COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2018/CLE/gen/00451

B E T W E E N

NEW PROVIDENCE DEVELOPMENT COMPANY LIMITED

Plaintiff

AND

(1) WINDSOR FIELD DEVELOPMENT LTD.

(2) WINDSOR PLACE LTD.

Defendants

Before:	The Honourable Chief Justice Sir Ian R. Winder
Appearances:	Gail Lockhart Charles KC with Tracey Wells and Candice Knowles for the Plaintiff
	Leif Farquharson KC with John Minns and Christina Davis-Justin for the First Defendant
	Damian Gomez KC with Marilyn Meeres and Paula Adderley for the Second Defendant
Hearing date(s):	23 August 2021, 24 August 2021, 16 March 2022, 17 March 2022, 23 March 2022, 27 April 2022, 11 May 2022, 21 July 2023

JUDGMENT

WINDER, CJ

Introduction

[1.] This is an action between the Plaintiff, New Providence Development Company Limited ("NPDC"), and the Defendants, Windsor Field Development Ltd ("WFD"), and Windsor Place Ltd ("WPL"). This action concerns the development of the "One West Business Park", or "One West Plaza" ("the OWBP"), on Windsor Field Road in the Western District of New Providence.

Background

[2.] NPDC is the developer of the Old Fort Bay Town Centre ("the OFBTC") located south of Windsor Field Road and opposite the Charlotteville subdivision ("Charlotteville"). The OFBTC opened in 2011, when Solomon's Fresh Food Market, a supermarket, opened to the public. The OFBTC has some 20+ stores, offices and restaurants, 30,000 square feet of office space, and seven one-acre "building pads".

[3.] The OWBP is a mixed-use retail/office/restaurant/leisure commercial development that competes with the OFBTC. It has been developed by WPL on an approximately 4.79-acre parcel of land on the northern side of Windsor Field Road ("the Site"). It was described in one advertisement placed on www.bettermcrbahamas.com in the following terms:

> PRIME COMMERCIAL SPACE – ONE WEST Business Park is a brand new commercial development set to break ground early 2018 as approximately 5 acres of prime development land, strategically located on the busy Windsor Field road.
>
> The road is frequently travelled by many people as it is the main road to access communities such as Lyford Cay, Old Fort Bay and Albany. Within these communities are many banks, offices, restaurants and businesses. This property is also less than a mile of the airport its proximity to the airport provides a lot of potential for business from tourist [sic] arriving to and leaving the island.
>
> Phase 1 of ONE WEST will allow 12 units to be available for purchase or for lease. Each unit will comprise of 2000 or 3000 sq ft of interior space and two levels. Both office and retail space are available. This is a perfect location to attract and capture a large and loyal customer base and the area has been in need of great commercial space for many years. This is an opportunity that you do not want to miss!
>
> With the project being in its initial stages, it is a perfect time to reserve your unit at a pre-construction cost. Reserving a space in the pre-construction stage allow [sic[you to get your unit exactly to your liking. Fully customizable options upon request about fitting out your space.

[4.] WPL purchased the Site from WFD in 2017. The Site comprises a portion of an approximately 9.7-acre parcel of land which WFD purchased from NPDC between 2004 and 2005 ("the 9.7 Acres"). The purchase of the 9.7 Acres by WFD was part of a joint transaction with Turnberry Developments Ltd ("TDL"). TDL acquired an adjacent 24.44-acre parcel of land ("the 24.44 Acres") from NPDC.

[5.] On 30 December 2004, NPDC entered into an agreement for sale with TDL and WFD (the "2004 Agreement") respecting the 24.44 Acres and the 9.7 Acres. The 24.44 Acres was described in the First Part of the First Schedule of the 2004 Agreement. The 9.7 Acres was described in the Second Part of the First Schedule of the 2004 Agreement. Clause 15 of the 2004 Agreement provided that the two sales were not severable, i.e., neither sale could complete without the other.

[6.] Clause 19(2) of the 2004 Agreement ("Clause 19(2)") provided:

> The Purchasers hereby severally covenant and agree with the Vendor as follows, the provisions of this covenant to survive completion:-
>
> ...
>
> (2) Not to develop or permit or suffer to be developed any part of the parcel described in the First part of the First Schedule except as a residential subdivision with such restrictions covenants and conditions and provisions as are comparable with the Declaration of Covenants, Conditions and Restrictions for the adjacent Subdivision called and known as "Charlotteville" established by Charlotteville Developments Ltd. provided nevertheless that if the approval of the Town Planning Department shall not be granted in respect of such proposed land use of the parcel described in the First part of the First Schedule the Purchaser thereof shall be at liberty to develop the same for light commercial industrial use similar to the adjacent development called and known as "Airport Industrial Park" (with similar restrictive covenants) or in such other manner as the Town Planning Department would approve but subject in such case to the approval of the Vendor and not to develop or permit or suffer to be developed any part of the parcel described in the Second part except either as a similar residential subdivision or light commercial industrial use similar to the said "Airport Industrial Park" (with similar restrictive covenants) the Purchaser in each case submitting the standard form of conveyance for any lots or parcels forming part of either parcels for the approval of the Vendor and the Purchasers will enforce all of the material terms and conditions thereof and not materially waive the same or any material breach thereof without the consent of the Vendor to the intent that any lot or parcel forming part of such parcels described in either the First or the Second Parts of the First Schedule hereto shall remain subject at all times to the provisions of the same any approval or consent of the Vendor in this sub-clause not to be unreasonably withheld or delayed.
>
> In this sub-clause "Vendor" shall include its assigns to any of the rights herein contained.

[7.] Clause 14 of the 2004 Agreement provided:

> The said hereditaments and premises are sold and will be conveyed subject to the restrictions and stipulations contained in the Second Schedule hereto for the benefit and protection of the adjoining or neighbouring property of the Vendor and the assurances shall contain such provisions and

covenants (which shall be so framed that the burden thereof shall run with and be binding upon the said hereditaments and premises into whose hands soever the same may come) as may be necessary for giving effect to the same but so that neither the Purchaser thereof nor those deriving title under it shall be liable for a breach of the said restrictions and stipulations so far as they are negative in character which may occur on or in respect of the said hereditaments and premises or any part thereof after it or they shall have parted with all interest therein.

[8.] The Second Schedule to the 2004 Agreement contained the following restrictive covenants:

1. Not to allow any dangerous poisonous or objectionable effluent to be discharged on or about the said hereditaments and premises of a kind calculated to or that does in fact contaminate or pollute any water lying upon or below the surface of the same or any adjoining or adjacent property and to take all such measures as may be necessary to ensure that any effluent so discharged will not be corrosive or otherwise harmful to otherwise affect the condition of such water or cause the same to be less potable than would otherwise be the case and (but as a separate stipulation) the Purchasers at their own expense to the satisfaction of the Vendor or its assigns of such right and in a proper manner to remove and otherwise dispose of any effluent.

2. No hoarding, road sign, billboard or other erection shall at any time be erected or placed or suffered to be upon any part of the said hereditaments and premises for the purposes of exhibiting any advertisement or notice relating to any business operated thereon otherwise except with the consent in writing of the Vendor or other assigns of such right.

3.No building or other structure shall be created within Fifty (50) feet of the adjoining public road called and known as Windsor Field Road.

4. Not to do or permit or suffer to be done in or upon the said hereditaments and premises anything which may be or become a nuisance or annoyance or cause damage to the neighbouring owners or occupiers.

[9.] By two separate conveyances dated 21 February 2005 ("the 2005 Conveyances"), NPDC conveyed the 24.44 Acres to TDL and conveyed the 9.70 Acres to WFD. The 2005 Conveyances bound TDL, WFD, and their respective successors in title to observe the restrictions and stipulations in the schedules to the respective 2005 Conveyances. Those schedules contained restrictions in the same terms as those contained in the Second Schedule to the 2004 Agreement.

[10.] By two conveyances dated 29 June 2010, WFD conveyed two separate 2.41-acre portions of the 9.7 Acres to Benaly Holdings Limited ("Benaly") and Mobro Ltd ("Mobro"). WFD retained the Site, located to the west of the 2.41-acre parcels respectively conveyed by WFD to Benaly and Mobro. In the conveyances from WFD to Benaly and Mobro, the restrictive covenants contained in the 2005 Conveyances were referred to and incorporated by reference as "the said Restrictions". NPDC's prior consent to these conveyances was not sought or obtained by WFD.

[11.] Benaly and Mobro were companies affiliated with Anthony Myers ("Myers") and James Mosko ("Mosko"). Myers and Mosko were beneficial co-owners of WFD with Dana Wells ("Wells") up to 2010.

[12.] In December 2016, Benaly and Mobro entered into a joint venture with NPDC to develop their 2.41-acre parcels and a 4.82-acre parcel on the southern side of Windsor Field Road into the "Windsor Professional Centre", a light commercial industrial subdivision with some limited office space that is adjacent to the Site. The applicable restrictive covenants limit development to "light commercial industrial use".

[13.] By an agreement for sale dated 27 September 2017 ("the 2017 Agreement for Sale"), WFD agreed to sell the Site (therein described as an approximately 4.75-acre parcel of land) to Leon Blaiweiss ("Blaiweiss") or his nominee for the net sum of $1,700,000. Blaiweiss is a director and the principal shareholder of WPL. Wells acted for WFD in the sale; the Rt. Honourable Hubert Ingraham (the "Rt. Hon Ingraham") acted for Blaiweiss.

[14.] In the 2017 Agreement for Sale, Blaiweiss (as "the Purchaser") represented that he was a Permanent Resident of The Bahamas and would submit an application to register the purchase of the Site with the Investments Board following completion. The 2017 Agreement for Sale contained no reference to the use of the Site as a commercial development and it did not foreshadow that a permit from the Investments Board would be required in relation to the transaction.

[15.] Pursuant to clause 6.1 of the 2017 Agreement for Sale, which, by clause 10.7, was agreed to be one of the clauses of the 2017 Agreement for Sale that survived closing, "the Purchaser" covenanted with WFD to, from the closing date, "...abide and be bound by the restrictions covenants conditions and/ or stipulations regarding the Hereditaments as set out more fully in Schedule "B" annexed hereto".

[16.] Schedule B of the 2017 Agreement for Sale set out various restrictive covenants including:

> 1. Not to develop or permit or suffer to be developed any part of the Hereditaments except either as a residential subdivision with such restrictions covenants and conditions and provisions as are comparable with the Declaration of Covenants Conditions and Restrictions for the subdivision called and known as "Charlotteville" or light commercial industrial use similar to the "Airport Industrial Park" with similar restrictive covenants. ...
>
> For the purposes of clause 1 above the restrictive covenants and conditions applicable to the Airport Industrial Park Subdivision are set out in the Fifth Schedule of the extract from the Airport Industrial Park lot conveyance annexed hereto as Schedule 1.

[17.] In November 2017, the Rt. Hon Ingraham contacted the majority shareholder of NPDC, H. Hunter "Terry" White III ("White"), to advise that his clients were planning to build on the Site

(in White's words, "the land next to the 'Windsor Professional Centre'") but they were concerned about the restrictions applicable to the land. White invited the Rt. Hon Ingraham to provide him with details of the proposed development but the Rt. Hon Ingraham did not do so.

[18.] By an assignment agreement dated 8 December 2017 (the "2017 Assignment Agreement"), Blaiweiss assigned the benefit of the 2017 Agreement for Sale to WPL pursuant to clause 10.1 of the 2017 Agreement for Sale.

[19.] By a supplemental agreement made between the Defendants dated 11 December 2017 (the "2017 Supplemental Agreement"), the Defendants agreed to amend the 2017 Agreement for Sale to insert a new clause 6.2, a new clause 6.3 and a new "Schedule B1". The 2017 Supplemental Agreement was in the following material terms:

> 1. Clause 6 of the Agreement is hereby amended by the addition of the following as clauses 6.2 and 6.3:
>
> 6.2 The Purchaser hereby covenants and agrees with the Vendor and its assigns to the intent that the provisions of this covenant shall survive completion of the sale and purchase herein contemplated that the Purchaser shall not develop or permit or suffer to be developed any part of the Property except either as a residential subdivision with such restrictions covenants and conditions and provisions as are comparable with the Declaration of Covenants, Conditions and Restrictions for the adjacent Subdivision called and known as "Charlotteville" or light commercial industrial use similar to the "Airport Industrial Park" with similar restrictive covenants and for the purpose of this clause the restrictive covenants and conditions applicable to the Airport Industrial Park Subdivision are set out in the extract from an Airport Industrial Park lot conveyance annexed hereto as "Schedule B1".
>
> 6.3 The Purchaser with the object and intention of affording to the Vendor a full and sufficient indemnity in respect of the covenant contained in clause 6.2 and with the intent that the provisions of this covenant shall survive completion of the sale and purchase herein contemplated hereby covenants with the Vendor that the Purchaser and its assigns will henceforth duly observe and perform the said covenant and will at all times indemnify the Vendor and its assigns against all actions claims and demands whatsoever in respect of the said covenant.
>
> 2. Schedule B. Schedule B is hereby deleted in its entirety and the Schedule annexed hereto and marked "Schedule B1" is substituted therefor.

[20.] An extract of the restrictive covenants applicable within the Airport Industrial Park Subdivision (the "AIP restrictive covenants") was appended to the 2017 Supplemental Agreement as "Schedule B1". The AIP restrictive covenants are set out at para [67] below.

[21.] By a conveyance dated 11 December 2017 (the "2017 Conveyance"), WFD conveyed the Site to WPL for the agreed-upon purchase price. The 2017 Conveyance was in the same form and was subject to the same restrictions and covenants as were contained in WFD's 2005 Conveyance.

[22.] Neither WFD nor WPL submitted the 2017 Conveyance to NPDC for its approval either before or after the execution of the 2017 Conveyance.

[23.] WPL began work on the OWBP in February 2018. Around this time, the OWBP was marketed and promoted on the internet and in The Tribune Home Buyer's Guide as a commercial development with retail and office space available for purchase or lease.

[24.] Not much time elapsed before NPDC became aware that work had begun on the OWBP. Counsel for NPDC sent a letter dated 23 February 2018 to WFD seeking confirmation that the proposed development on the Site would not breach Clause 19(2).

[25.] Wells responded to Counsel for NPDC by advising her that the Rt. Hon Ingraham represented the developer of the Site and his (the Rt. Hon Ingraham's) client was aware of the restrictions applicable to the Site. Wells also expressed the view that he did not believe the Rt. Hon Ingraham's client intended to develop the Site incompatibly with Clause 19(2).

[26.] Wells' response prompted Counsel for NPDC to send a letter dated 28 February 2018 to Ingraham Law Chambers seeking confirmation from the Rt. Hon Ingraham that the proposed development on the Site would not breach Clause 19(2). A meeting was held on 6 March 2018 between *inter alia* Counsel for NPDC and the Rt. Hon Ingraham, at which Counsel for NPDC reiterated NPDC's concerns about a possible breach of Clause 19(2). This meeting was ineffectual, as WPL did not stop work.

[27.] As a "non-Bahamian" under the **International Persons Landholding Act** (the "IPLA") (as such expression is defined in **section 14** of the **IPLA**), under **section 3(1)** of the **IPLA**, WPL required a permit to lawfully acquire the Site as a "non-Bahamian". WPL did not obtain a permit prior to the execution of the 2017 Conveyance. Instead, WPL obtained a validating permit dated 14 March 2018 from the Investments Board. The result is that, by operation of **section 3(4)** of the **IPLA**, WPL only became the owner of the Site as a matter of law on 14 March 2018.

[28.] On 14 March 2018, when the 2017 Conveyance had been stamped but yet not lodged for recording, Counsel for NPDC lodged the 2004 Agreement at the Registry of Records. That same day, Counsel for NPDC also wrote to the Rt. Hon Ingraham to reiterate NPDC's objections to WPL's development on the Site and to advise that, if confirmation was not forthcoming by 19 March 2018 that no further steps would be taken to "further the intended breach of [Clause 19(2)]", NPDC would make "immediate and urgent application for injunctive relief".

[29.] In a letter dated 19 March 2018, the Rt. Hon Ingraham responded to Counsel for NPDC's letter of 14 March 2018 to the effect that the proposed development on the Site fell within the parameters of the AIP restrictive covenants. The Rt. Hon Ingraham enclosed a copy of the AIP restrictive covenants and confirmed that the proposed development of the Site would fall within the parameters of the restrictions.

[30.] As at 28 March 2018, the ground at the Site was in the process of being levelled, holes had been drilled, trenches had been laid and construction vehicles were present at the Site.

These proceedings

[31.] These proceedings were commenced by NPDC on 25 April 2018 by a specially indorsed writ of summons.

[32.] NPDC filed a summons on 3 May 2018 for an interlocutory injunction restraining the Defendants from developing or permitting or suffering to be developed any part of the Site except in accordance with the terms of Clause 19(2). No interlocutory injunction was granted as the application was not pursued.

[33.] NPDC amended its statement of claim on 21 June 2018.

[34.] NPDC's claim, in the amended form, seeks injunctive relief, equitable compensation, an account of profits, common law damages, interest and costs from the Defendants. NPDC's principal allegation is that the sale, development and marketing of the OWBP has breached Clause 19(2). NPDC contends that Clause 19(2) is binding upon not only WFD but also WPL. NPDC also alleges breach of fiduciary duty, breach of trust, knowing receipt, tortious interference and unlawful means conspiracy.

[35.] The Defendants filed defences on 24 May 2018 and 28 May 2018 denying all liability. The Defendants maintained that position after the amendment of NPDC's statement of claim.

[36.] The Defendants contend that the development of the OWBP does not breach Clause 19(2). The Defendants additionally assert that neither of them is liable for breach of Clause 19(2) in any event. The Defendants argue that WFD parted with all interest in the Site, Clause 19(2) is a personal covenant that is not binding upon WPL, there is no trust-beneficiary or fiduciary-principal relationship benefiting NPDC, and the Defendants did not conspire together to injure NPDC.

[37.] WPL filed not only a defence but also a counterclaim, which was amended on 26 July 2018. WPL counterclaims against NPDC for slander of title and malicious prosecution. The basis of the

slander of title claim is NPDC's allegation that WPL did not acquire title to the Site and NPDC's allegation that Clause 19(2) is binding on the Site. The basis of WPL's malicious prosecution claim is the allegation that these proceedings were commenced maliciously to cause injury without any faith in their sustainability.

[38.] By a summons filed on 28 June 2018, NPDC unsuccessfully applied to strike out WPL's counterclaim on the basis that it disclosed no reasonable cause of action and was scandalous, frivolous, vexatious and an abuse of process.

[39.] By a consent order filed on 8 July 2021, directions were given for a split trial of the issues of liability and injunctive/declaratory relief on the one hand, and the issues of the assessment of damages, equitable compensation, the taking of an account of profits and interest on the other.

[40.] Trial of the issues of liability and injunctive/declaratory relief commenced on 23 August 2021. Evidence was heard from six witnesses between 23 August 2021 and May 2022. The witnesses that testified were Myers, Alistair Henderson ("Henderson"), Philip Simon ("Simon"), White, Wells and Blaiweiss. I have their witness statements, which stood as their evidence in chief, and transcripts of the hearings at which they were cross-examined.

[41.] Following the completion of the evidence, the parties lodged written closing submissions in January 2023. At a hearing before me on 21 July 2023, it was confirmed that the parties would rely on their written closing submissions. Subsequently, WFD lodged supplemental closing submissions on 1 August 2023, which WPL adopted. I thank all counsel for their well-argued written submissions.

Issues

[42.] The issues which require the Court's determination were adequately set out in NPDC's Statement of Facts and Issues filed on 18 August 2021. They were as follows:

> **[A] Claims against WFD**
>
> [1] Breach of Clause 19(2)
>
> (i) whether WFD has breached Clause 19(2) by taking steps to develop the Site other than as a residential subdivision or for light commercial industrial use or permitted or suffered the Site to be developed other than as a residential subdivision or for light commercial industrial use?
>
> (ii) whether WFD has breached Clause 19(2) by failing to advise NPDC of the proposed transfer of the Site from WFD to WPL or to seek NPDC's approval to its terms?

(iii) whether WFD has breached Clause 19(2) by failing to enforce the material terms and conditions of the 2017 Conveyance?

[2] Breach of fiduciary duty

(i) whether WFD owed fiduciary duties to NPDC by virtue of WFD's obligations under Clause 19(2) and whether WFD acted in breach of those fiduciary obligations?

[B] Claims against WPL

[1] Breach of Clause 19(2)

(i) whether Clause 19(2) runs with the land and is binding on successors-in-title, including WPL?

(ii) if so, whether WPL is in breach of Clause 19(2) by purchasing, developing and marketing the Site for a development comprising retail/office/leisure uses?

[2] Inducement of breach of contract

(i) whether, if WFD has breached Clause 19(2), those breaches were induced by WPL with an appreciation that the course it had embarked upon would put WFD in breach of contract or was recklessly indifferent to such result?

[3] Clause 6 of the 2017 Supplemental Agreement

(i) whether clause 6 of the 2017 Supplemental Agreement is enforceable by NPDC against WPL directly, as the beneficiary of a constructive trust of the covenants/promises entered into by WPL with WFD for NPDC's benefit?

[4] Knowing receipt by WPL of property transferred in breach of duty

(i) whether WPL holds the Site as a constructive trustee subject to an equitable obligation to respect Clause 19(2) by virtue of WPL's knowing receipt of property transferred in breach of fiduciary duty?

[C] Joint liability – Conspiracy to injure

(i) whether the Defendants have combined together (without just cause or excuse) to: breach and/or procure breaches of Clause 19(2); breach and/or procure breaches of fiduciary obligations by WFD; or breach WPL's obligations owed to NPDC as the beneficiary of a constructive trust; and whether it was foreseeable (and therefore intended) that injury would result to NPDC by virtue of the Defendants' deliberate course of conduct?

[D] Relief

(i) whether NPDC is entitled to injunctive relief against the Defendants in respect of the contractual and/or tortious and/or fiduciary and/or equitable wrongdoings relied on by NPDC and, if so, in what terms?

(ii) whether by reason of the breaches of Defendants' breaches of Clause 19(2) and/or WPL's inducement of the breaches and/or the Defendants' conspiracy, NPDC has suffered loss and damage including by reference to negotiating damages principles?

(iii) whether by reason of WFD's breaches of fiduciary duties and/or WPL's breach of its obligations as a constructive trustee (and/or as a knowing recipient) NPDC is entitled to recover equitable compensation and/or an account of profits?

[E] WPL's counterclaim against NPDC

(i) whether NPDC has, at a matter of law, immunity from suit in respect of the statements particularised at paras [2] to [3] of WPL's counterclaim?

(ii) whether NPDC intended to publish the statements and did so with improper motive/malice, whether the statements were false, and whether the statements caused WPL actual financial loss?

(iii) whether NPDC commenced these proceedings maliciously and whether WPL suffered actual financial loss as a result?

Threshold issue: Has the Site been developed in breach of Clause 19(2)?

[43.] It is only if the Site has been developed in breach of Clause 19(2), on the assumption that it is applicable, that it would be necessary to go on to address in any detail the other issues identified by NPDC. To ask whether the Site has been developed in breach of Clause 19(2) is to ask whether the Site has been developed for "...light commercial industrial use similar to the said 'Airport Industrial Park' (with similar restrictive covenants)" or not. This turns on the interpretation of that phrase. I turn, therefore, to the principles of contractual interpretation.

Principles of Contractual Interpretation

[44.] There was no real disagreement between the parties about the fact that covenants like Clause 19(2) in a deed or contract under seal are contractual rights between the original contracting parties. Nor was there any real dispute between the parties that the modern approach to the interpretation of contracts and other commercial documents should be applied to the 2004 Agreement. However, there was a lack of consensus about the exact principles that should be applied and each party relied on their own authorities, albeit with some overlap.

[45.] Counsel for NPDC submitted that the aim of contractual interpretation is to ascertain the objective meaning of the language the parties have chosen to express their agreement, citing **Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The "Ocean Neptune")** [2018] 1 Lloyd's Rep. 654.

[46.] Mrs. Lockhart Charles KC for NPDC submitted, relying on **Lloyds TSB Foundation for Scotland v. Lloyds Banking Group plc** [2013] UKSC 3, that the Court's task involves ascertaining the meaning of the words used *at the time the contract was entered into*, as the meaning of a contract cannot change subsequently in light of later developments.

[47.] In **Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc** [2013] UKSC 3, the Supreme Court of the United Kingdom stressed the importance of reading the words in a deed agreed in 1997 "in the light of what a reasonable person would have taken them to mean, having regard to what was known in 1997…" (to quote *Lord Hope* at para [34]).

[48.] Mrs. Lockhart Charles KC further submitted, citing **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 All ER 98, that the subjective understanding of the parties or the subjective meanings they ascribed to the terms of the contract is irrelevant when seeking to interpret a contract. Finally, she says, relying on **Chartbrook Ltd v Persimmon Homes Ltd** [2009] 1 AC 1011, that pre-contractual negotiations about the wording of contractual provisions are inadmissible to ascertain the meaning of a contract, even if those pre-contractual negotiations appear to reflect a consensus that was arrived at between the parties.

[49.] Mr. Farquharson KC for WFD submitted, relying also on the **Investors Compensation Scheme Ltd** case, that the Court's task is to determine the meaning that the words used by the parties would convey to a reasonable person. Such person having all the background knowledge that would have been reasonably available to both parties in the situation in which they were at the time of the contract. Citing **Tophams Ltd v Earl of Sefton** [1967] 1 AC 50, he says that when construing covenants in an instrument, as a starting point, the natural and ordinary meaning of the words used must be attributed to them. The Court's task when construing a document requires the Court to consider the entire deed or instrument and such background knowledge as a reasonable person would consider relevant.

[50.] Mr. Farquharson KC submitted that, according to **Chartbrook Ltd**, pre-contractual negotiations are not always inadmissible when interpreting a written contract but submitted that evidence of pre-contractual negotiations is admissible in order to establish a relevant background fact. Mr. Farquharson KC further submitted that evidence of pre-contractual negotiations is also admissible to establish the mutual intentions of the parties where such intentions are clear, citing **Union of Shop, Distributive and Allied Workers (USDAW) v Tesco Stores Ltd** [2023] 1 All ER 326.

[51.] Mr. Farquharson KC submitted, relying on **para [6-015]** of **Preston and Newsom: Restrictive Covenants Affecting Freehold Land** that, in the last resort, in a case of "interpretative doubt", regard may be had to the *contra proferentem* principle when interpreting a covenant.

[52.] Mr. Gomez KC for WPL, for his part, submitted that the Court ought to ascertain the meaning that the 2004 Agreement would convey to a reasonable person having all the background knowledge which would have reasonably been available to the parties in the situation in which they were in. He says that in doing so the Court ought to identify the meaning of the relevant words in light of the natural and ordinary meaning of the words, the overall purpose of the document, any other provisions of the document, the facts known or assumed by the parties at the time of the document's execution and common sense, but ignoring subjective evidence of any party's intentions. He also relied on a collection of well-known House of Lords and Supreme Court of the United Kingdom decisions on the interpretation of contracts, including the **Investors' Compensation Scheme Ltd** case, **Marley v Rawlings** [2014] UKSC 2, **Re Sigma Finance Corporation (in administrative receivership)** [2009] UKSC 2 and **Rainy Sky SA v Koookmin Bank** [2011] UKSC 50. It would be unproductive for me to recite them all.

[53.] In my view, the "well known and often quoted" decision of the House of Lords in the **Investors Compensation Scheme** case (as it was described by *Conteh JA* in **Crawford & Company International Inc v Crawford (Bahamas) Limited** [2012] 3 BHS J. No. 46) sets out the modern approach to the construction of contracts and other commercial documents and remains the *locus classicus* in this area. The principles have been restated and refined, but the basic approach remains settled.

[54.] A helpful and concise summary of the modern approach to contractual interpretation that takes into account developments post-**Investors Compensation Scheme** was provided by Popplewell J in **Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The "Ocean Neptune")** [2018] 1 Lloyd's Rep. 654. There, at para [8], *Popplewell J* said:

> The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more

> precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.
>
> [Emphasis added]

[55.] When construing a contract, it is true as a general proposition that the Court will place upon the words the meaning that they carried at the time the contract was entered into. **Lloyds TSB Foundation for Scotland** is an example. Another example is **Texaco v Dorothy Kernochan** [1973] AC 609, an appeal to the Privy Council from this jurisdiction. However, I do not understand this to be an inviolable rule. As I understand it, this is no more than a presumption which can be rebutted by contrary indications arising from the interpretation of the document and the apparent intention of the parties: **Dano Ltd v Earl of Cardogan** [2003] EWHC 239 (Ch), [2003] All ER (D) 309 (Feb) per *Etherton J* (as he then was) at paras [80] to [82].

[56.] In determining the objective meaning of the language which the parties have used, evidence of the subjective intentions of the parties, or the subjective meanings they ascribed to the terms of the contract, is inadmissible, as is evidence of the parties' subsequent conduct. These propositions are widely accepted and, in most quarters, taken for granted, but, if authority is needed, see **Prenn v Simmonds** [1971] 3 All ER 237; **James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd** [1970] AC 583; and **L. Schuler AG v Wickman Machine Tool Sales Ltd** [1974] AC 235.

[57.] On the issue of pre-contractual negotiations, evidence of what was said or done during the course of negotiations is inadmissible for the purpose of drawing inferences about what the terms of the contract mean, although such evidence may be admitted for other purposes such as establishing that a fact which may be relevant as background was known to the parties. In **Chartbrook Ltd,** *Lord Hoffmann* explained this at para [42]. While the decision of the English Court of Appeal in **USDAW** was understandably pressed by Mr. Farquharson KC as authority for a more generous position. *Bean LJ* referred at para [35] to pre-contractual statements being admissible in some circumstances, but he did so only briefly, without elaboration, and, before doing so, referred to previous learning. That suggests that Bean LJ, was not intending to break any new ground. The orthodox (and I suggest correct) position is as I have stated it. I am supported in this view by the decision of the English Court of Appeal in **Merthyr (South Wales) Limited (FKA Blackstone (South Wales) Limited) v Merthyr Tydfil County Borough Council** [2019] EWCA Civ 526 per *Legatt LJ* (as he then was) at para [50].

[58.] To the extent that the *contra proferentem* principle has been raised for consideration by Counsel for WFD, it is, I think, sufficient to state that it is a canon of construction that applies to the interpretation of ambiguous terms where the ordinary process of interpretation has failed. In

its traditional form, it requires that ambiguity in a contractual term be resolved against the drafter or proponent of the term in question. Its application in the context of covenants is not entirely free from doubt. There are authorities which suggest that ambiguities are usually to be resolved against the covenantor: see, for example, **Ferella v Otvosi** [2005] NSWSC 962 at para [21].

The factual background to the 2004 Agreement

[59.] As the authorities on the interpretation of contracts and other commercial documents direct me to consider what a reasonable person with all the background knowledge which would reasonably have been available to both NPDC and WFD at the time of the 2004 Agreement would have understood that language used in the 2004 Agreement to have meant, it is to the factual background to the 2004 Agreement that I next turn. That the factual background to the 2004 Agreement would prove highly contentious was foreshadowed before trial by the exceptionally limited scope of the Agreed Statement of Facts and Issues filed in this matter.

[60.] On the factual background to the 2004 Agreement, I found Myers and Henderson (Simon had no personal knowledge) to be credible witnesses and to be a bit more convincing than Wells when speaking to it. However, having said this, the Defendants' criticisms that NPDC overstated the industrial nature of the AIP at time of the 2004 Agreement and overstated the extent of its planning efforts were well-founded. I discuss this at *inter alia* paras [63], [64], [70] and [75] to [76] below. Some of Myers' and Henderson's evidence was undermined during cross-examination, and this has inevitably been reflected in my findings.

[61.] To put the 9.7 Acres into its geographic context, the 9.7 Acres was, prior to its severance or subdivision by WFD in 2010, situated between the 24.44 Acres and the AIP. The 24.44 Acres (which has been developed into the "Turnberry" residential subdivision since the completion of the sale of the 24.44 Acres to TDL) shared, and continues to share, a border with Charlotteville. Charlotteville was an existing subdivision when the 2004 Agreement was entered into. The 24.44 Acres is situated immediately to the west of what was formerly the 9.7 Acres before its severance or subdivision. The AIP is situated immediately to the east of what was formerly the 9.7 Acres before its severance or subdivision.

[62.] NPDC is one of the largest privately owned development companies in The Bahamas. NPDC acquired some 5,500 acres of land between the North Shore of New Providence and the South Shore of New Providence, not including Lyford Cay. Using that land, NPDC has developed several communities in the Western District of New Providence including Old Fort Bay, South Ocean and Mount Pleasant Village. NPDC has also seeded several other communities, including Charlotteville. These communities have predominantly existed independently, but, in some cases, restrictive covenants have been imposed to protect adjacent developments.

[63.] NPDC has planned the redevelopment of its land with some degree of care in an effort to ensure that there is a coherent and overarching plan for the area its developments are in. Where land has been sold by NPDC to third parties, NPDC has tried to exert control over the use of the land for the protection or benefit of its retained land. That control extends from restricting uses to regulating the appearance and maintenance of new developments. NPDC has enforced the restrictions it has imposed either through its agreements with the developers or through the conveyances to the developers. Another means by which NPDC has exercised control is through its "economic clout" (e.g., threatening to refuse to sell additional land to developers).

[64.] NPDC failed to establish that the control it has exerted has been "strict", as it claimed it was. While NPDC provided examples of it seeking to enforce Clause 19(2) after the 2004 Agreement was entered into, the AIP has developed to include a significant number of purely commercial uses since its inception in relatively close proximity to the OFBTC. Businesses such as Deltec Fund Services, Young's Fine Wine, Jimmy's Wines & Spirits, Bloom, Jones Photography, Struckum's Pest Control, Western Hardware & Lumber, 9 to 5 Shipping, Avis, A1 Car Rentals, Virgo Car Rentals, BDM Limited, Cacique International Limited, Taste of Europe, Cross Fit, Western Convenience Store, Café West by West, Another Man's Treasure, Chef's Pantry, Mac Fit 360, and Fight Sports Bahamas have all operated from the AIP. NPDC has not stopped this diversification.

[65.] NPDC formerly owned the land which today comprises the AIP subdivision. Airport Industrial Park Ltd ("AIP Ltd") developed that land after acquiring most it from NPDC. The first and second phases of the AIP subdivision were built out by AIP Ltd between 1997 and 2005. AIP Ltd was conveyed the majority of the lots comprising the AIP subdivision by NPDC on 17 July 1997, after which NPDC had no direct control over the uses of the AIP lots as the AIP is a "standalone" subdivision.

[66.] AIP Ltd intended that the AIP would be an industrial subdivision and lots were marketed to persons interested in industrial, heavy commercial or industry retail activity. However, the restrictions imposed in relation to AIP lots do not actually restrict the types of businesses that may be operated on the lots. The restrictive covenants in force at the AIP were framed primarily to protect third parties and the environment. The AIP restrictive covenants are thus broadly-framed in terms of their permitted uses.

[67.] More explicitly, the AIP restrictive covenants do not prohibit general retail or commercial activity and contain no restrictions limiting land use to "light commercial industrial use" akin to Clause 19(2). The AIP restrictive covenants are:

> 1.Not to erect or cause to be erected on the said hereditaments anything which shall be in breach of airspace requirements in connection with or as appurtenant to the Nassau International Airport.

2. Not to bring upon the said hereditaments any dangerous flammable explosive noxious or offensive substance without the consent of the Ministry of Works and the Purchaser or its assigns nor emit smoke in contravention of the said airspace requirements nor form any refuse dump nor to harbour vermin and not to permit or suffer the said hereditaments to be used as a dumping ground for the accumulation of garbage trash or other waste matter.

3. Not to allow any dangerous poisonous or objectionable effluent to be discharged into the sewers drains pipes or sewage disposal system or cesspit serving the said hereditaments or of a kind calculated to or that does in fact contaminate or pollute any water lying upon or below the surface of the Subdivision or any adjoining or adjacent property and to take all such measures as may be necessary to ensure that any effluent so discharged will not be corrosive or otherwise harmful to the said sewers drains pipes sewage disposal system or cesspit or cause obstruction or deposit therein.

4. Not to use the said hereditaments or suffer or permit the same to be used for any unlawful noisy or dangerous trade business manufacture or operation or for any purpose or in any manner which may be in contravention of the said airspace requirements or in any manner which may be in the Purchaser's opinion detrimental to the use and development of the Subdivision.

5. Not to erect or exhibit any signs or advertisements on the said hereditaments or any building thereon except as may be authorised by the Purchaser.

6. Not to obstruct or cause or suffer to be obstructed the roads of the Subdivision or the roadway connecting the same with Windsor Field Road by permitting or suffering the standing parking or storage of vehicles goods or merchandise thereon and to keep the same in a clean and tidy condition.

7. No temporary buildings shall be erected or allowed to remain on the said hereditaments except sheds or workshops to be used only for the works incidental on the erection of any permanent building or structure thereon.

8. No open toilet cesspit or pit for the disposal of any deleterious or other waste matter shall be dug constructed or allowed to remain on the said hereditaments.

9. No building or other structure shall be erected on the said hereditaments otherwise than in accordance with plans and specifications previously approved by the Vendor and by the Ministry of Transport (or other its successor or assignee) and no building or other structure shall be commenced on the same until such approvals shall be forthcoming.

[68.] No exhaustive list of the entities that occupied the AIP subdivision in December 2004 was placed before the Court, however, an incomplete list was provided by Myers based upon his recollection of the occupants at the time. In my view, Myers was a reasonably reliable witness on this particular issue given his connection to the AIP. The businesses operating at the AIP at the time of the 2004 Agreement included the following:

(i) a company engaged in the manufacture and sale of hot mix asphaltic concrete. The company sold asphalt to the Government and private road contractors;

(ii) a major residential and commercial builder, which had offices at the AIP mainly occupied by construction operators;

(iii) a landscaping contractor which also was involved in retail sales of plants and agricultural products. The landscaping contractor also had offices at the AIP where landscaping design/architecture work as carried out;

(iv) a manufacturer and engineering company which stored heavy equipment at the AIP;

(v) a company engaged in drilling drainage and water extraction wells which stored well drilling equipment at the AIP. The company also operated an office out of a container on its lot at the AIP;

(vi) a company engaged in manufacturing bleach and household chemicals, which sold its bleach and household chemicals from the AIP primarily to resellers and large distributors like food stores;

(vii) a company engaged in processing and cleaning contaminated soils which sold cleaned or processed soil or aggregate to contractors;

(viii) a retailer of building supplies to persons in the construction industry and the general public. This retailer also had offices in the AIP engaged in effecting the importation and sale of building supplies;

(ix) a liquid asphalt import, storage and distribution business which operated from an office at the AIP at which it dealt with the logistics of moving liquid asphalt transport containers from the United States of America to The Bahamas;

(x) a pool design and construction company which had offices at the AIP where pool design work was carried out and at whose premises pool products may have been sold;

(xi) a landscaping contractor with its maintenance storage and cleaning facility at AIP;

(xii) a paving company which used its premises for the storage of equipment;

(xiii) a concrete production company, which used its premises to store pumping equipment;

(xiv) a company which manufactured and assembled outdoor awnings and sold those awnings to the general public;

(xv) companies which sold industrial equipment or machinery to interested consumers;

(xvi) a construction company specialising in prefabricated homes which may have had offices at the AIP;

(xvii) an air freight import/export business; and

(xviii) two car rental companies which operated back offices from the AIP.

[69.] At the time of the 2004 Agreement, the AIP had the feel of an "industrial park" rather than a shopping mall or shopping centre, as the units at the AIP were far apart from one another, every business at the AIP had its own lot, and the infrastructure in the AIP consisted of wide roads and heavy lighting to handle industrial development. About 60% of the already-sold land in the AIP was allocated to heavy industry with the balance of the land allocated to other businesses. The AIP had a concrete plant, asphalt plant, waste water treatment plant and bleach and household chemical manufacturing facility at the rear of the development.

[70.] Some occupants or tenants at the AIP when the 2004 Agreement was entered into were engaged in retail or purely commercial activity. In addition, a number of occupants or tenants kept offices. However, most of the purely commercial activity at the AIP was oriented around the industrial, engineering and construction sectors and the offices at the AIP were not "stand alone" offices (in the sense that they were connected to the businesses operating there). Most of the businesses at the AIP were not of a type that would be found in a shopping mall or shopping centre and they did not receive general foot traffic as might occur at a shopping mall. There were no restaurants and no leisure/fitness tenants at the AIP when the 2004 Agreement was entered into. I am unable to accept Wells' evidence that there was a "good cross section of all kind of business activity" going on at the AIP when the 2004 Agreement was executed, as there is nothing to support this characterisation and Wells himself conceded under cross-examination that his recollection of the business activity occurring at the AIP when the 2004 Agreement was entered into was poor.

[71.] The initiator of the series of events that led to the 2004 Agreement being concluded was Myers. Myers approached NPDC in January 2004 in his capacity as owner and director of AIP Ltd to express an interest in purchasing *inter alia* both the 24.44 Acres and the 9.70 Acres from NPDC for AIP expansion and some possible multi-family residential development. AIP Ltd did not proceed with this transaction because there was another developer interested in the land and AIP Ltd did not wish to compete with them. However, in the end, both AIP Ltd and the other developer

withdrew their offers. This led Myers to enter into discussions with Wells and Mosko about forming a new entity to purchase the 9.7 Acres from NPDC.

[72.] WFD was formed by Myers, Wells and Mosko to purchase the 9.7 Acres from NPDC. When WFD was formed, it was negotiated between Myers, Wells and Mosko that Wells would own 50% of WFD, Benaly would own 25% of WFD and Mobro would own 25% of WFD. The purchase of the 24.44 Acres was pursued by Wells with other development partners through TDL, a separate entity.

[73.] The negotiation of the sale of the 24.44 Acres to TDL and the 9.7 Acres to WFD took place over several months prior to the execution of the 2004 Agreement in December 2004. The negotiations were handled by Leon Poitier ("Poitier"), a senior partner at Higgs & Johnson at the time, and Wells, then a partner at Graham Thompson. Experienced real estate attorneys therefore represented all sides of the transaction – Poitier for NPDC and Wells for TDL and WFD.

[74.] The intention between the parties was that the 24.44 Acres was to be developed as a residential subdivision similar to Charlotteville. The smaller 9.70 Acres was to be developed as an "extension of" (i.e. something similar to) one of the adjacent developments, i.e., either as a residential subdivision similar to Charlotteville and the 24.44 Acres, or as an extension of the AIP. The ability to engage in "light commercial industrial use" was attractive to, and something important for WFD, because of the possibility of market saturation in the residential market.

[75.] In the course of negotiating the 2004 Agreement, Wells was made aware that NPDC had a master plan which contemplated a town centre. Myers was also aware of this. When the 2004 Agreement was entered into, NPDC had already identified the land to the south of Windsor Field Road as the proposed location for a major new town centre retail development with the proposed name of the "Windsor Town Centre". NPDC's planning of the Windsor Town Centre had begun in 2003 and NPDC had already set aside large areas to the west of the proposed town centre and to the north of Windsor Field Road as new residential subdivisions to serve the new retail development.

[76.] Wells was aware of the proposed town centre but was never provided a plan by NPDC or the details of the proposed town centre. NPDC had not finalized or publicized the details of the proposed town centre when the 2004 Agreement was entered into nor had the NPDC land analysis plan dated 21 January 2005 been completed (though I note in passing that the land analysis plan was not detailed). It would not have been possible for a person in Wells' position to know what, exactly, would have constituted direct competition with NPDC's proposed town centre. Nevertheless, it would have been obvious to a reasonable person in Wells' position that NPDC's proposed town centre was intended to be a commercial area.

Has the Site been developed in violation of Clause 19(2)?

[77.] The true meaning of Clause 19(2) is a matter for me to decide. While Clause 19(2) is ambiguous, there has been no suggestion that Clause 19(2) is unenforceable or void for uncertainty because it is "impossible of apprehension or construction" (to adopt *Vaisey J*'s words in **National Trust for Places of Historic Interest or Natural Beauty v Midlands Electricity Board** [1952] 1 All ER 298). While the true meaning of Clause 19(2) is a matter for me, the burden of proving the necessary facts to establish that the development of the Site has breached Clause 19(2) (on the assumption that it is applicable) rests on NPDC.

[78.] Counsel for NPDC submitted that the phrase "light commercial industrial use similar to the [AIP]" in Clause 19(2) clearly prevents all elements of WPL's retail, restaurant, leisure and/or office scheme on the Site, which Counsel described as a "heavy commercial shopping centre for retail/office/restaurant/leisure purposes".

[79.] In support of this submission, NPDC asked the Court to have regard to the following averments, facts and matters (not all of which were established on the evidence):

(i) in December 2004, the AIP was exclusively occupied by businesses involved in the industrial (ie, engineering/building) sectors.

(ii) in December 2004, many businesses at the AIP were involved in industrial/manufacturing processes or light industrial uses, and the plots on the western side of the AIP adjacent to the 9.7 Acres were generally occupied by light industrial uses, with the heavier industrial processing plants further north.

(iii) in December 2004, there were no non-industrial or retail or restaurant or leisure/fitness centre tenants at the AIP.

(iv) the AIP was not set up in such a way as to make it attractive to retail consumers.

(v) no one with knowledge of the uses to which the AIP was put at the time of the 2004 Agreement would have understood the words "light commercial industrial use similar to the said Airport Industrial Park" to include ordinary shops not associated with the industrial and building trades, or a retail shopping destination.

(vi) it was known to all parties that NPDC would be developing land south of Windsor Field Road for a Town Centre, which would include retail, office, restaurant and leisure uses; and

(vii) the parties intended the 9.7 Acres to be an extension of the adjoining residential development or the AIP.

[80.] Counsel for WFD submitted that Clause 19(2) was not intended to be as restrictive as NPDC now seeks to assert. WFD argues that the restrictive covenants governing the AIP permit a range of uses across a variety of sectors and, therefore, the contention that WPL's activities give rise to a breach of Clause 19(2) is entirely without merit.

[81.] Mr. Farquharson KC further submitted that it is wholly contrary to business sense that the expression "light commercial industrial use" would exclude retail, restaurant, leisure or offices. Mr. Farquharson KC submitted that the words "commercial" and "industrial" are not legal terms of art, and ought not to be narrowly construed, particularly in the context of a use restriction, which by its nature constitutes a serious encroachment on legal property rights.

[82.] Relying on an electronic version of the *Cambridge Dictionary*, Mr. Farquharson KC submitted that the word "commercial" is a broad term which generally encompasses any activity, usually buying or selling, or trading goods or services, carried out for profit. The word "industrial", he says, is also broad and wide-ranging and can be used synonymously with the word commercial or can be used to refer to manufacturing or producing goods or a particular class or industry. Armed with these definitions, Mr. Farquharson KC submitted that, on their face, the words "light commercial industrial" do not exclude offices, restaurants or leisure spaces.

[83.] Counsel for WFD further submitted that the word "industrial" is unclear and ambiguous when considered in context. Counsel submitted that the business activities carried out at AIP at the time the 2004 Agreement was entered into provides guidance on the type of use envisaged by Clause 19(2). Counsel submitted that a number of businesses located at AIP in 2004 were using their premises for retailing, office-related, agricultural and various other commercial purposes or uses. Counsel also relied on evidence that the use of AIP lots has diversified further after December 2004 to include additional offices and retailing activity, including convenience stores, gyms, restaurants, liquor stores and wine retailers.

[84.] Mr. Farquharson KC commended to the Court the interpretations given to Clause 19(2) by Wells and Blaiweiss under cross-examination. Wells considered that "light commercial industrial use" is an abstract concept, devoid of any definition without the AIP restrictive covenants being used as a "frame of reference". Wells thought that the AIP restrictive covenants are what limit what is permissible on the Site. Blaiweiss who is a non-Bahamian, for his part, was informed that "there is no light commercial industrial meaning in The Bahamas" and, consequently, he sought to act conformably with the AIP's restrictive covenants and what he could see was being done at the AIP.

[85.] Counsel for WPL submitted that the covenant relied upon by NPDC is vague and, on its true construction, does not preclude WPL's development of the Site.

[86.] Mr. Gomez KC submitted that owners at the AIP openly used their properties for commercial uses such as retailing products and services, retailing office space, operating restaurant businesses, operating gyms and car rental operations while NPDC was able to legally control the AIP and, after the AIP property owners' association took control of the AIP (a point to which Myers testified and which was not put into controversy), more commercial activities were developed within the AIP.

[87.] Mr. Gomez KC further submitted that, in 2004/2005, each of NPDC and WFD knew of the use to which properties in the AIP were put, and the use to which the AIP was put in 2004/2005 is almost identical to the commercial use permitted by WPL on the Site.

[88.] Counsel for WPL submitted that "light commercial and industrial use similar to the Airport Industrial Park (with similar restrictive covenants)" enabled the Defendants and each of them to use the Site in the manner used by WPL and there has been no "deviation in use" committed by WPL.

[89.] It was my observation that, under Clause 19(2), WFD agreed in relevant part not to (so far as is relevant to the present circumstances) develop, permit or suffer to be developed the 9.7 Acres or any part thereof except for "...light commercial industrial use similar to the said 'Airport Industrial Park' (with similar restrictive covenants)". With this at the forefront of my mind, I cannot accept the proposition that the development and use of the 9.7 Acres was intended by the parties to be limited only by the restrictive covenants in force at the AIP.

[90.] The restrictive covenants at the AIP do not exclude purely retail or commercial activity. To accept Wells' interpretation, adopted by both Defendants, that any use permitted by the AIP restrictive covenants can be carried out on the Site, would, in substance, eliminate the requirement in Clause 19(2) that the "light commercial industrial use" be "similar to the AIP". This would violate a basic principle of interpretation that the Court must strive to give effect to every word of an instrument when interpreting it (see **Crosse v Bankes** (1886) SC 40 at page 41). I therefore cannot accept it.

[91.] My own reading of Clause 19(2) is that WFD agreed (i) not to develop, permit or suffer to be developed the 9.7 Acres except for light commercial industrial use similar to the AIP and (ii) to impose similar restrictive covenants. Incidentally, this is much the same as the interpretation that Henderson placed upon it in cross-examination (see pages 77 to 78 of the transcript of the 23 August 2021 hearing). The critical sub-issue under the "threshold issue" now under consideration

is therefore whether the OWBP falls within the scope of the expression "light commercial industrial use similar to the Airport Industrial Park…".

[92.] The phrase "light commercial industrial use" is ambiguous. The meaning of the modifier "light" is self-evident enough. However, the meaning of "commercial industrial use" is less clear. I am not certain that it has a natural and ordinary meaning or an accepted specialist or technical meaning (at least in The Bahamas). Be that as it may, as I accept the submission that the business activities carried out at AIP when the 2004 Agreement was entered into provides guidance on the type of use envisaged by Clause 19(2), I am relieved of the task of determining the meaning of "light commercial industrial use" in the abstract.

[93.] I have used "…the business activities carried out at AIP *when the 2004 Agreement was entered into*" (emphasis added) deliberately. Although both Defendants sought to emphasize the diversity of the commercial activity that has been permitted to take place at the AIP since the 2004 Agreement was entered into in their arguments, neither WFD nor WPL provided a basis or justification for reaching the conclusion that the diversification at the AIP since the 2004 Agreement was entered into is legally relevant to the construction of the 2004 Agreement. No case was made for accepting the thesis that the parties intended for the permitted uses of the 9.7 Acres to be capable of evolving based on diversification taking place at the AIP. When the context to the 2004 Agreement is taken into account, I do not think that the parties so intended. The prime reason I reach this conclusion is because neither NPDC nor WFD had control over the AIP and how it might develop in the future. While Myers (a co-owner of WFD at the relevant time) could influence how the AIP might develop, Wells and Mosko – or, at the very least Wells, could not.

[94.] Since I have rejected the thesis that the parties intended for the permitted uses of the 9.7 Acres to be capable of evolving based on diversification taking place at the AIP, the diversification of the businesses operating at the AIP after the 2004 Agreement was entered into is irrelevant to the true construction of Clause 19(2). As irrelevant to that issue, in my opinion, are (i) NPDC's attempts to enforce Clause 19(2) against TDL and WFD in 2008 and Benaly and Mobro in 2013 and (ii) NPDC's 17 January 2012 letter consenting to a liberal proposal to develop a part of the 9.7 Acres. Simply put, none of these matters occurring subsequent to the date the 2004 Agreement was entered into sheds light on what a reasonable person in the position of the parties when the 2004 Agreement was entered into would have understood Clause 19(2) to mean at the time the 2004 Agreement was entered into.

[95.] In my assessment, the important contextual matters or aspects of the factual background that bear upon the correct construction of Clause 19(2) are that:

(i) when the 2004 Agreement was concluded, the AIP was occupied by businesses predominantly involved in or associated with the manufacturing, infrastructure and construction sectors;

(ii) the offices at the AIP were not "stand alone" offices, in the sense that they were connected to the businesses operating at the AIP;

(iii) there was limited purely retail or commercial activity at the AIP;

(iv) the character of the AIP was far removed from that of a shopping mall or retail centre;

(v) the AIP was not set up in such a way as to make it attractive to retail consumers;

(vi) it was known to all parties that NPDC was planning to develop the "Windsor Town Centre" in the vicinity; and

(vii) the parties intended the 9.7 Acres to be an extension of the adjacent residential developments or the AIP.

[96.] The evidence establishes that the OWBP is a relatively large, dense shopping plaza with office space consisting of two blocks of two-storey units. Blaiweiss also admitted in cross-examination that WPL has or is putting "residential and offices on the second floor" of the units (page 32 of the 27 April 2022 transcript), though this was not pleaded by NPDC. The OWBP is, in my view, plainly not what Clause 19(2) envisaged. I therefore conclude with little hesitation that the development of the Site has breached Clause 19(2) on the assumption that it is applicable. I see nothing contrary to commercial common sense about this interpretation of Clause 19(2).

Issue [A][1](i): whether WFD has breached Clause 19(2) by taking steps to develop the Site other than as a residential subdivision or for light commercial industrial use or permitted or suffered the Site to be developed other than as a residential subdivision or for light commercial industrial use?

[97.] It is settled that, in the realm of restrictive covenants, the original covenantor remains liable to the original covenantee on a restrictive covenant even if there is no dominant tenement and even if he (the original covenantor) has parted with the servient tenement, because his liability is purely contractual. In addition, the original covenantor is liable in contract to the original covenantee for any breach of covenant committed by him while he remained seised of the servient tenement.

[98.] With the benefit of this exposition, I turn next to the issue of whether WFD, the original covenantor in this case, has breached Clause 19(2) by taking steps to develop the Site other than

as a residential subdivision or for light commercial industrial use similar to the AIP (with similar restrictive covenants) or permitted or suffered the Site to be developed other than as a residential subdivision or for light commercial industrial use similar to the AIP (with similar restrictive covenants), and is therefore liable to NPDC, the original covenantee in this case. This claim is made at para [61.3] of NPDC's amended statement of claim.

[99.] In considering this issue, I find it convenient to distinguish, as Counsel for WFD did in his written closing submissions, between the allegation that WFD actually developed the Site otherwise than as permitted and the allegation that WFD "permitted" or "suffered" the Site to be developed otherwise than as permitted.

[100.] With respect to the allegation that WFD developed the Site otherwise than as permitted, NPDC made no real attempt in its written closing submissions to support its claim that WFD was directly involved in developing the Site. There was considerable wisdom in that forbearance. As Counsel for WFD submitted, the word "develop" usually connotes building structures on the property. No reliable evidence was led or elicited at trial to the effect that WFD played any role in the development of the OWBP in this sense. Wells' evidence was that WFD has played no role whatsoever in the development or marketing of the Site. I readily accept that evidence and I find that WFD played no role in the construction or marketing of the Site or any structures or units thereon.

[101.] So far as relates Issue [A][1](i), then, the material question for this Court is whether there has been a breach of Clause 19(2) by WFD on account of it "permitting" or "suffering" the development of the Site otherwise than for light commercial industrial use similar to the AIP with similar restrictive covenants. The onus is on NPDC to establish a permission or sufferance.

[102.] NPDC's pleaded case is that WFD permitted or suffered the Site to be developed other than as a residential subdivision or for light commercial industrial use similar to the AIP with similar covenants "including by" the following matters:

> 61.3.1 Failing to enter into a conveyance containing equivalent restrictions on development to those contained in clause 19(2);
>
> 61.3.2 Failing to obtain the prior approval of the Plaintiff as to the terms of the Attempted Conveyance [i.e. the 2017 Conveyance];
>
> 61.3.3 Attempting to sell the Site to the Defendant in the knowledge that it is to be developed otherwise than for residential, recreational and related purposes or for light commercial industrial use similar to the Airport Industrial Park;

61.3.4 ...permitting and/or suffering the Second Defendant to develop the Site [for a retail, restaurant, leisure and office development] in circumstances where (because the Attempted Conveyance is null and void and of no legal effect) the First Defendant remains the legal and beneficial owner of the Site, as well as following the passing of title to the Site to the Second Defendant.

61.3.5 Approving a building or other structure on the Site which the Defendants intend to use for purposes outside clause 19(2) of the Agreement and/or without securing enforceable promises and/or undertakings from the Second Defendant not to do so.

[103.] The parties differed on the effect of a clause prohibiting an owner of land from "permitting" or "suffering" something to be done. Counsel for NPDC submitted that a covenant not to "permit" or "suffer' something imposes an obligation to take reasonable steps to prevent the offending activity, relying on **Berton v Alliance Economic Investment Company Limited** [1922] 1 KB 742.

[104.] In **Berton v Alliance Economic Investment Co Ltd** [1922] 1 KB 742, a lease contained a covenant that the lessee would not permit the premises to be used otherwise than as a dwelling-house. A sub-lessee let the premises to weekly tenants and the lessee sought possession against them but did not seek to eject the weekly tenants. The lessors brought an action for forfeiture of the lease for breach of the covenant by the lessee. The claim failed before the English Court of Appeal on the basis that the covenant had not been breached. *Atkin LJ* said in a concurring judgment at page 759:

It is not suggested that there is any difference between the words 'permit' and 'suffer' in this context, and I treat them as having the same meaning. It is clear that a person under a covenant not to use premises in a particular way cannot commit a breach of the covenant except by his own act or that of his agent. The same is true of a covenant not to permit. The user in one case and the permission in the other must be something which can be predicated of the defendant or the defendant's agent. It is not sufficient to show that the premises have been used in a way which would constitute a breach of the covenant; it must further be shown that the user is by the defendant or his agent, or that it is permitted by the defendant or his agent. It is not suggested that the appellants themselves used the premises wrongly; the facts are that they let them to MacIntosh and MacIntosh let them in separate tenements to the several undertenants. What is said is that the appellants permitted the premises to be used contrary to the terms of the covenant. To my mind the word 'permit' means one of two things, either to give leave for an act which without that leave could not be legally done, or to abstain from taking reasonable steps to prevent the act where it is within a man's power to prevent it. Acts which fall short of that, though they be acts of sympathy or assistance, do not amount to permission at any rate in the covenants with which we are dealing....

I am inclined to think that in certain circumstances a man may permit the continuance of an act if he can prevent it by taking legal proceedings and refrains from doing so. I can imagine a simple case, where a bailee, having agreed with the owner of a chattel not to permit any third person to have possession of it, is deprived of it by a third person; where he knows the third person is in possession of the chattel, and that a writ claiming a specific return to it could have but one result; if he refrained from taking proceedings I suggest that he might be held to have permitted the third

> person to have possession. But all the circumstances must be taken into account, and where there is a reasonable doubt whether legal proceedings to stop an act would be successful; where, for example, a person takes legal advice and comes to the conclusion that he could not reasonably expect legal action to be successful, there he does not permit the act by abstaining from legal proceedings. That is all that can be said against the appellants. ...
>
> [Emphasis added]

[105.] Mrs. Lockhart Charles KC submitted that, even if WFD did not play an active role in the physical development of the Site, it is nevertheless in breach of the prohibition on permitting or suffering the Site to be developed or used by WPL except as a residential subdivision or for light commercial industrial use similar to the AIP because it was manifestly reasonable for WFD to take all steps which it covenanted under Clause 19(2) to undertake to prevent the development or use of the Site except for the permitted uses.

[106.] Counsel for WFD submitted that WFD cannot be liable for "permitting" or "suffering" the Site to be developed in breach of Clause 19(2) because the two terms "permitting" and "suffering" have similar meanings and, once WFD conveyed the Subject Property to WPL, it had no control over WPL and, therefore, it could not have "permitted" the subsequent activities of WPL.

[107.] In support of this submission, Mr. Farquharson KC relied on **Hobson v Middleton** 108 ER 461 and **Tophams Ltd v Earl of Sefton** [1967] 1 AC 50. Mr. Farquharson KC described the **Tophams** case as the authority placed before the Court with "the closest factual similarity with the present case" in his supplemental written closing submissions (at para [9]).

[108.] In **Hobson v Middleton** 108 ER 461, the defendant covenanted with the plaintiffs in an indenture that he had not, at any time or times theretofore, made, done, or committed, or executed or knowingly or willingly permitted or suffered any act, deed, matter or thing whatsoever, whereby the premises mentioned in the indenture were impeached, charged, encumbered, or affected in title. It was alleged that the defendant in breach of the covenant had joined in with others and consented to the execution of a deed which charged the premises. *Bayley J* said at page 464:

> Now the words "permitting and suffering" do not bear the same meaning as "knowing of and being privy to"; the meaning of them is, that the defendant should not concur in any act over which he had a control. As far as the execution of the deed by himself, he admits the breach, but as to the residue, says he could not prevent it; and if "permitting and suffering" applies only to that which he could prevent, it is clear that his consent in this case was not a breach of the covenant.
>
> [Emphasis added]

[109.] In **Tophams Ltd v Earl of Sefton** [1967] 1 AC 50, Lord Sefton conveyed the Aintree racecourse in fee simple to Tophams Ltd ("Tophams") on 21 December 1949. In the conveyance to Tophams, Tophams covenanted with Lord Sefton to observe and perform the restrictive covenants set out in the third schedule of the conveyance.

[110.] One of the restrictive covenants was not to "cause or permit" the land to be used otherwise than for the purposes of horse-racing. The covenant by Topham to observe the scheduled restrictive covenants was expressed to be binding on Tophams only during Lord Sefton's lifetime and Tophams was expressly relieved of liability for breach of the covenant occurring on or in respect of the land conveyed after it parted with its interest.

[111.] Tophams entered into an agreement for sale with Capital & Counties Property Co. Ltd ("Capital & Counties") to sell the Aintree racecourse. Tophams was aware that Capital & Counties intended to develop the land for the purpose of building houses. Clauses 3 and 4 of the agreement for sale with Capital & Counties provided:

> 3. The property is sold subject to and with the benefit of the exceptions reservations adverse rights covenants restrictions declarations rents and other maters referred to in the documents set out in Sch. 1 hereto.
>
> 4. [Capital & Counties] shall in the conveyance and transfer to it covenant with [Tophams] by way of indemnity but not further or otherwise to perform and observe all covenants conditions stipulations restrictions and other matters to which the property is sold subject and to indemnify [Tophams] from and against all future liability arising in respect thereof.

[112.] Lord Sefton issued a writ to obtain a *qua timet* injunction preventing the completion of the sale from Tophams to Capital & Counties on the basis that Tophams would "permit" the land to be used for purposes other than horse-racing if they completed the sale to Capital & Counties knowing that it intended to use it for other purposes. An injunction was granted at first instance by Stamp J and was upheld on appeal by a majority of the English Court of Appeal (Sellers and Harman LJJ). That injunction was held to have been wrongly granted by a majority of the House of Lords (Lords Hodson, Guest and Upjohn) on further appeal, as Tophams could not be said to "permit" Capital & Counties to do what it proposed to do without being able to control it, and it would not be able to control it once it sold the land to Capital & Countries. The material parts of the majority's decision are to be found in the speeches of Lord Hodson, Lord Guest and Lord Upjohn at pages 64,65,68 and 73 to 76 of the *Appeal Cases* report.

[113.] Mr. Farquharson KC submitted, in the alternative, that it is doubtful that "reasonable steps" to prevent the alleged breach by WPL would have included taking legal action against WPL, as it is not clear that the legal action would have succeeded. In support of this submission, Mr. Farquharson KC relied on the **Berton** case. Mr. Farquharson KC also correctly noted that NPDC

did not plead that WFD was obliged under Clause 19(2) to take legal proceedings against WPL and yet failed to do so, a failing which precludes my consideration of the issue.

[114.] Counsel for WPL submitted, relying on the **Tophams** case, that once WFD sold its interest in the Site to WPL, WPL, as the owner of the fee simple estate, could not be controlled in its use of the Site by WFD or anyone else, and therefore WFD is not liable under Clause 19(2) for "permitting" or "suffering" the development of the Site contrary to Clause 19(2).

[115.] In my view, NPDC's claim that WFD permitted or suffered the Site to be developed other than as a residential subdivision or for light commercial industrial use similar to the AIP with similar restrictive covenants fails, but not precisely for the reasons given by the Defendants. I will first address why I hold that this aspect of NPDC's claim fails. As the Defendants placed heavy reliance on the **Tophams** case, I will then address why I regard the Defendants' arguments based on the **Tophams** case to be wrong in the particular circumstances of this case.

[116.] Having considered the authorities, it seems that, in some contexts, the terms "suffer" and "permit" have been construed by courts as synonyms, as the **Berton** case illustrates. I do not view this as being true only in specific contexts such as landlord and tenant (though equally, I accept the words may not be identical in every context). In **Ex parte Eyston** (1877) 7 Ch D 145, at page 149, *James LJ* expressed the strong view when interpreting a clause in a will that there is no substantial difference between the words "suffer" and "permit".

[117.] I do not understand my construction of "permit or suffer" to be very far from that of NPDC. However, I am unable to share NPDC's view that Clause 19(2) required or requires WFD to do what NPDC alleges it did or does, as the case may be, viz.: (i) to enter into a conveyance containing equivalent restrictions on development to those contained in Clause 19(2); (ii) to obtain the prior approval of NPDC as to the terms of the 2017 Conveyance; (iii) to refuse approval of buildings or other structures on the Site which are intended to be used for purposes outside Clause 19(2) unless secured by enforceable promises and/or undertakings; and (iv) to enforce the material terms of the 2017 Conveyance and/or refrain from unilaterally waiving them.

[118.] The simple point made by WFD in relation to Issue [A][1](ii) (whether WFD breached Clause 19(2) by failing to advise NPDC of the proposed transfer of the Site from WFD to WPL or to seek NPDC's approval to its terms) was that Clause 19(2) contemplated WFD submitting a "standard form conveyance" for a scheme of development or building scheme to NPDC. Where WFD did not in the event establish a scheme of development or a building scheme, it did not require WFD to submit the 2017 Conveyance to NPDC for its approval. For the reasons that are more conveniently set out in the discussion of that issue below, I accept this submission. The point made by Counsel for WFD can, in my view, be taken even further.

[119.] There are four points that are worthy of emphasis about Clause 19(2). The first is that Clause 19(2) was a covenant by both TDL and WFD, with respect to the 24.44 Acres and 9.7 Acres respectively. The second is that, as I have already mentioned, the intention between the parties to the 2004 Agreement was that the 24.44 Acres was to be developed as a residential subdivision similar to Charlotteville and the smaller 9.70 Acres was to be developed as an "extension of" (i.e. something similar to) one of the adjacent subdivisions. The third is that Clause 19(2) refers only to "Charlotteville" and "Airport Industrial Park", both subdivisions, by name. The fourth is that Clause 19(2) contemplated the submission by WFD of "the standard form of conveyance for any lots or parcels forming part of either parcels" for NPDC's approval and WFD enforcing "all of the material terms and conditions thereof" (i.e. the standard form conveyance).

[120.] In my view, when Clause 19(2) is read in context, the words "*...the Purchaser in each case submitting the standard form of conveyance for any lots or parcels forming part of either parcels for the approval of the Vendor and the Purchasers will enforce all of the material terms and conditions thereof and not materially waive the same or any material breach thereof without the consent of the Vendor to the intent that any lot or parcel forming part of such parcels described in either the First or the Second Parts of the First Schedule hereto shall remain subject at all times to the provisions of the same any approval or consent of the Vendor in this sub-clause not to be unreasonably withheld or delayed*" cast light on the true ambit of Clause 19(2).

[121.] As I read it, Clause 19(2) contemplated that WFD would develop the 9.7 Acres as a residential subdivision similar to "Charlotteville" or as a subdivision similar to the AIP, and that WFD would impose a scheme of development or building scheme with restrictive covenants applicable to all of the lots within the subdivision, and the use restrictions imposed by Clause 19(2) were directed towards achieving that object. Clause 19(2) further contemplated that WFD was to submit the standard form of conveyance for any lots or parcels in the scheme for NPDC's approval before conveying to the first purchaser in the scheme (as that is when the scheme crystallizes). WFD was thereafter to enforce all of the material covenants in the standard form conveyance against purchasers except with NPDC's consent. The parties did not contemplate that WFD would not develop the land and would instead sell separate parts of the 9.7 Acres to distinct developers.

[122.] Given the construction that I have placed on Clause 19(2), I am not persuaded that it would be correct to read Clause 19(2) as expansively as NPDC now urges me to. It is an unavoidable fact that Clause 19(2) was the result of negotiations conducted between sophisticated parties represented by experienced attorneys who were well-versed in the law of real property. It is equally a fact that Clause 19(2) was inserted for NPDC's protection in an attempt to restrict the use and enjoyment of the 24.44 Acres and the 9.7 Acres. In accepting Clause 19(2) as worded, NPDC must be taken to have accepted (and to have placed no or little weight upon) the risk that TDL and WFD would not develop the 24.44 Acres and 9.7 Acres as NPDC expected. In my view, to read Clause 19(2) as NPDC now urges me to do would be tantamount to crafting a new bargain, and would be

to read Clause 19(2) as imposing a wider obligation than it appears to have originally been intended to.

Issue [A][1](ii): Whether WFD has breached Clause 19(2) by failing to advise NPDC of the proposed transfer of the Site from WFD to WPL or to seek NPDC's approval to its terms?

[123.] I turn next to the issue of whether WFD is in breach of Clause 19(2) because it failed to advise NPDC of the proposed transfer of the Site from WFD to WPL or to seek NPDC's approval to its terms. This claim is made at para [61.1] of NPDC's amended statement of claim.

[124.] In NPDC's amended statement of claim, it is alleged that WFD breached Clause 19(2) by purporting to transfer the Site to WPL without obtaining the approval of NPDC to the terms of any conveyance because both WFD and WPL appreciated that NPDC would not have approved the terms of the conveyance of the Site from WFD to WPL and NPDC would have been acting reasonably in so declining.

[125.] In her written submissions, Counsel for NPDC submitted that WFD engaged in a "deliberate" and "calculated" failure to advise NPDC of the proposed transfer of the Site to WPL and failure to seek its approval as WFD appreciated that NPDC would not approve the sale of the Site to WPL on the terms on which it was effected.

[126.] NPDC also makes complaint that clauses 6.2 and 6.3 of the 2017 Supplemental Agreement do not "accurately or faithfully" reflect the restrictions within Clause 19(2) because the restrictive covenants should explicitly limit use of the Site to light commercial industrial use similar to the AIP. This complaint seems to me to be unfounded and I need not dwell on it. The complaint at para [61.2.2] of NPDC's amended statement of claim appears more meritorious, but it does not assist NPDC given the construction I have placed on Clause 19(2) whereby I do not find it to be applicable in the circumstances.

[127.] Counsel for WFD submitted that NPDC's allegation that the submission of the 2017 Conveyance to NPDC for approval would have prevented the breach NPDC now complains of is without merit because the terms of the 2017 Conveyance were "virtually identical" to the previously approved conveyances by NPDC including the 2005 Conveyance. Counsel also relied on the fact that WFD included the restriction on use in Clause 19(2) in the 2017 Agreement for Sale with WPL. Counsel for WPL made a similar point, submitting that the 2017 Agreement for Sale "mirrored" the 2004 Agreement and, therefore, NPDC could not have lawfully objected to the sale of the Site from WFD to WPL.

[128.] Counsel for WFD further submitted that the "accepted meaning" (as Counsel for WFD put it) of the reference to the term "standard form of conveyance" in Clause 19(2) is to a form of

conveyance which establishes a development scheme and that the wording "...to the intent that any lot or parcel forming part of such parcels described in either the First or the Second Parts of the First Schedule hereto shall remain subject at all times to the provisions of the same" was intended to refer to a restrictive covenant imposed on a development that was intended to be established as a scheme of development.

[129.] As I stated at para [118] above, I accept Counsel for WFD's submission regarding the correct construction of Clause 19(2). It is to my mind material that, together with the other expressions used in Clause 19(2), the expression "the standard form of conveyance" was used and not a wider expression like "any proposed conveyance". The use of the expression "the standard form conveyance" (emphasis added) suggests that it was intended that a single generic form of conveyance would be settled for the disposal of any part of the 9.7 Acres which WFD might dispose of. The expression is, in my view, inapt to cover WFD disposing of different parts of the 9.7 Acres to different developers in circumstances where the transactions might be different.

[130.] As Clause 19(2) did not contemplate WFD disposing of different parts of the 9.7 Acres to different developers, it did not contemplate WFD approaching NPDC in the circumstances that have transpired here. WFD is therefore not in breach of Clause 19(2) by failing to advise NPDC of the proposed transfer of the Site from WFD to WPL or in failing to seek NPDC's approval of the 2017 Conveyance's terms.

[131.] As the point was canvassed, I accept that NPDC would have been acting reasonably in declining to consent to the 2017 Conveyance had its consent been sought or required. It does not follow from the mere fact that NPDC did not place the use restriction in Clause 19(2) in the 2005 Conveyance to WFD that it would have been unreasonable for NPDC to insist that WFD place use restrictions in the conveyance to WPL. To have so insisted would have been in NPDC's legitimate commercial best interests and would not, in my view, have been something so outrageous or unreasonable or irrational that it would have been an abuse of NPDC's discretion to approve or withhold its consent.

Issue [A][1](iii): Whether WFD has breached Clause 19(2) by failing to enforce the material terms and conditions of the 2017 Conveyance?

[132.] I turn next to the issue of whether WFD is in breach of Clause 19(2) because it failed to enforce the material terms and conditions of the 2017 Conveyance. This claim is developed at paras [40A(f)], [61.3] and [61.4] of NPDC's amended statement of claim.

[133.] In the said paragraphs of NPDC's amended statement of claim, it is averred that, pursuant to Clause 19(2), WFD must enforce the material terms and conditions of its agreement with WPL and not materially waive the same or any material breach thereof. Accordingly, WFD must not

approve the erection of any building or structure on the Site if the said building or its proposed use would contravene the restrictions in Clause 19(2). It is further averred that WFD either failed to enforce the material terms and conditions of its agreement or it waived them.

[134.] Counsel for NPDC submitted that the covenants contained in clause 6.2 of the 2017 Supplemental Agreement were expressed to survive completion and were material terms/conditions of the conveyance of the Site from WFD to WPL for the purposes of Clause 19(2). By failing to take any steps to enforce against development which is in clear violation of the restrictions contained in clause 6 of the 2017 Supplemental Agreement and/or by either approving the construction of buildings to facilitate the unauthorized development or failing to take any steps to halt construction of unapproved buildings, WFD is in breach of Clause 19(2). Some of these allegations do not appear to have been pleaded.

[135.] Counsel for WFD submitted that NPDC's assertion that WFD failed to take any steps to enforce Clause 19(2) is ill-conceived because: (i) WPL was informed and made aware of the use restriction in Clause 19(2) and the use restriction in Clause 19(2) was re-stated in the 2017 Agreement for Sale; (ii) the development of the Site by WPL has not breached Clause 19(2) because the Site has been developed within the parameters of the use restriction and the AIP restrictive covenants; (iii) NPDC failed to show that WFD abstained from taking steps which would have prevented the breach. The conveyancing arrangements concluded between WFD and WPL effectively mirrored those entered into with NPDC in 2004 and 2005; and (iv) WFD included the restriction on use stated in Clause 19(2) of the 2004 Agreement in the 2017 Agreement for Sale.

[136.] Counsel for WPL submitted that WPL has not done or permitted anything which is inconsistent with the restrictive covenants set out in the 2017 Conveyance.

[137.] In my view, NPDC's claim that WFD is in breach of Clause 19(2) because it has failed to enforce the material terms and conditions of the 2017 Conveyance fails. This follows from the construction that I have placed on Clause 19(2), as I do not find it is applicable in the circumstances. However, there is a further point. As both counsel for the Defendants noted, clause 6.2 of the 2017 Agreement for Sale was not reflected in the conveyance to WPL (i.e. the 2017 Conveyance). There is therefore no evidence that WPL has done or permitted anything which is inconsistent with the restrictive covenants *in the 2017 Conveyance* or waived any material terms of the 2017 Conveyance.

Issue [A][2]: Whether WFD owed fiduciary duties to NPDC by virtue of WFD's obligations under Clause 19(2) and acted in breach of those fiduciary obligations?

[138.] Addressing next the issue of whether WFD owed fiduciary duties to NPDC by virtue of WFD's obligations under Clause 19(2), and whether WFD acted in breach of those fiduciary obligations, this claim is developed at paras 58A and 61 of NPDC's amended statement of claim.

[139.] NPDC alleges that, since 30 December 2004, WFD has owed fiduciary duties to NPDC in respect of the Site, including to act in good faith and not to place itself in a position where its duty to NPDC and its personal interest conflicted, particularly in relation to the terms of any sale of the Site by WFD and the continuing enforcement of the use restrictions and other stipulations of Clause 19(2) following conveyance of the Site to a third party. NPDC alleges those fiduciary obligations have been breached by the same acts and defaults as NPDC has relied on in relation to Clause 19(2).

[140.] NPDC submitted that the essential feature of fiduciary obligations arising in the commercial context is reliance by one party upon the other party to act on its behalf in some respect, rather than for its own commercial advantage. NPDC also argues that, even where the parties have entered into a commercial arm's length contract, there may be certain obligations which are fiduciary in nature, although the relationship between the parties is not a fiduciary one in the wider sense.

[141.] Mrs. Lockhart Charles KC submitted that the obligations imposed upon WFD to submit the standard form of conveyance to NPDC for its approval prior to any transfer, to ensure that any such transfer includes appropriate use restrictions/covenants binding on later owners, and to enforce all material terms and conditions are plainly fiduciary in nature because NPDC had no way of knowing what WFD planned to do with the land without WFD's cooperation and NPDC was entirely reliant upon WFD.

[142.] Mrs. Lockhart Charles KC further submitted that NPDC delegated the responsibility for enforcing the restrictions on the use of the land and associated covenants to WFD on its behalf and the enforcement of the restrictions was not in WFD's own commercial interests but NPDC's.

[143.] In support of NPDC's case based on breach of fiduciary duty, Counsel for NPDC relied on **Bristol and West Building Society v Mothew** [1998] Ch 1, **FHR European Ventures LLP v Cedar Capital Partners LLC** [2015] AC 250, **Al Nehayan v Ioannis Kent** [2018] EWHC 333, **Halton International Inc (Holdings) SARL v Guernroy Limited** [2005] EWHC 1968 (Ch), **Netherlands Society "Oranje" Incorporated v Kuys** [1973] 2 All ER 1222 and **John Youngs Insurance Services Limited v Aviva Insurance UK Limited** [2011] EWHC 1515 (TCC).

[144.] Counsel for WFD submitted that the relationship between NPDC and WFD was one of purchaser and vendor and their relationship was governed by the 2004 Agreement and the 2005 Conveyance without any obvious fiduciary component to their relationship.

[145.] Mr. Farquharson KC submitted that it is generally accepted that a party cannot rely upon tort or equity as imposing liability which is in conflict with the terms of a contractual agreement in force between the parties, citing **Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd.** [1985] 2 All ER 947 and **Hall (in his own right and as assignee of 1st Class Legal (IS) Ltd. v Saunders Law Ltd** [2020] EWHC 404 (Comm).

[146.] Mr. Farquharson KC also submitted that NPDC's breach of fiduciary claim is predicated upon a number of factual or legal assertions which NPDC has failed to prove or otherwise establish. The precise reasons Mr. Farquharson KC gave are more particularly detailed in his written closing submissions at paras [79] to [83] and I find it unnecessary to repeat them in this judgment.

[147.] WPL submitted that there is no basis for the imposition of a fiduciary duty or constructive trusts on the Defendants, as there is no evidence of any conspiracy to injure NPDC. It was submitted that, in effect, NPDC is seeking rectification of its agreement for sale through the imposition of fiduciary duties and constructive trusts, in the face of email correspondence between the attorneys for the contracting parties that demonstrate that there was a deliberate decision by both NPDC and WFD to make Clause 19(2) purely personal.

[148.] I accept WFD's submission that NPDC's breach of fiduciary claim is predicated upon a number of factual or legal assertions which NPDC has failed to prove or otherwise establish. Most notably, it cannot succeed in light of my holding that Clause 19(2) does not bear the construction NPDC has placed upon it and that it is not applicable in the circumstances that have transpired. However, I consider that the claim for breach of fiduciary duty fails even if one were to reach a different conclusion about the applicability of Clause 19(2).

[149.] A convenient starting point is that a fiduciary is someone who has undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence: **FHR European Ventures LLP v Cedar Capital Partners** [2015] AC 250 per *Lord Neuberger* at para [5]. The task of identifying whether a fiduciary duty exists in a particular circumstance can be complex. In **Glenn v Watson** [2018] EWHC 2016 (Ch), *Nugee J* (as he then was) provided a helpful summary of the law at para [131]. I extract the following relevant principles:

(i) There are a number of settled categories of fiduciary relationship. The paradigm example is that of trustee and beneficiary; other well-settled examples are solicitor and client, agent and principal, director and company (subject to the impact of the Companies Act 2006), and the relationship between partners..

(ii) Outside these settled categories, fiduciary duties may be held to arise if the particular facts warrant it. Identifying the circumstances that justify the imposition of fiduciary duties has been said to be

difficult because the courts have consistently declined to provide a definition, or even a uniform description, of a fiduciary relationship.

(iii) Fiduciary duties will not be too readily imported into purely commercial relationships. That does not mean that fiduciary duties do not arise in commercial settings – indeed they very frequently do, as the example of agency illustrates – but that outside the settled categories, this is not common, it being normally inappropriate to expect a commercial party to subordinate its own interests to those of another commercial party.

(iv) Without in any way attempting to define the circumstances in which fiduciary duties arise (something the courts have avoided doing), what the cases have in common is the idea that A will be held to owe fiduciary duties to B if B is reliant or dependent on A to exercise rights or powers, or otherwise act, for the benefit of B in circumstances where B can reasonably expect A to put B's interests first. That may be because (as in the case of solicitor and client, or principal and agent) B has himself put his affairs in the hands of A; or it may be because (as in the case of trustee and beneficiary, or receivers, administrators and the like) A has agreed, and/or been appointed, to act for B's benefit. In each case however the nature of the relationship is such that B can expect A in colloquial language to be on his side. That is why the distinguishing obligation of a fiduciary is the obligation of loyalty, the principal being entitled to *"the single-minded loyalty of his fiduciary"*: someone who has agreed to act in the interests of another has to put the interests of that other first. That means he must not make use of his position to benefit himself, or anyone else, without B's informed consent.

(v) This analysis also explains why fiduciary duties will not readily be found in commercial settings. In commercial dealings the relationships are (usually) primarily contractual; and it is of the essence of commercial contracts that each party is (usually) entitled, subject to the express and implied constraints of the contract, to seek to prefer his own interests, and is not obliged to put the interests of the other party first.

(vi) Even if a party is held to have owed a fiduciary duty to another party, the nature of the fiduciary obligations owed is itself a fact-sensitive enquiry, to be determined by considering the particular relationship between the parties. Thus for example in *John v James* the defendants were not disposed to dispute that the publisher owed a fiduciary obligation to account for royalties received, but it was disputed, and had to be decided, whether it owed a fiduciary obligation in respect of exploitation of the copyrights; in *Ross River* Morgan J had found that the defendants owed fiduciary duties in certain respects but not others, and the Court of Appeal found that the duties were more extensive.

[150.] I am satisfied that WFD did not owe NPDC any fiduciary duty in the present case. While I accept that it is possible that, in a commercial contract, certain obligations may be fiduciary and others not, in my view, the relationship between these parties was purely contractual. The terms of the 2004 Agreement and the 2005 Conveyance governed their duties to each other without any wider equitable overlay. No useful authority was provided by NPDC to support its contention and WFD was, on a proper reading of the 2004 Agreement, given powers or discretions exercisable on behalf of NPDC requiring it to subordinate its own interests.

[151.] The situation in the present case is, for example, far removed from that in **John Youngs Insurance Services Limited v Aviva Insurance Service UK Limited** [2011] EWHC 1515 (TCC), one of the cases relied on by NPDC, where Aviva trusted Youngs to decide whether claims by policyholders were valid as its agent. The mere fact that NPDC relied on WFD not to harm its economic interests is not a sufficient reason to find a fiduciary duty. In this connection, the remarks of *Richard Salter KC* in **John Hall v Saunders Law Limited and others** [2020] EWHC 404 (Comm) at para [55] are instructive:

> It is notoriously difficult to identify with precision the kind of circumstances that justify the imposition of fiduciary duties. It is clear that it is possible for fiduciary duties to arise even in a commercial setting. It is, however, also clear that it is not enough that one party simply "trusts" or is relying on the other party to perform an obligation to turn a contractual obligation into a fiduciary one. Something more than that is required to attract the intervention of equity. As Lord Mustill observed, when delivering the judgment of the Privy Council in *In re Goldcorp Exchange*:
>
> > .. No doubt the fact that one person is placed in a particular position vis-a-vis another through the medium of a contract does not necessarily mean that he does not also owe fiduciary duties to that other by virtue of being in that position. But the essence of a fiduciary relationship is that it creates obligations of a different character from those deriving from the contract itself ... Many commercial relationships involve just such a reliance by one party on the other, and to introduce the whole new dimension into such relationships which would flow from giving them a fiduciary character would (as it seems to their Lordships) have adverse consequences far exceeding those foreseen by Atkin LJ in In re Wait [1927] 1 Ch 606. It is possible without misuse of language to say that the customers put faith in the company, and that their trust has not been repaid. But the vocabulary is misleading; high expectations do not necessarily lead to equitable remedies.
>
> [Emphasis added]

[152.] As I have held that WFD did not owe NPDC any fiduciary duties, it follows that no issue of breach of fiduciary duty arises.

Issue [B](1)(i): Whether Clause 19(2) not to develop or permit or suffer the Site to be developed except as a residential subdivision or for light commercial industrial use similar to the AIP runs with the land and is binding on successors-in-title, including WPL?

[153.] I turn next to whether Clause 19(2) not to develop or permit or suffer the Site to be developed except as a residential subdivision or for light commercial industrial use similar to the AIP runs with the land and is binding on successors in title including WPL.

[154.] As background, the general rule, crystallised in English law since **Tweddle v Atkinson** (1861) 1 B & S 393 and entrenched by the House of Lords in **Dunlop Pneumatic Tyre Company Limited v Selfridge and Company Limited** [1915] AC 847, is that *a stranger to a contract cannot, in a question with either of the contracting parties, take advantage of the provisions of the contract, even where it is clear from the contract that some provision of it was intended to benefit him*. This is the fundamental doctrine of privity.

[155.] One exception to the doctrine of privity is that, in equity, restrictive covenants which run with the land are able to bind the original covenantor's successors in title, provided that they took the land with notice of the restrictive covenants. Such restrictive covenants can, depending on the circumstances, be enforced by a successor in title to the original covenantee. In this fashion, restrictive covenants resemble easements, in that they are rights over one plot of land (the servient tenement) for the benefit of another plot of land (the dominant tenement).

[156.] *Rand J* of Supreme Court of Canada provided a helpful description of the nature of restrictive covenants in **Noble v Alley** [1951] SCR 64, where he explained at page 69:

> Covenants enforceable under the rule of *Tulk v. Moxhay*, are properly conceived as running with the land in equity and, by reason of their enforceability, as constituting an equitable servitude or burden on the servient land. The essence of such an incident is that it should touch or concern the land as contradistinguished from a collateral effect. In that sense, it is a relation between parcels, annexed to them and, subject to the equitable rule of notice, passing with them both as to benefit and burden in transmissions by operation of law as well as by act of the parties.

[157.] NPDC submitted that Clause 19(2) runs with the land under the doctrine in **Tulk v Moxhay** 41 ER 1143. They submitted that, in order for a covenant to run with the land, it is necessary to demonstrate (i) a covenant which is negative in nature and intended to "run with" the land, (ii) that the plaintiff retains proximate land which is benefited by the covenant and (iii) that the defendant was on notice of the covenant prior to acquiring its interest in the land, citing **Whitgift Homes Ltd v Stocks** [2001] EWCA Civ 1732.

[158.] Mrs. Lockhart Charles KC submitted that the criteria thus identified are each satisfied here, as Clause 19(2) is negative in nature and was intended to run with the land, NPDC retains the OFBTC, which is benefited by Clause 19(2), and WPL was on notice of Clause 19(2) prior to acquiring its interest in the land.

[159.] Mrs. Lockhart Charles KC relied on **Millbourn v Lyons** [1914] 2 Ch 231 and **Lynnthorpe Enterprises Ltd v Sidney Smith (Chelsea) Ltd** [1990] 8 EG 93 in support of NPDC's position. I found neither authority relevant or helpful. The former concerned a case in which the clause imposing restrictions in the agreement for sale was prefatory and the agreement for sale was superseded by the conveyance. The latter concerned leasehold covenants and appeared to be strongly influenced by that context.

[160.] NPDC also sought to rely on the registration of the 2004 Agreement in the Registry of Records on 13 March 2018 prior to the registration of the 2017 Conveyance to argue that WPL is bound by the covenants contained in the 2004 Agreement. NPDC argued that the registration of the 2004 Agreement on 13 March 2018 constituted deemed notice to WPL.

[161.] Counsel for WFD submitted that Clause 19(2) did not run with and bind the 9.7 Acres as it was a "personal" covenant between the parties.

[162.] Mr. Farquharson KC submitted that the only restrictions expressly stated to "run with and bind" the 9.7 Acres were referred to in clause 14 of the 2004 Agreement and contained in the Second Schedule of the 2004 Agreement. The covenants in clause 19 of the 2004 Agreement were not so expressed.

[163.] In his supplemental written submissions, Counsel for WFD adopted the argument advanced in the **Tophams** case (at page 58) that "when the draftsman [of the original conveyance] wished to bind the land, he knew very well how to do it". Counsel submitted that the same could be said of clause 14 and Clause 19(2) of the 2004 Agreement, having regard to the terms of the 2005 Conveyance.

[164.] Mr. Farquharson KC further submitted that the covenants contained in clause 19 of the 2004 Agreement were understood by the parties to be "personal" covenants between WFD and NPDC, as reflected in the language of Clause 19(2) itself. Counsel pointed to Wells' testimony at trial where he said as much and pre-contractual email correspondence between Wells and Poitier as evidence that this understanding was mutual. Counsel also drew attention to the fact that Clause 19(2) of the 2004 Agreement was not included in the 2005 Conveyance, whereas clause 14 was.

[165.] Counsel for WPL submitted that (i) the covenant relied upon by NPDC was a personal covenant contained in clause 19 of the 2004 Agreement which was excluded from the covenants intended to run with the land set out in clause 14 of the 2004 Agreement (*expressio unius est exlucsio alterius*) and (ii) as there is no privity of estate nor privity of contract between NPDC and WPL, the result is that NPDC's claim for breach of covenant is fatally and fundamentally flawed.

[166.] In support of this submission, WPL relied upon **Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board** [1949] 2 KB 500, **Beswick v Beswick** [1968] AC 58, **White v Bijou Mansions Ltd** [1937] Ch 610, **Austerberry v Oldham Corporation** (1885) 29 Ch D 750, **Jones v Price** [1965] 2 QB 618, **Re Royal Victoria Pavilion, Ramsgate** [1961] Ch 581 and **sections 56(1), 78(1)** and **79(1)** of the UK's **Law of Property Act, 1925**. **Re Royal Victoria Pavilion, Ramsgate** [1961] Ch 581 was the most relevant of the authorities cited.

[167.] In **Re Royal Victoria Pavilion, Ramsgate** [1961] Ch 581, Thanet Theatrical Enterprises Ltd. ("Thanet") acquired a leasehold interest in the Royal Victoria Pavilion from Ramsgate Corporation. By a conveyance dated 7 July 1952, Thanet conveyed and assigned to F.T.S. (Great Britain) Ltd. the King's Theatre and the Ramsgate Picture House, which were freehold, and the Palace Theatre and Sangers Hotel and Restaurant, which were leasehold. Thanet assigned the Royal Victoria Pavilion to Ramsgate Pavilion Ltd. on 9 January 1953, who in turn assigned the

Royal Victoria Pavilion to the plaintiff. At that time, F.T.S. (Great Britain) Ltd retained the King's Theatre, which lay 175 yards to the west of the Royal Victoria Pavilion. The plaintiff applied *inter alia* for a declaration that clause 5 of the conveyance dated 7 July 1952 (a covenant by the vendors with the purchasers to "procure" limitations in the use of the Royal Victoria Pavilion) was not binding on him. That relief was granted. WPL cited **Re Royal Victoria Pavilion, Ramsgate** for its discussion of **section 79** of the UK's **Law of Property Act 1925**, but, more relevantly, *Pennycuick J* stated *inter alia*:

> The view that the covenant in clause 5 is intended to be of a purely personal character derives much support from the clauses which immediately precede and follow it. Clause 4, which as regards sub-paragraphs (a) and (c) at any rate is plainly intended to run with the land, is introduced by the apt words "The purchasers for themselves and their successors and assigns hereby covenant with the vendors." Clause 6, which is plainly intended as a purely personal covenant, is introduced only by the words "the vendors hereby covenant with the purchasers." It would be strange draftsmanship to interpose between these two covenants a covenant intended to run with the land, and yet only introduced by the words "the vendors hereby covenant with the purchasers."

[168.] I am satisfied that Clause 19(2) is not a restrictive covenant that runs with the land and binds WPL. It is a purely personal covenant that defines obligations between WFD and NPDC. In order for a covenant to run with the land and bind a successor in title of the original covenantor, the burden of the covenant must have been objectively intended to run with the covenantor's land, as the **Re Royal Victoria Pavilion, Ramsgate** case and the **Tophams** case (see, for example, the dissenting speech of *Lord Wilberforce* at pages 81 to 82) illustrate. I accept the submission made by both counsel for the Defendants that it is clear the draftsman or draftsmen of the 2004 Agreement and the 2005 Conveyance knew how to impose covenants intended to run with the land and that he or they chose not to do so in relation to Clause 19(2). That choice was deliberate because the parties intended Clause 19(2) to be purely personal. This is seen in the distinction in language between clause 14 of the 2004 Agreement and Clause 19(2), the provisions of the 2005 Conveyance and the wording of clause 19 itself.

[169.] Firstly, with respect to the distinction in language between clause 14 of the 2004 Agreement and Clause 19(2), clause 14 of the 2004 Agreement expressly provided that the 24.44 Acres and 9.7 Acres were sold and would be conveyed "*subject to the restrictions and stipulations contained in the Second Schedule hereto for the benefit and protection of the adjoining or neighbouring property of the Vendor and the assurances shall contain such provisions and covenants (which shall be so framed that the burden thereof shall run with and be binding upon the said hereditaments and premises into whose hands soever the same may come) as may be necessary for giving effect to the same*...". In sharp contrast, Clause 19(2) had the "Purchasers" covenant in relation to their own actions or omissions with no reference to land to be benefited and no stipulation that the covenant would burden the 24.44 Acres and the 9.7 Acres or that the conveyance should include provisions to do so.

[170.] Secondly, with respect to the provisions of the 2005 Conveyances, they bound TDL, WFD, and their respective successors in title to observe the restrictions and stipulations in the schedules to the respective 2005 Conveyances. The 2005 Conveyances employed standard conveyancing language to achieve this:

> 2. The Purchaser for itself and its successors in title and so as to bind so far as may be the said hereditaments and premises hereby conveyed into whosoever hands the same may come and so that this covenant shall be for the benefit and protection of the property of the Vendor adjoining or adjacent to the said hereditaments and premises hereby conveyed or any part or parts thereof hereby covenants with the Vendor and its successors in tile that the Purchaser and its successors in title and those deriving title under it will observe and perform the restrictions and stipulations contained in the Schedule hereto provided that neither the Purchaser nor those deriving title under it shall be liable for a breach of the said restrictions and stipulations so far as they are negative in character which may occur on or in respect of the said hereditaments and premises or any part thereof after it or they shall have parted with all interest therein.
>
> "Successors in title" shall mean and include the owners and occupiers for the time being of the said hereditaments and premises hereby conveyed or the adjoining or adjacent property of the Vendor as the case may be and those deriving title under them respectively.

[171.] The schedules in the 2005 Conveyances contained restrictions in the same terms as those contained in the Second Schedule to the 2004 Agreement, which were plainly intended to be binding on the 24.44 Acres and the 9.7 Acres, as per clause 14 of the 2004 Agreement. The restrictions in clause 19 were not included and no provision was made in the 2005 Conveyances for those provisions – in my view, deliberately.

[172.] Finally, the inclusion of the clause 19 provision in the 2004 Agreement suggests that at the time of the making of the 2004 Agreement, the draftsman or draftsmen intended to extend the benefit of parts of clause 19 to assigns and successors of the Vendor, but no similar provision was made in relation to the burden of clause 19, including the use restrictions in Clause 19(2). No provision was made that the Purchasers covenanted on their own behalf and on behalf of their assigns or successors in title and, instead, clause 19 contemplated that the Purchasers would undertake certain actions themselves. Clause 19 says:

> The Purchasers hereby severally covenant and agree with the Vendor as follows, the provisions of this covenant to survive completion:
>
> (1) Notwithstanding the provisions of paragraph 1, of the Second Schedule hereto the proposed development of the said hereditaments and premises may include but shall be limited to road construction, heavy equipment works, trenching, land clearing, drainage colverts and lakes, building construction and other related works and in such connection neither the Purchasers nor their agents workmen or others so employed shall be liable for a breach of the same except upon the negligence of any such parties which shall cause material contamination to the intent

that the proposed development and works carried out thereon in a manner consistent with similar developments shall not constitute a breach of the said restriction.

(2) Not to develop or permit or suffer to be developed any part of the parcel described in the First part of the First Schedule except as a residential subdivision with such restrictions covenants and conditions and provisions as are comparable with the Declaration of Covenants, Conditions and Restrictions for the adjacent Subdivision called and known as "Charlotteville" established by Charlotteville Developments Ltd. provided nevertheless that if the approval of the Town Planning Department shall not be granted in respect of such proposed land use of the parcel described in the First part of the First Schedule the Purchaser thereof shall be at liberty to develop the same for light commercial industrial use similar to the adjacent development called and known as "Airport Industrial Park" (with similar restrictive covenants) or in such other manner as the Town Planning Department would approve but subject in such case to the approval of the Vendor and not to develop or permit or suffer to be developed any part of the parcel described in the Second part except either as a similar residential subdivision or light commercial industrial use similar to the said "Airport Industrial Park" (with similar restrictive covenants) the Purchaser in each case submitting the standard form of conveyance for any lots or parcels forming part of either parcels for the approval of the Vendor and the Purchasers will enforce all of the material terms and conditions thereof and not materially waive the same or any material breach thereof without the consent of the Vendor to the intent that any lot or parcel forming part of such parcels described in either the First or the Second Parts of the First Schedule hereto shall remain subject at all times to the provisions of the same any approval or consent of the Vendor in this sub-clause not to be unreasonably withheld or delayed.

In this sub-clause "Vendor" shall include its assigns to any of the rights herein contained.

(3) In the event that the Vendor, at its sole discretion, or other of its successors in title to the property situate on the southern side of the said Windsor Field Road opposite the said parcel described in the Second Part of the First Schedule shall wish to develop the same including the provision of an access road to the said Windsor Field Road therefrom the Second Purchaser shall permit the construction of a roundabout on the said Windsor Field Road where it adjoins the said parcel to the extent and at the approximate location shown on the diagram or plan hereto marked "C" the same to be constructed and maintained including any island in the center of the said roundabout at the cost in all respects of the Vendor or its successors in title until the same shall be adopted as a public thoroughfare and in such event the Vendor and the Second Purchaser shall grant reciprocal rights of way over those portions of the roundabout owned by the Vendor and the Second Purchaser as a means of access to and from the Second Hereditaments or the said property of the Vendor and Windsor Field Road as the case may be to facilitate the integration and use of the said roundabout as forming a prat of the Windsor Field Road public roadway structure and the Second Purchaser shall ensure that any sale or other disposition of any part of the land affected thereby will include a provision to the above effect to ensure that the purchaser or grantee thereof shall have actual notice of the same.

[Emphasis added]

[173.] It seems to me that, while some allowance can be made for the fact that expressions may have been used superfluously and the wording of clauses 14 and 19 may have been taken from different precedent books or crafted by different hands, the totality of the indications I have

identified demonstrates, to my mind, a clear intention that clause 19 of the 2004 Agreement generally and, more specifically, Clause 19(2), was not intended to run with the land and bind successors in title of "the Purchasers". I find it unnecessary to have regard to the evidence of pre-contractual negotiations led and elicited at trial to reach a conclusion on this point. I was not provided any satisfactory authority warranting recourse to such material.

[174.] For completeness, I ought to address the issue of notice of Clause 19(2). I find that WPL had notice of Clause 19(2) prior to completion of the sale of the Site. Wells provided the Rt. Hon Ingraham with the covenant. This is supported by documentary evidence and White's evidence, which I accepted, that the Rt. Hon Ingraham called him in November 2017 because of concerns about the covenant affecting the Site. Whether or not WPL had actual notice of Clause 19(2), **section 52** of the **Conveyancing and Law of Property Act** fixed WPL with the notice that the Rt. Hon Ingraham had of Clause 19(2).

[175.] However, notice is, in and of itself, insufficient to convert a purely personal covenant into a covenant that runs with the land. It has been established since at least **London County Council v Allen** [1914] 3 KB 642 that notice is wholly irrelevant to whether a restrictive covenant binds a purchaser of the land save that, because restrictive covenants run in equity, the absence of notice may enable the purchaser to raise a *bona fide* purchaser defence: see, for example, the decision of *Scutton J* in that case at page 672. The registration of the 2004 Agreement before WPL recorded the 2017 Conveyance does not assist NPDC beyond possibly providing material for an argument that WPL had constructive notice of the 2004 Agreement before ownership of the Site changed. This is because the express effect of **section 10** of the **Registration of Records Act**, that of priority, only applies to inconsistent dispositions from the same vendor: **Inverugie Investments Ltd v Hackett** [1984] Lexis Citation 908.

Issue [B](1)(i): Whether WPL is in breach of Clause 19(2) by purchasing, developing and marketing the Site for a development comprising retail/office/leisure uses?

[176.] As I have held that Clause 19(2) is not binding on WPL because it was a purely personal covenant between NPDC and WFD, this issue does not arise.

Issue [B][2]: Whether, if WFD has breached clause 19(2) of the 2004 Agreement, those breaches were induced by WPL with an appreciation that the course it had embarked upon would put WFD in breach of contract or was recklessly indifferent to such result?

[177.] Turning next to NPDC's claim based in the tort of inducing a breach of contract, NPDC's claim for inducing a breach of contract is developed at paras [65] to [67] of its amended statement of claim, where a claim for inducing or procuring a breach of fiduciary duty or breach of trust is also pleaded.

[178.] In my view, it is unnecessary that I consider the issues of inducing or procuring a breach of fiduciary duty or a breach of trust because I am satisfied that WFD owed no fiduciary duties or trustee obligations to NPDC. Those issues are discussed elsewhere in this judgment. For essentially the same reason, I am of the opinion that the claim for inducement of breach of contract must fail, on the basis that there has been no breach of contract by WFD. However, in my view, the claim for inducing a breach of contract would fail even if WFD had been in breach of Clause 19(2) as NPDC alleges.

[179.] Mrs. Lockhart Charles KC in her written submissions identified three alleged breaches of contract upon which NPDC grounds its inducement claim: (i) WFD developing (together with WPL) or permitting/suffering the Site to be developed contrary to the restrictions in Clause 19(2); (ii) WFD failing to submit the terms of any conveyance to NPDC for its approval; and (iii) WFD failing to enforce the restriction on development of the Site, or other material terms (regarding building approval) which WFD should have been enforcing. NPDC alleges that WPL was aware of the obligations and restrictions contained in Clause 19(2) and/or was recklessly indifferent as to such obligations and restrictions and at all material times was aware of WFD's contractual duties and appreciated it was inducing WFD to breach the same and/or was recklessly indifferent.

[180.] Relying on **Clerk & Lindsell on Torts** (22nd edn), para [24-14ff], and **OGB Limited v Allan** [2008] 1 AC 1, Counsel for NPDC submitted that the tort of inducing a breach of contract has three essential elements: (i) a breach of contract by A; (ii) inducement by B; and (iii) knowledge on the part of B that he/she is inducing a breach of contract by A.

[181.] On the issue of inducement, Mrs. Lockhart Charles KC submitted that the threshold for "inducing" requires no more than that B can be said by his actions to have somehow "encouraged" the breach, citing **OGB v Allan** (supra) at para [42]. Counsel submitted, relying on **DC Thomoson & Co Ltd v Deakin** [1952] Ch 646 at page 694 that, where a third person with knowledge of a contract has dealings with the contract breaker which the third party knows to be inconsistent with the contract, this is sufficient to constitute an actionable interference.

[182.] NPDC submitted that, on the facts, WPL induced the breach of contract by not only offering to purchase the Site in the first place but also agreeing to provide WFD with an indemnity against any claims brought against it in respect of the covenants contained in clause 6.2 of the 2017 Supplemental Agreement, which in material part reflected Clause 19(2). However, this latter allegation was not pleaded as an inducement.

[183.] On the issue of knowledge, NPDC submitted, relying on **OGB v Allan** (supra), para [42], that actual knowledge of the breach is not required, nor is there any requirement to show malice or a desire to cause loss. Counsel submitted that, here, WPL knew about the obligations and

restrictions in Clause 19(2) and must have appreciated that the course it embarked upon would put WFD in breach of contract, or at the very least it was recklessly indifferent to such a result.

[184.] Counsel for NPDC drew a parallel between the present case and the facts of **Esso Petroleum v Kingswood** [1974] 1 QB 142, a case which *Bridge J* (as he then was) described as the "clearest possible example" of an actionable inducement of breach. Counsel submitted that, here, as in **Esso Petroleum**, the underlying breach is of covenants which required the Defendant to notify the Plaintiff of any transfer to ensure that any purchaser was bound by use restrictions, the Defendant attempted to "steal a march" on the Plaintiff for commercial gain, the breach by the Defendant was deliberate, and the breach was direct.

[185.] The Defendants focused their submissions on the issue of whether or not there was a breach of contract at all and did not address NPDC's claim for inducing a breach of contract in any detail.

[186.] For the purposes of stating the general requirements of the tort of inducing a breach of contract, I am content to adopt the summary provided by *Lord Hodge* in **Global Resources Group v Mackay** [2008] CSOH 148 at paras [11] to [14] (approved by the English Court of Appeal in **Kawasaki Kisen Kaisha Ltd v James Kemball Limited** [2021] EWCA Civ 33 at paras [20] and [21]):

(i) A commits the tort of inducing a breach of contract where B and C are contracting parties and A, knowing of the terms of their contract and without lawful justification, induces B to break that contract.

(ii) There can be no tort if there is no breach of contract. A lesser interference with contractual relations will not suffice.

(iii) For A to be liable for inducing breach of contract, he must know of the contract and that his acts will have that effect (i.e. will induce a breach of contract).

(iv) A must intend to procure the breach of the contract either as an end in itself or as the means by which he achieves some further end.

(v) A must induce B to break his contract with C by persuading, encouraging or assisting him to do so. The tort can also be committed where A has dealings with B which A knows are inconsistent with the contract between B and C.

(vi) If A has a lawful justification for inducing B to break his contract with C, that may provide a defence against liability.

[187.] The threshold for inducement is low. The mere offer of a price sufficient to entice a seller to sell property in breach of contract is an inducement for the purpose of the tort of inducing a breach of contract: **Sefton (Earl) v Tophams Ltd and Capital and Counties Property Co Ltd** [1964] 3 All ER 876 per Stamp J at pages 889 to 890. It is in relation to the issue of knowledge that I find NPDC's claim against WPL for inducing a breach of contract falters.

[188.] In **OGB Limited**, *Lord Hoffmann* said at para [39] that, to be liable for inducing a breach of contract "*...you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realize that it will have this effect. Nor does it matter that you ought reasonably to have done so.*" There is, in my judgment, insufficient material before me to establish that WPL had the necessary *mens rea*. I am, in essence, invited to infer the necessary *mens rea* from the existence and terms of the 2017 Supplemental Agreement. Even if I could consider that argument on the current state of pleadings, I am not prepared to make that inference. Whether or not there was a breach at all has been a legitimately debated issue in this Court and I accept Blaiweiss' evidence about his state of knowledge – he, and therefore, WPL, did not have a detailed appreciation of the rationale for the 2017 Supplemental Agreement.

Issue [B](3)(i): Whether clause 6 of the Supplemental Agreement is enforceable by NPDC against WPL directly, as the beneficiary of a constructive trust of the covenants/promises entered into by WPL with WFD for NPDC's benefit?

[189.] Moving to NPDC's claim based on the alleged existence of a trust over the rights contained in clause 6 of the 2017 Supplemental Agreement, the claim is developed at para [40A(e)] of NPDC's amended statement of claim, where NPDC alleges not that clause 6 of the 2017 Supplemental Agreement is held on trust for it but that WFD holds WPL's promise in restriction 9 in Schedule B1 on trust for NPDC.

[190.] For necessary context, a party, A, may hold the benefit of a contract with another party, B, or a term in it, for the benefit of a third party, C, by virtue of the terms of the contract. Where A holds the benefit of a contract with B, or a term in it, on trust for C, the contract can in some circumstances be enforced by C against B provided that A is joined to the action or this formality is dispensed with. **Les Affreteurs Reunis SA v Leopold Walford (London) Ltd** [1919] AC 801, a case cited by Counsel for NPDC, is an example of this.

[191.] In **Vandepitte v Preferred Accident Insurance Corporation of New York** [1933] AC 70, *Lord Wright* explained at page 79:

> ...a party to a contract can constitute himself a trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on the third party. The trustee then can take steps to enforce performance to the beneficiary by the other contracting party as in the case of other equitable rights.

> The action should be in the name of the trustee; if, however, he refuses to sue, the beneficiary can sue, joining the trustee as a defendant.

[192.] Lord Wright's dictum in **Vandepitte** concerned an express trust constituted in the very contract itself. However, a contract can also give rise to a constructive trust which is binding on third parties. **Binions v Evans** [1972] Ch 359, **Lyus v Prowsa Developments Ltd** [1982] 2 All ER 953, **Ashburn Anstalt v Arnold** [1988] 2 WLR 706 and **Lloyd v Dugdale** [2001] EWCA Civ 1754, referred to by Counsel for NPDC, are all cases in which the court has been invited to find constructive trusts where purchasers of land took their dispositions subject to specified encumbrances or prior interests.

[193.] A conveyance of land subject to or with notice of prior encumbrances or prior interests will not normally in and of itself operate so as to make the prior encumbrances or prior interests enforceable under a constructive trust. However, if there are special circumstances that show that the purchaser of the land undertook a new liability to give effect to the encumbrances or prior interests for the benefit of a third party, a constructive trust may arise.

[194.] The relevant principles were summarised by *Sir Christopher Slade* in **Lloyd v Dugdale**, at para [52], thusly:

> (1) Even in a case where, on a sale of land, the vendor has stipulated that the sale shall be subject to stated possible incumbrances or prior interests, there is no general rule that the court will impose a constructive trust on the purchaser to give effect to them. ...
>
> (2) The court will not impose a constructive trust in such circumstances unless it is satisfied that the conscience of the estate owner is affected so that it would be inequitable to allow him to deny the claimant an interest in the property. ...
>
> (3) In deciding whether or not the conscience of the new estate owner is affected in such circumstances, the crucially important question is whether he has undertaken a new obligation, not otherwise existing, to give effect to the relevant incumbrance or prior interest. If, but only if, he has undertaken such a new obligation will a constructive trust be imposed. ...
>
> (4) Notwithstanding some previous authority suggesting the contrary, a contractual licence is not to be treated as creating a proprietary interest in land so as to bind third parties who acquire the land with notice of it, on this account alone: see Ashburn Anstalt v Arnold (supra) at pp 15H and 24D.
>
> (5) Proof that the purchase price by a transferee has been reduced upon the footing that he would give effect to the relevant incumbrance or prior interest may provide some indication that the transferee has undertaken a new obligation to give effect to it: see Ashburn Anstalt v. Arnold...However, since in matters relating to the title to land certainty is of prime importance, it is not desirable that constructive trusts of land should be imposed in reliance on inferences from "slender materials".

[195.] Counsel for NPDC submitted that clause 6 of the 2017 Supplemental Agreement was imposed directly for the benefit of NPDC but also (in part) to attempt to protect WFD. Counsel submitted that the overall intention behind the clause was to impose relevant obligation on WPL for the benefit of NPDC. Mrs. Lockhart Charles KC submitted that, applying the principles in **Binions v Evans, Lyus v Prowsa Developments Ltd, Ashburn Anstalt v Arnold** and **Lloyd v Dugdale,** the present case "unquestionably" gives rise to a constructive trust in favour of NPDC to give effect to clause 6.2 of the 2017 Supplemental Agreement.

[196.] Mrs. Lockhart Charles KC made several points in support of her submission, including that WPL purchased the Site at "well below retail value" in recognition of the use restrictions imposed by Clause 19(2) and WPL entered into a new obligation under the 2017 Agreement for Sale, as amended, on terms which "clearly purport to reflect some of the obligations in Clause 19(2)" for the benefit of NPDC's interests. While the 2017 Supplemental Agreement did not properly or fully reflect the obligations in Clause 19(2), clause 6.2 of the 2017 Supplemental Agreement did include a direct restriction on WPL developing the Site except for the prescribed uses. Mrs. Lockhart Charles KC submitted that WPL's conscience was "clearly affected" with regard to NPDC's rights under Clause 19(2).

[197.] Counsel for WFD submitted that NPDC's reliance on some form of trust is misplaced and on a cursory reading of the cases referred to by Counsel for NPDC, none of them appear to have any factual similarities to the present case. Mr. Farquharson KC also pointed out that, in **Ashburn v Anstalt**, the English Court of Appeal stated, "Thus, mere notice of a restrictive covenant is not enough to impose upon an estate owner an obligation or equity to give effect to it." Mr. Farquharson KC further submitted that **Lloyd v Dugdale** suggests that one of the indicators of an intention to impose a constructive trust on a purchaser to give effect to other interests in land is, among other things, proof of payment of a reduced purchase price. That did not occur here. The only reliable evidence before the Court as to the value of the Site was the appraisal included in Wells' Supplemental Witness Statement, which showed the purchase price WPL paid was comparable to the Site's appraised value.

[198.] Counsel for WPL made submissions similar to that of WFD. He submitted that, in Wells' Supplemental Affidavit, the appraisal report gave the appraised value of the Site at $2,140,000 as of September 2013. The price WPL paid amounted to $2,040,000 which was no undervalue and there is therefore no basis for imposing constructive trusts.

[199.] Having considered the competing positions of the parties, I am not persuaded by the arguments forcefully put by Mrs. Lockhart Charles KC on behalf of NPDC. In my opinion, NPDC is not the beneficiary of an express trust of a promise under the 2017 Supplemental Agreement, as there is insufficient evidence of any intention to create a trust, which is required as one of the three certainties.

[200.] I am also unable to accept the submission that NPDC is a beneficiary under a constructive trust arising so as to give effect to clause 6.2 of the 2017 Supplemental Agreement. As Counsel for WFD submitted, none of the cases relied on by NPDC were decided on similar facts. Beyond this point, the most natural interpretation of clauses 6.2 and 6.3 of the 2017 Supplemental Agreement are that they were an attempt by WFD to limit its own liability under Clause 19(2) by means of personal covenants between it and WPL and there is no compelling evidence that WPL acquired the Subject Property at a significant discount due to the need to respect Clause 19(2). While Simon gave evidence of the purported value of land in the area, he conceded in cross-examination that he was not a realtor and he had no direct knowledge of the condition of the Site when it was sold to WPL. The only suitable evidence of the Site's market value was adduced to Wells' Supplemental Witness Statement. On the basis of the appraisal before the Court, as both counsel for the Defendants submitted, the Site was sold at close to its market value.

Issue [B](4)(i): Whether WPL holds the Site as a constructive trustee subject to an equitable obligation to respect Clause 19(2) by virtue of WPL's knowing receipt of property transferred in breach of fiduciary duty?

[201.] Turning next to whether WPL holds the Site on constructive trust for NPDC as a "knowing recipient", this claim is set out at para [67A] of NPDC's amended statement of claim, where NPDC pled that, title to the Site having passed to WPL in consequence of its unlawful inducement of WFD to breach its fiduciary, contractual and trustee obligations to NPDC, WPL holds the Site on constructive trust for NPDC to give effect to and observe the restrictions in Clause 19(2).

[202.] Counsel for NPDC correctly submitted that equitable liability to account as a constructive trustee on the basis of knowing receipt only arises when a recipient acts unconscionably by receiving and retaining property with the knowledge that it was transferred in breach of trust or breach of fiduciary duty.

[203.] In **Arthur v Attorney General of the Turks & Caicos Islands** [2012] UKPC 30, a case referred to by NPDC, *Sir Terence Etherton* stated at paras [31] to [33]:

> 31. A defendant incurs an equitable liability for knowing receipt when he or she acts unconscionably by receiving and retaining trust property with the knowledge that it was transferred in breach of trust. Liability for knowing receipt can also be incurred when property is transferred in breach of a fiduciary duty other than a breach of trust. An obvious example would be the transfer of a company's property in breach of the directors' fiduciary duties, a director not being a trustee of the company's assets. That is also the basis of the claim in the present case since it is not alleged that the Property was held by or for the Crown on trust, but rather that the Minister acted in breach of fiduciary duty to the Crown in authorising the transfer to the appellant.
>
> 32. The essential requirements of knowing receipt were stated by Hoffmann LJ in *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685, 700, as follows:

"For this purpose the plaintiff must show, first, a disposal of his assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty."

33. There has been debate in England and Wales and elsewhere about the nature of the recipient's state of knowledge necessary to give rise to equitable liability for knowing receipt of trust property transferred in breach of trust. In the present case both parties accept that the correct test is that stated by Nourse LJ in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 at 455, namely that the defendant's state of knowledge must be such as to make it unconscionable for the defendant to retain the benefit of the receipt. Mr Misick accepted that such unconscionable conduct can properly be described as equitable fraud.

[204.] A breach of trust or breach of fiduciary duty is an essential element of a claim for knowing receipt. A claim for knowing receipt cannot exist *in vacuo*. I have found that WFD was neither a fiduciary nor trustee for NPDC. As a result, NPDC's claim based on knowing receipt fails. WPL does not hold the Site on constructive trust for NPDC to give effect to and observe the restrictions with Clause 19(2) and the Defendants are not liable to pay NPDC compensation and/or to account for any profits derived on this basis advanced by NPDC. The Defendant is not entitled to a declaration that WPL holds title to the Site subject to Clause 19(2) as constructive trustee to observe the terms of Clause 19(2) of the Agreement for the benefit of NPDC.

Issue [C](i): Whether WFD and WPL have combined together (without just cause or excuse) to: breach and/or procure breaches of clause 19(2) of the 2004 Agreement; breach and/or procure breaches of fiduciary obligations by WFD; or breach WPL's obligations owed to NPDC as the beneficiary of a constructive trust; and whether it was foreseeable (and therefore intended) that injury would result to NPDC by virtue of WFD and WPL's deliberate course of conduct.

[205.] NPDC's claim for unlawful means conspiracy is set out at paras [68] to [74] of its amended statement of claim. NPDC and WFD both provided helpful expositions of the requirements of the tort of unlawful means conspiracy. However, as the Court of Appeal considered the tort recently in **Jennifer Bain v Family Guardian Insurance Company Limited** SCCivApp No. 64 of 2022, I believe it sufficient that I refer to that decision.

[206.] At para [94] of the **Jennifer Bain** case, the Court of Appeal approved the summary of the requirements of the tort of unlawful means conspiracy which was provided by *Cockerill J* in **FM Capital Partners Ltd v Marino** [2018] EWHC 1768 (Comm). There, *Cockerill J* said at paras [94] and [95]:

94. The elements of the cause of action are as follows:

i) A combination, arrangement or understanding between two or more people. It is not necessary for the conspirators all to join the conspiracy at the same time, but the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of: Kuwait Oil Tanker at [111].

ii) An intention to injure another individual or separate legal entity, albeit with no need for that to be the sole or predominant intention: Kuwait Oil Tanker at [108]. Moreover:

a) The necessary intent can be inferred, and often will need to be inferred, from the primary facts – see Kuwait Oil Tanker at [120-121], citing Bourgoin SA v Minister of Agriculture [1986] 1 QB: "[i]f an act is done deliberately and with knowledge of the 10 consequences, I do not think that the actor can say that he did not 'intend' the consequences or that the act was not 'aimed' at the person who, it is known, will suffer them".

b) Where conspirators intentionally injure the claimant and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests: Lonrho Plc v Fayed [1992] 1 AC 448, 465-466; see also OBG v Allan [2008] 1 AC 1 at [164-165].

c) Foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention: OBG at [166].

iii) In some cases, there may be no specific intent but intention to injure results from the inevitability of loss: see Lord Nicholls at [167] in OBG v Allan, referring to cases where: "The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort."

iv) Concerted action (in the sense of active participation) consequent upon the combination or understanding: McGrath at [7.57].

v) Use of unlawful means as part of the concerted action. There is no requirement that the unlawful means themselves are independently actionable: Revenue and Customs Commissioners v Total Network [2008] 1 AC 1174 at [104].

vi) Loss being caused to the target of the conspiracy.

95. However, a person is not liable in conspiracy if the causative act is something which the party doing it believes he has a lawful right to do: Meretz Investments NV v ACP Ltd [2007] EWCA Civ 1303; [2008] Ch 244, per Arden LJ (paragraphs [126]- [127]) and Toulson LJ (paragraph [174]); Digicel v Cable & Wireless [2010] EWHC 774 (Ch) at Annex I, paragraphs [117]-[118] (Morgan J).

[207.] NPDC's pleaded case is that on a date prior to the 2017 Conveyance, the Defendants entered into a combination or understanding with each other with the intention to injure or cause financial loss to NPDC through unlawful means and NPDC suffered such loss. The unlawful means relied on are (i) breaches of Clause 19(2) by WFD and/or WPL and/or breaches by WFD of its fiduciary and trustee obligations and (ii) the procurement of WFD's breaches of Clause 19(2) and/or its fiduciary and trustee obligations by WPL.

[208.] NPDC contends that the Defendants knew or ought to have reasonably known that the transfer of the Site and WPL's proposed development were unlawful and contrary to *inter alia* the express terms of Clause 19(2) because the Defendants were both aware or ought to have known of the terms of Clause 19(2), WFD had previously sought to develop the land directly adjacent to the Site as a retail centre and was prevented from doing so by NPDC citing and relying on Clause 19(2), and such knowledge is to be inferred from the Defendants' conduct, in particular, their failure to provide any proper or satisfactory response to the allegations of Clause 19(2).

[209.] NPDC asserts that the following acts were carried out in furtherance of the conspiracy between the Defendants to sell the Site to WPL with the intention of developing it in breach of Clause 19(2) as a retail etc development to compete with the OFBTC:

(i) entering into the 2017 Conveyance without notifying NPDC in advance or obtaining its prior approval to the terms of the 2017 Conveyance;

(ii) applying for planning permission to develop the Site in a manner inconsistent with the restrictions on development contained in Clause 19(2);

(iii) applying for a permit from the Investments Board to acquisition of the Site by the Second Defendant;

(iv) marketing the Site as a new retail and office development;

(v) approaching existing and prospective tenants in order to entice them away from NPDC's development;

(vi) offering existing and prospective tenants of the OFBTC more favourable terms than those being offered by NPDC;

(vii) failing to respond properly or at all to communications from NPDC requesting confirmation that they would not develop or permit or suffer the Site to be developed contrary to Clause 19(2);

(viii) taking steps together to build out a retail etc scheme on the Site at a time when it is owned by WFD and following transfer of title in the Site to WPL.

[210.] As against WFD, NPDC relies on the following acts said to be done in furtherance of the conspiracy:

(i) purporting to enter into the 2017 Conveyance without complying with Clause 19(2) and accepting monies purportedly paid by WPL;

(ii) failing to obtain NPDC's prior approval of the terms of the 2017 Conveyance;

(iii) failing to respond properly at all to communications from NPDC requesting confirmation that they would not develop or permit or suffer the Site to be developed contrary to Clause 19(2);

(iv) permitting or suffering the construction of a retail etc development on the Site while it remained the owner thereof and/or by approving the erection of a building or structure on the Site which will facilitate a non-complaint form of development.

[211.] As against WPL, NPDC relies on the following acts said to be done in furtherance of the conspiracy:

(i) negotiating terms for the purported transfer of the Site which contravened Clause 19(2), and paying monies to WFD, purportedly in respect thereof;

(ii) applying for a permit from the Investments Board to acquire the Site as a non-Bahamian;

(iii) applying for planning permission to develop the Site in a manner inconsistent with the restrictions on development contained in Clause 19(2);

(iv) marketing the proposed development as a retail and office development;

(v) instructing agents to approach existing and prospective tenants in order to entice them away from the OFBTC;

(vi) offering existing and prospective tenants of the OFBTC more favourable terms than those being offered by NPDC;

(vii) failing to respond properly or at all to communications from NPDC requesting confirmation that they would not develop or permit or suffer the Site to be developed contrary to Clause 19(2);

(viii) taking steps to construct a retail etc development on the Site with WFD's agreement or connivance.

[212.] In her written submissions, Counsel for NPDC submitted that the elements of the tort of unlawful means conspiracy are all "clearly evidenced" here. Mrs. Lockhart Charles KC submitted that the evidence at trial "clearly showed" that the Defendants combined with a view to attempting to transfer and develop the Site in breach of Clause 19(2). In this regard:

(i) WFD has a track record of seeking to "redevelop" the land in breach of Clause 19(2).

(ii) WFD deliberately and calculatedly failed to advise NPDC of the proposed to transfer of the Site to WPL and failed to obtain NPDC's consent to the terms of the conveyance, although WFD was fully aware of the terms of Clause 19(2).

(iii) WPL conspired in this breach by entering into the 2017 Conveyance in full knowledge that NPDC's approval had not been obtained, or was recklessly indifferent as to whether such approval had been obtained.

(iv) WFD's involvement in the conspiracy is further evidenced by WFD's breaches of its obligations which would have prevented the construction of the OWBP.

(v) the attempted reformulation of Clause 19(2) in the 2017 Supplemental Agreement to avoid the obligation to secure binding and directly provided use restrictions against third party purchasers also clearly amounts to a conspiracy to breach Clause 19(2).

(vi) both WFD and WPL effectively acknowledged their concerted wrongdoing by failing to respond to NPDC's communications seeking confirmation they would not develop the Site in breach of Clause 19(2).

(vii) both WFD and WPL fully appreciated the consequences of their deliberate actions for NPDC as both were aware NPDC attached importance to the restrictions, the rationale behind the restrictions and, in any event, it is self-evident that developing a retail centre directly opposite and in competition with OFBTC would cause damage to NPDC's commercial interests and WFD and WPL also tried to entice existing tenants away.

[213.] Counsel for WFD submitted that NPDC's evidence "singularly failed" to prove the alleged conspiracy. The evidence of Simon, Wells and Blaiweiss "uniformly showed" that WFD played no role in the development of the Site or any ancillary activity relating to the development of the Site. WFD's role was limited to being the vendor of an undeveloped parcel of land which has subsequently been developed into the OWBP.

[214.] Counsel for WPL submitted that there is no evidence of any conspiracy to injure NPDC. WFD lawfully sold the Site at a price which reflected the market value of the Property. There was no undervalue. There was no evidence that the Defendants acted in concert in WPL's development plans. The sale of the Site was an arms-length transaction. Furthermore, the agreement for sale between the Defendants mirrored the 2004 Agreement for Sale, so NPDC could not have lawfully objected to the sale by WFD to WPL.

[215.] Having regard to the requirements necessary to establish a claim for unlawful means conspiracy, NPDC's claim for unlawful means conspiracy fails because the unlawful means NPDC has relied upon have not been established. I have not found WFD to be in breach of Clause 19(2) or any alleged fiduciary or trustee obligations owed to NPDC. In addition, I accept the submissions of the Defendants that the evidence at trial failed to substantiate the alleged conspiracy. The alleged conspiracy was wholly speculative and without foundation in fact. I find on the evidence that:

(i) WFD does not have a track record of seeking to "redevelop" the land in breach of Clause 19(2). WFD did not proceed with a proposed townhouse, retail, etc development on the 24.44 Acres and 9.7 Acres in 2008 principally because the 24.44 Acres was restricted to solely residential use not because the proposed development was not permitted on the 9.7 Acres.

(ii) the sale of the Site to WPL was an arms-length sale. The Site was listed for sale with Bahama Island Realty and Wells/WFD was approached with an offer to purchase the Site by Blaiweiss, who was interested in acquiring land on Windsor Field Road. Blaiweiss was also a client of Bahama Island Realty. It was not disclosed to Wells/WFD at this time that Blaiweiss/WPL wished to develop the OWBP on the Site.

(iii) the sale price of the Site was $1,700,000 with WPL being responsible for payment of all stamp duty and the real estate agent's commission. The appraised value of the Property as of 2013 and the gross sale price were therefore similar.

(iv) Wells/WFD did not have any discussions with Blaiweiss/WPL about the development of the Site during negotiations or prior to completion of the sale to WPL. Wells/WFD did not give Blaiweiss/WPL any advice as to the activities that could be conducted on

the Site. WFD/Wells only provided Blaiweiss/WPL with the AIP restrictive covenants and commented on their breadth.

(v) WFD/Wells' and Blaiweiss'/WPL's respective understandings of the meaning of the expression "light commercial industrial use similar to the Airport Industrial Park" were genuinely held. Neither WFD nor WPL believed that the development of the OWBP would breach Clause 19(2). WFD attempted to introduce an arrangement comparable to Clause 19(2) as part of the sale of the Site to WPL.

(vi) Wells first spoke to Blaiweiss after closing. They did not have any discussions about the development of the Site until shortly before trial and Wells did not visit the Site with Blaiweiss until around 2020. Wells dealt with Blaiweiss/WPL during the sale through the Rt. Hon. Ingraham. The Rt. Hon Ingraham did not disclose what WPL intended to do with the Site.

(vii) Wells/WFD was not aware WPL intended to develop a retail shopping centre until closing of the sale of the Site to WPL when Wells accidently received an e-mail from the Rt. Hon Ingraham attaching a layout or a sketch of a layout of the proposed development, of buildings, parking areas, without a "huge amount" of definition. Wells had not seen any marketing or advertising for the OWBP prior to closing.

(viii) WFD did not: (a) give its approval to WPL's development of the Site or any structures thereon; (b) commission any building or architectural plans for any structures to be erected on the Site; (c) apply for planning permission or approval or building permits for any structures to be erected on the Site; (d) enter into any agreement with WPL relating to site clearance or preliminary works to be undertaken on the Site; (e) participate in or assist WPL with any clearance or preliminary works to be undertaken on the Site; (f) make the application for Investments Board approval for the permit validating the conveyance to WPL (WFD had relied on the representation contained in the 2017 Agreement for Sale that Blaiweiss was a Permanent Resident); (g) play any role in the marketing of the Site or any structures or units thereon; (h) enter into any agreement or understanding with WPL with the intention of causing financial loss to NPDC; (i) approached any existing or prospective tenants of NPDC to entice them away from the OFBTC (this was done by WPL's agents without WPL's approval); (j) offered any existing or prospective tenants of OFBTC leases of buildings or units owned by WPL; or (k) receive any income from the sale or rental of any unit on the Site.

Issue [D](i): Whether NPDC is entitled to injunctive relief against WFD/WPL in respect of the contractual and/or tortious and/or fiduciary and/or equitable wrongdoings relied on by NPDC and, if so, in what terms?

[216.] As NPDC has failed to establish that WFD or WPL is liable to it on any basis it has relied upon, NPDC is not entitled to injunctive relief against WFD or WPL in respect of the contractual and/or tortious and/or fiduciary and/or equitable wrongdoings relied on by NPDC.

Issue [D](ii): Whether by reason of WFD and/or WPL's breaches of Clause 19(2) and/or WPL's inducement of the breaches and/or WFD and WPL's conspiracy, NPDC has suffered loss and damage including by reference to negotiating damages principles.

[217.] As NPDC has failed to establish that WFD or WPL is liable to it on any basis it has relied upon, NPDC is not entitled to an award of damages whether assessed by reference to negotiating damages principles or otherwise.

Issue [D](iii): Whether by reason of WFD's breaches of fiduciary duties and/or WPL's breach of its obligations as a constructive trustee (and/or as a knowing recipient) NPDC is entitled to recover equitable compensation and/or an account of profits.

[218.] As NPDC has failed to establish that WFD or WPL is liable to it on any basis it has relied upon, NPDC is not entitled to equitable compensation or an account of profits.

Issue [E](i) Whether NPDC has, at a matter of law, immunity from suit in respect of the statements particularised at paras [2] to [3] of WPL's amended counterclaim?

[219.] WPL's slander of title or malicious falsehood claim is based upon allegations contained in NPDC's pleadings. Immunity from suit attaches to statements made in the course of judicial proceedings before a court of justice or tribunal exercising equivalent functions. In **Lincoln v Daniels** [1962] 1 QB 237, *Devlin LJ*, as he then was, said at page 257:

> The absolute privilege which covers proceedings in or before a court of justice can be divided into three categories. The first category covers all matters that are done coram judice. This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses, and includes the contents of documents put in as evidence. The second covers everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of the proceedings and starting with the writ or other document which institutes the proceedings. The third category is the most difficult of the three to define. It is based on the authority of Watson v. M'Ewan, in which the House of Lords held that the privilege attaching to evidence which a witness gave coram judice extended to the precognition or proof of that evidence taken by a solicitor. It is immaterial whether the proof is or is not taken in the course of proceedings. In Beresford v. White, the privilege was held to attach to what was said

> in the course of an interview by a solicitor with a person who might or might not be in a position to be a witness on behalf of his client in contemplated proceedings.
>
> [Emphasis added]

[220.] Insofar as WPL relies upon **Singh v Governing Body of Moorlands Primary School and another** [2013] EWCA Civ 909 in support of its counterclaim, I considered that decision at the interlocutory stage of these proceedings in **New Providence Development Co. Ltd v. Windsor Field Development Ltd. and another** [2019] 1 BHS J. No. 12. I need not repeat my consideration of the same here. I refer to paras [8] to [10] therein.

[221.] At the interlocutory stage of these proceedings, I refused to strike out WPL's claim on the basis that **Singh** demonstrated that judicial immunity is not absolute. However, WPL failed to make out a case at trial for circumventing judicial immunity in relation to the contents of NPDC's pleadings. I therefore hold, applying **Lincoln v Daniels**, that NPDC has immunity from suit in respect of the statements complained of and as particularised in paras [2] to [3] of WPL's amended counterclaim.

Issue [E](ii): Whether NPDC intended to publish the statements and did so with improper motive/malice, whether the statements were false and whether the statements caused WPL actual finance loss?

[222.] In light of what I have concluded in relation to Issue [E](i), the issues of whether NPDC intended to publish the statements and did so with improper motive/malice, whether the statements were false and whether the statements caused WPL actual financial loss do not arise.

Issue [E](iii): Whether NPDC commenced these proceedings maliciously and whether WPL suffered actual financial loss as a result?

[223.] Turning lastly to whether NPDC commenced these proceedings maliciously and whether WPL suffered actual financial loss as a result, in **Crawford Adjusters v Sagicor General Insurance (Cayman) Ltd** [2013] UKPC 17, the Judicial Committee of the Privy Council confirmed the existence of a tort of malicious prosecution of civil claims. The requirements of the tort were recently summarised by *Master Pester* in **Patel v Minerva Services Delaware, Inc and others** [2024] EWHC 172 (Ch) in this way at para [22]:

> 22. It is now clear that in an action for malicious prosecution, the claimant must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him by the defendant on a criminal charge (and now, via civil proceedings); secondly, that the prosecution was determined in his favour; thirdly, that it was without reasonable and probable cause; fourthly, that it was malicious; and fifthly, as a result of the proceedings, the claimant has suffered loss which

> sounds in damages: see per Rose J in Willers v Joyce [2018] EWHC 3424, at [187]. The onus of proving every one of those elements is on the claimant. …

[224.] As I understand the tort, under the law as it presently stands, a litigant does not enjoy a right to initiate civil proceedings maliciously and without reasonable and probable cause. To do so is tortious. The requirements of absence of malice and reasonable and probable cause are separate requirements of the tort. In order to have reasonable and probable cause, the defendant does not have to believe that the proceedings will succeed. It is enough that, on the material on which they acted, there was a proper case to lay before the court. Malice requires the claimant to prove that the defendant deliberately misused the process of the court.

[225.] On this understanding of the tort, I accept Counsel for NPDC's submissions that WPL's claim for malicious prosecution must fail. While NPDC has been unsuccessful in its claim, NPDC's position in relation to Clause 19(2) was a reasonable one to take and there was a genuine dispute to be litigated between the parties. It cannot be said that NPDC pursued this action without reasonable or proper cause. Moreover, there is no evidence that NPDC was actuated by malice in pursuing these proceedings. Ultimately, WPL has not discharged the heavy burden upon it to show lack of reasonable and probable cause or malice.

Conclusion

[226.] For the foregoing reasons, NPDC's claim and WPL's counterclaim are each dismissed in their entirety.

[227.] I am minded to make an order that the Defendants are to have the costs of NPDC's claim and NPDC is to have the costs of WPL's counterclaim, to be taxed, if not agreed. However, I will allow the parties 14 days to lodge written submissions to contend for some other costs order.

Dated the 16th day of July 2024

Sir Ian R. Winder
Chief Justice