

**THE EASTERN CARIBBEAN SUPREME COURT**

**IN THE HIGH COURT OF JUSTICE**

**FEDERATION OF SAINT CHRISTOPHER AND NEVIS  
SAINT CHRISTOPHER CIRCUIT**

**CLAIM NO. SKBHCV2017/0343**

**BETWEEN**

- 1. MERVIN GRANT**
- 2. HERITAGE PLANTATION**

Claimants

and

**DOCHE AND DOCHE INC.**

Defendant

**CLAIM NO. SKBHCV2018/0186**

**IN THE MATTER of Section 142 and  
144 of the Companies Act CAP 21:03  
of the Laws of the Federation of Saint  
Christopher and Nevis**

**And**

**IN THE MATTER of a Shareholders  
Agreement dated 21 July 2010 and a  
Supplemental Agreement dated 20  
November 2014**

**BETWEEN:**

**HERITAGE PLANTATION INC.**

Claimant

and

1. HERITAGE PLANTATION CONDOMINIUMS LTD
2. DOCHE & DOCHE

Defendants

**Appearances:**

Dr. Henry Browne Q.C., with him, Mrs. Marissa Hobson-Newman and Mr. O’Grenville Browne for the Claimant(s)  
Mr. Sylvester Anthony with Mrs. Angelina Gracy Sookoo Bobb and Ms. Renal Edwards for the Defendant(s)

-----  
2019: July 8  
(Closing submissions filed on 4 November 2019  
December 19  
2020 January 27  
-----

**JUDGMENT**

- [1] **VENTOSE, J.:** This case is not an unusual one in the Caribbean. It concerns the relationship between Mr. Mervin Grant and his company, Heritage Plantation Inc. (“HPI”), that owns land in Saint Christopher and developers, Mr. Victor Doche and Mr. Rafik Doche, through their company, Doche & Doche Inc. (“D&D”).
- [2] I have reproduced substantially, with thanks, the detailed background facts to these two claims as found in the closing submissions of the Defendant(s). Mr. Grant is the sole shareholder of HPI. HPI is the registered owner of the remainder of 20 acres of land at Scotch Bonnet, Frigate Bay, Saint Christopher (the “**Scotch Bonnet Lands**”). In 2001, Mr. Grant obtained a loan from the Bank of Nevis Limited (the “**BNL**”) that was secured by a mortgage over his residential home. In 2005, HPI obtained a further loan in the sum of US\$900,000.00 from BNL that was secured by a legal mortgage over the Scotch Bonnet Lands. On 26 May 2005, the legal mortgage was noted in favor of BNL for the principal sum of US\$900,000.00 with interest at 10.5% on the reducing balance for one year becoming due and payable on 31 March 2006. HPI failed to pay the loan amount of US\$900,000.00

by 31 March 2006. In addition, Calmer Developments Inc., another company owned by Mr. Grant, was given an overdraft facility by BNL (the “**Calmer Overdraft**”).

- [3] In 2007, D&D was incorporated as a limited liability company registered in Saint Christopher with Mr. R. Doche and Mr. V. Doche as the shareholders of D&D. D&D is a holding company that owns other companies.
- [4] On 21 July 2010, HPI and D&D entered into an agreement to establish the limited liability company, Heritage Plantation Condominium Limited (“**HPC**”), to develop, construct, market and sell condominium units (the “**Condominium Units**”) on the Scotch Bonnet Lands (the “**2010 Agreement**”). The 2010 Agreement was termed Shareholders Agreement. In the 2010 Agreement, it was agreed, among other things, that: (1) the parties would hold shares in HPC equally, 50 per cent each (Clause 3); (2) HPI would transfer Lot 3 of the Scotch Bonnet Lands to HPC (Clause 4); and (3) D&D shall raise US\$1m to develop and construct the Condominium Units on Lot 3, \$100,000.00 of this amount was to be used to secure the release of Lot 3 from BNL and another \$100,000.00 was to be paid to HPI on signing the transfer documents and the 2010 Agreement. The remaining \$800,000.00 was to be used to construct the Condominium Units (Clause 9).
- [5] The 2010 Agreement also made provision for the management and operation of HPC including the payment priority in relation to the proceeds of sales of the Condominium Units. A joint bank account was to be opened with the shareholders as signatories (Clause 10). All funds relating to the development and construction of the Condominium Units and items related to the joint venture were to be done through that bank account (Clauses 11 and 12). D&D was to be repaid from the net proceeds of sales of the Condominium Units. D&D was to be repaid US\$1m, as its contribution, and an additional US\$1m as its “share in the profits for participating in the Joint Venture” (Clause 19). Once D&D were paid the sum of US\$2m, the remaining funds in the bank account were to become the property of HPI (Clause 20).

- [6] Any further development and construction on Lot 4 were to take place after the payment to BNL of US\$100,000.00 and the opening and operation of a second and separate bank account. New arrangements for sharing profits for this new development shall be agreed between the parties (Clause 21).
- [7] On 22 July 2010, HPC was incorporated and, on incorporation, Mr. Grant was registered as the sole director and shareholder and Corporate Solutions Ltd. was registered as the Corporate Secretary of HPC. The 2010 Shareholders Agreement predated the incorporation of HPC. There was no dispute between the parties that the 2010 Agreement originally governed the relationship between them in respect of the operations of HPC.
- [8] In 2012, D&D discovered that Mr. Grant and HPI both failed to disclose that HPI was insolvent, and that both HPI and Mr. Grant had numerous debts and court judgments against them. These debts included the loans to BNL and the Calmer Overdraft both of which had been in default. As a result of the default by HPI and Mr. Grant on the BNL loans and the Calmer Overdraft, respectively, BNL sought to foreclose on the Scotch Bonnet Lands. Other debtors, including Rawlinson Isaac and S.L. Horsford & Co., were also calling in the debts that were due to them by HPI and Mr. Grant. Mr. Grant, on behalf of HPI, approached D&D to provide financial assistance in relation to these loans and debts. Mr. Grant and HPI negotiated with R. Doche and V. Doche, on behalf of D&D, to prevent BNL from foreclosing on the loans. Before the 2012 Agreement (see below) was executed, D&D, on 9 November 2012, paid out the loans to BNL in the presence of Mr. Grant. The total amount paid by D&D to BNL was US\$1,540, 175.58, in respect of two loans in the name of Mr. Grant and one in the name of HPI. The letter from BNL also notes that Mr. R. Doche and Mr. V. Doche “have undertaken by their signatures [...] to pay off the [Calmer Overdraft] on or before February 20, 2013.”.
- [9] On 13 November 2012, HPI and D&D executed a further agreement (the “**2012 Agreement**”) in which it was agreed that D&D would pay out the loans at BNL which totaled US\$1,540,175.58 as well as debts to Rawlinson Isaac (US\$160,000.00) and S.L. Horsford & Co. (US\$60,000.00) (Clause 1). It must be

noted that, although D&D agreed that it will pay that sum, the sum of US\$1,540,175.58 was already paid by V. Doche and R. Doche to BNL on 9 November 2012. In consideration of the sums advanced by or on behalf of D&D, HPI and Mr. Grant would transfer to HPC Lots 2, 3, 4, 5, 6, 13 and 14 of the Scotch Bonnet Lands (Clause 3). Mr. Grant and HPI were to transfer 100 percent share in HPC within 90 days (Clause 4). HPI was given the option of paying the advances made plus 10 per cent interest on or before 5 February 2013, in which case, the 2010 Agreement would now govern the relationship between the parties (Clause 5). In order for D&D to pay off the Calmer Overdraft, HPI committed to transfer Lot 9 of the Scotch Bonnet Lands to D&D as security (Clause 8).

[10] As part of the security for the 2012 Agreement, HPI granted to D&D an equitable mortgage over the Scotch Bonnet Lands. This was achieved by Mr. Grant and HPI consenting to the handing over of the certificate of title to the Scotch Bonnet Lands by BNL to D&D. HPI did not transfer Lot 9 to D&D as security for the payment by D&D of the Calmer Overdraft or repay D&D the sum of US\$1,540,175.58 and US\$160,000.00 by 5 February 2013 as stated in the 2012 Agreement. Mr. Grant and HPI approached D&D in March 2013 in respect of the payment of additional debts incurred by both Mr. Grant and HPI. The parties negotiated the refinancing of the equitable mortgage and Mr. Grant by email dated 27 July 2013 sent to R. Doche and V. Doche a document containing the calculation of the mortgage amount, totaling US\$2,482,424.00. Mr. Grant states expressly in that email that he was “just trying to make everything clear so that there is no mis-understanding in the future”. Mr. Grant cannot now dispute the calculation of the mortgage amount since it was based on his calculation that was accepted by R. Doche and V. Doche.

[11] On 3 October 2013, in the presence of R. Doche and V. Doche, Mr. Grant applied for a bank account for HPC. Notwithstanding the terms of both the 2010 Agreement and the 2012 Agreement, Mr. Grant remained the sole shareholder and the only registered director of HPC. Mr. Grant’s one common share in HPC was later transferred to HPI. Mr. Grant nonetheless named R. Doche and V.

Doche as the only signatories on the HPC bank account and identified them as directors of HPC. No doubt Mr. Grant would have been well aware that R. Doche and V. Doche were never appointed as directors of HPC. On 5 November 2013, Mr. Grant wrote to Mr. Sylvester Anthony confirming his appointment as Registered Agent and Corporate Secretary of HPC and handed over HPC's corporate file to Mr. Anthony which included a copy of the Notice of Resignation by the previous Corporate Secretary. The HPC bank account was officially opened by the bank on 20 November 2013. Prior to this, HPC did not have a bank account. At that time, HPC was not generating revenue or sales but was only incurring construction expenses which was the responsibility of D&D in accordance with the 2010 Agreement.

- [12] On 7 April 2014, HPI executed a Memorandum of Deposit of Certificate of Title of the Scotch Bonnet Lands, acknowledging that it (HPI) was indebted to D&D, creating the agreed equitable mortgage in its favour as security for the debt and appointing D&D as its Attorney for the execution of a legal mortgage. At the same time, D&D executed a Caveat, forbidding any dealings with the Scotch Bonnet Lands. This Caveat was noted on HPI's title in June 2014.
- [13] Mr. Grant and D&D continued discussing with R. Doche and V. Doche proposals in relation to the further debts of HPI and Mr. Grant. Mr. Grant drafted a revised agreement based on the discussions between the parties. Mr. Grant sent the draft revised agreement to V. Doche and R. Doche on 9 July 2014. On 13 November 2014, Mr. Grant wrote to V. Doche indicating that he was awaiting the finalized agreement from R. Doche and V. Doche to enable him (Mr. Grant) to "sign off" on a settlement agreement with Rawlinson Isaac (one of HPI's judgment creditors). Mr. Grant further indicated that he (Mr. Grant) had promised the High Court Judge that the settlement agreement with Rawlinson Isaac would be filed in a week. In those circumstances, Mr. Grant requested that D&D should pay Rawlinson Isaac with the undertaking that the further revised agreement will be signed as soon as it was ready. Mr. Grant assured V. Doche and R. Doche that there was no risk to them because: (1) they already had a mortgage in place over the Scotch Bonnet

Lands; (2) they were 90% shareholders of HPC; (3) they had 100% control of the funds in HPC; and (4) Lots 3, 4 and 5 were transferred to HPC. Mr. Grant emphasized that the further revised agreement “was merely a formality for everything that was already in place” and that there was no need to delay the process anymore.

[14] On 20 November 2014, HPI and D&D entered into the final and further revised agreement (the “**2014 Agreement**”) which was the culmination of the various proposals discussed in the emails between the parties. In the preamble to the 2014 Agreement, there is an express acknowledgment of the loan that is the subject of the 2012 Agreement. Also, in the preamble, it is stated that D&D would retain 90% of its shareholding and HPI was allotted the remaining 10% in HPC. The 2014 Agreement provided for the terms under which D&D would be paid as follows: (1) Closing costs to be first deducted from the proceeds of sales of the Condominium Units; (2) D&D to be paid US\$2.8m plus interest at 8%; (3) D&D to be paid US\$1m as their share in the profits of the Condominium Units; and (4) any amount remaining shall be paid to HPI as its share of the profits of the Condominium Units (Clause 3). Mr. Grant, on behalf of HPI, was to be paid the sum of US\$3,000.00 per week as an advance on any amounts due to HPI (Clause 4).

[15] It was also stated in the 2014 Agreement that on or before 31 October 2015, **D&D and HPI** shall convene a meeting to discuss and pay dividends based on the sales closed on the Condominium Units up to the date of that meeting. After all costs and financial liabilities have been paid, the remaining net funds shall be paid to the shareholders: 90% to D&D and 10% to HPI (Clause 4). The Equitable Mortgage was to be increased to US\$2.6m (minus the amounts due to HPI for Lot 5 and the amount due on Barbara Wiggins Land). Repayment by HPI of the loan was extended to October 2015 (Clause 5). It was expressly stated in Clause 5 that the mortgage amount represented amounts owed to D&D for loans and advances made by D&D on behalf of or to HPI and Mr. Grant and that the amount also includes accumulated interest up to the repayment date.

- [16] The management of the project to construct the Condominium Units was informal from the outset. It was not until three (3) years after the incorporation of HPC that a bank account was opened. There is no evidence produced by the parties to show that the shareholding of HPC was changed to reflect the agreements (2010, 2012 or 2014) between the parties. Mr. Grant, V. Doche and R. Doche had meetings at least once per week at D&D's office to discuss matters in relation to the project including subcontract work which Mr. Grant was carrying out and sales of the Condominium Units. The meetings were informal, and no notes were taken by the parties at those meetings. Sometimes, Mr. Grant would send notes of their discussions to V. Doche and R. Doche via email.
- [17] By 10 November 2015, neither HPI nor Mr. Grant had made any payments towards the loan granted to them by D&D that was secured by the equitable mortgage in favour of D&D which was initially scheduled to mature in 2013 but was extended to 2014 and later extended to October 2015. As a result, V. Doche on behalf of D&D wrote to Mr. Grant on 10 November 2015 and indicated that they (V. Doche and R. Doche) intended to call in the equitable mortgage. On 18 December 2015, D&D, as the appointed Attorney for HPI, executed an Acknowledgment of Debt and a Request to Note Mortgage in order to convert the equitable mortgage to a legal mortgage which was subsequently noted on the Certificate of Title in favour of HPI. On 21 February 2017, D&D initiated foreclosure proceedings by serving a Notice to Pay Off on HPI. On 4 September 2017, a second Notice to Pay Off was served on HPI. HPI again failed to comply with the Notice. On 12 November 2017, D&D caused a second Act of Seizure to be executed on the Scotch Bonnet Lands.
- [18] On 3 November 2017, HPI and Mr. Grant instituted a claim (Claim No. SKBHCV 2017/0343) in which they allege that the Power of Attorney and the Mortgage were void and no effect (the "**Mortgage Claim**").
- [19] D&D, in December 2017, sent a notice to HPI and Mr. Grant in respect of the scheduling of an annual general meeting of HPC to take place on 17 February 2018 to discuss the accounts and dividends. HPI and Mr. Grant applied for and



obtained an injunction restraining the holding of the annual general meeting and any other such meeting of HPC.

- [20] On 30 April 2018, the court granted the Defendants' application to strike out in Claim No. SKBHCV2017/0043, a claim previously brought by HPI and Mr. Grant. The court struck out the claim against R. Doche, V. Doche, and Mr. Sylvester Anthony and held that Mr. Grant had no standing to bring the claim. The court also gave HPI leave to file a new unfair prejudice claim against D&D that was filed on 28 June 2018 by HPI. In that claim, HPI alleges that the affairs of HPC are being or have been conducted in a manner which is unfairly prejudicial to it (the "**Unfair Prejudice Claim**").

#### **The Mortgage Claim**

- [21] The issue that arises in respect of this claim is essentially whether the mortgage and power of attorney are void as the Claimants allege. The Claimants allege that D&D did not pay the monies itself to BNL but that the sum of US\$1,540,175.58 was paid by V. Doche and R. Doche in their personal capacities. It must be stated at the outset that whatever arrangements D&D, V. Doche and R. Doche made to pay off the loans of Mr. Grant and HPI to BNL does not matter since the loans were thereby liquidated. I do not accept that D&D failed to make any payment in respect of the Calmer Overdraft. The letter from BNL to R. Doche and V. Doche dated 9 November 2012 does not create a legally enforceable agreement. In any event, Clause 8 of the 2012 Agreement specifically provides the only basis on which the Calmer Overdraft is to be paid by D&D, namely, the transfer as security by HPI of Lot 9 to D&D.
- [22] It is astonishing that the Claimant would claim that there is no evidence that D&D made a loan to HPI. The evidence in this matter is clear and shows convincingly the converse to be true.
- [23] The relevant sections of the Title by Registration Act CAP 10:19 of the Revised Laws of Saint Christopher and Nevis (the "**TRA**") are as follows:

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

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

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

(1) An equitable mortgage may be constituted by deposit of the certificate of title, and when a duplicate certificate of title is so deposited to cover any liability incurred by the registered proprietor, the Registrar of Titles shall not require the holder thereof to deliver up the same for the purpose of noting thereon any mortgage or encumbrance subsequent to the deposit, or for the purposes of any transfer.

**60. Equitable mortgage to extend over all property over which a mortgage extends.**

An equitable mortgage shall be constituted and created over the land contained in the certificate of title deposited, and over all fixtures, houses, outhouses, growing crops, stock, and other property over which a mortgage extends, and shall rank in its order according to the date of presenting a caveat, as hereinafter provided, to the Registrar of Titles to prohibit dealings with the land while the equitable mortgage exists.

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

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

**62. Equitable mortgagee may by caveat prevent dealing with land.**

The equitable mortgagee, if he or she desires to prevent any other creditor obtaining a preference over such effects comprised in his or her equitable mortgage as may be secured by bill of sale or otherwise, shall forthwith present a caveat, in manner hereinafter provided, to prevent any dealing with the land and the things accessory thereto, as already set forth, over which his or her equitable mortgage extends, but he or she may refrain from presenting such caveat, and in that case, his or her right as regards the registered proprietor shall not be adversely affected thereby, but he or she will not have any preference over a more diligent creditor whose security may be meantime completed.

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

(1) An equitable mortgage may be converted into a mortgage, with all the powers and privileges of a mortgagee against the registered proprietor

by way of sale of the land and otherwise, by the equitable mortgagee obtaining the judgment of the Court fixing the amount due to him or her by the registered proprietor, or obtaining from the debtor a writing accepting a specific sum therein stated as being due by him or her to the creditor under the equitable mortgage.

- [24] The Claimants submit that the mortgage amount was not actually advanced to HPI from D&D and that the amount stated in the document entitled “Acknowledgement of Debt under Section 63” was not advanced to HPI by D&D or any other person. However, section 44 of the TRA is in relation to legal mortgages not equitable mortgages. In addition, the Claimants submit that there was no “writing” signed by HPI acknowledging any “advances or loans” from D&D as the Defendants contend. I am of the view that the “Acknowledgement of Debt under Section 63” filed on 18 December 2015 was sufficient for the purposes of creating an equitable mortgage under section 59 of the TRA. For the purposes of section 59, the writing is evidenced by the provisions of the 2010, 2012 and 2014 Agreements.
- [25] I agree with the Defendants that the “Acknowledgement of Debt under Section 63” confirmed that the mortgage was for the “advances made and to be made” as provided for by section 61 of the TRA. Equally, there is no doubt that the Defendants had the right, pursuant to section 62 of the TRA, to caveat to prevent dealings with the Scotch Bonnet Lands. In my view, the evidence is clear as to the value of the equitable mortgage because Clause 5 of the 2014 Agreement provides that the equitable mortgage will be increased to US\$2.6m minus two amounts provided therein. The 2014 Agreement provides a clear mechanism to determine the value of the equitable mortgage.
- [26] The Claimants submit that the right of a registered proprietor of land under the TRA to provide such a power of attorney is provided for in section 146 of the TRA as follows:

**146. Form of power of attorney.**

- (1) A power of attorney intended to authorise dealings with land, if executed within the State, may be in Form 27 set out in the Second Schedule.

- [27] In the “Memorandum of Deposit of Certificate of Title” filed by HPI on 5 July 2016, HPI irrevocably appointed D&D as its Agent and Attorney and in its name and on its behalf to execute a writing under section 63 of the TRA accepting as due by HPI any amount payable by it to enable D&D to convert the equitable mortgage into a legal mortgage. The Claimants’ arguments in respect of the Power of Attorney are not convincing. No breach of trust has been established. I fail to appreciate the Claimants’ submission that nowhere can it be gleaned that HPI intended to give D&D the power to mortgage HPI’s lands to itself without prior notice and acceptance by HPI. This is exactly what HPI did as evidenced by the “Memorandum of Deposit of Certificate of Title”. It is quite startling for HPI to now argue against a right it expressly gave D&D in the “Memorandum of Deposit of Certificate of Title”. I agree with Counsel for the Defendant that the failure to use the form of power of attorney does not invalidate the Power of Attorney.
- [28] The Claimants have provided no basis on which to invalidate the Power of Attorney HPI granted to D&D and the Equitable Mortgage in favour of D&D. In addition, I also find that D&D properly complied with the provisions of section 63 of the TRA to convert the equitable mortgage into a legal mortgage. The sum due from HPI was evidenced in Clause 5 of the 2014 Agreement. The Claimants are not entitled to any of the reliefs claimed in the Mortgage Claim. Having regard to the clear evidence of the debt evidenced by Clause 5 of the 2014 Agreement, the Defendant is entitled to judgment on its counterclaim.

### **Shareholding in HPC**

- [29] The 2010 Agreement contemplated that HPI and D&D would each own 50% of the shares in HPC. On incorporation of HPC, Mr. Grant was the sole director and shareholder of HPC. The 2012 Agreement provides that D&D would own 100% of the shares in HPC. Mr. Grant admitted during the trial that after the 2010 Agreement, D&D owned 100% of the shares in HPC. However, the appropriate shareholder and Board of Directors resolutions were not completed during that time to give effect to any of these agreed shareholdings. The 2014 Agreement provides for the following shareholding in HPC: 90% to D&D and 10% to HPI. This

is reflected in the purported unanimous written resolution of the directors of HPC dated 30 September 2014 and an in an email from Mr. Grant to V. Doche and R. Doche dated 13 November 2014.

- [30] The Claimant submits that the unanimous written resolution of the directors of HPC dated 30 September 2014 is void because: (1) R. Doche and V. Doche had no legal authority so to do; (2) R. Doche and V. Doche were not Directors of HPC; (3) there was no quorum at the meeting; (4) Mr. Grant received no notice of the meeting in any capacity as director or shareholder of HPC and Mr. Grant was not present at the meeting; and (5) the resolution was given retrospective effect from 1 November 2013 which contravenes section 102 of the Companies Act CAP 21:03 of the Revised Laws of Saint Christopher and Nevis (the “**Companies Act**”) which provides that:

**102. Resolution passed at adjourned meeting.**

Where a resolution is passed at an adjourned meeting of

- (a) a company;
- (b) any class of members of a company; or
- (c) the directors or a committee of directors of a company;

the resolution is for all purposes to be treated as having been passed on the date on which it was in fact passed, and is not to be deemed passed on any earlier date.

- [31] Section 102 relates to adjourned meetings. However, section 96(3) of the Companies Act states that a resolution under this section shall be deemed to be passed when the instrument, or the last of several instruments, is last signed or on such later date as is specified in the resolution. It does not seem that section 96(3) allows for written resolutions to become effective at an earlier date other than the date on which it is last signed by all the directors.

- [32] There is no evidence that, after the incorporation of HPC, the shareholding of HPC was changed to reflect the terms of the 2010, 2012 or 2014 Agreements. There was no evidence before the court that R. Doche and V. Doche were ever appointed directors of HPC before the unanimous written resolution of the

directors HPC was passed on 30 September 2014. When R. Doche and V. Doche purportedly passed the unanimous written resolution of the directors of HPC dated 30 September 2014 they were not directors of HPC. The unanimous resolution is therefore null and void. HPI is and remains the only shareholder of HPC.

[33] I do not find that when this resolution was passed R. Doche and V. Doche acted in bad faith or fraudulently. I accept that they mistakenly assumed that based on the 2012 Agreement they were in control of HPC and were merely giving effect to the shareholding contemplated by the 2014 Agreement. This mistaken belief may have also been engendered by Mr. Grant himself. It will be remembered that in October 2013 when Mr. Grant applied, on behalf of HPC, for a new bank account in 2013, he named V. Doche and R. Doche as directors of HPC and as the only signatories on the HPC bank account.

[34] The intention of the Parties as evidenced in the 2014 Agreement is that the shareholding in HPC should be 90% to D&D and 10% to HPI. HPI is the current holder of one common share in HPC. HPI must now pass appropriate resolutions to reflect the intention of the parties as evidenced in the 2014 Agreement and as outlined in the now void unanimous written resolution of the directors HPC dated 30 September 2014.

### **The Unfair Prejudice Claim**

[35] Having found that HPI is and remains the holder of the only one common share in HPC, its claim for unfair prejudice fails and should be dismissed. As a matter of law, an unfair prejudice claim cannot be brought by a person who has 100% control of a company. This is because they would have the sole power to appoint the directors of the company and therefore control its management. However, the case proceeded at trial on the basis that R. Doche and V. Doche controlled in fact the affairs of HPC. The following will proceed on that basis.

[36] The Claimant claims various remedies against the Defendants alleging that the affairs of HPC are being or have been conducted in a manner which is unfairly prejudicial to the Claimant. The Claimant then seeks various remedies pursuant to

sections 142 and 144 of the Companies Act. It is therefore necessary to consider the scope of those two sections. Sections 142 and 144 are found in Part XX of the Companies Act, which is entitled “UNFAIR PREJUDICE”. This Part comprises three sections, including sections 142 and 144. Section 143 concerns the power of the Minister to apply to the court. Sections 142 provides as follows:

**142. Power for member to apply to Court.**

- (1) A member of a company may apply to the Court for an order under section 144 on the ground that the company’s affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members (including at least himself or herself) or that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.
- (2) The provisions of this section and sections 143 and 144 apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law, as those provisions apply to a member of the company; and references to a member or members are to be construed accordingly.

[37] Section 142 is an empowering section. A member of a company is given a statutory right to apply to the court for an order under section 144 that the company’s affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members (including at least himself or herself). This right belongs to a person who is a member of a company. To move the court to grant an order under section 144, the member must be able to prove or provide evidence that the company’s affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests: (1) of its members generally; or (2) of some part of its members including at least the member who makes the application. Once the court is satisfied in relation to these matters, the court may grant an order pursuant to section 144 which provides as follows:

**144. Powers of Court.**

- (1) If the Court is satisfied that an application under section 142 or 143 is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.
- (2) Without prejudice to the generality of subsection (1), the Court's order may
  - (a) regulate the conduct of the company's affairs in the future;
  - (b) require the company to refrain from doing or continuing an act complained of by the applicant or to do an act which the applicant has complained it has omitted to do;
  - (c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the Court may direct;
  - (d) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly;
  - (e) suspend the exercise of the powers of the directors;
  - (f) appoint an interim receiver of the company;
  - (g) order the directors to meet and to consider any matter and to give all necessary directions and orders in relation thereto.
- (3) If an order under this section requires the company not to make any, or any specified, alterations in the memorandum or articles, the company shall not then without leave of the Court make such alterations in breach of that requirement.
- (4) An alteration in the company's memorandum or articles made by virtue of an order under this section is of the same effect as if duly made by resolution of the company, and the provisions of this Act apply to the memorandum or articles as so altered accordingly.
- (5) The act of the Court recording the making of an order under this section altering, or giving leave to alter, a company's memorandum or articles shall, within fourteen days from the making of the order or such longer period as the Court may allow, be delivered by the company to the Registrar for registration, and if a company fails to comply with this subsection, the company commits an offence and liable to a fine not exceeding two thousand five hundred dollars and in the case of a continuing offence to a further fine not exceeding two hundred and fifty dollars for each day on which the offence so continues.



- [38] Section 144(1) of the Companies Act gives the court the power to make such orders as it thinks fit for giving relief in respect of the matters complained of in respect of an application made under section 142. In essence, the court is given wide powers to address any matters of which it is satisfied in respect of the application. In addition, section 144(2) goes on to provide specific non-exhaustive examples of things which the court may do pursuant to section 144, including: (a) regulate the conduct of the company's affairs in the future; (b) require the company to refrain from doing or continuing an act complained of by the applicant or to do an act which the applicant has complained it has omitted to do; or (c) authorize civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct.
- [39] In its statement of claim, the Claimant outlines various actions, which it alleges are unfairly prejudicial to its interest as a member of HPC. These range from mismanagement of the business of HPC, removal of the Claimant's representative from the Board of Directors of HPC, improperly conducting general meetings and Board meetings of HPC and excessive remuneration to the directors of HPC. In order to succeed in an unfairly prejudicial action pursuant to section 142 of the Companies Act, the Claimant must show: (1) the conduct complained about must be conduct of HPC's affairs; (2) the conduct must prejudice the Claimant's interest as a shareholder or member of HPC; and (3) the conduct of which the Claimant complains must be unfair.
- [40] In **Apex Global Management Limited v Fi Call Limited & Others** [2013] EWHC 1652 (Ch) ("**Fi Call**"), Vos J. stated:

In my judgment, these authorities all speak with one voice. They show that sections 994-6 provide a wide and flexible remedy where the affairs of a company have been conducted in a manner that is unfairly prejudicial to the interests of some or all of its members. A section 994 petition is appropriate where, for whatever reasons, the trust and confidence of the parties to a quasi-partnership has broken down. Relief can be granted to remedy wrongs done to the company, and in such a situation the alleged wrongdoers must be made parties to the petition. Non-members of a company who are alleged to have been responsible for such conduct can be joined as respondents, and, in an appropriate case, such non-

members can be made primarily or secondarily liable to buy the petitioners' shares. Artificial limitations should not be introduced to reduce the effective nature of the remedy introduced by sections 994-6.

[41] Section 994 the UK Companies Act is similar to section 142 of the Companies Act and section 996 is also similar to section 144 of the Companies Act.

[42] In **Re a Company (No. 005287 of 1985)** [1986] 1 WLR 281, Hoffmann J. had to consider an application to strike out H as a defendant to a claim for unfair prejudice. By the time the claim was filed, H had been but was no longer a member of the company. Hoffmann J. refused to strike out the claim against him either insofar as it claimed an account of certain company payments which it was said he had made without authority, or insofar as it claimed an order that he buy the petitioners' shares. Hoffmann J. stated (at pp. 284C-285B):

Mr. Briggs points out that these four specific powers [in what is now section 996(2)] all involve orders being made either against the company in respect of its conduct or against other members of the company. He therefore says that section 461 should be construed so as to limit the scope of the relief which may be given to regulating the affairs of the company and its members between themselves. There is no justification, he says, for extending that relief to orders against persons who have ceased to be members.

It is accepted that on the facts alleged in the petition, the truth of which, of course, remains to be tried, the petitioners would be able to mount a derivative shareholders' action of the kind exemplified by *Wallersteiner v. Moir* [1974] 1 W.L.R. 991 against H. in order to require him to account for such of the company's assets as he may have disposed of without authority. But it is said that such an action should be commenced separately by writ and that it would not be proper to seek the equivalent relief within a petition under section 459.

Looking at the matter from a practical point of view that does not seem to me to be very convenient. It would mean separate proceedings having to be commenced by writ and separate pleadings delivered in respect of matters which would very substantially overlap, if not duplicate, the issues canvassed in the petition and affidavits under section 459. It would then be necessary for both sets of proceedings to be heard together. I would be reluctant to come to the conclusion that this form of duplication was necessary unless it was clear that the Jurisdiction under sections 459 and 461 did not permit the whole matter to be dealt with upon the petition. It seems to me that although it is true that section 462(2) shows that the normal order under section 461 will be an order against the company or

another member, **there is no reason why the words of section 461(1) should not be given their full effect and allow the court to give relief in respect of a complaint that the company's affairs have been conducted in a manner unfairly prejudicial to the interests of members, even when this would involve giving relief against a respondent who is no longer a member.** For that reason, I am not willing to strike out H. as a party to the petition.

The other way in which Mr. Briggs made his submission was to say that at any rate no order could be made under section 461 for requiring H. to purchase the petitioners' shares. Section 461(2)(d), which I have already read, provides for such an order being made against members of the company, but says nothing about the order being made against a non-member. Mr. Kosmin, on the other hand, says that there are cases in which a person may be — for the purposes of giving relief — identified with a company which he controls and that it may be possible to obtain an order to that effect against H., either under the broad Jurisdiction of section 461(1), or by identifying H. with the Gibraltar company. It is not necessary for me to express any view upon whether that can be done because I do not think it would be right to strike out the paragraph seeking such relief unless I was satisfied that the possibility of obtaining it was perfectly hopeless. I do not feel in a position at the moment to say that, and I do not think it would prejudice H. very greatly if the paragraph seeking that relief were to remain in the petition, given that in the light of the conclusion to which I have already come he will remain as a respondent to the petition in respect of the relief sought under paragraph 2.

[43] In **Re Company (No.000314 of 1989)** [1990] B.C.C. 221, Mummery J. stated (at pp. 225-226) as follows:

The following guidance can be gathered from the decisions on sec. 459 and on the provisions of sec. 75 of the Companies Act 1980 which were replaced by sec. 459–461:

- (1) The provisions confer on the court a very wide jurisdiction and discretion, so wide that it has to be carefully controlled in order to prevent it from being used as a means of oppression by a dissident shareholder (*Re a Company No. 007623 of 1984* (1986) 2 BCC 99,191 at p. 99,196). In that case *Hoffmann J*, on the hearing of the petition, dismissed the claims of a minority shareholder who was seeking to use the petition under sec. 75 of the 1980 Act to compel the majority shareholders to buy his shares in circumstances where the company's articles provided a means for determining the fair value of those shares and that provision had not been invoked by him. In those circumstances he held that there were no grounds for characterising the conduct of the majority as unfair and it was neither

necessary nor appropriate to present such a petition. I note in passing that the articles of this company do not provide any special machinery for the purchase or valuation of members' shares.

- (2) The statutory provisions were enacted for the “protection of (the) company's members against unfair prejudice”. They were not enacted so as to enable a “locked in” minority shareholder to require the company to buy him out at a price which he considers adequately reflects the value of the underlying assets referable to his shareholding (Re a Company [1983] Ch 178 at p. 191C). In the present case it would not be sufficient for the petitioner or points of claim simply to aver that the petitioner was a minority shareholder in a private company who was not being offered for her shares a better price than she could obtain for them in the open market. As has been seen this petition and these points of claim allege more than that.
- (3) The provisions apply to conduct which is unfairly prejudicial to the interests of the member qua member. They do not extend to conduct which is prejudicial to other interests of persons who happen to be members of the company (Re a Company [1983] Ch 178 at p. 189E and Re a Company No. 00477 of 1986 (1986) 2 BCC 99,171 at p. 99,174). The interests of the member(s) referred to in the section are not, however, necessarily limited to his strict legal rights under the constitution of the company. The concept of “unfair prejudice” to “interests” clearly embraces a wider range of complaints than infringement of a member's legal rights under the articles and under the Companies Acts.
- (4) A resolution of a company is capable of being regarded as unfairly prejudicial within the meaning of sec. 459 if it has been proposed and would be prejudicial if carried through, even though there is no immediate threat that the offending resolution would be passed ( Re Kenyon Swansea Ltd (1987) 3 BCC 259 at pp. 264–265). There cannot be any valid objection to the present petition on the ground that the resolutions which have been proposed from time to time have not been validly passed or have not been passed at all.
- (5) The past acts of the company are also capable of being regarded as unfairly prejudicial within the meaning of sec. 459 , even though, at the date of the petition, or, I would add, at the date of the hearing, the unfairness has been remedied (see Re Kenyon Swansea Ltd at p. 265). Thus, if the withholding of the information requested by the petitioner in this case is capable of being unfairly prejudicial to her within the meaning of this section the petition does not cease to be maintainable on the ground that the information has been supplied subsequent to the presentation of the petition.

[44] The leading authority on the interpretation and operation of section 459(1) of the UK Companies Act is the decision of the House of Lords in **O'Neill v Phillips** [1999] B.C.C. 600; [1999] 1 W.L.R. 1092. A useful summary of the principles from this case was provided by the Court of Appeal in **Grace v Biagioli** [2006] B.C.C. 85 as follows (at pp. 104-105):

From Lord Hoffmann's speech one can deduce the following principles:

(1) The concept of unfairness, although objective in its focus, is not to be considered in a vacuum. An assessment that conduct is unfair has to be made against the legal background of the corporate structure under consideration. This will usually take the form of the articles of association and any collateral agreements between shareholders which identify their rights and obligations as members of the company. Both are subject to established equitable principles which may moderate the exercise of strict legal rights when insistence on the enforcement of such rights would be unconscionable.

(2) It follows that it will not ordinarily be unfair for the affairs of a company to be conducted in accordance with the provisions of its articles or any other relevant and legally enforceable agreement, unless it would be inequitable for those agreements to be enforced in the particular circumstances under consideration. Unfairness may, to use Lord Hoffmann's words, "consist in a breach of the rules or in using rules in a manner which equity would regard as contrary to good faith": see [1999] B.C.C. 600 at p.607B; [1999] 1 W.L.R. 1092 at p.1099A; the conduct need not therefore be unlawful, but it must be inequitable.

(3) Although it is impossible to provide an exhaustive definition of the circumstances in which the application of equitable principles would render it unjust for a party to insist on his strict legal rights, those principles are to be applied according to settled and established equitable rules and not by reference to some indefinite notion of fairness.

(4) To be unfair, the conduct complained of need not be such as would have justified the making of a winding-up order on just and equitable grounds as formerly required under s.210 of the Companies Act 1948.

(5) A useful test is always to ask whether the exercise of the power or rights in question would involve a breach of an agreement or understanding between the parties which it would be unfair to allow a member to ignore. Such agreements do not have to be contractually binding in order to found the equity.

(6) It is not enough merely to show that the relationship between the parties has irretrievably broken down. There is no right of unilateral withdrawal for a shareholder when trust and confidence between

shareholders no longer exist. It is, however, different if that breakdown in relations then causes the majority to exclude the petitioner from the management of the company or otherwise to cause him prejudice in his capacity as a shareholder.

[45] The Claimant submits that the following are examples of unfair prejudice: (1) the Defendants did not pay US\$100,000 to BNL for the release of Lot 4; (2) D&D did not itself advance the loan for the equitable mortgage; (3) D&D appropriated and operated HPC's bank account to the exclusion of the Claimant; (4) the Defendants hijacked HPC, ousted the Claimant from the management thereof and illegally reallocated the shares to abrogate themselves of the controlling majority; and (5) the Defendants failed to provide the Claimant with the accounts and financial information in relation to HPC.

[46] My findings in relation to those examples are as follows. First, when construction commenced on Lot 4, the 2014 Agreement had been executed and the BNL loan was already paid so there was no need to pay US\$100,000.00 to BNL to release Lot 4. Second, the evidence is clear that D&D paid for, or arranged the payment of, the loan to BNL. Third, when the bank account of HPC was opened by Mr. Grant, on behalf of HPI, in October 2013 and he named R. Doche and V. Doche as the only signatories on the bank account. Mr. Grant also named R. Doche and V. Doche as directors of HPC on the application when they were never appointed directors of HPC. In addition, there is no evidence that HPI ever complained about the manner in which transactions on the bank account were being conducted. Actually, in an email dated 13 November 2014 to R. Doche and V. Doche, in order to persuade them immediately to execute the 2014 Agreement, Mr. Grant, on behalf of HPI, informed R. Doche and V. Doche that there was no risk to them because, among other things, they "control 100% of all the funds of Heritage Condominiums through all the Bank Accounts".

[47] Fourth, the evidence at trial indicated that Mr. Grant, and through him, HPI, was intimately involved in the management of HPC, attending meetings with V. Doche and R. Doche each week. Mr. Grant was the site manager for the construction of the Condominium Units; and (5) Clause 4 of the 2014 Agreement put the

responsibility on both D&D and HPI to convene a meeting to discuss and pay dividends based on the Condominium Unit sales up to 31 October 2015.

- [48] The Claimant has failed to provide any evidence that D&D did not carry out its obligations under the 2010, 2012 or 2014 Agreements. They have also failed to substantiate any of the allegations made against the Defendants. There is no evidence that D&D deliberately did not open a separate bank account for the development on Lot 4 as contemplated by Clause 21 of the 2010 Agreement. In any event, HPI acquiesced in this and cannot now complain of its breach.
- [49] As I have found above, when R. Doche and V. Doche purportedly passed the now void unanimous written resolution of the directors HPC dated 30 September 2014, they were acting under the mistaken belief that they owned HPC pursuant to Clause 4 of the 2012 Agreement and that the resolution was giving effect to the shareholding contemplated by the 2014 Agreement. There was no bad faith or otherwise when this was one.
- [50] The 2014 Agreement effectively replaced the 2010 Agreement and the 2012 Agreement to the extent of any inconsistency between them. Clauses 19 and 20 of the 2010 Agreement initially governed the payments to D&D and HPI in respect of the proceeds of sales of the Condominium Units. D&D was to be refunded its capital injection of US\$1m and an additional sum of US\$1m as its share of the "profits". All remaining sums in the bank account were to be the property of HPI. HPI and D&D were to own 50% each of the shares of HPC.
- [51] The 2012 Agreement does not contain any clauses relating to the sharing of profits in respect of the proceeds of sales of the Condominium Units but contemplated that D&D would own 100% of the shares of HPC. This was not surprising since D&D would own HPC outright so there was no need to share anything with HPI.
- [52] The 2014 Agreement sets out expressly in Clause 3 the manner in which the profits on the sales of the Condominium Units on Lot 3 (Condominium Building 1 (as termed in the 2014 Agreement)) were to be shared. After (1) closing costs, (2) US\$2.8m plus 8% interest to D&D, and (3) US\$1m profit to D&D, the remaining

amount would be paid to HPI. This is not altogether different from what obtained in the 2010 Agreement except that the initial amount of US\$1m for construction was increased to US\$2.8m to reflect the loans and payments made by D&D on behalf of or to Mr. Grant and HPI. The share of profits to D&D of US\$1m remained the same, and the balance was to go to HPI. There is no question that Clauses 19 and 20 of the 2010 Agreement have been superseded by Clauses 3 and 4 of the 2014 Agreement.

- [53] It is important to make a clear distinction between the sharing of profits under the 2010 and 2014 Agreements and under the shareholding of HPC in particular. The shareholders can agree to share profits in a manner different to their shareholding. This is what occurred under the 2010 Agreement. Clause 3 of the 2014 Agreement only speaks to profits on proceeds of sales of the Condominium Units on Lot 3. It does not cover the profits of HPC for Condominium Units not included in the Condominium Units on Lot 3. Any profit sharing for a matter not included in the proceeds of sales of the Condominium Units on Lot 3 will be governed by the ratio of shareholding in HPC between HPI and D&D. This too was properly captured by Clause 4 of the 2014 Agreement which provides that “any remaining net funds shall be paid to the Shareholders – 90% to [D&D] and 10% to [HPI].” Clauses 3 and 4 of the 2014 Agreement now govern the sharing of profits of the sales of the Condominium Units on Lot 3 and the shareholding in HPC between HPI and D&D.
- [54] I find no evidence that HPI was prevented from participating in the profits of HPC. In fact, Mr. Grant, on behalf of HPI, collected the weekly cheque of US\$3,000.00 as an advance on the share of profits due to HPI from HPC. I also find that there is no evidence that: (1) there was any breach of the terms on which the parties agreed that the affairs of HPC should be conducted, namely, the 2010, 2012 and 2014 Agreements; or (2) any equitable considerations arising at the commencement of the relationship between D&D and HPI, or subsequently, to make it unfair for those conducting the affairs of the company to rely on their strict legal right.



[55] For these additional reasons, the Claimant's Unfair Prejudice Claim therefore fails and it is not entitled to any of the reliefs sought.

### **The Way Forward: the 2014 Agreement**

[56] I have already explained above that HPI must call a meeting of HPC to pass resolutions of the shareholders and Board of Directors to reflect the shareholding of HPC contemplated by the 2014 Agreement. It would also be necessary for the new directors of HPC to give effect to the Clauses of the 2014 Agreement, in particular, Clauses 3 and 4. The orders made below will reflect the way forward in this matter.

### **Prescribed Costs**

[57] There is no specified sum in the Unfair Prejudice Claim so prescribed costs is governed by CPR 65.5(2)(b). In relation to the Mortgage Claim, since there is a claim for a specified sum, an unspecified sum, and for other remedies, the court has ordered the Claimant to pay the sum of US\$2,030,663.12 to the Defendant. This means that the value of the claim for the purposes of prescribed costs must be based on the amount ordered to be paid by the Claimant in accordance with CPR 65.5(2)(a) and that amount is US\$2,030,663.12.

### **Disposition**

[58] For the reasons explained above, I make the following orders:

- (1) The Unfair Prejudice Claim is hereby dismissed.
- (2) Prescribed costs to the Defendant in the Unfair Prejudice Claim in accordance with CPR 65.5(2)(b) to be paid within 14 days of today's date unless agreed.
- (3) Within 14 days of today's date, HPI, as the sole shareholder of HPC, shall hold a general meeting of HPC to, or otherwise, pass the following resolutions:
  - a) That 90 common shares of US\$1.00 each, fully paid, be allotted to Doche & Doche Inc.;
  - b) That 9 common shares of US\$1.00 each, fully paid, be allotted to Heritage Plantation Inc.; and

- c) That Mr. Victor Doche and Mr. Rafik Doche be appointed as the only directors of HPC.
- (4) In addition to the resolutions mentioned in paragraph (3), HPC shall also pass appropriate resolutions in respect of: (i) the appointment of a company secretary; (ii) preparation of share certificates to reflect the new shareholding in HPC; (iii) the preparation of the register of members; (iv) change of registered address; (v) accepting the resignation of any existing company secretary or director of HPC; and (vi) any other matter to give effect to Paragraph (3) or any matter in Paragraph (4)(i)-(v).
- (5) Within 28 days of the passing of the resolutions and making the appropriate corporate filings giving effect to Paragraphs (3) and (4), the directors of HPC shall: (A) prepare current audited financial statements for HPC; (B) convene a general meeting as contemplated by Paragraph 4 of the 2014 Agreement; and (C) allocate the proceeds of sales of Condominium Units in Condominium Building 1 in accordance with Clause 3 of the 2014 Agreement.
- (6) Liberty to apply in relation to Paragraphs (3) to (5).
- (7) The Mortgage Claim is hereby dismissed.
- (8) Judgment in favour of the Defendant on the counterclaim in the Mortgage Claim.
- (9) The Claimant shall pay to the Defendant the sum of US\$2,030,663.12 within 28 days of today's date.
- (10) The Defendant is entitled to interest at a rate of 8% on the sum of US\$2,030,663.12 from 19 December 2015 until the date of judgment.
- (11) The Defendant is entitled to interest at a rate of 5% on the sum of US\$2,030,663.12 from the date of judgment until payment.
- (12) If the Claimant fails to pay the Claimant the sum owing by the date set out at Paragraph (9) above, that the mortgaged property shall be sold in accordance with the Title by Registration Act Cap 10.19 of the Revised Laws of Saint Christopher and Nevis 2009.
- (13) Prescribed costs to the Defendant in both the Mortgage Claim and the counterclaim in accordance with CPR 65.5(2)(a) to be paid within 14 days of

today's date unless agreed. The value of the claim for the purposes of this Paragraph in both the Mortgage Claim and the counterclaim is the amount ordered to be paid by the Claimant to the Defendant as set out in Paragraph (9) above.

**Eddy D. Ventose**

High Court Judge

**By the Court**

**Registrar**