

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
FEDERATION OF ST CHRISTOPHER AND NEVIS
NEVIS CIRCUIT
A.D. 2022**

CLAIM NO. NEVHCV2021/00117

BETWEEN

**NORBERT KLAUS
ANDREA KLAUS KALMAN** **Claimants**

And

**25 ACRES HOLDING
DEON & ASSOCIATES
DEON DANIEL** **Defendants**

Before: His Lordship Justice Patrick Thompson

Appearances: Mr. Brian Barnes of Counsel for the Claimants
Mr. Terence Byron and Ms. Talibah Bryon of Counsel for the Defendants

2022: June, 27th, 28th, 29th & 30th
July, 1st,
December, 6th

JUDGMENT

Thompson Jr J:

Factual Background.

1. The factual background is not in dispute.
2. The Claimants are a married couple. They are medical doctors who appear to have operated a successful ophthalmological practice in Lugano, Switzerland. In or about 2012 they began to make retirement plans and settled on Nevis as their chosen destination. They wanted to build a high end villa for the purpose of ultimately residing in the long term but in the short term for spending their vacations during the summer season. The Citizenship by Investment Program was their chosen vehicle to make their dreams a reality. They budgeted a sum of US\$1,500,000.00 for the purpose of acquiring a 1 acre lot and constructing a turnkey semi-custom villa with modern amenities subject to their specifications.
3. The first two defendants are corporations. The 3rd Defendant is a director of the other two defendants. In June 2013 the Claimants ("the Klaus's") and 25 Acres Holding ("25 Acres") agreed that 25 Acres would sell a parcel of land measuring 38,250 square feet at Fern Hill Estate ("Lot 3") to the Klaus's ("the Purchase & Sale Agreement"). In July 2013 Deon & Associates Ltd ("Deon & Associates") agreed with the Klaus's to construct a dwelling house on Lot 3 with a completion date of May 20th, 2014 ("the Construction Agreement").
4. Unhappily the purchase and sale of the land and the construction of the dwelling on Lot 3 were plagued with problems from the outset. Those problems culminated in an addendum to the construction agreement being executed by the parties in October 2014. Among other things, this addendum extended the time for completion of the construction of the house to June 30th, 2015.
5. Sadly, matters came to a head in January 2016 and on January 18th, 2016 the Klaus's terminated their agreement with Deon & Associates. The Klaus's continued the construction of their home with the assistance of local and foreign construction personnel (some of whom featured as witnesses in these proceedings). Finally, on June 22nd, 2018 the Klaus's filed these proceedings in the High Court seeking a number of reliefs against both 25 Acres and Deon & Associates but also against Deon Daniel in his personal capacity.
6. The Defendant has resisted these claims and relies on a defence of set off to the varying claims made by the Klaus's against him and the other defendants. Mediation bore no fruit and a further opportunity to mediate on morning of trial was fruitless thus necessitating a 5 day trial before this Court.
7. In the course of the trial it emerged that the Defendants were not disputing several of the reliefs sought by the Claimants. This Court thus proposes to deal with these aspects of the claim before turning to the disputed aspects of the Klaus's claim.

Encroachment

8. The Klaus's seek, as relief number 2 in their statement of claim an order for compensation for encroachment on Lot 3 at the same market value per square foot for a similar lot within a 2 mile radius of the land encroached upon or alternatively an order that the road be removed off of the Klaus's land.

9. This Court is at a loss as to how and why this aspect of the matter remained a live issue at trial. Everyone agrees that a Mr. Simeon Hill prepared a survey report on Lot 3 which the Klaus's and/or their lawyers have had in their possession since May 15th, 2017. It does not appear that any pre-action correspondence attaching the said survey report was ever sent by the lawyers for the Klaus's to the Defendants. The Defendants appear to have taken the view that since they did not have any survey plan from the Klaus's they could neither admit nor deny the disputed encroachment.
10. There was nothing preventing the Defendants from instructing their own surveyor to determine whether there was any merit in the alleged encroachment. This would have been an eminently reasonable step to take since they would have been entitled to recover the costs of any such survey report if matters were not as alleged by the Klaus's. To further compound matters, the Klaus's and their lawyers do not disclose the survey report until 14th September 2020. No reasonable explanation has been proffered to explain the state of affairs up to that date.
11. Pretrial mediation failed without any resolution of this aspect and on the 1st day of the trial counsel for the Defendants indicated that the Defendants took no issue with the encroachment and drew the Court's attention to paragraphs 16 and 17 of Deon Daniel's witness statement filed on April 30th, 2021.
12. At paragraph 17 of his witness statement Mr. Daniel accepted that Mr. Hill's survey report showed a difference of 978 square feet from what is noted on the Certificate of Title to Lot 3 and Mr. Hill's survey. Mr. Daniel went on to provide that 25 Acres would have had no issue rectifying the matter by either removing the road or compensating the Klaus's at the same market value per square foot if possible. Mr. Daniel has not however said why this has not yet taken place. Certainly he could have done so from September 2020 until his witness statement was prepared or at any time after filing. Had he done so, this court would have been spared the time and trouble of having to recite and distill the foregoing paragraphs. Had Mr. Daniel and or 25 Acres opted to resolve this aspect of the matter before trial they may have had a hand in deciding the exact nature of their liability to compensate the Klaus's for this significant shortfall in the lot which they had purchased.
13. On the other hand, the lawyers for the Klaus's have not led any evidence of the value of the land encroached upon or any formula or basis to calculate compensation. Their stance is all the more difficult to understand in view of their belated service of the survey report but also the Defendant's acceptance of liability to compensate their client for this default. They ought to have capitalized on the Defendant's admission in order to resolve this aspect of the proceedings.
14. Legal practitioners may take the view that the Claimant's failure to file any evidence on compensation puts an end to their claim for same. In this Court's view, the answer to that approach is simply this. There could be no objection to this Court referring the issue of compensation to be assessed by the Master. This would have necessitated a significant duplication of judicial effort in order for the Master to be apprised of the state of the matter. The interests of justice and the overriding objective are best met in this court's respectful opinion by the orders made below.
15. 25 Acres admits that they are required to compensate the Klaus's for their loss of use of 978 square feet from Lot 3. The Klaus's have not indicated what value is appropriate but this failure is not a bar to this Court ordering the Claimants within 7 days of the date of this judgment to file and serve evidence and/further submissions on the value of the said 978 square feet and whether they are

entitled to compensation for their loss of use of the said 978 square feet from June 2013 to trial. The Defendants are at liberty to file any submissions or evidence in reply 7 days later and should the parties fail to file the further evidence and submissions then this Court will summarily assess the damages payable to Klaus's for their loss of use and from what date.

16. Additionally pursuant to Section 141 of the Title by Registration Act it is also ordered and directed that Registrar of Titles is directed to amend the Certificate of Title to ensure that the boundaries of the Klaus's property are consistent with Simeon Hill survey report.
17. This court has carefully considered the reasoning of Justice Blenman (as she then was) at paragraphs 45-50 of her judgment in Clarabell Investments Ltd and others v Antigua Isle Company Ltd and others where the learned judge assessed for herself an appropriate figure as damages for the trespass and resulting loss of use caused by the Defendants. Significantly, Justice Blenman found that the plaintiffs in that matter were entitled to compensation for loss of use from the date of the trespass to the date of the trial as the trespass was still subsisting at trial. This Court adopts and endorses that approach to this aspect of the matter.
18. The parties to a civil suit have a duty to further the overriding objective of the Civil Procedure Rules. The matters set out at CPR 1.1, thus indicating its primacy are important. Saving of expense, allocation of resources and the expeditious handling of a matter are fundamental precepts. This Court's order requires a further use of resources by all concerned in order to meet the ends of justice in this matter. It is clear that the encroachment issue could and should have been resolved by the lawyers for the parties without the need for one scintilla of judicial input.

Deon Daniel vis a vis 25 Acres and Deon & Associates

19. As a timely corollary to the foregoing paragraph of this judgment, this Court is required to grapple with the issue of whether the 3rd Defendant, Deon Daniel was properly joined as a party these proceedings. It is not in dispute that Deon Daniel is a director of Deon & Associates and 25 Acres. The 1st and 2nd named Defendants are however clothed with their own legal personality. As Lord McNaughton highlighted in Salomon v Salomon Co Ltd [1897] AC 22 paragraph 51:

"The company is at law a different person altogether from the subscribers to the Memorandum [shareholders]Nor are subscribers as members liable in any shape or form, except to the extent and in the manner provided by the Act."

20. This Court notes that there was no application for Deon Daniel to be removed as a party. In the same vein, the Claimants ought to be taxed for their failure to demonstrate how Mr. Daniel, personally, as opposed to Mr. Daniel as director of 25 Acres and Deon & Associates breached the varying agreements in these proceedings. This Court thought it prudent to wait for all of the evidence to be taken at trial as opposed to determining this aspect as a preliminary matter at trial.
21. As a result, it was incumbent on the Claimants to demonstrate how Mr. Daniel supplanted the 2 corporate entities or held himself out as being personally responsible under the varying agreements so as to make himself personally liable. They have singularly failed to do so or adduce any evidence from which this Court could so find.

22. At trial the Defendants were represented by Terrence and Talibah Byron. At trial there was no clear demarcation that either of the Byron's were acting exclusively for Mr. Daniel. If that were so, then it is arguable that Mr. Daniel's counsel would be entitled to their costs in representing his personal interest in these proceedings since they would have gone through the trouble of representing his personal interests when they needn't have been required to do so. Irrespective of the ultimate result in these proceedings, any judgment made by this Court could only lie against 25 Acres and Deon & Associates for the reasons set out above. Whether Mr. Daniel may later become personally liable to satisfy any subsequent judgment or orders made by a Court against the corporations' remains to be seen.

Restrictive Covenants – Clause 6 (Trees) and other Restrictive Covenants

23. Clause 6 of the Purchase and Sale Agreement provides as follows:

"The Vendor will trim the trees around the lot each year at its expense, so that free sight to the sea is always guaranteed. The trees in front of the villa shall not exceed a level higher than six feet over the lowest level of lot #3. If the Vendor sells lots surrounding lot #3 this will be the subject of an obligation for the new owners of the lots in front of lot#3."

Clause 6 – The Trees

24. The Klaus's say that 25 Acres has breached Clause 6 of the agreement in that they have failed to trim the trees on the lots around Lot #3 such that they are unable to enjoy their contractually agreed view of the sea. The Klaus's contend that 25 Acres has failed, refused and/or neglected to cut the trees to the contractually agreed height. It is not clear whether are seeking specific performance of Clause 6 or damages for its breach.
25. In their filed written submissions dated September 2nd, 2022 counsel for 25 Acres do not address clause 6. In their oral submissions on July 1st, 2022, counsel for 25 Acres contended that their client had divested itself of its obligations under clause 6 and was not bound to trim the trees since the land with the trees was now owned by someone else. No evidence as to when 25 Acres sold the surrounding lots was called in evidence at trial and there is no reference by either side as to who the new owners of the surroundings lots are or when they became the owners or whether they took their title subject to the burden of any obligations created by clause 6.
26. The respective closing submissions of the parties are bereft of any reference to or analysis of the relevant law on restrictive covenants. This Court's task is to review the relevant legal principles and apply them to the facts of this case. The first question for the court is whether the fact that clause 6 is not listed on the certificate of title as an encumbrance is of any moment to the matters in dispute?
27. The First Schedule to the Title by Registration Act defines an encumbrance as *'all burdens, securities or liens upon land arising whether in law or in equity other than mortgages by which the land is subjected to particular interests in favour of individuals...and also any dealings with land which in the event of sale would limit the free use and disposal thereof by the purchaser....The instruments must be presented to the Registrar of Titles and must be noted by him or her on the certificate of title in the same manner as mortgages.'*

28. In the Court of Appeal decision in Raphael Donald and others v Egmont Development Inc. [1999] ECSCJ No. 25, the late Justice of Appeal Redhead opines at paragraph 28:

"In my judgment the conveyances from the common vendor to the respective purchasers do not have to say on the face of the documents that it is a building scheme. Once it is clearly spelt out in the document or it can be easily inferred from the documents that will suffice to bring into operation a building scheme."

29. In this Court's view, it would have been ideal if clause 6 had been endorsed on the certificate of title as an encumbrance but its absence is not fatal.
30. In any event and as a matter of law, the burden of a positive covenant does not run at either common law or equity. See Austerberry v Oldham Corp (1885) 29 Ch D 750. A positive covenant is one that requires the covenantor (in this case 25 Acres) to do some positive act involving expenditure. In this case that positive act would be to trim the trees. It is arguable that the position would be different if the covenant were a negative one in substance. The rationale for this important distinction is clear. In short, the law tries, as far as possible to restrain breaches of obligations as opposed to supervising the performance of an obligation.
31. There was no evidence from 25 Acres that they had sold the lots surrounding Lot#3 or any evidence that those new owners (if any) purchased their lots with knowledge of any obligation to trim the trees. In any event, clause 6 was a positive covenant and the burden of its obligation to trim the trees could not bind any subsequent purchaser of the surrounding lots.
32. On the other hand, the benefit of that positive covenant runs. See for example Sharp v Waterhouse (1857) 119 ER 1449. This means that the Klaus's are entitled to the benefit of that positive covenant under clause 6 of Purchase and Sale Agreement.
33. It follows therefore that 25 Acres is in breach of their contractual obligation at clause 6 of Purchase and Sale Agreement to trim the trees to the requisite height. 25 Acres did not lawfully pass this obligation on to any subsequent purchasers, assuming that the land was sold. Norbert Klaus, at paragraph 15 of his witness statement averred that the parcel of land in front of Lot#3 was sold to a 3rd party. That parcel of land is landscaped with trees which now exceed a height of six feet over the lowest level of Lot #3.
34. Page 381 of Bundle 3-1 of the trial bundle exhibits a photograph of the trees on the lot in front of Lot#3. This photograph which was tendered in evidence as part of the Claimant's documents is the only evidence that addresses this issue. There is no evidence from the Claimants on how 25 Acres' breach of clause 6 of the Purchase and Sale Agreement has diminished either their the value of Lot#3 or their loss of amenities since they are unable to enjoy their property in the way that they had contractually expected.
35. The absence of this evidence is all the more surprising since at paragraph 17 of his witness statement, Norbert Klaus says that clause 6 was a main term of Purchase and Sale Agreement. Even more surprisingly Norbert Klaus avers that Deon Daniel personally gave misleading and fraudulent assurances in respect of clause 6 which both he (Daniel) and 25 Acres are liable to satisfy. If the Claimants would have needed to adduce clear particulars of the alleged fraudulent conduct.

They have failed to do so. All the same, I am satisfied that 25 Acres has breached clause 6 of the agreement for the reasons set out above.

36. 25 Acres has advanced no submissions on this issue and this Court is not minded to simply pluck a figure from the air and summarily assess damages for the breach of clause 6 by 25 Acres. This Court does not intend to repeat its remarks about the overriding objective only to note that the consequences of the lack of assistance from counsel for the Claimant forces this court to make an order for evidence and further written submissions by the parties on the following:

- (i) The diminution in value (if any) of the Claimant's property occasioned by the fact that the trees on the lot exceeds the 6 foot requirement of Clause 6;
- (ii) The sum sought by the Claimant's for any loss of amenity occasioned by the fact that the trees exceed the 6 foot requirement
- (iii) How the sums sought in (i) and/or (ii) above are calculated

37. The further evidence and submissions of counsel for the Claimants are to be filed and served on counsel for the Defendants within 7 days of this judgment being delivered. Thereafter the Defendants are to file their evidence and further submissions on this issue no later than 7 days after the Claimants have filed and served their submissions and evidence on them. Should the parties fail to comply with this aspect of the judgment this court will determine for itself a reasonable sum to be paid as damages for the breach.

38. This court is unwilling to simply pluck arbitrary figures from thin air. Notwithstanding their conduct, both sides should be afforded a further opportunity to assist the Court on this issue. The interests of justice are not met by the arbitrary imposition of damages. Awards of damages for contractual breaches should, as far as possible, be transparent so that they can survive scrutiny and analysis.

39. The case of Wrotham Park Estate Co Ltd v Parkside Homes Ltd [1974] 1 WLR 798 is authority for the proposition that a Court has a discretion to assess a breach of contract and make an award where it was considered just to do so. The Supreme Court in Morris-Garner and another v One Step (Support) Ltd [2018] UKSC 20 overturned this reasoning on the basis that judicial discretion should not be the premise on which damages are awarded to compensate a Claimant. To allow this would allow courts to award damages where they may not be satisfied as to actual loss. Therefore, any award of damages should as far as possible be founded on the economic value of the Claimant's loss which would ensure the Claimant is compensated for the true value of the breach. It is not disputed that on occasion a court may be required to summarily assess damages, but that approach seems best suited to nominal or relatively small awards of damages. That is not the case here.

Other Restrictive Covenants

40. The following covenants were expressed to run with Lot #3 in the Purchase and Sale Agreement and are expressed as being applicable to all lots at Fern Hill Estate:

- i. The lot shall be used for only one single dwelling house

- ii. The lot shall not be used to erect thereon any commercial building or to carry on any commercial activity
- iii. No animals other than domestic pets shall be brought onto the lot or kept thereon
- iv. No abandoned, unused or wrecked vehicles shall be brought unto, kept or maintained upon the lot
- v. The lot shall not be used in any way which causes or may cause a nuisance to the owners of the adjacent or other lots in the subdivision.
- vi. There shall be no division or subdivision of said lot
- vii. No laundry shall be hung in a way rendering the same visible from the public road
- viii. All pool cleaning and ground maintenance must be done by the Developer (Deon & Associates) for the price of USD\$5,000.00 for one year. Deon & Associates will get preference for this service after the first year as long as price and quality corresponds to the local market.

41. When the Klaus's were issued with the Certificate of Title to Lot#3 on September 9th, 2015 it contained the following covenants:

- i. The residence to be built on the lot shall be single storied and shall commence on a back line to be decided by the Developers (Deon & Associates Ltd)
- ii. The house and roof at peak (high point) shall not exceed 20 feet from low ground built upon;
- iii. The lot shall be cleaned, leveled and grassed by the Vendor immediately after the completion of the dwelling house;
- iv. All pool cleaning and ground maintenance must be done by the Developer (Deon & Associates Ltd)
- v. All buildings must be built by the developer (Deon & Associates Ltd)

42. The Klaus's say that they orally demanded of Mr. Daniel (see paragraph 20 of the Norbert Klaus witness statement) that he remove the foregoing covenants. According to Mr. Klaus, Mr. Daniel has failed, refused and neglected to do so. It was Mr. Klaus's evidence that Shawna Lake was recommended to him as a lawyer by a lawyer in Europe. It was on this basis that he and his wife relied on Shawna Lake to assist them in this transaction. Mr. Klaus was of the view that Ms. Lake was a friend of Deon Daniel and appeared to imply that Ms. Lake appeared to serve the interests of both the Klaus's and Mr. Daniel. Incidentally, Mr. Daniel in his oral evidence at trial accepted that he was friendly with Ms. Lake but rejected any imputation that she was also serving his interests in this transaction.

43. By a waiver dated January 11th, 2016 Deon & Associates agreed to waive the applicability of the following covenants
- i. All pool cleaning and ground maintenance must be done by the Developer (Deon & Associates Ltd)
 - ii. All buildings must be built by the developer (Deon & Associates Ltd)
44. The Byrons, for 25 Acres, invite this court to reject the implication that Ms. Lake was not acting solely for the Klaus's in this transaction. They drew to this Court's attention the fact that by an email dated January 11th, 2016 Ms. Lake sent to Mr. Daniel (presumably at the request of the Klaus's) a copy of the said waiver for signature by Mr. Daniel. In their view, it would be surprising for the Klaus's having been so meticulous throughout this transaction to have forgotten or omitted to make an issue of the covenants they now seek removed. Counsel for 25 Acres argue that the Claimants were unlikely to have orally sought the removal of the other covenants.
45. A copy of the certificate of title containing the covenants was not tendered in evidence at trial. Counsel for the Defendants contended that certificate of title was not tendered in evidence at the trial and is fatal to this Court's ability to resolve this issue in favour of the Claimants.
46. Secondly, the Defendants say that even if the oral evidence of Norbert Klaus is evidence of the covenants on the title, even without the formal tendering of the certificate of title, there is a further difficulty. In their view, the Claimants have affirmed the covenants, waived their rights to challenge them and are now estopped from challenging same.
47. The Certificate of Title for Lot#3 was not formally tendered in evidence. Counsel for the Claimants sought to tender same after the close of their respective cases and the Court considered the Certificate of Title de bene esse.
48. Strictly speaking, the Certificate of Title ought to have been formally tendered in evidence as part of the Claimant's documents at trial. The failure to do so is not fatal for the following reasons.
49. The Defendants do not dispute the contents of the Certificate of Title. Their position is simply that the covenants on the Certificate of Title have been affirmed by the Claimants thus estopping them from now seeking to have these covenants discharged. There is no dispute by either side as to the contents of the Certificate of Title and as such whether it was formally tendered is of no moment since all sides agree as to what the Certificate of Title says. The position would be different if there was a dispute as to what the Certificate of Title says.
50. The following covenants are the ones which the Claimants seek to have discharged.
- i. The residence to be built on the lot shall be single storied and shall commence on a back line to be decided by the Developers (Deon & Associates Ltd)
 - ii. The house and roof at peak (high point) shall not exceed 20 feet from low ground built upon;

- iii. The lot shall be cleaned, leveled and grassed by the Vendor immediately after the completion of the dwelling house;

51. This Court's first task is to determine whether the foregoing covenants are positive or negative. This Court's analysis is set out below.

Restrictive Covenant	Court's Finding
The residence to be built on the lot shall be single storied and shall commence on a back line to be decided by the Developers (Deon & Associates Ltd)	Positive since it requires the residence to be single storied and built on a back line decided by Deon & Associates.
The house and roof at peak (high point) shall not exceed 20 feet from low ground built upon;	Negative since it requires the height of the Claimant's roof not to exceed 20 feet from the ground on which it was built, effectively deterring further construction.
The lot shall be cleaned, leveled and grassed by the Vendor immediately after the completion of the dwelling house;	Positive since it requires the lot to be cleaned, levelled and grassed by 25 Acres immediately after completion. This creates a positive obligation which is coupled with obligatory expenditure.

52. In keeping with this Court's analysis of restrictive covenants as discussed above, neither the burden nor the benefit of the positive covenants run with the land. In the same vein, the burden of the negative covenant runs with the land in equity. See Tulk v Moxhay (1848) 41 ER 1143.

53. At first blush, it would appear that Lot#3 is part of a scheme of development. That term has a particular legal meaning as more particularly described by Justice Parker in Elliston v Reacher [1908] 2 Ch 374 at page 384 and 385. He helpfully lists four factors for consideration in this regard:

- (1) "both the plaintiffs and defendants derive their title under a common vendor;
- (2) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development;
- (3) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other land retained by the vendor; and
- (4) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendors.

It is also observable that the equity arising out of the establishment of the four points I have mentioned has been sometimes explained by the implication of mutual contracts between the various purchasers, and sometimes by the implication of a contract between each purchaser and the common vendor, that each purchaser is to have the benefit of all the covenants by the other purchasers, so that each purchase is in equity an assign of the benefit of these covenants."

54. Even if I am satisfied that a scheme of development exists in respect of Lot#3 as result of Lord Parker's test above, I am required to consider whether there is also an intended reciprocity of obligation and benefit between the parties. See the reasoning of the Jamaican Court of Appeal and Privy Council in Privy Council Appeal No. 57 of 1997 – Lamb v Midac Equipment where Carey JA highlights at page 293:

"The editor of Preston & Newsom (5 Edn) in dealing with the appropriate words, says this (at pages 13, 14) and I accept this as representing the law:

'There are two familiar methods of indicating in a covenant of this kind the land in respect of which the benefit is to enure. One is to describe the character in which the covenantee receives the covenant a covenant with so-and-so, owners or owner for the time being of whatever the land may be. Another method is to state by means of an appropriate declaration that the covenant is taken for the benefit of whatever the lands may be.'

The clause does not, as Miss Phillips pointed out, speak to the covenantee as being owner of any remaining land nor does it speak to the covenants enuring for the benefit of any remaining lands. Far from bringing about annexation to benefit the property of the covenantee, it has created covenants which, in my opinion, would be of use to the covenantee for the protection of his property in his own lands and enabling him to dispose of the property advantageously in the future. Such a covenant is not annexed, as was pointed out by Sargant J in Chambers v Randall [1923] 1 Ch 149 at page 155. Where the covenants are not annexed, they are personal, and thus enforceable only between the original covenantor and the covenantee, not subsequent purchasers or transferees."

55. Ultimately, this is a question of evidence having regard to the facts of each case. There is no evidence as to the state of the covenants that exist on other certificates of title to the land at Fern Hill as sold by 25 Acres. There is no basis upon which this court can find that a scheme of development existed in respect of Lot 3 and its surrounding parcels.
56. So much for that. This Court is still left with the task of deciding whether to accede to the Claimant's application to modify and/or discharge the covenants. At common law a Court is empowered to discharge and/or modify a restrictive covenant if (a) there is sufficient evidence that a covenantee has acquiesced in the course of conduct inconsistent with its continuance, for example by disregarding past breaches of the covenant or (b) the character of the neighborhood has changed to such an extent that the covenant is essentially redundant. Farwell J states in Chatsworth Estates Co v Fewell [1931] 1 Ch. 224 at paragraph 230, with regards to the defendant's arguments on the basis of a change in character that:

"The defendant's first ground of defence is that there has been such a complete change in the character of the neighbourhood, apart from the plaintiffs' acts or omissions, that the covenants are now unenforceable."

But to succeed on that ground the defendant must show that there has been so complete a change in the character of the neighbourhood that there is no longer any value left in the covenants at all. A man who has covenants for the protection of his property cannot be deprived of his rights thereunder merely by the acts or omissions of other persons unless those acts or omissions bring about such a state of affairs as to render the covenants valueless, so that an action to enforce them would be unmeritorious, not bona fide at all, and merely brought for some ulterior purposes. It is quite impossible here to say that there has been so complete a change in the character of this neighbourhood as to render the covenants valueless to the plaintiffs. Whether right or wrong the plaintiffs are bringing this action bona fide to protect their property, and it is hopeless to say that the change in the character of the neighbourhood is so complete that it would be useless for me to give them any relief. “

57. St Christopher and Nevis appears not to have enacted any legislation analogous to Section 84 of the 1925 UK Law of Property Act (1925) or the Restrictive Covenants (Discharge and Modification) Act of Jamaica. These laws provide the legislative framework for the discharge and modification of a restrictive covenant. All is not lost since in this Court's view, Section 141 of the Title by Registration Act 2002 permits this Court in any proceeding in relation to land or any contract or transaction relating thereto, to direct the Registrar of Titles to cancel, correct, substitute or issue any certificate of title. This Court is thus empowered to order modification and/or discharge of the covenants if it is satisfied that any of the common law bases for doing so are properly made out.
58. This court is therefore minded to discharge the covenants identified above. 25 Acres has acquiesced by stating at paragraph 16 of their closing submissions that there is no evidence that the restrictive covenants are being enforced by them. This conduct is inconsistent with any reasonable expectation as to the continuance of these covenants. This Court is therefore empowered to exercise its powers to discharge the covenants set out at paragraph 50 above and directs to Registrar of Titles to do

Clause 7 – Full Infrastructure for Water & Electricity

59. Clause 7 of the Purchase and Sale Agreement reads as follows:

“The Vendor confirms that full infrastructure for water, telephone, internet, electricity, cable television, garbage disposal is already provided to Lot # 3 and that there will be no supplementary costs to the Purchasers for this infrastructure to the said Lot 3”

60. Infrastructure is not defined in the Purchase and Sale Agreement. The ordinary dictionary meaning of infrastructure as derived from the Merriam Webster Online Dictionary as follows:

- i. the system of public works of a country, state, or region also : the resources (such as personnel, buildings, or equipment) required for an activity
- ii. the underlying foundation or basic framework (as of a system or organization)

Infrastructure for Electricity

61. The Claimants in their statement of claim complain that the Defendants breached the Purchase and Sale Agreement by failing to supply full infrastructure for electricity to Lot 3 since the appliances and items more particularly described in 1st Schedule to the Construction Agreement required a Phase 3 electrical set up. The Defendants contend that they are not in breach of Clause 7 of the Purchase and Sale Agreement since there was clearly electricity at Lot 3 and that Phase 3 electricity was not available at that location. The Defendants say that they could not have warranted that Phase 3 electricity was available at Lot 3 since that type of electricity was not available in that area. They say further that the Defendant did not make the need for Phase 3 electricity a term of the Purchase and Sale Agreement and as such they are not in breach of their obligations in this regard.
62. Infrastructure at Clause 7 of the Purchase and Sale Agreement means the basic framework for utilities at Lot 3. It is common ground that there was electricity at Lot 3. The problem lay in the fact that the appliances which the Claimant's required to be installed would only work with a Phase 3 electrical set up because of their increased voltage requirements.
63. In this Court's view, unless it were a term of the Purchase and Sale Agreement that Phase 3 electricity was required the Defendants are not in breach of their obligation under Clause 7 of the Purchase and Sale Agreement. It was neither an express nor an implied term of the Purchase and Sale Agreement that a particular type of electricity would be required. This Court finds that as at the Purchase and Sale Agreement the Defendants were entitled to warrant that full infrastructure for electricity was provided.
64. The Construction Agreement is what put the Defendants on notice as to the type of appliances and voltage required at Lot 3 for this purpose. It is noteworthy that the Construction Agreement is dated July 31st, 2013 while the Purchase and Sale Agreement is dated June 28th, 2013. The Claimants have not persuaded this Court that the Defendant (as at the date of signing the Purchase and Sale Agreement) knew or ought to have known of the voltage requirements of the items listed in the 1st Schedule of the Construction Agreement, a document that came to be executed a month later. For all of these reasons, this Court is not persuaded that the Defendant is in breach of its obligation to provide full infrastructure for electricity to Lot 3.
65. The latter part of Clause 7 provides that there will be no supplementary costs to the Claimants for 'this infrastructure'. This aspect of clause 7 does not assist the Claimants since there was no evidence of the supplementary costs of supplying Phase 3 electricity to Lot 3. There was no evidence as to the cost of supplying Phase 3 electricity once it became apparent that it was required. Had there been such evidence then it was arguable that the cost of the transformer from NEVLEC and any additional works to ensure that Phase 3 electricity was supplied were for the Defendant's account since they had not only warranted that full infrastructure existed but had gone further to say that any supplementary costs for the infrastructure were for their account.
66. Counsel for the Claimant appended to his closing submissions an Excel Spreadsheet. Contained in that spreadsheet were a number of electricity bills spanning the period from June 2018 to February 2021. These bills were not useful in determining the supplementary costs for electricity and this Court is thus unable to determine why that material was placed before it in that manner. So much for the alleged breaches of the electricity infrastructure aspect of the Purchase and Sale Agreement.

Breach of the Construction Agreement - Electricity

67. Since this Court is dealing with the issue of the electricity at Lot 3 this Court thought it prudent to deal with the alleged breaches of the Construction Agreement on this issue. At paragraph 33 of his witness statement, Norbert Klaus says that Deon & Associates agreed to furnish their dwelling house with items specified in the 1st Schedule to the Construction Agreement. According to the Klaus's, those items required specific electrical wiring which mandated a Phase 3 electrical set up. The Klaus's say that in breach of the Construction Agreement, Deon & Associates provided a Phase 2 electrical set up. That Phase 2 electrical set up could not supply the requisite voltage for the items listed in the 1st Schedule to work. As a result, the Klaus's say they had to incur significant additional expense in order to remedy this significant breach and seek damages for the cost of rectifying this breach.
68. The Klaus's called Dr. Roland Klaus, a qualified engineer, as an expert witness in support of their case. Roland Klaus's evidence on this issue, as detailed at paragraphs 70-79 of his witness statement was as follows. The electrical engineering plans prepared by the architect were wholly inadequate. In January 2016 when the services of Deon & Associates were terminated most of the electrical cabling was either of the wrong size or in the wrong place. Remedial works had to be undertaken and redone at additional expense to the Claimants.
69. In Roland Klaus's' expert opinion there was no planning or engineering of the electro feed that would be sought from the Nevis Electricity Corporation ("NEVLEC"). In his view, the Claimant's specialized electrical appliances, fixtures and fittings had not been planned or sourced by Deon & Associates otherwise they would have known that the electrical set up would be insufficient to power those items and that a Phase 3 and not a Phase 2 set up was required. In his view, at termination, Deon & Associates had only provided a high voltage cable access which was the access point for NEVLEC in the Fern Hill area to all lots.
70. The Defendant's evidence on this issue came from the evidence of Deon Daniel, Elvis Maynard and Camille Kelly. At paragraphs 27-30 of his witness statement Mr. Daniel averred that there was no agreement between the parties that a Phase 3 electrical set up was required. In his view all of the other villas at Fern Hill carried a Phase 2 set up and had not issues with capacity. Finally, in his view there was nothing in Schedule 1 to the Construction Agreement that specified that a Phase 3 set up was required.
71. Mr. Maynard confirmed that he was an electrician of over 30 years' experience and was familiar with the Fern Hill area. In cross examination, Mr. Maynard accepted that if he had a full list of appliances he would then be able to calculate the electrical load that the house would have. In his view the electrical schedule and equipment in the house would tell you the cable and size of the power. Mr. Maynard was aware that Phase 3 electricity from NEVLEC was available in the Fern Hill area since he had recently upgraded the electricity of a resident of Fern Hill from Phase 2 to Phase 3. I confess that I was unable to follow Mr. Maynard's explanation of the difference between Phase 2 and Phase 3 even when I had put questions to him but this is no fault of Mr. Maynard's.
72. Ms. Kelly supplied the answers that the Court had sought of Mr. Maynard. Ms. Kelly confirmed that Phase 2 electricity was akin to the standard electricity that comes to an electricity pole. According to her, Phase 3 was a higher voltage for higher spec equipment and that the electrical engineer

would determine whether Phase 2 or 3 was required based on the area and appliances in the house. In her view, the contractor would rely on the electrical engineer to advise him as to what was required. Finally, it was her view that Phase 3 electricity was only needed for one or two outlets as opposed to the entire house.

73. Schedule 1 to the Construction Agreement sets out a number of electrical appliances. It was incumbent on the electrician and the ultimate responsibility of the contractor to ensure that the correct electricity was applied for and obtained at the Klaus's residence. In this regard, this Court wholly accepts the evidence of Roland Klaus on this issue. It is clear that this electrical aspect of this project was poorly planned and executed. The suggestion that the Klaus's somehow bore responsibility for this was absurd. How on earth would the Klaus's know or be expected to know what electrical infrastructure was available in Nevis in order to meet the needs of their appliances? Even if they did know what voltage their appliances required it was for the contractor and or his sub-contractor, the electrician to know what was required for those appliances to work in Nevis.
74. The position may have been different if the Klaus's did not indicate what appliances they wished installed. The fact that these appliances were to be sourced and purchased by Deon and Associates further underscores the scope of their default in this regard. Deon and Associates knew or ought to have known what electricity was available in Fern Hill and measured this against the items in the Schedule. As Norbert Klaus so eloquently put it, he was an eye surgeon, not a contractor.
75. The Klaus's were entitled to rely and did rely on Deon & Associates to manage this aspect of the construction. Deon & Associates singularly failed to perform their obligations in this regard under the Construction Agreement and are thus liable to compensate the Klaus's in damages for this breach.
76. This Court has found it impossible to accurately discern the expenses incurred by the Claimants' in remedying this aspect of the Defendant's breach of the Construction Agreement. Several hefty bundles were filed at the Court and it was hoped that the Claimants' counsel, in their closing submissions would have cross referenced and drawn the Court's attention to the relevant documents that substantiate their client's losses.
77. This Court presumes that the documents which particularize the sums claimed exist in the voluminous bundles filed but does not believe that it is the best use of judicial time to pore over thousands of pages of documents in the hopes of finding this material. This Court notes that at page 557 of Bundle 3-1 an estimate dated March 3rd, 2016 signed by Camille Kelly and Clive Evelyn and titled Klaus Residence Construction Completion provides for the following sums.

500 AMP Main Switch	-	US\$12,800.00
Electrical Wires and Panel	-	US\$58,840.00
Main Wire 500 MCM	-	US\$22,500.00

78. How these sums were arrived at? Whether they are reasonable and whether they properly represent the monies due and payable as damages for remedying the Defendant's breach of the Construction Agreement on this issue are all matters upon which the Court requires the input of both parties.
79. In view of this Court's previous findings in this matter the Claimants are to file and serve, within 7 days of this judgment a copy of their Schedule of Damages for the breach of this aspect of the

Construction Agreement and supporting documents. For the avoidance of doubt, this order is simply for the Claimants to draw this Court's attention to the relevant documents in their case at trial and not for the purpose of obtaining additional evidence. The Defendants will have 7 days from the date of service of this material to file any submissions they may have in relation to the sums sought by the Claimants. For the reasons that have been fully traversed above, the award of damages should not be a matter of judicial discretion thus necessitating the orders above.

Infrastructure for Water

80. Unlike the issue of electricity, everyone was agreed that there was no 'street water', that is to say, piped government water in the Fern Hill area at the time that the Purchase and Sale Agreement was executed by the parties. When asked to comment on Norbert Klaus's evidence Mr. Daniel averred that Norbert Klaus was mistaken when he said that Mr. Daniel had told him that Fern Hill had 'government water' since there was no government water at Fern Hill. Additionally, during cross examination, Norbert Klaus maintained that a neighbor of his at Fern Hill was connected to the public water supply.
81. I have no difficulty in finding that Mr. Daniel did in fact say that there was government water at Fern Hill particularly since clause 6 warrants this exact position. It would be a strange thing if a party were to promise one thing in a contract then orally represent an entirely different position, especially on an important issue. I therefore find that 25 Acres breached their obligation to provide full infrastructure for water under clause 6 of the Purchase and Sale Agreement. That is not the end of the matter.
82. The Klaus's do not say when they became aware of this breach but at paragraphs 37-38 of his witness statement, Norbert Klaus avers that when they became aware that their property was not connected to the public water supply they made inquiries of Mr. Daniel. It was their evidence that Mr. Daniel indicated that a cistern would be built to supply water to the villa on the property to address this situation.
83. The Klaus's did not demur from Mr. Daniel's proposal to build a cistern. They are taken to have accepted the breach and allowed Mr. Daniel to remedy same by constructing a cistern to supply water to their property. There is therefore no breach of this aspect of Clause 6 of the Purchase and Sale Agreement by 25 Acres.
84. The Klaus's next say that the cistern that was built was inadequate for their water needs (see paragraph 39 of the Norbert Klaus witness statement). According to them when they pointed this out to Mr. Daniel he (by a letter dated January 11th, 2016) informed them that they would have to pay Deon & Associates an additional US\$225,000.00 in order for them to build an additional cistern on their property. The Klaus's were incensed by this letter since clause 6 of the Purchase and Sale Agreement provided that "there will be no supplementary costs to the Purchasers for this infrastructure to the said Lot#3". In their view, the costs of remedying this breach were solely for Deon & Associates.
85. Mr. Daniel's position is set out in paragraphs 25 and 26 of his witness statement. In his view, the cistern that was built was approved by planning and would not have been so approved if it was inadequate. Moreover, he says that the ratio of water used to calculate the minimum water capacity was adequate for a four bedroom villa at Fern Hill and that this is consistent with the standard applied

throughout the Fern Hill Estate. As a result, he was of the view that Deon & Associates had properly discharged their contractual obligation to provide full infrastructure for water. In cross examination, Mr. Daniel essentially maintained his position that he had provided full infrastructure for water.

86. This Court has little difficulty in finding that 25 Acres is in breach of its obligation to ensure that the supplementary costs of providing full infrastructure for water were not passed on to the Klaus's. The fact that there was no public water supply meant that Deon & Associates were charged with the burden of ensuring that the Klaus's were adequately supplied with their water needs. This also meant that the cost of providing for their water needs was for Deon & Associates. The Klaus's by agreeing to have Deon & Associates construct a cistern to remedy this default should not be taken to have agreed to the construction of a minimum sized cistern. Deon and Associates cannot reasonably contend that they discharged their contractual responsibilities by constructing the minimum sized cistern for that area.
87. The evidence of Grenville Phillips, the Defendant's construction expert is particularly instructive on this issue. In his view, the cistern calculations were based on a minimum code standard. The minimum code standard simply establishes a baseline for what ought to be done. Put another way, the cistern capacity could not fall below that minimum standard. Simply attaining and not even surpassing the minimum standard did not mean that Deon & Associates had complied with their contractual obligations particularly since they had warranted that full infrastructure for water existed.
88. The evidence of the Claimant's witness, Ms. Martha Isbister was particularly insightful on this issue. It is significant that Ms. Isbister was not challenged by the Defendants on this aspect of her evidence. At paragraph 10, sub-paragraph 6 of her witness statement Ms. Isbister stated as follows:

"There is no public water supply to the area in Fern Hill Estates where the Claimant's property is located. Residents including the Claimants are dependent on their cisterns to supply water to their properties. The Claimant's property has 4 kitchens, 5.5 bathrooms with 7 showers, 2 tubs 13 sinks and 5 toilets. Based on an occupancy of 8 people (the house could sleep 10 comfortably) the average consumption would be 800 gallons a day or 24,000 gallons a month.

The pool has a capacity of 30,000 gallons. This figure does not factor in evaporation loss. The evaporation rate will vary by sun exposure, wind and humidity; an estimated rate for the summer would be 100 to 125 gallons per day.

Irrigation for the garden requires water. The garden materials were chosen to be drought tolerant and reduce demand. The average irrigation demand in the dry season is estimated at 5,000 gallons every 7-10 days.

The Defendants constructed one double chamber cistern on the Claimant's property under the main house deck. The capacity is about 24,000 gallons. The cistern is filled by rain water only as there is no island supply available. This one cistern would not have been sufficient to supply the water needs of the villa, pool and garden year round given the requirements of the house, cottage, pool and irrigation.

Prior to May 2017 and my association with the project, additional cisterns were built under the cottage and under the generator building. The cottage capacity is about 9,500 gallons. The cistern under the generator building holds about 8,000 gallons and is designated for irrigation.”

89. The Klaus's made it clear to the Defendants that what had been built was inadequate. Even without any contractual reference to a garden and the resulting need for irrigation the cistern constructed by the Defendants was woefully inadequate. A month's supply of water, even without the need to replenish the pool did not meet the Claimant's needs.
90. Clause 6 makes it clear that the supplementary costs for remedying this problem were not for the Klaus's. The Defendants had agreed to these contractual terms. They are bound by the terms of the agreement and the provision that they are to bear the supplementary costs of this infrastructure. There can be no real dispute that a cistern or cisterns amount to infrastructure under the Purchase and Sale Agreement. The Defendants were thus liable to construct the framework for that resource at their own expense. They failed to do so. They are thus liable to compensate the Claimants in damages for the reasonable costs of constructing the cistern(s) to meet their reasonable water needs.
91. The Claimant's say that they built two additional cisterns at an additional cost of US\$500,000.00 and seek the recovery of same as damages. The word 'cistern' appears 70 times in the Excel Spreadsheet that is appended to the Claimants closing submissions. This Court is unable to discern whether these 70 references all relate to the construction of the cistern that the Defendant refused to construct or are expenses related to maintaining and filling the said cistern(s) over the years. This Court notes that the sum of US\$19,252.15 is listed as the cost of construction of a cistern by Clive Evelyn. The date of that construction is November 2016. This figure is to be contrasted with the sum of US\$500,000.00 as the costs of construction of 2 additional cisterns at paragraph 40 of Norbert Klaus's witness statement. Without the assistance of the Claimant's counsel and input from counsel for the Defendants this Court cannot say what sum is payable as damages for the Defendant's breach of this aspect of the Purchase and Sale Agreement.
92. This Court is thus compelled to make an order for the Claimant to file and serve within 7 days of the date of delivery of judgment in this matter a copy of their Schedule of Damages, supporting documentation and any further submissions they wish to make on this issue. The Defendant has 7 days to file and serve, their response if any to this material. It bears repeating that the Claimants are only at liberty to direct the Court's attention to the documents in their case at trial that address this issue and not to obtain additional evidence.

Breaches of the Construction Contract

93. The Klaus's say and the Defendants accept that the Klaus's paid the sum of US\$2,029,865.00 to the Defendant under the Purchase and Sale and Construction Agreements. The Claimant's complain that Deon & Associates breached the Construction Agreement in the following ways:
- (i) Failed to complete construction by any of the contractual or mutually agreed upon dates for completion
 - (ii) Failed to supply the items in Schedule 1 to the Construction Agreement

- (iii) That the quality of the work performed by Deon & Associates fell below the contractually agreed standard of a 'substantial and workmanlike manner'.

Failure to Complete Construction by Agreed Date

94. Everyone agrees that the Defendant failed to complete the construction by any of the agreed dates for doing so. The Defendant says that he was hampered in his ability to do so because the Claimants kept moving the goalposts on him by bombarding him with changes. The Defendant says those matters plus challenges in obtaining material meant that the Claimant had essentially prevented him from meeting his contractual obligations before they were terminated.
95. As a matter of law, frustration of a construction contract is narrowly confined. The Defendants have not expressly pleaded or relied on frustration but has suggested that it was impossible to complete because of the Claimant's need for changes and/or difficulties in obtaining material.
96. In Wates Ltd v Greater London Council (1983) 25 B.L.R. 1 the Court held that the fact that it became more onerous or expensive for one party than he thought was not sufficient to bring about frustration. It had to be unjust to hold the parties bound in the sense that a supervening event, which was unforeseen, unexpected or un contemplated, rendered the performance of the contract radically different from that which was undertaken by the contract. The burden of doing so fell on the Defendants and they have failed to discharge this burden.
97. The Defendants say further that the Addendum provided for a deadline date for construction of April 30th 2016. This deadline was originally February 28th, 2016 since this was pursuant to a letter from the Claimant's legal practitioners dated October 5th, 2015. The Defendants contended that the Claimant's cannot complain about the Defendant's failure to complete by April 30th, 2016 when the Claimant's terminated the Construction Agreement on January 18th, 2016.
98. Clause 14 of the Construction Agreement is important and is set out below.

"Should the Builder fail in the due performance of the works or any part thereof or to proceed with same to the satisfaction of the Owners, the Owners may by notice in writing determine the contract so far as regards the performance or completion of the same by the Builder but without thereby affecting in other respects the obligations and liabilities of the Builder. On such determination of the contract as aforesaid the further use by the contractor of the plant implements and materials then upon the ground shall cease and the Owners may employ other contractors or workmen either by contract by measure and value or by day work to perform and complete the works or himself complete and perform the same and the costs and expense of such completion shall be paid to the Owners by the Builder or may be deducted by the Owners from any money due or to become due to the Builder"

99. In this Court's view, Clause 14 is clear. The Claimants were entitled to terminate the Construction Agreement if they were dissatisfied with the works performed by the Defendants. The Claimants were entitled to thus terminate the Defendant's services and recover from the Defendant the costs of completion. The fact that the Claimants terminated (as they were entitled to do) before the completion date means that the April 30th, 2016 date was a moot point.

100. As a corollary to this point, the Defendants contended that they were relying on a defence of prevention of performance¹ and relied on the case of Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd [2007] Bus LR Digest D 109. The Multiplex case is a decision on its own particular facts and is distinguishable. In Multiplex the employer made the time for completion at large. The employer could not therefore insist on performance of the contractual obligation to complete by a due date when the employer's own actions had prevented the sub-contractor from performing his obligations.

101. The Multiplex scenario is far removed from the instant case. The Defendant have not established any actions on the part of the Claimants which made time at large. Additionally, they have not pointed to any action on the part of the Claimants which prevented the Defendants from performing their obligations. The email correspondence confirms that the Claimants were concerned about the lack of progress with their project. No evidence was adduced whether orally or in the witness statements to substantiate the Defendant's position that the failure to complete was due whether wholly or in part to request for changes by the Claimants or any actions on the part of the Claimants.

102. The Claimants were not obliged to wait and see if the Defendants would in fact complete by April 2016. This Court's findings indicate that the Defendants had substantially failed to perform their obligations under the agreements up to January 2016 and pursuant to Clause 14 the Claimants were entitled to terminate.

103. The Defendants contend that as contractor they are entitled a right of correction and pray in aid the authority of Lintest v Roberts (1980) 13 BLR 38 in support of their position.

104. Firstly, the point in Lintest v Roberts has its genesis in the dissenting speech of Lord Diplock in P&M Kaye Ltd v Hosier & Dickinson Ltd [1972] 1 WLR 146. Lord Diplock was of the view that

"During the construction period it may, and generally will, occur that from time to time some part of the work done by the contractor does not initially conform with the terms of the contract, either because it is not in accordance with the contract drawings or the contract bills or because the quality of the workmanship or materials is below the standard required by cl. 6(1).

The contract places on the contractor the obligation to comply with any instruction of the architect to remedy any temporary disconformity with the requirements of the contract. If it is remedied no loss is sustained by the employer unless the time taken to remedy it results in practical completion being delayed beyond the date of completion designated in the contract. In the event the only loss caused is that the employer is kept out of the use of his building beyond the date on which it was agreed that

¹ Per Jackson J at paragraph 47-48 *"The essence of the prevention principle is that the promise cannot insist upon performance of an obligation which he has prevented the promisor from performing. In the field of construction law, one consequence of the prevention principle is that the employer cannot hold the contractor to a specified completion date, if the employer has by act or omissions prevented the contractor from completing by that date. Instead time becomes at large and the obligation to complete by the specified date is replaced by an implied obligation to complete within a reasonable time"*

it should be ready for use. For such delay, liquidated damages at an agreed rate are payable under cl. 22 of the contract.

On a legalistic analysis it might be argued that temporary disconformity of any part of the works with the requirements of the contract even though remedied before the end of the agreed construction period constituted a breach of contract for which nominal damages would be recoverable. I do not think that makes business sense. Provided that the contractor puts it right timeously I do not think the parties intended that any temporary disconformity should of itself amount to a breach of contract by the contractor."

105. The Court of Appeal in Lintest v Roberts did not express an opinion on Lord Diplock's dissenting dictum but it is important to note that Lord Roskill in Lintest v Roberts respectfully questioned whether the Lord Diplock intended that statement to be of general application. Lord Roskill was of the view that it was not necessary or him to agree or disagree with Lord Diplock particularly since Lord Diplock's view was a dissenting one. Moreover, the decision in Lintest v Roberts did not turn on this aspect.

106. It is therefore dubious to say the least, the extent to which Lord Roskill's judgment in Lintest v Roberts is authority for the general proposition of law that defects prior to completion give the contractor a vested right of correction.

107. The status of Lord Diplock's dictum was considered in the case of Foster Wheeler Group Engineering Limited v Chevron UK Limited [1996] Lexis Citation 2639. In that case the judge confirmed that he did not need to decide the 'vexed point of law' occasioned by Lord Diplock's approach but held that

"Foster Wheeler may be under a continuing duty to carry out work and to perform services so that, when done, and not merely on completion, the terms of the contract are met. Whether that duty exists, and the circumstances in which failure to observe it may constitute a breach of contract, will depend on further examination of the terms of the contract which may for example show that Chevron might suffer more than nominal loss and damage other than that arising from late completion (for example from the pleaded breaches of clause 3.1.2(c)). Even so, such a breach may still be a question of fact and degree"

108. Therefore, in his view, the issue of whether a breach of contract was occasioned in those circumstances was a question of fact and degree. In this Court's view, that approach is an eminently reasonable approach and one which this Court applies to this case. The facts in Lintest v Roberts were quite different from Kaye. In Lintest v Roberts, the question was whether the reasonable cost of the necessary remedial works was to be taken into account when calculating the sums due to the contractor.

109. No sums were due to the contractor in the present case. The Defendant did not have a vested right to correct defects. At the moment of termination of the contract the Claimants had an accrued right in respect of any defective work performed by the Defendant. Under Clause 5 of the Construction Agreement the Claimant could require the Defendants to take down and rebuild any

part which was not to their satisfaction. Moreover, under Clause 5 the Defendants had a 12 month period **after completion of the dwelling house** [my emphasis] to remedy all defects.

110. The Claimant's properly exercised their right to terminate under Clause 14 and the Defendants cannot now complain that they were not allowed to remedy any defects. In any event, there is no evidence on the Defendant's case that they sought such an opportunity and were rebuffed from doing so.

111. The Defendants say further that the case of City Axis Ltd v Jackson (1998) 64 Con LR 84 is authority for the proposition that where the homeowner unreasonably does not allow the contractor to return to the site the homeowner would have failed to mitigate their losses and cannot recover the costs of undertaking such remedial works.

112. In City Axis Ltd, one of the issues to be determined was whether the defendant should be entitled to any sum for the cost of snagging², that is to say, if he unreasonably denied the plaintiff in that case the opportunity to do the necessary work. There is no evidence that the Defendant in the present case sought such an opportunity or that their efforts were unreasonably rejected. Moreover, the Court in City Axis Ltd was of the view that:

"The law is set out in McGregor on Damages (16th edn) paras 315-319. It is clear that 'there may be cases where as a matter of fact it would be unreasonable to expect a plaintiff to consider any offer made in view of the treatment he has received from the defendant' (see Bankes LJ in Payzu Ltd v Saunders [1919] 2 KB 581."

113. The case of Woodlands Oak Ltd v Conwell [2011] EWCA Civ 254 confirms that the failure to give a contractor to rectify defects in the work may (depending on the circumstances) amount to a failure to mitigate. Moreover, Woodlands confirms that there are circumstances in which it is not reasonable to give the contractor that opportunity to remedy defects in the work.

114. Ultimately, the duty to take reasonable steps to mitigate is not a question of law but a question of fact to be determined in each case. See per Bankes LJ in Payzu Ltd v Saunders [1919] 2 K.B. 581 at page 588 and per Scrutton LJ in Payzu Ltd v Saunders [1919] 2 K.B. 581 at page 589 that:

"In certain cases of personal service it may be unreasonable to expect a plaintiff to consider an offer from the other party who has grossly injured him; but in commercial contracts it is generally reasonable to accept an offer from the party in default. However, it is always a question of fact. About the law there is no difficulty."

115. It is clear that the works which remained defective or incomplete were substantial. Snagging has clear application to the remedying of minor defects and in any event the Construction Agreement was clear on its terms.

Failure to Supply the items in Schedule 1

² Snagging refers to situations where the contractor is permitted to return to remedy minor defects. See Chitty's Volume 2: Construction Contracts; paragraph 37-203

116. The Claimants say that they paid Deon & Associates for a number of special items and fixtures listed in Schedule 1 of the Construction Agreement. These items were to be used in their villa but to date and despite their repeated demands for same they were never furnished. According to the Claimant's the Defendant invoiced them and they had paid the sum of US\$180,034.04 for these items and fixtures.

117. The Defendant accepts that he failed to provide the items in Schedule 1 but claims to be entitled to set off these sums against any monies which are owed to Deon & Associates by the Klaus's. In view of the foregoing findings, 25 Acres and Deon & Associates are liable to compensate the Klaus's in damages for their breaches of the Agreements as found by this Court. There are no sums owed to Deon & Associates by the Claimants and for this reason, the defence of set off fails entirely and Deon & Associates are ordered to pay the sum of US\$180,034.04 to the Claimants.

Substandard Workmanship

118. The particulars of substandard workmanship can be summarized as follows:

- i. The wrong windows were installed and some of these windows were defective and cracked
- ii. The pool was improperly plastered, cracked and untiled and the pool pipes and inlets and outlets for water circulation were missing
- iii. PVC and not copper pipes were used to provide hot water to the villa and pool and were unsuitable
- iv. Contractually agreed fixtures and fittings were not installed
- v. Incorrect and missing electrical wiring throughout the villa
- vi. Power outlets were wrongly placed throughout the villa
- vii. The solar water heating system was improperly installed
- viii. The wood in the villa's roof was damaged and leaking because of its prolonged exposure to the elements with damage due to fungus and termites and the fact that it was improperly sealed and poorly insulated
- ix. Multiple cracks in the walls and floors of the villa
- x. EnviroShake shingles were improperly installed with the wrong nails
- xi. Salty sand was used for construction resulting in salt spots on the walls of the Claimant's home

119. As a preliminary issue to determining the particulars of substandard workmanship this Court is required to assess whether the fact that the Claimant's required Deon & Associates to construct a 'high end villa' was a term of the Construction Agreement. Norbert Klaus, Roland Klaus and Dr. Roland Aeschi at various points in their oral evidence referred to the term 'high end villa'.

120. The fact that the word 'high end villa' is absent from the Construction Agreement requires an analysis of whether the term can be implied into the agreement and whether it denotes a particular standard of work to be performed by the Defendants.

121. As a matter of law, the basic principles³ that govern the implication of a term into a contract are as follows:

- (i) The term must be reasonable and equitable
- (ii) The term must be necessary to give business efficacy to the contract
- (iii) The term must be so obvious that it goes without saying
- (iv) The term must be capable of clear expression and;
- (v) The term must not contradict any express term of the contract

122. In this Court's view, it is not necessary to imply a term into the Construction Agreement that a 'high end villa' was required. The Claimants were at liberty to make that an implied term of the Construction Agreement and could thus have articulated with precision exactly what that term would have meant. It would be difficult if not impossible to now formulate an implied term that properly reflects what is contemplated by the term 'high end villa'. No doubt the Claimant's may think that it is obvious that what was required was a high end villa but without a clear and precise definition of what this meant for the Defendant's contractual obligations it would not be possible to imply such a term at this stage. Moreover, the term is not necessary in order to give business efficacy to the Construction Agreement and for the reasons set out above is unlikely to be reasonable and equitable.

123. In any event, in contracts for the supply of construction services the contractor must carry out the work using all proper care and skill and the contractor must exercise due care and skill if he was the one who chose the sub-contractor and the material supplied by him. See per Lord Reid in Young & Marten Ltd v McManus Childs Ltd [1969] 1 A.C. 454 at page 465

124. The Claimants contend that the Defendants failed to exercise the requisite care and skill and rely on the expert evidence of Dr. Roland Aeschi and the evidence of Dr. Roland Klaus in support of their position.

The evidence of Dr. Roland Klaus

125. Dr. Roland Klaus is the brother of Norbert Klaus and is a Swiss trained structural engineer of considerable knowledge and experience. Roland Klaus became involved in the project at Lot #3 when he was approached in October 2016 by Roland Aeschi (the Claimant's other expert witness) to provide technical engineering and management expertise on the project.

³ See Chitty on Contracts, Volume II – Specific Contracts at page 705-706

126. In January 2017 he conducted a preliminary assessment of the project and found that the construction was unfinished and defective and that the rough-in work was incomplete and substandard. Camille Kelly and Clive Evelyn had been retained by the Klaus's as project manager and building contractor after Deon & Associates had been terminated in 2016. In or around May and June 2017, Roland Klaus severed ties with Ms. Kelly and Mr. Evelyn respectively. From May 2017 onwards, Roland Klaus then retained the services of Ms. Martha Isbister and her company Latitude 17 LLP and they worked with other contractors to complete the project on Lot 3.

127. Roland Klaus's evidence as to the state of the property in 2017 can be summarized as follows:

- a. Drainage – according to him there were no drainage plans in relation to the project. This meant that the Klaus's had to back fill, seal and insulate concrete surfaces that were touching the soil
- b. Basement & Terrace Floor Slabs – these were cracked and had to be sealed and insulated to guard against humidity
- c. Concrete Structures – the living areas and basement interior walls showed cracks and had to be sealed
- d. Hydro solar and electro system – there were no engineering drawings or plans for this aspect of the work until after the Defendant had been terminated
- e. Architectural drawings – these were unfinished and generic and incomplete. They were thus insufficient for execution of this project and appeared to have been sourced from AutoCAD and not specifically adapted for the Claimant's project
- f. Air Conditioning – the American standard system described at item 31 in the Addendum to the Construction Agreement was a Phase 3 system. It was thus incompatible with the NEVLEC Phase 2 grid. No steps were taken by the Defendant to plan or configure the NEVLEC grid to meet the Claimant's needs.
- g. Security System – item 33 of the Addendum to the Construction Agreement provided for a security system. The infrastructure for the security system had not been installed by the Defendants.
- h. Plumbing – there were no architectural or engineering plans for the plumbing works. There was no filtration or sanitizing systems for the cistern water or any system to route water in the hot and cold system that had been agreed to.
- i. Electrical – the electrical plans and drawings were not tailored to the Claimant's specifications. They appeared to be generic conceptual drawings and as such access to the NEVLEC feed were not planned or engineered.

128. Finally, at paragraph 82 of his witness statement Roland Klaus indicated that the works that the Defendants failed to perform. This aspect of his evidence has to be juxtaposed against the

evidence of Ms. Isbister and that of Ms. Camille Kelly in order to determine the extent of the works done by the Defendants as the date of termination. This Court will deal with this aspect when it comes to review the evidence of Ms. Kelly.

129. The Defendant's made no headway when they cross-examined Roland Klaus. He accepted that he had never worked on a project in Nevis before but maintained that the standard of work done was sub-par anywhere. He accepted that it was difficult to source material in Nevis and that this meant that there were delays in making progress with the project. In his view, the Defendants ought to have taken steps to protect the property while they were waiting for material. He accepted that between January and May 2016 there was a risk of damage to the property after Deon & Associates had been terminated but that this damage, if caused was minimal, in comparison with the subpar works that had been executed.

130. This Court had little difficulty in accepting Roland Klaus's evidence. He was not assailed on the details of the matter summarized above and this Court has no difficulty accepting his evidence. All the same, this Court notes that Camille Kelly was retained in October 2015 as consultant/supervisor on the project. She was then retained as project manager until May 2017. It was thus incumbent on the Claimants to ensure that Ms. Kelly managed and preserved the project in the interregnum that ensued after the Defendant had been terminated. They therefore cannot complain about any damage to the property that may have ensued between January and May 2016.

The evidence of Dr. Roland Aeschi

131. The Claimant's also called Dr. Roland Aeschi as their expert witness. Dr. Aeschi was a specialized engineer in aquatic and pool engineering and building and construction. He was the principal of a Swiss company called AcquaPlan (in operation since 1971) and had been engaged in the engineering and construction of swimming pools and solar heating systems as a general contractor.

132. Dr. Aeschi's expert evidence largely mirrored that of Dr. Roland Klaus. In his view, the project had been executed without a concept and with insufficient architectural involvement from the architect (Mr. Spencer Brand). He too had not seen any detailed specialist engineering or professional detail designs for the project. The AutoCAD drawings that he had seen were basic and lacking in detail to show the exact positioning of electro and hydro lines and outlets.

133. Dr. Aeschi assessed the project in May 2016 and drew up a concept for structural repairs, electrical engineering and plumbing heating and light systems and with the approval of the Claimants and the assistance of other contractors executed these remedial and other works. At paragraphs 47-114 he outlined specific areas of deficiency. These areas are largely covered by the evidence of Roland Klaus summarized above. For the avoidance of doubt, Dr Aeschi's evidence is more detailed and granular than that of Roland Klaus. There is no suggestion that their evidence was tailored in any way but in this Court's view, there is little point therefore in summarizing the details of what has largely been already traversed.

134. Dr. Aeschi's expertise is pool construction and hot and cold water systems. His evidence at paragraph 98 of his witness statement is particularly instructive. His findings on this aspect can be summarized as follows:

- a. The pool plastering work had been poorly done and was cracking all over
- b. The pool had never been filled to test whether it was watertight
- c. The plaster was damaged as a result of incorrect water proofing and rain water (evidenced by sodium nitrate buildup) had seeped in behind the pool walls
- d. The basement wall of the apartment adjacent to the pool was not separated thus creating a high risk of seepage and leaks
- e. The underwater bench was too narrow to permit sitting, standing or lying on and the entrance steps were too small

135. Dr. Aeschi's cross examination yielded nothing that could assist the Defendants. He too had no previous Nevis construction experience and maintained that the standard of work was poor, globally. He had done work in Dubai where the temperature could get as hot as 50 degrees and was of the view that you simply adjust your concrete mixture to suit. He pointed out that the current plaster on the pool is not shrinking. In his view, too much water had been used in the plaster for the pool. 50 years of experience in pool construction meant that he was firm in his view that the work done by the Defendants was unacceptable.

136. In his view there are special plasters for pools, DRYLOK (what was used in Nevis) was obsolete and ZICA was a better plaster for that purpose. He rejected the suggestion that the cracks in the pool could be remedied by applying a polymer tile cement and drew to this Court's attention the photographs appended to his report that pointed out these cracks.

137. This Court has no difficulty accepting Dr. Aeschi's evidence. He appeared good-natured and doing his level best to assist the Court to understand exactly what he saw on site in May 2016. He pointed out that both himself and Grenville Phillips had pointed out the same problems with the cracks in their respective expert witness statements. In this Court's view, he also had the benefit of being on site and actually observing and noting his finding as opposed to Mr. Phillips who relied on photographs. For all of these reasons, this Court accepts the evidence of Dr. Aeschi as to the state of the Claimant's project in May 2016 and finds that the quality of the Defendant's workmanship fell below the requisite standard.

138. This Court has little difficulty in accepting Dr. Aeschi's evidence on the quality of the plastering works done by the Defendants. The Defendant's expert witness, Grenville Phillips accepted that there were cracks in the plastering of the pool for example. As he put it, the mixing of concrete and water in Caribbean conditions for plastering was a mixture of art and science. In his view, the pool cracks were hairline cracks and did not go to the structural integrity of the pool. Mr. Phillips' evidence is to be contrasted with that of Dr. Aeschi. Unlike Mr. Phillips, Dr. Aeschi visited the site in May 2016. Dr. Aeschi thus found that all of the plaster on the far side of the house and pool was full of cracks.

139. It is significant that Mr. Phillips did not express an opinion as to whether the quality of the plastering works was poor. See paragraph 3.1 of his expert report. In this Court's view, he could not

reasonably do so since he was only supplied with photographs of the cracks and asked to opine on them. Mr. Phillips in his report noted that if the plaster had debonded from the substrate then it became a structural issue and a breach of the quality standard. In this Court's view, this was exactly what Dr. Aeschi found. According to Dr. Aeschi between the plaster and concrete sounded hollow. There was no connection between the plaster and the concrete and there was some humidity and mold spores and water between the concrete and plaster. Mr. Phillips' evidence was thus unhelpful to the Defendants. This court has no difficulty in finding that the plastering works done by the Defendants fell below the requisite standard.

140. Dr. Aeschi's expertise for the past 50 years was in pool construction and design. In his view, the pool that the Claimant's required was a state of the art tide pool that required jets for circulation and tiling on an absolutely watertight surface. In his view, what the Defendants had built was not suitable even for a regular pool.

141. In Dr. Aeschi's view, the use of DRYLOK was improper for the sealing of the pool. According to him, the technology had moved on and as such better and newer products were used in order to seal pools. Mr. Phillips confirmed as much and indicated that the product used by the contractor to seal the pool was not ideal and he recommended two other products which were better suited.

142. Clive Evelyn, the sub-contractor who had executed some of the works and continued works after the Defendants had been terminated defended the use of DRYLOK. In his view, that was what they used in Nevis and he saw nothing wrong with its use on the Claimant's project. In this Court's view, that sort of approach (repeated on several occasions throughout the trial) was inimical to the Defendant's position at trial. As a result, this Court had little difficulty in rejecting Mr. Evelyn's evidence on this issue and accepting the evidence of Dr. Aeschi. The evidence of Wayne Andrew that he didn't recall seeing any cracks on the pool while he was engaged on the project at the house is easily reconciled by the fact that he did not indicate when he started work there. Therefore, either the pool works had been remedied by the time that he started work or he was lying about there not being any pool cracks since both Dr. Aeschi and Mr. Phillips spoke of pool cracks.

143. Mr. Andrew had been retained as a sub-contractor to do some plumbing works and accepted that PVC pipes were used were to supply hot and cold water to the pool and property. In his view, there was nothing improper about the use of PVC pipe to supply hot water since this was what was used throughout St Kitts and Nevis. Significantly, he could not recall the maximum temperature that PVC pipes could take. In Mr. Andrew's view, copper piping was stronger than PVC though more expensive. Finally it was his evidence that the contractor would be the one to inform the sub-contractor as to the suitability or unsuitability of PVC pipes and not the homeowner.

144. Mr. Andrew's evidence is to be juxtaposed with that of Dr. Aeschi. In Dr. Aeschi's view, PVC piping could only give you up to 60 or 70 degrees Celsius. With solar heating the temperature of the water can rise to as much as 80, 90 or even 100 degrees Celsius. Copper piping was thus required particularly since the pool was supposed to be heated. PVC piping could not therefore supply the requisite heated water throughout the house.

145. In this Court's view, it was incumbent on the contractor and his sub-contractors to determine exactly what was required in these particular circumstances. The cost of copper piping, significantly more expensive than PVC piping would thus be for the Claimant's account. Clearly copper piping

was required in order to properly supply the Claimants pool and Jacuzzi with the heated water that it required. This Court therefore has no difficulty in finding that the Defendants failed to perform the plumbing works in respect of the hot water system to the requisite standard.

146. On the issue of the electrical works, this Court found Mr. Daniel's answer while being cross-examined by Mr. Barnes to be illuminating. Mr. Daniel accepted that there were no engineering drawings or electrical engineering documents for the Klaus's project. In this Court's view, this was a massive concession since it underscored Roland Klaus's evidence that the project was not properly planned by the Defendants. This concession also supported Norbert Klaus's evidence that neither he nor his wife saw or met with any architect or engineer until they were perhaps 1 ½ to 2 years into the construction of the project.

147. In this Court's view the Defendants had failed to prepare and thus were doomed to fail in their execution of this project. The fact that the Defendant, at trial, was able without hesitation to accept that there were no engineering plans for a project of that nature and scope spoke volumes. In this Court's view, the Defendant did not appreciate the nature of what was required so that the problems of the kind experienced by the Klaus's were almost inevitable.

148. On the issue of the windows, the Claimant testified that he wanted windows that were resistant to category 5 hurricane forces. The addendum to the Construction Agreement specifically provided as follows, "item 15, all windows and outside doors will be hurricane resistant. Class 5. Product specification required." The Claimant gave evidence that the windows that were supplied were crooked and not up to the requisite standard. Norbert Klaus accepted that you could not tell whether a window was hurricane proof simply by looking at it but confirmed that he wanted windows that had been specifically certified to resist hurricane force winds up to category 5. The windows that were supplied did not meet this standard.

149. Mr. Daniel gave evidence that the agreement said hurricane resistant and that it was only after the windows were bought he was told that Category 5 windows were required. This Court has little difficulty in rejecting Mr. Daniel's evidence on this issue. The addendum to the Construction Agreement clearly spoke of class 5 and went on to provide that product specification was required. If Mr. Daniel was in any doubt as to what this term meant it was incumbent on him to seek clarification since he was the one responsible for ordering and securing the windows.

150. On the issue of the roof, the Construction Agreement provided that the sum of US\$195,000.00 was payable by the Claimants to the Defendants upon completion of the window beam. A further US\$195,000.00 was payable upon completion of the roof. These sums were received by the Defendant but the roof remained incomplete. For this reason, the addendum to the Construction Agreement was executed. Exhibit B to the addendum was a letter from Deon & Associates, signed by Mr. Daniel. In that letter, Mr. Daniel confirmed that the Claimants had selected a roof to be constructed with Cypress V Joint Lumber with insulation T1-8 plywood and tar paper and Euro Shingles. The price for the 'extra costing' to do this work was US\$72,000 of which half was immediately payable and the balance of US\$36,000.00 was payable on completion of the roof. It was agreed that the additional US\$72,000.00 was in addition to the payments for the roof that had been previously agreed.

151. The Klaus's say that the roof that the Defendant built was leaking. According to them, the roof was leaking and had black spots in various areas. Incorrect nails had been used to install the roof and the roof continues to leak. In their view, the only way to repair the damage done to the roof was to replace it with new cypress wood. In or about 2018 there was a fire at the property which caused some damage to the roof and the roof was thus repaired.
152. The Defendant says that there were black spots on the roof because after installing the rafters they had to wait 6 months to get the shingles from Canada and that during this time the rafters were exposed to rain. They had to obtain assistance from the Four Seasons Hotel in Nevis to install the shingles. According to the Defendant, the installation of the shingles and the completion of the roof was one of the last works that they performed on the property in or about September or October 2015. In his view, the damage to the roof was cosmetic 'water stains' which were remediable at minimal cost although he accepted that the guttering for the roof was incomplete.
153. The Defendant's witness, a Mr. Clive Evelyn accepted that the roof was exposed to the elements for a long time. According to him the wood got stained as a result of the rain but there was no fungus on the wood. Rather, when it rained the black tar paper would 'run'. Mr. Evelyn at paragraph 17 of his witness statement confirmed that he had a concern with the roof's insulation and said that he did not like the roll out type of insulation used by the Defendant. In his view, sheet and not roll out insulation was the better method.

The evidence of Martha Isbister

154. The Claimants also called a Ms. Martha Isbister as a witness at trial. Ms. Isbister was a project manager and the owner of Latitude 17, a company that specialized in the management of high end residential renovation and new construction projects. She was engaged by the Claimants on May 1, 2017 on the project at Lot#3.
155. Large parts of Ms. Isbister's evidence were covered by the evidence of Roland Klaus and Dr. Aeschi since in chronological terms she was the last of the Claimant's witnesses to become involved in this project. All the same her evidence shed important light on the following matters.

The roof

156. On the issue of the roof, Ms. Isbister observed the following deficiencies.
- (i) As at May 2017, the outdoor kitchen roof was leaking. The roof pitch was shallow which meant that water rested on the shingles and a waterproofing membrane had not been installed to address this.
 - (ii) As at May 2017 there were two flat roof areas on either side of entry. Water penetration was observed in the entry hall of the roof. The roofs had a flat pitch which meant that rain water did not flow to the drain.
157. The matters above were remedied and by installing a waterproofing membrane and replacing the roof with a steeper pitched roof. The pitch of the roof on the flat roof areas was also modified and sealed.

158. On November 30th ,2018, Enviroshake's Caribbean Sales Manager conducted an assessment of the roof and noted the following

(iii) There was inconsistent gapping on the roof and the low slope roof facing the road had almost no gapping at all.

(iv) There was inconsistent factory edge along the long rake and gable ends of the roof

159. These defects were remedied by the purchase and use of a gapping tool and additional shingles.

160. This Court has little difficulty in accepting the evidence of the Claimant's witnesses on this issue. The roof leaked which meant that it had not been properly built. I accept Ms. Isbister's evidence on this issue and reject the Defendant's witnesses who claimed that either the roof did not leak or they did not remember any leaks. This approach was unhelpful to the Defendant's case. The roof was clearly leaking and was not built to the requisite standard. The shingles were not properly installed and Clive Evelyn's evidence that the insulation was defective only underscores the Court's findings on this issue.

161. The Defendant is thus liable to compensate the Claimants in damages for the costs of remedying the aforementioned defects in the roof. This Court has been unable to discern with precision what these sums were. A spreadsheet was appended to the witness statement of Ms. Isbister detailing the monies spent by the Claimants since her involvement in the project. Counsel for the Claimant was required to carefully scrutinize the spreadsheet and draw the relevant aspects to the Court's attention when filing the Claimant's written submissions. Instead the same spreadsheet was appended to the Claimant's closing submissions. This Court is thus compelled to order that the Claimants are within 7 days to file and serve any further submissions addressing this issue and directing the Court to the exact sums in the spreadsheet that relate to the cost of remedying the roof defects. The Defendant has a further 7 days to file any submissions in response to the Claimant's submissions in this regard.

162. Secondly, on the issue of the of the pool Ms. Isbister also confirmed the pool cracks and indicated that Blue Bond (a product) which had been used on the surface of the pool walls had to be removed and replaced with SIKA/ZICA. She also observed cracks in the exterior wall of the overflow trough. The cracks appeared to be at the joint between the two walls since it appeared that the lower section had been built separately from the upper section. This required remedial works from Elmes Engineering.

163. Thirdly, she inspected the 35 Domus PVC windows and 1 PVC door that had been previously installed. In her view, the thickness did not suggest that it was impact strength glass.

164. Fourthly, at paragraph 9 of her witness statement she listed the contractors that were retained to perform remedial works and exhibited a spreadsheet to her witness statement which outlined the monies expended by the Claimants on this project.

165. In cross examination, much was made of Ms. Isbister's previous experience at The Four Seasons Hotel in Nevis and the value of villas at The Four Seasons and the price per sq foot for construction at The Four Seasons. This Court could not discern the utility of these questions at the time and notes that this evidence does not feature in the Defendant's closing submissions. The thrust of Ms. Isbister's cross examination seemed directed at the fact that works continued to be executed at the Claimants' property up to the present date. In her view, the house was habitable although it was not 100% complete. The Defendant seemed to suggest that works were done to the property after the Defendant's termination that were beyond the scope of the works that the Defendants were hired to do. For example it was put to her to what was originally agreed to be built was a generator pad and not the generator house that currently sits on the property.
166. Ms. Isbister did not know what the generator house or pool steps cost to be built or the stone walkway or downstairs unit. In re-examination by Mr. Barnes, she confirmed that there is some stone work on Lot 2 (presumably this is a lot which the Claimants subsequently purchased) which extends onto Lot 3 but would not have been included in the agreements.
167. This Court makes the following findings in respect of her evidence. There is no dispute that the pool works were defective. Her evidence further underscores these defects although it is not clear to this Court whether the Defendants were the ones who built the lower pool wall that required work. This court says so because Ms. Isbister would have taken up her role after remedial works had been started by the Claimants. There was no evidence that the lower pool wall had in fact been built by the Defendants and thus no basis upon which they can be held liable in damages for the cost of remedying same.
168. On the issue of the windows, Ms. Isbister's evidence confirms this Court's findings as to the quality of the windows that had been installed by the Defendants although this Court notes that Ms. Isbister does not say in her witness statement that the windows were cracked. To be fair, whether they were cracked or not was the icing on an indigestible cake since the issue was whether they were fit for purpose (category 5 hurricane resistant). Everyone agrees they were not certified for that purpose.
169. Finally, on the issue of the spreadsheets. The Claimants attorneys were required to ensure that the monies spent by the Claimants in remedying the Defendant's workmanship were clearly identified and referable to a corresponding expense. Simply collecting the data and asking the Court to sift and determine same was extremely unhelpful. This Court is unable to discern from the spreadsheet exactly what was spent by whom on what and whether these sums were reasonable in order to remedy the defects in the work done by the Defendants.

The evidence of Camille Kelly

170. The Defendants also called Camille Kelly as a witness in their defence. Ms. Kelly was a Project Manager and was on her evidence the project manager at the Klaus's property from October 2015 to November 2017. In Ms. Kelly's view, the Klaus's house would take about 18 months to complete once the items can be agreed upon upfront and sourced in a reasonable time.
171. In her view, the workmanship done by the Defendant on the Klaus's residence was of a high standard. There was no mold or spores or cracks in the walls. It was her evidence that the cracks

were 'hairline fissures' and that there were no defects in the pool or windows. A number of images of the state of the property in 2015 were shown to Ms. Kelly in cross examination and Ms. Kelly maintained that the images that were shown to her either did not accord with her examinations at the time or she did not recognize the areas that the images described. Finally, in her view, the Klaus's project was 65-70% complete in terms of the structures and that the finishing was all that remained to be done.

172. At paragraph 27 of her witness statement, Ms. Kelly indicated the percentage of completion of the following works when she left the project. These percentages were arrived at on the basis of her visual analysis of the works done by the contractor according to the plans. Her analysis was purely subjective and had not been qualified or tested against any objective analysis.

No.	Nature of the Works	Completion %	Whether Works had started (√ indicate yes and x indicates no)
1	Plumbing and/or installation of plumbing fixtures and fittings	60 %	√
2	Construction of guest gazebo	100%	√
3	Construction of generator house	80%	√
4	Electric installations and wires	70%	√
5	Wiring and installation of fittings for internet, telephone and tv access	0%	x
6	Roofing	100%	√
7	Gutter	0 %	x
8	Tiling	50%	√
9	Woodwork	0%	x
10	Installation of Windows	100%	√
11	Installation of Shutters	0%	x
12	Installation of mosquito grids	0%	x
13	Construction of Pool to specifications	60%	√
14	Installation of solar water heating system	0%	x
15	Construction of Cistern	100%	√
16	Installation of AC Units	10%	√
17	Installation of alarm system	0%	x
18	Landscaping and fencing	40%	√
19	Lighting	0%	x
20	Installation of Appliances	0%	x
21	Installation of water purification system	0%	x
22	Plastering	95%	√
23	Construction of Chilling Room	50%	√
24	Construction of Covered Outdoor Kitchen	100%	√
25	Construction of Outdoor Shower	100%	√

26	Painting	60%	√
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173. Firstly, as a matter of simple arithmetic, Ms. Kelly's calculation of the completion percentage is dubious. Since there are 26 items with different completion percentages, you must take an average of these numbers. The sum total of the percentages equals 1,175. If each of these items was 100% complete the percentage sum would be 2,600. The construction completion percentage would thus be 1175×100 divided by 2600 which equals to 45.19%. As a matter of simple arithmetic, Ms. Kelly's completion percentage of 65% to 70% in terms of the structures is inflated since the works listed above encompass both structural and finishing works.

174. Secondly, Ms. Kelly's evidence was frankly incredible in some respects. For example her evidence that she could not recognize areas in photographs that were shown to witnesses on both sides (Clive Evelyn, Roland Klaus and Roland Aeschi) was troubling. In the course of her evidence she wondered if the photos had been doctored and claimed not to recognize areas in photographs that Clive Evelyn readily recognized and identified.

175. Thirdly, Ms. Kelly appeared combative and sought to lay the blame for the failure to complete because of the Claimant's many requests for changes. Ms. Kelly's evidence went further than that of Mr. Evelyn or Mr. Daniel on this issue. This is surprising since either or both of them (Evelyn/Daniel) would have been privy to the so called numerous changes allegedly requested by the Klaus's. Moreover, this Court is satisfied that the Klaus's did not seek myriad changes and improvements but simply wanted what they had bargained for and demanded same of the Defendants and their sub-contractors. This Court has little difficulty in finding that the Defendants had improperly planned the work and thus characterized as changes works that were contractually due to be performed.

176. This Court is thus satisfied that the Defendants are in breach of their contractual obligations under the Construction Agreement for the reasons given above. The Claimants are thus entitled to damages for the Defendant's various breaches as set out above.

177. The Claimant's claim for damages is particularized below:

Cost of Project Management Services	–	US\$124,700.00
Costs to demolish/repair faulty construction	–	US\$715,451.31
Costs of shipping, duty and storage	-	US\$354,370.04
Costs to complete construction	-	<u>US\$2,773,646.32</u>
Total	-	<u>US\$3,967,467.67</u>

178. It is common ground that the measure of damages for breach of contract is to put the party whose rights have been breached in the same position, as far as money can do, as if their rights had been observed. In addition to the foregoing principle of law, the Privy Council in the case of Attorney General of the Virgin Islands v Global Water Associates Ltd [2020] UKSC 18 posited the following:

“But secondly, the party in a breach of contract is entitled to recover only such part of the loss actually resulting as was, at the time the contract was made, reasonably contemplated as liable to result from the breach. To be recoverable, the type of loss must have been reasonably contemplated as a serious possibility, in the sense discussed in paras 27 and 28 above.

Thirdly, what was reasonably contemplated depends upon the knowledge which the parties possessed at that time or, in any event, which the party, who later commits the breach, then possessed.

Fourthly, the test to be applied is an objective one. One asks what the defendant must be taken to have had in his or her contemplation rather than only what he or she actually contemplated. In other words, one assumes that the defendant at the time the contract was made had thought about the consequences of its breach.

Fifthly, the criterion for deciding what the defendant must be taken to have had in his or her contemplation as the result of a breach of their contract is a factual one.”

179. Applying this dictum to the facts of the present case means that the Claimant’s claim for damages for the costs of project management services is doomed to fail. Simply put, had the contract been performed there would have been no basis for any project management services. Moreover, it was not contended that the need for project management was in the contemplation of the parties and it would not have been reasonable to find that project management services were objectively required in the event of a breach.

180. By the same token, the costs of shipping, duty and storage of the items required to put the Claimant’s in the position that they would have been in had the Construction Agreement been performed means that the Claimant’s claim for these sums must succeed. The Defendant would have seen from the Schedules appended to the Agreement and the Addendum that the finishing’s for this project were to be sourced outside of the Federation of St Christopher and Nevis. A likely and reasonable consequence of a breach was that the completion of the contract would require the importation, shipping, storage and payment of customs duties on those items. The Defendant is thus liable to pay damages to the Claimants in the sum of US\$354,370.04.

181. The Claimants have sought two separate and distinct sums. The first is the costs of demolishing and repairing faulty construction in the sum of US\$715,451.31. As a matter of law, it seems that there could be no real challenge to this sum. Once this Court was satisfied that damages were payable for defective workmanship then it is clear that damages were recoverable for the reasonable costs of repairing these defects. An application of the principles in the Global Water case to this aspect confirms that damages in the sum of US\$715,451.31 are payable by the Defendants to the Claimants in this matter.

182. This sum of US\$715,451.31 will be reduced by any deductions in order to avoid the Claimants being doubly compensated. The Claimants are thus entitled to damages for defective workmanship in the sum of US\$715,451.31 less any deductions where the costs of defective workmanship have either been already taken into account or will be addressed in the further submissions ordered to be filed and the parties have 7 days to file and reply to any further submissions made in this regard.

183. The second aspect of the Claimant's claim for costs to complete construction in the sum of US\$2,773,646.32 is less straightforward. The Defendants have argued that the costs of completion have resulted in the Claimant's having a better building than the one they would have had if the contract had been fully performed. The evidential burden of establishing betterment rests on the Defendants. See British Westinghouse Electric and Manufacturing Company Ltd v Underground Railways Company of London Ltd [1912] AC 673.
184. In support of their argument for betterment the Defendant place significant reliance on the evidence that works continue to be undertaken on the Klaus's residence even up to the trial. The photographs tendered in evidence suggest that the Claimant's property has come a long way from its humble state when the Defendant's services were dispensed with. The Claimant's in the course of their evidence made it clear that they were not seeking to recover monies for all of the works done on the property after the Defendant had been terminated. In their view, they only sought compensation for breaches that flowed from the Defendant's breaches of contract.
185. This Court is satisfied that the Claimants property has been bettered. That is to say, the works that ought to have been done by the Defendants have been replaced with something greater in quality, value and standard than what had been originally agreed to. The Claimant's as they were entitled to do chose to improve upon and refine their villa beyond the scope of what had been originally agreed with the Defendant. In this Court's view, the fact that the costs of completion and repair almost double the original sums paid under the Agreements is a particularly weighty factor in determining this issue. No valuation of the property as at the date of termination and as at the date of trial was provided to this Court but it is apparent that the property has been bettered beyond the scope of what was contracted for.
186. How then does this Court apportion a sum for betterment? No estimate of the cost of remedial work was provided by either side. This Court cannot now assess for itself the cheapest estimate of the cost of the remedial works and deduct this from the costs of completion. The fairest solution seems to be to invite the parties to file further and reply submissions within 7 days of this judgment in keeping with the orders made above on the % to be deducted for betterment and how this percentage should be deducted from the sums claimed for the costs of completion.
187. Damages for compensation is also qualified by the principle that the Claimant had a duty to take all reasonable steps to mitigate the loss consequent on the breach. The onus of proving a failure to mitigate is on the Defendant. The Defendant's primary complaint in this regard relates to the fact that between the Defendant's termination in January 2016 and the visit by Dr. Aeschi to the site in May/June 2016 the site remained exposed to the elements.
188. As a matter of law, the Claimant's had a duty to mitigate the losses flowing from their decision to terminate the Defendants. On the evidence, Camille Kelly was already engaged as project manager and was thus responsible for the state of the property between January and May/June 2016. All the same, the evidence is not clear as to the damage that the project sustained during this period. This Court is in no position to presume damage and the Defendants bore the burden of establishing that the losses claimed by the Claimants were due, whether in whole or in part to the state of the property between January and May/June 2016. In this Court's view, these were all matters which Ms. Kelly was uniquely placed to establish. The Defendants failure to elicit this

evidence meant that this Court is not satisfied that the Claimants failed to take sufficient reasonable steps to mitigate the losses consequent on breach.

189. As a general rule, damages are assessed at the date when the cause of action arose. In cases where the measure of damages is the cost of repair or reinstatement the date of assessment is the date when it was first reasonable in all the circumstances for the Claimants to undertake the repair works. In this Court's view that date would have been January 19th, 2016.

Claim for Interest

190. The Defendant complains that the Claimants have failed to set out the basis for their entitlement to interest, the rate of interest and the period for which interest is claimed. In their view, the words of Rules 8.6(4) and 8.6(5) are clear and in the absence of any basis the Claimant's claim for interest is doomed to fail.
191. Section 29 of the Eastern Caribbean Supreme Court (St Christopher and Nevis) Act provides that the High Court is empowered to award interest as it thinks fit for the whole or any part of the period between the date when the cause of action arose and the date of judgment. The High Court thus has a discretion to award pre-judgment interest in St Christopher and Nevis.
192. The Claimant's in the prayer to their statement of claim and claim form seek interest in accordance with Section 29. They did not plead a rate of interest or a period for which they sought interest but claim to be entitled to interest pursuant to the Court's discretion under Section 29 to award interest for such pre period and at such rates as the Court thinks fit.
193. In this Court's view, the Court's undoubted discretion to award interest does not create a basis of entitlement within the meaning of CPR 8.6(4). All the same, Section 29 permits the High Court and/or Court of Appeal to award pre-judgment interest if in the exercise of its discretion it is minded to do so. Therefore, even without the Claimant expressly seeking pre-judgment interest this Court would have been empowered to make such an order if it were so minded.
194. The decision of the Court of Appeal in the case of Attorney General of St Christopher and Nevis v SKN Choice Times is instructive. In that case, the Claimant/Respondent sought 'statutory interest on the sum of EC\$225,000.00 from 15th March 2015 until payment of the full sum'. The foregoing pleading is analogous to the claim for interest by the Claimants in the present case. By parity of the same reasoning, if that pleading sufficed to ground an entitlement to pre judgment interest, the instant prayer for relief seeking interest must also suffice.
195. The rationale for pre-judgment interest is articulated by Justice of Appeal Michel in the SKN Choice Times matter at paragraph 22 of his judgment in the following terms:

"It cannot be disputed that a party wrongfully deprived by another of money to which the first party is entitled ought to be compensated for his loss, not just by an award to him of the sum of money to which he was entitled but so too by an award of the time value of the money from the date of its appropriation to the date on which it is ordered to be paid to him. This latter award is what is referred to as an award of pre-judgment interest"

196. There is no dispute that the Claimants are entitled to post judgment interest under the Judgments Act at the rate of 5%. In this Court's view, the Claimants are entitled to interest at the rate of 2 ½ % from January 16th, 2016 to date on the damages payable to the Claimants.

Further and other relief

197. Counsel for the Defendants reminded this Court in their closing submissions of the reasoning of Mr. Justice Neuberger (as he then was) in the case of Kirin – Amgen Inc. v Transkaryotic Therapies Inc. (No.2) and cited with approval by Justice Mason (as she then was) in the case of Bertha Francis v First Caribbean International Bank (Barbados) Ltd in the following terms:

"In summary, it appears to me that where there is a claim for 'further or other relief', then unless the claimant obtains permission to amend the particulars of claim to broaden the relief claimed, the position is as follows. First, relief will not normally be accorded in respect of a claim of a type which is not pleaded. Secondly, relief will not be accorded which is inconsistent with the relief specifically claimed, but that does not, of course, preclude alternative relief being granted, for instance, damages or a declaration in lieu of an injunction, or damages in lieu of specific performance. Thirdly, relief will not be granted if not supported by the allegations in the pleaded case. Fourthly, relief will not be accorded, save in very unusual circumstances, if the defendant reasonably claims that the claim for it takes him by surprise."

198. None of the reliefs sought by the Claimants all outside the scope of foregoing statement of principle. The allegations in the case for the Claimants in respect of the encroachment issue and the costs of construction of the cistern are foreshadowed in the pleaded case. The Defendant cannot reasonably claim to be surprised by any of these matters and as such there is no legal bar to dealing with the reliefs in the manner set out above.

Costs

199. The Claimants are entitled to their prescribed costs in this matter. The Defendant contends that Deon Daniel should not have been added as a party to the claim as there is no pleaded claim against him personally. All the same, Deon Daniel represented 25 Acres and Deon & Associates in these proceedings.
200. The Defendants are right. There is no pleaded claim of agency in respect of Mr. Daniel and as such no costs order can properly be levied against him in his personal capacity. On the other hand, Mr. Daniel would only have been entitled to the costs of defending these proceedings if he was able to demonstrate how he unreasonably incurred the expense of defending himself in these proceedings.
201. In this Court's view, there would have been a clear dividing line between the personal and corporate lawyers which would clearly permit a court to award costs for their efforts. In the absence of such a line of demarcation it would be difficult to apportion costs among the Defendants current legal practitioners. No submissions or applications were advanced at the outset or even during the course of the trial to dismiss the claim against Mr. Daniel in his personal capacity.

202. Finally, this Court tests its reasoning in this way. Assume for the sake of argument that Mr. Daniel had instructed separate counsel to represent each corporate entity. Deon and Associates were less successful than 25 Acres and it is arguable that those legal practitioners would have been entitled to their legal costs on the basis of the work that they had done. That work would have been easily identifiable. Mr. Daniel's current legal practitioners are unable to demonstrate a clear distinction between their efforts for the corporate entities and for Mr. Daniel himself and as such they are not entitled to costs.

Postscript

203. Finally, at the end of the hearing of this matter on July 1, 2022 I had ordered that the parties were to file and serve their respective submissions no later than August 17th, 2022. In my view that was a reasonable time, bearing in mind the looming end of term pressures for all concerned and the voluminous nature of the supporting documents.

204. It was on this basis that this Court said to the parties that this Court would use the long vacation in order to complete judgment with an eye on delivery of judgment in September 2022. Counsel for the Claimants filed their submissions on August 19th, 2022 and this Court takes no issue with that 2 day delay. On the other hand, counsel for the Defendants filed their submissions on September 2nd, 2022.

205. Those two weeks were extremely valuable since this Court could not begin crafting its judgment until it had thoroughly read and understood the Defendant's position. The loss of those two weeks meant that this Court was considerably hamstrung in its ability to meet its promise to the parties because once the new law term began it became difficult to find the time to address the numerous factual and legal contentions involved in this matter.

206. This meant that this Court could not comply with its stated promise to deliver judgment in early September. This Court takes its promises to dispense its judgment very seriously and apologizes to the parties for the additional time that it has taken to produce this judgment. It is not lost upon this court that the agreements that gave rise to this dispute were executed in 2013 although the claim was only filed in 2018 and they are no doubt anxious to have this matter resolved.

207. It is not lost upon anyone reading this judgment that further judicial time and effort is required in order to finally resolve this matter. That is to be deplored. The parties to any matter have a supervening obligation to assist the Court. The fact that further assistance is required is a telling indictment on the way in which this litigation was conducted by the parties.

**Patrick Thompson Jr
Resident High Court Judge**

BY THE COURT

REGISTRAR