

**IN THE COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division**

2013/CLE/gen/FP/00281

B E T W E E N

GRAND BAHAMA DEVELOPMENT COMPANY LIMITED

Claimant

AND

PORT LUCAYA MARINA COMPANY LIMITED

Defendant

Before: The Honourable Madam Justice Constance Delancy

Appearances: Karen Tyson with Tashana Wilson for the Claimant
Harvey Tynes, KC with Tanesha Tynes-Cambridge for the Defendant

Hearing date(s): 11 April 2025 and 23 May 2025

Submissions: 31 March 2026

JUDGMENT

DELANCY, J

[1.] This action commenced by the Claimant approximately 12 years ago and the issues between the parties were ventilated at trial before this Court in 2025. Due to the passage of time between its commencement and trial it is necessary to set out the background in some detail.

Background

[2.] On the 21st July 2006 New Hope Holdings Limited agreed to purchase the “*goodwill*” and 100% of the shares of the Defendant from the Claimant for the sum of \$3,500,000.00. The Agreement expressly provided that Claimant would grant to the Defendant a Lease of a portion of the seabed underlying the Port Lucaya Marina for 99 years at the reserved rent of \$1.00 per annum.

[3.] On 8 December 2006 the Claimant and the Defendant entered into an Indenture of Lease (“the Lease”) of 10.6 acres or thereabout being a portion of the bed of the sea in Bell Channel Bay northeasterly of Bell Channel Bay Subdivision, Unit 3, Grand Bahama (“the Marina”) for a period of 99 years’ subject to the covenants and conditions set forth in the Lease. The Defendant covenanted, *inter alia*, at Clause 2(3), 2(4), 2(5) and 2(14) (“the sub-clauses”) of the Lease as follows:

(3) At all times from time to time during the continuation of the term hereby created to keep the water of the demised premises clear of rubbish and other waste matter and not to discharge or permit or suffer to be discharged into the said water any rubbish sewage waste soil or noxious or offensive effluents or substances either from any land adjoining the same which shall now be or shall hereafter become the property of or shall be under the control of the Tenant or from any vessels from time to time being in the demised premises or from any permitted dock or jetty as hereinafter referred to.

(4) At all times and from time to time during the continuance of the term hereby created to keep all permitted docks and jetties on the demised premises in good and serviceable repair and condition.

(5) To maintain in good serviceable and operating condition (and where necessary to cause to be operated) all aids to navigation at present situate in or around the demised premises and to permit the Landlord at any time and from time-to-time place therein additional aids to navigation and after the same shall have been so placed to remain and if necessary operate the same.

(14) At all times during the term hereby granted subject to such temporary suspensions as may be necessary in the circumstances for the purposes of repairs or extensions to operate or cause to be operated in a proper and satisfactory manner upon the demised premises the business of a marina.

[4.] On 7 February 2013 the Claimant served the Defendant with a Statutory Notice pursuant to Section 16 of the Conveyancing and Law of Property Act (“the CLPA”) dated 5 February 2013 (“the Notice”) alleging that the Defendant breached the Covenants and requested that the Defendant remedy breach of the Covenants, within 90 days of the receipt of the Notice.

[5.] On or about March 2013 a “*Matrix comparison of the requested, proposed and actual works executed on the “Port Lucaya marina Dock Facility” located at Bell Channel Bay Parcels Y, Z and a portion O, Freeport, Grand Bahama.*” On 22 March 2013 Mr. Arthur (GBPA) estimated costs of outstanding repair work to be conducted by the Defendant.

[6.] On 5 July 2013, the Claimant commenced an action against the Defendant seeking (a) possession of the Marina; or (b) alternatively specific performance of the Lease; (c) costs; (d) interest at the statutory rate; and (e) any other relief that the Court may deem fit on the grounds that the Defendant breached the Sub-clauses.

[7.] On 31 July 2013 the Defendant filed a Defence denying the Claimant’s claim and stating, *inter alia*, that it had not repaired the concrete decking as it was unable to secure a building

permit to carry out the works. The Defendant also avers that at the date of entering into the Lease there were no navigational aids present along the eastern, western or central piers of the Marina nor had the Claimant sought its permission to place or erect the aforementioned navigational aids. The Defendant denied that it is required to repair and/or replace the wooden handrails located on or around the Marina under the terms of the Lease. With regard to the Claimant's alleged breaches the Sub-clauses in the Notice the Defendant averred 4.2 of its Defence as follows:

Since the issuance of the Notice on 5th February 2013 and prior to the commencement of this action, the Defendant has, inter alia, -

- a. Replaced all broken, decaying, warped and/or missing parts of the mooring wooden piles, wooden cross bracings, wooden joist and tie beam and bolts, wooden strip above the deck portion of the mooring piles and wooden joist beams where necessary in order to ensure the safety of the public;
- b. Secured all electrical conduits below the water or partially supported below deck of the docks on or around the property using a qualified Grand Bahama Port Authority licensed electrician, save those located directly below the concrete decking.
- c. Repaired the broken plumbing and sewage line located below the deck area at E28/E29 and E30/E31.

Evidence

[7.] The evidence of the parties is contained in the Witness Statements filed herein, the agreed bundle of documents and the viva voce evidence of the witnesses under cross-examination:

- (i) Paulette Ritchie filed on 22 November 2023 (*Claimant*)
- (ii) Dudley Francis filed on 7 November 2023 (*Claimant*)
- (iii) Arthur Jones filed 21 November 2023 (*Claimant*)
- (iv) Preben Oleson filed on 10 May 2022 (*Defendant*)
- (v) Chinyere Ijeoma filed on 10 May 2022 (*Defendant*)

Paulette Ritchie

[8.] Ms. Ritchie stated that she has been employed by the Claimant since 1997 and is currently its Senior Legal Counsel and Compliance Officer. Ms. Ritchie's evidence consisted largely of a chronology of events preceding the commencement the action and leading up to the date of execution of her witness statement.

[9.] Ms. Ritchie stated that the Notice was served on the Defendant's Registered Office of 5 February 2013 and its place business on 7 February 2013. On 13 March 2013 an interim inspection of the Marina was conducted by the Grand Bahama Port Authority ("GBPA").

[10.] Ms. Ritchie noted that several reports were prepared in relation to the Marina, namely: (i) Arthur Jones' (estimated costs of) *Repair Works Outstanding* dated 22 March 2013; (ii) Dudley Francis's *Condition Assessment Report* dated 8 August 2017; (iii) Mr. Francis' *Structural*

Condition Assessment Report dated 13 June 2019 which was provided to the Defendant on 9 August 2019; (iv) Arthur Jones/Nervee Engineering Ltd. Structural Report dated 17 August 2020.

[11.] Ms. Ritchie stated that GBPA issued a Final Notice for Repairs of the Marina on or about 23 September 2020 and required the Defendant to take measures to obtain a building permit for repair works no later than 30 September 2020; and the Defendant remains in breach of the relevant Sub-clauses.

[12.] On cross-examination Ms. Ritchie confirmed that she prepared and determined which provisions would be included in the Lease. She characterized the Lease as “*bare lease*”. Ms. Ritchie was shown Clause 5 of the Lease that began with the phrase “*Provided always*” and set out a list of events, if such an event(s) occurred entitled the Claimant to re-enter the Marina and the Lease would absolutely cease and determine. She agreed that Clause 5 contained an express provision for re-entry/forfeiture of the Lease. She was not aware of occurrence of any of the events listed in that Clause which would confer on the Claimant the right of re-entry/forfeiture. She alluded to the fact that the Defendant may have entered into receivership but did not include that in her Witness Statement.

[13.] Ms. Ritchie when taken to the recital B in the Lease stated that the phrase “*sub-clauses and conditions*” can be read disjunctively. She stated that the Sub-clauses were intended to be construed as conditions the breach of which the Claimant would be entitled to forfeit the Lease. She did not agree with the suggestion that in absence of the Sub-clauses in Clause 5 did not give the Claimant the right to forfeit the Lease. She stated that events listed in Clause 5 were additional to the Sub-clauses.

[14.] Ms. Ritchie agreed that paraphrasing Clause 4 of the Lease “*which essentially provides that PLM’s [the Defendant] right to peacefully enjoy the Demised Premises [the Marina] is conditional upon, inter alia, PLM’s [the Defendant] observance and performance of the various covenants contained in the Lease*” was incorrect as the Clause contained certain obligations assumed by the Claimant and not the Defendant to do certain things. She also conceded that the words “*is conditional upon*” are not contained in Clause 4 of the Lease. She did not agree with the suggestion that there are no words in Clause 4 expressed or implied, that the Defendant’s continued enjoyment under Lease was conditional upon it doing anything or that it conferred on the Claimant the right to forfeit the Lease for breach of any covenant by the Defendant.

[15.] Ms. Ritchie agreed that the “*Matrix comparison of the requested, proposed and actual works executed on the “Port Lucaya Marina Dock Facility”*”, which was completed prior to the commencement of the action, appears to suggest that some works had been done and the estimated costs for the completion of the works at \$174,437.20 and \$10,120.56 but the other

figure is obscured. She noted that this report was prepared after the service of Notice on the Defendant.

[16.] On re-examination Ms. Ritchie stated that she prepared the Lease and it would have been sent to the Defendant's attorney who at the time was Dupuch & Turnquest. She could not recall the date or the year that the Defendant may have gone into receivership during that time the Marina was ran and operated by a Court appointed receiver.

[17.] Ms. Ritchie states that she was unaware of any assignments of or charges on the Marina as the Lease expressly forbids any assignments.

Arthur Jones

[18.] In his witness statement Mr. Arthur Jones stated that while employed as Vice-President of the Building and Development Department at GBPA he conducted an inspection of the Marina on 13 March 2013. On 22 March 2013 he produced a "*Matrix comparison of the requested, proposed and actual works executed on the "Port Lucaya Marina Dock Facility"*" and estimated costs of such works. He produced an estimated costs consisted a sub-total of \$174,437.20 and a contractor's mark-up of about \$40,000 and a total of \$214,557.76.

[19.] On cross-examination Mr. Jones contradicted the assertion made at para. [5] of his Witness statement. He stated that he did not prepare the "*Matrix comparison of the requested, proposed and actual works executed on the "Port Lucaya Marina Dock Facility"*" attributed him in his Witness statement. However, he confirmed that he prepared the estimated costs of outstanding work dated 22 March 2013.

[20.] He wrote a letter of 3 April 2013, in response to Mr. Geiger's 11 March 2013 written request for structural drawings of the Marina's suspended concrete deck and reminded him that at a 28 February 2013 meeting he had already confirmed that GBPA did not have those drawings. He also stated that "*It was a simple process to determine the dimensions of the existing slab. You could core drill a portion of the slab to determine the reinforcing steel content.*"

[21.] Mr. Jones explained that "*core drilling*" as mentioned in his letter to Mr. Geiger entails cutting into a section concrete from around the steel to see what is there, and determine the cross-sectional area the concrete and the cross-sectional area of the reinforcing steel. The information collected from the "*core drilling*" or "*cuts into the concrete*" would allow an Engineer to determine the strength of that concrete member. Further that "*core drilling*" also entitles drilling pieces, pieces and pieces of the concrete member. He stated that this was a common practice when you don't have drawings. He also suggested that the Defendant could have knocked out parts of the rumble wall portion of the dock to get information to assist with creating drawings.

[22.] Mr. Jones stated that the estimated costs of cutting or core drilling a concrete slab depends on the size of the slab, its depth and mass. At the Marina he estimated the costs of cutting into the concrete “*core drilling*” at \$1,500 to \$2,000 of cross-sectional area of about 15 to 20 sq. ft. (speculation of his part). He noted that the Marina’s docking area consist of concrete and rumble walls near the land.

[23.] He was engaged by the Claimant, after he left the employ of GBPA, and conducted an inspection and assessment of the Marina 11 and 12 August 2020 and produced a Report on 17 August 2020 detailing his findings. He noted that Marina’s docks were no longer rigidly anchored to the earth horizontally or vertically making the same unsafe. He opined that this was a result of the Marina being subjected to Hurricanes Francis [*sic*] (2004), Jean [*sic*] (2004), Wilma (2005), Matthew (2016), Dorian (2019), and Tropical Storm Isaias (2020); , erosion, and wear and tear of common collisions between sea crafts and the docks’ foundation (the wooden pilings). He concluded that it may be more cost effective to build new docking facilities.

[24.] On cross-examination Mr. Jones explained the Building and Development Services Department (“BDSD”) of the GBPA under the Hawksbill Creek Agreement oversees safety in the physical environment within the Port Area. The BDSD reviews and approve building plans, issue building permits, conduct stage inspection of buildings and issue final approval of buildings/structures.

[25.] Mr. Jones stated that when conducted his inspection of the Marina in March 2013 he had not seen the Notice or any legal documents with respect to the Marina.

[26.] Mr. Jones was unable to say what works were outstanding of 5 May 2013 or 5 July 2013 (the date the Claimant issued the Writ). He can say that after his inspection of the Marina in March 2013 he knows that some repair work was done but could not say what was outstanding after that date.

[27.] Mr. Jones stated that Mr. Geiger in his 11 March 2013 requested structural drawings, at the behest of his Structural Engineer, guide him with the re-construction or repair to get the Marina back the structural integrity that is required. He stated Mr. Geiger could have obtained approval to carry out the repair work without the structural drawings; he would have to cut a section out the existing structure which would have provided him the same information that the drawings would have given him less the strength of the concrete. He conceded that you need to know how strong the concrete is. He would have to core drill and take pieces of the concrete and send them to a laboratory to have them analyzed to determine the strength of the concrete. Mr. Jones conceded that the core drilling and laboratory testing attracts a cost.

[28.] Mr. Jones conceded that the use of the phrase “core drilling” in his letter of 3 April 2013 was a poor choice of words but not poor judgment because he was addressing a contractor not a

lay person. He conceded that Mr. Geiger was correct to come to the BDSD for drawings because usually the GBPA would keep drawings for building permits as “a favour to the public”. However, he stated that the Defendant should have requested the drawings from the person who designed the Marina. GBPA normally keep such drawings for a period of at least 10 years but a lot of older drawings were damaged.

[29.] Mr. Jones accepted the suggestion that structural drawings are a key component to any repair project where structural integrity and safety are a priority. He then back tracked and said that as an engineer he could not answer; he qualified his response and stated having structural drawings was a key component sometimes, and other times they are not.

[30.] Mr. Jones accepted the suggestion that structural drawings serve as a map which show the size, spacing, and location of structural steel used for the support of concrete pedestals, columns and beams. Further he accepted the suggestion that failure to work in accordance with structural drawings would be careless and give rise to a risk to public safety

[31.] Mr. Jones did not accept the suggestion that core drilling enables one to investigate and assess an existing structure in order to produce new structural drawings; nor did he accept that core drilling enables one to investigate and assess an existing structure in order to produce new structural drawings.

[32.] Mr. Jones conceded that the suggestion that core drilling does enable the person inspecting based on core drilling to determine the size, location, and condition of the field was correct in some cases. He also accepted that a number of testing requirements were needed in the absence of proper drawings. On re-examination, Mr. Jones stated that he could only speculate the costs of laboratory testing on a concrete core removed as a result of core drilling.

Dudley Francis

[33.] Mr. Dudley Francis stated that on 8 August 2017, in his capacity as Chief Building Manager of the BDSD at GBPA, he inspected the Marina and produced a report of findings.

[34.] On 7 March 2019 he conducted another inspection of Marina and produced a Structural Condition Assessment Report on 13 June 2019 in which he concluded that the Marina required immediate repairs to prevent further collapse or catastrophic failures; recommended ongoing maintenance to prevent further deterioration; and noted no apparent major repairs since his August 2017 report. On 9 August 2019 he wrote a letter to the Defendant’s President notifying him of the contents of the June 2019 report and inquired into the plans to eliminate the defects/disrepair identified in his June 2019 report.

[35.] On 23 September 2020 shortly after the collapse of a portion of the docking at the Marina GBPA issued a final notice for repairs to the Defendant's President with a directive to apply for a building permit for the repair works no later than 30 September 2020.

[36.] On cross-examination Mr. Francis conceded that he had no knowledge whatsoever as to when the Marina was constructed. He agreed that the material used to construct the Marina consist of a combination of concrete reinforced steel and wood. Structural drawings are usually produced by a structural engineer and depict the main structural framework for any system that is constructed illustrated usually by plan views and sectional views. Sectional details give a picture of how that structure ought to be put together in terms of construction. Structural drawings are usually produced prior to construction however there are instances an engineer may be required to produce them after construction commonly known as "as built" drawings.

[37.] Mr. Francis stated that if available a contractor carrying out repairs on an existing dock should have access to the original structural drawings that were produced with the understanding that if the structure was constructed in accordance with those drawings, that information is extremely relevant; producing "as-built" drawings can also be significant as well. Mr. Francis stated that a contractor would normally check with BDSO to ascertain whether they had copies of the structural drawings on file, however, the engineer of record (the person who produced those drawings in the first instance) would also be a good source of obtaining that information.

[38.] Mr. Francis stated that to produce "as built" drawings an engineer would analyze the structure and if necessary, carry out tests on that structure to determine the structural integrity. He stated that such tests may include taking core samples and having them tested in laboratory for determine, for example the strength of concrete to assist with producing "as built" drawings.

Preben Oleson

[39.] Mr. Preben Oleson, the President and Director of the Defendant and of New Hope Holdings Limited stated that he recalled receiving the Notice alleging that the Defendant breached of the Sub-clauses and requiring the Defendant to carry out repair works outlined therein within 90 days.

[40.] Mr. Oleson stated that prior to 7 March 2013 he engaged the services of Wolfgang Geiger, a contractor, who engaged the services of Marrco Corderro, a structural engineer. Mr. Corderro determined he required the structural drawings for the concrete decking in order to design repair system that would be structurally sound.

[41.] Mr. Oleson also recalled that Mr. Geiger submitted a written request for the structural drawings to the GBPA on 11 March 2013. Further that his records reflect that by letter of 3 April 2013 GBPA advised that it did not have the drawings and he should proceed without them.

However, based on advice received from Mr. Corderro the Defendant determined that it would not be safe to proceed with repairs to the concrete decking in the absence of structural drawings. The Defendant is ready, willing and able to conduct the repairs upon the production of the structural drawings.

[42.] Mr. Oleson stated that he also explored the option of completely replacing the existing docks and replacing them with new structural sound docks. He stated that he does not accept that the Defendant is under an obligation to repair/replace wooden handrails on or around the Marina as claimed by the Claimant. Further there were no navigational aids present along the eastern, western or central piers around the Marina at the time of executing the Lease. Neither has the Claimant sought the Defendant's permission to enter the Marina to place or erect navigational aids along the aforementioned piers.

[43.] On cross-examination Mr. Olsen was shown a series of photographs, which were not dated, while he accepted that some of the wider views appeared to be portions of the Marina, he was not prepared to accept that some photographs zoomed in on particular areas or objects were a part of the Marina. He stated he cannot recall what the Marina looked like in 2013.

[44.] Mr. Olsen stated the Defendant spent several million dollars on the Marina after it was purchased in 2006 based on the requests over the years from GBPA. He recalled that the Marina was closed for a number of years because it was unsafe but could not recall the exact period of the closure.

[45.] Mr. Olsen accepted that certain repair works as were required by the Notice were not completed prior to the commencement of this action on the 5th of July 2013. He could confirm whether one of the outstanding works was the repairs to the electrical conduits. He also could not recall whether the mooring piles, wooden strips, and deck boards had been repaired or replaced.

[46.] Mr. Olsen stated that while he could not recall whether an application was made to GBPA for a work permit he recalled making a request for copies of structural drawings from GBPA. He also recalled that his structural engineer indicated that it would be impossible to do repairs without such drawings. He stated that he did not know what steps were required in the absence of the structural drawings. He did not recall being informed by his contractor or anyone else about the option of core drilling. He conceded that the Defendant has not replaced the concrete portions of the dock.

[47.] Mr. Olsen stated that he did not recall receiving a letter from GBPA dated 23 September 2020.

Chinyere Ijeoma

[48.] Ms. Chinyere Ijeoma stated that she was engaged by the Defendant's Counsel to advise generally on available options for effecting repairs, in the absence of structural drawings, to the suspended concrete docks like the Marina.

[49.] Ms. Ijeoma stated that she did not conduct an inspection of the concrete docks at the Marina. That her opinion was based on a review of information provided to her by the Defendant's Counsel, namely: (i) 11 March 2013 letter from Mr. Geiger to GBPA's Building Department, and (ii) 3 April 2013 from Mr. Jones to Mr. Geiger.

[50.] Ms. Ijeoma opined that Structural drawings are a key component of any repairs to be carried out on the concrete docks such as are at the Marina; conducting works in the absence of structural drawings would be careless and poses risks.

[51.] Ms. Ijeoma opined that the option of Core drilling into the docks' concrete slab to investigate and assess the existing structure was not economically practicable. It would require the services of a Structural Engineer. Additionally, a number of tests would have to be conducted on the steel and various concrete samples taken from the docks' slab which would require the services of Geotechnical Engineer. New "as built" drawings would require the services of a Draftsman or Engineer.

[52.] Ms. Ijeoma opined that Core drilling is an investigative process used by Engineers to assist with the production of new '*as-built*' drawings. The production of "*as built*" drawings would guide a contractor in effecting repairs.

[53.] On cross-examination Ms. Ijeoma stated that a repair job may be done in the absence of structural drawings although in her opinion that is not a safe practice. Structural drawings tells exactly what was performed on a site, what was installed and constructed. Oftentimes, structural drawings may be required if work is amended in the field, thereby requiring the need for "as-built" drawings.

[54.] Ms. Ijeoma explained that "deconstructed investigation" refers to a set of testing procedures that would be carried out in order determine whether or to proceed to deconstruct a building structure and it entails making sure that the environment and the structure is safe for any degree of deconstruction that needs to take place. If the material is concrete, checking PH-levels, to determine that the concrete is not going to start falling apart.

[55.] Ms. Ijeoma maintains that core drilling is not an economically practical option, it requires proper safety parameters to be in place as it is an invasive process that could led to collapse of the structure. Safety is the main consideration as an engineer. She stated that her opinion was not

based solely on the letters referred to in her witness statement but was also based on standard practice and what is required for such a project. She conceded that she did not conduct an inspection of the Marina but she has seen the docks at the Marina as visitor and not as an engineer.

Issues

[56.] The Court must determine:

- (i) Whether the Sub-clauses if breached would entitle the Claimant to forfeit the Lease;
- (ii) Whether the Defendant is entitled to relief from forfeiture under Section 16(2) of the CLPA; and
- (iii) Whether the Claimant is entitled to damages claimed herein.

Law and Discussion

[57.] It is not disputed that the parties entered in the Lease nor is it disputed that the Claimant served the Notice on the Defendant's registered office on 5 February 2013.

[58.] The Claimant at Clause 15 of the Lease reserved the right to serve the Defendant with a notice pursuant to Section 16 of the CLPA which states:

(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach. Lessee may apply for relief.

[Emphasis added]

[59.] Section 16(1) of the CLPA provides the mechanism employed to put a party in breach of a covenant or a condition under a lease on notice of such breach; specify which covenant(s) or condition(s) were breached; give a reasonable period to remedy such breach, if possible, and payment of compensation. The Court must determine whether the breach complained of warrants forfeiture of the demised premises or whether some other remedy may be applicable.

[60.] The Claimant served the Defendant with the Notice on 5 February 2013 referencing breach of the Sub-clauses by the Defendant and the works to be carried out to remedy the alleged breaches. The relevant portion of the Notice is set out below:

[the Claimant] “is of the opinion that the following works should be executed to remedy the breached ... including but not limited to the following works:

Repair Works

1. The following broken, decaying (structurally unsound) warped and/or missing parts to the docks located on or around the premises must be replaced throughout: -
 - a. mooring wooden piles, wooden cross bracings, wooden joist and tie beams (supporting the wooden docks) and bolts;
 - b. the wooden strips above the deck portion of the mooring piles;
 - c. the wooden joists and beams;
 - d. the concrete decking and supporting concrete pedestals/columns and beams.
2. All electrical conduits below the water or partially supported below deck of the docks on or around the premises must be adequately secured by a qualified (The Grand Bahama Port Authority Licensed) electrician.
3. The broken plumbing and sewage line located below the dock area specifically at E28/E29 and E30/E31 at the marina must be repaired immediately, as sewage is being discharged into the water.
4. Wooden handrails on or around the premises must be replaced and/or repaired.
5. Navigational aids (lights) along the eastern pier, western pier and central pier on or around the premises must be repaired or replaced.

NOW THEREFORE DEVCO [the Claimant] in accordance with clause 15 of the Lease and pursuant to section 16 of The Conveyancing and Law of Property Act HEREBY REQUIRE you to execute such works as may be necessary to restore the premises within ninety (90) days after the date of service of this NOTICE upon you.

AND FURTHER TAKE NOTICE, pursuant to section 16 of The Conveyancing and Law of Property Act, that if you should fail within the said ninety (90) day period to comply with the provisions of this NOTICE DEVCO [the Claimant] may without further notice to you:-

1. Apply to the Court for relief.”

[61.] Counsel for the Claimant submits that the Court ought to construe the sub-clauses as conditions when the Lease is taken as whole. That no precise wording is required in the lease to determine whether a provision should be construed as a condition or a covenant if the intention of the landlord is clear in the lease. Counsel invites the Court to adopt the dictum of *Bayley, J.* in **Doe (on the demise of Henniker) v Watt** (1828) 8 B & C 308:

In a lease for years no precise form of words is necessary to make a condition. It is sufficient if it appears that the words used were intended to have the effect of creating a condition. They must be the words of the landlord, because he is to impose the condition.

[62.] Counsel for the Claimant submits it is clear from the provisions of the Lease and in Clause 1 in particular that the Claimant intended observance of the sub-clauses were fundamental to the continuance of the lease. Further the Claimant’s witness, Ms. Paulette

Ritchie, the draftsman of the Lease testified that it was the intention of the Claimant that the sub-clauses be construed as conditions in the Lease. Clause 1, *inter alia*, states:

In consideration of the rent **and the Tenant's covenants** hereinafter reserved and contained the Landlord hereby demises unto the Tenant ALL THAT certain piece or parcel of land containing by admeasurement Ten and Six Hundredths of an Acre (10.6) or thereabouts at present covered with water and being a portion of the bed of the sea in Bell Channel Bay Unit 3 on the Island of Grand Bahama

[63.] Counsel for the Defendant submits that Clause 5 of the Lease contains expressed provisions for re-entry or forfeiture by the Claimant on the occurrence of any of specific events listed therein, namely:

PROVIDED ALWAYS and it is hereby agreed and declared that **if the Tenant** [Defendant] **shall enter into liquidation** whether compulsory or voluntary (other than the voluntary liquidation for the purpose of amalgamation or reconstruction) or **shall be struck off the Registrar of Companies** or **if any permitted assignee of the Tenant being an individual shall become bankrupt** or **make any arrangement with his creditors for the obligation of his debts by composition** or **other wise dispose if the demised premises or any part thereof** otherwise **than in accordance with the provisions hereof then and in any such case it shall be lawful for the Landlord** [Claimant] **at any time thereafter to re-enter upon the demised premises or any part thereof in the name of the whole** and thereupon without prejudice to any right of action of the Landlord in respect of any antecedent breach of the Tenant's covenants or of any of the provisions or stipulation herein contained.

[64.] Counsel for the Defendant submits that the sub-clauses are not included in Clause 5 and as such ought not be construed as conditions. Further that the Defendant's obligation under the sub-clauses are mere warranties which would give rise to a claim in damages not forfeiture. That the Claimant having included a provision in the Lease which spoke expressly to the conditions upon which its right to re-enter the Marina cannot now rely on the argument that the breach of the sub-clauses confers upon it the right of forfeiture.

[65.] Counsel for the Defendant invites the Court to consider the observations of *Lord Ellenborough, CJ* and *Lawrence, J.* of on **Doe (on the demise of Lockwood) v Clarke** E.R. Vol.103 at p.313. In that case the defendant, Clarke, entered into a lease for 21 years covenant ed not to sublet or assign the demise premises to any other person, if he breached that covenant the landlord had the right to re-enter and the lease to cease and be void. Upon Clarke becoming bankrupt he ceased to occupy the demised premises and the term of the lease came to a natural end. The Court determined that this was not a case of forfeiture as Clarke's actual occupation was a condition annexed to the lease.

[66.] Counsel for the Claimant invites the Court to consider the entire lease, conversely the Defendant invites the Court to focus on those provisions that speak specifically to the events that

invokes the Claimant's right to re-enter the Marina. The Claimant argues the sub-clauses are not merely sub-clauses as they are part of the consideration for the Lease and are additional to those provisos found in Clause 5 of the Lease. The Defendant contends that the Claimant included therein specific provisos that clearly list the events which would confer upon the Claimant the right to re-enter ought not to be allowed to broaden the scope to include the sub-clauses.

[67.] Counsel for Claimant submits that the Defendant having failed to carry out the repairs set out in the Notice, the Claimant has the right of forfeiture of the Lease. Counsel directs the Court attention to the dicta of *Somervell LJ* in **Maley v Fearn** [1946] 2 All ER 583:

In the course of the argument in this case my attention was drawn to some observations by Morton LJ in *Norman v Simpson*. The matter arose in this way. It was said, and I think said rightly, **that a stipulation (to use a neutral term) against sub-letting did not necessarily give a right of re-entry**. The law is, I think, accurately stated in **Woodfall on Landlord and Tenant**, 24th Ed. at p 911:

'A lease may be determined by entry or ejectment for a forfeiture incurred either by **(1) breach of a condition therein in the lease**, or (2) **for a breach of any covenant, in case (and in case only) the lease contain a condition or proviso for re-entry for a breach of such covenant**.'

Agreeing, as I do, with Morton LJ that in this case there was evidence on which the county court judge could find (as I think he did) that this stipulation was a condition, its breach, of course, gave a right of re-entry.

[68.] The Court finds that in this case the sub-clauses in the Notice are covenants which impose an obligation on the Defendant to maintain the Marina in a specified state of repair and failure to comply therewith constitutes a breach of the covenant (sub-clauses). Breach of the sub-clauses do not automatically terminate the Lease unless they contained express provisions conferring on the Claimant the right of re-entry or forfeiture. The Court also finds that Clause 5 contains express conditions that may affect the continuation of the Lease and confer upon the Claimant the right to re-enter the Marina on the occurrence of specific events.

[69.] The evidence in this case has centered around whether or not the Defendant complied with the Notice and completed the repairs or any part thereof. Based on the evidence and various reports the Court places the repairs into two general categories: (i) those which may have been remedied; and (ii) those which were difficult or impossible to remedy.

[70.] The Court had the benefit of the observations and technical insight of three (3) engineers, namely, Mr. Jones, Mr. Francis and Ms. Ijeoma. With respect to the evidence of the learned engineers the Court notes the following:

Mr. Jones:

- (i) Mr. Jones' first report of 22 March 2013 (following his inspection) consisted of an estimated costs outstanding repair works at the Marina approximately one month after the Notice served on the Defendant.
- (ii) Mr. Jones (Nervee Engineering Ltd.) conducted an inspection of the Marina in August 2020 and concluded that in light of the state of the docks it would be more cost effective to construct new docks. It is noteworthy that Mr. Jones highlighted the effects of 3 successive natural disasters prior the lease of the Marina by the Defendant from the Claimant and 3 natural disasters after the commencement of the action, last being approximately one week prior to his 2020 assessment.

Mr. Francis

- (i) Mr. Francis (GBPA) conducted assessment of the Marina and compiled a report on 8 August 2017:
 - a. he noted that several timber balusters were replaced at the above deck guardrails from the western side to center side;
 - b. Electrical service repairs in progress at the Central dock;
 - c. he recommended that the Defendant engage a GBPA license structural engineer to assess and analyze the entire Marina; make recommendations for the repair and replacement essential structural members where necessary. The structural engineer should provide a report detailing his findings and recommendations; must obtain a building permit GBPA to carry out construction repairs as per the structural engineer's report a copy of which must accompany the building permit application.
- (ii) On 13 June 2019 he recommended that the Defendant engage a structural engineer of record to conduct an independent structural evaluation of the Marina; address the structural adequacy of the existing concrete quay walkway; make recommendations on the type of repair system a qualified contractor will need to employ.

Ms. Ijeoma

- (iii) Ms. Ijeoma's opinion was qualified as being based on a review of the information contained in the 2013 correspondence between the Defendant's building contractor and Mr. Jones; and unrelated visit to the Marina.

[71.] The Court accepts the evidence of the Defendant that some repairs were conducted as result of the Notice and that there was reluctance of the part of the Defendant to embark upon repairs to the suspended concrete dock/quay way without the structural drawings or "as built" drawings. The Court notes that the common thread in the evidence of the engineers is that preceding with such repairs without structural drawing would be unsafe under the standard practices of construction.

[72.] It is noteworthy that the reports in 2017, 2019 and 2020 on the state of the Marina were all prepared after the Notice and did not appear to factor in the effect that the intervening natural disasters, save and except for the concluding paragraph of Mr. Jones' 2020 report. The March 2013 a "*Matrix comparison of the requested, proposed and actual works executed on the "Port Lucaya marina Dock Facility"*" was completed prior to the expiration of the 90 days period and after the Notice.

[73.] The Defendant considered the alternative approach to dealing with the suspended concrete docks/quay ways, namely, to construct new docking facilities. Mr. Jones' 2020 report made a similar observation. There is no evidence that this alternative was explored or any plans to embark on construction of the same.

[74.] Counsel for the Claimant submits that the Defendant was given a reasonable period of time (90 days) to perform the remedial works to cure the breach of the sub-clauses as required by Section 16(1) of CLPA. Counsel invites the Court to consider that shorter periods have been found to be reasonable in similar circumstances. Counsel relies on the case of *Higgins v Texaco Bahamas Ltd* (1987).

[75.] Counsel for Claimant submits that the Defendant having failed to carry out the repairs set out in the Notice, the Claimant has the right of forfeiture of the Lease. Counsel directs the Court attention to the dicta of *Somervell LJ* in **Maley v Fearn** [1946] 2 All ER 583:

In the course of the argument in this case my attention was drawn to some observations by Morton LJ in *Norman v Simpson* . The matter arose in this way. It was said, and I think said rightly, **that a stipulation (to use a neutral term) against sub-letting did not necessarily give a right of re-entry**. The law is, I think, accurately stated in **Woodfall on Landlord and Tenant**, 24th edn, p 911:

'A lease may be determined by entry or ejectment for a forfeiture incurred either by **(1) breach of a condition therein in the lease**, or (2) **for a breach of any covenant, in case (and in case only) the lease contain a condition or proviso for re-entry for a breach of such covenant**.'

Agreeing, as I do, with Morton LJ that in this case there was evidence on which the county court judge could find (as I think he did) that this stipulation was a condition, its breach, of course, gave a right of re-entry.

[76.] The CLPA does not define what is reasonable notice and the Court finds that it must consider the nature of the demised premises, and determine whether 90 days reasonable in the circumstances of this case. The Court heard the testimony of the engineers, read and considered the various reports outlining the nature and complexity of the remedial finds that 90 days was not reasonable in the instant case.

[77.] The Claimant pleads in the alternative that in the event the Court is not minded to grant an order for possession or forfeiture that it considers the remedy of specific performance. Counsel cited the case of **Rainbow Estates Ltd. v Tokenhold Ltd.** (199) Ch.64, in which the landlord sought an order of specific performance of a tenant's covenant to repair the leased premises, *Mr. Lawrence Collins* stated that:

"In my judgment, a modern law of remedies requires specific performance of a tenant's repairing covenant to be available in appropriate circumstances, and there are no constraints of principle or binding authority against the availability of the remedy...

Subject to the overriding need to avoid injustice or oppression, it will be appropriate for the remedy to be available when damages are not an adequate remedy or, in the more modern formulation, when specific performance is the appropriate remedy ...

There was no constraint preventing the court from ordering specific performance of a tenant's repairing covenants where damages were not an

[78.] The Court also found the case of **Blue Manchester Ltd v Northwest Ground Rents Ltd.** [2019] EWHC 142 (TCC) instructive in which *Stephen Davies, J* considered whether a tenant was entitled to an order for specific performance against a landlord for covenants to repair in a lease and the circumstances in which specific performance should be granted at paras. [53] - [54] and [57] thereof:

[53] **It is well established that specific performance is a discretionary remedy which will only be granted where it appears to the court in all the circumstances to be just and equitable.** The court must always proceed with caution since it is a draconian remedy in the sense that failure to comply with an order for specific performance is a contempt of court.

[54] The applicable principles were considered and stated by *Mr. Lawrence Collins* (sitting as a deputy HCJ) in a disrepair case, **Rainbow Estates Ltd v Tokenhold Ltd** [1998] 2 All ER 860 at 868, [1999] Ch 64 at 73, as follows:

‘Subject to the overriding need to avoid injustice or oppression, the remedy should be available when damages are not an adequate remedy or, in the more modern formulation, when specific performance is the appropriate remedy.’

57. The point is also considered in *Dowding* at 28-07 (in the context of claims by landlords) as follows:

"The work which the tenant is to be ordered to carry out must be identified sufficiently for the tenant to know what he has to do, and for the court to know whether he has complied with the order. The landlord must therefore have prepared a schedule of the works which must be “sufficiently certain to be capable of enforcement”. It is thought that in general terms the schedule should be sufficiently detailed for a reasonably competent and experienced builder reading it to know what has to be done. Thus, a blanket requirement for the tenant to carry out “all works necessary to put the premises into repair in

accordance with the covenants to repair in the lease” will not be sufficient. **However, the degree of precision required will vary from case to case. The tenant may be well aware of what needs doing, or the disrepair may be so serious that some form of order is required immediately.**

[79.] Counsel for the Defendant submits that the Court may prevent the Defendant who has paid a large premium for a long lease at a low rent from losing its asset by a breach of covenant which has caused the Claimant no loss. Counsel draw the Court’s attention to the fact that the “shares” and the “goodwill” in the Defendant were purchased for the sum of \$3,500,000.00 on the express condition that the Claimant would grant a 99-year Lease to the Defendant at the reserved rent of \$1.00 per year (see **Billson v Residential Apartments Ltd** [1992] 1 A.C. 494 per *Templeman* at page 535 letter B)

[80.] Counsel for the Defendant submits that the Defendant may be entitled to an injunction preventing the Claimant from re-entering the Marina. Section 16(1) provides that a lessee may apply for relief. Section 16(2) qualifies that the provisions of Section 16(1) placing the onus on the Defendant to make the application either in the action brought by the Claimant or bring a separate action itself in any other action:

(2) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or for forfeiture, **the lessee may, in the lessor’s action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief, may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit.**

[Emphasis added]

[81.] The Court notes that Counsel for the Defendant observed, during his cross-examination of Ms. Paulette Ritchie, that a Section 16(2) application was available to the Defendant. It is settled law that a party is bound by its pleadings. The Defendant did not make an application for Section 16(2) relief in these proceedings, nor did it make such an application in any action commenced by it. Further Section 16(2) does not provide for such application to be brought by the Court on its own initiative. In the absence of such application this issue falls away.

Disposition

[82.] In all the circumstances of the case the Court hereby refuses the Claimant’s application for an order for forfeiture of the Lease. The Court hereby accedes the Claimant’s alternative prayer for specific performance in the terms as set out hereafter.

[83.] The Court hereby orders the Defendant to engage a GBPA licensed/approved structural engineer within 30 days to conduct a full assessment and analysis of the Marina. The structural engineer shall prepare a detailed report of his/her findings and recommendations on the type of repair or replacement system to be employed by a qualified contractor to remedy the breaches of the sub-clauses. The structural engineer's report shall be completed within 60 days of he/her engagement and such report shall be shared with the Claimant.

[84.] The Defendant shall apply to GBPA for a building permit to conduct the repairs or replacement as per the structural engineer's report a copy of which shall accompany the building permit application.

[85.] The parties are hereby ordered to forward to the Court their respective submissions on the issue of costs within 21 days. The Court shall determine the issue of costs on the papers.

Dated the 17 day of September 2026

[Original Signed and Sealed]

Constance Delancy
Justice