

**EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF ST CHRISTOPHER AND NEVIS
NEVIS CIRCUIT**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. NEVHCV2022/0153

BETWEEN:

**MARK TOOGOOD
MARTIN PARRY**

**(Executors of the will of Rodney Toogood, deceased and duly appointed personal representatives
of the Estate of Rodney Toogood, deceased)**

Claimants

and

**DEON DANIEL
BEACHFRONT CONDOMINIUM HOLDING LTD.**

Defendants

Appearances:

Ms. Joia Reece and Ms. Joanne Flemming for the Claimants
Mr. Terence Byron and Mr. Vincent Byron for the Defendants

2023: October 4;
2024: June 28.

JUDGMENT

- [1] THOMPSON JR. J:** Deon Daniel (“the 1st Defendant” and “Deon”) and the late Rodney Toogood (“Rodney”) were friends. Rodney believed in the 1st Defendant and Rodney agreed to finance several of the 1st Defendant’s real estate projects. Sadly, Rodney died and his family have filed these proceedings claiming to be entitled to returns on their late relative’s substantial investments in the 1st Defendant’s Nelson Spring Beach Villas Development (“the Development”).

- [2] These proceedings were filed on November 2nd, 2022 but they relate largely to events that appear to have taken place between 1998 and 26 November 2009 and then disparate events in January, February and March 2010. Those events together with the dates of memoranda of transfers of Units at the Development largely constitute the factual background to these proceedings.
- [3] Counsel for the Claimant and Defendant filed their respective chronologies of significant events in late November 2023 but it is hoped that this court can be forgiven for not laboriously incorporating their respective chronologies into this judgment. It was hoped that a single agreed chronology would have been filed by both counsel but this was not to be.

Factual Background:

- [4] There is no real dispute that the 1st Defendant first met Rodney in or about 1998 when the 1st Defendant purchased a house in the Fern Hill Development from the 1st Defendant. Both sides agreed that at various times in 2004 and 2005 Rodney and the 1st and 2nd Defendant ("Beachfront") entered into project financing and development agreements. Pursuant to these agreements, Rodney would provide financing to the 1st Defendant and Beachfront who would pay agreed commissions to Rodney subsequent to the sale of the units built and developed and sold by the Defendants.
- [5] These projects included Phase 1 and Phase 2 of the Development together with other projects at Tower Hill, 25 Acres, Bush Hill and Four Seasons. The nub of the Claimant's case is that pursuant to an oral agreement with the Defendants, Rodney advanced the sum of approximately US\$900,000 towards the financing of the Development. Sadly, Rodney died on November 26, 2009.
- [6] According to the Claimants the Defendants were supposed to pay to Rodney the sum of US\$375,000 for each block of condominiums sold in the Development. It was their case that the final unit in Block 2 was transferred on January 7th, 2021 and the final unit in Block 3 was transferred on August 26th, 2019. The Claimant's also contended that the Defendant owes commissions on Nelson Spring Phase 3 in the sum of \$25,000 per unit sold so that the total amount due is \$1,300,000.00. Therefore, it was their case that Rodney's estate may have been due the sum of US\$3,750,000.00 and \$1,300,000.00 (presumably USD but more on this later) thus totaling \$5,050,000.00 being the commissions due to Rodney as a result of the foregoing oral financing agreement.
- [7] The Defendants dispute owing any money to the Claimants. The 1st Defendant is a director and shareholder of Beachfront and it was their case that no monies were owed to the Claimants as Rodney had been paid in full for his financing and investments. In support of the Defendant's position, counsel for the Defendant raised various factual and legal points which will be addressed later in this judgment.

Analysis

- [8] Firstly, the Claimants accept that they have not produced any written agreement between Rodney and the Defendant confirming the sums that they claim are owed. They however rely on the following disparate bits of evidence in support of their case.
- [9] Firstly, they rely on the notes or minutes of a meeting held on March 31st, 2010 between Mark Toogood, Claire Parry and Deon Daniel. According to the Claimants, those minutes, which were

signed by the 1st Defendant and confirm the Defendant's indebtedness to Rodney beyond all peradventure.

[10] The minutes or notes of the meeting are instructive and are summarized below:

The Notes of the Meeting on March 31st, 2010

HEADINGS	NOTES
Condos at Phase 1	All monies due to Rodney re the financing and commission re Phase 1 has been paid over by Deon. Nothing is outstanding
Pelican House charges	The amounts owed to Deon for the refurb of the office will be paid out of monies due to Rodney for the return of the Four Seasons land deposit and monies owed by Mr. (court cannot decipher name) at Bush Hill"
Nelson Springs Phase 2	No monies received by Rodney to date on sales. He is due US\$375,000 per block. There are 10 blocks giving a total amount of \$3,750,000. Deon has interest from a number of buyers and is awaiting Govt clearance for the individuals. Most are Russian clients.
Nelson Springs Phase 3	No activity on this Phase yet and nothing has been paid to Rodney. Commission due is \$25,000 per unit sold. The plan is to have 52 units. Total amount due \$1,300,000.
<u>Busch Hill</u>	Nothing else is due to Rodney and Deon confirmed that no monies were due to him on the 10 acres of land that Rodney did not complete on
Four Seasons Land	Rodney is owed \$33,334 USD but when the monies re the deposit are returned the amount due to Rodney will be transferred to Deon and Associates to cover the cost of Pelican House office refurb and general running costs.
Deeds held by Deon	Deon still holds the deeds to the condo on phase 1 and has the title deeds in Rodney's name to 2 acres of land at Busch Hill. There is a confirmed waiver of the Alien Landholding Tax of 10% meaning only 2.5% is due on the condo.
Marcon & Sergei	Deon has a cheque from Rodney for \$5,000 which he hasn't cashed as he is awaiting confirmation that Rodney had been paid by Sergei.

[11] Secondly, the Claimants rely on an email dated September 18th, 2012, from the 1st Defendant to the 1st Claimant in which the 1st Defendant wrote to the 1st Claimant confirming that monies are owed by the Defendants to the Estate of Rodney for Phase 2 of the Development.

[12] The relevant part of that email is instructive and is set out below:

"Regarding the funds from sales at Phase 2, kindly note that the development is not yet complete and we would have a complete statement compiled once all units have been sold in order to ascertain the amounts due to the Estate of Rodney Toogood. We have not yet started on Phase 3, therefore it would be inappropriate to allocate any funds to this development until there is one to base amounts on. The payments of US\$19k from Mr. Kishu's sales was credited to the renovation account for Pelican House (statement dated 22 November 2010) as per your email request....."

- [13] The 1st Defendant sought to explain this email by saying that he did not deny owing Rodney for Phase 2 of the Development because he was of the view that the 1st Claimant promised to invest the US\$1,000,000.00 that Rodney would have invested in the Development. According to the 1st Defendant, the September 18th, 2012 email was consistent with his case since it was his understanding that the 1st Claimant would simply continue what Rodney had started. It was the 1st Defendant's case that the email was consistent with the minutes of the March 31st, 2010 meeting.
- [14] That email is significant for the following reasons. Firstly, the email is roughly 2 and a half years after the meeting of March 31st 2010 and is the 1st Defendant's email (i.e. his own words) to the Claimants. Even if there was any scope for any argument about the March 2010 minutes and what they meant, the 1st Defendant's email clearly outlines and acknowledges the following significant facts. The 1st Defendant opted to confirm in writing, exactly, what the Claimants say was agreed, 2 ½ year after a meeting to that effect.
- [15] Secondly, the email confirms that the development at Phase 2 of Nelson Spring was not complete and thus presumably ongoing and thus recognized that once the units were sold the accounts due to the Estate of Rodney Toogood would be ascertained. This is precisely why the Claimants filed these proceedings. Moreover, the email gratuitously went on to confirm that work on Phase 3 had not started. If that were where the email ended then it would have been possible to argue that despite the minutes there was no agreement on Phase 3 but the email went on to provide that it would be inappropriate to allocate any funds to this development because work on it had not yet started. This aspect in relation to Phase 3 was telling since it confirms the essence of the Claimant's case. Otherwise there would be no need to indicate that work has not yet started or that it would be inappropriate to allocate funds unless of course funds were due and owing to Rodney in respect of Phase 3 and presumably Phase 2.
- [16] As an aside, the latter aspect of the email expressly confirms another aspect of the minutes of the meeting in relation to how the payment of US\$19k from Mr. Kishu's sales was to be allocated. This was another aspect of the notes that was supported by subsequent events and further undermines the 1st Defendants credibility.
- [17] Finally, the email of September 18, 2012 did not stand in isolation but was sent by the 1st Defendant in response to Mark Toogood's email in which Mark indicated that monies were owed to the Claimants on Phase 2 and 3 and that when they had spoken with Deon (18 months prior) he had said that he could not then pay what was owed. Therefore, if Mark's email was either incorrect or inconsistent with Deon's understanding then it would have been open to Deon to set out in detail the confusing explanation that he proffered at trial. The fact that he failed to dispute Mark's email and went on to approbate Mark's email thus affirming the fact of the 1st Defendant's indebtedness was telling. The inescapable inference is that the 1st Defendant's explanation at trial for the email was manifestly untrue and solely for the purpose of bolstering his case.
- [18] The Claimant's third prong of attack was focused on the fact of two additional documents. The first was a letter dated April 3rd. 2009 signed by Deon Daniel and copied to Rodney which outlines the same price per Block in Phase 2 at Nelson Spring in the sum of US\$375,000.00. The second was an unsigned agreement for Purchase and Sale between Rodney and the 2nd Defendant which at Schedule 1 outlines the sums owed by Beachfront to Rodney as a result of other agreements

between Beachfront and/or Rodney and Deon. The cumulative effect of these documents was to confirm that the facts were as contended for by the Claimants.

- [19] Interestingly enough, it was open to the Defendants to produce any documentary evidence that supported their case. No emails or memoranda in writing were disclosed in the course of the trial which supported the Defendant's version of the facts. There was no evidence of any search by Rodney's family to access his email correspondence with Deon but the 1st Defendant did not lead any evidence of any such emails which would support his factual case. Either there were no such emails or the email correspondence did not support his case. Had the Claimant's prayed in aid Part 28 of the CPR which mandates general and specific disclosure the 1st Defendant may have been compelled to search for and produce any such emails to this court. All the same, the documentary evidence told massively against the case for the 1st Defendant.
- [20] The Claimant called only one witness, Mark Toogood. Mark would not have been privy to his late uncle's conversations and dealings with the Defendants. The Defendant's cross examination of Mark Toogood was perfunctory, at best. There were no real factual issues which the Defendants could raise with Mark Toogood and as such nothing helpful to the case for the Defendants was elicited from him.
- [21] In cross examination, counsel for the Defendants suggested to Mark Toogood that he (Mark) did not know how much was provided by Rodney to Deon for phase 3 of the Nelson Spring. Implicit in that suggestion was an acceptance that monies had been provided by Rodney to Deon, otherwise the suggestion would only have been that no monies had been provided to Deon by Rodney for Phase 3. In all proceedings, counsel have a duty to put or suggest their client's case to a witness. The crafting of a suggestion is thus a careful process since that is the clearest signal to a judge in a civil trial or a jury in a criminal trial what the case is all about. A suggestion that a witness does not know what was provided is different from a suggestion that nothing was provided. The former suggestion is fatal to the Defendant's case since it tacitly recognized that monies were paid but that Mark Toogood was not aware of what these monies were. The fact that suggestion was even put spoke volumes about the Defendant's case and further undermined the Defendants legal position.
- [22] The Claimants cross examination of the 1st Defendant was also telling. The 1st Defendant's case was that in all of his previous dealings with Rodney for investment and development projects were in writing. According to him, if there was no written agreement, as in this case then there was no agreement and thus no liability to pay the Claimants.
- [23] The 1st Defendant's explanations for the email and minutes in which he accepts his indebtedness to Rodney were difficult to understand. The 1st Defendant had no explanation for why he would undertake to give the 1st Claimant an account of when the sales in Phase 2 were completed while arguing that he did not owe Rodney or his heirs one red cent. Moreover, the 1st Defendant could not point to any evidence that the 1st Claimant had agreed to invest any monies that Rodney had previously invested. Curiously, the 1st Defendant agreed that Rodney would have been paid for his investment after all the units were sold in Phase 2 and Phase 3 of the Development. In these circumstances, this court is at a loss as to how the 1st Defendant could say out of the same side of his mouth that no monies were due to Rodney.

- [24] Frankly put, the 1st Defendant was a wholly unreliable witness whose evidence was riddled with inconsistencies. Counsel for the Claimant appeared flabbergasted by the 1st Defendant's answers to her questions. Ms. Reece seemed incredulous at the answers supplied since to her it seemed that they did not appear to answer the question asked or were wholly unhelpful to the 1st Defendant and thus helpful to her client's case. For example, the 1st Defendant's insistence that business between himself and Rodney was always done via a documented agreement was at odds with the following email from the 1st Defendant dated February 11th, 2010 in the following terms

"Hi Mark, Thanks for your email, happy to know we have to keep that trust between us. I number of things that me and Rodney did was by trust and a haldshake (sp)"

- [25] That email directly contradicts the 1st Defendant's position and it is difficult to understand how the 1st Defendant could proffer two wholly inconsistent positions. The 1st Defendant's dealings with Rodney were business dealings so the only inference from this email is that Rodney and Deon did a number of business deals via trust and a handshake, the self-same oral agreement approach that is the subject of these proceedings. He later agreed that not all of his and Rodney's dealings were written down but perversely insisted that trust and handshake in the email did not relate to large sums of money. This answer begged the question of what exactly the 1st Defendant meant by large sums of money, if not the US\$5,000,000.00 reflected in the minutes.
- [26] In cross examination, the 1st Defendant frankly admitted that Rodney introduced him to persons who purchased property in his various developments and that those introductions brought benefits to him. The 1st Defendant accepted that Rodney marketed properties which in turn brought financial benefits both to him and Beachfront.
- [27] The Claimant's legal practitioners could have for example cross examined the 1st Defendant to confirm that consistent with the notes that at least some of the persons who purchased units in Phase 2 were Russian citizens. For what it is worth, the documents exhibited to Mark Toogood's affidavit and thus part of the evidence at trial confirmed that at least 2 of the purchasers who provided their passport information details were Russian citizens¹ as foreshadowed by the minutes.
- [28] The 1st Defendant's position is even more surprising when one considers how the minutes of the meeting appear internally consistent with the oral agreement that the Claimants contend for. So that for example the minutes clearly indicate that no monies are owed to Rodney for Phase 1. That is entirely consistent with the Defendant's case that no monies are owed on Phase 1 and the Claimants make no claim to any monies in relation to Phase 1. Therefore, it stands to reason that if the notes on Phase 1 are consistent then the notes on the foregoing sections are also consistent with the factual position. The 1st Defendant has not explained this significant discrepancy. The position may have been different if the notes were unsigned but the 1st Defendant does not dispute his presence at the meeting or his signature but maintains that the notes do not reflect the factual position.
- [29] Moreover, the notes are internally consistent so that for example the notes indicate at item 3 that monies were owed to Deon for the refurbishment of the Pelican House will be paid out of money due to Rodney for the return of the Four Seasons Land deposit. The Four Seasons Land deposit is item

¹ One of those citizens, whose identity need not be disclosed in these proceedings was also a Kittian citizen, presumably via the citizenship by investment program.

7 in the notes and the notes on that aspect confirms that identical understanding. The Claimant's counsel could have cross examined the 1st Defendant to confirm which of the other matters in the notes was consistent with the factual position but even without that line of cross examination, it is clear that the 1st Defendant disputes the parts of the notes that require him to pay monies to Rodney. For what it is worth, it would have been open to the 1st Defendant to dispute any other parts of the notes that he disputed but his factual case did not address this. The decision to do so speaks volumes and leads to the inference that the 1st Defendant was only interested in challenging the parts of the agreement that addressed his liability to Rodney and/or the Claimants.

- [30] Therefore, this Court has little hesitation in finding that the 1st Defendant appears to have assumed that the 1st Claimant would simply continue to invest in the Development in the same way that his late uncle did. In cross examination, the 1st Defendant indicated that monies were due to Rodney from Phase 2 but that it was their intention (presumably his and Rodney's) to put an agreement in place as to how to finance Phase 2 and Phase 3 but no financing was actually advanced. If this was true then it is frankly surprising that neither the emails nor the documents nor the minutes reference any such plan to make such an agreement.
- [31] In other words, if Rodney's financing agreement was incomplete then the minutes of the meeting and the documents do not make sense. If the position was as stated by the 1st Defendant the only logical answer to the emails was to simply repeat that Rodney and Deon had had discussions but nothing had been agreed. The minutes of the meeting would not have acknowledged the fact of the debt to Rodney for Phase 2 and 3 and there is nothing in the language of the minutes that assists the 1st Defendant's position on this issue. This court is compelled to find that the 1st Defendant's explanation for the emails and documentary evidence is a self-serving ex post facto attempt to justify his refusal to pay Rodney's estate what his own words accept they are owed.
- [32] The weight of the evidence leads this court to find that the 1st Defendant appeared to form the view that Rodney's passing absolved him from any liability to pay what was owed to Rodney to Rodney's heirs. The chronology is significant in that the March 2010 meeting was only 4 months after Rodney had passed away. That meeting is a clear and frank snapshot of how the 1st Defendant viewed his indebtedness to Rodney. No doubt, over time, that willingness to pay Rodney's family, diminished as the loss occasioned by his passing faded from the 1st Defendant's memory.
- [33] The Claimants also prayed in aid, Rodney's will which provided at clause 6 that he gave to his nephew Mark and his niece Claire Parry all monies due and owed to him by Deon Daniel 'in respect to our various joint investments not limited to our investments at Nelson Spring in the parish of St Thomas in the island of Nevis'. It was their case that Rodney clearly was aware of Deon's indebtedness to him as result of his various investments. Clearly, Rodney's will could not by itself create an agreement but the will together with the email and the minutes of the meeting all confirm that there was an existing agreement between Deon and Rodney. For all of these reasons, this court is compelled to accept the Claimant's factual case.

- [34] It is trite law that an oral agreement is a contract. It is also trite law that in order for a contract to exist there must be an offer, that offer must be accepted, there must be some consideration and there must exist an intention to create legal relations. Each of these elements are satisfied by the evidence above. In Storer v Manchester City Council [1974] 1 W.L.R. 1403, Lord Denning made it clear that:
- "In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed where there is to all outward appearances a contract. A man cannot get out of a contract by saying 'I did not intend to contract' if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract, that is enough."*
- [35] There was clearly a course of dealing between Rodney and the 1st Defendant in which Rodney would advance monies to the Defendants who would in turn pay a commission to Rodney after the developments bore fruit. There is no reason to believe that Phase 2 and 3 of the Development was exempt from this course of dealing.
- [36] The consideration for this oral agreement was the money advanced by Rodney and the minutes of the March 2010 meeting which set out the value of Rodney's efforts to the Defendants. Critically those minutes indicate the consideration that Rodney had provided so that any arguments about past consideration or a failure of consideration were doomed to fail. Blue v Ashley [2017] EWHC 1928 (Comm) confirms that Rodney's reinvesting of his time, efforts and connections was geared at promoting the Development. The 1st Defendant was compelled to accept this fact.
- [37] Blue v Ashley also confirms that it would be rare in commercial litigation that there would be no electronic footprint (text, email and the like) evidencing the agreement. The fact that no such footprint exists is easily explained by the fact of Rodney's demise. Without an order seeking specific disclosure from the Defendants of these electronic memoranda the 1st Defendant would have no obligation to produce same. Nevertheless, it would be extremely unlikely that if such electronic memoranda existed in support of the Defendant's case that it would not be provided to the court, irrespective of an order for disclosure. These are not unreasonable inferences and when that inference is allied to the Court's findings on the 1st Defendant's credibility, the Claimant's case is clearly made out.
- [38] Faced with a formidable factual case, the Defendants lawyers mounted a highly technical and ultimately specious attack on the Claimant's case. Their first attack was directed at the fact that Claimant's fixed date claim was unsealed. They pray in aid the words of the CPR and the reasoning of Master Actie (as she then was) in SLUHCV2018/0613 – Peterson Francis v Christopher Hunte that in order for a claim form to be valid, it must bear the seal of the court.
- [39] CPR 2.4 defines a fixed date claim form as a claim form upon which a date, time and place for the first hearing of the claim is placed. CPR 3.8(2) provides that the court may place the seal on any document by hand or electronically or by any other means. Even without recourse to CPR 26.9, CPR3.8(2) does not provide for the mandatory words 'shall' on the sealing of a fixed date claim. The words 'may' denotes a discretion and in any event the failure to add the seal does not invalidate or change the nature of the document. The Defendants were not misled as to the nature of the document or what the pleadings were all about.

- [40] Additionally, CPR 26.9 provides that a failure to comply with a rule does not invalidate any step taken in the proceedings unless a rule so provides and that if there has been an error of procedure or failure to comply with a rule the court may make an order to put that right without an application by either party. The CPR does not provide for any consequence for the failure to seal a fixed date claim form or ensure that the date and time of the first hearing were written on the fixed date claim form. A notice from the Registry was issued indicating the date and time and place of the first hearing so that the Defendants were not misled as to when their case would come on for hearing.
- [41] Moreover, to accede to the Defendant's submission would put an end to a trial where all sides had every opportunity to advance their factual and legal case. The lack of a seal falls squarely within the ambit of CPR 26.9 as a purely procedural matter which a court is empowered to rectify without more.
- [42] It is therefore ordered and directed that the seal of the court be placed on the Claimant's fixed date claim form and amended claim form by the Registrar of the court within 24 hours of this order. The fact that this procedural error is so readily corrected confirms that the Defendant's complaint in this regard are matters of form and not of substance. If the overriding objective, which means dealing with cases justly within the meaning of CPR2.2 is to have any useful meaning there can be no real objection to the course proposed above.
- [43] The Defendants next attempted to argue that consideration has failed since there was no documentary evidence that Rodney had actually provided any advances of money or reinvested some of his returns on investment or assisted with furnishing sales and marketing so as to entitle Rodney to any commission. This submission flies in the face of the documents outlined above but is also inconsistent with the 1st Defendant's own evidence at trial. The 1st Defendant confirmed that Rodney promoted and marketed the properties that he (Deon) was developing and that Rodney introduced him to persons who bought property in his development and that those introductions brought benefits to him. The 1st Defendant also accepted that Rodney invested time and money into the 2nd Defendant.
- [44] The Defendant's argument was that the evidence of Mark Toogood was insufficient since he was the single witness who outlined the Claimant's case. There is no rule of law that the evidence of one witness cannot suffice to prove a civil case. Additionally, the documents tendered and the evidence of the 1st Defendant clearly outlines and confirms the nature and scope of the Claimant's case.
- [45] The Defendant accepted that he is a director of the 2nd Defendant. It is clear that the 2nd Defendant was the vehicle by which the sale of the units in Phase 2 were sold. The fact that the property was sold and developed in this way does not prevent the Claimant from pursuing their claim against both the 1st and 2nd Defendant.
- [46] Counsel for the Defendants argued that there are some 'glaring peculiarities/shortcomings' in this action. There is no dispute that a grant of probate of Rodney's will was obtained so that the Defendant's complaint that Rodney's will was not produced to the Court is wholly without merit. The Defendants complain that it is passing strange that while there were three meetings in 2009 between Rodney and Deon there were no notes produced of these meetings. The Defendants make heavy weather of the fact that there is a note from Rodney that says "Phase 2-commission of \$375,000 per unit" and suggest that this is at odds with the Claimant's claim of \$375,000 per 10 block unit. The

Defendants' arguments ignore the fact that the sum is the same and that the sum relates to Phase 2 of the Development.

- [47] The Defendants have tendered in evidence the letter from the Bank of Nevis dated July 3rd, 2009 approving the Defendant's loan request in the sum of EC\$4,580,788 in support of their argument that no monies were due to Rodney. In their view, the security conditions under the loan do not mention Rodney and therefore no monies were due to Rodney. It is entirely plausible that both things are true, that is to say, that the Defendants borrowed money to complete Phase 2 and that Rodney advanced money for Phase 2. The fact of the loan does not exclude the fact of monies being owed to Rodney. In any event, the 1st Defendant did not lead any evidence that the loan from Bank of Nevis completely covered the cost of constructing and developing Phase 2. There was no evidence from him as to exactly how Phase 2 was funded to completion. These were all matters which was he (Deon) was best placed to answer.
- [48] In their oral closing arguments, counsel for the Defendants argued that the Limitation Act was a complete defence to the Claimant's claim against their respective clients. This argument was not repeated in their post-trial closing submissions filed on November 26, 2023. This argument was fully ventilated in the course of oral argument and it appeared to this court that there had been a tacit concession that this argument was without merit.
- [49] All the same, since the Claimants addressed the point in their written closing submissions filed on November 3rd, 2023 this court feels obliged to address the point for completeness. In short, the Defendants argued that the 6 year limitation period for all contractual claims applied to this matter. The Claimant's simple answer was that the right to bring a contractual claim expires six years from the date when the cause of action arose. The 6 year limitation period would run from August 26th, 2019 which was the date of the final sale of the Units in Block 2 of the Development. August 26th, 2025 was the relevant limitation date and thus the Defendant's limitation point wholly failed. Any argument by the Defendants that the Claimant's claim for an account was also captured by the Limitation Act would run into the same obstacle. The relevant period would again be 6 years from August 26th, 2019.
- [50] It is trite law that a claim for an account is equitable in nature. This means that a party seeking an account should also be prepared to account to the party from whom the account is sought so that "the whole subject be once for all settled between the parties". See Hanson v Keating (1844) 4 Hare 1 per Vice Chancellor Wigram. Part 41 of the Civil Procedure Rules governs claims for an account and set out the relevant procedure. Detailed directions for an account together with verification, notice of omissions, allowances and explanations for delay are all mandated under the rules. None of these matters were drawn to this court's attention at the trial of this matter.
- [51] In this court's view, the claim for an account appeared to have been levied either as an alternative or a supplement to the primary reliefs that the Claimants were seeking. All the same, where the Claimants have failed to particularize or pursue their claim for an account with the specificity mandated by Part 41 there can be no basis for this court to make any order for an account or include an account under its discretion to order further or other relief. Therefore, the Claimant's claim for an account against the Defendants fails.

- [52] In similar vein, the Claimant's claim against the 2nd Defendant has failed. There is no evidence that Rodney entered into any agreements other than with the 1st Defendant for the purpose of financing the Development. The Claimants accept that the 2nd Defendant was incorporated on September 23rd, 2004. This means that Beachfront would have been in existence at the time of the meeting in 2010. The fact that the notes expressly refer to Deon as opposed to Beachfront is telling. Beachfront is its own separate legal entity. The Claimants have not established on a balance of probabilities that Rodney entered into agreements with both Deon and Beachfront. The burden was on the Claimants to either show that the financing agreement was with both Deon and Beachfront or was with Deon acting on behalf of Beachfront. They did neither. It is accepted that Deon is a director of Beachfront but in the absence of any piercing of Beachfront's corporate veil (a difficult undertaking) to show that Beachfront and Deon were one and the same, the Claimants' claim against Beachfront also fails.
- [53] Insofar as Phase 3 of the Development is concerned, the evidence indicated that no development had taken place. If therefore, the 1st Defendant were to develop Phase 3 then a commission of US\$25,000.00 per unit would be due to Rodney's estate. The fact that Phase 3 remains undeveloped may be explained by the fact of this potential liability to the Claimants and only underscores the weakness of the 1st Defendant's position. Once again, no reasonable explanation has been proffered for the 1st Defendant's decision not to develop Phase 3. The court's inference above is not an unreasonable one.
- [54] The Claimant's claim thus succeeds and the 1st Defendant is liable to pay the sum of US\$750,000.00 or its ECD equivalent to the Claimants being the sums due per block on Phase 2 of the Development. It seems that 10 blocks were contemplated but the evidence at trial indicated that there were only 2 blocks in Phase 2.
- [55] The Claimants have enjoyed partial success on their claim. The claim against Beachfront was not easily separated from the claim against the 1st Defendant and it is not immediately clear exactly what relief was sought against Beachfront. In this court's view, it seemed that Beachfront was added to these proceedings as part of a belt and braces approach to secure the Claimant's position.
- [56] At paragraph 201-202 of its judgment in NEVHCV2022/0041 - Norbert Klaus et al v 25 Acres et al, this court held that if there a clear dividing line between the personal (Deon) and corporate (Beachfront) lawyers then this demarcation would clearly permit a court to award costs for their respective efforts. In the absence of such a line of demarcation it would be difficult to apportion costs among the Defendants current legal practitioners when there was no real distinction between the claim against Beachfront and the 1st Defendant.
- [57] There is no dispute about the court's discretion on costs or how that discretion should be exercised. See SLUHCVP 2022/0010 - Francis and another v Omega Caribe and also Bertrand v Elias [2023] UKPC 34 and Rampersad v Ramlal [2022] UKPC 50. Therefore, the parties are ordered to file and exchange their respective submissions on the costs order that this court should make no later than July 12, 2024.
- [58] This court apologizes to the parties for the delay in the delivery of its judgment in this matter. The Defendant's submissions were not filed until November 26, 2023. This court would not have been able to begin to compile its judgment until it had read and digested the arguments by both sides. That process could not begin until late November/December 2023. It is accepted that the Canons of

Judicial Ethics mandate a 6 month period for the delivery of judgment and the fact that this court was required to conduct several criminal and civil trials and sentencing judgments together with numerous interlocutory hearings and judicial settlement conferences explains but does not mitigate this court's shortcomings in this regard. Accountability means that this court must unreservedly apologize for its failure to deliver judgment before today's date.

Patrick Thompson Jr
Resident High Court Judge

BY THE COURT

REGISTRAR