COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2016/CLE/gen/000845

BETWEEN

(1) BENNET HOLDINGS LIMITED
(2) THOMAS INGERSOLL SCHEERER
(3) ARUNAS PLECKAITIS
(4) MARILYN PLECKAITIS
(5) TEOFILO VICTORIA
(6) MARIA MERCEDES DE LA GUARDIA
(7) DESTINATION SCHOONER BAY LTD

Plaintiffs

AND

SCHOONER BAY VENTURES LIMITED

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mrs. Gail Lockhart-Charles with her Mrs. Lisa Esfakis of Gail Lockhart Charles & Co. for the Plaintiffs
Ms. Courtney Pearce-Hanna and Ms. Philisea Bethel of Callenders & Co. for the Defendant

Hearing Dates: 27 March 2018, 31 January 2019, 25 February 2019, 28 March 2019, 30 July 2019, 16 October 2019, 20 January 2020, 23 January 2020

Contract Law – Alleged violation of Declaration of Covenants Conditions and Restrictions – Interpretation and construction of articles contained in the Declaration – Claim for loss of opportunity – Illegality – Sections 2, 4 and 40 Real Estate (Brokers and Salesmen) Act 1995

The crux of the dispute between the parties to this action is whether or not the Plaintiffs are in violation of the Declaration of Covenants, Conditions and Restrictions ("Declaration") governing the out-island real estate development project of Schooner Bay located in Abaco.

The First through Sixth Plaintiffs are homeowners in Schooner Bay. The Seventh Plaintiff ("DSB") is the property manager for their homes and claims to have been authorized by the Defendant to operate a property management business within Schooner Bay.

DSB asserts that it was in the process of having the homes advertised in the prestigious Coastal Living Magazine ("Coastal Living") and placed in its Vacation Rental Program when the Defendant interfered by contacting Coastal Living and informing them that the Plaintiffs were in violation of the development's Declaration. Coastal Living reacted by putting the process on hold until the dispute between the Plaintiffs and the Defendant was resolved.

The Plaintiffs maintain that because of the authorization given to DSB by the Defendant, they are not in violation of the Declaration governing Schooner Bay and thus commenced this action against the Defendant seeking various declarations and a claim for damages for loss of opportunity and rental income.

The Defendant denies that DSB received any such authorization and challenges DSB's operation of a business managing properties in Schooner Bay on the basis that it did not obtain a business licence in accordance with the Declaration.

The Defendant counterclaims seeking various reliefs including an injunction and damages for losses on the basis that the Plaintiffs willfully violated the Declaration causing the Defendant harm. The Defendant asserts that it previously advised all home and property owners in writing that DSB and its principal Mr. James Malcolm were not authorized agents of the Defendant.

During the trial, the Defendant raised the issue of illegality and amended its pleadings accordingly to assert that DSB's operation of a property management business without the requisite real estate broker licence is in contravention of the Real Estate (Brokers and Salesmen) Act 1995 and consequently the Plaintiffs are precluded from bringing this action.

HELD: Dismissing the Plaintiffs claim as well as the Defendant's counterclaim with no order as to costs.

1. Although there is some confusion in the contemporaneous documentary record with regards to the various names on the licences, all parties knew that DSB was the vehicle which was incorporated by Mr. Malcolm for the conduct of his property management services. DSB is therefore a proper party to these proceedings: **Metaxides and Silver Point v Swart and others** [2015] UKPC 32 relied upon.

2. The contracts entered into between the First through Sixth Plaintiffs and DSB prior to Mr. Malcolm receiving his real estate salesman's licence (30 May 2014) are illegal contracts which are void and unenforceable pursuant to section 40 of REA. **Cope v Rowlands** (1836) 2 M. & W. 149 applied.

3. DSB's property management business was not operating under the direction, control or management of a licenced broker as mandated by REA and therefore the contracts entered into are also void and unenforceable: See sections 2 and 4 of REA.

4. Plain and ordinary meaning of words used in commercial contracts should only be displaced if it produces a commercial absurdity: **Thompson and another v Goblin Hill Hotels Ltd** [2011] UKPC 8 considered.

5. The exclusivity clause contained in Clause 5.5 of the Declaration was for eight (8) years from the date that the Declaration was recorded (17 June 2009) which is 17 June 2017. The Defendant cannot shift the goal post to a date at its own whim and fancy. Any amendment to that date has to be specific and a general amendment to the Declaration will not suffice. Clause 5.5 in the Declaration has expired by an effluxion of time and the Defendant cannot rely on it.

JUDGMENT

Charles J:

Introduction

[1] This action concerns a dispute between the Defendant ("SBV") as property developer/vendor and owner of property and certain homeowners, the First through Sixth Plaintiffs and their property manager, the Seventh Plaintiff ("DSB") (collectively "the Plaintiffs") with regards to alleged violations of the Declaration of Covenants Conditions and Restrictions governing an idyllic out-island harbour community located in the real estate development known as "Schooner Bay" on the Eastern Coast of Great Abaco Island.

[2] Essentially, the Plaintiffs seeks a declaration that:

1. DSB is entitled to operate a property management business managing the properties owned by the Homeowners in Schooner Bay;

2. The Homeowners have the right to place their properties in the Coastal Living Rental Pool; and

3. The Homeowners have the right to advertise the Schooner Bay properties owned by them in Coastal Living Magazine and other publications and to use the words “Schooner Bay” in such advertisements as part of the legal description of their properties and description of the geographical locations.

[3] The Plaintiffs also seek damages for loss of opportunity to be assessed.

[4] On the other hand, SBV seeks confirmation and enforcement of the restrictive covenants contained in the Amended and Restated Declaration of Covenants, Conditions and Restrictions which grants exclusive rights to market and manage rental properties in Schooner Bay and to which the Homeowners agreed. In its Counterclaim, SBV also seeks damages for losses suffered due to the third party management of the Homeowners’ properties in breach of the Declaration as well as a permanent injunction against DSB from (i) operating a business in Schooner Bay without a business licence issued by the Board; (ii) holding itself out to be an authorized representative of the Schooner Bay Development and its property owners and (iii) listing or advertising the rental, sale or property management of any Schooner Bay Properties.

[5] SBV also raised the issue of illegality in its Amended Defence asserting that DSB’s operation of a property management business without the requisite real estate licence is in contravention of the Real Estate (Brokers and Salesmen) Act 1995 and, consequently, the Plaintiffs are precluded from bringing this action.

Salient facts

[6] Most of the salient facts are agreed by the parties. To the extent that there is a departure from the agreed facts, then what is expressed must be treated as positive findings of fact made by me.

[7] SBV is a company incorporated in The Bahamas carrying on business as a property developer and vendor of property located in the development known as “Schooner Bay”.

[8] The First through Sixth Plaintiffs (collectively "the Homeowners") purchased individual lots in Schooner Bay from SBV and erected homes on their properties. The First Plaintiff's home is located on Lot U13 and is known as "Carioca". The Second Plaintiff's home is located on Lot R2 and is known as "Zanzibar". The Third and Fourth Plaintiffs' home is located on Lot S4a and is known as "Crosswinds". The Fifth and Sixth Plaintiffs' home is located on Lot U31 and is known as "The Jib".

[9] The Conveyances of their properties are subject to the Declaration of Covenants Conditions and Restrictions dated 5 May 2009 (and recorded on 17 June 2009), as amended by an Amended and Restated Declaration of Covenants, Conditions and Restrictions dated 4 March 2010 along with a Rectification for an Amended and Restated Declaration of Covenants, Conditions and Restrictions dated 5 May 2010 and further amended by the Fourth Amendment to Declaration of Covenants, Conditions and Restrictions dated 7 March 2014 ("the Declaration").

[10] The Homeowners' properties are being managed by DSB, a Bahamian company which was said to be incorporated on 9 January 2013 to provide property management services to the Homeowners. The principal of DSB, James Malcolm ("Mr. Malcolm") is a Bahamian citizen and is also a homeowner in Schooner Bay. Mr. Malcolm was also a former sales and marketing employee of Lindroth Development Company ("LDC") where he held the position of Marketing Director and Public Relations for Schooner Bay.

[11] By letter dated 19 December 2013, SBV's General Counsel, Tina Gascoigne ("Ms. Gascoigne") wrote to Mr. Malcolm terminating the Agreement which SBV had with him. The letter states:

> **"….James,**
>
> **This letter shall serve as notice of our intention to terminate your agreement. You will be paid through December 31st the 3-month review point of your agreement with Lindroth Development Company.**

> **The original intent of the agreement was for you to continue to help in a sales capacity while you worked on DSB. With the change in direction with sales at Schooner and new sales team on site, which was not contemplated at the time your agreement was entered into, we must now terminate your agreement. We know and understand you have already been phased out of sales program and we therefore need to formalize that.**
>
> **We also hereby request that you move out of the space you have been using as your DSB office, by December 27, 2013, as we will need that space for other purposes. <u>You may continue to operate your business with the clients you currently have *but* we will be launching our own property management/vacation rental business to service Schooner Bay clients and buyers</u>…."**

[12] By the 19 December 2013 letter, the contract under which Mr. Malcolm had then been providing services to SBV was terminated.

[13] Sometime around the end of the first quarter of 2014, SBV launched its own vacation rentals and property management business. In the months that followed, SBV encountered homeowners that had entered into contracts with Mr. Malcolm/DSB on the basis that DSB was the sole authorised property management and vacation rental service provider for Schooner Bay. SBV also determined that Mr. Malcolm was advertising DSB as the sole authorised agent and representative for Schooner Bay on various destination and property rental websites which meant that Schooner Bay's business was being directed to DSB because of the misconception that DSB was **the** representative for Schooner Bay vacation rentals and not merely **a** representative.

[14] By letter dated 17 April 2015, Ms. Gascoigne wrote to Mr. Malcolm notifying him that DSB was operating in breach of the Declaration. She reminded him that SBV is the only entity with exclusive authority to operate real estate sales, rental or management offices at Schooner Bay. The letter demanded that Mr. Malcolm:

> **"1. Cease and desist the operation of DSB Bahamas Limited at Schooner Bay or in connection with any home at Schooner Bay, including making representation that you are an exclusive provider of rental cottages at Schooner Bay;**

2. **Not to hold yourself out as being able to provide rental or property management services at Schooner Bay;**

3. **Remove the real estate signage you have placed in the window of the home known as "Guess House" at Schooner Bay;**

4. **Remove the real estate signage you have placed at the entrance of the Schooner Bay project, on the crown land that is exclusively licensed to Schooner Bay Ventures".**

[15] The letter continued:

> **"Please also remove from Schooner Bay Ventures' on site trailers any and all items you have stored there. Please be sure to leave behind all Schooner Bay paraphernalia and belongings stored there or otherwise on site.**
>
> **As a property owner at Schooner Bay, you agreed to the terms of the Declarations and Covenants upon the execution of your conveyance and we therefore expect nothing less than your absolute cooperation.**
>
> **Failure to comply will result in further action being taken by Schooner Bay Ventures Limited to enforce its rights.**
>
> **Please also refrain from claiming yourself to be Founder, Director or affiliate of Schooner Bay Ventures…."**

[16] By email dated 22 April 2015, Ms. Gascoigne advised all Schooner Bay home and property owners (including Mr. Malcolm) that certain individuals were conducting business at Schooner Bay in violation of the Declaration. The email reminded all homeowners that they have to comply with the Declaration which they have all agreed to and that "*all owners and those who run business and visit here have to comply with the same rules. It is the only way to maintain a level of standard, service and a particular type of experience here at Schooner Bay*".

[17] Mr. Malcolm/DSB did not respond to either the 17 April letter or the email of 22 April 2015.

[18] On 4 November 2015, Mr. Malcolm emailed Ms. Kristen Payne ("Ms. Payne") of Coastal Living Magazine ("Coastal Living"), a prestigious consumer magazine

which features destinations around the world as a means of advertising them for vacation rental purposes. The email states:

> **"Thanks Bill, Hello Kristen,**
>
> **I am no longer employed at Sandpiper, but very much here at Schooner. I run my own vacation & destination management company at Schooner Bay – where Sandpiper Inn is located.**
>
> **We manage a lovely collection of 12 cottages, homes and villas (4 of which were actually designed by Bill). I am also in the re sale and Residence Club business in S. Abaco…."**

[19] By email on the same day, Ms. Payne responded to Mr. Malcolm. The email stated that she would be very interested in including "*your cottages in our curated collection of rental homes for Coastal Living*". On or about November 2014, after discussions between Coastal Living and DSB, Coastal Living proposed to include the Homeowners' properties in their magazine, under the management of DSB, by a Marketing Partnership Proposal in February 2016.

[20] By letter dated 20 February 2016, Ms. Gascoigne advised Coastal Living that Mr. Malcolm was operating a rental and property management business at Schooner Bay in violation of the Declaration and that they should not accept anything that he said as representative of SBV or Schooner Bay. The email continues:

> **"You are taking picture of and writing about Schooner Bay without any proper authority and <u>we ask that you immediately cease and desist from such actions</u>. Please do not publish, in any format, any information you have gathered during your trip(s) to Schooner Bay without our explicit written permission".**

[21] As a result of this letter, Coastal Living informed DSB by an email dated 18 March 2016 that they would be unable to move forward with placing the Homeowners' properties in their Vacation Rental Program until the dispute between the Plaintiffs and SBV was resolved.

[22] By letter dated 13 May 2016, the Plaintiffs' attorneys wrote to Mrs. Pearce-Hanna of Callenders & Co, as attorney for SBV, copied to Ms. Gascoigne, to request (i) a written retraction of SBV's allegation that DSB's management of the Homeowners' Schooner Bay home rentals is a violation of the Declaration; (ii) confirmation from SBV that the Homeowners and DSB have a right to place the Homeowners' properties in Coastal Living and (iii) acknowledgement of the right of the Homeowners to advertise their properties in Coastal Living and other publications and to use the words "Schooner Bay" in such advertisements as part of the legal description of the Properties and description of their geographical location.

[23] SBV has failed and/or refused to do what the letter of 13 May 2016 requested that it should do. As there was no amicable resolution of their dispute, the Plaintiffs instituted these proceedings.

The pleadings

[24] On 10 June 2016, the Plaintiffs filed a Writ of Summons indorsed with a Statement of Claim. In paragraph 6 of the Statement of Claim, DSB averred that it was authorized by SBV to operate a property management business within Schooner Bay and to provide property management services to its existing clients within Schooner Bay.

[25] In paragraph 12, the Plaintiffs denied that DSB's management of the Homeowners' Schooner Bay home rentals is a violation of the Declaration.

[26] In paragraph 16, the Plaintiffs alleged that they suffered loss and damage. They particularized their loss and damage as *"Loss of the opportunity to have the Properties listed in the Coastal Living Vacation Rental Program and loss of rental income from the Properties being so listed".* Fundamentally, the Plaintiffs seek the following: (i) a Declaration that DSB is entitled to operate a property management business managing the Homeowners' properties in Schooner Bay (ii) that they have the right to place their properties in Schooner Bay in the Coastal Living Rental Pool and (iii) that the Homeowners have the right to advertise the Schooner Bay

properties in Coastal Living and other publications, and use the words “Schooner Bay” in such advertisements as part of the legal description of their properties and description of the geographical location of the same. They also seek damages to be assessed and costs.

[27] On 14 July 2016, SBV filed a Defence and Counterclaim. In paragraph 3 of the Defence, SBV denies that DSB was authorized to operate a property management business within Schooner Bay and asserted that SBV has initiated legal proceedings challenging DSB’s operation of a business managing Schooner Bay properties as it did not obtain a business licence pursuant to the Declaration.

[28] In paragraph 4, SBV neither admitted nor denied that the Homeowners are and were at all material times existing clients of DSB. What SBV alleged is that if the Homeowners are indeed existing clients of DSB, then they are acting in breach of the Declaration generally and specifically Articles 5 and 7. SBV averred that, on 22 April 2015, it advised Schooner Bay home and property owners in writing that Mr. Malcolm and DSB were not authorized agents of SBV with respect to property sales, rental marketing and management within Schooner Bay and that they should not enter into business with either party. SBV asserted that the breaches of the Declaration are wilful on the part of the Plaintiffs and are intended to do harm to SBV.

[29] In paragraph 6 of the Defence, SBV averred that DSB has no capacity to act as the property manager or to advertise the development and properties within Schooner Bay. According to SBV, the right to manage properties, is a right reserved to SBV under Article 5, Part II, Clause 5.5 of the Declaration. SBV further averred that DSB has no authority to conduct business from within Schooner Bay as it does not have a business licence in accordance with Article 2, Part II of the Declaration (Business Licence).

[30] SBV counterclaimed against the Homeowners for (i) loss of marketing opportunities; (ii) loss of income and (iii) loss of the fees associated with the

property management and rentals arising from a breach of (a) an express term of the Declaration at Article 5, Part II, Clause 5.5, that SBV shall have exclusive right to all marketing of the Schooner Bay development for 8 years after the execution of the Declaration, meaning until 22 March 2018 at the earliest and (b) an express term of the Declaration at Article 7, "Constructive Notice and Acceptance" that the owner of and persons in possession of property in Schooner Bay accept such possession upon and subject to the provisions of the Declaration and covenant with SBV and other owners to comply with same.

[31] SBV alleged that DSB has committed unlawful acts in contravention of the Declaration and to the detriment of SBV. It further alleged that DSB has committed and continues to commit tortious acts against SBV's business interests by interfering with same. The particulars of the breach are set out below.

Particulars of Breach

a. By Article 2 Part II of the Declaration any person wishing to operate a business within Schooner Bay must obtain a business licence from the Board of Schooner Bay in order to operate a business within the Schooner Bay community.

b. The Seventh Plaintiff has through its principal induced homeowners to act in contravention of Article 5, Part II, Clause 5.5 of the Declaration.

[32] SBV further alleged that DSB has purported to act as property manager of Schooner Bay properties in contravention of the Declaration. As a result of these acts, SBV has suffered loss and damage. The particulars of the loss and damage are: (i) loss of good will; (ii) loss of brand reputation and prestige; (iii) loss of marketing opportunities and loss of fees associated with the property management and rentals.

[33] SBV claims against the Plaintiffs (i) Damages for the loss it suffered due to DSB's management of their properties within Schooner Bay in breach of the Declaration; (ii) A Declaration that SBV is the sole authorized entity to market the properties within the Schooner Bay development and (ii) a permanent injunction against DSB

restraining it from (a) carrying on business in Schooner Bay without a business licence issued by the Board; (b) holding itself out to be an authorized representative of the Schooner Bay Development and its property owners and (c) listing or advertising the rental, sale or property management of any Schooner Bay properties until 22 March 2018 or the expiration of the Defendant's exclusive rights under the Declaration, whichever is later. SBV also claims general damages, interest and costs.

[34] On 27 July 2016, the Plaintiffs filed a Reply and Defence to Counterclaim. In short, the Reply asserted that, by a letter dated 19 December 2013, SBV authorised DSB to continue to operate its business and the said letter constituted an unequivocal representation by SBV that DSB was entitled to operate its business and continue to provide the property management/vacation rental services to the Homeowners. The Reply further asserted that DSB relied on the representation of SBV as being authorized to operate its property management business and that it hired staff, purchased equipment, incurred expenses and negotiated contract with third parties including Coastal Living and that it would be unconscionable and unjust for SBV to assert a contrary position.

[35] During the cross-examination of Mr. Malcolm, SBV applied for and was granted leave to file an Amended Defence and Counterclaim on 29 March 2019 to include a claim against the Plaintiffs for illegality. The amendment provided:

> **"11A. The grounds of the Plaintiffs' claim, that inter alia the Seventh Plaintiff should be allowed to practice property management services for the First through Sixth Plaintiffs and damages are owing for allegedly preventing him from so doing, are in contravention of the Real Estate (Brokers and Salesmen) Act ("REA"), including but not limited to ss. 2, 3, 4 and 40 thereof. The REA mandates that property management services, which form the basis of this lawsuit, constitute "real estate business" and can only be offered/practised by a licensed real estate broker who has to be a natural person. The Seventh Plaintiff claims to be a company in paragraph 6 of the Statement of Claim and on that basis cannot hold a real estate broker licence and it cannot engage in the practice of real estate business as defined in the REA. The witness testimony of James Malcolm on behalf of the Seventh**

Plaintiff revealed that the Seventh Plaintiff did not and does not have a real estate broker conducting the practice of property management services that the Seventh Plaintiff alleged to have offered and wants to continue offering the First through Sixth Plaintiffs. Further, s. 40 of REA expressly states that a person who engages in the practice of real estate business as a real estate broker or a real estate salesman without a REA licence is not entitled to bring any suit or action for the recovery of any fee/reward regarding his engagement in such practice. Consequently, the grounds of and declarations sought in the Statement of Claim are in contravention of the REA and therefore unlawful and unenforceable against the Defendant."

[36] On 5 April 2019, the Plaintiffs filed a Reply to the Amended Defence and Counterclaim. In summary, the Reply to the Amended Defence denied that the REA was contravened as alleged in paragraph 11A of the Amended Defence. The Reply then asserted that (i) Mr. Malcolm was hired by Carmen Massoni, a fully licensed Bahamas Real Estate Association (BREA) broker and the proprietor of Bahama Island Realty (BIR) on 18 December 2013 and Mr. Malcolm received his BREA Salesman's licence on 1 January 2014; (ii) Mr. Malcolm continued to be employed by BIR during the years 2014, 2015 and part of 2016 during which time he maintained his BREA Salesman's licence and was permitted by the BIR broker to operate his property management business through DSB with the permission and approval of Mrs. Massoni; (iii) from 19 September 2012 to the present, Mr. Malcolm has been employed by Damianos Sotheby's International Realty ("Damianos Realty") under the fully licensed BREA broker George Damianos. Mr. Malcolm has continuously maintained his BREA Salesman's licence and is permitted by the Damianos BREA broker to operate his property management business through Destination Schooner Bay Ltd. with the permission and approval of the Damianos proprietor and licensed BREA broker George Damianos and (iv) Mr. Malcolm engages in property management and vacation rental business through his corporate entity DSB in Abaco and also in Eleuthera. His activities as a Bahamian licensed under BREA as a Real Estate Salesman are fully compliant with Bahamian law. Mr. Malcolm was awarded the 2018 Top Producer Eleuthera

award by Damianos Realty and he continues to be an employee in good standing of Damianos Realty.

The issues

[37] The pleaded case raises the following issues which have agreed by both parties. They are:

1. Whether DSB is a proper party to these proceedings?

2. Did Mr. Malcolm and/or DSB act illegally in contravention of the Real Estate (Brokers and Salesmen) Act 1995?

3. What is the proper interpretation of the Declaration specifically:

    i. What is the effect on the parties of the provisions outlined at Articles 5 and 7 of the Declaration?

    ii. What is the proper interpretation of Article 5, Part II, Clause 5.5 of the Declaration?

    iii. What is the effect of Article 2, Part II of the Declaration?

4. If the provisions of the Declaration entitle SBV to the exclusive operation of real estate sales, rentals or management offices within Schooner Bay and the same amount to a binding restriction, what is the effect of the said restriction on the Plaintiffs, specifically:

    i. Did the 19 December 2013 letter amount to a binding representation and have the effect of authorizing DSB to provide property management and rental services to the Homeowners and, if so, to what extent?

    ii. If so, is SBV estopped from relying upon the provisions of the Declaration, by virtue of the representation contained in the 19

December 2013 letter, insofar as they may apply to DSB and/or the Homeowners?

iii. Is SBV entitled to revoke any representation allegedly made in the 19 December 2013 letter? If so, was it revoked by the email of 22 April 2015 or otherwise?

iv. In light of Article 5 of the Declaration, are the Homeowners free to contract with an entity other than SBV for the purpose of *"real estate sales, rentals or management"?* Specifically, do the Homeowners have the right to market their homes directly with a third-party entity (such as Coastal Living) and/or contract with DSB without the approval of SBV?

v. Whether the Homeowners have the right to use the word *"Schooner Bay"* in such marketing, as a part of the legal description of their properties?

vi. Does any representation that may have been made to DSB by SBV in the 19 December 2013 letter act to release the Homeowners from the Declaration?

The evidence

[38] Mr. Malcolm gave evidence on behalf of the Plaintiffs and Ms. Gascoigne gave evidence on behalf of SBV. Real estate brokers Mr. Nicholas George Damianos ("Mr. Damianos") of Damianos Realty and Mrs. Carmen Gloria Massoni-Fernandez ("Mrs. Massoni") of BIR were subpoenaed by SBV to testify at the trial.

James Malcolm

[39] Mr. Malcolm filed a witness statement on 19 February 2018 which stood as his evidence in chief at the trial. He is presently employed with Damianos Realty. He is a licensed real estate salesman. He is also the President and sole beneficial owner of DSB which he said is a Bahamian company that operates a property management rental home business within Schooner Bay located in Abaco. He

stated that SBV is also a company incorporated in the Commonwealth of The Bahamas carrying on a business as a property developer and vendor of property located in Schooner Bay. He is aware that SBV is not licensed under the Act to engage in the practice of real estate business in the capacity of a real estate broker or real estate salesman within The Bahamas.

[40] In paragraph 19 of his Witness Statement, Mr. Malcolm alleged that it came to his attention that two letters were sent to SBV from BREA pointing out that SBV is not in possession of a BREA developer's license and as such would not be lawfully entitled to carry out real estate business in relation to the Homeowners' properties as it contended it is exclusively entitled to do. Shortly put, I am afraid that since this allegation was not pleaded, the Court is unable to consider it.

[41] Mr. Malcolm was extensively cross-examined by Mrs. Pearce-Hanna, who appeared as Counsel for SBV. Under cross-examination, he indicated that when the Homeowners were purchasing their properties, they wanted to know who was going to manage their properties and he told them that he would but he did not 'clear' that with anyone before he made that statement. He said that the plan he had with SBV was that in exchange for him receiving an exclusive opportunity to use DSB for rental sales and homes, he would give exclusive promotion to Schooner Bay. Ultimately, SBV did not give him an exclusive contract.

[42] When asked whether DSB had a business licence in order to operate a property management and vacation rental company, Mr. Malcolm answered "*one is in for renewal now*". He stated that since 2013 he has had business licences for every year with the exception of 2017 and it is for renewal in 2018. He confirmed that DSB was operating without a business licence in 2017 but it was because "*we were changing our office location*."

[43] Mrs. Pearce-Hanna suggested that DSB never had a business licence to which Mr. Malcom replied "*That's incorrect."* It was further suggested to him that, based on the documentary evidence presented, sometimes by himself and sometimes

with others, licences were granted to operate under the trading name *Destination Schooner Bay Limited* or *Destination Schooner Bay (Bahamas) Limited.* Mr. Malcolm subsequently accepted that the documents said that the Homeowners entered into a contractual agreement with DSB.

[44] It was next suggested to Mr. Malcolm that DSB was never issued a business licence, is not registered for VAT nor has DSB entered into any of the contracts that are before the Court. Mr. Malcolm insisted that it is completely inaccurate. It was further suggested to him that, he, in his personal capacity, is the holder of the business licences and that he, in his personal capacity as James Malcolm trading as Destination Schooner Bay Bahamas Limited, entered into contracts with the Homeowners. Mr. Malcolm stated that it is not accurate. He said that he holds a business licence trading as DSB.

[45] Mr. Malcolm further stated, under cross-examination, that he owns an undeveloped lot of land in Schooner Bay. He disagreed that it will be difficult to operate a home-based real estate office without a home. He then agreed that a home base is required to have a home-based real estate office. He confirmed that DSB does not own any property in Schooner Bay.

[46] Mr. Malcolm agreed that he is bound by the Declaration and Article 5 (5). He also confirmed that DSB does not own or lease land in Schooner Bay. He read and accepted that he was bound by the provision in the Declaration that states *"no business may operate in Schooner Bay without a business licence issued by the board".* He admitted that he did not have a business licence issued by the Board to operate in Schooner Bay. He then stated that SBV never asked him to apply for one nor asked him to submit an application. He further stated that "we were not given an application". He never applied for a business licence because, according to him, the process was never activated by the Board for him to do so.

[47] He also accepted, under cross examination, that although he worked for Damianos Realty under its broker licence, the brokerage was not affiliated with DSB.

[48] Mr. Malcolm was also questioned about the letter of 19 December 2013 which terminated the Agreement which SBV had with him specifically the penultimate paragraph which states:

> **"…You may continue to operate your business with the clients you currently have <u>but</u> we will be launching our own property management vacation rental business to service Schooner Bay clients and buyers.**"

[49] He maintained that this is what permitted him to represent the Homeowners. He confirmed that he did not enter into an agreement with the Third and Fourth Plaintiffs until 19 March 2014. He also accepted that the contract with the Second Plaintiff is dated 1 September 2014 and post-dated the termination letter of 19 December 2013 but he added that the Second Plaintiff was his client long before the 19 December 2013 letter. He denied that the First, Fifth and Sixth Plaintiffs were his only clients as at 19 December 2013.

[50] Upon being recalled to testify on the narrow issue of illegality, Mr. Malcolm acknowledged that he is a real estate salesman and he received his licence on 30 May 2014. Prior to that date, he was not a real estate salesman or a real estate broker. However, since 30 May 2014, he always maintained a real estate salesman licence which he renewed annually.

Tina Gascoigne

[51] Ms. Gascoigne filed a witness statement on 16 March 2018. She is an attorney and the in-house counsel and director of SBV.

[52] She testified that, all of Schooner Bay property owners including the First through Sixth Plaintiffs, are bound by the Declaration. She stated that Article 5.5 of the Declaration reserves to SBV the exclusive right to operate 'rental and management offices' for a period of 8 years and the reserved right acts as a deed restriction limiting the use of the land but if a homeowner wanted to operate a home-based real estate office (without posting any signage) the deed restriction would not act to prevent it. According to her, this exception allows a home-based business to operate within Schooner Bay in accordance with the Declaration and it does not

affect Schooner Bay's exclusive right to provide rental and management services to the Schooner Bay community for the duration of its exclusivity.

[53] Ms. Gascoigne further testified that Article 6 states *"To the extent permitted by law, the SBCC may, but is not obliged to, provide the following services or engage in the following activities….Issue, and revoke as necessary, business licences …"* and that Mr. Malcolm applied for a business licence and no business licence was ever issued therefore by continuing to operate DSB within SBV, Mr. Malcolm acted in breach of the Declaration and similarly, all the Homeowners contracted by him for his services, are in breach of the Declaration.

[54] During extensive cross-examination by Counsel for the Plaintiffs Mrs. Lockhart-Charles, Ms. Gascoigne confirmed that SBV is not a broker and that a company cannot be a broker but SBV has a broker on staff (Joan Russell) since 2014.

[55] She admitted that Black Fly Lodge was operating a business in Schooner Bay but was not formally issued a business licence by SBCC (the Board) but the Board agreed for them to open their business.

[56] Ms. Gascoigne further confirmed that the Board never published a business licence application form and guidelines as to the business licence requirements and the application process. She denied that an informal business licence was given to Mr. Malcolm's company.

[57] She stated that, at least from 23 April 2013, she was aware of Mr. Malcolm's plans but she did not encourage him to go into business. She however confirmed that, according to an email dated 11 September 2013, she was aware that Mr. Malcolm was about to execute owner agreements to go into effect on 1 October 2013 with seven homeowners as well as LOI's (Letters of Intention) with two others. However, she did not tell him that what he was doing was contrary to the Declaration because after she discussed the matter internally with Dr. David Huber, the owner of SBV, they concluded that it was not appropriate to shut Mr. Malcolm down since he already made assurances with those homeowners and

they were going to figure out how to transition. According to her, at that time SBV was not in position to start their own property management service and therefore SBV allowed Mr. Malcolm to proceed.

[58] Under further cross-examination Ms. Gascoigne confirmed that SBV had trademarked the name “Schooner Bay” therefore a homeowner would be in violation of the Declaration if the homeowner were to advertise his property and use the words “Schooner Bay” without permission. She also confirmed that SBV did not permit other real estate salesmen to operate in Schooner Bay and that was agreed to by all parties in the Declaration when they purchased their respective lots.

[59] Under re-examination, Ms. Gascoigne confirmed that Mr. Malcolm formed DSB and took on clients before she or SBV knew about it and before it was discussed with them.

George Damianos and Carmen Massoni

[60] Two witnesses namely George Damianos and Carmen Massoni were subpoenaed by SBV and their testimony concentrated on the issue of illegality. It is therefore not helpful to reiterate it here.

[61] All in all, both Mr. Malcolm and Ms. Gascoigne did not deviate much from what is contained in their witness statements. With respect to the subpoenaed witnesses, I found Mr. Damianos to be a reasonably straight-forward man. That said, he appeared somewhat slighted when he stated that Schooner Bay would not permit him onto their property. After all, he is a renowned Bahamian broker. With respect to Mrs. Massoni, in my opinion, she answered as best as she possibly could have recollected. For example, when she reviewed her letter dated 21 May 2014 to the Board of Directors of BREA regarding the apprenticeship of Mr. Malcolm, she confirmed that Mr. Malcolm was not a licensed real estate salesman at the date of the letter.

Discussion, analysis and findings

Issue 1 – Whether DSB is a proper party to these proceedings

[62] SBV argued that DSB is not a proper party to these proceedings and that it has no standing to bring any claim against SBV, either on its own behalf or on behalf of the Homeowners.

[63] In paragraph 7 of their Statement of Claim, the Plaintiffs asserted that the Homeowners are and were at all material times existing clients of DSB who is the exclusive contracted vacation manager for a collection of twelve (12) homes in Schooner Bay including Carioca, Zanzibar, Crosswinds, and The Jib ("the properties").

[64] Learned Counsel, Mrs. Pearce-Hanna submitted that DSB is not the exclusive contracted vacation property manager for the Homeowners, who have not even given evidence at this trial.

[65] In order to establish that DSB does not have a business licence, Mrs. Pearce-Hanna referred to a plethora of documents in the Bundle of Documents ("BoD") including the Business Licences granted in 2013, 2015 and 2016 as well as the Certificate of VAT Registration dated 15 July 2016 and 5 March 2018 respectively. She also referred to the DBS Vacation Cottage Rental Programme Owner Agreement between Destination Schooner Bay (**Bahamas)** Limited and the Homeowners.

[66] From these business licences produced by Mr. Malcolm, it is evident that DSB *per se* does not have a business licence. In fact, the business licence granted on 25 April 2013 was held in the name of "Malcolm Jam & Sam/Madrisotti F" using the trading name "Destination Schooner Bay Ltd". No business licence was produced for the year 2014. A business licence was granted to the same parties on 27 April 2015. In 2016, a business licence was issued to "Mr. James Malcolm trading as Destination Schooner Bay (Bahamas) Ltd. No business licence was issued for the

year 2017 because, according to Mr. Malcolm, this was due to a change of office location. No business licence was produced for 2018.

[67] Mrs. Pearce-Hanna urged the Court to find that, based on the evidence and the law, the Homeowners did not contract with DSB but with Destination Schooner Bay (Bahamas) Ltd, a trading name that was not used by Mr. Malcolm until 2016. She contended therefore, that DSB has not suffered any loss or damage. DSB had no licence to conduct business nor did it enter into any contracts with the Homeowners and, as such, it has not breached any of the covenants at Schooner Bay.

[68] All parties are bound by their pleadings. In respect of the Plaintiffs' pleading at paragraph 7 of their Statement of Claim, SBV, in its Amended Defence and Counterclaim at paragraph 4 pleaded the following:

> **"The Defendant neither admits nor denies paragraph 7 of the Statement of Claim. In the event that the First through Sixth Plaintiffs are existing clients of the Seventh Plaintiff, each of the Plaintiffs are (sic) acting in breach of the Declaration generally and Articles 5 and 7 particularly. Moreover, on 22 April 2015 the Defendant advised Schooner Bay's home and property owners in writing that James Malcolm and the Seventh Defendant were not authorized agents of the Defendant with respect to property sales, rental marketing and management within Schooner Bay and that they should not enter into business with either party. Therefore, the breaches of the Declaration are wilful on the part of the Plaintiffs and intended to do the Defendant harm."**

[69] It is a fact that SBV did not plead that DSB is not a proper party to these proceedings and does not have standing to bring any claim against SBV either on its own behalf or on behalf of the Homeowners. However, as Mrs. Pearce-Hanna submitted in Reply submissions, the whole purpose of taking evidence is to test the pleaded case. As correctly stated, if the pleaded case is inconsistent with the evidence, the Court is entitled to come to its own conclusion as to the true state of affairs based on the evidence. This proposition is supported by Scrutton LJ in **Lever Brothers v Bell** [1931] 1 KB 557 at p. 582 - 583 where he stated:

> **"In my opinion, <u>the practice of the Courts has been to consider and deal with the legal result of pleaded facts, though the particular legal result alleged is not stated in the pleadings, except in cases where to ascertain the validity of the legal result claimed would require the investigation of new and disputed facts which have not been investigated at the trial</u>…. therefore, the question as to the mutual mistake needs no further evidence to elucidate its legal effect and can be dealt with on the facts admitted and found by the jury or inferred by the judge <u>without any amendment of the pleadings.</u>"** [Emphasis added]

[70] Mrs. Pearce-Hanna submitted that the Court, having the benefit of Scrutton LJ's complete dicta, would agree that evidence is brought to test the pleadings and accordingly, the Court is able to infer or otherwise ascertain the true position in fact and in law without requiring any amendment to the pleadings. I agree with this submission.

[71] In my considered opinion, the pleadings established that there was a common assumption between the parties that Mr. Malcolm would set up a corporate entity to enter into contracts with homeowners in Schooner Bay to carry out property management services. The business licences have Mr. Malcolm and his wife's names trading as either Destination Schooner Bay Ltd ("DSB") or Destination Schooner Bay (Bahamas) Ltd. The Agreements with the Homeowners all have "Destination Schooner Bay (Bahamas) Ltd". Mrs. Lockhart-Charles admitted that there is some confusion in the contemporaneous documentary record with regard to the various names. However, I agree with her that it is not a matter of substance for the reason that the various licences show Mr. Malcolm as the holder of a licence to carry out property management business trading as Destination Schooner Bay (Bahamas) Limited (page 463 of the Bundle) and trading as Destination Schooner Bay Limited (page 440 of the Bundle). While there is no licence solely with the business name "Destination Schooner Bay Ltd", the company that was in fact incorporated in 2013 and 2015 is named Destination Schooner Bay.

[72] I am of the opinion that, at all material times, it was understood and the parties conducted themselves on the understanding that Mr. Malcolm, a licensed Real Estate Salesman, would be conducting the real estate business through a

corporate entity to be set up by him and the entity would enter into contracts with homeowners in Schooner Bay for the management of their properties. Whether the paper contracts were entered into in the trade name or in Mr. Malcolm's own name does not alter the fact that all parties conducted themselves on the understanding that Mr. Malcolm would be managing the Homeowners' properties through his corporate alter ego.

[73] Mrs. Lockhart-Charles relied on the Privy Council case of **Metaxides and Silver Point v Swart and others** [2015] UKPC 32 but Mrs. Pearce-Hanna attempted to distinguish it from the present case. In my opinion, the reasoning is apposite to the present case. Essentially, the Board held that, where a party represented by its conduct that it accepted a certain state of affairs to be the case, it would not be heard to adopt a contrary position. At [23], Lord Toulson, in delivering the Judgment of the Board, stated:

> **"It would have been obvious to anybody reading the originating summons, the amended originating summons, the ex parte injunction and supporting affidavit that Mr. Metaxides was seeking to proceed against the body which was responsible for the operation of the property. That party was SPCA. <u>There was a misnomer on the originating summons as first issued, and the amended version showed a degree of confusion or uncertainty as to the correct name, but such defects were inconsequential because SPCA recognised itself as the defendant both by entering an unconditional appearance and by its subsequent conduct. It thereby waived any irregularity regarding the form of title used in the proceedings (or the absence of formal leave to file the amended originating summons).</u> Having submitted to the court's jurisdiction and entered into a consent order, SPCA could not be heard to deny that it was a party to the proceedings and bound by the order, nor has it sought to do so."**

[74] In my opinion, DSB is a proper party to these proceedings. It is a fact that no business licence has the name "Destination Schooner Bay Limited" by itself but the 2013 and 2015 licences have Mr. Malcolm and his wife's names trading as Destination Schooner Bay Limited. A similar position obtains under the VAT Act. To my mind, this is sufficient for the reasons already expressed.

[75] Although not exactly on point, a somewhat similar issue arose in the case of **Soldier Crab Limited t/a Sandy Toes v Aqua Tours Limited** [2013/CLE/gen/013100] – Judgment delivered on 22 December 2016 –Charles J. BahamasJudiciary website for 2016. In that case, a written contract was entered into by two parties which were named in the contract as "Aquatours Ltd" and "Sandy Toes Ltd" whereby Aquatours agreed to provide boat transportation services. The first contract was performed in its entirety. A subsequent written contract was entered into by the same parties. It was not fully performed and the Plaintiff commenced proceedings against the Defendant. The Defendant alleged that the subsequent contract was a nullity because it contracted with a non-existent company and further, that the Plaintiff had not acted in accordance with certain provisions of the Companies Act and the Business Licence Act. The Court held that a company, like a natural person, has characteristics other than its name by which it can be identified. Such characteristics include its trading name, type of business, place of business and agents/directors. It was further held that the Defendant knew that it was contracting with a company which operated using the name "Sandy Toes", had a tourist excursion business on Rose Island and that Iola Knowles acted as its agent. These characteristics were identical to that of the Plaintiff. The Court also held that the Plaintiff was a party to the contract and the use of the name Sandy Toes Ltd rather than its corporate name, Soldier Crab Limited or its trading name, Sandy Toes, was a misnomer.

[76] At [40], the Court referred to the landmark case of **Investors Compensation Scheme Limited v West Bromwich Building Society** [1998] 1 WLR 896 which expounded the principles governing the construction of a document: see Lord Hoffman at pages 912 – 913. Then, at [41], the Court cited the case of **Prenn v Simmonds** [1971] 3 All ER 237 and the dicta of Lord Wilberforce (at pages 239-240) where he stated:

> **"In order for the agreement …to be understood, it must be placed in its context. The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. There**

> **is no need to appeal here to any modern, anti-literal, tendencies, for Lord Blackburn's well-known judgment in *River Wear Commissioners v Adamson (1877) 2 App. Cas 743* provides ample warrant for a literal approach. We must, as he said, inquire beyond the language and see what the circumstances were with reference to which the words are used, and the object, appearing from those circumstances, which the person using them had in view."**

[77] In the present case, I find that the vehicle which was incorporated by Mr. Malcolm for the conduct of his property management services is DSB. It is therefore a proper party to these proceedings.

Issue 2: Did Mr. Malcolm and/or DSB act illegally in breach of the Real Estate (Brokers and Salesmen) Act 1995?

[78] I propose to deal with this issue before the remaining issues because it may resolve the dispute in its entirety.

[79] SBV amended its Defence to plead illegality alleging a breach of the Real Estate (Brokers and Salesmen) Act 1995 ("REA") and in particular, sections 2, 3, 4 and 40.

[80] REA came into force on 1 January 1996. Its purpose is to (i) empower the Real Estate Board established under section 6 to regulate and control the business of real estate in The Bahamas, (ii) to empower the Board to conduct such examinations and courses as it deems necessary to promote and maintain high ethical and professional standards of conduct between Bahamas Real Estate Association ("BREA")'s licensed members and the general public in real estate transactions, and most importantly, (iii) to give the general public the assurance and understanding that all BREA licensed real estate brokers and salesmen are professional, accountable and liable under the provisions of REA.

[81] Section 3 of REA deals with the practice of real estate business and section 4 provides for the restrictions on engaging in the practice of real estate business. Section 4 provides:

"4. (1) Subject to subsection (3), a person shall not *engage* in the practice of real estate business or in any branch of such practice –

(a) in the capacity of a real estate broker unless he is the holder of a valid licence issued under subsection (1) of section 22 authorizing him to do so;

(b) in the capacity of a real estate salesman unless he is –

(i) the holder of a valid licence issued under subsection (2) of section 22 authorizing him so to do, and

(ii) an employee or agent of a duly authorized real estate broker.

(2) Every person who contravenes subsection (1) is guilty of an offence and shall be liable on summary conviction to a fine of three thousand dollars or to imprisonment for twelve months or to both such fine and imprisonment and in the case of a continuing offence to a further fine of one hundred dollars for each day during which the offence continues. [Emphasis added]

(3) ….."

[82] Section 40 (1) of REA provides:

"A person who engages in the practice of real estate business as a real estate broker or a real estate salesman without being the holder of a valid licence issued under section 22 authorising him so to do, or in contravention of any condition of such licence, shall not be entitled to bring any suit or action for the recovery of any fee or reward for, or in respect of, anything done by him on behalf of any other person in the course of engaging in such practice, and shall not be entitled to any lien on money or other property of such other person for the purpose of recovering any such fee or reward". [Emphasis added]

[83] Mrs. Pearce-Hanna submitted that the issue of illegality is two-fold namely:

(i) At the time that contracts were entered into on behalf of the First through Sixth Plaintiffs with the exception of the Second Plaintiff, Mr. Malcolm was engaging in the practise of real estate business without being a licensed salesman or broker, in contravention of REA and particularly, section 4; and

(ii) At no time during the operation of DSB and/or Mr. Malcolm's property management business did Mr. Malcolm operate the property management business in his capacity as an employee or agent of a real estate broker or otherwise under the supervision, direction and control of a real estate broker, in contravention of sections 2 and 4 of REA, resulting in the entire property management business of DSB/Mr. Malcolm being illegal.

[84] On the other hand, DSB contended firstly, that there is no breach of REA because Mr. Malcolm is employed **by** a broker and secondly, in light of the course of conduct between the parties, it would be unconscionable to allow SBV to raise the issue of illegality to disrupt the Plaintiffs' arrangements.

[85] Learned Counsel Mrs. Lockhart-Charles argued that Mr. Malcolm is a licenced real estate salesman who operated his property management business through DSB while being employed by a broker (Damianos Realty/Mr. Damianos and previously BIR/Mrs. Massoni). She further argued that Mr. Malcolm conducts his property management business as an employee of Damianos Realty and with their authorization.

[86] Mrs. Lockhart-Charles also argued that section 40 of REA does not apply to the present case because the Plaintiffs are not seeking to recover any fee or reward for or in respect of anything done by it on behalf of any other person.

[87] Learned Counsel Mrs. Pearce-Hanna submitted that any contracts entered into before 30 May 2014 (at the earliest) were executed before Mr. Malcolm acquired his real estate salesman licence. In or about March 2014, Mr. Malcolm sat the "Entry Level Salesman Exam. On 30 May 2014, BREA issued a letter to Mr. Malcolm stating that "*Please be advised that the Board of Directors of the Bahamas Real Estate Association has approved your application for membership in BREA and has approved your registration and licensing as Salesman subject to your immediate payment of the 2014 Annual Dues of $300….*"

[88] Accordingly, says Mrs. Pearce-Hanna, the earliest date that Mr. Malcolm could have legally acted as a licensed real estate salesman is sometime after 30 May 2014. I agree.

[89] Mrs. Pearce-Hanna further submitted that the effect of this fact is three-fold in nature in respect of the Homeowners' respective contracts.

[90] Firstly, the contracts entered into with the First Plaintiff (dated and signed 1 November 2013), the Third and Fourth Plaintiffs (dated 1 November 2013 and signed on 2 March 2014) and the Fifth and Sixth Plaintiffs (dated 19 March 2014 and signed on 23 March 2014) are illegal contracts which are void and unenforceable pursuant to section 40 of REA.

[91] Secondly, says Mrs. Pearce-Hanna, as none of those contracts were legal, insofar as the 19 December 2013 letter purported to give Mr. Malcolm/DSB permission to operate his property management business "*with the clients he currently have*", it cannot be relied upon to have acted as a waiver to permit the enforcement of illegal contracts that were void and unenforceable.

[92] Thirdly, in accordance with section 40 of REA, Mr. Malcolm/DSB shall not be entitled to bring any suit or action for the recovery of any fee or reward for, or in respect of, anything done by him on behalf of any other person in the course of engaging in such practice" because he was not a licensed real estate salesman. These are formidable submissions and I agree with them.

[93] The next question which arises is whether Mr. Malcolm was operating independently of a real estate broker?

[94] Mrs. Lockhart-Charles fought hard to demonstrate that throughout the operation of DSB/the property management business, Mr. Malcolm had been employed either as an employee or agent of either Mrs. Massoni (BIR) or Mr. Damianos (Damianos Realty). Both Mr. Damianos and Mrs. Massoni are brokers.

[95] However, by Mr. Malcolm's own evidence, DSB operated wholly independent of and without the oversight of any broker. This is how the evidence went during cross-examination: see Transcript of Proceedings dated 31 January 2019 at p 3 lines 2 through10.

> **"Q: Was there anybody else who sort of played your role as a realtor or who had a realtor's licence so that you could focus on other things while they handled things?**
>
> **A: In the company?**
>
> **Q: Yes.**
>
> **A: No, I am the sole holder of the real estate licence in the company."**

[96] Mrs. Pearce-Hanna continued with her cross-examination of Mr. Malcolm: see Transcript of Proceedings dated 31 January 2019 at p 4 line 25 through p 5 line 7:

> **"Q: Now, you work for Damianos' Realty?**
>
> **A: I currently work under a brokerage, yes.**
>
> **Q: <u>Is that brokerage affiliated with Destination Schooner Bay in any way?</u>**
>
> **A: <u>No.</u>**
>
> **Q: Okay, so as a real estate salesman, aren't you obligated to provide services under the guidance of a broker?**
>
> **A: Real estate sales, yes.**
>
> **Q: But your position is that you do not have to have a brokerage guidance for real estate businesses, I mean property management and rentals?**
>
> **A: That's correct.**
>
> **Q: That's your position.**
>
> **A: That's correct."**

[97] Mr. Malcolm's evidence is also supported by that of Mr. Damianos and Mrs. Massoni.

[98] Mr. Damianos is the CEO of Damianos Realty and Lyford Cay Sotheby International Realty. He is also a certified broker and residential specialist. *He is not familiar with DSB.* He is familiar with Mr. Malcolm who is a salesman with Damianos Realty. *His company does not provide property management services*. *He further stated that neither he nor his company would give DSB or Mr. Malcolm any direction with respect to his property management and rental business. Mr. Malcolm does not provide property management and rental facility through DSB to himself or Damianos Realty.* He is however aware that many of his agents have little cottage industry in the Family Islands to help support their life style and he would have approved Mr. Malcolm's operation of DSB or any other property management or rental service if it was brought to his attention. He asserted that he had absolutely no involvement with DSB.

[99] Under cross-examination by Mrs. Lockhart-Charles, Mr. Damianos confirmed that Mr. Malcolm is employed by his company as a real estate salesman. He stated that 99% of his sales people in the Family Islands do short-term rentals on their own outside of his company with no brand of Sotheby's or Damianos.

[100] Mrs. Massoni testified via video link from Vancouver, British Columbia, Canada. In her oral testimony, she stated that she is a realtor by profession and is licensed in The Bahamas since 1995. She was first in sales and, as a broker, in or about 1999 to 2003. She could not recall the exact date. She is the owner and former president of BIR. She is familiar with Mr. Malcolm as he became the agent for her company in 2014. She stated that he started as an intern in December 2013 and he was granted his licence on 1 January 2014. When shown a letter dated 21 May 2014 which she wrote to the Board of BREA, she then stated that he was doing his apprentice (ship) under her brokerage licence. She then confirmed that Mr. Malcolm did not have a real estate salesman licence as of the date of the letter.

[101] *She stated that she knows DSB existed but was not familiar with it except that it was part of Mr. Malcolm's business that he had when he joined the company. She further stated that DSB was not an affiliate or subsidiary of Bahamas Island Realty and she did not provide Mr. Malcolm with any advice on how to operate DSB. She knew that DSB existed but she was not involved in any shape or form. Neither did she review its operation or receive any compensation from DSB.*

[102] According to Mrs. Massoni, *she did not have any active or passive oversight of DSB and was not aware of who its clients were or aware of the terms under which they entered into agreement with DSB. She said that although Mr. Malcolm was working with her company she had no oversight or involvement in his business*.

[103] Under cross-examination from Mrs. Lockhart-Charles, *Mrs. Massoni confirmed that she was aware of the connection with Mr. Malcolm and DSB and she did not object to Mr. Malcolm operating DSB while he was employed under her as a broker*. As she alleged, she actually encourages her agents to do property management as the way to get clients later when they want to sell. *She further stated that during the time that Mr. Malcolm worked for her company he acted as an agent of the company.* Mrs. Massoni said that her company was lawfully entitled to conduct real estate business in Schooner Bay.

[104] Under re-examination, Mrs. Massoni confirmed that Mr. Malcolm acted in whole or in part as an agent of her company while he was employed there. She also confirmed that he was operating DSB while he was an agent of her company with a right to sell, to rent and to manage.

[105] Although Mrs. Lockhart-Charles sought to confirm with Mr. Damianos and Mrs. Massoni that throughout the operation of DSB, Mr. Malcolm has been employed by or an agent of either of them, I agree with Mrs. Pearce-Hanna that that is not the requirement of section 2. Section 2 defines a "real estate salesman" as "*an individual who engages in the practice of real estate business in whole or in part,*

as an agent of, or subject to the direction, control or management of, a real estate broker".

[106] Mrs. Lockhart-Charles further submitted that SBV has attempted to create an issue out of the operation of Mr. Malcolm's property management business through DSB. However, the facts are that Mr. Malcolm is the holder of a real estate salesman licence and is an employee of Damianos Realty and he was previously an employee of BIR. The reality, she says, is that DSB operates through James Malcolm, who is the holder of a salesman licence just as Damianos Realty does through Mr. Damianos, who is the holder of a broker's Licence, and BIR did through Mrs. Massoni, who is the holder of a broker's Licence. Additionally, she submitted that, according to SBV's own evidence, it too engages in this practice allegedly conducting real estate business through a broker that it has on staff.

[107] Mrs. Lockhart-Charles also submitted that the principle which is reflected in **Treasure Cay Limited v Webster and Ors; Albury v. Webster and Ors** [2005] 4 BHS 102 relied upon by SBV applies equally to Mr. Malcolm and his relationship with DSB with regard to the usual practice in the real estate industry in The Bahamas. SBV states, at paragraph 147 of its Submission, "*Not only is this practice common, widespread, and well known, it was tested in the case of Treasure Cay Limited v Webster and Ors; Albury v. Webster and Ors [2005] 4 BHS 102*." And, at paragraph 150, SBV sets out the relevant extracts from the decision of Thompson J as follows:

> **"In a reasoned judgment, Thompson J considered whether or not the Real Estate Salesman and Broker's Act applied to the transaction and if so, what effect did it have:-**
>
> > **"23 However does the Act prohibit a company from engaging in the real estate business?**
> >
> > **24 Counsel for Treasure Cay gives the analogy of counsel and attorneys working under the umbrella of a firm. Clearly the firm is not a counsel and attorney and would not be admitted as a counsel and attorney of the Supreme Court, but attorneys can practise as attorneys under the aegis of the firm and this is an established practice in The Bahamas.**

> **25 As stated by counsel for Treasure Cay "nothing in the Act prohibits the practice of real estate business, simpliciter without a licence". Section 40, and indeed the whole Act only addresses the position of individuals who engage in the real estate business as brokers and salesmen, and not companies which engage in any area of the practice of real estate business in any other capacity.**
>
> **26 The real estate business in The Bahamas has for years been carried on by companies which employ brokers and salesmen. Under the 1995 Act these brokers and agents now have to be properly licenced.**
>
> **27 In the instant case, under the provisions of the Act, had Mrs. Albury not been a properly licenced broker, her, acting in such a capacity would have been illegal, and Treasure Cay would have been precluded from obtaining any compensation for her actions. However, as she was properly licenced employer, acting as a real estate agent (as set out in the Re-Re-Amended Statement of Claim) from collecting the earned commission.**
>
> **28 In this connection in asserting that Parliament did not intend to change the way the real estate business in The Bahamas operated, I take solace from Devlin J's ruling in NATIONAL ASSISTANCE BOARD vs. WILKINSON [1952] 2QB 648 at page 661.**
>
> > **"It is a well established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words which point unmistakably to that conclusion."**
>
> **29 I am satisfied that Parliament evinced no clear intention to change the way real estate companies operated in The Bahamas at the time and it is not for me to correct the language of Parliament "in order to give an interpretation to statutory provisions which Parliament is allegedly assumed to have intended."**

[108] Mrs. Lockhart-Charles submitted that there is no reason to treat an officer of a company any differently that an employee as far as applying the principles enunciated by Thompson J in the Treasure Cay case is concerned, and allowing the company (DSB) to participate in the real estate industry through the licensure of its agent (in this case, Mr. Malcolm). And, in reliance on **Treasure Cay Limited**, that a great deal of weight would be attached to the evidence of Mr. Damianos,

Mrs. Massoni and the word of the President of the BREA, Carla Sweeting, as to the way real estate companies operate in The Bahamas. In reliance on this evidence and the legal principle expressed by Thompson J. in **Treasure Cay Limited**, the Court is invited to rule in favour of granting the declarations sought by the Plaintiffs.

[109] Mrs. Pearce-Hanna argued that the Plaintiffs' interpretation of **Treasure Cay Limited** is misconceived and inconsistent with both the language and facts of the case. I agree. **Treasure Cay Limited**. employed a broker who entered into an oral agreement in connection with the sale of a house. Mr. Malcolm is a real estate agent, which is obligated under REA to operate at all times either in a capacity as an employee or as an agent of a broker. The evidence clearly shows that Mr. Malcolm, in operating DSB, did not do so. DSB/Mr. Malcolm did not operate either as an agent of or under the direction, control or management of a broker.

[110] Based on the evidence and the applicable legal principles, I find that DSB operated independently of a broker. It follows that DSB was operating illegally and in violation of REA.

[111] Pursuant to section 40 of REA, neither Mr. Malcolm nor DSB is entitled to bring an action for the recovery of any fee or reward for, or in respect of, anything done by him on behalf of any other person in the course of engaging in such practice. I so find.

[112] SBV further submitted that the result of the violation of the express language of REA by all the Plaintiffs is that their retention of DSB is illegal and void in the circumstances of this case. She urged the Court to dismiss the action against SBV.

[113] Mrs. Pearce-Hanna also submitted that the Court is not permitted to support a plaintiff who committed illegal acts to derive rights from those acts. I do not believe that Mrs. Lockhart-Charles holds a contrary view. The case of **Cope v Rowlands** (1836) 6 LJ Ex 63 (per Parke B) which was subsequently applied in the Privy Council case of **Menaka, Wife of M. Deivarayan and Lum Kum Chum** [1977] 1

WLR 26, is sound authority for the proposition that a contract in contravention of or prohibited by statute is generally void and unenforceable. In **Cope**, Parke B stated that:

> **"It is perfectly settled that where a contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition, and it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is whether the statute means to prohibit the contract."**

[114] **Cope** is authority for the legal principle that a contract which is in contravention of or prohibited by statute will be rendered void and unenforceable.

[115] The Plaintiffs' claims are grounded on the presumption that the services offered by DSB/Mr. Malcolm were lawful. DSB/Mr. Malcolm's services were not lawful since they contravened REA as Mr. Malcolm was not a broker who is the only licensee allowed to perform the services which he promised to the Homeowners. That being the case, all of the Plaintiffs including DSB lack the standing to bring an action against SBV.

[116] For all of these reasons, I will dismiss the action brought by the Plaintiffs against SBV.

The Counterclaim

Issue: what is the true construction of Article 5, Part II, Clause 5.5 of the Declaration?

[117] In my opinion, the true construction of Article 5, Part II, Clause 5.5 of the Declaration will resolve the remaining issues which precipitated this action.

[118] Article 5, Part II, Clause 5.5 of the Declaration provides:

> **"5.5 <u>Real Estate Offices</u>. <u>For eight (8) years after the date that this Community Declaration is recorded, the Founder shall have the right to exclusive operations of real estate sales, rental or management offices within Schooner Bay, which shall be considered a deed restriction for the entire Schooner Bay</u> and shall be part of the consideration for the sale of property within Schooner Bay. <u>However, unsigned home-based real estate offices are permitted</u>."**

[119] It is an elementary rule of statutory interpretation that words must be given their ordinary grammatical construction unless so reading it would entail some absurdity, repugnancy or injustice and it is not competent for the court to modify the language contained in those words to bring it in accordance with his view as to what is right or reasonable.

[120] Learned Counsel Mrs. Pearce-Hanna submitted that, on a true construction of Clause 5.5, it can have no other meaning than the one which SBV relies upon; that the words must if at all possible be given their ordinary meaning. She accepted that the language could include offices and building structures but when one looks at the Declaration as a whole, for it to be interpreted for such limited effect is an absurdity. Counsel submitted that by Article 2, Part II, "Business Licences", SBV already controls the issuance of business licences and who can operate a business from physically within Schooner Bay. Similarly, by Article 4, SBV can control what buildings are built and for what purpose.

[121] Mrs. Pearce-Hanna next submitted that, moreover, and, most significantly, Article 5, Part II, Clause 5.3 (h) specifically gives SBV their right to maintain "*a sales office [and] a management office*" among others "*on **any** lot in Schooner Bay and may be relocated from time to time at SBV's discretion*."

[122] She further submitted that the Declaration already gives SBV substantial powers to exercise rights over the land when it comes to physical structures for sales and management offices. By necessity, Clause 5.5 must mean more than the presence of main offices. It must refer to operations - i.e. Provision of services. This language explains not only why it is for a fixed and defined period of time

(unlike under Clause 5.3 (h) by which SBV has permanent or, at the very least, indeterminable right to maintain sales and management offices). It is also consistent with the overall language of the Declaration which declares its intent to create and develop a guided community.

[123] Moreover, says Counsel, while the section continues on to provide for deed restrictions which may appear out of place, they are necessary to bind all homeowners in Schooner Bay. SBV cannot control real estate agents from outside of the development, because they are not bound by the Declaration. By making the right to exclusive operations a deed restriction, that runs with the land, SBV and the Declaration bind all current and future homeowners to this restriction/ limitation ensuring that the restrictive covenant *MUST* be abided by.

[124] Mrs. Pearce-Hanna referred to the Privy Council case of **Thompson and another v Goblin Hill Hotels** [2011] UKPC 8 to support her contention that in construing Article 5(5) of the Declaration, the Court ought to give the words contained in the Declaration their ordinary meaning and the same can only be displaced if it produces a commercial absurdity. She argued that the burden is on the Plaintiffs to satisfy the Court that the plain and ordinary meaning will produce a commercial absurdity.

[125] Mrs. Lockhart-Charles agreed that the Court should give the words contained in Article 5(5) of the Declaration, namely those relating to SBV's exclusive rights to manage properties in Schooner Bay, their plain and ordinary meaning as same does not result in a commercial absurdity.

[126] Simply put, all parties are agreed that the words of Clause 5.5 ought to be given their plain and ordinary meaning and the document must be read as a whole.

[127] So, what is the meaning of: **"<u>For eight years after the date that this Community Declaration is recorded,</u> <u>the Founder shall have the right to exclusive operations</u> of real estate sales, rental or management offices within Schooner Bay…. <u>However, unsigned home-based real estate offices are permitted</u>."**[Emphasis added]

[128] Clause 5.5, when dissected, raises three fundamental points namely:

- The Founder shall have exclusive rights to operate real estate sales, rental or management offices within Schooner Bay;
- The Founder shall have that exclusive right to operate real estate sales, rental or management offices for eight years after the Declaration is recorded which is eight years after 17 June 2009; and
- Unsigned home-based real estate offices are permitted."

[129] Mrs. Pearce-Hanna vehemently argued that the phrase "unsigned home-based real estate offices are permitted" has no effect on the exclusive rights for two reasons:-

1. The exception of home-based real estate offices is with respect to the fact that the rights reserved to the Founder are deed restrictions and affect the consideration of properties for sale. In effect, if one is proposing to operate a home-based real estate office that does not purport to interfere with the rights reserved to SBV, and so one will be allowed to operate on the property purchased and;

2. Any other interpretation would create a commercial absurdity as it would defeat the "exclusivity" clause in its entirety, and make it irrelevant.

[130] She asserted that Article 5.5 reserves the exclusive right to property management and rental to Schooner Bay without exception and even the letter of 19 December 2013 sent to Mr. Malcolm does not have the power to waive Article 5.5. I will come to this later on in this Judgment.

[131] Returning to the present issue of exclusivity, I do not agree with Mrs. Pearce-Hanna's strained meaning given to Article 5.5. In my judgment, when these words are given their ordinary meaning, it is apparent that DSB's property management activities do not infringe the Declaration as there has been no attempt by DSB to

operate real estate sales, rental or management offices within Schooner Bay other than unsigned home-based real estate offices.

[132] In addition, any exclusivity conferred by Clause 5.5 has expired since more than eight (8) years have elapsed since the recording of the Declaration. The Declaration was recorded on 17 June 2009: page 478 of BoD.

[133] In addition, I do not agree with Mrs. Pearce-Hanna that the expiration of the Declaration is not a relevant consideration as it does not affect the live issues between the parties. One of the critical issues in this case is the true construction to Clause 5.5. Under cross-examination, Ms. Gascoigne did state that the Declaration had been amended. In my view, this will require a specific amendment extending the 8 years and as Mrs. Lockhart-Charles puts it "*the clock is not simply reset*" when amendments to the Declaration unrelated to this Clause are made.

[134] The exclusivity clause contained in Clause 5.5 of the Declaration was for eight (8) years from the date that the Declaration was recorded (17 June 2009) which expired on 17 June 2017. SBV cannot shift the goal post to a date at its own whim and fancy. Any amendment to that date has to be specific and a general amendment to the Declaration will not suffice. I find that Clause 5.5 in the Declaration has expired by an effluxion of time and the Defendant cannot rely on it.

Exemption clause and waiver

[135] It is sensible to deal with this issue before I move to the Plaintiffs' claim for damages for loss of opportunity.

[136] SBV submitted that in so far as the Court may determine that its interpretation of Clause 5.5 of the Declaration is misconceived, Article 7 of the Declaration protects them from any liability arising from such a mistake, or negligence, and specifically from a suit for damages or equitable relief on account of their enforcement of this Community Declaration. It is binding on all Owners, including the Plaintiffs. SBV relies on it.

[137] Article 7 of the Declaration and in particular "Waiver" provides that:

> **"Neither the Founder [SBV]… nor their successors or assigns shall be liable for damages to any Owner… by reason of any mistake in judgement, negligence, nonfeasance, action or inaction in the administration of the provisions of this Community Declaration, the Design Code or the rules and regulations for the enforcement or failure to enforce this Community Declaration, the Design Code or the rules and regulations or any part thereof; and <u>every Owner, by acquiring an interest in Schooner Bay, agrees that he, she or it will not bring any action or suit against the Founder… to recover damages or to seek equitable relief on account of their enforcement or non-enforcement of this Community Declaration</u>."** [Emphasis added]

[138] On the other hand, Mrs. Lockhart-Charles submitted that SBV cannot avail itself to the protection of Article 7 as SBV's unconscionable interference in the Plaintiff's property management arrangements and obstruction of the listing of the Homeowners' properties in Coastal Living was neither done in good faith nor was it a genuine act of enforcement of the Declaration. According to her, the reality is that, after authorizing Mr. Malcolm to conduct property management services through his corporate vehicle DSB, SBV sought to deny that authorization was given, and disrupted those arrangements on the pretext that there was a breach of the Declaration and later, on illegality, an issue that SBV belatedly raised. Although belatedly raised, the Court gave permission to SBV to plead this issue as it only arose during the cross-examination of Mr. Malcolm. Says Mrs. Lockhart-Charles, the truth is that this was not a case of "mistake in judgment, negligence, or nonfeasance" but rather a case of misfeasance for which SBV should be afforded no protection by Article 7.

[139] I am afraid that I do not agree with the submissions of Mrs. Lockhart-Charles. The Homeowners are bound by the Agreement. They cannot seek protection under Clause 5.5 and then attempt to disassociate themselves from the express provision of Article 7 of the Declaration.

[140] The Privy Council decision of **Bahamas Oil Refining Company International Limited (Appellant) v The Owners of the Cape Bari Tankschiffahrts GMBH &**

Co KG (Respondents) [2016] UKPC 20 which was cited by SBV, is sound authority for the proposition that one can waive rights, even statutory rights, under contract. The facts are simple. There was a collision between a ship owned by the Appellant ("BORCO") and a ship owned by the Respondents (the "Owners"). It was the Owners' case that they were entitled to limit their liability, a legal right conferred by statute under contract (the "agreement"). The Owners contested and asserted that same was waived under contract.

[141] The critical issues before the Board were:

1) Was it permissible for the Owners to contract out of or waive their statutory right of limitation under Bahamian law namely the Merchant Shipping (Maritime Claims Limitation of Liability) Act 1989 and the Convention on Limitation of Liability for Maritime Claims 1976 ("the 1976 Convention"); and

2) On a true construction of the agreement, did the Owners and BORCO agree to exclude the Owners' statutory right to limit their liability?

[142] The Board asserted that the Court of Appeal unfairly held that it was not possible for the Owners of a vessel to contract out or waive its statutory right to limit their liability under contract without enabling the parties to advance submissions on the point. Further, the Board also held that one can, by agreement, waive or contract out of valuable rights, including a legal right under statute if the provision intending to do so is clear.

[143] Lord Clarke had this to say at [19] to [20] of the Judgment:

> **"19. Applying those principles of construction, the Board is of the clear opinion that it is open to parties, here shipowners, to agree to waive their right to limit their liability under the 1976 Convention or the 1989 Act. Simply as a matter of language, the Board concludes that there is nothing in the language of the Convention or the Act to prohibit them from doing so.**
>
> **20. …The language of the Convention strongly supports the conclusion that there is nothing to prevent shipowners agreeing to waive their right to limit. Chapter 1 expressly refers to the right of**

> **limit. Chapter I expressly refers to the *right of limitation.* Article 1.1 provides that they may limit their liability … for claims set out in article 2. The Board emphasises those provisions because they show that the Convention confers rights on shipowners and not duties. There is no linguistic support for the conclusion that shipowners cannot agree to pay more than the limit or, more accurately, cannot agree to pay a particular claimant more than the limit provided for in the Convention. They have a right to limit, which they can choose to exercise, or not, as they please."**

[144] As I see it, the Plaintiffs have waived their rights to sue SBV in light of the binding agreement between the parties.

Alleged waiver of the right to exclusive operations

[145] The Plaintiffs asserted that the letter of 19 December 2013 acts as a waiver of the restriction contained at Clause 5.5 of the Declaration. SBV does not accept this interpretation.

[146] Given the Court's earlier findings on illegality, I believe that no further discussion on this issue arises.

Other issues raised

[147] Given the findings of the Court, the other issues which arose do not warrant my consideration.

Conclusion

[148] For all of the reasons stated above, I make the following order:

1. The Plaintiffs' Specially Indorsed Writ of Summons filed on 10 June 2016 is dismissed;
2. The Defendant's Counterclaim filed on 14 July 2016 is dismissed.
3. Each party will bear their own costs.

Postscript

[149] One of the reasons that parties come to the Court is for the Court to assist them to resolve their disputes. Having come to the conclusion that Mr. Malcolm/DSB acted illegally in contravention of REA and that the exclusivity clause contained in Clause

5.5 has expired by effluxion of time (since June 2017) and also, that the interpretation of Article 5.5 proposed by Mrs. Pearce-Hanna would lead to commercial absurdity, where do the parties go from here?

[150] This postscript is meant to provide some advice to the parties based on the law. The sole purpose is to assist them on a way forward. It is not binding on either party. That said, it is plain to me that SBV can no longer rely on Clause 5.5 of the Declaration unless a specific amendment is made to it (on their own evidence, that it expired on 22 March 2018 at the earliest). It also seems plain to me that the Plaintiffs will be able to market their properties in whatever magazine(s) they choose to and by anyone who is qualified to do so under sections 2 and 4 of REA including but not limited to SBV.

[151] Undoubtedly, this gives rise to another issue of whether they are entitled to use the words “Schooner Bay” in conjunction with advertising their respective properties. I turn to Article 5.2 of the Declaration which provides:

> **“Article 5.2 of the Declaration aforesaid states the *“The Founder reserves the right to trademark the name "Schooner Bay" or other name of the Community as a trade name owned by the Founder. An Owner or occupant may use the trademarked name to describe the location of its business and may advertise a business as being located in "Schooner Bay" or other trademarked name. If requested by the Founder, the Owner, Tenant, or Occupant shall accompany such use with a symbol or explanation concerning trademark or service mark registration of the name. An Owner, Tenant, or Occupant may not use the trademarked name in any other manner without the express permission of the Founder, which may be arbitrarily denied. The Founder shall have the right to change the name, Schooner Bay, for all or any part of the property subject to this Community Declaration. The Founder may, but is not required to, amend this Community Declaration to reflect the name change. Any small business that proposes to use the name Schooner Bay shall be first approved by the Board of Governors.*** **"** [Emphasis added]

[152] Article 5.2 states that the Founder reserves the right to trademark the name “Schooner Bay” as a trade name owned by the Founder. The following words are material:

> **"An owner or occupant may use the trademarked name to describe the location of the business and <u>may advertise the business as being located in Schooner Bay…Any small business that proposes to use the name Schooner Bay shall be first approved by the Board of Directors</u>."**[Emphasis added]

[153] Given the fact that the Plaintiffs' properties are <u>geographically located in Schooner Bay</u>, it is my fervent hope that if and when they make the necessary application to the Board, such approval will not be unreasonably withheld.

[154] At the end of the day, it is hoped that this community would thrive and flourish in growth and everyone would live peacefully and happily ever after.

[155] Last but not least, I apologize for the inordinate delay in the delivery of this Judgment. I am immeasurably grateful to all parties for their forbearance.

Dated this 20th day of July, 2021

Indra H. Charles

Justice