COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2014/CLE/gen/773 consolidated with

BETWEEN

OLD FORT BAY PROPERTY OWNERS ASSOCIATION LIMITED
Plaintiff

AND

OLD FORT BAY COMPANY LIMITED
Defendant

BETWEEN

2014/CLE/gen/0889

MATTHEW CHANCE HUDSON
ZSUZSANNA MARTA FOTI
Plaintiffs

AND

OLD FORT BAY COMPANY LIMITED
NEW PROVIDENCE DEVELOPMENT COMPANY LIMITED
Defendants

AND BETWEEN

2017/CLE/gen/00014

OLD FORT BAY COMPANY LIMITED
Plaintiff

AND

OLD FORT BAY PROPERTY OWNERS ASSOCIATION LIMITED
Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: **In Action 2014/CLE/gen/773**
Mrs. Krystal Rolle and Mrs. Vanessa Carlino for the Plaintiff
Mrs. Gail Lockhart-Charles and Mrs. Lisa Esfakis for the Defendant

In Action 2014/CLE/gen/0889
Mrs. Krystal Rolle for the Plaintiffs
Mrs. Gail Lockhart-Charles and Mrs. Lisa Esfakis for the Defendants

In Action 2017/CLE/gen/00014
Mrs. Gail Lockhart-Charles and Mrs. Lisa Esfakis for the Plaintiff
Mrs. Krystal Rolle and Mrs. Vanessa Carlino for the Defendant

Hearing Dates: 13, 14, 15, 16 May 2019, 23, 24 July 2019, 23 January 2020, 4, 5, 6 February 2020, 3 July 2020, 24, 28 July 2000, 31 December 2021

Land – What lands constitute "common areas" within the Old Fort Bay Subdivision – Whether the Defendant holds "common areas" on trust for the Plaintiffs – Constructive trust – Fiduciary duties – Whether Plaintiffs' actions are barred by the doctrines of laches, limitation and acquiescence/estoppel –Whether Marina Expansion compromises security, exclusivity and vista of the POA and two-named Plaintiffs

The Plaintiffs are the Property Owners' Association ("POA") and two property owners of Old Fort Bay. They commenced this consolidated action against the Developer seeking a declaration and relief that certain areas in the Subdivision are "common areas" and that the Developer ought not be permitted to construct the expansion of the marina, on the basis that the proposed expansion compromises the security, exclusivity and vista of the POA and particularly interfere with the rights granted to the two named Plaintiffs. Alternatively, the Plaintiffs contend that the Developer holds the common areas on trust as for the POA. As a result of the ownership or beneficial ownership under trust, the Plaintiffs take issue with several things done by the Developer with respect to the areas they claim as common areas, namely: (i) the sale of Pineapple House and Pineapple Grove, (ii) the Marina Expansion in that it affects the Canals, Waterways and Boat Basin which belong to the POA, (iii) leasing the Old Fort Bay Club to a third party and (iv) the sale of the Identified Beach Reserve to a third party.

The Developer asserted that the areas contended as common areas are not and that as it owns all of the property, it remains its property unless and until it is conveyed. The Developer opposes the POA's claim with respect to the marina expansion and asserted that the proposed expansion will not have the effects complained of by the POA and the named Plaintiffs. It also asserted that no trust arises and that the Plaintiffs' claims are barred by the Statute of Limitation, the doctrine of laches and/or acquiescence/estoppel.

HELD: Finding that the Old Fort Bay Club, Pineapple House, Pineapple Grove and the Marina are not "common areas" and they belong to the Developer. Finding also that the

Canals, Waterways, Boat Basin and a portion of the Identified Beach Reserve are "common areas" and therefore, the Developer holds it on trust for the Property Owners Association and two named Plaintiffs. The issue with respect to the expansion of the existing Marina is adjourned pending (i) an Environmental Assessment Report, (ii) written opinions from all affected existing property owners and (iii) a site visit to the nearby marinas at Lyford Cay Club and Albany.

1. Everything within the mauve line on the Mauve Line Plan is "Old Fort Bay". The land within the mauve line has also been referred to as the "Old Fort Bay Subdivision". It follows that "Old Fort Bay" and "Old Fort Bay Subdivision" are synonymous and have been used interchangeably.

2. The POA's assertion that all lands within the mauve line of the Old Fort Bay Subdivision which are not developed as lots for sale are common areas and should be transferred is implausible. All of the land within Old Fort Bay belongs to the Developer (having been acquired by NPDC and then conveyed to OFBC in 1970) unless and until a conveyance is entered into and transfer of title takes place, the Developer has the right to sell, develop or retain the land. That right of the Developer is expressly provided for in clause 7 of the conveyance.

3. Pineapple House and Pineapple Grove are not common areas. There is nothing in the conveyance (or otherwise) which requires Pineapple House or Pineapple Grove (which were sold to third parties in 2005 and 2008 respectively, and developed as offices shortly after the sales) to be treated as common areas. To the contrary, clause 7 of the conveyance permits the Developer to act precisely as it has, in respect of these areas of retained land, expressly preserving its right to "deal with" the land as it saw fit. These properties were all land in the ownership of the Developer (until it sold them to third parties), which it was free to do.

4. The Old Fort Bay Club and the Marina are not common areas. They are not defined in any conveyances as "common areas". Even the POA acknowledged this fact as long ago as 30 June 2008. In any event, any claim to ownership of the Old Fort Bay Club and the Marina is barred by the doctrines of (i) Laches; (ii) Limitation and (iii) Acquiescence/estoppel.

5. The common areas are identified as the Canals, Waterways, Boat Basin and a portion of the Identified Beach Reserve. There are no conveyances which provide for universal Beach Access. There were correspondence between the POA and the Minister on this issue. These discussions should continue as the Minister has the capacity to deal with this ongoing issue. The area by the security gate is common area.

6. The Developer holds the common areas on trust for the POA. The constitutional documents of the POA have the cumulative effect of putting the Developer on notice that it holds the legal estate in the common areas for the POA. Further, in each of the original conveyances, the POA signed on its own behalf as distinct from and in addition to the

Developer so that the purchasers could receive the rights to common areas intended to be conveyed by the POA as the "real owner" of the common areas. Therefore, even prior to the actual conveyance of the legal estate of the common areas to the POA, everybody, that being the POA, the purchasers and the Developer fully recognized and accepted that the POA had a beneficial interest in the common areas.

7. Although the claim in respect of Pineapple Grove is not statute-barred since the 6 year time period for claims brought for trust property has not lapsed, in any event, the POA is barred by the doctrine of laches in respect of the Club, the Marina, Pineapple House and Pineapple Grove in bringing the claim. There has been very substantial delay by the POA. In respect of Pineapple House and Pineapple Grove, the POA acquiesced to the sale while in full possession of the facts. The Developer has acted to its detriment in light of the relevant history, in a manner that would make it wholly unconscionable to allow the POA to resurrect so stale a complaint about Pineapple House and Pineapple Grove.

8. "Beach Reserve" falls squarely within the definition of "common area" in the conveyances. The POA received no financial benefit and all such financial benefit was retained by the Developer. In this regard, the Developer breached its fiduciary duty owed to the POA when it transferred a portion of the Identified Beach Reserve to a third party. The POA ought to be compensated.

9. In order to definitively determine whether the Marina Expansion would negatively impact the residents of this upscale gated community, all contiguous property owners should be consulted and be given an opportunity to express their opinion(s) in writing and a comprehensive Environmental Assessment Report, done by a qualified expert, be submitted to the Court. A visit to the nearby marinas at Lyford Cay Club and Albany, if feasible, may assist the Court in deciding this issue.

JUDGMENT

Charles J:

Introduction

[1] Old Fort Bay is an upscale gated residential community, club and former colonial fort and home to many affluent people. The Old Fort Bay Club ("the Club"), the site of a fort that was built by the British during the 18th century to fend off pirates, privateers and buccaneers, is also part of this bitter impasse as to its ownership between the Old Fort Bay Property Owners Association Limited ("POA") and Old Fort Bay Company Limited ("OFBC") and New Providence Development Company Limited ("NPDC") (together "the Developer").

[2] These parties together with two property owners, Matthew Chance Hudson ("Mr. Hudson") and Zsuzsanna Marta Foti ("Ms. Foti") have filed separate actions which have been consolidated to determine the key issue in this case, namely: what lands constitute "common area" in the Old Fort Bay Subdivision ("the OFB Subdivision"). For convenience, I shall refer to Mr. Hudson and Ms. Foti as the POA, save where it is necessary to distinguish them.

[3] OFBC has also commenced an action, by Amended Originating Summons, No. 2017/CLE/gen/00014 against the POA seeking certain declarations relating, principally, to Lot three (3) of Charlotte Island and a declaration that the POA is not entitled to claim any rentcharge payments in relation to properties within Old Fort Bay which have not been previously sold or conveyed subject to a reservation of a rentcharge to issue thereout.

Summary of each party's case

POA's case

[4] Firstly, the POA asserts that certain areas are common areas which belong to the POA and should therefore be conveyed to them. According to the POA, the areas are "common area" because (i) they were included in the area identified as OFB Subdivision in the initial Mauve Line Plan; (ii) they were not identified as lots to be sold and (iii) they were never expressly reserved by the Developer. Alternatively, the POA contends that the Developer holds the common areas as constructive trustee for them.

[5] Secondly, the POA asserts that there is no verbal description of the OFB Subdivision by reference to acreage, boundaries or measurements. The description was solely by reference to (i) the Plan attached to the conveyances and (ii) the Mauve Line drawn thereon. Therefore, as a matter of law, because there is no full verbal description of what constitutes the OFB Subdivision and there is merely a description by reference to an attached Plan, the Plan prevails. According to the POA, it stands to reason that everything within the Mauve Line is the OFB Subdivision and therefore, Pineapple Grove, Pineapple House, the Club

(and surrounding areas), the Boat Basin and the Identified Beach Reserve ("the Disputed Lands") constitute common areas and belong to them.

[6] As a result of the ownership or beneficial ownership under trust, the POA takes issue with several acts done by the Developer with respect to the Disputed Lands namely, (i) the sale of Pineapple House and Pineapple Grove, (ii) the leasing of the Club to a third party and (iii) the sale of the Identified Beach Reserve to a third party and (iv) the Developer's intention to extend the Marina which the POA says, belong to them.

[7] The POA further contends that since they are the owners or, at least, the beneficial owners under constructive trust, the Developer being trustee, the aforementioned acts by the Developer constitute misappropriation and improper dealings with the common areas, thereby amounting to breach of fiduciary duty and breach of trust. It alleges that the Developer must account to the POA for any losses or gains from the wrongful use of trust property. It further alleges that they are entitled to each of the declaratory relief which is contained in their Amended Statement of Claim and, in the case of Mr. Hudson and Ms. Foti – in their Statement of Claim and also a permanent injunction with respect to the Marina as well as damages.

The Developer's case

[8] Firstly, the Developer takes issue with the POA's allegation that the OFB Subdivision comprised of 861 acres of land which was conveyed by NPDC to OFBC by Conveyance dated 1 July 1970. They say that the reference to the said 861 acres as a subdivision is inaccurate and misleading insofar as it suggests that the entire 861 acres was developed as a subdivision or as the gated residential community known as Old Fort Bay. According to the Developer, the said 861 acre tract is the site of diverse developments including the Royal Bank of Canada, Old Fort Bay Shell Service Station, part of the residential development known as Charlotteville, a portion of the residential development known as Venetian, the office complexes known as Pineapple Grove and Pineapple House, the Club, the

Old Fort Bay Marina, the Old Fort Bay gated community and a portion of the shopping centre known as Old Fort Bay Town Centre.

[9] The Developer asserts that the Old Fort Bay gated community comprises a number of individually approved subdivisions which were developed at different times (and some individual lots which were developed and sold without needing to be part of any subdivision) all physically located behind the gate and perimeter fence erected by the Developer in the mid-1980's to define the boundary of the Old Fort Bay gated community.

[10] The Developer says that the OFB Subdivision is only one of several subdivisions in the geographical area known as Old Fort Bay and the term "OFB Subdivision" ought not to be confused with the wider Old Fort Bay/Old Fort Bay gated community development.

[11] The Developer disputes that the Disputed Lands are "common areas" and asserts that it is the owner of all lands except those which were sold. With respect to the Club and the Marina, the Developer asserts that the POA, in correspondence, have acknowledged that it [the Developer] owns them. The Developer asserts that it is entitled to complete the proposed expansion works for the Marina. It denies that the expansion works are inconsistent with the building scheme.

[12] The Developer also says that the POA has also unduly delayed in taking issue with the proposed expansion of the Marina. It says that it submitted its approval on 3 April 2013 and the POA was aware as early as 19/20 June 2013. The POA delayed for 355 days before making an application for an injunction. Further, the POA knew, from as long as December 2013, that the Developer entered into contracts to undertake the works.

[13] With respect to the other areas contended as common areas, the Developer asserts that the POA has only recently claim beneficial ownership of the Disputed Lands after years of having sat on their hands knowing that the Developer was developing, selling and otherwise dealing with these areas.

[14] The Developer asserts that its intention, as consistently expressed in the standard conveyance, is and has always been that common areas would be limited to areas "*the use of which shall be common to all owners*" for the time being of any plots in the Old Fort Bay gated community.

[15] The Developer contends that it has been trying for over a decade to resolve this dispute in good faith and on reasonable terms and has even sent a signed Handover Deed to the POA that would have transferred 85.637 acres of land to them but the POA has spurned this and many other opportunities to strike a reasonable resolution. The Developer says that the POA has done so because it is wedded to absurd notions such as a claim to entitlement not only of the Club and surrounding areas but also the Marina, Pineapple House, Pineapple Grove, the Boat Basin and the Identified Beach Reserve.

[16] The Developer also asserts that because the POA has unduly delayed in taking issue with the matters complained of, it is now barred from any equitable or other relief by the doctrine of acquiescence, delay or laches.

[17] As the Developer and the POA cannot reach a compromise, they have turned to the Court for assistance. The Court apologizes for the inordinate delay in the delivery of this Judgment but it was principally due to the complexity of the matter which lasted for about 13 days (inclusive of a site visit) and generated boxes of documents and transcripts. That said, in preparing this Judgment, the Court had the benefit of all the transcripts and its own notes which included the assessment of the demeanour of the witnesses as they gave their evidence. Concisely, the Court clearly recalls the evidence, the demeanour of the witnesses and what transpired during the trial.

The evidence

[18] The evidence for the POA came from Matthew Chance Hudson and Richard Schaden, both filed their Witness Statements on 26 April 2019. The POA also relied on the expert evidence as well as the Report of John Guttman, who was

deemed an expert in Civil & Coastal Engineering. Additionally, the POA relied on the expert evidence of Philip Galanis, deemed an expert in Accounting and Business Valuation. He prepared a Valuation Report giving a value of the losses allegedly incurred by the POA as of 30 April 2019 during which time the POA was managed by the Developer.

[19] The Developer called Alistair Henderson, an accountant by profession to testify on its behalf. The Developer also called Todd Turrell who signed a witness statement dated 29 March 2019 and filed on 1 April 2019. Mr. Turrell's expertise was heavily challenged and criticized for lack of independence and lack of objectivity.

Challenge to Mr. Turrell's independence and objectivity

[20] In terms of Mr. Turrell's independence (or lack thereof), Mrs. Rolle QC for the POA argued firstly, that (i) Mr. Turrell has a 25 year history and relationship with the Developer; (ii) Mr. Turrell has been compensated and (iii) given Mr. Turrell's extensive retention, history, relationship and involvement in this matter and the nature of his expertise and work, if the Court makes a determination that the Developer can and should proceed with the proposed expansion of the Marina, Mr. Turrell's compensated involvement in this matter will certainly continue. According to Mrs. Rolle QC, an expert witness should never have a financial interest or benefit in the outcome of the matter in respect of which he is giving expert evidence.

[21] Secondly, says Mrs. Rolle QC, Mr. Turrell's lack of objectivity is made quite evident by the fact that he repeatedly involves himself in the underlying factual disputes between the parties which have no bearing whatsoever on his area of expertise. Firstly, at para 16 of his Witness Statement, Mr. Turrell, by indicating that he has never been paid by the POA, is clearly involving himself in the issue of the ownership/right to construct the proposed extended Marina. Accordingly, says Mrs. Rolle QC, there is no reason for him to condescend to this issue.

[22] Mrs. Rolle QC gave another example of Mr. Turrell's alleged lack of objectivity. She referred to para 30 of his Witness Statement where he states: "*I am advised however that Mr. Hudson has never made any complaint about the Existing Marina. I also note that Mr. Hudson purchased his lots many years after the Existing Marina had been constructed, and presumably therefor had no reservations at that time about purchasing a lot adjacent to an active marina, with boat slips of up to 100 ft in length."*

[23] Mrs. Rolle QC emphasized that Mr. Turrell has entangled himself in the underlying dispute between Mr. Hudson and the Developer and, if he wishes to give expert testimony, he ought not to condescend to that level.

[24] In addition, at para 47 of his Witness Statement, Mr. Turrell asserts:

> "**My drawing at [TT4] is accurately plotted and demonstrates that there will be more than enough room for boats to navigate, without impeding access to any of the existing slips, not to the licensed land adjacent to Mr. Hudson's plot, nor to any dock which he may decide to construct (I note, in this respect, that Mr. Hudson's Conveyance requires him to obtain the developer's prior approval before constructing any dock in any event; and I am aware from Mr. Henderson's statement that Mr. Hudson's draft plans have not been approved by anyone."** [Emphasis Added]

[25] Mrs. Rolle QC argued that an untainted and objective expert opinion would have stopped just prior to the emphasized portion of Mr. Turrell's statement. Instead Mr. Turrell saw fit to involve himself in the dispute between Mr. Hudson and the Developer relative to Mr. Hudson's alleged licensed lot and the rights deriving therefrom.

[26] Mrs. Rolle QC opined that Mr. Turrell has allowed himself to become involved in the "*fray" of the dispute* and his financial interest in the outcome of the determination of the "*marina issue"* may well have caused him to enter into the *"fray".* As a consequence, Mr. Turrell ought not be treated as an independent and objective expert witness. At most, he ought to be treated as a normal witness with

the Court determining what weight ought to be given to his evidence having regard to his lack of independence and lack of objectivity.

[27] Prior to Mr. Turrell's oral testimony on 6 February 2020, the Court (with agreement of Counsel) determined that Mr. Turrell would be deemed an expert in ocean engineering, marine designs and marine biology and the Court will determine what weight, if any, to give to his evidence and opinions. The law on how the Court will treat the evidence of an expert witness is clear. The Court will determine what evidence to accept and what evidence to reject. The Court do not have to accept the evidence and/or the opinions of an expert or, for that matter, any of the experts who testified if the Court does not believe that witness and/or if the evidence lacks independence and/or objectivity, even in the case of any unchallenged evidence of that expert. So, in my consideration of the evidence, I shall not treat Mr. Turrell's evidence like the evidence of a normal witness of fact but more in the context of an expert witness whose evidence may or may not lack objectivity and independence. In other words, I shall determine what weight, if any, to give to his evidence.

The witnesses

[28] The chief protagonists in this consolidated action are Matthew Chance Hudson, Richard Schaden and Alistair Henderson. As such, I have gone into greater detail in considering their evidence. This, in no way, is meant to diminish the importance of the expert evidence in this case.

Matthew Chance Hudson

[29] Matthew Chance Hudson filed a Witness Statement on 26 April 2019 which stood as his evidence in chief at trial. He is one of the named Plaintiffs in Action No. 2014/CLE/gen/0889 and the owner of Lot Fifteen (15) in Block Two (2) of the OFB Subdivision, one of the lots adjacent to the Boat Basin. He also makes his Witness Statement on behalf of the Second Plaintiff, Ms. Foti.

[30] He is a Barrister, Solicitor and Real Estate Developer in Canada. He was admitted to the Bar in Ontario, Canada in 1969 and has knowledge and experience in

property development which enabled him to speak definitively about certain matters relevant to the action. Mr. Hudson went to great lengths to explain the work he had done to qualify him to understand the documents and its implications. However, he repeatedly stated that he is a witness of fact although at times he ventured to give some legal opinions.

[31] In a nutshell, Mr. Hudson testified that the Canals, Waterways, Boat Basin, Beach Reserves and the Club are common areas which belong to the POA and that the Developer is not entitled to extend the Marina as proposed, lease the Club to a third party and sell the Beach Reserve.

[32] Mr. Hudson said that a review of the relevant documents revealed that the said areas are common areas. He stated that he has thoroughly reviewed the relevant documents such as the Conveyance from NPDC to OFBC ("the Vesting Deed"), the questionnaire in support of the application for the development of the OFB Subdivision under the Private Roads and Subdivision Act, correspondence between NPDC and Ministry of Works and NPDC and utility companies.

[33] He stated that in each of the 1990 conveyances, Old Fort Bay is defined as follows:

> **"Old Fort Bay" "shall mean the property situate in the Western District of the said Island of New Providence <u>shown edged in Mauve on the Plan and each and every part thereof</u> except in the case of the Sixth, Seventh and Eighth Schedules where it shall include any additions to or expansions of the same being part of the property edged in Yellow on the Plan."**

[34] Mr. Hudson testified that the Mauve Line Plan, which is the Plan attached to his predecessor's title documents, shows the totality of Old Fort Bay edged in mauve. He said it is an integral part of his title since it was used by the Developer to describe the property rights conveyed instead of a metes and bounds description. The Mauve Line outlines the area of the OFB Subdivision including the phases described by the NPDC in the initial application letter of December 1984. Title to the lots encompasses rights to the title of all common areas which are those in the line that are not platted into residential parcels for sale.

[35] Under cross-examination by learned Counsel, Mrs. Lockhart-Charles who appeared as Counsel for the Developer, Mr. Hudson insisted that it is not an exaggeration to say that absent the Plan edged in mauve, the Conveyance would not exist. According to him, it is the central component to the Conveyance, the *sine qua non* of the transaction.

[36] He further testified that he has noted that the Mauve Line outlines the entire area of the OFB Subdivision including the phases described by NPDC in the initial application letter of December 1984. He asserted that the title to these lots which includes his, encompasses rights to the title of all common areas which are those areas within the Mauve Line that are not platted into residential parcels for sale as the Developer promised, both to the government and to all lot buyers. He was questioned on what was promised to the government and he deposed that when one submits a plan to the government and the government grants rights to you based on the plan, that amounts to a promise that the government is entitled to rely upon.

[37] According to Mr. Hudson, after the approval for Phase 1, the Developer continued with additional phases of development. He stated that he has read and considered a letter from NPDC to the Ministry of Works dated 20 May 2004 whereby NPDC described the stages of development of the OFB Subdivision as at that date as comprising Phases 1 through 6. NPDC showed Phases 1 through 6 on a plan ("the 2004 Development Phase Plan") which was attached to the 20 May 2004 letter. He further stated that the 2004 Development Phase Plan shows the **"Area known as Old Fort Bay Subdivision"** as at that date and, since the 2004 Development Phase Plan is not coloured, you cannot see the mauve line but it clearly shows "*the Area Known as Old Fort Bay Subdivision*".

[38] According to Mr. Hudson, the 1990 conveyances provided a more detailed definition of the common areas of the OFB Subdivision than the post 2005 Conveyances which adopted a more restricted definition of common areas. The

reference to “Beach Reserves” was omitted from the definition in the post 2005 conveyances.

[39] Mr. Hudson further testified that he has never seen a document, public or otherwise, where the Developer provided for or referred to land within the OFB Subdivision which was neither (i) developed lots for sale (i.e. residential sites); or (ii) to be developed as such; or (iii) common area/recreational open space.

[40] According to him, the OFB Subdivision was clearly defined as the entire area within the Mauve Line which would consist of either developed lots for sale (i.e. residential sites) or common area/recreational open space. He has never seen a document where the Developer reserved unto itself the title to or right of usage of any of the areas within Old Fort Bay which were not specifically identified as lots to be sold or common areas.

[41] Mr. Hudson stated that the POA has included several different plans of the OFB Subdivision; the oldest which he has seen is that of his predecessor in title’s Agreement for Sale dated 20 March 1997. The Plan attached is the Mauve Line Plan which is dated November 1992. Significantly, the Mauve Line Plan depicts Western Road (also referred to in later plans as West Bay Street) and it shows the Mauve Line as being immediately north of Western Road (West Bay Street). Consequently, on the Mauve Line Plan, the entire southern boundary of the OFB Subdivision adjoins Western Road and Old Fort Bay is shown as being all of the property immediately north of Western Road.

[42] The 2004 Development Phase Plan shows an “*Area Known as Old Fort Bay Subdivision*”. It shows undeveloped land immediately north of West Bay Street and within the “*Area Known as Old Fort Bay Subdivision*”. This undeveloped land is shown as being south of the developed lots comprising Phase 6 of the OFB Subdivision and immediately south of Old Fort Bay Drive. There are no lines that sever this area of undeveloped land from the “*Area Known as Old Fort Bay*

Subdivision". The undeveloped portion is shown as a portion of "*the Area Known as Old Fort Bay Subdivision.*"

[43] Mr. Hudson stated that it was not until 2006 when the Developer proposed a Plan called the common area to the POA Plan, that there were lines of demarcation, removing this portion of undeveloped land from the area known as Old Fort Bay on the common area land to the POA dated 2006.

[44] Mr. Hudson accepted that the OFB Subdivision was done in phases but he does not accept that this means that the Developer could completely remove land originally defined as common areas from within the Subdivision once the first lot had been conveyed to a third party unless it obtained the consent of all such land owners with vested rights.

[45] Mr. Hudson said that Pineapple House and Pineapple Grove were part of the undeveloped land which previously formed part of the "*Area Known as Old Fort Bay Subdivision*". He further stated that Pineapple House was sold for $600,000.00 and Pineapple Grove was sold for $880,000.00 and that the POA gained no benefit therefrom.

[46] With reference to the Club, Mr. Hudson said that before the Subdivision was even approved, the intention of the Developer, as the applicant, was for the Club to be a common area. He said that, by letter dated 10 December 1984, the Developer wrote to the Ministry of Works and made specific reference to the Club, describing it as the "theme" of the proposed Subdivision:

> **"The Old Fort Bay building itself would remain intact but would be restored to its original beauty as the "theme" of the structure. <u>The land area immediately surrounding the building would be designated as a common area, for the communal use of the property owners within the overall development. The common area would include some appropriate beach frontage. The owners in the Old Fort Bay Development would have a vested interest in this common area, such interest vesting with the property purchased by the owner</u>."**[Emphasis added]

[47] Notwithstanding that letter, says Mr. Hudson, the Developer leased the Club to a third party, Old Fort Bay Club Ltd. by lease dated 1 May 2003. Further, notwithstanding the 1984 letter, the Common Area Land Plan proposed by the Developer in December 2004 describes the Club as its property. He asserted that the Developer has not acknowledged that the Club is common area and has converted it for its own use and benefit.

[48] In relation to the Beach Reserve and Marine Expansion - Canals, Waterways and Boat Basin - Mr. Hudson stated that the rights to the Canals, Waterways and Boat Basin are set out in the Second Schedule to the Plaintiffs' conveyances and title documents. Therefore, only the rights in the proviso of those documents have been reserved and they do not reserve title to the said areas. He said that he has not seen any other documents which have the effect of reserving rights to the Developer regarding Canals, Waterways and the Boat Basin. He asserted that the Beach Reserve is identified on the Plan attached to the Agreements for Sale and conveyances of both himself and his predecessor and he has seen the conveyance dated 21 February 2005 whereby the Developer conveyed the Identified Beach Reserve to Last Resort Ltd., who then, by subsequent conveyance, conveyed it back to the Developer who then conveyed it to a third party. Since that day, the Developer has not provided any other Beach Reserve to replace the Identified Beach Reserve it sold.

[49] The Boat Basin is an open water vista extending at the end of the main waterway in Old Fort Bay. Mr. Hudson stated that it is identified in the Agreement for Sale and the Conveyance to himself and his predecessor in title and it is clear that the Boat Basin and Beach Reserve are part of his title.

[50] Mr. Hudson deposed that he has not seen any document by which OFBC reserved any of the POA's rights to use the Identified Beach Reserve, the Boat Basin or any other amenities constituting common areas.

[51] Mr. Hudson further deposed that he became aware of the Developer's intention to extend the Marina within the Boat Basin of the Canal and Waterways in March 2014. As a result, he sent an e-mail to Mr. Henderson on 6 March 2014 expressing his grievances. Mr. Henderson stated that the Developer was entitled to extend the Marina on the basis of the proviso, which he does not accept.

[52] Mr. Hudson stated that he has never seen a document which gives Old Fort Bay Marina Company Ltd. any rights to the Canals and Waterways. Every document he has read described the Canals and Waterways as a common area belonging to the POA. According to him, there is a lease dated 3 March 2010 between the Developer, as landlord, Old Fort Bay Marina Company Ltd, as the Company and James Lyle as the tenant. The lease acknowledges that the Marina is constructed in the Canal and Waterways of Old Fort Bay.

[53] Mr. Hudson further stated that the nature of the expansion, which is to provide docking for non-owners, is not under the control of the POA. Having reviewed the Plan, he said that, as a result of the proposed nature, size and intended purpose of the expansion, it would have the effect of substantially limit or, at least, affect his ability to safely navigate within the Boat Basin. He also stated that it would pose security risks for the entire community but especially for himself and Ms. Foti since their properties are adjacent to the Boat Basin. He said it would also obstruct the amenity view of both of them thereby decreasing the value of their properties and it would lead to fouling of the riparian environment of the entire Boat Basin and adjacent canal.

[54] With respect to the Licensed Lot, Mr. Hudson stated that the expansion of the Marina would have the effect of obstructing his ability to use the license granted to him by the Developer to construct docking facilities on a piece of land adjoining his lot and the Boat Basin. He rejected the Developer's assertions that his right to build a docking facility is subject to their approval.

[55] Mr. Hudson was questioned quite extensively as to his motive for instituting his action as he does not live at Old Fort Bay and he does not intend to build there since he lives at Ocean Club. Under re-examination, he stated that the reason why he seeks civil redress is that he has been damaged in a monetary way and the manoeuvers by the Developer have greatly lowered the value of his lot. For him as a boater, the reason that the particular lot was so attractive was that it allowed frontage for two docks. He stated:

> **"When you have a large boat, you want to be right along to the waves in the canal and so that's why the licensed lot was important, it gives me a dock facing the canal. And we wanted to be close to the ocean but not on the beach because of storm surge. But we wanted easy access to the beach and this title to the lot, so far I was and am concerned, I had a Beach Reserve that was almost immediately across from us and gave access to what is a very lovely beach. And we were going to have a view, a vista, across the boat basin. The few little slips and docks that were alongside the eastern side of it were not a problem whatsoever…And of course, security is important. You have a large yacht. My yacht was 130 feet. Security is very important….Of course Mr. White's plans took away all of that, no Beach Reserve, a huge commercial marina with strangers parking their boats in your front yard, little or no security, all the problems you get in a large marina, environmental and otherwise, which has completely destroyed the value of the land…."**

[56] Going back to the Mauve Line Plan, under cross-examination, Mr. Hudson maintained that anything that is not a lot on the Mauve Line Plan is common area and part of his case is that he has rights flowing from the licence made on 14 July 1999. By this licence, the Developer (the Licensor) at the request of the Licensee) has agreed to grant to the Licensee (Grand Canal Properties Ltd), an exclusive licence to use the strip of land more particularly described in the Second Schedule. He argued that he derived title through this licence. At page 59 to 61 of the Transcript of Proceedings of 13 May 2019, this is how the cross-examination of Mr. Hudson went:

> **"Mrs. Charles:** **Yes, and Grand Canal Properties Limited is the entity that you derived title through to the licence?**
>
> **Mr. Hudson:** **Yes.**

Mrs. Charles **And your position is that this licence granted Grand Canal Properties Limited valid rights that Old Fort Bay Company Limited was entitled to grant to Grand Canal Properties Limited?**

Mr. Hudson: **I assume so.**

Mrs. Charles **You assume so, but you must. You rely on it because you are here suing as the owner of this licence, coming to court saying, I have a licence, my rights under this licence are being infringed. So now you more than assume that they have the right, that this licence was lawfully granted?**

Mr. Hudson: **At the time, I assumed. I was answering your question you asked me not the one you didn't ask me. Yes. I assumed at the time.**

Mrs. Charles: **Has your assumption changed over time?**

Mr. Hudson: **Well, I have a lot more knowledge now so now I ----.**

Mrs. Charles: **Now you accept that you don't have a licence, a valid licence?**

The Court: **Let him answer, please.**

Mr. Hudson: **No, I believe the licence is valid. We've already touched upon one of the drafting issues.**

Mrs. Charles: **So you believe the licence is valid, therefore, you believe that Old Fort Bay Company Limited had the right to grant an exclusive licence over this property because this property belonged to Old Fort Bay Company Limited, isn't that correct?**

Mr. Hudson: **Or they had an arrangement with the POA.**

Mrs. Charles: **Sorry, or they what?**

Mr. Hudson: **Or Old Fort Bay Company Limited had an arrangement with the Property Owners Association which at the time they controlled?**

Mrs. Charles: **Is the Property Owners Association a party to this licence?**

Mr. Hudson: **No.**

Mrs. Charles: **Okay, so you have Old Fort Bay --. Let's look at the licence. Let's look at the operative part.**

Mr. Hudson: **I think the first "whereas" maybe gives us all the information we need, which does refer to the Property Owners Association?**

Mrs. Charles: **No, no, no. Well we can refer to that. There's an agreement for sale, the principal agreement dated 1997 so that's not the licence, right? This is an agreement for sale?**

Mr. Hudson: **No, that's my underlying document.**

Mrs. Charles: **No, I'm asking you. This is an agreement for sale not a licence. This is an agreement for sale for a lot of land that's being referred to, correct?**

Mr. Hudson: **That's correct.**

……

Mrs. Charles: **So there is an agreement for sale, 1997, made between the licensor, who is the licensor, Old Fort Bay Company Limited, correct?**

Mr. Hudson: **No. Old Fort Bay Property Owners Association.**

Mrs. Charles: **The Licensor, Mr. Hudson?**

……..

Mrs. Charles: **Now, that strip pf land that the Licensor, Old Fort Bay Company Limited, agreed to grant exclusively to the Licensee is, on your case, common area?**

Mr. Hudson: **Yes.**

Mrs. Charles: **Okay. Now, isn't common area, on your case, land that is for the use of all residents of Old Fort Bay?.**

Mr. Hudson: **Yes.**

…….

Mrs. Charles: **So do you accept that on your very own documents, there is a contradiction?**

Mr. Hudson: **I fully accept that on the face of these documents drawn by your clients, there was a contradiction."** [Emphasis added]

[57] Under further cross-examination, Mr. Hudson insisted that he has exclusive possession to the licensed lot and the exclusive right to construct docking facilities on his licensed lot. He answered affirmatively that he is seeking to rely on the licence and the rights pursuant to that licence and that the Developer had the right to grant him that licence. According to him, in 1997, he was granted the exclusive right to use the licensed lot (strip of land more particularly described in the Second Schedule and coloured blue) to construct docking facilities and that no other use was given to him other than that. He said that he did not have possession of anything. He could not build anything. He was asked to find in his conveyance any reference to the Mauve Line Plan which he could not do. He also stated that it was the first time that he was seeing the conveyance of his predecessor in title, Willy Frey and Krisztina Frey, although he purchased from them. Having had the opportunity to see, hear and observe the demeanour of Mr. Hudson, I do not believe him that it was the first time that he was seeing the Conveyance. This is a man, a lawyer of many years, and a professor who studied all these documents and even sought an injunction from another judge and referred to this document. That said, he however agreed that there is no reference to Beach Access.

[58] When questioned whether his whole case rests on an agreement for sale which is different from the conveyance that his predecessor in title entered into, he conveniently stated that he did not come to testify in an expert capacity. Yet, in the same breath, when Mrs. Lockhart-Charles suggested to him that the conveyance (the title deed) is the *sine qua non* of his purchase, he spoke like a lawyer namely that where two documents are in conflict, it is up to someone to resolve that conflict

and based on his experience, where conflicts arise, it is normally resolved against the drawer. So, he is entitled to rely on the 1997 conveyance.

[59] Mr. Hudson was questioned whether he was aware that the POA had themselves, in a letter to the Developer, as long as 2008, acknowledged that the Club was owned by the Developer, he stated that he was aware of that fact but the POA, under the chairmanship of Dr. Munnings, was influenced by Mr. White who was controlling the POA. He hastily added that he is not testifying on behalf of the POA but on his behalf and that of Ms. Foti.

[60] He maintained that the POA is entitled to ownership of the common areas including the Club, the Marina, Pineapple House and Pineapple Grove.

[61] All in all, I found Mr. Hudson to be an unimpressive and unreliable witness. No doubt, he has an axe to grind because if the proposed extended Marina becomes a reality, that, according to him, would greatly lower the value of his lot. For him as a boater, the reason that this particular lot was so attractive was that it allowed frontage for two docks. In addition, his access to the beach and his vista across the boat basic would be taken away. So, in my opinion, he has commenced his litigation against the Developer and in effect, holding him to ransom. In addition, although he insisted that he has exclusive possession to the Licensed Lot, his conveyance proves otherwise. He cannot rely on the 1997 agreement for sale: see cross-examination by Mrs. Lockhart-Charles (above).

Richard Schaden

[62] Mr. Schaden filed a Witness Statement on 26 April 2019 which stood as his evidence in chief at trial. He testified on behalf of the POA. He is an Attorney-at-law licensed to practice in Michigan, Colorado and Illinois, USA. He is also a professor of Engineering. In addition, he has a United States Coast Guards Master of Vessels License and an Air Transport Jet Pilot which is current. He alleged that his professional career and experience have enabled him to have an understanding and appreciation greater than that of a layperson in respect of some

of the matters which have arisen. Despite his impressive qualifications, he is, nonetheless, a witness of fact.

[63] Mr. Schaden's evidence in chief basically mirrored that of Mr. Hudson with respect to the Developer's application for the Subdivision and the initial correspondence with utility companies. His evidence in chief also mirrored that of Mr. Hudson's with respect to the Developer's control of the POA before 2006, the land which comprises the OFB Subdivision, what lands are the common areas and with respect to the Disputed Lands.

[64] Mr. Schaden stated the role and purpose of the POA in the OFB Subdivision. According to him, the POA was incorporated by the Developer on 18 April 1991 and it has the responsibility of administering and managing the OFB Subdivision, which was originally carried out by the Developer. According to him, these duties include the right to approve the construction of buildings, docks, piers, jetties etc.

[65] He asserted that the conveyances make reference to such approvals being given by the Developer or the POA. Prior to the transfer of control of the POA, this function was exercised by the Developer. Before the Developer's 2013 decision to construct the extended marina, ownership and control of the POA had already been transferred. The POA had already called for the transfer of the common areas.

[66] Mr. Schaden further testified that the POA has, for over 10 years, maintained control and management of all of the security and landscape services including the refuse and rubbish collection in Old Fort Bay. He stated that the POA appoints and controls the Architectural Review Committee in Old Fort Bay. It also carries out the day to day matters duties which were managed by the Developer until in or about 2006. These are now exclusively controlled by the POA.

[67] Mr. Schaden averred that the Developer has sold virtually if not all of the lots in the OFB Subdivision and the POA is now solely responsible for the administration of

the OFB Subdivision. He said that this includes the determination of whether or not there should be an expansion to the existing Marina.

[68] Like Mr. Hudson, Mr. Schaden was also extensively cross-examined by Mrs. Lockhart-Charles.

[69] He confirmed that he has been a member of the Board of Directors of the POA for approximately 7 years.

[70] He was questioned about the *Ex Parte* injunction that was granted in this matter at the request of the POA and which was supported by an affidavit from him. In his affidavit, he said that the POA was entitled to the property that belonged to James Lyle but clarified that and stated that he is not speaking of all but a part of the property.

[71] He agreed that the POA knew of the Marina Expansion in 2013.

[72] He stated that the Mauve Line Plan that Mr. Hudson referred to is the same as his and it has Beach Access to his property. Mr. Schaden stated that he bought his property from Sea Horizons and his predecessor bought it from the Developer.

[73] With respect to the common areas, Mr. Schaden repeated what is contained in his Witness Statement. He was cross-examined extensively on the Mauve Line Plan and whether it was the same plan that was attached to Mr. Hudson's predecessor in title's unsigned conveyance that was attached to an Agreement for Sale. Mr. Schaden, stated that he would identify it as the Mauve Line Plan. When he was referred to the recording reference which says 6338 Volume 511, he accepted that it looked like the one he saw in the office of his previous lawyer as the Mauve Line Plan. He has not seen the Mauve Line Plan on his predecessor in title's conveyance.

[74] Mr. Schaden was questioned several times about the declaration in paragraph 82 of the Amended Statement of Claim with respect to whether the POA is claiming

that all property within the OFB Subdivision, within the Mauve Line on the Original OFB Subdivision Plan which are not identified as lots for sale to purchasers, constitutes common areas. Also, he has not seen any provision where the Developer expressly excepted or reserved unto itself the title and ownership of any land within the boundaries of the Mauve Line and/or within the OFB Subdivision which has not been specifically identified as lots for sale.

[75] Mr. Schaden insisted that the Club belongs to the POA because the Developer stated the same in a letter dated 10 December 1984 which Mr. Hudson also referred to.

[76] Although Mr. Schaden began his testimony under cross-examination confidently, it quickly became obvious that he was an unimpressive and unreliable witness. I believe that he was not being honest to the Court when, as a lawyer, he stated that he does not know that the POA's claim (2014/CLE/gen/773) was redrafted to reflect the claim brought by Mr. Hudson and Ms. Foti in 2014/CLE/gen/0889. According to him, he does not even know whether the two claims are very similar.

[77] A further example of Mr. Schaden's evasiveness related to his accusation that the Developer had sold lots, before they had been approved under the Private Roads and Subdivisions Act. Mr. Schaden explicitly made this allegation but, having failed to provide any specifics, and having been reminded that a lawyer cannot make a serious allegation like that without proper evidence, Mr. Schaden then recanted and conceded that "*I do not have enough detailed knowledge to say lots were sold without approval"*. Then, although he needed to be asked the question twice before he would give a straight answer, Mr. Schaden accepted he was not suggesting that the Developer had done anything unlawful.

[78] In my opinion, Mr. Schaden's Witness Statement, patterned so much after that of Mr. Hudson, is replete with purported legal analysis as to the parties' respective property rights. However, when directly confronted on the issue, Mr. Schaden conceded and stated that he does not know much about the property. Also, as a

man learned in the law, he was equally less convincing when it appeared that he did not understand the word “conveyance”, which he used throughout his Witness Statement. Further, Mr. Scahden admitted during cross-examination, that his dock within the Existing Marina was “possibly” trespassing on common area and that he initially wished to build that dock so that it would be “quite a bit longer” than 100 feet.

Alistair Henderson

[79] Mr. Henderson filed a Witness Statement on 1 April 2012 which comprises of 64 pages and is made up of over thirty exhibits. By profession, he is an accountant. He began working with NPDC in September 1973, originally as Financial Controller and has worked for NPDC ever since in various roles. He was NPDC’s Secretary and Vice-President of Finance when, around 1984, the concept of development the area now known as Old Fort Bay was first given serious consideration. He was involved, in different roles within NPDC and OFBC, throughout the development of Old Fort Bay. He has been a Director of NPDC from 2011 to date and OFBC from May 1974 to date. Between 2011 to 2 June 2014, he was President of NPDC and OFBC. From 2 June 2014, he has been a Consultant to both NPDC and OFBC.

[80] Mr. Henderson was also a director of the POA from around 1993 to February 2011. In that capacity, he signed many conveyances of land within Old Fort Bay on behalf of the POA. Initially, he was appointed a director of the POA by the Developer which controlled the POA until around September 2006. At that time, the Developer accepted that 60% of the lots in Old Fort Bay had been sold and that control of the POA was to be handed to the residents. Accordingly, on 20 September 2006 (at the POA’s AGM), new elections to the Board was held. Mr. Henderson was voted back to the Board in his capacity as a resident of Old Fort Bay and he remained in that capacity until February 2011.

[81] Under the sub-heading, the Development of the Old Fort Bay Community, Mr. Henderson stated that, by conveyance dated 1 July 1970, NPDC conveyed 861

acres of land in the Western District of New Providence to OFBC. Part of the 861 acres had been developed by the Developer as the gated residential community of Old Fort Bay. According to him, there have been other substantial developments within the 861 acres but outside of Old Fort Bay, for example, the Royal Bank of Canada, Old Fort Bay Shell Service Station, part of the residential development known as Charlotteville, a small part of the residential development known as Venetian, the office complexes known as Pineapple Grove and Pineapple Grove and a portion of the shopping centre known as Old Fort Bay Town Centre.

[82] Mr. Henderson asserted that the Old Fort Bay gated community comprises a number of individually approved subdivisions which were developed at different times (and some individual lots which were developed and sold without needing to be part of any subdivision) all physically located behind the gate and perimeter fence erected by the Developer in the mid-1980's to define the boundary of the Old Fort Bay gated community.

[83] According to Mr. Henderson, OFB Subdivision is only one of several subdivisions (not phases) in the geographical area known as Old Fort Bay and the term "OFB Subdivision" ought not to be confused with the wider Old Fort Bay/Old Fort Bay gated community development. He asserted that the subdivisions and other residences of Old Fort Bay are physically located behind the perimeter fence which was erected by the Developer in the mid-1980's to define the boundary of the Old Fort Bay gated community. The perimeter fence has remained in the same alignment since that time. The land at Pineapple House and Pineapple Grove has at all times been outside the Old Fort Bay perimeter fence.

[84] Mr. Henderson asserted that the development of the Old Fort Bay gated community began in or around 1983 with the first subdivision initially approved by the Ministry of Works and Utilities in November 1988 (although a slight variation to the precise layout was subsequently approved which increased the number of ocean/beach front lots and re-numbered them). He was cross-examined about

"subdivision" and phases and, for present purposes, this has been explored under the nomenclature "Old Fort Bay Subdivision" and therefore will not be repeated.

[85] With respect to the Disputed Lands, Mr. Henderson insisted that they are the property of the Developer. He stated that, in 2002, the Developer (OFBC) made an agreement with Lindroth Development Co Ltd (Orjan Lindroth's company) to design, obtain approval for, develop and sell further residential subdivisions in the Old Fort Bay gated community; to renovate and establish the Old Fort itself (and surrounding land) as a private members' club and to develop and construct the Marina. In consequence of this agreement:

a. Eight further subdivisions were approved for sale by the Ministry of Works and Utilities, between 8 August 2004 and 30 October 2008 (Canal Beach subdivision, Charlotte subdivision, Charleston subdivision, Venetian subdivision, Montagu subdivision, Fincastle subdivision, Club Villas subdivision, and Estate Lots subdivision). Lots within these subdivision approvals were sold from around late 2004. Almost all lots within Old Fort Bay have now been sold. Many beautiful new homes have been built on these lots. There is currently considerable home construction activity ongoing at Old Fort Bay.

b. The Fort itself was renovated at very considerable expense to the Developer in the period 2002-3 and it was opened in May 2003.

c. During 2003-4, the Marina was extended (having consisted, since the mid-1980s, of a single long dock) to its existing configuration of 19 slips, with surrounding amenity, parking and access area. The Marina has not been materially altered since. This is primarily because, on 10 June 2014, the POA secured, on an *ex parte* basis, an injunction preventing further works of construction of a Marina Expansion for which the Developer had been granted a building permit in May 2013.

[86] He was a resident within Old Fort Bay in the period early 1998 to October 2014. Initially, in early 1998, he purchased "Marina lot 1" from OFBC. He sold this property to Ms. Foti on or around 26 April 2007. Subsequently, he became the owner of another property within Old Fort Bay which he sold in October 2014. He confirmed that, as an early and long-time resident of Old Fort Bay, he disagrees with the arguments which the POA (and Mr Hudson/Ms Foti) advance in this litigation, which do not reflect his understanding or expectation of the basis on which he bought and held these properties within Old Fort Bay. In particular:

a. He did not and does not consider that the Developer holds any land as "common area" for the POA (or the residents of Old Fort Bay), whether as a trustee or otherwise. The extent of any "common area" is at the Developer's full discretion, as are the precise terms on which any conveyance of that land to the POA is to take place.

b. He did not and does not consider that land not shown specifically as a lot on plans attached to the Ocean Drive and other early conveyances (some of which plans were extremely rudimentary, reflecting the evolving nature of the project) was intended to become "common area".

c. He did not and does not consider that the POA (or any resident of Old Fort Bay) has any interest in the Club, the Marina, the lot on which Mr. Lyle's residence now sits, or the land now known as Pineapple House and Pineapple Grove (sold in 2005 and 2008 respectively and developed as offices shortly after the sales), nor in the proceeds of the Developer's dealings with any of this land. It was never agreed, understood or expected that any of this land would become "common area". These areas were all land in the ownership of the Developer which the Developer was free to deal with as it pleases.

d. He did not and does not consider that promises of universal, free Beach Access were made by the Developer in any of the conveyances. Beach Access is available to those who purchased lots on the beach, to a small number of

purchasers who specifically requested and bargained for Beach Access (to whom beach licences were granted, or confirmatory letters addressed), or to members of the Club.

e. He did not and does not consider that there is any legitimate reason to prevent the proposed Marina expansion. Such an expansion is, in his view, entirely in keeping with the general plan of a waterfront residential community (the nearby developments of Albany and Lyford Cay have far bigger Marinas). The Old Fort Bay conveyances have reserved to the Developer the specific right to construct such a Marina expansion.

[87] Mr. Henderson testified that the POA was incorporated on 18 April 1991. Its primary intended purpose was to collect the assessments from residents and to perform the maintenance and other services later set out in the conveyances (Sixth Schedule). In addition, the POA was to hold "common area" as determined by the Developer and the terms of transfer to the POA agreed. While initially controlled by the Developer, the POA's constitution provided that control would pass to the residents when 60% of "*so much of the Property as may be set aside by the Developer as parcels for sale*" had been sold (or earlier, at the Developer's option).

[88] The 60% point was reached during 2006 and on 20 September 2006, at the POA's AGM, a new Board of Old Fort Bay residents was elected. He was among them. From his understanding, The Developer's A shares in the POA were formally transferred to Dr. Harold Munnings in or about August 2009, although effective control of the POA had already been passed to residents in September 2006. He is not aware of the Developer voting its A shares after September 2006.

[89] Both before and after September 2006, and until around January 2011, Mr. Henderson signed the Conveyances of lots within Old Fort Bay as director on behalf of the POA. He ceased to be a director of the POA in February 2011. Therefore, the next conveyance, in July 2011, was signed by Dr. Munnings for the POA.

[90] He emphasised that the land at Pineapple House and Pineapple Grove has, at all times, been outside the Old Fort Bay perimeter fence.

[91] With respect to land alleged to be common areas, Mr. Henderson stated that no land has been transferred to the POA as “common area”. Unless and until a conveyance of land is entered into, all of the land within Old Fort Bay remains in the Developer’s ownership and the Developer has the right to sell, develop or retain the land. This right is expressly reserved by clause 7 of the conveyances. He said that the manner in which Subdivision approval was sought for various subdivision in Old Fort Bay is important and no approved subdivision plan illustrates any land within Old Fort Bay as “common area”. Nor is there any requirement to provide any “common area” in the subdivision approvals themselves.

[92] He asserted that the approved subdivision plans and approvals were publicly available documents. He would have expected that all purchasers’ attorneys would have secured the relevant subdivision plans and approvals before the conveyance, in order to check that the lot could lawfully be sold. They certainly should have done so. He is aware that many attorneys did exactly that. Purchasers were therefore aware that the approved subdivision plans and approvals imposed no requirement on the Developer to treat any particular land as “common area”. According to him, the conveyances refer to “common area”, but, in his view, it is clear that there was no specificity, representation or promise in the conveyances that any particular land would become “common area”.

[93] The conveyances do not set out a specific mechanism by which (or time at which) “common area” was to be designated or conveyed to the POA. The overall structure and intention was that the Developer had full discretion as to what land it offered to dedicate as “common area”, and (subject to agreement as to the terms of transfer with the POA) this land would be conveyed to the POA by the Developer. This has, at all times, been his understanding as to how the “common area” would be determined and dedicated.

[94] With respect to the Beach Reserve, Mr. Henderson said he did not and does not consider that promises of universal, free Beach Access were made by the Developer in any of the conveyances. According to him, Beach Access is available to those who purchased lots on the beach, to a small number of purchasers who specifically requested and bargained for Beach Access (to whom beach licences were granted, or confirmatory letters addressed), or to members of the Club.

[95] Mr. Henderson said that a number of non-beachfront purchasers (in the period 1997 to early 2003) specifically bargained with the Developer for Beach Access rights at the time of their purchases which were verbally granted if agreed. However, Mr. Henderson maintained that the Developer never agreed, in any contractual document enforceable by the POA or any resident, to grant free, universal Beach Access to all of Old Fort Bay residents.

[96] Mr. Henderson further stated that the Plan relied on by Mr. Hudson to assert that residents are entitled to Beach Access cannot be properly relied upon. He said that Plan was attached to a draft conveyance to Grand Canal, which was never executed. He said it is the 2006 conveyance to Mr. and Mrs. Frey (Hudson's predecessor in title) which is the starting point for identifying the relevant rights and duties between the Developer and Mr. Hudson. The Plan attached to the 2006 conveyance has no area marked as "Beach Reserve". The triangular land marked "Beach Reserve" in the 1997 Plan was shown as occupied by a lot. By an Indenture made on 10 June 2013, Mr. and Mrs. Hudson bought Lot 2-15 within the original Old Fort Bay subdivision (and associated rights) from Mr. and Mrs. Frey. Even more fundamentally, no conveyance was ever executed with Grand Canal. Rather, Lot 2-15 was sold to Mr. and Mrs. Frey in August 2006. (This was in any event 18 months or so after the sale of the area marked "Beach Reserve" by OFBC to the Last Resort Limited: see below). The accompanying conveyance plan omits any area marked as "Beach Reserve". He is aware that the terms of a conveyance replace those of earlier agreements absent some clear express agreement to the contrary) the conveyance plan must be taken as replacing any Agreement for Sale plan.

[97] Quite apart from the question of what plan was intended to be attached to the Agreement for Sale with Grand Canal, neither the Agreement for Sale nor the draft conveyance contained any specific provision granting Beach Access, whether in respect of the area marked “Beach Reserve” or generally.

[98] With respect to the proposed Marina expansion, Mr. Henderson said that the expansion is, in his view, entirely in keeping with the general plan of a residential waterfront. The Old Fort Bay conveyances have reserved to the Developer the specific right to construct such a Marina expansion. He said that the Marina, in its current state, cannot be claimed as a common area because the POA makes no contribution toward it and there has never been any intention for it to be a common area. Mr. Henderson emphasized that the Developer has kept docking facilities in this location since before any lot was sold. A long dock was in place between the mid-1980s and 2003/4 when the existing Marina was constructed.

[99] With respect to the proposed expansion in particular, Mr. Henderson testified that the assertions of Mr. Hudson/Ms. Foti as to how the community and their properties will be affected are untrue and exaggerated. According to him, it is untrue that the Marina will become a commercial marina. The Marina is not, and will not be, registered with the Marina Operators of The Bahamas. It does not and will not appear in The Bahamas Handbook or The Bahamas cruising guide, where commercial marinas are advertised. It does not and will not provide fuel services. It is, and will remain, a private, non-transient boat basin. New slips will only be available to residents of Old Fort Bay and to Club members.

[100] According to him, the Developer will ensure, on the basis that the POA accepts the same restriction as part of its rules and regulations, that no boat uses the extended Marina which is longer than 100 ft. In addition, it will be a requirement that no vessel in the 100 ft slips should exceed its slip length. The Developer will ensure that boats are only brought to the Marina where it has first been demonstrated that the vessels’ drafts can be accommodated within the relevant depths. He said

sufficient user restrictions are in place to prevent all of the concerns asserted such as nuisance and security.

[101] With respect to the Club, he said that it is operated by Old Fort Bay Club Ltd, another wholly owned subsidiary of the Developer. The Club was opened in about May 2003 following very extensive renovations carried out from the beginning of 2002. The Club itself has subsequently made further extensive improvements. It was very well known to Old Fort Bay residents and property-owners that the Club's renovations were proceeding when they were. Since the Club was opened, the POA has co-signed numerous conveyances which show the Club as built out, with many specifically noting the interest of Old Fort Bay Club Limited. Many such conveyances were signed by the POA after control of its Board was handed to residents in September 2006. These conveyances reflect a clear understanding and acceptance by the POA that the Developer was entitled to deal with the Club lands as it has.

[102] He accepted that the POA was initially controlled by the Developer but gave the reasoning for this: the POA's constitution provided that control would pass to the residents when 60% of *"so much of the property as may be set aside by the Developer as parcels for sale*" had been sold (or earlier, at the Developer's option). The 60% point was reached during 2006 and, on 20 September 2006, at the POA's AGM, a new Board of Old Fort Bay residents was elected.

[103] Under cross-examination, Mr. Henderson maintained his position with regards to "common area". He accepted that the description of OFB Subdivision being bounded by the Mauve Line is consistent for the 1990 conveyances.

[104] Mr. Henderson stated that the letter of 20 May 2004 to the Ministry of Works had errors as the word "Subdivision" is an error. He conceded that he had never petitioned the Ministry to correct it because "*it wasn't picked up because it wasn't important at the time"*.

[105] He stated that he has seen the definition of common areas and agreed that as they go through the 1990 conveyances, that definition of common areas includes Beach Reserve. He accepted that, at some point, the phrase “Beach Reserve” was removed from that description of common areas.

[106] He accepted that the Plan which was attached to the Agreement between OFBC, POA and Grand Canal had a plan attached that identified a Beach Reserve and that that agreement also defined common area to include Beach Reserve.

[107] He said the Developer was in discussions with a gentleman by the name of Floggl for the sale of building and surrounding lands – the ocean drawn lots. If that had happened, then they would have had to have access for the other owners in Old Fort Bay to the beach. They had to define access so they came up with the concept of Beach Reserve, which is as drawn on the Plan attached to the agreement.

[108] At the same time, they were in discussions with other developers, notably Lester Smith who was developing an adjacent property and did not have any beach property in that development and wanted some. The Floggl discussions never materialized and the agreement with Lester Smith did not materialize but they did prepare a plan in the likelihood that the Floggl sale went through, which is the Plan that shows the Beach Reserve – the one with the Grand Canal Agreement. The Plan with the word “Beach Reserve” was prepared for an isolated transaction.

[109] He rejected Mrs. Rolle QC’s suggestion that the conveyances around 2005/2006 eliminated “Beach Reserve” in the definition of common areas because they sold it. He said the Beach Reserve never existed as a Beach Reserve.

[110] He accepted that the statement to the government also said that the Club would be a common area and that property owners would have a vested interest through their conveyances. He said that was the concept at that time. He said he is not a position to say whether the new concept of the Club being private was communicated to the government.

[111] He agreed that in 2009, the Developer, in deciding that title to the common areas should be transferred to the POA listed “Retained Land” but none of the 1990 conveyances, nothing before this proposed Handover Deed referred to the concept of Retained Land. The proposed Handover Deed was never executed because it was never agreed by the POA.

[112] He said until the Development was completed in around 2006, you could not tell what the common areas were.

[113] In assessing the demeanour of Mr. Henderson, I found him to be a well-informed witness, no doubt, because he was intimately involved in the development of Old Fort Bay from day one. He was generally speaking helpful but I cannot say that I accepted everything he said as credible. He also has an axe to grind because he represents the Developer in this action. In short, like Mr. Hudson and Mr. Schaden, I also take his evidence with a pinch of salt.

Two preliminary issues:

Liability of NPDC and OFBC

[114] Before I proceed any further, there are two preliminary issues that need to be resolved namely: (i) the liability of both NPDC and OFBC to the Plaintiffs (POA/Mr. Hudson/Ms. Foti) and (ii) the nomenclature “OFB Subdivision”.

[115] The first preliminary issue seems less controversial than the second one. Mr. Hudson and Ms. Foti in 2014/CLE/gen/0889 have brought their action as against both NPDC and OFBC asserting in their pleadings that OFBC is the alter ego of NPDC and that all pleaded acts, omissions or breaches attributed to the Developer are alleged as against both NPDC and OFBC.

[116] In similar vein, the POA in 2014/CLE/gen/773 have, by their pleadings, asserted that all references to “the Developer” of the OFB Subdivision include OFBC and NPDC.

[117] This has not been disputed by the Developer. Actually, at para 1 of his Witness Statement, Mr. Henderson averred that:

> **"…I am duly authorised by both OFBC and NPDC to make this witness statement on their behalves. OFBC is a wholly owned subsidiary of NPDC, and is the developer of the upscale gated residential community known as Old Fort Bay, located in the Western District of New Providence. A number of other wholly owned subsidiaries of NPDC control and operate certain parts of Old Fort Bay, including Old Fort Bay Club (the Club) and Old Fort Bay Marina Limited (the Marina). Where I refer below to "the Developer", this is a reference to the relevant company or companies within the NPDC group with the operative rights and obligations."**

[118] Therefore, the claims by the POA and Mr. Hudson/Ms. Foti relative to the common areas and the misuse and/or misappropriation thereof, including but not limited to damages claims are claims properly made not just as against OFBC but also as against NPDC. The Court agrees that both NPDC and OFBC will be bound by any Judgments and Orders which it may make in this consolidated action.

The nomenclature "Old Fort Bay Subdivision"

[119] The second preliminary issue relates to the nomenclature "*Old Fort Bay Subdivision*" and whether it was belatedly obfuscated by the Developer to disguise and muddle the misappropriation of the common areas. According to the POA, the essence of the Developer's changed terminology is the suggestion that "*Old Fort Bay Subdivision*" is a term which relates to and describes only Phase 1 of the so-called overall "*Old Fort Bay Development*."

[120] The nomenclature is described by Mr. Henderson in his Witness Statement wherein he stated at paras 5 - 7:

> **"5. The Old Fort Bay gated community with which these actions are concerned comprises a number of individually approved subdivisions which were developed at different times, and some individual lots which were developed and sold without needing to be part of any subdivision.**
>
> **6. The subdivisions and other residences of Old Fort Bay are physically located behind a perimeter fence which were erected by OFBC in the mid-1980s to define the boundary of**

the Old Fort Bay gated community. (There are, of course l, gates within the fence to provide access.) The perimeter fence has remained in the same alignment since that time. I note that the land at Pineapple House and Pineapple Grove has at all times be <u>outside</u> the Old Fort Bay perimeter fence.

7. OFBC began planning for the development of the Old Fort Bay gates community in around 1983. The first subdivision was initially approved for sale by the Ministry of Works and Utilities in November 1988 (although a slight variation to the precise layout was subsequently approved, which increased the number of ocean/beach-front lots, and re-numbered the lots). <u>The first subdivision was known as Old Fort Bay subdivision</u>. The Old Fort Bay subdivision consisted of 16 ocean/beach-front lots (numbered 1-1,1-2 and so on) and 15 canal-front lots (2-1,2-2 and so on), with what is now Ocean Drive running between them. The Old Fort Bay subdivision (with the minor variation) is shown on the plan at [AH 1] which was part of the 18 May 1993 Agreement for Sale (and 7 June 1995 Conveyance) for lot 1-3. (This was, I believe, the earliest Ocean Drive Agreement for Sale.) Sales of the lots in the Old Fort Bay subdivision (as well as certain hill-top and Marina front lots which did not require subdivision approval) took place between 1993 and around 2000, although as I explain at paragraphs 58-59 below a number of Ocean Drive purchasers bought multiple lots in the Old Fort Bay subdivision. By this time (the end of 2000), there were therefore only in the region of around 20 property-owners within the Old Fort Bay gated community".

[121] The POA submitted that these statements, made by Mr. Henderson in April 2019, arose after the dispute with the POA over the common areas had arisen and after litigation had commenced.

[122] However, says the POA, what Mr. Henderson said in his Witness Statement is contrary to the contents of his letter dated 20 May 2004 which he, on behalf of the Developer, sent to the Ministry of Works. The letter clearly identified the various Phases of the *"Old Fort Bay Subdivision*". It does not equate the *"Old Fort Bay Subdivision*" as being merely Phase 1. In fact, it quite clearly requested that the Bond amount be subdivided between the various Phases of the *"Old Fort Bay Subdivision*".

[123] According to the POA, the Developer's intentions and use of terminology could not possibly be any clearer. Attached to that 20 May 2004 letter was a Plan which showed the same land area as the Plans attached to the Conveyances. This Plan also shows the various phases identified in Mr. Henderson's letter as being the Phases comprising the *"Old Fort Bay Subdivision*".

[124] Under cross-examination by learned Queen's Counsel, Mrs. Rolle, Mr. Henderson said that it was an error. This is how the cross-examination went:

Mrs. Rolle: **So now you would agree with me having put the labels on the Plan one through six that each and every one of those Phases are within the Mauve Line, correct?**

Mr. Henderson: **Yes.**

Mrs. Rolle: **Okay, so we've looked at this 2004 letter. You've described the Old Fort Bay Subdivision where you invited the Ministry of Works to divide these Bonds between these six Phases…**

Mr. Henderson: **May I just make a comment, my Lady?**

The Court: **Sorry.**

Mr. Henderson: **She said that we describe the Old Fort Bay Subdivision. I don't think we have.**

Mrs. Rolle: **Pardon me, Sir, what was that?**

Mr. Henderson: **I think you said that we've just describe the Old Fort Bay Subdivision unless I misheard you.**

Mrs. Rolle: **I made reference to what is said in the letter. It says: Old Fort Bay Subdivision: the Performance Bond for the Old Fort Bay Subdivision. That's what it says right?**

Mr. Henderson: **That was an error.**

Mrs. Rolle: **Oh that was an error? Oh!**

Mr. Henderson: **Yeah, which I didn't pick up at the time.**

Mrs. Rolle: **So now. Where there?**

Mr. Henderson: **<u>The name Old Fort Bay Subdivision Performance Bond, that is incorrect.</u>**

Mrs. Rolle: **That's incorrect.**

Mr. Henderson: **It should be Old Fort Bay Performance Bond.**

Mrs. Rolle: **It shouldn't say Subdivision?**

Mr. Henderson: **It shouldn't."**

[125] In my opinion, the Developer's 20 May 2004 Letter and the attached Plan with the two explicit and unequivocal descriptions thereon paint an entirely different picture from that advanced by the Developer in Mr. Henderson's Witness Statement. During the trial, Mr. Henderson attempted to explain this inconsistency. He also attempted to disassociate himself from the letter and the Plan by saying that Lindroft would draft the letter and he merely signed it.

[126] Now, the Developer has asserted that the specific Phases noted on the Plan are not identical to the Phase numbers and names eventually developed. I agree with the POA that, if that were the case, it is completely irrelevant. The fact is that the Developer in 2004 described the relevant land area as the ***"****Old Fort Bay Subdivision*" being comprised of various Phases of development regardless of the specific names or numbers of the Phases.

[127] Clearly, the Plan shows the entire land area and it describes the entire land area as the ***Old Fort Bay Subdivision."***

[128] It is my firm view that there is no ambiguity or error at all. The evidence, which includes, among other things, the Developer's own correspondence and plans, overwhelmingly demonstrates that, from the beginning of the development of this Subdivision right up until some point after 2006 when the Developer started to solidify its plans of selling off and/or retaining common areas, the entire area of

land shown on the Plans was consistently referred to as the "Old Fort Bay Subdivision".

[129] The POA argued that, once the selling off and retention of common areas commenced, suddenly there is a change in terminology. The change of terminology, says the POA, was quite obviously adopted for the purpose of attempting to disguise and obscure the misappropriation of the common areas. I agree. Having seen and observed the demeanour of Mr. Henderson during the trial, I do not believe that a sagacious accountant, as he is, would make such a grave error. What makes the explanation of "error" incredulous and palpably bad is the fact that this it is not the only instance where the Developer alleged "*undetected error"* during the course of the Trial*.*

[130] During extensive cross examination by Mrs. Rolle QC, Mr. Henderson conceded that, despite his proposition that the term *"Old Fort Bay Subdivision"* only referred to Phase 1, a number of the Approval letters from the Ministry of Works made reference to the 'Phases" within the *"Old Fort Bay Subdivision".*

[131] Mr. Henderson also described these letters as *"Errors"* which had not been detected.

[132] The POA argued that, consequently, the Ministry of Work Approval Letters which make reference to the various *"Phases"* within the *"Old Fort Bay Subdivision"* are the Developer's second undetected error. Mr. Henderson was cross-examined on this and this is how the cross-examination went: (Transcript of Proceedings on 4 February 2020 at p 31 at lines 5-31 & p 32 at lines 1-5):

"Mrs. Rolle:	**So what about H: Final Approval. Canal Beach Lots, Old Fort Bay Subdivision?**
Mr. Henderson:	**Yep.**
Mrs. Rolle:	**Is that an error?**

Mr. Henderson: **I think that's compounds that 2004 letter errors. Because you will find in some of those approvals it says Old Fort Bay Subdivision and some it doesn't.**

The Court: **Sorry. I didn't get that. That's an error in this H?**

Mr. Henderson: **In H Canal Beach Lot Subdivision, yes.**

The Court: **That's an error.**

Mr. Henderson: **Yes.**

Mrs. Rolle: **So tell me, when you received –and when I say you, I don't mean you personally, I mean the Defendant, the Developer, Old Fort Bay Company Limited and New Providence Development. When these erroneous letters were received, did you ever petition the Ministry of Works to correct that?**

Mr. Henderson: **No. I don't think it was picked up.**

Mrs. Rolle: **When was it picked up?**

Mr. Henderson: **And it wasn't noticed as being important.**

Mrs. Rolle: **It wasn't notice as being important?**

Mr. Henderson: **No, not at that time.**

Mrs. Rolle: **When was it noticed as being important?**

Mr. Henderson: **When you brought it up.**

Mrs. Rolle: **Today?**

Mr. Henderson: **No, in this case.**

Mrs. Rolle: **So, to be clear and I want to be fair. That wasn't noticed as being important until this case arose. That's what you are saying.**

Mr. Henderson: **Yes".**

[133] According to the POA, the fact which is overwhelmingly significant for the Court's consideration is the fact that the Defendants, on their own admission, only *"detected"* the second undetected error **"as being important"** when the issue was raised by the POA in the litigation. What this clearly indicates is that at no point prior to the litigation was this nomenclature utilized. It arose and was adopted exclusively for the Developer's defence of the POA's claims.

[134] Further, says the POA, the Approval from the Ministry of Works which referenced the *"Phases"* of the *"Old Fort Bay Subdivision"* are also described by the Developer as *"an undetected error".* The POA say that there are multiple plans in evidence which bear various different dates. Each of these plans shows the same area of land and in each case the plan describes the entire area as the *"Old Fort Bay Subdivision".* For example, Plan date: November 1998 (attached to most of the conveyances during the 1990's; Plan date: May 2005 (attached to conveyance dates 15 August 2006 and Plan date: December 2006 (draft Plan of Common areas).

[135] The POA contended that each of these Plans between 1998 and 2006 clearly and unequivocally stated *"Old Fort Bay Subdivision"* as being the entire area of land. It is beyond question that the description on these multiple Plans is wholly consistent with the 20 May 2004 Letter and the Plan attached thereto and with the said Approval Letters referencing the "Phases" of the *"Old Fort Bay Subdivision".*

[136] The POA further argued that, in any event, regardless of whether the terms *"Phases"* or *"Subdivisions"* are used to describe the groups of lots covered by the individual approvals, the fact is that each such *"Phase"* or *"Subdivision"* is indisputably within the Mauve Line.

[137] Except for the evidence of Mr. Henderson which I find to be incredible, the Developer has advanced no other reason for the description on these Plans. It was at some point after 2006 that the phrase, *"Compilation Plan of various Subdivisions*

and Parcels Old Fort Bay", as stated on the 2011 Plan, was coined by the Developer.

The issues

[138] Now to the issues. There are (2) key issues and a litany of sub-issues which are raised in the pleadings. The two key issues are:

1. Whether the Disputed Lands constitute common areas in the residential development known as and located at Old Fort Bay? and

2. Whether the Developer is entitled to construct the Marina Expansion in accordance with the planning permission which it was granted.

[139] The following sub-issues arise out of the key issues namely:

1. Whether the Developer held the common areas as trustee on a constructive trust for the POA?

2. Whether the Developer owed a fiduciary duty to the POA while managing, operating and controlling the POA?

3. If the above two sub-issues are answered in the affirmative, whether the Developer breached its fiduciary duty and/or constructive trusts as regards the POA?

4. Whether the POA is entitled to damages and if so, the quantum if the Developer has breached its fiduciary duty and/or breach of trust?

5. Whether the Developer continues to have any right to approve the plans for constructing buildings or other structures, docks, jetties and the like at the OFB Subdivision?

6. What relief, if any, are the POA and the Plaintiffs, Mr. Hudson and Ms. Foti entitled to?

Whether the Disputed Lands constitute common areas?

A. Land comprising the OFB Subdivision

[140] The Developer submitted that only part of the 861 acres which was conveyed to OFBC form part of the gated residential community of Old Fort Bay. The Developer further submitted that the Old Fort Bay gated community comprises a number of individually approved subdivisions which were developed at different times (and some individual lots which were developed and sold without needing to be part of any subdivision) all physically located behind the gate and perimeter fence erected by the Developer in the mid-1980's to define the boundary of the Old Fort Bay gated community and the nomenclature "OFB Subdivision" was one done in error as the OFB Subdivision is only one of several subdivisions in the geographical area known as Old Fort Bay and the term "OFB Subdivision" ought not to be confused with the wider Old Fort Bay/Old Fort Bay gated community development.

[141] The POA urged the Court to accept the Mauve Line as the description of what constitutes the OFB Subdivision; the Plan attached to the conveyances. As there is no verbal description by reference to acreage, boundaries or measurements and only a description by reference to the Plan and the Mauve Line therein, the latter should prevail. Therefore, they say that everything within the Mauve Line is the OFB Subdivision.

[142] A good starting point is to look at the specific provisions of the conveyances. Each conveyance defines "*Old Fort Bay*" as:

> **"Old Fort Bay" "shall mean the property situate in the Western District of the said Island of New Providence <u>shown edged in Mauve on the Plan and each and every part thereof</u> except in the case of the Sixth, Seventh and Eighth Schedules where it shall include any additions to or expansions of the same being part of the property edged in Yellow on the Plan."**

[143] The Plan referred to in this definition which is edged in Mauve to demarcate the area known as "Old Fort Bay" has been referred to by the POA as the "Mauve Line Plan."

[144] As Mrs. Rolle QC pointed out, prior to the commencement of the cross-examination of Mr. Henderson, an enlarged copy of the Mauve Line Plan was displayed in Court. Mr. Henderson (i) confirmed the existence of the Mauve Line on the Mauve Line Plan and he confirmed the exact location of the Mauve Line for the entirety of its perimeter; (ii) he identified and labeled the location of the various developed areas within the Mauve Line on the Mauve Line Plan; (iii) he identified and labeled the location of Pineapple Grove and Pineapple House (which the Court visited on the site visit) and confirmed that they were each within the Mauve Line.

[145] The definition of "*Old Fort Bay"* as extracted from the conveyances must be read together with the Mauve Line Plan.

[146] When read together, I agree with the submissions made by Mrs. Rolle QC that everything within the Mauve Line on the Mauve Live Plan is *"Old Fort Bay."* I also agree with Mrs. Rolle QC that the land area within the Mauve Line on the Mauve Line Plan has also been referred to as the "*Old Fort Bay Subdivision".* It follows that *"Old Fort Bay"* and *"Old Fort Bay Subdivision"* are synonymous and have been used interchangeably.

B. Common areas?

[147] The next question which arises is what land within the Mauve Line constitute common areas?

[148] Learned Queen's Counsel Mrs. Rolle submitted that it is evident that the Court cannot accept the Developer's argument that the common areas of Old Fort Bay have never been determined and/or that the purchasers were granted rights to common areas without the parties knowing what land these rights relate to. She submitted that the Court must make a determination on what constitutes the common areas in the OFB Subdivision as gleaned from the parties' intentions from the outset and from the relevant documents and the representations made to the Ministry of Works in support of the statutorily prescribed process. She opined that it must be presumed that everything the Developer made/said to the Minister

pursuant to the statute was true and correct unless the Developer is asserting otherwise.

[149] She argued that it is absurd for the Developer to suggest that all of the conveyances to purchasers over the more than 27 years up to present granted easements, rights of way, licences and other rights of usage but these grants were in respect of a notional concept of common areas because the common areas of the OFB Subdivision, even now, has yet to be determined. The Developer says that the time of these conveyances when the rights were granted, there was no agreement on the land to which these rights were attached.

[150] According to Mrs. Rolle QC, as a matter of law, any grant of an interest in land must be certain. The land of which the grant relates must be identified and known at the time of the grant. She argued that it is not legally possible for there to be a grant of an Easement, Right of Way or License without the parties knowing which land the rights relate to at the time of such a grant. She quoted Fox LJ in **Ashburn Anstalt v Arnold** [1989] Ch. 1 at p. 26 that **"*In matters pertaining to the title to land, certainty is of prime importance*".**

[151] On this point, I am of the opinion that the Developer, who is the owner of all lands within Old Fort Bay remains the owner and unless and until a conveyance of land is entered into, all of the land remains in the Developer's ownership and the Developer has the right to sell, develop or retain the land. That right is expressly reserved by clause 7 of the conveyance. I shall come back to this issue.

[152] Returning to the issue of what land constitutes the common areas, Firstly, says Mrs. Rolle QC, the fact that the conveyances say that "***the common areas shall include <u>but shall not be limited</u> to Beach Reserves canals waterways roadways footpaths or other tracks boat-ramps and <u>recreation or other areas the use of which shall be common to all owners for the time being</u> of any plots or portions of Old Fort Bay"*** demonstrates that the Developer envisaged that the common areas would include just more than canals, waterways, footpaths

and the like; *"the like*", to my mind, must be consistent with the *ejusdem generis* rule.

[153] Secondly, she argued that the fact that the Memorandum of Association provides that the POA may ***"sell, let, alienate, mortgage, charge or otherwise deal with"*** the common areas clearly demonstrates that the Developer envisaged that the common areas would include land.

[154] Thirdly, the anticipated potential use of the common area land, that being sale, mortgage lease, also suggests that the Developer was not envisioning an insignificant amount of land.

[155] Fourthly, the Developer in completing the application questionnaire acknowledged that the OFD Subdivision was a ***"mixed land subdivision proposal"*** and that this ***"mixed land"*** included roads, residential sites and recreational open space.

[156] Consequently, says Mrs. Rolle QC, the original intention of the Developer was that within the OFB Subdivision there would be lots for sale, roads and common areas.

[157] Mrs. Rolle QC also submitted that the provisions of Section 3 of the Act regarding the application for subdivision approval clearly demonstrates the significant importance of the Survey Plan.

[158] Mrs. Rolle QC submitted that in respect of each phase of the development of the Subdivision, the Developer submitted Plans to the Ministry which were approved. Consistent with the Developer's own description of the OFB Subdivision in the original application questionnaire, the approved Plans show lots for sale and open space, which were the only categories of land. She said that there can be no derogation by the Developer of Plans approved by the Minister unless such derogation was approved by modification under the Act, which there was not.

[159] Mrs. Rolle QC vehemently argued that, within the Mauve Line, there are only (i) Lots for sale; (ii) Canals & Waterways; (iii) Roadways and (iv) Common Area lands.

According to her, the POA contends that this was the *"concept"* of the Subdivision and this concept remained unchanged from the start to the present with the only variation being the syphoning of the common areas by the Developer with the *"concept"* remaining unchanged. Consequently, all lands within the Mauve Line of the OFB Subdivision which were not developed as lots for sale are common areas.

[160] To my mind, the POA's assertion that all lands within the Mauve Line of the OFB Subdivision which were not developed as lots for sale are common areas and should be transferred to the POA seems implausible based on what Mrs. Rolle QC submitted.

[161] The indisputable fact is that all of the land within Old Fort Bay belongs to the Developer (having been originally acquired by NPDC and then conveyed to OFBC in 1970) unless and until a conveyance is entered into and transfer of title takes place. The Developer has the right to sell, develop or retain the land. This right of the Developer is expressly provided in clause 7 of the conveyance which provides as follows:

> **"…neither the covenants by the Purchaser nor anything else herein contained shall operate <u>to impose any restriction on the manner in which the Vendor or the Association may lay out or deal with any other land forming part of Old Fort Bay</u> including the mode of laying out the same the area and number of any of the lots or the class or type of any building to be constructed on the same or be deemed to create a building scheme in respect of the remainder of Old Fort Bay Provided however neither the Vendor nor the Association shall deal with or otherwise develop such land except in accordance with a general plan of development as a private residential area consistent with the present scheme of development and conforming substantially with the existing Estate Restrictions and Stipulations and Rentcharge Stipulations …".**

[162] Those rights have not materially changed since the first conveyance was granted in 1993. By contrast, the residential development of Old Fort Bay has materially changed since the Ocean Drive Phase was developed as subsequent phases have been planned and built out. The development is an evolving process with some individual lots still being developed today. The "common area" have not been

decided and as such, transferred to the POA because the parties cannot agree on what these common areas are. Although the conveyances refer to "common area", there is no clear specificity or promise in the conveyances that any particular land would become "common area." What the conveyance says is common areas shall include but shall not be limited to Beach Reserves, Canals, Waterways, Roadways, Footpaths or other tracks, boat-ramps and recreation or other areas **the use of which shall be common to all owners** for the time being of any plots or portions of Old Fort Bay".

[163] Another way of saying this, is that a private club or a private office cannot be "common area" if the use of them is not common to all owners.

[164] As Mrs. Lockhart-Charles for the Developer correctly submitted, clause 7 of the conveyances provides clear and indisputable support for the Developer's position. It is wholly incompatible with any interpretation of the conveyance which treats the Developer as being under an extant obligation to transfer prescribed areas of the development to the POA, or to hold them on the POA's behalf. Clause 7 is an express reservation of the Developer's entitlement to deal as it pleases with its retained land. It is wholly inconsistent with the notion that the precise extent of "common area" is fixed until the Developer and the POA finally conclude an agreement. Until then, clause 7 governs the Developer's use of its land, with the inevitable result that if the Developer sells or develops its land for non-common use, this is squarely within its retained rights.

[165] I agree with Mrs. Lockhart-Charles' submissions that, if the parties had intended that the "common area" of the Development were to be set aside and protected from the outset (or at some other specified time), clause 7 would have included an express exception to that effect. It did not. There is no such qualification. This is for the simple reason that the designation of "common area" was always intended to be at the Developer's discretion, acting in good faith.

[166] At para 53 of Mr. Schaden's Witness Statement, he stated that "*On my reading of the Ocean Drive Conveyances I did not see any provision where the Developer expressly excepted or reserved unto itself the title and ownership of any land within the boundaries of the "mauve line" and/or within the OFB Subdivision which had not been specifically identified as lots for sale*". Mr. Hudson also made the same statement. However, both fail to mention clause 7 of the conveyances. The conveyance Plans were intended to (i) identify generally where the Old Fort Bay gated community was located (among other things, so it was clear which roads and canals/waterways were being described in Schedule 2), and to (ii) identify the particular lot being acquired. The plans were not of course in identical form, as they evolved to reflect past construction activities and/or updated development plans.

[167] Mrs. Lockhart-Charles emphasized some additional points about the various conveyance plans from time to time:

a. There is not a single plan attached to a conveyance which includes a notation or designation specifying any particular land within Old Fort Bay as "common area". This is stated in para 32 of Mr. Henderson's Witness Statement. This point has not been challenged during cross-examination. This fundamental point makes it very difficult for the POA to argue that the extent of "common Area" has been fixed to date.

b. One just has to glean at the early conveyance Plans to recognise the absurdity of the POA's argument that "common area" would be anything not later set aside as a lot. Apart from the initial subdivision along Ocean Drive, the Plans have virtually no detail. No-one could conceivably look at those Plans and say they have an enforceable expectation that the Club or Pineapple House (for example) were to be treated as "common area". Even the post-2006 Plans contain no identification of what is to be "common area". **There is no clause in the conveyance providing that "common area" would be anything not developed as a lot,** and nothing on the Plans suggests that such an agreement

had been made. Why would the Developer agree to such an arrangement? How can it sit with clause 7 of the conveyances?

c. Schedule 2. Rights acquired by purchasers, beyond ownership of their specific lots, are set out in Schedule 2 of the conveyances. Purchasers were granted a right of way over roads and a right of navigation over the Canals/Waterways (subject to the Developer's right to construct docks etc. to which reference is made below), rights which exist independently of any question of "common area". Purchasers were also granted a right to "*use (but by way of licence only) the remaining common areas laid out within the perpetuity period for the purposes designated from time to time by the Association*". This last right pre-supposes that "common area" has previously been dedicated to the POA, so it does not take matters any further in terms of seeking to understand the manner and timing in which that dedication would occur.

d. Further, it is of considerable significance that at all times in the period from 1993 to 2020, it is the Developer (and not the POA) which grants purchasers the relevant rights of way/navigation. There is no document in which the POA has (whether before or after September 2006) granted or purported to grant such rights. During that period, the POA had signed numerous conveyances stating that it is the Developer which grants such rights. Of course, it is only the Developer (and not the POA) which can grant such rights of way/navigation, as those areas of land continue to belong to the Developer.

e. Schedule 6. At para 36 of his Witness Statement, Mr. Henderson averred:

> **"[The Developer's] position on "common area" is consistent with the Sixth Schedule of the Conveyances. This Schedule sets out the services which the POA was to perform, funded by the rent assessments paid by residents. The identified services include repair /maintenance of the roads in Old Fort Bay (clause 1), maintenance of the waterways, including dredging to ensure they are "free from silt or other impediment to a depth of Eight (8) feet at mean sea level" (clause 8), and security (clause 4). These services, which the POA has long been carrying out (funded by rent assessments on residents), are specifically defined in a manner which is entirely**

separate from any "common area" (to which clause s 5 and 7 refer). Thus, POA expenditure on maintenance of the roads and waterways does not imply dedication of those areas as "common area"; it reflects the structure and requirement of the Second and Sixth Schedules read together."

This was not challenged during cross-examination.

[168] Mrs. Lockhart-Charles further argued that the POA is not under any present obligation to provide any services with respect to land which may in the future be designated as "common area". The POA's obligations regarding maintenance of roads and waterways support residents' existing Schedule 2 rights of way/ navigation.

[169] With respect to the POA's reliance on Recital D of the conveyance, Mrs. Lockhart-Charles noted that the POA "*has been incorporated for the purpose of (inter alia) holding the title to the common areas of Old Fort Bay and for the general administration of the same*" but this does not advance their argument in any way. Specifically:

a. The Courts will be slow to find that operative provisions are contained in recitals, and all the more so if the part of the recital relied upon deal with a subject matter which is also dealt with in the main body of the agreement. Recitals which act as explanatory preamble to the detailed terms that follow are plainly not contractual: see for example ***J Toomey Motors Ltd v Chevrolet Ltd*** [2017] EWHC 276 (Comm) at [73] and [76].

b. In any event, the language of Recital D indicates that the POA has no more than an <u>expectation</u> that the Developer will grant title to areas (not identified with specificity in the conveyance) which it determines to dedicate for "common use". The purpose of the POA may well include holding title to "common area", but that is entirely consistent with the structure of the conveyance explained above, whereby it is the Developer which determines what land will ultimately comprise the "common area". There is nothing in Recital D which specifies what land the POA will in due course receive, nor in what timeframe.

[170] Handover terms: Mrs. Lockhart-Charles argued that a further indication that the structure of the conveyances is that it is for the Developer, acting in good faith, to determine the extent of the "common areas" is that it must be reasonable for the Developer to seek appropriate terms in any handover arrangement: para 35 of Mr. Henderson's Witness Statement. The Developer seeks covenants that the "common areas" will not be altered (or have rights granted to additional third parties outside Old Fort Bay) without its consent. This is to ensure that its retained interests within Old Fort Bay are protected. If the structure of the parties' arrangement were, as the POA contends (i.e. that the extent of "common area" was fixed long ago, comprising all land not laid out as lots by the Developer), this would not be permissible. This is, again, a consequence of the POA's argument which defies commercial common sense. It is another clear reason why the Developer's construction is correct.

[171] Planning consents and subdivisions approvals: None of them illustrates any "common area" nor does the various planning or subdivision approvals contain a condition which has any bearing on the issue of "common area".

[172] Mrs. Lockhart-Charles also argued that there is nothing of relevance in the Private Roads and Subdivision Act 1961 to which the POA has referred. The Act says nothing at all about the general topic of "common areas". It requires specifications for new roads and for the subdivision of lots within new residential developments: see in particular sections 3 – 8. But it does not cover land which is proposed to be neither road nor subdivided lot or restrict the Developer's ability to deal with its retained land as it wishes.

[173] Finally, says Mrs. Lockhart-Charles, the Witness Statements of both Mr. Hudson and Mr. Schaden make copious reference to phasing plans attached to Mr. Henderson's 20 May 2004 letter. According to her, the letter has nothing to do with "common areas".

[174] Mrs. Lockhart-Charles vociferously challenged the other arguments put forward by the POA.

[175] At para 46 of his Witness Statement, Mr. Hudson seeks to place reliance on what he describes as "*the initial application letter of December 1984*", namely the 10 December 1984 letter. According to Mrs. Lockhart-Charles, Mr. Hudson's argument is wrong, both in fact and in law for the following reasons:

a. As to fact, the 10 December 1984 letter was <u>not</u> the basis of the Developer's final application or any ensuing planning approval in respect of Old Fort Bay. The first available planning consent was 18 months later (see the 13 June 1986 approval "in principle"). This did not mention the 10 December 1984 letter. Rather, it referred to "*your application of 27th March 1986*". The POA has not produced, or sought to place any reliance, on the <u>actual</u> application letter, as distinct from a "concept" letter which is nothing beyond one of many "draft" ideas that the Developer contemplated in the very early days.

b. As to law, as already noted, there is nothing in any actual planning consent (for example, a planning condition) on which the POA is able to rely. This is significant, because statements made in the course of a planning application have no status, and are not enforceable against the Developer, unless they are encapsulated in a planning condition (or some other legally enforceable mechanism, such as an agreement with the planning authority that runs with the land). It is well-established that a planning permission is a public document, likely to affect third party rights and the public at large. In consequence, the materials that may be referred to for the purpose of understanding what has been granted permission are strictly limited and confined to the consent itself, unless the consent expressly incorporates another document or is ambiguous: **Midcounties Co-Operative Limited v Wyre Forest District Council v Tesco Stores Ltd** [2010] EWCA Civ 841. Moreover, enforceable restrictions on the grant of permission can only be achieved by the imposition of conditions contained in the permission itself, or some enforceable agreement running with

the land: **I'm Your Man Ltd v Secretary of State for the Environment, Transport and the Regions** [1999] 77 P&CR 251. Thus, and for any of these reasons, even if the 10 December 1984 letter were the operative application document, this would not take the POA anywhere, as a matter of law.

[176] For my part, I find the submissions advanced by Mrs. Lockhart-Charles to be very attractive. In my judgment, the POA's core submission that all lands within the Mauve Line of the OFB Subdivision which was not developed as lots for sale are "common area" is untenable and must fail.

Whether the Disputed Lands constitute common areas

Pineapple House and Pineapple Grove

[177] Firstly, I agree with Mrs. Rolle QC that each and every part thereof of lands within the Mauve Line is a part of the OFB Subdivision.

[178] However, it cannot be disputed that OFBC had initially owned the 2.01 acre parcel of land (Pineapple House) which it sold to Pineapple House Investments Limited on 15 September 2005. The land was sold on the basis that offices were to be constructed at Pineapple House and it is presently used for offices. Equally, it cannot be disputed that Pineapple Grove was also initially owned by OFBC until it was sold on 6 November 2008 to Pineapple Grove Limited. That parcel comprises 2.22 acres.

[179] At paragraphs 38 to 40 of his Witness Statement, Mr. Henderson stated, in summary, the following:

1. He does not accept that Pineapple House and Pineapple Grove ever became "common areas" as the "common areas" are still to be determined and, in any event, the Developer will not be proposing that parcels which it sold to third party be so treated;

2. Pineapple House and Pineapple Grove were always separated from the Old Fort Bay residential community by a boundary fence. The letter of 30 June

2008 from Dr. Harold Munnings as the Chairman of the POA, documented that the POA was fully aware of the Developer's plans to sell Pineapple Grove and Pineapple House.

3. Pineapple House and Pineapple Grove were lands owned by the Developer and it was entitled to do what it pleases with its lands.

4. There is no conveyance Plan, marketing brochure, website or sales materials which indicates in any way that Pineapple House and Pineapple Grove were anything but part of the Developer's landholdings. No allegation of a specific promise or representation was made by the Developer that Pineapple House or Pineapple Grove would fall into lands to be designated as "common areas".

5. The Old Fort Bay security fence (erected in the mid-1980s) ran along the northern border of Pineapple House (and still does). Pineapple Grove is also outside the Old Fort Bay security fence. Neither the POA nor Old Fort Bay residents ever funded any maintenance (or other) costs relating to the land at Pineapple House and Pineapple Grove. Neither property was never used by or made available to Old Fort Bay residents for common use.

6. There was not a single objection or query about the sale or development of either Pineapple House or Pineapple Grove until about 2014. This long history of acquiescence falls also to be considered alongside the absence of protest to the earlier sale and office development of Pineapple House and Pineapple Grove.

7. It is correct that the area in question was included within the mauve/blue lines on Plans attached to the conveyances as being part of the Old Fort Bay development (rather than the relevant line running along the security fence, as would have been more accurate). I note that this continued to be the case even for conveyances executed after 15 September 2005. The post-15 September 2005 conveyances were endorsed by the POA (as a co-

signatory) in full knowledge that Pineapple House and Pineapple Grove had been sold for office development, and without any objection by anyone. In signing later conveyances on that basis and without protest, the POA has, in my view, accepted and endorsed the Developer's sale of Pineapple House and Pineapple Grove.

[180] Learned Queen's Counsel Mrs. Rolle submitted that during cross-examination of Mr. Henderson, he made three significant concessions namely:

1. Pineapple Grove and Pineapple House were both within the Mauve Line on the Mauve Line Plan;

2. Pineapple Grove and Pineapple House are both captured by the "*Old Fort Bay"* description and;

3. The areas where Pineapple Grove and Pineapple House have never been demarcated for sale.

[181] According to Mrs. Rolle QC, by conceding that *"Old Fort Bay"* is everything within the Mauve Line and then by conceding that Pineapple Grove and Pineapple House are within the Mauve Line and captured by the definition, Mr. Henderson has thereby conceded and accepted that Pineapple Grove and Pineapple House were a part of the OFB Subdivision. She urged the Court to hold the same. I accept that both Pineapple Grove and Pineapple Grove were a part of the OFB Subdivision.

[182] Mrs. Rolle QC next submitted that the fact that Mr. Henderson conceded that Pineapple Grove and Pineapple House had never been demarcated as lots for sale and their location was a part of the 'admitted' common area land, demonstrate that the Pineapple Grove and Pineapple House properties were "common areas".

[183] I am afraid that I am unable to accept the POA's submissions that the Pineapple Grove and Pineapple House properties were "common areas". Such a finding is irreconcilable with the facts in this case. Firstly, there is nothing in any conveyance

(or otherwise) which requires Pineapple House or Pineapple Grove (which were sold to third parties in 2005 and 2008 respectively, and developed as offices shortly after the sales) to be treated as "common area". To the contrary, clause 7 of the conveyances permits the Developer to act precisely as it has, in respect of these areas of retained land, expressly preserving its right to "deal with" the land as it saw fit.

[184] Pineapple Grove and Pineapple House were all lands in the ownership of the Developer (until it sold them to third parties), which it was free to do. It was never agreed, understood or expected that any of these lands would become "common areas". These lands are located outside the perimeter fence erected around Old Fort Bay in the 1980s (long before any lot within Old Fort Bay was developed or sold). Neither the POA nor Old Fort Bay residents ever contributed to maintenance or other costs associated with these lands. This was not challenged on cross-examination.

[185] It is worthy to note that the POA called no witness who gave evidence that, at the time of their purchase of a property within Old Fort Bay, they considered they were acquiring an interest in Pineapple House or Pineapple Grove as "common areas", or in the proceeds of earlier sales thereof. That is not surprising. As Mrs. Lockhart-Charles correctly stated, the POA's argument is fanciful.

[186] Further, I agree with Mrs. Lockhart-Charles that the POA, Mr. Hudson and Ms. Foti have plainly agreed and consented to the Developer having dealt with Pineapple House and Pineapple Grove in the way it did, and/or waived any right to complain. Specifically:

a. <u>The POA:</u> The POA has signed numerous conveyances following the sales of Pineapple House and Pineapple Grove by the Developer, which it (POA) has plainly done on the basis that it agreed and accepted that there was nothing objectionable about those dealings. These Conveyances cannot fairly be understood or interpreted in any other way. As explained by Mr.

Henderson, whose evidence on this issue has not been challenged in cross-examination, these later conveyances *"… were endorsed by the POA (as a co-signatory) in full knowledge that Pineapple House [or Grove] had been sold for office development, and without any objection by anyone. In signing later conveyances on that basis and without protest, the POA has in my view accepted and endorsed the Developer's sale[s]*". Such later agreements have either varied the terms of any earlier contract between the POA and the Developer, alternatively they reflect waivers by the POA of any right to complain about a breach.

b. Mr. Hudson: He bought Lot 2-15 from Mr. and Mrs. Frey on 10 June 2013, well after the sales of both Pineapple House and Pineapple Grove. There is nothing in his Conveyance to indicate he was purchasing some sort of inchoate right to complain about land dealings in the distant past, and at a time well before any alleged fiduciary relationship could possibly have been owed to him. Again, he has waived any right to complain about these matters and/or bought his Lot affirming that Pineapple House and Pineapple Grove were not, and did not need to have been treated as "common areas".

c. Ms. Foti: She bought her property from Mr. Henderson in April 2007. This was 18 months after the sale of Pineapple House and following the construction of offices on that site in 2006. She cannot conceivably have acquired her property on the basis that Pineapple House was "common area". Further, in purchasing on a basis that there was nothing objectionable about the sale of Pineapple House, she was necessarily agreeing that the Developer was equally entitled to deal with Pineapple Grove (to which the same considerations applied) and/or waiving any right to complain.

[3] No loss or damage to POA or Hudson/Foti as Developer would otherwise have used the land for residential purposes

[187] The Developer asserted that the POA (including Mr. Hudson and Ms. Foti) suffered no loss or damage as a result of the sale of Pineapple Grove and Pineapple House

to third parties. I agree since I have already found that neither property fell within the definition of “common area”.

[188] Even if the Court were wrong to find that neither Pineapple Grove nor Pineapple House fell within the definition of “common area”, is it too late to complain or bring proceedings. There has also been “acquiescence” by the POA and Mr. Hudson/Ms. Foti which will be discussed momentarily.

Is it too late to complain or bring proceedings?

[189] The Developer alleged that it is too late to complain or bring proceedings claiming the proceeds of sale of Pineapple Grove and Pineapple House, based on all of (a) the doctrine of Laches, (b) Limitation, and (c) Acquiescence / Estoppel.

Applicable legal principles

Laches

[190] In **Snell’s Principles of Equity 31st ed**. at page 99 paras 5-16, the General Editor stated:

> **“Delay defeats equity or equity aids the vigilant and not the indolent. In the words of Lord Camden L.C. a court of equity “has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive, and does nothing.” Delay which is sufficient to prevent a party from obtaining an equitable remedy is technically called “laches.”**

[191] The principles applicable to the equitable doctrine of laches can be summarised as follows:

a. In deciding whether a beneficiary has been guilty of laches, the relevant questions are (i) the length of delay and (ii) the nature of the acts done during the interval (such as any change of position) which make it unconscionable for the plaintiff to be permitted to assert a claim: **Lindsay Petroleum Oil Co. v Hurd (1874)** L.R. 5 P.C. 221 at 239.

b. In general, laches therefore requires knowledge of the relevant facts and either acquiescence, or prejudice or detriment to the defendant: **Paddico v Kirklees Metropolitan Council** [2014] UKSC 7.

c. By virtue of section 44 of the Limitation Act 1995, "*nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise"*. A defence of laches can therefore be raised where a limitation period applies and the claim is not statute-barred, or where no express limitation period arises under the Limitation Act: see ***In re Loftus, decd*** [2006] EWCA Civ 1124 at para 37.

Limitation

[192] Section 5(1) of the Limitation Act 1995 bars any claim for breach of contract after 6 years.

a. A 6 year time limit also applies to actions by a beneficiary to recover trust property or in respect of any breach of trust (Limitation Act, section 33(3)), unless one of the exceptions in section 33 applies.

b. For limitation purposes a breach of fiduciary duty is treated as equivalent or analogous to a breach of trust: see **JJ Harrison (Properties) Ltd v Harrison** [2001] EWCA Civ 1467.

c. An action for an account is subject to the same time limit as the claim which is the basis of the duty to account.

[193] The case for the POA is that the Developer is a trustee of the common areas for the POA. The POA appears to claim that the exception in section 33(1)(b) of the Limitation Act applies, namely that the action is "*one to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to the trustee's use*". According to the Developer, the POA is wrong for the following reasons:

a. “Trust” and “trustee” for these purposes include “implied and constructive trusts”: section 2(1). However, as per Millett LJ in **Paragon Finance plc v DB Thakerar & Co** [1999] 1 All ER 400 , 408:

> **“… the expressions ‘constructive trust’ and ‘constructive trustee’ have been used by equity lawyers to describe two entirely different situations. The first covers those cases … where the defendant, though not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the plaintiff. The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff ….”**

b. Only the first category (“class 1”) will be treated as a “trust” for the purposes of the exception to the ordinary limitation rules under section 33(1)(b): **Paragon Finance plc v DB Thakerar & Co,** above.

c. The fact that an alleged trustee owes pre-existing fiduciary duties to the beneficiary is not enough, by itself, to bring a constructive trust claim within class 1: **Gwembe Valley Development Co. Ltd v Koshy** [2004] 1 BCLC 131 at p.165 g–i. It is necessary to demonstrate that the trustee owes pre-existing duties in respect of the property in question so that “in legal theory it has been in his possession throughout”: **Halton International Inc & Anr v Guernroy Ltd** [2006] EWCA Civ 801 at 22-23.

d. Even if there was any scope for imposing a constructive trust in favour of the POA in respect of the “common area” (which there is not, for the reasons set out above), that trust would, on any analysis, fall within “class 2” of Millett LJ’s categories in **Paragon Finance**, above:

   (i) The Developer purchased the land known as Old Fort Bay long before the POA even came into existence. There is no basis whatsoever for treating this land, or any part of it, as if it has ‘always belonged’ to the POA.

(ii) The Developer is not even in a fiduciary relationship with the POA, for the reasons set out above. It certainly did not owe any pre-existing 'trustee like' duties to the POA in respect of the so-called "common area" at the time of their transfer to third parties, so as to bring any constructive trust claim within "class 1": **Halton International Inc** [supra].

[194] I do not agree with the Developer's submissions that it does not hold the "common area" on trust for the POA.

[195] Firstly, the Memorandum of Association provides that the POA was incorporated for the purpose of acquiring, holding and owning the common areas. So, the Developer is aware that despite the fact that the legal title to the common areas was for the time being vested in them {the developer) that legal title would at some point in the future be conveyed to the POA (the rightful owner).

[196] Secondly, the fact that the Articles of Association state that the POA ***"… will acquire from the Developer the common areas of all of the subdivisions comprising any part of the Old Fort Bay Property …"*** also undoubtedly puts the Developer on notice that it holds the legal estate in the common areas for the POA.

[197] Thirdly, in each of the original conveyances, the POA signed on its own behalf as distinct from and in addition to the Developer. As Mrs. Rolle QC correctly alluded to, one of the reasons for the POA joining in these conveyances is because the only way that the purchaser can receive the rights to the common areas intended to be conveyed by the conveyance is if the "real owner" of the common areas is a party to the conveyance to convey the same. Significantly, the POA has joined in and signed on these conveyances to convey to the purchasers their rights to the common areas **even prior** to the common areas having been actually conveyed to the POA.

[198] This is because even prior to the actual conveyance of the legal estate of the common areas to the POA, everybody, that being the POA, the purchasers and the Developer fully recognized and accepted that the POA had a beneficial interest in the common areas.

[199] Additionally, the tendering by the Developer of the Handover Deed is again an acknowledgement that the property was being held by the Developer for the POA. The Developer cannot suggest otherwise even though Mr. Henderson disagreed that the Developer holds the "common area" whether as trustee or otherwise.

[200] As Mrs. Rolle QC correctly argued, this is a classic case of the legal estate being vested in the Developer with the Developer fully recognizing and accepting that the common areas were beneficially owned by the POA and that the legal estate would ultimately be conveyed for the merger of those interests.

[201] That however does not alter the finding that Pineapple Grove and Pineapple House do not fall within the definition of "common areas".

Acquiescence/Estoppel

[202] The applicable legal principles may be summarised as follows:

a. The key requirements are (i) acquiescence, in the sense of an express or implied representation or assurance by A, (ii) reasonable reliance thereon by B, (iii) in B acting to his/or detriment: **Gillett v Holt** [2001] Ch 210 at 225.

b. It is fundamental to appreciate that element (i) can be established without the need for some express statement from A. Standing by in silence is sufficient: **Thorne v Major** [2009] 1 WLR 776 at [29, 55], where Lord Walker made clear that failure to disabuse B of a mistaken belief would suffice and that "*the landowner's conduct in standing by in silence serves as the element of assurance*".

[203] It is a fact that Pineapple House was sold in September 2005 and was completed and first used as offices during 2006. Pineapple Grove was sold in November 2008 and developed as offices shortly thereafter. The development of these lands as offices took place in plain view of the POA and all residents of Old Fort Bay. It cannot be denied that anyone passing along West Bay Street would have seen the construction works. Notwithstanding, there was not a single objection or query about the sale or development of these lands by any resident or the POA until the middle of 2014 (when these proceedings were issued).

[204] Thus, the claims were issued around 9 years after the sale of Pineapple House, and around 5½ years after the sale of Pineapple Grove and without any complaint or objection.

a. Dr. Munnings' 30 June 2008 letter refers to the sales of Pineapple House and Pineapple Grove, without any complaint ("*Land sales agreement with Miaoulis and Mosko*"). Dr. Munnings was a director of the POA at the time. It seems clear that the POA had no objection at the time and fully respected the Developer's right to deal with its land as it saw fit.

b. The POA rented an office within Pineapple Grove during the first part of 2015.

c. The POA has contracted with the Developer on numerous occasions in terms which plainly evince its acceptance and agreement to the Developer's sale of the Pineapple lands. If not a contractual preclusion for or waiver of these claims, those agreements were a clear representation by the POA that it had no objection to the Developer's sale of the land in question and its retention and use of the proceeds of sale.

d. In relation to Pineapple Grove, Mr. Henderson noted that, had the POA raised any protest to the sale of Pineapple House (whether before or after residents took over control of the POA's board in September 2006), the Developer "*would likely have sought the necessary clarification (including*

securing declarations from the Court as to the correct legal position) before proceeding with the sale", or alternatively the Developer would have reflected on its option of developing the land as three-storey condominiums. Mr. Henderson was not cross-examined on these matters. Mrs. Lockhart-Charles argued, quite correctly, that this is clear evidence that the Developer relied to its detriment on the absence of protest from the POA (or anyone else) to the way in which it was dealing with the relevant lands.

[205] Given the foregoing, I find that the POA's claims in respect of Pineapple House and Pineapple Grove are barred by the doctrine of laches. In respect of Pineapple House (i) there has been very substantial delay. The proceedings were issued nearly 9 years after the sale. No explanation has been offered by the POA for the delay, or the absence of any complaint at any time in this 9 year period; (ii) the POA has acquiesced to the sale while in full possession of the facts. Notably, two years after the Old Fort Bay residents assumed control of the POA, Dr. Munnings' 30 June 2008 letter refers to the sale of Pineapple House, without any protest or complaint. Further, the POA has contracted with the Developer on numerous occasions in terms which plainly evince its acceptance and agreement to the Developer's sale of the Pineapple lands and (iii) the Developer has acted to its detriment in light of the relevant history, in a manner that would make it wholly unconscionable to allow the POA to resurrect a stale complaint about Pineapple House. The Developer dealt with Pineapple Grove on the same basis, in reliance on (a) the lack of objection by the POA, (b) Dr. Munnings' 30 June 2008 letter (on behalf of the POA) raising no complaint, and (c) the other conveyances duly signed by the POA without objection regarding the previous sale of Pineapple House. The evidence is clear that the Developer would and could otherwise have developed the land in question as residential condominiums, to which not even the POA would be able to muster an objection. The Developer has therefore acted to its detriment in reliance on the POA's acquiescence, and that alone makes it wholly unfair for the sale of Pineapple House to be revisited in these proceedings. I agree with these submissions.

[206] With respect to Pineapple Grove, again there has been substantial delay which has not been explained. The period between the sale of Pineapple Grove and the issue of proceedings was around 5½ years although Dr. Munnings' 30 June 2008 letter (referring to the "*land sales agreement*" with "*Miaoulis*") is itself a reference to the pending sale of Pineapple Grove. Mr. Miaoulis was a director of Pineapple Grove Limited, and signed the transfer. Again, it seems to me that the POA acquiesced to that sale.

[207] Although the limitation period has not expired with respect to this matter, there has been acquiescence by the POA and the POA is estopped from bringing a claim.

[208] Mrs. Lockhart-Charles submitted that even if the POA overcomes all the above hurdles, its financial claims are grossly exaggerated and it should be awarded no more than nominal damages. In particular:

a. Mr. Galanis' calculations are unreliable and exaggerated, because he has used a base figure which includes a substantial amount of stamp duty that the Government not the Developer would have received and even after seeking to correct these figures after the luncheon adjournment on the day of his testimony, he dug his heels in on an incorrect premises contending that the POA suffers a loss not just the first time that a piece of common area is sold, but every time that property is sold on it suffers a loss related to what he described as the incremental difference.

b. The POA and Mr. Galanis have failed to calculate the value of the land to the POA as "common area". That is the true measure of any actionable loss by the POA, and it is not equitable or conscionable that the Court should consider any greater award. Had the POA been gifted the Pineapple House/Grove lands as "common area", the POA would have had to use the land accordingly, i.e. retain it in a use "common" to all residents. The POA would not have been entitled to sell or develop the land for offices. Thus, whatever value the Developer secured from the sales it was able to negotiate reflects development

value, and is irrelevant to an assessment of the value of “common area” in the hands of the POA.

[209] With respect to the expert evidence of Mr. Galanis, I found him to be straightforward and frank in his testimony. He provided very helpful expert evidence to the Court which I accept. Had it not been for my conclusion that Pineapple Grove and Pineapple House are not “common areas” and I would have accepted Mr. Galanis’ valuation without reservation; of course, making alterations, where necessary.

[210] To summarize, there has not been any agreement – whether in the Conveyances or otherwise - that Pineapple House or Pineapple Grove fell to be treated as “common areas” even though it is within the Mauve Line. As Mr. Henderson stated and which I accept, although included within the Mauve Line on Plans attached to the conveyances as being part of Old Fort Bay development, it would have been more accurate to say *“the Mauve Line running along the security fence”*). Even if my conclusions were wrong, the POA and Mr. Hudson/Ms. Foti have all subsequently contracted on the plain basis that they agreed and did not object to the Developer having sold Pineapple House and Pineapple Grove, and/or have affirmed the Developer’s said sales and waived any right to complain.

[211] Consequently, they cannot complain of any loss or damage which has been caused to any of them because the Developer would otherwise have used the land for residential purposes. It is also too late for the POA and/or Mr. Hudson/Ms. Foti to complain, or bring proceedings claiming the proceeds of sale, based on all of (a) the doctrine of laches, (b) Limitation, and/or (c) Acquiescence / Estoppel. I must however add that any claim by the Developer to challenge the POA/Mr. Hudson/ Ms. Foti’s claims with respect to Pineapple Grove is statute-barred will fail as six years have not elapsed. That said, these parties have acquiesced or are estopped from bringing any claim against the Developer for reasons expressed above.

The Old Fort Bay Club

[212] The Club is operated by Old Fort Bay Club Ltd, another wholly owned subsidiary of NPDC. The Club opened in or about May 2003, following very extensive renovations carried out from the beginning of 2002. The Club itself has subsequently made further extensive improvements. Mr. Henderson asserted that he is not aware of any objection or protest to the renovation or operations of the Club at any time during the time that the renovation was taking place over a twelve year period between early 2002 and the middle of 2014. Indeed, Ms. Foti has been a paying club member since she purchased her property in April 2007. Mr. Hudson sought to join the Club in 2013, but withdrew his application.

[213] Mr. Henderson stated that the Club operates from the following areas:

a. An area of just over 3 acres, comprising the renovated Old Fort itself, the new Pool and Terrace, various landscaped and parking areas and the adjacent beach. This area is leased from the Developer, as it has been since 2003.

b. An area of land measuring about 2.5 acres located between the Club and Mr. Lyle's property. This land was bought by NPDC from the Last Resort Limited in December 2008. Subsequently, NPDC has allowed the Club to use this land. It has been maintained at the Club's expense and is used by Club members for volleyball, football and other sports, as well as for Club events.

[214] Mr. Henderson detailed the extensive renovation and improvement which had been carried out at the approximately 3 acre site leased from OFBC. He highlighted that these renovations works cost approximately $4.2 million which were incurred by the Developer against a background of the total absence of any protest or complaint about its use of the land in question, whether from the POA or any resident, in the more than 12 year period from 2002 to around mid-2014. Had there been a complaint, for example during the renovation works, the Developer would likely have sought the necessary clarification (including securing

declarations from the Court as to the correct legal position) before proceeding or committing itself further.

[215] Mr. Henderson alleged that:

a. The claim of the POA (and Mr. Hudson and Ms. Foti) that the Club's land (or any part of it) is or was "common area" is incorrect. He stated that:

(i) There is no conveyance plan, marketing brochure, website or sales materials which indicates in any way that the Club's land (or any part of it) was anything but part of the Developer's landholdings. He is unaware of any allegation of a specific promise or representation by the Developer that the Club's land (or any part of it) would fall into "common area". He says that he is certain that no such promise or representation was ever made.

(ii) The marketing brochure/Old Fort Bay website describes in some detail the renovations to the Old Fort Bay Club. No prospective purchaser could read this document and think the Club was proposed to be "common area".

(iii) The early conveyance Plans (i.e. those prior to the 2002-3 renovation) show the old Fort itself, but with no indication or representation regarding its future use (or that of surrounding land), and certainly no promise that it would fall into "common area".

(iv) Later conveyance Plans (i.e. following the renovation and opening of the Club) illustrated the Club as built out, with many specifically noting the interest of Old Fort Bay Club Limited. Indeed, once the Developer had committed to funding the renovation of the old Fort and establishment of the Club, it should be little surprise to the Court that the opportunity to enjoy these major improvements through Club membership was a significant selling-point in marketing activities

from early 2002. And obviously, potential purchasers were told about the Club's membership fees. No-one was told that the land would be or was "common area".

(v) Development and operation of the Club is, again, entirely in accordance with clause 7 of the conveyances. It is completely normal for residential developments such as Old Fort Bay to be served by a facility such as the Club. Both Lyford Cay and Albany have established and operate equivalent facilities.

[216] In summary, says Mr. Henderson, there is no substance in the claim that the Club lands are or were "common area", and that, in any event, it is completely unfair and unreasonable for this claim to be made so long after substantial renovation and improvement costs were incurred by the Developer (without a single murmur of discontent from the POA or residents). He does not accept that the POA, Mr. Hudson or Ms. Foti are entitled to bring a claim regarding the Club lands. Specifically:

a. Since the Club was opened, the POA has co-signed numerous conveyances which show the Club as built out, with many specifically noting the interest of Old Fort Bay Club Limited. Many such conveyances were signed by the POA after control of its Board was handed to residents in September 2006. These conveyances reflect a clear understanding and acceptance by the POA that the Developer was entitled to deal with the Club lands as it has. This position is also evident in Dr. Munnings' 30 June 2008 letter acknowledging the Club as owned by the Developer and separate from "common area spaces."

b. Ms. Foti purchased her lot in April 2007 after the Club had been opened for over 4 years. She has, at all times thereafter, been a Club member. She has fully accepted the present state of affairs.

c. Mr Hudson purchased his lot in June 2013, over 10 years after the Club opened. It is nonsensical for him to suggest anything other than that he bought in full knowledge of and accepting the Developer's use of the Club lands.

[217] The POA submitted that the Developer, in its 10 December 1984 letter to the Ministry of Works, unequivocally and unambiguously represented to the Ministry not only that the Club and its surrounding areas would constitute "common area", but stated that each owner would have a vested interest in the property upon the purchase of his/her lot. Mrs. Rolle QC stated that such representations to the Minister as to the Club's intended land use are material considerations. Further, said Mrs. Rolle QC, there is nothing in any of the documents submitted to the Ministry which describes the Club as land to be retained by the Developer or having been reserved to the Developer.

[218] On the other hand, Mrs. Lockhart-Charles asserted that the POA does not contribute toward the maintenance of the Club and that the Developer has the right to develop its land as it pleases by virtue of clause 7 of the conveyance.

[219] Mrs. Lockhart-Charles next asserted that the POA's argument in relation to its claim of ownership over the Club appears to hang entirely on the 10 December 1984 letter. According to her, it is a hopeless for the following reasons:

1. The letter does no more than explain a generalised concept (the word "concept" is used throughout), at a time long before any consent was granted, let alone any construction works commenced. Plans for such a large site inevitably evolve over time: see Transcript of Proceedings dated 5 February 2020 at p. 24 line 30 to page 28 line 29.

2. Clear confirmation that the 10 December 1984 letter has no status for present purposes is that it was <u>not</u> the basis of the Developer's final application or any ensuing planning approval in respect of Old Fort Bay. The first available planning consent was 18 months later: 13 June 1986

approval “in principle”. This did not mention at any point the 10 December 1984 letter. Rather, it refers to “*your application of 27th March 1986*”. The POA has not produced, or sought to place any reliance on, the actual application letter (which is not available within the Bundles), as distinct from a “concept” letter which is nothing beyond one of many “draft” ideas that the Developer contemplated in the very early days.

3. None of the planning consents relating to Old Fort Bay (whether the initial 1988 approval, or the 2004-08 approvals) imposed a condition on the Developer requiring that the Club or surrounding land must in effect be treated as “common area”. This is what the Government planners would have had to do, had they considered it an essential pre-requisite of what they were giving consent to.

4. The letter on which the POA relies was written in December 1984, nearly 7 years before the POA was incorporated. It cannot reflect a contract or agreement with the POA.

5. There is no evidence that a single purchaser of any lot within Old Fort Bay saw the 10 December 1984 letter before their purchase. Although it contains no enforceable promise to subsequent purchasers, it has plainly not been relied on anyway. The letter appears to have been buried deep in archive files for about 30 years until resurrected by Mr. Hudson’s researches in about 2013/14.

[220] As Mrs. Lockhart-Charles correctly argued, the POA or Mr. Hudson/Ms. Foti cannot bring a claim in respect of the Club and/or the surrounding lands. It is also too late to do so given the acquiescence and acknowledgement by the POA that the Club and surrounding areas are not “common areas”.”

[221] In any event, it is too late to complain or bring proceedings claiming the proceeds of sale based on (a) the doctrine of Laches, (b) Limitation, and (c) Acquiescence/ Estoppel.

[222] The Court also observed that the POA, under the chairmanship of Dr. Munnings acknowledged, on 30 June 2008 that the Club was "*owned b*y" the Developer. This explicit acknowledgment was re-confirmed by the POA's then Chairman, Sir William Allen when he wrote to the Director of Physical Planning on 27 April 2011. In this letter, he wrote:

> **"A "right of way" has been denoted on the MOW/Town Planning approved subdivision plan within the Old Fort Bay community. However, it is non-functional as it does not extend to the public beach; rather it ends on Old Fort Bay Club property which is owned and controlled by the Developer who affords access to and through Club property to paying Club Members only."**

[223] Needless to say, even the POA acknowledges that the Club is owned and controlled by the Developer.

The Identified Beach Reserve (now part of Mr. Lyle's residence)

[224] The POA and Mr. Hudson/Ms. Foti complain about a small triangular area marked as "Beach Reserve" on what may have been the Agreement for Sale plan with Grand Canal regarding Lot 2-15. This land was sold by the Developer in February 2005 (in a conveyance to which the POA was a co-signatory) and was re-purchased by the Developer in December 2008 then re-sold to Mr. James Lyle in early 2010. Mr. Lyle has built his residence on the land thereon in 2011/12.

[225] According to the Developer, there is no substance to the complaints of the POA and/or Mr. Hudson/Ms. Foti for the following reasons:

1. These complaints are barred by the doctrines of (a) Laches, (b) Limitation, and (c) Acquiescence/Estoppel. The same legal principles apply as explained in relation to Pineapple House, Pineapple Grove and the Club. Here, proceedings were issued more than 9 years after the Developer sold

the land (in a conveyance to which the POA was a co-signatory), without any explanation being offered by the POA for this delay. Further, the Developer relied on the absence of complaint or objection in taking the risk of buying the land back (at market value) in December 2008, before selling much of it on again in early 2010. The Developer also relied on the fact that the POA was a co-signatory to the February 2005 sale, and has been a co-signatory to numerous subsequent conveyances which are inconsistent with any such "Beach Reserve" being "common area": The Developer's case on absence of complaint and detrimental reliance has not been contested by the POA at any stage during the Trial, nor could it be. Accordingly, it is far too late for a claim to be made for the proceeds of the February 2005 sale of this land (both contractual and any equitable/trust claims were statute barred in February 2011), and in any event to permit such a claim would be grossly unfair and inequitable to the Developer given the subsequent long history of acquiescence, and the Developer's detrimental reliance on the evident representation from the POA and residents that its February 2005 dealings with the land were unobjectionable.

2. Even taking at face value the supposed Agreement for Sale plan on which the POA and Mr. Hudson rely, it is far from sufficient to make the land in question "common area". Nothing in the conveyance expressly promises or commits to providing that specific land (or any specific land) as "common area". It is accepted that some of the definitions of "common area" in the early conveyances refer to "Beach Reserves". But this language is simply illustrative of the sorts of land which <u>might</u>, in due course, be dedicated by the Developer so as to be available for "common" use by all Old Fort Bay residents. It does not presume or require that any Beach Reserve (singular or plural) necessarily will be so made available. The definition of "common area" is not tied in any direct way to the supposed Agreement for Sale plan, or to any area marked thereon. The key words, according to Mrs. Lockhart-

Charles, are "*the use of which shall be common to all owners*". This requires a future act of dedication by the Developer (acting in good faith) as to what land from its retained land is to be made available for "common use" by the residents.

3. Mr. Hudson (and the POA) are not entitled to make any claim based on the supposed Agreement for Sale plan because:

    i. Mr. Hudson has failed to produce the counter-party version of the original 1997 Agreement for Sale, relying instead on photocopies of photocopies of what was registered. His (or to be precise Grand Canal's) original Agreement for Sale is required, because the Agreement for Sale held by the Developer does not mark any area as "Beach Reserve". Accordingly, Mr. Hudson has failed to discharge the positive burden of proof on him to establish that the actual Agreement for Sale plan includes the alleged "Beach Reserve" notation.

    ii. Even ignoring (i) above, the relevant plan was superseded and has no legal status. As Mr. Henderson stated, there was never a conveyance of land in relation to Lot 2-15 which incorporated the alleged plan. The plan was part of a <u>draft</u> conveyance annexed to an Agreement for Sale in favour of Grand Canal. Grand Canal never completed the purchase. Instead, in August 2006, with Grand Canal's consent, Lot 2-15 was sold by the Developer directly to Mr. and Mrs. Frey. The conveyance to the Freys attaches a plan which has no area marked as "Beach Reserve". On well-known legal principles, the terms of a conveyance replace those of earlier agreements absent some clear express agreement to the contrary. There is no such evidence here. Hence, when in June 2013 Mr. Hudson bought the Freys'

interest, he bought what they had acquired and the supposed 1997 plan was no part of that title.

4. Neither the POA not Ms. Foti is entitled to make any claim for the "Beach Reserve", having contracted on the basis this was land belonging to the Developer which was entitled to deal with it as it did and/or having waived any right to complain. Specifically:

   a) The POA. Even if the POA can over-come all the objections set out above and demonstrate that it was party to a conveyance (whether that regarding Lot 2-15 or otherwise) which incorporated a plan showing a "Beach Reserve", the POA's subsequent contractual dealings with the Developer bar it from pursuing these arguments. In particular:

      i. The POA was itself a co-signatory to the February 2005 sale of the land in question by the Developer to The Last Resort Limited. It is therefore absurd to turn around nearly 10 years later and complain.

      ii. The POA has been a co-signatory to numerous subsequent conveyances which are inconsistent with any such "Beach Reserve", either because the land in question is not so marked on accompanying plans, or because the transaction followed the purchase and house construction by Mr Lyle. As stated by Mr Henderson (and not challenged in cross-examination): "*This includes the many conveyances signed by the POA after effective control was handed to residents in September 2006. All these conveyances were executed by the POA in the full knowledge of all its directors and officers that Beach Access was provided by way of Club membership (or earlier beach licence only). The POA has in my view agreed and accepted, and contracted many times on the basis of that state of affairs*".

b) Ms. Foti. Ms. Foti acquired her lot at a time when the alleged "Beach Reserve" was owned by The Last Resort Limited. She purchased fully accepting and agreeing this, and without any objection.

5. No fiduciary duty was owed, and no constructive trust arose, on which any claim regarding the "Beach Reserve" can be founded.

6. The POA's financial claims are exaggerated and nothing more than nominal damages are recoverable. Specifically:

   a. The POA's complaint is about the Developer's sale of the alleged "Beach Reserve" to Last Resort. This transaction (to which the POA was itself a co-signatory) took place in February 2005. Wrongly, though, Mr. Galanis has carried out his calculations based on a later transaction in December 2008. That is totally incorrect. The POA's operative complaint must relate to the February 2005 transaction. Subsequent commercial dealings, whereby the Developer took the financial risk of buying back the relevant land and then re-sold it to another third party (Mr. Lyle), are irrelevant.

   b. The transaction with Last Resort in February 2005 related to an area of 4.148 acres. But the alleged "Beach Reserve" is only 0.765 acres. That is only 18% of the land sold to Last Resort. The POA and Mr. Galanis have made no adjustment to reflect this obviously material point.

   c. The reality of the POA's case is that it uses the alleged "Beach Reserve" to seek to argue for universal Beach Access rights. That is wrong for reasons set out at length above. But even if it were correct, the underlying objection can be addressed very simply, by providing open access to the beach via the path that divides Mr. Lyle's lot from the Club. If necessary, the Developer would undertake to achieve this result. No financial compensation is required.

d. Mr Galanis has once again erroneously carried out his calculations based on a figure which includes stamp duty. It is obvious this should have been deducted, as the relevant sum does not benefit the Developer.

[226] On the other hand, Mrs. Rolle QC submitted that in many of the 1990 conveyances such as the Hudson Conveyance actually have the Mauve Line Plan attached to them. The Mauve Line Plan clearly identified a Beach Access adjacent to the Hudson Lot. The 1990 conveyances including the Hudson conveyance expressly provides that "common area" shall not be limited to "*Beach Reserves*".

[227] Mrs. Rolle QC submitted that the POA's right to a Beach Reserve arise in two ways. Firstly, the right was conveyed by express conveyance of the "Rights Granted" to the purchasers. Many of the 1990 conveyances such as the Hudson conveyance attach the Mauve Line Plan. That Plan clearly identified a Beach Access adjacent to the Hudson Lot. The 1990 conveyances, including the Hudson conveyance expressly includes the words *"Beach Reserves"* within the definition of common area. Firstly, the conveyances expressly grant to the purchasers, Hudson included, the right to use the common areas as *"Rights Granted".* The conveyances define the *"Rights Granted"* as *"the rights of way and other rights and easements set out in the Second Schedule."* Consequently, said Mrs. Rolle, by the express conveyance of the *"Rights Granted"* to the purchasers which expressly included the right to use any *"Beach Reserves",* the right to use the *"Beach Reserves"* was expressly conveyed and granted to the purchasers.

[228] Secondly, says Mrs. Rolle QC, the Beach Reserve was an incidental benefit necessary of the complete enjoyment of the lot under "the appurtenances thereunto belonging". Each of the conveyances conveyed to the purchasers the subject hereditaments *"…TOGETHER WITH the appurtenances thereunto belonging."* which refers to a right to be used with the lot conveyed as an incidental benefit necessary for the complete enjoyment of the lot. She urged the Court to view the Beach Reserve as a benefit necessary for the enjoyment of the lot.

[229] Finally and even further, Mrs. Rolle QC submitted that even in the absence of these express grants the conveyance of the lot is deemed to include the conveyance of any right which is identified as appertaining to the lot by section 6 of the Conveyancing and Law of Property Act which provides:

> **6. (1) A Conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, hedges, ditches, walls, fences, ways, waters, watercourses, liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of Conveyance demised, occupied or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.**
>
> **(2) A Conveyance of land, having houses or other buildings thereon,**
>
> > **shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, tanks, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, houses or other buildings conveyed, or any of them, or any part thereof, or at the time of Conveyance demised, occupied or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses or other buildings conveyed, or any of them, or any part thereof."** [Emphasis Added]

[230] Mrs. Rolle QC contended that there is no doubt that the conveyances, including the Hudson conveyance, conveyed to the purchasers the right to use the Identified Beach Reserve which existed "at the time of the conveyance".

[231] Therefore, by virtue of section 6, the right to use the Identified Beach Reserve is deemed to have been granted to the purchasers because this right was identified within the definition of common area as a right which appertained to the lot. Consequently, the right to use this Identified Beach Reserve was a vested right and the sale of the Identified Beach Reserve was a breach and abrogation of that vested right. These are compelling arguments and I agree with them.

[232] Mrs. Rolle QC further stated that the Developer does not dispute the fact that (1) the conveyances granted easements, rights of way and licences to the common areas which by definition included Beach Reserves and (2) that the Plan attached to the Hudson title documents included a Beach Reserve.

[233] Mrs. Rolle QC submitted that the Developer's acceptance of these facts is dispositive of the legal issue of whether by virtue of the Hudson title documents, Mr. Hudson was granted easements, rights of way and licenses to the Beach Reserve which was expressly defined in his deeds and identified on the Plan attached to his title documents.

[234] According to her, the issue of the grant of rights to Mr. Hudson with respect to the Identified Beach Reserve is separate and distinct from the POA's right to own the Identified Beach Reserve as common area.

[235] With regards to the POA's right to own the Identified Beach Reserve, the Court has to assess the Developer's explanation relative to the use of the Identified Beach Reserve. In that regard, the Developer has presented another Plan which does not show the Identified Beach Reserve.

[236] In this regard, three Plans were presented to the Court. For a better understanding, it would be useful if I reproduce the photos which Mrs. Rolle QC have so gratefully provided:

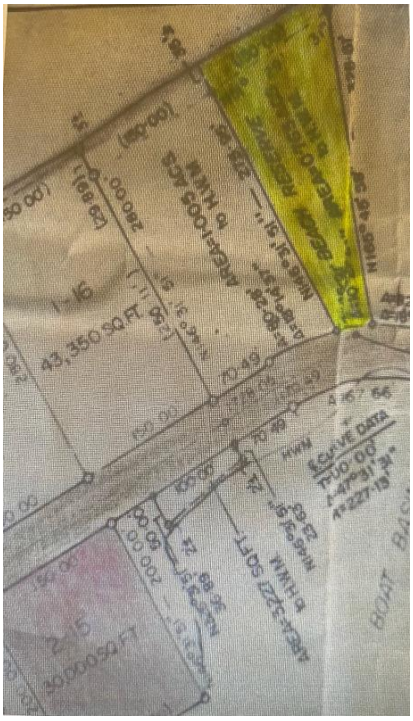

PHOTO 1- Volume 6 Tab 4

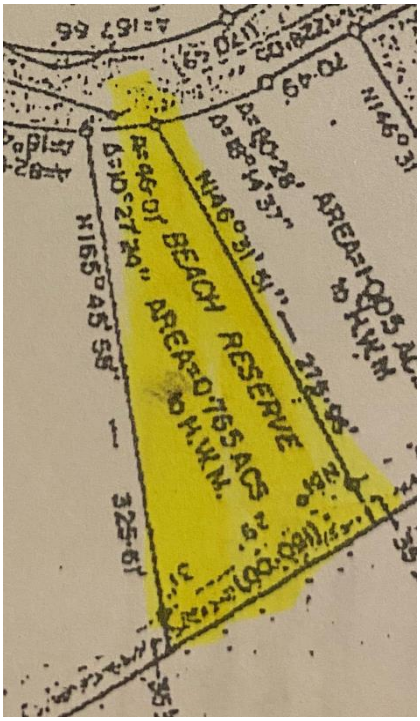

PHOTO 2-Exhibit RS-1

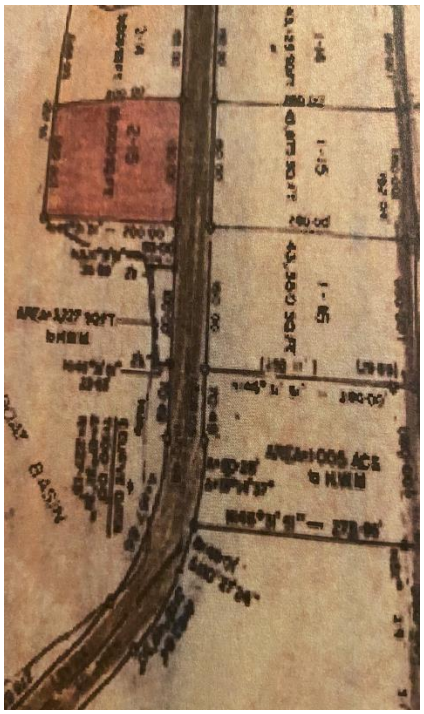

PHOTO 3 - Volume 4 Page 369

[237] The first two photographs depict the Identified Beach Reserve on the Plans attached to the two (2) aforementioned separate documents. The third photograph is the Plan from the Developer which has not been presented in conjunction with and alongside any document recorded or unrecorded.

[238] Mr. Henderson's explanation for his Plan which does not show the Identified Beach Reserve is that it is an error. Under cross-examination, he said "*well, the one with the Beach Reserve on it. It was not an official agreed plan*."

[239] After some probing by Mrs. Rolle QC, Mr. Henderson stated that the Plan that shows "Beach Reserve" was intended for a limited purpose - that being the transaction with Floggl and with Lester Smith who was developing the adjacent property. Shortly put, I did not find Mr. Henderson to be a credible witness when he gave this explanation. To my mind, this was a deliberate attempt by Mr. Henderson to mislead the Court. Mrs. Rolle QC intimated that the 1990 conveyances were prepared by Messrs. Harry B. Sands, Counsel & Attorneys at

Law and each one included the reference to *"Beach Reserves"* in the definition of "common area" as a part of the "rights granted."

[240] Mrs. Rolle QC argued that if the Court were to accept Mr. Henderson's explanation, it necessarily means that Messrs. Harry B. Sands, in preparing these multiple conveyances, acted in contravention of NPDC"s instructions and for in excess of a decade, NPDC and Messrs. Harry B. Sands failed to detect it.

[241] Mrs. Rolle QC next submitted that Mr. Henderson's 'explanation' that the wrong plan was attached to the agreement and the conveyance on two separate occasions is not just suggesting that some plans just got mixed up in a box at NPDC's office. According to Mrs. Rolle QC, the suggestion by the Developer to find that, in the preparation of the agreement and the conveyance in Messrs. Harry B. Sands' Chambers, attached plans to documents which were erroneous and/or inconsistent as between copies in circumstances where they would have undoubtedly had an independent obligation to properly review the documents and confirm their accuracy before execution and recording. According to Mrs. Rolle QC, the Court ought not to accept such a dubious account from the Developer. I agree. I did say, in assessing the evidence of Mr. Henderson, while knowledgeable with respect to the Old Fort Bay Development, he also has an axe to grind in these proceedings.

[242] Mrs. Lockhart-Charles fought hard to defend the incredulous account given by the Developer. In my considered opinion, the complaints by the POA and Mr. Hudson/Ms. Foti on the Identified Beach Reserve are not barred by the doctrines of (i) Laches, (ii) Limitation and (iii) Acquiescence/Estoppel because the complaint is in respect to the Developer's sale in 2010 to Mr. Lyle.

[243] Furthermore, "Beach Reserve" falls squarely in the definition of "common area" and, as Mr. Henderson confirmed, he, on behalf of the Developer, signed the conveyances for the POA when the Identified Beach Reserve was sold and re-sold. Mr. Henderson also confirmed that, in respect of this sale, the POA received

no financial benefit and that all such financial benefit was retained by the Developer. In this regard, the Developer breached its fiduciary duty which it owed to the POA when it transferred the Identified Beach Reserve to Mr. Lyle.

[244] The POA is entitled to damages for the sale of a portion of the Identified Beach Reserve. Mrs. Rolle QC acknowledged that the adjustment the POA would make to the claim of damages is in respect of the Identified Beach Reserve and its size.

[245] Mrs. Rolle submitted that during the course of cross-examination of Mr. Henderson, he confirmed that he was unable to definitely state in acres the size of the property which was sold to Last Resort which included the Identified Beach Reserve. The transaction with Last Resort in February 2005 related to an area of 4.148 acres. But, it is alleged that the Identified Beach Reserve is 0.765 acres. Mr. Galanis made no adjustment to reflect this point and, as Mrs. Rolle QC pointed out, the Court in assessing damages must take into account the fact that the Identified Beach Reserve was only a portion of the lot sold. The sum assessed for the Identified Beach Reserve is $9,075,000 adjusted for inflation. An appropriate discount given the issue of size would be 50%. The result, according to her, would be $4,537,500. No doubt, the Developer would challenge this amount as Mrs. Lockhart-Charles is of the view that the Beach Reserve is only 0.765 acres or 18% of the land sold to Last Resort.

[246] On this issue, accepting Mr. Galanis' valuation which was also adjusted to take into consideration, the question of inflation, I will leave the final figure to be worked out by Counsel.

Beach Access

[247] In paras 58 to 61 of his Witness Statement, Mr. Henderson sets out what he believes is the true and correct position on Beach Access. He stated that:

a. Prior to the opening of the Club in about May 2003, properties in Old Fort Bay which had been sold by OFBC comprised (i) the Old Fort Bay subdivision lots, and (ii) a relatively small number of other lots capable of sale without

subdivision. Half of the OFB Subdivision lots were beachfront lots which obviously came with direct Beach Access. The other lots in the OFB Subdivision were canal-front lots (numbered 2-1 to 2-15). Most of these (11 out of 15) were purchased by persons who bought the beachfront lot nearby or opposite, with a view to developing the canal-front lots in a manner ancillary to their principal residence on the beachfront lot. A number of non-beachfront purchasers (in the period 1997 to early 2003) specifically bargained with the Developer for Beach Access rights at the time of their purchases. If agreed by the Developer, these were granted verbally and in due course confirmed by way of written beach licences or letters to the same effect. The sole canal-front lot within the initial OFB Subdivision that was not bought together with a beach-front lot, or in respect of which a beach licence was granted, is Lot 2-15, now owned by Mr. Hudson.

b. The Developer never agreed, in any contractual document enforceable by the POA or any resident, to grant free, universal Beach Access to all Old Fort Bay residents.

c. As from about March 2003, with the Club restoration nearly complete, and planning proceeding in earnest for what would become the final 8 subdivisions (comprising about 130 units of the approximately 170 total lots within Old Fort Bay), the Developer clarified that future purchasers from it would be entitled to Beach Access only through Club membership. Beach Access was show-cased as one of the many benefits of Club membership (with a view to increasing its attractiveness). Most prospective purchasers from this point on questioned what the arrangements were regarding Beach Access, for fairly obvious reasons. They were informed that the Developer's policy was that Beach Access for new purchasers was through Club membership only.

[248] Mr. Henderson asserted that the POA's and Mr. Hudson's case on Beach Access seems to be based virtually entirely on the plan said to have been attached to the Agreement for Sale regarding Lot 2-15 with Grand Canal, which marks a triangular

area diagonally opposite as “Beach Reserve”. He does not follow how this plan justifies the contentions of either the POA or Mr. Hudson/Ms. Foti.

[249] Mrs. Rolle QC submitted that the Developer has an obligation to provide Beach Access. The obligation to provide Beach Access which was mandated from the very beginning and then sold cannot be reasonably challenged by the Developer. In this regard, it is also crucial to note that the express grant of the ***“Rights Granted”,*** and/or the express grant of the “***appurtenances thereunto belonging”*** or the grant of such rights by operation of law by virtue of Section 6 of the Conveyancing Act all run with the land. They enure for the benefit of any purchaser who then holds the land consistent with what the Minister has mandated. A private beach licence, on the other hand, is a private revocable right which does not run with the land.

[250] On the other hand, Mrs. Lockhart-Charles submitted that no representation has ever been made by the Developer that residents would enjoy universal, free Beach Access. Nor was any representation ever made to Mr. Hudson or Ms. Foti specifically that they would be granted Beach Access, except via membership of the Club.

[251] I do not agree with Mrs. Rolle QC that the Developer has an obligation to provide Beach Access because, according to her, the Minister mandated it and the Developer cannot simply ignore the Minister. Mrs. Rolle QC was no doubt referring to the letter from the Ministry dated 14 April 1986. The letter, in part, stated “*The Committee would wish to see some access to the beach or a part of the beach provided for the general public.”* Then, in another letter dated 25 May 2011, the Minister stated “*The Committee also agreed that a proper public access should be provided to the beach…The Department will request the developer shows this access on a proper survey plan to be used in perpetuity by the residents of Old Fort Bay”.*

[252] The latter letter was a response to the letter penned by Sir William Allen, Chairman of the Old Fort Bay Handover Committee to the Director of Physical Planning.

[253] In my considered opinion, the Court cannot direct the Developer to comply with a request of a Minister especially since “common area” does not include “Beach Access”. However, the Minister has requested that the Developer shows in a proper survey plan, Beach Access for the use in perpetuity by the residents of Old Fort Bay. That said, the Court is not condoning a flagrant breach of a request by a Minister. In my opinion, the Handover Committee Chairman is capable of pursuing this issue either with the Developer and/or the Minister. The Minister is very capable of enforcing such directive if the Developer fails to comply.

The Boat Basin

[254] In his Witness Statement, Mr. Hudson asserted that the rights to the Canals, Waterways and Boat Basin are set out in the Second Schedule to the Plaintiffs’ (Mr. Hudson/Ms. Foti) conveyances and title documents. Therefore, he said, only the rights in the proviso of those documents have been reserved and they do not reserve title to said areas. He said that he has not seen any other documents which have the effect of reserving rights to the Developer regarding Canals, Waterways and the Boat Basin. According to Mr. Hudson, the Boat Basin is an open water vista extending at the end of the main waterway in Old Fort Bay. He stated that it is identified in the Agreement for Sale and the conveyance to himself and his predecessor in title and it is clear that the Boat Basin is a part of his title.

[255] Mr. Hudson further deposed that he became aware of the Developer’s intention to expand the Marina within the Boat Basin of the Canal and Waterways in March 2014. As a result, he sent an e-mail to Mr. Henderson on 6 March 2014 expressing his grievances. Mr. Henderson stated that the Developer was entitled to extend the Marina on the basis of the proviso, which he (Mr. Hudson) does not accept.

[256] Mr. Hudson said that he has never seen a document which gives Old Fort Bay Marina Company Ltd. any rights to the Canals and Waterways. Every document

he has read described Canals and Waterways as a common area belonging to the POA. According to him, there is a lease dated 3 March 2010 between OFBC as landlord, Old Fort Bay Marina Company Ltd, as the Company and James Lyle as the tenant. The lease acknowledges that the Marina is constructed in the Canal and Waterways of Old Fort Bay.

[257] Mr. Hudson stated that the nature of the expansion, which is to provide docking for non-owners, is not under the control of the POA. Having reviewed the Plan, he said that, as a result of the proposed nature, size and intended purpose of the expansion, it would have the effect of substantially limit or, at least, affect their ability to safely navigate within the Boat Basin. He also stated that it would create security risks for the entire community but especially for himself and Ms. Foti since their properties are adjacent to the Boat Basin. He said it would obstruct the amenity view of both of them, thereby decreasing the value of their properties and would lead to fouling of the riparian environment of the entire Boat Basin and adjacent canal.

[258] Mrs. Rolle QC contended that the Boat Basin exists within the Canals and Waterways of the OFB Subdivision. According to her, a Boat Basin is "*a basin in which small boats and other small vessels are moored."* She emphasized that the operative word is "small."

[259] She submitted that the Canals and Waterways are indisputably common areas, the use of which was also (i) expressly granted to purchasers by the conveyances of the "*Rights Granted"*, expressly granted to purchasers by the conveyances of the *"appurtenances thereunto belonging"* and (iii) deemed to have been granted by operation of law under section 6 of the Conveyancing Act.

[260] According to Mrs. Rolle QC, the right to use the Boat Basin as like the right to use the Identified Beach Reserve also vested in the purchaser at the date of his/her conveyance and is a vested right. Any act by the Developer which infringes this

vested right to use the Boat Basin is similarly a breach and abrogation of this vested right and ought not to be allowed.

[261] No doubt, this complaint is part of the more controversial complaint with respect to the Proposed Extended Marina within the Canal, Waterways and Boat Basin of the OFB Subdivision.

The Existing Marina

[262] At paras 72 to 79 of Mr. Henderson's Witness Statement which remained unchallenged, he detailed that the existing Marina was developed by Old Fort Bay Marina Limited, which leases the relevant land from OFBC. These works were carried out between October 2003 and October 2004. The works involved the installation of docks to create 19 slips, and the creation of a landscaped area for parking and the very minor services offered at the Marina (water and electricity). The cost of these development works was in the region of $750,000. The Developer maintains the existing Marina.

[263] Mr. Henderson unequivocally disagreed with the POA's assertion that the existing Marina is "common area". Mr. Henderson explains why that assertion has no basis. Specifically:

a. The existing Marina has never been dedicated as "common area" by the Developer, and it has no intention of doing so.

b. The Developer has kept docking facilities in this location since before any lot was sold. A long dock was in place between the mid-1980s and 2003/4 when the existing Marina was constructed.

c. The existing Marina was constructed in accordance with the Developer's right to do so preserved by clause 7 (and clause 2 of the Second Schedule) of the conveyances.

d. No conveyance, conveyance plan, marketing brochure, website or sales materials shows the Marina area as anything but part of the Developer's land interests. The marketing brochure/Old Fort Bay website marks the whole "Boat Basin" areas as "Marina" on the plan at the back of the document. No prospective purchaser could read this document and think the Marina was proposed to be "common area".

e. The POA has (including in the period following 20 September 2006) co-signed numerous conveyances which showed the existing Marina and its control by Old Fort Bay Marina Limited. In executing such conveyances, the POA was agreeing and endorsing the Developer's ownership and control of the existing Marina.

f. Mr. Hudson and Ms. Foti purchased their lots (in 2013 and 2007 respectively) long after the existing Marina had been constructed. It was plain to see on any visit to Old Fort Bay. As both their properties (Lot 2-15 and Marina Lot 1) are proximate to, and overlook, the existing Marina, they were both very well aware of the Marina's existence when they purchased.

g. In addition to the fore-going, Mr. Henderson asserted that it seems totally unfair and unreasonable for the existing Marina to be claimed as "common area" in circumstances where:

    (i) The existing Marina was constructed in 2003/4 at substantial expense (over $750,000). There was not a single protest or objection to the existing Marina between 2003/4 and this litigation commencing in 2014. The project was completed (construction having taken a number of months), in part relying on the absence of any complaint during its early stages.

    (ii) Indeed, the construction of the existing Marina was well known to the POA and existing Old Fort Bay residents before it had materially progressed. In this respect, I note the Developer's 27 January 2003

letter to Old Fort Bay residents which stated: "*The work on the new marina is underway and we apologize for any inconvenience caused during the works by the fill/debris on the roadway. The revised layout of the docks can be reviewed on the website*."

(iii) The existing Marina has at all times been maintained by the Developer, and not the POA. This maintenance expenditure was, until 2014, incurred by the Developer on the understanding that there was no challenge to its ownership and control of the existing Marina.

(iv) Dr. Munnings' 30 June 2008 letter asserts that the Marina is "*owned and represented by NPDCo*". In short, Mr. Henderson says that he is not aware of any suggestion whatsoever by anyone at the POA (or any resident) to the effect that the existing Marina was to be treated as "common area" until this litigation, nearly 10 years after the existing Marina had been constructed. The POA's change of position is disingenuous, opportunistic and dishonourable.

h. Mr. Henderson stated that he is aware that Mr. Hudson relies on the fact that certain conveyance plans mark the area where the existing Marina is located as "boat basin". He does not understand this argument. A description as a "Boat Basin" seems to me to be entirely consistent with use for Marina purposes. Mr. Hudson bought his lot at a time when the existing Marina had been in place for over 9 years.

i. Finally, Mr. Henderson has serious difficulties with the POA's argument that the existing (and extended) Marina is not consistent with a "*general plan of development as a private residential area consistent with the present scheme of development*" (clause 7 of the conveyance). According to him, Old Fort Bay is a water-front community, with numerous internal canals and waterways. Docking facilities are a fundamental aspect of such a community. One hundred or so lots within Old Fort Bay are canal-front (with

36 or so that do not have canal frontage; or 42 if the neighbouring development with access rights, Xanadu, is included). Many private docks have been constructed on canal-front lots. Furthermore, the conveyance (Sixth Schedule, clause 8) specifically refers to the POA's obligation to maintain "*any public or communal dock, pier, sea-wall or groyne*". While the existing Marina is not public or communal, this shows that such a facility is not an alien feature in a development such as Old Fort Bay. Moreover, photographs of Albany and Lyford Cay (respectively) showing that nearby residential areas have provided substantial Marina facilities without (as far as I am aware) any objection.

[264] Mrs. Rolle QC argued that there is no legal basis for the finding that the Developer owns the 3.724 acre portion of the Canals and Waterways of the OFB Subdivision. In my judgment, the Canals and Waterways as well as the Boat Basin are common areas. Its use is common to all users in this residential community. However, with respect to the Marina, the POA itself has acknowledged that it is owned by the Developer. This acknowledgement dates back to 2008. Dr. Munnings' 30 June 2008 letter asserts that the Marina as "*owned and represented by NPDCo*". A rhetorical question is: if the Developer does not own the Marina which it developed as far back as *circa* 2003, then who owns it? Is the Developer holding it on trust for the POA as it alleged? If so, then at some point in time, the Developer did own it.

[265] In any event, it is also too late to complain or bring proceedings claiming that the Marina is "common area" in accordance with the doctrine of laches, the Statute of Limitation and having themselves acquiesced. They permitted the Developer to construct and maintain the Existing Marina without demur so it is just too late to raise any objections. As for Mr. Hudson and Ms. Foti, when they brought their respective properties, they were well aware of the Existing Marina and in my respectful opinion, they would have been very naïve if they had no idea of who owned the Marina since their respective properties are contiguous to, and overlook the Existing Marina.

[266] The submission made by the POA must therefore fail. The Marina is owned by the Developer. Now, to the Proposed Extended Marina.

The Proposed Extended Marina

[267] The POA argued that the Developer is not entitled to install or construct its Proposed Extended Marina ("Marina Expansion") within the Canals, Waterways and Boat Basin of the OFB Subdivision. It refers to seven reasons which form the basis for its complaint namely:

1. The Proviso on its proper construction does not entitle the Developer to install or construct the Marina Expansion.

2. In any event and even if the Proviso was referable to such a Marina (which is vehemently denied), the decision as to whether such a Marina should be built, when and how it would be build, its management and operation would be vested solely in the POA, this falling within the POA's common area management and operational duties of which it was seized at the time of the Developer's application for approval.

3. The Developer's purported right to install and construct the Marina Expansion within the Canals, Waterways and Boat Basin of the OFB Subdivision would constitute a breach of the Rights Granted to Mr. Hudson and Ms. Foti.

4. The Developer's purported right to install and construct the Marina Expansion within the Canals, Waterways and Boat Basin of the OFB Subdivision would be a breach of Mr. Hudson's vested rights arising from his Licensed Lot.

5. The Developer's purported right to install and construct the Marina Expansion within the Canals, Waterways and Boat Basin of the OFB

Subdivision would be in breach of the Hudson Development Costs Agreement.

6. The proposed Marina Expansion is in breach of the estate covenants in the conveyances and inconsistent with the Developer's representation which induced purchaser of the lots in the OFB Subdivision.

7. In any event and without prejudice to (1) through (6), the Marina Expansion ought not be built because of the overwhelming impact it would have on the Boat Basin.

The Proviso

[268] The Developer argued that it is entitled to install or construct the Marina Expansion within the Canals, Waterways and Boat Basin of the OFB Subdivision on the basis of the Proviso, that being the proviso to the Rights Granted in Clause 1(2) of the Second Schedule of the Conveyances. Clause 1(2) inclusive of the Proviso provides as follows:

> "**Full and free right and liberty for the Sub-Purchaser and his agents, tenants, servants, visitors and licensees (in common with all others who have or may hereafter have the like right) at all times hereafter by day and by night…(2) on in and by vessels and boats of a type not otherwise prohibited by and exceeding the length width and draught specified in the Rules and regulations to navigate pass and repass in conformity with such Rules and regulations along and in the water in the canals or waterways from time to time constructed in or forming part of Old Fort Bay and the continuations thereof leading to the Sea within the perpetuity period and to tie up such vessels and boats at and to the Property where the same adjoins a canal or waterway or to any permitted landing-stage dock or jetty appurtenant thereto in accordance with the Rules and Regulations and for such purposes to pass and repass along over and upon any seawall adjoining the Property Provided always that the Vendor or the Association shall have the right to install or permit to be installed *by the owner or owners for the time being of any plot or other parcel of land adjoining any such canal or waterway such docks, piers, jetties, moorings, landing-stages or pilings on such area of the said waterway as it shall***

***in its absolute discretion think fit notwithstanding that such navigation may be impeded*."**

[269] Mrs. Rolle QC argued that the right which is reserved by the Proviso is a right to build a dock at an individual lot. This is why within the Proviso itself the dock could also be built by the owners themselves. Any other construction would mean that an individual owner could decide to build the same proposed Marina Expansion within the Canals, Waterways and Boat Basin. This is a proposition which need only be stated to be outright rejected. This exceedingly limited construction is overwhelmingly supported by the Developer's own attempt to redraft the Proviso in the proposed Handover Deed to give it a broader interpretation by omitting the words "***by the owner or owners for the time being of any plot or other parcel of land adjoining any such canal or waterway such…".***

[270] According to Mrs. Rolle QC, the proposed redraft also sought to take the power completely away from the POA. This, she says, is fundamentally inconsistent with the purpose and role of the POA and really was yet another reason to reject the proposed Handover Deed.

[271] In any event, says Mrs. Rolle QC, it is quite clear that the Developer itself wholly recognized that the Proviso in its presently drafted form cannot be construed to empower it to build a Marina in the Canals, Waterways and Boat Basin of the OFB Subdivision.

[272] Mrs. Lockhart-Charles, on the other hand, contends that the Developer reserves the right to construct docks etc. in the Waterways and Boat Basin. According to her, by clause 1(2) of the Schedule of the Conveyances, the Developer enjoys an express, unfettered right to build docks etc. anywhere within the waterway. She said that the homeowners' rights of navigation within the waterways are subservient to the Developer's right.

[273] Additionally, says Mrs. Lockhart-Charles, clause 7 reserves to the Developer (in respect of property interests which it retains in Old Fort Bay) the right to lay out or

deal with any land forming part of Old Fort Bay which is not the subject of a conveyance.

[274] At trial, the POA stipulated that the Marina Expansion falls within the words "*docks, piers, jetties, moorings, land-stages or pilings"*. Mr. Guttman, the expert witness for the POA, agreed that the Marina Expansion consisted of "docks', "piers", and "pilings".

[275] Mrs. Lockhart-Charles argued that the Developer has reserved the *"right to install"* any *"docks", "piers",* which *"it shall in its absolute discretion think fit."*

[276] In my opinion, Mrs. Rolle QC is correct with her interpretation of the Proviso. However, I agree with Mrs. Lockhart-Charles that the Developer has the right to install docks, jetties, moorings etc. in the Waterways by virtue of the said Proviso.

[277] Now, having already established that the Existing Marina is owned by the Developer, the only question relates to whether the Marina Expansion compromises the security, exclusivity and vista of the POA and particularly interfere with the rights granted to Mr. Hudson and Ms. Foti. Stripped to its bare essentials, the POA contended that the nature and size of the Marina Expansion would negatively impact the Canals, Waterways and the Boat Basin.

[278] In his Witness Statement, Mr. Henderson detailed in paras 80 to 117, the long-standing Marina Expansion which was frustrated by an *ex parte* injunction imposed by the Court. A permit was already granted to the Developer in May 2013. A proposed layout plan of the Marina Expansion has been exhibited. The Court also had the added opportunity of going to the *locus in quo* and visited the site of the Existing Marina but declined the offer to go on a boat to have a better vista. Albeit, it was during Covid-19. The Marina Expansion identifies 17 additional slips on floating docks. Two of those slips are to be 100 ft, the others being either 60 ft (11 slips) or 80 ft (4 slips).

[279] The POA, Mr. Hudson (who does not live in Old Fort Bay) and Ms. Foti (who did not come to court to give testimony) vehemently objected to the Marina Expansion because, principally, they are of the opinion that it will be a “commercial” Marina and compromise their security and vista. In the case of Mr. Hudson, he testified that, having reviewed the Plan and given the nature, size and intended purpose of the expansion, it would have the effect of substantially limit or at least affect his ability to safely navigate within the Boat Basin. He also stated that it would create security risks for the entire community but especially for himself and Ms. Foti since their properties are adjacent to the Boat Basin. He further stated that it would also obstruct the amenity view of both of them, thereby decreasing the value of their properties and it would also lead to fouling of the riparian environment of the entire Boat Basin and adjacent canal.

[280] In his Witness Statement, Mr. Henderson gave a summary of the Developer’s proposed use restrictions in respect of the Marina Expansion insisting that the Developer will ensure that all users observed the following restrictions namely:

- Users will be restricted to residents of Old Fort Bay (or neighbouring developments with access rights to Old Fort Bay) or members of the Old Fort Bay Club.
- Dockage arrangements are not transferable and will apply only to the specified boat as identified and named on the relevant registration form.
- Facilities will include water, electricity and state of the art pump-out facilities. There will be no fuel services (whether at the Marina or by tanker delivery). There will be no disposal of other refuse or garbage at the Marina.
- There will be no general public access to the Marina or its facilities.
- No public conveniences will be provided at the Marina.
- No boat using the Marina Expansion shall be longer than 100 ft. Further, no more than two 100 ft. vessels will be permitted at the new slips. The POA to accept the same restriction as part of its rules and regulations. In addition, it will be a requirement that no vessel in the <100ft slips should exceed its slip length.

- Any boat brought into the Old Fort Bay Waterways by a Marina user must be capable of being accommodated within the relevant prevailing water levels.
- No living or overnight sleeping at the Marina. No nuisance or other activity causing disturbance at the Marina or to any Old Fort Bay resident. The tranquility and quiet enjoyment of Old Fort Bay and the Marina must be maintained at all times. Marina users to be held fully responsible for any crew or invitees admitted to Old Fort Bay. He presumes that the POA will wish to include comparable restrictions in its rules and regulations.
- All boats using the Marina must have boat insurance, including public liability.
- No discharge of grey or black water (and no pumping out bilges with oily water or discharging sewage or other pollutants) into the canals, waterways or Marina of Old Fort Bay. Any transgression of this requirement will result in loss or forfeiture of user rights.
- The tender or second boat must remain on the mother craft at all times while the mother craft is within the Old Fort Bay Marina, Canals and Waterways.
- No repairs/maintenance permitted save for (i) repairs/maintenance which causes no pollution, nuisance or disturbance, or (ii) in an emergency. No spray painting of boats or equipment. The POA should include the same restrictions in its rules and regulations.
- Boats within the Canals, Waterways and Marina of Old Fort Bay must operate at no wake speed (5 knots or less).
- Marina users to make an appropriate rent-charge payment to the POA.

[281] Mr. Henderson also provided the “Yacht Harbour Information and Regulations” in force at Lyford Cay (“Lyford’s Regulations”). According to him, the proposed stipulations above reflect the Lyford Regulations but in a number of respects the suggested controls are stricter than what operates at Lyford Cay.

[282] The primary concern to the Marina Expansion comes from Mr. Hudson and Ms. Foti supported by the POA (spearheaded, in my opinion, by Mr. Schaden). In my view, Mr. Hudson and Ms. Foti will be the ones who would be most affected. Their rights ought to be protected and, even though Mr. Hudson does not live in Old Fort Bay, his concerns with respect to the "devaluing" (if I may use that terminology) of his property, is a legitimate concern. Further, both Mr. Hudson and Ms. Foti with canal lots have the Rights Granted to navigate in and through any part of the Canals & Waterways of the OFB Subdivision.

[283] The POA is concerned that the nature and size of the Marina Expansion, and its intended purpose to accommodate a number of large vessels will affect the ability of Mr. Hudson and Ms. Foti to navigate within the Boat Basin, to gain access to their lots and to use it as such. Having done a site visit of the Marina, I cannot comprehend how 17 additional slips on floating docks; two of which will be 100 ft; the others being either 60 ft (11 slips) or 80 ft (4 slips) would affect Mr. Hudson and Ms. Foti's ability to navigate the Boat Basin freely but this view may change when the Court does a more detailed site visit as opposed to the one which was done during the Covid-19 pandemic. That said, I have no doubt that his vista would be affected although the Marina Expansion is not intended to attract very large boats even like Mr. Hudson's 120 ft. yacht. On the contrary, the Developer does not intend that the Marina Expansion would be used by any boat longer than 100 feet. The POA's expert Mr. Guttman agrees with the Developer confirming at page 2 of his Report that the Marina Expansion "*has been designed*" for additional boats "*with lengths up to 100 feet*."

[284] In his expert evidence which has been heavily criticized by the POA for lack of independence and objectivity (which I bear in mind), Mr. Turrell stated that the requirement for the Marina Expansion compliment and not interfere with the passage of boats and access to docks was a "*fundamental consideration"* in the design, and *"careful"* consideration was given to these matters.

[285] Due to the depth of the channel linking Old Fort Bay with the sea, Mr. Turrell opined that 100 ft is the effective size limit anyway. Mr. Guttman did not disagree accepting, under cross-examination, that the entrance channel was only around 6 ft deep so restricting the scale of boat that can enter Old Fort Bay's waters.

[286] Mr. Henderson asserted that the Existing Marina incorporates 2 x 100 ft slips and these have no caused any difficulty for anyone in the 15 years that they were built.

[287] Mr. Henderson said that the allegation that the Marina Expansion will impede access to (a) any future dock which Mr. Hudson may wish (and be permitted) to construct on his lot or the land immediately adjacent, and/or (b) the private dock shared by Mr. Schaden and Mr. Thiebault which is located between the western extent of the existing Marina and the land in which Mr. Hudson is interested is without foundation.

[288] Mr. Henderson stated that many of the drawings exhibited to Mr. Hudson's 15 January 2015 affidavit (i) misleadingly fail to reflect a straight line off piers 11/12, (ii) fail to reflect the length or width of boat that would be permitted at new slip 4 (which is only an 80ft slip), and (iii) wrongly include a tender adjacent to the boat at new slip 4, when this will not be permitted by the Developer. Interestingly, page 92 of Mr. Hudson's exhibit (the plan which is marked "Frederic Thiebault" at the top) makes much more reasonable assumptions, and demonstrates in clear terms that there is no substance to the allegations that anyone's access will be impeded.

[289] Besides the nature and size of the Marina Expansion, the POA also alleged that the Marina Expansion will negatively impact the quality of the environment that presently exists in the Canals & Waterways and the Boat Basin. In Mr. Guttman's Report, he stated:

a. The present flushing capacity of the existing boat basin is already operating at a reduced level due to the configuration of several deadend canals connected to the main canal.

b. The existing pattern of water flow within the boat basin will be disrupted by the installation of support piles for the new docks. This disruption will reduce the velocity of the existing water flow into and out of the basin thereby reducing the flushing capacity of the system.

c. The addition of a large commercial floating pier in the center of the existing boat basin will require connections for support services from the upland. None of these utility services are currently available with the capacity to serve these new boats at the proper location.

d. The use of bow and stern thrusters with large propellers on large boats will create erosion of the existing shoreline and cause turbility in the boat basin thereby reducing water quality.

e. The proposed expansion in the number of slips beyond those presently moored in the existing boat basin should require the preparation and submission of a comprehensive Environmental Report prior to the issuance of any governmental approvals.

[290] Although the Marina Expansion received government approval, I agree with Mr. Guttman, a man who has considerable experience in the area of civil, coastal and environmental engineering, that a comprehensive Environmental Assessment Report ought to have formed part of the procedure for government approval. Undoubtedly, I believe that Mr. Turrell would also agree that such a report is fundamental. In addition, I agree with Mr. Guttman that all of the existing property owners should be given an opportunity to voice their opinions regarding the Marina Expansion.

[291] Having come to the conclusion that the Developer owns the Existing Marina and is planning its expansion, the following ought to be done before the Court could come to a sensible decision which unquestionably, will affect negatively or positively, the entire Old Fort Bay Community.

1. All contiguous property owners must be consulted and be given an opportunity to express their opinion (s) in writing;

2. A comprehensive Environmental Assessment Report to be prepared by a Qualified Expert to be agreed by all Counsel;

3. Another site visit to be arranged by all Counsel upon consultation with the Court and to include, if possible, a visit to the marinas at Lyford Cay Club and Albany.

[292] In this regard, I shall reserve my final decision on the Marina Expansion until the above is done.

Area by security gate

[293] Although this did not expressly fall within the Disputed Lands, it was raised in submissions. In an effort to assist these parties in this very old impasse, I nevertheless, deal with it because it appears uncomplicated. To my mind, this area falls within the definition of "common area" within Old Fort Bay. The Developer should relinquish any rights it has to this area to the POA for them to administer and manage.

Other issues raised

[294] In light of the conclusions reached on the Disputed Lands, there appears to be no other matters including legal issues to be considered except the claim made by the Developer in its Amended Originating Summons filed on 14 June 2017.

The Developer's action (2017/CLE/gen/00014)

[295] The dispute between the Developer and the POA concerns Lot 3 Charlotte Island Subdivision ("Lot 3"). By Amended Originating Summons, the Developer seeks a number of relief principally that the POA is not entitled to claim any rentcharge in relation to properties within Old Fort Bay which have not been previously sold or conveyed subject to the reservation of a rentcharge to issue thereout and damages against the POA for the delay in the completion of the sale of Lot 3 from the

Developer to Metatron Investments Ltd ("Metatron") which delay was allegedly caused by the POA's refusal to acknowledge, prior to the Conveyance of Lot 3 to Metatron, that Lot 3 was unencumbered by any rentcharge payments due to the POA.

[296] In his First Affidavit, Mr. Simon explained that the Developer has had no choice but to bring this claim, due to the POA's refusal to confirm to Metatron that rentcharge payments were not due and outstanding to the POA. This resulted in the sale being delayed and the Developer being required to provide an indemnity to Metatron in respect of the rentcharge payments allegedly due to the POA (amounting to $15,675.20).

[297] As with the Developer's response to the POA claims, above, the position under the conveyance is clear and straightforward. The rentcharge only becomes payable upon the sale of a plot of land by the Developer to an individual purchaser. In short:

a. By virtue of clause 2 of the conveyance, the Developer conveys the individual property to the purchaser "*subject to payment of the rentcharge and the observance and performance of the Rentcharge Stipulations*...".

b. It is the purchaser, not the Developer, who covenants to observe the Rentcharge Stipulations under clause 4 of the conveyance, as set out in Schedule 4. Likewise, the POA covenants with the Purchaser only to perform the Services under the conveyance, subject to payment (by the Purchaser) of the Rentcharge (clause 6). Schedule 4 contains the Rentcharge Stipulations "to be performed **by the Purchaser**". These include, at para 1 "*At all times hereafter [to] pay the Rentcharge.*"

c. By contrast, by virtue of clause 7, the Developer retains the right to sell, lease or hold property free of the Rentcharge Stipulations.

d. There is no covenant anywhere in the conveyance or elsewhere requiring the Developer to pay the rentcharge in respect of unsold plots or at all.

e. As Mr. Simon explained in his First Affidavit, at para 5, entirely consistent with the above interpretation of the conveyances is that Recital C makes clear that the rentcharge is to be reserved "**upon the sale** of each plot".

[298] In summary, the obligation to pay the rentcharge in respect of individual properties is owed by the purchaser of an individual property within Old Fort Bay, pursuant to clause 4 of the conveyance. There is no obligation under the conveyance for the Developer to pay the rentcharge in respect of unsold lots or at all. The Developer therefore seeks a declaration from the Court as to the correct legal position under the conveyance, as set out above, as well as damages in respect of the delay to the sale of lot 3 caused by the POA's misconceived claim to be owed rentcharge payments by it.

[299] Unless I am mistaken, there appears to be no submissions from the POA on this action. Accordingly, I will order the declarations sought in the Amended Originating Summons namely:

(i) A Declaration that prior to the conveyance of Lot Three (3) of the "Charlotte Island Subdivision" being a part of Old Fort Bay in the Western District of the Island of New Providence ("Lot 3 Charlotte") to Metatron Investments Ltd. Lot 3 Charlotte was unencumbered by any rentcharge payments due to the Defendant;

(ii) A Declaration that the Defendant is not entitled to claim any rentcharge payments in relation to properties within Old Fort Bay which have not been previously sold or conveyed subject to the reservation of a rentcharge to issue thereout;

(iii) A Declaration that any claims by the Defendant for rentcharge payments in relation to properties within Old Fort Bay which have not been previously sold or conveyed subject to the reservation of a rentcharge to issue thereout are invalid;

(iv) Damages (if any) to be assessed (if not agreed) against the Defendant for the delay in the completion of the sale of Lot 3 Charlotte from the Plaintiff to Metatron Investments Ltd.

(v) Interest and;

(vi) Costs to be taxed if not agreed.

Conclusion

[300] This case has occupied a lot of the Court's time which could have been avoided if good sense had prevailed. I do hope that these parties will put their differences aside and hold no one to ransom in what, for the most part, appears to be very straightforward but lengthy issues. In conclusion, the Court makes the following order:

1. A Declaration that Pineapple Grove, Pineapple House and the Old Fort Bay Club are the properties of the Developer and do not fall within the definition of "common areas".

2. A Declaration that the Identified Beach Reserve is "common area" within the OFB Subdivision and ought not to be sold. The POA is entitled to damages for the sale of a portion of the Identified Beach Reserve. Such damages are to be calculated by Counsel.

3. With respect to the Marina Expansion:

    (i) All contiguous property owners must be consulted and be given an opportunity to express their opinion (s) in writing;

    (ii) A comprehensive Environmental Assessment Report to be prepared by a Qualified Expert to be agreed by all Counsel;

(iii) Another site visit to be arranged by all Counsel upon consultation with the Court and to include, if possible, a visit to the marinas at Lyford Cay Club and Albany.

4. A Declaration that the Developer transfers forthwith to the POA the properties determined by the Court to be “common areas” including the lands by the security gate.

Costs

[301] This issue will be determined by the Court on a date to be fixed after consultation with all parties as neither party was wholly successful.

Dated this 4th day of January 2022

Indra H. Charles
Justice