

**THE EASTERN CARIBBEAN SUPREME COURT**

**IN THE HIGH COURT OF JUSTICE**

**FEDERATION OF SAINT CHRISTOPHER AND NEVIS**

**NEVIS CIRCUIT**

**CLAIM NO.      NEVHCV2024/0003**

**Linked to NEVHCV2023/0126**

**BETWEEN**

**NEWFOUND PINNEYS LIMITED**

**CLAIMANT/ COUNTER DEFENDANT**

**AND**

**LINDSAY FITZPATRICK GRANT**

**1<sup>st</sup> DEFENDANT / ANCILLARY CLAIMANT**

**AND**

**PINNEYS FOREST DEVELOPMENT CORPORATION LIMITED**

**2<sup>nd</sup> DEFENDANT/ COUNTER CLAIMANT / ANCILLARY  
DEFENDANT**

**Appearances**

Tim Prudhoe KC, Counsel, with Brian Barnes and Brianna Brantley of Daniel Brantley for  
Newfound Pinneys Limited, with Lawrence Edwards in attendance.

E. Anthony Ross KC, Counsel, with Kamau Grant for Lindsay Fitzpatrick Grant.

Ms. Kurlyn D. V. Merchant and Ms. Aymah C. George of Merchant Legal Chambers appearing for  
Pinneys Forest Development Corporation Limited.

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2026: APRIL 28

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**JUDGEMENT**

**In dispute over sale of mortgage**

- 1 **Morley J:** This case is about a mortgage, created when A borrowed money from B secured against land belonging to A, B later sold the mortgage to C, and A has litigated that what C has bought from B is worthless when C sought to get A to pay off to C the debt which had been owed to B and to seize the land.
- 2 In clearer brief terms:
- a. On its face the mortgage secured a debt of US\$7.92m against almost 100 acres<sup>1</sup> of land.
  - b. In 2005, Newfound Pinneys Ltd (*Newfound*) was set up in August and acquired 450 acres of land on Nevis in order to develop it into luxury accommodation.
  - c. To do this, in 2006 it borrowed US\$4.2m from 8 people, here called 'pre-launch investors' (*PLIs*), promising lots on the land when developed or in any event a return of 1.2 times the investment, which would mean US\$5.04m, to be secured against 100 acres in the Pinneys area of Nevis, being a plot registered to Newfound in Book 44 Folio 116 in the Land Registry.
  - d. To keep things simple, a lawyer local to Nevis was to act as trustee for the *PLIs*, named Lindsay Grant, a leading local personality and former minister, and so he was to hold the mortgage and trust papers dated in April 2007, being documentation it appears largely drawn up by Newfound and given to Grant in February 2008 who then registered the mortgage.
  - e. By a quirk to be explored in this judgment, as above the debt said secured on the face of the mortgage was US\$7.92m, not US\$5.04m.
  - f. But nothing was developed. The original directors and managers of Newfound changed several times. The money had been taken and not used as expected.

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<sup>1</sup> Specifically 99.93 acres.

- g. In 2014, Lawrence Edwards, a learned chartered accountant in Cayman, became a director of Newfound, as part of his work running companies in 'financial distress'.
  - h. But then during 2021, Pinneys Forest Development (*Forest*), was set up in June, and paid US\$3.15m to the PLIs for Grant to assign to Forest the mortgage, and who then on 07.02.23 issued notice to Newfound to pay off the US\$7.92m to Forest as a prelude to forcing sale of the 100 acres, valued on 12.09.23 by surveyor Dave Simon for Forest at US\$2.5m, at which point there was pandemonium at Newfound, who had been sitting quietly many years not doing anything about owing money to the PLIs, with the land security now being valued as vastly less than the debt.
  - i. It is clear from all the material perused in writing and in trial, I am sure the 8 PLIs having had no return in 15 years on their investment had agreed to get their money back, costing in 2021 in US dollars 75% what they had paid out in sterling in 2006, which at least was something, and Forest had seen an opportunity to more than double its money, by getting the 100 acres, and on top holding Newfound seeming to owe US\$5.42m more than the land appeared worth.
  - j. The person who spotted the opportunity was Brian Dobbin, who reported much experience developing land, with some flamboyance arriving onto Nevis for court in a helicopter, and he was an original director of Newfound when the PLIs had been persuaded to invest, he had resigned on 18.08.06, and he had lately set up Forest on 25.06.21 he said to do what had not been done in all this time, namely develop the land.
  - k. The pivotal trial issues have been, could Grant assign the mortgage to Forest, to include the debt, and what was it worth.
  - l. In marched the lawyers, Newfound suing Forest and the trustee, with the stage set for argument between Messrs Edwards, Grant and Dobbin in a trial during 02-06.03.26, in which Counsels Prudhoe KC, Ross KC, and Merchant, with juniors, have appeared respectively to do legal battle, in part of high quality, orally and in writing.
- 3 The working court bundle has consisted of, with much repetition of documents:
- a. a 'core bundle' (CB) of 635 pages, which includes affidavits from Edwards, Grant and Dobbin, and
  - b. a 'trial bundle' (TB) in 4 parts, where

- i. part 1 is 234 pages of pleadings,
  - ii. part 2 is 201 pages of affidavits and supporting materials,
  - iii. part 3 is 723 pages of documentary exhibits, and
  - iv. part 4 is supplemental material of 27 pages.
- 4 In addition, there has been a joint authorities bundle (JAB) of 674 pages of legal authorities offered, and submissions:
  - a. For Newfound, pretrial of 5 pages and post-trial of 19 pages;
  - b. For Grant, 4 and 13 pages; and
  - c. For Forest, 7 and 17 pages.
- 5 Trial was 5 days, being 02-06.03.26, and in sum the papers total 2560 pages.

### The details

- 6 On 18.08.05, Newfound was incorporated in Nevis<sup>2</sup>, and owned by Newfound Resorts Limited of Canada under Brian Dobbin's leadership. In 2006, it acquired approximately 450 acres at Pinneys Estate for a luxury resort development, including in particular 99.93 acres ('100 acres') as registered on 03.05.06 in Book 44 Folio 116<sup>3</sup>. To fund development, Newfound entered into sales agreements dated 18.12.06 with 11 PLIs who were to provide a cumulative investment of US\$6.6m. The sales agreements at para 8 provided that this investment would be secured by way of a mortgage over the 100 acres to the value of 1.2 times the sum invested, creating at worst a 20% return. The PLIs included 8 investors (Dickie<sup>4</sup>, Pollen<sup>5</sup>, Waller<sup>6</sup>, Childs<sup>7</sup>, Cabourne<sup>8</sup>, Fox<sup>9</sup>, Ridgeley<sup>10</sup>, and Syms<sup>11</sup>) contributing US\$4.2m, and 3 others (Philpot<sup>12</sup>, Jones<sup>13</sup>, and

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<sup>2</sup> TB3p16

<sup>3</sup> TB3p17-18

<sup>4</sup> TB3p29

<sup>5</sup> TB3p37

<sup>6</sup> TB3p45

<sup>7</sup> TB3p53

<sup>8</sup> TB3p61

<sup>9</sup> TB3p69

<sup>10</sup> TB3p77, the PLI being Andrew Ridgeley, the famous pop star from the duo *Wham!*

<sup>11</sup> TB3p85

<sup>12</sup> TB3p93 and p118

<sup>13</sup> TB3p126

- Conlon<sup>14</sup>) who invested US\$2.4m, which would have brought up the total to US\$6.6m, but the 3 later opted for separate security in Canada. With the 3 securing elsewhere, the 8 entered an intercreditor agreement which would be dated 27.04.07, as a document designed to underpin the indebtedness and reason for the mortgage.
- 7 At 1.2 times the sum invested, the return would in theory be \$5.04m on US\$4.2m, or US\$7.92m on US\$6.6m.
- 8 In around 2006, Grant agreed to act as trustee to simplify the 8 PLIs security arrangements, helping draft the memorandum of mortgage securing US\$7.92m, for which by invoice dated 23.05.07 he was paid US\$20000<sup>15</sup>, and the final mortgage and trust documents later originated from Newfound's then director, general counsel, and vice president Derrick White in correspondence to Grant dated 05.02.08, which Grant lodged at the Land Registry, where on 11.02.08 the mortgage was formally noted on Newfound's land title at Book 44 Folio 116 concerning the 100 acres to secure the sum of US\$7.92m.
- 9 The mortgage then remained recorded on the land title without objection from Newfound for 13 years until 2021.
- 10 On 21.06.21, Forest was incorporated<sup>16</sup>, led by Dobbin, and on 13.09.21 the 8 PLIs sold their interest in the mortgage to Forest for US\$3.15m, paid in sterling as £2282609, instructing Grant as trustee to transfer the mortgage to Forest. Following these instructions, Grant executed a Deed of Assignment dated 02.11.21 and a subsequent Memorandum of Transfer of Mortgage which was formally noted on the land title to the 100 acres on 06.07.22. Forest's plan was to get the 100 acres to build a boutique hotel with 12 bungalows and later 70 luxury villas.
- 11 On 07.02.23, Forest issued notice to Newfound to pay off the US\$7.92m recorded on the mortgage and land title, with seizure of the land by the court bailiff on 12.04.23, and this led on

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<sup>14</sup> TB3p134

<sup>15</sup> TB3p603 – US\$19958.33.

<sup>16</sup> TB3p304

23.01.24, to Newfound initiating these proceedings for declaratory relief against Grant and Forest, challenging the validity of the 2008 mortgage, the trust instrument, and the assignment.

12 The key documents in this litigation are therefore:

- a. the Sales Agreements dated 18.12.06 with the initial 11 PLIs<sup>17</sup>;
- b. the Inter-Creditor Agreement dated 27.04.07 with the remaining 8 PLIs<sup>18</sup>;
- c. the Declaration of Trust, dated 27.04.07, identifying up to 11 possible investors to maximum US\$6.6m as at schedule B part I, though in the end covered by the trust was the investment by 8 at US\$4.2m as at schedule B part II<sup>19</sup>;
- d. the Memorandum of Deposit of Certificate of Title dated 27.04.07<sup>20</sup>;
- e. the Memorandum of Mortgage dated 27.04.07, for US\$7.92m<sup>21</sup>;
- f. the letter dated 05.02.08 from Derrick White of Newfound to Lindsay Grant enclosing all the mortgage and trust paperwork<sup>22</sup>;
- g. the Agreement for Sale of the Mortgage by the 8 PLIs to Forest dated 13.09.21<sup>23</sup>;
- h. the Deed of Assignment of the mortgage dated 02.11.21<sup>24</sup>;
- i. the subsequent Memorandum of Transfer of Mortgage dated 11.02.22<sup>25</sup>, which was formally noted on the title on 06.07.22<sup>26</sup>;
- j. the Notice to Pay Off dated 07.02.23<sup>27</sup>, with land seizure of the 100 acres declared by the court bailiff on 12.04.23<sup>28</sup>; and
- k. the land registry title for Book 44 Folio 116 and what is formally recorded on it in the Registrar's handwriting, both from 11.02.08<sup>29</sup> and 06.07.22<sup>30</sup>.

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<sup>17</sup> TB3p29-141

<sup>18</sup> TB3pp142-151

<sup>19</sup> TB3p153-155

<sup>20</sup> TB3p156-159

<sup>21</sup> TB3p161-162

<sup>22</sup> TB3p152

<sup>23</sup> TB3p169-191

<sup>24</sup> TB3p195-197, p412-435 unredacted.

<sup>25</sup> TB3p198

<sup>26</sup> TB3p251

<sup>27</sup> TB3p199-203

<sup>28</sup> TB3p204-206

<sup>29</sup> TB3p17-18

<sup>30</sup> TB3p250-251

- 13 During the history of the litigation, the claim was amended by original counsel Colin McKie KC in May 2025, and Counsel Prudhoe replaced him on 30.10.25, the claim being presented in short to argue the US\$3.15m bought Forest nothing, seeking declarations that:
- a. no debt of any amount was owed to Grant or to the PLIs;
  - b. the Declaration of Trust is invalid;
  - c. the Memorandum of Deposit created no equitable mortgage, and the Memorandum of Mortgage created no mortgage and/or did not convert an equitable mortgage into a legal mortgage;
  - d. the transfer of the mortgage to Forest was invalid; and
  - e. enforcement proceedings commenced by Forest are legally ineffective; all as set out formally below:

By Amended Claim Form filed on the 20.05.25, the Claimant seeks:

- (i) A declaration that NPL is not indebted to Forest in the amount of US\$7.92 million or any other sum.
- (ii) Further, or alternatively a declaration that any claim by Forest for the payment of US\$7.92 million or any other sum, pursuant to the Sales Agreement, the Declaration, the Memorandum of Mortgage and the Forest transfer is barred for limitation.
- (iii) A declaration that the Declaration of Trust does not constitute a valid and enforceable trust.
- (iv) A declaration that NPL did not create a valid and enforceable equitable mortgage over the NPL Land, pursuant to the Memorandum of Deposit or otherwise.
- (v) A declaration that the Memorandum of Transfer of Mortgage or Encumbrance executed by the 1st Defendant – Mr. Grant as trustee and Mortgagee in favour of the 2nd Defendant – Forest dated the 11th February, 2022 (the Forest Transfer) registered and noted on the Claimant's / NPL Certificate of Title Book 44 Folio 116 of the Register of Titles, Nevis Circuit, is not enforceable against NPL, such being void and/or voidable;
- (vi) A declaration that the Notice to Pay off and Act of Seizure and all other enforcement documents and actions attended to by the 2nd Defendant- Forest are similarly invalidated and ineffective as not enforceable by the 2nd Defendant against NPL;
- (vii) An Order of [Withdrawal]/[Removal] shall be filed by the Defendants to withdraw/remove the Forest Transfer registered and noted on the Claimant's/ NPL Certificate of Title Book 44 Folio 116 of the Register of Titles, Nevis Circuit, and shall be submitted to the Register within 14 days of this order;
- (viii) An Order of [withdrawal]/removal shall be filed by the Defendants to withdraw/remove the Memorandum of Mortgage registered and noted on the Claimant's/NPL Certificate of Title Book 44 Folio 116 of the Register of Titles, Nevis Circuit, and shall be submitted to the Registrar within 14 days of this order;
- (ix) Costs; and
- (x) Such further and other relief as the Court deems fit.

- 14 In parallel, Grant has made a claim he should not be a party, only a witness, is upset his being made a party as maligned him, and wants to be indemnified as to his considerable costs, either

by Newfound or Forest, depending on who wins, while Forest has made a counterclaim about having paid property taxes and stamp duty of EC\$360k<sup>31</sup> on the 100 acres, and other damages, which will become an issue if its purchase of the mortgage has bought nought.

15 As a trial, the affidavit evidence of each witness was received as testimony<sup>32</sup> and there was some expansion and then cross-examination. Edwards began on 02.03.26, Dobbin was interposed on 03-04.03.26, Edwards resumed on 04-05.03.26, and Grant was 05-06.03.26. Of interest in the testimony was as follows:

a. Concerning Dobbin:

- i. He was an original director of Newfound, who had in 2003 and 2005 won awards as a property developer, active in eg St Kitts, Antigua, St Lucia, Canada, and Ireland, and who had been party to buying in 2006 all 450 acres of the Pinneys land for US\$21.5m, the billionaire Bill Gates owning adjoining land.
- ii. He explained Forest had been set up specifically to target the undeveloped Pinneys land, knowing Newfound was in financial distress.
- iii. He had been aware of the 11 PLIs making investments, who he said he knew as friends with private money, and having ceased being in any way active in Newfound by 2007, having resigned in 2006, he did not know what had happened to the money raised nor how it was spent.
- iv. While discussing whether the debt secured by the mortgage should be US\$7.92m or less, he told the court all he really wanted was the land, which although valued at US\$2.5m, he could turn into US\$80m through development, building an access road for US\$1.5m.
- v. He expressed incredulity Edwards had not sought to develop the land from 2014, nor would sell when Dobbin approached him, wondering if the inactivity was somehow money laundering, or designed to keep generating fees as a custodian of Newfound in financial distress, as he queried directly by a letter dated 26.05.25<sup>33</sup>.

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<sup>31</sup> EC\$212912.64 stamp duty and EC\$146912.10 property taxes.

<sup>32</sup> CBp155 – Edwards, 10 pages, dated 08.09.25; CBp166 – Grant, 11 pages, dated 08.09.25; CBp341 – Dobbin, 10 pages, dated 08.09.25.

<sup>33</sup> TB4p16

- vi. Further, he explained the sterling Forest paid on 13.09.21 to the PLIs, all being from the UK, being £2282609, was a complete repayment of their investment in 2006, where they had converted sterling to US dollars at a time when the exchange rate was about 1:2. However, per Edwards, on 13.09.21 the exchange rate was 1:1.38 so that the sum of £2282609 would have been US\$3.15m, being 75% the original US\$4.2m<sup>34</sup>. While I accept the sterling payment may have satisfied the original sums paid as sterling then converted to US dollars in 2006, now returned, it is also clear by 2021 there had been no return for the PLIs on the original investment, and it was now cheaper to convert dollars to sterling, so that the effect of this clever financial transaction was that Forest was getting the mortgage at a cost to them in 2021 of US\$3.15m, being 75% of the US dollars sum received in 2006.

b. Concerning Edwards:

- i. With 35 years' experience as an accountant, first with PWC, later in private practice concerning distressed companies, he was an outsider to the originating facts, as he had only come into Newfound in 2014, becoming a director, and had sought to piece together through paperwork and other diligent enquiries what had been happening in the company previously, which he suspected had been much mismanaged by Dobbin, along with other projects.
- ii. He had first learned of Newfound when asked to investigate whether there was realistic security in the Pinneys land to the benefit of a company named Agilo Security, originally 'Equity Trust Trustee & Agency Services', which Edwards was safekeeping, to the value of US\$15m, secured against the 100 acres, as a second charge dated 10.07.08, behind the Grant mortgage dated 11.02.08.
- iii. As to what had happened to the money raised from the 11 PLIs, he did not know.
- iv. From review of Newfound papers, he spotted the figure of US\$7.92m was too high as secured by the Grant mortgage recorded on the land title to the 100 acres, realizing only US\$4.2m had only ever been raised, leaving an apparent balance of US\$3.72m, which he wrote to Grant as mortgage trustee on 30.04.21<sup>35</sup> to ask the

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<sup>34</sup> As calculated by Edwards, see para 47 Edwards affidavit, CBp161.

<sup>35</sup> TB3p374.

balance be applied to Agilo Security. Grant did not reply, so that Edwards wrote again on 03.05.21<sup>36</sup> and 10.05.21<sup>37</sup>, Edwards rang so there was a brief telephone discussion with Grant, and he wrote again on 07.06.21<sup>38</sup>, and 09.06.21<sup>39</sup>, enclosing all the mortgage and trust paperwork, showing he had considered it, again without reply.

- v. Finally on 06.09.21<sup>40</sup> Edwards wrote to Grant to say he had heard rumor someone was about to buy the mortgage *'having been registered for an amount almost double the non-interest bearing amount advanced and never corrected'*. This exchange is of interest as it tells the court Edwards was treating the mortgage as effective, and it lies ill now to argue it never was.

c. Concerning Grant:

- i. In legal practice since 05.11.90, the absence of response by Grant to Edwards explains why Edwards was wary Grant was up to something underhand, wondering if there was fraud afoot, though could not identify how, not formally pursued in this case, though floated by Edwards in court, as it lies ill a lawyer, and former minster, does not reply to a professional enquiry, ignoring correspondence, and then being found later to have sold the mortgage, which is exactly what Edwards raises as a concern on 06.09.21, while Grant through his firm Grant Powell & Co in a letter to firm Daniel Brantley representing Newfound on 17.11.21 wrote seeming dismissively he had been too busy as a minster to reply to enquiry.
- ii. In evidence Grant simply said he did not think it right to talk to Edwards, which was weakly put, and I incline he should have, and did not as he was hiding from Edwards the plan to sell the mortgage, which he had helped to draft in 2007<sup>41</sup>, which in his affidavit he knew about from not later than July 2021, which then occurred on 02.11.21 by deed of assignment, for which he told the court he was paid US\$32000,

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<sup>36</sup> TB3p377

<sup>37</sup> TB3p378

<sup>38</sup> TB3p380-382

<sup>39</sup> TBp383

<sup>40</sup> TBp384

<sup>41</sup> See para 11 of Grant's affidavit, CBp168.

as to talk would alert, with the worry the settlement for the 8 PLIs might then fall through.

- iii. In my view he ought to have at least written to Edwards he would not correspond directly as he was a trustee, as to have kept silent explains why Edwards became suspicious, and when later advised by counsel there may be argument the trust was invalid and the mortgage void, it was not unreasonable Edwards thought the trustee party to some measure of wrongdoing, so that for this reason, I do not find it wrong Grant was joined as a defendant in these proceedings: the lesson is, answer your mail, even if only to say you cannot comment.
- iv. However, this is not to say there was wrongdoing by Grant, or anyone, and I next turn to analysis of what Dobbin bought for US\$3.15m.

16 *Obiter* and of interest, exploration of evidence during the trial revealed it is a curious feature in this case that secured against the 100 acres at Book 44 Folio 116, which is land still wholly undeveloped and where the original money invested has disappeared, on inspection of the land certificate are 3 charges, being valued on their face as US\$7.92m to Grant (later Forest), then US\$15m to Agilo Security, and then US\$6m to a 'Neil Minx' (recorded also but later on 10.07.08)<sup>42</sup>, making a total of US\$28.92m, noting the 100 acres valued in 2021 at US\$2.5m, while the whole 450 acres were originally in 2006 bought for the lesser sum of US\$21.5m, begging this question: is land being bought cheaply on the promise of development, which then leads to money being raised from investors on the promise of a large return when developed, but not being developed, the money disappearing, companies then becoming 'distressed', the mortgages written onto the land titles are largely worthless, particularly later charges, so that investors have in effect lost their money to a dubious practice of investing in land which is never developed, so that the land is a tantalus to make folk give away their money in the belief a valuable luxury paradise will be built which never is.

## The mortgage creation

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<sup>42</sup> TB3p18

- 17 Notwithstanding the evidence offered through the witnesses, with much unhappiness expressed between men of standing as to whether Dobbin is an unreliable businessman, Grant has been somehow devious, and Edwards has been unreasonable, this case turns much more on reading the documents, as to what they intended, and whether within the law.
- 18 Concerning the sales agreements of 18.12.06, these set out the following at paras 1 and 7-9:

The Pre-Launch Offering

1. On or before March 1, 2007, the Developer shall identify and divide a piece or parcel of the Land into not more than Fifty (50) lots, but not less than Twenty Five (25) lots, (the "Sales Phase I") for sale thereafter, and on or before March 1, 2008, the Developer shall identify and divide a piece or parcel of the Land into not less than Twenty Five (25) lots (the "Sales Phase II"), for sale thereafter. The lots of Sales Phase I and Sales Phase II shall not be less than Zero Decimal Five (0.5) acres each.

The Security

7. As consideration of the payment of the Purchaser Price, the Developer shall mortgage a portion of the Land (the "Secured Land"), as more particularly described in the attached Schedule "B," to the benefit of the Purchaser as a member of the Purchase Group (hereinafter the "Mortgage"), attached as Schedule "C."
8. The Mortgage shall secure the Purchaser's rights and obligations under the Agreement to a maximum amount equal to One Decimal Two (1.2) times the cumulative total of all sums received by the Developer under the Accepted Offers (the "Maximum Secured Amount").
9. The Mortgage shall remain in full force and effect throughout the term of this Agreement, and shall rank as a first charge and encumbrance upon the Secured Land, and the Purchaser shall enter into an Intercreditor Agreement (hereinafter the "Intercreditor Agreement"), attached hereto as Schedule "D") with the Developer and the other members of the Purchase Group.

- 19 I note in particular para 8 creates a 1.2 multiplier for the sums invested to be secured by the mortgage.

- 20 Further, I note the land, mortgage, and the intercreditor agreement, in draft, are specifically referenced as schedules B, C, and D, though the size of the debt to be secured by the mortgage is for now blank, while at para 22 the agreement is to be subject to the laws of St Kitts & Nevis.
- 21 Concerning the 8 PLIs intercreditor agreement finally of 27.04.07, Newfound is the 'obligor' and the 8 the 'creditors', and it makes specific reference to the Sales Agreements as *'the prelaunch offering agreements between the obligor and the creditors'*, and also to their address as being that of Grant, which I find anticipates the trust.
- 22 The purpose of the intercreditor agreement is set out at para 2:

## 2. ENFORCEMENT OF SECURITY

To the extent permitted under applicable law, Enforcement Action against the Charged Property may be taken by the Majority Creditors for breach by the Obligor of an obligation under a Finance Document and the Obligor waives all rights it may otherwise have in the taking of an Enforcement Action by the Majority Creditors against the Charged Property to require that the Transaction Security be enforced in any particular order or manner or at any particular time or that any sum received or recovered from any person, or by virtue of the enforcement of any of the Transaction Security or of any other Security Interest, which is capable of being applied in or towards discharge of any of the Secured Obligations, is applied in any particular manner

- 23 Turning to the trust document dated 27.04.07, it reads:

**AND WHEREAS**, the Developer presented for sale certain rights, title and interest in and to portions of the Land at a reduced pre-launch price (the "Pre-Launch Offering") to a select and limited number of purchasers as more particularly described in the attached Schedule "B", Part I (hereinafter the "Investors");

**AND WHEREAS**, NPL and the Investors entered into various and separate agreements under which NPL agreed to grant to the Investors, as a class, a mortgage (hereinafter the "Mortgage") over that piece or parcel of land as more particularly described in the attached Schedule "C";

**AND WHEREAS**, certain of the Investors as listed in Schedule "B", Part II, as the same may be amended pursuant to Clause 2 hereof (the "Mortgage Investors") agreed to hold the mortgage as members of a class as more specifically set out in the attached Schedule "D" (hereinafter the "Inter-Creditor Agreement")

**AND WHEREAS**, I, Mr. Lindsay Grant, Solicitor, of St Kitts & Nevis (hereinafter the "Trustee"), have agreed to hold the Mortgage as solicitor for the benefit of the Mortgage Investors;

- 24 I note in the trust document as above:
- a. Grant at para 4 is to hold in trust for the 8 PLIs as 'mortgage investors' a mortgage, referencing in para 3 the intercreditor agreement, which had referenced the 8 sales agreements, and which constructively are referenced in para 2 as the 'various and separate agreements' which led to Newfound agreeing to the mortgage.
  - b. The first para refers only to 'presenting' for sale to 11 PLIs for US\$6.6m, as captured in Schedule B part I, and the third speaks to the 'agreement' later reached but only by 8 PLIs as captured in Schedule B part II, where the investment is reported to have settled as US\$4.2m.
  - c. I conclude from this the size of the debt to be secured by the mortgage held in trust by Grant is, referencing through the intercreditor agreement back to para 8 of the sales agreements, 1.2 times US\$4.2m invested under para 3, being therefore US\$5.04m.
- 25 Turning to the memo of mortgage, also dated 27.04.07, signed by Derrick White for Newfound, and as was later on 11.02.08 noted on the land title of the 100 acres, it states:

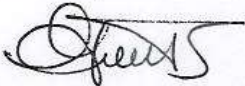
We, NEWFOUND PINNEYS LIMITED a company incorporated under the Companies Ordinance of Nevis with registered office at TDC Building, Main Street, Charlestown, in the Island of Nevis registered proprietor of all that parcel of land described in the Schedule hereto IN CONSIDERATION of the sum of US\$7,920,000.00 (Seven Million, Nine Hundred and Twenty Thousand Dollars United States Currency) due and owing by us to LINDSAY GRANT, SOLICITOR, whose address for service is 2<sup>nd</sup> Floor Suite #4 Evelyn's Building, Main Street, Charlestown, Nevis DO HEREBY MORTGAGE the said land as security for the performance of our obligations contained in an agreement dated 27<sup>th</sup> April, 2007.

AND we consent to the noting by the Registrar of Titles of a mortgage for the said sum of money upon the Certificates of Title of the said parcel of land and authorize and grant warrant to the Registrar of Titles accordingly. Given under the Common Seal of NEWFOUND PINNEYS LIMITED this 27<sup>th</sup> day of April, 2007.

- 26 It is clear the figure of US\$7.92m is wrong. This sum, mixing up paras 1 and 3 in the trust document above, anticipates the investment secured by the intercreditor agreement being US\$6.6m, but it never was, it was only ever US\$4.2m, where 3 of the 11 early investors - Philpot, Jones, and Conlon - had later made different arrangements to secure their investments, leaving the 8 to be secured by this mortgage.
- 27 It is unclear why this is wrong, seeming designed excessively to enrich the 8 PLIs by an extra US\$2.88m, and just who wrote out the figure of US\$7.92m, someone must have calculated it and then typed it, who may have been Grant or Newfound's Derrick White, who had a legal team of 3, both it appears having some input in settling the final terms of the memo, and trust document, or some other person in the mix, but for the purposes of this judgment, whoever or why is beside the point: I am sure the figure is wrong.

- 28 This figure of US\$7.92m has then been noted in the handwriting of the Registrar on the land title from 11.02.08, when registered by Grant, as appears below:

Mortgage in favour of Lindsay Grant, Director of 2<sup>nd</sup> Floor Suite #4 Evelyn's Building, Plaza Street, Nervis  
to secure the sum of US\$ 7,920,000.00 (Seven million nine hundred and twenty thousand Dollars United States Currency) to be repaid in accordance with an agreement dated 27<sup>th</sup> April 2007. Vide Instrument dated 5<sup>th</sup> February 2008 and filed "N" Noted this 11<sup>th</sup> day of February 2008 at 11:15 am

  
Registrar of Titles

- 29 When Forest then purported to buy the mortgage, the figure has been repeated in a note on the land title, dated 06.07.22:

Transfer of Mortgage in favour of Lindsay Grant, Director of 2<sup>nd</sup> Floor Suite #4 Evelyn's Building to secure the sum of US\$ 7,920,000.00 (Seven million nine hundred and twenty thousand dollars, United States Currency). Noted on 11<sup>th</sup> day of February, 2008 at 11:15 am. to the extent of the said sum of US\$ 7,920,000.00 or such amount as remains due and owing thereupon to and in favour of Pinnacle Forest Development Corporation Limited. Vide Instrument dated 11<sup>th</sup> day of February 2008 and filed "N".  
Noted this 06<sup>th</sup> day of July, 2022 at 10:00 am

  
Registrar of Titles

- 30 Counsel Merchant argues the figure should stand as 'indefeasible', meaning once it is written on the land title, it cannot be undone. She relies on the **Title by Registration Act (TBRA)** cap 10.19 which states:

**Certificate of title to be indefeasible.**

8. All certificates of title granted under this Act, and all notings of mortgages and encumbrances on the same, shall be indefeasible.

**First Schedule**

Indefeasible. The word used to express that the certificate of title issued by the Registrar of Titles, and the notings by him or her thereon, cannot be challenged in any Court of law on the ground that some person, other than the person named therein as the registered proprietor, is the true owner of the land therein set forth, or on the ground that the mortgages or encumbrances in the notings thereon are not mortgages and encumbrances on the said land; except on the ground of fraud connected with the issue of such certificate of title, or the noting of such mortgages or encumbrances....

Note...The notings made by the Registrar of Titles upon a certificate of title are as indefeasible as the title upon which they are marked, that is, that any one, in dealing with the land, may take it as guaranteed by the Government of the State that no other mortgages or encumbrances affect the land than those noted on the certificate of title, and that the existing mortgages and encumbrances are correctly set forth.

31 However, there is also **s141 TBRA**, which states:

**Court may order cancellation or amendment of certificate of title.**

**141.** At the request of a Registrar of Titles upon petition or case stated, or in any proceeding respecting any land, or in respect of any contract or transaction relating thereto, or in respect of any instrument, caveat, or dealing with land, the Court may by decree or order direct the Registrar of Titles to cancel, correct, substitute, or issue any certificate of title, or make any noting or entry thereon, and to do such acts as may be necessary to carry into effect any judgment of the Court.

32 In my judgment, as a matter of construction the effect of **s141 TBRA** is to set in context **s8 TBRA** and the **First Schedule**, in that these refer to the indefeasibility of the fact of a title or note, but allowing for correction where there has been an error, like in a date, or figure, or spelling, or amount, or name, which may be wrongly written, absent fraud as here. It makes no sense where the court is sure there has been at least a mistake, that it cannot be corrected, and so I do so in this case under **s141 TBRA**, this being a proceeding respecting land and contract, and order the notes of 11.02.08 and 06.07.22 corrected by the Registrar of Titles to reflect the sum of US\$5.04m.

33 At this point, as it stands, I find the intention in the documents of Newfound, the 8PLIs and Grant, was to create an enforceable legal mortgage held in trust securing a debt of US\$5.04m over the 100 acres, specifically referencing schedule B part II in the trust document which showed the initial investment to be \$US\$4.2m.

- a. It is clear this is the intention of Newfound as the final paperwork was received by Grant from Newfound's Derrick White on 05.02.08<sup>43</sup>, enclosed with a letter stating:

Privileged and Confidential

February 5, 2008

Lindsay Grant  
Lindsay Grant & Company  
P.O. Box 823  
3 Church Street,  
Basseterre,  
St. Kitts

Dear Mr. Grant:

Please find enclosed the executed Memorandum of Mortgage and Memorandum of Deposit of the Certificate of Title.

Further, we have enclosed the Trust Declaration to be executed by you which sets out the amounts secured by the Memorandum of Mortgage at any given time. The remaining Inter-Creditor Agreements are in the process of being delivered to our office in St. Kitts and shall be forwarded directly to you. Based on the Inter-Creditor Agreements executed by James Cabourne, Roland Fox, Andrew Ridgley and David Syms the current invested amount is set out in Part II of Schedule B attached to the Trust Declaration.

Thank you for your assistance in this matter.

- b. And further, after receipt of the paperwork there was then presentation on 11.02.08 of the memorandum of mortgage by Grant to the Registrar of Titles under the **TBRA**, though with the wrong figure of US\$7.92m on it, so it was noted on the land title, as above, consistent with the **TBRA**:

**Mortgage to be constituted by noting on certificate of title.**

**36.** A mortgage may be created and constituted over any land by the noting of the same by the Registrar of Titles on the duplicate certificate of title, both that in the Registry and that in the hands of the registered proprietor.

**Memorandum of mortgage to be presented to Registrar.**

**37.** (1) The warrant to authorise the Registrar of Titles to make any such note upon the certificate of title shall be a memorandum of mortgage in Form 8 set out in the Second Schedule, which shall be presented to the Registrar of Titles by the mortgagor or mortgagee, or by those authorised to act on their behalf....

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<sup>43</sup> TB3p152

**Particulars of mortgage to be noted on certificate of title.**

39. When a memorandum of mortgage has been presented, the Registrar of Titles shall proceed forthwith to note the chief facts set forth therein upon the duplicate certificates of title, according to the form of noting of mortgages upon the form of the certificate of title, Form 4 set out in the Second Schedule.

**On noting of mortgage, land to be held in pledge by mortgagee.**

41. So soon as the Registrar of Titles has noted the mortgage upon the certificate of title, the land contained in such certificate shall be held in pledge by the mortgagee, from the date of the mortgage, for the repayment to him or her of the principal sum actually advanced and the interest set forth therein.

- 34 Counsel Prudhoe argues there cannot be a legal mortgage for more than the sum ‘actually advanced’, which would be therefore for US\$4.2m, not US\$5.04m nor US\$7.92m. This is because **s44 TBRA** states:

**Mortgage to be for specific sum actually advanced.**

44. A mortgage cannot be created or constituted for any undetermined sum, but only for the sum expressly stated in the instrument, and actually advanced.

- 35 However, there is a curious interplay between equitable and legal mortgages created by **s59, s61 and s63 TBRA**, which state:

**Equitable mortgage constituted by deposit of certificate of title.**

59. (1) An equitable mortgage may be constituted by deposit of the certificate of title...

**Equitable mortgage may be for a definite sum, or to cover advances.**

61. An equitable mortgage may be constituted by the deposit of the certificate of title, either for the repayment of a definite sum then advanced, if placed to the account of the borrower, or to cover advances to be made, or for the purpose of covering advances made or to be made, or liability for sums due.

**Conversion of an equitable mortgage into a mortgage.**

63. (1) An equitable mortgage may be converted into a mortgage, with all the powers and privileges of a mortgagee against the registered proprietor by way of sale of the land and otherwise, by the equitable mortgagee obtaining the judgment of the Court fixing the amount due to him or her by the registered proprietor, or obtaining from the debtor a writing accepting a specific sum therein stated as being due by him or her to the creditor under the equitable mortgage.

- 36 In my judgment, as a matter of construction of this legislation, by Newfound depositing the certificate of title to the 100 acres with Grant under **s59 TBRA**, as recorded in the memorandum of deposit of 27.04.07, an equitable mortgage can be created to secure a sum greater than that advanced, per **s61 TBRA**, *‘to cover... liability for sums due’*, where here the sum due will be US\$5.04m (wrongly said to be US\$7.92m) as the return on the investment of US\$4.2m, as agreed as the 1.2 ratio in para 8 of the sales agreements. The equitable mortgage can then be turned into a legal mortgage under **s63 TBRA**, *‘by the equitable mortgagee (being Grant holding in trust for the 8 PLIs) obtaining from the debtor (being Newfound) a writing accepting a specific sum stated as being due by him to the creditor under the equitable mortgage’*, which ‘writing’ is the memorandum of mortgage, signed by the debtor, Newfound, specifically by its director Derrick White<sup>44</sup>, supported by his letter of 05.02.08.
- 37 There is clear support for this analysis in the case of **Mervin Grant v Doche & Doche Inc 2020**<sup>45</sup>, a decision of Ventose J as he then was, upheld on appeal<sup>46</sup>, directly relevant being a case in the instant jurisdiction of St Kitts & Nevis, that when converting an equitable mortgage, the Registrar is entitled to act on the parties’ agreement as to the sum secured: that the mortgage secured whatever amount the debtor by the required writing accepts as due.
- 38 It follows the argument offered by Counsel Prudhoe fails, though it is understandable why it was made as reference in **s44 TBRA** to the sum actually advanced creates confusion, begging whether the words *‘and actually advanced’* are redundant in light of **s61** and **s63 TBRA**. Further, I am wholly persuaded from the evidence of Grant that it is normal for a debt to be secured over land greater than the sum actually advanced, and that he has performed hundreds of such transactions, where he uses the term ‘upstamping’ for the increased value. Finally, it would make no sense for mortgages only to secure sums advanced as routinely there is interest owed which the land secures, and which is confusingly mentioned in **s41 TBRA**. In short, for all these reasons, I find the mortgage secures US\$5.04m against the 100 acres.

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<sup>44</sup> See the signature of Derrick White as director on behalf of Newfound on the memorandum of mortgage at TB3p162.

<sup>45</sup> See *Mervin Grant v Doche & Doche Inc 2020* SKBHCV2017/0343 at JABp111.

<sup>46</sup> See *Mervin Grant v Heritage Plantation Condominiums 2021* SKBHCVAP2020/006 at JABp139.

39 *Obiter*, at this point in the analysis, reflecting on upstamping, it can be mentioned there is the hint the figure of US\$7.92m originates from Grant, in a letter from him to PLI Roland Fox, dated 11.06.08<sup>47</sup>, where Grant explains *'the figure of US\$7.92m comprises the total amount upstamped for monies extended or to be extended. This means that in the event other amounts are required beyond the original figure then there will be no need to do any further upstamping of the document'*.

- a. If so, this would be a misapplication of **s61 TBRA**, which contemplates covering *'advances to be made'*, when as above the US\$6.6m was only ever an early contemplation involving 11 PLIs, but where only 8 PLIs remained, whose investment was recorded at schedule B part II of the trust document, and captured in an intercreditor agreement only involving the 8, not 11.
- b. Further, the letter begs whether therefore Grant helped draft the trust document, which sets out the two schedules at part B, giving rise to the wrong calculation, which drafting might be expected of him as the local attorney, rather than by Derrick White, noting also the trust document is witnessed by someone illegible who cannot now be remembered, while in a different font to memoranda, and though dated 27.04.07, the letter from Derrick White of 05.02.08 contemplates it has yet to be signed.
- c. In short, the intercreditor agreement as written, which underpins the trust, did not contemplate 11 PLIs paying in US\$6.6m, so that the mortgage created should never have been based on an expected investment of US\$6.6m as meaning there would be later advances of US\$2.4m in addition to the US\$4.2m, which the Grant letter of 11.06.08 seems to contemplate; to have written the mortgage up as US\$7.92m would mean the 8 PLIs secured far more than they had agreed as a ratio of 1.2, so that the trust document, which input confusingly schedule B part 1, and which was wholly unnecessary, could look as if Grant had made US\$2.4m extra for his trustors, for which they might be exceedingly grateful.
- d. However, for the purposes of this judgment I do not need to decide who created the figure of \$7.92m, nor why, and will leave it moot as merely a mistake.

40 Counsel Prudhoe next makes a bolder argument, that there was no legally recognizable mortgage at all, because:

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<sup>47</sup> TB3p403

- a. The drafting was shoddy, thereby creating nought;
- b. The sales agreements contemplated receiving further money, which was not paid, and so there was never a completed contract to create a debt to tie to a mortgage; and
- c. The declaration of trust is invalid as unilateral over property not owned by Grant.

41 In response, as above, I am satisfied the key documents, though they might be better drafted, intended to and so did create an equitable mortgage securing a debt, upstamped by 20% against the sum actually advanced, payable by Newfound to the 8PLIs, secured against the 100 acres, and then by deposit of title, with Newfound signing the memo of mortgage, created a legal mortgage noted on the land title to the value of US\$7.92m, to be corrected to US\$5.04m, and which is legally enforceable under **s45 TBRA**, which states:

**On non-payment mortgagee may take steps for sale of land.**

45. The specific sum lent upon the pledge of the land shall be payable at any date which may be fixed in the memorandum of mortgage, and, if not repaid at that date, the mortgagee may, at any time thereafter, take steps for the sale of the land...

42 As to the argument the trust is invalid, I find this fails because:

- a. The trust document came back to Grant from Newfound's Derrick White on 05.02.08, asking him to execute it, showing Newfound in agreement with it, fully knowing its terms, and accepting to be bound by it, while also signing the memo of mortgage with Grant as mortgagee;
- b. Further, *Lewin on Trusts*<sup>48</sup> is simply silent, not contrary, on whether Grant can have become a trustee in the manner here, which I find he did in light of how all parties agreed, and in any event Grant's ownership of the 'property' over which he declares trust is not of the land but of the mortgage, by 'holding' it, which the trust makes clear; and
- c. Finally, there are in the trust the 3 certainties, as set out by *Underhill & Hayton*<sup>49</sup>, where there is
  - i. certainty of intention to create a trust by the 8 PLIs, Newfound and Grant,
  - ii. certainty of the trust property, being the mortgage to secure US\$7.92m (corrected to US\$5.04m) secured against the 100 acres, and

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<sup>48</sup> See 20<sup>th</sup> ed Lewin on Trusts at 3-0004 at JABp630.

<sup>49</sup> See 20<sup>th</sup> ed, Underhill & Hayton, The law relating to trusts and trustees, chapter 1, at JABp624.

iii. certainty of the beneficiaries, namely the 8 PLIs.

43 As to the general proposition there was here no legally recognizable mortgage, this sits ill as above with Edwards in 2021 having sought to add Agilo Security as a creditor to it to the value of US\$3.72m (being the difference between US\$7.92m and US\$4.2m), thereby treating the mortgage as effective, raising estoppel, as Newfound can rightly be estopped from challenging the validity of deeds it executed knowingly and voluntarily, and accepted to be effective for 13 years, while the lawful existence of the mortgage is indefeasible as noted on the land title (the amount to be corrected to US\$5.04m), showing this argument seems merely opportunistic in the context of a litigation strategy likely led by counsel it appears to attack everything and see what might work.

44 In conclusion, I am satisfied there was an enforceable legal mortgage held in trust by Grant created in 2008, begging next, was there in 2021 an effective assignment of the mortgage to Forest.

### **The assignment of the mortgage to Forest**

45 After the mortgage was created, nothing happened. In theory from the sales agreements of 18.12.06, by 01.03.07 lots were to have been identified for the 8 PLIs, but were not, and in any event, the mortgage was only executed a month later, being 27.04.07, and not registered on the title until 11.02.08. I surmise it was likely expected over time the land would be developed and all would be well, the investors being far off in UK and not much able to press for progress.

46 In the papers, there are documents to show incompleting tinkering around the intercreditor agreement, on 28.09.12<sup>50</sup>, and 31.07.18<sup>51</sup>, which suggest the PLIs were hopeful to recover their

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<sup>50</sup> TB3p474

<sup>51</sup> TB3p479

- investment somehow, in 2012 floating they would settle with Newfound for a return of US\$3.65m; indeed, this proposed settlement was signed off by Newfound by someone illegible, yet did not follow through, perhaps suggesting the PLIs decided to allow further time for the investment to bear fruit, bearing in mind from 2008 there had been the global financial crisis so that from 2012 the financial climate was improving.
- 47 In the meantime, Newfound had different managers and ended up in financial distress, in 2014 coming to the attention of Edwards who became its director. Still nothing happened and no land was developed.
- 48 At one point in April 2021, in correspondence showing letters of intent dated 26.04.21<sup>52</sup> originating in the court papers from Grant, a company named Fairway Asset Management led by a 'Regis Huff' as CEO appears to have tried to buy the mortgage from the PLIs.
- 49 Then from 21.06.21, Forest was incorporated and Dobbin appeared back on the scene from 2007. He quietly negotiated with the 8 PLIs to purchase the mortgage, creating paperwork where:
- a. On 13.09.21, there was an 'agreement for purchase and sale of mortgage', duly signed by the 8 PLIs, and on behalf of Forest by its counsel Sylvester Carrott and Tony Greer<sup>53</sup> acting under power of attorney, paying US\$3.15m as £2282609;
  - b. On 02.11.21, there was a deed of assignment of the mortgage by Grant to Forest<sup>54</sup>; and
  - c. On 11.02.22, there was a memorandum of transfer of the mortgage by Grant to Forest<sup>55</sup>, which was used then to annotate the land title and record the mortgage as being in the name of Forest<sup>56</sup>.
- 50 I am satisfied the paperwork is in order, and the only issue arising is whether Grant could assign to Forest without the permission of Newfound. There is nothing in any agreement that says not, the purchase of debt by others is a common feature of business, and it appears well established in the legislation that a mortgagee can assign to another, as per **s64 TBRA**:

**Memorandum of transfer to be presented to Registrar.**

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<sup>52</sup> TB3p638-652

<sup>53</sup> TB3p412 unredacted

<sup>54</sup> TB3p195-197

<sup>55</sup> TB3p198

<sup>56</sup> TB3p250-251

**64.** A mortgage or encumbrance may be transferred from the mortgagee or encumbrancee to any other person, who shall then become the mortgagee or encumbrancee, by the presentation of a memorandum of transfer to the Registrar of Titles in Form 11 set out in the Second Schedule, and the noting by him or her of the fact of the transfer upon the certificate of title.

51 Moreover, that permission is not required appears as long ago as in **Jones v Gibbons 1804**<sup>57</sup>:

...a mortgage consists partly of the estate in the land, partly of the debt. So far as it conveys the estate, the assignment is absolute and complete the moment it is made according to the forms of the law. Undoubtedly it is not necessary to give notice to the mortgagor, that the mortgage has been assigned, in order to make it valid and effectual...the debtor has no means of redeeming it but by paying the money. Therefore he, who has the estate, has in effect the debt; as the estate can never be taken from him except by payment of the debt...it is difficult to say the mortgage passes and is well assigned to one person and yet the debt remains in another. It is impossible that it can be so divided. Therefore, by the assignment of the mortgage the debt necessarily passes, as incident to it, and it is clear, to constitute a valid assignment, notice to the mortgagor is not necessary...

52 It follows I am satisfied Forest has lawfully acquired from the 8 PLIs the mortgage held in trust by Grant securing over the 100 acres a debt by Newfound of what has been corrected to be US\$5.04m.

53 Further, I am sure if consent by Newfound had been required it would have been refused by Edwards, because:

- a. It would be preferable to maintain the debt and security as owing to the 8 PLIs who were docile, based in the UK, not much in a position to press for a return, having not pressed for 15 years, whereas Forest led by Dobbin, active in local business, would inevitably next attempt to seize the land to develop it as it should have been; and
- b. The effect of its sale, valued at US\$2.5m, if paid, would leave Newfound still owing US\$2.54m, raising the prospect of Forest pressing in settlement for more land from Newfound; and
- c. There would no longer be security for the second charge of US\$15m being to the benefit of Agilo Security, of which Edwards is also a director.

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<sup>57</sup> See Jones v Gibbons 1804 9 VES 407 at JABp237.

54        However, notwithstanding the calamity likely created by the sale of the mortgage, in short I find permission of Newfound was not required.

55        Counsel Prudhoe makes a further bold argument, that the assignment of the mortgage was only of the security and not of the debt, so that what has been acquired by Forest is worthless, as a security with no underlying debt secures nought. However, in my judgement this argument is wrong, because:

- a. To assign the mortgage is to assign the debt as secured by the land, simpliciter, well supported by the authority of **Jones v Gibbons 1804** as above;
- b. Under **s66 TBRA** it is clear all rights in a mortgage are transferred as at the date of transfer, as appears on the title deed, here 06.07.22, which rights must include the debt:

**Date of transfer.**

66. (1) The date of the presentation shall be the date of the transfer, and immediately thereafter the transferee shall enter into the whole rights of the transferor under the mortgage or encumbrance.

- c. The deed of assignment and memo of transfer both specifically reference the debt embraced by the mortgage; and
- d. In *Fisher & Lightwood on the Law of Mortgage* at para 20.3 (15ed), in Commonwealth law it is clear since 1925 transfer of the mortgage transfers the debt:

**Form of transfer**

24.3 The transfer of a mortgage consists of the assignment of the debt and the conveyance of the mortgagee's estate which is the security for the debt. Formerly these two parts of the transfer were separate. Thus it was usual in the deed of transfer first to assign the debt absolutely and then to convey the property subject to the equity of redemption. The separate assignment of the debt and the mortgagee's estate was rendered unnecessary (in the case of unregistered land) by the **Law of Property Act 1925**, under which a deed merely purporting to transfer the mortgage has the effect of transferring at once the entire package of mortgagee's rights. In such a case, the deed will transfer, in the absence of a contrary intention expressed therein, the right to demand, sue for, recover and give receipts for the mortgage money or the unpaid part thereof and any interest due; the benefit of all securities for the debt, the right to sue on all covenants with the mortgagee, and the right to exercise all powers of the mortgagee; and all the estate and interest in the mortgaged property vested in the mortgagee subject to redemption or cesser subject to the equity of redemption.

## **Pay off and land seizure**

- 56 What has happened next is Forest has sought to have Newfound pay it the debt, sending notice to pay off, and Newfound not doing so, as being in distress it can be predicted to be without funds, has gone on to seize the land, the Notice to Pay Off dated 07.02.23<sup>58</sup>, with land seizure of the 100 acres declared by the court bailiff on 12.04.23<sup>59</sup>, under **s71** and **s72 TBRA**:

**Notice to pay off.**

**71.** (1) When a mortgagor or encumbrancer has failed to perform the conditions of the mortgage or encumbrance, or when the mortgagee or encumbrancee may lawfully demand the repayment of the sum lent on mortgage, or the amount or provision secured by the encumbrance, the mortgagee or encumbrancee shall serve, or cause to be served, upon the registered proprietor a formal notice to pay off set out in Form 14 in the Second Schedule requiring him or her to perform the acts therein required within sixty days from the date of service.

**Seizure of land on non-payment after notice.**

**72.** If the registered proprietor shall not, within the time specified, pay off the mortgage or encumbrance, or do the acts required of him or her in the notice to pay off, the mortgagee or encumbrancee may seize the land contained in the certificate of title on which the mortgage or encumbrance is noted, with the things accessory thereto as set forth and enumerated in this Act as falling within the mortgage or encumbrance.

- 57 Thereafter on 24.10.23, proceedings have been filed under **s75 TBRA** by Forest against Newfound as NEVHCV2023/0126 to settle articles of sale of the 100 acres, valued at US\$2.5m<sup>60</sup> by surveyor Dave Simon, stayed by Thompson J on 13.01.25 pending outcome of these proceedings NEVHCV2024/0003, where **s75** states:

**On non-payment of debt within thirty days after seizure, articles of sale to be settled by a Judge.**

**75.** If the debt is not paid off or discharged, or the acts required in the notice to pay off are not performed, and no new arrangements are made within thirty days from the date of seizure, the mortgagee or encumbrancee shall lodge in the Registry of the High Court articles of sale...

- 58 The first point arising is, from the history of the mortgage it is clear seeking pay off has arisen to secure a debt created by Newfound borrowing monies to develop land which it never did, nor paid any money back at 1.2 the borrowing, and so notice to pay off can here lawfully arise per

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<sup>58</sup> TB3p199-203

<sup>59</sup> TB3p204-206

<sup>60</sup> Specifically US\$2498250, with fire-sale value of US\$2248425, at TB3p220.

**s71 TBRA** where the *'mortgagor has failed to perform conditions of the mortgage'*, and *'the mortgagee (now Forest) may lawfully demand the repayment of the sum lent on the mortgage'*.

- 59 The second point arising is the debt is no longer US\$7.92m, so that the notice to pay off will need amending to pay off US\$5.04m, which I here declare, so that its effect is to edit the figure rather than require the enforcement proceedings under NEVHCV2023/0126 wholly restarted<sup>61</sup>.
- 60 The third point arising is Counsel Prudhoe next makes a further bold submission, that there can be no enforcement of the debt by legal action as it is barred by the **Limitation Act** (LA) cap 5.09. His argument is either the debt existed in contract between the 8 PLIs and Newfound, actionable within 6 years of a cause of action under **s4(1)(a) LA**, or the 8 PLIs may have had an action for recovery of land under the mortgage, actionable within 12 years of a cause of action under **s6(3)** or **s18 LA**, but who raised no complaint for 15 years, when it is obvious they should have done, as no land was ever developed, no plots were settled on them, and no money was paid with return of 1.2, or at all, meaning the 8 PLIs sold a debt they had allowed to be time-barred.
- 61 To my mind, this argument is misconceived, as a cause of action must have accrued to begin the clock ticking on the time period to sue.
- a. But here, the 8 PLIs have not decided a cause of action has in fact accrued, recalling there was no date set in the paperwork by when Newfound should settle up. Instead, they have sat patiently in the expectation of one day a handsome profit or luxury home, and by 2021 wished to wait no longer, selling what they believed was still the debt owed to them for another to have its advantage, and if needed to act under **s45 TBRA** as above. The fact Counsel Prudhoe may have sued earlier does not mean everyone must, and it was open to the 8 PLIs to just wait.
  - b. Further, and in the alternative, the cause of action could be said to have accrued the day they sold the mortgage to Forest, being 13.09.21, showing thereby they had lost faith in ever receiving a return from Newfound, agreeing to receive back at best merely the money they put in so many years earlier. And if the cause of action accrued under either **s4** or **s6** or **s18**

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<sup>61</sup> Following delivery of the judgment, and then discussion with counsel, a date was set to discuss progressing claim NEVHCV2023/0126 to its next stage.

LA on 13.09.21, then the notice to pay off issued by Forest was well within either limitation period.

- c. Further and finally, in **Caribbean Commercial Bank (Anguilla) v Tosh Sharnii Carty Bin-Nassir 2025**<sup>62</sup>, on Anguilla, where there is a similar **Limitation Act**, Moise J determined the act does not apply as time limiting action to enforce sale of land by a mortgagee.

60 In all the circumstances explored above, the disposition of the court is that Forest has on 07.02.23 begun a lawful suit of Newfound to sell the land to pay off the debt it lawfully bought on 13.09.21 from the 8 PLIs, assigned by Grant on 02.11.21, though for the wrong amount, here corrected from US\$7.92m to US\$5.04m, so that at this stage either Newfound pays \$5.04m or it must sell the 100 acres, and possibly more land to settle its lawful debt.

61 Further, costs will follow, to be paid by Newfound, both to Grant and to Forest<sup>63</sup>.

62 Insofar as Grant made an ancillary claim to be indemnified by Forest, I make no decision, because

- a. the point is now moot as his costs should be paid by Newfound, while
- b. there may yet be argument over Forest believing it had bought a debt of US\$7.92m, not \$5.04m, a difference of US\$2.88m, raising possible litigation between Forest, Grant, and perhaps Derrick White over how the wrong figure came to be written onto the mortgage, and
- c. the indemnity clause on the assignment is signed by Grant alone<sup>64</sup>, not by Forest, and so I find does not bind Forest if in dispute over the mortgage.

63 Finally, concerning the counterclaim,

- a. damages sought by Forest for lost business opportunity fall away as the opportunity is not lost with Forest winning this action, and
- b. that stamp duty and taxes on the 100 acres should be paid by Newfound, or not at all, becomes moot if Forest is poised to acquire the land, where any argument that the land is

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<sup>62</sup> See Caribbean Commercial Bank (Anguilla) v Tosh Sharnii Carty Bin-Nassir 2025 AXAHCv2024/0074 at JABp357.

<sup>63</sup> Following delivery of the judgment, it was agreed between counsel costs should be assessed at a later date, and a timetabling order followed.

<sup>64</sup> TB3p196

exempt from tax, as said by Newfound, means argument money has been wrongly paid out by Forest is in fact to be taken up with the Nevis Island Administration (NIA), not with Newfound.

## Disposition

64 Overall then, concerning the amended claim filed on 20.05.25 by Newfound, as listed at para 13 above, this court has decided as follows:

- (i) A declaration that NPL is not indebted to Forest in the amount of US\$7.92m or any other sum – is refused, except to correct the debt to US\$5.04m.
- (ii) Further, or alternatively a declaration that any claim by Forest for the payment of US\$7.92m or any other sum, pursuant to the Sales Agreement, the Declaration, the Memorandum of Mortgage and the Forest transfer is barred for limitation – is refused.
- (iii) A declaration that the Declaration of Trust does not constitute a valid and enforceable trust – is refused.
- (iv) A declaration that NPL did not create a valid and enforceable equitable mortgage over the NPL Land, pursuant to the Memorandum of Deposit or otherwise – is refused.
- (v) A declaration that the Memorandum of Transfer of Mortgage or Encumbrance executed by the 1st Defendant – Mr. Grant as trustee and Mortgagee in favour of the 2nd Defendant – Forest dated the 11.02.08 (the Forest Transfer) registered and noted on the Claimant's / NPL Certificate of Title Book 44 Folio 116 of the Register of Titles, Nevis Circuit, is not enforceable against NPL such being void and/or voidable – is refused.
- (vi) A declaration that the Notice to Pay off and Act of Seizure and all other enforcement documents and actions attended to by the 2nd Defendant- Forest are similarly invalidated and ineffective are not enforceable by the 2nd Defendant against the NPL – is refused, with direction the stay created on 13.01.25 by Thompson J on suit NEVHCV2023/0126 is lifted, with expectation the court will next move forward with deciding the application filed on 24.10.23 under **s75 TBRA** for articles of sale.
- (vii) An Order of [Withdrawal]/[Removal] shall be filed by the Defendants to withdraw/remove the Forest Transfer registered and noted on the Claimant's/ NPL Certificate of Title Book 44 Folio 116 of the Register of Titles, Nevis Circuit, and shall be submitted to the Register within 14 days of this order – is refused.
- (viii) An Order of [withdrawal]/removal] shall be filed by the Defendants to withdraw/remove the Memorandum of Mortgage registered and noted on the Claimant's/NPL Certificate of Title Book 44 Folio 116 of the Register of Titles, Nevis Circuit, and shall be submitted to the Registrar within 14 days of this order – is refused.
- (ix) Costs - are awarded to the two defendant parties Grant and Forest payable by the claimant Newfound.
- (x) Such further and other relief as the Court deems fit – none.

65 Further on the counterclaim by Forest, as amended on 18.06.25, this court has decided as follows:

- i. Special damages in the sum of EC\$359824.74 for taxes paid to the NIA – Forest now having won the action, none awarded, as these are recoverable, if at all, from the NIA, not Newfound.
- ii. Damages for loss of project revenue to be assessed – none awarded as not arising as Forest has succeeded in this claim.
- iii. Damages in restitution– none awarded as not arising as Forest has succeeded in this claim.
- iv. Court fees – none awarded as not arising as Forest has succeeded in this claim.
- v. Legal Practitioners cost – none awarded on the counterclaim, noting instead the costs of the substantive action have been ordered payable by Newfound.
- vi. Interest pursuant to Section 29 of the Eastern Caribbean Supreme Court Act – not awarded as not arising.
- vii. Such further and other relief as this Honourable Court deems just – none.

66 Finally, on the ancillary claim by Grant dated 17.05.24 to be indemnified by Forest, and complaint he should never have been made a party:

- a. As to complaint, for the reasons explained above at para 15c the court finds it was not unreasonable to join him as a party, makes no finding as to his being criticized, and further notes in this judgment there has been no formal finding of specific wrongdoing by Grant or anyone; and
- b. As to being indemnified by Forest, the court makes no decision as the point is moot because Newfound has lost the action, with costs awarded payable by Newfound to Grant and to Forest.

67 As a concluding observation, I should like to thank counsel for hard work and mostly able argument, with I hope two constructive criticisms: there should be one working 'trial bundle', not two as emerged here, CB and TB, with in addition there should always be a thinner 'chronology bundle' for all exhibits in date order, irrespective of origin, copied only once to excise copious document repetition.

68 Going forward, the court expects this land will now be developed, as Dobbin has said in evidence it will be, to the benefit of all on Nevis, whose people deserve better than money being raised from overseas and nothing built.

**The Hon. Mr. Justice Iain Morley KC**

**High Court Judge**

**28 April 2026**