COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2012/CLE/gen/01147

BETWEEN

SANDYPORT HOMEOWNERS' ASSOCIATION LIMITED

Plaintiff

AND

R. NATHANIEL BAIN

Defendant

Before Hon. Chief Justice Sir Ian R. Winder

Appearances: Kahlil Parker KC for the Plaintiff
Meryl O. Glinton for the Defendant

28 March 2019, 5 June 2019, 3 December 2019, 11 January 2022, 20 January 2023 and 31 January 2023

JUDGMENT

WINDER, CJ

This is an action by the Plaintiff, Sandyport Homeowners' Association Limited (the "Association"), to enforce restrictive covenants contained in a conveyance to the Defendant, R. Nathaniel Bain ("Bain"). Bain challenges the Association's *locus standi* and counterclaims for declaratory relief and damages for alleged losses suffered as a result of the Association's actions.

BACKGROUND

General

[1.] The Association is a limited company which is responsible for the common property and amenity areas (the "Common Areas") within the residential development known as "Sandyport" in New Providence. The Common Areas consist of roadways, common parking areas, paths, waterways, swimming pools, tennis courts, security guard houses, walls, garbage collection points and the like. The Association maintains the Common Areas by levying maintenance, indenture and other charges on the owners of lots in Sandyport.

[2.] On the basis of an Indenture of Conveyance dated 21 May 2008 (the "Developer's Conveyance"), and a Deed of Assignment dated 3 November 2009 (the "Developer's Assignment") (together the "Association's Documents"), both made with Sandyport Development Company Limited (the "Developer"), the Association has proceeded on the footing that it is vested with title to and is licensor of the Common Areas and it is entitled to enforce and effectuate the restrictive covenants binding residential lots in Sandyport ("Gated Lots").

[3.] At the heart of this matter is an incomplete residence on a Gated Lot owned by Bain, namely, Lot 23 in Royal Palm Cay in Sandyport Phase 5A (the "Subject Property"). Bain acquired the Subject Property from the Developer in 2005 by an Indenture of Conveyance dated 29 September 2005 made between the Developer, Bain, and FirstCaribbean International Bank (Bahamas) Limited ("FirstCaribbean") (the "2005 Conveyance").

[4.] In the 2005 Conveyance, Bain covenanted in clause 2 as follows:

> The Purchaser hereby covenants with the Vendor and all other persons claiming under the Vendor as purchasers of any part or parts of Subdivision Five to the intent that the burden of this covenant may run with and bind the land hereby conveyed and every part thereof into whosoever hands the same may come and to the intent that the benefit thereof may be annexed to and devolve with each and every part of Subdivision Five other than the land hereby conveyed that the Purchaser and all persons deriving

title under the Purchaser will at all times observe and perform the said restrictions but so that neither the Purchaser nor the executors administrators or assigns of the Purchaser shall be liable for any breach of the restrictions occurring upon or in respect of the said hereditaments after the Purchaser or the executors administrators or assigns of the Purchaser shall have parted with all interest therein ....

[5.] The "*said restrictions*" referred to in clause 2 of the 2005 Conveyance (the "Scheduled Restrictive Covenants") were set out in a Schedule to the 2005 Conveyance and included the following:

> (5) No building fence wall or other structure including but not limited to, garage, swimming pool house drives parking areas landscaping, sea wall slip, boat landings, docks, piers dolphins or mooring posts modifications or alterations ('Structures') whatsoever shall be erected placed or altered on any lot or canal unless and until the proposed detailed plans and specifications thereof shall have been approved in writing by the Vendor. All Structures shall be of the Sandyport Georgian Colonial style. Every application to the Vendor shall be in writing and shall be accompanied by (a) the detailed plans and specifications of the proposed Structures including adequate offstreet parking and exterior colour (b) the details of the proposed type of construction (c) a plot plan showing the proposed location of Structures on the lot and (d) a drainage plan showing the position of drainage swales and conduits and (e) a construction schedule (collectively called 'the Plans'). Such approval shall not be given if the Vendor in its sole discretion determines that the proposed Structures would affect the integrity (by appearance or otherwise) or endanger any part of the remainder of the Sandyport Property or buildings. The issuance by the relevant Government authorities of a building permit which may be in contravention of these restrictions shall not prevent the Vendor from enforcing these provisions.
>
> (8) No Structure shall be built erected or landscaped other than according to the Plans approved in writing before the same is commenced and shall not after be altered in external appearance without the like approval of the Vendor in writing.
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> (9) If within forty-five (45) days after the issue of a receipt in writing for such Plans by the Vendor no written objection shall have been received by the owner from the Vendor then such Plans shall be deemed to have been approved.
>
> (13) All construction activity on any lot and traffic shall be subject to the general supervision of the Vendor.
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> (29) No building or other structure shall remain unfinished for more than One (1) year after the same shall have been commenced. No lot shall be left without being landscaped for in excess of one (1) year from the date hereof unless a building has been commenced.

[6.] These proceedings were commenced by the Association by Writ of Summons on 28 August 2012. The Association's case is that Bain commenced and carried on construction on the Subject Property without its approval and without paying the requisite fees, in breach of the Scheduled Restrictive Covenants. The Statement of Claim provides:

1. The [Association] is a limited company having its Registered Office in the city of Nassau, New Providence, an island on The Commonwealth of the Bahamas, carrying on a non-profit business within the said Commonwealth as the owner, operator, and licensor of the [Common Areas], and the beneficiary of the restrictive covenants binding the properties, within the Sandyport Residential Development, in the Western District of the said Island of New Providence.

2. By virtue of a conveyance between [the Developer] and the [Association] dated the 21st day of May A.D. 2008, recorded in the Registry of Records in Volume 10446 at pages 162 to 187, the [Association] became the owner of the [Common Areas] in the Sandyport Development as defined in the said conveyance. By virtue of the Deed of Assignment between [the Developer] and the [Association] dated the 3rd day of November A.D. 2009, stamped and now or about to be recorded in the Registry of Records, the rights, title, and interest, of [the Developer], as Vendor in the original conveyances of properties within Sandyport and licensor under the various licenses granted to property owners in Sandyport, were assigned to the [Association].

3. By virtue of an Indenture of Conveyance dated the 29th day of September A.D. 2005, [Bain] became the owner of all that piece parcel or lot of land being [the Subject Property], in the said Sandyport Subdivision, which conveyance is Recorded in Volume 9473 at pages 308 to 325 (hereinafter referred to 'the property').

4. [Bain's] use and enjoyment of the property is subject to restrictive covenants in favour of the [Association] set out in the Schedule to [Bain]'s conveyance. Clause (5) of the Schedule to [Bain]'s conveyance provides that: 'no building fence wall or other structure... whatsoever shall be erected placed or altered on any lot or canal unless and until the proposed detailed plans and specifications thereof shall have been approved in writing by the [Association]...such approval shall not be given if the [Association] in its sole discretion determines that the proposed structures would affect the integrity (by appearance of otherwise) or endanger any part of the remainder of the Sandyport Property or buildings. The issuance by the relevant Government authorities of a building permit which may being contravention of these restrictions shall not prevent the [Association] from enforcing there provisions'. [Bain], in breach of the said restrictive covenant, has commenced construction on the property which has not been approved by the [Association].

5. Clause (13) of the said Schedule provides that: 'All construction activity on any lot and traffic shall be subject to the general supervision of the [Association].' Pursuant to its rights and obligations in this regard, as well as its duties under Clause (25) set out hereinabove, the [Association] requires all owners within Sandyport to submit, in addition to their application for approval, an application fee of $1,000.00, to defray its cost in conducting the requisite reviews and securing the requisite expert opinions, and, upon approval, a construction fee of $2,500.00 to address the attendant costs of supervising and ongoing maintenance due to construction traffic. [Bain] has failed and refused to pay the requisite application fee and has declared his intention in advance to refuse to pay the construction fee, should his application have met with the [Association]'s approval. However, notwithstanding [Bain]'s refusal to comply with the rules and regulations for the due operation of the Sandyport community, the [Association] has preliminarily examined proposed drawings submitted by the

[Association] [sic] on or about the 15th day of August A. D. 2012, on a conceptual application basis.

6. Notwithstanding that the [Association] has yet to approve the said drawings, and [Bain] has yet to pay the requisite fees, [Bain] has unlawfully commenced and continued construction activity on the property in breach of his contractual obligations. Furthermore, the [Association] fears that [Bain] is proceeding based on drawings which are inherently defective and will not meet approval without amendment.

7. Cause (29) of the said Schedule stipulates that: 'no building or other structure shall remain unfinished for more than one (1) year after the same shall have been commenced...' [Bain] has allowed an unfinished structure to remain on the property for a number of years. [Bain] has yet to submit proof that he secured the necessary approvals upon commencing construction initially, which began years prior to the [Association]'s abovementioned acquisition of the abovementioned rights and responsibilities.

8. The [Association]'s demands notwithstanding, [Bain] has failed and refused to cease his unlawful construction activity upon the property. It is the [Association]'s honest belief that [Bain] will persist in his unlawful behavior unless compelled and restrained by this Honourable Court.

AND THE PLAINTIFF CLAIMS:

1. An injunction prohibiting and restraining [Bain] from commencing or continuing construction on the property, Lot 23 Royal Palm Cay Sandyport Subdivision Phase 5A, New Providence, The Bahamas, unless and until he secures the requisite approval from the [Association] to do so.

2. A Declaration that [Bain] is bound by the Restrictive Covenants set out in the Schedule to his conveyance of the property.

3. A Declaration that the [Association] is entitled to enforce the said Restrictive Covenants against [Bain].

4. Damages for Breach of Contract.

5. Interest.

6. Costs

7. Such further or other relief as to the Court may seem just.

[7.] In response to the Association's claim, Bain alleges that: (i) the Association lacks legal capacity and standing to bring this action; (ii) the Developer's Assignment is invalid and void; (iii) Bain obtained the requisite approval of his construction plans from the Developer or, alternatively, the Association is estopped from enforcing any relevant rights it may have; and (iv) if Bain requires the Association's approval to continue construction, the Association has no right to impose fees for approval. Bain's Defence and Counterclaim provides:

1. [Bain] neither admits nor denies the averments in paragraph 1 as to the [Association]'s corporate status or the situation of its registered office. Otherwise, [Bain] denies the averments in paragraph 1 and puts the [Association] to proof thereof.

2. As regard paragraph 2, [Bain] says of [the Association's Documents], that it does not admit to their import for [Bain], in particular its beneficial ownership by assignment of the leasehold reversionary estates on which the [Association] seeks to rely; and says further as to the averments in paragraph 2, that the [Association] is put to strict proof of the following:

i. that the [Association] became owner of the (or any) [Common Areas] in the Sandyport Development; and

ii. that insofar as it affects [Bain]'s right to use and enjoy the leasehold property the subject of a Conveyance by the [Developer] dated 29th day of September. A.D., 2005 that the conveying to the [Association] of the [Common Areas] also effected the legal assignment by the [Developer] of the reversionary interest in the said leasehold property to which the covenants are annexed and for the benefit of which the said covenants are enforceable; and

iii. that, as regard the Restrictive Covenants set out in the Schedule to the original Conveyance dated 5th day of September, A.D., 2005, made between the [Developer] of the first part and [FirstCaribbean] of the second part and [Bain] of the third part, in particular, the rights title and interest of the [Developer] as Vendor in the purported original conveyances of properties within Sandyport and licensor under the various licenses purportedly granted to property owners in Sandyport, were assigned to the [Association].

3. Paragraph 3 is admitted, and save insofar as it is admitted [Bain] supplements it with the contents of paragraph 4-6 of its Defence herein.

4. [Bain] avers that sometime in or about the year 2005, he was introduced to Mr. Neil Jones, son-in-law of the developer of Sandyport, Mr. Garth Buckner, who originally offered to sell the [the Subject Property] to [Bain]. Some weeks after the completion of the purchase of the said property, [Bain] began drawing up plans for the construction of a residence. The said plans were referred to Mr. Neil Jones for approval.

5. [Bain] avers further that on or about 5th October 2007, he applied to the proper Government authority for a Building Permit for the property. At or about the same time, [Bain] received notification orally from the Sandyport development office that his plans were approved and that he could commence construction based on the approved plans. Mr. Jones himself returned a copy of the plans to [Bain] and commented on the plans favourably. He also later joined [Bain] at the intended construction site, at which time he commented that the foundation might not need to be dug as deep as in other development sites in Sandyport.

6. Shortly thereafter, [Bain] began construction on the site based on the approved plans. The foundation was inspected on 8th February 2008 and three further inspections occurred between then and 11th March 2009. However due to the general economic downturn, [Bain] was forced to delay further construction midway through

the year 2010. He was not able to re-commence construction until about January 2012.

7. As regard paragraph 4:

i. [Bain] neither admits nor denies that his use or enjoyment of the said property is subject to restrictive covenants, in favour of the [Association] or at all and puts the [Association] to proof otherwise;
ii. [Bain] neither admits nor denies what is averred in reliance on Clause (5) of the Schedule to [Bain]'s Conveyance as the effect thereof on ~~its~~ his use and enjoyment, or that any such Schedule exists, or that ~~it~~ he is bound by any such Clause, and ~~it~~ he requires the [Association] to prove the contrary;
iii. if (which is not admitted) such a schedule with such clause does exist, and if (which is denied) he is bound by such Clause, [Bain] denies that he is in breach of the said Clause and repeats paragraphs 4-5 of the Defence herein;
iv. [Bain] admits that the construction has not been approved by the [Association], but denies any such approval is or was at the relevant time required or necessary and repeats paragraphs 4-5 of the Defence herein.

8. Regarding paragraph 5:

i. [Bain] neither admits nor denies what is there averred in reliance on clause (13) of the Schedule to the [Bain]'s conveyance, or that such a Schedule exists or that the [Bain] is bound by such Clause;
ii. [Bain] neither admits nor denies that the [Association] has any rights, obligations or duties in relation to [Bain] pursuant to Clause (13) of the Schedule to [Bain]'s Conveyance or at all, and puts the [Association] to strict proof;
iii. [Bain] admits that the [Association] charges an application fee of $1,000 and a construction fee of $2,500, but denies that he is obligated to pay these or any other fees to the [Association] in respect of the construction upon his property and repeats paragraphs 4-5 of his Defence.
iv. [Bain] admits that he has refused to pay any application and construction fees, but he denies that any such fees are required of him and repeats paragraphs 4-5 of the Defence;
v. [Bain] admits that he submitted drawings to the [Association]; however, such drawings were submitted as an attachment to a letter dated 13th August, 2012, which may have been received by the [Association] on or about 15th August 2012. [Bain] neither admits nor denies that the [Association] has examined those drawings.

9. As regards paragraph 6:

i. [Bain] denies that the commencement or continuation of construction on the site is either unlawful or in breach of contractual obligations; moreover the [Association] has not particularised or asserted any loss or damage it has sustained by reason of such alleged breach; or in what way, or to what extent (if any) the construction affects the integrity (by appearance or otherwise) and/or endangers any part of the Sandyport Property or buildings;

ii. further, [Bain] denies that the drawings of the plans are defective, inherently or at all;
iii. [Bain] neither admits or denies whether his plans would meet with the [Association]'s approval, and he denies that any such approval is required or necessary, and repeats paragraphs 4-8 (including the sub-paragraphs thereunder).

10. As regard paragraph 7:

i. [Bain] neither admits nor denies what is there averred in reliance upon Clause (13) of the Schedule to the [Bain]'s conveyance, or that such a Schedule exists, or that [Bain] is bound by such Clause;
ii. [Bain] admits that he has allowed an unfinished structure to remain on the property, however, the erected structure was a work in progress, save for a period of a year and a half; and he repeats paragraph 6 of the Defence;
iii. [Bain] admits that he has not provided proof of the approval he received in or about October 2007, however in March 2012 he explained to the [Association]'s representative, Mr. Cooper, that his construction had commenced approximately 4 years prior and had previously received approval; and. further, [Bain] has requested copies of the information in his file from the Sandyport development office and was informed only that his file was incomplete; and, moreover, he sought to obtain the necessary evidence from Mr. Neil Jones, but was informed that a copy could not be provided because a new company currently runs the Association;
iv. [Bain] neither admits nor denies that the [Association] has acquired any rights and/or responsibilities, and puts the [Association] to proof;
v. if (which is denied) the [Association] has acquired any rights and/or responsibilities, [Bain] admits that the necessary approval and his commencement of construction occurred before such rights and/or responsibilities were acquired.

11. [Bain] says that the required approval of the [Developer] was personal and contractual and not a Restrictive Covenant capable of assignment nor in fact assigned to the [Association]; alternatively, the [Association] and/or the Development have by their conduct and otherwise affirmed his continuing construction on the basis of that said approval.

12. As pertains to paragraph 8, paragraph 9(i) of the Defence is repeated.

13. [Bain] asserts that his construction plans received the required approval and is not in any way unlawful or in breach of any contractual agreements. He further asserts that, due to the previous approval which was granted to him and his reliance on such previous approval, to his own detriment, the [Association] is estopped from preventing his construction project.

14. Further, in the alternative, [Bain] says that, if (which is denied), his proposed plans were not approved by the [Developer] at the relevant time in accordance with clause (5) of the Schedule to the Conveyance dated 5th day of September, A.D., 2005, made between the [Developer] of the first part and [FirstCaribbean] of the second part and

[Bain] of the third part (the 'Defendant's Conveyance'), he is nevertheless entitled to assert the deemed approval under clause (9) of the said Schedule."

[8.] Bain counterclaims against the Association for *inter alia*, a declaration that Bain is entitled to complete construction on the Subject Property, a declaration that Bain is not bound by the Scheduled Restrictive Covenants (and, in particular, the restriction set out in clause 5), damages for and on account of nuisance and trespass to Bain's land, an injunction restraining the Association from interfering with Bain's right to the unencumbered use and enjoyment of the Subject Property and $20,450 in special damages. Bain's Amended Defence and Counterclaim provides:

> 15. [Bain] repeats paragraph 1 through 14 above of the Defence.
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> 16. [Bain] contends that the effect of Recital (A) and Clause 1 (and its sub-clauses) of the Conveyance and of the Assignment between the same parties to the Conveyance was not to vest ownership in the [Association] of the reversionary interest under the Conveyance from the [Developer] to [Bain] dated 29th day of September, A.D., 2005; and so it follows that the [Association] as purported assignee of the covenants is not the owner of land for the benefit of which the covenants pertain.
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> 17. [Bain] further contends regarding Recital (E) of the Conveyance that the intention of his predecessor in title (the [Developer]) was to cause its wholly owned subsidiary, the [Association], to issue shares to each owner of property situate in and forming a part of the Gated Lots and that all such owners become beneficial owners of all of the issued shares of the [Association] on completion of the Sandyport Development or such part or parts thereof as the [Developer] in its absolute discretion substantially did in fact complete.
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> 18. The [Developer], then under control of Mr. Hugh Buckner, having completed or substantially completed the Sandyport Development in or about December 2009, its directors and officers who had also been directors and officers of the [Association] (its wholly owned subsidiary), transferred in blank the remaining few shares in the [Association] which since issuing have been treated as owned by the [Developer]; and it also purported to convey to the [Association] such amenity land and facilities (described in the Conveyance as the 'Common Areas') as the [Association] willingly accepted as what the said Company was obliged to convey to it.
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> 19. The [Developer] and the [Association] as evident by the execution of the Conveyance and the Assignment, were in effect the same persons acting by the same directors. The [Association] at all material times being a public company breached section 80(1) of The Companies Act, 1992 ('the 1992 Act') in that it did not have fewer than three directors at least two of whom were neither officers or employees of it nor any of its affiliates. As such the [Association]'s directors were incapable of discharging duties owed the [Association] and the [Developer] simultaneously, and they lacked legal capacity to direct the management of the [Association]'s business and affairs and to administer such in the best interest of [Bain] and other Gated Lots owners in Sandyport Development.

20. [Bain] further contends he is the owner of the property entitled to be issued shares in the Association, but that to his knowledge he is not now or ever was in possession of shares issued to him by the [Association] in virtue of Recital (E) of the Conveyance or the terms of any Agreement between the [Developer] and himself as mentioned in Recital (E) of the Conveyance.

21. [Bain] also contends, assuming (but not admitting) he was issued shares of the [Association] to which he was entitled by virtue of his ownership of property situate in and forming a part of the Gated Lots affected by the Assignment that he and all the owners of Gated Lots as aforesaid are the beneficial owners of all of the issued shares of the [Association] within the contemplation of Recital (E) of the Conveyance, that as a result of such material change in its affairs the [Association] ceased to be a private company in pursuance of sections 62 and 63 of The Securities Industry Act, 1999 ('the Securities Act') upon the Conveyance and the Assignment and was thereafter deemed a public company which it was at the time it instituted action against [Bain] despite its lack of cause of action and its directors' lack of lawful authority to sue in the [Association]'s name.

22. [Bain] contends that the [Association] being a public company within provisions of the Securities Act, breached such provisions by failing to comply with publication and filing requirements under section 64 and 65 of the said Act and that the [Association] and its directors in the conduct of its affairs have failed to comply with financial disclosure provisions of the 1992 Act.

Particulars of Association's and its directors' statutory breaches,

i. Failing to file a report with the Securities Commission of The Bahamas (the Commission) as to material changes occurring or which were likely to occur in the affairs of the [Association] by virtue of [Bain] and all the owners of property situate in and forming a part of the Gated Lots affected by the Assignment being or becoming beneficial owners of all of the issued shares of the [Association] upon the completion of the Sandyport Development or the substantial completion of such part or parts thereof by the [Developer] in its discretion.

ii. Failing to publish in a newspaper circulating in The Bahamas a notice of such material change in the [Association]'s affairs and to file with the Commission the requisite annual and quarterly reports (as required) as relate to the [Association]'s financial disclosure.

iii. Failing to comply with the provisions of section 118(1)(a) and (b) of the 1992 Act requiring the [Association]'s directors to place before members at annual general meetings comparative financial statements in the approved form or at all.

iv. Failing to comply with the provisions of section 118(1)(b) of the 1992 Act requiring directors of he [Association] to place before its members at annual general meetings reports of the auditor.

v. Failing to comply with the provisions of section 118(1)(c) of the 1992 Act requiring directors of the [Association] to place before its members at annual general meetings further information respecting the [Association]'s

financial position and results of its operations required by its articles or any unanimous shareholder agreement.

23. The [Association] and its directors have corporately and individually purportedly under authority, have acted in the [Association]'s name to the disregard of [Bain]'s right to uninterrupted use and enjoyment of his property and property rights as a property owner member of the [Association]. As a result [Bain] has suffered loss and damage which is continuing.

24. In the premises the [Association] wrongly and repeatedly and without [Bain]'s consent interfered with his ownership rights as relate to Lot 23, Royal Palm Cay, Sandyport, Subdivision Phase 5A ('the property'), particularly his right to the use and enjoyment thereof in derogation of his said rights expressly and/or impliedly confirmed in a Conveyance between the [Developer] of the first part and [FirstCaribbean] of the second part and [Bain] of the third part, dated 29th day of September, A.D., 2005 and recorded in Volume 9473 at pages 308 to 325 inclusive.

Particulars of [Association]'s interference and breach of agreement

i. The [Association]'s Security Officers in March 2012 came onto the construction site and demanded [Bain] and his workmen cease work on the property.
ii. The [Association]'s Security Officers in March 2012 refused [Bain] and his workmen access to his property at entrance of the Development. As a result of such refusal of access to him and his workmen [Bain] lost the opportunity to benefit from work his workmen were contracted to do and that he was under contract to pay and did pay them for the three hours they were refused admission.
iii. The [Association]'s Security Officers acting under its instructions refused [Bain]'s workmen access to the development for the purpose of completing the construction on the property site. As a result [Bain] lost the opportunity to benefit from work his workmen were contracted to do and that he was under contract to pay them for a period of several weeks immediately prior to the [Association] commencing this action in which it was sought and was granted interim injunctive relief.
iv. In July 2012, the [Association] made a complaint to the Police who, as a result of which, during [Bain]'s temporary absence from the site, came thereon and escorted his workmen off the property and the development; consequently, [Bain]'s already prepared mixed cement mortar and equipment were left unsecured, at the site, exposed to the elements.
v. As a result of the temporary injunction being in force, [Bain] is incapable without leave of the Court of exercising his ownership rights in respect of the property, including completing the construction thereon.

25. In the premises [Bain] has suffered loss and special damage.

Particulars of special damage.

Construction delays at property site owing to work stoppage resulting in expenditures by [Bain] for unused hired labour and construction material

caused by [Association]'s removal from site and denial of access of workmen to the Development during the period 2nd July 2012 to date (and continuing):

Description	$
-3 hr. construction delay on 2nd July	1,500.00
-2 ½ hr construction delay on 3rd July	1,250.00
- 1 hr. delay at Police Station on 3rd July	200.00
- 2 hr. construction delay on 4th July	1,000.00
- 2 hr. construction delay on 9th July	1,000.00
- 3 hr. construction delay on 10th July	1,500.00
-3 hr. construction delay on 11th July`	1,500.00
-2 hr. delay at Police Station on 11th July	400.00
- 3 hr. construction delay on 16th July	1,500.00
-2 hr. construction delay on 17th July	1,000.00
- 3 hr. construction delay on 18th July	1,500.00
- 3 hr. construction delay on 19th July	1,500.00
- 3 hr. construction delay on 23rd July	1,500.00
- 3 hr. construction delay on 24th July	1,500.00
- Backhoe rental from 23rd to 27th July	3,600.00
	20,450.00

AND [Bain] counterclaims:

(1) A Declaration that [Bain] is entitled to complete construction on Lot No. 23, Royal Palm Cay, Sandyport
(2) A Declaration that [Bain] is not bound by the (or any) Restrictive Covenants set out in the Schedule to [Bain]'s Conveyance legally enforceable by the [Association] as of right and in particular the restriction set out at clause (5) in the said Schedule.
(3) Damages for and on account of nuisance and trespass to [Bain]'s land by the [Association] and its agents and employees.
(4) An Order under Section 21(1) of The Supreme Court Act, 1996 or under the Court's inherent jurisdiction, restraining the [Association] and its officers and directors and its employees and agents or otherwise howsoever, from interfering with [Bain's] right to the unencumbered use and enjoyment of his property.
(5) $20,450.00 special damages.
(6) Interest on the said damages pursuant to provisions of The Civil Procedure (Award of Interest) Act, 1992.
(7) Further or other relief as to the Court seem just.
(8) Costs.

Procedural History

[9.] On 24 October 2012, Barnett CJ (as he then was) granted an interlocutory injunction upon the application of the Association, restraining Bain from constructing on the Subject Property without the permission of the Association (the "2012 Injunction").

[10.] On 5 February 2013, Bain applied to set aside or vary the 2012 Injunction and to strike out the Association's Writ of Summons and Statement of Claim. In the course of that application Bain applied for leave to admit fresh evidence claiming that, on 17 June

2013, while searching through a storage unit, he discovered approved plans that were given to him by the Developer prior to him commencing construction. Barnett CJ granted leave to Bain to adduce the belatedly discovered documentary evidence and on 2 October 2014, Barnett CJ gave judgment in favour of Bain, dismissing the Association's claim and discharging the 2012 Injunction (the "2014 Judgment").

[11.] The Association appealed the 2014 Judgment. On 10 September 2015, in ***Sandyport Homeowners Association Limited v R Nathaniel Bain SCCivApp & CAIS No. 289 of 2014***, the Court of Appeal allowed the Association's appeal issuing a judgment (the "Court of Appeal Judgment") remitting the matter to the Supreme Court for trial and restoring the 2012 Injunction. The Court of Appeal found that the procedure that had been adopted in hearing the action was improper.

EVIDENCE

[12.] At the trial the parties were permitted to make use of the affidavits filed earlier in these proceedings. Affiants were cross-examined on their affidavits or witness statement.

[13.] The Association relied on the following evidence at trial in support of its case ("the Association's Evidence"): (i) the Affidavit of Simon Cooper filed on 29 August 2012 (the "First Cooper Affidavit"); (ii) the Second Affidavit of Simon Cooper filed on 17 October 2012 (the "Second Cooper Affidavit"); (iii) the Affidavit of Kooraram Ramburun filed on 17 October 2012 (the "Ramburun Affidavit"); (iv) the Third Affidavit of Simon Cooper filed on 22 February 2013 (the "Third Cooper Affidavit"); and (v) the Fourth Affidavit of Simon Cooper filed on 9 March 2018 (the "Fourth Cooper Affidavit).

[14.] Bain relied on the following evidence at trial in support of his case ("Bain's Evidence"): (i) an Affidavit made by Bain filed on 15 October 2012 (the "First Bain Affidavit"); (ii) an Affidavit made by Bain filed on 5 February 2013 (the "Second Bain Affidavit"); (iii) an Affidavit made by Bain filed on 8 July 2013 (the "Third Bain Affidavit"); (iv) an Affidavit made by Bain filed on 13 June 2017 (the "Fourth Bain Affidavit"); and (v) a Witness Statement made by Bain filed on 20 July 2018 (the "Bain Witness Statement").

Simon Cooper's evidence

[15.] The Association's main witness, Simon Cooper ("Cooper"), was the former General Manager of the Association over the period 2010 to 2018. Cooper was never a director of the Association, but he took instruction from and represented the Board of Directors of the Association during his tenure as General Manager. In his affidavit evidence, Cooper described the Association as a non-profit limited company that is the owner and manager of the Common Areas within Sandyport by virtue of the Association's

Documents. The Association meets its contractual, financial, and other obligations via maintenance, indenture and other charges levied on property owners in Sandyport.

[16.] Cooper also explained that the Association's membership (in the company law sense) is exclusively comprised of owners of property within Sandyport. Property owners are entitled to shares in the Association but Bain is not a shareholder in the Association because he has never requested shares and shares are only issued upon request. Bain may obtain a share in the Association by following the established process.

[17.] Cooper's opinion was that the Association is entitled to control and regulate construction activity in Sandyport by virtue of the Association's Documents. According to Cooper, the only permission that is relevant to these proceedings is the written approval of the Association. The 2005 Conveyance provides that the Association's discretion is absolute with respect to approving or rejecting proposed structures. It is the Association's responsibility to ensure that proposed structures do not affect the integrity of, or endanger, any part of the Sandyport property or buildings.

[18.] Cooper said that Bain has not been given the Association's approval to build on the Subject Property. The Association repeatedly advised Bain that he required the prior written approval of the Association to commence construction and Bain had been taken through the Association's published application process. However, while Bain submitted drawings to the Association on or about 15 August 2012, his submission did not meet his obligations under the Scheduled Restrictive Covenants, which obligations Bain has never met. Bain also failed and refused to pay the Association's requisite application fee of $1,000, which is payable with respect to all proposed construction activity within Sandyport to allow the Association to obtain professional advice and support.

[19.] Cooper said that the Association has commenced these proceedings in order to vindicate its rights. Bain has unlawfully proceeded with construction that has not been and is unlikely to be approved in its current incarnation based on the Association's preliminary examination of his plans. Bain's workers have been on the Subject Property despite the Association setting out its position to Bain.

[20.] Cooper denied that the Association had excluded Bain from the Subject Property after the commencement of these proceedings, noting that Bain had attended the Subject Property on 6 March 2018. Cooper explained that Bain had only been precluded by the Association from building on the Subject Property. Cooper asserted, however, that the Developer has the right to restrict owners' access to and through Sandyport for non-payment of fees. In Bain's case, this is pursuant to a licence granted to Bain dated 29

September 2005 (the "2005 Licence"). Bain was $62,884.49 in arrears as at 8 March 2018.

[21.] In cross-examination, Cooper stated or accepted *inter alia* that: (i) he was not involved in Sandyport's affairs prior to his tenure as General Manager; (ii) the Association's agents had entered onto the Subject Property without Bain's permission; (iii) on multiple occasions he (Cooper) or the Association (it was not clear) refused Bain or his agents access to Sandyport; and (iv) he personally called the police to escort construction workers off of the Subject Property and outside of Sandyport.

[22.] In his re-examination, Cooper stated *inter alia* that: (i) the Association's responses to failures to build in accordance with approved plans varied but, depending on the magnitude of the breach, the Association might insist the construction be stopped; (ii) in terms of general process, when the Association received a construction application, it reviewed it for completeness and then sent the application out to a consulting architect that is retained by the Association for an opinion on the applicant's architectural plans. The $1000 "application fee" charged by the Association contributes towards the cost of this. A "building fee" of $2500 is charged by the Association at the point of approval; and (iii) Bain's access to Sandyport was interrupted for non-payment of fees and because the 2012 Injunction prevented Bain from building on the Subject Property.

Kooraram Ramburun's evidence

[23.] Kooraram Ramburun ("Ramburun") was employed by the Association as a "Progress Chaser" at the time of trial. According to Cooper, this required him to monitor pending construction activity in Sandyport to check and see whether, if anything was built, it had been approved by the Association. Ramburun's role in this matter was that he had taken photos at the Subject Property in October 2012.

[24.] In his affidavit evidence, Ramuburun said that he regularly observed Bain and his workmen's activities at the Subject Property and, on 15 October 2012, he attended the Subject Property, entered the Subject Property, observed Bain's workmen carrying out work on the interior of Bain's house and took photographs of the work. Photographs were exhibited to the Ramburun Affidavit.

[25.] In cross-examination, Ramburun said that he entered the Subject Property on 15 October 2012 with the permission of Bain's workmen. He denied that they were merely securing the roof of the building for hurricane purposes.

Bain's evidence

[26.] Bain was a contractor by occupation and was not resident in Sandyport.

[27.] In his affidavit evidence, Bain explained that his interest in Sandyport began with being introduced in or about 2005 to Mr. Neil Jones ("Jones"). Jones was the son-in-law of the developer of Sandyport, Mr. Garth Buckner ("Buckner") and it was Jones who offered to sell Bain the Subject Property. According to Bain, some weeks after he completed his purchase of the Subject Property, he went about having plans drawn for the construction of a residence on the Subject Property. Bain referred those plans for approval to Jones, who visited the Subject Property from time to time. At the time, there were no other buildings under construction at Royal Palm Cay nor had any infrastructural improvements, including the laying of roads, been carried out.

[28.] Bain admitted that he did not submit the items listed at clause 5(d) and (e) of the Scheduled Restrictive Covenants when he sought the Developer's approval to build. Bain said he could not design a drainage plan prior to the installation of the roadways because they are important for establishing the depths and angles for run off, nor could he prepare a construction schedule, as he could not say when certain parts of the house would be completed as he had to await the completion of Royal Palm Cay's infrastructure.

[29.] Bain stated that, in *circa* October 2007, the Sandyport development office notified him of its approval of his plans and said that he could commence construction on the basis of the approved plans, which he was to retrieve from the office at any time he determined. Around this time, he also applied to the Government for a building permit on the basis of the plans, which he was eventually granted.

[30.] According to Bain's evidence, Jones returned a copy of his approved plans to him. A copy of the purported approved plans are exhibited to Bain's Third Affidavit. According to Bain, the plans (the "Purported Approved Plans") bear the signature of Jones and are dated 19 September 2007. Bain said that Jones commented on the plans favourably at the time as being very nice drawings and enquired about which architect had drawn them. Also, sometime around this time, Jones joined Bain at the Subject Property to locate the boundary stakes on the Subject Property. (Bain would later complain that many of the boundary lines in Royal Palm Cay, including his, are incorrect.) According to Bain, when he later made enquiries of the Developer's office regarding information on file concerning his approval from the Developer, he was told nothing was on file. When he tried to see Jones regarding his approval from the Developer, Jones said he could not provide a copy because "*a new company now runs the Association*" and he (Jones) could not remember the particulars of Bain's project.

[31.] Bain said that he started construction shortly after receiving approval from the Developer. (Bain's Statement of Facts and Issues filed on 17 September 2018 states Bain

commenced construction "*in or about February 2008*".) According to Bain, his building and another adjacent to it were the only buildings under construction at Royal Palm Cay at the time, when infrastructural improvements and road works were in progress. Bain said that his construction was in the Developer's direct line of sight as the Subject Property was approximately 600 feet from Sandyport's development office yet the Developer, whose supervisors were on site daily, never complained to him.

[32.] According to Bain, as a result of the general economic downturn, he delayed further construction at the Subject Property beginning in mid-2010 until January 2012. Thereafter, the construction of Bain's residence proceeded without disruption for about two months. However, in early March 2012, a Sandyport security officer came to the Subject Property and demanded that Bain and his workers cease work and remove themselves from the Subject Property immediately.

[33.] Bain further stated that the security worker also told him that he (Bain) had "business to take care of" at Sandyport's management office. According to Bain, when he attended the management office, he was presented with a bill for charges he had allegedly incurred but which he protested paying as he felt he was not given a satisfactory explanation for them. Cooper informed Bain that the bill represented design review fees Bain was obligated to pay and a construction fee. Bain told Cooper the fees should not apply to him as his construction had been in progress for four years. Bain said this exchange marked the first occasion Bain became aware that the Association was the "new owner" of Sandyport.

[34.] According to Bain, the next day, he was denied access to the Subject Property and his workmen were refused entrance at the gate to Sandyport for 3 hours while Bain went to the Cable Beach Police Station to lodge a complaint. The Police regarded the matter as a civil matter which they would not involve themselves in. Thereafter, Bain's workmen were excluded from the Subject Property for a period of several weeks. Later in the year, in around July 2012, Cooper called the Police when Bain was absent from the Subject Property and had the Police escort all of Bain's workmen from the Subject Property, leaving mixed mortar and other materials sitting exposed on the construction site. Subsequently, the Association had a jeep parked across the entrance to Sandyport in the morning to restrict Bain's workmen's access to the Subject Property. For about two weeks, Bain had to use a backhoe to force his way onto the Subject Property.

[35.] In Bain's First Affidavit, he stated that he is regularly billed for the periodic Indenture Charge provided for in the 2005 Conveyance, which he pays. Bain sent a letter dated 13 August 2012 to the attorneys for the Association, Cedric L. Parker & Co, enclosing architectural drawings for his construction and a cheque in the amount of $2,006.

[36.] In his later affidavit evidence, Bain alleged that he had been prevented by the Association from attending at the Subject Property or entering Sandyport on numerous occasions since the commencement of these proceedings. According to Bain, his access to the Subject Property was first prevented shortly following the Court of Appeal Judgment. The most recent occasion Bain was obstructed from accessing the Subject Property was on 12 April 2017 when Cooper personally confronted Bain and tried to prevent him from accessing the Subject Property. Since then, Bain has been permitted to access the Subject Property but has often encountered resistance from security officers, who also during such visits come onto the Subject Property without his permission to seemingly supervise him.

[37.] In cross-examination, Bain stated or accepted *inter alia* that: (i) he never received a receipt from the Developer reflecting that he submitted the Purported Approved Plans to the Developer; (ii) the Purported Approved Plans do not comply with clause 5 of the Scheduled Restrictive Covenants; (iii) he did not submit a written application to the Developer for approval, all he submitted was the Purported Approved Plans (which he contended is all he was required to submit); (iv) he did not submit a drainage plan or a construction schedule despite the requirements of Clause 5 of the Scheduled Restrictive Covenants; (v) by virtue of clause 29 of the Scheduled Restrictive Covenants, he had one year to complete construction; (vi) by virtue of clause 13 of the Scheduled Restrictive Covenants, he required approval or permission to engage in or re-commence construction activity in Sandyport; (vii) he did not seek approval or permission before re-commencing construction in 2012; (viii) clause 5 of the Scheduled Restrictive Covenants mandates that any modification or alteration of any structure in Sandyport requires the written approval of the Association and that ought to be accompanied by a written application with the same plans that are spelt out in clause 5; (ix) when he was approached by the Association and advised of his arrears and indenture charges and the fact that he was required to submit a fresh application to engage in or re-commence construction activity on the Subject Property, he sent his 13 August 2012 letter to Cedric L. Parker & Co. enclosing his architectural plans and cheque but the payment he enclosed did not satisfy the arrears that was due and owing to the Association in full; and (x) when Bain submitted his plans for the Association's approval in 2012, he refused to pay the application fee of $1,000.

[38.] In his re-examination, Bain said that when he received his original approval to build from the Developer's agents, he did not have to pay $1000 for that approval and he never understood that he was obligated under "the agreements" (which I understood to mean the 2005 Conveyance and 2005 Licence) to pay for the approval of the Developer.

[39.] Bain said in response to questions posed by the Court that: (i) when he submitted the Purported Approved Plans to the Developer, they were approved by Buckner and Jones; (ii) it was Jones' signature on the Purported Approved Plans; (iii) Jones was the son-in-law of Buckner and he "*worked for the Owner*"; and (iv) Jones "*visited the site*" everyday. In the course of further examination by his own counsel, Bain confirmed that he believed Jones was an agent of the Developer.

ISSUES

[40.] In my view, the dispositive issues arising between the parties are:

i) whether the Association is, in principle, entitled to enforce the Scheduled Restrictive Covenants against Bain?

ii) whether the Association is entitled to enforce the Scheduled Restrictive Covenants against Bain in the circumstances that have transpired?

iii) if the Association is entitled to enforce the Scheduled Restrictive Covenants against Bain, to what remedies is the Association entitled?

iv) whether the Association wrongfully interfered with, trespassed upon and/or created a nuisance vis-à-vis Bain's enjoyment of the Subject Property?; and

v) to what remedies, if any, is Bain is entitled?

SUBMISSIONS

The Association's Submissions

[41.] Counsel for the Association submitted that it is an established fact that the Association is the owner and operator of the Common Areas. In support of this submission, Counsel for the Association relied upon a finding to this effect by *Barnett CJ* in ***Derek Ryan v Sandyport Homeowners Association Ltd [2012] 3 BHS J No 22.*** Mr. Parker KC submitted that, while the facts of ***Ryan*** are different, the underlying principle is the same, namely, the Association is entitled to ensure compliance by property owners in Sandyport with the rules and regulations to which they all voluntarily agreed to be subject.

[42.] The Association submitted that this matter has been precipitated by Bain's "*inexplicable*" and "*unreasonable*" refusal to comply with the Association's published construction approval process. Bain is a delinquent property owner who has pointed to nothing that can vindicate or excuse his delinquency. Bain's attempt to suggest that "*some other entity ought to be operating Sandyport*" is lacking in substance and "*nothing more than a cynical attempt at misdirection*".

[43.] In support for the Association's title as owner and operator of the Common Areas, Mr. Parker KC relied upon ***Hindle and Another v Hick Brothers Manufacturing Company [1947] 2 All ER 825***, the headnote of which reads:

> Where a person claiming to be assignee of the reversion obtains payment of rent from a tenant by fraud or misrepresentation, such payment is no evidence of title, but where there is no such fraud or misrepresentation receipt of the rent is prima facie evidence of title.
>
> Where rent is paid by a tenant in such circumstances as to amount to prima facie evidence of title, the person receiving the rent is in as good a position as if he were actually in possession, and, although it is open to the tenant to prove, if he can, that he paid the rent in ignorance of the true state of the title and that some third person is the real assignee of the reversion, he must show such a title in that third person as would entitle him to a verdict in ejectment. It is not sufficient to show that the person to whom the rent is paid has no title, his receipt of the rent being sufficient until a better title is shown. After payment of rent the onus to show mistake or ignorance of the facts relating to the title shifts to the tenant.

[44.] Counsel for the Association submitted that there is no difference at law between a licensor/licensee relationship and a landlord/tenant relationship when considering the effect of paying rent or maintenance charges pursuant to a lease or a licence. Counsel submitted that, in the present case, Bain admitted that he paid maintenance charges to the Association. This is *prima facie* evidence of the right, title and interest the Association is asserting.

[45.] Mr. Parker KC directed the Court's attention to the finding of Bucknill LJ in ***Hindle***, at page 828, that "*...if the defendants were to succeed, it would be manifestly unfair and unjust...[t]hey paid rent until January 1945 and then they stopped paying.*" Counsel submitted that, here, Bain is seeking to "*throw the management and operation of the entire Sandyport Community into disarray in a desperate last-ditch attempt to avoid paying a nominal fee and submitting himself to a process which is mandated by the covenants and restrictions by which he voluntarily agreed to be bound*".

[46.] The Association complains that Bain has not complied with the requirements of clause 5 of the Scheduled Restrictive Covenants. Clause 5 required detailed plans and specifications of the proposed structures including adequate off-street parking and exterior colour, the details of the proposed type of construction, a plot plan showing the position of drainage swales and conduits and a construction schedule. They say that Bain admitted in cross-examination that he was required to secure the written approval of the Association to modify or alter any structure in Sandyport, which required him to submit a written application and supporting documents in compliance with clause 5 of the Scheduled Restrictive Covenants.

[47.] Mr. Parker KC submitted that Bain's criticisms of the Association's Documents are "*disingenuous*" but addressed them by submitting that:

i) Bain's emphasis on the fact the Association's Documents relate to the Common Areas fails to appreciate that the Scheduled Restrictive Covenants inured for the benefit of the Common Areas and that, in and of itself, forms a basis for the Association's entitlement to review and control proposed construction and modification of buildings in Sandyport. The Association has a significant vested interest in ensuring that Structures are of the standard and nature apt for Sandyport and do not present a hazard to its Common Areas.

ii) (referring to clause 1.3 of the Developer's Conveyance and clause 1 of the Developer's Assignment) the Association's Documents reflect the transfer by the Developer of its rights, title and interest under the conveyances and licenses with lot owners in Sandyport (i.e. the "Founding Agreements"). The Developer's rights were assignable to Bain's knowledge because the 2005 Conveyance "*presaged*" the transfer by the Developer of its rights to the Association.

[48.] The Association submitted that Bain's estoppel defence is "*unsustainable*" because: (i) Bain adduced no evidence he ever secured the initial written approval of the Developer save for plans which have an unverified signature and which do not amount to the requisite prior "written approval" of the Developer; (ii) Bain admitted he abandoned construction for approximately four years and then recommenced it without seeking or securing the requisite prior approval of the Association, the initial approval having lapsed after a year; (iii) Bain acknowledged the terms of clause 35 of the Scheduled Restrictive Covenants (which is a "*no waiver*" clause); and (iv) Bain's purported belief he had the Developer's approval was unreasonable.

[49.] In response to Bain's complaint that the Developer's Assignment imposed additional obligations on him, the Association submitted that there is no evidence that the circumstances Bain finds himself in are any more onerous than those which existed prior to the Association's Documents; the Association merely stands in the position of the Developer. Mr. Parker further submitted that, pursuant to clause 2 of the 2005 Conveyance, the Scheduled Restrictive Covenants are not static but may be expanded.

[50.] In relation to Bain's counterclaim, the Association says that:

i) Bain failed to produce any evidence in support of any of the amounts prayed for by way of special damages in his counterclaim as he was bound to do. Mr. Parker cited a statement of principle by *Evans JA* at para 7 in ***Deborah Gilbert v BH Riu Hotels Limited t/a Riu Palace Paradise Island SCCiv App No. 143 of 2019*** that, in order to be successful, a plaintiff must successfully plead and prove a claim for special damages, in support of this submission.

ii) Bain failed to plead or prove any actual damage or loss suffered to justify an award of general damages on his counterclaim. No expert or other evidence was led by Bain to establish that he in fact suffered any losses whatsoever. No relevant expert produced a report to the Court setting out the basis upon which Bain's alleged complaints regarding his interrupted construction activity could or should have resulted in any loss or damage to him.

Bain's Submissions

[51.] Bain submitted that the recitals of the Association's Documents inaccurately suggest that Bain agreed to the transfer of the Common Areas and the rights and benefits and obligations of the Developer from the Developer to another company owned by the purchasers of lots in Sandyport upon the substantial completion of Sandyport when this is not in fact borne out in the 2005 Conveyance or the 2005 Licence. Bain says that this lack of his consent to the transfer of the Common Areas and the rights and benefits and obligations of the Developer from the Developer to the Association is crucial to any analysis of the Developer's Conveyance's and the Developer's Assignment's interpretation.

[52.] Bain submitted that it is trite law that a party cannot be a plaintiff unless he has a vested interest in the subject matter of the action, citing ***Halsbury's Laws of England (4th Edn), Volume 37***, para 216, and further submitted that the Association lacks such an interest here.

[53.] Bain contended that the Developer's Conveyance did not and could not have conveyed to the Association any right to enforce the Scheduled Restrictive Covenants as against Bain in the context of the present action or at all. In this vein, Miss Glinton submitted that the intent and purpose of a conveyance is and could only be to transfer to another person title or interest in real property. Accordingly, the Developer's Conveyance was intended to convey to the Association nothing more than the Common Areas, as defined in Recital A of the Developer's Conveyance. This is indicated on the backing sheet of the document, which describes the document as a "*Conveyance of the Common Areas*", and it is corroborated by Recital D, Recital E, clause 1 and clause 1.3 of the Developer's Conveyance, which refer only to the transfer of the Common Areas.

[54.] Bain submitted that, to the extent that the Developer could, by way of conveyance, transfer to the Association the rights and obligations of the Scheduled Restrictive Covenants, clause 1.3 of the Developer's Conveyance specifies and limits any such transfer to being solely "*for the Uses relating to the Indenture Charge*" and "*for the purposes of repairing, maintaining, reinstating or renewing the Common Areas*". This view of the ambit of the clause is supported by Recitals A to C of the Developer's Assignment;

the Developer's Assignment refers to the Developer's Conveyance as purporting to convey and transfer title to the Common Areas only. The Developer's Conveyance could not have conveyed to the Association, by itself, the right to bring claims founded on clauses 5 and 13 of the Scheduled Restrictive Covenants, which do not relate to the Common Areas.

[55.] Miss Glinton submitted that clause 2 of the Developer's Conveyance, and the Developer's Assignment, are invalid insofar as they purport to assign to the Association in a blanket manner, and without any specification, all of the Developer's rights, benefits and obligations under the various conveyances granted to the owners within Sandyport and, specifically, are unenforceable as against Bain who never consented thereto. While a party to a contract may assign their benefits under a contract (in some circumstances, without reference to the other party to the contract, save that notice must be given to them of the assignment for it to take effect as against them), a contracting party cannot transfer to another the obligations of a contract without the express consent of the other contracting party as a novation is required. Counsel cited ***Chitty on Contracts 25th edn, Volume 1***, para 1315, ***Linden Gardens v Lenesta Sludge Disposals Ltd [1994] 1 AC 85*** per *Lord Browne-Wilkinson* at page 103, ***Southway Group Ltd v Wolff [1991] 57 BLR 33*** per *Bingham LJ*; and ***Alina Budana v The Leeds Teaching Hospitals NHS Trust [2017] EWCA Civ 1980*** per *Gloster LJ* at para 26(i) in support of this submission.

[56.] Miss Glinton submitted that, if the Court finds that the Association was validly assigned all the rights and obligations of the Developer in the 2005 Conveyance, and that the Association has standing to bring the present action, the Court should find that Bain's application to construct was approved by the Developer and the Association cannot now succeed in its claim to restrain Bain from constructing according to the Purported Approved Plans. It is neither lawful, just nor equitable for the Association to impose a fee for the review of the Purported Approved Plans.

[57.] Bain submitted that the Association led no evidence to rebut his evidence in relation to the events transpiring between Bain and the Developer. Cooper was never an agent of the Developer and was not employed by the Association until 2010. In those circumstances, it falls upon the Court to determine whether it finds Bain's evidence credible. He says that his evidence has been consistent since the commencement of this action and his case is also supported by the lack of action or objection on the part of the Developer notwithstanding it must have been aware of Bain's construction works.

[58.] Bain argues that to the extent that the Association has placed emphasis on clause 29 of the Scheduled Restrictive Covenants, the 2005 Conveyance does not provide for any particular remedy in the event that a party exceeds the stipulated one-year period

and it does not mandate that any further approval is required in the event that an approved construction project exceeds one year. Bain says that the proper remedy for breach of clause 29 of the Scheduled Restrictive Covenants would primarily be specific performance. Miss Glinton observed that, here, the Association does not claim an order for demolition or specific performance; it claims only an injunction restraining Bain from commencing or continuing construction unless and until he obtains the Association's approval. On that basis, they submitted that the Association has not in fact claimed any relief in these proceedings relating to clause 29 nor any loss or damage consequential thereto.

[59.] Miss Glinton submitted that, if Bain's evidence that the Purported Approved Plans were approved by the Developer is rejected, having stood by and/or encouraged the construction to proceed for a two-year period, the Developer was, and likewise the Association, claiming through the Developer, is, estopped from now asserting any right to require such approval. In support of this submission, Miss Glinton relied upon ***Hobson Bay City Council v Andrews Gibbon & Ors [2011] VSC 140***, at paras 24 to 28, and *Bereton J* in ***Greek Macadonian Club Limited v Pan Macedonian Greek Brotherhood NSW Limited [2007] NSWSC 92***, at para 49.

[60.] Miss Glinton argues that an equitable proprietary estoppel arises in Bain's favour here because: (i) Bain obtained the requisite approval from the Developer, upon which he relied, or the Developer knew of Bain's intention to build as they returned his plans "*marked as approved*" and "*commented on them favourably*"; (ii) Bain commenced construction; and (iii) the Developer had a clear view of Bain's construction and even attended at his construction site but did not object to his construction or take any steps to prevent him from constructing or take any issue with the length of time it was taking him to complete construction and therefore stood by and encouraged Bain's construction.

[61.] Counsel for Bain also submitted that the terms of the 2005 Conveyance do not require Bain to seek further approval, whether because he has taken longer than a year to complete construction or because he is re-commencing or continuing with "suspended" construction, as long as he constructs in accordance with approved plans. Counsel for Bain noted the Association has led no evidence that Bain is proposing to build otherwise than in accordance with the Purported Approved Plans.

[62.] Miss Glinton further submitted that, if the Court is minded to conclude that Bain is obliged to submit plans to the Association for approval prior to commencing construction, the Association has no legal basis to assess fees for approval. Counsel submitted that a "*condition precedent*" of the 2005 Conveyance was that, save for the easements and restrictions expressly set out therein, Bain's rights in relation to the Subject Property

would be otherwise "*free from incumbrances*". The requirement to pay a fee of $1,000 for approval of construction plans, followed by another $2,500 "building fee" if the plans are approved, is a financial incumbrance.

[63.] Bain submitted that his claims of trespass and nuisance are supported by his unrebutted evidence and admissions made by agents of the Association and that those claims are made out. Bain says that the Association's purported defence to its interferences with his use and enjoyment of his land was unsound because: (i) the Association has no standing to enforce the provisions of the 2005 Conveyance or the 2005 Licence; (ii) if the Association has standing to enforce the provisions of the 2005 Conveyance and the 2005 Licence, its remedies in the event of non-payment of fees are set out in clauses 1(2)-1(4) of the 2005 Conveyance and clause 8 of the 2005 Licence, and the Association did not exercise those rights; and (iii) the 2012 Injunction does not purport to prevent Bain from accessing the Subject Property.

FINDINGS OF FACT

[64.] Before I set out my findings of fact, I will address two preliminary matters arising out of the submissions made by learned counsel for the parties.

Preliminary Matters

Derek Ryan v Sandyport Homeowners Association Ltd.

[65.] Turning to the first preliminary matter, I am unable to accept Counsel for the Association's submission that I am bound by any findings of fact made in ***Derek Ryan v Sandyport Homeowners Association Ltd***. Section 121 of the ***Evidence Act*** addresses the conclusive effect of judgments. It provides that "*every judgment is conclusive proof in all subsequent proceedings between the same parties or their privies, of facts directly in issue in the case actually decided by the court, but not of facts which are only collaterally or incidentally in issue, even though the decision of such facts as necessary to the decision of the case*". It is not clear that the issue of the Association's standing or title was in dispute in ***Derek Ryan.*** More importantly, Bain was not a party or privy to those proceedings. Consequently, Bain cannot be bound by any findings of fact therein.

Hindle v Hick Brothers Manufacturing

[66.] As regards the second preliminary matter, I do not consider that ***Hindle v Hick Brothers Manufacturing*** materially assists in the disposition of this matter. In ***Hindle***, a tenant's claim that the assignee of the reversion to premises lacked title was answered by the contention that the payment of rent is *prima facie* evidence of a tenancy and the onus shifts to the tenant to show that the rent was paid by mistake or in ignorance of the true state of title and that there is some third party entitled to the reversion. Bain is not a

tenant such that in ***Hindle*** is on all fours with the present case. I was not provided any authority applying ***Hindle*** in the context of a licence relationship. There are fundamental distinguishing features between a lease and a licence such that I am not prepared to conclude that ***Hindle*** is applicable. However, even if ***Hindle*** is applicable, it is authority for nothing more than a presumption of valid title which may be displaced.

Findings

[67.] I have considered the evidence of the witnesses and the documents in evidence in this case. I have also conducted a close study of the transcript of the hearing of 28 March 2019 and recalled the demeanour of the witnesses while they were giving evidence. Based on the balance of probabilities, I make the findings of fact set out below.

[68.] It is convenient to begin with the status of the Association. I find that the Association is a non-profit private limited liability company that is the owner and manager of the Common Areas in Sandyport. The Association's membership is exclusively comprised of owners of property in Sandyport. Bain was not, up to trial, a shareholder in the Association because, while property owners are entitled to shares in the Association, they are issued upon request, and Bain had not requested that a share be issued to him.

[69.] I find the Association meets its contractual, financial and other obligations to maintain the Common Areas and provide services for the benefit of property owners in Sandyport via maintenance, indenture and other charges levied on owners in Sandyport. The Association traces its authority to exercise the rights and powers of the Developer to the Developer's Conveyance, a copy of which is exhibited as "**SC-1**" to the First Cooper Affidavit, and the Developer's Assignment, a copy of which is exhibited as "**SC-2**" to the First Cooper Affidavit.

[70.] I accept Bain's uncontroverted evidence that his interest in Sandyport began in about 2005 with being introduced to Jones, who was the son-in-law of Buckner, Sandyport's developer, with whom Bain met and who offered Bain the Subject Property. I also accept Bain's evidence that Jones requested a deposit, which Bain paid in the form of a bank cheque in favour of the Developer, as part of Bain's purchase of the Subject Property. Bain's purchase of the Subject Property culminated in the 2005 Conveyance, and the 2005 Licence.

[71.] I did not find that the Purported Approved Plans were approved by Jones or the Developer, as Bain could not properly verify the signature on the Purported Approved Plans, which he said that he located in the storage shed. In essence I did not find that this document was authenticated. I am unable to accept Bain's account that, before commencing construction on the Subject Property, he submitted the Purported Approved

Plans to the Developer (by taking them to the Developer's office and handing them to the receptionist there) or that he was notified by the Developer's office that the Purported Approved Plans had been approved and were available for collection such that he could commence construction; or that he collected the Purported Approved Plans, which had been purportedly signed by Jones.

[72.] However, in case I am wrong in my conclusion regarding the authenticity of the Purported Approved Plans, for completeness, I find that Bain did not receive a receipt from the Developer reflecting that he submitted any plans and he did not submit a written application to the Developer seeking approval or permission to build on the Subject Property or a drainage plan showing the position of drainage, sewers and conduits or a construction schedule. I do accept Bain's reasons for not providing a drainage plan or construction schedule, however.

[73.] I did find that, at some point before Bain commenced construction, Jones commented favourably on Bain's proposed works, Jones attended the Subject Property with Bain to locate the boundary stakes of the Subject Property and Bain received at least oral approval ostensibly from the Developer to commence construction of his house without paying any application fee or building fee.

[74.] I accept Bain's evidence that he genuinely believed Jones was an agent of the Developer. However, to the extent that Bain had any relevant dealings with Jones, Bain failed to lead any evidence of Jones' actual position in the Developer and led no cogent evidence bearing out that Jones had actual authority to act on behalf of the Developer in matters of development planning. However, equally, nothing suggests Jones' dealings with Bain were a secret to the Developer.

[75.] I am prepared to find that Bain started construction at some point in or around February 2008. I accept Bain's account that, around this time, his building and another adjacent to it were the only buildings under construction in Royal Palm Cay and that infrastructural improvements and road works were in progress. I also accept Bain's evidence that the Developer's supervisors were regularly present at Sandyport and that the Subject Property is approximately 600 feet from Sandyport's development office/management office and was and is visible therefrom.

[76.] I find that Bain was issued a building permit from the Ministry of Works approving his construction on the Subject Property and that, between 2008 and 2010, several mandatory inspections of Bain's work in progress required by the Ministry of Works were carried out. The foundation of Bain's building was inspected on 8 February 2008. In addition, column inspections for the first floor were conducted on 16 July 2008, tie-beam

inspections for the first floor were conducted on 9 December 2008 and structural beam and slab inspections were conducted on 11 March 2009.

[77.] Taking into consideration the proximity of the Subject Property to Sandyport's development office and the regular presence of the Developer's personnel at Sandyport at the time when Bain began construction on the Subject Property, I find the Developer was aware of Bain's construction and its progress until at least when Bain ceased construction activity in mid-2010. I further find that the Developer made no complaints to Bain between 2008 and 2010 about Bain's construction and that, as the promoter of the subdivision, and the original vendor, the Developer would have been aware of its rights under the Scheduled Restrictive Covenants.

[78.] I accept Bain's evidence that he suspended construction at the Subject Property from mid-2010 to January 2012 as a result of a general economic downturn affecting his ability to carry out his building plans. I also accept the unchallenged evidence that, in January 2012, Bain resumed construction on the Subject Property without first seeking the approval or consent of the Association and that construction proceeded without any disruptions for about two months.

[79.] I accept Bain's evidence that, in early March 2012, a Sandyport security officer attended the Subject Property and demanded that Bain and his workers cease their construction activity and remove themselves from the Subject Property immediately. Bain was also told to attend the Sandyport management office, which he did do. I find that Bain and his workers complied.

[80.] I find that when Bain attended the Sandyport management office further to the Sandyport security officer's instructions, he was presented by Cooper with a bill or invoice from the Association reflecting the Association's usual charges (i.e. its application fee and building fee) which Bain refused to pay. This marked the first time Bain became aware of the Association and its contention that it was the new "owner" of Sandyport (as Bain puts it). I find that the following day, Bain was denied access to the Subject Property and Bain's workmen were refused entrance at the gate to Sandyport for three hours while Bain went to the Cable Beach Police Station to file a complaint.

[81.] In the aftermath of those events, an "*impasse*" between Bain and the Association developed. Bain's workers were excluded from Sandyport and the Subject Property every day over a period of several weeks. Later in the year, in July 2012, Cooper called the Police when Bain was not at the Subject Property and had the Police escort Bain's workers off of the Subject Property and out of Sandyport leaving mixed mortar and other materials sitting exposed at the Subject Property. Furthermore, on dates which are

unclear, the Association had a jeep parked across "*the entrance to the gate*" (to adopt Bain's language) to restrict Bain's workers' ability to access the Subject Property and, for about a two-week period, Bain had to use a backhoe to force his way to the Subject Property.

[82.] I accept Cooper's evidence that, before these proceedings were commenced, the Association repeatedly advised Bain that he required the prior written approval of the Association to commence construction on the Subject Property and that Bain was taken through the Association's published application process at length.

[83.] It is undisputed that Bain submitted architectural drawings to the Association under cover of a letter dated 13 August 2012 to Cedric Parker & Co together with a cheque in the amount of $2,006 and that Bain refused to pay the Association's application fee of $1,000 when he submitted his plans. I find that Bain's payment of $2,006 did not satisfy the arrears that the Association then claimed was due and owing to it from Bain for maintenance charges. At the time that the cheque was tendered, the Association's accounts reflected Bain owed $10,029.01 to the Association. Bain had made small payments towards maintenance charges on a number of occasions previously.

[84.] On 15 October 2012, Ramburun attended the Subject Property and observed construction workers carrying out work on the interior of Bain's building. He entered the interior of the building with the permission of Bain's workmen and took photos of the construction work taking place there.

[85.] After the Court of Appeal Judgment, the Association prevented or obstructed Bain from attending at the Subject Property or entering Sandyport on a number of occasions. On at least one occasion, the Association's agents called the Police to assist them in removing Bain from the Subject Property although the Police declined to intervene. The last occasion on which Bain's ability to access the Subject Property was interfered with by the Association was on 12 April 2017 when Cooper confronted Bain and attempted to prevent him from accessing the Subject Property. Sandyport security officers sometimes enter upon the Subject Property without Bain's permission when monitoring him.

ANALYSIS AND DISCUSSION

Issue 1: Whether the Association is, in principle, entitled to enforce the Scheduled Restrictive Covenants against Bain?

[86.] I accept without difficulty Counsel for Bain's submission that it is trite law that a party cannot be a plaintiff unless he has a vested interest in the subject matter of the action. However, for the reasons that I shall now give, I do not accept Bain's submission that the Association has no standing to bring the present proceedings.

[87.] There is no real dispute between the parties, or any sound basis for doubting, that Bain is bound by the Scheduled Restrictive Covenants. The only question is whether the right to enforce the Scheduled Restrictive Covenants is vested in the Association. This turns not upon the practical utility of the Association being in a position to ensure property owners comply with the Scheduled Restrictive Covenants, or the consequences for Sandyport if the Association cannot do so, but rather upon the terms of the Association's Documents and the application of the appropriate principles of contract and property law.

[88.] The Court is not relieved of the need to consider the issue by Bain's concession in cross-examination that clause 5 of the Scheduled Restrictive Covenants requires that he obtain the Association's consent before pursuing the modification or alteration of any structure in Sandyport. That was, in substance, a concession on a point of law, namely, the true construction of clause 5 of the Scheduled Restrictive Covenants. Bain (by his counsel) has resiled from that concession, and, in any event, the Court is not bound by the parties on questions of interpretation as it might be in the case of an admission of fact.

[89.] The resolution of this issue requires an examination of the relevant law governing the devolution of the benefit of (i.e. the right to enforce) restrictive covenants. As the area is notoriously complex and it serve as a helpful aid to comprehension, I briefly outline my understanding of the relevant principles.

The enforcement of restrictive covenants

[90.] Restrictive covenants are contractual terms agreed to by deed and, therefore, the original covenantee can always enforce the covenant against the original covenantor provided that the original covenantee has not divested himself of the benefit of the covenant by assigning it to some other person. This follows from the privity of contract between the parties. Where the original covenantee is not the party who seeks enforcement, however, the situation is more complex due to the absence of privity of contract.

[91.] In general, in order to succeed, a successor to the original covenantee must establish that he has the benefit of the restrictive covenant by showing one of the following: (i) the benefit of the covenant has been validly assigned to him; (ii) the covenant was annexed to land he has acquired or (iii) the restrictive covenants were imposed as part of a valid building scheme and land he has acquired falls within the area or locality of the scheme.

[92.] Different principles apply to the devolution of the benefit of restrictive covenants in law and in equity and different remedies are available in law and in equity. Where the benefit of a covenant runs only in equity, only discretionary equitable remedies are available.

[93.] Addressing the common law position first, the benefit of a restrictive covenant may pass if the covenant is: (i) assigned as a chose of action by way of a legal or statutory assignment under the ***Choses in Action Act*** (which attaches the benefit to the assignee); or (ii) one which automatically runs with the land. In relation to assignment, the covenant must not be of a purely personal nature, the formalities for a valid assignment under the ***Choses in Action Act*** must be adhered to and the assignment must be absolute. In relation to the benefit of the covenant running with the land, the covenant must "touch and concern the land" (i.e. affect the use or value of the land) and the original covenantee and successor in title must both have the same legal estate in the benefited land.

[94.] In equity, the benefit of a restrictive covenant may run if the following conditions are met: (i) the covenant must touch and concern the land; and (ii) the benefit of the covenant must have passed to the plaintiff in one of three ways, namely, (a) by annexation to the benefited land now in the hands of the plaintiff, (b) by assignment, provided this takes place at the same time as the transfer of the benefited land now in the hands of the plaintiff, if the action is brought against a successor in tile to the covenantor's land, or (c) under a building scheme, the familiar requirements for which were stated in ***Elliston v Reacher [1908] 2 Ch. 374*** and, more recently ***Jamaica Mutual Life Assurance Society v Hillsborough [1989] 1 WLR 1101***.

Application to the Association's Documents

[95.] Examining the Association's Documents, it is convenient to first address one of Counsel for Bain's criticisms of the Association's Documents which does not turn on contract or property law principles. Counsel for Bain submitted that the intent and purpose of a conveyance can only be to transfer title to or an interest in real property and, therefore, any purported assignment of the right to enforce the Scheduled Restrictive Covenants effected by the Developer's Conveyance is invalid. I do not agree.

[96.] While a conveyance is undoubtedly an instrument transferring title or an interest in property as Counsel for Bain submits, it is fundamentally a deed, and there is no reason why, within sensible limits, a conveyance can only deal with a transfer of title or grant of an interest. Conveyances routinely address matters ancillary to the transfer or grants they effect such as making provision for the production of copies of title deeds. An assignment of a right to enforce restrictive covenants which benefit land which is conveyed may similarly be regarded as ancillary.

[97.] It is next convenient to address Counsel for Bain's submission that the Developer's Conveyance was intended to grant to the Association nothing more than the Common Areas of Sandyport, as defined in Recital A of the Developer's Conveyance. I have little hesitation rejecting this submission. In my view, not only did the Developer's Conveyance validly transfer the Common Areas to the Association but it is clear from the operative provisions of the Developer's Conveyance that it was intended to pass the benefit of the Scheduled Restrictive Covenants to the Association.

[98.] Pursuant to clause 1 of the Developer's Conveyance, the Developer conveyed the Common Areas to the Association for a consideration of $1.00 in the following terms (so far as is relevant):

> 1. In pursuance of the said agreement [referred to in Recital D] and in consideration of the sum of One dollar ($1) in the currency of the said Commonwealth now paid to the Vendor by the Purchaser and other good and valuable consideration (the receipt whereof the Vendor hereby acknowledges() the Vendor AS BENEFICIAL OWNER hereby grants conveys and confirms unto the Purchaser ALL THOSE pieces parcels or lots of land being the Common Areas of the Gated Lots which said pieces parcels or lots of land have such position boundaries shape marks and dimensions as are shown on PLAN C coloured brown and blue for identification purposes only and on the detailed identification Plan D for the purpose of identifying the detailed plans only and on the detailed plans E to L attached hereto and are delineated on those parts which are shown hatched in RED TOGETHER WITH the appurtenances thereunto belonging
>
> ...
>
> 1.3 AND TOGETHER ALSO WITH the right to enforce for the benefit of the said Common Areas all covenants entered into by the Owners with the Vendor as defined in the Agreements for the USES relating to the Indenture Charge and for the observance of conditions and Said Restrictions AND TOGETHER WITH the right for the Purchaser and its successors in title owners from time to time of the Purchaser's property to exercise those rights as exist in the Agreements at all reasonable times and with or without servants and workmen to enter upon the Gated Lots as set out therein for the purpose of repairing maintaining reinstating or renewing the said pipes sewers drains tubes wires and the seawall or beach (if the Gated Lots are situate on the canal forming a part of the Common Areas) the Purchaser and its successors in title aforesaid doing no unnecessary damage by or in the course of such entry repair maintenance reinstatement or renewal and making good to the full extent thereof all damage done thereby or in the course thereof ...

[99.] In my judgment, the Association has standing to enforce the Scheduled Restrictive Covenants against Bain pursuant to clause 1.3 of the Developer's Conveyance. Clause 1.3 of the Developer's Conveyance transferred to the Association the Developer's rights to enforce the various covenants to observe and perform the Scheduled Restrictive Covenants given to the Developer by property owners in Sandyport in their conveyances

of Gated Lots. This construction of clause 1.3 of the Developer's Conveyance is a more natural reading of the provision than the one contended for by Bain.

[100.] In my view, the construction of clause 1.3 advanced by Counsel for Bain places insufficient weight upon the draftsman's use of the phrases "*all covenants*" and "*and for the observance of conditions and said Restrictions*" appearing in clause 1.3 of the Developer's Conveyance. In addition, as Counsel for the Association correctly observed, Counsel for Bain's position overlooks the fact that the Common Areas benefit from the building controls imposed by clause 5 of the Scheduled Restrictive Covenants and, it is to be noted, the provisions of other Scheduled Restrictive Covenants.

Issue 2: Whether the Association is entitled to enforce the Scheduled Restrictive Covenants against Bain in the circumstances that have transpired?

[101.] In order to determine this issue, of whether the Association is entitled to enforce the Scheduled Restrictive Covenants against Bain in the circumstances that have transpired, it is, in my view, necessary to determine: (i) whether Bain has breached the Scheduled Restrictive Covenants on the evidence; and (ii) whether the Association is precluded from enforcing any such breaches of the Scheduled Restrictive Covenants

Whether Bain has breached the Scheduled Restrictive Covenants on the evidence?

[102.] My understanding of the gravamen of the Association's case is that Bain triggered the Association's right to review his proposed construction activity on the Subject Property when he abandoned construction in 2010 and proposed to resume it in 2012. Essentially, Bain breached the Scheduled Restrictive Covenants when he failed to obtain the Association's approval before proceeding with construction in January 2012.

[103.] It will be seen from the foregoing summary that the premise underpinning the main thrust of the Association's case is that, under clause 5 of the Scheduled Restrictive Covenants, the Association's approval has been and is required in order for Bain to proceed with construction on the Subject Property, having stopped it in 2010.

[104.] In my view, on the true construction of clause 5 of the Scheduled Restrictive Covenants:

i) the Developer is the party whose approval Bain has at all material times needed to seek; and

ii) (assuming there are previously-approved plans) the Developer's approval is not required for Bain to "re-commence" or continue construction.

[105.] Clause 5 of the Scheduled Restrictive Covenants makes specific use of the phrase "*the Vendor*". The phrase "*the Vendor*" is defined in the parties clause of the 2005 Conveyance to mean the Developer. The parties clause provides (so far as is relevant):

> THIS INDENTURE OF CONVEYANCE is made the 29th day of September, A.D. 2005 BETWEEN **SANDY PORT DEVELOPMENT COMPANY LIMITED** a company incorporated under the laws of the Commonwealth of The Bahamas and carrying on business within the said Commonwealth (hereinafter called 'the Vendor')

[106.] The 2005 Conveyance is a formal document which was drawn by a professional firm of attorneys. The language used in the document, including defined terms, must therefore be given considerable weight when seeking to ascertain the meaning of its provisions. The authorities show that at least "*strong and cogent*" reasons are necessary to justify departing from a defined term appearing in a conveyance: ***Margerison v Bates [2008] 3 EGLR 165*** per *Deputy Judge Bartley Jones KC* at para 26.

[107.] In ***City Inn (Jersey) Ltd v Ten Trinity Square Ltd [2008] EWCA Civ 156***, a case in which the phrase "*the Transferor*" was defined in an instrument of transfer to mean the Port of London Authority without any reference to the Port Authority's successors in title, the question arose whether the phrase included the Port Authority's successors in title. *Jacob LJ* said at para 8:

> 8. It is obviously a strong thing to say that where a draftsman has actually defined a term for the purposes of his document that in some places (but not others) where he uses his chosen term he must have intended some other meaning. It is not impossible, however. If, approaching the document through the eyes of the intended sort of reader (here a conveyancer), the court concludes that notwithstanding his chosen definition the draftsman just must have meant something else by the use of the term, it will so construe the document. Such a conclusion will only be reached where, if the term is given its defined meaning the result would be absurd, given the factual background, known to both parties, in which the document was prepared. ...
>
> [Emphasis added]

[108.] In the present case, there are references to the Vendor's successors and/or assigns in clauses 1, 1(1), 1(2), 1(3), 1(4), 3, 8 and 9 of the 2005 Conveyance. This is a strong indication that the draftsman of the 2005 Conveyance did not intend the phrase "*the Vendor*" to include the Developer's successors and assigns and was aware of the need to make express reference when intending to refer to them given how he defined the phrase "*the Vendor*". That indication is reinforced by the fact that the term "*Licensor*" used in the 2005 Licence, drafted by the same firm of attorneys that drafted the 2005 Conveyance, is defined to include, where the context admits, the Developer's assigns, while comparable language is absent from the 2005 Conveyance.

[109.] There is nothing in the established factual background or context which persuades me that a primarily textual analysis of the 2005 Conveyance is inappropriate. The background to the 2005 Conveyance related by Bain is conventional. On the other hand, the background suggested by the Association's Documents themselves, *viz.* that there was an agreement that the Developer would transfer the Common Areas and the management thereof to a company formed for such purpose, has not been proven, and I do not accept Counsel for the Association's submission that the intended transfer of rights and responsibilities from the Developer to the Association was "*presaged*" by the 2005 Conveyance and 2005 Licence.

[110.] I am also not persuaded that there is anything absurd in construing the phrase "*the Vendor*" in clause 5 of the Scheduled Restrictive Covenants to mean "*the Developer*". It is perfectly possible to conceive of reasons why a developer of a subdivision would wish to retain control over the development they created even after the developer has sold off all of the lots in the subdivision. A developer, particularly a professional development company, might consider themselves best placed to regulate the future development of the subdivision. There are also, more generally, possible aesthetic, financial and altruistic reasons why a vendor might wish to retain a power to give or withhold consent to construction after parting with any beneficial interest in a subdivision: ***Crest Nicholson Residential (South) Ltd v McAllister [2003] 1 All ER 46*** per *Neuberger J* (as he then was) at para 46.

[111.] Most compelling of the factors weighing against construing "*the Vendor*" to simply mean "*the Developer*" is the fact that clause 33 of the Scheduled Restrictive Covenants requires that the property owner obey the rules for the Common Areas promulgated from time to time by "*the Vendor*" in accordance with the terms of their licence and (on the basis of the 2005 Licence) that licence contemplates the Developer's assigns. However, in my view, that factor does not cross the threshold of demonstrating "*absurdity*" or even "*strong and cogent reasons*" so far as clause 5 of the Scheduled Restrictive Covenants is concerned or other clauses relating to development control.

[112.] By clause 2 of the 2005 Conveyance, Bain covenanted to "*...at all times observe and perform the said restrictions*". Those restrictions (i.e. the Scheduled Restrictive Covenants) were fixed from the date upon which the 2005 Conveyance was executed by the parties and they contemplated Bain approaching the Developer, not the Association, for approval to build. The mere assignment of the Developer's rights to the Association could not alter this. The situation is analogous to that which obtained in ***Churchill v Temple [2011] 1 EGLR 73***, where *Deputy Judge Strauss KC* said at para 46:

> [46] Mr Davies submitted, in the alternative, that Mr and Mrs Temple were entitled, under the ordinary law of assignment, to exercise Mr and Mrs Strong's rights under paras 4 and 5 [to give or withhold approval to construction]. I do not accept this

> argument. Once it is decided that the words 'the Vendors and their surveyor' mean what they say, and do not on their proper construction include successors in title, the only contractual right that can be assigned is the right to have plans submitted to Mr and Mrs Strong or their surveyor for approval or consent. Otherwise, the effect of the assignment would be to enlarge the assignee's rights.
>
> [Emphasis added]

[113.] Like the first instance judges in ***City Inn (Jersey) Ltd v Ten Trinity Square Ltd [2007] 3 EGLR 59***, ***Margerison v Bates*** (supra), and ***Churchill v Temple*** (supra), I adhere to the literal interpretation of the phrase "*the Vendor*" for present purposes. I add to this that, in my judgment, it was not competent for the Developer to purport to substitute the Association as the party empowered under the Scheduled Restrictive Covenants to approve contemplated development within Sandyport through the mechanism of the Association's Documents.

[114.] It was, of course, at all times prior to the execution of the Association's Documents open to the Developer to exercise the right vested in it by clause 2 of the 2005 Conveyance to "*modify vary or release all or any of the said restrictions in respect of the said hereditaments and also of all or any other lot or lots comprised in Subdivision Five*" (the "Clause 2 Right") to require that property owners obtain the Association's consent in place of its own. However, I agree with Counsel for Bain that the Association has provided no evidence of a deed by which the Scheduled Restrictive Covenants were modified pursuant to the Clause 2 Right.

[115.] For the foregoing reasons, I hold that the phrase "*the Vendor*" in clause 5 of the Scheduled Restrictive Covenants means "the Developer" and Bain needed to seek the Developer's consent rather than the Association's to build on the Subject Property. The Association's claim for injunctive relief, damages for breach of contract and consequential interest probably fails on this basis alone. However, in my view, there is further reason why the Association cannot succeed in obtaining damages or injunctive relief – and that is that there is no need under the Scheduled Restrictive Covenants for a property owner to apply for approval to "re-commence" or continue construction in accordance with already approved plans, even if this takes place more than a year after the approval has been granted. The Scheduled Restrictive Covenants make no express provision for such an obligation and so onerous an obligation ought not to be a matter of inference or implication.

[116.] On a fair reading of clause 5 of the Scheduled Restrictive Covenants, where a property owner desires to build on a lot in Sandyport, they must first apply for permission to build their house according to proposed detailed plans and specifications. Once they are in receipt of approval of those plans and specifications, clause 8 of the Scheduled

Restrictive Covenants prevents them from building the house otherwise than in accordance with those detailed plans and specifications and, after they have built their house, they cannot alter its external appearance without like approval in writing. It cannot be disputed that clause 29 of the Scheduled Restrictive Covenants provides that no building shall remain unfinished for more than one year. However, I agree with Counsel for Bain that the Scheduled Restrictive Covenants do not specify that an approval to build obtained under clause 5 of the Scheduled Restrictive Covenants lapses within a year. Such a limitation ought to be clearly stated. I also agree with Counsel for Bain that a breach of clause 29 attracts its own remedies without affecting the meaning of other clauses of the Scheduled Restrictive Covenants.

[117.] Respectfully, the construction of the Scheduled Restrictive Covenants contended for by the Association could lead to absurd results and ought to be avoided. Suppose a property owner applies to the Developer for permission to build a home on his Gated Lot in accordance with plans prepared by an architect. He obtains that permission and immediately begins construction. However, owing to some personal event, he is unable to complete construction within the prescribed period of a year. He is near completion and proposes to finish construction in accordance with the architectural plans that he submitted and received approval for. On the Association's case, simply because a year has passed, he must reapply for permission and pay another application fee. However, there is no proper basis for the refusal of approval and the application fee would serve no purpose. This cannot be what the Scheduled Restrictive Covenants contemplate.

[118.] In view of the conclusions I have reached, whether Bain has complied with the Scheduled Restrictive Covenants turns on whether Bain complied with clause 5 of the Scheduled Restrictive Covenants prior to initially commencing construction on the Subject Property. As I understand it, the Association's pleaded claim is not based upon a breach of the Scheduled Restrictive Covenants at the time when Bain first started to build, but a later breach in 2012 when Bain "re-commenced" or continued construction on the Subject Property. While the Statement of Claim avers at paras 4 and 6 that Bain in breach of restrictive covenant commenced construction on the Subject Property, the Statement of Claim centres upon Bain proceeding with construction without the approval of the Association. The Association had no right to give or withhold approval when Bain first commenced construction in or around February 2008, as the first relevant document the Association relies upon for its authority to control and regulate construction activity in Sandyport is the Developer's Conveyance dated in May 2008. Thus, the Association's claim for injunctive relief, damages for breach of contract and consequential interest must fail.

[119.] In the event that I am wrong and the Association is also to be taken to be advancing a claim based upon a breach of the Scheduled Restrictive Covenants when Bain first commenced construction on the Subject Property, I am satisfied that Bain did breach the Scheduled Restrictive Covenants. I have already found that Bain did not submit a written application for approval to build to the Developer or a drainage plan showing the position of drainage, sewers and conduits or a construction schedule. Bain was therefore correct to admit in cross-examination that he failed to comply with (and therefore breached) the Scheduled Restrictive Covenants when he commenced construction in 2008. Clause 9 of the Scheduled Restrictive Covenants does not avail Bain because I have found he did not receive a receipt in writing from the Developer so as to trigger the deeming clause.

Whether the Association is precluded from enforcing the breaches of the Scheduled Restrictive Covenants?

[120.] In my judgment, the Association would nonetheless to be precluded from enforcing the breaches of the Scheduled Restrictive Covenants on which it relies. Bain ran a proprietary estoppel defence at trial which did not strictly comport with his pleaded case, inasmuch as Bain's pleaded defence of estoppel is based on him having received the Developer's approval to build whereas, in her closing submissions, Counsel for Bain advanced a defence based on the Developer *standing by* and *encouraging* Bain's construction. However, Counsel for the Association sensibly and reasonably did not take the pleading point.

[121.] In ***Greek Macedonian Club Limited v Pan Macedonian Greek Brotherhood NSW Limited [2007] NSWSC 92,*** *Bereton J* discussed the doctrine of proprietary estoppel and said at para 49:

> 49 The basis in equity of the Club's claim is properly to be seen as falling in the rubric of equitable proprietary estoppel. Equity comes to the relief of a plaintiff who has acted to its detriment on the basis of a fundamental assumption in the adoption of which the defendant has played such a part that it would be unfair or unjust if the defendant were left free to ignore it; equity intervening on the footing that it would be unconscionable for the defendant to deny the assumption ... It is essential to an equitable estoppel that the defendant knows or intends that the party who adopts the assumption will act or abstain from acting in reliance on it ... Such knowledge or intention may easily be inferred where the adoption of the assumption or expectation is induced by the making of a promise, though it may also be found where the defendant encourages a plaintiff to adhere to an assumption or expectation already formed, or acquiesces in an assumption or expectation when in conscience, objection ought to be stated .... The unconscionability which attracts the intervention of equity is the defendant's failure, having induced or acquiesced in the adoption of the assumption or expectation, with

knowledge that it would be relied on, to fulfil the assumption or expectation or otherwise to avoid the detriment which that failure would occasion."

[Emphasis added]

[122.] Having regard to my findings of fact, I agree with Counsel for Bain's submission that it would be unconscionable for the Developer or the Association (as the Developer's successor) to now enforce the Scheduled Restrictive Covenants against Bain to the extent that they require that he obtain approval to build at this stage. However, in my view, it is acquiescence and not proprietary estoppel that is relevant. Bain's Amended Defence and Counterclaim arguably raises acquiescence in the averment at para 11 that "*the [Association] and/or the [Developer] have by their conduct and otherwise affirmed his continuing construction on the basis of that said approval*".

[123.] The defence of acquiescence was considered by *Allen J* (as she then was) in ***Paradise Island Ltd v El Condor Enterprises Ltd [1993] BHS J No 34***, where a developer of a residential subdivision sought an injunction to restrain the operation of a hotel operating in breach of the restrictive covenants of its subdivision. *Allen J* said at paras 35 to 37 and at para 40:

> 35 Chatsworth Estates Company v. Fewell [1931] 1 Ch. 224 was an action to enforce restrictive covenants against a purchaser with notice, bound only in equity. There the defendant relied on two equitable defences - the first of which was:-
>
> (a)An allegation that this change was brought about by the acts or omissions of the plaintiffs or their predecessors.
>
> 36 It was there held that in order to succeed on the ground, the defendant must make out a sort of estoppel by showing that the plaintiff's acts and omissions were such as to justify a reasonable person in believing that the covenants were no longer enforceable.
>
> 37 In my view, on this application, the defendant must at least adduce some evidence to show that the plaintiff not only knew about the alleged breaches but actually encouraged those breaches or failed for such a period of time to take steps to enforce the restrictive covenants as to lead a reasonable person to believe that the covenants were no longer enforceable.
>
> 40 At p. 230 - 231 of the Chatsworth Estates case, Farwell, J., said:-
>
> ...'The defendant really relied on the acts and omissions of the plaintiffs and their predecessors as a bar to equitable relief. Now the plaintiffs are not unduly insistent on the observance of these covenants in this sense, that they do not conduct inquisitorial examinations into their neighbours' lives, and do not make it their business to find out very carefully exactly what is being done, unless the matter is brought to their notice, either by complaints of other inhabitants, or by seeing some board or advertisement. I cannot think that plaintiffs lose their rights merely because they treat their neighbours

with consideration. They are doing what they think sufficient to preserve the character of the neighbourhood. Whether they do enough is another matter, but I am quite satisfied that they are not intending, by their acts or omissions, to permit this area to be turned into anything other than a mainly residential area. There is no doubt however that they have permitted breaches of covenant in several cases where houses have been turned into flats, they have permitted at least four houses to be carried on as boarding-houses or hotels, and they have not prevented - in some cases because they did not know of them - some half a dozen other houses being used as boarding houses or guest houses.

There are still however a very large number of private dwelling-houses in the area, and I am satisfied that while the use of Bella Vista as a guest house or boarding house may not at the moment cause any actual damage to Compton Place or its owners, there is a prospect of damage in the future if the defendant is allowed to continue to use Bella Vista in that way, because it might well lead to many other houses being so used which would undoubtedly damnify the owners of Compton Place, especially if they develop the park and grounds as intended. In that way it will certainly be detrimental to the plaintiffs to permit Bella Vista to be used as a guest house. But whether they are entitled to relief depends on the exact effect of their past acts and omissions.

Now, as stated in many authorities, the principle upon which this equitable doctrine rests is that the plaintiffs are not entitled to relief it would be inequitable to the defendant to grant it. In some of the cases it is said that the plaintiffs by their acts and omissions have impliedly waived performance of the covenants. In other cases it is said that the plaintiffs, having acquiesced in past breaches, cannot now enforce the covenants. It is in all cases a question of degree. It is in many ways analogous to the doctrine of estoppel, and I think it is a fair test to treat it in that way and ask, Have the plaintiffs by their acts and omissions represented to the defendant that the covenants are no longer enforceable and that he is therefore entitled to use his house as a guest house?'.

[Emphasis added]

[124.] More recently, in ***Singh v Rainbow Court Townhouses Ltd [2018] UKPC 19***, the Judicial Committee of the Privy Council considered the principles governing the defence of acquiescence in circumstances where the manager of a developer sought to enforce restrictive covenants against the owner of a townhouse in the development who had carried out works to her property in breach of a restrictive covenant in her lease not to make any alterations or additions in or on her property without first obtaining the developer's written approval. The defence failed on the facts. Lord Carnwath, giving the advice of the Board said at paras 31 to 33:

31. In considering these linked issues, the Board will start by looking at the general principles, turning to the detail of the alleged breaches and the order made in respect of them. On the issue of waiver or acquiescence the Board is content to adopt the approach of Farwell J in the Chatsworth Estates case. It finds the authority of direct assistance, because like the present case it concerned enforcement of covenants by

an estate company for the protection of an estate as a whole, rather than by an individual property owner against a neighbour (as in other cases cited below, such as Gafford v Graham (1998) 77 P & CR 73).

32. However, that consideration tends to point against Mr Strang's submission. Farwell J recognised that the company had not been 'unduly insistent' on the observance of the covenants, nor had it made its business to conduct inquisitorial examinations unless a matter was drawn to its attention by complaints of neighbours or otherwise (p 230). The issue was not whether breaches had been overlooked in individual cases but whether those omissions could be said to amount in effect to a representation that the covenants were no longer enforceable. On the facts of the case, Farwell J held that the company was not disentitled by its past actions from an injunction to restrain the defendant's use. Not only were there particular explanations for at least some of the cases, but to debar relief would make it extremely difficult for the company in future to prevent other persons carrying on guesthouses. Further, it was a clear case for an injunction without the need to show substantial damage, at p 233:

> 'Damages are no remedy because the object of the covenant is not to make persons pay for committing breaches but to prevent these breaches.'

33. Applying that approach to the present case, the Board agrees with the judge and the Court of Appeal that the exchanges in October and November 2014 cannot possibly be interpreted as amounting to representations by the company that the covenants in the lease requiring approval for works were no longer effective either in general or in relation to the appellant's proposed works. The mere failure of two officers to make immediate objection in October 2014 when notified of works due to start within in about a week, without any detailed information of their nature cannot be interpreted as a representation of any kind on behalf of the company. The letter of 18 November 2014 contained no such representation, express or implied, and in any event cannot have been relied on as such by the appellant, being received at a time when most of the work had been completed.

[Emphasis added]

[125.] In the instant case, Bain began construction on the Subject Property after receiving at a minimum oral approval to build ostensibly emanating from the Developer. Regardless of whether Jones had actual authority to bind the Developer in matters of development planning, Bain genuinely believed Jones to have authority to act on behalf of the Developer and genuinely believed he had approval to build before he proceeded. Given the relationship between Buckner and Jones, it is more likely than not that the Developer was not unaware of the dealings that had taken place with Bain and, for its own part, the Developer did not object to Bain beginning construction or, between 2008 and 2010, take any steps to prevent him from proceeding with construction, despite it having knowledge of the progress of Bain's construction and its own rights. The Developer's conduct amounted to a representation that strict compliance with the building covenants requiring approval in the Scheduled Restrictive Covenants was not expected of Bain so far as his construction was concerned and Bain proceeded to his detriment. Accordingly, I hold the

defence of acquiescence is made out. If necessary, I would also find an equitable proprietary estoppel.

[126.] Were I wrong in my conclusion that the Association is not entitled to enforce the Scheduled Restrictive Covenants against Bain in the circumstances that have transpired due to equitable proprietary estoppel or acquiescence, I would hold that the considerations I have identified militate decisively against the grant of an injunction to the Association. In ***Shaw v Applegate [1978] 1 All ER 123***, a defence of acquiescence failed but the English Court of Appeal declined to grant the plaintiff an injunction to enforce restrictive covenants due to the plaintiff's delay in enforcing their rights. *Goff LJ* said at pages 132 to 133:

> Looking at all the circumstances of this case, I agree with Buckley LJ that there is not sufficient here to establish the defence of acquiescence totally destroying the plaintiffs' rights. Although they saw the business developing, it was not until 1973, when the main body of new gaming machines came into use, and it became predominantly for grown-ups, or adolescents, and not kiddies, that they saw clearly that it had become, if indeed it has become, a serious threat to their business.
>
> Then the question is, should we grant an injunction? and of course the plaintiffs rely on the well-known dictum of Lord Cairns LC in Doherty v Allman ((1878) 3 App Cas 709 at 719, 720). However, I do not myself consider that that prevents the court from considering the effect of delay or other supervening circumstances. In my judgment, we have here a number of circumstances which make this a case in which that dictum does not compel us to grant what is, after all, a discretionary remedy, and unless so compelled I would hold that this is not a case in which relief by injunction should be granted. ...
>
> In my judgment, therefore, we should refuse an injunction and grant damages under Lord Cairns's Act. There are, or may by, cases where it is clear that damage can only be nominal and in such cases it may be right, as Blackett-Ord V-C did in this case, to dismiss the action altogether. But, in my judgment, it was not right to apply that principle to this case. It is impossible without an enquiry to say whether or not the damage can be quantified and whether or not it will prove to be substantial. I agree, therefore, that the right course in this case is to withhold an injunction and to direct an enquiry as to damages.
>
> [Emphasis added]

Issue 3: If the Association is entitled to enforce the Scheduled Restrictive Covenants against Bain, to what remedies is the Association entitled?

[127.] For the reasons I have given above, I would dismiss the Association's claim for a permanent injunction, allow the Association's claim for a declaration that Bain is bound by the Scheduled Restrictive Covenants and allow the Association's claim for a declaration that the Association has standing to enforce the Scheduled Restrictive Covenants against Bain.

[128.] As to the Association's breach of contract claim, that is a remedy at law. The Association appears to be an equitable assignee and the Developer has not been joined. The Association is not entitled to judgment for damages on this basis, notwithstanding I would prefer not to rest my decision upon this finding. I would therefore dismiss the Association's claim against Bain for damages for breach of contract and consequential interest.

[129.] Were I wrong to dismiss the Association's claim for damages for breach of contract and consequential interest, I accept Bain's submission that the Association has not pleaded any loss or damage and has not provided any evidence of loss or damage. Loss or damage is not an essential element of a claim for breach of contract, but the failure to plead or prove loss or damage is fatal to any claim for more than nominal damages to mark the breach of contract.

Issue 4: Whether the Association wrongfully interfered with, trespassed upon and/or created a nuisance vis-à-vis Bain's enjoyment of the Subject Property

[130.] Turning to whether the Association wrongfully interfered with, trespassed upon and/or created a nuisance vis-à-vis Bain's enjoyment of the Subject Property, it is useful to first recall the requirements of the torts of trespass and nuisance.

The tort of trespass

[131.] The tort of trespass was authoritatively considered by *Allen P* in ***Fairness Limited v Steven Bain and others SCCivApp No. 30 of 2015***, where she said at paras 28 to 30:

> 28. Trespass is defined in Volume 97 (Tort) of the Fifth Edition of Halsbury's Laws of England (2015) as the unlawful presence on land in the possession of another. Indeed, according to that text, a person trespasses on land '**if he wrongfully sets foot on it, or rides or drives over it, or takes possession of it, or expels the person in possession**...'
>
> 29. At paragraphs 573 and 574 the authors of Halsbury's Laws say:
>
> **'573.If the defendant intends to enter the land on which he trespassed it is no defence that he mistakenly thought that it was his own land; mistake is no defence in trespass.**
>
> **574. Any form of possession, so long as it is exclusive and exercised with the intention to support a claim of trespass is sufficient to support a claim of trespass against a wrongdoer. It is not necessary, in order to maintain trespass, that the claimant's possession should be lawful, and actual possession is good against all except those who can show a better right to possession in themselves. However a mere trespasser who goes into occupation cannot by the very act of trespass, and without acquiescence give himself possession against the person he has ejected...'**

30. Moreover, so far as they are relevant to this case, the defences available against a claim for trespass are as set out at paragraphs 581, 583, 584, and 587 of the same volume and edition of Halsbury's:

'581 A defendant may plead and prove that he had a right to the possession of the land at the time of the alleged trespass, or that he acted under the authority of some person having such a right; but he may not set up the title of a third person unless he claims under or by authority of such a person ...

583. It is a good defence to a claim of trespass for the defendant to plead and prove that he entered on land in the exercise of a legal right whether statutory or otherwise... The defence of justification must be specially pleaded and must cover all of the acts done.

584. Mere delay by the claimant in complaining of the defendant's actions is not of itself sufficient to establish the defence of acquiescence or estoppel. It must further be shown that the defendant had been misled to his detriment so that it would be unconscionable for the plaintiff to assert his rights. However the claimant is not debarred by acquiescence from enforcing legal rights of which he was unaware.

587. A claim of trespass to land is barred by lapse of the statutory period of limitation, which, except in certain specified cases, is six years from the cause of action arose.'

The tort of nuisance

[132.] The tort of nuisance was considered by *Charles Sr. J* (as she then was) in ***Brigetta Seymour and others v Karen G Rigby 2020/CLE/gen/00287*** (unreported, 26 May 2022), at paras 18 to 21, where she said:

> [18] The law on nuisance was most succinctly stated by Small J in Hinsey v Bahamas Electricity Corp. [2001] BHS J No 95 at para 42 as:
>
> > 'The essence of nuisance is activity, whether by an act or omission, which is an interference with, disturbance of or annoyance to a person in the exercise or enjoyment of his ownership or occupation of land.'
>
> [19] The principles of nuisance were neatly set out by Sir Terence Etherton MR in Williams v Network Rail Infrastructure Ltd; Waistell v Network Rail Infrastructure Ltd [2019] QB 601 at paras 39 and 40:
>
> > '39 I would summarise as follows the present principles of the cause of action of nuisance.
> >
> > 40 First, a private nuisance is a violation of real property rights. That means that it involves either an interference with the legal rights of an owner of land, including a legal interest in land such as an easement and a profit a prendre, or interference with the amenity of the land, that is to say the right to use and enjoy it, which is an inherent facet of a right of exclusive possession: Hunter v

> Canary Wharf Ltd [1997] AC 655, 687G–688E (Lord Goff citing FH Newark, 'The Boundaries of Nuisance' 65 LQR 480), 696B (Lord Lloyd of Berwick), pp 706B, p 707c (Lord Hoffmann) and p 723D—E (Lord Hope of Craighead). It has been described as a property tort: Dolan Nolan, '"A Tort Against Land": Private Nuisance as a Property Tort" in Rights and Private Law, Dolan Nolan & Andrew Robertson (eds) (2011).'

[20] Nuisance by encroachment on a neighbour's land is one of three kinds of nuisance. At para 41, Sir Terence stated:

> '41 Secondly, although nuisance is sometimes broken down into different categories, these are merely examples of a violation of property rights as I have described them. In Hunter's case at p 695c, for example, Lord Lloyd said that nuisances are of three kinds: "(1) nuisance by encroachment on a neighbour's land, (2) nuisance by direct physical injury to a neighbour's land; and (3) nuisance by interference with a neighbour's quiet enjoyment of his land."'

[21] Nuisance is actionable in some instances without proof of damage. The question depends on the nature of the nuisance. Sir Terence continued at para 42:

> '42 Thirdly, the frequently stated proposition that damage is always an essential requirement of the cause of action for nuisance because nuisance is derived from the old form of action on the case must be treated with considerable caution. As to the proposition, see, for example, Lemmon v Webb [1894] 3 Ch 1, 11, 21, 24; Davey v Harrow Corpn [1958] 1 QB 60, 71; Hunter's case at p 69 5D; and Delaware Mansions Ltd v Westminster City Council [2002] 1 AC 321, paras 15, 33. It is clear both that this proposition is not entirely correct and also that the concept of damage in this context is a highly elastic one. In particular, interference with an easement or a profit a prendre is actionable as a nuisance without the need to prove specific damage: Harrop v Hirst (1868) LR 4 Ex 43, 46–47, 48; Nicholls v Ely Beet Sugar Factory Ltd [1936] Ch 343, 349–350. Furthermore, in the case of an artificial object protruding into a claimant's property from the neighbouring land, Mr David Hart QC, for NR, accepted that the claimant has a cause of action in nuisance without proof of damage. Although McNair J said in Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd [1957] 2 QB 334 that an advertising sign erected by the defendant which projected into the airspace above the plaintiff's shop was a trespass and was not capable of constituting a nuisance, he so held without any reference to the previous authority to the contrary in Baten's Case (1610) 9 Co Rep 53b and Fay v Prentice (1845) 1 CB 828 and so Kelsen's case must be considered per incuriam in relation to that issue. So far as concerns such nuisance from encroachment by an artificial object, the better view may actually be that damage is formally required but damage is always presumed: Baten's Case; Fay v Prentice at p 841. That, in itself, shows both the artificiality and elasticity of any requirement of damage for the purpose of establishing nuisance'.

[133.] Importantly, the categories of nuisance are not closed. Examples of activities amounting to a nuisance include watching and besetting a man's house with a view to compelling him to do or not do that which he is entitled to do (***Lyons v Wilkins No 2***

[1899] 1 Ch 255) and where things or activities impede access to part of a dwelling (***Guppys (Bridport) Ltd v Brookling [1984] 1 EGLR 029***). In ***Fearn v Board of Trustees of the Tate Gallery [2023] 2 All ER 1***, an appeal to the Supreme Court of the United Kingdom which concerned whether "overlooking" could in law amount to a nuisance, *Lord Leggatt* (with whom *Lloyd Lord-Jones* agreed) said at para 12:

> 12. A second fundamental point, directly relevant in this case, is that there is no conceptual or a priori limit to what can constitute a nuisance. To adapt what Lord Macmillan said of negligence in Donoghue v Stevenson [1932] AC 562, 619, the categories of nuisance are not closed. Anything short of direct trespass on the claimant's land which materially interferes with the claimant's enjoyment of rights in land is capable of being a nuisance.
>
> [Emphasis added]

[134.] I have accepted Bain's evidence on the subject of the Association trespassing on the Subject Property and the Association's interferences with his use and enjoyment of the Subject Property, though I prefer Ramburun's evidence that he entered the Subject Property on 15 October 2012 with the permission of Bain's workmen and not as a trespasser.

[135.] Applying the authorities, in my judgment, Bain has established both trespass and nuisance. The Association, through its agents, entered upon the Subject Property without Bain's permission and the evidence bears out an unreasonable and heavy-handed course of conduct on the part of the Association which substantially interfered with Bain's use and enjoyment of the Subject Property and caused him loss and damage.

[136.] For the avoidance of doubt, I have not taken into account Bain's compliance with the 2012 Injunction when considering whether nuisance has been *prima facie* established by Bain. To do so would subvert the principle that, in the absence of an express or implied cross-undertaking in damages, a defendant who is ultimately victorious at trial has no recourse to recover losses he may have incurred from complying with an interlocutory injunction or a voluntary undertaking (as to which, see, e.g., ***Neptune Capital Group Ltd v Sunmax Global Capital Fund 1 Pte Ltd [2016] SGHC 148*** at para 35).

[137.] As regards the Association's defence to the trespass and nuisance claims, I accept Counsel for Bain's reply thereto. The remedies for a failure by a property owner to pay the Indenture Charge and Maintenance Charge are set out in clauses 1(2)-1(4) of the 2005 Conveyance and clause 8 of the 2005 Licence, and the Association did not exercise those rights. Furthermore, the 2012 Injunction afforded the Association little excuse for its conduct as the 2012 Injunction prohibited Bain from building but not merely attending at

the Subject Property. The Association has therefore failed to establish a viable defence to Bain's trespass and nuisance claims.

Issue 5: To what remedies, if any, is Bain is entitled?

Special damages in the sum of $20,450

[138.] While I have found Bain is entitled to succeed in nuisance and trespass, I accept Counsel for the Association's submission that Bain has failed to produce adequate evidence to substantiate the amounts prayed for by way of special damages in his counterclaim. I therefore decline to award Bain the sum of $20,450 claimed in special damages.

[139.] In ***Deborah Gilbert v BH Riu Hotels Limited t/a Riu Palace Paradise Island SCCiv App No. 143 of 2019***, *Evans JA* giving the judgment of the Court of Appeal said at para 7:

> 7. The law is clear that a plaintiff in order to be successful must specifically plead and prove a claim for special damages. As submitted by Mr. Farquharson this requirement was explained by the Court of Appeal of Guyana in the case of Heeralall v Hack Bros (Construction) Co Ltd (1977) 25 WIR 117 at page 124 as follows: 'A trial judge called upon to assess damages in a common law action for personal injuries on the ground of negligence must bear in mind the well-established general common law principles to be applied. It will not be amiss to repeat them put together in this judgment. Damages are special and general. Special damages must be specifically pleaded and proved, and are awarded in respect of out of pocket expenses and loss of earnings actually incurred down to the date of the trial itself. They are generally capable of substantially exact calculation or at least of being estimated with a close approximation, to accuracy... General damage, on the other hand, need not be pleaded specifically as the law implies it, as usually falls under these heads: (a) loss of future earnings or income; (b) pain and suffering; and (c) loss of amenities or enjoyment of life...'
>
> [Emphasis added]

Damages for and on account of nuisance and trespass

[140.] It is also my view that Bain has failed provide cogent evidence which assists the Court in quantifying general damages for nuisance and trespass. As Bain has failed to place the Court in a position to make an informed award of damages, in my judgment, the appropriate course is that I award Bain nominal damages, which I assess in the amount of $2,500.

[141.] In ***Greer v Alstons Engineering Sales and Services Ltd (2003) 63 WIR 388***, a decision of the Judicial Committee of the Privy Council, Sir *Andrew Legatt*, giving the advice of the Board, said at paras 6 to 9:

> [6] In the Court of Appeal, Jones JA, with whom de la Bastide CJ and Lucky JA agreed, explained the decision to award $5000 by way of nominal damages –
>
> 'The appellant claimed damages for loss of use of the backhoe in negligence in respect of the period from July 1982 to January 1984 and in detinue for a period of at least six months thereafter. A claim for loss of use of an income-earning chattel is a species of special damages. The onus is therefore on a claimant to prove strictly not only his loss but also the quantum of it. The trial judge held that the appellant had not given cogent evidence to support his loss. She described his evidence as vague and generalised. Indeed, his evidence was that the daily rate for the backhoe in 1982 was $500 increasing in 1983 to $600, and by 1984 the figure was $800 per day, or $100 an hour. He failed to produce any documentation in support of these claims and furthermore these sums were all gross.
>
> In order for net loss to be assessed, there must be evidence about the expenses incurred in earning that income. In this case, there was evidence that whenever the backhoe was rented out, it was rented out with a driver. There was, however, no evidence as to what the cost of that driver was to the appellant, nor was there evidence of the amount spent on fuel and oil nor maintenance nor any other incidental expense necessary for the operation of the backhoe.
>
> In the light of this state of affairs, I hold that the learned trial judge was correct in refusing to award the damages claimed ...
>
> When such evidence is not provided, however, it is open to the trial judge to give consideration to an award of nominal damages. In McGregor on Damages (13th Edn) at para 295 it is stated: "Nominal damages may also be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given. This is only a subsidiary situation, but it is important to distinguish it from the usual case of nominal damages awarded where there is a technical liability but no loss". In the present case the problem is simply one of proof, not of absence of loss but of absence of evidence of the amount of loss.'
>
> [7] Mr Marcus contended that whatever the difficulty of computing special damage the appellant was entitled to general damages, which should be substantial. He cited Owners of No 7 Steam Sand Pump Dredger v Owners of ss Greta Holme ('The Greta Holme') [1897] AC 596 and Owners of ss 'Mediana' v Owners, master and crew of the lightship 'Comet' ('The Mediana') [1900] AC 113, in each of which a sum was awarded by the House of Lords for loss of use of a vessel damaged by the defendants' negligence. At p 116 of the second case, Lord Halsbury LC said that 'the term "nominal damages" does not mean small damages', while at p 605 of the first case Lord Herschell said after referring to out-of-pocket expenses –
>
> '... I think they are also entitled to general damages in respect of the delay and prejudice caused to them in carrying out the works entrusted to them. It is true these

damages cannot be measured by any scale; but that would be equally true in the case of damages in respect of the deprivation of an individual of a chattel which he had purchased for purposes of comfort and not profit.'

[8] As a more modern example of such damages Mr Marcus referred to Dixons (Scholar Green) Ltd v J L Cooper Ltd [1970] RTR 222, in which the plaintiffs called no evidence to prove the loss incurred by the deprivation of a commercial vehicle for eleven weeks, and the English Court of Appeal substituted for the trial judge's award of £2 an award of £450. In the light of this, although he never hazarded a particular figure, Mr Marcus contended for an award substantially higher than the sum awarded.

[9] Although the loss under this head was unquantified, it is the duty of the court to recognise it by an award that is not out of scale. The sum of $5000 may indeed be regarded as on the low side; but it is not so low as to be wrong in principle and to warrant interference by their lordships.

[Emphasis added]

[142.] I decline to accede to Miss Glinton's invitation to order an assessment of any damages suffered by Bain as a consequence of the Association's tortious interferences with Bain use and enjoyment of the Subject Property. There was no agreement for there to be a split trial with the issue of liability being first and separately determined from the issue of quantum. It was Bain's obligation to make good his claims for damages at the hearing on 28 March 2019. In ***Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5***, *Lewison LJ* aptly observed, at para 114, that "*...trial is not a dress rehearsal. It is the first and last night of the show*". In my view, to order the assessment of damages sought by Bain would be to wrongly give Bain a second bite at the cherry.

Declaratory relief

[143.] In light of the conclusions that I have reached earlier in this Judgment, Bain is not entitled to a declaration that he is not bound by the Scheduled Restrictive Covenants legally enforceable by the Association as of right.

[144.] Bain is likewise not entitled to a declaration he is entitled to complete construction on the Subject Property. It having been established that Bain breached the Scheduled Restrictive Covenants, I am not satisfied that there is no property owner in Sandyport able to prevent Bain from completing construction on the Subject Property.

Permanent injunction

[145.] It is well-settled that injunctive relief is discretionary and, where prohibitory in form, preventative. In ***Proctor v Bayley (1889) 42 Ch D 390***, a patent infringement case, *Cotton LJ* said at page 398:

It does not follow that because a man has done a wrongful act an injunction will be granted against him, though he is liable for damages for the wrong. The Court of

> Chancery said, 'a man threatens and intends to do a wrongful act, we will, before it is done, grant an injunction to prevent his doing it, and we will grant it where the act has been done and is likely to be repeated'—the jurisdiction is simply preventative.

Fry LJ, in the same case, said at page 401:

> Now an injunction is granted for prevention, and where there is no ground for apprehending the repetition of a wrongful act there is no ground for an injunction. It was pressed on us that the Defendants insisted on their having a right to do what they had done, but, looking at all the circumstances of the case, this foolish attempt to justify a past act does not raise any presumption that they intend to repeat it. The injunction therefore falls...

[146.] I am not satisfied that there is a real risk of further interferences by the Association. The evidence does not bear out recent interferences with Bain's use and enjoyment of the Subject Property. In addition, the Association appears to have proceeded on the basis of a misapprehension of its rights which ought now to be corrected by this Judgment. I see no need for a permanent injunction and therefore decline to grant one.

Conclusion

[147.] I grant the Association the declarations it seeks and dismiss the balance of its claims. I grant Bain damages for nuisance and trespass in the amount of $2,500 and dismiss the balance of his counterclaim save that, having regard to the principles discussed by the Court of Appeal in ***D.B.S. Builders and Developers Company Limited v Beauport Investment Company Limited SCCiv App No 39 of 2002***, I order that the 2012 Injunction be discharged and the Association shall pay such damages to Bain pursuant to its undertaking in damages as may be assessed by the Registrar on account of that injunction having been wrongly granted. I will deal with the costs of these proceedings on written submissions. The parties are to submit bills of costs and written submissions not exceeding 10 pages in length within 14 days of this judgment.

Dated the 21st day of July, 2023

Sir Ian R. Winder
Chief Justice