

**BARBADOS**

**[Unreported]**

**IN THE SUPREME COURT OF JUDICATURE  
HIGH COURT  
CIVIL DIVISION**

**CV. No. 262 of 2014**

**BETWEEN:**

**KINSALE HOLDINGS LIMITED**

**CLAIMANT**

**AND**

**COOL BLUE RESIDENCES LTD**

**DEFENDANT**

**Before the Honourable Madam Justice Margaret A. Reifer, Judge of the  
High Court**

**Dates of Hearing: 2016 December 5<sup>th</sup>, 6<sup>th</sup>, 21<sup>st</sup>  
2017 May 31<sup>st</sup>**

**Appearances:**

**Mr. Bryan Weekes Attorney-at-Law for the Claimant represented by  
Mr. Larry Warren**

**Mr. Kevin Boyce and Ms. Shena-Ann Ince Attorneys-at-Law for the  
Defendant represented by Mr. Robby Bell**

## Judgment

### Background/Introduction

[1] This matter began by Claim Form and Statement of Claim, filed February 2014, together with Notice of Application filed with a Certificate of Urgency and Affidavit in Support.

[2] The substantive relief claimed is as follows:

- “1. An injunction restraining the Defendant by itself or by its servants agents or otherwise from constructing on Lot 24 Coral Cliff, Maynards, in the parish of Saint Peter in this island a dwelling house of more than one storey and constructed of any material other than stone or masonry.
2. An injunction mandating that the Defendant remove the structure existent on Lot 24 Coral Cliff, Maynards, in the parish of Saint Peter which is in excess of one storey;
3. An injunction mandating that the Defendant remove any structure or any part of a structure on Lot 24 Coral Cliff, Maynards, in the parish of Saint Peter which is not constructed of masonry or stone;
4. Further or in the alternative, damages to be assessed;
5. Interest;
6. Costs.”

[3] The parties are both registered companies owning residential real property in a development/building scheme known as Coral Cliff, Maynards in the parish of St. Peter, in this Island; the Claimant company being the owner of Lot 27 therein, the Defendant company being the ‘purported’ owner of Lot 24, which at the time of suit was under construction. (The Defendant pointedly uses the word “purportedly” as it submits later in the proceedings that the Claimant has committed a fundamental procedural error by failing to lead evidence to support the assertion that it is the owner

of lot 27. It alleges that a Conveyance shows that lot 27 was conveyed to a company called Larry Warren Architect Limited.)

[4] Both parcels of land were purchased from E.B.T. Limited, which was the developer of the residential district known as Coral Cliff, and was responsible for the creation of the covenants associated with Lots 11 and 29 therein.

[5] Both Lots, 27 and 24, are situated on a cliff facing the ocean. The Claimant's property is situated to the north of the Defendant's along the same ridge line. This fact is significant to an allegation of loss and damage, particularly of privacy. Lot 26 separates Lot 27 and Lot 24.

[6] At the heart of the claim is the interpretation of a restrictive covenant to which lots 11 to 29 of the said building scheme enjoy both the benefit and the burden. These restrictive covenants are to be found in a Deed of Conveyance dated the 15<sup>th</sup> June 1970 between E.B.T. Ltd, Edward Ive O'Hara and St. Lucy Manufacturing Limited.

[7] The critical covenant is to be found at page 7 paragraph 2(b) of the said Deed and restricts the owner as follows:

“Not at anytime to erect or cause or permit to be erected on the said lot or parcel of land or any part thereof any buildings or erections other than those comprising one single private dwelling house together with the boundary walls or fences garage servants rooms and other usual outbuildings for use in connection therewith which dwelling house garage servants rooms and outbuildings shall be subject to the following restrictions, namely:-

- (i) No such buildings and erections shall be constructed otherwise than of stone or masonry construction or be roofed with any material other than shingles or tiles or asbestos;
- (ii) No such buildings and erections or any of the lots marked 11 to 29 inclusive of the key plan shall be of more than one storey or in excess of twenty feet in height above ground level at the highest point of the lot on which it is built.”

[8] The Claimant alleged in this Claim, breach of the above covenant by the Defendant, and loss and damage to the Claimant, but insofar as the allegations in the original Claim Form are significantly narrowed by the time of Case Management, it becomes moot to outline at this stage the claims therein, except to state generally, that the Claimant sought a declaration that the structure erected on Lot 24 by the Defendant amounts to a breach of the restrictive covenants contained in the Deed of Conveyance referenced above.

[9] The concerns of the Claimant are best summarized in the Witness Statement of Anna Warren at Paragraph 10 as follows:

“10. Our main concern with the proposed construction of dwelling houses of more than one storey, regardless of height is that once a house can be constructed of more than one storey, the privacy of many of the Lots which enjoy the benefit of the restrictive covenants will be compromised.”

## **The Urgent Application and its Disposition**

- [10] By Notice of Application filed February 21<sup>st</sup> 2014 with an Affidavit/Certificate of Urgency, the Claimant sought Interlocutory Injunctive relief, restraining the Defendant from continuing construction on the second floor of the dwelling house on Lot 24. This Application was supported by the Affidavit of Mr. Larry Warren as Director/Principal of the Claimant, of even date. This Affidavit outlined the formal exchanges between counsel for the Claimant and the Defendant's principal, Mr. Robbie Bell prior to litigation.
- [11] On the 28<sup>th</sup> February 2014 the Application was adjourned *sine die*, at the request of the parties, to facilitate the filing of the Defendant's Affidavit in Response.
- [12] The Affidavit in Response to the Urgent Application was filed on April 8<sup>th</sup> 2014 by the Defendant's Director/Principal, Mr. Robbie Bell.
- [13] On May 2<sup>nd</sup> 2014 the parties, appearing before the Court on the hearing of this Urgent Application, informed the Court that after discussion between all concerned, they wanted to use the time for case management to take the matter to speedy trial. Significantly, counsel for the Claimant informed the Court that it remained within the discretion of the Defendant whether he will continue construction until such time as the substantive matter can be heard.

- [14] Accordingly, several case management orders were made and the matter adjourned to September 24<sup>th</sup> 2014 for Pre-Trial Review. (It is unfortunate that on this judge's rotation to Criminal Sessions there was no transfer of this matter to another judge as requested of the Registration Department. This matter was continued by this judge on a return to the Civil Division in 2016.)
- [15] Further case management followed: March 2<sup>nd</sup> 2016, March 16<sup>th</sup> (Draft Order in terms of Application of March 7<sup>th</sup> 2016), May 23<sup>rd</sup> 2016 (issue of expert witness) June 21<sup>st</sup> (Draft Consent Order approved as Amended), November 9<sup>th</sup> (trial dates fixed), November 23<sup>rd</sup> (Pre-trial review).

### **The Further Pleadings**

- [16] The Defendant filed a Defence on March 28<sup>th</sup> 2014, the basis of which is an admission that the construction is of a two-storey dwelling house, but a denial that it is in contravention of the said restrictive covenants. At paragraph 8 of the Defence, the Defendant speaks to the Developer's intent in terms to the effect that, it was not to restrict the number of storeys, but to ensure "*that the said properties constructed are no more than 20 feet in height*". The Defendant therefore denies that it is in breach of the restrictive covenants affecting Lot 24, and further, avers that the

Claimant's Statement of Claim discloses no valid or sustainable claim in law.

[17] The Defendant's Defence annexed documents on which it intended to rely in support of its case, namely, a surveyors report that the house is less than 20 feet in height (18 feet 11<sup>3</sup>/<sub>4</sub> inches to be exact), and the Developer's approval of the construction designs prior to sale to the Defendant dated August 1<sup>st</sup> 2010.

[18] In Reply, it is the Claimant's allegation, *inter alia*, that the Developer's intent was to ensure "*the privacy of the owners of any lot which benefits from the said covenant*" and "*the view enjoyed by any lot which benefits from the said covenant*".

[19] The case management orders were duly satisfied, the most notable filings being the Witness Statements of Larry Warren and Anna Warren for the Claimant, and Robbie Bell for the Defendant, which re-iterate the parties' interpretation/understanding of the Restrictive Covenant.

### **The Issues Narrowed**

[20] In our case management conference of June 21<sup>st</sup> 2016, the issues were narrowed by the Claimant's abandonment of the allegation that the subject dwelling-house "*is also guilty of using materials other than stone or*

*masonry in the construction of the dwelling-house on its Lot.” See Amended Claim Form and Statement of Claim filed July 12<sup>th</sup> 2016.*

[21] The Issues for determination have been settled as being:

- (1) The meaning of the restrictive covenant: does the covenant mean that buildings within the development can be either a maximum of one storey or a maximum height of 20 feet or whether such buildings must comply with both restrictions?
- (2) Whether the Claimant has breached that covenant?
- (3) If so, whether the Claimant should be granted the injunctive relief sought and/or damages and/or interest.

### **The Evidence at the Trial**

[22] Two of the three persons providing Witness Statements gave evidence to the Court.

[23] Larry Warren, Director/Principal of the Claimant was tendered for cross-examination, and explained his interpretation of the covenant to the effect that, it only permitted one storey. Curiously, it was his interpretation that a deck which created a second storey, would not be in contravention of the restrictive covenant as long as it is not used as a living space.

[24] His cross-examination established beyond a shadow of a doubt that the construction of Lot 24 did not impact Lot 27 as it relates to light, air, views or privacy or at all. It was also admitted, that there are other properties, specifically Lots 12, 13 and possibly others, which have a second storey. The witness’s view was, that this was allowable because these were all

sloping lots and the second storey was not at road level, but downhill at a sloping grade level.

[25] The Claimant called no more witnesses and closed its case.

[26] Defendant Director/Principal, Mr. Robbie Bell was the only other witness. His evidence, by way of amplification, established that E.B.T. the Developer, is still an existing company and that the cost of removing the offending part of the dwelling house would be significant. This no doubt was intended to support the Defendant's later submission (advanced in the alternative), that the grant of an injunction would be oppressive to the Defendant, causing him significant loss and damage.

## **The Submissions**

### **The Case for the Claimant**

[27] The Claimant's submission is that, properly interpreted, the subject covenant prohibits the construction of two-storey dwelling-houses on the lots bound thereby. Stated otherwise, a dwelling-house can be less than 20 feet in height, but still breach the covenant if it is more than one storey. He argues that the purpose of the covenant is to ensure: (a) the privacy of the owners of any lot which benefits from the said covenant; (b) the view enjoyed by any lot which benefits from the said covenant. *"It [is] submitted that the height restriction is intended to protect views and*

*perhaps the amount of natural light which each lot in the scheme may enjoy*”; while the restriction on the number of storeys goes to the protection of each owner’s privacy, as well as protecting views.

[28] Stated differently, the case for the Claimant is that the most obvious meaning of the covenant in this case is that the owner of a lot to which the covenant relates, is not to build any dwelling-house higher than twenty feet and such a dwelling-house should be no more than one storey in height, as this is what the covenant actually says.

[29] Counsel submits that in the exercise of judicial interpretation of the subject covenant, the Court should apply the same principles used in contractual interpretation: the Court should look to the language actually used in the deed creating the restrictive covenant and to the intent of the drafters of the covenant. In other words, whether the use of the word “or” is conjunctive or disjunctive.

[30] Counsel in his Written Submission made reference to **Denham ASJ** of Australia in **Clare v Bedelis [2016] VSC 381**, where he examined extracts from the authorities and enumerates the principles of interpretation applicable to restrictive covenants under the rubric “The Construction of Restrictive Covenants”, to be found at paragraph [31] and onwards. See also **Gubbels v Anderson [1994] 91 B.C.L.R. (2<sup>nd</sup>) 379** (first instance

decision) (1995), 8 B.C.L.R. (3<sup>rd</sup>) (Appeal); **McCartin v Davis [2004] B.C.W.L.D 1067**; **Hofer v Guetonne [2011] BCCA 393**; **Nicholls v Sagicor Life Inc. BB 2014 HC 55**; **Arnold v Britton and Ors [2015] UK SC 36**.

[31] Counsel submits at paragraph 20 of his Written Submissions that “*The meaning of the word “or” in a document will depend on the context in which the word is used and the intention of the drafters of the document*”.

[32] Counsel examined in detail the remedies available to a litigant where there has been a breach of a restrictive covenant, principally, injunctive relief (permanent and mandatory) and award of damages, and the criteria influencing the award of one as opposed to the other: see **Shelfer v City of London Electric Lighting Company [1895] 1 Ch 287**; **Constable of West Yorkshire [2007] EWCA Civ 181**; **Lund Jacklin et al v AJA Taylor & Co. Ltd [1973] 230 EG 363**; **Wrotham Park Estates Co. Ltd v Parkside Homes Ltd [1974] 798**; **Wakeham v Wood [1981] 43 P. & C. R. 40**; **HKRUK II (CHC) Limited v Marcus Alexander Heaney [2010] EWHC 2245 (Ch)**; **Sutherland Shire Council v Faircraft Party Ltd 51 L.G.R.A. 389**; **B.C. Ltd v Scana Holdings Ltd 1998 Carswell BC 150**.

[33] Counsel argued a case of breach and the grant of a mandatory injunction instead of damages.

[34] Needless to say, if this Court's finding on Issue #1 is that there has been no breach, Issues 2 and 3 become moot.

### **The Case for the Defendant**

[35] Generally, the Defendant denies that the house constructed on Lot 24 is in breach of the covenant. Further, the Defendant denies that the Claimant has any benefit from the covenant, and/or that the construction adversely impacts any of the practical benefits of light, air, views and privacy. As such, the Defendant argues, the Claimant is not entitled to any of the relief claimed in the event that it is successful. The Defendant argues in the alternative, that based on the evidence adduced and the absence of any tangible injury, were the Court minded to grant any relief, such relief should be limited to a nominal award of damages, if at all.

[36] The Defendant argued that the word "or" carries a natural disjunctive meaning: per **Halsbury's Law of England Volume 79 (2014) 5<sup>th</sup> Edition**.

[37] The Defendant cited the **Stair Memorial Encyclopedia** as authority for the further submission that where "*the two words separated by "or" are*

*not similar, as is the case here between one storey and 20 feet, then the “disjunctive force” of “or” is strong.”*

[38] Counsel referenced **Lord Denning MR** in the UK Court of Appeal case of **Monte Ulia (Owners) v Banco and Others (Owners) The Banco [1971] 1 All ER 524**, where in an interpretation of the phrase “or any other ship”, **Lord Denning MR** had this to say about the use of the word “or”:

“It is used to express an alternative as in the phrase “one or the other”. It means that the Admiralty jurisdiction in rem may be invoked either against the offending ship or against any other ship in the same ownership, but not against both. This is the natural meaning of the word “or” in this context. It is the meaning which carries into effect the International Convention. It is the meaning which on high authority we ought to give to it. In *Morgan v Thomas* [1882] 9 QBD 643, 646 Jessel MR said: “You will find it said in some cases that “or” means “and” but “or” never means “and” unless there is a context which shows it is used for “and” by mistake.” So also in *Re Diplock* [1941] Ch 253, 260 Sir Wilfred Green MR said: “The word “or” is prima facie, and in the absence of some restraining context, to be read as disjunctive...”

[39] Thus, the case of the Defendant is, that the proper interpretation of the Covenant is that the buildings within the Development can be either of one storey or a maximum height of twenty feet, but both restrictions cannot apply conjunctively. There is no basis to be found in the context, no ambiguity, no impossibility, no difficulty whatsoever, why the Court ought to go behind the *prima facie* meaning of “or” to alter its meaning to the conjunctive “and” or “nor” as claimed.

[40] Counsel cites **Mr. Justice Lowry** in the Canadian case of **Goodwin v Ridley, 2006 BCCA 581 (CanLII)** as follows:

“[11] I consider that, quite apart from what view might be taken of the preferred interpretation, there are two plausible meanings that can be given to the restriction. It can be properly read either way. The wording is not free of ambiguity.

[12] It is not a matter of resolving the ambiguity. A restriction on the use of land must be clearly expressed. If ambiguity exists, it is to be resolved in favour of the free use of land. The principle was stated in **Anderson v Dickie [1915], 84 L.J.P.C. 219 (HL)** by **Lord Dunedin** at 227:

Far earlier than this it had been held that all conditions restricting the use of land must be very clearly expressed, the presumption being always for freedom.

[14] ... The ambiguity in the wording employed is to be resolved in favour of there being no restriction under the building scheme on Ms. Goodwin’s construction of a house on her lot...”

[41] Reference is also made to **Mr. Justice Brooke** in **Jabs v Good, 2009 BCSC 320. (CanLII)**

[42] The Defendant distinguished the circumstances to be found in **McDonald et al v Jordan BB 1991 HC 61** and **Metropolitan Board of Works v Steed 8 Q.B.D. 445**, cited by counsel for the Claimant. See also **Prim v Smith [1888] 20 Q.B.D. 643** where **Lord Justice Fry** stated that there was no doubt that the proper use of the word “or” is to express an alternative.

[43] Counsel for the Defendant turned next to the Contextual Approach to Contractual interpretation after having posited, as did counsel for the

Claimant, that the rules for the interpretation of restrictive covenants are the same as for contractual interpretation. See the local and regional interpretation of this approach as discussed in the following cases: **E. Phil & Sons A/S (Denmark) v Brondum A/S (Denmark) (Civil Appeal No. 24 of 2012) per Burgess JA. System Sales Ltd v Arletta O. Brown-Oxley and Sonja Patzena Suttle Civil Appeal No. 10 of 2006; Canada Imperial Bank of Commerce v Gypsy International Ltd and Royston Beepat [2015] CCJ 16; Sea Haven Inc. v Dyrnd [2011] 79 WIR; RBTT Bank B'dos Limited v Fitzroy Adolphus Davis and Lisa Davis Civil Appeal No. 2 of 2015.**

[44] The relevant contextual background in this matter consists of the Defendant's construction plans being submitted to the developer of the housing estate, those plans being signed off on each page by an agent of the developer and being approved by the developer, the fact that the Developer is the owner of Lot 26 (the lot between the Claimant and the Defendant), as well as the existence of other multiple storey structures in the area subject to the same restrictive covenant.

[45] Counsel submitted that such evidence supports the interpretation by a reasonable man that the subject covenant permits the construction of more than one storey, provided that the overall height does not exceed 20 feet.

[46] Further, counsel submitted, *inter alia*, that the Claimant has not established any basis for relief as it does not enjoy any benefits of the covenant and has suffered no injury; and in the alternative, that the grant of an injunction would be unduly oppressive to the Defendant, which would suffer significant loss and damage.

### **The Law to be Applied**

[47] There is in principle no difference between general contractual interpretation and the interpretation of restrictive covenants. This is recognized by the authors of the text **Restrictive Covenants and Freehold Land – A Practitioner’s Guide**, cited by counsel to the Defendant. He references paragraph 14-02 where it states as follows:

“The construction of restrictive covenants is carried out by a court in the same way as with other words which are intended to have a specific meaning in a document. As a general rule, the aim of the court is to ascertain in the intention of the parties from the words used, considering those words in light of the factual circumstances in which they appear; the last factor is sometimes referred to as the “factual matrix”.”

[48] In **Nicholls v Sagicor Life Inc. BB 2014 HC 55** this Court conducted a review of the law as it stands in Barbados on this point, at **paragraphs [39] to [47]** of its judgment. This Court maintains its position therein set out seriatim:

“[39] Our Court of Appeal in the recently decided case of **System Sales Ltd v Arletta Brown-Oxley et al, Civil Appeal No. 10 of 2006** delivered on May 15th 2014, outlined and analyzed the fundamental principles

that should guide inquiry into the meaning of contractual language: see also **E. Phil & Sons A/S (Denmark) v Brøndum A/S (Denmark) Civil Appeal No. 24 of 2012 (unreported); Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] WLR 896; Sirius International Insurance Co. (publ) v FAI General Insurance Ltd [2005] 1 All ER 191; Sea Haven Inc v Dyrud (2011) 79 WIR.**

- [40] In that case the Court of Appeal stated conclusively at para. 27 of their judgment that “the basic principles which should guide our courts in the interpretation of contracts are those enunciated by **Lord Hoffman** in **Investors Compensation Scheme**, namely, the contextual approach.
- [41] In the **Investors Compensation Scheme Case**, **Lord Hoffman** declared that almost all the old intellectual baggage of “legal” interpretation has been discarded, and he enumerated the current principles as follows:

“(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the “matrix of fact,” but the phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for

whatever reason, have used the wrong words or syntax. (see **Mannai Investments Co. Ltd v Eagle Star Life Assurance Co. Ltd. [1997] 2 WLR 945**).

(5) The “rule” that words should be given their “natural and ordinary meaning” reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in **The Antaios Compania Neviera S. A. v Salen Rederierna A.B. [1985] 1 AC 191, 201**:

“... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.”

[42] **Burgess JA** spoke to this Contextual Approach when he adopted the principles enunciated in the **Investors Compensation Scheme Case in E. Phil & Sons A/S (Denmark) v Brøndum A/S (Denmark) Civil Appeal No. 24 of 2012 (decision of October 23rd 2013) (E. Phil)**. His words are instructive where he states as follows:

“First, that case heralds an unmistakable shift in approach to contractual interpretation, namely, a shift to ascertaining the contextual meaning of the relevant contractual language and away from literalism in the interpretative process: see per Lord Steyn in *Sirius* at p. 200. Second, ambiguity is not a pre-requisite of an investigation of the background or factual matrix in which a contract had been concluded. Third, such an investigation is an indispensable part of the process of understanding what a contract means in all cases. The background, which may include the legal, regulatory and factual matrix constituting the background, enables the interpreter to determine the intended meaning of the contractual language. Finally, the actual words used do not necessarily govern the meaning to be given to the contract; the background can let the judge decide that the parties used the wrong words, or mis-ordered their words, and to ascribe to the parties’ words the meanings they must have intended, in the light of the background. The last point was made by Lord Hoffman in **Chartbrook** where he said at p 1113-1114:

“When the language used in an instrument gives rise to difficulties of construction, the process of interpretation does not require one to formulate some alternative form of words which approximates as closely as possible to that of the parties. It is to decide what a reasonable person would have understood the parties to have meant by using the language which they did.””

...

[44] **Lewison in The Interpretation of Contracts (2nd ed.)** has this to say at **p 36**:

“In addition to the words of the instrument, and the particular facts proved by evidence admitted in aid of construction, the court may also be assisted by a consideration of the commercial purpose of the contract, and in considering that purpose may rely on its own experience of contracts of a similar character to that under examination.”

[45] At **page 37**, **Lewison** also makes reference to the case of **Mannai Investment Co Ltd v Eagle Star Life Assurance Co. Ltd [1997] AC 749 at 771** where **Lord Steyn** stated as follows:

“In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them.”

[46] In summary, what is outlined above clearly indicates that the current approach of a court of law in a task such as this, **is to ascertain the contextual meaning of the relevant contractual language.**

[47] In such an exercise, an investigation of the factual background/factual matrix is an indispensable part of the process of understanding what a contract means, since the background enables the interpreter to determine the intended meaning of the contractual language. One must always be wary, in this context, of the dangers of a purely ‘semantic and syntactical analysis’ of the words in a commercial contract.”

[49] **Since Nicholls v Sagicor Life Inc (supra)** our Court of Appeal revisited the issue of Contractual Interpretation in the case of **RBTT Bank Barbados Limited v Fitzroy Adolphus Davis et al Civil Appeal No. 2 of 2015**. The Caribbean Court of Justice also visited this subject in **Canadian Imperial Bank of Commerce v Gypsy International Ltd and Royston Beepat 2015 CCJ 16**.

[50] At paragraphs [37] to [46] **Burgess JA** goes into a review of the law under the rubric ‘**Basic Guiding Principles of Interpretation**’ and the application of these principles to the case at hand (the release agreement). Of interest is his review of the recent Supreme Court of the United Kingdom case of **Arnold v Britton [2015] UKSC 36** where **Lord Neuberger** restated **Investors Compensation Scheme**; as well as the English Court of Appeal decision in **Egan v Static Central Companies (Europe) Ltd [2004] 2 Lloyds Rep. 429**. His discussion as to what constitutes admissible background in construing written agreements is instructive.

## **Discussion**

[51] Pursuant to the above principles, this Court has taken a two-pronged approach in its analysis of this matter, by firstly, examining the language

used in the subject covenant, and secondly, by looking at Context as an aid to interpretation.

[52] At the heart of this matter is the determination of the meaning of the relevant restrictive covenant: namely the determination of whether the word “or” to be found at clause 2(b)(ii) is disjunctive or conjunctive.

[53] In seeking to determine or understand the language of a written document, a Court may look at dictionaries and other materials in order to elucidate the meaning of the words.

[54] **Merriam Webster Online Dictionary** defines “or” as a function word to indicate an alternative or other options. Further, the **Oxford Advanced Learner’s Dictionary** defines the word as a conjunction used to link alternatives or a word used to introduce another possibility.

[55] In **Green v Premier Glynrhonwy Slate Company Limited (1928) 1 KB 561**, a matter surrounding proceedings for compensation to be allowed to the deceased workman’s family, in determining dependency, the issue turned entirely on the construction of section 8 of the Compensation Act. The court was of the view that the section gave rise to two categories; alternatively, where the workman leaves a widow or other member of his family, who is not a child under the age of 15, then the words “and” in

addition bringing in the second category of “one or more children under the age of fifteen.”

[56] **Scrutton LJ.** was of the opinion that to inquire into the other members of the workman’s family over fifteen years of age would lead one to read “or” as “and”. His Lordship opined “*You do sometimes read “or” as “and” but you do not do it unless you are so obliged, because, “or” does not generally mean “and”, similarly, “and” does not generally mean “or”.*”

[57] In **Federal Steam Navigation Co. Ltd et al v Department of Trade and Industry [1974] 2 All ER 97**, a British ship on the high seas discarded a mixture of oil and water into the sea in an area that was prohibited sea area under the Oil in Navigable Waters Act 1955. The owner of the ship and the master were prosecuted and both were convicted of an offence under section 1(1)a of the Act. They appealed, contending that they could not both be charged with and convicted of the offence since the relevant section provided that the owner or master should be guilty of the offence.

[58] It was held that the appeal should be dismissed since the “or” in section 1(1) was used conjunctively and not in an alternative and exclusionary sense. Accordingly, the owner and the master could be each convicted of an offence. The court was of the view that there is certainly no doubt that

generally it is assumed that “or” is intended to be used disjunctively and the word “and” conjunctively. It is only when to construe those as such would lead to an unintelligible absurd result, the courts will substitute one word for the other.

[59] It is clear that the word “or” is taken to have a disjunctive meaning unless to do so would result in an absurdity.

[60] Even if a lingering doubt remains as to the meaning to be attached to this covenant, the decision of **E. Pihl and Sons A/S (Denmark) v Brondum A/S (Denmark) Civil Appeal No. 24 of 2012** provides some assistance. The major issue in this case was the dispute arising between the two parties regarding the construction of a contract and their interpretation of the arbitration clause. The court reaffirmed the principle outlined in **Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896** which states that interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. It includes absolutely anything which would have affected the way in which the language of the document

would have been understood by a reasonable man. The context behind the contract is paramount.

### **Findings of Fact and Law**

[61] This matter surrounds the interpretation of a contract as a question of mixed law and fact. It has been said that the proper interpretation of a contract is a question of law, but that the ascertainment of the meaning of a particular word is a question of fact. See **The Interpretation of Contracts 2<sup>nd</sup> ed by Lewison QC and Burgess JA at para 18 and 19 of Brondum** (supra) where he stated:

“In a nutshell, questions of law are questions about what the correct legal test is, questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.”

### **Findings of Fact and Law are as follows:**

1. This Court accepts that the natural and presumptive meaning of the word “or” is disjunctive: **See Prim v Smith [1888] 20 QBD**. The circumstances as outlined, warrant no different interpretation: that is, there are no circumstances making modification necessary in order to avoid absurdity, inconsistency or repugnancy.
2. The Defendant’s interpretation of the intent of the Developer (contextual interpretation) is more sustainable than that of the Claimant. It is notable that the Claimant did not call on the principals

of E.B.T. Limited (the Developer) to provide Witness Statements or to give evidence in this matter, but opted to advance its own interpretation/understanding of the context. Such expression of opinion did little to counter the Defendant's evidence of its course of dealings with E.B.T. prior to the actual purchase. The Defendant's evidence in this regard has therefore not been rebutted. See paragraphs 8 to 13 of the Affidavit of Robbie Bell filed April 8<sup>th</sup> 2014 and in particular paragraph 21 which provides the relevant matrix of fact and states as follows:

“21. E.B.T. Limited is the developer of Coral Cliff. In this capacity, I believe that it has firsthand knowledge of the manner in which the restrictive covenants are to be enforced. E.B.T. Limited reviewed, signed off and affixed the Company seal on each page of the construction plans, including pages 6 and 7 thereof that demonstrates the side elevation of the house.

22. Further, E.B.T. Limited, on approving the construction plans specifically noted that:

“The attached construction designs by Harper Downie dated July 2010 have been pre-approved by the vendor on the basis the final design will be materially based on those shown **with particular reference to the overall height of the building not being more than 20 ft** above the ground level of the highest point on Lot 24..” [Emphasis added]

23. I believe that by reviewing the construction plans, E.B.T. Limited knew about the proposed layout of the property and the fact that the property contained two storeys. I believe that the only reference in the approval that spoke to the subject matter of restrictive covenant 3b(ii) was in relation to a restriction on the height of the property.”

The Claimant's opinion is made up of assumption/rationalizations as seen from paragraph 22 of the Witness Statement of Larry Warren provides as follows:

“22 On the matter of the interpretations of the covenants, I have recently driven around the development and I am convinced that the single storey was deliberate put in to ensure that no floor level was significantly above grade level and the reason for the height restrictions was for those lots which had sloping lots namely lots 10-13. The only residence that has built down the hill is on lot 13, but the top storey is at or near the adjacent lots grade level. Mr. Bell has raised the floor level significantly above grade level of the adjacent lots and created another living space at the higher level which is a complete departure from all the residences in the lots noted. I think this will become obvious to the judge when she visits and it is this that we object to mostly as it sets a precedent that does not currently exist and placing a living space at a height that can overlook a neighbour's property. I am sure additional to this the storey restriction has to do with the potential for improved views from within the development.”

3. The issue of the Claimant's Loss and Damage.

It is significant, as expressed by this Court in its outline of the relevant facts in this matter, that the two properties are on the same ridgeline facing the sea. Were the Court to rule in favour of the Claimant's interpretation of the subject covenant, there could be no award as claimed in the statement of claim, as the Claimant has suffered no loss or damage. Stated differently, there has been no infringement of the Claimant's right to light, air, views or privacy (See evidence of Mr. Larry Warren). It is noted also that there is no evidence that the privacy of any other land owner has been breached or that there has been any impact on their access to light, air or view. No other parties have sought to be joined in these proceedings.

## **Disposal**

[62] In light of the above findings of law and fact, the Claimant's case is dismissed with costs to the Defendant, to be agreed or assessed.

**MARGARET A. REIFER**  
Judge of the High Court