

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT**

COMMON LAW AND EQUITY DIVISION

2018/CLE/gen/01348

**IN THE MATTER of a Share Purchase Agreement dated the 30th June 2007 and
made between Eleuthera Properties Ltd and Robert B. Millard**

AND

**IN THE MATTER of the exercise of a put option set out at Article 12 of the
aforementioned Share Purchase Agreement**

BETWEEN

ROBERT B. MILLARD

Claimant

AND

ELEUTHERA PROPERTIES LIMITED

Defendant

Before: Her Ladyship The Honourable Madam Justice Deborah
Fraser

Appearances: Mr. Brian Simms KC with Mr. Wilfred P. Ferguson Jr. for
Robert B. Millard

Mr. Robert Adams KC with Mr. Edward J. Marshall II for
Eleuthera Properties Limited

Judgment Date: 26 May 2023

**Application for Further and Better Discovery – Order 24 Rules 3 and 7 of the
Rules of the Supreme Court, 1978 – Prima Facie Case – Documents in party’s
possession, custody or power – Relevance of Specified Documents - Subsidiary
Company in possession of documents - Agency**

JUDGMENT

1. This is an application for Further and Better Discovery filed herein on 31 May 2022 by the Claimant, Mr. Robert B. Millard (“**Mr. Millard**”).

Background

2. Mr. Millard is a shareholder in the Defendant Company, Eleuthera Properties Ltd. (“**EPL**”).
3. EPL is a registered company incorporated under the laws of the Commonwealth of The Bahamas and the owner of approximately Four Thousand Six Hundred (4,600) acres of land situated in South Eleuthera, The Bahamas.
4. On 30 June 2007, the parties entered into a Share Purchase Agreement (“**SPA**”) where Mr. Millard agreed to purchase and EPL agreed to sell Ten Thousand (10,000) ordinary shares in the capital of EPL

5. Clause A of the SPA states:

“The Company has an authorized share capital of Four Hundred Thousand Dollars in the currency of the Commonwealth of The Bahamas (B\$400,000.00) divided into Four Hundred Thousand (400,000) ordinary shares of B\$1.00 each, of which One Hundred Sixty Six Thousand Five Hundred (166,500) have been issued and are fully paid or credited as fully paid and the remaining Two Hundred Thirty Three Thousand Five Hundred (233,500) ordinary shares in the authorized capital of the Company have not been issued or allotted.”

6. Clause 11.1 of the SPA provides:

“If the Company shall within two (2) years from the Closing Date, issue (other than to employees or contractually retained professional consultants of the Company as part of a formalized compensation plan) any ordinary shares at a price less than the Share Price, the Company shall (a) immediately notify the Purchaser in writing with respect thereto within fifteen (15) days of such issuance of shares (the Company Notice) and (b) immediately issue and grant to the Purchaser, free of any cost, stamp duty or charge of any kind or nature whatsoever, an amount of additional ordinary shares such that the Purchaser shall own and hold all of his ordinary shares at an effective price per share (for all of the Purchaser’s shares) equal to the lowest price at which such new shares are issued.”

7. Subsequently and after speaking with the Chairman of the Sunshine Group of Companies, Sir Franklyn Wilson (“**Mr. Wilson**”), Mr. Millard invested an additional One Million Dollars (\$1,000,000.00) into EPL resulting in Mr. Millard being transferred an additional Five Thousand (5,000) ordinary shares in EPL.

8. Clause 12 of the SPA provides:

“12.1 If the Purchaser retains at least Ten Thousand (10,000) shares in the Company for a period of at least ten (10) years from

the Closing Date, the Purchaser shall have the option during the Option Period to sell all or any portion of his shares in the Company to the Company at a Strike Price per share equal to One Hundred and Twenty-five per cent (125%) of the Share Price.

12.2 The Purchaser shall exercise the Put Option by serving on the Company during the Option Period a Put Notice specifying the number of shares to be sold and the price payable for such shares. Upon exercise of the Put Option by the Purchaser, the Company shall be obliged to the purchaser the Option Shares at the Strike Price.

12.3 The Strick Price may, at the Company's option, be paid by any one of the following methods:

- a) Conveyance of good and marketable fee simple title to land located in South Eleuthera of equivalent value to the Option Shares, free from any liens, mortgages or encumbrances (with respect to which, no less than five (5) acres shall be specifically identified and selected by the Purchaser, and which at the Purchaser's sole and absolute discretion, may consist of contiguous sand beachfront in the "Jack's Bay" area (if then still unsold to an Unaffiliated Investor) or such other parcel(s) of contiguous sandy beachfront of land then identified and selected by the Purchaser elsewhere in Eleuthera and then owned by the Company and/or any Affiliate thereof). The Purchaser's selection of land as aforesaid shall take place within a reasonable time following the Purchaser's receipt of notification from the Company that the Company intends to redeem the Option Shares by way of a transfer of land or a combination of cash and land and the land thus selected shall be appraised in the manner set out in clause 12.4 and the acreage reduced accordingly if its value exceeds the portion of the Strike Price to be paid in land.
- b)
- c)

12.4 To the extent that the Company elects to pay the Strike Price in whole or in part by a conveyance of land to the Purchaser, the value of such land shall be determined by an independent appraisal from a reputable professional appraiser licensed by the Bahamas Real Estate Association and mutually agreed on by the Company and the Purchaser....

12.5

12.6 The Put Option shall expire: if it is not exercised by the Purchaser within the Option Period; or thirty (30) days after the formal listing and unrestricting trading of the ordinary shares of the Company..."

- 9. On or about 13 July 2017, Mr. Millard, in compliance with Clause 12 of the SPA gave written notice of his exercise of the Put Option for all shares, which he claims totals Seventeen Thousand Five Hundred (17,500) shares by virtue of the

Put Notice to EPL. Mr. Millard claims that the additional Two Thousand Five Hundred (2,500) shares (at \$400 per share) were given to him under similar terms to the initial Ten Thousand (10,000) ordinary shares. This, Mr. Millard claims, was orally agreed between himself and Mr. Wilson.

10. EPL refused to acknowledge the additional Two Thousand Five Hundred (2,500) shares and stated that it would honor the Fifteen Thousand (15,000) ordinary shares issued.
11. In anticipation that the Strike Price of the Put Option would be satisfied in whole or in part by conveyance of land to Mr. Millard, the parties jointly engaged Bahamas Realty Ltd. for a valuation on certain lots at Jack's Bay on or about January of 2018.
12. On or about 7 May 2018, a final joint appraisal report ("**Report**") for a portion of Jack's Bay was prepared. It represented that:

"A detailed request response from a representative of the Defendant provided the following data with regard to transactions of lots in the Jack's Bay development that have occurred within the past year. We believe this data to be accurate and have relied upon as such.

Sales in Jack's Bay provided from the Defendant's representative.

Lot Number BF-2 in Jack's Bay in March 2018 for \$1,000,000 gross...

Lot Number BF-4 in Jack's Bay in February 2018, for \$1,000,000 gross...

Lot Number BF-5 in Jack's Bay in February 2018 for \$1,000,000 gross...

Lot Number BF-V1 in Jack's Bay in February 2018 for \$1,000,000 gross...

Note: Three additional transactions were provided for ocean view lots that sold in 2018 with an approximate average sales price of \$6,250 per lineal foot. Jack's Bay beach front lot sales number approximately 5 in the past six months indicating an absorption rate of approximately 10 units per year"

13. The concluding summary of the Report was amended to include an estimate of how many lots would be required to satisfy a sum of USD\$7,500,000.

14. The Report also stated:

"As per your request, please find a chart laying out the task of how many lots would be required to satisfy the \$7,500,000 loan under the current analysis....

However, it is important to note that we are drawn back to the transactions reported at the subject property, which is identical to

all characteristics of comparison and thus much of our weight is based on these transactions...”

15. On or about 21 June 2017, pursuant to Clause 12.3(a) of the SPA and in reliance of the Report, Mr. Millard by email via his agent purportedly identified lots 8-22 for the transfer of land in satisfaction of the USD\$7,500,000.00 of the Put Option. This, however, is denied by EPL. It avers that Mr. Millard never definitively identified which lots he would accept in satisfaction of the USD\$7,500,000.00 debt.
16. On 20 November 2018, Mr. Millard brought an action by way of Originating Summons (but by Order of the Honourable Justice Ruth Bowe-Darville, 03 February 2021, the matter was continued as if begun by Writ of Summons) for breach of contract. He claims, *inter alia*, that (i) EPL failed to act in good faith by instructing the independent appraiser to add information to the report without Mr. Millard’s knowledge; and (iii) EPL inaccurately, fraudulently and/or negligently represented to him that 5 lots in Jack’s Bay was sold within 6 months which significantly influenced the Report.
17. Mr. Miller claims various reliefs.
18. EPL filed a Defence and Counterclaim on 09 March 2021 denying the allegations made by Mr. Millard and puts him to strict proof.
19. Further pleadings were filed by the parties. For the purposes of this judgment, however, the Court will only focus on subsequent filings relevant to the application for Further Discovery.
20. The Honourable Senior Justice Indra Charles made an order on 07 April 2022 (filed 19 April 2022) directing the parties to, *inter alia*, file and serve any applications on or by 31 May 2022, failing which either party shall be precluded from doing so.
21. On 03 May 2021, EPL filed its List of Documents.
22. On 04 May 2021, Mr. Millard filed his List of Documents.
23. On 21 April 2022, Mr. Millard wrote to EPL requesting certain documents, a further and better list of documents and permission for the Plaintiff to inspect and take copies of the documents identified in such further and better list of documents.
24. On 26 April 2022, EPL replied saying the request was overly broad and asked for Mr. Millard to specify how the requested documents were relevant to the matters in question.
25. On 29 April 2022, Mr. Millard’s counsel provided further explanation as to why the requested documents were relevant and that it would likely enable Mr. Millard to inquire into the knowledge and state of mind of EPL.
26. On 16 May 2022, Mr. Millard’s counsel wrote to EPL’s attorneys stating they had not received any response to their 29 April 2022 letter.

27. On 30 May 2022, EPL's counsel wrote to Mr. Millard's counsel informing them that EPL's position would be delivered the following day.
28. On 31 May 2022, and in compliance with the Order made by Charles Snr. J, Mr. Millard's counsel filed an application for Further and Better Discovery ("**Further Discovery Application**").
29. Attached to the Summons is a schedule of documents Mr. Millard requests EPL to provide. The schedule provides the following:

"1. Copies of all of EPL's audited financial statements/reports from 2009-2018;

2. Copies of all communications between EPL and purchasers (whether potential and/or real);

3. Copies of all appraisals/estimates for lots in Jack's Bay from 2007-2018; and

4. Copies of all sales documents for lots in Jack's Bay inclusive of all conveyances, agreements for sale, and intention to purchase documents from 2009-2018."

ISSUES

30. The issue that the Court must decide is whether EPL should make Better and Further Discovery?

Mr. Millard's Evidence

31. Mr. Millard filed the Affidavit of Valdere Murphy on 31 May 2022. The affidavit provides: (i) a chronology of events which necessitated the Further Discovery Application; (ii) that one of the issues that the Court must determine is whether the unilateral information provided to the jointly appointed appraiser by EPL regarding the sale of lots in Jack's Bay was inaccurately and/or fraudulently and/or negligently represented to the appraiser; (iii) that, in order for the Court to make a determination on that issue, it must, *inter alia*, make a finding as to the validity of the lot sales as stated by EPL and that state of mind of EPL when providing information to the joint appraiser for the purposes of producing the appraisal report; (iv) that the information Mr. Millard is requesting is relevant because it will assist in verifying the accuracy of the information provided to the joint appraiser; and (v) that it is reasonable to suppose that the documents and classes of documents requested by Mr. Millard contain information which would enable Mr. Millard to verify and confirm the accuracy of the information provided unilaterally to the joint appraiser and inquire into the knowledge and state of mind of EPL when providing information unilaterally to the joint appraiser for the purposes of producing the appraisal report.
32. On 13 October 2022, Mr. Millard filed the Second Affidavit of Valdere Murphy. It states that: (i) Jack's Bay Development Ltd ("**JBDL**") is 100% beneficially owned

by Cotton Bay Developers Limited, which in turn is 100% beneficially owned by EPL (an exhibit is attached corroborating this evidence); (ii) Mr. Wilson was the Chairman of both JB DL and EPL; (iii) EPL's Audited Financial Statements for 2014 at page 11 provide: "*Consolidation of a subsidiary begins when the Company ('the Defendant') obtains control over the subsidiary and ceases when the Company loses control of the subsidiary*"; (iv) EPL confirms that Beacon Bahamas LLC and Beacon Land Development LLC (being companies hired by JB DL to manage the real estate development project known as Jack's Bay - collectively, "**Beacon**") had communications with persons whom expressed an interest in purchasing land in Jack's Bay; (v) Mr. Ray Jackson (a representative of EPL) could not have provided any communications to the appraiser and other individuals concerning the sale of land at Jack's Bay without EPL first providing detailed information about the Put Option exercise to Beacon and/or Mr. Ray Jackson; (vi) the Affidavit of Sir Franklyn R. Wilson KCMG does not provide any details as to what steps were taken to obtain from Beacon and JB DL the documents specified in Mr. Millard's request other than contacting Mr. Abbott, its former Chief Executive Officer; (vii) No information is provided as to why Mr. Abbott no longer has information/correspondence pertaining to sales of lots in Jack's Bay during the period of 2009 to 2018; and (viii) Mr. Millard believes that EPL has not disclosed information concerning the sale of land at Jack's Bay.

EPL's Evidence

33. On 29 September 2022, EPL filed the Affidavit of Sir Franklyn R. Wilson KCMG. The affidavit states that: (i) EPL's letter dated 31 May 2022 informed Mr. Millard that, as a shareholder, he is entitled to financial statements of EPL and exhibits such financial statements for the years of 2009, 2010, 2011, 2013 to 2018 (as the year 2014 was already in Mr. Millard's possession); (ii) EPL has already provided documents which they believe are relevant to the issues before the Court; (iii) documents that Mr. Millard is requesting have no evidential materiality; (iv) the land at Jack's Bay is owned by an affiliate company, JB DL, and that the land at Jack's Bay was not subdivided between the years 2009-2018; (v) In July of 2017, JB DL entered into a Project Management Agreement with Beacon empowering Beacon to manage the real estate development project known as Jack's Bay; (vi) After execution of the Project Management Agreement, Beacon assumed marketing and responsibility of the land eventually made available for sale in Jack's Bay; (vii) the Project Management Agreement came to an end in September of 2018; and (viii) EPL was not responsible for the marketing or communications with prospective or actual purchasers of land in Jack's Bay from its affiliate, JB DL, thus there is no communications between EPL and purchasers of lots in Jack's Bay from 2009 to 2018.
34. Mr. Wilson's affidavit also stated that: (ix) EPL used best efforts to retrieve from Beacon and JB DL the remaining documents specified in Mr. Millard's request concerning the sale of the lots in Jack's Bay over the relevant period; (x) Mr. Wilson personally contact Mr. Michael Abbott and asked him whether Beacon

had any documents relating to lots at Jack's Bay. Mr. Abbott told Mr. Wilson that Beacon was dissolved and that he no longer had any documents or correspondence pertaining to the sales in Jack's Bay during the period of 2009 to 2018; (xi) JBDL provided additional documents to EPL, which is exhibited to the affidavit; (xii) the documents from JBDL establish that Lots BF-1 and BF-2 were sold to third parties for the price of \$1,000,000 gross, which price is also aligned with the appraiser's valuation of the beachfront lots in Jack's Bay in 2018; and (xii) EPL does not have within its possession, custody or control any other documents relating to the matters in question in the action.

Mr. Millard's Submissions

35. Mr. Millard seeks Further and Better Discovery by EPL. His counsel highlights the following portions from paragraph 51 of his Statement of Claim (which was filed 03 February 2021) to identify the parts of his case which require Further and Better Discovery on the part of EPL. The relevant excerpts read:

“iv. The Defendant inaccurately and fraudulently and/or negligently represented to the Plaintiff through the joint independent appraiser that 5 lots in Jack's Bay had been sold within 6 months which significantly influenced the outcome of the Report;

v. The Defendant caused the Plaintiff delay in fulfilling his obligations under [clause] 12.3(a) [of the] SPA by making inaccurate representations and unilateral modifications which influenced the outcome of the Report.

vi. The Defendant sought to induce the Plaintiff into satisfying his obligations under [clause] 12.3(a) [of the] SPA through the Plaintiff's selection of lots in Jack's Bay for transfer based on inaccurate and misrepresented lot sales which heavily influenced the Report.....”

36. Mr. Millard's counsel submits that, what is germane to his claim is the issue of whether the unilateral information provided to the joint appraiser by the Defendant (whether by its wholly owned subsidiaries, affiliates and their respective agents, officers, directors, chairman, representatives, managers and/or howsoever otherwise) regarding the sale of lots in Jack's Bay was inaccurate, and fraudulently and/or negligently represented to the appraiser in order to influence the outcome of the appraisal report.

37. His counsel further submits that, in order to properly address the above issue, the Court will have to make a finding of fact regarding the validity of the purported sale of lots as stated in the Report. Further, Mr. Millard's counsel asserts that the Court will have to determine whether the data provided by the Defendant (whether by its wholly owned subsidiaries, affiliates and their respective agents, officers, directors, chairman, representatives, managers and/or howsoever otherwise) is accurate and can be relied upon.

38. Mr. Millard's counsel then provides the authority that empowers the Court to order further and better discovery. According to **Order 24 rule 3 of the Rules of the Supreme Court, 1978 ("RSC")**:

"(1) Subject to the provisions of this rule and of rules 4 and 8, the Court may order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to make and serve on any other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question in the cause or matter, and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party.

(2) Where a party who is required by rule 2 to make discovery of documents fails to comply with any provision of that rule, the Court, on the application of any party to whom discovery was required to be made, may make an order against the first-mentioned party under paragraph (1) of this rule or, as the case may be, may order him to make and file an affidavit verifying the list of documents he is required to make under rule 2 and to serve a copy thereof on the applicant.

(3) An order under this rule may be limited to such documents or classes of document only, or to such only of the matters in question in the cause or matter, as may be specified in the order"

39. His counsel also references the practice notes of the **United Kingdom Supreme Court Practice 1976 under Order 24 rule 3** which provides:

"An order may be made for a further and better list of documents where it appears (a) from the list itself, or (b) from the documents referred to in it, or (c) from admissions made either in the pleadings of the party making discovery or otherwise, that the party making discovery has or has had other relevant documents in his possession, custody or power (emphasis added)."

40. Mr. Millard's counsel then draws the Court's attention to **Matthews & Malek on Discovery**. Specifically, **paragraphs 5.35 to 5.38** provide:

"5.35 An order for further and better discovery may be made where it appears that the party making discovery has misconceived the principles upon which discovery of documents should be made or has misconceived his case so that the Court is confident that if he had conceived it properly he would have disclosed further documents or has failed to follow the prescribed form as to the List of Documents or verifying Affidavit.

5.36 Alternatively, the court may order a further and better List if it is shown:

(a) from the List or affidavit itself; or

(b) from the documents referred to therein; or

(c) from admissions made either in the pleadings of the party making discovery or otherwise; that there is a reasonable suspicion that other documents exist in his possession, custody or power, which are relevant to the issues in the action and which have not been disclosed.

5.37 The source of the information that other documents exist may be from the List or affidavit itself, but also from the documents referred to in it. Thus, the Court may infer that other documents exist if they are referred to in documents disclosed, or even if they are in the nature of things likely to exist on the basis of documents disclosed, although not expressly referred to. A letter referred to in a document disclosed in the List will itself be presumed to be relevant unless the contrary is shown. An admission that other documents exist need not be contained in a List of Documents or in pleadings; an admission made in any matter may suffice. By listing a document a party admits its relevance and hence may constitute an admission that documents upon which it is founded are also relevant unless the contrary is shown.

5.38 The Party seeking further and better discovery need not actually prove that there are further documents; so long as the Court has reasonable suspicion that there are further documents, it may order a further and better list of Documents (with or without a verifying affidavit) or verifying affidavit (emphasis added)”

41. His counsel then relies on the case of **British Association of Glass Bottle Manufacturers v Nettlefold [1912] 1 KB 369** (“Nettlefold”) (in which the House of Lords case of **Kent Coal Concessions, Ltd v Duguid [1910] AC 452** was applied) to demonstrate how further discovery principles are applied. Mr. Millard’s counsel asserts that, in both cases, based on a document that was disclosed by one party, there was an irresistible inference that further documents relating to the matters in question existed. Cozens-Hardy M.R. stated the following at page 374:

“On this point, the case seems to me to be indistinguishable from the case of Kent Coal Concessions Ltd v Duguid, where the inclusion by a company of its balance-sheet referring to nothing else was held to justify a further affidavit of documents on the ground that the inference that the company must have books and so on shewing the particulars from which the items in the balance-sheet were taken (emphasis added)”

42. Mr. Millard’s counsel asserts that EPL produced a valuation chart that refers to agreements and reservations in its discovery without producing the actual agreements and reservations being referred to. He submits that EPL must have these documents in its possession.

43. In relation to relevance of the documents being requested, his counsel posits the test for relevance can be found in the case of **The Compagnie Financiere et**

Commerciale Du Pacifique v The Peruvian Guano Company [1882] 11 QBD 55 (“The Compagnie”) where Lord Justice Brett stated:

“It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary.”

44. Mr. Millard’s counsel further submits that *The Compagnie* case was mentioned in the case of *O Co. v M Co.* [1996] 2 Lloyds’s Rep. 347 where Justice Colman made the following pronouncements:

“On the contrary, the document or class of documents must be shown by the applicant to offer a real probability of evidential materiality in the sense that it must be a document or class of documents which in the ordinary way can be expected to yield information of substantial evidential materiality to the pleaded claim and the defence to it in the broad sense which I have explained. If the document or class cannot be demonstrated to be clearly connected to issues which have already been raised on the pleadings or which would in the ordinary way be expected to be raised in the course of the proceedings, if sufficient information were available, the application should be dismissed (emphasis added).”

45. Based on the foregoing, Mr. Millard’s counsel asserts that data used to compile the valuation chart produced by EPL during discovery is clearly connected to issues which have been raised by Mr. Millard in his pleadings.

46. Mr. Millard’s counsel also relies on **Order 24 rule 7 of the RSC** which states:

“7. (1) Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been in his possession, custody or power, and if not then in his possession, custody or power when he parted with it and what has become of it.

(2) An order may be made against a party under this rule notwithstanding that he may already have made or been required to make a list of documents or affidavit under rule 2 or rule 3.

(3) An application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or

power the document, or class of document specified or described in the application and that it relates to one or more of the matters in question in the cause or matter”

47. His counsel further asserts that **Matthews & Malek on Discovery** at paragraphs 5.44 and 5.45 provide:

“5.44 An application under RSC Order 24 r. 7 may be made at any stage, and may be made notwithstanding that the party has already made a List of Documents and provided an affidavit under rules 2 and 3....

5.45 Before the Court will order an affidavit of specific documents, or classes of documents, a prima facie case must be shown for:

(a) Possession, custody or power; and

(b) Relevance of the specified documents.

The application may be based merely on probability arising from the surrounding circumstances or in part on specific facts deposed to. Once this test has been satisfied the Court has a discretion whether or not to order discovery, subject always to the principle of necessity established by RSC Order 24 r. 8...(emphasis added)”

48. Mr. Millard’s counsel asserts that application of this rule concerns the disclosure of specific documents or classes of documents which can be identified, are relevant and were/are in the possession, custody or power of EPL.

49. His counsel further submits that the case of **Berkeley Administration Inc. and McClelland 1990 FSR 381** sets out the relevant principles in respect of the same rule (Order 24 Rule 7) in the then English Rules of the Supreme Court. The case provides:

“(1) There is no jurisdiction to make an order under R.S.C, Order 24 rule 7, for the production of documents unless (a) there is sufficient evidence that the documents exist which the other party has not disclosed; (b) the document or documents relate to matters in issue in the action; (c) there is sufficient evidence that the document is in the possession, custody or power of the other party.

(2) When it is established that those three prerequisites for jurisdiction do exist, the court has a discretion whether or not to order disclosure.

(3) The order must identify with precision the document or documents or categories of document which are required to be disclosed, for otherwise the person making the list may find himself in serious trouble for swearing to a false affidavit, even though doing his best to give an honest disclosure

(4).....

(5) It is not an answer to an assertion that documents falling within a particular category are disclosable that no such documents are in the other party's possession or power, although if this information has already been conveyed on oath in the course of the proceedings this would furnish a reason why, in the exercise of the court's discretion, it might well not make an empty order (emphasis added)"

50. Mr. Millard's counsel also addresses the law on discovery specifically in relation to affiliates of a parent company. He cites the case of **In the Matter of the Estate of Osama Abudawood (Unreported, Justice Kawaley 27 July 2022)** ("**Osama Abudawood**"). At paragraph 19, the ruling stated:

"The conclusion that the English rule does not provide an exhaustive definition of what constitutes "control" confirms that in substance that rule is analogous to our own GCR Order 24 Rule 7(1), which makes no attempt at all to define precise parameters of the term "power". I accordingly find that an arrangement or understanding pursuant to which the parent company has in practice free access to the documents of its subsidiaries will potentially support a finding that the documents are within the "power" of the parent company and accordingly discoverable."

51. Mr. Millard's counsel concludes by requesting the Court to grant the order as provided in the Further Discovery Application.

EPL's Submissions

52. EPL's counsel submits that it used its best efforts to retrieve from third parties who were directly involved in the sale of land at Jack's Bay (being Beacon and JBDL), further documents requested by Mr. Millard.

53. Its counsel asserts that several documents have been submitted by the two entities and subsequently EPL filed a Supplemental List of Documents on 29 September 2022 in its attempt to comply with Mr. Millard's counsel's request for further documents.

54. In addition, Mr. Wilson, through his affidavit, states that EPL does not have within its possession, custody or power any other documents relating to the matters in question in this action apart from the documents disclosed in its List of Documents and Supplemental List of Documents. Accordingly, EPL' counsel asserts that it has complied with its discovery obligations in these proceedings.

55. Like Mr. Millard's counsel, EPL's counsel relies on **Order 24 rule 3 of the RSC**. Its counsel also highlights an excerpt from **Practice Direction 24/2/11 of the English Supreme Court Practice 1999**.

56. EPL's counsel submits that Order 24 of the English RSC 1999 mirror Order 24 of the Bahamian RSC. The Practice Direction reads:

“Relating to any matter in question (r.2 (1)) – These words refer, not to the subject-matter of an action, but to the questions in the action. So, in an action for possession of land, where the plaintiff’s title is in question, they refer to the title not the land...They are not limited to documents which would be admissible in evidence....nor to those which would prove or disprove any matter in question; any document which, it is reasonable to suppose, “contains information which may enable the party (applying for discovery) either to advance his own case or to damage that of his adversary, if it is a document which may fairly lead him to a train of inquiry which may have either of these two consequences must be disclosed....Compare the more restricted approach in *O Co. v M Co.* [1996] 2 Lloyd’s Rep. 347, in which it appears *Taylor v Anderson* was not cited....The formulation must not, in my judgment, be understood as justifying discovery demands which involve parties to civil litigation being required to turn out the contents of their filing systems as if under criminal investigation merely on the off-chance that something might be drawn. On the contrary, the document or class of documents must be shown by the applicant to offer a real probability of evidential materiality in the sense that it must be a document or class of which in the ordinary way can be expected to yield information.....(emphasis added)”

57. EPL’s counsel asserts the more restrictive approach applied in ***O Company v M Company* [1996] 2 Lloyd’s Rep. 347** has been adopted and applied in the English Court of Appeal decision of ***Robert Hitchens Limited v International Computers Limited* [1996] Lexis Citation 1579**. There, Hobhouse LJ stated:

“In my judgment it is important to bear in mind the words of Colman J in the case of *O Company v M Company* [1966] 2 Lloyd’s Reports 347 regarding the application of the well-known principles stated in the judgment of Brett LJ in *Compagnie Financiere du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55. Colman said: “The principle was never intended to justify demands for disclosure of documents at the far end of the spectrum of materiality which on the face of it were unrelated to the pleaded case of the plaintiff or defendant and which were required for purely speculative investigations. The excessively wide application of Lord Justice Brett’s formulation of relevance has probably contributed more to the increase of the costs of English civil and commercial litigation in recent years than any factor other than the development of the photocopying machine”

The time has passed, in my judgment, when courts can properly order discovery without considering whether it is necessary and whether it really does serve to advance justice and reduce the costs of litigation (emphasis added).”

58. EPL’s counsel also relies on the pronouncements made in ***Wittingham and another v Alexiou and others* [2004] CLE/gen/00640**. There, the Court stated:

“...where a party is not certain as to what he is seeking, or for that matter, what he may find as a result of discovery, he should not be allowed to go on a fishing expedition.”

59. With respect to “possession, custody and power”, EPL’s counsel directs the Court to **Practice Direction No. 24/2/8 of the English Supreme Court Practice 1999** for guidance on what the phrase means. It provides:

“.....the party must disclose under this rule (and the Court’s power to order him to do so under rule 3(1)) the following classes of documents:

1. Documents that are or have been in his possession – Possession is distinguished from mere corporeal holding i.e. custody. A bailee or agent has possession of documents entrusted to him for the owners, a servant as such has merely custody.
2. Documents that are or have been in his custody – Therefore documents of a limited company, held by an employee or director ordered to make discovery, are included on one or the other of these two classes.
3. Documents that are or have been in his power – This include all documents which, though they are not in his possession or custody, he has a right to obtain from the person who has them e.g. where he is the owner and has not parted with the right to possession.”

60. EPL’s counsel also asserts that Mr. Millard’s counsel submitted the novel argument that JBDL was acting as agent. They rely on the **Osama Abudawood** case to advance:

“.....establishing that clearly relevant documents held by non-party subsidiaries are within the parent company’s “power” for the purpose of GCR Order 24 Rule 7(1) is an inherently difficult forensic task when the discovery applicant is a stranger to the corporate groups internal affairs.”

61. Furthermore, EPL’s counsel asserts that the English House of Lords decision of **Lornho Ltd. et al v Shell Petroleum Ltd. et al [1980] 1 WLR 627 (“Lornho”)** provides guidance on what is meant by “Documents that are or have been in his power”. There, the Court held that, a party only has a document in its ‘power’ where such party had an enforceable legal right to obtain such document from the third party with actual possession of it, without the consent of any other person. The Court held that, since none of the documents in the company’s subsidiary’s possession could be obtained without the subsidiary’s consent, they were not documents within the defendant’s ‘power’.

62. In relation to the instant case, EPL’s counsel submits that it has disclosed all documents relevant to the action and there is nothing further to disclose.

63. EPL’s counsel concludes that, based on the circumstances and arguments advanced, the Further Discovery Application ought to be refused.

DISCUSSION

Whether EPL should make Better and Further Discovery?

64. The law relevant to Discovery is not in dispute. The Court's power to order discovery, as both parties' counsel have correctly referred to, is derived from **Order 24 rules 3 and 7 of the RSC** (as mentioned at paragraphs 21, 29 and 38 of this judgment).
65. From the Court's perspective, the main crux of the matter is that the requested documents must be relevant to the action and in EPL's possession, custody or power. Mr. Millard must demonstrate there is a prima facie case regarding the discoverability (i.e. relevance and that EPL is in possession, custody and power of such documents) of the requested documents. Mr. Millard's counsel strenuously advances that documents relevant to the matters pleaded at paragraph 51 (iv) – (v) of his Statement of Claim have not been disclosed by EPL and must be disclosed in order for Mr. Millard to properly bring his claim and possibly weaken EPL's position.
66. Additionally, Mr. Millard's counsel submits that the Court requires certain documents in order to make proper findings of fact to issues integral to Mr. Millard's case and thus necessitates disclosure of material documents in EPL's possession.
67. The documents that Mr. Millard specifically seeks disclosure of are:
- “1. Copies of all of EPL's audited financial statements/reports from 2009-2018**
 - 2. Copies of all communications between EPL and purchasers (whether potential and/or real)**
 - 3. Copies of all appraisals/estimates for lots in Jack's Bay from 2007-2018 and**
 - 4. Copies of all sales documents for lots in Jack's Bay inclusive of all conveyances, agreements for sale, and intention to purchase documents from 2009-2018.”**
68. By virtue of EPL's filing of its Supplemental List of Documents, item 1 has been disclosed, thus the Court need not compel disclosure of that class of documents. In relation to items 2 to 4, Mr. Millard's counsel asserts that full disclosure of such documents/information has not occurred. Specifically, Mr. Millard's counsel seeks disclosure of the data used to compile the valuation chart.
69. His counsel asserts that, even though the valuation chart was disclosed, the actual agreements and reservations referred to therein have not been provided. The main reason for such disclosure is to ensure the veracity of the information contained in the valuation chart.

70. Paragraphs 39 to 48 of the Second Affidavit of Valdere Murphy provides a thorough analysis and comparison of the valuation chart and the documents disclosed by JBDL, which are referred to in EPL's Supplemental List of Documents. Several inconsistencies (which have not been contested or objected to by any further affidavit evidence by EPL) highlighted by Mr. Millard's counsel in the analysis include the following:

“-The Valuation Chart states that Lot BF-2 had a purchase agreement contract dated 7 March 2018, yet the document provided by JBDL states that the purchase agreement contract for Lot BF-2 is dated 13 April 2018.

-The Valuation Chart does not contain any information pertaining to BF-1 however, the information provided by JBDL refer to this.

-JBDL does not provide any information pertaining to the remaining seven lots referred to in the valuation chart namely, BF-4, BF-5, BF-V1, BF-V1, BCE-1, BCE-1 and OV-3. No information has been provided to substantiate the information contained in the valuation chart about Lots BF-4, BF-5, BF-V1, BF-V1, BCE-1, BCE-1 and OV-3.

-It is not clear whether the lots listed in the Valuation Chart as BF-V1 twice and BCE-1 twice are in fact four separate lots or duplicate entries.

-JBDL's document pertaining to a reservation agreement entered into with Messrs. Bob Moeller and Jacob Wilson for the sale of Lot BF-2 at a price of \$1,250,000 is not reflected in the valuation chart provided by Mr. Ray Jackson to the Joint Appraiser.”

71. The test of relevance was enunciated in the following terms in *The Compagnie* case:

“It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary (emphasis added).”

72. It is also important to note that, according to the Second Affidavit of Valdere Murphy at paragraphs 11 and 12 (which, again, have not been contested or objected to) that JBDL is 100% beneficially owned by Cotton Bay Developers Limited, which in turn is 100% beneficially owned by EPL. At all material times Mr. Wilson was the Chairman of both JBDL and EPL. They exhibit a chart corroborating such evidence.

73. It too was noted at paragraph 15 of the Second Affidavit of Valdere Murphy that:

“Most notably, the Defendants Audited Financial Statements for the year 2014 at page 11 provides the basis of consolidation.

'Consolidation of a subsidiary begins when the Company (the Defendant) obtains control over the subsidiary and ceases when the Company loses control of the subsidiary....(emphasis added)'

74. Consequently, Mr. Wilson would have access to and control of documents/information in the possession of both JBDL and EPL.

75. Furthermore, paragraph 15 of the Affidavit of Sir Franklyn R. Wilson KCMG reads:

“After executing the Project Management Agreement, Beacon and its personnel assumed full responsibility for the marketing of land eventually made available for sale in Jack’s Bay and communications with persons whom expressed an interest in purchasing land in Jack’s Bay.”

76. By such an admission, Beacon (who acted as an agent for JBDL and by extension for EPL) has had communications with buyers/prospective buyers of lots in Jack’s Bay.

77. As EPL’s representative has made representations that the valuation chart is based on ‘data’ in his possession, such information/data must exist and be in EPL’s possession. As was observed in the *Nettlefold* case (mentioned at paragraph 41 of this judgment), there is an irresistible inference that there must be documents in EPL’s possession which provided the data being referenced in the valuation chart it disclosed.

78. In this regard, the Court rules that Mr. Millard has proven a prima facie case of discoverability as his counsel demonstrates precisely where in his pleadings (being paragraph 51 of his Statement of Claim) the documents in question derive its relevance. Such documents would lead to an inquiry into the mind of EPL and assist the Court in determining whether such information provided to the appraiser in preparing the Report was negligently and/or fraudulently provided to make an inaccurate Report. Further, his counsel has demonstrated that EPL is in possession of such documents by virtue of Mr. Wilson’s admissions in his own affidavit, as stated above, along with the evidence that JBDL is an affiliate of EPL and has given consent to the release of and access to documents relevant to the matters in question.

79. The Court finds such documents, namely the agreements, reservations and any other documents that EPL’s representative derived the ‘data’ along with any communications between buyer/prospective buyers and Beacon, relevant to the case as they indeed relate to the matters in question. Specifically, the Court must determine whether the valuation chart accurately reflects information relevant to the prices of lots that were sold in Jack’s Bay in 2018. As Mr. Millard’s counsel has pointed out, there are several inconsistencies that need to be addressed and corrected. This can only be done by reviewing such documents which have been referred to in the valuation chart and reconciling the information produced in the valuation chart.

80. Furthermore, relying on EPL's case of *Lornho*, consent is not an issue as between EPL and its subsidiary, JBDL. JBDL has voluntarily provided several documents relating to sales/purported sales in Jack's Bay. Therefore, EPL cannot now shield itself by stating that consent of a subsidiary is required for any disclosure of documents held by it. By its own admission, documents relevant to the action have already been forthcoming from JBDL.

81. This is evidenced by paragraphs 19 to 21 of the Affidavit of Sir Franklyn R. Wilson KCMG which provide:

“19. Notwithstanding, since issuance of the Plaintiff’s Summons, the Defendant has used its best efforts to retrieve from Beacon and its affiliate, JBDL, the remaining documents specified in the Plaintiff’s request concerning the sale of the lots in Jack Bay over the relevant period.

20. In that regard, I personally contacted Mr. Michael Abbott and asked him whether Beacon had, within its possession, documents and communications relating to the sale of lots in Jack’s Bay. Mr. Abbott informed me, and I verily believe, that Beacon was dissolved in September of 2019 and he no longer has any of the correspondence and other documents pertaining to sales of lots in Jack’s Bay during the period 2009 to 2018, including reservation agreements, sales agreements and correspondence on behalf of JBDL with prospective and actual purchasers.

21. JBDL, however, has provided, inter alia, the following documents pertaining to the sales of the beachfront lots(emphasis added).....”

82. Accordingly, no issue of consent arises and this Court rules that such documents held by JBDL and Beacon are in the possession custody and/or power of EPL and are thus subject to disclosure.

83. It is also important to note that, Mr. Wilson's affidavit does not provide any cogent or corroborating evidence that Beacon has been dissolved (there is nothing exhibited to the affidavit confirming this – he relies only on a bare statement from Mr. Michael Abbott, as mentioned at paragraph 20 of his affidavit) nor does he state where the documents/correspondence that have been in Beacon's possession relevant to the sales of lots in Jack's Bay are located or likely to be found.

84. Further, the Court rules that Mr. Millard, consistent with *The Compagnie* case, has demonstrated that the documents or class of documents “offer a real probability of evidential materiality” as the Court must have sight of the data referred to in the valuation chart to make a full and proper assessment of all the information available at the time the chart was prepared in order to make a proper determination of fact.

85. It is incumbent on all parties to comply with the rules of court – particularly with regard to discovery - so that all parties, and the Court, have all information

material to the action to ensure that justice is done and the law is correctly applied to issues for determination.

CONCLUSION

86. In the circumstances and based on the authorities referred to above, the Court accedes to Mr. Millard's application. I will exercise my powers and order EPL to make further and better disclosure.

87. Accordingly, the Court makes the following order:

1. Eleuthera Properties Limited ('EPL') shall within 14 days, make and serve an affidavit stating whether any of the documents specified or described in the Schedule hereto or any class of documents so specified or described or any other relevant documents to the proceedings which it is reasonable to suppose contains information which may enable the Plaintiff to advance his own case or to damage that of EPL or if it is a document which may fairly lead the Plaintiff to a train of inquiry, and/or have been at any time in its possession, custody or power, and if not in its possession, custody or power, when they or any of them parted with it or them and what has become of the document or documents.
2. That EPL do within 14 days of paragraph 1, make and serve in relation to the documents specified or described in the Schedule hereto, a further and better list of documents which are or have been in their possession, custody or power, along with an affidavit verifying such further and fuller list of documents.
3. That EPL do within 7 days of the making or serving of the further and better list of documents pursuant to the Schedule, permit Mr. Millard to inspect and take copies of the documents identified in such further and fuller list of documents and all such documents as are referred to in the stated affidavit of EPL as being in their possession, custody or power.
4. The Schedule shall read as follows –

Schedule

- I. **Copies of all communications between EPL and purchasers (whether potential and/or real)**
 - II. **Copies of all appraisals/estimates for lots in Jack's Bay from 2007-2018; and**
 - III. **Copies of all sales documents for lots in Jack's Bay inclusive of all conveyances, agreements for sale, and intention to purchase documents from 2009-2018.**
5. Mr. Millard is awarded costs for this application, to be taxed if not agreed.

88. Lastly, I wish to thank both parties' counsel for such well written and well-presented arguments.

Justice Deborah Fraser

Dated this 26th day of May 2023