

THE EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 2021

Claim No. SKBHCV2015/0167

BETWEEN

CC&F INC.

Applicant

- and -

[1] MANOR INTERNATIONAL INC.
[2] DOCHE AND DOCHE INC.
[3] VICTOR DOCHE
[4] RAFIK DOCHE
[5] DENIS CHAREST

Respondents

Before: The Hon. Mr. Justice Trevor M. Ward QC

Appearances:-

Mr. Chesley Hamilton and Ms. Nadia Chiesa of Counsel for the Applicant and Fifth Respondent.
Mr. Sylvester Anthony and Ms. Angelina Gracy Sookoo-Bobb, instructed by Ms. Renal Edwards for
the 2nd, 3rd, and 4th Respondents.

2022: February 10,
July, 25

JUDGMENT

[1] **WARD, J.:** On 11th March 2020 CC&F Inc (CCF) filed an application for enforcement of a Consent Order entered between the parties on 3rd February 2016. A brief background of the circumstances

that led to the Consent Order being entered is necessary to provide context to the present application.

Background

- [2] CCF is a company incorporated under the laws of St. Kitts and Nevis. Its directors are the fifth respondent, Denis Charest, and Rene Fafard. The first respondent Manor International Limited (Manor) is a limited liability company incorporated under the laws of St. Kitts and Nevis on 28th October 2009. It is in the business of construction and land development. At the time of Manor's incorporation, the subscriber and sole shareholder was Victor Doche. The Second Respondent Doche & Doche Inc (D&D) is a limited liability company, incorporated under the laws of St. Kitts and Nevis. The 3rd respondent, Victor Doche and the 4th respondent, Rafik Doche are its shareholders and directors.
- [3] When the context so requires, D&D, Rafik Doche and Victor Doche shall be referred to collectively as "the Doche parties" and when the context so requires I will refer to CCF and Denis Charest collectively as "the Charest parties".
- [4] In 2012, a Shareholders' Agreement ("the Agreement") was entered into between CCF, D&D, Denis Charest, Victor Doche, Rafik Doche and Manor. The agreement was actually signed by the parties in September 2012 but was backdated to 10th April 2012. By virtue of the agreement, the new shareholders of Manor became CCF with 60 common shares, and D&D with 40 Common shares and 20 Class "A" shares. The new shareholding allotments entitled CCF to 60 votes at all meetings of shareholders while D&D, by virtue of holding 40 common shares and 20 Class "A" shares, also became entitled to 60 votes at all meetings of shareholders. Thus, the new shareholding allotments resulted in each of the shareholders having 50% voting rights.
- [5] The two directors of Manor became Denis Charest, representing CCF, and Rafik Doche, representing D&D. The named officers of Manor became Denis Charest as President, Victor Doche as Vice President, and Rafik Doche as Secretary and Treasurer. In addition, an omnibus resolution dated 24th September 2012 was approved by Victor Doche. This resolution purported to confirm, approved and ratify his appointment as the first director of the company and further purported to confirm, approve and ratify all actions taken and documents executed by him as director of the company.

- [6] Manor planned and developed the Manor By The Sea condominium project, comprising 6 buildings with 57 condominium units built to date. The relationship between the parties subsequently broke down. On 20th July 2015 CCF filed a fixed date claim against Manor and the same respondents to this application seeking certain relief under sections 142 and 144 of the Companies Act, Cap. Among other reliefs sought were relief from unfair prejudice, the appointment of an interim receiver to manage the affairs of Manor and an order that the Doche parties turn over all documents related to Manor in their respective possession, custody or control.
- [7] On 6th August 2015, CCF brought a without notice application for the preservation of documents related to the affairs of Manor. On 13th August 2015, the Court issued an Order requiring the Doche parties to preserve all documents related to Manor. Upon being served with the Order, Rafik Doche filed an affidavit in response (“the preservation affidavit”) dated 25th August 2015. However, by that year’s end the parties moved to settle their dispute. Accordingly, by Notice of Application filed on 14th December 2015 CCF applied to the Court for a Consent Order in terms negotiated by and agreed upon between all parties to the claim filed by CCF. On 3rd February 2016 the parties entered into the Consent Order, which CCF now seeks to enforce.
- [8] On or around 24th March 2017, CCF brought an application seeking the appointment of a receiver to protect the company’s interests. By Order dated 21st June 2018, Lanns, J dismissed the application.

The terms of the Consent Order

- [9] The Consent Order stipulated the following:
1. Mr. Franklyn Maitland (“the Auditor”) to continue his appointment as the Auditor of the First-named Respondent (“Manor”) and to complete the audit of the accounts of Manor, said audit to be completed as soon as possible, and in any event within sixty (60) days after submission to the Auditor by the parties of all documents requested or to be requested by the Auditor and in possession custody or control of that party, including all documents referred to in paragraph 5 below, and without prejudice to the foregoing the following documents:
 - (i) any additional sales agreements and sales contracts applicable or related to the Manor By The Sea condominium or any Manor By The Sea condominium units;
 - (ii) agreements, if any, between or with any party or parties which provide for, or which include any provision relating to the payment of any sales commission, marketing

fees, finder's fees or other related fees or commissions on the marketing or sale of any Manor By The Sea condominium units;

- (iii) any additional bank credit advices, incoming wire transfer forms and large transaction reporting forms related to the receipt of funds generated by the sale of any Manor By The Sea condominium units;
- (iv) any additional bank statements for all accounts into which funds generated by the sale of any Manor By The Sea condominium units were paid;
- (v) any bank statements for any accounts into which funds wired or provided by the Fifth- named Respondents("DC"), or by Placement Denis Charest Inc. ("PDC") or by the Claimant ("CC&F"), to or for the benefit of Manor, were received;
- (vi) any additional cheques representing payments made by Manor, or by The St. Christopher Club Limited for and on behalf of Manor together with all supporting invoices;
- (vii) a list of all sales commissions, marketing fees, finder's fees or any fees or payments made to Remax, and/or to the Third-named Respondents ("VD") and/or to Fourth-named Respondent("RD") and/or to "DC" and/or to Julie Couillard and/or to Corrine Doche and/or to Natasha Doche and/or to Alexander Doche, in anyway related to the marketing or sale of any Manor By The Sea Condominiums units; and
- (viii) any bank statement for St. Christopher Club Limited bank accounts showing all funds received by The St. Christopher Club Limited on behalf of Manor, and all payments of fund made for and on behalf of Manor, together with all applicable credit advices, cheques and invoices.

2. That without prejudice to the generality of the audit, that the aforementioned audit shall include and address the following issues:

- (i) The sale of the Manor By The Sea condominiums units and the income generated; into which account and at which bank(s) the monies received for each unit sold were deposited and on what dates; the price of each unit sold and the expenses applicable to each unit sold; the sales commissions, marketing fees and finder's fees or other related fees, paid on each unit sold; to whom the sales

commissions, marketing fees and finder's fees or other related fees, and the other closing expenses were paid on each unit sold;

(ii) The loans obtained from The Bank of Nevis Limited for which any of the lands contained Certificate of Title Book J3 Folio 449, Book O3 Folio 166, and Book K3 Folio 569, all of the Register of Titles for St. Christopher, were mortgaged to said bank as security, together with details of (i) into which account(s) those loan funds were initially credited to (ii) what precisely those funds were utilized for (iii) to whom payments were made out of those funds, (iv) by whom and from which accounts, these loans were repaid;

(iii) The amount and status of any loans advanced by CC&F and/or PDC and/or the Second-named Respondent ("D&D") and or St. Christopher Club Limited to Manor including any amounts due for repayments;

(iv) The issue with the walls to be constructed by Manor for St. Christopher Club Limited ("SCC");

(v) Any amounts due from Manor to CC&F and/or PDC and/or DC and/or D&D and/or RD and/or VD or from any one or more such parties to Manor;

(vi) Amounts withdrawn by D&D, VD, RD, CC&F, DC from Manor and the status of such withdrawals;

(vii) Whether any funds belonging to Manor were used by or for the benefit of any third party and whether there are any monies due from any third party to Manor or vice versa, and if so on what basis;

3. That consequent upon and at the conclusion of the audit referenced in paragraph 1 and 2 above that the Auditor do also set out a statement outlining what funds if any are due to Manor from CC&F and/or D&D and/or RD and/or VD and/or any other third party; or vice versa, and that any party so affected be entitled to file any objections to the audit report and final statement within 14 days after the completion and service of a copy of the audit report and final statement on that party. The auditor shall address such objections within 14 days of receipt and issue a decision, and where he considers it necessary, any adjustment to the

audit report and final statement. If any party who has filed objections is dissatisfied with the decision of the auditor and/or the audit report and final statement, that party may apply to the court within 14 days of the auditor issuing his decision for a determination of the particular issues raised in the objections, with a final statement to be determined by the court.

4. Manor be responsible for the payments of the services provided by the Auditor.

5. CC&F, DC, D&D, VD and RD do submit, within seven (7) days of the date of this Order, to Mr. Maitland all documents in their respective possession, custody and control, and referred to in paragraph 1 above and also the documents which were requested by Mr. Maitland in his letter dated 24th June 2015. Further CC&F and DC do submit any further documentation relating to Manor's construction operations and D&D, RD, and VD do submit any further documentation relating to the marketing and sale of Manor's Condominium units, requested by Mr. Maitland within 7 calendar days of any such written request.

6. CC&F, D&D, RD, VD and DC be allowed unhindered access to the property/premises of Manor situated at Bird Rock and Frigate Bay for the purposes of carrying out their respective obligations under the Shareholders' Agreement.

7. All property and assets including but not limited to vehicles, equipment, machinery, tools, building materials, supplies, books, records and documents belonging to Manor and in the possession, custody or control, and/or in the names of CC&F, DC, D&D, VD, RD and/or SCC be returned to the premises of Manor situated at Bird Rock within 7 days of the date of this Order. All property and assets beneficially belonging to Manor shall be immediately transferred to Manor. Manor to pay all taxes, fees, custom duties, shipping, freight and port charges, and all other governmental charges in relation to all such transfers, where such payment is properly the lawful obligation of Manor.

8. No person/ entity to be allowed to use the property, condominium units, vehicles, employees, equipment, tools, materials, machinery and any other assets or resources of Manor except for the operations of Manor, unless a written agreement is entered into between Manor and such other persons/entity and approved by the Board of Directors of Manor as evidenced by a Board Resolution.

9. Rene Fafard be employed by Manor on the terms agreed upon by the board of directors to complete the construction of Buildings 5 and 6 of the Manor by The Sea Condominium project and that CC&F and D&D as shareholders in Manor, DC and RD as directors of Manor, VD as Vice President of Manor and Rene Fafard as signatory to the bank accounts of Manor cooperate fully, take all necessary action (in their respective capacities) pursuant to the Shareholders' Agreement, and Manor's Articles of Association, and consistent with the efficacy of operating a business, to facilitate the completion of the said construction.

10. RD and DC as the only two Directors of Manor shall act in the best interests of Manor and cooperate fully, including but not limited to the approval of contracts, approval of payments and signing of cheques, to ensure the completion, sale and delivery of all units of the Manor by the Sea condominium units and to ensure that all debts and other contractual obligations of Manor are paid and fulfilled.

11. The Board of Directors comprising DC and RD shall convene a meeting at a convenient location, whether within or outside St. Kitts within seven (7) days of the date of this Order to

- (i) approve the contract for employment of Rene Fafard;

- (ii) review and approve the budget for completion of buildings 5 and 6 of the Manor by the Sea Condominiums project;

- (iii) receive an update on sales of all condominium units;

- (iv) (subject, where necessary to the finalization of the audit) review and approve payments of debts and execution of contractual obligations of Manor including but not limited to (a) any debt owing by Manor to PDC and/or DC and/or CC&F and/or D&D and/or SCC; (b) the construction and/or completion of walls for SCC and (c) the payment of all arrears of rent in relation to the premises leased from the Development Bank of St. Kitts and Nevis;

and any other business determined by the Directors.

The Board of Directors of Manor shall at such meeting adopt the resolutions attached hereto as Schedule A.

12. All monies received from sales of Manor by the Sea condominium units shall continue to be deposited in the bank account of Manor held at The Bank of Nevis Limited and/or The Bank of Nova Scotia, Fort Street, Basseterre with notice of all deposits to be given to the Auditor.

13. Any further sales commission and/or marketing fees payable to Remax, or any entity or person associated with and/or related to Remax, to be held in escrow in Manor's account, until the Parties resolve all issues in relation to the payment of such sales commissions, and/or marketing fees. Payment out to Remax shall be subject to a determination of Remax's entitlement to such sales commissions. The parties shall in good faith attempt to resolve the issue of entitlement of Remax to charge sales commission on the sale of Manor condominium units. If the parties are unable to resolve the issue amicably, any one party may choose to submit the matter to mediation (via a mediator within the court mediation program) and the other party will be obliged to mediate the matter. If the parties are unable to resolve this issue via mediation, any party may apply to the court to resolve the issue.

14. All further proceedings in this matter be stayed except for the purpose of carrying the terms of the Order into effect including enforcement. For that purpose, the parties have liberty to apply to the Court. This shall include:

(a) liberty to apply to the court for the determination of any matter or issue that arises between the parties in their carrying out the terms of this Order:

(b) liberty to apply for any of the following remedies:

i. An order for payment by the Applicant/Claimant, Second-named Defendant/ Respondent, and/or the Third-named Respondent/Defendant and/or Fourth-named Respondent/Defendant and/or Fifth-named Respondent/Defendant, as the case may be, of any amount found to be due and owing to the Company by such Respondents(s)/Defendant(s) respectively, as the case may be pursuant to and upon the conclusion of the audit report and final statement, and, where applicable, after a final statement determined by the Court;

ii. An order for payment by the Company to the Applicant/Claimant, Second-named Defendant/ Respondent, and/or the Third-named Respondent/Defendant, and/or

Fourth-named Respondent/Defendant, and/or Fifth-named Respondent/Defendant, as the case may be, of any amount found to be due and owing to the Applicant/Claimant or such Respondent(s)/Defendant(s) respectively, as the case may be, pursuant to and upon the conclusion of the audit report and final statement, and, where applicable, after a final statement determined by the Court;

iii. That upon completion of the audit report and final statement, and where applicable, upon the determination of a final statement by the Court, and where said final statement (as the case may be) shows that either the Second-named Respondent/Defendant, Third-named Respondent/Defendant, or Fourth-named Respondent/Defendant or any other party is indebted to or otherwise liable to the Company, that the Applicant/Claimant be authorized to institute a derivative action in the name of and on behalf of the Company against any such Defendant(s) or party.

iv. That upon completion of the audit report and final statement, and where applicable, upon the determination of a final statement by the Court, and where said final statement (as the case may be) shows that either the Applicant/Claimant or the Fifth-named Respondent/Defendant or any other party is indebted to or otherwise liable to the Company, that the Second-named Respondent/Defendant, be authorized to institute a derivative action in the name of and behalf of the Company against any such Defendant(s) or party.

v. Alternatively, that upon the completion of the audit report and final statement, or upon determination of a final statement by the court (where applicable), that the Court do, as against any person a party to this action who is found to be indebted to or liable to the Company, order that such person do pay such sum as may found to be due to the Company, together with any interest that may be applicable.

15. There be no order as to costs.

SCHEDULE A

BOARD RESOLUTIONS OF MANOR INTERNATIONAL INC.

1. Employment of Rene Fafard

1. The Company hereby agrees to the employment of Rene Fafard as Manager of the Company's Factory and Construction Operations to complete the construction of Buildings 5 and 6 on the following terms:

(a) weekly salary of US\$1000.00 (subject to statutory deductions)

(b) provision of company vehicle and fuel to the value of US\$100.00 per week;

2. Upon his employment, Mr. Fafard will perform the following tasks:

i) Take a complete inventory of all assets, materials and other property of the Company;

ii) Evaluate the condition of all existing materials to determine its usability for construction purposes

iii) Consequent upon such evaluation, to submit to the BOD for its consideration and approval, a comprehensive list of materials and supplies required to complete the said Buildings 5 and 6;

iv) Prepare and submit to BOD for its consideration and approval a detailed budget to cover all costs related to the completion of Buildings 5 and 6, together with a work plan and timeline for such completion;

v) Identify and submit to the BOD for its consideration and approval any subcontractors to be employed together with the terms of any proposed subcontracts.

2. Within 3 business days of the execution of this Resolution and consistent with the existing Shareholders Agreement, the BOD will meet to discuss the following agenda items:

A. Update On Sales of All The Company's Condominium Units

(a) Review all purchase and sale agreements that have been executed;

(b) Review all purchase and sale agreements that are yet to be executed;

(c) Review unsold units and confirm price structure.

B. Regularizing the Lease from Development Bank Limited to Manor Factory Premises

The Company Secretary/ Director will execute no later than 3 business days after the date hereof, the existing lease with the Development Bank Limited for the factory premises and will make payments, immediately, of any and all arrears of rent owing to Development Bank for the said lease. If necessary, the Company shall extend the lease for such periods as required to allow for the completion of Building 5 and 6 for the eventual winding up of the business affairs of the Company.

3. Debt owing by The Company to Placement Denis Charest Inc. (PDC)

No later than 3 business days after receiving the Auditor's report and Final Statement the Company's Board of Directors will meet and the Company will review its accounting record to determine the balances owing on:

- (a) any cash advances made by SCC and/or D&D;
- (b) the loan extended by PDC; and
- (c) agree on a repayment schedule.

4. Debt owing by The Company to any other Third Party

The Company to review its accounting records to determine whether any other debts are owed by the Company to any Third Party and upon Verification by the Auditor of such debts the Company, if it possesses the finances, shall settle all those debts.

5. Walls for St. Christopher Club Gardens Project

No later than 3 business days after the employment of Rene Fafard as Manager, to commence construction and installation of walls for the St. Christopher Club Gardens Project. In the event that the audit report and/or final statement concludes that payment for the walls have not been made or are in any way deficient, an appropriate deduction will be made from any share of profits payable by the Company to D&D.

6. Attorney to represent the Company

No later than 3 business days after the date hereof, the Company to engage the services of an independent Attorney/Law Firm to represent its interest with such Attorney/Law Firm to be separate from the Attorneys representing its shareholders, CC&F Inc. and Doche &

Doche Inc. or any shareholders, director, officer, employee or related party of such shareholders The Company shall provide such Attorney a copy of these resolutions and authorize the Attorney to take such steps as may be required to ensure compliance with the said solutions.

7. Property of Third Parties

The Company shall immediately release to all third parties any property in the possession of the Company and belongings to such Third Party. Any such Third Party to pay the Company any monies expended by the Company on behalf of such Third Party in relation to any such property including but not limited to (i) shipping expenses, (ii) import duty and (iii) customs service charge, up to date of import. The Company to record, but only as being supportive of the above, the agreement by the individual shareholders (which each shareholder by signing hereby confirms) to release to Denis Charest and Isabelle Fafard all personal items belonging to them or either of them that may in the possession, custody or control of any shareholders.”

- [10] Immediately beneath this, the signatures of the respective lawyers for CCF & Charest, the Doche parties and Manor are appended to the Consent Order; as well as the Signature of the Deputy Registrar (Ag).

Legal principles

- [11] The general rule is that an order obtained by consent of the parties is binding upon them and remains valid until set aside by fresh proceedings brought for that purpose: **Kinch v Walcott and others**.¹ It is tantamount to a contract and the parties are bound by its terms. The principle was stated by Byron JA as he then was in **Cecilia Francis v Louis Boriol**:²

“The legal principles to be applied are not in dispute as this branch of law has been settled for a long time. A Consent Order is binding on the parties to it but is no less than a contract, because there is added to it the command of the court, and as such it is subject to the incidents of a contract including the liability to be set aside.”

¹ [1929 AC 842.

² SLUHCAP No 13 of 1995.

The application to enforce the Consent Order

- [12] The application to enforce the Consent Order is supported by an affidavit of Denis Charest filed on 11th March 2020 and a reply affidavit sworn on 28th June 2021. Affidavits in opposition were sworn by Rafik Doche on behalf of the 2nd, 3rd and 4th respondents sworn on 21st August 2020, 7th June, 2021 and 25th August 2015. By order of this court dated 17th November 2021, paragraphs 4, 5, 20-25, 28 and 34 (save for the first sentence), of the reply affidavit of Denis Charest were struck out on application of the 2nd, 3rd and 4th respondents after hearing submissions by both sides. Leave was granted for Denis Charest and Rafik Doche to be cross-examined on their respective affidavits.
- [13] CCF alleges that the Doche parties have failed to comply with several provisions of the Consent Order, as a result of which, CCF, in its capacity as shareholder, and Charest in his capacity as President of Manor have been unable to access critical information about Manor's operations and finances to which they are entitled. Complaint is made that Manor has ceased operations for more than four (4) years and there is a serious risk that its assets are being dissipated and/or wasting although Manor has sufficient assets and funds in its accounts to satisfy its obligations but has been unable to do so because of the deadlock within the company. I will presently examine each allegation of breach seriatim and the respective reliefs sought. The captions used hereafter to characterize the allegations of breach and the reliefs sought are partly adopted from the headings used by counsel for CCF in their written submissions and which have also been employed by counsel for the Doche parties.
- [14] Before doing so, however, it is worth noting that some of the orders sought for production of documents are predicated on the basis that they are necessary to enable the auditor, Franklin Maitland, to complete the audit report which is said to be an "interim report". Undoubtedly, the auditor was not supplied with all of the information he requested during the course of his audit. The auditor states at page 6 of the report that, "Clause 5 of the Consent Order ordered CC&F, DC, D&D, VD and RD to submit "all documents in their respective possession, custody and control...." to the auditor. There appears to have been a serious violation of that order. Appendix 1 provides an indication of documents due and documents obtained from each side." From this, it is evident that neither the Charest parties nor the Doche parties were fully compliant in terms of supplying information and documents requested by the auditor.

[15] But does this mean his audit report is incomplete? Several reasons lead me to think that it is not incomplete. In the first place, when the auditor submitted his report to the court on 3rd December 2016, the accompanying cover letter, which is captioned: “Re Report on Audit of Manor for 2009 to 2014 -Part 1”, stated:

“Respectfully, we submit Part 1 of the Report demanded by the Consent Order of 3rd February 2016. The report is provided in one binder and accompanying exhibits and appendices in another.

The full Report has also been completed but had been divided into Part 1 and Part 2 to accommodate any revision arising from the below referenced review. Part 2 contains matters likely to be affected by the review and include accounts representing: due to/from SCC and related companies, inventory and fixed assets, accounts of major suppliers.

DRAFT financial statements (FS) have been submitted to the directors for review and discussion. The directors of D&D, a shareholder of Manor, have requested time to resolve a material difference on the account of a major supplier, and review the FS. Following the review, it may be necessary to revise Part 2 of the Report and the FS.”

[16] I am unable to read this as connoting that the report is incomplete. Paragraph 3 of the Consent Order stipulated that “consequent upon and at the conclusion of the audit” referenced in paragraph 1 and 2 above that the Auditor do also set out a statement outlining what funds if any are due to Manor from CC&F and/or D&D and/or RD and/or VD and/or any other third party; or vice versa, and that any party so affected be entitled to file any objections to the audit report and final statement within 14 days after the completion and service of a copy of the audit report and final statement on that party. The auditor has set out such a statement, which he can only have proceeded to do consequent upon and at the conclusion of the audit.

[17] Further, the auditor himself makes the point at page 8 of his report that “A financial audit does not examine 100% of transactions, balances and related documents or events, but select samples for testing or examination, draws conclusions that inform the auditor’s opinion.” He makes the further point that he has a responsibility to obtain evidence that in his professional opinion is sufficient and appropriate to form an opinion. This he has clearly done, notwithstanding that every document he

requested was not supplied. I find that the audit report was completed. I turn now to examine the various orders sought by CCF.

Prayer 1 (a) of the application - Order for production of missing documents in breach of paragraphs 1 and 5; (b) order for production of the minute book

[18] CCF seeks the following:

“(a) pursuant to paragraphs 1 and 5 of the Consent Order, an Order that, within seven (7) days of this Order, D&D, Victor Doche and/or Rafik Doche shall produce to the Auditor (as defined below) and to CCF, to the extent that they have not already been produced:

(i) all documents requested by the Auditor in respect of the preparation of his interim report dated 5 December 2016 and 11 January 2017 (“Auditor’s Interim Report”);

(ii) all missing documents referred to, requested by or required by the Auditor in the Auditor’s Interim Report for the purpose of completing a further report; and all documents identified in paragraph 1(i)-(viii) of the Consent Order”.

(iii) all missing documents referred to, requested by or required by the Auditor in the Auditor’s Interim Report for the purpose of completing a further report; and all documents identified in paragraph 1(i)-(viii) of the Consent Order”.

(b) an Order that, within seven (7) days of this Order, Rafik Doche produce, or cause to be produced by any third party in possession thereof, the minute books of Manor to the Auditor;

[19] CCF complains that despite numerous requests from the auditor, the Doche parties have breached paragraphs 1 and 5 of the Consent Order by failing to cooperate with the auditor and refusing to provide necessary documents stipulated in paragraphs 1 and 5 to allow him to complete the audit report. To date, the Doche parties have failed to produce a number of categories of documents, including Manor’s minute books which CCF claims were last in the possession of Manor’s former Company Secretary. They were not delivered to the Auditor pursuant to the Consent Order.

[20] The Doche parties in their affidavits in response, sworn by Rafik Doche, aver that all documents in their possession, custody or control were turned over to the auditor and/or authorised related parties and that Manors’ Bank, the Bank of Nevis, (BON) was instructed to make available to the auditor any documents he requested. They also rely on the affidavit sworn by Rafik Doche in August 2015 in

response to the *ex parte* “preservation” Court Order of 6th August 2015 which they say confirmed all the documents which were in their possession or under their control at the material times and also confirmed which documents they knew to exist and those which did not exist.

- [21] They further contend that all of the documents outlined in orders 1 and 5 that were in their possession and control were turned over to the auditor, who has since completed the required audit and submitted his report to the Court in two parts in December 2016 and January 2017 respectively.
- [22] As it relates to the relief sought in relation to the minute book, the Doche parties aver that there is no order relating to production of minute books in the Consent Order and therefore there is no such order to be enforced. They reiterate the point made in the preservation affidavit that the corporate records of Manor were reconstituted in March 2012 by Counsel Sonia Parry, a Partner in the Law Firm then representing CCF and that although Rafik Doche is the Secretary of Manor, these reconstituted corporate documents were never given to him and he has no knowledge of the whereabouts of the originals of these documents including but not limited to the Minutes Books of Manor.

Discussion and findings on prayer 1(a) and (b)

- [23] A careful reading of the Consent Order would cause one to note that the documents to be handed over to the auditor were not simply documents requested by him but those in the possession, custody or control of the party to whom the request is directed. For there to be a breach of this order, it must be proved, the burden being on CCF, that the Doche parties are in possession, custody or control of specific documents requested but have failed or refused to supply them to the auditor. This is a question of fact. In resolving this factual dispute, I bear in mind that Dennis Charest and Rafik Doche were cross-examined on their respective affidavits. I therefore had the advantage of gauging the content and quality of their responses, which I was able to cross-reference against their affidavits and other documentary evidence before me to assess their credibility. Where there is a conflict in the evidence therefore, my assessment of their credibility assumes great weight.
- [24] That said, I find that the Doche parties have not failed or refused to hand over documents in their custody, control or possession, in breach of paragraphs 1 and 5. I base my finding on several facts. First, contemporary emails from Rafik Doche to the auditor demonstrate that the Doche parties were cooperating with the auditor. A few examples cited by counsel for the Doche parties in written closing

submissions serve to illustrate this. For example, on 8th March 2016, Rafik Doche wrote to BON and, inter alia, reminded the bank that they are authorized to disclose information relating to Manor to the auditor. Subsequently on 14th November 2016 Rafik Doche and Denis Charest both signed the letter of confirmation for BON to give the auditor direct access to all information relevant to the audit exercise. The point is effectively made that both the Charest and Doche parties had access to the accounts of Manor so that if information was not forthcoming from the BON, both sides are in a position to do something about it.

[25] The Doche parties point further to Rafik Doche's contemporaneous email responses to the auditor's letter dated 21st January 2015³ seeking full disclosure of information on three loans from BON as opposed to the information and bank loan statement in relation to only one such loan with which he had been provided; and secondly, seeking from Rafik and Victor Doche an accounting for monies received from the sale of condominiums between 2011 and 9th July 2012. Counsel for the Doche parties sum up the net effect of what Rafik Doche's responses conveyed to the auditor as gleaned from several emails at pages 183 -187 of the Hearing Bundle Volume 1:

- a. He did not recall he or Victor Doche (V. Doche) refusing an explanation or anything required to complete the audit; [Pages 184-185;
- b. He was willing to assist with anything needed to complete the audit, including to provide explanations to questions the auditor had; [Page 184]
- c. While the only loan discussed was the US\$1.2 or US\$1.3 loan against the land, it was his understanding that the auditor was authorized to request any documents for Manor from BON and urged the auditor to request from the bank any documents he needed. [Page 185 and 192]
- d. He also pointed out to the auditor that his questions could be easily answered since he had access to SCC accounts. His mandate to audit these companies meant that he would see the trail of all transactions across the companies. [Page 185]

³ Volume 1 at pages 183 - 187.

e. The auditor was made aware of the difficulties in opening a bank account, which was documented to all shareholders. All deposits and sales balances are recorded and was verbally confirmed by the auditor. [Page 185]

f. The auditor's first request was on 11th January 2015. Even though Rafik Doche was sick and not in the office, he responded on 19th January 2015, advising that he was back in the office and available to clarify whatever the auditor needed [Page 186 and 192].

g. An email from Rafik Doche to Nicholas Beugnot, counsel for CCF, stating that periodic sales reports were sent to all parties which would include his client. [DC 20 at page 630 of Bundle 1].

[26] The Doche parties further point out that on 27th January 2015, because of the inquiries made by the auditor the day before, Rafik Doche sent an email to BON copying the shareholders and the auditor. This email was titled 'Manor loans' and asked the bank for 'statements reflecting draws and payments for all loans obtained for that [Manor International and Manor By the Sea] account'. BON responded by asking whether the information was in addition to what was provided to the auditor. The bank then proceeded on 30th January 2015 to provide the statements for 'Manor International loan accounts' as well as drawdowns. On 15th January 2015, Victor Doche responded to the auditor's email of 11th January 2015 advising, among other things, that although Rafik Doche was ill, he could speak to the bookkeeper.

[27] Having carefully reviewed all the foregoing, I am satisfied that the summary accords with the contents of the respective emails. I note further that the audit report accounts for all three loans of Manor. At page 10, the auditor stated: "As part of the audit, all significant assets, loans, and other liabilities were reconciled or analysed and reconciled, and third-party confirmations requested. In particular, confirmations were sent and replies received from banks for bank balances and loans." These are discussed extensively at pages 27 - 32 of the audit report, with loan summaries provided at Appendix 2. Further, the auditor stated at page 8 that in order to respond adequately to paragraphs 2 and 3 of the Consent Order, "100% examination was performed on revenue from condos and related expense, revenue from concrete products and borrowings." The audit report also states that among the records examined were bank statements, debit/credit advices for accounts at BON and Bank of Nova Scotia (BNS); loan statements and agreements; and numerous emails and letters from BON and BNS. In the face of this, the allegation that the Doche parties have failed to provide information

concerning Manor loans and banking documents within their control to the auditor cannot be sustained.

- [28] Secondly, CCF places heavy, if not exclusive, reliance on letters from the auditor to the Doche parties in which he charges that certain documents have not been supplied. Counsel for the Doche parties urged caution in placing any weight on these since the auditor was not cross-examined on them. I am in respectful agreement. Having seen and heard Rafik Doche testify before me, I found him to be a credible witness, whose evidence on this point was largely supported by contemporaneous documents. His evidence is to be preferred where it conflicts with assertions that are untested by cross-examination.
- [29] Thirdly, Rafik Doche's preservation affidavit of August 2015 in which he confirmed all the documents which were in the possession or under their control at the material times and in which he also confirmed which documents they knew to exist and those which did not exist, stands uncontradicted. Those assertions must therefore be taken to be true.

The minute book

- [30] As it relates to the non-production of the minute book, counsel for the Doche parties submitted that the order sought in respect of this item should not be granted because there is no reference to a minute book in the Consent Order and so cannot give rise to an order to enforce it. In written submissions, learned counsel for CCF, Ms. Chiesa submitted that a minute book is a fundamental record of a corporation and would therefore be produced in an audit. This much was conceded by Rafik Doche in cross-examination when he admitted that it is an important document for a company in which critical decisions taken by the company are recorded. In my view, the minute book is caught within the terms of the Consent Order relating to the production of all books and records of Manor.
- [31] However, on the evidence before me, CCF has not proved on the balance of probabilities that the minute book is currently in the possession of the Doche parties. At paragraph 16 of Denis Charest's affidavit in reply sworn on 28th June 2021, he asserts that the minute book was provided to the Law Offices of Sylvester Anthony, who was the secretary of Manor, on or around 21st February 2012. The basis of this assertion is said to be an email from Victor Doche dated 20th February 2012 (Exhibit DC25) and an email from Rafik Doche (Exhibit DC26) which together conveyed that Manor's minute book and corporate documents had been located.

[32] The email from Victor Doche to Denis Charest dated 20th February 2012 states:

“Salut Denis,

Irving Boncamper wife just found the originals of Manor Corporation and minute book, we will deliver them tomorrow by Sylvester Anthony and advise Sonia accordingly

Victor”

[33] If that email stood alone, then it would be hard to resist the conclusion that, at that time, the Doche parties were then in possession of the minute book. However, the following day, 21st February, CCF's then counsel, Nicholas Beugnot, sent an email to Rafik and Victor Doche, on which Denis Charest was copied. So far as material, it states:

“Dear Victor and Rafik,

Denis has asked me to write to you directly in connection with the need to re-constitute the corporate records of Manor International Inc. I understand from my discussion with Ms Parry, local counsel for Denis, (whom I have copied on this email so she can be in the loop) that it has been confirmed after her discussion with Mr Sylvester that the corporate records are missing and unlikely to be recovered. As this point, Denis wants to have the records recreated as soon as possible, as this is a precondition to issuing shares to the parties and it is in the interest of all to have a proper minute book for Manor. Ms Parry will complete the necessary work to recreate the minute book.”

[34] This email confirms the evidence of Rafik Doche as summarised at paragraph [22] above and supports his viva voce evidence that Mrs. Boncamper had not in fact found the minute book. Mr. Beugnot's email establishes that as early as 21st February 2012, the parties agreed that the corporate records were missing and unlikely to be recovered, thus necessitating the recreation of the minute book. Interestingly, Denis Charest did not then seek to suggest otherwise by referring to the contents of Victor Doche's email of the previous day. It does not now lie in the mouth of the Charest parties to demand its production when they accepted in February 2012, after discussion with their own local counsel, that it did not exist. No new evidence has been adduced to explain why it is now thought that the minute book is in the possession of the Doche parties. They have failed to satisfy me that this is so.

- [35] For the foregoing reason, the orders sought at paragraphs 1(a) and (b) of the Notice of Application are refused.

Prayer 1 (c)- Order for Third party records pursuant to paragraph 2

- [36] CC&f seek an Order that, within seven (7) days of this Order, D&D, Victor Doche and/or Rafik Doche produce, or cause to be produced by third parties (including but not limited to St. Christopher Club Limited (“SCC”) and/or ReMax Paradise Properties St. Kitts and Nevis (“Remax”) and/or third party sales agents involved in the sale and purchase of units in Manor By The Sea (“MBTS”) (“MBTS Agents”) who may be in possession or control of these documents, all documents and information required to complete the Audit in respect of the issues identified in paragraph 2 of the Consent Order, including all documents or categories of documents identified as missing or incomplete by the Auditor in his Interim Report”.
- [37] The Doche parties’ response to this application is that there is absolutely no stipulation in the Consent Order which required the Doche parties to produce or cause any other third party to produce any document of any type or description.

Discussion and conclusions re payer 1(c)

- [38] In my view, the submission advanced by the Doche parties is misconceived. As Ms. Chiesa rightly points out paragraphs 1 (ii) (vi) (vii) and (viii) of the Consent Order avail. They clearly contemplate the production of records from or involving third parties relating to, inter alia, the payment of any sales commissions, marketing fees, finder’s fees and production of any bank accounts showing all funds received by the St. Christopher Club on behalf of Manor.
- [39] However, I have previously commented on the auditor’s report in which he acknowledges receiving and examining 100% of purchase/sale agreements. Rafik Doche’s evidence, which I accept, is that a banker’s box containing all purchase and sale agreements that had been executed, together with an index of the contents of the box, was delivered to CCF, along with cancelled sales agreements, copies of receipts of deposits and a list of unsold units and estimated selling price. Notwithstanding this, the auditor clearly states at page 15 of the report that “Over US\$1.5M was paid in sales commission to foreign and local agents, but no appropriate audit evidence was provided.” The auditor seems to have had a basis for determining the amount paid by way of sales commissions, even

though he laments the absence of appropriate audit evidence and that documents to support the verification of sales commissions were mostly unavailable, and where available, were weak.

[40] At page 36 of the audit report the auditor determined that between 29th October 2009 and 31st December 2014, sales commissions amounted to EC\$4, 925, 273 or US\$1, 832, 183. This statement is followed by Table 1 which shows for each year the revenue from condos sold, number of units sold, commissions in EC dollars, and the percentage of the sales price that the commissions represent. Table 2, which follows, presents a distribution of sales commission based on residence of agents. The auditor found that commissions to foreign agents represented 66% (EC\$3,246,764) of total commissions, with 34% (EC\$1,678,509) to local agents. Of the amount to local agents, \$851,740 (51%) was recorded as paid to Remax, a local property management entity owned by Rafik Doche.

[41] The auditor stated that Finder's fees of EC\$557,129 were incurred between 2009 and 2014 and were in connection with two (2) condo units. Both amounts were deducted at source. Sufficient, appropriate audit evidence to verify the amounts were not provided.

[42] I am therefore satisfied that the auditor had in his possession sufficient of the material sought under this limb of the application to complete his audit. There is therefore no basis for the orders sought. The application for the order sought at paragraph 1(c) of the Notice of Application is refused.

Prayer 1(d) & (e) - Orders directed at SCC/BON/Remax et al,

[43] The orders sought at paragraphs 1(d) and (e) of the Notice of Application flow from that sought at 1(c). They are in the following terms:

“(d) further to paragraph (c), an Order directing SCC and/or Bank of Nevis and/or ReMax and/or MBTS Agents and/or third parties (including CBI agents involved in the purchase and sale of MBTS) to produce all documents and information related to Manor which may be requested by the Auditor, including but not limited to all documents and correspondence related to the purchase and sale of units in MBTS;

(e) further to paragraph (c) above, an Order directing Bank of Nevis to produce all documents and information related to Manor which may be requested by the Auditor, including but not limited to all documents and correspondence related to bank accounts for or used in

connection to Manor; (including cheques, loans, bank transfers, wire transfers, and instructions to Bank of Nevis to close accounts or transfer funds in other accounts at Bank of Nevis);”.

- [44] Having regard to my findings and conclusions in relation to the order sought at paragraph 1 (c) the orders sought at paragraphs 1 (d) and (e) are refused.

Prayer 1 (f) - Order for accounting and tracing re the three loans from BON

- [45] Under this limb of the application, CCF seeks an order in the following terms:

“(f) ... following production of the documents related to the issues set out in paragraphs 2(i), (ii), and (iii) of the Consent Order (including but not limited to e-mail correspondence), an Order for an accounting and tracing all sums related to loans #3690104, #3690130 and #3690182 from Bank of Nevis to Manor, which loans were to be used for construction of MBTS.”

- [46] Ms. Chiesa submitted that the Consent Order at para 2(ii) did provide for accounting and tracing of loans, contrary to the submissions of Ms. Sookoo-Bobb for the Doche parties. Ms. Chiesa further submitted that the auditor was unable to obtain the necessary information from the BON.

- [47] Two observations may be made about this application. The first is that the Consent Order granted liberty to the parties to apply to the Court to determine any issue that may have arisen while carrying out the terms of the order. Para 14 (b) limits the remedies available on any application for enforcement of the Consent Order. They are: (i) an order for payment to Manor by the parties if it is found they owe money; (ii) an order for payment by Manor to any of the parties if any sums are found to be due and owing to them by Manor (iii) institution of a derivative action by the applicant in the name of Manor if found that D&D, or V. Doche or R. Doche are indebted or otherwise liable to the company; (iv) institution of a derivative action by the Doche parties in the name of Manor if found that the applicant or Mr. Charest is indebted or otherwise liable to the company; (v) an Order by the court directing that any party who is found to be indebted or liable to the Company to pay such sum as may be found due to the company together with any applicable interest.

- [48] There is no provision for an order for tracing and accounting. The order sought is not for the purpose of enforcing the Consent Order nor is it a remedy provided for by the Consent Order. Secondly, even

if paragraph 2(ii) could be interpreted as contended for by Ms. Chiesa, the auditor has dealt extensively with these three loans in his audit, as discussed at paragraph [27] above. Accordingly, the application for the order sought at paragraph 1(f) is refused.

Prayer 1 (g) - Order that auditor prepares a further report

[49] At paragraph 1(g) CCF seeks an order in terms that “pursuant to paragraph 3 of the Consent Order and following production of the documents identified in paragraphs (a), (b) and (c) above, an Order that the Auditor shall prepare and submit to the Court a further report and, if necessary, the parties shall have leave to file objections and seek a final determination by the Court in accordance with paragraph 3 of the Consent Order”.

[50] Counsel for CCF submitted that several issues identified by the parties as crucial to the dispute between them, which it was agreed the auditor should investigate and reach conclusions on remain unresolved. It was submitted that this is due to the numerous limitations and challenges encountered by the auditor during the audit. Thus, the auditor should be required to complete his audit and for this he would require payment.

[51] For the reasons discussed above, there is no requirement for the auditor to produce a further report as the auditor has addressed in his audit report issues relating to the BON loans; sales of Manor by the Sea, sales commissions, finders’ fees etc. at pages 33 to 43 and status of loans to and from Manor and amounts due to and from Manor at pages 43 to 48 as well as pages 72 to 81. This application under paragraph 1 (g) is refused.

Prayers 1 (h) & (i) - Orders for appointment and payment of independent forensic accountant

[52] At paragraphs 1(h) and (i) of the Notice of Application, CCF seeks the following orders:

“(h) In the alternative to paragraph (g) above, an Order that an independent forensic accountant be appointed by the Court to conduct an audit of Manor’s accounts from 2009 to date and to investigate the issues set out at paragraph 2 of the Consent Order”; and

“(i) further to paragraph 4 of the Consent Order, an Order that Rafik Doche and Denis Charest shall authorize payments from Manor’s Account No. 51-541484 at the Republic Bank (formerly Bank of Nova Scotia) (“Manor’s RB Account”) to pay any accounts rendered by the Auditor or an independent forensic accountant within 30 days of receipt;”.

- [53] These orders are sought as alternatives to that sought at 1(g) for a further report from the auditor. My observations at paragraph [51] apply here with equal force. Accordingly, the orders sought by prayers 1(h) and (i) are refused.

Prayer 1 (j) – Order for return of Manor's property and assets

- [54] CCF seeks the following order:

“(j) pursuant to paragraph 7 of the Consent Order, an Order that D&D, Victor Doche, Rafik Doche and/or SCC return or cause to be returned to the premises of Manor situate at Bird Rock all property and assets of Manor, including but not limited to the items listed in Appendix “A”.”

- [55] The evidence before me suggests that matters on this front have progressed somewhat. The evidence of Rafik Doche is that the cage set concrete framework; plumbing pipes and jacks; vehicles and keys were returned. CCF was advised that D&D was unable to return the transport trailers because it does not have the equipment to do so and gave CCF and Rene Fafard permission to enter D&D's property to remove them, as he had brought them there in the first place. I find that the only items that remain to be returned to Manor are the wall trailers. CCF says they have no responsibility to fetch them. They are right. They are currently in D&D's possession; it is for D&D to return them. I therefore order that D&D, Victor Doche, Rafik Doche and/or SCC return or cause to be returned to the premises of Manor situate at Bird Rock

Prayer 1(k), (l), (m) – Declaration of breach of Order 8 of Consent Order

- [56] It is convenient to take the next three orders sought together as they are related. CCF seeks:

(k) a declaration that D&D, Victor Doche, Rafik Doche and/or entities controlled by them, including but not limited to Remax, are in breach of paragraph 8 of the Consent Order by virtue of renting out units in MBTS, and further, an Order that D&D, Victor Doche, Rafik Doche and/or entities controlled by them, including but not limited to ReMax, produce within seven (7) days of this Order an accounting of all rents, fees and/or other payments received, directly or indirectly, in respect of the rental of such units;

(l) further to paragraph (k) above, an Order enjoining D&D, Victor Doche, Rafik Doche and/or entities controlled by them, including but not limited to Remax, from renting out any units in

MBTS buildings and/or renewing any existing rental agreement without express written consent of the board of directors of Manor as required in paragraph 8 of the Consent Order;

(m) further to paragraphs (k) and (l) above, an Order that all rents, fees and/or other payments, directly or indirectly, received by D&D, Victor Doche, Rafik Doche and/or entities controlled by them, including but not limited to Remax, in respect of the rental of any units in MBTS buildings be deposited within seven (7) days of this Order to Manor's RB Account and that D&D, Victor Doche, Rafik Doche and/or entities controlled by them, including but not limited to ReMax, provide a monthly accounting for all rents, fees and/or other payments to Manor;

- [57] The contention here surrounds the removal of an exclusivity clause which the Charest parties say was included in the original sales and purchase agreement prepared by Manor in April 2012. The clause provided:

"The seller or his appointee reserves the exclusive right as listing broker to the unit in the event the purchaser decides to sell or rent the unit."

- [58] CCF alleges that it was later surreptitiously removed by the Doche parties, depriving Manor of the exclusive right to be the listing broker for future rentals and sales. At least 35 units were sold by Manor pursuant to Sale and Purchase Agreements that do not contain the exclusivity provision. In reliance on the improperly altered Sale and Purchase Agreement, ReMax (a related company of the Doche parties) has acted as broker for the subsequent rental and resale of MBTS condominiums and commissions were unlawfully paid to ReMax.

- [59] CCF contends that this is in breach of paragraph 8 of the Consent Order which required such activity to be authorised by a written agreement between Manor and Remax and approved by Manor's board of directors. Since at least 2013, Remax has been renting sold units in MBTS's completed buildings without any agreement with Manor or approval of Manor's board of directors. Even after the Consent Order, Remax has continued to rent out these units without authorization from Manor. CCF further alleges that Rafik Doche has been diverting business from Manor to his company, ReMax, which has been collecting approximately \$2,500 monthly per unit. None of this money has been accounted for or paid to the benefit of Manor.

[60] The Doche parties deny that they or any entities controlled by them, including ReMax, are in breach of paragraph 8 of the Consent Order by renting out any Manor by the Sea condominium units owned by Manor. They contend that the other units have been sold by Manor to various purchasers who are free to transact with them as they wish. Accordingly, they deny that Manor, CC&F and/or Denis Charest are entitled to any accounting of rents or other particulars in relation to units not owned by Manor.

[61] It is further said by the Doche parties that in the alternative, the order sought does not amount to enforcement of the Consent Order as the Consent Order did not require them and/or Remax to provide an accounting of rents and fees collected on behalf of the owners of the various units.

Discussion and findings re prayers 1(k), (l) and (m)

[62] If, as CCF contends, there is no exclusivity clause in the sale and purchase agreements of at least 35 units, then the owners of such units are under no obligation to engage Manor as the listing broker for future rentals and sales. They are free to engage any agent of their choosing. There can be no orders restricting their dealings with their property in the manner sought by CCF. Further, the findings of the auditor as it relates to sales commissions paid between 29th October 2009 and 31st December 2014 in respect of 35 units have already been discussed in this judgment. Accordingly, the orders sought at paragraphs 1(k), (l), (m) are refused.

Prayer 1(n) – Order for payment to Rene Fafard

[63] CCF seeks the following orders, purportedly pursuant to paragraphs 9 and 11 of the Consent Order:

“(n) that within seven (7) days of this Order, (i) Rafik Doche and Denis Charest authorize payments from Manor's RB Account of all outstanding salary and compensation owed to Rene Fafard pursuant to his employment contract passed by unanimous resolution on 4th April 2016, and (ii) Rafik Doche and Denis Charest continue to authorize payments from Manor's RB Account of salary and compensation due to Rene Fafard and employees involved with respect to the completion of construction of buildings in the MBTS identified as "Manor 5" and "Manor 6";

[64] CCF contends that Rene Fafard has been employed by Manor as Construction Manager since 1st July 2009. The Consent Order provided that Rafik Doche and Denis Charest would pass a board

resolution to employ Rene Fafard as Manager of Manor's factory and construction operations to complete construction on Manor 5 and Manor 6. Further, Manor would pay Mr Fafard a weekly salary of US\$1,000 and provide him with a company vehicle and fuel up to a value of US\$100 per week. On 4th April 2016, Rafik Doche and Denis Charest passed the said resolution but since in or around mid-April 2016, Rafik Doche has refused to pay Mr. Fafard's salary.

- [65] The Doche parties say that all operations of Manor ceased, and all of the employees were terminated in December 2014 by Charest. Since then, there has been no operations of Manor and no further workers were employed.

Discussion and conclusions re prayer 1(n)

- [66] The evidence that emerged after cross-examination of Denis Charest is that he terminated construction by Manor in December 2014. He admitted this. Further, the problem in moving the project forward after the Consent Order was entered and after the passing of the resolution of 4th April 2016 seems to be that the parties cannot agree and approve the budget for completion of buildings 5 and 6 of the Manor by the Sea Condominiums project. Fafard proposed a budget which was revised by Rafik Doche and resubmitted to the Charest parties for their consideration. There matters stalled. I do not read the Consent Order or resolution of 4th April 2016 as requiring payment to Fafard for work not actually done. Thus, the order sought at paragraph 1(n) is refused.

Prayer 1(o) - Order to facilitate resumption of Manor's Operations

- [67] Pursuant to paragraphs 9, 10 and 11 of the Consent Order, CCF seeks an Order that within seven (7) days of this Order, Rafik Doche and Denis Charest pass all necessary board resolutions, approve all budgets and take all necessary steps to resume construction of Manor 5 and Manor 6, and to ensure that Manor's construction projects and developments comply with all applicable laws.
- [68] These paragraphs of the Consent Order expressly contemplate that the parties would work together to complete construction of phases 5 and 6 of the Manor developments. CCF alleges that Manor has been unable to complete its planned construction of the MBTS development since it ceased operations because of the conduct of the Doche parties. It is said that there are a number of steps that will need to be taken before Manor can resume construction and complete the MBTS development but the parties cannot agree on what steps are required, let alone cooperate to take those steps. This situation makes it necessary to grant the order set out in paragraph 1(o).

[69] In his first affidavit in response, Rafik Doche asserts that paragraphs 9, 10 and 11 of the Consent Order do not speak to the resumption of construction. He describes the prayer sought at paragraph 1(o) as “another back door attempt to take steps to resume construction of Manor 5 and 6 which is not provided for”. He further stated that in any event, in April 2016, he provided a budget to CC&F for discussion. By letter dated 21st June 2016, CC&F responded to his budget proposal and ended by indicating that CC&F through Charest was ready to have a Board meeting and that a proposed agenda would be submitted for the Doche’s input. An agenda was never forwarded as promised and the parties did not meet. Subsequent requests by the Doche parties to convene a meeting went unanswered.

Discussion and conclusions re prayer 1(o)

[70] The contention by Rafik Doche that the resumption of construction is not addressed in either paragraphs 9, 10 or 11 of the Consent Order is erroneous. Paragraph 9 orders that:

“Rene Fafard be employed by Manor on the terms agreed upon by the board of directors to complete the construction of Buildings 5 and 6 of the Manor by The Sea Condominium project and that CC&F and D&D as shareholders in Manor, DC and RD as directors of Manor, VD as Vice President of Manor and Rene Fafard as signatory to the bank accounts of Manor cooperate fully, take all necessary action (in their respective capacities) pursuant to the Shareholders’ Agreement, and Manor’s Articles of Association, and consistent with the efficacy of operating a business, to facilitate the completion of the said construction.”

[71] The words underlined dispel any notion that the resumption of construction was not contemplated by the order. Further, it is no answer to the application to say that budget proposals were exchanged by the parties but a promised meeting never materialized. It bears remembering that a Consent Order, once “agreed upon between parties for the purpose of receiving the approval and being made subject of a Consent Order by the court, once they have been made the subject of the court order, no longer depend upon the agreement of the parties as the source from which their legal effect is derived. Their legal effect is derived from the court order. ...”⁶ Omrod L.J. reasoned: “If their legal effect is derived from the court order, it must follow ... that they must be treated as the order of the

court and dealt with, so far as possible in the same way as non- consensual orders.” Cited by Lanns J.⁴

- [72] In my view, responsibility rests equally with the Charest and Doche parties to ensure that this order is complied with. The order sought by CCF in this regard is properly to be regarded as seeking to enforce the Consent Order and is hereby granted, save that the time for compliance shall be 21 days from the date of this order.

Prayer 1 (p) – Order for accounting in relation to condominium /homeowners’ fees

- [73] Under this limb of the application CCF seeks the following orders:

“(p) pursuant to paragraphs 12 and 13 of the Consent Order, an Order that (i) an accounting be produced within fourteen (14) days of this Order for any and all condominium fees and/or purported Homeowners Association fees collected from tenants and/or owners of condo units in MBTS by or on behalf of Remax or any other party, and (ii) that any and all condominium fees and/or purported Homeowners Association fees collected from tenants and/or owners of condo units in MBTS be paid into Manor's RB Account”.

- [74] CCF asserts that Remax has been collecting so-called "Homeowners Association" or "HOA" fees in the amount of US\$400 per month per unit since at least 17th February 2012 even though no Homeowners Association has been established for the MBTS condominiums to date. They maintain that Remax has no entitlement to such fees.

Discussion and conclusions re prayer 1(p)

- [75] It is useful to call to mind the terms of paragraphs 12 and 13 of the Consent Order.

“12. All monies received from sales of Manor by the Sea condominium units shall continue to be deposited in the bank account of Manor held at The Bank of Nevis Limited and/or The Bank of Nova Scotia, Fort Street, Basseterre with notice of all deposits to be given to the Auditor.

“13. Any further sales commission and/or marketing fees payable to Remax, or any entity or person associated with and/or related to Remax, to be held in escrow in Manor's account, until the Parties resolve all issues in relation to the payment of such sales commissions,

and/or marketing fees. Payment out to Remax shall be subject to a determination of Remax's entitlement to such sales commissions. The parties shall in good faith attempt to resolve the issue of entitlement of Remax to charge sales commission on the sale of Manor condominium units. If the parties are unable to resolve the issue amicably, any one party may choose to submit the matter to mediation (via a mediator within the court mediation program) and the other party will be obliged to mediate the matter. If the parties are unable to resolve this issue via mediation, any party may apply to the court to resolve the issue."

[76] Paragraph 12 provides for the deposit of proceeds of sale of condominium units to be deposited into Manor's BON or BNS accounts. Paragraph 13 stipulates that after the Consent Order, any further sales commission and/or marketing fees payable to Remax, or any entity or person associated with and/or related to Remax, are to be held in escrow in Manor's account pending resolution by the parties of all issues related to payment of such sales commissions, and/or marketing fees. In default of amicable resolution, the parties shall resort to mediation.

[77] It is clear that nothing in these paragraphs provide for an accounting for any and all condominium fees and/or purported Homeowners Association fees collected nor for deposit into Manor's Republic Bank Account. They relate to sales commissions, sales fees and/or marketing fees payable to Remax and provide that these are to be held in escrow pending determination of Remax's entitlement to be paid same. Accordingly, the order as prayed at paragraph 1(p) is refused in so far as it seeks an accounting and deposit of funds into Manor's Republic Bank (RB) account.

[78] However, it is also equally clear that the parties have not been able to arrive at an amicable, good faith resolution of these vexed issues. By the terms of the Consent Order, they are required to resort to mediation as the measure of first resort. I will so order.

Prayers 2 & 3 - Order for appointment and payment of independent counsel for Manor.

[79] CCF seeks an order at prayer 2 that independent counsel be appointed by the Court to represent the interests of Manor, if Rafik Doche and Denis Charest cannot agree on counsel within fourteen (14) days of this Order. At prayer 3 they seek further to prayer 2 an Order directing that Rafik Doche and Denis Charest shall authorize payment of the accounts of Manor's counsel from Manor's RB Account within 30 days of receipt.

- [80] CCF submitted that the Consent Order required Rafik Doche and Denis Charest to pass a resolution that Manor engage an independent attorney to represent Manor's interests separate from the interests of its shareholders. After the resolution to appoint an attorney for Manor was passed on 4th April 2016, Adrian Scantlebury was retained to act for Manor. However, as early as 5th May 2016, Rafik Doche refused to authorize payment of Mr, Scantlebury's invoices. As a result, Mr. Scantlebury brought an application to be removed from the record as Manor's attorney. Manor has not been represented by counsel since at least April 2016. Ms. Chiesa submitted that given the contentious relationship between Manor's directors, Denis Charest and Rafik Doche, it is crucial that, as a separate legal entity, Manor's interests be protected. This would be achieved by the appointment of an independent attorney to represent Manor's interests.
- [81] The Doche parties say that there is no provision in the Consent Order that provides for the appointment of independent counsel. While it might be desirable and is included in the unanimous written resolution, the Consent Order does not provide for this. There is therefore no provision in the Consent Order relating to independent legal counsel to be enforced they submitted.

Discussion and findings re prayers 2 & 3

- [82] Paragraph 11 of the Consent Order stipulates that the Board of Directors of Manor shall at such meeting adopt the resolutions attached as Schedule A to the Consent Order. Schedule A provides, inter alia, at resolution 6:

"6. Attorney to represent the Company

No later than 3 business days after the date hereof, the Company to engage the services of an independent Attorney/Law Firm to represent its interest with such Attorney/Law Firm to be separate from the Attorneys representing its shareholders, CC&F Inc. and Doche & Doche Inc. or any shareholders, director, officer, employee or related party of such shareholders The Company shall provide such Attorney a copy of these resolutions and authorize the Attorney to take such steps as may be required to ensure compliance with the said solutions."

- [83] The effect of paragraph 11 and paragraph 6 of Schedule A is that the Consent Order imposed an obligation on the parties to appoint independent counsel to represent Manor's interest. Contrary to Mr. Doche's view, it is not merely desirable; it is mandatory. The parties clearly recognised this because the evidence establishes that on 4th April 2016 Denis Charest and Rafik Doche passed a

resolution appointing Mr. Adrian Scantlebury as Manor's counsel. However, this appointment was short-lived as the parties failed to reach agreement on his fees. He therefore withdrew as counsel. It does not appear that the parties made any effort to find a suitable replacement. This places them in breach of the Consent Order. The order sought by CCF at prayers 2 and 3 of the Notice of Application are aimed at giving effect to paragraph 11 and resolution 6 of Schedule A. They are accordingly granted.

Prayer 4 - Interlocutory Order for preservation of documents and information

- [84] The fourth prayer seeks an interim and interlocutory order that D&D, Victor Doche, Rafik Doche, SCC, Bank of Nevis and/or ReMax preserve all documents and information related to Manor and/or any loans taken out by Victor Doche and/or Rafik Doche purportedly in the name of Manor and/or the sale or rental of any properties owned by Manor;
- [85] It has to be borne in mind that paragraph 14 of the Consent Order stayed the matter except for the purpose of carrying the terms of the order into effect. It provided for the remedies for which the parties may move the court. It seems to me that an interlocutory order for preservation of documents is not caught by the terms of the Consent Order nor is it provided for in the available remedies. Accordingly, the order sought by prayer 4 is refused.

Conclusion

- [86] A reading of the auditor's report and the affidavits filed by the parties in this case show that all parties are in breach of clause 5 of the Consent Order which ordered CC&F, DC, D&D, VD and RD to submit "all documents in their respective possession, custody and control...." to the auditor. In the words of the auditor, "There appears to have been a serious violation of that order."
- [87] It seems plain that although the parties entered a Consent Order on 3rd February 2016, daggers were never sheathed. Within a short space of time terse and accusatory emails were being exchanged and already bad relations worsened. Meanwhile, Manor's "Manor by the Sea" development ground to a halt and languishes to this day while the protagonists dig their heels in and adopt recalcitrant postures on matters which require sober, level-headed, good- faith negotiations which seasoned businessmen should be capable of. Lamentably, six years on, the parties seem no closer to resolution. The parties should recall that they are signatories to a Consent Order in which they agreed

and were ordered to act in the best interests of Manor and to cooperate fully on matters designed to further that objective.

Disposition

[88] For the reasons discussed in this judgment, I make the following orders:

- (i) the orders sought at paragraphs 1 (a), (b),(c), (d), (e), (f), (g), (h), (i), (k), (l), (m), (n), (p); and 4 of the Notice of Application are refused;
- (ii) pursuant to paragraph 7 of the Consent Order, D&D, Victor Doche, Rafik Doche and/or SCC shall within 14 days of this order return or cause to be returned to the premises of Manor situate at Bird Rock the two concrete walls transport trailers which are the property of Manor;
- (iii) pursuant to paragraph 11 of the Consent Order, within twenty-one (21) days of this Order, Rafik Doche and Denis Charest shall pass all necessary board resolutions, approve all budgets and take all necessary steps to employ Rene Fafard on the terms agreed in the Consent Order and to resume construction of Manor 5 and Manor 6, and to ensure that Manor's construction projects and developments comply with all applicable laws;
- (iv) pursuant to paragraph 11 of the Consent Order, within fourteen (14) days of this order Rafik Doche and Denis Charest shall agree on independent counsel to represent the interests of Manor, failing which one will be appointed by the Court;
- (v) Further to order (iv) above, Rafik Doche and Denis Charest shall authorize payment of the accounts of Manor's counsel from Manor's BON account within 30 days of receipt.
- (vi) No order as to costs.

Trevor M. Ward QC
High Court Judge

By the Court

Registrar

