

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT VINCENT AND THE GRENADINES

SVGHCVAP2018/0010

BETWEEN:

MICHAEL PHILLIP ULLMANN

Appellant

and

[1] LARS G. ABRAHAMSSON

[2] LUMA LTD

Respondents

Before:

The Hon. Mr. Gerard St.C. Farara
The Hon. Mde. Margaret Price Findlay
The Hon. Mr. Sydney A. Bennett

Justice of Appeal [Ag.]
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Richard O. F. Williams for the Appellant
Ms. Ronnia R. Durham-Balcombe for the Respondents

2022: July 21;
December 16.

Civil appeal – Contract Law – Joint venture - Unsigned written agreement – Elements of a valid contract – Inadequate pleadings – Part 10 of the Civil Procedure Rules 2000 – Whether pleading of ‘consensus’ enough to establish a binding agreement - Whether the appellant established a binding agreement between the appellant and the first respondent – Whether first respondent was under a contractual duty to account to the appellant – Section 3 of Registration of Documents Act – Whether the judge ought to have made an order restoring the appellant to the Board of Directors of LUMA

The appellant, Michael Phillip Ullman, commenced a claim against the respondents Lars Abrahamsson (“the first respondent”) and LUMA LTD. (“LUMA”) by Fixed Date Claim Form (“FDCF”) seeking certain declarations and orders. At paragraph 4 of his statement of claim, the appellant pleaded that in 2007 he had several discussions with the first respondent in respect of a proposed joint venture investment project involving mainly the purchase and sale of real estate by participating in a land development programme organized by the Government of Saint Vincent and the Grenadines. It was the appellant’s pleaded case at paragraph 5, that in accordance with the said

discussions and negotiations the appellant and the first respondent arrived at a 'consensus which they reduced into writing in the form of an agreement dated 29th August 2007' ("the unsigned written agreement") or ("the written agreement"). The appellant also pleaded that 'the principal framework of the written agreement was that the appellant and the first respondent would establish a jointly owned limited liability company to be called 'LUMA LTD', to be based in Bequia in the State of Saint Vincent and the Grenadines', and to operate on the terms and conditions set out at sub-paragraphs (1) to (8) of paragraph 5 of the statement of claim. The said written agreement dated 29th August 2007, which was not signed, was exhibited and marked "M.P.U.1" to the affidavit of the appellant which was filed on the same day and accompanied the Fixed Date Claim Form and statement of claim. The unsigned written agreement contained terms and conditions concerning the ownership, purpose, capitalization, operation, and future split of profits of LUMA. It also contained provisions not pleaded by the appellant at paragraph 5 of the statement of claim as the terms and conditions of the alleged written agreement between the appellant and the first respondent.

The unsigned written agreement contained provisions relating, *inter alia*, to TERRA CARIBBEAN (a company incorporated in the Grenadines as CASA LTD) acting as the real estate agent when LUMA buys and sells real estate, the ownership of TERRA CARIBBEAN, and the investment by the first respondent of all commissions due to TERRA CARIBBEAN as equity in LUMA, and the release of the said commissions to TERRA CARIBBEAN 'when each project is completed, sold out and all money collected', less a retention by TERRA CARIBBEAN of 8% accrued interest on the commissions invested in LUMA. The unsigned written agreement also provided at paragraph 6 for GRECO LTD to 'administrate the operation of LUMA' and to be 'paid a sum which equals 2% on working invested capital', which sums were to be used by GRECO LTD 'to pay for rent of office, telephone, fax, internet services and other related expenses such as transportation and administration.' Paragraph 8 of the unsigned written agreement stipulated: 'Any profits, commissions and fees from the operation of LUMA LTD to [the first respondent] will be regulated in a separate agreement between LA [the first respondent] and TERRA CARIBBEAN/GRECO LTD.'

There was no pleaded case and no evidence was adduced at trial in relation to who drafted or prepared the unsigned written agreement, nor was any signed version produced during the proceedings or at the trial in the court below.

The appellant did not plead in his statement of claim any oral agreement between himself and the first respondent, nor were any particulars pleaded as to the discussions and negotiations between them in 2007 leading to the 'consensus'. The only evidence produced of the discussions prior to the alleged consensus and written agreement, was a two-page document sent by the first respondent to the appellant by email dated 21st August 2007. This document was said by the first respondent in his said email to be a 'general proposal' on how to proceed with the discussed joint venture, and invited the appellant's comments and inputs thereon. No evidence was led as to what, if any, response or comments or inputs the appellant may have made to the said proposal. LUMA was not a party to the said unsigned written agreement and the appellant did not plead how or under what circumstances LUMA became bound by the alleged agreement between himself and the first respondent. Likewise,

the entities TERRA CARIBBEAN/CASA LTD and GRECO LTD were not parties to the unsigned written agreement.

The appellant pleaded at paragraph 12 of the statement of claim, that 'in keeping with [his] undertaking to provide the working capital for LUMA', he had, between 7th September 2007 and 19th December 2007, transferred to the first respondent, in five unequal tranches, particulars of which were set out therein, the total sum of US\$ 570,473.00 (equivalent to EC\$ 1,553,545.51). At the trial no documentary or other evidence of these pleaded bank money transfers or of any such payments or transfers were put into evidence by the appellant. This was so even though the appellant had both at paragraph 12 of his statement of claim and at paragraph 13 of his affidavit filed 15th December 2014, stated or averred that he can provide details of the said money transfers in the event that the first respondent or anyone else is minded to dispute his figures.

The appellant also pleaded that pursuant to the terms of the alleged written agreement, the first respondent had a contractual obligation, as did LUMA, to account to him in relation to the joint venture, and in relation to two real estate transactions undertaken by LUMA, and to share the profit derived therefrom with him in accordance with the terms of the said contract. His case was that both the first respondent and LUMA had breached that obligation. The appellant also claimed that the first respondent has been guilty of oppressive conduct towards him, in that he and his wife had wrongfully removed the appellant from the Board of Directors of LUMA against his will, and that the first respondent and his wife have been operating LUMA without regard to the appellant's interests.

In their joint defence, the respondents admitted the main (or opening) part of paragraph 5 of the statement of claim that in accordance with the discussions and negotiations between the appellant and the first respondent in 2007 they 'arrived at a consensus which they reduced into writing in the form of the unsigned written agreement.' The respondents however pleaded that they had not seen a signed written agreement, but did not deny or admit having previously seen the unsigned written agreement.

The respondents also admitted at paragraph 28 of their joint defence, that the sums of money sent by the appellant 'represents part of the investment in [LUMA]', but did not admit to any of the specific sums or to the total sum pleaded by the appellant at paragraph 12 of the statement of claim. The respondents also pleaded in their joint defence that the appellant 'withdrew from his commitment to invest the initial funds and the project came to a stop several years ago.' The respondents also pleaded at paragraph 52 of the joint defence that in discussions between the first respondent and the appellant regarding the joint venture, the latter 'had no more interest in any investments in Saint Vincent and the Grenadines and agreed to accept a lump sum from his investment once the land is sold. Therefore, the first respondent removed him as a director of LUMA and if [the appellant] so wishes [the first respondent] can reinstate [the appellant] as a director but will at the same time remove [the first respondent] and his wife as directors.'

The learned judge identified three issues for consideration and determination. These were whether the first respondent or LUMA has breached the purported agreement between him/it and the

appellant; whether the first respondent and/or LUMA have operated in breach of a duty to account to the appellant for the financial management of LUMA; and to what relief is the appellant entitled.

The learned judge found that the unsigned written agreement cannot be accepted as a written agreement that is binding on the appellant or on LUMA, and that it will have limited evidentiary weight unless there is other evidence which collectively establish a prima facie case. The learned judge also found that while there was a valid offer and acceptance between the appellant and the first respondent, it is not clear what was actually offered and accepted, apart from a consensus to engage in a joint venture investment project for the purchase and re-sale of land through LUMA. The judge also found that the consideration for any such agreement is unclear, as is whether the first respondent intended to enter into legal relations. She concluded that the 'arrangement was seemingly so informal and unstructured as to appear to have been based on a changing paradigm.' Accordingly, the judge found that there was no valid and legally binding agreement between the appellant and the first respondent whether made in writing or made orally.

The learned judge also made no finding as the actual bank transfers by the appellant pleaded at paragraph 12 of the statement of claim, on the basis that there was no cogent evidence of such payments. The learned judge, however, was satisfied and did find as a fact, that the appellant had made some investments in unknown sums towards the joint venture project with the first respondent.

The learned judge also found that the unsigned written agreement was required to be registered pursuant to section 3 of the Registration of Documents Act. This was on the basis that clause 6 constituted GRECO LTD as an agent of LUMA to represent it and act on its behalf in the State of Saint Vincent and the Grenadines, and that the failure to register the said agreement renders it incapable of being admitted into evidence.

The learned judge held that there was no evidence that a contract existed between the appellant and LUMA from which the alleged obligations to account flowed. Accordingly, neither LUMA nor the first appellant was liable for breach of contract for failing to account to the appellant. However, the learned judge found that the appellant and all shareholders in LUMA have an interest in obtaining notices regarding shareholder meetings and accounting information which would be presented at such meetings.

The learned judge found that having been removed as director and deprived of notices of shareholders' meetings, the appellant has demonstrated that this is an appropriate case in which declaratory and injunctive relief should be granted. The learned judge however declined to make an order restoring the appellant to the Board of Directors of LUMA.

Dissatisfied with the decision of the learned judge, the appellant appealed against the judge's dismissal of the claims and orders at subparagraphs 4(a) to (d) of paragraph [116] of the judgment relying on nine grounds of appeal.

Held: dismissing the appeal against the dismissal orders at sub-paragraphs 4(c), (d) and (e) of paragraph [116] of the judgment below; allowing the appeal against the dismissal order at sub-

paragraphs 4 (a) of paragraph [116]; declaring that the removal of the appellant from the Board of Directors of LUMA was invalid, setting aside the removal, and declaring that the appellant is restored to the Board of Directors with immediate effect retroactive to the date of his purported removal; and ordering that the appellant pays 80% of the first and second respondent's cost of the appeal, such costs to be assessed, if not agreed within 21 days from the date of this judgment, that:

1. On any proper reading of the statement of claim, the appellant did not rely on the coming into existence of an oral agreement between himself and the first respondent. What was pleaded was that the appellant and the first respondent had reached a 'consensus' which they reduced into writing in the form of a written agreement. A 'consensus' is not in law the same as the coming into existence of a binding contract or agreement. A 'consensus' implies that during discussions and negotiations between two or more potential parties to a contract, they had reached some common ground or understanding of certain terms which could form the basis of a yet to be entered into binding agreement. Thus, the pleading in the statement of claim of a consensus is not a pleading of a binding contract or agreement. Likewise, a consensus is not and is very different in law from a pleading of an oral agreement coming into existence between the parties, unless the statement of claim goes on to give details of how and when the consensus became an oral agreement and what were its specific terms.
2. In this case, no properly pleaded oral agreement coming into existence between the appellant and the first respondent was relied on in the statement of claim, as a contractual basis or foundation upon which the claims against the first respondent and/or LUMA for breaches of contract and breach of obligation to account to the appellant, were based. This is clear since the appellant did not set out in the statement of claim the matters discussed or negotiated between himself and the first respondent which led, not just to a consensus, but more importantly, to a binding and enforceable oral agreement between the appellant and the first respondent. The appellant's case is that the agreement between himself and the first respondent was in writing as evinced by the unsigned written agreement. Likewise, there was no pleading that the alleged binding agreement was partly oral and partly in writing. In light of the appellant's pleaded case, the learned judge was correct to find that there was no properly pleaded or evinced written or oral agreement coming into existence between the appellant and the first respondent.

Wisniewski v Central Manchester Health Authority [1998] Lloyd's Rep Med 223 (unreported) applied; **Benham Ltd v Kythira Investments Ltd [2003] EWCA Civ 1794**. applied; **Gregory Gordon v Jacqueline Havener ANUHCVP2015/0030** (delivered 7th December 2017, unreported) considered.

3. It is trite that for a binding agreement to be created or to come into existence, there must be an offer capable of acceptance, an unequivocal acceptance of that offer, and consideration moving from the promisor to the promisee. In ascertaining whether a binding agreement was created, the court must find an intention to create legal relations. No such intention was made out on the evidence given by the appellant, and the first respondent and LUMA did not participate in the trial. There was no evidence given by the appellant as to the discussions and negotiations between himself and the first respondent in 2007. No evidence was led as to what were the precise terms of the consensus reached between them, the terms of which were reduced into writing in the form of the unsigned written agreement. Moreover, the performance of certain terms of the unsigned written agreement is stated to be dependent upon the coming into existence of other agreements with other related legal entities, namely, CASA LTD and GRECO LTD, neither of which were parties to the said unsigned written agreement. Furthermore, there was no evidence that the other agreements contemplated under the unsigned written agreement involving as parties either of these entities, were concluded with or between them. Accordingly, the provisions of the unsigned written agreement resemble, at best, an informal 'agreement' or an agreement to agree, and not a concluded and binding contract in law. For these reasons alone, no written contract came into existence between the appellant and the first respondent by virtue of the unsigned written agreement, and the learned judge was correct to so find.

Bodley v Cathy Louis et al SLUHCV2015/0172 and SLUHCV2018/0366 (delivered 17th February 2020, unreported) applied.

4. It is indisputable that LUMA was not a party to the alleged agreement between the appellant and the first respondent in 2007. Moreover, having regard to the finding that there was no oral or written contract in law between the appellant and the first respondent, it was impossible for LUMA to have been a party to or to become bound subsequently, in any way, by the said agreement and the alleged terms and conditions as set out in the unsigned written agreement or as pleaded by the appellant. Similarly, it cannot be said that the unsigned written agreement was a pre-incorporation contract which came into existence between the appellant and the first respondent as shareholders and promoters of LUMA, such that it subsequently binds LUMA, nor was there any such contract capable of being adopted by LUMA. Accordingly, section 16 of the Companies Act is not engaged. It also follows that no contractual obligation to account to the appellant binding on the first respondent and/or LUMA has been established. This aspect of the appellant's claim was misconceived and was rightly rejected by the learned judge.

Section 16 of the **Companies Act** Cap 143 of the Revised Laws of Saint Vincent and the Grenadines 2009 considered.

5. Section 3(b) of the **Registration of Documents Act** provides that Powers of Attorney and deeds of substitution thereunder empowering any person to represent and act for another person in St. Vincent and the Grenadines shall be registered. In this case, the learned judge set aside the order admitting the unsigned written agreement into evidence on the basis that clause 6 thereof purports to empower GRECO LTD to administer LUMA's operations, signifying that GRECO LTD is constituted as LUMA's agent to represent it and act on its behalf in the State of Saint Vincent and the Grenadines, and that the failure to register the said agreement renders it incapable of being admitted into evidence. By Clause 8 of the unsigned written agreement any profits, commissions and fees from the operation of LUMA will be regulated by a separate agreement between the first appellant, and TERRA CARIBBEAN (also known as CASA LTD)/GRECO LTD. This clause makes it clear that a separate agreement would be drawn up regulating any profits, commissions and fees due to the first respondent, as the majority shareholder in TERRA CARIBBEAN (CASA LTD) and GRECO LTD. However, the unsigned written agreement was not, by virtue of its clause 6, caught by section 3(b) of **The Registration of Documents Act** of Saint Vincent and the Grenadines. Clause 6 did not constitute GRECO LTD an agent of LUMA nor was it a power of attorney empowering GRECO LTD to act as agent for LUMA in the State of Saint Vincent and the Grenadines. Accordingly, this finding by the learned judge was erroneous for the reason that GRECO LTD is not a party to the unsigned written agreement and, accordingly, could not have been appointed as agent for LUMA thereunder; and, in any event, the said unsigned written agreement did not constitute in law either a Power of Attorney or a binding and enforceable contract.

Section 3 of the **Registration of Documents Act** Cap 132 of the Revised Laws of Saint Vincent and the Grenadines 2009 considered.

6. In their filed defence, a defendant must state which (if any) allegations in the claim form or statement of claim are (a) admitted; (b) denied; (c) neither admitted nor denied, because the defendant does not know whether they are true; and (d) the defendant wishes the claimant to prove. In this case, the first respondent, in breach of rule 10.5(3) of the CPR, did not admit nor deny receiving the wire transfers particularised by the appellant at paragraph 12 of the appellant's statement of claim. CPR 10.7 provides that the consequence of a failure to set out in the defence all the facts on which he or she relies to dispute the claim, is that the defendant may not at trial rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission or the parties agree.

Rules 10.5(3) and 10.7 of the **Civil Procedure Rules 2000** applied.

7. In circumstances where the respondents elected not to participate in the trial, it was open to the learned judge to draw such inferences adverse to the respondents as the circumstances required. However, this does not mean that the burden of proof which rests on the appellant during trial can be circumvented. The appellant was still obligated to produce sufficient cogent evidence of each wire transfer as to satisfy the judge that they were made by the appellant and in the particularised amounts. The appellant did not produce any documentary evidence of these transfers, and provided no explanation or any satisfactory explanation for not doing so. Accordingly, the learned judge did not err in finding that the appellant had failed to satisfy her as to each of the pleaded bank transfers sent by him to the first respondent as part of his investment in the capital of LUMA or in the joint venture.
8. The pleading at paragraph 52 of the defence is tantamount to an admission that the appellant was wrongfully removed as a director of LUMA by the first respondent, who, it is not disputed, had no power under the constitutional documents of LUMA or its By-Laws or under the **Companies Act**, to remove the appellant as a director. The appellant did not resign as a director, and there was no resolution of the shareholders removing him from the Board pursuant to paragraph 4.4 of the By-Laws. In these circumstances, the learned judge ought to have found that the appellant had been wrongfully removed as a director by the first respondent, that such removal was accordingly unlawful having been done in breach of the provisions of paragraph 4.4 of the By-Laws and sections 72 and 73 of the **Companies Act**, and was therefore invalid. Accordingly, the judge ought to have made a declaration that the appellant did not cease to be a director of LUMA, but remained continuously on the Board of Directors, entitled to notice of meetings of the Board and to copies of all documents, including company accounts, which are to be or were considered at any such meetings.

Sections 72 and 73 of the **Companies Act** Cap 143 of the Revised Laws of Saint Vincent and the Grenadines 2009 considered.

JUDGMENT

- [1] **FARARA JA [AG.]:** This is an appeal against the order at paragraph [116] (4) of the judgment of Henry J (“the learned judge”) dated 30th July 2018 in Civil Claim No. 239 of 2014 (“the Claim”). By the order at paragraph [116]4 the learned judge dismissed the appellant’s claims against the respondents (as defendants) for an order (a) restoring him to the Board of Directors of LUMA LTD (“LUMA”); (b) declaring that LUMA is a joint venture

real estate company with the main purpose of buying, developing and selling real estate in Bequia in the state of Saint Vincent and the Grenadines; (c) directing the first respondent, to cause LUMA's by-laws to be amended to require the signature of two directors (one being the appellant) to effect the execution of important documents by LUMA particularly those affecting property interests; (d) for the taking of accounts specifically to determine whether and if so what monies are contractually due to the appellant, pursuant to joint venture activities by the first respondent and LUMA, or for payment to him of sums deemed due to him on the taking of such accounts; and (e) damages.

- [2] However, the appellant was partially successful in the Claim. Accordingly, at subparagraphs 1 to 3 of paragraph 116 of the judgment, the learned judge (1) declared that the shareholding in LUMA consists of 100 ordinary shares with a nominal (or par) value of \$10,000.00, which shares are beneficially owned by the first respondent as to 51 % with a total nominal value of \$510,000.00, and by the appellant, as to 49% with a total nominal value of \$490,000.00; (2) ordered LUMA to retain, at its expense, a qualified accountant to prepare audited financial accounts for the period 1st January 2014 to 31st October 2018; and (3) enjoined LUMA from selling, disposing or otherwise alienating any of the unsold lots registered in the name of the said company by Deeds of Conveyance 4374 of 2007 and 1952 of 2008, without the leave of the court. This declaration and orders have not been appealed.

The Pledged Cases

- [3] The Claim was commenced by the appellant against the respondents by Fixed Date Claim Form ("FDCF") dated 2nd December 2014 and filed 15th December 2014. The Claim was brought (at least in part) pursuant to Part 41 of the **Civil Procedure Rules 2000** ("the CPR"). Part 41 deals with claims for an account and/or for some other relief which requires the taking of an account.

[4] By the FDCF, the appellant sought, as a shareholder of and investor in LUMA, the following reliefs:

- (i) a declaration that LUMA 'is a joint venture real estate company jointly owned by [the appellant] and [the first respondent], with the main purpose being to buy, develop and sell real estate in Bequia, St. Vincent and the Grenadines for profit';
- (ii) a declaration that the 100 issued shares in LUMA are beneficially owned as to 51% to the first respondent and 49% to the appellant;
- (iii) an order for taking such accounts 'as may be requisite in order to determine whether and if so what monies are contractually due to [the appellant] pursuant to the joint venture activities of the [first and second respondents], and consequential directions for the taking of those accounts';
- (iv) an order for the payment to [the appellant] of any sums found due to him upon the taking of such accounts;
- (v) an order restoring [the appellant] to the board of directors of LUMA;
- (vi) an order directing the [first respondent] to cause the by-laws of LUMA to be amended 'so as to require the signatures of two directors, one being [the appellant], to effect the execution by [LUMA] of important documents, particularly those affecting interests in the property' of LUMA;
- (vii) an injunction restraining LUMA 'from alienating any of the unsold lots without the specific authorisation of [the appellant], those lots being the lands described in Deed of Conveyance Number 4374 of 2007 and Deed of Conveyance Number 1952 of 2008;
- (viii) for damages;

(ix) further or other relief; and

(x) costs.

[5] At paragraph 4 of the statement of claim, the appellant pleaded that in 2007 he:

“... held several discussions with the [first respondent] in respect of a proposed joint venture investment project involving mainly (but not exclusively) dealing with real estate by participating in a land development programme organised by the Government of St. Vincent and the Grenadines acting through two State agencies. The [appellant] and the [first respondent] purposed to establish a joint venture which would purchase lands in Bequia from private individuals and from the state-owned National Properties Limited, the duly authorised agent for the state-owned International Airport Development Company Limited. The [appellant] and the [first respondent] agreed that they would develop and re-sell for profit the lands so acquired such profits to be apportioned between themselves as joint venture partners.”

[6] The main (or beginning) part of paragraph 5 of the statement of claim states:

“In accordance with their said discussions and negotiations, the [appellant] and the [first respondent] arrived at a consensus which they reduced into writing in the form of an Agreement dated the 29th day of August 2007. The principal framework of that written Agreement was that the [appellant] and the [first respondent] would establish a jointly owned limited liability company to be called LUMA the [second respondent], to be based in Bequia in the State of St. Vincent and the Grenadines, and to be operated on the following terms and conditions...”

[7] There then followed at paragraph 5, eight numbered sub-paragraphs setting out the appellant's particulars of the terms and conditions of the alleged ‘agreement’ or ‘consensus’ reached between himself and the first respondent with regard to the operation of LUMA. These are: -

“(1) The capital of [LUMA] would be represented by 100 ordinary shares: the [first respondent] would own 51 percent of the shares in [LUMA], and the [appellant] would own the remaining 49 percent of the shares.

(2) A company called CASA LTD, trading as TERRA CARIBBEAN (“CASA LTD”) and owned mainly between the [first respondent] (as to 51 percent

of the shares therein) and Tord Lindstedt (as to 30 percent of the shares therein), would act as the real estate agent in all real estate transactions involving [LUMA]. The entity CASA LTD would be paid a 5 percent commission on sales (unless otherwise agreed); the commission received would remain in [LUMA] as equity to be released when projects were finalised or upon the making of alternative arrangements. The [appellant] and the [first respondent] would have a clear plan and agreement for every contemplated land acquisition in advance of such acquisition.

- (3) (a) The initial equity in [LUMA] was agreed to have been based on mutual investments, as follows:
- (i) the [appellant] would invest a minimum of \$US 2 million of his own funds in the joint venture; and
 - (ii) the [appellant] would discuss with the [first respondent] the possibility of investing an additional investment of \$US 3 million from the [appellant's] UK based bank.
- (b) The [first respondent] would re-invest in [LUMA] his portion of the commissions which were expected to accrue through CASA LTD pursuant to paragraph (2) above.
- (c) Additionally, the [first respondent] would contribute his local knowledge and his ability to purchase real estate freely as a citizen of St. Vincent and the Grenadines.
- (d) Each land acquisition was to be agreed upon by the [appellant] and the [first respondent]; and the [appellant] would have the responsibility for making the final decision in respect of each land acquisition.
- (e) The [appellant's] initial capital investment in [LUMA] of US\$ 2 million would be deposited into an interest-bearing bank account controlled by the [appellant]. [LUMA] would have access to at least 5 percent of the capital (that is, US\$ 100,000.00) as working capital for deposits on potential deals, those funds to bear interest at the rate of interest prevailing in banks operating in St. Vincent and the Grenadines, and the investment funds to be readily available for disbursement as the opportunities would arise.
- (f) Deposits would be paid into the client account of the lawyer acting on behalf of [LUMA], to be paid out upon the execution of deeds of conveyance for lands purchased by [LUMA].

- (g) Deeds of Conveyance when finalised would be held by [LUMA's] lawyer in escrow.
 - (4) The [first respondent] would pay to the [appellant] accrued interest of 8 percent per annum when each acquired parcel of land was finally disposed of and all money would have been collected in respect of that transaction/project.
 - (5) The [first respondent] as the 51 percent shareholder in CASA LTD would invest as equity in [LUMA] all commissions received by CASA LTD from each real estate transaction. The entity CASA LTD would be entitled to its commissions at the end of each transaction/project, including the right to 8 percent accrued interest on the investment of its commissions in LUMA.
 - (6) The operations of LUMA would be managed by GRECO LTD, a limited liability company incorporated in St. Vincent and the Grenadines, with the [first respondent] as 51 percent shareholder therein and Tord Lindstedt as 30 percent shareholder therein, for a fee equal to 2 percent of the working invested capital of [LUMA]. The entity GRECO LTD would use that 2 percent fee to defray administrative expenses such as office rent, communications charges, services, transportation and the like.
 - (7) When the [appellant], the [first respondent], CASA LTD and GRECO LTD would have been paid the respective equity, accrued interest, administration fees and commissions in accordance with the terms of agreement set out above, and all other operating costs and expenses would have been fully discharged, the net profits would be apportioned between the [appellant] and the [first respondent] on a fifty-fifty basis.
 - (8) A separate written agreement would be drawn up to regulate the dealings between the [first respondent] and CASA LTD and GRECO LTD.
- [8] A copy of the (unsigned) agreement dated 29th August 2007 ("the unsigned written agreement") or ("the written agreement") pleaded at paragraph 5 of the statement of claim, is referenced at paragraph 6 as exhibited and marked "M.P.U.1" to the affidavit of the appellant (filed 15th December 2014) accompanying the statement of claim. This unsigned agreement is headed '**Agreement between Michael Ullmann and Lars Abrahamsson**'. It commences with these words:
- "This contract is set out between Lars Abrahamsson (LA) and Michael Ullmann (MU) regarding land acquisition, development and sales of real estate

properties in the company registered as LUMA in Bequia, St. Vincent and the Grenadines.”

- [9] There then follow eight numbered clauses which, though not in identical wording to the particulars of the terms and conditions pleaded at paragraph 5 of the statement of claim, are essentially, the same or very similar terms. Again, they all are stated to be concerned with the ownership, purpose, capitalisation and future split of profits of LUMA. It also contained provisions not pleaded by the appellant at paragraph 5 of the statement of claim as the terms and conditions of the alleged written agreement between the appellant and the first respondent. The unsigned written agreement contained provisions relating, *inter alia*, to the role of TERRA CARIBBEAN (a company incorporated in the Grenadines as CASA LTD) acting as the real estate agent when LUMA buys and sells real estate, the ownership of TERRA CARIBBEAN, and the investment by the first respondent of all commissions due to TERRA CARIBBEAN as equity in LUMA and the release of the said commissions to TERRA CARIBBEAN ‘when each project is completed, sold out and all money collected’, less a retention by TERRA CARIBBEAN of 8% accrued interest on the commissions invested in LUMA. The unsigned written agreement also provided for GRECO LTD to ‘administrate the operation of LUMA’ and to be ‘paid a sum which equals 2% on working invested capital’, which sums were to be used by GRECO LTD ‘to pay for rent of office, telephone, fax, internet services and other related expenses such as transportation and administration. Clause 8 of the unsigned written agreement stipulated: ‘Any profits, commissions and fees from the operation of LUMA LTD to [the first respondent] will be regulated in a separate agreement between [the first respondent] and TERRA CARIBBEAN/GRECO LTD.’ There was no evidence before the court below as to who drafted or prepared the unsigned written agreement, and no signed or executed version of that ‘agreement’ (or any other agreement) was produced during the disclosure stage of the proceedings or admitted into evidence at the trial. At paragraph 9 of his witness summary, the appellant states emphatically that the said written agreement ‘had not been signed by the parties’.

[10] Save as set out below, the appellant did not in his statement of claim plead any oral agreement between himself and the first respondent. He provided no particulars of the discussions and negotiations between them in 2007 leading to the 'consensus'. Likewise, there was no direct evidence from the appellant in his witness statement or otherwise as to the actual discussions and negotiations between himself and the first respondent in 2007. The only evidence as to what terms and conditions may have been the subject of such discussions and negotiations, is to be found in the document accompanying the first respondent's email sent 21st August 2007 to the appellant, which email and accompanying document are dealt with at paragraph [19] below. Additionally, at paragraph 7 of the statement of claim the appellant pleads:

"In the days leading up to their formal Agreement, the [appellant] had agreed with the First Defendant that he the [first respondent] should go ahead and have the company incorporated. The [first respondent] suggested, and the [appellant] agreed, that the [first respondent] would include his wife Margit Abrahamsson as a director of [LUMA], together with the [appellant] and the [first respondent] being the other directors. The [first respondent] signed the necessary incorporation documents as the Incorporator on 27th August 2007."

[11] At the end of the unsigned written agreement, appears the name of the two purported contracting parties, 'Michael Ullmann' and 'Lars Abrahamsson', with the date '2007-08-29' in print beneath each person's name. In the appellant's affidavit accompanying the FDCF, he averred, *inter alia*, that in 2007 he had several discussions with the first respondent "in respect of a joint venture investment project mainly (but not exclusively) dealing with real estate in a land development programme organized by the Government of St. Vincent and the Grenadines acting through two state agencies."¹ He also averred (para.6), that:

"In accordance with our said discussions and negotiations, Lars [the first respondent] and I arrived at a consensus which we reduced into writing in the form of an Agreement dated the 29th day of August 2007. The principal framework of that written Agreement was that Lars and I would establish a jointly owned limited liability company to be called LUMA...to be based in Bequia in the state of Saint Vincent and the Grenadines, and to operate on the following terms and conditions:"

¹ Para. 5 of the appellant's affidavit in support of FDCF.

(Again, there followed sub-paragraphs numbered (1) to (8) in identical terms to the eight numbered sub-paragraphs at paragraph 5 of the statement of claim.)

- [12] It is indisputable that LUMA was not a party to the said unsigned written agreement or document. Nevertheless, LUMA was sued as a co-defendant in the Claim, and certain of the reliefs sought by the appellant were against both the first respondent and LUMA. The appellant did not plead how or under what circumstances LUMA became bound by the alleged agreement between himself and the first respondent. There was no assertion in the statement of claim that LUMA had subsequently adopted the unsigned written agreement, or that by its subsequent conduct it must be considered to have treated itself as a party to and bound by the said agreement. There was no pleading to the effect that the said agreement was a pre-incorporation contract between the appellant and the first respondent as the promoters and only shareholders of LUMA, to which agreement LUMA subsequently become bound. Instead, the claim to an account is predicated upon LUMA, like the first respondent, being a party to the said agreement and thus 'contractually obliged' to account.

Paragraph 18 of the statement of claim states:

"18. The [appellant] is confident that (sic) the first/second [respondent] was/were contractually obliged to account to the [appellant] for those two transactions [relating to the purchase and sale of Lot 3 at Bequia by LUMA – paras. [14-17], and to share the profit with him in keeping with the terms of their contract. Neither the [first respondent] nor the [second respondent] has done so, which the [appellant] considers a flagrant breach of contract."

- [13] Also, at paragraph 35 the appellant asserts that from his 'own perspective', LUMA has failed to account to him for the use of the over half a million dollars which he invested in the said company.
- [14] In the appellant's witness summary (filed in the proceedings below on 22nd January 2016) he essentially restates what is pleaded in the statement of claim and averred in his affidavit filed with the statement of claim.

[15] In their joint defence (filed 29th July 2015 pursuant to the order of the learned judge dated 14th July 2015), the first and second respondents, at paragraph 4 in response to paragraph 4 of the statement of claim stated: ‘...in or about 2007 the [appellant] approached the [first respondent] and proposed to invest up to US\$5 million [in] various real estate acquisitions including the opportunity to but at a 20% discount land from National Properties Limited, which discount was given to citizens of St. Vincent and the Grenadines.’ At paragraph 5, the respondents admitted ‘the main paragraph 5’ of the statement of claim (set out at paragraph [6] above). The effect of this is that the first and second respondents admitted that in accordance with the discussions and negotiations between the appellant and the first respondent they ‘arrived at a consensus which they reduced into writing in the form of the 29th August 2007 agreement’. By this pleading, the respondents also admitted that the ‘principal framework’ of the said unsigned written agreement was as described by the appellant in the main paragraph 5 of the statement of claim, which is, that the appellant and the first respondent ‘would establish a jointly-owned limited liability company to be called LUMA...’ to be based in Bequia in St. Vincent and the Grenadines, and to be operated on certain terms and conditions. In their defence, the first and second respondents also admitted certain of the particulars of the terms and conditions of the ‘consensus’ or agreement pleaded at paragraph 5 of the statement of claim, and denied others. Specifically, the respondents admitted the matters stated at sub-paragraphs (1),(2),(3)(a),(c),(f)&(g); and (5),(6)&(7).²

[16] With regard to the unsigned written agreement, the respondents pleaded simply that they ‘have not seen a signed written agreement.’³ They did not deny or admit to having previously seen the unsigned written agreement, albeit they admitted that the ‘consensus’ reached between the appellant and the first respondent had been reduced into writing in the form of the said unsigned written agreement. Likewise, the first respondent did not admit to having signed the said written agreement, neither party produced a signed version in the

² Paras. 6 to 21 of the joint defence.

³ Para. 22 of the joint defence.

proceedings below, and the appellant's evidence was that it had never been signed by the parties. Moreover, the respondents did not expressly deny that the unsigned written agreement did not accurately set out all the terms and conditions of the 'consensus' reached between the appellant and the first respondent. This much can be gleaned from the fact that they denied certain of the particulars of the terms and conditions pleaded and relied on by the appellant in the statement of claim and in his witness statement.

[17] In their defence, the respondents admitted other parts of the statement of claim. They admitted paragraphs 7, 8, 9 (with an inconsequential exception), 10(1) to (5), 14 (in part), 15, 16 (in part), 20, 21 (in part), 22, 24 (in part), 25(in part), 26 (in part), 28, 29 (in part), 31, 33 (in part), 37 (in part to the extent at para. 53), 38 (in part), and 39 (in part). Several other averments in the statement of claim were in the defence either not admitted or the appellant was put to proof thereof.

[18] LUMA was incorporated as a limited liability company at the Commerce and Intellectual Property Office as Company No. 137 of 2007 on 29th August 2007, the same day as the printed date below the names of the appellant and first respondent in the unsigned written agreement . It is notable that the provisions of the opening paragraph and the first numbered paragraph of the unsigned written agreement, treat the company LUMA as if it had been incorporated and registered under the laws of St. Vincent and the Grenadines. The first meeting of the directors of LUMA was documented as held on 30th August 2007. These minutes show that the appellant attended or participated in the first meeting by telephone.⁴ At this meeting, the appellant, the first respondent, and the latter's wife (Margit Abrahamsson) were appointed its first directors, with the first respondent as chairman. Also at the first meeting, the first By-Laws of the company were adopted; and it was resolved to issue share certificate No. 1 for 51 shares in LUMA to the first respondent, and certificate No. 2 for 49 shares to the appellant. The first By-Laws of the company were exhibited as "M.P.U.6" to the affidavit of the appellant.

⁴ Para. 15 of the appellant's witness summary.

[19] Another document admitted into evidence at the trial is of some significance in the chronology of events as they unfolded between the appellant and the first respondent leading up to a 'consensus' being reached between them. This is an email headed 'Proposal for discussion' sent 21st August 2007 at 4:26 pm from the first respondent to the appellant. This email sets out 'a general proposal how to proceed with discussed JV'. It states:

'Michael,

Attached is a **general proposal** how to proceed with discussed JV. I have also attached a brief description what can be done at the Belmont lot (for discussion purposes) and a breakdown of potential rental income. (Emphasis mine)

I look forward to hear from you with comments and inputs and hopefully we can start our JV quite soon.'

[20] The 'general proposal' document referred to in and accompanying the said email, is a document on the letterhead of 'The Grenadine REAL ESTATE CO. LTD' and is headed 'Michael Ullmann General proposal – 21st of August 2007'. Its opening words are: 'L.A. and M.U. have discussed a **partnership** (called JV – Joint Venture in this text) related to Real estate investments in Bequia.' Although this proposal speaks to a 'partnership', it does go on to provide for a local company to be used as the vehicle to buy and invest in real estate in Bequia. The first numbered paragraph states in part: 'The purpose is to use a local company to buy and invest in real estate and by acting fast, efficient and receive proper discounts and avoid alien land holding expenses (7% on purchase price).'

[21] At paragraph 12 of the statement of claim, the appellant pleaded that 'in keeping with [his] undertaking to provide the working capital for LUMA', he had, between 7th September 2007 and 19th December 2007, transferred to the first respondent, in five unequal tranches particulars of which were set out therein, the total sum of US\$ 570,473.00 (equivalent to EC\$ 1,553,545.51). Included in this sum was the amount to cover total disbursements (for architectural, engineering, project management and legal fees) amounting to EC\$ 190,000.00 relating to expenditures 'principally to preparatory work on a condominium development which had reached a fairly advanced stage of planning.' The appellant also goes on to state:

“The [appellant] has particularised the foregoing transfers, together with disbursements of which I am aware in respect of architect’s fees, engineer’s fees, project manager’s fees and legal fees in tabulated form which is exhibited with the accompanying Affidavit of the [appellant], and which disbursements amount to **EC\$ 190,000.00** as far as the [appellant] is aware. Those expenditures relate principally to preparatory work on a condominium development which had reached advanced stage of planning. The [appellant] can provide details of the said money transfers in the event that the [first respondent] or anyone else is minded to dispute the [appellant’s] figures.”

- [22] In response to paragraph 12, the respondents admit to the appellant having sent certain sums of money as his investment in LUMA. Paragraph 28 of their defence states:

“28. Regarding paragraph 12 [t]he [first respondent] was not the administrative officer of the venture **but admits that sums sent from the [appellant] represents part of the investment in the Second Defendant [LUMA]**. The [appellant’s] estimates of the costs are not correct but the [first respondent] is now in Europe and have no access to actual costs until his return to St. Vincent and the Grenadines.”
(Emphasis mine)

- [23] This is a clear admission by the respondents that some moneys were sent by the appellant, albeit they did not admit to receiving the specific sums transferred or the total sum of US\$570,473.00 pleaded at paragraph 12 of the statement of claim. Paragraph 28 (above) is also an admission by the respondents that whatever sums were sent or transferred by the appellant to them ‘represents part of the investment’ in LUMA. This statement in the defence points, at minimum, to some binding ‘undertaking’ or commitment on the part of the appellant to make a monetary investment in LUMA or in the joint venture to be carried out by LUMA. In his reply, the appellant, at paragraph 16, states that he ‘is in a position to provide details of the said money transfers.’ However, the appellant did not produce during the disclosure stage of the proceedings or at the trial any documentary evidence of the pleaded transfers of money to the first respondent for investment in the operations of LUMA. This absence of documentary proof of money transfers was the subject of adverse comments and findings as to lack of proof by the learned judge in her judgment.

- [24] The appellant’s pleaded case of a duty to account to him owed by both the first respondent and LUMA, and their respective breaches of that duty, is set out at paragraphs 13, 18 and

35 of the statement of claim. At paragraph 13, the appellant pleads that pursuant to the terms of his agreement with the first respondent, the latter had 'obviously the contractual obligation', as indeed did LUMA, 'to keep [the appellant] fully informed of the accounts pertaining to their joint venture, in that the bottom line of their Agreement contemplated the making of mutual profit in terms of dollars and cents...' He also averred that the duty on the part of both respondents to account to him 'was and is therefore a fundamental aspect of their relationship, and the [appellant] had every expectation that the [first and second respondents] would have honoured their obligation to account to him for the financial management of [LUMA] and of the enterprise embarked upon by [LUMA] in the discharge of its mandates as a joint venture.'

[25] At paragraph 18, the appellant also pleaded that the respondents were 'contractually obliged to account' to him in relation to two real estate transactions undertaken by LUMA, and to share the profit with him in keeping with the terms of their contract. However, neither respondent had done so, leading to a 'flagrant breach of contract.' The first real estate transaction (pleaded at para.14) was the purchase of a parcel of land situate at Friendship in Bequia, comprising 23,482.9 square feet (Lot 3), from National Properties Limited, by Deed of Conveyance dated 27th November 2007 made between National Properties Limited (acting as the authorized Attorney on record for The International Airport Development Company Limited) and LUMA registered as Deed No. 59 of 2008. The second real estate transaction (pleaded at para. 16) was the sale of the said Lot 3 by LUMA by Deed of Conveyance dated 30th April 2008 registered as Deed No. 1891 of 2008 to Walter Charles Davidson for the sum of US\$ 200,000.00.

[26] At paragraphs 20 to 31 of the statement of claim, the appellant gave particulars of three other real estate transactions in Bequia undertaken by LUMA pursuant to the agreed upon joint venture. These relate respectively to Lot 17 at Friendship, the Belmont Lot, and the Park/Industry parcel. At paragraph 32, the appellant summarizes and provides a breakdown of the gross acquisition expenditure of EC\$ 1,619,510.32 in relation to all four lots (including

Lot 3) at Bequia; less the gross net proceeds/receipts of sale of Lots 3 and 17 totaling (by estimate) EC\$ 870,977.00; less estimated disbursements of EC\$ 190,000.00; leaving after applying his total investment of EC\$ 1,533,545.51, an estimated net profits on these real estate transactions of EC\$ 595,012.19 plus accrued interest on bank balances during the immediately preceding 5 to 7 years. Based upon these calculations, the appellant asserts (at para.35) that LUMA has failed to account to him 'for hundreds of thousands of Eastern Caribbean Dollars'; and that he has never received even as much as one dollar as a return on his investment.

[27] In response to the appellant's pleaded case at paragraphs 13, 18 and 35 of the statement of claim of a contractual duty to account, and breaches of that duty by both respondents, the respondents state in their defence as follows:

"Paragraph 13- they assert that the [first respondent] relied on the Managing Director Mr. Tord Lindstedt to produce accounts.; accounts were produced on several occasions but the appellant 'gave up his interest in the Joint Venture and was not in touch with [the] [first respondent] for a very long period."⁵

"Paragraph 18 – is not admitted. The [first respondent] reported on many occasions to the [appellant] the costs of the operation of the Second Defendant, no such thing was agreed that the profits should be split after each transaction, the purpose was to buy and sell properties and to build a development named Luma Lofts."⁶

"Paragraph 35 – The [first respondent] tried on several occasions to resolve the issue of the joint venture. Several years ago the [appellant] and the [first respondent] to accept a lump sum from his investments once the lots and the development was sold. The [appellant] seeks now to withdraw from the mutual agreement and filed this unnecessary claim."

[28] At paragraph 36 of the statement of claim, the appellant asserts that the first respondent has been guilty of 'oppressive conduct' towards him, in that he and his wife had removed the appellant from the Board of Directors of LUMA without his approval and certainly against his will; that the first respondent and his wife have been operating LUMA without regard to his (the appellant's) interest; and that he has not been given notice of shareholder meetings or

⁵ Para. 29 of the joint defence.

⁶ Para. 34 of the joint defence.

notice of meetings of the Board of Directors. In response thereto, the respondents deny paragraph 36 and state that upon several discussions had between the appellant and the first respondent, it was 'agreed that [the appellant] had no more interest in any investments in St. Vincent and the Grenadines and agreed to accept a lump sum from his investment once the land is sold. Therefore, the [first respondent] removed him as a director and if the [appellant] wishes the [first respondent] can reinstate the [appellant] as a director but will at the same time remove the [first respondent] and his wife as directors.'

- [29] A witness summary under the signature of the first respondent was filed in the proceedings below on 19th May 2016. In that witness summary, the first respondent did not address, and there is no mention therein, of the 'consensus' reached between himself and the appellant, or what was the terms and conditions of the consensus reached between himself and the appellant with regard to the joint venture and/or LUMA. What the first respondent does state (in pertinent part) therein is the following:

"16. I do not have nor did I ever have any intentions not to honour the mutual agreement to pay him US\$380 000.00 once the properties were sold..."

...

"20. If MU had honoured his commitment to invest US\$2 million we could have done well with [the] development project as I had already presold 3 units. Instead we lost the profits we did on the sale of the lots bought from National Properties by spending it on the development which was a shame."

"21. I am disappointed that MU withdrawn his commitment from the investment as we had a good investment going and I am firm in my belief that MU withdraw with an excuse that is not the real truth of his financial status at the time."

Judgment in the Court below

- [30] After a trial in May 2018, the learned judge gave judgment in which the appellant succeeded on part of his claim against LUMA, and made an award of costs against the said company.

However, the first respondent took no active part in the trial of the Claim and, accordingly, the learned judge held that he was not entitled to recover his costs.⁷

[31] The judge identified three issues for consideration and determination. These were whether:

(1) the [first respondent] or LUMA has breached the purported agreement between him/it and [the appellant]?;

(2) the [first respondent] and/or LUMA have operated in breach of a duty to account to the [appellant] for the financial management of LUMA?; and

(3) to what relief is the appellant entitled?

[32] In the section of the judgment dealing with 'preliminary observations', the learned judge noted that in the joint defence the first respondent admitted that 'he and [the appellant] held discussions about embarking on a joint venture investment project.' However, the first respondent and LUMA denied they were liable to the appellant for breach of contract or that they had a duty to account to him. The judge observed: '[the first respondent] and LUMA ... filed no affidavits, witness statements or witness summaries.'⁸ This was not entirely accurate, since, as mentioned above, the first respondent, did file a witness statement in the proceedings below. The judge also observed that neither Mr. Joseph Delves -legal practitioner on record for the respondents- or the first respondent 'attended or participated in the trial;'⁹ and the court proceeded with the trial in their absence pursuant to CPR 39.4(b).¹⁰

[33] In considering issue 1, the learned judge observed:¹¹

"[The appellant's] case is that the agreement between him and [the first respondent] was in writing. In the absence of a signed contract or written memorandum signed by [the first respondent], the [unsigned written agreement] ... cannot be accepted

⁷ Para. [114] of the judgment of Henry J.

⁸ Para. [16] of the judgment of Henry J.

⁹ Para [17] of the judgment of Henry J.

¹⁰ Para.[18] of the judgment of Henry J.

¹¹ Para. [31] of the Judgment of Henry J.

as a written agreement that is binding on [the first respondent] or on LUMA... It will have limited evidentiary weight, unless there is other evidence which collectively establish a *prima facie* case. In this regard any reliance by [the appellant] on its contents to establish any fact would be of limited benefit to him unless he has presented independent material and related evidence which established those facts on a balance of probabilities, or unless LUMA...and/or the first respondent admit them in their pleadings.”

- [34] The learned judge considered the appellant’s lack of proof of the averment at paragraph 12 of the statement of claim, that he had, in keeping with his undertaking in the consensual agreement reached with the first respondent, provided working capital for LUMA and had, in fact, transferred the total sum of US\$570,473.00 to the first respondent between 7th September 2007 and 19th December 2007 in five tranches. The learned judge made the following finding at paragraph [49]:

“I am unable to find merely on his say so that [the appellant] transferred the amounts alleged. That is not how the Court operates. It would be remarkable if it did. The Court requires cogent testimony of such payments. In their absence, I make no finding that [the appellant] made those money transfers to LUMA or to [the first respondent].”

- [35] With regard to whether LUMA was bound by the terms of the unsigned written agreement negotiated and agreed by the appellant and the first respondent, and which was at the heart of the appellant’s claim in the proceedings, the learned judge concluded:

“[51] [The appellant] did not make any submissions regarding how LUMA became contractually bound under a contract to which it was not a party. Apart from producing the unsigned agreement [the appellant] did not indicate what was the nature of the contractual agreement between [the first respondent] and him. It is not clear if he is relying on a partly written and partly oral agreement or otherwise. He has relied throughout on a written agreement between him and [the first respondent] but he has not made a certified copy of that written agreement available for the Court’s review and evaluation.”

- [36] Having set out and considered the terms of the unsigned written agreement between the appellant and the first respondent, the learned judge considered that the provisions of clause 6, which purports to empower GRECO LTD to administer LUMA’s operations, ‘signifies that GREGO is constituted as LUMA’s agent to represent it and act on its behalf in [Saint Vincent

and the Grenadines]. Based on this deduction, the learned judge went on to make a conclusion of law, which conclusion, counsel for the respondents Ms. Durham-Balcombe, in her oral submissions before this Court, conceded was wrong in law and cannot be sustained. This conclusion was:

“[54] ...Such an agreement must be registered pursuant to section 3 of the Registration of Documents Act. This agreement appears not to have been registered. That failure renders it incapable of being admitted into evidence. In the circumstances, I set aside the order admitting this document into evidence.”

[37] The learned judge also concluded that even if the said agreement was ‘viable for the purpose of being admitted into evidence’, it is ‘legally problematic in a number of respects’, including that it is unsigned or was never signed, as admitted by the appellant, and the document itself introduced certain ‘inconsistencies’ in the testimony of the appellant, which inconsistencies he has not addressed.¹² The judge concluded on this aspect: ‘These omissions create a lacunae in [the appellant’s] testimony which cannot be supplied through inference.’ Certain of these omissions relative to ‘banking information and documentation regarding financial transactions, including money transfers’, the judge characterized as ‘capricious’. She concluded that these types of omissions ‘places the Court in the embarrassing position of deciding on the one hand, whether to ignore rules of evidence and the many laws and regulations aimed at eradicating laxity in the financial arena, particularly in relation to large money transactions, or finding on the other hand that [the appellant’s] oral testimony is insufficient to establish the fact of the transfers and the amounts.’¹³ The learned judge went on to state that ‘where [the first respondent] and LUMA have acknowledged monetary contributions by [the appellant] towards the joint venture project, the Court is prepared to act on those, but not otherwise.’¹⁴

[38] The learned judge concluded that, in the absence of documentary evidence of the wire transfers particularised at paragraph 12 of the defence, the proof that the appellant had

¹² Para. [55] of the judgment of Henry J.

¹³ Para. [56] of the judgment of Henry J.

¹⁴ Para. [58] of the judgment of Henry J.

indeed made the pleaded money transfers to the first respondent or LUMA was unsatisfactory, and did not meet the requisite standard of proof on a balance of probabilities. However, the learned judge was satisfied, and did find as a fact, that the appellant had made some investments in unknown sums towards the joint venture project with the first respondent. Paragraph [59] states:

“[59] ...Taking all the evidence into account I am not satisfied that [the appellant] has established that he transferred a total of [EC]\$1,533,545.51 to [the first respondent]. The agreement in draft imposes no obligation on him to do so. There is not adequate proof that he did. I accept that he made monies available for capital investment in LUMA ... I cannot be sure of the amount or to whom the monies were transferred. I am satisfied and to find that he made investments by providing an unknown sum of money towards the joint venture project with [the first respondent].”

[39] As to whether a valid and binding contract had come into existence between the appellant and the first respondent, the learned judge reasoned that:¹⁵

“... there was a valid offer and acceptance in this case, but it is not clear what was actually offered and accepted, apart from the consensus to engage in a joint venture investment project for the purchase and re-sale of land through LUMA ...The consideration is unclear as is whether [the first respondent] intended to enter into legal relations. The arrangement was seemingly so informal and unstructured as to appear to have been based on a changing paradigm. That would not meet the requirements of a valid and legally binding agreement.”

[40] At paragraph [62], the learned judge addressed the question of whether the appellant had established the existence of either a verbal or written contract with the first respondent on the terms and conditions averred by the appellant in his pleadings and evidence. She posited:

“He [the appellant] appears thereby to be relying on the existence of a verbal contract although none was expressly pleaded. There is inadequate evidence of a signed written or oral contract which created such obligations between [the first respondent] and [the appellant]. I am unable to find that a written contract exists between them I make no such finding. I also make no finding that an oral contract existed between [the appellant] and [the first respondent]. There is no assertion that there was.”

¹⁵ Para. [61] of the judgment of Henry J.

[41] And finally on this issue, the learned judge held that no valid and enforceable contract came into existence between the appellant and the first respondent or the appellant and LUMA:

“[63] There is no allegation that the contract was in any other form. I am unable to understand exactly what is being alleged in terms of the form of the contract. I am not at liberty to supply those details. I refrain from doing so. I find therefore that no valid contract existed between [the appellant] and [the first respondent]. [The first respondent] has not breached the purported agreement between him and [the appellant]. The earlier finding in respect of LUMA ... is supported by the applicable law and further reasons provided immediately above. For completeness, I repeat that I find that LUMA ... has not breached the purported agreement between it and [the appellant].”

[42] As to the second issue posited by the learned judge – whether there was a duty on the part of the first respondent and/or LUMA to account to the appellant for the financial management of LUMA, the learned judge looked at this from the position of both a contractual and implied statutory duty. She concluded that the appellant has ‘failed to indicate how this duty arose’, whether it arose as a matter of contract or, perhaps, a statutory duty.¹⁶ The learned judge considered the appellant’s evidence, in some detail, regarding the alleged failure by the first respondent and/or LUMA to produce any accounts to him as a shareholder of LUMA, whether as to commissions received or re-invested in LUMA, or an accounting as to the various real estate transactions undertaken by LUMA; and the alleged ‘flagrant’ breach of contract by the first respondent and/or LUMA in failing to do so. The appellant testified that he had provided the funds to LUMA for the purchase of four parcels of land -two of which have been sold. However, the learned judge found (at para.[75]) that he had not supplied any ‘documentary or verifiable proof that he delivered the funds to [the first respondent] or an officer of LUMA ... as alleged. He filed no written submissions on that issue. It is not clear from his evidence how the funds were transferred and became part of LUMA’s...capital. I accept that he invested considerable amounts in that company as working capital.’

[43] The learned judge also considered and analysed the appellant’s evidence as to certain other transactions undertaken by LUMA with respect to its agreed mandate and purposes, his

¹⁶ Para. [64] of the judgment of Henry J.

reference to other transactions allegedly undertaken by the first respondent and LUMA pursuant to the joint venture enterprise, and his estimate as to expenditures and profit on each transaction. At paragraph [79], the learned judge states: '[The first respondent] and LUMA admitted that the funds to purchase those properties were provided by [the appellant] and that his calculations are likely to be close to the actual amounts. I therefore find that they are.'

- [44] The learned judge considered the admission in the joint defence of the first respondent and LUMA that the agreement between the appellant and the first respondent provided for a 50/50 apportionment of the net profits, which sum would arise from their 'joint enterprise in respect to each transaction' after payment of equity, accrued interest, administration fees, and commissions to them and to CASA LTD and GRECO LTD respectively, pursuant to the contract'.¹⁷ At paragraph [86] the learned judge made this finding:

"[86] I accept [the appellant's] testimony that [the first respondent] has failed to account to him for how those funds were disbursed. I make no finding that [the first respondent] has thereby breached a contract with [the appellant] by not accounting to him for those monies. There is no sufficient evidence of such a contract. LUMA ... was under no such contractual obligation to [the appellant]. I therefore make no finding of breach of contract by it."

- [45] On the question of an implied claim as to breach of statutory duty, the learned judge considered the hallmark principle of company law that a company is a separate and distinct legal entity from its incorporators.¹⁸ She also considered the types of statutory duties imposed on directors of companies by the **Companies Act**,¹⁹ the appellant's status as a minority shareholder in LUMA, and the practical and legal consequences which flow from that status; the protections which the Companies Act affords to minority shareholders; and the well-known rule in **Foss v Harbottle**²⁰ providing for the right of a company to initiate court action in its name in relation to certain claims, and there being no corresponding right

¹⁷ Para.[85] of the judgment of Henry J.

¹⁸ *Salomon v A Salomon & Co Ltd* (1897) AC 22.

¹⁹ CAP 143, Revised Laws of Saint Vincent and the Grenadines 2009.

²⁰ (1843) 2 Hare 461.

in a shareholder to do so, except through the prism of a derivative action in the company's name. The judge also noted that the appellant has not alleged or pleaded any breach of the By-Laws of LUMA's or any of its internal regulations, upon which the court could grant some relief.

[46] However, the learned judge accepted the appellant's 'averments that he had not been given notices of meetings' of shareholders of LUMA, concluding that he is entitled to be notified of all meetings of shareholders, unless he waived such right.²¹

[47] At paragraphs [104] and [105], the learned judge makes the following conclusion on issue 2:

"[104] Having regard to the company law principles outlined earlier, there is no evidence that a contract existed between [the appellant] and [LUMA] from which the alleged obligations flowed. [LUMA] is not liable to [the appellant] for breach of contract in respect of the alleged failure to account to him for the two referenced transactions. Neither is [the first respondent].

[105] Applying the same principles, it seems clear that [the appellant] and all shareholders in [LUMA] have an interest in obtaining notices regarding shareholder meetings and accounting information which would usually be presented at such meetings. I am satisfied that [the appellant] has been denied such information. [LUMA] has a statutory duty to provide such information. It has failed to honour that obligation."

[48] Specifically regarding the first respondent's liability for failing to issue notices of shareholder meetings, the learned judge, while concluding that he did have such a responsibility which he had failed to discharge to the appellant as the other shareholder in LUMA, found that he was not liable to the appellant for such failure or breach of duty, statutory or otherwise, since clause 10 of the By-Laws of LUMA provides for directors to be indemnified by LUMA for any such liability, and that he [the first respondent] 'is absolved from responsibility for any acts done by [LUMA].²²

²¹ Para. [96] of the judgment of Henry J.

²² Para [106] of the judgment of Henry J.

[49] With regard to issue 3 -what relief is the appellant entitled to - the learned judge concluded that, in light of her findings on liability, damages is not an appropriate remedy. She reasoned that the appellant's 'investment appeared to be by way of payment for shares and also through contribution to the company's capital', in which instances the funds become the property of LUMA to be dealt with in accordance with decisions taken by its management team, including the directors.²³ Accordingly, the appellant loses all proprietary interest in such monies once they are converted to and become part of LUMA's property. His investment in the company is represented by his shareholding or shares in LUMA, thereby entitling him to an accounting at meetings of shareholders. Accordingly, the learned judge concluded that 'Having been removed as director and been deprived of notices of shareholders' meetings, I am satisfied that [the appellant] has demonstrated that this is an appropriate case in which declaratory and injunctive relief should be granted.'²⁴ Accordingly, the learned judge made the orders at sub-paragraphs 2 and 3 (mentioned above) of paragraph [116] appointing a qualified accountant to prepare audited financial accounts for the period 1st January 2014 to 31st October 2018; and restraining LUMA from selling, disposing of or otherwise alienating certain unsold lots.

[50] However, the judge declined to make an order restoring the appellant to the Board of Directors of LUMA; or directing amendments to the By-Laws of the said company so as to require the signature of two directors, one of which must be the appellant, on the execution, on behalf of LUMA, of all important documents, 'as I consider such action to be an unnecessary over-reaching by the Court in the company's internal management.'²⁵ Likewise, the learned judge declined to make a declaration that LUMA is a joint venture real estate company with the main purpose of buying, selling, developing and selling (sic) real estate in Bequia in Saint Vincent and the Grenadines, on the basis that such matters would be

²³ Para. [107] of the judgment of Henry J.

²⁴ Para.[108] of the judgment of Henry J.

²⁵ Para.[111] of the judgment of Henry J.

adequately addressed in the incorporation and other company documents, and it is unnecessary 'to make an order to state the obvious.'²⁶

[51] The learned judge also declined to make an order for the taking of an account 'specifically to determine whether and if so what monies are contractually due to [the appellant] pursuant to the joint venture activities of [the first and second respondents]'; or an order for payment of any monies found due to the appellant, since the appellant had failed to prove that either of them were contractually indebted to him in respect of such activities.²⁷

[52] Finally, on the issue of damages, the learned judge concluded that the appellant's claim was 'misconstrued. Such a remedy is not available to him based on the findings.' His damages claim was accordingly dismissed.²⁸

Grounds of Appeal

[53] In his notice of appeal, the appellant challenges the judge's findings of fact and law at paragraphs 21,22,31,49,54,55,56,59,62,86,96,104,105,106,108 and 111 of the judgment. He seeks an order setting aside the judge's orders at paragraph [116] 4 and for this Court to make certain declarations and an order for damages to be assessed for breach of contract. The appellant relies on nine grounds of appeal. The issues raised by these grounds may be restated as follows:

- (1) Whether the learned judge erred in not finding, on the pleadings and evidence, that a binding oral agreement came into existence between the appellant and the first respondent the terms of which was reduced into writing in the form of the unsigned written agreement;
- (2) If so, were the terms and conditions of the said oral agreement those set out in the unsigned written agreement;

²⁶ Para. [112] of the judgment of Henry J.

²⁷ Para.[113] of the judgment of Henry J.

²⁸ Para.[114] of the judgment of Henry J.

- (3) Whether the learned judge erred in not finding that the first respondent had breached the terms of the said agreement;
- (4) If a binding agreement existed between the appellant and the first respondent in the terms and conditions of the unsigned written agreement, whether LUMA was or became bound by the said pre-incorporation agreement made by and between the appellant and the first respondent as the principals, promoters and shareholders of LUMA;
- (5) Whether pursuant to the terms of the said agreement, the first respondent and/or LUMA were under a contractual or other legal obligation to account to the appellant for the operations and real estate transactions of the joint venture undertaken by LUMA, including the purchase and sale of lots 3, 17, the Belmont parcel, and the Park/Industry parcel situate at Bequia in St. Vincent and the Grenadines;
- (6) Whether the learned judge erred in setting aside the order admitting the unsigned written agreement into evidence on the basis that such an agreement must be registered pursuant to section 3 of **The Registration of Documents Act**;²⁹
- (7) Whether the learned judge erred in finding that the unsigned agreement purported to be a power of attorney and was required to be registered pursuant to section 3 of **The Registration of Documents Act**;
- (8) Whether the learned judge erred in not finding that the appellant had established, on a balance of probabilities, that he had made the money transfers to the first respondent, as part of his investment in LUMA, particulars of which were provided at paragraph 12 of the statement of claim;
- (9) Whether the learned judge erred in not concluding that the mandatory provisions of the **Companies Act** for the appointment and termination of directors rendered

²⁹ CAP 132 of the Revised Laws of Saint Vincent and the Grenadines 2009.

the appellant's removal from the Board of Directors of LUMA unlawful and a nullity, and in not making an order returning him to its Board of Directors.

- [54] Issues 1,2,3, and 4 above may conveniently be dealt with together. I will then turn to issue 5. Issues 6 and 7 will be dealt with together; and then issues 8 and 9.

Issues 1,2,3 and 4

- [55] The learned judge concluded that the appellant's case being that the agreement between himself and the first respondent was in writing, and having not produced a signed contract or memorandum between them, the unsigned written agreement cannot be accepted as a written agreement that is binding on the first respondent, or on LUMA. The judge posited that the unsigned written agreement would have limited evidential weight, 'unless there is other evidence which collectively establish a *prima facie* case. In this regard, any reliance by [the appellant] on its contents to establish any fact would be of limited benefit to him unless he has presented independent, material and related evidence which establishes those facts on a balance of probabilities, or unless [LUMA] and/or [the first respondent] admit them in their pleadings.'³⁰ This conclusion by the learned judge at paragraph [31], is based upon the learned judge's understanding of the appellant's claim as pleaded in the statement of claim for certain reliefs, which case is based solely on the coming into existence of a written contract between himself and the first respondent. It was not the judge's discernment that the appellant's claim as pleaded was based on an oral agreement reached in 2007 between himself and the first respondent, or partly oral and partly in writing, the terms of which were reduced into writing in the form of the unsigned written agreement. This notwithstanding, the learned judge did go on to examine whether any oral agreement had been established to the requisite standard in a civil case.

- [56] Having examined the pleaded cases and the evidence of the appellant at trial concerning the coming into existence of a binding agreement between himself and the first respondent,

³⁰ Para.[31] of the judgment of Henry J.

the learned judge concluded: 'It appears there was [a] valid offer and an acceptance, but it is unclear as to what was actually offered and accepted, apart from the consensus to engage in a joint venture investment project for the purchase and re-sale of land through [LUMA].'³¹ As to the requirement for 'consideration', the judge concluded that it is unclear whether the first respondent intended to enter into legal relations with the appellant; 'the arrangements were so informal and unstructured as to appear to be based on a changing paradigm'; and would, therefore, not meet the requirements of a valid and legally binding agreement. The judge also found that the pleadings and evidence did not establish that an oral contract had come into existence between these two parties, which claim the judge observed was not expressly pleaded by the appellant. Accordingly, she concluded on this central issue that no valid contract existed between the appellant and the first respondent.³²

- [57] As to the claim against LUMA, the learned judge held that LUMA was not a party to the alleged agreement between the appellant and the first respondent; and that the appellant had pointed to no agreement or exceptional circumstances which would render LUMA obligated to perform any duties or actions under a contract to which it was not a party. Accordingly, LUMA was not liable for any alleged breach of the contract relied on by the appellant as the 'central contract' in his claim.³³

Appellant's Submissions - Issues 1,2,3 and 4

- [58] These four issues are the main planks of the appellant's appeal. They concern the very foundation of the appellant's pleaded case. They concern whether the appellant relied in his pleadings on the existence of an oral or written, or partly oral and partly written, contract coming into existence between himself and the first respondent; and, if so, whether LUMA became bound by the alleged agreement. It is the appellants' primary submissions on these issues that the respondents, having in their defence admitted that a 'consensus' had been reached between the appellant and the first respondent, the terms of which agreement was

³¹ Para.[61] of the judgment of Henry J.

³² Para.[63] of the judgment of Henry J.

³³ Para.[21] of the judgment of Henry J.

reduced into writing in the form of the unsigned written agreement, the learned judge erred in not finding that a valid oral contract existed between the appellant and the first respondent as evinced by the terms of the unsigned written agreement. This, the appellant submits, is borne out by the pleadings and the evidence at trial in the witness summary and affidavit of the appellant. He argues that it is obvious from the statement of claim that the agreement between himself and the first respondent was oral (parol) in nature, since neither party asserted that the agreement reached between them was to be signed in order for it to be binding on them respectively. In this respect the appellant places much reliance on paragraph 5 of the statement of claim, and the response thereto and admission by the respondents at paragraph 5 of their defence. He also relies on paragraph 7 of his witness summary, placing much emphasis on the words 'discussions and negotiations', 'arrived at a consensus', and 'which was reduced into writing in the form of an Agreement dated 29th day of August 2007', to which pleaded facts the respondents admitted in their defence.

- [59] As to the actual terms of the alleged 'agreement', the appellant relies, in particular, on subparagraphs (1) to (8) of paragraph 5 of the statement of claim, paragraphs 8 and 9 of his witness summary, paragraph 6 of his affidavit, and on the 14 exhibits filed in support of the FDCF. Additionally, the appellant contends that the first respondent has never denied that he and the appellant came to an agreement. To the contrary, he explicitly admitted that they did. This admission at paragraph 5 of the defence to the main paragraph 5 of the statement of claim is, it is submitted by the appellant, an admission to an oral agreement reached between the appellant and the first respondent. He also points to paragraph 1 of his witness summary of the first respondent, at which, *inter alia*, it is admitted that he and the appellant entered into discussions on how to proceed with the appellant's stated interest to invest money in the real estate market in Bequia, 'which resulted in an agreement.' In this context, reference was also made to paragraph 20 of the defence by which the respondents admitted 'The mutual agreement stated that the future profits would be split but the [appellant] withdrew his interest before the capital was invested and before the development project Luma Lofts was [sic] even started.'

[60] In summary, the appellant contends there was, on the pleaded case and evidence before the court below, no issue that:

- (i) an agreement was entered into between the appellant and the first respondent with regard to a joint venture concerning the investment in the purchase and re-sale of real estate in Bequia in St. Vincent and the Grenadines, which agreement concerned, expressly, the incorporation and mutual ownership of a company LUMA;
- (ii) the said agreement was made and entered into orally by the appellant and the first respondent;
- (iii) thereupon the terms and conditions of the said oral agreement were reduced into writing as set out in the unsigned written agreement, which unsigned agreement is itself evidence of a binding oral agreement having been reached between the appellant and the first respondent upon the terms and conditions set out therein;
- (iv) the unsigned written agreement is not itself the agreement pleaded and relied on by the appellant in its claim, but is evidence of the said oral agreement and its terms and conditions;
- (v) the respondents, having accepted in their defence that an agreement was reached between the appellant and the first respondent and reduced into writing in terms of the unsigned agreement, failed to plead any alternative term or terms than those set out by the appellant in his statement of claim and in his witness summary or in the unsigned agreement;
- (vi) the respondents having filed a witness summary of the first respondent, failed to take part in the trial, and to test the appellant's evidence on these important issues by cross-examination;
- (vii) accordingly, the trial judge had only one version of the facts surrounding the coming into existence of a binding agreement between the appellant and the

first respondent, which version was admitted in the defence, and which admitted of an oral agreement (a consensus) having been reached between the appellant and the first respondent on the terms set out in the unsigned agreement;

(viii) in these circumstances, the learned judge ought to have held that there was an oral and binding agreement between the appellant and the first respondent, in the terms set out in the unsigned written agreement, which agreement was binding on both the first respondent and on LUMA.

[61] The appellant also submits that on the pleaded cases and the evidence before the trial court, it is clear that an agreement came into existence between the appellant and the respondent. The terms of the said agreement are clear and are, in essence, admitted by the respondents. As the learned judge found, there was a valid offer and acceptance. The only dispute by the respondents in their defence concerned, not the agreement pleaded and relied on by the appellant at paragraph 5 of the statement of claim and admitted at paragraph 5 of the defence, but concerned a different 'written agreement' referred to at paragraph 21 of the defence. The agreement at paragraph 21 of the defence concerned an agreement to be prepared between the first respondent and CASA LTD and GRECO LTD (pleaded at paragraph 5(8) of the statement of claim), but which was not effected by the first respondent who managed both of these companies.³⁴

[62] In the premises, the appellant submits that the learned judge failed to take account or proper account of the relevant pleadings and evidence, and wrongly applied the relevant principles of law relating to the three elements of a binding contract – offer, acceptance and consideration - when she concluded that no binding agreement came into existence between the appellant and the first respondent. He submits that the learned judge erred in concluding that the consideration for the pleaded agreement was unclear as to whether the first respondent intended to enter into legal relations, and that the arrangement was informal and

³⁴ Para. 17 of the Respondents' Written Submissions.

unstructured, thus not meeting the requirements of a valid and legally binding agreement. In doing so, the appellant argues, the learned judge fell into grave error of fact and law, such that her conclusions on these critical aspects cannot stand, and ought to be set aside by this Court and a finding of the existence of a binding agreement between the appellant and the first respondent substituted.

[63] As to whether LUMA is bound by the alleged oral agreement between the appellant and the first respondent, the appellant submits that, on the applicable facts and relevant principles of law relating to pre-incorporation agreements, it is. He argues that in certain circumstances a company may become bound by a pre-incorporation agreement entered into by and between promoters or shareholders of that company. It is submitted that although LUMA was not expressly made a party to the alleged oral agreement, as it was not in existence at the time when the oral agreement was entered into between the appellant and the first respondent, there is evidence that LUMA adopted the said agreement upon its incorporation and, consequently, became bound by it.

[64] In expanding on these submissions, the appellant argued, firstly, that for a pre-incorporation agreement to become binding on a company promoted and incorporated by the parties to the agreement, the said agreement need not be in writing. In support of this submission, the appellant relies on the provisions of section 22 of the **Companies Act** which stipulates the kinds of contract which may be effective in law and binding on companies. These include at subsection (4): 'A contract that, if made between individuals, would, by law, be valid although made by parol only and not reduced to writing may be made by parol on behalf of the company.' The gravamen of this provision is that a company may enter into a contract which could be made by parol if entered into between individuals. In this regard, the appellant also relies on certain passages from **Gower and Davies Principles of Modern Company Law**.³⁵ At page 66 the learned authors state (in part):

³⁵ Paul Davies and Laurence Gower: *Principles of Modern Company Law* (7th edn., Sweet & Maxwell 2003) at pgs.66 and 77.

“An alternative method is an agreement, concluded among all the shareholders, but existing outside and separate from the articles and to which the company itself may or may not be a party. Such an agreement is not normally treated as part of the constitution of the company, though it may have an effect which is rather similar to a provision in the articles. The main advantages of the shareholders agreement over the articles are that the agreement is a private document which does not have to be registered at Companies House and that it derives its contractual force from the normal principles of contract law and not from s.14, so that the limitations discussed above on the s.14 contract seems not to apply to the shareholders’ agreement.”

- [65] Secondly, the appellant submits that since the shareholders (appellant and first respondent) of LUMA were the parties to the alleged oral pre-incorporation agreement, the terms of the said agreement will be enforceable as a ‘corporate act’. In support of this submission, the appellant relies on this extract at paragraph 1.2.3 in the text **Shareholders Agreements**:³⁶

“In the circumstances where a resolution should be passed in a general meeting the courts will accept the agreement (formal or informal) or the acquiescence of all shareholders as a corporate act of the company, as if a resolution had been passed (1.3.1.]. This principle has been established by a number of cases, such as *Re George Newman & Co* [1895] 1 Ch. 674...”

- [66] This passage, relied on by the appellant in his Supplemental Submissions (filed 9th September 2022 pursuant to the order of this Court dated 21st July 2022), goes on to state:

“Generally speaking, all shareholders must consent to the matter in question. However, in *Re Duomatic Ltd* [1969] 1 All E.R. 161 it was held that the informal agreement of all members holding voting shares (there was a preference shareholder who had no voting rights) to the payment of certain directors’ remuneration was valid and binding, as the preference shareholder could not have objected in any event, although a payment for loss of office to a director in contravention of the precursor to s.312 of the Act (which requires disclosure to all members of the company) was held not to be valid because no disclosure had been made to the preference shareholder.” (my emphasis)

- [67] There was no evidence before the court below that the first respondent, as a shareholder and on behalf of LUMA, consented for LUMA to be bound by the terms of the alleged oral agreement entered into between himself and the appellant, as contended by the appellant. This notwithstanding, it is also the appellant’s contention that the evidence is clear that

³⁶ John Cadman (4th edn., Sweet & Maxwell 2003).

LUMA by its actions and conduct adopted the oral agreement between the appellant and the first respondent. This evidence included accepting the transfer of moneys from the appellant as pleaded and particularised at paragraph 12 of the statement of claim; LUMA issuing shares in itself to the appellant and the first respondent, LUMA purchasing and selling real property at Bequia and disposing of the income and profits.

[68] The appellant also relies on the provisions of Part 10 of the **CPR** providing for a defendant's duty to set out his or her case in the defence. Rule 10.5(1) requires a defendant to 'set out all facts on which the defendant relies to dispute the claim.' Rule 10(3), (4) and (5) states:

"(3) In the defence the defendant, must say which (if any) allegations in the claim form or statement of claim –

- (a) are admitted;
- (b) are denied;
- (c) are neither admitted nor denied, because the defendant does not know whether they are true; and
- (d) the defendant wishes the claimant to prove.

(4) If the defendant denies any of the allegations in the claim form or statement of claim –

- (a) the defendant must state the reasons for doing so; and
- (b) if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence.

(5) If, in relation to any allegation in the claim form or statement of claim, the defendant does not –

- (a) admit it; or
- (b) deny it and put forward a different version of events,

The defendant must state the reasons for resisting the allegation."

[69] It is the submission of the appellant that the joint defence of the respondents consists of bare denials, and did not comply with the mandatory requirements of Part 10 of the **CPR**. They argue that it was incumbent upon the respondents, having admitted at paragraph 5 of their defence that the discussions and negotiations in 2007 between the appellant and the first respondent had reached a consensus, which was then reduced into writing in the form of the unsigned written agreement dated 29th August 2007, to set out the terms of that agreement, and not simply to deny certain of the terms and conditions pleaded by the

appellant at paragraph 6 of the statement of claim. Moreover, the facts at trial, as gleaned from the appellant's witness summary and affidavit filed with the FDCF, contradicted the respondents' bare denials in their defence on nearly every respect, and demonstrate that the defence was unmeritorious. In this regard, the appellant points, in his written submissions, to paragraphs 6 to 17 of the statement of claim as not being seriously denied or contradicted.³⁷

- [70] As to the principles applicable where an agreement is partly oral and partly in writing, the appellant cites this passage from the learned authors of **Chitty on Contracts**³⁸ dealing with 'proof of terms':

"Where the agreement of the parties has been reduced to writing and the document containing the agreement **has been signed** by one or both of them it is well established that the party signing will ordinarily be bound by the terms of the written agreement whether or not he has read them or whether or not he is ignorant of the precise legal effect. But it by no means follows that the document will contain all the terms of the contract; it may be partly oral, and partly in writing. **Further many contracts are made solely by word of mouth or are contained in or evidenced by documents which have not been signed by the party affected. In such cases, it will be necessary to prove which statements, or stipulations, were intended to be incorporated as terms of the contract to have contractual effect.**" (Emphasis mine)

- [71] As to the consequences which flow from a failure by a party to cross-examine a key witness of the opposing party in relation to material issues of fact, the appellant relied on the well-established principle that such failure 'may be treated as an acceptance of the truth of that part or whole of the evidence' of the opposing party.³⁹ It amounts to a tacit acceptance of the witness's evidence in chief.⁴⁰

- [72] As to the inferences which a court may draw from the absence of a party or the silence of a particular witness at the trial who might be expected to have evidence material to an issue

³⁷ Para. 22 of the Appellant's Written Submissions.

³⁸ Chitty on Contracts (28th edn., Sweet and Maxwell 1999) at 12-002.

³⁹ Halsbury Laws of England (4th edn., vol 17 (1), para 1024).

⁴⁰ Adrian Keane: The Modern Law of Evidence (2nd edn.)120.

in the claim, the appellant relies on these four principles as formulated by Brooke LJ in his leading judgment in the English Court of Appeal in **Wisniewski v Central Manchester Health Authority**.⁴¹ These principles were adopted by Lord Justice Simon Brown in **Benham Ltd v Kythira Investments Ltd & Anor**.⁴² They are:

“(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness’s absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.”

[73] The appellant also contends that the respondents having elected, for tactical reasons and without any reasonably plausible explanation, not to participate in and not to call any evidence at the trial, the judge ought to have found that the adverse inferences to be drawn therefrom support the appellant’s case of the existence of a binding agreement on the terms and conditions set out in the unsigned agreement; and that the appellant had proven his claim on the balance of probabilities. In this respect, the appellant also relies, in addition to the learning at paragraph 39, on this extract at paragraph 30 of the judgment in **Kythira Investments Ltd & Anor**:

“The point is worth making too even in those cases where the defendant elects to call no evidence. True, as Mance LJ made plain in *Miller* (see paragraph 20 above), the only issue then is whether the claimant has established his claim on the balance of probabilities. But it must be recognized that he may have done so by establishing no more than a weak *prima facie* case which has then been strengthened to the necessary standard of proof by the adverse inferences to be drawn from the

⁴¹ [1998] Lloyd’s Rep Med 223 (unreported).

⁴² [2003] EWCA Civ 1794.

defendant's election. Such adverse inferences can in other words tip the balance of probability in the claimant's favour."

[74] The appellant submits that, in the circumstances of this case, where the respondents and their legal practitioner were absent from and did not take any part in the trial (whether in person or remotely), the learned judge erred in failing to draw the appropriate adverse inferences from their absence and silence, especially that of the first respondent, who clearly would be expected to give material evidence on a raft of material issues. These would include evidence as to his discussions and negotiations with the appellant, the consensus or oral agreement which they reached, the terms and conditions of the said agreement, the reduction of the agreed upon terms and conditions into writing in the form of the unsigned agreement; and in relation to other issues such as the operations of LUMA and the agreed upon joint venture, the money invested by the appellant in the joint venture which moneys were transferred to the first respondent, the purchase and sale by LUMA of lots in Bequia, and the net profits derived from each such sale.

[75] It is therefore the appellant's submission that in failing to draw such adverse inferences, the learned judge committed an error of principle. Moreover, she failed to give any weight or sufficient weight to the relevant evidence from the appellant as set out in his affidavit and witness summary, as to the existence of a binding oral agreement between himself and the first respondent. The appellant argues that the judge was plainly wrong in finding that no contract existed between the appellant and the first respondent.⁴³ Likewise, the appellant contends that the learned judge erred in not concluding that, on well-established principles, LUMA had adopted the said agreement and became bound by it.

Respondents' Submissions – Issues 1,2,3 and 4

[76] The respondents accept, and it is so well-established as to be trite, that binding contracts may be made orally (subject to certain stated exceptions) or in writing, or partly oral and

⁴³ Para. 29 of the Appellant's Written Submissions).

partly in writing, and may also be inferred from the conduct of the parties. While the law does not require a contract to be in any particular form, in order for a binding contract to come into existence, there must be an intention to create legal relations, and all three elements of offer, acceptance, and consideration must be present.⁴⁴

[77] In determining whether the particular factual circumstances (as found by the court) evinces an intention to create legal relations, a court must apply an objective test. It must determine whether a binding contract was created and, if so, on what terms. In order for this requirement to be satisfied, the parties must be *ad idem* on all the essential terms of the agreement. Where the parties are *ad idem* on certain essential or material terms, but not on others, no binding and enforceable agreement comes into existence.

[78] It is the respondents' case that when one considers the respective pleaded cases at paragraph 5 of the statement of claim and paragraphs 5 to 21 of the defence, it is clear that the appellant and the first respondent had not agreed and were not *ad idem* on all the material terms of the alleged agreement. They point to the learned judge's findings at paragraph 22 of the judgment below, where she found that there was no evidence that the unsigned agreement was confirmed or ratified by the appellant and the first respondent, or that it 'contained all of the terms and conditions relied on by [the appellant].' In reliance on **Gregory Gordon v Jacqueline Havener**⁴⁵, they argue that this finding was open to the learned judge on the evidence at the trial, and this Court ought not to interfere with that finding of fact by the judge unless the judge's conclusion was rationally unsupportable or (put differently) one which no rational judge could have reached.

[79] As to the elements of offer, acceptance, and consideration essential for the formation of a valid contract, the respondents point to the judge's conclusions at paragraph [61] of the judgment on each of these elements. The respondents argue that while they did admit in

⁴⁴ Bodley v Cathy Louis et al SLUHCv2015/0172 and SLUHCv2018/0366 (delivered 17th February 2020, unreported).

⁴⁵ ANUHCvAP2015/0030 (delivered 7th December 2017, unreported).

their defence that there was an agreement between the appellant and the first respondent, this agreement is not the same as that which was pleaded and relied on by the appellant. Further, at paragraph 14 of their defence, the respondents averred that the appellant had never deposited the sum of US\$ 2 million which, according to paragraph 3 of his affidavit, was part of the agreement. Moreover, at paragraph 20 of the defence, it is asserted that the appellant 'withdrew his interest before the capital was invested and before the development project Luma Lofts [had] not even started...' Furthermore, the appellant provided no evidence or proof that he had in fact provided or invested the said sum of US\$ 2 million. The respondents argue, therefore, that this 'suggests that the key element of consideration was missing from the agreement and hence could not amount to a contract.'⁴⁶

[80] In my opinion, this last point on a lack of consideration leading to there being in law no binding agreement between the appellant and the first respondent, is seriously flawed and without proper foundation in well-established principle. The respondents confuse the requirement of consideration for there to be a binding agreement between parties, with the discharge by one of the parties of the contractual obligation to pay the full sum (or consideration) stipulated under an otherwise binding contract between them. Furthermore, this point relied on by the respondents falls to the ground as it completely ignores the concept of part performance, as opposed to a total failure of consideration leading to the contract being vitiated at the instance of the other party, which latter concept was not relied on by the respondents in seeking to assert that no binding agreement came into existence between the appellant and the first respondent.

[81] The respondents also point to paragraphs 21 and 22 of the defence to the effect that 'the written agreement was to be produced by a third party, and 'as far as [the first respondent] knows no such agreement was signed and [the first respondent] has no knowledge of where such a copy could be found ... the [respondents] have not seen a signed written contract.' The respondents also contend that the learned judge was correct to conclude that the

⁴⁶ Paras. 5 of the Respondents' Submissions.

evidence did not support the coming into existence of an oral contract between the appellant and the first respondent. That being the case, the respondents argue that the unsigned written agreement is not an agreement in law, and the learned judge was correct to so find. They also argue that the email dated 21st August 2007 from the first respondent to the appellant, is a general proposal (as is stated therein) and is not a binding or concluded agreement between the said persons. This email is therefore only evidence of some of the matters or terms being discussed or negotiated at that time, between the appellant and the first respondent, and evinces that the said parties had not concluded or settled the terms and conditions of any agreement. The respondents also argue that while ‘the parties [appellant and first respondent] did have some agreement’, the unsigned agreement relied on by the appellant is not the agreement of the parties and, ‘at most, it represents pre-contract negotiations or a draft of an intended agreement;’ and is not a contract between the said parties.⁴⁷

[82] The respondents submit further that, in the absence of a signed written agreement or the adoption of the unsigned written agreement by the appellant and the first respondent, or conduct evincing a clear intention to be bound by the terms stated therein, the appellant had failed to discharge the burden of proof on him to a balance of probabilities, to show that a binding agreement had come into existence between himself and the first respondent. The learned judge, having considered the totality of the evidence, was correct in her findings at paragraph [61], [62] and [63] of the judgment that the essentials of a binding contract had not been established to her satisfaction by the appellant.

[83] As to whether LUMA was bound by any such alleged agreement, the respondents contend that the learned judge, having found correctly that the evidence, oral and documentary, did not establish, to the requisite standard, that a binding agreement came into existence between the appellant and the first respondent, it follows that LUMA cannot be said to have adopted or become a party thereto. Moreover, as the learned judge found, LUMA was not a

⁴⁷ Para. 6 of the Respondents’ Further Submissions.

party to the alleged agreement between the appellant and the first respondent, and there is no basis in law upon which it can be said to be bound by the said agreement, even if the existence of such an agreement had been established to the court's satisfaction. In this respect, the respondents rely on the fundamental principle of company law of separate legal corporate personality, distinct from its shareholders: **Salomon v A Salomon & Co. Ltd.**⁴⁸

- [84] In their Further Submissions, the respondents rely on the general rule that a company cannot adopt or ratify a transaction purporting to have been made on its behalf before its incorporation: **Rolle Family and Company Limited v Rolle (Bahamas) Ltd.**⁴⁹ They refer to section 16 of the **Companies Act**, which sets out the requirements to be satisfied if an agreement which is otherwise void at common law is to be deemed the agreement of a company. The purpose of section 16 is to bind not only the persons who purported to make the agreement on behalf of the company, but also the company itself, if it adopts the agreement in place of that person or persons. Section 16(2) provides:

“Within a reasonable time after a company comes into existence, it may, by any action or conduct signifying the intention to be bound thereby, adopt a written contract made in its name or on its behalf before it came into existence.”

- [85] The respondents submit that the requirements of section 16(2) cannot be satisfied in the instant matter. Firstly, the purported agreement was not made in the name of LUMA or on its behalf; but exclusively between the appellant and the first respondent in their personal capacity. Secondly, the unsigned written agreement is dated the same day that LUMA was incorporated, and thus cannot (even if a contract, which it is not) be considered a pre-incorporation contract capable of being adopted by LUMA. Thirdly, in order for LUMA to be said to have adopted the alleged agreement, there must be some executory obligation by which LUMA would be bound upon adopting the said agreement or transaction. In the instant matter, there was no pleading by the appellant that LUMA adopted the alleged agreement whether by some act (such as a resolution of its shareholders or directors) or by its conduct

⁴⁸ [1897] AC 22.

⁴⁹ [2017] UKPC 35 at para.4.

and, in any event, there is no executory obligation under the alleged agreement to which it would be bound.

Analysis and conclusions on Issues 1,2,3 and 4

- [86] On any proper reading of the statement of claim, the appellant did not rely on the coming into existence of an oral agreement between himself and the first respondent. What was pleaded was that they had both reached a 'consensus' which they reduced into writing 'in the form of' the unsigned written agreement. A consensus is not the same in law as a binding contract or agreement. It implies that during discussions and negotiations between two or more potential parties to a contract, that they reached some common ground or understanding of certain terms which could form the basis of a yet to be entered into binding agreement. Thus the pleading in the statement of claim of a 'consensus' is not the pleading of a binding contract or agreement. Likewise, it is not and is very different in law from a pleading of an 'oral' agreement coming into existence between them, unless the statement of claim goes on to give details of how and when the consensus became an oral agreement and what were its specific terms. This was not the appellant's pleaded case. No properly pleaded oral agreement coming into existence between the appellant and the first respondent was relied on in the statement of claim, as contractual basis or foundation upon which the claims against the first respondent and/or LUMA for breaches of contract and breach of an obligation to account to the appellant, were based. This is clear since the appellant did not set out in the statement of claim the matters discussed or negotiated between himself and the first respondent, which led, not just to a 'consensus', but much more importantly, to a binding and enforceable oral agreement between the appellant and the first respondent. As the learned judge correctly observed, the appellant's case is that the agreement between himself and the first respondent was in writing, as evinced by the unsigned agreement. It is common ground that there is no signed written agreement in existence between them, and none was produced by either party during the trial. Likewise, it was not the appellant's pleaded case that the alleged binding agreement was partly oral and partly in writing.

[87] This notwithstanding, the learned judge did go on to consider whether the appellant could be relying on an oral agreement having come into existence between himself and the first respondent. At paragraph [62], the learned judge asked herself the question whether from his pleading and evidence, the appellant could be said to be relying on 'the existence of a verbal contract', notwithstanding that none was pleaded by him. She concluded that the evidence adduced by the appellant was 'inadequate' to conclude that either a signed written agreement or an oral contract creating binding obligations between the appellant and the first respondent, on the terms and conditions relied on by the appellant, was created or exists between them.

[88] What then is the effect of the admission at paragraph 5 of the defence to the matters averred at the 'main' part of paragraph 5 of the statement of claim? By the defence, the first respondent admitted to having had discussions and negotiations in or about 2007 with the appellant, which resulted in them arriving at a 'consensus', the terms and conditions of which was reduced into writing in the form of the unsigned written agreement. Taken at its highest, this is not an admission of the existence or coming into existence of a binding contract or agreement between the first respondent and the appellant, whether oral or in writing, or partly oral and partly in writing. Furthermore, no such agreement, whether oral or in writing, was pleaded or relied on by the appellant who had, at all times, the burden of establishing, to the requisite civil standard, that such an agreement came into existence. Instead, the appellant by his pleaded case relied on the unsigned written agreement dated 29th August 2007 as being the contract or agreement between himself and the first respondent with regard to the joint venture involving the purchase, development and sale of lots of land at Bequia in the state of Saint Vincent and the Grenadines. As mentioned above, a consensus is not the same species in law as a binding contract or agreement. It is quite possible for parties negotiating with each other to, at some point, reach a consensus on certain key terms and conditions, without proceeding to enter into legal relations with each other, and to enter

into a binding and enforceable agreement on the terms and conditions of their 'consensus', or on some other or different variation of those terms and conditions.

[89] In my considered view, this was the state of the appellant's pleaded case upon which he sought certain reliefs. In fact, the appellant did not at any time allege or aver in his statement of claim that a binding agreement came into existence between himself and the first respondent on the terms in the unsigned agreement, save for the use at paragraph 5 of the word 'Agreement' to describe the unsigned document dated 29th August 2007. In short, there is no properly pleaded contract or agreement by the appellant, whether written or oral, upon which he relies to found his claims for relief in the FDCF and the statement of claim, including the alleged contractual obligation to account to him for the operations of LUMA and for damages which, presumptively, is damages for breach of contract. In the face of such a woefully inadequate pleaded case, the learned judge was correct to find that there was no properly pleaded or evinced binding written or oral agreement coming into existence between the appellant and the first respondent.

[90] In determining whether a binding agreement was created, the court must find an intention to create legal relations. No such intention was made out on the evidence evinced by the appellant and the first respondent and LUMA did not participate in the trial. No evidence was given by the appellant as to the discussions and negotiations between himself and the first respondent in 2007. No evidence was led as to what were the precise terms of the 'consensus' reached between them, except that these terms and conditions were later reduced into writing in the form of the unsigned written agreement. It is trite that for a binding agreement in law to be created or to come into existence, all three elements of a binding contract must be present. These are: an offer capable of acceptance, an unequivocal acceptance of that offer, and consideration moving from the promisor to the promisee. In applying these principles, the learned judge considered (at paragraph [61] of her judgment) that there 'appears' that there was a valid offer and acceptance in this case, 'but it is not clear what was actually offered and accepted.' With respect to the learned judge, in my

judgment, an 'offer' the terms of which are unclear from the evidence, is not a valid offer in law. That being so, there could be no valid acceptance of such an offer, and worst where the terms of the so-called acceptance is itself also unclear or unequivocal. As to the presence of consideration, the learned judge held that it was also 'unclear as is whether [the first respondent] intended to enter legal relations.' The element of consideration is not the same as an intention to create legal relations; it is but one of the elements necessary for a binding contract to come into existence between parties, which along with other surrounding circumstances sustains the conclusion being drawn that both parties had the requisite intention to enter into binding and enforceable legal relations with each other.

- [91] The unsigned agreement is written in the language of a 'contract' in the sense that it is headed an 'Agreement', it commences with the words 'This contract', it identifies clearly who are the two parties, and it states the purported terms and conditions of the so-called 'contract'. However, the performance of certain of its purported terms is stated to be dependent upon the coming into existence of other agreements. This much is clear from the provisions of and the stated manner in which paragraphs 2, 5, 6 and 8 of the said document is or were to operate. These provisions relate to legal entities not a party to the said 'agreement', such as CASA LTD. and GRECO LTD. There was no evidence that the other agreements contemplated under the unsigned written agreement involving as parties either of these entities, were or had been concluded with them. Accordingly, the provisions of the unsigned written agreement resemble (without deciding) at best an informal 'agreement' or an agreement to agree, and not a concluded and binding contract in law. Importantly, of course, the said document was never signed by either the appellant or the first respondent. For these reasons alone, no written contract came into existence between the appellant and the first respondent by virtue of the unsigned written agreement, and the learned judge was correct to so find. Furthermore, there is no evidence that the intended parties, the appellant and the first respondent, subsequently accepted or agreed that this document was effectively, or was to be treated by them, as a binding agreement or contract between them,

‘regarding land acquisition, development and sales of real estate properties in the company registered as LUMA in Bequia, St. Vincent and the Grenadines.’

[92] For all these reasons, in our considered view, the learned judge was correct to find that no valid contract, written or oral, existed or came into existence, between the appellant and the first respondent.⁵⁰ In light of this primary finding of fact and law, it follows, first, that the appellant has not established, to the standard of a balance of probabilities, that the terms and conditions set out in the unsigned agreement were the terms of the alleged oral agreement between the appellant and the respondent; nor has he established, to the said requisite standard, that the first respondent has breached the terms of the alleged oral agreement with the appellant

[93] The learned judge correctly found that LUMA was not a party, and never became in law a party, to the alleged oral (or written) contract between the appellant and the first respondent. No such contract having come into existence in law, it was impossible for LUMA to be a party to it or to be bound, in any way, by the alleged terms and conditions as set out in the unsigned agreement or as pleaded by the appellant. In those circumstances it cannot be said that LUMA was bound by the said terms or obligated to perform any duties or actions thereunder or in compliance therewith. This finding also extends to any question as to whether the alleged contract between the appellant and the first respondent, can be said to be a pre-incorporation contract entered into between the appellant and the first respondent as promoters and shareholders of LUMA, such that the said contract subsequently binds LUMA. In this respect, it is sufficient to say no such pre-incorporation contract came into existence nor was there any such contract capable of being adopted by LUMA. In these circumstances, section 16 of the **Companies Act** including section 16(2) is not engaged. Moreover, even if the appellant had established that such an agreement came into existence between himself and the first respondent, it was indisputably not a contract made in LUMA’s name or which purported to be made in its name, nor is it clear whether the alleged contract

⁵⁰ Para. [63] of the judgment of Henry J.

came into existence before LUMA was incorporated, unless it was an oral agreement, made by the appellant and the first respondent before 29th August 2007, which was not the case here. This ground of appeal accordingly fails.

Issue 5

- [94] This issue may be taken shortly. The appellant's claim to an account from or by the first respondent and LUMA is based upon an alleged contract obligation between the appellant and the first respondent. These issues have been determined as stated above. No such oral contract was either pleaded or came into existence binding on either the first respondent or LUMA. Accordingly, contrary to the appellant's pleaded case of a right to and corresponding obligation on the part of the first respondent and LUMA to account to him regarding the affairs of LUMA in paragraphs 13 and 18 of the statement of claim, no such contract existed. Accordingly, it follows that no contractual obligation to account to the appellant binding on the first respondent and/or LUMA has been established, and this aspect of the appellants claim is misconceived and was rightly rejected by the learned judge. However, this conclusion, based on the lack of a binding contract, is different to the appellant's rights, as a director and shareholder of LUMA, to access to the accounts showing the complete financial affairs of LUMA, which rights are protected under its constitutional documents, including its By-Laws, and is stipulated under the **Companies Act**. Accordingly, this ground of appeal also fails.

Issues 6 and 7

- [95] These two issues are really one issue. In our judgment, the learned judge misconstrued and misapplied section 3 of **The Registration of Documents Act** in setting aside the order admitting the unsigned agreement into evidence. Section 3(1) provides:

The following documents shall be registered under this Act –

- a. Documents relating to the title to, transfer of or encumbrance on any real estate;
- b. Powers of Attorney and deeds of substitution thereunder empowering any person to represent and act for another person in St. Vincent and the Grenadines;

- c. Certified office copies of the Probate of every will and of the Grant of Letters of Administration by the Court.

[96] The learned judge's scrutiny (in this regard) was directly at clause 6 of the unsigned written agreement. It states:

"6. GRECO LTD (which is owned by [the first respondent] to 51% and [Tord Lindstendt] to 30%) shall administrate the operation of LUMA...and will be paid a sum which equals 2% on the working invested capital. GRECO LTD uses this income to pay for rent of office, telephone, fax, internet services and other related expenses such as transportation and administration."

[97] The judge found (at para. [54]) that by clause 6 empowering GRECO LTD to administer LUMA's operations, it 'signifies that GRECO LTD is constituted as LUMA's agent to represent it and act on its behalf in the State.' She therefore concluded that such an agreement must be registered pursuant to section 3, and since it does not appear to have been registered, it is incapable of being admitted into evidence by virtue of section 22 of the said Act. Accordingly, the learned judge set aside the order made on the date of the trial admitting the unsigned agreement into evidence. In support of these grounds of appeal, the appellant submitted firstly that in coming to this conclusion the learned judge failed to appreciate that an agreement to appoint a management company has nothing to do with the actual appointment of the manager and the mechanics of the operations. Secondly, the appellant submits that clause 8 of the unsigned agreement provided that 'any profits, commissions and fees from the operation of LUMA LTD will be regulated by a separate agreement between [the first respondent] and CASA LTD/GRECO LTD.' The appellant submits that this clause makes it clear that a separate agreement would be drawn up regulating the dealing between LUMA, GRECO LTD and CASA LTD; and thirdly, that, in any event, a management agreement does not have to be registered pursuant to the Registration of Documents Act. I note, however, that clause 8 provides for this separate agreement to be between the first respondent (LA -not LUMA), TERRA CARIBBEAN (which is CASA LTD) and GRECO LTD.

[98] That said, we agree with the appellant's submissions on these two issues, as did counsel for the respondents during her oral submissions on the appeal. In our considered view, the unsigned written agreement was not, by virtue of clause 6, caught by section 3(b) of **The Registration of Documents Act**. Clause 6 did not constitute GRECO LTD an agent of LUMA nor was it a power of attorney empowering GRECO LTD to act as agent of LUMA in the State of St. Vincent and the Grenadines. This finding by the learned judge was erroneous for the reasons that GRECO LTD is not a party to the unsigned written agreement and could not in law be appointed thereby as agent of or for LUMA; and, in any event, the said unsigned written agreement did not constitute either a power of attorney or a binding and enforceable contract in law. Accordingly, the order made by the learned judge setting aside the previous order admitting the unsigned written agreement into evidence in the proceedings below, was wrong in principle and must be set aside. I would so order.

Issue 8

[99] The respondents in their defence admitted that the sums sent from the appellant 'represents part of the investment in [LUMA].' They neither admitted to receiving any particular sum or sums or a gross sum. They did not respond specifically to each of the five particularised transfers at paragraph 12 of the statement of claim, totaling US\$ 570,473.00. At paragraph 12, the appellant also averred that he can provide 'details of the said money transfers in the event that [the first respondent] or anyone else is minded to dispute [his] figures.' A virtually identical averment was made in his witness statement. This notwithstanding, the appellant failed to produce, either during the discovery phase of the proceedings or at the trial, documentary proof of any of these five transfers or wire transfers to the first respondent which the appellant pleaded was in keeping with his 'undertaking to provide working capital' for LUMA.

[100] In the absence of such evidence, the learned judge was unable to find, 'merely' on the appellant's say so, that he had transferred the sums pleaded at paragraph 12. The judge found that documentary evidence of each wire transfer was required as cogent evidence of

such payment having been sent or made by the appellant.⁵¹ However, based on the admission at paragraph 28 of the defence, the judge was satisfied and found as a fact that the appellant had made investments 'by providing an unknown sum of money towards the joint venture project with [the first respondent].' Importantly, the learned judge went on to make an order for LUMA to retain a qualified accountant to prepare audited financial accounts for the period 1st January 2014 to 31st October 2018 and to submit an original set of such accounts to each party (including the appellant).⁵² This the learned judge considered was a necessary result of the appellant being a shareholder and director (until removed by the first respondent) of LUMA, but not because of any contractual right independent of the articles being a contract inter se with the shareholders.

[101] At paragraph 28 of the defence, the first respondent also pleaded in response to paragraph 12 of the statement of claim, that he was not the administrative officer of the joint venture. However, there is no outright denial that the sums particularised or any of them were transferred to him during the specified period, which is specific assertion at paragraph 12 of the statement of claim, to which he was meant to be responding. The respondents (or at least the first respondent) was required by CPR 10.5(3) to either admit or deny or to neither admit or deny this specific averment because he (they) do not know whether it was true or not. This the respondents failed to do in breach of this rule. He neither admitted nor denied receiving these wire transfers from the appellant. However, the consequence of a breach by a party of this duty to set out in the defence all the facts on which he or she relies to dispute the claim is the defendant in breach may not at trial 'rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission or the parties agree.'⁵³ The sanction is not that the averment pleaded and not properly traversed or addressed in the defence is deemed to be admitted, or that the trial judge is obliged to treat it as having been admitted. In this respect, I agree with the appellant's point that, in such circumstances where the respondents elected not to

⁵¹ Paras.[49] [56] of the judgment of Henry J.

⁵² Para.[116](2) of the judgment of Henry J.

⁵³ CPR 10.7.

participate in the trial, it was open to the learned judge to, and she ought to have drawn, such inferences adverse to the respondents as the circumstances required.

[102] However, this does not mean that the burden of proof which rests at all times during the trial with the appellant on a balance of probabilities, can be circumvented. The appellant was still obligated to produce sufficient cogent evidence of each wire transfer as to satisfy the learned judge that they were made by the appellant and in the particularised amounts. As matters turned out, the appellant failed to produce any documentary evidence of these transfers, and provided no explanation or any satisfactory explanation for not doing so. This must be viewed in the context of the appellant having stated at paragraph 12 of the statement of claim that he was in a position to do so.

[103] I therefore conclude that the learned judge did not err in finding that the appellant had failed to satisfy her as to each of the pleaded money transfers or bank wire transfers sent by him to the first respondent as part of his investment in the capital of LUMA or in the joint venture. The judge did the best she could in the circumstances and was correct to find, in light of the respondents' admission at paragraph 28, that the appellant had made investments of unknown sums of money towards the joint venture. This ground of appeal accordingly fails.

Issue 9

[104] The appellant argues that the learned judge erred in not making an order returning him to the Board of Directors of LUMA. The appellant was appointed a director at the first meeting of the shareholders of LUMA held on 30th August 2007. At paragraph 36 of the statement of claim, he avers that the first respondent and his wife purported to remove him as a director without his approval and against his will. He sought an order restoring him to the Board of Directors of LUMA. In response to paragraph 36 of the statement of claim, the respondents, at paragraph 52 of their joint defence, aver that during discussions between the first respondent and the appellant regarding the joint venture, it was agreed that he 'had no more interest in any investments in St. Vincent and the Grenadines and agreed to accept a lump

sum for his investment once land is sold.’ Therefore, the first respondent removed him as a director and ‘if [the appellant] so wishes the [first respondent] can reinstate [him] as a director but will at the same time remove the [first respondent] and his wife as directors.’

- [105] This pleading at paragraph 52 of the defence is tantamount to an admission that the appellant was wrongfully removed as a director by the first respondent, who, it is not disputed, had no power under the constitutional documents of LUMA or its By-Laws or under the **Companies Act**, remove the appellant as a director. The appellant did not resign as a director, and there was no resolution of the shareholders removing him from the Board pursuant to paragraph 4.4 of the By-Laws. In these circumstances, the learned judge ought to have found that the appellant had been wrongfully removed as a director by the first respondent, that such removal was accordingly unlawful having been done in breach of the provisions of paragraph 4.4 of the By-Laws and sections 72 and 73 of the **Companies Act**, and was therefore invalid. Accordingly, the judge ought to have made a declaration that the appellant did not cease to be a director of LUMA, but remained continuously on the Board of Directors, entitled to notice of meetings of the Board and to copies of all documents, including company accounts, which are to be or were considered at any such meetings. In this respect, the learned judge erred at paragraph [111] in refusing to make an order declaring the appellant’s removal as a director to be invalid and that the notice filed at the Companies Registry removing him as a director was invalid and ineffective. Accordingly, this ground of appeal succeeds.

Disposition

- [106] For the reasons stated above, the appeal fails on grounds 3(a), (b), (c), (d) and (g) of the appellant’s notice of appeal. The appeal succeeds on grounds 3(e), (f), (h) and (i). Accordingly, the appeal against the order dismissing the claim for the reliefs at paragraph [116] 4(a) to restore the appellant to the Board of Directors of LUMA succeeds. The appeal against the orders dismissing the claims for reliefs at paragraph [116] 4(c), (d) and (e) fails. The appeal against the dismissal of the declaration at paragraph [116] 4(b) that LUMA is a

joint venture company with the main purpose of buying, selling, developing and selling real estate in Bequia, Saint Vincent and the Grenadines was not pursued by the appellant in his written and oral submissions on the appeal. Accordingly, no order is made with respect thereto and the dismissal by the learned judge of this aspect of the claim remains.

[107] The appellant has failed in his appeal on most of his grounds of appeal, including in relation to the main issues as to the existence of a binding agreement between himself and the first respondent, in the first instance, and with the first respondent and LUMA in the second instance. The general rule that costs follow the event applies, with some moderation for the extent to which the appellant's appeal has had some success. Taking all factors into account I would order the appellant to pay eighty percent (80%) of the first and second respondents' costs in the appeal. The order for costs made by the learned judge at paragraph [116] 5 of the judgment stands.

Orders

[108] Accordingly, it is ordered as follows:

- (1) The appeal against the dismissal orders at sub-paragraph 4(c), (d), and (e) of paragraph [116] is dismissed;
- (2) The appeal against the dismissal order at sub-paragraph 4(a) of paragraph [116] is allowed.
- (3) It is declared that the removal of the appellant from the Board of Directors of LUMA LTD was invalid and is accordingly set aside and the appellant restored to the Board of Directors with immediate effect retroactive to the date of his purported removal.

- (4) The appellant shall pay 80 percent of the first and second respondent's cost of the appeal, such costs to be assessed, if not agreed within 21 days from the date of this judgment.

I concur.
Margaret Price Findlay
Justice of Appeal

I concur.
Sydney Bennett
Justice of Appeal [Ag.]

By the Court

Chief Registrar