COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2019/CLE/gen/01331

BETWEEN

BESING SHORES LIMITED

Plaintiff

AND

LITTLE BAY PARTNERS LLC

Defendant

Before: The Honourable Madam Senior Justice Indra H. Charles

Appearances: Mrs. Gail Lockhart-Charles KC and Ms. Candice Ferguson of Gail Lockhart-Charles for the Plaintiff
Mr. Brian Simms KC and Mr. Valdere Murphy of Lennox Paton for the Defendant

Hearing Dates: 3 May 2022, 4 May 2022, 5 October 2022 (oral submissions)

Effect and Meaning of the use of the words "more or less" in Agreement for Sale – Contract – Rescission – Misrepresentation – Notice to Complete – Deficiency - Discrepancy between the size of the property as represented in the Agreement for Sale and the actual size of the property – Damages – Costs

Expert evidence – Partiality and independence of expert witness – Expert's wife's firm engaged by Plaintiff - Admissibility of evidence – Weight to be attached

The Plaintiff (as Purchaser) and Defendant (as Vendor) entered an Agreement for Sale ("the Agreement") dated 2 May 2019 for the sale of the Property in Harbour Island for a purchase price of US$4.8 million.

While the Agreement provided that the Property being sold was 2.355 acres, the northern, southern and western boundaries of the Property were described in the Agreement with the terminology *"more or less."* The Purchaser had a survey of the Property carried out after the Agreement was signed, which disclosed that the size of the Property was 6,272.64 square feet less than 2.355 acres. A later survey reflected that the size of the Property was 6,359.76 square feet. This evidence was not challenged. The Defendant served the Plaintiff with a Notice to Complete dated 12 September 2019 which provided that, if the Plaintiff failed to complete the transaction within (21) days, the deposit in the amount of US$480,000 ("the Deposit") would be

forfeited to the Defendant. The Defendant contended that the discrepancy between the size of the Property as reflected in the Thompson Survey and the size of the Property in the Agreement fell within the scope of the words *"more or less"* and, therefore the Notice to Complete was valid. The Defendant contended that it was thus entitled to forfeit the Deposit if the Plaintiff failed to complete the transaction. The Plaintiff maintained that the discrepancy in the size of the Property was not covered by the words "*more or less*" and that it was entitled to rescind the Agreement and request the return of the deposit.

In determining whether the Plaintiff or Defendant is entitled to the Deposit, the first issue to be determined by this Court is what is the effect and meaning of the use of the term *"more or less"* in the Agreement for Sale and does the size discrepancy between the size of the Property as reflected in the Thompson Survey and the size of the Property as reflected in the Agreement for Sale fall within the scope of the term *"more or less".*

HELD: Finding that the deficiency of 6,359.76 square feet in the quantum of the Property was too substantial to be encompassed in the words "*more or less",* the Plaintiff is entitled to avoid the transaction and receive its deposit back together with damages associated with the transaction to be assessed by the Registrar upon production of invoices within 21 days hereof and costs to be taxed if not agreed.

1. The general principles on the independence and unbiased opinion of an expert are conveniently set out by Nelson J in **Armchair Passenger Transport Ltd v Helical Bar plc** [2003] EWHC 376 at para. 29. The fact that the expert's wife's firm was engaged by the Plaintiff from the outset when it decided to purchase the Property does not mean that the expert cannot be independent and objective. The fact of his connection with the Plaintiff might affect what weight, if any, the Court, as the arbiter, attached to his evidence and opinions: **Miguel Fernander v Neptune Watertoys Limited d/b/a Blue Adventures** 2013/CLE/gen/00180 at paras 92-94 relied upon.

2. On a balance of probabilities, the evidence of the Plaintiff and its expert witnesses are preferred to that of the Defendant and its expert witnesses. The evidence of the Plaintiff's expert witness, the surveyor, is unchallenged that the Property as described in the Agreement consisted of 2.355 acres (or 102,583.80 square feet) of land. On his Second Survey on 20 May 2019, the total area of the Property was found to be 2.209 acres (96,224.04 square feet); a difference of 6,359.76 square feet. The deficiency in the quantum of the Property is too substantial to be encompassed by the words "*more or less":* **Nashville Contractors Ltd v Middleton** [1983] O.J. No. 341; **Bouskill v Campea** [1976] Carswell Ont 831, CA; **Winch v Winchester** (1812) 35 ER 146 applied. **Wilson Lumber Co. v Simpson** [1910] O.J. No. 56 distinguished.

3. Given that the shortfall of 6,359.76 square feet was too substantial to be encompassed by the words "*more or less"*, the Plaintiff was entitled to rescind the Agreement for Sale and get back its deposit of US$480,000. The Plaintiff cannot be required to complete the transaction since the Defendant misrepresented the acreage of the land it purported to sell to the Plaintiff. The Plaintiff is entitled to the costs including architectural and design fees, surveyor costs, shipping calls and transaction legal fees.

JUDGMENT

Charles Snr. J:

[1] The Plaintiff ("Besing Shores") contracted to purchase the property known as "Beacon Hill" in Harbour Island ('the Property") comprising 2.355 acres of land "*more or less*" for US$4.8 million. Besing Shores paid a deposit of US$480,000 to the vendor ("Little Bay"). Subsequent to the payment of the deposit and, as part of its due diligence investigations before the contemplated sale, Besing Shores discovered that there was a discrepancy of 6,359.76 square feet between the size of the Property as represented in the Agreement for Sale ("the Agreement") and the actual size that the Property when it was surveyed by its surveyor. Besing Shores refused to complete the sale contending that the discrepancy in the size of the Property was not covered by the words *"more or less*" in the Agreement. Little Bay had not challenged the survey findings but maintains that the discrepancy does not amount to a breach of contract because the inclusion of the words *"more or less*" in the description of the Property fell within the scope of the Agreement.

[2] The pivotal issue before the Court is whether the discrepancy between the size of the Property as reflected in the survey carried out by Besing Shores' surveyor, Mr. Donald Thompson and the size of the Property in the Agreement fell within the scope of the words *"more or less"* and therefore the Notice to Complete was valid. Little Bay contends that it was entitled to forfeit the Deposit since Besing Shores failed to complete the transaction.

The pleadings in a nutshell

[3] By Writ of Summons indorsed with Statement of Claim filed on 17 September 2019, Besing Shores seeks the following relief against Little Bay namely:

(1) Rescission of the Agreement for Sale dated 2 May 2019;

(2) Repayment of the sum of US$480,000;

(3) A declaration that the Notice to Complete served on behalf of Little Bay is null and void and/or of no effect on the ground the Agreement for Sale has been rescinded;

(4) An order setting aside the Notice to Complete and/or declaring it ineffective;

(5) Damages for misrepresentation;

(6) Interest pursuant to Civil Procedure (Awards of Interest) Act and,

(7) Costs.

[4] In its Defence and Counterclaim filed on 26 June 2020, Little Bay denies that Besing Shores is entitled to any of the relief sought in the Writ of Summons and counterclaimed, in the main, for the following:

(1) A declaration that Little Bay has shown a good root of title in relation to the Property subject to the Agreement between Little Bay and Besing Shores;

(2) An Order that Besing Shores has breached the terms of the Agreement;

(3) A Declaration that the Notice to Complete dated 12 September 2019 which was issued by Little Bay to Besing Shores in accordance with Clause 11 of the Agreement is valid;

(4) An Order that the deposit of USD$480,000 held by Messrs. King & Co as stakeholders shall be forfeited to Little Bay and;

(5) An Order setting aside Besing Shores' purported rescission of the Agreement and/or a Declaration that Besing Shores' notice to rescind is invalid.

Factual matrix

[5] On 2 May 2019, Little Bay as Vendor entered into the Agreement with Besing Shores as Purchaser relative to the sale of Property. Item 10 of the Schedule to the Agreement describes the Property as:

> **"ALL THAT piece parcel or lot of land comprising <u>Two and Three Hundred and Fifty-five Thousandths (2.355) Acres</u> being Parcel**

Number One (1) on the Plan of the Subdivision by Bahamas Calypso Music Limited of a portion of Lot Number Seventeen (17) and a portion of Lot Number Eighteen (18) in a Plan of Harbour Island one of the Islands of the Commonwealth of The Bahamas and bounded NORTHWARDLY by Parcel Number Four (4) of the said Subdivision and running thereon Three Hundred and Forty-four and Sixty-nine Hundredths (344.69) feet more or less to the Harbour at High Water Mark EASTWARDLY by a Twenty (20) foot wide right of way now formerly the property of Bahamas Calypso Music Limited and running thereon Two Hundred and Fifty-seven and Eighty Hundredths (257.80) feet SOUTHWARDLY partly by the Eastern and the Western portion of Parcel number One A (1A) of the said Subdivision now the property of the Vendor and now or formerly the property of the said Bahamas Calypso Music Limited respectively and partly by a road reservation and running thereon jointly from the said Twenty (20) foot wide right of way to the Harbour at High Water Mark Three Hundred and Seventy-one and Fifty-one Hundredths (371.51) feet more or less and WESTARDLY by the Harbour and running thereon Two Hundred and Seventy-four and Fifty-one Hundredths (274.51) feet more or less which said piece parcel or lot of land has such position shape marks boundaries and dimensions as are shown on the diagram or plan attached to an Indenture of Conveyance dated the 1st day of November, 1990 made between Ingrid Hamilton of the one part and Regina Choukroun of the other part and now of record in the Registry of Records in the City of Nassau in the Island of New Providence another of the islands in the said Commonwealth in Volume 5546 at pages 167 to 174 and is delineated on that part which is coloured PINK thereon…." [Emphasis Added]

[6] The Agreement also contained the following representations and clauses:

1) The Vendor will sell and the Purchaser will purchase the fee simple estate in possession of the hereditaments in *Item 10* of the Schedule to the Agreement. (Clause 1 of the Agreement);

2) The said hereditaments are being sold together with the rights of way and easements over the roadways and the restrictive covenants (if any) respectively described in *Item 10* of the Schedule but otherwise free from encumbrances. (Clause 2 of the Agreement);

3) Updated Survey Plan & Survey Markers: *The Purchaser may (but is not obligated to), at its own cost and expense, (i) obtain an up to date survey plan and (ii) ensure that all relevant survey markers are in place (with steel and cement) on the said hereditaments.* For this purpose the Vendor hereby

agrees that the Purchaser and/or its agents (hereinafter collectively called "Authorised Visitors") may enter the said hereditaments at any reasonable time within Two (2) months of the date hereof provided that no such entry upon the said hereditaments shall be deemed a waiver of the Purchaser's right to raise requisitions or objections to any matters affecting the documentary title to the said Property. The Purchaser agrees to indemnify and save the Vendor harmless from and against any and all claims, demands, charges, expenses or judgments, property damage, diminution in value, or other liability which the Vendor may incur arising out of such entry and activity by Authorised Visitors, including reasonable attorneys' fees. The Authorised Visitors shall promptly restore the said Property to its condition prior to such entry, except that if the Purchaser completes the Sale, it shall have no obligation to restore the said Property. (Schedule, Item 11 (2) of Agreement).

4) Dock Improvements and Dredging: The Purchaser shall at its own cost and expense obtain the relevant government approvals to improve the existing dock (or build a new dock) (the "said Dock") and to dredge the area from the said dock to deeper water (the said "Dock Approval"). In this regard, the Vendor hereby agrees and covenants:

    i) to ensure that all Dock License fees for the existing Dock are paid up to end of 2019;

    ii) that the Purchaser may apply for the said Dock Approval in the Vendor's name (if required);

    iii) to use the Vendor's best efforts to supply the Purchaser with any and all information and/or documents required by the relevant government departments for the said Dock Approval.

For the avoidance doubt this Agreement is NOT subject to or conditional on the Purchaser obtaining the said Dock Approval.

This clause shall survive completion of the sale and purchase herein contemplated. (Schedule, Item 11 (4) of Agreement for Sale).

5) That at any time on or after the completion date, a party who is ready, able and willing to complete may give the other notice to complete, See Clause 11 and 12 of the Agreement;

6) That the parties were to complete the Agreement within a period, not being less than fourteen (14) days of giving a notice to complete and that for this purpose time was of the essence of the Agreement, See Clauses 11 and 12 of the Agreement; and

7) That if the Purchaser failed to complete in accordance with the terms of the notice to complete, the Vendor may rescind the Agreement and on doing so, forfeit the Deposit, See Clause 11 of the Agreement. [Emphasis added]

[7] The purchase price under the Agreement was US$4.8 million and Besing Shores was required to pay a deposit in the amount of US$480,000 representing 10% of the purchase price which it did to Messrs. King & Co. King & Associates still holds the Deposit as stakeholder pursuant to the Agreement.

[8] On 17 September 2019, Besing Shores purported to rescind the Agreement alleging that Little Bay made misrepresentations relative to the size of the Property namely the Property was 6,272.64 square feet less (0.144 acres less or 6.11% less) than was represented in the Agreement [i.e. 2.355 acres]. In fact, after a second Thompson Survey was carried out, Besing Shores now states that the Property is 6,359.76 square feet less than what was represented in the Agreement. Little Bay urges the Court not to countenance such an attempt by Besing Shores specifically since it was pleaded at paragraph 7 of their Statement of Claim that the Property was 6,272.64 square feet. Whether the Property is 6,272.64 square feet or 6,359.76 square feet less, there is an unchallenged size discrepancy as reflected in the two Thompson Surveys and the size of the Property as reflected in the Agreement (and the Chee-A-Tow Survey).

[9] Besing Shores says that because the size difference is significant and material, it is within its rights to rescind the Agreement. On the other hand, Little Partners argued that it did not contract to sell Besing Shores *exactly* 2.355 acres but rather the parties agreed expressly and/or impliedly that the size of the Property would be 2.355 acres "*more or less*".

The issues

[10] The parties identified nine (9) issues. In my opinion, the following issues arise for consideration namely:

(1) Whether Besing Shores' purported rescission of the Agreement for Sale was valid?

(2) Whether Little Bay has shown a good root of title in relation to the Property? If so, whether Little Bay's Notice to Complete was valid in accordance with the Agreement for Sale and Besing Shores has breached the terms of the said Agreement?

(3) What is the effect and meaning of the use of the words "*more or less*" in the Agreement for Sale and does the discrepancy between the size of the Property as reflected in the Thompson Survey and the size of the Property as reflected in the Agreement for Sale (and the Chee-A-Tow Survey) fall within the scope of the words *"more or less"?*

(4) Whether Besing Shores or Little Bay is entitled to the deposit of $480,000 held by King & Co?

(5) Whether either party has suffered any loss or damage? If so, what is the measure of damages?

[11] In my opinion, the pivotal issue relates to the effect and meaning of the use of the words *"more or less*" in the Agreement and whether the discrepancy between the size of the Property as reflected in the Thompson Survey and the size of the

Property as reflected in the Agreement (and the Chee-A-Tow Survey) fall within the scope of the words *"more or less"?*

The evidence

[12] The evidence for Besing Shores came from Gil Besing and his two expert witnesses, Donald Thompson and Mr. Teófilo Victoria while the evidence on behalf of Little Bay came from Charles P. Darby III and his two expert witnesses, James Mosko and Elbert Thompson.

Preliminary objection: challenge to partiality and independence of Teófilo Victoria

[13] Learned Counsel Mrs. Lockhart-Charles KC appearing as Counsel for Besing Shores, applied to have Mr. Victoria deemed an expert in Architectural Urbanism and Planning. Learned Counsel Mr. Murphy who appeared with Mr. Simms KC for Little Bay raised the objection that, under the Professional Architects Act, 1994, it is an offence to engage in any architectural practice in The Bahamas without a licence and therefore, Mr. Victoria should not be deemed an expert. This objection has no merit as Mr. Victoria is here to give expert testimony and not to practise his profession in the Bahamas.

[14] Mr. Murphy then launched an attack at Mr. Vitoria's competency as an expert witness. According to him, Mr. Victoria's evidence should be declared inadmissible and/or ought to be given no weight due to his clear partiality and conflict of interest.

[15] The general principles on the independence and unbiased opinion of an expert are conveniently set out by Nelson J in **Armchair Passenger Transport Ltd v Helical Bar plc** [2003] EWHC 376. After considering a wealth of authorities, Nelson J stated at para 29 that:

> **"29. The following principles emerge from these authorities: -**
>
> **i) It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings.**
>
> **ii) <u>The existence of such an interest, whether as an employee of one of the parties or otherwise, does not automatically</u>**

> **render the evidence of the proposed expert inadmissible. It is the nature and extent of the interest or connection which matters, not the mere fact of the interest or connection.**
>
> **iii) Where the expert has an interest of one kind or another in the outcome of the case, the question of whether he should be permitted to give evidence should be determined as soon as possible in the course of case management.**
>
> **iv) The decision as to whether an expert should be permitted to give evidence in such circumstances is a matter of fact and degree. The test of apparent bias is not relevant to the question of whether or not an expert witness should be permitted to give evidence.**
>
> **v) The questions which have to be determined are whether:**
>
> > **(i) the person has relevant expertise and**
> >
> > **(ii) he or she is aware of their primary duty to the Court if they give expert evidence, and willing and able, despite the interest or connection with the litigation or a party thereto, to carry out that duty.**
>
> **vi) The Judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the Civil Procedure Rules.**
>
> **vii) If the expert has an interest which is not sufficient to preclude him from giving evidence the interest may nevertheless affect the weight of his evidence.** [Emphasis Added]

[16] Mr. Murphy contended that Mr. Victoria has an apparent or actual interest in the outcome of these proceedings. In fact, Mr. Victoria confirmed that his wife [i.e., Maria de La Guardia] and de La Guardia Victoria Architects and Urbanists ("DLGVA") [i.e., the firm of which Mr. Victoria is a principal] were engaged to conduct work on behalf of Besing Shores previously and DLGVA have done work for Mr. Besing for at least nine years.

[17] The line of questioning relative to Mr. Victoria (and DLGVA) relationship with Mr. Besing was as follows: see Transcript of Proceedings dated 3 May 2022, page 63, lines 4-12):

"Q: Okay. Thank you. Mr. Victoria can you, please, confirm whether you or your company has done work for Mr. Besing in the past in –

A: Yes.

Q: -- The Bahamas or otherwise?

A: Yes. We have.

Q: So Mr. Besing is a valuable and important client of your company; correct?

A. Absolutely." [Emphasis added]

[18] Mr. Murphy intimated that it would appear that DLGVA and Mr. Besing have a tight-knit business relationship (or otherwise). According to him, Mr. Victoria and DLGVA are still engaged by Besing Shores (and Mr. Besing) to carry out other work. As the cross-examination continued Mr. Victoria stated as follows (Transcript of Proceedings dated 3 May 2022 at page 77, lines 20-25):

"Q: So you are engaged and still engaged by the Plaintiff, in this case, to carry out other work, than testifying today; is that correct?

A: Yes." [Emphasis added]

[19] Mr. Victoria confirmed that he benefits from the profits of DLGVA and accepted that DLGVA was paid for services rendered vis-à-vis the Property. At page 62, lines 29-32 of the Transcript of Proceedings of 3 May 2022, when questioned, he stated:

"Q: And you benefit from the profits of your company, correct?

A: Certainly.

Q: And Mr. Besing, relative to the services provided –and just for clarity, not your services as an expert or purported expert, but rather, for the project – paid your company $35,652.76? Correct?

A: You know, I don't know the exact figure; but we were -- we were remunerated, of course." [Emphasis added]

[20] Mr. Victoria confirmed that he was personally involved in the project which is the subject matter of these proceedings. During cross-examination, at page 57, lines 31-32 of the Transcript of Proceedings dated 3 May 2022, Mr. Victoria said:

> **"Q: …So you are not directly involved in the project; were you?**
>
> **A: Well, yes. I might not be part of this chain of emails; but I know everybody, for instance, in this email that you're showing us from Monique Cartwright. I know Mr. Blacquiere. I know Mr. Breyfogle. I've worked with all these people on multiple projects that happened simultaneously.**
>
> **Q: So you worked with them on this project; correct?**
>
> **A: I worked with them in this project to the extent that I'm involved in planning at DLGV Architects & Urbanists.**
>
> **Q: It's interesting your name doesn't appear on any of the correspondence, but you were involved so that's your evidence. If I can take you back – so you're opining again on work that you were involved in and purporting to give expert evidence on it, as well; correct?**
>
> **A: Yes. I think I understand the point you're making."**

[21] According to Mr. Murphy, Mr. Victoria and DLGVA were intimately involved in the project which is the subject matter of the proceedings, that is, Mr. Victoria's firm was engaged by Besing Shores from the outset when it decided to purchase the Property.

[22] In **Miguel Fernander v Neptune Watertoys Limited d/b/a Blue Adventures** 2013/CLE/gen/00180**,** this Court considered the independence of the expert witness and stated at paras 92-94:

> **"[92] The Defendant raised an issue as to the independence of Dr. Ekedede. Therefore, I shall remind experts of their overriding duty to the court. <u>An expert's duty extends to assisting the court *impartially* on the matters relevant to his/her expertise. Put another way, an expert witness must provide independent assistance to the court by way of objective unbiased opinion in relation to matters within the expert's expertise. He must not omit to consider material facts which could detract from his or her concluded view.</u>**

> **[93] In the Trinidadian case of Darwin Azad Sahadtah and Kamalar Mohammed Sahadath v The Water And Sewage Authority of Trinidad and Tobago Claim No. CV2016-01737, Kokaram J. had this to say, at pages 91-92:**
>
> > **"91.Experts cannot usurp the function of the Judge as the ultimate arbiter of fact. It is for the Court to determine the issue of causation and loss based upon the totality of the evidence…**
> >
> > **92. In The Ikarian Reefer [1993] F.S.R 563 Justice Cresswell set out the duties and responsibilities of expert witnesses as follows:**
> >
> > > **"1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation: see Whitehouse v Jordan ((1981) 1 WLR 246, 256) per Lord Wilberforce.**
> > >
> > > **2. Independent assistance should be provided to the court by way of objective unbiased opinion regarding matters within the expertise of the expert witness; see Polivitte Ltd v Commercial Union Assurance Co plc ((1987) 1 Lloyd's Rep 379, 386) per Mr Justice Garland, and Re J ((1990) FCR 193) per Mr Justice Cazalet. An expert witness in the High Court should never assume the role of advocate."**
>
> **[94] Expert witnesses must act independently regardless of by whom he or she is paid. Their duty is to assist the court, not the party who pays him/her. It is then for the Court to determine the issue of causation based upon the totality of the evidence."** [Emphasis Added]

[23] Mr. Murphy submitted that, of particular note, despite having a duty to do so, Mr. Victoria in his witness statement failed to disclose the fact that there was a longstanding relationship between DLGVA and Gil Besing nor was it disclosed in Mr. Victoria's witness statement that he was personally involved in the project that is the subject matter of these proceedings from the outset. According to him, this involvement goes beyond his purported evidence as an expert witness. Equally, Besing Shores also failed to disclose this conflict of interest to the Court.

[24] Mr. Murphy referred to the English Court of Appeal case of **Toth v Jarman** [2006] EWCA Civ 1028 on disclosure. There, Sir Mark Potter P stated:

"[102] However, while the expression of an independent opinion is a necessary quality of expert evidence, it does not always follow that it is sufficient condition in itself. Where an expert has a material or significant conflict of interest, the court is likely to decline to act on his evidence, or indeed to give permission for his evidence to be adduced. This means it is important that a party who wishes to call an expert with a potential conflict of interest should disclose details of that conflict at as early a stage in the proceedings as possible.

…

[108] … If there was a conflict of interest which was not obviously immaterial, it should have been disclosed by Professor Hull to the defendant's solicitors and by them to the appellant's solicitors. … The likelihood is that the relevant information would not have been known to Mr Toth or to the court without disclosure and explanation, and it plainly raised a question as to a conflict of interest. In such a situation, the expert should disclose such information to enable the court and the other party properly to assess the conflict of interest**.**

…

[112] … We can understand that (in the absence of guidance from the court) a party who calls an expert witness at trial, or serves an expert's report in advance of trial, may be aware of a potential conflict of interest but consider that it is not material and that it therefore need not be disclosed. However, for the future, we do not consider that a party should take the course of non-disclosure. We say this because it is for the court and not the parties to decide whether a conflict of interest is material or not. The court may take a different view from that of the parties as to whether an expert has a conflict of interest which might lead the court to reject the independence of his opinion … Similarly, in the interests of transparency and of deflecting suspicion, the other party ought to have the information as soon as possible. We do not consider that the parties can properly agree that a conflict of interest which is otherwise disclosable need not be drawn to the attention of the court. A party who is in the position of wanting to call an expert with a potential conflict of interest (other than of an obviously immaterial kind) should draw the attention of the court to the existence of the conflict of interest or possible conflict of interest at the earliest possible opportunity. By the same token, it is obviously desirable for the other party to make any objection that it may have to the admission of expert evidence at as an early a stage in the proceedings as practicable.

[113] The obligation to disclose the existence of a conflict of interest in our judgment stems from the overriding duty of an expert, to which we have already referred and which is clearly laid down in CPR 35.3, and also from the duty of the parties to help the court to further the overriding objective of dealing with cases justly (CPR 1.3). The court needs to be assisted by information as to any potential conflict of interest so that it can decide for itself whether it should act in reliance on the evidence of that expert. [Emphasis added]

[25] According to Mr. Murphy, Mr. Victoria did not appear to appreciate his duty to give objective and unbiased evidence to the Court. In fact, when it was put to him that his expert evidence was not given with impartiality, his response was "*I understand*." The fact that Mr. Victoria's evidence (during cross-examination) was that he and/or DLGVA worked with Scott Blacquiere (who is the principal of BRON) in relation to the project casts even further doubt on the credibility of his evidence. That is, it is not apparent whether BRON Ltd produce the drawings (which were approved) for the construction of a palapa in isolation or whether BRON Ltd worked in collaboration with DLGVA relative to same. According to Mr. Murphy, Mr. Victoria's witness statement also does not address this fact.

[26] Mr. Murphy argued that the issues with Mr. Victoria's evidence did not stop there. For example, Mr. Victoria at paragraph [10] of his witness statement purports to estimate the total costs of demolition and construction of a new concrete ramp on the Property at $220,000.00 but Mr. Victoria did not produce a quote to evidence how he arrived at the sum.

[27] Mr. Murphy argued that, for the above reasons, Mr. Victoria's evidence cannot objectively be described as an *"independent product of the expert uninfluenced as to form or content by the exigencies of litigation,"* nor can his evidence be described as an *"objective unbiased opinion regarding matters within the expertise of the expert witness."*

[28] The fact that Mr. Victoria confirmed that his wife [i.e., Maria de La Guardia] and de La Guardia Victoria Architects and Urbanists ("DLGVA") were engaged to conduct work on behalf of Besing Shores previously and DLGVA have done work for Mr. Besing for at least nine years does not mean that Mr. Victoria is incapable of fulfilling the functions of an expert witness. The question whether Mr. Victoria is able to give expert evidence depends on whether: (i) it can be demonstrated that he has the relevant expertise and (ii) that he is aware of his primary duty to the Court is to give expert evidence.

[29] Mr. Victoria is a graduate of Columbia University with a Master's Degree in Architecture and Urban Design. He is currently an Associate Professor at the University of Miami and has taught Urban Design and Land Planning for 40 years. He and his wife have been in private practice since 1987 and they have designed multiple land use master plans for town developments, resorts and residential communities in Norman Cay, Grand Bahama and the first masterplan for Old Fort Bay in New Providence. His Curriculum Vitae, which is attached, is very impressive.

[30] He has indicated to the Court that he understands his role as an expert witness. I believe him. The fact that Mr. Victoria's firm was engaged by Besing Shores from the outset when it decided to purchase the Property does not mean that he cannot be independent and objective. The fact of his firm's connection with Besing Shores might affect what weight, if any, the Court, as the arbiter, attaches to his evidence and opinions.

[31] As I understand the law, if an expert's evidence and opinions are not challenged, the court is still not bound to accept it as true and accurate. The Court has a discretion to determine what expert evidence and opinion(s) it chooses to accept or reject even if it is unchallenged.

[32] In my analysis of the evidence, I shall consider the various factors when assessing his reliability including his qualifications and experience as an expert, the methodology used, the evidence upon which he relies and any limitations of uncertainties associated with his evidence. I shall also keep a close eye on his objectivity particularly in giving opinions. At the end of the day, I shall determine what weight, if any, to give to his evidence. That said, based on his qualifications and experience and the fact that he acknowledges that he owes a duty to the Court, I will deem him an expert in in Architectural Urbanism and Planning.

Discussion, analysis and conclusion

The effect and meaning of the use of the words "more or less" in the Agreement

[33] In my opinion, addressing the pivotal issue now may assist in the determination of the other issues.

[34] The issue before me is clear: was the deficiency of either 6,272.64 square feet as pleaded or 6,359.76 square feet as reflected in the Second Thompson Survey (which I accept) in the size of the Property too substantial to fall within the scope of the words "*more or less"* in the description of the Property being 2.355 acres *more or less* as reflected in the Agreement (and the Chee-a-Tow Survey)?

[35] If it is, then Besing Shores is entitled to avoid the transaction and get its deposit back. If it is not, then Besing Shores is guilty of breach of contract and liable to Little Bay in damages.

[36] Besing Shores contends that Little Bay did not have good marketable title to the Property due to the size discrepancy between the size of the Property as reflected in the Thompson Survey and the size of the Property as reflected in the Agreement for Sale (and the Chee-A-Tow Survey).

[37] On the other hand, Little Bay argues it did not contract to sell *exactly* 2.355 acres, but rather, 2.355 acres *"more or less"*.

[38] Mr. Murphy referred to **Stroud's Judicial Dictionary of Words and Phrases 5th edn** which provides useful guidance on the meaning of the phrase *"more or less".* Specifically, at page 1629-1630, it is stated that:

> **"MORE OR LESS. (1) " 'About,' and 'more or less,' seem to be words of general import, and I should have much difficulty in saying that evidence ought to be received to ascertain their meaning" (per Littledale J., Cross v Eglin, 9 L.J.O.S.K.B. 145); they frequently, if not generally, connote an estimate and not a warranty (McLay v. Perry, 44 L.T. 152).**
>
> **…….**
>
> **(8) "The words 'more or less' or 'thereabouts,' in a contract for sale of realty, <u>will only cover a moderate excess or deficiency</u>, and will**

> **never be suffered to be the instrument of fraud" (Add.C. (11th ed.) 502; see Day v Fynn, Owen, 133; Dart (8th ed.) 565). They would cover 5 out of 41 acres (Winch v. Winchester, 1 V. & B. 375,) but not 100 out of 349 acres (Portman v. Mill, 8 L.J. Ch. 161)…"**

[39] Mr. Murphy cited a number of Canadian cases which provides persuasive guidance on the effect and meaning of the words "*more or less*".

[40] In **Wilson Lumber Co. v Simpson** [1910] O.J. No. 56, the vendor thought that the property in question had a street frontage of 110 feet, more or less, because that was how the property had been described in assessment notices. The actual frontage was instead 98 feet 6 inches. The purchaser failed to communicate that his building plans for the property required a property of 110 feet and, significantly the price of the property was a block sum and not expressed to be related to the dimensions of the property. When the true dimensions of the property were determined, the purchasers demanded an abatement of the purchase price and subsequently sued for specific performance with abatement. Meredith C.J., held that the purchaser was entitled to the property *without* any abatement on the basis that the measurement of the depth of the property were controlled by the word *"more or less"* and *the deficiency was not substantial enough* to raise a presumption of fraud or gross mistake. The Ontario High Court of Justice Divisional Court affirmed the judgment of Meredith C.J., and Boyd C expressly found at paragraph [6] *"had the vendor sought specific performance, the purchaser might have had difficulty in answering."*

[41] In **Nashville Contractors Ltd v Middleton** [1983] O.J. No. 341, an action was commenced for damages arising out of the non-completion of a contract for the sale of land. The land was described in the contract as comprising 2.5 acres *"more or less"* but had an actual area of approximately 1.8 acres. The defendant refused to close without an abatement in price which the plaintiffs were not prepared to accept. The plaintiffs resold the land to a third party at a lower price and brought the action to compensate them for the loss of their bargain with the defendant. Saunders J held at para. 18 that:

> **"The variance is not small. The contract describes an area of land that is approximately 39 per cent larger than the actual area. Looked at another way, the actual area is approximately 28 per cent less than that described in the contract. There is not a case to which I was referred where a purchaser was compelled to complete with so great a discrepancy between the existing property and its contractual description."**

[42] Mr. Murphy submitted that the size discrepancy is *not* substantial enough to entitle Besing Shores to avoid the transaction. He relied on the evidence of their expert, Elbert Thompson who was deemed an expert in real estate: sale and appraisals to substantiate his point that the linear frontage and buildable area is the same in both Surveys. He contended that Mr. Victoria failed to acknowledge this fact.

[43] Mr. Murphy argued that, in any event, Little Bay has shown a good marketable title vis-à-vis the Property and the size discrepancy was *not* substantial enough to entitle Besing Shores to avoid the transaction. He further argued that (i) the difference in the size of the Property would not, in any significant way, have affected Besing Shores' use or enjoyment of the Property; (ii) the value of the Property was not adversely impacted as a result of the size difference and (iii) it would have been *"very simple"* and *"very easy"* to reclaim the land that was lost as emphasized by Little Bay's other expert, James Mosko.

[44] To my mind, the case of **Bouskill v Campea** [1976] Carswell Ont 831 from the Ontario Court of Appeal (cited by Little Bay) is useful as it narrows the issue which now confronts me. The brief facts are that Ms. Bouskill (the appellant) was the owner of a piece of property which she listed for sale with a real estate agent at the price of $74,900. The property was described as Part Lots 8 and 9, Plan F.21, being *100 feet more or less by 172 feet more or less* with a private side drive and being on the east side of Southdown Road on which is situate house No. 943 South down Road. In fact, the property had a frontage on Southdown Rd. of 100 ft. and a depth back from the street of 160 ft. 11 3/4 inches.

[45] Emilio Campea ("the respondent"), having seen a "For Sale" sign on the property, contacted the real estate agent and submitted an offer of $72,500. He paid a

deposit in accordance with the terms of the agreement. On the day fixed for closing, the respondent discovered the error in the measurement of the property and refused to complete.

[46] The issue before the trial Judge was whether the deficiency of 11 feet ¼ inch in the depth of the property was too substantial to be encompassed by the words "*more or less*" in the description in the agreement of purchase and sale?

[47] Mr. Justice Donnelly held that the deficiency in the quantum of the property was too substantial to be encompassed by the words "*more or less*". The respondent did not at the time disclose to either the vendor or her real estate agent that he had offered to purchase the property with a view to attempting to have it re-zoned and developed for high-rise apartments or townhouses. An expert witness testified at the trial that the deficiency would be significant to a purchaser contemplating subdivision. The trial Judge was also influenced by the fact that, due to the total absence of any stakes or markers, the boundaries of the property were not readily ascertainable upon inspection.

[48] It was argued by Counsel for the appellant that the respondent should not be allowed to allege the materiality of the deficiency in the context of a purpose which was never communicated to the vendor. Wilson J.A. stated at para. 14:

> **"No authority was put forward by counsel in support of this proposition. My own research discloses an apparent conflict between cases such as *Shepherd v Croft,* [1911] 1 Ch. 521 and *In re Belcham and Gawley's Contract*, [1930] 1 Ch. 56. I have been unable, however, to locate any case in which a failure on the part of the purchaser to communicate his intended use of the property to the vendor was considered relevant to a claim for damages for breach of contract or for the return of a deposit. Indeed, it is pointed out by Vice-Chancellor Plumer in *Knacthbull v Grueber* (supra) at page 63 that if a purchaser communicates his motives in offering for the property, he may find the price has gone up! In my view, therefore, the respondent is not precluded from alleging the materiality of the deficiency having regard to his intent to subdivide even although he had kept that intent a secret from the appellant."**

[49] The Court of Appeal, commented: if a purchaser communicates his motives in offering for the property, he may find the price has gone up! The respondent was not precluded from alleging the materiality of the deficiency having regard to his intent to subdivide even although he had kept that intent a secret.

[50] In the present case, Besing Shores has positively asserted that its use and enjoyment of the Property would be adversely and negatively impacted as a result of the size difference. In my understanding of the law, there is no burden placed on any purchaser of a property to disclose to the seller the reasons why he/she is interested in purchasing the property. As I see it, the long drawn out discussion which ensues later in this Judgment seems irrelevant but, in the event that I am wrong, I shall consider them.

[51] In my opinion, the real issue is whether the discrepancy of 6,359.76 square feet in the size of the Property as reflected in the Second Thompson Survey and the size of the Property as reflected in the Agreement falls within the ambit of the words "*more or less".*

[52] This question whether a size discrepancy is significant to entitle a purchaser to avoid the transaction is a question of fact and will depend on all the circumstances of the case. In **Bouskill**, the trial judge held that a shortfall of 11 feet ¼ inch in the depth of the property being *100 feet more or less by 172 feet more or less* was too substantial to be encompassed by the words "more or less" in the description of the agreement.

[53] In **Wilson**, Meredith C.J., held that the purchaser was entitled to the property *without* any abatement on the basis that the measurement of the depth of the property were controlled by the word *"more or less"* and the deficiency was not substantial enough to raise a presumption of fraud or gross mistake.

[54] In **Nashville**, the land was described in the contract as comprising 2.5 acres *"more or less"* but had an actual area of approximately 1.8 acres. Saunders J held that the variance of approximately 39 per cent was significant.

[55] The English case of **Winch v Winchester** (1812) 35 ER 146 also provides useful guidance in this context. There, a purchaser had bought an estate described in the particulars of sale as "*containing by estimation forty-one acres, be the same more or less."* It was subsequently found on measurement only to have between 35-36 acres.

[56] On an application by the vendor, the purchaser could not resist the claim for specific performance due to the size discrepancy. It is of particular note that while the Court found that the purchaser was entitled to an abatement of the purchase price, the Court arrived at this finding on the basis that it was held that an agent of the vendor expressly agreed to provide an abatement if the property was less than the 41 acres.

[57] Sir William Grant MR held at page 147 that:

> **"First, the effect of the words "more or less," added to the Statement of Quantity, has never been yet absolutely fixed by Decision (Hill v Buckley, 17 Ves.394); being considered, sometimes as extending *only to cover a small Difference*, the one way, or the other; sometimes as leaving the quantity altogether uncertain, and throwing upon the Purchaser the Necessity of satisfying himself with regard to it."**

[58] In English land law and indeed, in Bahamian land law, the words *"more or less*" is often used in legal descriptions of property to connote that the exact boundaries or measurements are not known with precision but are close approximation. For example, a property description may state that *a parcel of land is approximately 2.355 acres more or less indicating that the exact size of the parcel is not known with certainty but is believed to be roughly in that range* [emphasis added]

[59] Little Bay concedes that the Property is 6,272.64 square feet less than 2.355 acres. However, it argues that it did not contract to sell *exactly* 2.355 acres but rather that the parties agreed expressly and/or impliedly that the size of the Property would be 2.355 acres *"more or less".*

[60] Besing Shores maintains that the words "*more or less*" in the context in which it is used, is to be interpreted as set out in the witness statement of one of its expert witnesses, Donald Thompson, a licensed land surveyor in The Bahamas. He was deemed an expert in land surveying after no objection by Counsel for Little Bay.

[61] In paragraph 3 of his witness statement, Mr. Thompson avers that, at the request of Besing Shores, he carried out a survey of the Property on 20 May 2019 ("Second Thompson Survey") and determined that the Property is 2.209 acres which is 6,359.76 square feet or 0.147 acres less than the 2.355 acres stated in the Agreement.

[62] In paragraph 4, Mr. Thompson attached an extract from the U.S. Department of the Interior Bureau of Land Management Glossary of Surveying and BLM Mapping Terms which provides the following definition of the words "*more or less*":

> **"MORE OR LESS -** ***When used in connection with quantity or distance in a conveyance of land*** **are considered words of safety or precaution,** ***intended to cover some slight or unimportant inaccuracy. The same applies to the use of the word "about*****."**

[63] During cross-examination on 3 May 2022, Mr. Thompson made it clear that the "*more or less*" terminology is intended to address only *slight* changes to the boundary. At page 29 of the Transcript of Proceedings of 3 May 2022, on re-examination by Mrs. Lockhart-Charles, Mr. Thompson stated:

> Q: Now, Mr. Thompson, what does that ---what does that mean to you, in terms of the surveying practice in The Bahamas?
>
> A. In the old conveyances, their measurements are not exact. They used chains and so forth. And even now, when they're using measurements along the high water mark, lakes, ponds, and stuff like that, they use the term 'approximate' because the coastlines and water waves, the high water mark and the <u>conditions created by nature causes those boundaries to change slightly</u>."

[64] During further re-examination, he stated that the description and the 2.355 acres came from the Chee-A-Tow plan in 1990. He surveyed the Property in 2019, nearly 30 years later. When he surveyed the Property, he did not find the same measurements. He said that "*the northern, eastern and southern boundaries were pretty much the same. The only difference was on the coastline*."

[65] Mr. Thompson said that the discrepancy in the acreage of the Property was caused by natural erosion. Mrs. Lockhart-Charles asked him whether he considers the difference in square footage to be slight or unimportant. Mr. Thompson stated "*I really can't answer that question as being slight or unimportant because it's a lot of land".* He also stated that the area where the land has shrunk is a fairly flat area: the coastline moved inward from where it was 30 years ago.

[66] Besing Shore also relied on the evidence of Mr. Victoria who asserted that "*the discrepancy of 6,359.76 square feet in the description of the Property could in no way be considered a "slight" or "unimportant" inaccuracy in the context of the Property in question*."

[67] As already mentioned, Mr. Victoria was deemed an expert in Urban Design and Land Planning because of his qualifications and experience in that field. His evidence is contained in his witness statement filed on 16 December 2021 which was accepted as his evidence in chief. It was supplemented by oral testimony given under cross-examination and re-examination during the trial.

[68] In paragraph 3 of his witness statement, Mr. Victoria states that he reviewed the Agreement for Sale dated 2 May 2019 entered into between Little Bay Partners LLC and Besing Shores, Ltd. for the sale of certain property in Harbour Island described in the Schedule thereto as follows: *ALL THAT piece parcel or lot of land comprising Two and Three Hundred and Fifty-five Thousandths* property *(2.355) Acres.*

[69] He asserts, in paragraph 4, that the representation that the property was 2.355 acres (102,583.8 square feet) is based on a Chee-A-Tow & Company Limited survey dated 1990.

[70] In paragraphs 5 to 7, he states that he is aware that Besing Shores subsequently had the Property surveyed on 20 May 2019 by Mr. Thompson and the total area was found to be 2.209 acres (96,224.04 square feet). The difference of 0.146 acres (6,359.76 square feet) between the two surveys, represents a reduction of 6.2 percent from what was initially represented by Little Bay. According to him, this area is equal to approximately the size of a large house. The hatched area in the attached diagram (Exhibit TV-2) shows the reduction in area between what Little Bay represented that it was selling (1990 survey) and the actual survey of 2019. He stated:

> **"It is especially significant because the reduction occurred along the waterfront which is Beacon Hill's greatest attraction and amenity. I am aware that the buyer intended to build a dock and accessory structures along the bay front that would support various boating activities. These structures include but were not limited to a palapa for lounging and dining by the bay, various storages for boat supplies, kayaks, paddle boards, paddles, snorkel equipment and life vest, fish cleaning, and outdoor shower, etc."**

[71] Mr. Victoria opined that the reduction of 6,359.76 square feet of property along the bayfront does not allow for the construction of these supporting accessory structures.

[72] During extensive cross examination, Mr. Victoria confirmed that the topography of the land would make it difficult to relocate the structures that were planned for placement near the waterside by pushing them further inland above the high water mark. The cause of this difficulty was the steep hill on the landward side of the high water mark.

[73] He stated that, essentially, to move this structure inland would involve surmounting "*a steep and sharp vertical rise*". During further cross-examination, Mr. Victoria further stated, at page 65 of the Transcript of Proceedings dated 3 May 2022:

Q: And, specifically, I want to take you to TV-3, the second drawing, as it were, which has Palapa, Kayak, Paddle Board, Storage, Boats Supply, Storage.

A: And Dock.

Q: And Dock; correct. Are you there?

A: Yes, sir.

Q: Mr. Victoria, I put it to you that nothing would have prevented you from reshuffling these accessories to bring them below the high water mark.

A: Actually, you're wrong. The site – the site takes a steep and sharp vertical rise, at that point. It would be difficult to maneuver. We placed them there for a reason. It will be difficult to maneuver those buildings and these are abstractions, by the way. They still have to be designed." [Emphasis added]

[74] Mr. Victoria also produced a sketch illustrating the land that was lost which is exhibited hereto as Annexure 1. On his sketch, Mr. Victoria depicted the land that has been lost in red and he described the impact of this loss in his testimony in re-examination on 3 May 2022 in the Transcript of Proceedings at page 81, lines 11-26 and page 82, lines 4-24:

A: This line in red or rather the round within is, as you can see, a set of contour lines. And the – in this type of graphics, the dimension between the contour lines, the pixel describes the sharpness or aggressiveness of that topography. And so – what this is showing, which is, actually, not uncommon, on the littoral towards the bay in Harbour Island, is a very steep and sharp incline towards an upper portion of the site.

So building there could be done, certainly; but it's very difficult and far more costly. This is why we were considering that realm between the cliff and the bay to be suitable for this kind of function, you know. So, actually, reshuffling, as Dr. Murphy [sic] puts it, has its limitations. It just can't be done sort of with limitless possibilities.

……

Q: Yes. So could you, please, indicate, using – by reference to this plan, what is the area that has been affected or that has been lost by the land shrinkage? Could you just show us, on the plan – on this plan what area has been lost?

A: Yes. You will see – let me see here. This is from the – this line depicts or points to the old 30-year old survey, which – this is the area that has been lost….

Q: Okay.

A: So as you can see, it's, one, going back to my initial response, the shrinkage is real. I mean, you know, you can ignore it. You can abandon it, as a question, but it's very real. It's less footage, but it also poses certain problems in building because of that topography. And the reshuffling of functions of these accessory functions – are critical to the project, actually – becomes more limited. It's a challenge, in fact." [Emphasis added]

[75] Mr. Besing, who is the beneficial owner of Besing Shores also testified. He filed a witness statement on 17 December 2021 which was admitted as his evidence in chief. Mr. Besing's witness statement was supplemented by his oral testimony at trial on 4 May 2022.

[76] He confirmed that the property acreage as represented in Item 10 in the Schedule of the Agreement for Sale Agreement was "**ALL THAT piece or lot of land comprising Two and Three Hundred and Fifty-five Thousandths (2.355) Acres**…". He also confirmed that the Vendor and Purchaser were initially both represented by the law firm of King and Co in connection with the Agreement and Besing Shores paid the deposit of US$480,000 to King and Co as stakeholders pursuant to the terms of the Agreement for Sale.

[77] Mr. Besing testified that Besing Shores owns land on the Pink Sands beach of Harbour Island and he was looking for property to support waterside activities since

the Pink Sands beach was not suitable for such use. The Property was being acquired for this use.

[78] Mr. Besing concurred with the opinions of his two expert witnesses that the discrepancy of 6,359.76 square feet in the description of the Property could, in no way, be considered a "slight" or "unimportant" inaccuracy in the present context. In particular, the main selling point of the Property is that it is waterfront property and that is how it was able to command the high price that is reflected in the Agreement and his intended development of the Property was significantly impacted by the reduced square footage.

[79] The assertions in Mr. Besing's witness statement as to the impact of the land shrinkage on his development plans were reinforced by his testimony at trial. At pages 5 to 6 of the Transcript of Proceedings dated 4 May 2022, when being re-examined by Mrs. Lockhart-Charles, he stated:

> Q: I'd like to take you to paragraph 13 of your witness statement.
>
> A: Yes.
>
> Q: Which says as is stated in the witness statement of thee should [sic] Victoria. "I intended to build a dock and accessory structures along the bay front of the property that would support various boating activities, including a pro for lounging and dining by the bay, storage for boat supplies, kayaks, paddle boards nor equipment and life vest fish cleaning and outdoor shower etc. I am advised that as stated in Victoria's statement reduction of six thousand three hundred fifty-nine point seven six square feet of property along the bay front does not allow for construction of these supporting accessory structures.
>
> Q: My question to you, Mr. Besing is.
> In cross-examination it was put to you that you had obtained approval for a dock with a palapa. And it was suggested that therefore you could build the accessory structures that you intended to build when you sought to acquire

this property. Was the dock with the palapa the only accessory structure that you intended to build?

A: No, it was not. Can I expand beyond yes or no?

Q: Yes please. I'm asking you to clarify? That was put to you yesterday.

A: No it would not. In fact the structures that we intended to build were paramount to the acquisition of property from the standpoint that as you will notice on virtually all of the bay front on Harbour Island other property owners have those facilities at the water front. And it was even amplified and more important on that particular property because of the substantial grade change from the water front to the property where a physical home may be built. And we were going to build various buildings, a store and house the materials and the supplies and kayaks and paddle boards, etc. At the bay front. And six thousand feet is a substantial area representing the side of a five bedroom house. So we lost substantial property at the water level.

Q: When you describe the elevation, how does one get from one elevation to another elevation on the property, by what means?

A: There is a staircase I believe with 35 threads."

[80] Mrs. Lockhart-Charles submitted that it is clear from Mr. Besing's evidence that the missing shoreside acreage is not unimportant. The storage of paddle boards and other items (for example) as described is considerably more convenient at the water level than at the top of a steep hill requiring lifting and traveling up and down a 35 tread staircase every time any such item is used.

[81] Mr. Murphy invited the Court not to accept the evidence of Mr. Besing arguing that his evidence is full of contradictions and evasiveness. He argued that Mr. Besing's evasive demeanour was evident when he was questioned about the approval for the palapa.

[82] Instead, Mr. Murphy urged the Court to accept Mr. Mosko's evidence in that regard. In his witness statement filed on 25 March 2022, Mr. Mosko, a civil engineer with over 45 years of experience, testified that although he had not visited the Property when he made his witness statement, he agrees with Mr. Elbert Thompson's opinion in paragraphs 25-26 that the reduction in the size of the Property is insignificant and properly falls within the nomenclature "*more or less"* and that the buildable area of the Property is not substantially impacted as a result of the reduction.

[83] Mr. Mosko has since visited the Property. In paragraphs 16-17 of his witness statement, he stated, given that the size of the Property is more than 2 acres, the reduction in the size would not itself prohibit the construction of the structures referred to by Mr. Victoria. The thrust of his evidence is that it would be "very simple" and "very easy" to reclaim the land that was lost to erosion. Specifically, Mr. Mosko stated (see Transcript of Proceedings dated 4 May 2022 at page 35, lines 23-32 and page 37, lines 28-32 and page 38, lines 1-4):

> "Q: Mr. Mosko, your expert opinion as set out in this witness statement, does it remain the same in light of your visit to the property?
>
> A: Well, when I looked at the property I had a couple of questions. One it's very obvious that the steps that go down at about a 25 degree angle, so quite steep. Then the property levels off to a very, very flat slope, probably 2 degree [sic]. And it goes all the way to the water. And that is why I was curious to see when they did the survey did the gentlemen try to probe the boundary. Did he go out to find out where the boundary used to exist and how deep was the water when he went out there. I would be surprised if it was more than 6 inches deep, and the slope at 1 and 20 which that piece of property was it doesn't take much of a sea rise elevation to gobble up a few feet. I don't know how many feet was missing."
>
> **...**
>
> A. We did not set any tide gauges there, but the slope is so flat it's like 1 and 20 just guessing at that. So you basically have a couple inches of rising

> water you will lose several feet of land and the original surveyors were done in the 90s, so that is 30 years later. So I have done a full survey there. We could do a full survey but the fact that it was so shallow where the existing points were leads me to believe the property got swallowed up or washed away [Emphasis Added]

[84] Mr. Mosko opined that one could get the original coastline back *"pretty easy"* by backfilling the lot with *"a couple of loads of cement bags"* and *"a few boulders"*.

[85] In sum, the thrust of Mr. Mosko's evidence is that the land which was lost to erosion could be easily reclaimed.

[86] Further, Mr. Elbert Thompson, who was declared an expert in Real Estate sales and appraisals, stated that while he is not a surveyor, he could read maps which he was self-trained to do. He acquired that skill through being an appraiser.

[87] He stated, at paragraph 13 of his witness statement, that Mr. Victoria's witness statement is replete with inaccuracies, errors and misstatements. Firstly, he stated that while there is a difference between the surveys, Mr. Victoria inaccurately states that the difference is 0.146 acres or 6,359.76 square feet. He claims that this is inaccurate. I have already found that Mr. Thompson (Donald) is a reliable witness and that the Property is 2,209 acres or 6,359.76 square feet less than what is represented in the Agreement.

[88] Mr. Elbert Thompson stated that it is critical to appreciate that, in The Bahamas, waterfront property is not valued by square footage but rather linear water footage. He criticized Mr. Victoria for stating that "*reduction does not allow for the construction of these supporting accessory structures.*"

[89] The gravamen of his argument is that the reduction in the size of the Property is insignificant and probably falls within the nomenclature of "*more or less".*

[90] Under cross-examination, he stated that land that is flat by the sea is more valuable than land on the cliff and the ability to use the land is there. The value of beach property is by lineal footage.

[91] Little Bay's beneficial owner and principal, Charles Darby III filed a witness statement on 16 December 2021 which stood as his evidence in chief at the trial. He testified on 4 May 2022. He admitted that the Property was in reality smaller than it was represented to be in the Agreement for Sale. He tried to suggest that his conversations with Mr. Besing could somehow override the terms of the Agreement but, under cross examination, he admitted that he would be bound by the terms of the Agreement.

[92] Mr. Darby stated that the size difference did not impact the liveable area of the Property. When challenged by Mrs. Lockhart-Charles, he acknowledged that this was only his opinion and that he had no expertise in the matter. He also acknowledged that his opinion differs from that of Besing Shores' experts. This is how the cross-examination went: (see Transcript of Proceedings dated 4 May 2022 at page 27, lines 3 -27):

> Q: So Mr. Darby, the western boundary is the boundary on the shoreline, is that correct?
>
> A: Correct.
>
> Q: And the property Mr. Thompson's surveyed reveals that the property had lost land on the shoreline, correct?
>
> A: Correct.
>
> Q: And in your opinion that did not affect the liveable or buildable area, correct?
>
> A: Correct.

Q: But you have no expertise. You are not a land planner. So you have no expertise as to the affect of land on buildable area.

A: Yes, I don't have any expertise and I wasn't opining to it. I was selling it more or less anyways. But I was just trying say to someone who I was hoping to buy the property that I did not think it generally impacted the enjoyment of the property. That is what I was trying to get it.

Q: And that was your opinion?

A: Yes.

Q: And you would acknowledge that Mr. Besing I think and his expert his architect disagree with that?

A: That is their opinion. They are entitled to that opinion."

[93] Mr. Murphy suggested that the attempt by Mrs. Lockhart-Charles to challenge the expertise of Mr. Darby failed because Mr. Darby indicated during his re-examination with respect to his knowledge of coastal development that: *"I have spent the greater part of my adult life developing coastal land here in Charleston, Keil [sic] island predominately, in Ireland and both St Kitts… and so I'm very much aware of that and that is my expertise in that area and I'm very cognizant of how to build, how to maintain, how to prevent,"* since 1998.

[94] There was no application before the Court to deem Mr. Darby as an expert witness in coastal development. He is entitled to give evidence, as he did, but he is not entitled to give any opinion evidence.

[95] On a balance of probabilities, I prefer the evidence adduced on behalf of Besing Shores to that of Little Bay. The evidence of Mr. Thompson is especially important in establishing the deficit in the land. His evidence remains unchallenged that the Property as described in the Agreement consisted of 2.355 acres (or 102,583.80 square feet) of land. On his second survey on 20 May 2019, the total area was found to be 2.209 acres (96,224.04 square feet); a difference of 6,359.76 square

feet. Even though the Statement of Claim averred 6,272.64 square feet that was at the time of the First Thompson Survey. Mr. Thompson's evidence was not challenged. In fact, he is the only surveyor who testified in this case. As I already stated, I also observed his demeanour during the trial and I accepted his evidence.

[96] Mr. Thompson attached a definition of the words *"more or less"* as used by the U.S. Department of Interior Bureau of Land Management which provides that when *"more of less"* is used in relation to quantity or distance in a conveyance of land, those words are intended to cover "*some slight or unimportant inaccuracy*." To my mind, this definition also accords with case law. As Mr. Thompson sums it up, the words *"more or less"* are intended to address slight changes to the boundary; not 6,359.76 square feet. In my opinion, even 6,272.64 square feet would be considered to be significant and not slight or unimportant.

[97] Although Mr. Victoria's impartiality and independence was challenged, on the contrary, he gave evidence in a clear and straightforward manner. He was calm and collected and I accept his expert testimony. In paragraph 7 of his Witness Statement, he stated that the reduction of 6,359.76 square feet of property along the Bayfront does not allow for the supporting structures that Besing Shores intended to build. In summary, he states that the 6.2% difference between the Survey of 1990 and the current survey of 2019 is significant and could in no way, be considered a "slight" or "unimportant" inaccuracy especially when considering its impact on the enjoyment of the bay front. He surmised that it would cost approximately $90,000.00 to demolish the existing concrete ramp and to erect a new ramp would cost about $130,000.00. He estimates that the total cost would be approximately $220,000 and the relocated access ramp would further limit the buildable area of the Property. He was challenged as to these figures but Little Bay did not provide and opposing figures so I accept Mr. Victoria's evidence in this regard.

[98] With respect to the evidence of Mr. Mosko, he stated that Mr. Victoria's statement that the reduction of 6,359.76 square feet of property along the Bayfront does not

allow for the construction of the accessory structures. He said that it is a bald assertion particularly since the reduction in the size of the Property would not within itself prohibit the construction of the accessory structures. To my mind, Mr. Mosko's statement is even balder as he had not even visited the Property when he said so. As I indicated, the thrust of his evidence was with respect to the ease to reclaim the land which is now under water.

[99] Now, Mr. Elbert Thompson was questioned by Mrs. Lockhart-Charles with respect to the usage of the land in light of the size difference. The line of questioning went this way: (see Transcript of Proceedings dated 4 May 2022 at page 49, lines 20-21):

> Q: You could sue [sic] bathe on it [i.e. the loss land]. Is there any land that you can't do anything with?
>
> A: You could do that with the property there now. So if you have more of it I don't know if that would give you more use.
>
> Q: But if you have more of it, then you have more space, don't you. You can have a picnic, you can put chairs, umbrellas. Isn't more land – can't you the more land you have don't you have the ability to use that land?
>
> A: You could use it for sure. But it's not prohibiting you from what you can do there now."

[100] Mr. Murphy insisted that the foregoing reflects that the difference in the size of the Property would not have in any significant way affected Besing Shores' use or enjoyment of the Property. The documentary evidence reflects, among other things, that dredging permit was approved and Besing Shores received approval to construct a palapa on the land. While this might be so, Mr. Victoria opined that you could build a large house on the land that is lost. The reduction is 6,359.76 square feet of property along the Bayfront does not allow for the construction of the accessory structures. As I already indicated, it is my firm view that a purchaser does not have to indicate to a vendor what his intentions are when he is purchasing

land from the vendor. All that he should concern himself with is whether he is getting what he bargained for.

[101] Considering all the evidence and the applicable law with respect to the meaning of the words *"more or less"*, on a balance of probabilities, I find as a fact that the difference between the size of the Property as reflected in Second Thompson Survey (as well as the First Thompson Survey) and the size of the Property as reflected in the Agreement (and the Chee-A-Tow Surveys) do not fall within the meaning of *"more or less"* as used in the Agreement. The discrepancy of 6,359.76 (or even 6,272.64) square feet could not be considered as slight or unimportant.

Some applicable legal principles

[102] In her submissions, Mrs. Lockhart-Charles briefly alluded to some legal principles which are applicable based on the findings of this Court.

[103] Mr. Murphy submits that there is no analysis of the legal principles. These are well-settled principles and do not really need any analysis.

[104] A person who signs a contract is bound by its terms unless he can establish one of the three defences: (i) fraud; (ii) misrepresentation, or (iii) *non est factum*: **L'Estrange v Graucob** [1934] 2 K.B. 394.

[105] Besing Shores relies on **Museprime Properties Ltd v Adhill Properties** [1990] 2 EGLR 196 for the proposition that (i) oral comments made during the course of negotiations or discussions cannot override representations made in a written contract, and (ii) where there is a misrepresentation in the written contract the plaintiff is entitled to refuse to complete on the basis of misrepresentation.

[106] The Plaintiff also relies on the case of **Spice Girls Ltd. v Aprilia World Service BV** [2002] EWCA Civ 15 and **Smith v Chadwick** (184) 9 AC 187 for the principles that rescission is available as a remedy for misrepresentation in circumstances where the representee is induced to enter into the contract by the misrepresentation.

Consequential orders flowing from the Court's findings

[107] Having found that the discrepancy of 6,359.76 (or even 6,272.64) square feet could not be considered as slight or unimportant but is substantial and Besing Shores was induced to enter into the Agreement based on Little Bay's representation, Besing Shores is entitled to rescind the contract.

[108] Little Bay alleges that there was no misrepresentation and, in the event that the Court finds that there was any misrepresentation, at its highest, it was an innocent one. In the course of his testimony, Mr. Besing stated that he did not believe that Mr. Darby intentionally misrepresented anything with respect to the Property.

[109] That said, the fact that the Court has found that the discrepancy is significant, Besing Shores was entitled to rescind the Agreement and receive the deposit of US$480,000 back.

[110] Despite the fact that on 12 September 2019, Little Bay sent Besing Shores a Notice to Complete in accordance with Clause 11 of the Agreement, because of the breach, Besing Shores cannot be required to complete the sale. Simply put, Little Bay contracted to sell 2.355 acres of land and having misrepresented the amount of acreage in the Agreement, it was in no position to close the sale. In the circumstances, Little Bay was in no position to serve a Notice to Complete.

[111] Besing Shores is entitled to the following relief:

1. Rescission of the Agreement for Sale;
2. Repayment of the sum of US$480,000.00 which is held by King & Co;
3. A Declaration that the purported Notice to Complete served on 12 September 2019 is null and void and/or of no effect on the grounds that the Agreement for Sale has been rescinded;
4. An Order setting aside the Notice to Complete and declaring it ineffective;
5. Damages and costs.

[112] Besing Shores claims loss and damages in the amounts as particularized in paragraph 13 of the Statement of Claim.

Particulars

(i) Deposit	US$480,000.00
(ii) Architectural and Design Fess	34,652.76
(iii) Surveyor	9,555.00
(iv) Shipping and calls	272.04
(v) Transaction legal fees	21,828.75
TOTAL	**$546,308.55**

Damages

[113] Mr. Murphy Bay submits that there are no invoices produced on behalf of Besing Shores to demonstrate that it paid architectural and design fees, surveyor costs, shipping and calls and transaction legal fees.

[114] Mr. Murphy submits that, in accordance with Schedule, Item 11(2) of the Agreement for Sale, the Purchaser was responsible for the costs and expenses associated with the surveyor. He further submits that Mr. Besing acknowledged that fact and as such, Besing Shores is not entitled to recover the costs associated with the engagement of Mr. Thompson.

[115] The deficiency in the quantum of the Property is too substantial to be encompassed by the words "*more or less".* Consequently, Besing Shores was entitled to avoid the transaction and receive its deposit back as well as all of the associated pre-sale expenses. Had the sale gone through, all of these expenses such as architectural and design fees, surveyor costs, shipping calls and transaction legal fees would have had to be borne by Besing Shores as stipulated in the Agreement.

[116] I will make an order for Besing Shores to produce all invoices within 21 days hereof so that special damages can be assessed by the Registrar if there is no agreement by the parties.

The Counterclaim

[117] Given the outcome, the Counterclaim is dismissed.

Interest and costs

[118] There ought not to be any argument on whether Besing Shores is entitled to interest. I will therefore order that there be interest at the statutory rate of 6.25% per annum on the sum of US$480,000 from today's date (the date of judgment) to the date of payment. If Besing Shores can verify the associated costs by the production of invoices within 21 days hereof, then there may not be any need for an assessment of damages by the Registrar. Special damages, if proved, will also attract interest at the statutory rate.

[119] With respect to costs, the general rule is that the successful party is entitled to its costs. There is no reason for me to deviate from this general principle.

[120] My order is that Besing Shores will be entitled to its costs to be taxed if not agreed.

Dated this 28th day of February 2023

Indra H. Charles
Senior Justice