

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

SAINT CHRISTOPHER AND NEVIS

SKBHCVAP2020/0006

BETWEEN:

**[1] MERVIN GRANT
[2] HERITAGE PLANTATION INC.**

Appellants

and

**[1] HERITAGE PLANTATION CONDOMINIUMS LTD.
[2] DOCHE & DOCHE INC.**

Respondents

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Dr. Henry L.O.S Browne, QC with him, Mr. O’Grenville Browne
for the Appellants
Mrs. Angelina Gracy Sookoo-Bobb, Mr. Sylvester Anthony and
Ms. Renal Edwards
for the Respondents

2020: October 28;
2021: April 29.

Civil appeal – Approach of appellate court to findings of facts – Unfair prejudice – Sections 142 and 144 of the Companies Act – Whether 2nd respondent had committed numerous breaches of agreements resulting in the loss of its entitlement to some or all of the benefits under agreements – Whether 2nd respondent’s conduct in managing the affairs of 1st respondent was unfairly prejudicial to 2nd appellant – Whether the judge, having dismissed the unfair prejudice claim, had power under section 144(2) or otherwise to make the orders that he did regarding the affairs 1st respondent – Creation of mortgages – Section 44 of

Title by Registration Act – Whether mortgage created in relation to money advanced by 2nd respondent to 2nd appellant by discharge of the mortgage in favour of the Bank – Memorandum of Acknowledgement of Debt – Conversion of equitable mortgage into legal mortgage – Section 63 of the Title by Registration Act – Whether the Memorandum of Acknowledgement of Debt complies with section 63 of the TRA to allow 2nd respondent to acknowledge the amount due under the equitable mortgage for converting the equitable mortgage into a legal mortgage – Whether the mortgage is valid

Mr. Mervin Grant (“Mr. Grant”), the 1st appellant, is the sole shareholder of the 2nd appellant, Heritage Plantation Inc. (“HPI”). HPI owns 20 acres of land at Frigate Bay, Saint Christopher (“the Scotch Bonnet Property”). In 2005, the Scotch Bonnet Property was mortgaged to the Bank of Nevis Limited (“the Bank”) to secure the repayment of a loan to HPI of \$900,000.00. In or about 2010, Mr. Grant entered into negotiations with, Mr. Victor Doche and Mr. Rafik Doche (the “Doches”), the owners of the 2nd respondent Doche & Doche Inc (D&D), a holding company. D&D is entitled to shares in the 1st respondent, Heritage Plantation Condominiums Limited (“HPC” or “the Company”). The negotiations resulted in three agreements (collectively referred to as “the Agreements”). The first agreement (“the 2010 Agreement”) contemplated, among other things, the formation of HPC as a joint venture company. HPC was incorporated on 22nd July 2010 and Mr. Grant was registered as its sole director and shareholder. Under the 2010 Agreement, D&D was to raise \$1 million for the construction of condominium units on Lot 3 of the Scotch Bonnet Property. Construction of the units commenced using funds provided by or on behalf of D&D. D&D also agreed to provide assistance to settle debts owed by HPI including the mortgage loan to the Bank and an overdraft at the Bank in the name of Calmer Developments Ltd (“the Calmer overdraft”). On 9th November 2012, the Doches paid HPI’s outstanding mortgage loan and undertook to repay the Calmer overdraft. This was confirmed in a letter from the Bank to the Doches.

Under the terms of the second agreement (“the 2012 Agreement”), D&D became entitled to all the shares in HPC, and, having discharged HPI’s obligations to the Bank, it would be reimbursed the monies it had advanced or be granted security. HPI had an option to reverse the matters contemplated by the 2012 Agreement by reimbursing the funds advanced by D&D on its behalf by 5th February 2013. This was not done. Therefore, HPI’s obligation to provide D&D with security for the monies that D&D had advanced for the repayment of the HPI loans still stood. Mr. Grant and HPI provided security in the form of an equitable mortgage over the Scotch Bonnet Property. The equitable mortgage was completed on 7th April 2014 when HPI executed a Memorandum of Deposit of Certificate of Title of the Scotch Bonnet Property acknowledging HPI’s indebtedness to D&D (“The Memorandum”). The Memorandum appointed D&D as HPI’s attorney to convert the equitable mortgage to a legal mortgage. By the time the third agreement was signed in 2014 (“the 2014 Agreement”), the parties agreed that the amount that had been invested into the project for the construction of the units had risen to \$2.8 million. A dispute arose between the parties whether D&D had raised the \$1 million as it was required to do under the 2010 Agreement and had invested it into the construction of the units through companies that it controlled. By November 2015, when the equitable mortgage was scheduled to mature, HPI had not made any payments on account of the amounts due to

D&D. As a result, D&D appointed itself attorney of HPI, by way of a power of attorney, and executed an acknowledgement of debt in order to convert the equitable mortgage into a legal mortgage.

In November 2017, Mr. Grant and HPI initiated a claim against D&D challenging the power of attorney and the mortgage as being void and of no effect and seeking an account of monies said to have been advanced by D&D and constituting the mortgage monies (“the mortgage claim”). D&D counterclaimed for the monies advanced to the appellants which now formed the mortgage monies, or for enforcement of the mortgage. In June 2018, HPI commenced another claim seeking relief under sections 142 and 144 of the Companies Act on the ground that the affairs of HPC have been and are being conducted in a manner that is unfairly prejudicial to HPI, and sought orders regarding the corporate and business affairs of HPC (“the unfair prejudice claim”). The claims were heard by Ventose J in July 2019. The learned judge dismissed the mortgage claim for an order setting aside the mortgage between HPI as mortgagor and D&D as mortgagee and granted D&D’s counterclaim for payment of the monies due under the mortgage. The judge also ordered that, in default of payment within 28 days, the mortgaged property should be sold under the provisions of the Title by Registration Act (“the TRA”). The learned judge dismissed HPI’s unfair prejudice claim and made orders regarding the corporate affairs and structure of HPC. He also ordered the appellants to pay prescribed costs on both claims.

Being dissatisfied with the orders made by the learned judge, the appellants appealed. The issues that arose for determination on appeal are: (i) whether D&D had breached the Agreements resulting in the loss of its entitlement to some or all of the benefits under the Agreements; (ii) whether D&D’s conduct in managing the affairs of HPC was unfairly prejudicial to HPI; and (iii) whether the judge, having dismissed the unfair prejudice claim, had power under section 144(2) of the Companies Act or otherwise to make the orders that he did regarding the affairs of HPC; (iv) whether D&D advanced any money to HPI to discharge the mortgage in favour of the Bank; (v) whether the Memorandum of Acknowledgement of Debt signed on behalf of D&D complies with section 63 of the TRA to allow D&D to acknowledge the amount due under the equitable mortgage for converting the equitable mortgage into a legal mortgage; and (vi) whether the mortgage is valid.

Held: dismissing the appeal; and making the orders set out at paragraph 79 of this judgment, that:

1. An appellate court should exercise extreme caution in considering the findings of fact by the trial judge and should only interfere when it is satisfied that there is no or no sufficient evidence to support the trial judge’s findings, or that his conclusions on the facts are plainly wrong. This is because a trial judge has the distinct advantage of seeing the witnesses give their evidence and observing their demeanour, and he or she is in the best position to assess their credibility. The appellate court is deprived of this advantage and carries out its role of reviewing the evidence on the basis of the printed record. However, an appellate court is more inclined to interfere with the trial judge’s findings of fact where those findings are based on documentary evidence or undisputed facts.

Ming Siu Hung and others v J F Ming Inc and another [2021] UKPC 1 considered.

2. In order to sustain a claim of unfair prejudice under section 142 of the Companies Act, the court must be satisfied that the challenged conduct relates to the affairs of the company, the conduct caused prejudice to the interests of a member of the company, and the prejudice was unfair. In this case, the allegations relied on by HPI to ground its claim for unfairly prejudicial conduct by D&D consists of either allegations that D&D breached the terms of the Agreements and/or it failed to comply with the rules for holding meetings of HPC and providing information about the Company's affairs in accordance with the articles of association and the Companies Act. The learned judge reviewed the pleadings, the evidence in the case and the relevant law and made findings of fact that D&D did not breach the terms of the Agreements, did not exclude Mr. Grant from meetings of the Company and the operation of the Company's bank account, and from participating in management decisions. There is no basis for the appellate court to disturb the findings of the learned judge and the decision to dismiss the claim that D&D conducted affairs of HPC in a manner that was unfairly prejudicial to the HPI.

Section 142 of the **Companies Act**, Cap. 21.03, Revised Laws of Saint Christopher and Nevis, 2002 considered.

3. Section 144 of the Companies Act empowers the court to grant wide and flexible remedies where the affairs of the company have been or are being conducted in a manner that is unfairly prejudicial to the interests of one or more of its members. The jurisdiction of the court to make orders under section 144(2) is triggered by a finding of unfair prejudice under section 142. It follows that the learned judge, having dismissed the unfair prejudice claim, should not have proceeded to make the several orders that he did regarding the corporate and business affairs of HPC. Accordingly, the orders made by the learned judge in sub-paragraphs (3) to (6), of paragraph 58 of the judgment cannot stand.

Sections 142 and 144 of the **Companies Act**, Cap. 21.03, Revised Laws of Saint Christopher and Nevis, 2002 considered; **Re a Company (No 007623 of 1986)** [1986] BCLC 362 considered; **O'Neil and another v Phillips and others** [1999] 1 WLR 1092 applied; **Grace v Biagioli and others** [2006] BCLC 70 applied.

4. The \$1,540,175.58 that was paid by the Doches to the Bank on behalf of D&D was used to discharge the HPI mortgage debt. There is no other reason why the Doches would have paid over \$1.5 million to the Bank, and none has been suggested. The fact that the \$1,540,175.58 was paid to the Bank by the Doches on behalf of D&D is of no significance in this case. It follows that the contention made by the appellants that a valid mortgage was not created because no money was actually advanced to HPI by D&D is without merit and was correctly rejected by the learned judge, as it is by this Court.

Section 44 of **Title by Registration Act**, Cap. 10.19 of the Revised Laws of Saint Christopher and Nevis, 2009 applied.

5. The creation of an equitable mortgage by deposit of title deeds is permitted by section 51 of the Title by Registration Act. In this case, the equitable mortgage was created when HPI executed the Memorandum of Deposit of Certificate of Title and left the certificate of title for the Scotch Bonnet Property with D&D. The Memorandum granted agency powers to D&D to acknowledge the mortgage debt and convert the equitable mortgage into a legal mortgage. In the exercise of these powers D&D executed an Acknowledgement of Debt and sought to convert the equitable mortgage into a legal mortgage. The learned judge correctly found that the Acknowledgment of Debt had complied with the provisions of the TRA and therefore the mortgage was valid. Accordingly, the judge's orders made at paragraph 58 subparagraphs (8) to (12) of the judgment cannot be impugned.

Section 51 of **Title by Registration Act**, Cap. 10.19 of the Revised Laws of Saint Christopher and Nevis, 2009 applied.

JUDGMENT

- [1] **WEBSTER JA [AG]**: On 27th January 2020, the learned trial judge delivered his decision in claims numbers 343 of 2017 and 186 of 2018. In claim No. 343 of 2017 the judge dismissed the claims of the 1st and 2nd appellants (as claimants) for an order setting aside a mortgage for \$2,030,663.12¹ between the 2nd appellant as mortgagor and the 2nd respondent/defendant as mortgagee, and granted the 2nd respondent's counterclaim for payment of the monies due under the mortgage, and in default of payment within 28 days, the mortgaged property be sold under the provisions of the **Title by Registration Act**² ("the TRA"). In claim No. 186 of 2018 the trial judge dismissed the 2nd appellant's claim for an order that the affairs of the 1st respondent were being conducted in a manner that was unfairly prejudicial to the 2nd appellant and made orders regarding the corporate and business affairs of the 1st respondent. The appellants were also ordered to pay prescribed costs on both claims. Further details of the trial judge's orders are in paragraph 18 below.

¹All references in this judgment to "\$" are to dollars in the currency of the United States of America.

² Cap. 10.19 of the Revised Laws of Saint Christopher and Nevis, 2009.

- [2] The appellants were dissatisfied with the trial judge's orders in both claims and appealed to this Court. This is the decision on the appeal.

Background

- [3] The factual background to the disputes between the parties is long and detailed. It is helpfully summarised in the judge's judgment and I generously borrow from his summary.
- [4] The 1st appellant, Mr. Mervin Grant ("Mr. Grant"), is the sole shareholder and the person in control of the 2nd appellant, Heritage Plantation Inc. ("HPI"). HPI owns 20 acres of land at Scotch Bonnet, Frigate Bay, Saint Christopher ("the Scotch Bonnet Property"). The Scotch Bonnet Property was mortgaged to the Bank of Nevis Limited ("the Bank"), in 2005, to secure the repayment of a loan to HPI of \$900,000.00.
- [5] Mr. Victor Doche and Mr. Rafik Doche are land developers, and I will refer to them individually as "Victor Doche" and "Rafik Doche" and together as "the Doches". They are the owners of the 2nd respondent, Doche & Doche Inc. ("D&D"). D&D is a holding company. It is entitled to shares in the 1st respondent, Heritage Plantation Condominiums Limited ("HPC" or "the Company") and owns shares in other companies, including St. Christopher Club Limited.

The 2010 Agreement

- [6] In or about July 2010, Mr. Grant and the Doches entered into negotiations for developing the Scotch Bonnet Property by building and selling condominium units. The negotiations resulted in three agreements (collectively referred to as "the Agreements"). The first agreement was made on 21st July 2010 ("the 2010 Agreement"). The Agreement is styled a "Shareholders Agreement". It contemplated the formation of HPC as a joint venture company and the construction of condominium units on Lot 3, being a part of the Scotch Bonnet Property (clause 1). The 2010 Agreement contains provisions for (among other things):

- (a) HPI and D&D would each hold 50% of the shares of HPC (clause 3).
- (b) HPI would transfer Lot 3 of the Scotch Bonnet Property to HPC (clause 4).
- (c) The shareholders as directors of HPC would appoint Mr. Grant as chairman and managing director, Victor Doche as a director and Rafik Doche as secretary (clause 5).
- (d) HPI recognised a debt of \$150,000.00 plus interest due to D&D (on behalf of St. Christopher Club) and D&D had the option to acquire an unfurnished unit in settlement of the St. Christopher Club debt. HPI could cancel the option by paying the debt by 31st December 2010 (clauses 7 and 8).
- (e) That D&D was to raise \$1 million to develop and construct the condominium units on Lot 3. The \$1 million would be a loan by D&D to HPC ("the construction loan"). \$100,000.00 from the \$1 million was to be paid to the Bank to release Lot 3 from the mortgage, and another \$100,000.00 to HPI upon the signing of the 2010 Agreement and the transfer of Lot 3 to HPC. The balance of \$800,000.00 was for the construction of the units and the necessary infrastructure on Lot 3 (Clause 9).
- (f) The parties were to open a joint bank account with the shareholders as joint signatories. The account would be the operating account for the joint venture (clauses 10-12).
- (g) Clauses 19 and 20 are particularly important. They provide that D&D would be repaid the \$1 million construction loan and a further \$1 million as its share of the net profits from the sale proceeds of the units (on Lot 3), and after the payments to D&D, HPI would be paid

the balance in the joint account as its share of the profits. The units on Lot 3 were later described as "Building 1".

- (h) If parties decided to construct additional units on Lot 4, they would enter into a separate agreement, D&D would pay \$100,000.00 to the Bank on account of the HPI mortgage to release Lot 4, and HPC would open another joint bank account and make a new arrangement for profit sharing (clause 21).

[7] HPC was incorporated on 22nd July 2010 and Mr. Grant was registered as the sole director and shareholder of the company. This does not reflect the terms of the 2010 Agreement which provided that the shares would be held equally between HPI and D&D and that each shareholder would have a representative on the board of directors.

[8] Construction of the units on Lot 3 commenced in 2011 using funds provided by or on behalf of D&D. The source of funds for this initial construction is a heavily contested issue in the appeal and I will deal with it below.

[9] In 2012, Mr. Grant approached D&D for financial assistance about debts owed by himself and HPI. These debts were the mortgage loan to the Bank, and an overdraft at the Bank in the name of Calmer Developments Ltd (a company owned by Mr. Grant) of approximately EC\$189,619.95 which was described in the 2012 Agreement as "the Calmer Development overdraft" (hereinafter referred to "Calmer overdraft"). Both loans were in default and the Bank was taking steps to foreclose on the Scotch Bonnet Property. Other creditors were demanding payments of their debts. They included Rawlinson Isaac and S.L. Horsford & Co. D&D agreed to provide assistance to settle the debts. On 9th November 2012, the Dochess paid

the Bank \$1,540,175.58 and undertook to repay the Calmer overdraft. This was confirmed in a letter dated 9th November 2012 from the Bank to the Dochès.³

The 2012 Agreement

[10] On 13th November 2012, HPI and D&D executed a second agreement (“the 2012 Agreement”). The 2012 Agreement provided that:

- (i) D&D would pay the outstanding loan to the Bank of \$1,540,175.58 and obtain the release of the securities that the Bank held including the mortgage on the Scotch Bonnet Property (clause 1). I note that by the time the 2012 Agreement was signed the Dochès had already paid the \$1,540,175.58 to the Bank as evidenced by the Bank’s letter dated 9th November 2012, referred to in the preceding paragraph of this judgment.
- (ii) D&D would pay an additional \$160,000.00 to discharge the HPI loans due to Rawlinson Isaac and S. L Hosford & Co. (clause 2).\
- (iii) In consideration of the funds to be advanced by D&D under clauses 1 and 2 of the Agreement HPI and Mr. Grant would transfer Lots 2, 3, 4, 5, 6, 13 and 14 of the Scotch Bonnet Property to HPC (clause 3).
- (iv) Mr. Grant and HPI would deliver to D&D, before disbursement of any funds contemplated by the Agreement, ‘pre-endorsed 100% share’ and other corporate documents and resolutions of HPC. HPI had the option to reverse these transactions and make the 2012 Agreement null and void by reimbursing D&D the funds it had advanced plus 10% by 5th February 2013 (clauses 4 and 5).

³ Record of appeal, volume 9 e-pages 14-15.

- (v) All disbursements by D&D, that were not related to the condominium units, would be due to D&D from HPI and repaid or secured by 15th February 2013 (clause 7).
- (vi) If HPI did not meet its commitment to the Bank regarding the Calmer overdraft and D&D had to pay the said overdraft, HPI would transfer Lot 9 of the Scotch Bonnet Property to D&D as security for the reimbursement of the payment by D&D (clause 8).

[11] The essence of the 2012 Agreement is that D&D became the person entitled to all the shares in HPC, and, having discharged HPI's obligations to the Bank, it would be reimbursed the monies it had advanced or be granted security. HPI had an option to reverse the matters contemplated by the 2012 Agreement by reimbursing the funds advanced by D&D on its behalf by 5th February 2013. HPI did not reimburse any of the monies advanced by D&D and therefore the 2012 Agreement remained in place subject always to the terms of the other agreements between the parties. This kept alive HPI's obligation to provide D&D with security for the monies that D&D had advanced for the repayment of the HPI delinquent loans.

[12] Mr. Grant and HPI provided security in the form of an equitable mortgage over the Scotch Bonnet Property. The mortgage was created by the delivery to D&D by the Bank of the certificate of title and other documents relating to the Scotch Bonnet Property. This was done on 9th November 2012, when the loans were repaid by the Dochés on behalf of D&D. On 27th July 2013, Mr. Grant confirmed the amount of the mortgage by sending the calculation of the amount due (mortgage) of \$2,482,424.77 to the Dochés. The calculation ended with the notation "Mortgage amount US\$2,500,000.00".⁴ The creation of the equitable mortgage was completed on 7th April 2014 when HPI executed a Memorandum of Deposit of Certificate of Title of the Scotch Bonnet Property ("the Memorandum")

⁴ Record of appeal, volume 9, e-page 106-107.

acknowledging HPI's indebtedness to D&D. The Memorandum appointed D&D as its attorney to convert the equitable mortgage to a legal mortgage.⁵

- [13] The parties continued discussions regarding the debts owed by HPI which by then had turned out to be more than was disclosed to D&D before the 2012 Agreement was signed. On 9th July 2014, Mr. Grant prepared and sent a draft revised agreement to the Doches.⁶ Further negotiations followed mainly concerning Mr. Grant's requests for D&D to advance additional funds to settle debts owed HPI. On 13th November 2014, Mr. Grant wrote to the Doches urging them to settle the terms of the new agreement and assured them that they are adequately secured with the mortgage over the Scotch Bonnet Property, and that they are 90% registered shareholders of HPC and had 100% in control of the funds of HPC. He continued – 'The Agreement is a mere formality for everything that is already in place. There is no need to delay the process any more.'⁷

The 2014 Agreement

- [14] On 20th November 2014, HPI and D&D entered into a further agreement ("the 2014 Agreement"). The material provisions of the 2014 Agreement included:
- (a) D&D will retain 90% and HPI 10% of the shares in HPC (third recital).
 - (b) HPI was due \$416,440.00 following the sale of a unit to Barbara Fernandes-Wiggins and Steven Wayne Evelyn and the said amount will be deducted from the amount due under the mortgage to D&D (clause 1).
 - (c) On completion of the sale of units in Building 1 on Lot 3, the net proceeds of sale will be allocated as follows (clause 3).
 - i. D&D shall be paid a gross amount of \$2.8 million plus interest at 8% starting 1st January 2015 as repayment of the

⁵ Record of appeal, volume 4, e-pages 57-61.

⁶ Record of appeal, volume 9, e-pages 128 -132.

⁷ Record of appeal, volume 9, e-page 143.

construction loan for Building 1 on Lot 3, plus \$1 million as its share of the profits from Building 1 (clause 3).

- ii. After payment of the said amounts to D&D the amount remaining from the sale proceeds of Building 1 shall be paid to HPI as its share of the profits from Building 1 (clause 3).
 - iii. Unit 1302 is owned solely by D&D free and unencumbered in settlement of old debts owed to D&D with the option to sell or dispose of same. This transfer is in settlement of debt owed to D&D by HPI (clause 3).
- (d) Under the heading "Payments to Shareholders" (clause 4) Mr. Grant was to be paid \$3,000.00 per week during the construction period of the additional buildings, all such payments to be deducted from HPI's 10% share of profits as an advance of any amounts (of profits) due to HPI. The undisputed evidence is that Mr. Grant received \$739,812.66 by way of advances comprising weekly drawings and payments made to third parties on his behalf.⁸ I will address this further at paragraph 55 below.
- (e) Clause 4 also provided that the parties were to convene a meeting on or before 31st October 2015, and thereafter annually, to discuss payment of dividends based on sales of the units. D&D would receive 90% and HPI 10% of the dividends under the new share structure of HPC.
- (f) By the time the 2014 Agreement was signed, the amount advanced to or on behalf of HPI by D&D had increased to \$2.6 million and the parties agreed to increase the amount of the equitable mortgage to \$2.6 million less any amount payable to HPI (clause 5).

⁸ Record of appeal, volume 9, e-pages 49-51.

Proceedings in the High Court

- [15] By November 2015, when the equitable mortgage was scheduled to mature, HPI had not made any payments on account of the amounts due to D&D. As a result, D&D appointed itself attorney of HPI and executed an acknowledgement of debt in order to convert the equitable mortgage into a legal mortgage.⁹ On 21st February 2017, D&D initiated foreclosure proceedings by serving a notice to pay¹⁰ on HPI and generally took steps to execute the mortgage on the Scotch Bonnet Property.
- [16] On 3rd November 2017, Mr. Grant and HPI initiated claim number 343 of 2017 (“the mortgage claim”) against D&D challenging the power of attorney and the mortgage as being void and of no effect, and seeking an account of monies said to have been advanced by D&D and constituting the mortgage monies. D&D counterclaimed for the monies advanced to the appellants and now forming the mortgage monies, or for enforcement of the mortgage.
- [17] On 28th June 2018, HPI commenced claim number 186 of 2018 seeking relief under sections 142 and 144 of the **Companies Act**¹¹ on the ground that the affairs of HPC have been and are being conducted in a manner that is unfairly prejudicial to HPI, and sought orders regarding the corporate and business affairs of HPC (“the unfair prejudice claim”). D&D did not file a counterclaim.
- [18] The claims were heard by Ventose J in July 2019 with closing submissions in November and December 2019. He delivered his judgment on 27th January 2020 and made the following orders, at paragraph 58, which I set out in full:
- “(1) The Unfair Prejudice Claim is hereby dismissed.
- (2) The Unfair Prejudice Claim is hereby dismissed.

⁹ Record of appeal, volume 4, e-pages 63-65.

¹⁰ Record of appeal, volume 4, e-pages 75- 80.

¹¹ Cap. 21.03, Revised Laws of Saint Christopher and Nevis, 2002.

- (3) 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
- (4) 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 (sic) 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.
- (5) 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).
- (6) 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.
- (7) Liberty to apply in relation to Paragraphs (3) to (5).
- (8) The Mortgage Claim is hereby dismissed.
- (9) Judgment in favour of the Defendant on the counterclaim in the Mortgage Claim.
- (10) The Claimant shall pay to the Defendant the sum of US\$2,030,663.12 within 28 days of today's date.
- (11) 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.

- (12) 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.
- (13) If the Claimant fails to pay the Claimant (sic) 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.
- (14) 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."

[19] In summary, the learned judge dismissed the mortgage claim and the unfair prejudice claim, allowed the counterclaim in the mortgage claim, and made orders in the unfair prejudice claim regarding the corporate structure of HPC and the conduct of the Company's affairs. He ordered the appellants to pay prescribed costs to the respondents on both claims.

The appeal

[20] The appellants appealed against the orders made by the trial judge. D&D did not file a counter notice of appeal. The appellants' notice of appeal lists 14 grounds of appeal. What is noticeable about the grounds of appeal is that, in large part, they challenge the trial judge's findings of fact, inferences drawn from the factual evidence, and/or findings of mixed fact and law. The challenges to findings of law are grounds of appeal number (xii) which raised for the first time the issue of a constructive trust in respect of monies currently held in HPC's bank account, and ground (xiv) which seems to call into question the judge's interpretation of clause 3 of the 2014 Agreement. Learned counsel for the appellants, Dr. Henry Browne, QC, also raised in his written and oral submissions that the 2014 Agreement did not in any way replace the 2010 Agreement.

[21] The findings of fact and of mixed fact and law that are challenged are underpinned by the submissions that the trial judge came to the wrong conclusions on the evidence. For example, the appellants' submission that D&D breached the 2010 Agreement by not investing the \$1 million to construct Building 1 has to be considered in the context of the judge's finding that D&D invested or caused to be invested up to \$2.8 million as a loan during the construction of Building 1.¹² The appellants say that the judge was wrong to come to this conclusion. As such, I will deal firstly with this Court's approach to challenges to the findings of fact by the trial judge.

Approach to findings of fact

[22] The principles that guide an appellate court in reviewing findings of fact by the trial judge are well known and are set out in numerous judgments of this Court, and also in the written submissions of the respondents. It is unnecessary for me to repeat them in detail in this judgment. The main principles that I extract from the cases are:

- (a) The trial judge has the distinct advantage of seeing the witnesses give their evidence and observing their demeanour and he or she is in the best position to assess their credibility. The appellate court is deprived of this advantage and carries out its role of reviewing the evidence on the basis of the printed record.
- (b) The appellate court should exercise extreme caution in considering the findings of fact by the trial judge and should only interfere when it is satisfied that there is no or no sufficient evidence to support the trial judge's findings, or that his conclusions on the facts are plainly wrong. This principle is particularly important in this case.

¹² See paragraph 52 of the judgment below.

- (c) The inferences drawn from the factual evidence and the demeanour of the witnesses should be treated with an equal amount of respect by the appellate court.
- (d) The appellate court is more inclined to interfere with the trial judge's findings of fact where those findings are based on documentary evidence or undisputed facts. In this situation the appellate court is in as good a position as the trial court to interpret the evidence.
- (e) The standard of review for issues of law is correctness and the appellate court will interfere if it disagrees with the trial judge's findings of law.

[23] A recent example of the application of these principles in the context of an unfair prejudice claim is the decision of the Privy Council in **Ming Siu Hung and others v J F Ming Inc and another**,¹³ on appeal from this Court, where Lord Briggs stated:

“It is necessary at this point to bear in mind the well-settled constraints upon the appellate jurisdiction, when asked to re-exercise a discretion conferred upon the first instance judge. These constraints form part of a package, developed over many years, which ensure that the benefit of finality which should normally follow from the judicial determination of the parties’ dispute is not rendered ineffective by undue appellate activism. The general reasons for appellate restraint are well summarised by Lewison LJ in his well-known judgment in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] FSR 29, para 114, as follows:

“114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them.”¹⁴

¹³ [2021] UKPC 1.

¹⁴ *Ibid* at paragraph 23.

- [24] There is no dispute that these are generally the principles that should guide the Court of Appeal in reviewing the findings by the trial judge. The difficulty in this case, as in most cases where findings of fact are challenged, is in the application of the principles to the facts of the case. I will apply the principles when I come to deal with the findings of the judge on both claims.

The unfair prejudice claim

- [25] The unfair prejudice claim was brought by HPI under section 142 of the Companies Act alleging that the Dochies and D&D have conducted and continue to conduct the affairs of HPC in a manner that is unfairly prejudicial to HPI, as a shareholder and as a result HPI sought the relief set out in the statement of claim.

- [26] Section 142 reads:

“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.”

- [27] Section 144 sets out the powers of the court on the making of an order under section 142. Section 144 reads:

“(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."

[28] Section 144(1) gives the court a general power to make orders on a section 142 claim; and the authorities establish that this power is a wide and flexible remedy where the affairs of the company have been or are being conducted in a manner that is unfairly prejudicial to the interests one or more members. Section 144(2) gives the court the power to make specific orders on a finding of unfair prejudice under section 142. One issue that this Court will have to resolve is whether the judge, having dismissed the unfair prejudice claim, had power under section 144(2) or otherwise to make the orders that he did regarding the affairs of HPC, past and future. I will deal with this below.¹⁵

[29] The equivalent provision to sections 142 and 144 of the Companies Act of Saint Christopher and Nevis in the United Kingdom is sections 994 – 996 of the Companies Act 2006, formerly section 459 of the **1985 Companies Act** (as amended). These provisions have been interpreted in several cases in the United Kingdom and the Eastern Caribbean. The case that is most often referred to or the general principles of unfair prejudice claims is the House of Lords decision in **O'Neil and another v Phillips and others**¹⁶ where Lord Hoffmann made a comprehensive review of the unfair prejudice remedy. The principles outlined in his judgment were helpfully summarised by the Court of Appeal (Patten J) in

¹⁵ Paragraphs 68-70.

¹⁶ [1999] 1 WLR 1092.

Grace v Biagioli and others¹⁷ which summary was adopted by Ventose J in the lower court at paragraph 44 of his judgment. I repeat and adopt the summary by Patten J:

“(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 the rules in a manner which equity would regard as contrary to good faith' (see [1999] 2 BCLC 1 at 8; [1999] 1 WLR 1092 at 1099); 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

¹⁷ [2006] BCLC 70 at para. 61.

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.” (Underlining supplied)

- [30] I note Patten J’s reference to Lord Hoffmann’s brief description of unfairness as consisting of either breaching the rules or using the rules in a manner that equity would regard as contrary to good faith. Having reviewed the allegations of unfairness in this case, I note that they consist almost entirely of allegations of breaches of the Agreements or non-compliance with the rules in HPC’s articles of association. With the exception of the unanimous directors’ written resolution, referred to below,¹⁸ this is not a case where there is a majority shareholder who controls the board of directors and passes resolutions or otherwise acts in accordance with the articles and any agreements between the parties, but in a manner that is not fair to the other shareholder, in this case HPI. This is a case of alleged breaches and non-compliance with the Agreements and the articles.

HPI’s standing to apply under section 144

- [31] The first hurdle that HPI has to overcome is showing that it is a member of HPC since, only a member can apply for relief under section 142. It is common ground that Mr. Grant is the sole shareholder of the record of HPC and that the parties agreed in the 2010 Agreement that the shares of HPC would be split equally between HPI and D&D. That arrangement was varied in the 2014 Agreement to say that D&D would own 90% of the shares and HPI 10%. The shares have not been allotted and issued to reflect any of the positions in the two Agreements. The effect of this is that HPI, on its case, is an unregistered shareholder of 50% of the shares of HPC, and on D&D’s case HPI is an unregistered shareholder for 10% of the shares. In either case, HPI is an unregistered minority shareholder of HPC.

¹⁸ Paragraph 61.

- [32] The Court was not provided with any authority or argument to dispute that an undisputed but unregistered minority shareholder cannot apply for relief under section 142. It appears that the issue was raised in the lower court and the judge decided, at paragraph 35 of the judgment, that the trial should proceed on the basis that as a matter of fact Rafik Doche and Victor Doche controlled the affairs of HPC. There is no appeal or counter appeal against this position taken by the judge, and I will proceed on the basis that HPI is an unregistered minority shareholder entitled to either 10% or 50% of the shares of HPC, and is entitled to apply for relief under section 142.
- [33] Having established its standing to apply for relief under section 142, HPI must satisfy the court of three things: (i) the challenged conduct relates to the affairs of HPC, (ii) the conduct caused prejudice to the interests of HPI as a member of HPC, and (iii) the prejudice was unfair.

Conduct of D&D and the Doches amounting to breaches of the Agreements

- [34] A significant part of HPI's pleaded case in the lower court centred on allegations that D&D had committed numerous breaches of the Agreements resulting in the loss of its entitlement to some or all of the benefits under the Agreements, and that its conduct in managing the affairs of HPC was unfairly prejudicial to HPI. The particulars of unfair prejudice, gleaned from the pleadings and the submissions of counsel, include:
- (1) Failing to conduct the affairs of HPC in accordance with or in breach of the provisions of the Agreements between the parties, resulting in D&D either losing or not becoming entitled to its benefits under the Agreements. The alleged breaches, which I will deal with below, include:

- a. It failed to invest the \$1 million or any other amount into the project as contemplated by clause 9 of the 2010 Agreement.
 - b. It failed to pay the sum of \$1,540,175.58 to the Bank to discharge the mortgage as contemplated by clause 1 of the 2012 Agreement.
 - c. It withdrew the sum of \$4 million from HPC's bank account without the knowledge or consent of Mr. Grant.
- (2) Failing to convene and hold meetings of HPC and generally excluding Mr. Grant from the management of the company.
 - (3) Operating HPC's account at the Bank to the total exclusion of HPI.
 - (4) Misappropriating funds from HPC without prior knowledge or approval from HPI, including payments totalling \$4 million between April and May 2015 to the Doches.
 - (5) Passing the unanimous directors' resolution on 30th September 2014.
 - (6) Re-allocating the shares of HPC to give themselves majority ownership and control of the Company.

I will now deal with these allegations in the factual matrix of this case applying the principles set out above for guiding this Court in dealing with challenges to findings of fact and law.

Investment of the \$1 million loan

[35] Clause 9 of the 2010 Agreement provides that:

"D&D shall be responsible for raising US\$1 million dollars which will be used in the development and construction of the Condominium Units as per the construction budget, however, it could be adjusted with the agreement of the shareholders. US\$1 million shall be a loan by D&D to Heritage Plantation Condominiums Ltd. US\$100,000.00 from the US\$1 million to be paid to Bank of Nevis for the release of Lot # 3 of the Heritage Plantation Development and US\$100,000.00 to be paid to HERITAGE upon signing the necessary Transfer Documents for Lot No. 3

and this Shareholders Agreement. The balance of US\$800,000.00 to be used in the Construction of the Condominium Building on Lot 3 and related infrastructure work. The Shareholders agree to conform to all Bank of Nevis Loan requirements within reason.”

By the time the 2014 Agreement was signed in November 2014, the parties agreed that the amount that had been invested into the project for the construction of the units had risen to \$2.8 million. The dispute between the parties is that D&D says that it raised the \$2.8 million as it was required to do by clause 9 of the 2010 Agreement and invested it into the construction of the units through companies that it controlled. D&D did not provide the court with documentary evidence of the amounts that it invested. However, there is other evidence showing that D&D put up the initial construction costs. Construction started in 2011 and there is evidence that D&D made payments towards the construction of the units. For example, in an email dated 15th September 2011 from Victor Doche to Mr. Grant, Mr. Doche complained that:

“You already took to date 112,000.00 plus a fortune we spent on the site infrastructure that is still owed to us, all we do is pay bills and yet to see one penny. Every week we have at least 6,000 to 10,000.00 in payroll and the last couple of months we paid 60k USD for windows, 24k USD for 12000 sf of tiles plus 36000.00 in material to finish the interior, doors, sheet rock, electrical and plumbing materials etc etc etc. And another 45k to be paid next week for the air conditions., 20 k for windows and god knows what else.”¹⁹

[36] In paragraph 10 of his witness statement Rafik Doche confirmed that D&D had paid the \$1.5 million into the project by September 2011.²⁰ And in cross examination he testified that D&D had invested substantial amounts of money into the construction of the units and that the monies were paid using companies controlled by D&D.²¹

¹⁹ Record of appeal, volume 9, e-page 155.

²⁰ Record of appeal, volume 3, e-page 14.

²¹ Record of appeal, volume 3, e-page 374.

[37] Dr. Browne challenged D&D's assertion that it had invested the \$2.8 million or any other sum into the construction of the units. He submitted that D&D breached the Agreements because it had not paid any money whatsoever into the project. Therefore, D&D was not entitled to any benefits under the Agreements including the agreement for D&D to own 90% of the shares of HPC. Dr. Browne supported his submission on two bases. Firstly, that there was no evidence that D&D itself paid any monies into the project. This submission is easily disposed of. D&D's obligation under the 2010 Agreement was to raise \$1 million and pay it into HPC to fund the early construction costs. There is no requirement, contractual or otherwise, that D&D itself had to pay the monies into HPC. D&D's obligation was to raise the money and loan it to HPC to be used for the construction of the units, which is what it did. There is no evidence that the cash that was used to construct the units starting in 2011 came from any other source. D&D discharged its obligation of paying up to \$2.8 million into the project using companies that it controlled.

[38] Dr. Browne's second reason for challenging D&D's position on the payment of the \$2.8 million was that the monies came from pre-sales of units. Specifically, that HPC entered into an agreement with Globelink, a Chinese company, on 24th September 2013 for the sale of 75 units ("the Globelink agreement"). Deposits on some of the units were paid to HPC after the signing of the Globelink agreement and that is the money that was used to fund the construction. The flaw in this argument, as pointed out by learned counsel for the respondents, Mrs. Angelina Gracy Sookoo-Bobb, is that construction of the units started more than two years earlier in 2011 – see for example paragraph 37 above showing that substantial amounts of money were being expended on the project from and before September 2011, and that these funds were being paid by entities controlled by D&D or the Doches. The Globelink agreement was made in September 2013, two years after construction had started, and the payment of deposits started in December 2013. This is borne out by the credit advices in the record that show that the deposits were paid into HPC's bank account between December 2013 and

October 2015.²² In short, the deposits from the Globelink agreement could not have been the source of funds for the construction of the units which was far-advanced when the agreement was signed in September 2013 and when the payments of the deposits started in December 2013.

[39] While the trial judge did not make an express finding that D&D invested the \$2.8 million, it is clear from the judgment that he treated the \$2.8 million as having been paid by or on behalf of D&D. At paragraph 48, he found that: '[t]he 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.' More specifically, the trial judge found at paragraph 50, that: '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.'

[40] The reference to a \$1 million capital injection is to the \$1 million mentioned in clause 9 of the 2010 Agreement and an obvious rejection of the appellants' position that D&D did not pay any cash into the project. The judge returned to D&D's capital injection in paragraph 52 when he noted that: '...the initial amount of US\$1m for construction increased to US\$2.8m to reflect the loans and payments made by D&D on behalf of or to Mr. Grant and HPI.'

[41] This is effectively a finding by the judge that D&D invested \$2.8 million into the construction of the units, and, by implication, a rejection the appellant's case that the construction money came from deposits or pre-sales of units. The finding is amply supported by the evidence and there is no basis on which this court should interfere with the trial judge's conclusions. The finding effectively disposes of the appellants' position that the D&D breached clause 9 of the 2010 Agreement.

Payment of the \$1,540,175.58 to the Bank

²² Record of appeal, volume 5, e-pages 118-206.

[42] By clause 1 of the 2012 Agreement, D&D agreed to pay \$1,540,175.58 to the Bank to discharge loans of HPI and Mr. Grant, and also to discharge the Calmer overdraft. Upon payment, the Bank would release the land titles to the Scotch Bonnet Property and Mr. Grant's residence to D&D. The \$1,540,175.58 was paid to Bank as evidenced by the Bank's letter to the Dochess dated 9th November 2012,²³ and the Bank delivered the titles to the secured properties to D&D. It is not clear why HPI submitted in its written and oral submissions that there is no documentary evidence that D&D paid off the loans. The fact that the payment was made in the names of the Dochess personally is of no moment. The payment was made on behalf of D&D and complied with its obligation under clause 1 of the 2012 Agreement. This was confirmed by the trial judge in paragraph 46 of the judgment. I will return to this payment when I deal with the mortgage claim below.

[43] D&D also paid off the amounts due to Rawlinson Isaac and S.L. Horsford & Co. mentioned in clause 2 of the 2012 Agreement and added these payments to the amount due under the mortgage.

[44] The above findings that D&D did not breach the terms of the Agreements lead unyieldingly to the conclusion that it was not unfairly prejudicial for D&D to take the full benefits accruing to it under the Agreements.

Failing to convene and hold meetings of HPC and generally excluding Mr. Grant from the management of the company.

[45] HPI complained that HPC did not hold meetings as required by the Companies Act and HPC's articles of association, and that Mr. Grant was excluded from management meetings.

[46] The responsibility for holding of meetings to discuss payment of dividends based on sales of the units was a joint responsibility of HPI and D&D under clause 4 of

²³ Record of appeal, volume 9, e-page 14.

the 2014 Agreement. Mr. Grant, who was the sole shareholder and director of record of HPC, had the power to convene such meetings and there is no evidence that he tried to do so or that he tried and was refused by D&D. The evidence is that the affairs of HPC were conducted on an informal basis and neither party took the trouble to organise formal meetings or otherwise to comply with the formal requirements of the Companies Act and HPC's articles of association.

[47] The meetings that were held were management meetings. The trial judge found, at paragraph 47 of the judgment, that Mr. Grant was intimately involved in the management of HPC and attended meetings with the Dochés each week. Neither party took and kept minutes of these meetings or even a record of when the meetings took place. The written and oral evidence in the court below is that Mr. Grant was involved in the decisions of the company from choosing and ordering building materials, designing the units and marketing the project. There is no evidence of any meeting of HPC from which he was excluded.

[48] The failure of HPC to convene meetings of the company and to keep proper records of such meetings cannot be attributed solely to the Dochés. Mr. Grant was equally responsible for these failures.

[49] The trial judge found that Mr. Grant was not excluded from meetings of HPC held by the Dochés. This finding was open to the judge on the evidence and is no basis for this Court to interfere with it. The finding does not support HPI's claim that its representative, Mr. Grant, was excluded from meetings of HPC.

The bank account

[50] By clauses 10-12 of the 2010 Agreement, the parties agreed to open a joint bank account with the shareholders as joint signatories. The account would be the operating account for the joint venture. Mr. Grant took responsibility for opening the account. Notwithstanding that he was still on record as the only director and shareholder of HPC, he named Rafik Doche and Victor Doche as the only

signatories to the account and also identified them in the account opening forms as the directors of HPC. The account was officially opened by the Bank on 20th November 2013. Before this, HPC did not have a bank account.

- [51] By not including himself as a signatory to the bank account, and not even naming himself as a director of HPC, Mr. Grant was not acting like a person who wanted to be included in the operation of the account. This is not to say that he did not want to be kept informed of the general operation of the account. However, there is no evidence, before the breakdown of the relationship between the parties, that he asked to be made a signatory to the account or requested and was denied information about the operation of the account. The evidence does not suggest that he was deliberately excluded from the operation of the account. The trial judge treated with this issue when making his findings in paragraph 46 of the judgment. The learned judge found:

“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 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 bank accounts.”

Mr. Grant’s conduct and the tone of his email are not those of a person who feels that he (as HPI’s representative) was being excluded from the operations of HPC’s bank account and there is no basis to interfere with the learned judge’s finding to this effect.

Provision of information

- [52] There is no gainsaying that Mr. Grant, as the sole shareholder and director of HPC, was entitled to information about the Company’s business, including financial information, from those who were running the Company’s business (the Doches). There is no evidence that he was denied information about the running

of the HPC. He attended weekly meetings with the Doches and was intimately involved in all major decisions.

- [53] HPI was also provided with financial information about the project in early 2016 in the course of separate proceedings between the parties in the High Court of Nevis. It is not clear what information was provided and what information, if any, remains outstanding. Generally, the failure to keep proper accounts and to provide such accounts to shareholders may be a breach of the articles or an understanding between the shareholders, but that does not necessarily amount to unfairness. The applying party must still prove that the non-disclosure caused prejudice.²⁴ HPI has not provided any evidence of prejudice. It has already received substantial payments on account of its profits.²⁵ Any further entitlement will become apparent when the audited accounts are prepared and a proper account is taken, a process which I understand from counsel is well underway.

Payment of dividends/profits

- [54] Learned counsel Dr. Browne complained in his written and oral submissions that HPI did not get any returns by way of dividends or profits from the joint venture. This is not correct. The 2014 Agreement provides for the payment of interim dividends to HPI. The clause reads:

“During the Construction Period of the additional Condominium buildings, Mervin Grant on behalf of Heritage (HPI) will be paid US\$3,000.00 per week. This amount will be deducted accordingly from the total amount due to Heritage from the 10% profit of HPC in land costs. This amount will be considered as an advance on any amounts due to Heritage.”

- [55] The undisputed evidence is that Mr. Grant, on behalf of HPI, received substantial payments on account of HPI's entitlement to profits under the joint venture. The payments are listed at pages 49 to 51 of volume 9 of the record of appeal. They amount to approximately \$739,812.66 comprising weekly drawings and payments

²⁴ Per Rimer LJ in *Oak Investment Partners XII, Limited Partnership v Boughtwood* [2010] 2 BCLC 459.

²⁵ See paragraphs 55–57 below.

made to third parties on behalf of Mr. Grant (not including the amounts paid for discharging the respondents' loan obligations). Examples of these other payments are payments to the Inland Revenue Department as stamp duties owing by Mr. Grant or HPI. He acknowledged receipt of these payments as an advance on profits in an email exchange with Victor Doche on 28th July 2015. Mr. Doche wrote: 'Hi Mervin. Just to confirm that you have been taking advances on behalf of Heritage plantation 10% shares, for the last 3 years and as 90% shareholder we are entitled same proportionally.'²⁶ Mr. Grant replied: 'I agree that you and Rafik are entitled to advances as well. I have no problem with Doche and Doche taking advances. Just make the proper accounting notes and advise me accordingly.'

- [56] On this state of the evidence, it is difficult to see how HPI could complain that they have not been paid any dividends or received any profits from the joint venture. Interim dividends were paid to Mr. Grant on account of HPI's share of the profits.
- [57] The flipside of this issue is the payment of interim dividends to D&D. The evidence is that in 2015 the Doches made four withdrawals totalling \$4 million from the HPC account. The withdrawals were on account of D&D's share of profits on the sale of the units. The source of D&D's authority to do this is clause 3 of the 2014 Agreement which provides that: 'Doche & Doche shall be paid a gross amount of US\$2.8 million dollars plus interest at 8% starting Jan 1st 2015 as repayment of Construction Loan for Building 1', and '... a gross amount of US\$1 million as their share in the profits in Condominium Building 1.'
- [58] HPI challenged D&D's entitlement to these withdrawals on the ground of the alleged breaches of the Agreements. I have already found that the alleged breaches disentitling D&D to its entitlements under of the Agreements have not been proved. HPI also challenged the withdrawals because they were made without its approval or even on notice to HPI. The email exchange between Mr.

²⁶ Record of appeal, volume 9, e-page 149.

Grant and Victor Doche in July 2015 that is set out in paragraph 55 above confirms that D&D could make drawdowns so long as it made proper accounting notes and advised Mr. Grant. There is no evidence that D&D informed HPI of its intention to withdraw the \$4 million. However, the appellants having agreed the approximate amount of D&D's loan repayment and profit share, and that D&D could make withdrawals, the failure to notify Mr. Grant about the withdrawals in a timely manner did not make them unfair to HPI.

Re-allocating the shares of HPC to give the Doches majority ownership and control of HPC

- [59] The history of the parties' agreements regarding the shares of HPC is that they first agreed to be equal shareholders as reflected in the 2010 Agreement. In the 2012 Agreement, it was agreed that HPI would deliver all the shares in HPC to D&D but this was on a conditional basis and I do not regard it as an agreement to transfer the beneficial interest in all the shares to D&D. The entitlement to shares was changed in the 2014 Agreement when the parties' agreed that D&D would own 90% of the shares to D&D and HPI 10%. However, the shares were not issued to reflect the new shareholding and the records of HPC at the Companies Registry were not updated. I dealt with this issue in paragraph 31 above and noted that D&D owns either 90% or 50% of the shares of HPC. D&D's entitlement to its shares came about as a result of its financial contribution to and participation in the joint venture project. Its ownership is reflected in the Agreements, all of which were prepared by Mr. Grant. There is no suggestion that he did not understand what he was agreeing to.
- [60] In the circumstances, I do not agree that D&D received the shares or reallocated them in a manner that was unfair to HPI or that HPI was prejudiced by the agreement for D&D to own shares in HPC.

The unanimous directors' resolution

- [61] On 30th September 2014, Victor Doche and Rafik Doche, purporting to act as the only directors of HPC, passed a unanimous written directors resolution which,

among other things, confirmed the shareholding of HPC as set out in the 2014 Agreement. At the time, Mr. Grant was the sole director of record of the company and the resolution was not signed by him. HPI challenged the resolution and sought orders from the High Court declaring it null and void and of no effect. The trial judge granted the relief sought by HPI and set aside the resolution on the ground that the Doches were not appointed as directors of the Company and therefore could not pass a directors' resolution. However, he did not treat the passing of the written resolution as being unfair. His finding on this point is set out at paragraph 33 of the judgment:

"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."

This is an unimpeachable finding of fact by the trial judge based on his assessment of the witnesses giving their evidence and there is no basis for this Court to interfere. The resolution did not cause any unfair prejudice to HPI.

The Calmer Developments Overdraft

- [62] This is a short point. In the letter dated 9th November 2012 the Bank accepted the undertaking of the Doches to discharge the Calmer overdraft, on or before 28th February 2013. By clause 8 of the 2012 Agreement which was signed shortly after on 13th November 2012, D&D agreed that in the event that D&D had to pay the overdraft HPI would transfer Lot 9 of the Scotch Bonnet Property to D&D as security (for the reimbursement of the amount paid). D&D did not discharge the overdraft because HPI did not transfer Lot 9 to D&D as security as required by clause 8.

Unit 1302

[63] Clause 3 of the 2014 Agreement provides that Unit 1302 is owned by D&D free and unencumbered 'in settlement of old debts owed to Doche and Doche...This transfer is in settlement of debt owed to Doche & Doche by Heritage.' No details were given in clause 3 of the "old debts". Dr. Browne submitted that the effect of clause 3 is that the transfer of unit 1302 to D&D wiped out all the debts that had been paid by D&D on behalf of HPI or Mr. Grant and the appellants do not owe D&D anything. This submission is difficult to reconcile with the remainder of clause 3 and the other provisions of the 2014 Agreement which acknowledge the cumulative amount of \$3.8 million owing to D&D for the construction loan \$2.8 million and unpaid profits of \$1 million. The trial judge did not make a finding on this point. Nonetheless, I prefer the submission of Mrs. Sookoo-Bobb that the so-called "old debts" was the \$150,000.00 debt due to St. Christopher Club from D&D referred to in clause 7 of the 2010 Agreement. It had nothing to do with the \$2.8 million in the agreement. This position is consistent with the evidence in the case that there were several existing debts owed by Mr. Grant and HPI to third parties that were discharged by D&D and the \$2.8 million was separate and apart and made up of the advances for the construction of the units in accordance with clause 9 of the 2010 Agreement.

[64] Dr. Browne also submitted that, as a matter of law, the 2010 Agreement continued in full force and was not superseded in any way by the 2014 Agreement. The learned judge dealt with this point at paragraph 50 of the judgment:

"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."

This seems to be logical and correct. The parties must have had the terms of the earlier agreements in mind when settling the 2014 Agreement and the inconsistent terms in the earlier agreements must give way to the terms in the later agreement. The example used by the learned judge was the construction loan. Clauses 9 and 19 of the 2010 are to the effect that D&D would raise \$1 million and lend it to HPC

to construct the villas. By 2014, the amount invested by D&D had increased to \$2.8 million to cover the increased cost of construction. The increased amount of loan was reflected in clause 3 of the 2014 Agreement which is obviously different from the \$1 million in the 2010 Agreement. In this and similar situations the terms of the later agreement would prevail.

[65] I agree with the learned judge's conclusion that the 2014 Agreement effectively replaced the 2010 Agreement and the 2012 Agreement to the extent of any inconsistency between them.

[66] Finally, Dr. Browne submitted that the monies currently held in HPC's bank account are held on a constructive trust for HPI. Counsel did not elaborate on this point and I would say simply that there is no evidence to justify imposing such a trust on the funds in the account. They are to be paid out in accordance with the Agreements.

Conclusion on the unfairly prejudicial claim

[67] In summary, the allegations relied on by HPI to ground its claim for unfairly prejudicial conduct by D&D consists of either allegations that D&D breached the terms of the Agreements and/or it failed to comply with the rules for holding meetings of HPC and providing information about the Company's affairs in accordance with the articles of association and the Companies Act. The learned trial judge reviewed the pleadings, the evidence in the case and the relevant law and made findings of fact that D&D did not breach the terms of the Agreements, did not exclude Mr. Grant from meetings of the Company and the operation of the Company's bank account, and from participating in management decisions. These findings have not been disturbed by this Court and there is no basis for appellate intervention in the learned trial judge's decision to dismiss the claim that D&D conducted affairs of HPC in a manner that was unfairly prejudicial to the HPI.

The trial judge's orders

[68] The learned judge, having dismissed the unfair prejudice claim, proceeded to make several orders regarding the directors and secretary of HPC, the allotment and issue of shares in the Company, the holding of a general meeting, the preparation of audited financial statements and the allocation of the proceeds of sale of the units in Building 1 as contemplated by clause 3 of the 2014 Agreement. However, the question arises whether the judge had the power under section 144 to make these orders. Section 144, which is set out in paragraph 27 above, provides that the court can only make orders 'If [it] is satisfied that an application under section 142 or 143 is well founded ...'. The obvious meaning of these words is that the jurisdiction of the court to make orders under section 144(2) is triggered by a finding of unfair prejudice. This has been confirmed by several cases including **Re a Company (No 007623 of 1986)**²⁷ where Hoffmann J dismissed an unfair prejudice petition and commented: '[t]his means that I have no jurisdiction to grant relief under s 75'.²⁸

[69] The order of this Court on the unfair prejudice claim must therefore be that the appeal is dismissed, and the orders made by the learned trial judge in subparagraphs (3) to (6), of paragraph 58 of the judgment be set aside. This will provide the appellants with some success on the claim and I would therefore order that the parties bear their own costs of the unfair prejudice claim.

[70] I commented in this judgment, as did the trial judge in his judgment, that there is a need for proper financial accounts to be produced. Both parties have said as much in their written and oral submissions. Based on the evidence of Rafik Doche in the lower court, such accounts should now be available. These accounts should be produced and delivered to HPI, a shareholder of HPC, without further delay.

The mortgage claim

²⁷ [1986] BCLC 362.

²⁸ Ibid page 368.

[71] The factual background to the appeal against the findings of the judge in the mortgage claim is set out in paragraphs 11 and 12 above. To recap, the 2012 Agreement provided that the Doches would pay \$1,540,175.58 to the Bank to discharge three loans to the Bank by HPI or Mr. Grant, to obtain the release of the securities for the loans, and \$160,000.00 in third party loans owed by HPI. The securities, including the title to the Scotch Bonnet Property, were released by the Bank to D&D. These payments were unrelated to the project and it was agreed in clause 8 of the 2012 Agreement that they would be repaid by 5th February 2013 or be secured. The amounts advanced were not repaid by the stipulated date and HPI granted an equitable mortgage over the Scotch Bonnet Property in favour of D&D by executing the Memorandum. The equitable mortgage was later converted to a legal mortgage following the procedures in the TRA, when D&D executed an Acknowledgment of Debt under section 63 (of the TRA) on 18th December 2015.

[72] The issues that arise for consideration in the mortgage appeal are:

- (i) Whether D&D advanced any money to HPI to discharge the mortgage in favour of the Bank.
- (ii) Whether the Memorandum of Acknowledgement of Debt signed on behalf of D&D complies with section 63 of the TRA to allow D&D to acknowledge the amount due under the equitable mortgage for converting the equitable mortgage into a legal mortgage.
- (iii) Whether the mortgage is valid.

Payment to the Bank

[73] The issue of the payment of \$1,540,175.58 to the Bank is an issue of fact that is easily resolved. The learned judge found on the evidence, and I agree, that the payment of \$1,540,175.58 was made by Victor Doche and Rafik Doche on behalf of D&D, and the HPI loan was thereby liquidated. The \$1,540,175.58, and other amounts advanced by D&D to or on behalf the Appellants, became the subject matter of the mortgage between HPI and D&D. HPI posited that section 44 of the

TRA stipulates that a mortgage can only be created on the basis of a sum of money actually advanced to the mortgagor (HPI), and there was no evidence that D&D advanced any money to HPI. This overlooks the fact that the \$1,540,175.58 was paid by the Dochets to the Bank on behalf of D&D, and the payment was used to discharge the HPI mortgage debt. There is no other reason why the Dochets would have paid over \$1.5 million to the Bank, and none has been suggested. The fact that the money was paid to the Bank by the Dochets on behalf of D&D is of no significance in this case. The submission by Dr. Browne that a valid mortgage was not created because no money was actually advanced to HPI by D&D is without merit and was correctly rejected by the trial judge, as it is by this Court.

- [74] I also note that the \$1,540,175.58 was included in the 'calculation of the mortgage amount' that was prepared by Mr. Grant and sent to D&D on 27th July 2013 before the creation of the equitable mortgage in April 2014.²⁹

The Acknowledgment of Debt

- [75] The equitable mortgage was created by executing the Memorandum and leaving the certificate of title for the Scotch Bonnet Property with D&D. The equitable mortgage so created was in respect of the monies owed by HPI to D&D and acknowledged by HPI in the Agreements, especially the 2014 Agreement, as well as the mortgage calculation sent by Mr. Grant to the Dochets on 27th July 2013.³⁰ The creation of an equitable mortgage by deposit of title deeds is permitted by section 51 of the TRA. The Memorandum specifically provided that:

"HERITAGE PLANTATION INC. IRREVOCABLY APPOINTS YOU [D&D] and your appointed agent ITS ATTORNEY in its name and on its behalf to execute a writing under section 63 of the Title by Registration Act, Cap 10.19 of the laws of Saint Christopher and Nevis accepting as due by HERITAGE PLANTATION INC. any amount payable by it to enable you to convert the equitable mortgage hereby evidenced into a legal mortgage."³¹

²⁹ Record of appeal, volume 9, e-page 107.

³⁰ Ibid.

³¹ Record of appeal, volume 4, e-page 58.

[76] Acting on the agency powers granted by the Memorandum, D&D executed an Acknowledgement of Debt for \$2,030,663.12 to convert the equitable mortgage into a legal mortgage. HPI challenged D&D's power to acknowledge a debt owing to itself. However, the power to do so is set out in the Memorandum signed by HPI acknowledging D&D's right, as mortgagee, to acknowledge the mortgage debt and convert the equitable mortgage to a legal mortgage.

[77] I would affirm the learned judge's conclusion that the Acknowledgment of Debt complied with the provisions of the TRA and that the mortgage was valid. I would dismiss the appeal from the mortgage claim and affirm the judge's orders made at paragraph 58 sub-paragraphs (8) to (12) of the judgment.

Orders

[78] Pulling all the findings and conclusions together, I would make the following orders:

- (1) The appeal against the dismissal of the unfair prejudice claim is dismissed.
- (2) The orders made by the learned trial judge in sub-paragraphs (3) to (6) of paragraph 58 of the learned judge's judgment are set aside.
- (3) The order made by the learned trial judge that the appellants pay prescribed costs of the unfair prejudice claim is set aside and the parties shall bear their costs of the unfair prejudice claim in the lower court and the appeal to this Court from that decision.
- (4) The injunction granted by this Court on 16th November 2020, restraining the respondents from dealing with the funds in accounts numbers 296160 and 293236 of Heritage Plantation Condominiums Ltd. at the Bank of Nevis Limited pending the delivery of judgment by this Court is discharged.

(5) The appeal against the orders of the trial judge in the mortgage claim is dismissed and the judge's orders set out at sub-paragraphs (7) to (12) of paragraph 58 of the learned judge's judgment are affirmed.

(6) The appellants shall pay the respondents' costs of the mortgage appeal at the rate of two-thirds of the amount of costs awarded for the mortgage claim in the lower court.

[79] The Court gratefully acknowledges the assistance of counsel.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Louise Esther Blenman
Justice of Appeal

By the Court

Chief Registrar