COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2017/CLE/gen/01042

BETWEEN

RAINBOW BAY PROPERTY OWNERS ASSOCIATION LIMITED

Plaintiff

-AND-

(1)WARREN FARQUHARSON
(2)GAYLE FARQUHARSON

Defendants

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mrs. Giahna Soles-Hunt and Mr. Glenn Curry of Glinton Sweeting O'Brien for the Plaintiff
Mr. Ashley Williams of Atlaw Chambers for the Defendants
Ms. Adelma Roach and Ms. Sybrena Deleveaux of the Attorney General's Chambers as amicus curiae

Hearing Dates: 08, 09 May, 19 July 2019, 30 July 2019, 17 December 2019, 27 August, 15 October 2020, 25 February 2022

Restrictive covenants – Whether Defendants breached covenants – Whether Defendants were bound by a restrictive covenant in an unrecorded document – Whether the Defendants were bona fide purchasers for value without notice – Constructive Notice - Conveyancing and Law of Property Act – Whether the building was one storey or two storeys according to Bahamas Building Code – Whether the Plaintiff unreasonably withheld approval to build

The Plaintiff is the Property Owners' Association of a Subdivision known as Rainbow Bay. They commenced this action against the Defendants who are property owners of a lot in the Subdivision, seeking a Declaration that two covenants are enforceable and were breached by the

Defendants. The Plaintiff contends that the Defendants breached (i) the covenant not to commence construction without the Plaintiff's approval of exterior plans and (ii) the covenant not to build above 18 feet. The Plaintiff also sought an Order directing the Defendants to cease further construction until they have received the Plaintiff's approval.

The Defendants denied liability. With respect to the covenant to obtain the Plaintiff's approval of plans, they asserted that they were empowered to commence construction since they obtained the approval from the Ministry of Works. With respect to the height restriction, they asserted that the restriction was unenforceable against them. The Defendants said they were not bound by the prior height restriction not to build above one storey because: (i) they were bona fide purchasers for value without notice with respect to the 18 foot height restriction and (ii) the Plaintiff did not properly amend the covenant on the height restriction.

The Defendants further alleged that the Plaintiff unreasonably withheld approval of their application to build.

HELD: Finding that the Defendants breached both covenants namely (i) not to commence construction without prior approval of the Plaintiff and (ii) not to build above the 18 foot height restriction. The issue with respect to whether the building is one story or two storeys falls away based on the finding that the Defendants had constructive knowledge of the 18 foot height restriction.

1. The Defendants were bound by the restrictive covenant not to commence construction without the Plaintiff's approval of the plan. As such, they breached the covenant when they commenced construction without such approval, even though they had approval from the Ministry of Works.

2. Although the amendment of the one storey height restriction to 18 feet was not reflected in a recorded document and it was not referred to in any of the Defendants' title documents, upon reasonable investigation, it could have been discovered and the Defendants had constructive knowledge of it since it was on the Plaintiff's website and also, in the application form for building approval.

3. The restrictive covenant with respect to the height restriction was just that. It was not an article in the Article of Association. Therefore, it was not an amendment which was required to be agreed upon by members of the Association. The Plaintiff's Board was entitled to make the amendment.

4. The burden is on the Defendants and not the Plaintiff to prove that the Plaintiff's refusal to consent was unreasonable. The Plaintiff did not have to prove that its refusal was correct or even justified. It simply needs to prove that its refusal was reasonable in the circumstances which is a question of fact: **Porton Capital Technology Funds and others v 3 M UK Holdings Ltd and 3 M Company** [2011] EWHC 2895 (comm) applied. The Defendants have not discharged this burden.

JUDGMENT

Charles J:

Introduction

[1] By Writ of Summons filed on 31 August 2017 and Amended Statement of Claim filed on 9 May 2019, the Plaintiff, Rainbow Bay Property Owners Association Limited ("the POA") instituted these proceedings against the Defendants, Warren and Gayle Farquharson ("the Farquharsons") seeking, in the main, a declaration that the restrictive covenants relating to the Restrictions and Conditions of Rainbow Bay are enforceable and binding and that the Farquharsons are in breach of them.

[2] On the other hand, the Farquharsons alleged that they are bona fide purchasers for value without notice as it relates to the restrictive covenants and, in any event, the construction of their one storey property complies with the restrictions as contained in the Conveyance. Further that the POA's withholding and/or denial of the construction approval was unreasonable in the circumstances.

Background facts

[3] The POA is a company incorporated under the laws of the Commonwealth of The Bahamas. It operates as a residential association for the improvement and benefit of all lots and lot owners in the subdivision known as "Rainbow Bay", situate on the Island of Eleuthera, one of the Islands of The Bahamas.

[4] The Farquharsons are the owners of Lot 1, Block 47, Section C of the Rainbow Bay Subdivision ("the property") which they purchased on 18 March 2010. As the owners of a lot in Rainbow Bay, the Farquharsons are also members of the POA. All lots in Rainbow Bay are subject to certain binding restrictive covenants as outlined in the "Rainbow Bay Restrictions and Conditions".

[5] The Farquharsons derived title to the property by virtue of a conveyance between Rainbow Bay Limited and Gordon F. Price Limited of the one part and George

Morrison Lightner Jr. and Patricia Lou Lightner of the other part recorded in the Registry of Records in Volume 2828 at pages 511 to 522 dated 20 June 1977 ("the Conveyance").

[6] The Conveyance contains restrictive covenants which the Farquharsons had notice and are therefore bound by them. Clause 4 of the Schedule of Restrictions and Conditions – Residential Lots states:

> **"(4) No building or structures of any kind shall be built or constructed on the said hereditaments nor shall there be any alteration to any building or structure of any kind unless and until the exterior elevation plans and the proposed type of construction and the proposed location of such buildings or structures (and of any septic tank sewerage soak away pit to be constructed in connection therewith) upon the said lot of land shall have been submitted to and approved in writing by the Approving Authority hereinafter defined…."**

[7] Clause 3 provides:

> **"(3) No building or structure of more than one storey at the highest elevation of the lot shall be constructed on the said hereditaments except (a) by written permission of the Vendor until such time as a Residents' Association comprising residents of or owners of lots in the said Subdivision shall have been formed and the Vendor shall have conveyed the roads in the said Subdivision to such Residents' Association and (b) after such time by written permission of the Residents' Association. No separate living unit shall be constructed thereon without its own private inside toilet facilities."** [Emphasis added]

[8] In 2005, with a view to avoiding confusion as to what one storey is, the POA passed a resolution which amended the one storey height restriction to 16 feet. In 2010 (before the Farquharsons purchased their lot), upon a request from Governor's Harbour Building Department, the POA passed a resolution which increased the height restriction from 16 feet to 18 feet. The Farquharsons, however, assert that both resolutions were not properly adopted.

[9] A new document called "Rainbow Bay Restrictions and Conditions" was annexed to the POA's application for building approval. The building application and the

new version of the Restrictions and Conditions are available on Rainbow Bay's website. It included the covenant not to commence construction without the POA's approval. However, the restriction on height was now a restrictive covenant not to build above 18 feet.

[10] In or around September 2016, the Farquharsons commenced construction of a house on their property after having obtained approval from the Ministry of Works ("the Ministry") but without approval from the POA. The construction was undertaken by Mr. and Mrs. Major of DIY Construction.

[11] On 29 September 2016, the POA's Building Site Inspector, Perry Attfield ("Mr. Attfield") sent an email to the Farquharsons, informing them that they needed to apply for building approval from the POA before commencing construction. The Farquharsons responded by email dated 2 October 2016 and stated that they were unaware of the requirement to seek approval from the POA prior to commencing construction.

[12] On 8 December 2016, the Farquharsons submitted an application for building approval along with the required plans. The application was declined on the basis that, on the plans, the building would have exceeded the 18 feet height restriction.

[13] The Farquharsons then applied for special permission to build notwithstanding that the plans exceeded 18 feet. The POA also declined this application.

[14] Due to reasons disputed between the parties, the Majors withdrew from the construction in or around May 2017.

[15] Shortly thereafter, the Farquharsons hired Clement Cash ("Mr. Cash") as the new contractor who shortly withdrew. They then hired Mr. Kemp as the contractor in or about November 2017. Mr. Kemp continued construction until the Order made on 11 April 2018 which required the Farquharsons to maintain the status quo until the determination of the case. From time to time, there been some relaxation of this Order to permit the Farquharsons to protect their property.

The pleadings

[16] The POA asserted that the Farquharsons breached the covenant not to commence construction without first obtaining approval of the plans from the POA. The Farquharsons denied liability and asserted that they were entitled to commence construction, as the plan had been approved by the Ministry of Works.

[17] The parties agree that the Farquharsons were bound by the restrictive covenant to only build a one storey home without permission. Even further, however, the POA contends that the Farquharsons were also bound by the more particular height restriction that those one storey houses not be built over 18 feet without permission of the POA. They say that this more particular restriction was contained in the new version of the Rainbow Bay Restrictions and Conditions, which was impliedly part of the Farquharsons' title documents.

[18] The Farquharsons, on the other hand, assert that they were bona fide purchasers for value without notice with respect to the new version of the Restrictions and Conditions. Alternatively, they say, the one storey height restriction covenant was not properly amended, since it had only been agreed to by the POA Board and not three-fourths of the members of the POA, as required by the Articles of Association. The Farquharsons also contended that the POA unreasonably withheld approval to commence construction.

The issues

[19] The following issues arise for determination:

(i) Whether the Farquharsons breached the covenant not to commence construction without approval;

(ii) Whether the Farquharsons were bound by the restriction not to build over 18 feet

i. Whether the Farquharsons were bona fide purchasers for value without notice with respect to the 18 foot height restriction; and

ii. Whether the POA properly amended the one storey height restriction;

(iii) If they were not bound by the 18 foot restriction, whether the Farquharsons breached the covenant not to build above one storey?

(iv) Whether the POA unreasonably withheld approval to build?

The evidence

[20] Matthieu Hoopes, Perry Attfield and Richard Pinder gave evidence on behalf of the POA. Warren Farquharson and his wife, Gayle Farquharson gave evidence on their own behalves. The Court subpoenaed Craig Delancy, the Buildings and Control Officer in the Ministry of Public Works to assist with the determination of the "storey" issue. After a site visit, the POA requested and was granted leave to file a Witness Statement from an expert of its own, Jason Lorandos.

Matthieu Hoopes

[21] Mr. Hoopes filed a Witness Statement on 29 June 2018, which stood as his evidence in chief at trial.

[22] He is a US Citizen and a permanent resident of The Bahamas. He has been a resident of Rainbow Bay since 1996 and was a Board Member of the POA for approximately 18 years. Currently, he is the Secretary/Treasurer of the POA.

[23] Mr. Hoopes alleged that he was a Board Member in 2005 as well as in 2010 when the resolutions were unanimously adopted to (i) clarify the ambiguous term of "one storey" (found in the Covenant) as being 16 feet and (ii) to modify that height clarification to 18 feet, at the request of the Ministry, to allow more freedom of design.

[24] Mr. Hoopes further alleged that he prepared the Minutes of the Annual General Meeting ("AGM") in 2010, reviewed and sent them to the editor to be published in the newsletter. He stated that the newsletter is circulated by mail. He further stated that he mails the ones from Governor's Harbour and the POA's accountant mails the ones in the United States.

[25] Mr. Hoopes stated that, he first became aware of the Farquharsons' attempt to build a home without the approval of the POA's Board in September 2016. He said that he was apprised of the difficulty that Mr. Attfield was having in getting the Farquharsons to comply with the Covenant Restrictions. In May 2017, when the Farquharsons' first contractor withdrew from the construction, he, along with Mr. Attfield, met with the Farquharsons' second contractor, Mr. Clement Cash, at Mr. Cash's request. Mr. Cash requested permission to continue construction. The POA did not grant such permission. He stated that Mr. Cash left the meeting stating that, notwithstanding, he intended to continue with the construction.

[26] Mr. Hoopes next alleged that, after being told that the Farquharsons had hired a third contractor, Mark Kemp, he emailed Mr. Kemp (whom he has known for over 20 years) advising him that the Farquharsons did not have building approval from the POA and subsequently wrote a letter asking him to cease construction. Both correspondence were not acknowledged by Mr. Kemp.

[27] He testified that he was aware of the Order granted by this Court on 11 April 2018 for the parties to maintain the status quo. He has personally witnessed a breach of the order by the Farquharsons as they continue to construct the house.

[28] He stated that there have been occasions where property owners' applications for approval to build were denied. In those instances, the applicants would amend the plans to get approved and consult the neighbours. He said that he obtained building approval before commencing construction and he had to seek special permission to go above the height restriction. He was not on the Board at that time. Mr. Hoopes also stated that he was required to purchase four lots behind him so as not to obstruct anyone's view.

[29] Under cross-examination, he stated that when the Farquharsons eventually applied to have their plans approved "as is", the Board did not consult with the neighbours on their opinions because they never applied for a variance. Mr. Hoopes said that there were no bordering neighbours.

[30] He further testified that there were approximately 50 people at that meeting who agreed to the change in the height restriction from one storey to 16 feet.

[31] Under further cross-examination, Mr. Hoopes stated that he believed that the POA provided the Farquharsons with the new Restrictions and Conditions. He then said they were provided with the building permit.

[32] Mr. Hoopes also stated that in some cases the POA is not aware of who a property owner is until they apply for building approval. He admitted that Clause 6 of the Articles of Association with respect to the Secretary's obligation to keep an updated register of property owners is not strictly complied with.

[33] Mr. Hoopes was questioned as to whether the new Restrictions and Conditions are readily available on a title search, and he stated that the 18 feet height restriction is on the website and on the application for building plans. He asserted that the website is referred to in the newsletter and the POA provided proper notice to the Farquharsons that there was a height restriction.

[34] During re-examination, Mr. Hoopes stated that the building application is on Rainbow Bay's website. So also are the Restrictions and Conditions. The Farquharsons have access to the website.

Richard Pinder

[35] Mr. Pinder's evidence is contained in a Witness Statement filed on 22 February 2019. He is a past president of the POA. He was elected President in 2005 and served in that capacity for three years. He is no longer on the board of the POA. He was the President when the resolution was unanimously adopted to amend the one storey height restriction to 16 feet. He stated that the purpose was to "eliminate confusion" about what one storey is.

[36] He stated that he was a member of the Board in 2010 although he was not the President at the time.

[37] Under cross-examination, he alleged that the purpose, to some degree, of the height restriction was to protect ocean view. He is familiar with the location of the Farquharsons' lot. When asked whether there are any views to protect he said "*Not directly, to my knowledge*."

[38] Mr. Pinder testified that the Restrictions and Conditions normally become apparent to the purchaser during the purchase. According to him, the website also would have existed at that time and the height restriction would have been there. He also stated that he could not say whether the requirement for the POA to keep an up-to-date record of property owners and incoming property owners was followed.

Perry Attfield

[39] Mr. Attfield's evidence in chief is contained in his Witness Statement filed on 29 June 2018. He testified that he retired from working in the Communications Cabling Industry in Nassau, Bahamas. He is a property owner and resident of Rainbow Bay and has been assisting the POA's Board with building application and site inspections for approximately 5 years.

[40] He stated that, after becoming aware that the Farquharsons were building in or around September 2016, he contacted the Majors, who are the owners of the construction company who first undertook construction. According to Mr. Attfield, the Majors were experienced with building homes in Rainbow Bay, as they had built over a dozen homes. He called Mrs. Major and advised her that the Farquharsons did not have approval from the POA. Mr. Attfield said Mrs. Major had not realized that they did not have the POA's approval and that they were working from the Town Planning approval. According to Mr. Attfield, when Mrs. Major told the Farquharsons of what he said, they requested that the Majors resume construction anyway.

[41] On 29 September 2016, Mr. Attfield said he sent an email to the Farquharsons, informing them that they needed to apply for building approval from the POA before commencing construction. The Farquharsons responded by email dated 2 October

2016, stating that they were unaware of the requirement to seek approval from the POA prior to commencing construction. On 8 December 2016, he received a building application along with the plans from the Farquharsons. He conducted a site visit shortly thereafter, where he and Mr. Major agreed where the starting point for the measurement of the height would be. According to Mr. Attfield, based on the plans provided, the projected building would have been more than 6 feet above the height restriction, even if the floor foundation would have been finished at just above ground level. Consequently, he declined the building application by emails dated 14 and 19 December 2016.

[42] About six weeks later, Mr. Attfield emailed Mr. Farquharson, inquiring about his intentions with respect to the building. Mr. Farquharson said that he was undecided.

[43] On 9 March 2017, Mr. Attfield became aware of further construction on the Farquharsons' property. He emailed Mr. Farquharson, reminding him that he did not have building approval and again asking for his intentions. The email was unanswered.

[44] On 24 March 2017, Mr. Attfield received a copy of a letter sent by the POA's attorney to the Majors again asking them to cease construction. On 4 April 2017, Mr. Attfied met with the Majors at the site to come up with suitable revisions to the plans. They came up with simple modifications to the belt course height and roof pitch, which would have accorded with the 18 foot restriction. According to him, Mr. Farquharson did not agree to the modifications and the Majors withdrew.

[45] The Farquharsons then hired Mr. Cash and, in November 2017, it appeared that the Farquharsons hired another contractor, Mr. Kemp.

[46] Under intense cross-examination, Mr. Attfield stated that he was unaware whether the POA provided the Farquharsons with the Restrictions and Conditions but they should have come across it during their title search.

[47] He asserted that applications for exceptions from the height restrictions usually require a written submission giving reasons why the variation is necessary but he never received anything to that effect from the Farquharsons.

[48] After a site visit, Mr. Attfield was again examined on what took place. He said Mr. Delancy took the measurements of how high the foundation was above ground level. He noticed that the floor had been raised, which produced a ceiling height of 7.4 inches.

[49] Under cross-examination by learned Counsel Mr. Williams, who appeared for the Farquharsons, Mr. Attfield insisted that it could not be determined as yet whether there were any sea views to be obstructed by the Farquharsons' house. He stated that the sea is 500 feet away from the lot. Under re-examination, he said the building definitely obstructs the view of the lots behind it.

Craig Delancy

[50] Mr. Delancy filed a Witness Statement on 21 January 2019 and a Supplemental Witness Statement dated 25 April 2019 which stood as his evidence in chief at trial. He is the Buildings Control Officer in the Ministry. His duties are assigned to him by or under the Act and are subject to the general supervision and control of the Minister of Public Works. Based on his qualifications and experience, he was deemed an expert witness in buildings construction.

[51] Mr. Delancy gave expert testimony as "amicus curiae" in this matter. His evidence focused on what "one storey" is and whether the Farquharsons' building plans as approved by the Ministry conform to the definition of "one storey".

[52] According to Mr. Delancy, the plans show that the proposed building clearly shows that it is one storey with a high pitched roof and vaulted ceilings. From a structural design, there appears to be no evidence of use of the attic space.

[53] Mr. Delancy provided the definition of "storey" according to the definition in the Bahamas Building Code 2003 Edition (latest) (the "BBC"). "Storey" means "*that*

portion of a building included between the upper surface of any floor and the upper surface of the floor next above but not including a penthouse used only for the purpose of housing electrical or mechanical equipment. The top most storey shall be that portion of a building included between the upper surface of the top-most floor and the ceiling or roof above….If the finished floor level directly above a basement is more than six feet above grade, such basement shall be considered a storey."

[54] He stated that the Building Permit Application with drawings that were approved by the Ministry in Central Eleuthera on 26 January 2014 remains to be considered a single storey pursuant to the BBC.

[55] Under cross-examination by learned Counsel Mrs. Hunt, who appeared as counsel for the POA, Mr. Delancy stated that, based on the plan, the measurement between the finished floor and the belt is approximately 9 feet, which he said could be a floor or a storey. Later on, when asked whether there are two floors, he stated that "*it would appear to be two floors*."

[56] Although there is no basement on the plan, Mr. Delancy agreed that the photographs show that the Farquharsons' building has a basement. However, under cross-examination by Mr. Williams, he said that having a basement does not necessarily change a building from one storey to two storey. It only has this effect if the floor above the basement is more than six feet above grade. He said the photo of the Farquharsons' building seems to be 6 feet, but that because the other side is higher or deeper, it could change the definition to two storey.

[57] According to Mr. Delancy, because the land is slopey, the natural thing to do is turn the slope into a basement. The fact that the window is high and operable does not make it an attic.

[58] Mr. Delancy said the foundations for one storey and two storey buildings are different, so a person would have to apply to the Ministry for a variance of the plan's approval if they changed from a one storey to a two storey home. He said it

is possible for a building about 29 feet high to obstruct the view of the lots behind. However, he said that, although it is possible based on the natural terrain, he could not know for sure. Although he stated that he was not aware of an application for variance from the initial plans by the Farquharsons, he admitted that a variance could have been granted but he was unaware of it.

[59] After the site visit, Mr. Delancy was cross-examined again. He confirmed that the measurement of the foundation on the southeastern corner was just under 4 feet. On the southwestern side, the foundation was 8 feet 11 inches. On the northwestern side, the measurement was 9 feet 2 inches and on the northeastern side was about 7 feet.

[60] Mr. Delancy stated that, upon entering the building, it appeared to have been an almost finished room with a kitchenette or a counter, a bedroom, a bathroom and a sitting room. There was provision for a shower and there was a ceiling fan. He agreed that there seemed to be a deviation from the initial plans for the basement level but he received a copy of the receipt where the approval for the deviation was paid for.

[61] Based on the measurement that he took of the floor when he (we) entered the building and the definition of a storey, he opined that the finished room or spaces would be considered a basement and not a storey notwithstanding that some sides were above 6 feet (which is the measurement above which a basement is considered a storey according to the BBC). He explained that the southeast corner of the building was 4 feet and using that as the finished grade on a sloping property, it is below 6 feet. He insisted that the building is one storey. He stated that there would have been excavations into the earth in order to level out the floor because it was not sitting on a flat area. He said the property slopes down, which is why 4 feet is the highest point of the property.

[62] He rejected Mrs. Hunt's suggestion that his conclusion that the building was one storey was based on impartial bias to the Farquharsons. He said, as an architect, he considers all of the variations.

Warren Farquharson

[63] Mr. Farquharson filed a Witness Statement on 20 July 2018 which stood as his evidence in chief at trial. He testified that during the sale transaction, his then attorney, Ms. Carlene Farquharson ("Attorney Farquharson"), conducted a title search on the property which revealed that the property was encumbered by certain restrictive covenants, one of which was that a dwelling house of one storey could be built on the property and that, if a variation was required in relation to the one storey height restriction, that could be obtained by written permission from the POA.

[64] Mr. Farquharson alleged that, upon completion of the purchase, the POA gave them a welcome letter which contained general information about the Subdivision and the fees which were to be paid for the maintenance and general upkeep of the community. He maintained that he and his wife were never informed by the POA that there was an 18 feet height restriction. Furthermore, the information relating to the height restriction could not be gleaned upon a reasonable inquiry as there is no mention of such restriction in any title document concerning the Subdivision.

[65] Mr. Farquharson next alleged that, after purchasing the property, he and his wife hired a licensed architect to prepare building plans for a one storey two bedroom cottage which was to be built on the property. He stated that the architect drafted the plans according to their specifications and they were submitted to the Ministry in New Providence but were advised that the building plans had to be submitted to the local office in Eleuthera which they did.

[66] He stated that the first contractor, the Majors, made him aware that Mr. Attfield told them that they needed the POA's building approval. This led them to consult their Attorney Farquharson who confirmed that the property was bound by a restrictive

covenant to obtain the POA's approval before commencing construction but there was no 18 feet height restriction. Mr. Farquharson said that he was advised by Attorney Farquharson that the POA was relying on the new Restrictions and Conditions which he became aware of for the first time when the POA produced it to Attorney Farquharson during the dispute. In or around December 2016, upon the advice of their attorney, he completed the POA's building application form and submitted it for approval.

[67] Mr. Farquharson stated that the POA's refusal of their application for approval was unreasonable because they were not informed of the 18 feet height restriction nor did they have any notice of it since the restriction does not exist in their Conveyance. The POA referred them to their website which contained a reference to the 18 feet height restriction. Mr. Farquharson stated that they were not convinced that the information on the POA's website fulfilled the notice requirement according to the laws of The Bahamas.

[68] The Farquharsons then sought a variation from the POA on the basis that several homes in the Subdivision exceeded 18 feet and/or were not one storey building. The POA refused to grant them the variation. Mr. Farquharson stated that because they believed that the POA unreasonably withheld building approval, they continued construction despite requests from the POA for them to desist from doing so.

[69] Mr. Farquharson stated that Mr. Attfield was perhaps annoyed by their refusal to cease construction so he began harassing the Majors which eventually led to the Majors deciding to withdraw. According to him, he did not recall the Majors proposing a modification of the plans to comply with the 18 feet height restriction. The Farquharsons then engaged the services of Mr. Cash who also withdrew from the construction because of Mr. Attfield's menacing behaviour.

[70] Mr. Farquharson then hired Mr. Kemp who continued construction until the court ordered that the status quo be maintained. He confirmed that they applied for a

variation from the initial plan to build the basement which was approved by the Ministry.

[71] Under cross-examination, it took a bit of time for Mr. Farquharson to eventually agree that Attorney Farquharson advised that there were certain restrictive covenants attached to the property. He maintained that, at the time of the purchasing transaction, he was unaware that he needed permission from the POA to build more than one storey. He further stated that he did not have notice that all lot owners required permission from the POA to build any property in Rainbow Bay. He stated that his wife received the welcoming letter from the POA. He cannot say how she received it. Mr. Farquharson stated that Mr. Attfield did not initially inform him that his building was in contravention of the height restriction. He informed the Majors.

[72] Under further cross-examination, Mr. Farquharson maintained that he did not build a two storey building. He also asserted that he is now aware of the website. He could not access information without the password but he obtained the building application from the website. He estimated the height of the basement to be approximately 7 feet.

Gayle Farquharson

[73] Mrs. Farquharson filed a Witness Statement on 20 July 2018 which stood as her evidence in chief at trial. Her witness statement was almost identical to that of her husband.

[74] Like her husband, Mrs. Farquharson said that she was not aware of the Restrictions and Conditions until Attorney Farquharson presented it to them during correspondence with the POA.

[75] Under cross-examination, Mrs. Farquharson said that during the conveyancing transaction, Attorney Farquharson made her aware of outstanding homeowners' association fees. She went to the website but she could not recall whether she could have accessed the building regulations and the building application. She did

not admit or deny that the building application was publicly accessible on the website.

[76] She took the photos because Mr. Attfield contended that their home was more than one storey. She said that they applied for building approval after commencing construction because they were not aware that they had to apply prior.

Jason Lorandos

[77] After the site visit and the cross-examination of Mr. Delancy, the POA sought leave to call their own expert, Mr. Lorandos who filed a Witness Statement on 30 September 2019. He was deemed an expert in architecture. He stated that he visited the site but he was prevented from taking measurements because the Farquharsons prohibited him from entering the property. Notwithstanding, his view was that the height-above-grade was a minimum of 6 feet and, in his opinion, the building which was already constructed, referred to as a basement, is a "storey". His view was based on the photographs in the bundle of photographs, counting the concrete blocks and referencing other items in the photographs. He said the photographs show that the building rises above grade by at least 7 standard concrete blocks at that point with an additional 16 inches to account for the poured concrete belt course. As such, the height-above-grade should measure at least 72 inches or 6 feet from grade, each standard block being 8 inches x 8 inches x 16 inches.

[78] Under cross-examination, Mr. Lorandos stated that his definition of a single storey in accordance with the BBC, is a habitable building with one level of living.

Discussion

Issue 1: Whether the Farquharsons breached the covenant not to commence construction without POA's approval

[79] It is undisputed that the Farquharsons were bound by the restrictive covenant not to commence construction without the approval of the POA. They were not empowered to commence construction by the Ministry's approval. They also required approval from the POA.

[80] During submissions, Mr. Williams conceded that the Farquharsons commenced construction without such approval. Accordingly, they breached the restrictive covenant not to commence construction without the prior approval of the POA.

Issue 2: Whether the 18 foot height restriction applies to the Farquharsons

[81] The POA contends that the Farquharsons breached the covenant not to build above 18 feet without special approval from the POA. However, the Farquharsons assert that the 18 foot height restriction did not apply to them because (i) they were bona fide purchasers for value without notice with respect to that restriction and (ii) the resolutions changing the height restriction from one storey to both 16 feet and 18 feet were not properly adopted.

Bona fide purchasers for value without notice

[82] With respect to the new Restrictions and Conditions, Learned Counsel Mr. Williams submitted that the 18 foot height restriction is unenforceable against the Farquharsons because they were bona fide purchasers for value without notice. Mr. Williams contended that they had no actual notice of the 18 foot restriction (on its own nor as contained in the new version of the Restrictions and Conditions). According to Mr. Williams, the Farquharsons only became aware of the version of Restrictions and Conditions on which the POA relied upon in September 2016, when the POA began communication with the Farquharsons' lawyer during the dispute. Further, says Mr. Williams, the Welcome Letter made no reference to height restriction and the website referred to in the Welcome Letter required a password which was not provided upon sale.

[83] Mr. Williams next contended that the Farquharsons did not have constructive notice, as it could not be said that the 18 foot height restriction could have been discovered upon a reasonably diligent search expected of conveyancing attorneys. Mr. Williams argued that the new Restrictions and Conditions could not have been with the Ministry in Eleuthera as the POA contends. According to him, had it been with them, the Farquharsons would not have obtained the Ministry's approval of the plan that exceeded 18 feet. It did not form part of the title documents. He further

submitted that searching a website is not part of the reasonable due diligence that constitutes constructive notice.

[84] Learned Counsel Mrs. Hunt submitted that the new Restrictions and Conditions with the 18 foot restriction impliedly formed part of the Farquharsons' title documents. According to her, the POA was entitled to enforce restrictive covenants by the Conveyance dated 5 November 1979 between Rainbow Bay Limited and Gordon F. Price Limited of the one part and the POA of the other part. Further, the Conveyance stated that the right to enforce Restrictions and Conditions for Rainbow Bay was set out in the Affidavit of Gordon F. Price dated 23 September 1969. She contended that the "one storey" height restriction, which both parties agree, was subsequently changed to 16 feet and then 18 feet.

[85] It is irrefutable that the POA is entitled to enforce restrictive covenants, or even their right to make a Declaration of Restrictions and Conditions, which is ordinary for subdivisions/developments and/or condominiums.

[86] The Farquharsons however assert that they are bona fide purchasers for value without notice. In other words, they assert that there was no notice of the 18 foot height restriction. The POA asserts that the notice of the 18 foot height restriction is its presence on their website.

[87] Section 52 of the Conveyancing and Law of Property Act, Ch 138 speaks to restriction on constructive notice. It provides:

> **"52. (1)A purchaser shall not be prejudicially affected by notice of any instrument, fact or thing unless –**
>
> **(a) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or**
>
> **(b) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had**

been made as ought reasonably to have been made by the solicitor or other agent.

(2)This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe any covenant, condition, provision or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if the section had not been enacted".

[88] In **Dennis Dean v Arawak Homes** [2014] UKPC 24**,** the Privy Council had to determine who had better documentary title to the land. The Appellants asserted that they were bona fide purchasers for value without notice with respect to the judgments against the certificate of title of one of their links in their chain of title. In determining whether they were bona fide purchasers for value without notice, the Board set out what constitutes due diligence on the part of the Purchaser's attorney in a conveyancing transaction. At para. 24, Lord Hodge, in delivering the Judgment of the Board, stated:

"24. Bahamian conveyancing practice involves title searches in the Registrar General's Department back to a root title at least thirty years before the transaction. It also involves personal searches in the Supreme Court's records for relevant judgments against the people who provide the links in title or who appear to have interests in the property. Allen SJ at para 54 of her judgment, a passage which the Chief Justice endorsed in his judgment, stated:

"In order to get a good and marketable title, such title must begin with a root at least thirty years old and the risk is on the purchaser, who must satisfy himself by a full investigation of the title, before completing the purchase. It goes without saying that a *bona fide* purchaser who is giving value for his title would reasonably be expected to investigate the title by doing the usual and proper inquiries before paying for it. Had this been done, [Mr Dean], or any legal counsel working on his behalf, would have discovered the conveyances and Court orders affecting the subject land and would know that the vendor could not pass legal title to the subject land in 1999."[Emphasis added]

[89] The Board affirmed the Court of Appeal's conclusion that the Appellants could not be bona fide purchasers for value without notice because they had constructive

knowledge (which is measured by the investigations and inquiries that ought to have been made by the purchaser or his attorney) of the actions filed against Mr. Johnson, who was their root of title to set aside his certificate of title as well as the judgment that the predecessor had obtained the certificate by fraud. They were deemed to have constructive notice of those facts since a reasonable investigation would have revealed it.

[90] In the present case, it is acknowledged by the POA that the 18 foot height restriction was contained in the unrecorded new Restrictions and Conditions on the website in addition to a previous Newsletter.

[91] In **Dennis Dean**, the Privy Council held that the extent of the constructive knowledge of a purchaser depends upon an *objective* assessment of what inquiries and inspections he or someone on his behalf should have made.

[92] I agree with Mr. Williams that putting the 18 foot height restriction on a website does not constitute constructive notice in conveyancing practice as purchasers are not bound to check websites. It is not part of the reasonable investigations expected to be carried out by a purchaser and/or his attorney to uncover encumbrances. But that is not the end of the story.

[93] The Farquharsons conceded that they have breached the restrictive covenant when they commenced construction without the POA's approval. Had they applied for approval, they would have discovered on the application form that there is an 18 foot height restriction. In addition, having had the opportunity to see, heard and observe the witnesses as they testified, I did not find the Farquharsons to be credible witnesses. The litany of inconsistencies in their evidence made their evidence very unreliable. Mr. Farquharson was also a very unimpressive witness. They are both intelligent people and must have also check the website. I did not believe Mrs. Farquharson that Attorney Farquharson only mentioned homeowners' association fees and nothing else.

[94] Also, I believed Mr. Attfield when he said that he met with the Majors on 4 April 2017 to come up with suitable revisions to the plans. They came up with some simple modifications but the Farquharsons did not agree and the Majors withdrew their services.

[95] In my judgment, the Farquharsons were deemed to have constructive notice of the 18 foot height restriction since a reasonable investigation would have revealed it. Accordingly, they could not be bona fide purchasers for value without notice since they had constructive notice. They are therefore bound by the implied covenant not to build over the 18 foot height restriction.

Resolutions not properly adopted

[96] Mr. Williams contended that there are two (2) reasons why the resolutions changing the height requirements were not effective. First, he stated that the change was not made in accordance with the Articles of Association, which required a three-fourths majority of all of the members (lot owners) and ratified in writing by special resolution at an extraordinary general meeting. In support of his contention. Mr. Williams relied on Articles 10, 31 and 49 of the Articles of Association.

> **"10. In all matters which fall to be decided by the votes of members of the Association, each member shall have one vote for every lot site…"**
>
> **31. The Board, or the Secretary with the authority of the Board, may enter into contracts or engage and discharge employees as may be deemed necessary for the carrying out the functions of the Association. The Board is also empowered to carry out any other function of the Association except those functions or acts which specifically require approval of the members in general meeting.**
>
> **49. No new articles shall be made nor any of the existing Articles altered or rescinded except by a three fourths majority vote of members of the Association at an Extraordinary General Meeting specifically called for the purpose ratified and confirmed as a special resolution in accordance with the Act."**

[97] Article 31 states that the Board is empowered to carry out every function of the Association unless it is a function or act that specifically requires approval of members i.e. property owners in a general meeting. Similarly, Article 49 states that new articles or amendments to existing articles can only be changed by a three fourth majority applies only to new articles of amendments to existing articles. Mr. Williams' assertion that the change to the one storey height restriction needed to be changed by a three fourths majority of the property owners is premised on the one storey height restriction being an act that specifically requires the approval of the members or a provision in the Articles of Association. The one storey height requirement was not an article in the Articles of Association. It was a restrictive covenant. Further, by passing the resolution, the POA Board was not seeking to create a new article. It sought to amend a restrictive covenant, which was contained in the title documents. Accordingly, it was not something that was required to be amended by the members or by three fourths majority of those members.

[98] In my judgment, pursuant to the Memorandum and Articles of Association, the Board of the POA had the authority to change the height requirement without reference to lot owners.

[99] The second issue of the validity of the resolutions, according to Mr. Williams, is the fact that the absence of the actual resolution evidencing the approval of the amendment to the height restriction. On the other hand, Mrs. Hunt submitted that the absence of the resolution does not render the agreement ineffective. She asserted that it is a well-established principle that where it can be shown that all shareholders who have the right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in a general meeting would be (**Re Duomatic** [1969] 2 Ch 365).

[100] I agree with Mrs. Hunt that the absence of the resolutions does not, itself, render the amendment(s) to the height restriction ineffective. The POA produced an email

from the then Secretary of the Minutes taken at the 13 March 2010 AGM where the then President, John Kavali, reported that due to a request form the Governor's Harbour Building Department, the Board had adopted a resolution to increase the height restriction from 16 feet to 18 feet. Further, the POA produced an excerpt from the 2005 Fall Newsletter which stated that the Board held a meeting on 18 March 2005 where a resolution was passed to amend the restrictions and conditions applicable to "Residential Lots" and that the restriction on height would now read:

> **"No building or structure of more than 16 feet from the finished floor to the top of the building ridgepole at the highest natural elevation of the lo, prior to the commencement of construction, shall be constructed on the said hereditaments EXCEPT by written permission of the Approving Authority as set forth above."**

[101] The Newsletter stated that the purpose of the amendment was to eliminate confusion as implied by the term "storey" and thus impose an actual height restriction from the highest point of one's property. It further stated that "*The Board deems height restrictions a major concern particularly in Rainbow Bay as the subdivision is reputed for its magnificent ocean views."* This is consistent with the evidence of each of the POA's witnesses. I am satisfied that the changes were duly made.

No capacity

[102] Mr. Williams submitted that the POA does not have the capacity to enforce the restrictive covenants because it is not an approved local improvement association under the Subdivisions (Local Improvement Associations) Act, Ch. 258 ("the Subdivisions Act"). According to Mr. Williams, had the POA been established under the Subdivisions Act, its documents on restrictions and conditions would have been recorded in the Registry, thereby giving constructive notice to the world.

[103] In support of his contention that the failure to be established under that Act prevented the POA from enforcing restrictive covenants, Mr. Williams relied on **Watlings Island Property Owners Association v Director of Physical**

Planning and others [2018] 1 BHS J No 96. However, that case can be distinguished from the instant case. That was an application for judicial review by the Property Owners' Association, disputing the fairness of the Physical Planning Committee's decision refusing the property owners' association's application to re-zone the parks in the Subdivision. The fact that the Property Owners' Association was not registered under the Act became relevant to the Respondent's objection to the Association's sufficiency of interest or locus standi. In considering whether the Association had sufficient interest in the decision, Winder J reasoned that since the statute contemplates the creation of a specific type of Association to represent the owners of the subdivision, only that association and not any other would be interested in the decision made by the Town Planning Committee. He concluded that only an association made under the Act could be interested in the decision. The rationale was that because the Association was seeking government approval from the Town Planning Committee, which is established under the Town Planning Act, Ch 255, an association must have been established under the Subdivision Act since the law provided the opportunity.

[104] Differently, however, the POA in the instant case does not seek any government approval. Further, the Subdivision Act merely makes provision for the formation of local improvement associations to establish, maintain and operate improvement associations for the benefit of lot owners in sub-divisions, as stated in its long title. No provision (expressly or impliedly) has the effect of compelling associations who represent property owners to do so. The Act provides that owners who wish to form themselves into an association can apply under the Act, but it is not compulsory. It is therefore difficult to see how not being formed under that Act would have the effect of preventing the POA from enforcing restrictive covenants.

[105] The POA is a Company incorporated under the Companies Act and has the common areas and unsold lots vested in it. The fact that it was not established under the Subdivisions Act does not render it incapable of enforcing restrictive covenants.

[106] This argument is untenable and must fail.

Issue 3: Whether the Farquharsons breached the covenant not to build a building exceeding one storey

[107] Given my findings that the Farquharsons have breached the two covenants namely (i) constructing their building without the POA's approval (which they have conceded) and (ii) building in contravention of the 18 foot height restriction, the issue of whether the Farquharsons breached the covenant not to build a one story building falls away.

[108] However, in the event that I am wrong to find that the Farquharsons had constructive knowledge of the 18 foot height restriction, I shall carry on.

[109] The Farquharsons contended that their building is one storey notwithstanding that it has a basement in addition to the main level. The POA, however, asserted that the basement (which is already built) is itself a storey, which means that the building will be two storeyed.

[110] Mrs. Hunt went to great lengths in her cross-examination to prove that the Farquharsons deviated from their approved plan, which did not provide for a basement. The Farquharsons asserted that they received approval for the amendment to the plan, which provides for a basement. However, the deviance from the plan is only relevant to determining this issue to the extent of acknowledging that the initial plan did not provide for a basement yet the building has a basement. The issue is simple – is the basement a "storey" itself? If it is, the building has two storeys. If it is not, the building has one storey. The basement is already built, which allowed for it to be measured at the site visit. As such, the question of whether the building reflects the approved plan is irrelevant.

[111] The evidence of the two experts was conflicting on the issue of whether the building is one or two storeyed.

[112] The Court ordered that Mr. Delancy from the Ministry of Works appear to assist the Court. He opined that the building is one storey notwithstanding that, on most sides of the building, the height of the basement exceeds 6 feet, which is the maximum height that a basement can be before it is considered a storey according to the BBC. Mr. Delancy reasoned that, despite the measurements, the house is built on slopey ground and as such, the ground likely had to be excavated for the foundation. He opined that the shallowest side of the house, which measured just under 4 feet, represented the true grade.

[113] Mr. Lorandos, who was the expert for the POA, opined that the height-above-grade was a minimum of six feet. He said his definition of single storey is a habitable building with one level of living. As such, he opined that the building is two storey since the basement was a minimum of 6 feet which is a storey.

[114] I accept the evidence of both experts to some extent. I bear in mind that Mr. Delancy is an independent witness who was called by the Court to assist and that Mr. Lorandos was paid by the POA. Also of importance is that Mr. Lorandos did not enter the property but merely viewed it from a distance. He therefore came to his conclusions by referencing the surroundings and other items in photographs. I am therefore reluctant to accept Mr. Lorandos' opinion on the height-above-ground, which he says is a minimum of 6 feet.

[115] In that regard, I accept Mr. Delancy's evidence that the measurements from most of the sides of the building were not accurate as a result of the unevenness of the terrain. Mrs. Hunt was incorrect in her cross-examination to suggest that the definition of "storey" does not reference grade. Even on Mr. Lorandos' opinion on the height-above-ground, the basement is not considered a storey. According to the BBC, a basement is considered a storey "if the finished floor level directly above a basement is *more* than six feet above grade." Further, the classification of buildings as one storey or two storey does not, in the BBC, seem to refer to liveableness. In my judgment, it matters not that the basement had been built in such a way to provide for a person to live there.

Whether the POA unreasonably withheld approval

[116] By their Amended Defence, the Farquharsons pleaded that they submitted a building application to the POA but the POA unreasonably withheld its consent/approval. Mr. Williams submitted that while there is no express term in the restrictive covenant which indicates that the POA should not unreasonably withhold its consent, the Court has the power to imply terms regarding the instrument as a whole against the factual background.

[117] In this regard, Mr. Williams relied on the Privy Council decision in **Attorney General of Belize v Belize Telecom** [2009] UKPC 10. This case is not authority for the proposition that the Court can imply an obligation on the POA not to unreasonably withhold consent/approval. In **Belize Telecom**, the Privy Council decided that, in determining whether terms should be implied into the Articles, it did not have the power to imply terms to make the contract more efficient. The correct approach is to consider the whole of the document. The Court has the power to imply a term only if the Court finds that the parties must have intended that the absent term be present.

[118] In considering the issue of the reasonableness in relation to withholding consent, in **Porton Capital Technology Funds and others v 3 M UK Holdings Ltd & 3 M Company** [2011] EWHC 2895 (Comm), the High Court of England provided useful guidance regarding the issue of the withholding of consent. The question before the Court was whether the claimants had acted reasonably in withholding consent to Acolyte ceasing business. The judge held, in applying existing case law, that the claimants had indeed acted reasonably. The following principles are derived from the case namely:

1. The burden is on the party seeking consent to demonstrate that the withholding party's refusal to consent was unreasonable;

2. The withholding party does not need to prove that its refusal to consent was correct or even justified. It simply needs to prove that its refusal was reasonable in the circumstances which is a question of fact;

3. In determining what is reasonable, the withholding party is only required to consider its own interests; and

4. The withholding party does not need to balance its interests against the interests of the party seeking consent unless competing interests are wholly disproportionate.

[119] The Farquharsons argued that the POA unreasonably withheld their consent for the following principal reasons namely:

1. The POA, by its own admission, indicated that the height restriction of 18 feet was meant to protect ocean views but a review of the plan of Rainbow Bay, shows that the property of the Farquharsons is located in an area where ocean views cannot be obstructed;

2. The POA did not confer with owners of adjoining lots near the Farquharsons to determine if they had any issue with the fact that the Farquharson's building was more than 18 feet;

3. The POA sought to require the Farquharsons to purchase additional lots thereby securing a financial advantage to the POA in the form of additional association fees;

4. The POA has granted several approvals for buildings exceeding 18 feet in Rainbow Bay. Therefore, there is no strict adherence to the covenant enforcement and the restrictive covenants have either been modified or are now obsolete;

5. The POA failed to follow its own internal procedures to ensure that it would be aware of new property owners; and

6. The building of the Farquharsons does not infringe with the overall character of the neighbourhood.

[120] Mr. Williams submitted that, on a balance of probabilities, the POA's actions in withholding approval was unreasonable and that the POA acted outside the scope of its authority as (i) it was not formed under the Local Improvement Associations Act and (ii) the proper process for amending the restrictive covenants was not followed. He further submitted that the reverse burden is on the POA to show that its actions in relation to withholding approval were reasonable.

[121] The burden is on the Farquharsons and not the POA to show that the POA's refusal to approve was unreasonable. The POA simply has to prove that its refusal was reasonable. This is a question of fact.

[122] The POA submitted that the issue of the 18 foot height restriction is a criterion that has been applied to all applicants. I accept the evidence of Mr. Hoopes and Mr. Attfield that the height restrictions had been applied evenly and strictly to other lot owners as it had been to the Farquharsons. As I see it, it is a means of ensuring some degree of uniformity in the construction of buildings as well as protecting neigbouring vistas which the POA accepted, was the primary reason for the height restriction. True, when the Court made a site visit, there were no views (at that time) which appeared to be adversely affected by the Farquharsons' incomplete building.

[123] In my opinion, one of the issues which led to the present state of affairs is the blatant refusal of the Farquharsons to comply with the restrictions. Mr. Attfield testified (and I believed him) that the Majors made some modifications to the plans in order to accommodate both parties but the Farquharsons simply refuse to budge. Instead, they pressed on with their illegal activity even in the face of an order to maintain the status quo (which the Court was apprised of during court hearings). In fact, Mr. Farquharson admitted that he ignored Mr. Attfield and continued with the construction of the building.

[124] The POA, through several letters and emails, attempted to settle this matter amicably and to rectify the Farquharsons' breach. In fact, the POA's agents invited the Farquharsons to submit their plans for approval - despite not having done so prior to the commencement of construction.

[125] Mrs. Hunt submitted that the covenants have to be enforced. The Farquharsons argued that there are other two storey houses in Rainbow Bay. This is accurate but the POA, through its witnesses, submitted that save for three houses in Rainbow Bay, all of the other homeowners have applied for approval to build in accordance with the covenants. In any event, the POA is not saying that applications were not refused but where those applications were refused, the homeowners modified their plans to comply with the POA's restrictions. As Mr. Hoopes himself testified, his initial application was rejected due to the height restriction so he agreed to purchase additional lots so that he would not obstruct his neighbours' panorama.

[126] In my considered opinion and applying the test as laid down in **Porton**, the Farquharsons have not satisfied me that the POA acted unreasonably in refusing to approve their application. The withholding of consent does not need to be correct or justified. The POA just need to be reasonable taking into account their own interests and not those of the Farquharsons. Their own interest is that anyone who breaches their covenants need to apply and comply with their requirements.

[127] The question of whether approval was unreasonably withheld must be determined on the considerations of the POA at the time when the application was being considered. The question is whether it was unreasonable for them to make that determination as they did, at that time in those circumstances. On legal principles, the POA was entitled to refuse approval of the Farquharsons' application on the 18 foot height restriction but, in my considered opinion, the POA does have the unfettered discretion to grant permission to the Farquharsons to complete their building. The Farquharsons must therefore present a proper application and abide with the requirements of the POA. As it stands, they have no legs to stand on.

[128] There appears to be a lot of tension between these parties. Undoubtedly, the Farquharsons are the architects of their own misfortune. They must therefore be contrite. That said, I will implore the POA to favourably consider the Farquharsons' application once they comply with the requirements of the POA.

Conclusion

[129] The covenant not to construct without the POA's approval was enforceable against the Farquharsons, as it was in their title documents. As such, they breached the covenant when they commenced construction without the POA's approval. They also conceded to this breach. With respect to the 18 foot height restriction, I find as a fact, that the Farquharsons had constructive notice of this restriction. Consequently, they also breached this restrictive covenant. The issue of whether the building is one storey or two storey falls away given my finding with respect to the 18 foot height restriction.

[130] In terms of withholding of approval by the POA, the burden is on the Farquharsons to show that the POA's refusal was unreasonable. The POA need not be correct or justified in withholding consent. They just need to be reasonable taking into account their own interests and not those of the Farquharsons. Rules and procedures need to be maintained and obeyed not flouted. Otherwise, chaos and disharmony would ensue. In my judgment, I find that the POA has not acted unreasonably in withholding consent/approval to the Farquharsons.

[131] Even during the trial, the POA was amenable to settling this dispute but the Farquharsons refused to.

[132] In the circumstances, the Court makes the following orders:

1. That the two restrictive covenants are enforceable and binding as against the Farquharsons;

2. The Farquharsons are in breach of the two restrictive covenants and

3. A perpetual injunction is granted for the Farquharsons to cease further construction until there is full compliance with the requirements of the POA with respect to the two restrictive covenants.

Costs

[133] In civil proceedings, costs are always discretionary. The Court has a wide discretion in deciding what costs order it makes: see RSC O. 59 Rule 2 (2) and Rule 3 (2) as well as section 30(1) of the Supreme Court Act.

[134] As a general rule, the successful party is entitled to his costs. Both parties have submitted their respective Bill of Costs ahead of this judgment. The difference is substantial. In the circumstances, I will order that the Farquharsons pay costs to the POA to be taxed if not agreed.

Dated this 25th day of February 2022

Indra H. Charles
Justice