IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2018/CLE/gen/01480

IN THE MATTER OF sect. 13 and the other provisions of The Law of Property and Conveyancing (Condominium) Act, 1965 (as amended).

B E T W E E N:

LUCAYAN TOWERS SOUTH CONDOMINIUM ASSOCIATION
(a statutory non-profit body Corporate)

Plaintiff

AND

GRAND BAHAMA UTILITY COMPANY LIMITED

First Defendant

AND

JULIE GLOVER

Second Defendant

Before: The Honourable Mr. Justice Loren Klein
Appearances: Ms. Meryl Glinton for the Plaintiff
Mr. Edward Marshall and Mr. Samuel Brown for the First Defendant
No appearance for Second Defendant
Hearing dates: 5, 31 May 2023

RULING

KLEIN, J

Writ action—Statement of Claim——Plaintiff a Condominium Association and Licensee of the Grand Bahama Port Authority (GBPA)—Defendant (Grand Bahama Utility Company) a Licensee of the GBPA and Utility Supplier for Freeport (GBUC)—Hawksbill Creek Agreement (HCA)—Grand Bahama (Deep Water Harbour and Industrial Area) Acts—Supply of water and sewerage by GBUC to Port Area under HCA—Plaintiff incurring significant arrears in water and sewerage bill with GBUC—Whether GBUC alter ego of GBPA with respect to the provision of utility services—Whether GBPC has absolute discretion to fix rates and penalties for services—Whether GBUC may disconnect services for non-payment—Counterclaim—Contract—Circumstances in which contract will be inferred—Claim in quantum meruit for services consumed—Unjust enrichment

Statutory interpretation—Interpretation and General Clauses Act, ss. 11(2), 36(1)—Schedules to Acts—Contractual interpretation—Principles—Implication of terms—"Braganza" principles

Declaratory relief—Whether Plaintiff entitled to declaratory relief against First Defendant—Privity of Contract—Standing—Neither plaintiff nor first defendant parties to the underlying contract that is the subject of the claim for declarations—Public law considerations—Injunctive relief—"Just and Convenient"—Jurisdiction to grant injunction in support of declaratory judgment

Second Defendant—Restitutionary claims—Claims for damages and relief against Second Defendant for allegedly interfering with management and finances of Plaintiff—Claims for interlocutory judgment against Second Defendant for unliquidated damages and detention of goods—R.S.C. Ord 13, 44. 2,3 and 5

INTRODUCTION & BACKGROUND

1. This case is about the supply of water and sewerage services. It raises novel and difficult questions of law, however, because it concerns the supply of these utilities in the unique legal context of the Hawksbill Creek Agreement ("HCA"). The HCA is a rather complex arrangement under which the colonial Government in 1955 granted (among other rights) a monopoly to a private company (Grand Bahama Port Authority) ("GBPA") to supply utility services (including water and sewerage, electricity and sanitation) and the right to carry out quasi-governmental functions within a demarcated geographical area of Freeport ("the Port Area"), in exchange for various tax and developmental concessions.

2. The claim arises in a circuitous way. The plaintiff is the Lucayan Towers South Condominium Association ("LTS"), a licensee of the GBPA and the body corporate responsible for management of the condominium. It has been embattled since 2013 in litigation concerning its management Board, which has financially crippled the Association and deeply divided its membership. Among its debts are arrears in excess of $400,000.00 owed to the first defendant, the Grand Bahama Utility Company ("GBUC") for the supply of water and sewerage services ("the utility services") accumulated from 2014.

3. The plaintiff does not in principle dispute the obligation to pay for the utility services. Rather, it says it should not be made to pay charges that are "arbitrary, unregulated and unreasonable" and, therefore, contrary to the scheme of the HCA. Consequently, it commenced this action by writ filed 17 December 2018. Initially, the writ was only indorsed with a claim for injunctive relief against the first defendant, but it was amended 27 March 2019 to include additional reliefs. The statement of claim (filed 12 December 2022) was further expanded to claim various declarations and other Orders against GBUC (the "main claim").

4. I have referred to the claim against the GBUC as the main claim because there is also a claim against a second defendant (the "secondary claim"), who is the sole representative of a group of owners or residents of LTS that at various periods purported to be its legitimate Board. Initially, four members of that Board were named, but the plaintiff discontinued the claim against the other defendants by notice of withdrawal and discontinuance filed 2 March 2022. It is alleged that this group diverted funds intended to pay the utilities and either caused or contributed to the

financial woes of the Association and its inability to pay the arrears. Therefore, the plaintiff claims (among other relief) an indemnity and/or contribution from the second defendant.

5. Attempts by the utility company to enforce payment of this debt, including by threatening and/or disconnecting the supply, have been thwarted by applications to the Court for injunctions. On 21 October 2022, this Court granted a further injunction on, *inter alia*, public interest grounds to prevent the disconnection of the supply (See Ruling dated 21 October 2022, *Lucayan Towers South Condominium Association v. Grand Bahama Utility Company Ltd. and Julie Glover, David Gillis, Todd Kimball, Serge Poitras,* 2018/CLE/gen/01480).

6. By way of defence and counterclaim filed 19 January 2023, GBUC counterclaimed for the amount said to be owing by the plaintiff in contract, or alternatively on a *quantum meruit* basis.

Essential material and factual background

The Plaintiff

7. By a Declaration of Condominium dated 4 October 1988, the plaintiff is vested with the operation of the condominium property. It is a relatively large condominium, comprising 12 storeys and 137 units. A license agreement was executed between the plaintiff and the GBPA dated 1 October 2002 authorizing it to operate and manage the condominium complex and entitling it to the benefit of the provisions of the HCA as a licensee of the GBPA.

8. As mentioned, the plaintiff commenced this action by way of writ of summons issued on 17 December 2018 (amended 25 March 2019). By statement of claim filed 12 December 2022, the plaintiff sought the following reliefs:

> "(1) A Declaration that as a Licensee of the Port Authority within the meaning and intent of Clause 2(1) of the Principal Agreement and Clause 2 (16) and (17) of the 1960 Agreement, the Plaintiff is entitled to all rights, facilities and privileges under the Principal Agreement (as amended).
>
> (2) A Declaration that construction and operations of utilities being the Port Authority's primary obligations within the meaning and intent of Clauses 1(6), 1(7) and 1(8) and 2(21) of the Principal Agreement, GB Utility is providing water and sewerage as the Port Authority's *alter ego*.
>
> (3) A Declaration that the Port Authority as the operator of a self-regulated utility (being a primary obligation) it may not, absent a Court Order, lawfully discontinue or cease providing the Plaintiff essential public utilities services as Licensees operating in the Port Area by virtue of the principal Agreement (as amended), preemptively or unilaterally with notice, so as to be punitive in its effect.
>
> (4) An Order prohibiting and restraining the Defendants and each of them whether by their subsidiaries or affiliates or Licensees or managers or officers or directors or servants or agents from actually or threatening disconnection of the water and sewage supply to the Property of the body corporate ["Lucayan Towers South Condominium Association"].

(5) A Declaration that the First Defendant is not entitled to unilaterally set rates, or impose fees and charges, and/or that any such fees and charges must be reasonable and proportionate.

(6) A Declaration that any fees and charges assessed for non-potable water were unreasonable.

(7) An Order that any fees and charges imposed by the Second Defendant for non-potable water were unreasonable and be unrecoverable and/or reimbursed to the Plaintiff.

(8) An Order restraining the Defendants (and each of them) from engaging in any conduct the effect and/or purpose of which causes further harm and loss and damage to the Property of the Plaintiff's body corporate.

(9) An Order directing the Second Defendants and each of them to turn over and/or cause to be turned over to the Plaintiffs all assets including cash, proceeds of cheques and negotiable instruments being levied maintenance contributions and property which the Body Corporate is entitled to receive from Unit owners (the "said Assets") which the Second Defendants now hold or once held (despite the Judgement dated 4th September 2017 given by the Court of Appeal in 2015/SCCiv./No. 0007).

(10.) An Order restraining the Second Defendants (and each of them) immediately to cease soliciting and/or receiving and/or diverting and retaining or withholding from the Body Corporate any part or portions of the contributions levied against individual Units located in the Property.

(11) An Order restraining the Second Defendants (and each of them) whether by their accomplices, privies, agents or otherwise from disposing of or in any way dealing with the said Assets or any part or portion thereof without consent in writing of the Body Corporate Board of Directors; and prohibiting them from using the said Assets for the payment of attorney's fees and legal costs and related expenses incurred or to be incurred in Supreme Court Action 2013/CLE/gen/No. 2024 and Civil Appeal 2015/SCCiv/No. 0007 or for defending this action or any applications or appeals relating to proceedings consequent upon any decision or Order of the Court.

(12) An Order directing the Second Defendants (and each of them), whether by their accomplices, privies, agents or otherwise to account for what they have done with the said Assets.

(13) An Order directing the Second Defendants (and each of them) forthwith to disclose the names and/or identities of any accomplices, or privies, or agents (other than each other) who how hold or once held any of the said assets.

(14) Damages as against the Defendants (joint and several) for having discontinued and ceased water and sewerage supply to the Property not authorized by Court Order.

(15) Damages as against the Second Defendants for late fees, penalties, and interest assessed by the First Defendant, and caused by the Second Defendant's withholding of funds, to be assessed.

(16) Further or alternatively, an Order that the Second Defendants indemnify the Plaintiff for any fees, penalties and interest assessed by the First Defendant and caused by the Second Defendants' withholding of funds.

(17) Aggravated and/or exemplary/vindicatory damages.

(18) Interest pursuant to the provisions of the Civil Procedure (Award of Interest) Act, 1992.

(19) Further or other relief.

(20) Costs.

The first defendant

9. The first defendant is also a licensee of the GBPA. It was granted a licence on 19 September 1961 permitting it to, *inter alia*, establish, construct, maintain, and operate systems for pumping, storing and distributing water within the Port Area. A supplemental licence was issued on 14 October 1968. In or about 1980, the GBUC began providing utility services to LTS in exchange for payment.

10. In its defence, the first defendant denies that the plaintiff is entitled to the relief claimed, and by way of counterclaim filed 19 January 2023 claimed the following relief:

(i) Damages for breach of contract in the amount of $381,426.34, and continuing.
(ii) Alternatively, an order that the plaintiff pay the sum of $381,426.34 (and continuing) on a *quantum meruit* basis for the services provided to and consumed at LTS.
(iii) Interests and costs.

The Second Defendant

11. The second defendant is Julie Glover. As indicated, she is the lone representative of the Board ("the Glover Board") that purported at one time to manage the affairs of the Association between March 2013 and March 2014 (and perhaps for some time afterwards), on the mistaken view (as later determined by the Court of Appeal) that they were the validly elected Board under disputed elections. More will be said about the secondary claim later, but for present purposes it is for compensation and other reliefs arising from the alleged mismanagement of the Association's funds, which it is claimed has directly led to the accumulation of the arrears with the first defendant.

12. The plaintiff filed an affidavit evidencing that the second defendant was served with the amended writ of summons on 1 May 2019, but she did not enter an appearance in this matter or participate in the proceedings.

Essential Factual Background

13. It appears that from about 1980, the first defendant provided the utility supply to LTS for payment, which was regularly made up until 2014. In December 2014, the plaintiff's utility services account ("the utility services account") fell into arrears in the amount of $16,358.82. As a result, on 2 December 2014 the plaintiff entered into a payment plan with the first defendant to make monthly instalment payments to the first defendant in the amount of $1,500.00, beginning 30 December 2014. In exchange, the first defendant agreed not to discontinue services as long as the plaintiff continued to make payments in accordance with the plan.

14. During the period 2 December 2014 to November 2018, the plaintiff made various payments to reduce the arrears, but by 7 November 2018 the arrears had climbed to $47,827.26. By 5 March 2019, this had increased to $77, 472.05, and on 20 March 2019, the first defendant discontinued service, although this was restored after a payment of $10,000.00 was made. Shortly

after this, on 9 April 2019, the plaintiff applied for and obtained *ex parte* an injunction from K. Thompson J, restraining the first defendant from discontinuing utility services to LTS. Curiously, the injunction was to continue pending the determination of an action arising out of a claim against the second defendants in a different action (2013/CLE/gen/2024), or until the trial of the writ filed in this action, which at that point was generally indorsed only in respect of injunctive relief, although "further or other relief" was claimed. As noted, that writ was amended 25 March 2019 to assert additional claims against the second defendants.

15. On 1 September 2019, Hurricane Dorian made landfall in Grand Bahama, bringing with it storm surges of up to 20 feet. The storm damage severely compromised the utility company's ability to supply potable water to its customers in the Port Area between 1 September 2019 to 2 November 2021. During this period, the water supplied was non-potable and, in consideration of this, the GBUC applied a 25% discount to the invoices of customers. On 11 November 2021, it appears that the first defendant proffered a second payment plan to the plaintiff, when the arrears stood at $273,654.38, the material terms of which included a penalty write-off of $39,935.52, and monthly payments of $7,304.00. This was never agreed.

16. By letter dated 10 December 2021, the GBPA deemed the water supplied by the utility company to its customers to be potable in accordance with the World Health Organization ("WHO") standards. On 13 December 2021, the utility company issued a public notice in the newspapers informing its customers that it had achieved island-wide potable water, and regular charges were reinstated. Since this date, it is alleged that the plaintiff only made 11 payments, totaling some $31,300.82 and that the arrears at the date of the trial stood at $418,541.14, and were climbing.

17. An injunction was granted initially on 9 April 2019, which was discharged by consent and the Order of this court on 1 October 2021. However, this Court granted a fresh injunction on 21 October 2021 based on differently pleaded causes of action. This injunction was only granted for a period of 6 months initially and directions given for an expedited trial. However, the first defendant gave an undertaking that it would refrain from seeking to disconnect pending the determination of the action. Further, the injunction was granted without prejudice to the right of the first defendant to pursue lawful remedies to obtain payment for services provided.

The legal/statutory framework (The Hawksbill Creek Agreement)

18. The HCA is constituted by an Agreement dated 4 August 1955 between the then colonial Government and the GBPA (the "Principal Agreement"), which has been amended and augmented by two supplemental Agreements, dated 11 July 1960 and 1 March 1966. The Agreements are scheduled to a series of Acts, the first styled as the *Hawksbill Creek Grand Bahama (Deep Water and Industrial Area) Act, 1955* and the others being amendments to that Act, which I shall refer to compendiously as "the HCA Acts" for ease of exposition. By these Agreements and Acts, the colonial Government conferred on the GBPA, an incorporated private company, various powers, rights and obligations for the creation and operation of a duty-free zone in the Port Area. This area

was to be administered on terms and conditions that are analogous to the powers traditionally bestowed on statutory corporations and municipal authorities to provide and operate essential services to townships or municipalities, including the power to seek bye-laws for that purpose.

19. For completeness, there are a number of later HCA Acts (dated 1993, 1994), but these mainly extend the time period for several of the exemptions from taxes and import duties granted under the earlier Acts. They are not relevant for the purposes of this Ruling.

Issues to be determined by the Court

20. As often happens in matters such as this, each party formulated its issues from its own standpoint. The plaintiff submitted that there were six main issues for the determination of the Court, while the first defendant submitted that there were eight. I have distilled the following issues from a review of the issues submitted by both parties, borrowing language from formulations by both sides. The first three are listed as preliminary issues, although as will be seen, they are tied to the substantive issues.

Preliminary issues

(i) Whether the series of Agreements scheduled to the HCA Acts are enactments that form part of the statute law of The Bahamas.
(ii) Whether the plaintiff has standing to obtain declaratory relief against the first defendant in a private law action, based on a contract to which neither the plaintiff nor the first defendant is a party.
(iii) Whether GBUC is the *alter ego* of the GBPA with respect to the undertaking for the utility supply.

Main issues

(iv) Whether the plaintiff is entitled to all "rights, facilities and privileges" of the HCA by virtue of being a licensee of the Port Authority under the principal Agreement (as amended).
(v) Whether the first defendant provides the utility supply to the plaintiff by virtue of the licence issued to it by the GBPA under the provisions of the HCA (as amended), and/or as the *alter ego* of the GBPA.
(vi) Whether the first defendant is unilaterally entitled to set rates or impose rates, fees and charges for the utility supply and whether such rates, fees and charges must be reasonable and proportionate.
(vii) Whether the first defendant is entitled to disconnect water and sewerage supply to the plaintiff as a self-help remedy for non-payment of arrears, or alternatively whether the plaintiff is entitled to a permanent injunction restraining GBUC from discontinuing the supply of utility services to the LTS even in the event it fails to pay for such services.

(viii) Whether LTS is entitled to an award of damages payable by GBUC and, if so, in what amount.

(ix) Whether GBUC is entitled to charge LTS for services supplied to them by virtue of a contractual arrangement and therefore GBUC is entitled to compensation in damages, or whether GBUC is entitled to compensation on a *quantum meruit* basis for services consumed.

21. Both sides lodged comprehensive written submissions with the court. As for evidence, the plaintiff relied primarily on the witness statement of Maurice Glinton KC filed 30 May 2023, although Mr. Glinton filed a "Fourth Affidavit" (2 May 2023) in support of a discovery request that was also relied on for the hearing, as well as several earlier affidavits mainly directed to the secondary claim. The first defendant relied mainly on the witness statements of Anastasia Rahming, Melonie Stanislaus and Remington L. Wilchcombe, all filed 27 April 2023. All of the witnesses gave oral evidence and were cross-examined. In addition, the parties filed an agreed bundle of documentary evidence for use at the trial ("the Bundle").

ANALYSIS AND DISCUSSION

The plaintiff's case

22. The plaintiff identified 6 main issues for hearing, which it distilled into five main arguments summarized under the following heads: (1) the claims for declaratory relief (issues "i" and "ii"); (2) the requirement of "reasonableness" in setting rates (issue "iii"); (3) the right to disconnect (issue "iv"); (4) GBUC's counterclaim (issue "v"); and (5) the claims against the second defendant (issue "vi"). It is convenient to present the arguments in this order.

(1) Claims for declaratory relief

23. The plaintiff's contention in this regard is that it is entitled, in relation to the supply of water and sewerage services, to enforce as against GBUC "*all rights, facilities and privileges of a Licensee in virtue of the principal agreement (as amended)*." For this proposition it relies on the definition of licensees in the principal agreement at cl. 2(1)(e), as augmented by cl. 2(17) of the 1960 Agreement, and the covenants the GBUC made with the GBPA under its licence.

24. Clause 2(1)(e) of the Principal Agreement defines "a licensee" to mean "*any person or company licensed in writing by the Port Authority under their Common Seal to carry on any manufacturing, industrial, or other business, undertaking, or enterprise within the Port Area*." This was expanded by cl. 2(16) in the 1960 Agreement as follows:

> "Whenever in the Principal Agreement (as amended by these presents) the Port Authority is (either expressly or by implication) obliged or empowered to perform any act the Port Authority shall be entitled in writing under their Common Seal to licence any other person or company to perform such act and all references in the Principal Agreement (amended as aforesaid) to the Port

> Authority's performing any act shall be deemed to include references to such act being performed by any person or company licensed as aforesaid to perform such act. Provided that nothing in this sub-clause shall relieve the Port Authority from any of its primary obligations under the Primary Agreement (amended as aforesaid)."

25. Then, it is said that the covenant entered into by the GBUC also leads to the conclusion that the rights and obligations were intended to be enforceable by a licensee. The GBUC's covenants provided, *inter alia*:

> "[to] observe perform and comply with all the covenants provisions and conditions in the Government Agreement contained and on the part of the Port Authority to be observed so far as the same relate to the Utility Company's Land or to any part thereof or to anything done carried on or committed thereon or in respect thereof or in respect of the construction installation or operation of any utility service (of whatsoever kind the same may be) by the Utility Company within the Port Area…".

26. The second strand of the plaintiff's arguments is that the GBUC is functionally and operationally the *alter ego* of the GBPA in relation to its obligations to provide utility services. Therefore, the Court is urged to look at the economic reality of the corporate relationship between the two entities to properly interpret the rights of the plaintiff and first defendant under the principal Agreement (as amended), to which neither is a party but from which they derive their respective rights and obligations.

27. The plaintiff's claim that the GBUC is the *alter ego* of the first defendant is based mainly on circumstantial evidence. First, it is said that the GBPA's website discloses that it is primarily owned by Inter-Continental Diversified Corporation ("IDC"), and the shareholders of that company own a number of other companies including Grand Bahama Utility Company, Freeport Commercial & Industrial Limited and Carrick Group Limited. In other words, GBUC is an affiliate of the same group of companies as the GBPA, within the meaning of s. 2 of the *Companies Act*. Further, it is said that the reality of the relationship between the two entities is that every step taken by GBUC is dictated by the policy of the GBPA and that in relation to the utility supply, GBUC and the GBPA are functionally and operationally a single unit.

28. The plaintiff quoted extensively from *Gower's Principles of Modern Company Law* (6th ed. Sweet & Maxwell, 1997) on the concept of the single economic unit and circumstances warranting piercing the corporate veil, but only a short extract is necessary.

> "Where then does this leave 'lifting the veil'? Well, considerably more attenuated that some of us would wish. There seems to be three circumstances only in which the courts can do so. These are:
> (1) When the court is construing a statute, contract or other document;
> (2) When the court is satisfied that a company is a "mere façade" concealing the true facts;
> (3) When it can be established that the company is an authorized agent of its controllers or its members, corporate or human.

> And (2) only is a true example of lifting the veil; in (1) and (3) the separate personality of the company is not denied but the practical effect on the parties' rights and liberties is the same as if it had been. The court cannot lift the veil merely because it considers that justice so requires. Nor, unless the case falls within one or both of circumstances (1) and (2) can it have regard to the economic reality that most groups are operated as if they were a single entity."

29. The plaintiff claims that this case comes within categories (1) and (3). Thus, the argument, as far as I understand it, is that GBUC is an entity incorporated for fulfilling the GBPA's obligations under the principal Agreement and is correspondingly bound by the terms, rights, obligations and restrictions thereunder. The plaintiff says that further evidence of the relationship between GBPA and GBUC is provided by GBUC's acceptance and averments in its pleadings, and the oral evidence of its witnesses at trial that the GBPA, and not the GBUC, is authorized and permitted to set rates, charges and fees, as well as penalties in connection with the provision of water and sewerage services, and that the GBPA approved the potability standard for the water.

The requirement of reasonableness

30. The bulk of the plaintiff's written submissions was directed to this point. The key contention is that "*the rates, charges and fees arbitrarily imposed by GBUC*" are unreasonable. In support of this contention, it relies on the express provisions of the principal agreement, from which it is submitted the relationship with GBUC derives, as there is said to be "*no contract for services existing between them*". In particular, the plaintiff points to the mutual obligations and covenants undertaken by the GBPA and the Government under the HCA.

31. The relevant clauses of the HCA containing the obligations and covenants of the parties relating, *inter alia*, to the construction and operations of utilities under the HCA are as follows [Underlining supplied]:

> 1955 Agreement
>
> Cl. 2(21): "That subject to the provisions of subclause (10) of Clause 1 hereof only, the Port Authority shall have the sole right to construct and operate utilities (and without limiting the generality of the foregoing word 'utilities', in particular electrical supply, gas supply, water supply, telephone and sewerage disposal system) within the Port Area, and the necessary distributions systems in connection therewith, and that no licence or other permission or authority shall be required by the Port Authority from the Government or any department thereof in connection therewith, and that (subject to the provisions of subclause (6) of 1 hereof) the Port Authority shall have the authority to charge such rates or other charges for such utilities or any of them as the Port Authority shall in its absolute discretion deem fit and proper […]"
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> Cl. 3(6): "That the penalty for any breach of this agreement by the Port Authority or by any lessee company of the Port Authority or by any Licensee (other than the covenant on the part of the Port Authority contained in sub-clause (1) of clause 1 hereof)

shall be in damages only which shall be fixed by mutual agreement by the Port Authority and the Government and in default of agreement shall be determined by arbitration as hereinafter provided…"

Cl. 3(8): "This agreement shall be subject to the review at any time at the request of either party hereto; and subject to the consent and approval of the Legislature of the Colony being first obtained in respect of any amendment hereof, may be amended by the mutual consent of the parties hereto with the consent of all persons, firms, and persons licensed hereunder to carry on any manufacturing, industrial or other business, undertaking or enterprise within the Port Area which consent of such persons, firms, and companies licensed hereunder shall be evidenced by the execution of the instrument amending this Agreement by each of such persons, firms and companies licensed hereunder."

1960 Amendment

Cl. 2(16) "Whenever in the Principal Agreement (as amended by these presents) the Port Authority is (either expressly or by implication) obliged or empowered to perform any act the Port Authority shall be entitled in writing under their Common Seal to license any other person or company to perform such act and all references in the Principal Agreement (amended as aforesaid) to the Port Authority's performing any act shall be deemed to include references to such act being performed by any person or company licensed as aforesaid to perform such act. Provided that nothing in this sub-clause shall relieve the Port Authority from any of its primary obligations under the Primary Agreement (amended as aforesaid)."

1966 Amendments

Recitals

"(c) The Port Authority have on their part agreed to enter into the covenants hereinafter contained relating to the construction of housing accommodation schools and medical clinics and the provision of water electricity and other utility services;

(d) The Government is satisfied that it is desirable for the purposes of encouraging and facilitating further development in the Island of Grand Bahama and of ensuring the proper and efficient administration thereof that the provisions of the Principal Agreement and the Supplemental Agreement should be amended in the manner hereinafter appearing and that such further agreements should be made as are hereinafter contained."

Amendments

Cl. (3)(3) "The Port Authority will continue or cause to be continued the operation in the Port Area of garbage collection and disposal facilities;"

Cl. (3)(5) "The Port Authority will procure that all water supply systems in the Port Area directly or indirectly under their control are from time to time inspected and are safe-guarded against contamination.

Cl. (3)(7) "The Port Authority will co-operate with the Government for the purposes of pest control and elimination by providing such means of access within the Port Area as are reasonably available and making provisions in the said Building Code as may from time to time be mutually agreed by the Government and the Port Authority for such purposes, Provided Always (and it is hereby mutually agreed) that the Port Authority and any utility company or corporation shall be entitled to make charges in connection with the supply and distribution of water and electricity sewage disposal systems and garbage collection and disposal facilities".

Cl. 13 "Having regard to the considerable increase in the industrial and other development of the Port Area and the nature and extent of certain of the responsibilities imposed by the Principal Agreement (as heretofore amended) upon the Port Authority that is to say *inter alia* […] for the laying-out and development of the Port Area and the administration and control thereof (under clause 1(4) of the Principal Agreement) for the safe construction and the proper maintenance of all buildings and machinery installed in buildings within the Port Area so as to provide for the health and safety of employees and the general public and for the installation and maintenance of good public sanitation within the Port Area (under clause 1(10) of the Principal Agreement) and having regard to the need in the public interest to ensure the Port Area have the powers necessary to enable them to discharge effectively such and other responsibilities more particularly described in the Principal Agreement and Supplemental Agreement and this Agreement the Government hereby undertakes to consider sympathetically any application by the Port Authority for the promotion of legislation to permit the Port Authority to make bye-laws subject to the approval of the appropriate Minister for the purpose of enabling the Port Authority to discharge the said responsibilities and to authorise the Port Authority or any duly authorized Licensee to collect or recover from owners or occupiers of premises reasonable fees or charges for services provided or rendered by the Port Authority or such Licensee in the discharge of the said responsibilities." [Underlining supplied.]

Interpretation issue: The legal status of the HCA

32. Before launching into substantive submissions in support of its claims, the plaintiff made submissions on what it says should be the proper approach to interpreting the HCA and its standing to seek declaratory relief. Firstly, it contends that the agreements do not have statutory force, although this was hedged with the caveat that this is not to say that "*the finalized Agreements were not of any statutory significance*."

33. As will be further explained, this contention is in opposition to the reliance by the first defendant on s. 11(2) of the *Interpretation and General Clauses Act*, which provides that:

> "Every schedule to or table in any Act and any notes to such schedule or table shall be construed and have effect as part of such Act."

34. The conclusion that the HCA Schedules are not statutory is said to be supported by the following factors. Firstly, s. 2 of the principal Act provided that the Governor in Council or Governor General is "*hereby authorized, at any time with six months after the coming into operation of this Act, to enter into an agreement, substantially in the form set out in the Schedule hereto*." Thus, Government was authorized to enter into the Agreements and what was scheduled to the Acts were drafts, as indicated by the phrase "*substantially in the form set out in the Schedule.*" In this regard, it is pointed out that there are some discernible differences in the drafts scheduled to the Act and the principal agreement actually executed: for example, Cl. 3(8) of the draft in the Schedule refers to interpretation, whereas Cl. 3(8) of the adopted agreements deals with review and amendment of the principal Act.

35. The plaintiff also relies on the observations made in the 1971 Report of the Royal Commission appointed to review the HCA, where the Commissioners concluded that the Acts were [at 27]: "…*merely enabling. [T]hey… did not themselves] confer any rights or impose any obligations. All that [they] did was to empower the Government to enter into binding consensual arrangements with the Port Authority in terms approximating to the draft of the agreement set forth in the schedule thereto*."

36. Further, the plaintiff contends that the consequences of interpreting the Schedules as having statutory force in and of themselves would be to give greater effect to the model agreements in the Schedules than to the settled terms of the actual agreements, which the plaintiff says would create an inconsistency and a nonsense.

37. Notwithstanding the argument that the HCA is not to be accorded the same status as an enactment, the plaintiff was keen to acknowledge that this does not mean that the finalized agreements are without statutory significance. In this regard, the plaintiff cites two cases that considered the legal status of the agreements in the course of applications brought by licensees.

38. In **Shangrila (1986) Ltd. v The Grand Bahama Port Authority Limited** (1984/CLE/gen/154), the applicant challenged the GBPA's decision to grant a license on the condition that it was subject to Government approval. In the course of his decision Adams J. made the following observations:

> "…it may well be that in certain respects the principal Agreement carved out a state within a state. The Act empowered the Governor to enter into a valid contract with the Port Authority and envisaged that he would do so within six months. The Port Authority had the sole power to grant licences. Because enclaves were no longer acceptable, the 1966 Amendment permitted Government to take over responsibility for some of the administrative activities that had been allocated to the Port Authority. None the less, the Port Authority is still entrusted with certain governmental responsibilities and with development activities.

> The Report of the Royal Commission rightly points out that the answers to the development and progress of Freeport lies in and through the Agreement, that its importance is fundamental and without it there would be no Freeport….
>
> While agreeing with Mr. Seligman that there is no local Government Act in the Bahamas, I am of the view that Mr. Smith's submissions that the Port Authority has powers and obligations that are not dissimilar to those of a local authority is not without merit. Mr. Smith puts it this way. He contends that the Port Authority, although on the face of it, a private making enterprise de jure, by the Agreement and scope of its terms, but the duties and powers entrusted to it by virtue of the Agreement as enabled by statute, is in effect or de facto a public local authority whose responsibility lies to the residents in the Port Area to administer and control the Port Area according to the terms and conditions of the Agreement.
>
> The Agreement was one under seal and was statutory. The 1960 and 1966 amendments were also under seal and statutory. The Agreement recognized the existence of the Port Authority to grant licences and I am of the view that there is a corresponding duty in the Port Authority to exercise that power according to the terms and conditions of the Agreement. Clearly, the *raison d'etre* for such an extensive power is the benefit of the local residents and the rapid development of the area. The Agreement owes its genesis to the Act and the Port Area was provided by the Agreement with the means of growth and development.
>
> Mr. Smith has rightly quoted from Odgers' 'the Construction of Deed and Statutes' (5th ed.) at page 375, where the learned author says:
>
> "If the donee (of the powers) has nobody's interest to consult but his own, the power is permissive merely, but if a duty to others is at the same time crated, the exercise of the power will be imperative."
> […]
>
> The Port Authority is bound to exercise its monopoly in the public interest and for the public benefit in accordance with the terms of the Agreement."

39. In **Commonwealth Brewery Limited v Attorney General of the Bahamas et. al.** (1997/CLE/gen/14), Sawyer C.J. (as she then was) said:

> "The difficulty is that the Hawksbill Creek Agreement is contained in the Schedules to the statutes which I enumerated above and is therefore part of the statute-law of The Bahamas […]
>
> Considering the Hawksbill Agreement as a whole, it appears to me that to the extent of the Port Area, the Government gave the Port Authority powers which one would normally associate with Local Government authorities and thereby created a special enclave in order to encourage the development of that particular part of The Bahamas."

40. Summarized, the plaintiff's position on the status of the HCA is that while falling short of being statutory, it creates binding rights and obligations for the parties of a statutory character,

having been authorized by Acts of Parliament. Further, owing to the statutory foundation and context of the HCA, the interpretation of the Agreements is amenable to public law principles.

Reasonable rates

41. The plaintiff makes four central submissions on the reasonableness point: (i) the first defendant is obligated by the HCA to charge only a reasonable rate for its services; (ii) the regulation of GBUC is necessary to determine the reasonableness of that rate; (iii) the GBPA is not a lawful, appropriate or impartial regulator of the GBUC; and (iv) in any event, and importantly, such regulation must be prescribed by statute or bye-laws approved by the Minister.

42. The plaintiff developed these arguments as follows. First, it is contended that the first defendant is in error by construing cl. 2(21), which provides that the GBPA "*shall have the authority and may charge such rates or other charges for such utilities or any of them as the Port shall in its absolute discretion deem fit and proper…*" as granting the GBPA or GBUC untrammeled freedom to set rates.

43. This contention is said to ignore or give insufficient weight to provisions of the amending agreements, which are to be read compendiously with the Principal Agreement. These include, for example, cl. 1(17), which provides for the GBPA to "*operate the same in accordance with good operating practice*", and recital (c) of the 1966 amendment, which records that the GBPA expressly agreed to the 1966 amendments. Importantly, those amendments introduced, *inter alia*, cl. 13, the effect of which is said to specifically constrain or curtail the "*absolute discretion*" in the GBPA in the Principal Agreement by stipulating that fees and charges for services collected or recovered should be "*reasonable*".

44. Further, the plaintiff argues that even if the requirement of reasonableness was not directly imposed by the 1966 amendment, it ought to be implied by operation of law. This is by virtue of the GBPA being granted and exercising a monopoly under cl. 2(21) of the Principal Agreement and cl. 2(16) of the amending agreement. Reliance for this proposition is placed on an extract from P.P. Craig in his text *Administrative Law* (4th Ed. Sweet & Maxwell, 1999), where the learned author observed:

> "The common law has exercised considerable influence over corporations which possess monopoly power. Two areas are of principal interest.
>
> The area which is relatively well publicized is the law of monopolies *stricto sensu*. […]
>
> The other area in which the common law courts exercised influence is, as stated, much less well known. It has indeed been almost forgotten, but it was and is of considerable importance. The courts held that the common law imposed an obligation on those who had market power to charge no more than a reasonable price for their goods. The courts, in effect, were imposing a common law based species of price regulation on those who wielded monopoly power. Not only did they take this step, but they reasoned through the rationale for doing so from first principles.

> In *Allnutt v Inglis* the question arose as to whether the London Dock Company, which by licence from Parliament possessed a monopoly to receive certain wines, could lawfully exclude from the docks a cargo owner who refused to pay their schedule of charges. Lord Ellenborough reasoned as follows. While a man could fix his own price for the use of property, he could not do so where the public have a right to resort to the premises and to make use of them. Where a person had the benefit of a monopoly, this entailed a correlative responsibility, the consequence of which was that he could charge no more than a reasonable price for the service offered. The monopoly itself could be either 'legal' or 'factual': it could result from the grant of an exclusive license from parliament, or it could exist because on the facts, the provider of the service controlled the entirety of the space available for the warehousing of the goods. That statute required that the goods be warehoused in the Dock Company's premises was not passed solely for the benefit of the Company, but also for the benefit of trade and the public. The latter purpose could be defeated if the Dock Company was at liberty to charge any price which it chose.
>
> Similar reasoning is evident in other areas where monopoly power existed. In *Corporation of Stamford v Pawlett*, the corporation possessed the right to hold two fairs each year. It customarily received a 'toll' of 2d on the sale of certain items at the fair. The defendant refused to pay the toll. The court held that where the word 'toll' was found in a charter it should be taken to mean reasonable toll. It was not open to the King to allow a corporation to charge an unreasonable toll, and any excess charge could be recovered in legal action. The principle underlying such cases is the same as that expounded above: the grantee of rights to a market or fair becomes the holder of an exclusive privilege. The grant was not merely for his own benefit but for the benefit of the public and the trade. It could be defeated if any price whatsoever could be charged."

45. The plaintiff argues that both cases are *apropos* the case at bar, and that to the extent that it is suggested by the GBUC that a claim of estoppel might avail to prevent the plaintiff challenging the basis and reasonableness of GBUC's historic and on-going assessment of charges and fees, **The Corporation of Stamford v Pawlett** case is directly applicable. That is because the right of a party to challenge the reasonableness of a toll in that case was affirmed even though the challenge was made nearly a century after the toll had been claimed and received.

46. Further, that case is also said to be authority for the principle that the burden of proving that the fees and charges were reasonably assessed falls on the grantee who levies the fees. Reference is made to J. G. Fleming, The Law of Torts (9th Ed. Sydney, 1998), where the author states that:

> "Fairness, in turn, might suggest that if evidence relating to a particular element is apt to be within the control of one party, his should also be the burden of proving it."

47. The plaintiff also relies on ss. 88 and 89 of the Evidence Act. Section 89 provides as follows:

> "89. Where persons stand in such a relation to each other that one of them necessarily reposes confidence in the other, or is placed by circumstances under his authority, control or influence, the

> burden of proof as to the good faith of any transaction between them, from which such other person derives advantage, shall be upon such other person."

48. Thus, the plaintiff submits that the burden of proof falls on the GBUC, as it is bound to repose confidence in the utility provider, which has the right to set rates, determine the basis upon which rates are set and, therefore, retains control and influence over the supply of water and sewerage services. In this regard, the plaintiff also pointed out that while GBUC admitted in its pleadings that it was authorized to levy charges pursuant to the Principal Agreement, at trial the witnesses for GBUC offered no explanation as to the procedure by which rates, charges or fees were set or increases approved, save by reference to the GBPA.

Regulation

49. As to the regulatory aspect, the plaintiff contends that the statutory scheme envisions that operation of a monopolistic supply would be regulated to ensure compliance with the HCA. In this regard, the plaintiff submits that the GBPA could not be a true and proper regulator of GBUC, not only because the latter is its "*alter ego*", but because of what are said to be the financial ties between the two companies, sharing, as it is alleged, common corporate ownership and shareholders. Thus, it is said that these ties negate GBPA being a regulator in any real and meaningful way, which is contrary to the statutory scheme and common law principles.

50. In this regard, it is submitted that the references to the "*public interest*" in the HCA are to ensure the Port Authority has the powers necessary to enable them to discharge their responsibilities for providing utilities, to seek Ministerial approval for the promotion of bye-laws for that purpose and to recover only "*reasonable fees or charges for services*", are all pointers that there is to be implied some administrative or regulatory oversight. By analogy, the plaintiff argues that the requirement for regulation bears some affinity to the process described in the United Kingdom and other common law jurisdictions for the regulation of administrative functions performed by corporations in place of central or local government. It relies in particular on the following passage from Professor Craig's text on *Administrative Law* (*supra*), where the learned author noted:

> "The pattern of administrative development in the nineteen century has already been reviewed and one aspect is of particular relevance here. Many administrative functions during this period were undertaken neither by central nor local government. They were often performed by corporations who were given special statutory authority insofar as it was necessary to enable them to carry out their tasks. The provision of most utilities, such as water and lighting, as well as the operation of canals, railways and roads, was carried out by these means even after the reform of the municipal corporations. Moreover, such bodies normally possessed a large degree of market power. A considerable amount of time was spent in the Commons on legislation which would empower the statutory undertakings to perform these tasks. …
>
> The rates to be charged for services by those who possessed a degree of monopoly power granted to them by statute had to be regulated. One common technique was for direct departmental

supervision of the 'tariff' which the statutory undertaking proposed to charge. This was used in, for example, the areas of roads and canals."

51. Thus, to the extent that a regulatory regime is not established, the plaintiff contends that the court should have regard to common law principles and intervene to fill the gaps, which cannot be filled *ipso facto* by the GBPA.

52. By way of further argument, the plaintiff submits that in relation to the 1.5% interest applied as a penalty on outstanding bills, the GBUC has led no evidence to support its entitlement to assess that penalty, save for the evidence of Ms. Rahming, who said that the penalty was set and determined by the GBPA and provided for on the "Certificate of Deposit". However, a copy or sample of this document was never produced. Further, the plaintiff asserts that it is entitled to rely upon cl. 3(6) of the Principal Agreement, to the extent that it provides for penalties for breach of the agreement by the Government, the GBPA, or any licensee, to be fixed by mutual agreement of the Government and the GBPA, and in default of which the amount is to be determined by arbitration. Thus, it is submitted that the failure to fix penalties should result in the penalties applied being deducted from the plaintiff's invoices retrospectively, as well as any payments made towards such payments since 17 December 2006 (i.e., the limitation period for documents under seal).

53. Finally, on this point, the plaintiff submits that even if the GBUC is able to set and impose a penalty without reference to any agreement between the GBPA and the Government, the monthly assessment of a 1.5% interest penalty on its face is excessive and oppressive. The result is that for a bill left outstanding for a year, the customer is penalized by an 18% interest rate, which is higher than any commercial bank interest rate or any award under the *Civil Procedures (Award of Interest) Act.*

Requirement for bye-laws to authorize imposition of rates and for regulation

54. The plaintiff contends further that the charges were made contrary to the obligatory procedure stipulated in cl. 13 of the 1966 Agreement, which it says mandates that an application be made to the Government by the GBPA for the promotion of bye-laws to enable the discharge of its responsibility as an undertaker for the supply of water, and to authorize the collection or recovery of reasonable charges and rates for services provided. Moreover, the plaintiff claims that without the enactment and authority of the bye-laws, the first defendant is not authorized to impose charges or prescribe penalties for a failure to pay charges for water supplied or disconnect water and sewage supply to the property.

(4) The Right to Disconnect

55. The plaintiff's main argument on this point is that while the HCA does make provision for GBUC to charge for the provision of services, it does not make any provision for the disconnection of services. In this regard, it is submitted that pursuant to cl. 3(6) of the Principal Agreement, the

only remedy GBUC may seek against the plaintiff is in damages, and that it is not empowered, and in fact is expressly restrained, from discontinuing its supply of water to the plaintiff. By way of comparison, reference is made to bye-law 7 of *The Freeport Bye-laws*, which provides a legal process for the payment of amounts owed or seizure of goods to satisfy any debt owed to the Port Authority for consumption of telephone, water, gas or electricity service as follows:

> "If it be shown to the satisfaction of a magistrate on sworn information in writing that a person is about to quit premises to which there is a telephone service or to which water, gas or electricity is supplied by the Port Authority or any licensee thereof and has failed to pay on demand any charge for such service or for water, gas or electricity payable and due from him in respect of those premises and intends to evade payment thereof by departing from the premises, the magistrate may, in addition to issuing a summons for non-payment of the sums due, issue a warrant under his hand authorizing the person named therein forthwith to enter the premises and seize sufficient goods and chattels of the defaulter to meet the claim of the Port Authority or licensees and to detain them until the complaint is determined upon the return of the summons."

56. Thus, the plaintiff argues that GBUC's powers rights and privileges are limited to those provided by statute, and the attempt to rely on s. 36(1) of the *Interpretation and General Clauses Act* by the first defendant, which implies incidental powers necessary to do an act authorized by statute, is misguided. That section provides as follows:

> "Where any written law confers upon any person power to do or enforce the doing of any act or thing, all such powers shall be deemed to be also conferred as are reasonably necessary to enable the person to do or enforce the doing of the act or thing."

57. It is contended, therefore, that s. 36(1) cannot be relied on to give GBUC the power to enforce the doing of an act, and that the clear intent of cl. 13 of the 1966 Amendments was to provide this power through promulgation of bye-laws. Therefore, unless and until, the requisite conditions of an application to the Government for bye-laws or legislation is met, there is no power to enforce by disconnection.

(5) GBUC's Counterclaim

58. The plaintiff does not dispute that the GBUC is entitled to remuneration for the supply of utilities. But it contends that the rates fixed must be reasonable and take into consideration: (i) the periods when the water supplied was admittedly "non-potable"; and (ii) the inferior quality of the water, even when deemed potable, which required the residents to continue to purchase water for drinking and cooking. The inferior quality of the water is said to be indicated in the Glinton statement at para. 30, and which it is claimed was not refuted by the GBUC:

> "30. For those of us who have resided in the Port Area for many years, we recall the days when it was possible to drink water directly from the tap. However, regardless of the water being declared potable by G.B. Utility, those of us still residing in the Port Area are aware that the water still

carries a scent and a taste which is unusual; consequently, I and other residents continue to purchase water for drinking and cooking."

59. Additionally, the plaintiff complains that GBUC is not entitled to an award of damages for the amount claimed in circumstances where the amounts stipulated are not broken down into what amounts were assessed for the collection of garbage, provision of sewerage services and the supply of water. Further, the plaintiff submits that until the quality of service and the rate assessed are regulated, it is entitled to a permanent injunction.

(6) The claims against the Second Defendant

60. In its amended writ of summons, the plaintiff made a battery of mixed claims against the second defendant. These included:

(i) An Order that the Second Defendant immediately cease soliciting and/or receiving and/or diverting and retaining or withholding from the Body Corporate's Board of Directors any (or any parts or portions of) contributions levied against individual apartment Units in the Property, whether from among each other or other Unit owners whomever else;

(ii) An injunction restraining the Second Defendant whether by herself, accomplices, privies, agents or otherwise howsoever from disposing of or in any way dealing with the said assets or any part thereof without consent in writing of the Plaintiff acting by its current Officers and Directors;

(iii) An Order prohibiting the Second Defendant from using any part of the said assets for or in connection with legal fees incurred in Supreme Court Action 2013/CLE/gen No. 2024 or for her defence in this action including any applications or appeals in relation to any proceedings consequent to any decisions or Orders of this Honourable Court, or at all;

iv) An Order that the Second Defendant do herself and by her accomplices, privies, agents or otherwise account for what she did with the said assets or their whereabouts;

v) An Order requiring the Second Defendant to disclose the names and/or identities of accomplices, privies, and agents (other than each other), if any, who now hold or once held any of the said assets property of the Body Corporate;

vi) An injunction to restrain the Second Defendant, whether by her accomplices, privies, agents, from doing any of the following acts and things, that is to say:

a) Holding herself out as the Body Corporate's agent authorised to conduct business for and/or in its name of the Body Corporate pending hearing of the present application or the Writ (whichever is sooner); and

b) Interposing herself in the Body Corporate's functions and duties as relate to the management of the Property by purporting to give or solicit from persons information pertaining to the Plaintiff Body Corporate's business and affairs involving the essential or non-essential services necessary to maintaining the Property's safety and utility for the convenience of Unit owners and other residents;

vii) An Order prohibiting the Second Defendant from promoting or aiding and/or abetting each other or others in acts upon or to the Property the responsibility of the Body Corporate, and otherwise from engaging in conduct detrimental to the tranquility and orderly management of the Property and unit owners' and other residents' peaceful enjoyment thereof; and

viii) Further or other relief.

61. As indicated, the second defendant did not enter an appearance, and the plaintiff elected (pursuant to *R.S.C. 1978, Ord 13, 44. 2,3* and *5*) to only pursue the claims for unliquidated damages and detention of goods and to seek interlocutory judgment on those claims—as permitted under the Rules if a defendant fails to give notice to defend after the prescribed time. Thus, the relief initially sought against the second defendant has been whittled down to the claims that the second defendant:

> " (i) Turn over to the Plaintiffs all cash and proceeds of cheques and negotiable instruments which she solicited or received from Unit Owners of the Lucayan Towners South Condominium Association ("the Body Corporate") and now or once held (in spite of the Court of Appeal Judgment delivered in 2015/SCCivApp./No.0007 on 4th September 2017), since before and after that day being also the subject of the Plaintiff Body Corporate's claims in Supreme Court Action 2013/Cle/gen No. 2024 or the total sum of such assets as money had and received to the use of the Body Corporate to be assessed;
> (ii) Deliver up or cause to be delivered up the said assets being levied contributions the Plaintiff Body Corporate is lawfully entitled to receive from Unit Owners of the Body Corporate by virtue of sections 14(2)(b) and (c) of The Law of Property and Conveyancing (Condominium) Act, 1965 as amended ("the Act") and is authorised by Article IV(1)(b) of the Bye- laws of the Declaration of Condominium to collect for operation of the Body Corporate and maintenance of the Property or the total sum of such assets as money had and received to the use of the Body Corporate to be assessed;
> (iii) Pay to the Plaintiff Damages for wrongful detention of the said assets and/or alternatively, for conversion of the cheques and negotiable instruments constituting assets of the Body Corporate Julie Glover received from solicitations or otherwise to be assessed;
> (iv) Pay to the Plaintiff Damages for wrongful interference with the said property to be assessed;
> (v) Pay to the Plaintiff Special Damages to be assessed;
> (vi) Pay to the Plaintiff Interest pursuant to provisions of The Civil Procedure (Award of Interest) Act, 1992;
> (vii) Pay to the Plaintiff the Costs of the action, such costs to be taxed if not agreed."

62. The plaintiff also submits that in the circumstances it was and is appropriate for the assessment of damages to be dealt with by the trial judge, and for any consideration of such damages to take into account the pleadings and evidence against the second defendant, which demonstrates that the plaintiff's inability to pay the first defendant has been caused by the "*tortious interference, wrongful detention and withholding of assets*" by the second defendant.

The Plaintiff's evidence

63. The plaintiff's evidence is primarily to be found in the witness statement of Maurice O. Glinton, President of the Board of Directors of the LTS. The bulk of that statement was, admittedly, directed to the claims against the second defendant. It chronicled the history of the legal dispute between the rival Boards and the alleged acts of the "*unelected, unauthorized*"

directors in receiving funds from many of the Association members and diverting or withholding them. The latter part of the affidavit raised legal issues relating to the ability of the GBUC under the HCA to charge rates for water and sewerage services, and the obligation to charge reasonable rates, both at common law and under the HCA.

64. Much of the factual evidence on behalf of the plaintiff was elicited in cross-examination. It was Mr. Glinton's evidence that he has been a resident of the plaintiff Condominium since 1980. He testified that the services to the Condominium property are billed generally and not to individual unit owners, and while he was aware of the bills as the President, he did not personally scrutinize them so as to be aware of the water usage and the rate of usage by the property. He stated that the ability of the GBUC to supply a consistent quality of water has been affected by the seasonal hurricanes, including Hurricanes Matthew (2016) and Dorian (2019). For example, it was asserted that Hurricane Dorian disrupted the ability of the GBUC to supply potable water for about 2 years, although the water continued to be usable for washing, cooking, bathing and cleaning.

65. Mr. Glinton accepted during cross-examination that in April 2019, when the plaintiff obtained the first injunction against the first defendant, the amount that was due and owing on the account was in excess of $100,000.00, and in April 2023, the amount had increased (at least according to the GBUC) by over $400,000.00—although he did not accept that this was an accurate bill. He also stated that, in any event, a large part of that bill was made up of interest and penalties, which were arbitrary and unreasonable. He does not dispute that since 9 April 2019, the Plaintiff only made 11 payments to the First Defendant totaling $31,478.76.

66. The plaintiff made an application just prior to the hearing for disclosure of the water quality reports of the GBPA in the period following Hurricane Dorian, the hard copies of which the first defendant alleged had been destroyed during flooding in that hurricane. Eventually, the first defendant was apparently able to generate copies from either its electronic files or copies retained by third parties, which were produced and included in a supplemental documentary bundle filed by the plaintiff. That bundle also contained several presentations and correspondence relating to applications for an increase of rates by the GBUC.

First Defendant's case

67. As indicated, the first defendant identified some eight issues, several of which overlapped with the issues identified by the plaintiff. Those additional issues that were specific to its defence and counter-claim are as follows:

(i) Whether the GBUC is entitled to charge the plaintiff for the utility service supplied by virtue of contractual agreement and if so, what amount is the plaintiff obligated to pay to GBUC for the services.

(ii) If GBUC is not entitled to charge by virtue of a contractual arrangement, whether it is entitled to claim on a *quantum meruit* basis and if so, what amount of contribution it can claim.
(iii) Whether the plaintiff is entitled to a permanent injunction to restrain the shutting off of services in the event it fails to pay.
(iv) Is the plaintiff entitled to damages and if so, in what amount.

68. At a general level, the first defendant submitted that the plaintiff's claims for declaratory and other relief are wholly ill-conceived as a matter of fact and law. Further, they contend that the plaintiff has failed to discharge its evidential burden, and that judgment ought to be entered for the first defendant on its counterclaim, which it claimed had been proved by way of credible evidence—namely, that the LTS consumed and took the benefit of the water supplied since 2014, in circumstances where it has not paid the first defendant for such supply.

Declaratory relief

69. As to the declarations sought, the first point advanced by the first defendant is that the plaintiff has advanced a claim in private law and the general principle is that the applicant for declaratory relief will only have standing where the claim pertains to the declaration of legally enforceable rights or liabilities, including statutory rights. Reliance is also placed on the leading case of **Gouriet v Union of Post Office Workers** [1978] AC 435, for the principle that, where public rights are concerned, a private person can only sue if there is also an interference with private rights of his, or if the infringement of the public right will inflict special damages on him.

70. In this regard, the first defendant submits that its right to supply the utility services in exchange for payment under the HCA is contained in an agreement to which the plaintiff is not a party, and which is not enforceable by it. Further, it is submitted that the plaintiff failed to produce any evidence demonstrating that it was the intention of the parties to the HCA to make breaches of provisions that do not concern the individual benefits to which licensees are entitled under the HCA remediable in private law at the behest of a licensee. Thus, the plaintiff has no standing to maintain a claim against the first defendant for declaratory relief.

71. Next, it is said that the court ought to refuse the claim for declaratory relief because it raises a hypothetical issue that has no bearing on the questions of fact and/or law raised.

Entitlement to provide utility services by virtue of a licence from GBPA and the provisions of the HCA

72. This argument addresses what the first defendant describes as the "gravamen" of the plaintiff's complaint, that the GBPA has failed to promote bye-laws authorizing the first defendant to provide utility services. The first defendant contends that this is based on a misreading of the provisions of the HCA, in particular cl. 13 of the 1966 amendment, which it says the plaintiff

interprets as imposing a duty on the GBPA to promote bye-laws to enable and authorize the GBPA to charge for the provision of utility services.

73. The first defendant contends that properly construed, that clause only contains a covenant that the Government would "*sympathetically consider*" an application by the GBPA for bye-laws for that purpose, and that it was not intended to prescribe that the GBPA, or its licensee, may not collect or recover from customers who consume and use those services unless legislation or bylaws were specifically promulgated authorizing the GBPA or its licensees to do so.

74. To the contrary, they contend that the right to provide and charge for those services is rooted in the following sources: (i) the terms of the GBUC's licence; (ii) cl. 2(16) and 3(7) of the 1960 Agreement and 2(21) of the 1966 Agreement; and (iii) the *Freeport (Water Preservation) Bye-Laws* 1967.

75. In this regard, the GBPA issued a license to the first defendant in 1961 permitting it, *inter alia*, to construct, maintain, operate and carry on systems for (i) the pumping, storing and distribution of water; (ii) sewage disposal; (iii) garbage collection, as well as carry out all business and activities necessary or incidental to the same. Clause 2(16) simply provides the right for GBPA to license any other person or company to perform any of the acts it is obligated to perform under the HCA. Clause 3(7) provides, *inter alia*, that "…*the Port Authority and any utility company or corporation shall be entitled to make charges in connection with the supply and distribution of water and electricity sewage disposal systems and garbage collection*…". Clause 2(21) provides that "…*the Port Authority shall have the authority to and may charge rates or other charges for such utilities or any of them as the Port Authority shall in its absolute discretion deem fit and proper*….".

76. Finally, it is contended that the *Freeport (Water Preservation) Bye-Law* defines the first defendant as a company that is authorized to provide a public water supply within the Port Area, and while there is no express provision within that Bye-Law relating to payment for water supplied, this can be filled by recourse to s. 36 of the *Interpretation and General Clauses Act*, which implies all incidental powers necessary for the doing of any act conferred by written law.

Whether the first defendant is entitled to charge for the utility services by the law of contract and if so, how much is owed?

77. Separate and apart from the provisions of the HCA, the first defendant pleads and argues that it has supplied utility services to LTS in exchange for payment since 1980, at rates set by the first defendant from time to time and which are currently published on the company's website. It did not, in so many words, plead a specific contract, but it is implied that there is a contractual relationship between the parties for the utility supply. The first defendant further pleads that, having requested the first defendant to continue to provide the utility services in exchange for payment since 1980, the LTS is estopped from denying the first defendant's right to provide the services in exchange for payment. In this regard, the first defendant also relies on the fact that the

plaintiff entered into a payment plan in December 2014 (referred to above) that acknowledged the arrears.

78. The first defendant submits that the evidence shows that pursuant to the supply agreement, it supplied water to the first defendant since 1980, for which the plaintiff paid until its account fell into arrears in 2014. Following Hurricane Dorian in 2019, there was a period from 3 September 2019 to 2 November 2021 when the water was admittedly of inferior quality, but a discount was applied by the GBPA of 25% to take account of this, and the water was restored to potable quality on 2 November 2021. Thus, it is contended that the plaintiff is liable on a contractual basis for the water supplied and consumed and not paid for in full up to the date of the counterclaim ($381,426.34) and continuing.

Claim on quantum meruit basis

79. As an alternative to its contractual claim, the first defendant submits that it is entitled to compensation by the plaintiff in the claimed amount on a *quantum meruit* basis, on the restitutionary basis of unjust enrichment. They cited the UK Supreme Court case of **Benedetti v Sawridis and others** [2013] UKSC 50, where that Court gave authoritative guidance on the principles applicable to such claims and stated that:

> "10. It is now well-established that a court must first ask itself four questions when faced with a claim for unjust enrichment as follows: (1) Has the defendant been enriched?; (2) Was the enrichment at the claimant's expense? (3) Was the enrichment unjust? (4) Are there any defences available to the defendant?"

80. The plaintiff claims that on the facts of this case, even if there is not found to be a contractual agreement for the utility supply, the evidence shows that the first defendant supplied water to LTS since 2014, and that such water was used and consumed without due payment being made. Therefore, as a matter of fairness, the first defendant ought to be compensated on a *quantum meruit* basis as the plaintiff was unjustly enriched.

Entitlement to a permanent injunction and damages

81. On this issue, the first defendant makes two main submissions. Firstly, it is said that the right to discontinue the supply of utility services to LTS is not dependent on statutory authority. Thus, it should not be enjoined from discontinuing the supply of utility services to LTS because of the absence of bye-laws. Secondly, it is contended that plaintiff has failed to demonstrate by evidence that it has suffered loss or damage due to the first defendant's alleged acts or omissions with respect to the supply. To the contrary, it is argued that the evidence led at trial demonstrates that it is the first defendant that has suffered loss and damage by reason of the plaintiff's refusal to pay for water supplied to LTS.

Reasonableness, right to disconnect and the "alter ego' principle

82. The first defendant also filed "responsive closing submissions" in which it expanded on several issues in the plaintiff's written submissions: (i) the question of the reasonableness of the rates; (ii) the first defendant's right to disconnect; and (iii) the *alter ego* principle.

83. On the question of reasonableness, the GBUC submitted that given the clear and unequivocal terms of cl. 2(21) (which is among the provisions the plaintiff has contractually agreed to observe in clause 4(2) of its licence), the court should not imply any qualifications or conditions upon the exercise of the GBPA's power to set rates it deems proper in its "absolute discretion". It relies mainly on the case of **Taqa Bratani Limited v Rockrose UKSC8 LLC** [2020] EWHC 58, where Judge Pelling J, QC (as he then was) in considering the question of whether or not a right expressed in absolute terms in a commercial or standard form agreement could be "impliedly qualified" made, *inter alia*, the following observations:

> "There is no reason to treat a provision which brings the relationship of the parties to an end differently from one that entitles one party to terminate a particular role carried out by one of the parties under the agreement in question, at any rate whereas here the parties are expressly permitted to act on what they perceive to be their own best interests. Even if such a distinction does have a principle basis, in my judgment that does not lead to the conclusion that a term should be implied that qualifies an otherwise unqualified express term in *Braganza* terms because to imply such a term would be to depart from the cardinal rule that '…if a contract makes express provisions…in almost unrestricted language, it is impossible in the same breath to imply into that contract a restriction…" that qualifies what the parties have agreed should be unqualified."

84. The first defendant therefore argues that applying the "Braganza" principle **(Braganza v BP Shipping Ltd.** [2015] 1 WLR 1661) to the right conferred on the GBPA to set rates pursuant to an absolute discretion would be an unwarranted interference upon the freedom of GBPA and the Government of the Bahamas to contract on the terms they chose. They posit further that the fact that the HCA is scheduled to an Act of Parliament makes "*the implication of additional terms into its provisions manifestly different from the implication of terms into a normal commercial or standard form contract*", referring to the case of **Cookson Le** (1875) 23 L.J. Ch. for the statement of principle.

85. On the point of shut-off, the first defendant argues that the plaintiff's reliance on cl. 3(6) to argue that the remedy for non-payment for water supply is in damages only and that they are restrained from disconnecting water supply is misconceived and a "perverse" interpretation of that agreement. Firstly, they argue that the provisions were clearly only intended to provide a remedy to the contracting parties (the Government and the GBPA) and not any licensee, in respect of whom there is no privity of contract. They brand as specious the argument that until the quality of service and the rates are assessed the plaintiff is entitled to a permanent injunction, because the HCA does not require rates for water supply in the Port Area to be regulated by another entity other than the GBPA, which has an absolute discretion to set rates for water.

86. As to the submission that the first defendant is but the *alter ego* of the GBPA, the first defendant submits that this is unfounded both on the evidence and contrary to law. The first

defendant submits that it is a separate legal entity from the GBPA and has obtained a license from the GBPA to supply water and other utility services in the Port Area, in the place of the GBPA.

87. Further, it submits that recent authorities have clarified that piercing the corporate veil is only justified in "*very rare*" circumstances, mainly where a company places another under its control to deliberately evade an existing legal obligation or frustrate it (see **Prest v Petroel Resources Ltd**. [2013] 2 AC 415, per Lord Sumption JSC at para. 35). In this case, it is argued that the plaintiff has not advanced a case or any pleadings that there has been any evasion of responsibility or frustrating action on the part of either of those companies with respect to the setting of rates for the supply of water. As stated in its written submissions:

> "39. If the mere fact that companies are within the same group of companies, or a company has been licensed to perform the function of another, is sufficient to justify piercing the veil it would make a mockery of the limited liability company both in principle and in practice and would be contrary to the principles of corporate separation which have been long established in this jurisdiction."

First defendant's evidence

88. As mentioned, the first defendant relied on the witness statements of Anastasia J. Rahming, a Utility Relations Manager; Melonie Stanislaus, an Assistant Customer Relations Manager; and Remington Wilchcombe, the Director of Engineering and Special Projects.

89. Ms. Rahming has been employed with the first defendant since January 2013. The thrust of the Rahming statement was to explain the billing process and how the plaintiff accumulated the arrears. In examination-in-chief, Ms. Rahming explained that the bills issued to the first defendant were "*compromised of water charges, garbage charges and sewage charges*". The bills are calculated based on consumption, in accordance with the rates that are provided on the first defendant's website. The garbage and sewage charges are flat fees that are separate from the water fees.

90. Her statement indicated that the plaintiff's account with the first defendant was in arrears in the amount of $418,541.14 at the date of her statement, which was 26 April 2023. She explained that this amount included a penalty of 1.5%, which is a monthly interest fee charged on the outstanding balance on the account. This penalty is applied to all 'delinquent' accounts, that is, accounts with a balance of 60 days and over. The rate of the penalty was said to be set by the GBPA. She stated that once a customer applies for water services with the first defendant, the 1.5% rate is indicated on the certificate of deposit, so customers are aware that there is interest charged on the account's outstanding balance. Moreover, the rate is posted on the first defendant's website for customer's knowledge, so that they would be aware of how their bill is calculated.

91. She also explained the adjustments made in the aftermath of Hurricane Dorian, which resulted in the first defendant supplying water to Grand Bahama Island free of charge until 31 October 2019. She agreed that the water being supplied at that point was non-potable and admitted

that she was "unsure" of its quality. With effect from 1 November 2019, the first defendant applied a 25% discount to all invoices issued to its customers who were not receiving potable water, including the plaintiff. The percentage of this discount was a directive given by the Port Authority. During this time, the witness stated that she thought "*…the penalty was still applied*" but cannot recall for certain. To her knowledge, there was no agreement by the first defendant to suspend penalty charges to customers during the discount period following Hurricane Dorian, and neither does she recall any directive given by the GBPA to stop charging penalties during this time. On 10 December 2021, the water supplied to the plaintiff was approved and confirmed by the Port Authority as being potable.

92. The Stanislaus statement was merely to the effect that she received an email from Ms. Deann Seymour, who is the Chief Financial Officer of the GBPA and a member of the GBPA's Regulatory Committee, on 4 November 2019, informing her that a 25% discount was to be applied to all customer's accounts owing to the non-potability of the water following Hurricane Dorian. She understood this was to continue until the water quality was restored to being potable. Asked in cross-examination how those discounted rates were approved, she indicated that this was done by the regulatory committee and her duties were only to ensure that the rates approved by the GBPA were implemented by the first defendant.

93. Mr. Wilchcombe has been employed with the first defendant since 2017, and his duties involve ensuring that the first defendant's infrastructure for the supply of water is properly operating by implementing and ensuring proper maintenance and repairs are carried out. Significantly, his duties included testing water samples of the various plants for conductivity, total dissolved solvents ("TDS"), and salinity levels. The tests for conductivity and salinity levels are necessary to determine the chemical composition of the water and its quality. He indicated that GBPA applies the World Health Organization ("WHO") standards to determine the potability of water. According to the WHO, the TDS level in the water must be 1000mg per litre or less for the water to be deemed potable. He maintained that poor salinity, the presence of E-coli bacteria, or any physiochemical parameters do not determine the potability of the water, although those are taken into account to determine whether the water is safe.

94. Mr. Wilchcombe, in his witness statement and during examination, explained what occurred with the water supply following Hurricane Dorian. He indicated that flood damage from the Hurricane affected several of the wellfields (1, 3, and 6), inundated them with seawater, and caused some minor damage to pipes, conduits, and meters. Water supply was restored within 4 days of the Hurricane, and was said to be suitable for cleaning and sanitary purposes. Water quality testing was conducted from November 2019 to 2021 with external help from firms and NGOs to determine its potability. Samples collected from the tests of the water conducted by the first defendant were sent to Florida Spectrum Laboratory for further testing, and the results submitted to him. Laboratory reports of water quality for the period 2015 to 2019 were requested from Florida Spectrum, but only those reports from 2018 onwards were available. The GBUC flushed the wells and pipes to expel contaminated water and replenish the system with clean water. Mr. Wilchcombe further stated that the first defendant drilled additional wells to supply water to

wellfields 1, 3 and 6 (which supplies the plaintiff's condominium) to make the water supply potable again. By the end of November 2021, the GBUC had commissioned a reverse osmosis system to assist with its efforts to restore the water quality. His evidence was that by December 2021, the potability tests were showing readings below 1000mg for TDS for a continuous period of 30 days.

95. On re-examination, he accepted that the reverse osmosis system took some time to implement. He accepted that the water supplied following Hurricane Dorian was non-potable, but expressed that Florida Spectrum tests showed that the microbiology of the water was safe for sanitary purposes and cleaning. He stated that there were no health concerns regarding the water supplied at the time.

Court's Discussion

Preliminary points

(i) Legal status of the HCA

96. There are a number of subsidiary issues with which the Court must contend, as they are of some significance to the resolution of this matter. The first is what is the precise constitutional status of the HCA. It arises because the parties take different views as to the legal effect of the Agreements: the first defendant relies on s. 11(3) of the *Interpretation and General Clauses Act* to contend that the scheduled agreements have effect and should be construed as the Acts, while the plaintiff's view is that it is an Agreement with contractual force but of a statutory character. This may seem a rather rarefied distinction, but it is one that has bedeviled courts and academic commentators since the inception of these Agreements.

97. On the side of the view that the Agreement is statutory, we find a number of cases. In **Shangrila (1982) Ltd. v Grand Bahama Port Authority Ltd**. (*supra*) Adams J., commenting on the status of the HCA noted: "*The Agreement was under seal and statutory. The 1960 and 1966 amendments were also under seal and statutory*." Then in **Commonwealth Brewery v Attorney General and Ors**. *(supra*), Sawyer CJ (as she then was) also confronted with the status of the HCA, indicated, as follows: "*The difficulty is that the Hawksbill Creek Agreement is contained in the Schedules to the statute which I have enumerated above and is therefore part of the statute law of The Bahamas*."

98. In a later case, **St. George and others v Hayward and others** [2008] 1 BHS J. No. 20, Adderley J followed **Shangri La** and **Commonwealth Brewery** and cited Farewell J in **Manchester Ship Canal Company v Manchester Racecourse Company** [1900] Ch. 352 for the principle that: *"I think that when the Act of Parliament confirms the schedule agreement and declares it to be valid and binding upon the parties, it means what it says and gives it validity."*

99. On the other side of the debate are the 1971 Report of the Royal Commission appointed to review the Hawksbill Creek Agreement, **Hepburn v Comptroller of HM Customs** [1995] FP/No.

249 and **Bahamian Outdoor Adventure Tours Ltd. v R** (FP/28/2000 and FP28/00). In the 1971 Report, the Commissioners made the following observation (Ch. 2, under the sub-head "*An Agreement, not an enactment*") [at 27]:

> "Before we consider the terms of the first Agreement and its two Amendments, it may well be necessary to correct a misconception which seems to us to be fairly common. Many people refer to "the rights of licensees under the Hawksbill Creek Act" as if that Act was itself the governing instrument. Even some of the publicity issuing from the Port Authority highlights the Act as prescribing the relations between the Government and itself. But that is not so. The misconception no doubt arises because on the day prior to the execution of the Agreement the Act was passed authorizing the Government to become a party to it. The Act, the full name of which is the Hawksbill Creek, Grand Bahama (Deep Water Harbour and Industrial Area) Act, was therefore merely enabling. It did not of itself confer any rights or impose any obligations. All that it did was to empower the Government to enter into binding consensual arrangements with the Port Authority in terms of or approximating to the draft of the agreement set forth in the schedule thereto. As we shall show, however, the Act is not wholly without relevance." [Emphasis supplied.]

100. In **Hepburn v Comptroller of HM Customs** (*supra*) Gatpansingh, following the lead of the Royal Commission, commented as follows:

> "It is extremely difficult to rationalize the various interpretations of the structure and intent of the Hawksbill Creek Agreement 1955, as amended, being advanced by the defendants or as set out in the customs guide. The language of the agreement is by no means arcane and ought to be simple of construction but this is certainly not the case. The first thing to observe is that the agreement is not an enactment. The Hawksbill Creek Grand Bahama (Deep Water Harbour and Industrial Area) Act No. 5 of 1955, to which the agreement is scheduled, by authorising the Governor in Council to enter into it, merely sanctioned the assignment by the Governor in Council, to the Grand Bahama Port Authority, of the constitutional power normally vested in that body, to grant duty exemptions on certain goods generally described as supplies, imported for certain specific purposes under the Agreement. This was a convenient constitutional arrangement for the economic development of the Port Area."

101. Note, also, in this regard, the statement of Lyons J. in **Bahamian Outdoor-Adventure Tours Ltd. v R.** (*supra*) (at para.4):

> "The Applicants herein are licensees under the provisions of the Hawksbill Creek Agreement. The Agreement, as is well known, form the contract between the Grand Bahama Port Authority Limited and the Government of the Commonwealth of the Bahamas in respect of the development of Freeport."

The law on Schedules to Acts

102. A succinct statement of the approach as to whether a schedule forms part of the text of the law is found in E.A. Driedger, *Construction of Statutes* (Toronto: Butterworths, 1974), at p. 117:

"A schedule or Appendix is part of the statute, but whether it forms part of the text of the law depends on the terms of the Act."

103. This approach was applied by the Manitoba Court of Appeal in **Winnipeg City v. Winnipeg Electric Railway** [1921] 2 W.W.R. 282. In that case, the Court had to construe the effect of an Agreement between the City of Winnipeg and the Winnipeg Electric Railway Company, which provided for the purchase and assignment of the rights in a railway company to the Respondent. By Chapter 56 of the *Statutes of Manitoba, 1892*, the Respondent Company was incorporated and given powers under the Act to construct and operate railway lines. A copy of the contract between the parties was set forth as Schedule "B" to the Act, and by s. 2 was "*confirmed and validated to all intents and purpose as therein expressed*". In rejecting the contention that the Agreement had the same force as the statute, Fuller J.A. reasoned as follows:

> "81. I think the rights and liabilities of the parties are solely governed by the contract subsequently entered into between them on June 4, 1892, which was "confirmed and validated to all intents and purposes as therein expressed" by Ch. 54, Statutes of Manitoba, 1895. Mr. Symington, counsel for the appellant, laid down as a proposition of law that an agreement set up in a schedule to a statute has the same effect as if it were a clause of the statute itself. […] The authorities cited do not, in my opinion support such a proposition. […]
>
> 120. The results of the cases cited which are in point appears to be that in order to make an agreement scheduled to an Act a part of an Act itself it is not sufficient to find words in the statute merely confirming and validating the agreement; you must find words from which the intention can be inferred.
>
> 121. In my judgment, therefore, the Act confirming and validating the contract of June 4, 1892, had not the effect of making its provisions statutory law."

104. The majority of the Supreme Court of Canada came to a similar decision many years later in **British Columbia A.G. v. Ontario** (1994) 2 S.C.R. 41. There, the Court decided that an operational agreement (the "Dunsimer Agreement"), which was attached as a Schedule to certain federal railway legislation and "approved and ratified" within the body of legislation, simply ratified and confirmed the Agreement but did no more. Mr. Justice Iacobucci, writing for the majority, stated (at p. 34):

> "[S]tatutory ratification and confirmation of a scheduled agreement, standing alone, is generally insufficient reason to conclude that such an agreement constitutes a part of the statute itself. […] I also find useful the following dictum from Fullerton J.A. in *Winnepeg v. Winnipeg Electric Railway Co.* (1921) 2 W.W.R. 282 (Man. C.A.) at p. 306:
>
> "In order to make an agreement scheduled to an Act a part of the Act itself, it is not sufficient to find words in the statute merely confirming and validating the agreement, you must find words from which the intention can be inferred."

105. Applying this approach to a construction of the *HCA*, all the indicators are that the Scheduled Agreements were not intended in and of themselves to have statutory force. Firstly, the authorizing Acts merely authorized the Governor-in-Council/Governor-General to "enter into an Agreement *substantially in the form* set out in the Schedule hereto…". [*Emphasis supplied*.] In other words, the Acts themselves contemplate that what was scheduled was not necessarily the final form of the Agreements, which is the clearest indicator that the Agreements were not statutory.

106. Secondly, it is noted that the inducing words of the Act do not even purport to "confirm" or "ratify" the Agreement, as was the case in **British Columbia A.G. v Ontario.** In fact, they could not do so, as the Agreements were not yet executed, nor in final form. If Parliament intended to give any kind of statutory effect, or indeed to validate or confirm the agreements, it would have used stronger and clearer language. For example, in the *Emerald Beach Hotel Act 1953*, the following formulation was used: "*The Agreement made on the Fourteenth day of April A.D. 1953, and set forth in the Schedule to this Act, is hereby approved, ratified and confirmed*."

107. Thirdly, c*l*. 3.8 provides for the agreement to be reviewed and amended by mutual consent of the parties, including the majority of licensees, subject to first obtaining the consent and approval of Parliament. Fourthly, the Agreement provides that in case of differences of opinion on its interpretation, the matter is to be settled by arbitration under the *Arbitration Act*. Both provisions militate against a finding that incorporation into the Act was intended and did occur: see, e.g., **Elizabeth Metis Settlement v. Metis Settlement General Council and Resco Oil and Gas Ltd.** [2001] ABQB 201 (CanLII), where the Queen's Bench Division relied on similar arbitration provisions in a Co-Management Agreement scheduled to an Act to find that incorporation into the Act was not intended and did not occur.

108. For my part, for the reasons given by the plaintiff and the judicial dicta and opinions expressed above, I am of the view that the provision of the Agreements scheduled to the Acts are not thereby made statutory law in the sense contemplated in s. 11(3) of the *Interpretation and General Clauses Act.* In fact, the reliance on s.11(3) overlooks the fact that there are no substantive provisions of the enabling Acts against which the Schedules can be construed. The substance of the Acts is a few introductory sections simply authorizing the Government to enter into the Agreements substantially in the form set out in the Schedule, and indicating that the Agreements were under seal.

109. However, as acknowledged by the plaintiff—and none of the cases that have construed the Agreements differ on this point—these Agreements clearly have some statutory character or significance. Although the Acts only authorized the Government to enter into the Agreements, the contractual validity of the Agreements depended on the authority given by the Acts. Thus, if any of the agreements derogated in any material aspect from what was scheduled to the Acts, it could not have been validly entered into.

110. It was not necessary to express a conclusion on this point in the Injunction Ruling, but what I said there remains appropriate:

> …[A]ttempts at dichotomizing the HCA as either an Agreement or enactment is an oversimplification of the complex legal structure and status of the development scheme created by the HCA and Acts. It is plain that the bundle of rights, duties and liabilities, and exemptions governing the development and operation of the Port Area are contained in a contract between the Government and a private company, as amended. The fact that these contracts are set out in schedules to Acts does not *ipso facto* make it a part of those Acts, unless that intention can be derived or inferred from the terms of the Acts, which only appear to be enabling. However, as noted by the Royal Commission set up to review the HCA in its 1971 Report, the Acts are not "*wholly without relevance*". The HCA was entered into pursuant to statute, gave effect to governmental policy involving the transfer of governmental functions to a private company, and various obligations under the Agreement have been transformed into bye-laws. Thus, the HCA and its associated legislation created a unique legal and constitutional arrangement founded on contract but which clearly has statutory *imprimatur* and dimensions.

111. Thus, the HCA is to be interpreted primarily according to the rules by which commercial contracts are interpreted, which is to identify the objective intentions of the parties having regard to the language used in their documentary, factual and commercial context (see **Arnold v Britton** [2014] UKSC 36, **Costain Ltd. v Tarmac Holdings** [2017] EWHC 319). But this is not to lose sight of the fact that these agreements impose obligations on the Crown and confer benefits on members of the public, enforceable through covenants made with the Government, and therefore public law considerations also apply.

(ii) Whether there is jurisdiction to grant declaratory relief

112. The first defendant opposed the claim for declaratory relief on two main grounds: (i) that the plaintiff has no standing to apply for declaratory relief and therefore the Court has no jurisdiction to grant it; and (ii) that even if there were jurisdiction, the questions raised are hypothetical and the court should refuse to exercise its discretion to grant the remedy.

113. The court's jurisdiction to grant declaratory relief is very wide and derives both from statute (*Supreme Court Act*, ss. 15, 16, 19) and the Rules of Court. Of particular note is *R.S.C.* Ord. 15, r. 17, which provides that:

> "No action or other proceedings shall be open to objection on the ground that a merely declaratory judgment is sought thereby, and the Court may make a binding declaration of right whether or not any consequential relief is or could be claimed."

114. Secondly, the power to grant declaratory relief is discretionary. In **Financial Services Authority v Rourke** [2002] CP Reg 14, Neuberger J. said:

> "…the power to make declarations appears to be unfettered. As between the parties in the section, it seems to me that the court can grant a declaration as to their rights, or as to the

existence of facts, or as to a principle of law, where those rights, facts, or principles have been established to the court's satisfaction. The court should not, however, grant any declarations merely because the rights, facts or principles have been established and one party asks for a declaration. The court has to consider whether, in all the circumstances, it is appropriate to make such an order." […]

115. Then, in the authoritative text of *Zamir & Woolf on Declaratory Judgments* (4th Ed., 2011), this is what is said [§ 4-99]:

> "If it can be shown that a declaration would not serve any practical purpose, this will weigh heavily in the scales against the grant of declaratory relief. If, on the other hand …the grant of declaratory relief will be likely to achieve a useful objective, the court will be favorably disposed to granting relief. The question of whether or not any useful purpose would be served by granting declaratory relief is therefore of prime importance in determining how the discretion should be exercised…A declaration which would serve no useful purpose whatsoever can be readily treated as academic or theoretical and dismissed on that basis. However, while a declaration which resolves an issue of law cannot be described as being of no practical utility, the point may still be academic or theoretical because there is no existing factual claim which it will resolve."

116. The fact that a claimant is not a party to the relevant contract in respect of which it is asserted is also no reason to refuse declaratory relief, although the court will exercise its discretion cautiously in such circumstances: see, **Bank of New York Mellon v. Essar Steel India** [2018] EWHC 3177 [at 21], and **Rolls-Royce Plc v Unite** [2009] EWCA 387 [at 120]. As said in **Rolls-Royce**:

> "(4) The fact that a claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to an application for a declaration, provided that it is directly affected by the issue. …(5) The court will be prepared to give declaratory relief in respect of a "friendly action" or where there is an "academic question" if all parties so wish, even on "private law" issues. This may particularly be so if it is a "test case", or it may affect a significant number of other cases, and it is in the public interest to decide the issue concerned."

117. In **Milebush Properties Ltd. v Tameside Metropolitan Borough Council** [2011] EWCA Civ 270, which concerned the issue of whether a declaration was available in private law proceedings between non-contracting parties on the meaning and effect of planning obligations in a deed, Moore-Bick LJ said [88]:

> "[88] In my view, the authorities show that the jurisprudence has now developed to the point at which it is recognized that the court may in an appropriate case grant declaratory relief even though the rights or obligations which are the subject of the declarations are not vested in either party to the proceedings. That was certainly the view of the court in *In re S* and it is also the clear implication of the observations in *Feetum v Levy* and the *Rolls-Royce* case that things have moved on since Meadows. In the Mercury case it was not considered relevant that BT had rights under the licence and it was no bar to the proceedings that Mercury did not. To that extent the position is mirrored in this case, in which Tameside has obligations under the agreement but Milebush has no rights, I can see no reason in principle why the nature of the underlying obligation should be critical. The most important consideration is likely to be whether the parties have a legitimate

> interest in obtaining the relief sought, whether to grant relief by way of declaration would serve any practical purpose and whether to do so would prejudice the interests of parties who are not before the court."

In the instant case, Moore-Bick was in the minority in that he would have allowed the appeal on the narrow point that the judge was wrong to find that no useful purpose would be served by the grant of the declaration, but there was consensus that the judge's approach to the issue of the availability of the grant of the declaration, which aligned with the passage cited above, was correct (Mummery LJ at [44, 46]; Jackson LJ at [95].

118. It also has to be borne in mind that while the HCA confers rights which undoubtedly have public law elements, they also include rights in private law, because the obligations under the Agreements are secured by the exchange of covenants between the GBPA and individual licensees. For example, the 1971 Commission Report stated [para. 93]:

> "Moreover, the Agreement specifically includes licensees of the Port Authorities as beneficiaries of its privileges and incentives and, correlatively, binds the Port Authority to cause its licensees to enter into covenants to honour the obligations it imposes."

119. I also hasten to add that in many (if not all) of the cases brought over the years by licensees challenging some action of the GBPA with respect to benefits under the Agreement, mainly in connection with the grants of licenses, the Courts have affirmed the rights of the applicants to seek declaratory relief. In ***Shangri La***, Adams J. found merit in the argument that the Port Authority "…*by the Agreement and scope of its terms, by the duties and powers entrusted it by virtue of the Agreement as enabled by statute, is in effect a de facto public local authority*….". Further, as said in **Pyx Granite Co. v Ministry of Housing and ors.** [1960] A.C. 260, Per Viscount Simonds (at 259) "*It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words*."

120. While the first defendant is right to point out that the grant of a declaration is discretionary, I part company with its contention that the declarations sought are irrelevant to the legal questions raised in this matter, or that they will serve no useful purpose. I am of the view that in a case such as this, involving difficult questions of the construction of statutorily-enabled Agreements made in the public interest, and which repose governmental powers in a private company over the lives of those citizens who come within the genus of licensees of the GBPA, the Court is empowered to declare the rights of those licensees who seek to have them determined. The HCA provides for the plaintiff, as a licensee and owner/occupier of premises within the Port Area to be entitled to water and other utilities supplied by the GBPA or a licensee on its behalf at "*reasonable fees or charges*" (and I will come to construe what that might mean in due course), and it therefore has every right to seek a declaration as to the existence of those rights.

121. I dealt with the issue of standing in the interlocutory Ruling, although I was not required to decide it there and, in any event, no objection had been taken to the standing of the plaintiff to

seek declaratory relief. But what I said there remains appropriate to the substantive action, so I will repeat it:

> "It is accepted that the rights, obligations and liabilities in issue have a public law dimension because of the governmental nature of the functions exercised by the GBPA, the fact that the HCA is authorized by statute, and because the Government is a party to the Agreement. In this regard, the plaintiff accepts that the Attorney-General would have standing to intervene in this matter because of these factors. But nevertheless, the rights concerned are contained in an Agreement to which the plaintiff is not a party, and ordinarily the doctrine of privity might throw up obstacles to obtaining relief. However, as a licensee of the GBPA, and therefore a beneficiary of the rights, facilities and privileges contained therein (see cl. 3(5)), the conclusion seems irresistible that the plaintiff would have standing to seek declaratory and other relief to secure the benefits of those contractual promises to licensees, who are active and critical participants in the Agreement (see *Shangri La, supra*, in this regard).

(iii) Whether GBUC is the alter ego of GBPA

122. The plaintiff in particular addressed significant arguments to the question of whether GBUC, with respect to the provision of utility services was the *alter ego* of the GBPA, such that the court should 'pierce the corporate' veil. In effect, it appears that the Court was being asked to treat the two entities as a single economic unit for the purpose of construing their rights and obligations under the HCA, and to suggest that to the extent that the GBPA and GBUC were said to be joined at the hip, there could be no proper regulation and oversight of GBUC in the discharge of its functions under the HCA. Independent regulation and oversight, the plaintiff contends, is required under the HCA and in accordance with the principles of administrative law.

123. The *alter ego* doctrine recognizes that in some situations the intentions, knowledge and acts of certain persons or entities are the intentions, knowledge and acts of the company, and such persons or entity simply assume the status of the alter ego of the company as representing its mind and will (see **Tesco Supermarkets Ltd. v. Nattrass** [1972] AC 153). However, this is to be distinguished from those persons or entities who act on behalf of the company as its servants or agents, but do not exercise the *de facto* control of what the company does in its day-to-day activities. Whether a person or entity is to be regarded as "the company" or merely as its servant or agent, is a question of law and fact: see **Tesco Supermarkets Ltd. v. Nattrass**, supra, 169-170.

124. In my view, the evidence of the plaintiff, although mainly circumstantial, does bear out that there is a close relationship between the GBPA and the GBUC. But I am not of the opinion that a sufficient factual or legal case has been made out that the acts, intention and knowledge of the GBUC are to be treated as those of the GBPA. The only "evidence" in this regard was that the GBPA and GBUC are said, in material published online, to be owned by the same set of shareholders, that the GBPA sets the rate, charges and fees for the utility services supplied, decided the discounts and announced when the water was restored to potability.

125. But I would readily find that the GBUC was and is operating as the agent of the GBPA with respect to the provision of the utilities, as it is to the GBPA that the HCA assigns the "primarily responsibility" for the provisions of those services (cl. 2(16) of the 1960 Agreement). Further, while it specifically authorizes the GBPA to licence another person or entity to perform those functions on its behalf, the primary responsibility for the provisions of those services cannot be alienated. Thus, at the end of the day, the plaintiff has a point that it is the GBPA that has a contractual obligation and responsibility to the Government for the provisions of those utilities to licensees, and GBUC can only be performing those functions on behalf of the GBPA.

(iv) Whether the plaintiff is entitled to a declaration for, inter alia, the provision of services at a reasonable rate

126. The fifth declaration sought was a declaration that "*the first defendant is not entitled to unilaterally set rates, or impose fees and charges, and/or that such fees and charges must be reasonable and proportionate*." The undisputed evidence was that the GBPA, not the GBUC, set the rates and therefore the question of whether the "first defendant" can unilaterally set rates does not arise *stricto sensu*. But as I have determined, the first defendant can only be providing these primary obligations of the GBPA under the HCA as its agent. Thus, in essence, the real question posed by the declaration sought is whether the GBPA and/or the GBUC can unilaterally set rates, or impose fees and charges for the provision of the utility services.

127. I must say there is some ambiguity in the use of the phrase "unilaterally", and it is not clear whether the plaintiff intends this to mean that the setting of rates should be under the control of some independent body or regulator (as opposed to the GBPA purporting to regulate the GBUC), or whether the rates should be determined in consultation with Government. According to the evidence, the current *de facto* procedure appears for applications for rate increases by the GBUC to be submitted to the GBPA's "Regulatory Committee" for approval. It appears also, that the practice of the GBPA is to give notice of the applications for rate increases to Government, and that it gave notice on 12 April 2023 in respect of the most recent application for increase. In response, it appears that the Government (Ministry for Grand Bahama) issued a Statement indicating that it "[*did] not believe that a proper consultation can occur between now and May 1 2023, the date the GBPA indicated it would make a final decision*" and that "*water with high salinity was delivered to many homes in Grand Bahama after Dorian with no compensation from the utility company*" (see agreed Bundle of documents). It appears that the GBPA approved the 2023 rate increase application on or about 1 May 2023, despite Government's protestations.

128. In my view, the provisions of the HCA (cl. 2(22) of the Principal Agreement, cl. 3(7) and cl. 13 of the 1966 Agreement) as well as the Water Bye-laws, all are pointers that the GBPA or any licensee providing utilities are empowered to charge for those services. The HCA is silent as to the process for determining those rates, fees or charges. There can be no gainsaying that it would certainly be in keeping with the tenets of good administration and public law principles that there should be independent oversight and regulation of a body that has authority to impose fees and charges on the public for the provision of essential services, especially where there is a

monopoly undertaking. And it hardly seems possible that this independence can be achieved by the GBPA purporting to regulate the very company that it licensed to carry out a primary obligation and function of the GBPA itself.

129. By way of comparison, it is significant that the 1966 Amendments provided for the GBPA to supply water to several communities outside of Freeport (Eight Mile Rock, Pinder's Point, Lewis Yard and Hunters Settlements) at a cost of six shillings per gallon (based on the cost at that time of providing and distributing the water). Importantly, however, it provided that any rate increases would be based on the same ratio but was to be ascertained by Price Waterhouse & Co. or some other reputable firm of chartered accountants nominated by the GBPA and approved by Government. In other words, the Agreement provides for water supplied outside Freeport to be subject to increase based on independent oversight as agreed between the parties.

130. I can find nothing in the Agreements, however, that requires that the determination of the fees and charges should be by some consultative process, or that they should be subject to oversight (subject to what I say about the Government's role below). Therefore, I do not see how the Court can imply one, as terms are normally only implied to give business efficacy to an agreement (see **Attorney General v Belize Telecom** [2009] 1 WLR 1988), and in any event the parties before the court are not the parties to the Agreement. Thus, there is no impediment in the HCA itself to the GBPA/GBUC setting the rates as long as they comply with the requirement of cl. 13 to be "*reasonable*"—a point to which I will return.

131. As discussed, the primary argument of the first defendant that it has an unqualified right to set fees and charges is anchored on cl. 2(21), and the principle that the court should not imply any qualifications on terms in a commercial contract that purport to give a party an unqualified discretion (see **Taqa Bratani Limited v RockRose** (*supra*)). For the reasons which I give below, I am of the opinion that the first defendant does not have an absolute discretion to set rates, and that rates set must be reasonable. I say so for the following reasons.

132. First, the argument is based on a clear misconstruction of the HCA, and from reading cl. 2(21) of the Agreement *in vacuo*. Admittedly, the Principal Agreement gave the GBPA what was said to be an "absolute discretion" to determine rates. But whatever may have been meant by that expression at the time, it cannot be doubted that the effect of the 1966 Amendments was to modify the original agreement between the parties, and cl. 13 of the amendments plainly provides for only "*reasonable fees or charges for services*" to be levied. To contend that the first defendant or the GBPA still has an absolute discretion to set rates would be to pretend the Agreement stood still since 1955, and to ignore the plain meaning of cl. 13. As noted, the Port Authority specifically agreed (recital "c" of the 1966 Agreement) to enter into the covenants relating to, *inter alia*, "…*the provision of water electricity and other utility services*", and cl. 13 was one of the covenants undertaken. Thus, the concept of an absolute discretion to set rates or charges for utility services was consigned to the dustbin of history once the 1966 Agreement was statutorily authorized and executed.

133. Secondly, I do not think the ratio in **Taqa** is applicable. As the Judge said there (para. 46) "…*the Braganza doctrine has no application to unqualified termination provisions within expertly drawn complex agreements between sophisticated commercial parties such as those in this case*." In **Braganza v BP Shipping Ltd.** [2015] 1 WLR 1661, the UK Supreme Court exercised a jurisdiction to judicially review and control the exercise of a discretion given to a party in a commercial contract (hence the "*Braganza principle*"). In my view, the first defendant's argument in this regard overlooks the fact that these were not strictly commercial contracts between commercial parties, but a "Governmental" agreement that also purported to confer benefits on eligible members of the public—that is, licensees of the Port. Further, as has been explained, even though the Agreements are not enactments, it is common ground among the parties and a proposition that has never been doubted by any academic commentary or any of the cases that the Agreements have statutory character, as they owe their existence to Acts of Parliament.

134. In fact, I hasten to point out that it is inconsistent on the part of the first defendant to argue the cl. 2(21) point, having contended that the Agreements were enactments. Assuming, *ad arguendo*, that this were correct, then they would fall to be interpreted not as commercial agreements, but as statutes. In this regard, there is the well-known common law doctrine of implied repeal, which simply states that there is a presumption that a later enactment repeals an earlier one. As expressed in *Bennion, Statutory Interpretation*, 6th ed. (2013) para. 87:

> "(1) Where a later enactment does not expressly repeal an earlier enactment which it has power to override, but the provisions of the later enactment are contrary to those of the earlier, the later repeals the earlier in accordance with the maxim *leges posteriors priores contrarias abrogant* (later laws abrogate earlier laws). This is subject to the exception embodied in the maxim *generalia specialibus non derogant*…".

In this scenario, the 1966 amendment would have repealed the 1955 prescription, because an "absolute right" to charge rates is incapable of standing together with a right to charge rates that are "reasonable", and the 1966 provision in this regard must be considered repealed.

135. I therefore find that the parties to the HCA agreed that the charges and rates for the supply of utilities would be "reasonable", and that the plaintiff is entitled to the benefit of "reasonable" rates as a licensee of the GBPA. To find otherwise would deprive cl.13 of any effective content.

136. More troublesome are the questions of who determines what is reasonable, what is the standard, and who can enforce it? The plaintiff relies on the common law principles relating to the court's powers to control the operation of monopolies, whether *de jure* or *de facto*, and the old cases dealing with the imposition of reasonable "tolls" or other charges in respect of grants by statute to private corporations to operate public utilities or places to make a case for court-intervention. However, in those cases where this was done, the obligation to charge reasonable rates was normally imposed by a grant by charter or statute to a corporation or municipality.

137. That is not quite the same as the case before the Court. Here, the provision for "*reasonable rates"* arises in a Governmental Agreement between the GBPA and the Government, albeit

authorized by statute. In fact, it is quite clear that the obligations undertaken by the GBPA with respect to the development of Freeport and the obligations assumed thereunder to the genus of the public which represents its licensees were imposed as covenants made with the Government under the HCA. Thus, to a large extent, it falls to the Government as covenantee and protector of the public interest on whose behalf it contracted to enforce those rights.

138. The position is further elucidated by cl. 28(9) of the Agreement, which provides for all questions or differences arising with respect to the construction or otherwise of the Agreement to be referred to arbitration pursuant to the Arbitration Act 1950 of the UK (and any statutory modifications in force). What this means is that the court's jurisdiction to determine the substantive rights and obligations of the contracting parties thereto is ousted (except to the extent that the matter may arise on appeal from any arbitration proceedings).

139. I therefore do not have jurisdiction to determine whether or not the rates or any fees or charges are reasonable, and plainly the proper parties for the determination of any dispute arising out of the Agreements are not before the court. The fact that the licensees, as beneficiaries under the HCA, may be entitled to declaratory relief, does not make them parties to the contract or entitle them to enforce it as privies, and certainly not in private law proceedings.

140. Even if there were jurisdiction to do so, I am of the opinion that there is insufficient material before me that would allow me to properly carry out that exercise. The plaintiff drew the Court's attention to a line of old cases that affirmed the "test of reasonableness", but which did not articulate any standards for assessing reasonable. In any event, these old cases are not likely applicable to today's modern circumstances. More modern cases on the economic regulation of utilities that have considered whether charges by a utility provider are excessive and constitute an abuse of a dominant position under competition laws have used the standard applied in the EU jurisprudence under art. 86 of the EEC Treaty (which prohibits abuse of monopoly power) of whether a given rate "*…bears a reasonable relation to the economic value of the product supplied*". This is said to be a matter of fact and degree which involves a considerable margin of appreciation (see **Albion Water Ltd. v Albion Services Regulation Authority** [2006] All ER (D) 222, CAT [309 et. seq.].

141. In a press statement, issued 2 May 2023, following its approval of the rate increase, the GBPA said the application for increase was "*based on the cost-of-service model in line with best practice*". The power-point presentations of the GBUC seeking to justify rate increases cited, among other things, the need to recover capital investment and recoup losses sustained by Hurricane Dorian, the investment in additional wells and new technology such as a new reverse osmosis system to restore potability following Hurricane Dorian and provide consistent potable water, inflation, etc. The presentational material also compared the rates assessed in the Port with those assessed by the Water and Sewerage Corporation, as follows: GB Utility (5000 gallons) $25.94; Water and Sewerage (5,000 gallons) $77.73, which it said was 300% lower that W&S rates.

142. The one area in which there is a significant disparity is the penalties. Of the $418,541.14 claimed in arrears as at 4 May 2023, more than $100,000 of that amount is accrued penalties. In this regard, it may be noted that while the language of cl. 2(21) of the Principal Agreement speaks to "rates or *other* charges", the language of the 1966 amendments only mentions "*charges*" and "*fees or charges*". But nothing in the HCA speaks to the imposition of penalties. By way of comparison, section 23 (1) of the *Water and Sewerage Corporation Act*, Ch. 196, empowers the Corporation to turn off supply for non-payment, but no penalties (other than expenses) are levied for arrears:

> "23. (1) If a person entitled to a supply of water under an agreement with the Corporation makes default in payment of any sum due and owing to the Corporation, the Corporation may, after the expiration of 30 days from the date upon which notice that the supply will be cut off shall have been served upon the person, cut off the water-supply until payment of the sum due and of any expense incurred by the Corporation is made."

143. Further, the issue of how reasonable rates were to be assessed was not argued or put in cross-examination by the plaintiff in any substantive way, although the plaintiff did raise the issue regarding the mechanism for determining the rates. In any event, as stated, the determination of what constitutes reasonable rates are outside the remit of the court's jurisdiction. I would mention, however, that to the extent that the plaintiff asserted, that the burden is on the first defendant to establish that the fees and charges were reasonable, I do not think this is a correct statement of law: the burden of showing that the fee or charge is unreasonable lies upon the claimant (see, *Mills v Mayor et. al of Colchester* (1868) L.R. 3 C.P. 575. Obviously, this does not detract from the general legal principle that there may be facts within the particular knowledge of the defendant that might impose an evidential burden on him.

(v), (vi) Whether first defendant provides utilities under the terms of its licence and the HCA, and/or as the alter ego of GBPA?

144. I also do not think that this point requires any great elaboration. The distinction may be significant for other arguments that might be made, but in my opinion it is not material for the relief sought in the instant case. As I have indicated in the earlier discussion on the *alter ego* point, the GBUC is clearly entitled under its licence and the HCA to provide utility services as a licensee. However, I do not think that the plaintiff has made out a legal or factual case that would justify a finding that the GBUC is the *alter ego* of the GBPA in this regard (and indeed this determination was not necessary for the resolution of this matter), and neither is there any reason advanced that would justify the court in piercing the corporate veil.

145. However, it is to be noted that the first defendant is not the usual class of licensee authorized to carry out commercial ventures or business undertakings in the Port, but to provide an essential utility which the GBPA itself has a primary obligation and non-delegable responsibility to provide under cls. 1(6), 1(7) and 1(8) and 2(21) of the Principal Agreement (as amended). Therefore, in providing the utility services, it is doing so pursuant to its licence and the HCA, but also as the agent of the GBPA.

(vii) The right to disconnect

146. I must say that the arguments presented by Ms. Glinton on this point were attractively constructed, but at the end of the day I think they are bound to fail. I agree with her submissions that the HCA clearly contemplates pursuant to cl. 13 of the 1966 amendment that the GBPA would seek to put its ability to discharge its responsibilities as a provider of water and sewerage services, including its power to collect or recover from owners or occupiers of premises reasonable rates, on a statutory footing by the promulgation of bye-laws. It cannot be doubted that the failure to seek to transform these obligations and powers into statutory powers does not align with the principles of good management and administrative law, especially in respect of the operation of a monopoly. For whatever reason, more than 50 years onward, the GBPA has not thought it necessary to fill these administrative and legislative lacunae in its operations, nor has the Government pressed them on the point.

147. However, I cannot agree with Ms. Glinton that the effect of this is that there is no right to disconnect, because the language contained in that provision does not impose a mandatory requirement for bye-laws, but only provides an undertaking by the Government "…*to consider sympathetically any application by the Port Authority for the promotion of legislation*…". I dealt with this issue in the injunction Ruling, in the context of whether the plaintiff's claim, as then formulated, raised a serious issue to be tried. In the interest of economy, I will repeat what I said there:

> "74. [T]he fallacy in the plaintiff's argument is that it assumes that the source of potential payment obligations and the right to disconnect can only arise in the context of authorizing statute. It is clear, however, that similar obligations and rights might also arise in the context of contractual or commercial relations.
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> 75. An example of this is provided in the Privy Council's decision in *Minister of Justice for Canada v Levis* [1919] A.C. 505. The issue there was whether the appellant was entitled to an order of mandamus to have the water supply to Government buildings reconnected, after they had been shut off by the city over unpaid bills. In that case, the city council had made bye-laws for the assessment of a special annual tax on all buildings to meet the sums expended on the construction of waterworks to supply the city, and which bye-laws made the payment of those taxes payable before water could be supplied at the rates imposed by the city. The city disconnected supply to certain Government buildings after there was a failure to agree the rates between the Government of Canada and the city for the supply of water. The express power given to the city by art. 5661 of the Cities and Towns Act, 1909, was in the following terms: "*If any person…refuses or neglects to pay the rate lawfully imposed for the water supplied to him….the municipality may cut off the water and discontinue the supply as long as the person is in default*."
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> 76. The Government applied to have the water supply restored on the basis that the respondent was under a legal obligation to supply the Government buildings, without the payment of any taxes in respect thereof or, alternatively, any payment other than may be agreed between the parties, or a fair payment for the quantity of water consumed. The respondents conceded that the Government was free from liability for all taxation, but contended that as the water supplied was in the nature

of a merchantable commodity, the Government was not entitled to continue to receive it without payment. Both the first instance court and Superior Court of Quebec rejected the petition for mandamus, and the Government appealed with special leave to the Privy Council. The Privy Council dismissed the appeal and, in a judgment delivered by Lord Parmoor, stated as follows [pg. 514]:

> "The result is that at the time when the petition was presented for an order for mandamus the respondents were not in default, since the Government of Canada at that time was not willing to pay a price for the supply of water which had by a concurrent finding of two courts held not to be excessive. The respondents were therefore no longer bound to supply a commodity for which the appellant as their customer was no longer willing to pay, and equally they were entitled to discontinue the supply, not as an exercise of an express power to cut it off, but as an implied correlative right, arising because the appellant was no longer prepared to perform his reciprocal obligation." [Emphasis supplied.]

148. The plaintiff sought to distinguish the case of ***Minister of Justice for the Dominion of Canada v Levis*** in its arguments, on the ground that the bye-laws under consideration in that case provided for a power of disconnection and that it was not a case of a monopoly of supply. It is true that the bye-laws in that case did authorize disconnection. However, their Lordships made it plain that the entitlement to discontinue the supply arose not only as a result of an "*express power to cut it off*", but as an "*implied correlative right*", because the respondent was no longer prepared to perform his reciprocal obligation to pay. Further, although there was no monopoly in that case, the respondent municipality was granted a right and obligation to supply water by statute. I therefore do not think that the factors mentioned by the plaintiff take this case outside of the reasoning in the **Levis** case.

149. However, I do think that the first defendant's reliance on s. 36(1) of the *Interpretation and General Clauses Act* for the right to disconnect is misplaced. That provision implies incidental powers where something is provided for under any written law, which is not the case here (cf. s 23(1) of the *Water and Sewerage Corporation Act*).

150. I hasten to add, however, that a holding that the GBUC may be entitled to disconnect a customer's account for unpaid arrears as a corollary of its commercial relationship, is not the same thing as saying that they are entitled to summarily disconnect in the circumstances of this case. As I have explained, this is not a usual case by any standard, and it involves the question of benefits and privileges under Agreements which have important statutory and constitutional implications. This Court has found that the plaintiff is entitled to be charged "*reasonable fees or charges*" for the utility supply provided by the Port Authority or its licensee, and will declare so. It would render such a declaration of right a *brutum fulmen* if the first defendant could still turn around and disconnect, while the plaintiff's claim that its rights have been denied remains pending.

151. The court's jurisdiction to grant injunctive relief, including the ancillary jurisdiction to do so in support of a declaratory judgment, is grounded by the principle of what is "*just and*

convenient", as outlined in s. 21 of the Supreme Court Act and the case law. It is a wide jurisdiction, though not without borders, and must be exercised on the basis of judicial principles, as is the case with all judicial discretion

152. Examining the limits of this jurisdiction, Lord Justice Baker said in **Re G (Court of Protection: Injunction)** [2022] EWCA Civ 1312:

> "54. In any event, the whole question of the ambit of the s. 37 [s. 21 SCA] power has since then been comprehensively re-examined by the Privy Council in *Convoy Collateral Ltd. v Broad Idea International Ltd.* [2021] UKPC 24 ("*Broad Idea*"): see at [4]-[58] per Lord Legatt JSC giving the majority judgment of the Board (with the agreement of Lords Briggs, Sales and Hamblen JJSC). Having examined *The Siskina* and other cases in detail at [4]-[51], Lord Legatt's conclusions on what Lord Diplock said in *The Siskina* can be found in [52] as follows:
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> > '52. The proposition asserted by Lord Diplock in *The Siskina* and [*Bremer Vulkan Shiffbau und Maschinenfabrik v South India Shipping Corp. Ltd.* [1981] AC 909] on the authority of [*North London Railway Co v Great Northern Railway Co* (1883) 11 QBD 30] was that an injunction may only be granted to protect a legal or equitable right. There can be no objection to this proposition in so far as it signifies the need to identify an interest of the claimant which merits protection and a legal or equitable principle which justifies exercising the power to grant an injunction to protect that interest by ordering the defendant to do or refrain from doing something. In *Beddow v Beddow* (1878) 9 Ch. D. 89, 93, Sir George Jessel MR expressed this well when he said that, in determining whether it would be right or just to grant an injunction in any case, "what is right or just must be decided, not by the caprice of the judge, but according to sufficient legal reasons or on settled legal principles." As described above, however, within a very short time after *The Siskina* was decided, it had already become clear that the proposition cannot be maintained if it is taken to mean that an injunction may only be granted to protect a right which can be identified independently of the reasons which justify the grant of an injunction.'
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> 55. This identifies two requirements before an injunction can be granted: (i) an interest of the claimant which merits protection and; (ii) a legal or equitable principle which justifies exercising the power to order the defendant to do or not do something."

153. More specifically, in **Koza Ltd. v Koza Atlin Isletmeleri as** [2020] EWCA Civ 1081, in considering whether a freezing order (injunction) could issue on the basis of an undertaking given to the court that was the basis for earlier injunctive relief, Popplewell J said:

> "64. Section 37(1) of the Senior Courts Act 1981 provides that a court may grant an injunction, interlocutory or final, in all cases in which it appears to the court to be just and convenient to do so. Section 37(3) specifically recognizes freezing orders as an exercise of the power conferred.
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> 65. In *Maclaine Watson & Co. Ltd. v International Tin Council* (No.2) [1989] 1 Ch. 286, Kerr LJ, giving the judgment of the court said at p. 303E-F:
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> > 'Secondly, there is the authority of this court in *A.J. Beckor & Co. Ltd. v Bilton* [1981] QB 923 and other cases that there is an inherent power under what is now section 37(1) to make

any ancillary order, including an order for discovery, to ensure the effectiveness of any order made by the court.' "

154. He continued [at para. 78]:

> "[…] Moreover and in any event, the court has an interest in the performance of its orders and undertakings, just as a claimant has an interest in the performance of its private rights. In each case the fact that the issue is not going to be determined, and that the injunction is in practice going to afford final relief, is an important factor in the exercise of the discretion importing what will usually be a higher threshold on the merits of the issue. The court does not, however, simply throw up its hands and say that unless it can be sure that the claimant is right on the disputed issue, it is powerless to prevent what it has a high assurance will be a breach."

155. See, also, **The Board of Management of Wilson's Hospital School v Enoch Burke** [2023] 1ECA 52, where in dismissing an appeal against an interlocutory injunction obtained against a school teacher, the Court of Appeal were of the opinion that injunctive relief could indeed be granted in support of a declaratory judgment if the declaratory orders sought in the plenary summons were granted at the conclusion of the trial (per Whelan J., at 63).

156. The fact of this matter is that the plaintiff has succeeded on its claim for declaratory relief with respect to its rights under the HCA as a licensee entitled to be charged *reasonable fees or charges* for its utility services. It faces an actual threat that its supply might be disconnected, notwithstanding that the charges and rates which have led to the arrears on which the threat of disconnection is premised may not have been reasonable, especially during post-Hurricane periods. Its rights must mean something, and must be worthy of protection. They might not be directly enforceable as against the GBPA or GBUC by the plaintiff, but "*ubi jus, ibi remedium*" (where there is a right, there is a remedy). In its 1971 Report, the Commission noted [at 28]:

> "Because of the constitutional status of the Bahama Islands as a colony under the Crown, and because the Legislature by an Act especially authorized the Government to enter into each of the three agreements, any obligations undertaken by the Government thereunder fall to be regarded as obligations binding on the Crown."

157. Thus, it may be that the plaintiff is able to seek mandamus to have its rights determined by the process provided for under the HCA between the Government and the Port Authority, or it may be entitled to bring other proceedings in public law. The plaintiff claimed a permanent injunction, but I do not think it would be a proper exercise of the s. 21 jurisdiction to grant a permanent injunction in all the circumstances of this case. But I would grant an injunction for a period of six months following this Ruling to allow the plaintiff to take whatever steps it deems necessary to seek to enforce its declared rights.

(i) Whether LTS is entitled to an award of damages payable by GBUC and, if so, in what amount?

158. It was never made clear on the pleadings the basis for the claims for damages against the first defendant, whether contractual or breach of statutory duty, or whether arising out of the terms of the HCA or any contractual relationship with the GBUC. For example, one finds at para. 27 of the claim, an assertion that the GBPA, nor its *alter ego* the GBUC can, absent approved bye-laws, unilaterally and lawfully impose on the plaintiff charges for the utility services, in respect of which the plaintiff seeks a declaration to that effect and "*exemplary damages*" as against GBUC. Further, it was asserted that the averments made against the GBUC relating to the alleged non-conformance with the Agreement in the supply of the utilities and the disconnections had the effect of "expropriating" and "exploiting" the "rights, facilities and privileges" to which the plaintiff was entitled under the Agreement and caused the LTS to suffer irremediable harm and substantial damages, for which it was said damages were not an adequate remedy and relied on heavily in the claim for injunctive relief. Finally, there was a claim for damages as against the "defendants" for having discontinued and ceased water and sewerage supplies to the property not authorized by court order.

159. There is one further argument to which I should make reference in relation to the damages claim, and that is a reference in written submission to cl. 3(6) which provides for damages to be fixed by mutual agreement between the Government and the GBPA for breaches of the Agreement, or in the default for the matter to be determined by arbitration. The plaintiff relies on this clause, as far as I understand the argument, not to create any entitlement for damages, but to say that penalties for failure to make payment of rates and charges set by GBPA or GBUC should have been agreed between the parties to the Agreement and codified in legislation. Consequently, it is said that the penalties applied to the rates should be disallowed and deducted from the plaintiff's invoices and any penalties made towards such payments since December 2006 (the limitation period for actions under seal).

160. Obviously, this argument does not assist the claim for damages on behalf of the plaintiff. In any event, it appears that the plaintiff is mixing apples and oranges, as the damages contemplated by cl. 3(6) are damages *inter se* between the parties to the Agreement. In other words, the plaintiff's arguments in this regard adds little to the complaint that the provision of the utility supply as well as rates and penalties should be prescribed.

161. The major defect of any claim for damages, to the extent that they arise primarily out of the HCA is that there is no privity of contract between the plaintiff and the GBPA, as has been pointed out. As to the claim for exemplary damages, I am unsure of the basis for this, as it cannot be said that a failure to promote bye-laws is a breach of the Agreement or wrongful conduct, it not being a mandatory requirement. It is trite that exemplary damages are punitive and intended to convey disapproval of the defendant's conduct, but it was never pleaded which conduct was being relied on to justify the claim for exemplary damages. In a similar vein, vindicatory damages are only awardable for breaches of fundamental rights under the Constitution, which are not claimed here (see, **AG of Trinidad & Tobago v Ramanoop** [2005] UKPC 15. Further, to the extent that the plaintiff makes general allegations relating to any infringement of its "*rights, facilities and*

privileges" under the Agreement, there are no specific pleaded allegations of what rights were breached that would give rise to a cause of action for damages and what damages were sustained as a result. As to the allegations concerning the disconnection of supply, I have found that disconnection without statutory authority is not unlawful, and in any event it appears that the service was restored rather quickly, although the plaintiff claimed it suffered "inconvenience".

162. To be sure, the LTS complained of being supplied with non-potable water for periods, especially following Hurricane Dorian, and sub-standard supply. However, it never articulated a claim for damages on those grounds. As was pointed out in the Injunction ruling, s. 12 of the *Water Preservation Bye-laws* provides for an "*authorized supplier of water*" (which includes the GBUC) to exercise all reasonable skill and care to ensure that any water supplied for domestic purpose "*is wholesome to drink according to the relevant provisions of the International Standards for drinking Water for the time being prescribed by the World Health Organization*." There was, however, no claim made by the LTS for breach of statutory duty, or in negligence, or contract (since that standard would have been implied in any contract or arrangement with the GBUC, which would have arisen independently of the HCA).

163. General allegations and arguments that charges and fees are excessive and unreasonable for non-potable water do not amount to pleading a cause of action that would sound in damages, much less for exemplary damages. I therefore dismiss the claim for damages.

(ii) Whether the first defendant can claim damages in contract and or on the basis of quantum meruit and, if so, what amount? [The counterclaim]

164. The first defendant did not plead a formal contractual agreement between it and the plaintiff, or with the individual unit owners. Its counter-claim simply stated that:

> "20. Since 1980, the First Defendant has provided, *inter alia*, the Utility Services to LTS in exchange for payment by the Plaintiff, at rates set by the First Defendant from time to time."

165. It is ordinarily to be expected that a request for a supply of water by a licensee of a water undertaker will result in the creation of an agreement or contract that reflects the mutual agreement between the water undertaker and the customer for the supply of water and sewerage services and for the customer to pay for such supply on the terms in force from time to time. It is equally clear that the court may imply a contract in fact based on the conduct of the parties where it is appropriate to do so and necessary "…*to give business reality to a transaction and to create enforceable obligations between the parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist*" (see May LJ, "**The Elli**": [1985] 1 Lloyds Rep. 105 [at 115]; and Bingham LJ, "**The Aramis**" [1989] 1 Lloyds Rep. 213. This is supported by authority and good sense.

166. However, and for whatever reason, the first defendant did not assert such a contract, and did not produce such an agreement in evidence. It did provide documentary evidence, such as the

customer billing history to indicate that the plaintiff was a customer, but those bills did not include any evidence of the parties' agreement. In the circumstances, it should not be left to the Court to imply a contract out of the interstices of bare pleadings and evidence of subsequent dealings, and the court will not lightly do so: see Megaw LJ in **Horrocks v Forray** [1976] 1 All ER 737 at 742. I am further of the view that it is not "necessary" to do so in this case, as the first defendant has claimed, alternatively, on the basis of *quantum meruit*.

167. In such circumstances, the court may enforce the implied promise of the recipient to pay a reasonable sum (sometimes said to be in quasi-contract, since as a contract is implied in law as opposed to fact) on the *quantum meruit* basis, on the doctrine of unjust enrichment. The leading cases in this area are the UK Supreme Court cases of **Benedetti v. Sawiris** (supra), cited by the first defendant, and **Barton v Morris (in place of Gywn-Jones)** [2023] UKSC 3. Benedetti sets out the four essential elements in the claim for unjust enrichment: enrichment of the defendant; enrichment at the expense of the claimant; the unjust nature of the enrichment; and the presence of any defences. In **Barton v Morris,** Lord Leggatt made the following statement of principle (with which all the court agreed, although he was in the minority in finding that a term for the payment of a reasonable sum was to be implied) [at 138]:

> "The obligation to pay a reasonable sum reflects the ordinary expectation that those who, in a commercial context, provide valuable services to others do so for reward and not simply out of charity or benevolence; and by the same token someone who requests such services does so on the understanding that they are to be paid for. The law gives effect to this common understanding by imposing, in the absence of contrary agreement, an obligation to pay a reasonable sum which represents what the services were worth (*quantum meruit*)."

168. What is a reasonable sum is to be determined based on all the circumstances, but it is clear on the cases that the claim is focused not on compensation for the claimant, but on the benefit gained by the defendant. In **Benedetti v Sawiris**, it was said that the starting point for assessment is the market value of the services rendered to the defendant, but it is permissible to allow subjective devaluation where the defendant would not have paid the market value. In **Sempra Metal Ltd. v IRC** [2008] 1 AC 561, HL, Coulson J. said:

> "The starting point for identifying and valuing any benefit to the defendant is the objective market value, or market price, of the services provided by the claimant….The defendant is entitled to prove that he did not subjectively value the benefit at all or that he valued it as less than the market price in order to reduce the quantum of the claim."

Further, the court may have regard to the terms of an unenforceable or related contract (**Banque Paribas v Venaglass Ltd.** [1994] CILL 918, CA.), and in **Benedetti** Lord Neuberger stated that there may be cases in which an agreement between the parties as to remuneration may, without further consideration, be taken as the best evidence of the objective market value.

169. In this claim, the first three elements are not in dispute. In fact, it is to be noted that the plaintiff never denied that the supply had been provided by the first defendant, that the services

were consumed, and that there was an obligation in principle to pay for the services rendered, subject to the requirement that the rates were not arbitrary, regulated and were reasonable [para. 95 of its written submissions]. The plaintiff's defence to the counter-claim was to put the first defendant to strict proof and generally deny the allegations, but it mounted no specific defence to the claim in *quantum meruit*, such as change of position, etc. I therefore find that the first defendant has a *prima facie* right to *quantum meruit* in the law of unjust enrichment, and in the absence of a contract with clearly identifiable terms.

Quantum

170. In its counterclaim the first defendant pleaded the outstanding yearly arrears from 2014 as follows:

30 December 2014:	$15,491.33
15 December 2015:	$11,543.70
22 December 2016:	$10,000.00
06 December 2017:	$11,481.44
11 December 2018:	$54,980.07
16 December 1019:	$119,759.27
10 December 2020:	$190,416.27
06 December 2021:	$283,001.92
05 December 2022:	$381,426.34

171. Thus it claimed areas in the amount of $381,426.34 (and continuing) both in contract and quantum meruit. These arrears were confirmed by the evidence of Ms. Rahming and the GB Utility Customer History Report for Lucayan Towers South going back to the 30 September 2019, which showed the balance at that point as $101,573.90, and a balance of $418,541.14 at 4 May 2023. Mr. Glinton accepted that in April of 2019 the amount exceeded $100,000.00, although when asked in cross-examination whether that amount had increased to $418,541.14 by April of 2023, he answered "…*by your accounting, by your billing*".

172. As noted, the first defendant claimed the same sums under contract and *quantum meruit*, but the cases cited above make it quite clear that this is not the right approach to a *quantum meruit* claim. It cannot be pleaded as a backstop to a claim in contract; and the approach in principle is very different. Contractual remedies are calculated by reference to the contract price and terms; while compensation for unjust enrichment may be calculated by reference to the value of the services, which may or may not be the same as the contractual rate (**Costello and anor. v MacDonald and others** [2011] EWCA Civ 90 [at. 31, Etherton LJ].

173. The court can look at all the evidence and circumstances in determining what is a reasonable sum. In this regard, the plaintiff argued that the penalties imposed on arrears of 1.5% were unreasonable and excessive, and that these charges were continued even during the period when the GBUC was (admittedly) unable to supply potable water. Interestingly, the monthly bill

for May 2023 was $5,556.83, while the penalty applied for that month was $4,534.54. Further, of the $418,541.14 claimed in April of 2023, over $100,00.00 of that amount was penalties. I agree that the penalty is not reasonable, and is not objectively part of the market price of the services provided by the first defendant. I will accept the "contractual" rates charged for the supply of the services as the market value of the services provided by the first defendant, in the absence of any contrary figures suggested by the plaintiff. I will therefore assess a reasonable sum as the amount of arrears for the utility services from the date claimed up to the date of this Judgment, but from which is to be deducted the amounts representing the 1.5% penalty.

174. There are two matters that I should make very clear before leaving this point. Firstly, it should be appreciated that this case turns on its peculiar facts, and the court is not indicating by any stretch of the imagination that a party who contracts to pay a penalty of 1.5% on arrears as part of their agreement is in anyway relieved from it. That may be a bad bargain, but if those are the terms accepted, so be it. Secondly, I should also make it clear that in determining a reasonable sum on the claim in *quantum meruit*, the court is not pronouncing on the reasonableness or not of the fees and charges imposed by the GBUC according to cl. 13. The first defendant counterclaimed in *quantum meruit*, and the Court was thereby required to assess what a reasonable sum is for the claim in those circumstances.

Secondary claim

175. As to the claims against the second defendant, I think for reasons that have developed since my hearing of this action, the Court can make short shrift of this. Subsequent to my hearing this action, I heard two summonses by the plaintiff in this action which were the remaining outstanding matters from the 2013 actions, and which were ordered to be heard by the Court of Appeal. Those matters were: (i) Claim No. 2013/CLE/gen/02044: *Maurice O. Glinton et. al. (suing in their respective capacities as officer and directors of the said body corporate) v. Doug Prudden et. al. (styling themselves as Lucayan Towers South Board of Directors 2013)*; and (ii) Claim No. 2013/CLE/gen/FP/00230, *Doug Prudden et. al. v. Maurice O. Glinton et. al.*

176. It was very clear to me, in form and substance, that the secondary claims in this action were largely subsumed by those extant matters. In fact, the Court always harboured concerns as to whether the reliefs sought against the second defendant were merely parasitic to the reliefs sought against the first defendant. This is not to say that the plaintiff can be blamed for seeking to combine the claims, seeing that they attribute the inability to pay the utility arrears directly to the actions of the second defendant and others. Further, the court ordered a speedy trial in this matter, having regard to the continuing injunction imposed on the first defendant, and the plaintiff was not yet sure of a hearing date for the conjoined actions when this matter was heard. However, it would border on abuse of process of the Court to consider the same issues in two different actions, and as there was no appearance by the second defendant in this action, I would exercise my discretion not to grant any of the reliefs sought against her in this action. I do so on the basis that the same issues and claims are raised in the preceding actions, and they would be the more appropriate forum in which to deal with those issues.

177. It is also settled that the Rules which permit a judge to grant summary or interlocutory judgment give the court a discretion whether to grant the relief sought or indeed any relief. In **Charles v Shepherd** [1892] 2 QB 622, the claimant appealed to the Court of Appeal from a decision refusing to enter a final judgment under what was then Order XXVII of the Rules of the Supreme Court 1883, and the forerunner of what is RSC Order 13, rr. 1-6. In dismissing the appeal, Lord Esher MR said:

> "[W]e are of the opinion, upon the true construct of that rule – first that the Court is not bound to give judgment for the plaintiff, even though the statement of claim may on the face of it look perfectly clear, if it should see any reason to doubt whether injustice may not be done by giving judgment; it has a discretion to refuse to make the order asked for; and secondly, that the expression "such judgment as upon the statement of claim the Court or a judge shall consider the plaintiff to be entitled to", includes an interlocutory judgment to be subsequently worked out, as well as a final judgment for taking an account in equity."

See also, the UK Court of Appeal's decision in **Phonographic Performance Ltd. v. Maitra** [1988] 1 WLR 870 [55].

178. In the circumstances, I would decline to exercise my discretion to grant the relief sought against the second defendant in this action, as reliefs have been sought and argued with the benefit of argument from the defendants in a subsequent hearing.

CONCLUSION AND DISPOSITION

179. Out of the 20 heads of relief sought by the plaintiff, heads 9-13 and 15-16 concern the claim against the second defendant and are not dealt with here. I should also note that, although the Court has made several declarations, it has not done so in the form sought by the plaintiff, as they would not have accorded with the Court's findings on the facts and applicable law. In summary, my conclusion on the other declarations and orders sought are as follows:

(1) I grant the Declaration that as a licensee of the Port Authority within the meaning and intent of Clause 2(1) of the Principal Agreement and Cl. 2(16) and (17) of the 1960 Agreement, the plaintiff is entitled to all "rights facilities and privileges" *conferred on a licensee* under the Principal Agreement (as amended).

(2) I refuse the declaration that, construction and operation of utilities being the Port Authority's primary obligations within the meaning and intent of Clauses 1(6), 1(7) and 1(8) and 2(21) of the Principal Agreement, GBUC is providing water and sewerage services as the Port Authority's *alter ego*. However, it is declared that GBUC is providing water and sewerage services as the Port Authority's agent.

(3) I refuse the declaration that the Port Authority as the operator of a self-regulated utility (being a primary obligation) it may not, absent a Court Order, lawfully discontinue or cease providing the plaintiff essential public utilities services as a Licensee operating in the Port Area by virtue of the Principal Agreement (as amended).

(4) I grant the Order prohibiting and restraining the *first defendant* whether by its subsidiaries or affiliates or managers or officers or directors or servants or agents or otherwise howsoever from actually or threatening disconnection of the water and sewerage supply to the Property of the body corporate (LTS) for a period of six months from the date of this Ruling.

(5) I refuse the declaration that the first defendant (and/or the GBPA) is not entitled to unilaterally set rates, or impose fees and charges for the utility services. However, it is declared that the first defendant and/or the GBPA may only impose such fees and charges as are reasonable within the meaning of cl. 13 of the 1966 Amendment for the supply of utility services.

(6) I refuse the declaration that the fees and charges assessed for non-potable water were unreasonable, on the basis that the court has no jurisdiction to determine the same.

(7) I refuse the order that any fees and charges imposed by the first defendant for non-potable water were unreasonable (and therefore irrecoverable and ought to be reimbursed to the plaintiff) on the basis that the court has no jurisdiction to determine the same.

(8) I grant the Order restraining the first defendant from engaging in any conduct the effect of which causes further harm and loss or damage to the property of LTS, *provided* that this does not prevent the first defendant from taking any lawful action to recover its debt or any other lawful action which is not enjoined.

(14) I refuse the order for damages against the first defendant for having discontinued and ceased water and sewerage supplies to the LTS, as no damages were pleaded or proved in respect of such action.

(17) I refuse the claim for aggravated and/or exemplary damages as the facts giving rise to such remedies were not pleaded or proved.

180. As to the first defendant's counterclaim, I grant the claim in *quantum meruit*, which I have assessed as the amount of the arrears from the date claimed to the date of this Judgment, less the amount representing the applied penalty of 1.5%. This amount, based on an adjusted customer history report submitted by the first defendant at the Court's request, comes to $427,878.49. Interest is to run pursuant to the *Civil Procedure (Award of Interest) Act* from the date of this Judgment.

181. It will be apparent that this is not an outright win for either the plaintiff or the first defendant on its counterclaim. In the circumstances, I invite the parties to lay over written submissions on costs (including draft statements of costs by a claiming party) within 21 days of this Judgment, which I will summarily assess on an issues basis.

Klein J.

31 March 2025