COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
2019/CLE/gen/00734

BETWEEN:
Belitza Marling Sagaray Silva

Plaintiff

AND

Replay Destinations (Bahamas) Ltd.

Defendant

Before:	The Honourable Mr. Justice Loren Klein
Appearances:	Mr. Kevin Moree, with Mr. Andrew Smith for the Plaintiff Mr. Raynard Rigby with Ms. Shade Munroe for the Defendant
Hearing Dates:	25 February 2020, 10 March 2020, 10 June 2020, Closing submissions July 2020

RULING

Law of Property Conveyancing (Condominium) Act, 1965—Vendor and Purchaser Summons—Agreement for Sale of Unit in Condominium Complex—Notice to Complete—Validity of Notice—Validity of Defendant's title—Good and marketable title—Description of Property—Size of unit substantially larger than description in Declaration of Condominium—Diagram exhibited to Agreement identifying Unit as 6,165 sq. ft.—Declaration listing Unit as 4,801 sq. ft.—Rescission of Sales Agreement on contractual grounds—Claim for Return of Deposit—Whether Agreement effectively rescinded—Whether plaintiff entitled to return of deposit—Title Commitment Insurance—Contractual interpretation—Implication of terms—Waiver of right to challenge title

INTRODUCTION AND BACKGROUND

Introduction

[1] At the heart of this dispute is a discrepancy of some 1,300+ square feet. It is the approximate difference in the size of a luxury penthouse advertised for sale in an exclusive condominium complex on Paradise Island called the One Ocean Condominium ("One Ocean") after extensive renovations and the dimensions recorded in the statutory declaration containing the certified architectural drawings and plans of the building (the "Declaration of Condominium"). This discrepancy led the plaintiff (the purchaser) to rescind the agreement for sale over concerns that the defendant (the vendor) was unable to convey good title to the unit and has resulted in this litigation.

[2] The case at bar is part of a litany of legal issues that have affected the sales of units of One Ocean owing to concerns about the accuracy of the Declaration. These are thought to arise from changes to the original design when the building was constructed without

corresponding amendment to the Declaration and/or changes in the size and configuration of units following extensive renovations undertaken by the 'second' developer, Replay Destinations Ltd. (See, in this regard, the decision of Winder J., in *One Ocean Association v. Qamea Stanley and ors*., 2020/CLE/gen/00385, unreported, 20th December 2021, cataloguing some of these deficiencies and granting an order to amend the Declaration on the application of the One Ocean Association ("the *Qamea* decision")). I shall refer to this case again, as it has some significance for this matter.

[3] The claim also illustrates the unique complications that can arise from transactions involving the peculiar legal estate of fee simple ownership of property in a multi-storey building. This form of real property interest, also called "strata" title in some parts of the Commonwealth, owes it origin exclusively to statute—specifically the law of *Law of Property (Condominium) Act 1965* (the "Condominium Act")—and it might be said that in this jurisdiction only the *Quieting Titles Act* has been productive of greater mischief in the law of real property.

Summary of salient facts

[4] In a nutshell, the application arises out of the following facts. On the 19 July 2018, Belitza Marling Sagaray-Silva (the plaintiff and "purchaser" in this action) entered into an Agreement for Sale ("Agreement") with Replay Destinations (Bahamas) Ltd. (the defendant and "vendor") for the purchase of Penthouse 901, One Ocean Condo Place Condominium, Paradise Island. For convenience, the parties will be variously referred to as the plaintiff or purchaser, and defendant or vendor.

[5] The penthouse was offered for sale at US$ 4,100,000.000, of which $410,000.00 was paid as a deposit. Unit 901 was undergoing extensive renovations while it was being marketed and was advertised as containing 6,165 sq. ft. of living space. However, the Declaration registered under the Condominium Act described it as comprising 4,801 sq. ft.

[6] The transaction failed to close within the original timeframe, but the Agreement provided for its continuance unless one of the parties issued a notice to complete ("NTC"). The purchaser issued a notice to complete on 8 February 2019, identifying four issues that were said to be in default and giving the vendor until 1 March 2019 (21 days from the notice) to make good the default. The material terms of that notice were as follows:

> "2. The Vendor has made default in complying with its obligations under the said Agreement in that it has (*inter alia*)
>
> (a) failed to close by 28th August, A.D., 2018;
> (b) failed to remedy all items/outstanding items set forth in the current Inspection Statement (aka Punch List and hereinafter referred to as the "**Punch List**")); [*issue was withdrawn by Plaintiff's Counsel*]
> (c) delivering a Temporary Certificate of Occupancy; [*issue was withdrawn by Plaintiff's Counsel*]; and

(d) failed to meet Requirement 6(a) of the Title Commitment dated 2nd day of August, A. D., 2018 or have such Requirement removed therefrom.

3. The Purchaser hereby requires the Vendor forthwith to make good such default by closing prior to the termination of this notice, by completing all items/outstanding matters set forth ... and providing a Title Insurance Commitment having met or having removed requirement 6(a) therefrom, subject as provided in the said Agreement but otherwise free from encumbrances delivering the assurances as provided in the said Agreement and completing the sale of the Property.

4. If the Vendor fails to comply with this Notice by Thursday the 1st day of March, 2019 being Twenty-one calendar days from the date hereof, then in accordance with Clause 5 of the said Agreement the deposit paid to Winter Borghardt Chambers in the sum of US$410,000.00 shall be returned immediately to the Purchaser and thereupon the Agreement will be terminated and canceled in full and final satisfaction of this matter.

[7] A flurry of emails and other correspondence passed between the respective representatives of the purchaser and vendor during the period between the service of the notice and the termination of the contract.

[8] On 1 March 2019, at 5:00 p.m., the attorneys representing the purchaser (King & Associates) sent an email to, among others, the agent for the vendor and stakeholder (Mr. Jan Borghart) as well as the attorneys for the One Ocean Homeowners Association ("the Association") (Glinton Sweeting O'Brien). That email stated that the notice to complete had expired at 5:00 p.m. that day and the vendor had failed to complete, in that it had, *inter alia*:

"1. Failed to deliver a good and marketable documentary title to the Unit;
2. Failed to deliver a Title Commitment free from requirement Six (a) of the Title Commitment for further amendments to be made to the Declaration of Condominium;
3. Failed to deliver a Title Commitment that provides good title to the entirety of square footage contracted to be purchased on the correct unit entitlement to the unit;
4. Failure to deliver a Temporary Occupancy Certificate: and
5. Failed to complete all the items set forth in the Punch List."

[9] It concluded by saying that the purchaser was looking forward to the return of the deposit within 7 days, failing which they would resort to litigation "*without adieu*".

[10] By reply letter dated 5 March 2019, the managing director of Replay, Mr. Michael Sneyd, disputed the contention that the vendor had not completed in accordance with the NTC. He characterized the email of the 1 March as "*a blatant attempt …to exit a binding Agreement for Sale*". Replay therefore refused to return the deposit.

[11] Notwithstanding that the parties had drawn a line in the sand, it appears there was some attempt to salvage the Agreement, and the purchaser conducted one final inspection of the

premises on 6 March 2019. Following this inspection, Mr. Paul King of King & Associates issued an email that day stating "*This matter, our client's patience and trust are no longer salvageable.*" That email also responded to Mr. Sneyd's letter of 5 March and pointed out what the purchaser considered to be the outstanding issues as follows:

> "The Vendor has not provided good fee simple documentary title to the Unit as advertised and proposed as it does not own the entirety of the Unit. It is that simple.
> The description of the unit in the declaration is 4,767 square feet. The advertised and purported size of the Unit pursuant to the Agreement for Sale is 6,105 square feet. This is a 22% difference and in anyone's book is a material issue.
> The owner of this additional square footage of 1,398 square feet is, and remains, One Ocean Property Owner's Association."

[12] Replay responded by letter dated 13 March 2019, disputing the purchaser's contentions and maintaining that it had fully complied with the notice:

> "A few corrections to your assertion: the original Declaration of Condominium, dated 11 May 2005, lists the area of Unit 901 at 4,737 square feet; the Amendment of Declaration of Condominium, dated 18 January 2010, lists the area of Unit 901 at 4,801 square feet. Both these areas are wrong. The certified architectural area for the unit is 6,419 square feet. Therefore, your client would actually receive more area that they agreed to acquire.
> […]
> This area calculation mistake will be corrected in a joint application to the court by Replay and the One Ocean Association." [Underlining supplied.]

[13] By Originating Summons filed 29 May 2019, pursuant to s. 4 of the Conveyancing and Law of Property Act (Ch. 123), the plaintiff sought the following declarations and orders:

> "1. A Declaration that Belitza Marling Sagaray Silva ("the Plaintiff") has effectively rescinded and/or terminated the Agreement for Sale dated 19 July 2018 ("the Agreement for Sale") made between the Plaintiff of the one part and Replay Destinations (Bahamas) Ltd. ("the Defendant") of the other part for the sale of Unit 901, One Ocean Condominium, Paradise Island, The Bahamas.
>
> 2. An order that the Defendant refund to the Plaintiff the deposit in the amount of Four Hundred and Ten Thousand United States Dollars (US$410,000.00) which was paid by the Plaintiff to the Defendant pursuant to the Agreement for Sale."

[14] The Defendant filed a Counterclaim on 5 November 2019 seeking the following relief:

> (a) A Declaration that the Agreement for Sale dated 19th July 2018 entered into between the Plaintiff and the Defendant is a valid and binding agreement and the Plaintiff is contractually bound to complete the purchase of Unit 901, One Ocean Condominium, Paradise Island, The Bahamas in strict accordance with its terms.
> (b) A Declaration that the Plaintiff is estopped from raising the issue of unit entitlement due to the clear representations and terms set out in the said Agreement for Sale dated 19th July, 2018 entered into between the Plaintiff and the Defendant.

(c) An Order that the Plaintiff pay to the Defendant such damages occasioned by the delay and refusal to complete the said purchases." [*withdrawn by Defendant's counsel*]

[15] The counterclaim was filed pursuant to the Order and ruling of Bowe-Darville, J. of 25 October 2019, made on the summons of Replay of 16 August 2019. That Order gave leave to Replay to file a counterclaim and for the parties to cross-examine each other's witnesses. Bowe-Darville J. refused leave, however, to convert the proceedings to a writ action.

[16] Although the counterclaim included a claim for damages, the court drew to the attention of the parties at the directions stage that it was not open to a party to seek a claim for general damages under the vendor and purchaser procedure (see *In re Hargreaves and Thompson's Contract*, 32 Ch. D. 454; and *In re Wilson's & Stevens' Contract* [1894] Ch. D. 546). Mr. Rigby therefore indicated (very properly) that he would not be pursuing the damages claim.

Facts and Issues

[17] By the terms of the Plaintiff's Statement of Facts and Issues, the following four matters were set out as the issues for the Court's determination:

> "1. Whether the discrepancies between the actual size of Unit 901 and the size stated in the Declaration created title issues such that the Defendant does not have good marketable title to Unit 901.
> 2. Whether the subject matter of the Agreement for Sale is Unit 901 as described in the Declaration, or as it actually exists.
> 3. Whether the Defendant has good marketable title to the subject matter of the Agreement for Sale.
> 4. Whether the Plaintiff was entitled to terminate the Agreement for Sale pursuant to clause 4(b).

[18] The Defendant identified the following issues for the determination of the court:

> "1. Whether the Plaintiff contracted to purchase Unit 901 on the terms set out in the Agreement?
> 2. What is the effect of clause 11(f) (and others) and the meaning of Permitted Exceptions in the Agreement?
> 3. Whether the Plaintiff had any lawful basis/ground(s) to seek to terminate the Agreement?
> 4. Whether the Notice to Complete was valid in the circumstances?
> 5. Whether the Defendant is bound to return the Plaintiff's deposit?
> 6. Whether the Plaintiff is bound to complete the sale as per the terms of the Agreement?

[19] The issues identified by the parties basically resolve themselves into the principal question of whether the purchaser's rescission of the Agreement was valid and effective. This is

primarily a matter of construing the contract to determine objectively what the parties provided for and whether the vendor was in breach, such as to warrant cancellation of the Agreement. But the matter also requires consideration of the troublesome question of whether the statutory conditions for the transfer of the legal estate in condominium property were satisfied, which arises when there are alleged inaccuracies between the statutory declaration and the physical units.

The Agreement for sale

[20] The Agreement is very comprehensive, running to some 44 pages, and it is necessary to set out the relevant parts in some detail to understand the parties' claims (formatting in the original retained as far as practical, underlining for emphasis):

> **Clause 1. Purchase and Sale.**
>
> (a) For the consideration and subject to the terms and conditions set forth herein. Purchaser agrees to purchase from Seller, and Seller agrees to sell to Purchaser the fee simple estate in possession of, in, and to Unit 901, ("the Unit") in One Ocean Condominium, Paradise Island in the Commonwealth of The Bahamas ("Community"), together with an appurtenant 2.06% unit entitlement in the common property of the Unit the location, layout, configuration and dimensions of which Unit are shown on the several plans and diagrams attached hereto as Exhibit "A". The legal description of the Unit shall be in accordance with the plans attached to the Declaration of Condominium ("the Declaration of Condominium") for Ocean Place on the Harbour Condominium. The Declaration of Condominium is available for review at the sales and marketing office of the Seller.
>
> (b) Purchaser acknowledges and agrees that Purchaser's title in the Unit shall be subject to the terms and conditions of the Declaration of Condominium and the Permitted Exceptions (defined below) all of which shall be legally described in an Indenture of Conveyance substantially in the form attached hereto as Exhibit "B" (such Indenture of Conveyance, along with any variations thereto that Closing Agent may deem necessary or appropriate in accordance with this Agreement, is the "Conveyance").
>
> (c) It is agreed that the Seller will convey the fee simple estate in the Unit to the Purchaser subject to and in accordance with this agreement on the Closing Date (as hereinafter defined in Clause 5).
>
> **Clause 3. Receipt of Documents**
>
> By executing this Agreement, Purchaser acknowledges that Purchaser has received and has had an adequate opportunity to read and understand this Agreement and all exhibits.
>
> Purchaser acknowledges that (i) the Unit is part of the Community, (ii) Purchaser has had an opportunity to review the Survey Plan for the Community which is annexed to or referenced in the Declaration of Condominium ("Survey Plan"), (iii) the Unit is subject to the Declaration of Condominium and the Survey Plan, (iv) Purchaser acknowledges that Purchaser has been given the opportunity to seek the assistance of counsel if deemed necessary, and (v) Purchaser acknowledges that the Declaration of Condominium may be subject to amendment and that Purchaser will be bound by any such amendments, which

in many instances may be effected whether or not Purchaser has consented to the amendment. Upon taking title to the Unit, Purchaser agrees to be bound by and comply with the terms, conditions, and obligations set forth in the Declaration of Condominium.

Clause 4. Title

(a) Conveyance; Permitted Exceptions. Seller, as beneficial owner, shall convey to Purchaser on the Closing Date good fee simple documentary title to the Unit by the Conveyance SUBJECT ONLY TO (i) those title exceptions and other matters set forth in Exhibit "C" to this Agreement; (ii) matters specifically set forth in this Agreement; and (iii) other matters approved or waived by Purchaser (collectively, "Permitted Exceptions"). "Good title" means documentary title commencing with a good root of title in accordance with the provisions of The Conveyancing and Law of Property Act of the Commonwealth of The Bahamas.

(b) Inspection of Title. Within Seven (7) business days after the Effective Date, Seller shall furnish to Purchaser, at Seller's expense, a title insurance commitment ("Title Commitment") for an owner's title insurance policy for the Unit ("Owner's Title Policy") issued by Insurance Data Management, Inc. The Title Commitment shall be in an amount equal to the Purchase Price and shall evidence that Seller is vested with fee simple title to the Unit, free and clear of all liens, charges, encumbrances, exceptions, or qualifications whatsoever save and except for the Permitted Exceptions. Purchaser shall have Twenty-one (21) days after receipt of the Title Commitment time being of the essence to notify Seller in writing of any objections to title matters other than the Permitted Exceptions or Purchaser shall be deemed to have approved such matters. If Purchaser timely notifies Seller in writing of any objections to title matters other than Permitted Exceptions and Seller is unable or unwilling to satisfy or remove any such matters prior to Closing, Seller shall notify Purchaser prior to Closing. Purchaser shall have Five days after receipt of such notice to notify Seller in writing of Purchaser's election either (i) to waive such objection and proceed with Closing, or (ii) to terminate this Agreement, in which event Seller shall refund or cause Winter Borghardt to refund to Purchaser the Deposit and any other monies paid by Purchaser all without interest, costs, or compensation to Purchaser, Purchaser shall accept the same in full satisfaction of all claims arising under or related to this Agreement, and all rights and obligations of the parties under this Agreement that do not expressly survive the termination of this Agreement shall terminate and be null and void. If Purchaser fails to notify Seller of Purchaser's election within such Five (5) day period, Purchaser shall be deemed to have waived any objections to title and shall proceed with Closing.

(c) Title Insurance. On the lodging for record of the Conveyance in the Registry of Records in Nassau, The Bahamas, Seller shall cause an Owner's Title Policy to be issued for the Unit at Seller's expense, showing title vested in Purchaser subject only to the Permitted Exceptions.

(d) Full Satisfaction of Seller's Obligations. Purchaser agrees that the Title Commitment and Owner's Title Policy that Seller is specifically required to provide pursuant to this Clause 4 shall be in lieu of any obligations Seller may otherwise have under the common law, equity or the Conveyancing and Law of Property Act with respect to providing evidence of title or information regarding title matters with respect to the Unit.

Clause 5. Closing

Closing shall occur on the 28th day of August, A.D. 2018 and is conditional on the issuance of a Temporary Certificate of Occupancy from the Ministry of Works for the Unit, which closing date shall be designated by Seller (the "Closing Date"). On the Closing Date, Purchaser shall cause payment of the balance of the Purchase Price and Purchaser's Closing costs to be remitted at the office of Winter Borghardt or at such other place as Seller shall designate in writing. Any notice given by Seller pursuant to this Clause may be electronic or by facsimile.

If the purchase is not completed on the Closing Date, this Agreement shall nevertheless (subject as hereinafter provided) continue in full force and effect unless one of the parties hereto shall serve upon the other Twenty-one (21) calendar days' notice to complete (of which time shall be deemed to be of the essence) and the party shall at the end of Twenty-one (21) calendar days after receipt of such notice have failed to complete in accordance with this Agreement.

Clause 7.

C. Seller represents and warrants that the completed Unit and other improvements will materially conform to the said plans and drawings and comply with applicable laws.

Clause 11. Purchaser's Acknowledgements

[*(a)-(e) omitted*]

(f) Purchaser hereby acknowledges and agrees that:

(i) the area of the Unit set forth in the Declaration of Condominium may immaterially differ from the actual area of the Unit as a result of variation during the construction of the building structure of the Community the use of different measurement methods or a combination of both;

(ii) the unit entitlement of the Unit is based on the approximate proportion that the floor area of the Unit at the date of the Declaration of Condominium bears to the then aggregate floor area of all the condominium units in the Community taken together as set out in the Declaration of Condominium;

(iii) In the event that there is (in Seller's opinion) a marked variation with respect to the discrepancies mentioned in Clause 11(f)(i) and 12(f)(ii) [*sic*] above then the stated Unit area and Unit entitlement as contained in the Declaration of Condominium shall prevail; and

(iv) Purchaser hereby unconditionally and irrevocably waives any and all actual or potential rights or claims which Purchaser might have against Seller, its directors, officers, employees, agents, consultants and representatives arising out of or in connection with the matters outlined in this Clause 11(f).

Clause 15. Purchaser's Remedies

If Seller fails to comply substantially with the terms and conditions of this Agreement and fails to perform any of the obligations required hereunder as and when due prior to the Closing Date and Purchaser has complied therewith, Purchaser may deliver to Seller a written notice demanding that Seller comply with this Agreement within Fourteen (14) business days following Seller's receipt of the notice. If Seller has not complied upon the expiration of the Fourteen (14) business day period, Purchaser may deliver to Seller a written notice terminating the Agreement. Upon delivery of a written notice terminating

the Agreement, Seller shall refund to Purchaser the Deposit. the Upgrade Payment and any other portion of the Purchase Price paid up to the date of termination without interest or any other costs or compensation to Winter Borghardt by Purchaser if Winter Borghardt has not already delivered it to Seller in accordance with this Agreement, as Purchaser's sole remedy and this Agreement shall thereupon be terminated and canceled and all rights and obligations of the parties under this Agreement that do not expressly survive the termination of this Agreement shall terminate and be null and void. Purchaser hereby waives all other remedies, including specific performance, except as provided below. Neither Purchaser nor Seller shall have any right to monetary damages except as specifically set forth in this Clause and Clause 14.

Clause 26. Entire Agreement: Changes

This Agreement contains the entire agreement between Purchaser and Seller. Upon execution of this Agreement by Purchaser and Seller, this Agreement may only be altered, amended, or changed by an instrument in writing signed by both Purchaser and Seller, except as otherwise provided in this Agreement.

Clause 28. NO ORAL REPRESENTATIONS

SELLER WISHES TO AVOID ANY MISUNDERSTANDING CONCERNING THE PURCHASE OF THE UNIT. IT IS THE POLICY OF SELLER NOT TO ENTER INTO ANY ORAL AGREEMENT OR TO ASK ANY PURCHASER TO RELY ON ANY ORAL REPRESENTATIONS CONCERNING THE UNIT OR THE COMMUNITY. THE ENTIRE AGREEMENT BETWEEN PURCHASER AND SELLER MUST BE EXPRESSED IN WRITING. THEREFORE, PURCHASER SHALL WRITE IN BELOW ANY REPRESENTATIONS OR PROMISES THAT ARE NOT SET FORTH IN THIS AGREEMENT BUT THAT HAVE BEEN MADE BY SELLER OR ITS PURPORTED AGENTS OR EMPLOYEES AND UPON WHICH PURCHASER IS RELYING IN MAKING THIS PURCHASE.

Exhibit "C"
Permitted Exceptions

[…]
2. Survey plan
3. Declaration of Condominium […]
7. STANDARD EXCEPTIONS IN TITLE INSURANCE POLICIES ISSUED IN THE COMMONWEALTH OF THE BAHAMAS."

The Legal Framework

Law of Property and Conveyancing (Condominium) Act

[21] The Condominium Act provides that a condominium constitutes an estate in real property which, subject to the provisions of the Act, "*may devolve or be conveyed in the same manner and form as land*" (s. 6(3)).

[22] However, in contrast to the metes and bounds measurements used to describe typical freehold, the boundaries and property interests associated with a condominium are created and defined by a statutory declaration, which is a composite document containing certified architectural plans and other identifying indicia and information. This Declaration has been called the "foundation stone" of condominium property ownership (see *Goodyear v. Maynard* (unreported, No. 981 of 1982, per Henry J.). It must comply with statutory requirements to validly create the legal estate known as a condominium and for any subsequent sale.

[23] While a condominium is a statutory concept, many of the principles which undergird it and provide aid in interpreting and giving life to its operation are well-known legal principles. This interrelationship is brought out admirably in a passage from the Canadian case of *Nova Scotia Ltd. v Rodgers*, 2001 NSCA 12, where Cromwell J.A. noted as follows:

> "[5] From a purely legal perspective, a modern condominium is created pursuant to detailed legislative provisions such as, in Nova Scotia, the Condominium Act, R.S.N.S. 1989, c. 85, (the "Act"). The condominium is, therefore, a creature of statute. But condominium legislation reflects the combination of several legal concepts and relies on, and to a degree incorporates by reference, principles drawn from several different areas of law. The law relating to individual ownership of real property is, of course, central because the owners of the individual units are, subject to certain limits, entitled to exclusive ownership and use of their units: see s. 27(2). The law relating to joint ownership is significant because the owners are tenants in common with respect to the common elements: see s. 28(1). The law relating to easements and covenants is relevant because the unit owners have rights of compliance by the others with the provisions governing the condominium and certain easements are, by statute, appurtenant to each unit: see s. 30(2) and 29. The law relating to corporations is also of importance because the condominium is administered by the condominium corporation in which the unit holders are in a position analogous to shareholders: see, e.g., ss. 13 and ff and s. 25. While the Condominium Act enables and, to a degree, regulates the legal aspects of condominium ownership, it does so against a vast background of general legal principles which will frequently be relevant to the interpretation and application of the Act."

[24] Thus, the resolution of the issues raised in this application requires a discussion and reconciliation of several areas of the law, including the ordinary law of contract, the law of real property and conveyancing and the statutory principles creating and regulating ownership of condominia.

[25] The provisions of the Act which are relevant to this application are ss. 2, 4, 5 and 6, and are set out below:

> 2. "Declaration" means the instrument by which property is subject to the provisions of this Act and incudes such instruments as may from time to time lawfully amend such Declaration".

4. (1) A Declaration for the purposes of this Act shall comprise an instrument (which may be in several parts and have annexed thereto such drawings, plans and schedules as may be deemed necessary or convenient) duly executed under seal by the person or persons having the legal and equitable title in fee simple absolute to the property to which the Declaration relates and shall contain the following particulars —

(a) a statement of the interests which the person or persons executing the instrument have in the property and his or their intention by virtue of such Declaration to subject the property to which it relates to the provisions of this Act;
(b) a description of the property sufficient to identify it and its location precisely;
(c) a description of the building including its location in relation to the property, the number of storeys, basements, cellars and units and the principal materials of which it is or is to be constructed;
(d) the distinguishing number or other symbol, the location, approximate floor area, limits, boundaries and any other data necessary for the proper identification of each unit;
(e) the drawings and plans of the building in accordance with the provisions of section 5 of this Act;
(f) a statement of the covenants, conditions and restrictions covering the use, occupancy and transfer of the several units;
(g) a Schedule prescribing the unit entitlement of each unit on a basis prescribed by subsection (4) of this section;
(h) a description of the common property;
(i) the style and title of the body corporate referred to in section 13 of this Act and, if it is a company registered under the Companies Act, a copy of its memorandum and articles of Association;
(j) the byelaws applicable to the property;
(k) any other matters (not inconsistent with the provisions of this Act) in connection with the property which the person or persons executing the Declaration may deem desirable to prescribe;
(l) the methods consistent with this Act to be observed and the conditions to be fulfilled for the amendment of the Declaration by the unit owners.

(2) No such Declaration or any amendment thereof shall be valid or in any way affect the property to which it relates unless and until it is lodged for record in the registry. A fee of five hundred dollars shall be payable for recording any Declaration and a fee of one hundred dollars for recording any amendment thereof.

(3) Insofar as it is practicable to do so the limits and boundaries of each unit in the building shall be defined by reference to floors, walls and ceilings and, unless the Declaration otherwise provides, the common boundary of any unit with another unit or with the common property shall be the centre of the floor, wall or ceiling.

(4) The unit entitlement of a unit shall be expressed in the Declaration as a fraction or percentage and shall be fixed either —

(a) as the approximate proportion that the estimated value of the unit at the date of the Declaration bears to the then aggregate estimated value of all the units taken together; or
(b) as the approximate proportion that the floor area of the unit at the date of the Declaration bears to the then aggregate floor area of all the units taken together,

but such proportion shall reflect any substantially exclusive advantages that may be enjoyed by one or more unit owners but not all unit owners in a part or parts of the common property.

5-(1) As a part of every Declaration there shall be a complete set of drawings and plans of each floor, basement and cellar of the building showing the layout, locations, designations and approximate dimensions of the units which shall be accompanied by a certificate of a recognized architect certifying that such drawings and plans are accurate copies of the drawings and plans for the buildings as approved by such property authority as has power to approve plans for the construction of the buildings.

(2) The certificate referred to in sub-section (1) of this section shall also include a statement that the drawings and plans accurately depict the building as erected and completed unless at the date of the recording of the Declaration the building is not complete in which event such statement shall be lodged in the registry upon the completion of the building and before the first conveyance of any unit in the building under the provisions of this Act.

(3) An architect shall be deemed to be recognized within the meaning of this section if he is in possession of such professional qualifications as may from time to time be approved by the Minister of Works for the purposes of this section.

6.(1) Upon the lodgment for recording of a Declaration under the provisions of section 4 of this Act, the property to which the Declaration relates shall thereupon be deemed to be divided in such number of separate parcels of land (in this Act defined as "Units") each having such limits and boundaries as are described in the Declaration and such parts of the property not included within the limits and boundaries of units shall be deemed to be common property for the purpose of this Act which shall be held in undivided shares by all the unit owners in accordance with section 7(1) of this Act.

(2) Where before the first conveyance of any unit there is in being any mortgage or charge affecting such unit, then either –

(a) before the making of such first conveyance—

(i) every such mortgage or charge shall be paid and satisfied; or

(ii) the unit shall be released from the mortgage or charge by a valid instrument of release duly lodged for record in the registry; or

(b) before the making of such first conveyance, the mortgagees or charges shall join therein,

and if any first conveyance of a unit is made without the provision of this section having been complied with then such conveyance shall be void and of no effect.

(3) Subject to the provisions of this Act, each unit together with the undivided share in the common property held therewith shall for all purposes constitute an estate in real property which, subject to the provisions of this Act, may devolve or be conveyed, leased, mortgaged or otherwise dealt with in the same manner and form as land.

> (4) When recorded a Declaration shall be binding on all owners of units in the building to which the Declaration relates and shall constitute constructive notice to subsequent purchasers and all other persons.

The Declaration

[26] The Declaration of One Ocean (then called "Ocean Place on the Harbour") was registered in June of 2005 by the original developer Peace Holdings Limited and the mortgagee, Prince Regent International Holdings Ltd. The development consisted of 79 units. The Declaration was amended in January 2010, partly as a result of remedial construction done to the stairways and the entrance areas of certain suites which resulted in variations to the areas of certain suites (for example, Unit 901 changed from 4,737 sq. ft., with a 2.02 unit entitlement, to 4,801 sq. ft., with a 2.06 unit entitlement). In 2014, Replay purchased 52 of the units, rescuing the project from a 2012 receivership. By a supplemental amendment in April 2016, the name of the condominium was changed to "One Ocean". The court in the *Qamea* decision in December 2021 ordered that the Declaration be further amended to accurately reflect the unit sizes and entitlements.

<u>The Evidence</u>

[27] Evidence was presented by Sarah King, Paul King and Samira Coleby on behalf of the purchaser. Andrew Stirling and Michael Sneyd were the main witnesses for the vendor. They were all cross-examined during the hearing.

The Kings

[28] Sara King and Paul King are partners in King & Co. They are members of the legal team that represented the purchaser and negotiated and drafted the Sales Agreement and NTC. Mr. King took the lead role and Ms. King indicated in her testimony that she played a subordinate role with respect to the preparation of the documents.

[29] An issue of some significance that arose out of the evidence of Ms. King concerned "Exhibit A" of the Agreement, which was apparently not attached. This is important, because it is contended that this exhibit was intended to form a part of the description of the property. In her affidavit, Ms. King indicated that on 21 March 2018, she sent an email to Jan Borghart, the closing agent for the vendor, requesting Exhibit A. He wrote back on 22 March 2018 enclosing two "*illustrative plans we use as Exhibit "A" in sales contracts*", which stated that the Unit was 6,165 square feet.

[30] The issue of what was intended to be included in Exhibit A was posed to Mr. King in cross-examination by Mr. Rigby:

"Q: Let me start at page 20 at Clause 1 of the Agreement for Sale. So based on Clause 1, the Defendant agreed to sell to the Plaintiff Unit 901 for a unit entitlement of 2.06 in the common property.

A: Yes.

Q: And Exhibit A is supposed to be the unit or the dimension of the unit shown on several plans and diagrams attached. Apparently there was no Exhibit A.

A: But they were confirmed to be attached to the …Jan Borghart forwarded them to us. They were the plans that outlined the actual physical units.

Q: They were not plans taken from the Declaration?

A: They were not.

Q: Right. Okay. And I think Mr. Borghart's e-mail suggests that they were illustrative plans?

A: They were plans of Unit 901 as being sold to our client, as being representatively sold, and as very clearly indicated to me by Jan as the actual unit in being, which is the reason why I had comfort in the language in here."

[31] Mr. King made several assertions in his affidavit which are worthy of note. In his main affidavit filed 31 May 2019, he stated as follows:

"6. In 2017, when I was representing another potential purchaser of a penthouse unit in One Ocean Condominium ("One Ocean"), I had raised the issue with the Defendant's representatives that the advertised and purported sizes of the penthouse units were significantly larger than the sizes stated in the Declaration of Condominium dated 11 May 2005 and recorded in the Registry of Records Volume 9234 at pages 1-140 ("the Declaration"). The discrepancy was due to the Defendant renovating One Ocean such that the roof was moved and the penthouse units were enlarged. The increase in size of penthouse units led to another fundamental issue as unit entitlement in One Ocean is calculated based on the size of the units. Therefore, when the size of the penthouse units was increased the unit entitlement associated with those units also increased while the unit entitlement of all the other units in One Ocean decreased. Furthermore, it appeared to me that a significant portion of the additional square footage which now forms a part of the penthouse units was common property that originally was part of the roof area.

7. With respect to this transaction whereby the Plaintiff had agreed to purchase the Unit from the Defendant, the Defendant's representatives assured me, as the Plaintiff's representative, that issues stated in paragraph 6 above would be resolved prior to the Closing Date. Despite continued promises by representatives of the Defendant that the sale would be completed in a timely manner it was not. This is because the Defendant (i) did not have a good marketable title to the Unit as a result of the issue stated in paragraph 6 above and (ii) failed to remedy defective and/or substandard workmanship and materials in the Unit."

[32] He was repeatedly cross-examined by Mr. Rigby as to the assertion that "*representatives of the Defendant*" assured him that an amendment would be made to the Declaration prior to closing. His answers in cross-examination were somewhat more equivocal than the position stated in his affidavit. In response to one such question from Mr. Rigby, he said:

> "It was always contemplated for the Declaration to be amended to include and encompass the extra square footage of the penthouse units and respectively also amending unit entitlements for the units. So that was the plan for many, many months and it was certainly the plan when we were entering into the agreement and certainly the plan that was entered on the Title Commitment and only at the eleventh hour was it removed without our consent."

However, when pressed by Mr. Rigby as to whether there was any obligation in the Agreement to amend the Declaration prior to closing, he conceded that there was no expressed term in the Agreement.

Samira Coleby

[33] Samira Coleby is a real estate agent at Damianos Sotheby's International Realty. She served as the purchaser's representative for dealing with the Association, having been her real estate agent in the purchase of another unit at One Ocean (509). She swore two affidavits (the first filed 30 May 2019 and a supplemental filed 21 January 2020). The first was to exhibit correspondence dated 3 May 2019 from the Association circulating a consent form and voting ballot seeking the approval of all owners to amend the Declaration. This course of action was being taken pursuant to a Resolution of the Directors of One Ocean passed on 28 February 2019. The intended amendment was to reconcile discrepancies in the penthouse boundaries, unit entitlements and allocation of common property, which it was apprehended had been caused by the renovations. By return form, dated 6 May 2019, the purchaser did not consent to the amendments. Ms. Coleby's supplemental affidavit simply exhibited an email from one of the sales agents for One Ocean enclosing marketing information contained in a brochure for Unit 901.

Andrew Stirling

[34] Mr. Andrew Stirling of Plan It Bahamas ("PIB") was the architect of record engaged by Replay to, among other things, undertake an analysis of the living spaces in the penthouses which were under renovations, including Unit 901. He submitted a report dated 14 February 2019, which was included in his affidavit filed 22 August 2019. His report concluded, among other things, that the total area of Unit 901 was 6,149 sq. ft. both pre- and post-renovation. He described the effects of the main renovations done to the building at paragraph 3 of his affidavit, which I set out below:

> "3. I am familiar with the construction of the One Ocean Condominium and the old mansard roof that existed under the original design and construction. I am also aware that a flat roof replaced the mansard roof, partly after the hurricane damage to the mansard roof and partly due to the age and overall poor condition of the mansard roof, a decision was taken by the Homeowners Association of the complex to replace and improve the roof design. The mansard roof was a sloping roof with peaks and valleys and some of the interior beams/walls that were built below the mansard roof were not always structural in nature; but were there to subdivide the interior rooms of the units below. It is my opinion that the

spaces between the old eastern and western mansard roofs on level 10 was not common property because no one could gain access to it save for the owner/occupier of that particular unit. The flat roofing over the top of the original mansard roof was the only recognized 'common area' space, as service staff could gain direct access to these upper rooftops (from a stair within the elevator shafts which exited directly onto the flat-level 11 Rooftop, without firstly traversing through a private unit to do so."

[35] The report set out the figures as follows:

"901. EXISTING AREAS (Pre-Renovation)

Existing Ground Floor Interior:	2940 sq. ft.
Existing Ground Floor Terraces:	526 sq. ft.
Existing Loft Floor Interior:	1423 sq. ft.
Existing Loft Terrace (central terrace):	460 sq. ft.
Existing Loft Dormer Terraces	100 sq. ft.
Existing Unused Roof Areas:	970 sq. ft.
TOTAL AREA	**6, 419 sq. ft**

901 NEW AREAS (Post-Renovation)

New Ground Floor Interior:	2940 sq. ft. (same as original)
New Ground Terraces:	526 sq. f. (same as original)
New Loft Floor Interior:	2135 sq. ft. (add in central terrace and some of unused roof area, 712 additional square feet from existing newly air-conditioned area)
New Loft Terrace	818 sq. ft. (dormer terraces and unused roof areas)
TOTAL AREA	**6,419 sq. ft."**

[36] Mr. Stirling was extensively cross-examined on these calculations by Mr. Moree. It was suggested to him that if his calculations were correct, it could mean only one thing—that the registered Declaration was defective. His evidence was that the actual size of the unit was consistent with the figures in his report, which he had checked several times using AutoCAD (a computer software used by architects and engineers), and therefore he agreed that the dimensions in the Declaration were "*significantly incorrect*".

Michael Sneyd

[37] Mr. Michael Sneyd is the Managing Director of Replay Bahamas, a position he has held since the Fall of 2017. His evidence was taken by remote video link from Canada. His evidence, as tested on cross-examination by Mr. Moree, was that no representation had been made to the purchaser that the declaration would be amended prior to closing. He

testified that the question of amending the declaration came up because of a decision taken by the Association. Some of the salient points of his evidence are set out below:

> "Q: Mr. Sneyd, when I asked you about the intention to amend the declaration I believe you said it was a possibility, is that correct?
>
> A: As I mentioned, the Home Owners Association felt that amending the declaration was in the best interest of all of the owners of the One Ocean. Replay accepted the HOA's request that the declaration be amended.
>
> Q: And this would have occurred after the agreement for sale, which was July 2018?
>
> A: Yes.
>
> The Court: Might I ask just a quick question, counsel? Mr. Sneyd, what was the genesis of the request by the HOA to amend The Declaration of Condominium?
>
> A: I believe, Mr. Moree, your firm was selling two units within the building, 707 and 709, the purchaser of those units raised the differential between the actual size of the units and the original condominium declaration as a concern. Your firm then wrote to the HOA and pointed this out and actually threatened the HOA that they would suffer losses if they didn't take care of this issue. The HOA then reviewed the matter with their attorney and as I understand it, the ultimate purchaser of 707, 709. Mr. Moree's firm was responsible for selling [and] those purchasers felt comfortable buying the units by virtue of having title insurance, which is the same of every other purchaser from Replay."

Conclusions on the evidence

[38] I must say that I have some difficulty accepting Mr. Stirling's evidence that the size of Unit 901 remained the same pre- and post-renovation. In his report, he refers to "*712 additional square feet from existing newly airconditioned area,*" which was added to the loft floor interior. Further, he testified during cross-examination that some of the area under the sloping mansard roof, which had been unusable because of the head height limitations, was converted into usable space when it was replaced by a flat roof. The Resolution by the Association to amend the Declaration was also predicated on the view that the renovations would and had significantly increased the size of the penthouse units, perhaps enclosing common property in the process.

[39] It might well be that there were variations as a result of different architectural methodologies of computing the spaces (as suggested by Mr. Stirling), as well as discrepancies between the original plans because of alterations and changes which may not have been reflected on the declaration (and indeed this is one of the findings of Winder J., in *Qamea* [para. 20], who had before him the architect (Mr. Johnson) who signed the architect's certificate in 2010 after the amendments). But I am persuaded in the round that there was some increase to the square footage of Unit 901 as a result of the renovations and, in particular, the repairs to the mansard roof, even if the calculations errors also had a part to play.

[40] Having said that, it is not for this court to make any definitive findings as to whether the Declaration (as amended) is defective, or how much additional space has been created by the renovations, or how that space is to be allocated as between common property and unit owners. There is no evidence before me from the architect who certified the 2010 plans as to the methods or measurements used to calculate the unit areas and common areas, nor any opportunity to cross-examine him. In any event, these are not issues that can be decided on a vendor and purchaser summons as they affect third party rights and would require the participation of the Association and possibly other parties. The issue for the court revolves around the significant discrepancy in the size of the unit as advertised for sale and the dimensions stated in the declaration, and this much is not controversial between the parties.

Legal Submissions

The plaintiff's case

[41] The plaintiff's central argument is that on a proper construction of the agreement, the subject matter of the sale is Unit 901 post-renovation (as advertised by the vendor), and that it was a condition precedent that the Declaration be amended prior to closing. This interpretation, the plaintiff contends, is justified bearing in mind the background knowledge of the parties at the date of execution of the Agreement and that the unit was under renovation when advertised for sale with the common knowledge that it would result in an increase in space.

[42] The plaintiff relies in particular on clauses 7 and 9 of the Agreement. Clause 7 contains a representation and warranty from the vendor that "*the completed unit and other improvements will materially conform to the said plans and drawings and comply with all applicable laws*." Clause 9 ("Construction Specifications") provides for the purchaser to examine "*any plans drawings or diagrams ("the Plans") relating to the layout and construction of the Unit at Seller's business office*…" and states that the "…*Unit will be constructed in substantial accordance (in Seller's opinions) with the Plans*…". The reference to the plans and diagrams in 7 and 9, the plaintiff contends, can only be to the plans and diagrams which are referred to in Clause 1(a) as defining the "*location, configuration and dimensions of the Unit*" to be sold, and said to be contained at Exhibit A.

[43] Significantly, the plaintiff argues that an interpretation to give commercial sense to the agreement requires the implication of a proviso in the Agreement modifying the legal description as appears in the Declaration as follows: "…*and to be further amended to coincide with the said plans attached hereto as Exhibit A*." In this regard, the purchaser also relied on a requirement of the Title Insurance Commitment ("TIC") issued in favour of the purchaser at Replay's expense, which provided for amendment of the Declaration

prior to closing (cl. 6(a)). That term was subsequently deleted, as provided for in the TIC, but there is some dispute as to whether the deletion was effective.

[44] The plaintiff contends further, or alternatively, that the Declaration fails to comply with sections 4(1)(d) and (e) of the Condominium Act, and as a result title to Unit 901 is rendered defective and the defendant cannot transfer valid title. In this regard reliance is placed on *Goodyear v Maynard* (unreported, No. 981 of 1982, [1983] BHS J. No. 4) and *Treco v Shutley* [1996] BHS J. No. 123. Further, it is argued that if the purchaser were forced to take title, she would be exposed to litigation or hazard, relying on *Synokva v Albury* [2017] 1 BHS 1 No. 122. Therefore, in all the circumstances, the purchaser was entitled to "terminate" the Agreement pursuant to cl. 4(b).

The defendant's case

[45] Mr. Rigby for the Defendant rested his case on several planks. Not surprisingly, his main submission is that on the defendant's construction of the Agreement, the defendant did establish a good marketable title to the Unit and was ready, willing and able to convey same by closing date. The defendant submitted that "…*it is the declaration of Condominium which forms the good and marketable title to Unit 901 and not the Agreement for Sale*." It is further argued that the Declaration complied with all the relevant requirements of section 4, which requires the Declaration to contain a description of the property "…*sufficient to identify it and its location precisely…*" [4(1)(b)] and "*the location, approximate floor area, limits, boundaries and any other data necessary for the proper identification of each unit*" [4(1)(d)].

[46] He also cited the authority of *Treco v Shutley*, a case in which it was held that an inconsistency in a Declaration with the as-built unit will not necessarily invalidate a conveyance. He contended that the defendant complied with the requirements of the Agreement and the NTC in respect of the TIC. In this regard, it is asserted that the removal of the requirement of 6(a) from the TIC, albeit at the 11th hour, did not entitle the plaintiff to abort the agreement, as the Agreement and the NTC specifically provided for the defendant to remove this requirement at its option.

[47] In addition to the argument that it had produced good and marketable title, the defendant also relied on several defences to the plaintiff's claims. Firstly, it was argued that the terms of cl. 11(f) of the Agreement made it clear that the Declaration was to prevail in the case of a "*material*" discrepancy in the description of the unit. Secondly, it was argued that the defendant was entitled to rely on the doctrine of waiver, as clause 11(f) provides that the plaintiff agreed to "*unconditionally and irrevocably waive any and all actual or potential rights or claims which Purchaser might have against Seller…arising out of or in connection with the matters outlined in this Clause 11(f).*"

ANALYSIS AND DISCUSSION

Contractual Interpretation

[48] I now come to consider the proper construction to be given to the Agreement in light of the rival constructions and arguments of the parties. Before turning to look at the terms of the Agreement, however, I will review briefly the law relating to contractual interpretation and the common law requirements of good title, so far as they are relevant to this matter.

[49] There is no disagreement between the parties as to the interpretive principles to be applied to a commercial contract. I set out briefly the modern approach to the construction of a commercial contract, which are usefully summarized in *Costain Ltd. v Tarmac Holdings Ltd.* [2017] EWHC 319, a case relied on by Mr. Rigby, where Coulson J. expressed the following:

> "[28] The modern starting point is the judgment of Lord Clarke in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, (2011) 138 Con LR 1, [2011] 1 WLR 2900 (at [21]): 'The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.' [29] More recently, in *Arnold v Britton* [2015] UKSC 36, [2016] 1 All ER 1, [2015] AC 1619 Lord Neuberger summarised the relevant principles in clear terms: '[15] When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 4 All ER 677, [2009] AC 1101 (at [14]). And it does so by focusing on the meaning of the relevant words, in this case cl 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see *Prenn* [1971] 3 All ER 237 at 240–241, [1971] 1 WLR 1381 at 1384–1385 and *Reardon Smith Line Ltd v Hansen-Tangen*, *Hansen-Tangen v Sanko Steamship Co* [1976] 3 All ER 570 at 573–575, [1976] 1 WLR 989 at 995–997 per Lord Wilberforce, *Bank of Credit and Commerce International SA (in liq) v Ali* [2001] UKHL 8, [2001] 1 All ER 961, [2002] 1 AC 251 (at [8]), per Lord Bingham of Cornhill, and the survey of more recent authorities in *Rainy Sky*, per Lord Clarke at paras [21]–[30] …"

[50] For the purchaser, Mr. Moree drew the court's attention to the line of authorities dealing with the circumstances in which the court will imply terms into a contract to give it

efficacy. In particular, he relied on the case of *Attorney-General of Belize and others v. Belize Telcom Ltd. and another* [2009] UKPC 10, on appeal from the Court of Appeal of Belize, in which the Board conducted a careful analysis of the authorities relating to implication of terms in a contract.

[51] In delivering the judgment of the Board, Lord Hoffman said as follows:

> "[21] It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. It will be noticed from Lord Pearson's speech that this question can be reformulated in various ways which a court may find helpful in providing an answer—the implied term must 'go without saying', it must be 'necessary to give business efficacy to the contract' and so on—but these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument, read as a whole against the relevant background would reasonably be understood to mean? […] .
>
> [26] In *BP Refinery (Westernport) Pty Ltd. v Shire of Hastings* (1977) 180 CLR 266, 282-283 Lord Simon of Glaisdale, giving the advice of the majority of the Board, said that it was 'not…necessary to review exhaustively the authorities on the implication of a term in a contract' but that the following conditions ('which may overlap') must be satisfied:
>
> > '(1) it must be reasonable and equitable;
> > (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
> > (3) it must be so obvious that 'it goes without saying'
> > (4) it must be capable of clear expression;
> > (5) it must not contradict any express term of the contract.'
>
> [27] The Board considers that this list is best regarded, not as a series of independent test which must each be surmounted, but rather as a collection of different ways in which judges have tried to express the central ideal that the proposed implied term must spell out what the contract actually means, or in which they have explained why they did not think that it did do."

The requirements of a good marketable title

[52] As indicated, the common law concept of fee simple ownership of property has been imported into the condominium regime by s. 6(3) of the Condominium Act. A convenient place to begin examining the issue of good title is therefore with the common law principles.

[53] In *Synkova v Albury* [2017] 1 BHS 1 No. 122, a case relied on by Mr. Rigby, Winder J elaborated on the requirements of a good marketable title by reference to the UK Court of Appeal case of *Barclays Bank PLC v Weeks Legg & Dean (a firm)*, 3 All ER 213 at 221, as follows:

> 11. In the English Court of Appeal decision of *Barclays Bank PLC v. Weeks Legg & Dean (a firm) [1998] 3 All ER 213 at 221*, *Millet LJ* was called upon to construe the expression "a good marketable title". According to *Millet LJ*, two separate questions will arise, namely, *the subject matter of the sale* (what has the vendor agreed to sell?) and *the vendor's duty to prove his title to the subject matter of the sale* (has the vendor sufficiently deduced title to what he has agreed to sell?). At page 221, with respect to this second question, *Millet LJ* states:
>
> "A purchaser is entitled to be satisfied:-'that his vendor is seised of the estate which he is purporting to sell, in this case the fee simple, and that he is in a position, without the possibility of dispute or litigation, to pass the fee simple to the purchaser.' (See *Re Stirrup's Contract* [1961] 1 All ER 805 at 809, [1961] 1 WLR 449 at 454 per Wilberforce J)
>
> Where the title shown is less than perfect, the question is whether the risk is 'so remote or so shadowy as to be one to which no serious attention need be paid ... the test must always be: would the court, in an action for specific performance at the instance of the vendors, force a title containing the alleged defect upon a reluctant purchaser?' (See *Manning v. Turner* [1956] 3 All ER 641 at 643 [1957] 1 WLR 91 per Stone V.C.)
>
> A title which, though technically defective, is one which the purchaser is bound to accept, is known as 'a good marketable title'. The meaning of the expression is well established. In *Pyrke v. Waddington* (1852) 10 Hare 1 at 8, 68 ER 813 at 816 Turner V.C. said:
>
> '... the rule rests upon this, that every purchaser is entitled to require a marketable title; by which I understand to be meant, a title which, so far as its antecedents are concerned, may at all times, and in all circumstances, be forced upon an unwilling purchaser ... and that this is the true rule to be applied in such cases, is, I think, the more apparent, from the repeated decisions that the Court will not compel a purchaser to take a title which will expose him to litigation or hazard ...'
>
> The obligation of a vendor is to deduce sufficient title to the property which he has contracted to sell. The expression 'good marketable title' describes the quality of the evidence which the purchaser is bound to accept as sufficient to discharge this obligation. It says nothing about the nature or extent of the property contracted to be sold to which title must be deduced ... It follows from what I have said so far that the expression 'a good marketable title' leaves open the question 'a good marketable title to what?' Where the expression is contained in a contract for the sale of land, it must mean 'to the property contracted to be sold'. It can have no other meaning."

[54] As may be seen from this abstract, the obligation to produce good title may be qualified by the particulars or conditions contained in the contract. Additionally, the cases make clear that a purchaser takes subject to any irremovable incumbrance which is either patent (i.e., visible to the eye) or of which he was aware of when he entered the contract (*Timmins v. Moreland Street Property Co. Ltd.* [1958] Ch. 110 [132].

[55] It is accepted that these authorities correctly set out the obligations and principles relative to good marketable title at common law. But as explained, title to condominium property cannot be determined simply by reference to common law principles. By way of example, cl. 4 of the Agreement defines good title according to the normal statutory definition—"*documentary title commencing with a good root of title in accordance with the provisions of The Conveyancing and Law of Property Act.*" A good root of title under that Act is a title going back at least 30 years, which clearly does not apply in the case of the Condominium Act, as a good root of title is created when the Declaration is registered and the property first conveyed. Regard must therefore be had to the statutory context.

The significance of the statutory Declaration

[56] Both parties sought to buttress their case with reference to case law in which the court has considered whether failure of the Declaration to comply with the statutory requirements or any inaccuracies between the statutory declaration and the as-built building or unit rendered the creation and/or transfer of title defective. Needless to say, judicial views on the matter is divided.

[57] In *Treco v Shutley* [1996] BHS J. No. 123, Davis J. held that an architect's certificate which failed to disclose that one room in a condominium unit was not completed did not prevent the declaration having effect so that title could validly be conveyed to the unit. The learned Judge rejected the extreme positions that had been put by counsel on either side—on the one hand, that there had to be the strictest conformity between the architectural certificate and the unit and, on the other hand, that it was the Declaration alone that had to be regarded for the purpose of title. His Lordship concluded that the proper interpretation lay somewhere in the middle:

> "23. The Court is unable to agree with the submissions made by Mrs. Hassan or its matching counterpart at the other extreme end made by Mr. Barnett. In the case of the former, the reason is clear if one were to consider the fact that the magnitude and enormity of some condominium schemes are such that it would be an extraordinary thing for deviation in the plans or drawings, however slight, to be a sufficient basis to abort the entire project. This, with respect, could not have been the intention of the legislature. In the case of the latter proposition, that of Mr. Barnett, it is similarly the case. The extreme position cannot be countenanced. Thus, the architect cannot with impunity certify compliance when in fact there have been substantial and/or significant variations in the constructed project without the possibility of this having a destructive or deleterious effect on the attempt to create a condominium which could be embraced by the legislation.
>
> […]
>
> 25. Nothing in the evidence supplied in this matter has revealed any encroachment of any unit on to the areas of another, or on any of the common areas. So in truth and in fact none of the unit owners could at any time say that the character or characteristics of Unit 301 has impacted negatively on his unit or the scheme as a whole or the enjoyment thereof by virtue of alterations in the construction of Unit 301.
>
> 26. The finding of the court is that the efficacy of the Declaration in its life-giving function to the condominium has not been impaired by the imperfection in Unit 301 or in the architect's failure to disclose it in his final certificate. The court therefore holds that in the circumstances of this case the transfer of title to the units - in particular Unit 301 is valid.
>
> 27. Uppermost in the court's consideration of the matter was the importance of avoiding a construction of the Act which could be said to be doing violence to its letter and/or spirit.

[58] Mr. Moree contended that the Declaration failed to comply with sections 4(1)(d) and (e) of the Act, and therefore the vendor was unable to make good title to Unit 901, citing the case of *Goodyear v. Maynard* (unreported, No. 981 of 1982 [1983] BHS J., and *Treco v. Shutley* (*supra*).

[59] In *Goodyear*, the defendant declined to complete a contract for the sale of a condominium unit in Freeport on the grounds, *inter alia*, that the Declaration did not comply with the provisions of s. 4(1)(l) of the Act. That section requires that the declaration contain "*the methods consistent with this Act to be observed and the conditions to be fulfilled for the amendment of the Declaration by the unit owners*." The clause in the Declaration only provided for amendment of unit entitlements, and not any other amendments. On this basis, Henry J. refused the plaintiff's (the vendor) application for a declaration that a good title to the property had been shown in accordance with the contract for sale.

[60] His Lordship reasoned as follows:

> "4. […] With great respect I find myself unable to agree with this interpretation [that of Brice C.J. in *Roberts Realty*]. I prefer and respectfully adopt the reasoning and views expressed by da Costa J. (as he then was) in the other case to which I have been referred E 56/80 G.*L.T. Corporation Limited v Bank of Nova Scotia*. In that case, the learned judge concluded the words "shall" as used in section 4 of the Act is mandatory and that "the law contemplated that it was necessary to insert in the particulars of the Declaration the methods consistent with this Act to be observed and the conditions to be fulfilled for the amendment of the Declaration, by unit owners'." He went on to observe that "unless the particulars required by s. 4(1)(l) of the Act are inserted in the Declaration, then Parliament would have created a hybrid fee simple, the incidents of which are immutably fixed unless section 30 of the Act is ever brought into operation."
> […]
> 6. The Declaration is the foundation stone on which the entire legal edifice in the Act is built. If the declaration is defective, that edifice must fall. In my view the failure to include in the Declaration the particulars prescribed in section 4(1)(l) of the Act renders the Declaration void. As a consequence, the property to which it relates would not have been brought within the ambit of the Act and the titles contemplated by the Act for the unit owners could not be created."

[61] *Treco v Shutley* is representative of those cases where the court has given a purposive interpretation to the Condominium Act. See, also, in this regard *Roberts Realty of The Bahamas Ltd. v. Lino A Innscinzi* (E/419/72), one of the earlier cases decided under the Act, in which Brice C.J. held that not all of the particulars required by section 4(1) were mandatory. In the *Roberts Realty* case, as referenced in *Goodyear*, Brice C.J. held that some of the particulars "*must obviously be included in order to carry out the purpose of the Act*", but others such as those in section 4(1)(l) are "*more in the nature of ancillary matters…to be read with the qualification that they are to be so included if they are intended to be binding*." The *Qamea* decision must now be added to the cases adopting a purposive construction, where Winder J. (citing *Treco v Shutley*) accepted that courts have shied away from striking down Declarations on the basis of mere inaccuracies.

[62] To the other side, and representing the strict constructionist approach, is *Goodyear*, along with cases such as *G.L.T. Corporation Ltd. v Bank of Nova Scotia* [unreported, E56/1980, da Costa J.), *Kloi Rise Villas Ltd. v Royal Bank of Canada* (unreported, No. 523 of 1982), [BHS] J. No. 25, Henry, J); and *Seaport Construction Co. Ltd. v. Residential Resort Developments* Ltd. *(In Liquidation)* (No. 874 of 1988 [1988] BHS J. No. 169. *Roberts v. Albacore Developments Ltd.* (unreported, No. 267 of 1988 [1988] BHS J. No. 54, a decision of Georges, CJ, is also cited in this group, but that case bears closer examination as it does not fit completely into either mold.

[63] In *Roberts v. Albacore Developments*, Georges CJ had to construe the provisions of ss. 4(1) and 6, to decide whether non-compliance with those sections rendered invalid the plaintiff's title in respect of the conveyance of a unit in a condominium. He held that a Declaration of Condominium, which was lodged by the defendant subsequent to a mortgage of the premises comprised in the Declaration, was invalid, in that the defendant and declarant at that point was not a person entitled to both the legal and equitable title in the land (as required by s. 4 of the Act). Therefore, the purported conveyance of a unit by a purchaser (Bude Investments Ltd.) from the owner-developer (Albacore) to the plaintiff Roberts, was also invalid.

[64] His reasoning is set out in the following passages:

> "26. In this case, the first defendant conveyed the apartment and its share of the common undivided property to Bude Investments Ltd. as land for an estate in fee simple. Bude Investments in turn conveyed what they conceived had been vested in them to the plaintiffs. Nothing could pass under either conveyance because in fact Apartment 511 and the undivided share of the common property to be enjoyed therewith had not become "land" under the Act. […]
>
> 27. The difficulties which arise in such a case flow from failure to scrupulously follow a prescribed statutory procedure which permits the creation of an unusual estate in land not known to the common law. There would seem to be no justification for introducing equitable principles to confer on one of the parties an estate completely different from that which was the subject matter of the purchase and sale. The intervention of equity is aimed at creating an estate identical with that which would have been created at law but existing in equity instead. That would have been impossible in this case." [Underlining supplied].

[65] Notwithstanding his findings, His Lordships concluded that once the mortgage had been paid off, and the legal and equitable title in fee simple became vested in the defendant, they were empowered to make the Declaration required under the Act. More importantly, on his construction of s. 4, which provides for a Declaration to be "*in several parts and drawings may be annexed thereto*", the plans which had been lodged under the Declaration found to be invalid, but which remained on the record, could simply be incorporated by reference by the new Declaration made "…*to regularize the title*". (See further in this regard, the sequel to this ruling, *Roberts Realty* (*Glinton v Albacore Developments Ltd.* [1988] BHS J. No. 69), which gave effect to the principles enunciated in the first Ruling.)

[66] I do not have to prefer the interpretation in any of these cases over the other because, as may be clearly seen from *Treco* and *Roberts*, the reasoning is not all to one side, and several turn on their particular facts. In any event, I am of the view that the matter before the court is distinguishable on its particular facts. This is not a case where there is some error discovered in the Declaration upon a requisition by a purchaser, or in which some inaccuracy comes to light following a conveyance or other transaction to throw doubt on the title. The issue was well known to the parties prior to entering into the Agreement and was in fact specifically addressed in its terms, although the parties differ on how those terms are to be interpreted.

[67] I am, however, attracted to the reasoning of Brice C.J. *in Roberts Realty*, Davis J. in *Treco* and, in particular, the approach of Georges C.J. in *Roberts v Albacore*, in which he found ways to save the transaction from total invalidity, where the defects were capable of being cured consistently with the intent and purpose of the Condominium Act. I would also venture to state that the cases and the Act draw a distinction between complying with the statutory requirements necessary to create the legal estate—as no valid title can pass if no legal estate comes into existence—and subsequent resale where there is a validly created estate under a recorded Declaration. For example, s. 6(4) provides that the recorded Declaration in respect of any unit "*shall be binding on all owners of units in the building to which the Declaration relates and shall constitute constructive notice to subsequent purchasers and all other persons*." And s. 8 sets out the required particulars of a deed related to a unit after the recording of the Declaration, which is to include, among other things, a description of the property "*including the volume and page wherein the Declaration is recorded*", the unit number or symbol, and the unit entitlement.

[68] In my view, it cannot have been the intention of Parliament to create a statutory fee simple title which is made defeasible by virtue of any alterations to a unit or the building, even though authorized by the Association on behalf of the owners, which may introduce inaccuracies in the registered Declaration that are capable of being rectified by amendment. If this were so, it would render the provision at s. 6(4) that a registered declaration constitutes constructive notice of title to subsequent purchasers and all other persons without any meaning. The Act also provides for a democratic process for amending the Declaration to bring it in line, or alternatively it can be done via the courts. But until it is amended, it must have statutory force and effect as the fee simple title to the units.

[69] In this regard, it is important to note that section 4 of the Condominium Act, which sets out the statutory requirements for registering the Declaration, although cast in mandatory language, does not specify that failure to comply with any of the requirements of the Act will render the conveyance void. This is to be contrasted, for example, with section 6, which requires the satisfaction or release of a mortgage or charge, or that the mortgagee or charges join in the conveyance before the making of any *first* conveyance of a unit, and

specifies that the effect of failure to comply is that the conveyances will be "*void and of no effect*" (s. 6(2)). This provision, added by an amendment in 1969, was intended to protect the original purchasers of condominium units, by ensuring that both the legal and equitable interest in the units were conveyed together (see, for example, *MacIsaac v Haddad* [1988] BHS J. No. 6). The cases arising under s. 6 are therefore right to emphasize the mandatory nature of complying with section 6, as the statutory consequences of failure to comply are specified.

[70] Further, it is to be noted that many of the provisions of s. 4 are not drafted in immutable terms. Note the following examples: under s. 4 (1) the contents of the declaration may be accreted and need only contain drawings, plans and schedules "*as may be deemed convenient*"; s. (4)(1)(d) provides for the declaration to contain the "*approximate floor area*", thereby indicating that the description in the declaration might be at variance with the as-built unit; s. 4(1)(k) provides for any other matters "*which the person or persons executing the Declaration may deem desirable to prescribe*"; s. 4(1)(l) provides for the amendment of the Declaration by the unit owners by "*methods consistent with this Act*"; and s. 4(3) provides for the boundaries of units to be defined by reference to floors, walls and ceilings "*insofar as is practicable to do so*". Having regard to the flexibility of the statutory language, it is difficult to justify the finding in *Goodyear* that a failure to include an omnibus provision for amending the Declaration (which could always be added by amendment) would render invalid any conveyance under that Declaration.

Conclusions on the Agreement for Sale

[71] Before turning to look at the specific terms of the Agreement, a few general observations may be made. Firstly, as mentioned, the Agreement is a comprehensive and carefully drafted one and the parties did not leave anything to chance. This is hardly surprising, considering the value of the property involved and the economic sophistication of the parties. Secondly, it is said to represent the entire agreement between the parties (cl. 26), which could only be amended in writing. Thirdly, there is no room for any reliance on any oral representations which were not incorporated into the agreement (cl. 28).

Subject matter of the contract

[72] The plaintiff contends that the subject-matter of the contract is Unit 901 based on the renovated physical dimensions. As was colourfully put by counsel in opening submissions, the plaintiff did not agree for "*the purchase of two-thirds of a condominium*". He also referred to the well-known quote of Turner V.C. in *Pryke v. Waddington* (1852 68 ER 813 (mentioned in *Synoka v Albury* (*supra*)) where it was said: "…*the Court will not compel a purchaser to take a title which will expose him to litigation or hazard...*".

[73] The defendant contends that good title means title as good as that contracted for, and that the title to Unit 901, as defined by the Declaration, is precisely what the purchaser

contracted to purchase. Therefore, the title should be accepted and the purchaser obligated to complete the sale. It is not denied that the Declaration should be amended at some point, not only in relation to 901 but generally, but the defendant's view is that this is not a condition-precedent to the sale.

[74] In support of this line of argument, the defendant relies on an extract from *Emmet on Title* (para. 5.0004-Sale of such title as the vendor has) which provides as follows:

> "Even where a purchaser agrees to accept a vendor's title, he has a right to assume that the vendor has disclosed all that it was his duty to have disclosed, and the condition can only be read as precluding objection on that footing (*Re Haedicke and Lipski's Contract* [1901] 2 Ch 666, *Becker v Partridge* [1966] 2 QB 155). Also a vendor who contracts to sell only such right or interest, if any, as he has, is bound to convey such right or interest free from an existing encumbrance (*Goold v Birmingham, Dudley and District Bank* (1888) 58 LT 60)..."

[75] The defendant's written submissions quoted extensively from several cases in support of this principle, but I only reproduce a portion from the ruling of Danckwerts LJ in *Becker v Partridge* [1966] 2 QB 155, where he said:

> <u>There is no doubt that by a clearly drawn special condition which is put in the contract by a vendor who acts in good faith, and which discloses a possible defect in the title, the purchaser may be compelled to accept the title offered by the vendor; but the vendor must have disclosed the defects of which he knew.</u>

[76] The said defect in this case arises from the claim that the extra space is common property, which belongs collectively to the Association (on behalf of all the owners in undivided shares), and therefore the vendor is not able to convey it. Although not argued as such, this is but a statement of the principle known by the Latin tag *nemo dat qoud non habet* (often abbreviated as the *nemo* dat rule), which simply means that a person cannot transfer that which he does not own.

The issue of common property

[77] "Common property" is defined at s. 2 to mean "*so much of the property which, <u>upon the recording of a declaration</u>, is not contained within the boundaries of any unit*." In addition to the interest in the "separate parcels of land" constituting the units, the owners hold common property in undivided shares with all the unit owners.

[78] There was quite a bit of dispute over whether the renovations encroached on common property. The defendant's position is that no evidence was led by the plaintiff as to encroachment on the common property. In cross-examination, Mr. Stirling stoutly rejected the assertion that the renovations had encroached on common property. His view was that the difference in square footage was explained by a mistake in the area calculation

in the original architectural documents, and that in any event the area under the mansard roof was not common property, as it was only accessible to the owners of the units.

[79] I do not find the defendant's assertion that no evidence was led on this matter to be a wholly accurate statement. The issue was addressed by Mr. King in his main affidavit, where he opined that a "*significant portion of the additional square footage which now forms a part of the penthouse units was common property that originally was part of the roof area*". Further, as related in the affidavit of Samira Coleby, the Association took a Resolution to amend the Declaration, specifically out of concerns that the "*roof renovations have encroached upon and consequently reduced the common property*".

[80] However, Mr. Rigby is quite right to point out, as the court has observed, that the extent of any encroachment on common property was not an adjudicative fact before this court. This is a matter that could only be determined on an application for that purpose based on specific evidence on the issue from both sets of architects involved in the project (pre and post renovations) and involving all the necessary parties.

[81] Based on the evidence in this case, there is no way to tell how much (if any) of the common property was included in the new 901 area. While it is accepted that the vertical lifting of the mansard roof created additional living space for the penthouses, it may be that such space was always within the limits and boundaries of those units, and only accessible to the owners of those units. Indeed, there are findings to this effect in *Qamea* [see paras. 21-25]. But even assuming that some of the space was formerly common property, its significance for this application still has to be determined with reference to the terms of the Agreement and the statutory context. While the court may take judicial notice of subsequent findings, it is constrained to determining the parties' rights on the evidence before it.

What title did the parties contract for?

[82] The key question for the court is this: what is the nature of the title that the purchaser agreed to accept from the vendor? To answer this question, one must look to what they reduced to writing. In looking to the contract, I remind myself that the court will strive to construe a contract so as to give it business efficacy, but it cannot ignore the clear terms agreed by the parties. In *Arnold v Britton* (*supra*), Lord Hodge said [76]:

> "76. The [court] is not there to re-write the parties' agreement ….The question for the court is not whether a reasonable and properly informed [party] would enter into such an undertaking. That would involve the possibility of re-writing the parties' bargain in the name of commercial good sense."

[83] In my opinion, a construction based on the natural and ordinary meaning of the words leads to only one conclusion, and it is that the vendor contracted to convey to the purchaser

its existing legal title in Unit 901, as defined by the Declaration, and this is what the purchaser agreed to accept. I have come to this conclusion for a number of reasons.

[84] Firstly, while I accept that some ambiguity was created by the reference to "Exhibit A", there was nothing in that exhibit to displace the clear statement that the legal description of the Unit "*shall be in accordance with the plans attached to the Declaration of Condominium*". "Exhibit A" was said to define the "*location, layout, configuration and dimensions of the Unit*". But it was only an illustrative rendition of a renovated model, not an actual plan of Unit 901 itself. It is to be noted that the advertised square footage (6,125) was also different from the architect's finding (6, 419 sq. ft.), so there would still be a discrepancy (even though of a much smaller scale). In any event, the law is clear that reference to a plan which is described to be "for the purposes of identification only" or which is illustrative is subordinate to any verbal description of the property in the Agreement (see, *Willson v Greene* [1971] 1 W.L.R. 635).

[85] Secondly, the Agreement provides for the vendor to sell (and the purchaser to buy) its fee simple estate in possession in Unit 901 together with the appurtenant "*2.06 unit entitlement in the common property of the Unit*". In this regard, it must be remembered that essential to the concept of condominium ownership is that ownership of a unit and its appurtenant common interest cannot be separated (see s. 6(3)). The 2.06 unit entitlement is based on the approximate proportion of the floor area of the Unit to the aggregate floor area of the condominium at the date of the Declaration (as amended) and as set out therein, and this is specifically stipulated in cl. 11(f)(ii). Therefore, there could be no doubt that it was the unit so defined that was being sold.

[86] Thirdly, the purchaser specifically acknowledged that the title it was receiving would be subject to certain exceptions. Cl. 1(a) provides that the "*Purchaser's title in the Unit shall be <u>subject to</u> the terms and Conditions of the Declaration of Condominium and the Permitted Exceptions*." Further, at cl. 4(a), the seller contracted to provide "*good fee simple documentary title SUBJECT ONLY to (i) those title exceptions and other matters set forth in 'Exhibit C' to this Agreement; (ii) matters specifically set forth in this Agreement; and (iii) other matters approved or waived by Purchaser (collectively, 'Permitted Exceptions')*." The most relevant for our purposes were the exceptions set forth at Exhibit C, which included the survey plan annexed to the Declaration and the Declaration itself.

[87] Mr. Rigby provided a lengthy extract from "*Words & Phrases Legally Defined*" on the various meanings of "subject to". There is no need to reproduce that passage, but I have culled therefrom two examples: "subject to" is to introduce a condition or proviso to an offer (*Watson v McAllum* (1902) 87 LT 547, at 548 per Joyce J) or to indicate that something is "swallowed up" or "negatived by" those matters it is made subject to (*Benge & Pratt v Guardian Assurance Co. Ltd.* (1914) 34 NZLR 81 at 86, per Stout CJ). In the context of this Agreement, I am satisfied that the effect was to stipulate clearly that the

obligation to produce fee simple documentary title to the Unit was modified by what was contained in the exceptions, including the Declaration itself.

[88] Fourthly, in addition to the matters set out in the particulars of sale at cl. 1 of the Agreement, the defendant relies heavily on cl. 11(f) of the Agreement, and in particular the purchaser's "acknowledgements" and "agreements" under that clause. Mr. Rigby submitted that c1. 11(f) was of "*paramount importance in determining the issue of title and alleged title defect*." By these acknowledgements, the defendant contends the plaintiff was "*put on adequate notice that the Declaration was 'supreme' and agreed to be bound by it in accordance with section 6 of the LPCCA*" [the Act]". The acknowledgements are set out above, but the most important of them is 11(f)(iii), which is reiterated for quick reference:

> "In the event that there is (in Seller's opinion) a marked variation with respect to the discrepancies mentioned in Clause 11(f)(i) and 12(f)(ii) [*sic*] above then the stated Unit area and Unit entitlement as contained in the Declaration of Condominium shall prevail; ….".

[89] Although cl. 11(f)(iii) is phrased in the conditional ("*in the event*"), it was common ground that the parties knew at the time the agreement was executed that there was a substantial difference in the size of the unit as described in the Declaration and the post-renovation dimensions. Therefore, this clause was operative from the inception of the Agreement.

[90] Fifthly, although this point was not specifically addressed by any of the parties, it seems that the title insurance was specifically intended to relieve the vendor of any obligation to provide evidence or information on title that would otherwise arise at law or in equity. For example, at Clause 4(d) (under the rubric "Full Satisfaction of Seller's Obligations), the purchaser specifically acknowledged that the Title Commitment and Owner's Title policy "*shall be in lieu of any obligations Seller may otherwise have under the common law, or equity or the Conveyancing and Law of Property Act with respect to providing evidence of title or information regarding title matters with respect to the Unit*."

Implying terms into the Agreement

[91] Mr. Rigby submits that the contention of the plaintiff that there should be implied into the Agreement a term to require an amendment to the Declaration in advance of closing should be rejected for three main reasons: (i) there was no evidence that any assurance was made as to an amendment prior to completion either before or contemporaneously with the agreement; (ii) such a representation falls foul of clauses 26 and 28; and (iii) the evidence is clear that no representations were in fact added to the agreement.

[92] I agree that this is not a proper case on the facts to imply the suggested terms to give the Agreement commercial efficacy. Although Paul King in his evidence indicated that it was

the "*understanding*" that the Declaration would be amended prior to closing, he could not rely on any specific assurances in this regard. Mr. Sneyd rejected the contention that any assurances were given—"*I certainly did not give any such assurances and I don't know who did*." As has been noted, the Agreement is clear that it was intended to represent the complete understanding by the parties and any oral representations on which the purchaser intended to rely were required to be written. No representations were appended to the Agreement.

[93] I am also of the view that the authorities on which the plaintiff relies for implication of a contractual term do not support the plaintiff's case. I do not find, for example, that the imposition of such a term is necessary to give business efficacy to the contract based on the terms of the Agreement. This was a carefully negotiated contract, and the purchaser was free to clearly specify in the Agreement that the amendment of the Declaration was to be a precondition to closing, or to append it as a representation. In any event, to interpose such a term would be contradictory to the expressed provision that if there was any discrepancy in the size of the unit as registered and the renovated unit (as there was), the Declaration was to govern.

[94] The defendant also points out that the original closing date for the Agreement—it was executed on 19 July 2018 with a closing date 30 days later on 28 August 2018—augurs against an interpretation that the Declaration was intended to be amended before closing. Quite clearly, amendment of the Declaration would have been impractical in such a short timeframe. Amendment of a declaration requires a special resolution passed by owners representing a minimum of 75% of the suite entitlement or, in the alternative, an application to the court. Where any issue of disposal of common property is involved, it also requires the unanimous consent of the owners of all units (s. 22 of the Act). In fact, it is worth noting in this regard that the plaintiff herself did not consent to the proposal for amendment of the Declaration at the time it was originally circulated.

Should the title be forced on the purchaser?

[95] The plaintiff contends that the discrepancy in title constitutes a defect that would expose her to litigation or hazard. If this were a mis-description or mistake arising in a traditional conveyance of freehold, it would certainly rank as an error *in substantialibus* that might justify rescission of a contract. But this is not such a case. The purchaser was fully aware of the issues relating to size of the unit as a result of renovations, specifically contracted to take the title, and therefore must be deemed to have accepted whatever risks were associated with it. Further, it seems that the very purpose of the TIC was to indemnify the purchaser against any risk from title issues relating to size.

[96] In the leading case of *MEPC v Christian-Edwards* [1978] Ch. 281 [at 290], Goff LJ explained that the principle that the court will not require a purchaser to buy a lawsuit—

> "…means no more than the title will not be forced upon him if there is a realistic prospect of litigation. This position is summarised in Fry, 6th ed., p. 416, para. 890:
>
> '(i) Where the probability of litigation ensuing against the purchaser in respect of the matter in doubt is considerable, or as it was put by Alderson B., where there is a 'reasonable decent probability of litigation'. The court, to use a favourite expression, will not compel the purchaser to buy a lawsuit."

[97] Having regard to all the circumstances of this case, I do not find that the purchaser would be exposed to a serious risk of litigation in respect of the Unit for the following reasons. The issue with 901 was part of a general issue affecting ownership and unit entitlement at One Ocean as a result of authorized renovations, and it was understood by all that this would have to be addressed by the Association in any event as part of the management of the condominium. Also, the vendor (as second developer) had committed to working with the Association to have the Declaration amended, including joining in an application to the court, if necessary, for this purpose. Further, pursuant to cl. 3 of the Agreement, the purchaser acknowledged that the "*Declaration of Condominium may be subject to amendment and that the Purchaser will be bound by any amendment whether or not Purchaser had consented to the amendment*". In fact, as was borne out in the *Qamea* action bought by the Association, only owners objecting to the proposed amendments were named as parties. The purchaser seems to have relented of her objection by the time that application was made.

Waiver/estoppel

[98] In addition to the interpretative arguments, Mr. Rigby asserts that the plaintiff is estopped or has waived any right to take issue with the title or call for an amended Declaration prior to closing. This is because under cl. 11 (f) the plaintiff agreed to "…*unconditionally and irrevocably waive any and all actual or potential rights or claims which Purchaser might have against Seller,….arising out of or in connection with the matters outlined in Clause 11(f).*" Mr. Moree contends that such a waiver can only operate in *in futuro*, and cannot be invoked in the context of a vendor-purchaser summons.

[99] Mr. Rigby referred the court to several authorities on to the law relating to waiver and estoppel, but these did not assist the court on the issue of arguing an estoppel in a vendor-purchaser summons. However, a similar issue was raised in the case of *MEPC Ltd. v Christian-Edwards* (*supra*), which by analogy might be relevant to the issue here. In that case, at the Court of Appeal (whose ruling was affirmed by the House of Lords), counsel for the purchaser, in fortifying his submission that the court "…*will not compel the purchaser to buy a lawsuit*", argued that the vendor and purchaser summons was itself an example of such litigation. In response to this, Goff L.J., delivering the judgment of the Court, said as follows (pg. 290):

> "In our judgment, however, that cannot possibly be right. It would stultify the whole purpose of the Vendor and Purchaser Act 1874. The purchaser must make up his own

> mind whether he is satisfied with the title, and if not he can either rescind at his peril or get the point which worries him summarily determined upon a summons under the Act; but if then the court should hold the title good and such as he ought to have accepted he cannot turn round and say "Ah no, because although I was wrong and the title was good I had to come to the court for a ruling." We are not of course considering any question of the costs of the summons, but whether a title otherwise good cannot be forced upon a purchaser because the purchaser will not accept it until the court has ruled upon it."

[100] It is my view, by analogy with this passage and relying on general principles, a vendor and purchaser summons issued by the purchaser to determine whether she has properly rescinded an agreement for sale (i.e., whether the vendor has made good title) is not properly a claim against the vendor in respect of any matter arising out of title issues. It is simply a procedure for the court to determine the validity or otherwise of the title and, therefore, no estoppel or waiver can properly operate against the purchaser in that context. I therefore agree with Mr. Moree's submissions on this point.

Was the notice of rescission/termination effective?

[101] In *Chesire and Burn's Modern Law of Real Property* (15th Ed., pg. 136-137), it is stated that a contract for the sale of land may be rescinded in different situations:

> "Where…the vendor fails to show a good title or to deliver the actual land or interest described in the contract, or where the vendor or purchaser fails to complete after time has been made of the essence, it is commonly said that the innocent party may rescind. This is not rescission ab initio, but acceptance of a repudiation of the contract, discharging both parties from further performance. […]
>
> The right to rescind may also be conferred by the express terms of the contract."

[102] It should be reasonably clear, based on the Court's analysis above, that rescission was not effective based on failure to make good title to the subject matter the vendor contracted to convey. The matter does not rest there, however, because the evidence led at trial and the terms of the NTC suggest that the plaintiff specifically rests it right of rescission/termination on the alleged failure of the vendor to comply with Cl. 4(b), and the issues relating to the title commitment.

[103] In the email of 1 March 2019 giving notice that it was rescinding/termination the contract, the reasons given (among others) were that the vendor:

> "2. Failed to deliver a Title Commitment free from requirement 6(a) of the Title Commitment for further amendments to be made to the Declaration of Condominium.
> 3. Failed to deliver a Title Commitment that provides good title to the entirety of the square footage contracted to be purchased and the correct Unit Entitlement to the Unit…"

It will also be recalled that these were among the items identified in the NTC, and the only two which remained after the items in the Punch list were withdrawn.

The Title Insurance Issue

[104] Clause 4 deals with title issues, and 4(b) provides for the vendor to provide, at its expense, title insurance for the Unit. It provides for the title commitment to be "*in an amount equal to the Purchase Price and shall evidence that the Seller is vested with fee simple title to the Unit, free and clear of all liens, charges, encumbrances, exceptions, or qualifications whatsoever save and except for the Permitted Exceptions.*" The process provides for the purchaser, within 21 days of receipt of the Title Commitment, to notify the seller of any objections to title (excluding the excepted matters), time being of the essence. If this notification was made, and the seller was unwilling or unable to satisfy or remove such matters prior to closing, it was to notify the purchaser. This then triggered a right for the purchaser within five days after receipt of the notification to either waive the objection and proceed with closing, or terminate the agreement, and in those circumstances the vendor was to cause the refund of the deposit. The return of the deposit was to be in full satisfaction of all claims arising under the agreement, and all rights and obligations arising under the Agreement not expressed to survive termination, would be null and void. However, if the purchaser failed to notify within 5 days, the purchaser was deemed to have waived any objections in title and proceed to closing.

[105] The TIC was issued by International Data Management ("IDM") in favour of the plaintiff on 2 August 2018, through its registered intermediary in the Bahamas, Compu-Title. The insurance was being provided by Amtrust Title Insurance Company Ltd., a New York based company ("the Company"), and its terms were in the standard form of the American Land Title Association ("ALTA"): Schedule A (transaction information, including legal description), Schedule B, Part 1 (Requirements) and Schedule B, Part II (Exceptions). IDM also issued an Undertaking and Gap Indemnity Agreement with the Plaintiff dated 15 August 2018, which included an undertaking given by IDM through its local intermediary to have the title documents (including the amended declaration stipulated at 6(a) of the TIC) promptly recorded in the Registry after closing.

[106] The "land" to be insured was described in the TIC according to the terms of the existing Declaration:

> "ALL THAT Unit being Penthouse 1 Ocean East and also known as Unit Number (901) in the Condominium called and known as "One Ocean" being situate on a portion of Allotment Number Eight (8) of the original Hog Island (now known as Paradise Island) one of the Islands of the Commonwealth of The Bahamas which Suite has such location shape approximate floor area dimension and boundaries as are shown on the Plans attached to the Declaration of Condominium as amended by Amendment of Declaration of Condominium as amended by a Second Supplemental Amendment to the Declaration of Condominium and recorded at the Registry of Records in the City of Nassau on the Island of New Providence one of the Islands of the Commonwealth of the Bahamas in Volume 9234 at pages 1 to 140, Volume 10984 at pages 393 to 420, and Volume 12525 at pages 481 to 485 respectively, AND TOGETHER WITH ALL THAT undivided 2.06% share in the common property of the said Condominium."

[107] By virtue of Schedule B-I ("Requirements") certified copies of several documents creating the insured interest were to be provided at the time of closing by the Bahamian attorney conducting the closing, satisfactory to the Company, that were to be lodged with the Registrar General and properly executed and stamped for Stamp Duty and Value Added Tax (VAT). One of those documents was that specified at paragraph 6(a), which provided as follows:

> "6 a. Further Amendment to Declaration of Condominium from Peace Holdings Limited and Prince Regent International Limited, as amended by Amendment of Declaration of Condominium, recorded in Volume 9234 at pages 1 to 140 and in Volume 109884 at pages 393 to 420, respectively, and by Second Supplemental Amendment dated 15th March, 2016, recorded in Volume 12525 at pages 481 to 486, to incorporate physical changes to the Condominium Building and Units, and at a minimum, new Surveyor's certificate and plans, as well as the Common Area attributed to each Unit;..."

[108] Paragraph 4 of the TIC provided for the company to amend the Commitment at any time. This was reinforced by the proviso to Schedule 1, which provided as follows: "*The Company reserves the right to amend the Legal Description, the Requirements (Exhibit B, Part 1) and Exceptions (Exhibit B, Part 2) and make additional Requirements and take additional Exceptions upon review of the above Requirements*."

[109] It was clear that the issue of the discrepancy in the size of the Unit and that stated in the Declaration was of some concern for the prospective insurer, and in this regard several amendments to deal with this issue were made, which are worth setting out. On 28 February 2019, Schedule B 1 was further amended by adding the following requirements:

> "10. An assurance acceptable to the Company from the Ocean Place on the Harbour Association that the Peace Holdings Limited Declaration of Condominium from Peace Holdings Limited and Prince Regent International Limited, recorded in Volume 9234 at pages 001 to 140 of the records of the Registrar General of the Commonwealth of The Bahamas, will be further amended to bring it into compliance with the Law of Property and Conveyancing (Condominium) Act.
>
> 11.Corporate indemnity and undertaking acceptable to the Company from Replay Investment Group Inc. wherein they covenant and agree to protect, defend, and save the Company harmless from any loss, cost, expense, or damage, including without limitation reasonable attorneys' fees, which the Company may suffer, expend, or incur by reasons of the Company issuing the Policy without exception for or affirmatively insuring against such matters, but without prejudice to the right of the Company to defend at the expense of the undersigned (if it so elects) any action or proceeding affecting the Company's obligations under the Policy in connection with said matters.
>
> […]
>
> 15.Any claim related to Common Property and/or Unit Entitlement, as well as the inability or failure of Replay Destinations (Bahamas) Ltd. and/or Ocean Place on the Harbour Association, their agents, successors and assigns to amend the Declaration of

> Condominium from Peace Holdings Limited and Prince Regent International Limited, recorded in Volume 9234 at pages 001 to 140 of the records of the Registrar General of the Commonwealth of The Bahamas in order to bring it into compliance with the Law of Property and Conveyancing (Condominium) Act (this Exception will be removed from the Policy without cost to the Insured when Requirements 10 and 11 are satisfied)."

[110] Both 10 and 11 were deleted the following day (29 February 2019) and 6(a) was also deleted by amendment dated 1 March 2019.

[111] Mr. Rigby argues that pursuant to cl. 4(b) of the Agreement, the contractual right to abort the sale was only triggered if the defendant was "*unable or unwilling to satisfy or remove any such matters prior to closing*." He contended further that as requirement 6(a) was in fact removed by the insurers just prior to the closing date, the Title Commitment was delivered completely in accordance with the Agreement. The defendant's response to the issues raised on the TIC by the plaintiff is captured in the email from Hector Riviera of IDM sent 1st March 2019 at 6:33 p.m. to Paul King, answering the latter's email in point-counterpoint fashion as follows (responses in bold font in original):

> 2. Failed to deliver a Title Commitment free from requirement 6(a) of the Title Commitment for further amendments to be made to the Declaration of Condominium: -
>
> **CLARIFICATION: - The intent of the Amendment to the Commitment attached to this email as to dispense with Requirement 6(a) if Replay provided an Indemnification and the Association an Undertaking acceptable to IDM. As is IDM's known practice, along with the Amendment, I also sent a Requirements Checklist showing the Requirement for these documents had been satisfied. The documents were provided, were acceptable and were deleted from the Requirements Checklist...**
>
> 3. Failed to deliver a Title Commitment that provides good title to the entirety of the square footage contacted to be purchased and the correct Unit Entitlement to the Unit:-
>
> **CLARIFICATION:- IDM was never requested to describe the property in question other than how it is described currently in the Commitment. Title insurance companies insure based on what is recorded. Accordingly, the current recorded Declaration was used for the following approximate description included in the Commitment since inception (2nd August, 2018) ...**
> **...**
> **Furthermore, as I had advised, Title Insurance Policies do not insure precise areas due to different dimensions that can be obtained by different surveyors using different equipment. That is why property areas or sizes are described in approximations or as "more or less"....**

[112] Mr. Moree argued that the amendments to the TIC had the effect of unilaterally amending the terms of the Agreement to remove the requirement to amend the Declaration prior to closing.

[113] Mr. Rigby countered that the amendments were perfectly permissible, as it was a contractual arrangement between the defendant and the Company providing the insurance, and the consent of the plaintiff was not required to vary any term or condition. Additionally, it did not constitute an amendment of the Sales Agreement, which was precluded by cl. 26. Moreover, he points out that the plaintiff's NTC specifically demanded (as provided for at 4(b)), that the requirement was either to be *satisfied* or *removed* from the TIC.

[114] For the reasons largely given by Mr. Rigby, I agree that the amendments to the TIC did not alter the parties' rights and obligations under the Agreement. Although it was for the benefit of the purchaser, the TIC was a contract between IDM and the defendant, and IDM was free to indicate the terms and conditions on which it was prepared to offer the insurance. In fact, in deleting the amendments, IDM was signaling that it was prepared to shoulder the risks based on whatever indemnification it had received from Replay and assurances from the Association (if any), even in absence of the Declaration being amended prior to the creation of the insured interest.

[115] The terms of the TIC could be varied so long as it did not derogate from the requirement in cl. 4, mainly that it would be for the sale amount (which it was) and that it was to "*evidence that the Seller is vested with fee simple title to the Unit, free and clear of all liens, charges, encumbrances, exceptions, or qualifications whatsoever save and except for the Permitted Exceptions."* As discussed, this definition was aligned with the description of the property which the purchaser agreed to accept in the Agreement, and which was consistent with what was in the Declaration. Thus, I do not find that there was any derogation from cl. 4(b) of the Agreement.

The issue of time of closing

[116] The plaintiff also took the point that the 21 days allowed under the NTC had expired by the time of the receipt of the notification from Mr. Riviera of the removal of 6(a) (communicated at 6:33 p.m., when the notice was said to expire at 5:00 p.m.). Mr. Rigby argued that the Agreement provides for 21 'calendar days' to comply with the NTC, which he says excludes Saturday and Sundays, being non-working days, and would therefore take the sunset date to the 9th and not 1st March 2019.

[117] I do not think Mr. Rigby is right in his submission that a 'calendar day' is synonymous with a working day. A calendar day is simply a reference to a full 24-hour period. In fact, the definition which he quoted from the *Encyclopaedia of Forms and Precedents* describes a 'calendar day' as from "midnight to midnight." Additionally, the Agreement simply stipulates 21 calendar days; it did not say, for example, by close of business or by any specific time on the 21st day. Neither was a time stipulated in the NTC, which in any event could not deviate from what was specified in the Agreement. I therefore find that

the Notice did not expire until 12 midnight on the 1st March. Even if I am wrong in this, it seems to me that the purchaser did not treat the contract as terminated at 5 p.m. on the 1 March 2019, as she visited the property on the 6 March to do a final inspection, and this could only be done if the purchaser was treating the Agreement as still on foot.

[118] The rescission was therefore not effective based on an alleged breach of clause 4(b) of the Agreement, as I do not find that there was such a breach.

CONCLUSION AND DISPOSITION

[119] For the reasons articulated above, I therefore refuse the declaration sought by the plaintiff that the Agreement was effectively rescinded and/or terminated. Consequently, I refuse to order the refund of the deposit.

[120] As to the 1st declaration sought by the defendant on the counterclaim that the contract is a valid and binding agreement and the plaintiff is contractually bound to complete the purchase of Unit 901, I say firstly that it is not part of the Court's function on a vendor and purchaser summons to determine the existence or validity of the contract; the process binds the parties to admit the contract. Secondly, it follows from the finding that the contract was not validly rescinded or terminated that it potentially remains on foot. I say potentially because events have intervened which may or may not have affected the position and circumstances of the parties. However, based on the case as was argued before me, I would order that the deposit is to remain with the stakeholder pending completion of the contract or, failing completion, it stands forfeited to the vendor.

[121] I also refuse the declaration sought by the defendant that the plaintiff is estopped from raising issues relating to the unit size and entitlement because she is alleged to have waived the right to bring any claim in this regard.

[122] Costs will be those of the defendant to be taxed if not agreed, although I think it would be appropriate in the circumstances of this case and in my discretion to reduce the defendant's costs by 15%. I think this reduction of costs is appropriate because the defendant has not been successful on every point and was responsible for some delay in the hearing due to the unavailability of one of its main witnesses.

Concluding remarks

[123] Before ending this ruling, it is appropriate to make two general observations. The first is that the facts of this case were exceptional, and it must be appreciated that the outcome turned largely on the terms of the Agreement for Sale. It therefore does not purport to lay down any general principles regarding the conveyance of condominium title.

[124] Secondly, it is apparent that the Condominium Act has not kept pace with the mischief which has been generated by some of its provisions. These difficulties are strikingly illustrated by transactions involving the sale (or resale) of units, which seemingly cast an onerous burden on a prospective purchaser to ascertain that the building and units comply with near exactitude to the Declaration and registered plan. It has been left for the courts to attempt to ameliorate some of these issues by resort to common law and equitable principles on a case-by-case basis, which has not always produced a uniform approach. The time may well have come for there to be a review and revision of the Act benchmarked on other jurisdictions to address the unique issues that have developed regarding condominium title. It is noted, for example, that modern condominium legislation in Canada and elsewhere provide for what is called an "estoppel certificate" to be provided by the Association to the purchaser of a resale unit, providing information in relation to the condominium and unit which creates an estoppel in favour of the purchaser, and removes some uncertainty out of the transaction.

[125] It only remains to be said that this case was exceptionally well argued by counsel on both sides, and they put their respective clients' case as well as could be done. I am also grateful for their patience in awaiting these reasons.

24 February 2022

Klein, J
Justice