the sale of the Parcels, as P had regularly failed to make the Clause 3 payments and strata payments as and when they fell due on each parcel, with no payments having being made since February 2015 on Parcel 296H11, D formed the view that P was unwilling and/or unable to comply with his contractual obligations. D contends that P, due to the nature of his payment history, had fundamentally breached the contracts, thereby enabling D to treat the contracts as repudiated. He said that, as a consequence, an email was sent by D2 to P on 18 April 2016 in the following terms:

GRAND COURT CAYMAN ISLANDS GOVERNMENT

"It would appear that you do not fully grasp the concept of breach of contract. Your after-the-fact payment, even if it were accepted (which is being sent back to you) still leaves you in breach/default of both our sale agreements. Accordingly, we are NOT accepting any further payments on

[7] D2, by email dated 4 March 2016 , expressed a willingness to allow the sales to go through, but only if it was accepted that he would be paid the amounts specified therein which he said were due to him.



either #10 (which you stopped payments on and are fourteen months behind) or #11 in which you habitually pay months late). Therefore I will post a check back to you if you make future default payments. The attached check has been mailed back to National House Bakery today."

16. P contends that D, by the 18 April 2016 email and conduct thereafter, have rescinded the two Agreements, as they are empowered to do under Clause 6 in each Agreement. P submits that the words '*rescission*" used in Clause 6 is intended to refer to termination for repudiatory breach. Accordingly, on 28 April 2016, P's attorney wrote to D in reply to the email stating that:

> "*Whilst not explicitly referenced it is clear that you have invoked clause 6 of the Agreements by rescinding the agreements by written notice.*"

In the letter P's attorney formally demanded forthwith payment of all monies paid by P under the Agreements less deposits paid. P claimed that these amounts totaled approximately CI$594,067.80. In the letter P stated that, although Clause 6 permitted D to rescind the Agreements, it did not entitle them to keep "*all principal sums*" paid by P under the Agreements.

Background - The Pleadings and the Proceedings

17. In light of the above, P issued his Originating Summons on 24 May 2016 in which he sought a declaration that the Agreements had been rescinded by D2's email sent 18 April 2016. P also sought an account of and payment of all sums due and owing pursuant to Clause 6 in each of the Agreements as a consequence of the termination and sought interest on all sums found due and owing from the date of the said email.

18. Having regard to issues raised by D, on 10 February 2017, the parties agreed that the claim should be treated as if brought by Writ. P's Statement of Claim was filed on 29 March 2017.

19. D filed their Defence and Counterclaim on 21 April 2017. D pleaded that P's persistent breaches of the Agreements amounted to fundamental breaches of the contracts and amounted to a repudiation of each contract by P which entitled D, on acceptance to be discharged of all further obligations under the contracts, to treat the contracts as being at an end and, in respect of each contract, to claim damages for breach of contract. D pleaded at paragraph 15 that "*by written notice*" they accepted P's repudiation of each contract and that D treated each of them as having been terminated. D counterclaimed for:

> "*... interest on the instalments due up to the termination date: late fees outstanding up to the termination date; outstanding strata fees due and unpaid up to the date of delivery up of possession: mesne profits equivalent to the commercial rent payable on the shops, from the termination date to the date the Plaintiff delivers up possession: orders of possession of the shops and for the removal of cautions against the land registers*[8]*; a right to set-off the sums due to the Defendant against the sums due to the Plaintiff.*"[9]

20. P filed his Defence to the Counterclaim on 17 May 2017.

[8] See paragraph 21 below.
[9] Paragraph 19 D's Written Opening Submissions.

21. P, despite contending that the Agreements had been rescinded by D pursuant to Clause 6, remained in occupation of the Parcels resulting in a Summons for vacant possession[10] and for the removal of two registered cautions[11] being issued by D on 19 May 2017. By a Consent Order on 20 October 2017, P was ordered to deliver up vacant possession of the Parcels on or before 30 November 2017 (extended later to 31 January 2018) and the Registrar of Lands was directed to register a discharge of the cautions.

22. The final hearing with oral evidence took place on 7 and 8 February 2018. The matter was adjourned for this reserved written judgment to be delivered following the receipt of further written submissions which were received from the parties by or on 12 February 2018. Unfortunately, this Judgment is longer than I would have wished it to be. However, as this appears to be the first time that the Grand Court has been asked to consider issues arising from the default in the sale of land in an instalment contract case, it is hoped that the wider analysis of the general principles and the law may prove to be of assistance if there are any similar cases in the future.

23. On 20 June 2018 the Court wrote to both parties. Firstly, the Court found it necessary to seek further clarification from the parties about the effect of the wording at the closing part of Clause 6 in the Agreements. Secondly, the Court felt it appropriate to provide the parties with an article written by John Toohey[12] in 1964 entitled "Default in the Sale of Land" and an extract from pages 484 to 514 Edition 1 Voumard: Sale of Land "Chapter

[10] On 20 October 2017 Carter J. approved a Consent Order for P to deliver vacant possession of the properties by 30 November 2017. That date was extended by consent on 30 November 2017 and finally on 24 January 2018 until 31 January 2018 upon payment of a fixed monthly rent.
[11] P had cautions in his favour placed on the parcels at the Land Registry on 1 October 2009 when he discovered that D2 was borrowing money secured on the complex.
[12] Barrister and solicitor of the Supreme Court of Western Australia.

XII, Breach of Contract and the Remedies Therefor".[13] Although both of these extracts relate to the approach in Australia, an opportunity for comment upon the content was given to the parties, especially as the Cayman Islands, by enactment of the Registered Land Law in 1971, adopted the Torrens title system that is used in and originated in Australia. Mangatal J. in her judgment delivered in the Supreme Court of Jamaica (a country which has also adopted the Torrens system) in the case of ***Jamaican Redevelopment Foundation Inc v The Real Estate Board and The Registrar of Titles*** HCV 5152 of 2009 recognised the potential usefulness of the analysis conducted by the authors in the highly regarded Voumard when considering issues of dispute arising out of the sale of land. At the outset of the hearing I had made some reference to the parties about the case law in Australia. The written comments prepared by the parties were received on 10 July 2018.

The Termination of the Agreements and the Issues Arising From It

24. Both parties agree that the Agreements were terminated on 18 April 2016. P accepts that the failure to pay the purchase price on time was "*inconsistent with the continuation of the contract*" and that his breaches of the contract were repudiatory.[14] In these circumstances I find that the two contracts have been validly terminated.

25. However, the parties do not agree what legal analysis is applicable to the termination by D's email of 18 April 2016 and what consequences flow from that termination.

[13] The chapter was referenced at footnote 83 in the John Toohey article written in 1964.
[14] Paragraph 10 of P's Written Opening Skeleton Argument and paragraph 1 of P's Written Closing Submissions.

P's Submissions in Relation to the Legal Analysis Applicable to the Termination

26. P states that that word "rescission" is often seen in contracts of sale in the context of termination for breach and that in Clause 6 it was intended to refer to termination for repudiatory breach. P rightly does not suggest that rescission used in Clause 6 was intended to result in *rescission ab initio,* which would have put the parties back to the position they were in prior to entering each Agreement. The Clause did not include the type of wording along the lines of *"... as if this agreement had never been entered into"* which may be found in agreements where the parties expressly agree that they intend the contract to provide for a recession operating *ab initio*.

27. P submits that there is nothing in the Agreements that suggests that D had an option to terminate for the breach, save than by the means set out in Clause 6. P argues that, in the absence of any other provision in each Agreement, Clause 6 sets out the only intended mechanism by which contracts could be terminated for a breach for failure to complete. P therefore contends that, although he accepts that each contract was terminated for repudiatory breach,[15] it is wrong for D to state that they had a choice either to rescind the contract under Clause 6 or to terminate for repudiatory breach.

28. P claims that D, by taking the option to terminate the Agreements by means of D2's email dated 18 April 2016, were thereby electing to exercise their right to *"rescind"* found in Clause 6 in each Agreement. P submits that D2's email could only properly be regarded as being written notification given in accordance with Clause 6. P argues that D followed the procedure set out in Clause 6 when he sent the 18 April 2016 email, and as a consequence Clause 6 sets out what consequences flow from the termination.

[15] Paragraph 17 of P's Written Opening Skeleton Argument.

P's Submissions in Relation to the Consequences that Flow from the Termination

29. P correctly states that, due to the termination, the Parcels were no longer being sold to him and the transfer of the Parcels will not occur and as a consequence the consideration in the contracts has totally failed.

30. Although neither Agreement made any specific mention of what should happen to the interest payments made by P, save for the interest on the deposits, P contends that provisions in each Agreement, including Clause 6, were intended to cover the parties' dealings relating to the sale/purchase of each parcel, including the principal sum and interest.

31. Clause 6 makes clear that the deposit and interest thereon are non-refundable, but does not provide that any other payment by P is non-refundable. Neither Clause 6 nor any other Clause in the Agreements contain a forfeiture provision permitting the vendor to retain instalment payments. Such provision may sometimes be found in sale of land contracts by the use of wording along the lines of:

"The purchaser agrees that if the purchaser fails to comply with any provision of this contract and the vendor elects to terminate the contract, then in addition to any other remedy available to the vendor, the vendor may retain all of the instalments (including interest) paid or payable by the purchaser up to the date of termination as compensation to the seller for the purchaser's use and occupation of the property."

If the parties had intended there to be a departure from the position in common law as regards the return of instalment payments to the purchaser, then a clause similar to this example would have been in the Agreements. P correctly states that the fact that the

Agreements specifically provide that the deposit and interest are not to be refunded indicates an intention that any other payment made are to be refunded.

32. Clause 6 provides for compensation for the vendor (D), namely for work done by the vendor (D) to the specific parcel at the purchaser's (P) request. It also provides that the vendor (D) may resell the Parcels and keep the proceeds from that. P rightly adds that the term in Clause 6 permitting D to keep "*such an amount as is sufficient to compensate the Vendor for any work done to the Strata Lot by the Vendor*" would only make sense if it could be deducted from the instalment sums that D were obligated to return to P.

33. In his Written Response dated 10 July 2018, P contends that the purpose of the wording at the final part of Clause 6 was to make clear that it was not possible for a party to recover consequential losses arising out of a failure to complete the contract. P states that the wording in the clause means that any recovery for breach is that set out in the Agreement. That said, P contends that does not preclude the recovery of the purchase price and interest. P states that this is because (i) the deposit paid by the purchaser is expressed to be non-refundable, thereby envisaging that other payments made by the purchaser are refundable; (ii) the entitlement of the vendor to keep sums to compensate for work done by him only makes sense if it was intended that the vendor had to return the amounts paid by the purchaser subject to this deduction being made; and because (iii) it would be "*deeply unattractive*" and "*commercially absurd*" if the vendor could keep all the sums paid by the purchaser and in addition keep all the proceeds from the reselling of the parcel.

34. In support of his contention that the Agreements regulate the rights and remedies available to the parties P refers to page 425 in the article written by John Toohey[16], where the author states:

> *"What has emerged from this paper, I hope, is that in certain respects the law has been unable to make adequate safeguards in this part of the field of vendor and purchaser relationships. The difficulty facing the courts is that this relationship is usually regulated by a formal contract albeit one on a printed form and there is a limit to how far the terms of the contract can be ignored or over-ridden."* [My emphasis]

35. P correctly states that the common law position is that if, as is the case here, in the contract of sale there is no express or implied forfeiture clause, and the vendor terminates the contract upon the purchaser's default, the purchaser may recover any prepayment or instalments paid in part payment of the price. With this in mind, P submits that, it matters not whether one characterises the termination as a rescission or termination on repudiatory breach, as neither scenario, in the absence of forfeiture provisions in the Agreements, alters the common law position relating to the purchaser recovering the money (including the interest payments) paid over by him in part performance. P contends that, for the purposes of recovery of payments made to D, one cannot separate the principal and interest payments made by him as they are both a part of the contractual bargain. In support of this contention, P reiterates that the parties had put their mind to the issue of interest, as illustrated by Clause 6 permitting the interest accrued on the deposit to also be retained as liquidated damages whilst containing no similar forfeiture provision in relation to the other interest. Accordingly, P claims that both the principal and interest payments should be returned to him.

[16] See paragraph 23 above.

GRAND COURT CAYMAN ISLANDS GOVERNMENT

36. It appears from a letter from P's attorneys dated 27 September 2017 that P "*acknowledges*" that D are entitled to also recover the following:

(i) Interest on the balance of the purchase price after 1 April 2016.[17]

(ii) Outstanding late fees[18].

(iii) Outstanding strata fees (subject to verification of the figure claimed and any sums being statute barred)[19].

(iv) Mesne profits for P's occupation of the properties between 18 April 2016 (the expiry of P's legal right to occupy the two Parcels) and P vacating the properties[20]. The CI$2,400 figure for mesne profits suggested by D was not agreed in the letter.[21] In P's Opening Written Submissions it is contended that CI$1,500/month is the appropriate market rent figure for the properties, as this is the same rate that P is renting his property at in the complex.

(v) The deposits of $3,000 and $7,500.[22]

(vi) To now sell or lease the properties as he sees fit.

D's Submissions in Relation to the Legal Analysis Applicable to the Termination

37. D agree that the Agreements were terminated, but not by any rescission by them under Clause 6, but by repudiation arising out of D2's acceptance of P's repudiatory breaches of contract. D contend that D2's 18 April 2016 email was not "*an invocation*" by D2 of Clause 6 in the Agreements, but was simply a taking up of an option to accept P's

[17] See paragraph 57 below for agreed figures.
[18] Due to the sum s involved *"P concedes these sums on a pragmatic basis and without any admission of any liability with regard to the other claims made"* – see paragraph 35 P's Written Opening Skeleton Argument. - see paragraph 57 below for agreed figures.
[19] Confirmed by P at paragraph 24 of his First Witness Statement re-signed on 7 February 2018 and paragraph 36 P's Written Opening Skeleton Argument. – see paragraph 57 below for agreed figures.
[20] Confirmed by P at paragraph 30 (c) of his First Witness Statement re-signed on 7 February 2018.
[21] D2 states that the rent being paid for such a property in the complex is in the region of CI$2,400 per month.
[22] Confirmed by P at paragraph 31 of his First Witness Statement re-signed on 7 February 2018.

repudiatory breaches of contract. D contend that on its plain reading Clause 6 provided the vendor (D) with an option to rescind the relevant Agreement by written notice, but did not restrict them from terminating by repudiation.

38. D, placing reliance upon Lord Hoffman's restatement, at paragraph 14 in ***Chartbrook Ltd and another v Persimmon Homes Ltd and another*** [2009] 1 AC 1101, of the principles set out by the House of Lords in ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** [1998] I WLR 896, 912-913, contend that, when interpreting Clause 6 in each Agreement and considering its effect, one should have regard to what a reasonable person informed by the available background knowledge would have understood it to mean. D highlighted Lord Neuberger's following guidance given at paragraph 19 in ***Marley v Rawlings*** [2015] AC 129:

> *"When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions."*

39. D state that the Clause 6 sets out how the vendor must exercise the option to rescind, and that this includes providing express written notice of his invoking of the clause and that all he seeks to do is forfeit the deposit to the purchaser. It is submitted that D did not do this by the sending of the email on 18 April 2016. D states that the content of the email did not meet the requirements of a notice and that the language used by D2 therein was not such to show an assertion of the Clause 6 rights. However, I note that Clause 6 does

not set out any formal requirements for the notice, simply requiring that it be a "written notice."

40. D highlight that the email "*written notice*"[23] to P dated 18 April 2016 made no mention of the term rescinding[24]. I note that the notice made no specific mention of the word repudiation. Upon reading the email, it is evident that D2 therein refers to the "*concept of breach of contract*" and to P remaining "*in breach/default of both of our sales agreements*." D2 goes on to say that the received cheques and any future cheques will be returned. When reading this email what is clear is that D2 was not intending to rescind the contract in the traditional sense, as he was not seeking to restore the parties to be in the same position that they were before the Agreements were made. What is clear from the email is that D2 had concluded that P was in breach of the Agreements. It is clear from the email that D2 was no longer going to accept cheques and thereby he was terminating the contract for breach, albeit without using the term repudiation or rescission for the termination.

41. When considering D's surrounding conduct when determining whether D2 intended to invoke the option in Clause 6, I note that, when P wrote to D2 on 28 April 2016 highlighting that although *"not explicitly referenced"* D2 had invoked Clause 6 of the Agreements by rescinding the agreements by written notice, surprisingly no reply was given in writing refuting that contention or seeking to make clear the intended nature of the termination. In fact, on the papers placed before the Court, the first mention of the termination being by *"renunciation"* (rather than by rescission) by D to P was over 9

[23] Paragraph 15 of the Defence and Counterclaim.
[24] Unlike D2's faxes dated 17 August 2010 and 15 February 2000 – **see paragraph 9** above.

GRAND COURT
CAYMAN ISLANDS GOVERNMENT

months later in a letter dated 9 February 2017 from D's attorney despite D's attorneys filing D2's Acknowledgment of Service on 26 August 2016 and D1's Acknowledgment of Service on 26 September 2016. The Originating Summons in which P reiterated his contention that the contract had been rescinded by the 18 April 2016 email had been served on D1 by registered mail to its registered office on 24 May 2016.

42. D argue that the signed First Agreement and Second Agreements did not record the terms of the "*owner-financing agreement*", especially in relation to what would happen if there was a default of the interest and principal payments. It is submitted that it would be "*absurd*" to interpret that the intention of Clause 6, which it is contended made no mention of the rights of the parties arising from a default of principal and interest payments, was for it to govern every situation where D sought to exercise a right in relation to non-payment of the instalments. D contend that Clause 6 does not exclude any of the remedies available to D under the general law. As a consequence, it is argued by D that they, as the vendors, in light of the repudiatory breaches by P, did not need to invoke Clause 6 in order to terminate the contracts, adding that upon terminating the Agreement they could seek other remedies on any other ground on which they are entitled at common law or in equity.

D's Submissions in Relation to the Consequences that Flow from the Termination

43. By the close of the hearing, D were contending that the issues remaining for determination following the termination were (i) what portion of the monies received by them are recoverable by P, and (ii) what is the appropriate commercial rent P should pay

GRAND COURT
CAYMAN ISLANDS GOVERNMENT

to D as mesne profits for his use and occupation of the properties following the date of termination of agreements to the date of delivery up of possession.

44. D contend that a distinction exists between the type of case that is before me and the type of case where the contract contains a forfeiture clause. D state that the approach to be taken in each instance is the one advocated by Denning, L.J. in ***Stockloser v Johnson*** [1954] 1 QB476 at 486:

> *"It seems to me that the cases show the law to be this. (i) When there is no forfeiture clause. If money is handed over in part payment of the purchase[25] price, and then the buyer makes default as to the balance, then, so long as the seller keeps the contract open and available for performance, the buyer cannot recover the money, but once the seller rescinds the contract or treats it as at an end owing to the buyer's default, then the buyer is entitled to recover his money by action at law, subject to a cross-claim by the seller for damages: see Palmer v Temple, Mayson v Clouet, Dies v British & International Mining & Finance Corpn Ltd, and Williams On Vendor And Purchaser, 4th ed, vol 2, p.1006. (ii) But when there is a forfeiture clause or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause), then the buyer who is in default cannot recover the money at law at all. He may, however, have a remedy in equity, for, despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on such terms as the court thinks fit..... In a proper case there is an equity of restitution which a party in default does not lose simply because he is not able and willing to perform the contract. Nay, that is the very reason why he needs the equity. The equity operates not because of the purchaser's default, but because in the particular case it is unconscionable for the seller to retain the money."*

GRAND COURT
CAYMAN ISLANDS GOVERNMENT

[25] My emphasis by underlining.

45. D submit that the situation in the matter before me is consistent with the second part of the first limb outlined by Denning L.J. in ***Stockloser*** as there is no forfeiture clause[26] and they, as vendors, have treated the contracts as being at an end due to P's default. D claim that as fundamental breaches have occurred due to P's persistent breaches, they are entitled to sue for damages which arose before the termination on 18 April 2016 and these include outstanding interest and late fees to the date of termination.

46. D submit that too much reliance has been placed by P on Clause 6. D argue that Clause 6 simply provides and reiterates the principle that there is a right to retain a reasonable deposit and interest thereon as liquidated damages.

47. As already mentioned, D's main contention is that Clause 6 is not determinative of D's rights and does not exclude any of the remedies at common law and in equity which are available to them under the general law as a consequence of P' repudiatory breaches of the Agreements. D contends that he has elected to discharge his future obligations under the contract, using the breaches by P as his justification, and reserves his right to sue for damages for breach. Therefore it is contended that the principles under the general law still apply. Reliance is placed upon the extract of Voumard[27] at page 501 where the authors state, when commenting upon a similar clause in a statute (albeit a clause without the '*no further action*" wording seen in Clause 6), as follows:

> "*Such a clause does not take away from the vendor or in any way restrict the right, which according to general legal principles, he would have apart from it upon a breach by the purchaser of the contract.*"

[26] For example, similar to the one set out in paragraph 7 herein.
[27] See paragraph 23 below.

GRAND COURT
CAYMAN ISLANDS GOVERNMENT

46. In their Further Written Submission filed on 10 July 2018, when addressing P's contention that the latter part of Clause 6 was intended to make clear that it was not possible to recover consequential losses as a result of a failure to complete the contract, D contend that, due to the wording "*in respect thereof*", the correct interpretation of Clause 6 is that it is referring to rights of action arising from the forfeiture of P's deposit, interest on the deposit and payments made to compensate the vendor for work done upon rescission of the contract pursuant to the clause. It is suggested that the word "*thereof*" relates to the exercising of the option to rescind in accordance with and pursuant to Clause 6. D argue that the words in the clause only apply to the rights specified in that earlier part of the clause. D claim that if their interpretation is wrong, then Clause 6 would operate as a bar to P's claim for relief or remedy arising from D's exercise of their option to rescind provided by the clause.

GRAND COURT
CAYMAN ISLANDS GOVERNMENT

47. D accept that the principal payments made under the Agreements should be repaid. D dispute P's claim for recovery of the interest paid pursuant to the Agreements. D contend that P's interest payments were not a part payment of the purchase price, but were made pursuant to the arrangements for D's financing of the purchase price. D argue that the interest payments constitute compensation to D for providing the financing and are compensation for being deprived of the use of the premises over the amortisation period. At paragraph 18 in D's Written Closing Submissions, D added that P has derived a benefit from the payments. The "*value*" received for the payments is set out at paragraph 50 of D's earlier Written Opening Submissions, namely, P's use and occupation of the property for the duration of the amortisation period. Therefore, even in the absence of a forfeiture clause permitting the retention of the instalment payments, D contend that the

common law position, outlined in paragraph 35 herein, which enables a purchaser to recover any prepayment or instalments paid in part payment of the price does not apply to the interest payments made.

48. D contend that the extracts from the John Toohey article and from Voumard which are later anlaysed herein "*are accurate statements of the applicable principles and completely support*" their case concerning their retention of the interest payments.

49. During oral closing submissions, Counsel for D was asked by the Court what amount should be refunded to P if the Court found that the Agreements had been rescinded by D pursuant to Clause 6. At that time Counsel conceded P would then be entitled to the return of principal and interest.

50. However, Counsel then filed a Written Supplement to his Closing Submissions on 9 February 2018 in which he retracted his concession, contending that under the proper construction of the Agreements P would only be able to recover the balance of the principal payments made by him towards the purchase price. In support of his revised position Counsel pointed out that Clause 3 of the Agreement in relation to Parcel 296H10 states that the:

"*total purchase price of the Strata Lot will be the sum of CI$120,000*"

and that Clause 3 of the Agreement in relation to Parcel 296H11 states that the:

"*total purchase price of the Strata Lot will be the sum of CI$150,000.*"

Counsel then highlighted that interest is not included in the balance figure set out in Clause 3(b) and contended that it was therefore intended to be an amount payable in

addition to the balance to compensate D for being kept out of the balance of the purchase price until the balance was cleared.

51. Counsel for D contended that, when considering Clause 6, the wording that D may:

> *"...keep absolutely out of any further sum paid by the purchaser sufficient to compensate the vendor for any work done to the strata lot..."*

is specifying that further amounts in addition to the deposit may be deducted from the amount to be paid to P. Counsel added that the words "*any further sum paid*" relates to the balance sum set out in Clause 3(b) in the Agreements, and as interest is not defined as being part of the balance, those payments are not included. Counsel submits that this supports a submission that the interest is intended to be compensation for D.

52. P, on the other hand, counters that the reference in Clause 6 to a failure to complete the agreement relates to a failure to perform the purchaser's duty found at Clause 3, which includes at Clause 3 (b) payment of the interest and principal. P also argues that Clause 6 when using the term "*at the times*" found in Clause 3, is clearly referring to monthly payments of interest and principal set out in Clause 3 (b).

53. Counsel for D completed his revised submissions by reiterating, for the avoidance of doubt, his contention that if the Court were to find that the Agreements were terminated by D's acceptance of repudiatory breaches by P, then the same situation would arise and interest could not be regarded as being part of the purchase price that is required to be refunded to P.

GRAND COURT CAYMAN ISLANDS GOVERNMENT

54. D had originally pleaded, as an alternative, compensation from P by means of mesne profits for his occupation of each parcel from the date of him taking possession to the date of him vacating. At the close of the case, as clarified in the most helpful Further Amended Schedule of Loss and Damages dated 9 February (2018) prepared by Counsel for D, D made clear that he was no longer pursuing this alternative claim for an occupation rent.

Areas of Agreement and Mesne Profits

55. D rightly seeks, and P does not oppose, the retention of the deposits paid and interest thereon. In ***Stockloser***, Denning L.J. said at 490 that if money was expressly paid as a deposit, that was "*equivalent to a forfeiture clause*." A deposit is a part of the purchase price, but it is also a guarantee for the performance of the contract. It is sound legal principle, on the authority of ***Howe v Smith*** (1881) 27 Ch. D. 89 and reiterated by Lord Browne-Wilkinson's statement at 578 in the Privy Council decision (on appeal from Jamaica) ***Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd*** [1993] A.C. 57, that, generally, reasonable deposits paid to secure the performance of a contract are forfeitable where the purchaser breaches the agreement. P did not seek a remedy in equity to relieve him from forfeiture of the deposit and recovery of the same. This is so whether or not there is a forfeiture clause. P, accepting that the size of each deposit means that it should not be regarded as being a penalty, agrees to their retention by D.

56. D, pursuant to oral agreements made between the parties for P to pay them whilst in occupation of the Parcels, also claim for strata fees paid by D and for the outstanding strata fees. This is not a surprising or unusual arrangement, as a purchaser, whilst in

occupation of the relevant property under an instalment sale contract, would ordinarily be expected to meet the running costs of that property. In contracts that are to be performed over a substantial period of time, often a purchaser will be required to enter into certain covenants in respect of the land. Common obligations might well be to pay strata fees, rates and taxes if in England and Wales and insure the property. As earlier mentioned, this is now agreed by P, as are the figures for the same which are set out in paragraph 57 below.

57. By the end of the hearing the parties had been able to narrow down the issues by reaching considerable agreement as to what amounts were due in CI$ to D on Counterclaim. These are as follows:

A.	**<u>Parcel 296H10</u>**	
(i)	Outstanding late fees	934.00
(ii)	Interest on 934 at Court Funds rate, (2.375% pa from 19/04/16 to 7/02/18 - 0.6 per day for 660 day)	39.60
(iii)	Interest on 3,000.96 at Court Funds rate, (2.375% pa from 19/04/16 to 17/02/18 - 0.19 per day for 670 days)	127.30
(iv)	Strata fees paid by D from 31/01/14 to 22/07/14	17,593.17
(v)	Outstanding strata fees from 31/07/14 to 18/04/16	9,815.59
	Agreed sub-total of amounts due to D on this parcel	**<u>28,509.66</u>**
B.	**<u>Parcel 296H11</u>**	
(i)	Outstanding late fees	2,229.00
(ii)	Interest on 2,229 at rate 2.375% pa from 19/04/16 to 7/02/18 - 0.14 per day for 660 days	92.40
(iii)	Strata fees paid by D from 31/01/14 to 22/07/14	17,642.46

(iv)	Outstanding strata fees from 31/07/14 to 18/04/16	9,823.78
	Agreed sub-total of amounts due to D on this parcel	**29,787.64**
	Agreed sub-total of amounts due to D on both parcels	**58,297.30**

58. **Accordingly, I order that CI$58,297.30 should be deducted and retained by D from any sums that are ordered returnable to P.**

59. Although the parties agree that D is entitled to mesne profits from 19 April 2016 to 30 November 2017 (19 months) on each parcel, they cannot agree the rate.

60. D has provided a comprehensive valuation report dated 15 December 2017 prepared by Uche Obi, MA FRICS, a chartered valuation surveyor with DDL Studio. I have also had the benefit of hearing Mr. Obi's oral evidence. Mr. Obi helpfully conducted a comparable method approach when ascertaining the market rental value. He referenced units within the same complex and others nearby when reaching a conclusion that the market value for Parcel 296H10 is CI$1,985/month and for Parcel 296H11 is CI$2,015/month. When I compare Mr. Obi's detailed and informed analysis with P's evidence and valuation of CI$1,500/month based on his analysis of the physical lay-out of the Parcels and the fact that he obtains $1,500/month for his unit in the complex, I prefer the evidence submitted by D.

61. I find that the level of mesne profits should be CI$1,985/month for Parcel 296H10 and CI$2,015 for Parcel 296H11. The total amount of mesne profits for Parcel 296H10 amount to CI$38,508 and for Parcel 296H11 they amount to CI$39,090.99. **Accordingly,**

I order that a further CI$77,598.99 should be deducted from the sums that are returnable to P.

Analysis of the Remaining Contested Issues in Light of the Parties above Positions

1) The termination of the Agreements - rescission/repudiation - interpretation and effect of Clause 6

62. It is rightly conceded in this case by P that his breaches of the Agreements are repudiatory. Even if a person wished to perform their contract, but due to lack of finance was unable to do so, a party may still treat this as a repudiation and a discharge of the contract.

63. In the past there has been confusion caused when determining what rescission actually means in cases similar to the one before me. In the cases one sees the word "rescission" being used in a number of different ways and having different meanings. The traditional primary use, when applied to contracts, conveys the idea of an avoidance *ab initio,* treating the contract as if it had never been. If this occurs, then one can no longer claim to treat the contract as subsisting and therefore cannot recover damages for its breach. There is a distinction between that usage and a second type, which P contends is what D did in this case, namely where a party treats the contract as discharged by breach elects to discharge his future obligations under the contract. In such a situation the phrase "*rescind*" is used more loosely, as it is in reality a discharge by breach. There are instances where a party might refer to a situation as "rescinding" the contract, when it is in fact and in law a case where there has been a repudiatory breach of contract and a party has declared the contract to be at an end. This latter use comes about usually by the insertion in the contract of a default provision conferring on a party the right to determine

the contract upon the happening of certain events. Upon the determination of an agreement pursuant to a condition of this nature, the rights of the parties will depend on the construction of the contract. If P is correct about the purpose of D2's termination email, in the matter before me, the relevant provision is the right expressly provided for in Clause 6 to D to "*rescind*" upon P's default of payment as required in Clause 3.

64. The different use of the word rescission is helpfully set out in statements of principle in The Law of Rescission (2nd ed., 2014, O'Sullivan et al) paragraph 1.01. Although the parties did not refer to this text, the principles are not controversial and I see merit in repeating them herein:

> *"The term 'rescission' is often and confusingly used to describe two quite different ways in which a contract may be brought to an end. One form of 'rescission' is found on a defect in the formation of the contract, arising by reason of fraud, duress, undue influence or other invalidating cause. The defect affects consent and entitles one of the parties to extinguish the agreement as from the beginning or ab initio. But a contract may also be brought to an end by reason of the other party's later non-performance or defective performance, or because it has become frustrated: the contract was properly formed, but then not carried out in accordance with its terms. When a contract is 'rescinded' for breach or frustration in this way it is terminated only in respect of future rights and obligations or de futuro.*

65. The authors continue at paragraph 1.08:

> *"In England this distinction was fully elaborated only in the second half of the twentieth century. Misconceptions that culminated in the decision in Horsler v. Zorro prompted some of the clearest extra-judicial explanations of the nature and basis of the distinctions. Eventually the law was*

definitively restated in Johnson v. Agnew. The divide between termination ab initio and de futuro is also recognised in Canada, Singapore and Malaysia.

.....

It is now accepted that it is the character of the event that confers the right to terminate which is of decisive importance in explaining the entitlement to termination ab initio and de futuro. In the case of termination ab initio there is a defect in the formation of the contract whereas termination de futuro involves a later defective performance or impossibility of performance. Hence it is said the contract in the former case can be undone from the start whereas in the latter it can only be truncated for the future."

66. Again the authors state at paragraph 1.20:

"A contract terminated by one party for the other's breach or repudiation, or terminated automatically by reason of frustrating events is terminated de futuro or for the future. The prospective nature of termination de futuro means that although obligations that would have fallen due after the date of termination are extinguished, thus discharging the party from the need to perform them, rights and obligations that have unconditionally accrued prior to termination remain enforceable. Unpaid deposits and certain kinds of instalment payments are the most common examples."

67. The authors then go on to state at para 1.22:

"Rights to contractual damages survive termination for breach or frustration. Both parties remain liable to pay damages for any prior breaches and where the contract is terminated for breach the defaulting party is also obliged to pay damages to compensate for the other party's loss of the bargain."

68. The consequences when a contract is brought to an end by the acceptance by one party to it of a repudiatory breach of contract by the other party were illustrated by Dixon J.'s statement of principle in the High Court of Australia case of ***McDonald v Dennys Lascelles Ltd*** (1933) 48 C.L.R. 457, 476-477[28]. The question for determination by the High Court was whether a guarantor of the obligations of a purchaser under a terms contract was liable following the termination of the terms contract by the vendor for the purchaser's default for an unpaid instalment of the purchase price. The guarantors contended, first, that upon the termination by the vendor of the contract of sale, the contract was cancelled *in futuro*. Since there would be no transfer or conveyance of the subject real property, the obligation to pay the outstanding instalment of the purchase price came to an end. Next, they contended that their obligation as guarantors was secondary, only, and the termination of the purchaser's obligation to pay the instalment, likewise, terminated the guarantors' obligation. The Court accepted both of these contentions (Evatt J. dissenting). Dixon J. stated that:

> *"When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected.*
>
> *When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be, to the position they occupied before the contract was made. But when a contract, which is not void or voidable at*

[28] In ***McDonald*** a purchaser "rescinded" for his vendor's breach.

law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach...." [My emphasis by underlining]

69. This passage from ***McDonald*** has been expressly approved by the House of Lords in ***Bank of Boston Connecticut v. European Grain and Shipping Ltd.*** [1989] A.C. 1056, 1098-1099 by Lord Brandon of Oakbrook and by Lord Wilberforce in ***Johnson v Agnew*** [1980] A.C. 367 (HL). Lord Wilberforce at page 396 in ***Johnson***, when considering the right of an innocent party to a contract for the sale of land to damages on the contract, approved the "*attractive*" and "*logical approach*" of Dixon J.

70. In ***Johnson*** at 392, Lord Wilberforce considered the options available to a vendor in a contract for sale of land when repudiation arises due to a failure to complete by the purchaser. Lord Wilberforce when advocating a departure from what he termed to be a "weak" line of English case authorities and expressing a preference for the approach taken by Dixon J. in ***McDonald*** stated at 396D:

"This is however the first time that this House has had to consider the right of an innocent party to a contract for sale of land to damages on the contract being put an end to by accepted repudiation."

Lord Wilberforce highlighted the distinction between rescission *ab initio* arising from an allegation about a defect in the formation of the contract and cases where, although parties might in fact refer to a situation as *"rescinding"* the contract, it is, in fact, and in law, a case where there has been a repudiatory breach of contract and the parties (or the courts) have declared the contract to be at an end. Lord Wilberforce stated that in the

latter case, where the contract is at an end, that does not bring about rescission *ab initio* and a party can indeed claim for damages for breach of contract. Lord Wilberforce stated at 392:

> *"In this situation it is possible to state at least some uncontroversial propositions of law.*
>
> *First, in a contract for the sale of land, after time has been made, or has become, of the essence of the contract, if the purchaser fails to complete, the vendor can either treat the purchaser as having repudiated the contract, accept the repudiation, and proceed to claim damages for breach of the contract, both parties being discharged from further performance of the contract; or he may seek from the court an order for specific performance with damages for any loss arising from delay in performance. (Similar remedies are of course available to purchasers against vendors.) This is simply the ordinary law of contract applied to contracts capable of specific performance.*
>
> *Secondly, the vendor may proceed by action for the above remedies (viz. specific performance or damages) in the alternative. At the trial he will however have to elect which remedy to pursue.*
>
> *Thirdly, if the vendor treats the purchaser as having repudiated the contract and accepts the repudiation, he cannot thereafter seek specific performance. This follows from the fact that, the purchaser having repudiated the contract and his repudiation having been accepted, both parties are discharged from further performance.*
>
> *At this point it is important to dissipate a fertile source of confusion and to make clear that although the vendor is sometimes referred to in the above situation as 'rescinding' the contract, this so-called 'rescission' is quite different from rescission ab initio, such as may arise for example in cases of mistake, fraud or lack of consent. In those cases, the contract is treated in law as never having come into existence. (Cases of a contractual right to rescind may fall under this principle but are not relevant to the present discussion.) In the case of an accepted repudiatory*

breach the contract has come into existence but has been put an end to or discharged. Whatever contrary indications may be disinterred from old authorities, it is now quite clear, under the general law of contract, that acceptance of a repudiatory breach does not bring about ' rescission ab initio '. I need only quote one passage to establish these propositions.

In Heyman v Darwins Ltd ([1942] 1 All ER 337 at 360-361, [1942] AC 356 at 399) Lord Porter said:

> *"To say that the contract is rescinded or has come to an end or has ceased to exist may in individual cases convey the truth with sufficient accuracy, but the fuller expression that the injured party is thereby absolved from future performance of his obligations under the contract is a more exact description of the position. Strictly speaking, to say that, upon acceptance of the renunciation of a contract, the contract is rescinded is incorrect. In such a case the injured party may accept the renunciation as a breach going to the root of the whole of the consideration. By that acceptance he is discharged from further performance and may bring an action for damages, but the contract itself is not rescinded."* [My emphasis by underlining]

See also Boston Deep Sea Fishing and Ice Co. v. Ansell (1888) 39 Ch.D. 339 , 365, per Bowen L.J.; Mayson v. Clouet [1924] AC 980, 985, per Lord Dunedin and Lep Air Services Ltd. v. Rolloswin Investments Ltd. [1973] A.C. 331 , 345, per Lord Reid, 350, per Lord Diplock. I can see no reason, and no logical reason has ever been given, why any different result should follow as regards contracts for the sale of land, but a doctrine to this effect has infiltrated into that part of the law with unfortunate results. I shall return to this point when considering Henty v. Schroder (1879) 12 Ch.D. 666 and cases which have followed it down to Barber v. Wolfe [1945] Ch. 187 and Horsler v. Zorro [1975] Ch. 302."

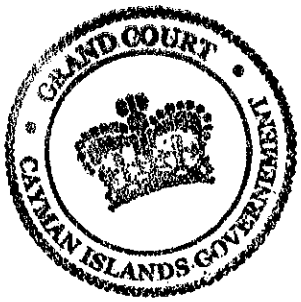
71. Lord Wilberforce then outlined his fourth and fifth propositions, but these arose when there were specific performance issues. He went on to conclude with reference to all of the propositions:

"These propositions being, as I think they are, uncontrovertible, there only remains the question whether, if the vendor takes the latter course, i.e., of applying to the court to put an end to the contract, he is entitled to recover damages for breach of the contract. On principle one may ask "Why ever not?" If, as is clear, the vendor is entitled, after, and notwithstanding that an order for specific performance has been made, if the purchaser still does not complete the contract, to ask the court to permit him to accept the purchaser's repudiation and to declare the contract to be terminated, why, if the court accedes to this, should there not follow the ordinary consequences, undoubted under the general law of contract, that on such acceptance and termination the vendor may recover damages for breach of contract?

72. As made clear by Viscount Simon in ***Howard v Pickford Tool Co. Ltd*** [1951] 1K.B. 417, 421 it is settled law that the repudiation of a contract has no legal effect in itself except to confer on another party the option to discharge the contract. Viscount Simons stated:

"If one party so acts or so expresses himself, as to show that he does not mean to accept and discharge the obligations of a contract any further, the other party has an option as to the attitude he may take up. He may, notwithstanding the so-called repudiation, insist on holding his co-contractor to the bargain and continue to render due performance on his part. In that event, the co-- contractor has the opportunity of withdrawing from his false position, and even if he does not, may escape ultimate liability because of some supervening event not due to his own fault which excuses or put an end to further performance: a classic example of this is to be found in Avery v. Bowden[29]. Alternatively, the other party may rescind the contract, or as it is sometimes expressed, "accept the repudiation", by so acting as to make plain that in view of the wrongful action of the party who has repudiated, he claims to treat the contract as at an end, in which case he can sue at once for damages. "Rescission

[29] (1885) 5 E. & B. 714.



(except by mutual consent or by a competent court)", said Lord Sumner in Hirji Mulji v Cheong Yue Steamship Co. Ltd,[30] *"is the right of one party, arising upon conduct by the other, by which he intimates his intention to abide by the contract no longer. It is a right to treat the contract is at an end if he chooses, and to claim damages for its total breach, but it is a right in his option." But repudiation by one party standing alone does not terminate the contract. It takes 2 to end it, by repudiation, on the one side, and acceptance of the repudiation, on the other."*[My emphasis]

Conclusion on Issue of Rescission/Repudiation and Application of Clause 6

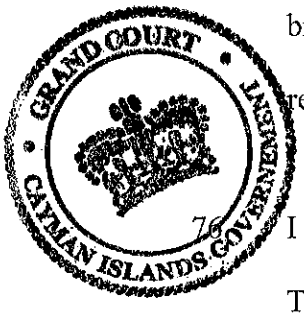
73. Whenever default occurs the first enquiry must be into the terms of the contract and then into the vendor's actions to determine which particular remedy he is purporting to exercise because that may directly affect what he is entitled to recover.

74. I accept that if a vendor wishes to sue a purchaser for damages they must first rescind the contract or if the purchaser has repudiated the contract, accept such repudiation and then bring an action for damages for breach of contract. However rescission in this context, unless the contract makes clear that the intention is that it be recession *ab initio*, may also cover the way that rescission is used to cover acceptance of termination for breach. The contract, albeit extinguished, remains alive for the purposes of allowing the vendor to pursue all rights required under it.

75. If a right to terminate has arisen at common law, the innocent party may also have a right to terminate pursuant to a clause in the contract. Whether to terminate a contract at common law or whether to terminate pursuant to a particular provision of a contract

[30] [1926] A.C. 497, 509.

which does not include a provision excluding damages not mentioned in the contract may be a matter of strategy and may depend on a comparison of the value of the claim for damages recoverable under the general law on the one hand and any remedy which the contract may confer if a contractual right is exercised on the other hand. Unless there is an express or implied agreement to the contrary, a contractual right to terminate the breach does not displace any right of termination arising by operation of law in respect of breaches of essential terms, sufficiently serious breaches of non-essential terms or repudiation.



76. I am satisfied that the email of 18 April constituted notice for the purpose of Clause 6. The Agreements do not set out any requirements for the Clause 6 written notice. For example, there is no requirement about the content of the notice or for the notice to contain a notice period for the intention to terminate.

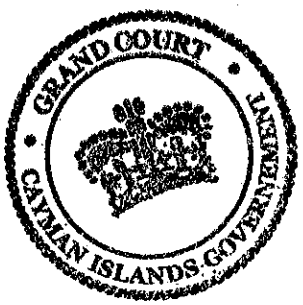
77. In the absence of a clause by which the parties contemplated rescission *ab initio*, it is now clear that "recession" in default of sale of land matters normally means that the vendor is terminating the contract for breach because the power or option for him to do so is conferred on him by the contract for any breach committed by the purchaser. When I look at Clause 6 in the Agreements, it is clear that the wording that the vendor "*may at its option rescind*" is referring to the now common interpretation and use of the word rescinding in default in sale of land contracts. It is clearly used in the context of D2 exercising his option to terminate the contract for breach if he chooses.

78. Accordingly, I am satisfied that the parties intention, as shown in the Agreements, was that Clause 6 would provide the avenue to rescind when accepting a repudiatory breach

arising out of the purchaser's failure to keep the agreement. I am satisfied that P invoked Clause 6 when he sent notice by the 18 April 2016 email of the termination due to the breach. I am satisfied that clause is the governing clause. What I must now go on to consider is whether Clause 6 was drafted in such a way as to exclude or restrict P's right to recover damages not provided for in the clause, in particular retention of the interest payments made by P.

2) Consequences that Flow from the Termination and the Application of Clause 6

79. In ***Mayson v Clouet*** (1924) AC 980 Lord Dunedin stated at 987:



> *"The law is quite plain. If one party to a contract commits a breach then if that breach is something that goes to the root of the contract, the other party has his option. He may still treat the contract as existing and sue for specific performance; or he may elect to hold the contract is at an end – that is, no longer binding on him – while retaining the right to sue for damages in respect of the breach committed."*

80. As already mentioned herein, at page 392 in ***Johnson*** Lord Wilberforce found that, where the word rescission is used in cases where there has been a repudiatory breach of contract and the parties have declared the contract to be at an end, a party can claim for damages for breach of contract. At page 397C in ***Johnson*** Lord Wilberforce judicially approved an extract from page 508 in Voumard where the authors stated that damages may be recovered and then, referring to ***McKenna v Richey*** [1950] VLR 360, a case decided in the Supreme Court of Victoria, Australia where damages were awarded in lieu of a decree for specific performance, he added at 398B:

> *"...., I am happy to follow the latter case. In my opinion Henty v. Schroder, 12 Ch.D. 666, cannot stand against the powerful tide of logical objection*

and judicial reasoning. It should no longer be regarded as of authority: the cases following it should be overruled.
In particular Barber v. Wolfe [1945] Ch. 187 and Horsler v. Zorro [1975] Ch. 302 cannot stand so far as they are based on the theory of "rescission ab initio" which has no application to the termination of a contract on accepted repudiation." [My emphasis added]

It is clear that in this regard the law in England and Wales relating to the default in the sale of land in recent times has started to move towards a more similar line to that taken in Australia. A development which is evidenced by the above approach in ***Johnson*** post the John Toohey article where the author, relying on ***Barber*** as being good law in England, wrote at page 408 that, unlike in Australia, the English Courts at the time did not accept that a vendor who had rescinded due to the purchaser's default could sue for damages.

GRAND COURT CAYMAN ISLANDS GOVERNMENT

81. In the absence of any contrary express provision in the contract[31], if a party elects to treat the contract as being terminated as a result of the failure of a purchaser to pay the purchase money or an instalment of the purchase money, he is entitled to recover damages for the breach if he suffers loss as a consequence. It is therefore again necessary to look more closely at Clause 6.

82. Clause 6 makes time of the essence. It is agreed that the clause provides that the deposit (and interest thereon) shall be forfeited to the vendor, who is at liberty upon written notice to rescind the contract and to resell the property and retain the full sale price absolutely. It is agreed that the vendor may also retain out of the other payments made to

[31] My emphasis by underlining.

him an amount sufficient to compensate him for any work done to the parcel at the request of the purchaser which involves a deviation from or amendment to the basic plan for the parcel or any substitution requested by the purchaser in respect of the fixture and fitting.

83. If that was all that Clause 6 stated it would not take away from D or in any way restrict their rights which, according to general legal principles they would have apart from it upon any breach of contract by P. Clause 6 confers on the vendor several separate rights, any of which he may choose to exercise or not.[32] The power to rescind contained in Clause 6 is a power which when exercised would bring the contract to an end, save that the vendor may then act under the special provision in Clause 6 when exercising a right to recover damages for breach of contract.

84. However, Clause 6 does not end there. A clause giving a power to rescind may be drafted in such a way as to exclude or restrict the right to recover damages. The clause is written without any punctuation, and at its close it states:

"... and no further right of action shall arise in respect thereof nor shall any party hereto have any further rights, demands, actions, claims for damages the one against the other and the Vendor may resell the Strata Lot and keep the full price absolutely." [My emphasis]

When one looks at the language used at the end of the clause it is clear that the intention of the parties here was that actions and recovery for breach be restricted to that set out in the contract. The words *"in relation thereof"* relate to a consequence of the rescinding by notice. The final words:

[32] See Voumard page 501

"nor shall any party hereto have any further rights, demands, action, claims or damages the one against the other and the vendor may resell the Strata Lot and keep the full sale price absolutely"

is wider and is an express provision intending to restrict any recovery for consequential losses resulting from the breach.

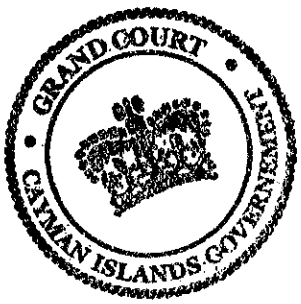
85. If Clause 6 did not have that wording towards its end, a finding that D2's email constituted him exercising his option to rescind in the context of accepting repudiatory breach (as rescind in such circumstances merely means putting an end to the contract) would have meant that arguably he still retained a wider right to sue P for damages for breach of contract over and above the separate rights contained in the clause.

86. If I am wrong when determining that (i) the termination was by rescission as meant in Clause 6 and that (ii) the right of claiming damages was restricted by Clause 6, then consideration needs to be given as to whether that would change the position in relation to the contested claim by P for the interest payments.

87. The Privy Council decision in ***Mayson*** makes clear the common law position that in the absence of express or implied agreement in the contract to forfeit payments as liquidated damages upon termination, the purchaser is entitled to recover the money paid over in part performance, as vendors are bound to restore any monies paid as they cannot have the land and its value too. The clause in ***Mayson*** allowed the vendor to keep the deposit paid under a contract for sale, but made no mention of retaining two later instalments of cash.

88. The authors confirm that position at paragraph 15-098 in McGregor on Damages:

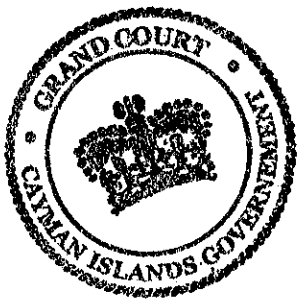
> *"If there is no agreement, whether express or implied, that money paid shall not be returnable on default, then nothing in the nature of agreed liquidated damages exists in the contract and the defaulter is entitled, if the other party rescinds on the basis of default and does not keep the contract open and available for performance, to recover the money he has paid over in part performance in an action for money had an received. Clear decisions to this effect are Mayson v Clouet and Dies v British and International Mining Corporation, where a buyer of land and a buyer of goods respectively defaulted in their instalments of the purchase price, and the law is so stated by Somervell and Denning L.JJ in the Court of Appeal in Stockloser v Johnson."*



89. In ***McDonald,*** Dixon J. considered what consequences may flow from the termination of an instalment agreement, including the status of instalment payments already made. Dixon J stated at pages477-478:

> *"It does not, however, necessarily follow from these principles that when, under an executory contract for the sale of property, the price or part of it is paid or payable in advance, the seller may both retain what he has received, or recover overdue instalments, and at the same time treat himself as relieved from the obligation of transferring the property to the buyer. When a contract stipulates for payment of part of the purchase money in advance, the purchaser relying only on the vendor's promise to give him a conveyance, the vendor is entitled to enforce payment before the time has arrived for conveying the land; yet his title to retain the money has been considered not to be absolute but conditional upon the subsequent completion of the contract. "The very idea of payment falls to the ground when both have treated the bargain as at an end; and from that moment the vendor holds the money advanced to the use of the purchaser" (Palmer v. Temple (1839) 9 Ad. & E at pp.520, 521; 112 E.R., at p.1309).*

In Laird v. Pim (1841) 7 M. & W., at p.854, Parke B. *says: "It is clear he cannot have the land and its value too"; the case, however, was one in which conveyance and payment were contemporaneous conditions (see Laird v. Pim (... at page 480; 151 E.R., at p.855). It is now beyond question that instalments already paid may be recovered by a defaulting purchaser when the vendor elects to discharge the contract (Mayson v. Clouet ...). Although the parties might by express agreement give the vendor an absolute right at law to retain the instalments in the event of the contract going off, yet in equity such a contract is considered to involve a forfeiture from which the purchaser is entitled to be relieved (see the judgment of Long Innes J. in Pitt v. Curotta [1931] NSWStRp 30; (1931) 31 S.R. (N.S.W.) 477 at pp 480-482). The view adopted in In re Dagenham (Thames) Dock Co.; Ex parte Huls ((1873) L.R. 8 Ch.1022) seems to have been that relief should be granted, not against the forfeiture of the instalments, but against the forfeiture of the estate under a contract which involved the retention of the purchase money: and this may have been the ground upon which Lord Moulton proceeded in Kilmer v. British Columbia Orchard Lands Ltd. ((1913) A.C. 319) notwithstanding the explanation of that case given in Steedman v. Drinkle ((1916) 1 A.C. 275) and Brickles v. Snell ((1916) 2 A.C. 599). However, these cases establish the purchaser's right to recover the instalments, other than the deposit, although the contract is not carried into execution. If a vendor under a contract containing an express power to forfeit instalments at first determined the contract and retained the instalments but afterwards resiled from his former election to treat the contract as discharged and insisted that, if the purchaser was unwilling to forfeit his instalments according to the tenor of the agreement, he should at least carry out the sale, perhaps the purchaser as a term of equitable relief against forfeiture would be required to carry out his contract. But, where there is no express agreement excluding the implication made at law, by which the instalments become repayable upon the discharge of the obligation to convey and the purchaser has a legal right to the return of the purchase*



money already paid which makes it needless to resort to equity and submit to equity as a condition of obtaining relief, the vendor appears to be unable to deduct from the amount of the instalments the amount of his loss occasioned by the purchaser's abandonment of the contract. A vendor may, of course, counterclaim for damages in the action in which the purchaser seeks to recover the instalments."[My emphasis by underlining]

90. D contends that the interest payments should not be regarded as being instalment part payments of the purchase and that they are recoverable in damages as compensation for P's use and occupation of the property[33], for being deprived of the balance of the purchase price and "*for effectively financing the purchase price*" over the duration of the amortisation period.

91. When arguing that D has an entitlement to retain the interest payments made D submit that each of the Agreements were "... *in the nature of*" two agreements. Agreement 1 being for the sale of the relevant parcel and Agreement 2 being an owner-financed loan agreement. D argue that, after P had paid the deposit and occupied the Parcels, the parties' relationship changed from being one of a vendor and purchaser to one of a lender and borrower under the owner-financed loan agreement. D relied upon the interest worksheets as being evidence of the owner finance agreements.

92. As mentioned earlier herein, in his Written Supplement Closing Submissions dated 10 July 2018, D rely upon extracts from the John Toohey article and from Voumard as support for their case concerning their retention of the interest payments.

[33] Expressed as being that paragraph 50 of the Opening Written Submissions but at paragraph 19 of the Closing Written Submissions as compensation for being deprived of the use of the Parcels.

93. At page 507 in Voumard, under the heading "Effect of an Express Provision for Forfeiture of Instalments"[34], the authors start by reiterating that at common law a purchaser is entitled to recover instalments of principal paid by him if the contract does not provide for the forfeiture of those instalments to the vendor. They go on to state that where such a provision exists the purchaser must invoke the equitable jurisdiction of the Court to relieve against forfeiture. They suggest that in Australia, even if a purchaser has been in possession of the property under the terms of the contract, that a provision for forfeiture upon rescission would be a penalty and that he would have an:

> *"equitable right, subject to the imposition of such terms and conditions as the Court may think just, to be relieved against the forfeiture of all payments of principal money paid by him."*

94. The authors of Voumard then analyse what relief may be given to the purchaser, highlighting the different approach to this then taken in England. The authors state at pages 509-510 that:

> *"Where the Court relieves a defaulting purchaser from forfeiture of instalments paid it will do so only upon such terms and conditions as it thinks just in the circumstances. These terms and conditions will be determined upon a consideration of the terms of the contract, what has happened since the contract was made (including the circumstances under which it was rescinded), and the attitude of the vendor at the hearing in the action. Normally relief will be granted upon the following terms: - The purchaser is entitled to be credited with instalments of principal moneys but not interest, paid by him, but against this the vendor is entitled to (i.) damages sustained by loss of contract, that is the difference between the contract price and the fair market value of the land at the date of the termination of the contract, (but in estimating this damage the vendor*

[34] My emphasis, as in the matter before me there is no such forfeiture clause.

must take into account any improvements made by the purchaser which increase the value of the land, and he must also give credit for the amount of any deposit received by him and which is forfeited under the contract), and (ii.) any interest payable under the contract which is in arrears at the time of determination of the contract. The vendor is entitled to interest on purchase money in lieu of an occupation rent for the period during which the purchaser has had possession of the property. He is therefore entitled to retain any interest payment already made and to receive credit for any arrears of interest. [My emphasis]

The Court will order that amount found to be due to one party be set-off against the amount found to be due to the other party."

95. At page 423 in the John Toohey article, under the heading "Remedies Available to Vendor Only" and under the subheading "Recovery of Interest Payments", the author refers to the emphasised part of the above extract from Voumard. He states that Voumard is suggesting that such an entitlement for the vendor should be considered in calculating what moneys a vendor is entitled to retain. However, Toohey went on to write that:

"This relation of interest to occupation is both arbitrary and unreal. The amount of interest paid by a purchaser depends on three factors, the amount of the purchase price, the size of the deposit he pays, and the size of the instalments. In these circumstances, any relation the interest payments may have to the value of the property as a rental proposition is entirely accidental. The authorities on the matter are not clear. In Mellett v Jones[35] Dean and Smith JJ. suggested that the vendor "cannot have both an occupation rent and interest.... In cases where the contract provides for the forfeiture of instalments and the purchaser seeks relief in equity against such forfeiture, it is common to allow relief on terms which

[35] [1959] Victorian R. 122 at 132.

include such rent." The court then referred to Berry v Mahoney[36] *and Hodder v Watters*[37] *where this was done.*

Once again a more equitable assessment would be achieved by an assessment of the rental value of the property, by taking into account that the purchaser "had use and occupation of the (vendor's) asset."[38]

Having elected to rescind, the vendor cannot then claim interest which has not yet accrued[39] *but he is entitled to interest which has accrued but has not been paid."*

96. P counters D's submissions that the interest payments should constitute compensation by stating that D have had the benefit of using the CI$593,421.54 principal and interest sums paid by P for around twenty years. P adds that D have actually benefitted from the appreciation of the Parcels totaling CI$175,000 and have utilised the Parcels to their benefit, because in or around 2009 D2 borrowed money secured against the properties at the complex to fund his construction project, including the Parcels without the consent of P. This was a benefit to D. I note with interest that, for good reason, in Queensland, Australia s.73 of the Property Law 1974 (QLD) provides a statutory protection to a purchaser where there is an instalment contract as it prohibits a vendor from mortgaging the property. It also provides that if the vendor does that without the consent of the purchaser the contract is voidable and the seller is guilty of an offence for which a fine can be imposed. There is, of course, no similar statutory prohibition in the Cayman Islands and D have not committed any offence.

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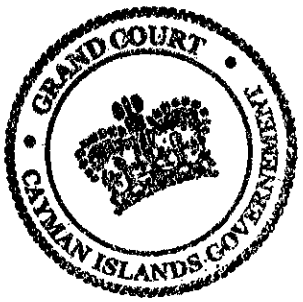
[36] [1933] Victorian L.R. 314.
[37] [1946] Victorian L.R. 222, at 231-232.
[38] ***Coates v Sarich*** (1963) Full Court of Western Australia.
[39] ***Nowak v Linton*** [1960] West. Aust. R.2.

97. P contends that the passage in Voumard should carry little weight in the Cayman Islands. He highlights that it is a dated commentary on Australian law relating to default in the sale of land which has developed differently, presumably when compared to the law in England and Wales. It is accepted that instalment contracts may be more prevalent in Australia, but P does not acknowledge that a further reason highlighted by John Toohey for the different development is that Australia has a Torrens System, the same system used in the Cayman Islands. I also note that one example of the difference shared by John Toohey, relying on ***Barber v Wolfe***, [1945] Ch.187, was the English Court's refusal at the time to allow a vendor, who has rescinded because of a purchaser's default, to sue for damages as well. However, in more recent times the House of Lords in ***Johnson*** rejected the approach advocated in the line of authorities including ***Barber*** and favoured the Australian approach explained by Dixon J. (as he was then) in ***McDonald***.[40] In the appropriate circumstances, although not binding, I am satisfied that some of the Australian case authorities and the texts analysing them may be helpful and informative. That said, care would have to be taken when applying them, especially in the absence of any evidence of the adoption of that approach hitherto in the Courts of the Cayman Islands or England and Wales. However, having regard to the context in which they were written, the above extracts are more likely applicable to a situation where there is a forfeiture provision in relation to the instalment payments in contract and the Court has to carry out its balancing exercise in equity.

98. P further contends that the emphasised part of the extract from Voumard in paragraph 48 above has no application in the matter before me. He refers to an extract from the section

[40] See paragraphs 72 and 82 below.

"Right to Recover Instalments in the Absence of an Express Provision for Forfeiture." As already clarified herein, the Agreements before me do not contain an express forfeiture provision. At page 505 the authors of Voumard state:



> *"Where the vendor elects to rescind the contract upon the ground of the purchaser's default, what is the position of the parties as to the instalments of principal moneys paid by the purchaser if the contract does not provide for forfeiture thereof to the vendor? If the purchaser has not been in possession of the property, it is clear that he is entitled at common law to recover those instalments from the vendor. Is his position any different if he has had possession under the terms of the contract? There is no express decision as to the matter, but there are strong dicta to the effect that where the purchaser has been in possession he is still entitled to repayment of instalments of principal, but not repayment of interest already paid.*[41] *The ground upon which this view is based is that the consideration for the payment of the principal moneys under the contract is the conveyance or transfer of the land, that once the act of the vendor in rescinding the contract deprives the purchaser of the right to a conveyance or transfer, the consideration for the payment of the instalments of principal money has wholly failed, and he is thus entitled to recover them at common law as money had and received to his use. The soundness of this view has been questioned in three learned articles in the Australian Law Journal*[42]*, the view there but being that as the purchaser has had possession of the land under the contract, it cannot be said that there has been a total failure of the consideration for which he contracted. In substance this contention is that a contract for sale on terms, the purchaser being entitled to possession before paying the whole of the purchase money, is an entire contract for use and occupation for a specified period and a transfer of the freehold at the end of that period in*

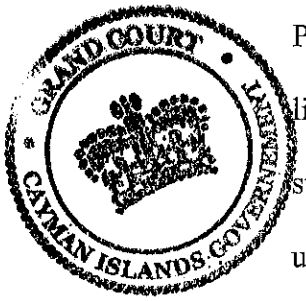
[41] ***McDonald*** at p.478 A (per Dixon J.); ***Berry v Mahoney*** (19333) V.L.R 314, at p.320 (F.C.); ***Real Estate Securities Ltd. v Kew Golf Links Estate Pty, Ltd.***, (1935) V.L.R. 114, at p.120 (per Lowe J.).
[42] 7 A.L.J. 366; 8 A.L.J. 8; and 9 A.L.J. 3.

return for a principal sum with interest thereon. If it be correct to regard such a contract as entire, it may be conceded that the argument is sound; for, in the circumstances under consideration, the rule applicable is that money paid upon a consideration which is entire, cannot be recovered unless there has been a total failure of consideration. It is submitted, however, that the consideration is not entire, but divisible, and that a contract such as we are considering is, from the point of view of failure of consideration, properly regarded as a main contract for the transfer of the freehold in return for the principal sum, and a subsidiary contract under which the purchaser is entitled to possession pending execution of the transfer, in consideration of the payment of interest on the balance of the purchase money from time to time unpaid. Thus the dicta of above referred to would appear to be sound in principle, that it may be assumed that on this point the law is settled so far at least as the Courts of Victoria are concerned."

99. I am unable to find, and have not been shown, any similar dicta expressed in cases outside of Victoria. Although I accept that it is an approach that may well be followed in other Australian States, I have not been made aware of a similar approach having been followed in the Cayman Islands or in England and Wales.

100. In any event, P rightly submits in his written response dated 10 July 2018 that the passage has no application to the matter before me, as it relates to contracts which provide for occupation on commencement of the payment of the purchase price. The Agreements provide that vacant possession would be given on closing, unless the vendor gave its express consent in writing to earlier possession and subject to such terms as shall then be agreed. Clause 3 set out details of the interest to be paid under the contract, and as a consequence of Clause 5 these payments would therefore not be consideration for

occupation of the Parcels. P rightly points out that if he had never entered into occupation of the Parcels before the final payment the same amount of interest would still have been payable pursuant to Clause 3. Accordingly, it is correctly submitted that under the terms of the Agreements, there has still been a total failure of consideration on the sale of the Parcels. The parties intended that the express consideration for the occupation was the linked later agreement made pursuant to Clause 5, namely for P to pay insurance and strata fees and there is no provision in the contract or linked agreement for interest to be used as a form of occupational rent. P reiterates that Clause 6 is intended to govern what happens upon default and, although it makes provision for the vendor to keep interest on the deposit, it does not provide for the vendor to retain the interest payments.



101. When I consider Ds' arguments about whether the First and Second Agreements were themselves made up of two separate agreements, I accept P's contention that there is no clear indication in either Agreement that the parties intended each one to contain two separate agreements. When I review them, it is evident that the Agreements relating to the Parcels are nothing more than instalment contracts. They are agreements for the purchase of a property where the purchaser pays a deposit and then pays the purchase price by gradual increments (monthly instalments which include an interest element) without obtaining a transfer of title into his name until the final payment is made. I therefore find that the Agreements are not made up of a separate sale/purchase agreement and a separate loan agreement.

102. If I am wrong, and each agreement is constituted by two separate agreements as contended by D, then the fact that the title was not transferred to P at the time the

Agreements were entered into means that, due to the termination and resultant non-transfer of title, the consideration has failed for the loan. The cases of ***Mayson*** and ***McDonald*** confirm that any instalments paid (which are regarded as pre-payments of the consideration for the ultimate conveyance) belong at law to the purchaser on the basis that consideration for the conveyance had failed and accordingly can be recovered at law by him, whether or not there is a forfeiture provision. That is precisely the position in the matter before me, consideration having totally failed upon termination of the agreement. Clause 6 does not change that and it is clearly not an express forfeiture provision in relation to instalment payments. In Clause 6 the parties specifically put their minds to interest payments upon default, but made provision only in relation to interest on the deposit payment. In fact, Clause 6 implies that after the deposit and interest thereon *"any further sum paid by the purchaser"* cannot be retained by the vendor save to extent permitted in Clause 6. Due to the common law, there is no requirement for the clause to expressly provide for the return of the instalment payments.

GRAND COURT CAYMAN ISLANDS GOVERNMENT

103. Due to Clause 3 (b) interest is a component of the purchase obligations, especially in this case where the Agreements did not provide for possession of the Parcels at the commencement of the payment of the purchase price. In consequence it is no more appropriate for D to retain the interest payments separately than it is for them to retain the whole or any part of the principal payments. The question one might ask is that, in the absence of a specific forfeiture provision, how can interest be payable upon a principal sum that ultimately was never payable?

104. When default happens regard must first be had to the terms of the contract and also then to the vendor's actions to determine what remedy he is exercising. If the vendor validly terminates the agreement for repudiatory breach of the contract of sale by reason of the purchaser's default, by exercising his rights pursuant to Clause 6, his remedies would be set out in the same Clause 6. The consequences flowing from a failure by P to make any interest payments are governed by Clause 6. Clause 6 does not provide for the forfeiture of any part of the interest payments. Clause 6 clearly does not alter the common law position concerning the retrain of instalment payments which includes interest paid.

105. If I am wrong when I conclude that the parties intended by the word "rescind" in Clause 6 for it to be the governing clause when there has been termination for breach in the performance of the contract and that P by his email did not intend to invoke Clause 6, I am still satisfied that the interest paid by P still cannot be retained by D as damages under repudiation for the reasons set pout in paragraphs 100-104 herein.

106. Therefore, P rightly states that he is entitled to recover the interest payments. D2 remains the absolute owner of the Parcels, but subject to his obligation of refunding to the purchasers all sums of money (except the deposit and interest thereon) which P has paid on account of the purchase.

107. Accordingly, I order that D, subject to the agreed and above ordered set-off amounts[43] do repay the instalment payments which are made up of the principal and interest payments to P.

[43] See paragraphs 62-66 herein.

Costs

108. I note than an order for costs was made in favour of the Defendants in the Order dated 20 October 2017. If either party wishes to be heard on any other issue as to costs, then they should within 21 days of the circulation of the perfected version of this Judgment, file and serve a Summons seeking a costs hearing.

109. I thank Counsel for their well-argued and helpful contributions on the novel points of law for this jurisdiction, including the prompt response to my request for clarification submissions. I also thank Counsel and their clients for their patience in awaiting this decision.

Footnote

110. Having regard to the aim of damages being to put the injured party in the same position he would have been in if the contract had been performed, I note that in the Written Further Supplement to the Defendants' Closing Submissions dated 10 July 2018, the Court was informed that D2 has placed the Parcels on the market for sale. If Clause 6, which entitles the vendor to sell the property and keep the full sale price absolutely, had not been found to be the governing clause in this case, the capital appreciation in the parcels may have been a relevant consideration for the Court as a set off when assessing damages.

THE HON. MR. JUSTICE RICHARD WILLIAMS
JUDGE OF THE GRAND COURT