IN THE SUPREME COURT OF BELIZE, A.D. 2013

CLAIM NO: 68 of 2013

BETWEEN

NOEL POTGIETER
DAVID CROWTHER
DAN NEUBAUER
DANIEL WEFLEN
PETER DEKENS **CLAIMANTS**

AND

MAYACAN DEVELOPMENT COMPANY LTD. **DEFENDANT**

Keywords: Company, Commercial and Land Law; Directors Resolution for sale of land owned by Company to directors; S. 55(1) of the Law of Property Act, Cap. 190 of the Laws of Belize Revised Edition 2000; Powers and duties of directors; breach of fiduciary duties.

Before the Honourable: **Mr. Justice Courtney A Abel (Ag)**

Hearing Dates: 6th June 2013
17th July 2013
20th September 2013

Appearances:

Mr. Michel Chebat S.C. of M. H. Chebat & Co. Counsel for the Claimants.

Mr. Oscar Sabido S.C. of Sabido and Co. Counsel for the Defendant.

JUDGMENT

Delivered on the 20th day of September 2013

Introduction

[1] This case concerns a land development project in the Stann Creek District of Belize involving a portion of the Hughes' Estate which initially comprised a 96 acre parcel of land approximately ("the project") and later an adjacent 1748 acre parcel of land.

[2] The Defendant owns both parcels of land and is a limited liability company formed and registered under the laws of Belize for the purpose of the land development project.

[3] The Claimants are all shareholders of the Defendant and/or investors in the project.

[4] The Claimants allegedly advanced monies pursuant to an agreement to discharge a debt by the Defendant (and secured by certain properties). The Claimants claim that they were, under the alleged agreement, entitled to certain lots of beachfront lands of the project to which the Defendant is entitled and which the Defendant has wrongly refused and continues to refuse to transfer to them, which claim the Defendant strenuously resists.

[5] The present, bitterly contested claim (involving issues of both fact and of company law), is therefore to determine the entitlement of the Claimants and/or of the Defendant to the claimed lots of land and for consequential reliefs.

[6] By agreement of the parties there is an injunction on the claimed lots of land and the case has been fast tracked to accommodate the commercial imperatives of the situation with regard to the claimed lots and of the project as a whole.

The Court Proceedings

[7] The Claimant issued a Claim Form & Statement of Case on the 5th February 2013.

[8] The reliefs claimed by the Claimants in their Claim Form & Statement of Case were as follows:

1. Specific performance of an agreement made between the Claimants and the Defendant wherein the Defendant agreed that in exchange for paying the Bank of Nova Scotia the mortgage foreclosure sums, legal fees, initial fees associated with

the 6 beachfront lots, and the auctioneer's fees, that the Defendant would transfer to each Claimant, a lot of land, as evidenced by Directors resolution of April 2001:

> Lot 9 to Noel Potgieter, Lot 56 to David and Isabella Crowther, Lot 57 to Dan and Laurie Neubauer, Lot 58 to Daniel and Barbara Weflen and Lot 61 to Peter and Nellie Dekens which form, and some are part of, the land development project located in the Stann Creek District and being a portion of the Hughes Estate and comprising approximately 96 acre parcel and a 1748 acre parcel and being the property of the Defendant ("the claimed lots")

2. An Order of the Court requiring that the Defendant to transfer title to the said lots to the Claimants or their assigns;
3. Alternatively, an Order of the Court authorizing the Registrar of the Supreme Court to transfer title to the said lots to the Claimants or their assigns;
4. An Order of the Court requiring the Defendant to pay damages for the said breach of the agreement.
5. Costs

[9] The Claimant, at the same time that they filed their Claim Form, made an application for an injunction supported by an Affidavit of the 4th Claimant.

[10] In the Statement of Case the Claimants (which includes four (4) of the past directors of the Defendant Company), alleged that they entered an agreement with the Defendant for the Defendant to transfer the claimed lots to each Claimant respectively, after a successful bid to bail out the Defendant from financial difficulty with the Bank of Nova Scotia in Belize ("Nova Scotia Belize") with monies which they were invited by the Defendant to advance to Nova Scotia Belize on behalf of the Defendant.

[11] An Ex Parte Injunction was granted on the 19th February 2013 restraining the Defendant, generally from dealing with the claimed lots.

[12] On the 12th March 2013 the parties consented to an extension of the injunction and for various directions for the case to be progressed to a Case Management Hearing on the 16th April 2013 on which occasion the application for discharge of the injunction would be heard.

[13] A Defence was filed on the 18th March 2013 followed by an Amended defence filed on the 22nd March 2013.

[14] In its Amended Defence the Defendant denied (or required the Claimants to prove) many of the factual allegations on which the Claimants' claim was based and in particular:

(a) Denied that the Defendant invited investors to advance monies to Nova Scotia Belize as alleged under any agreement to transfer the claimed lots in exchange for such advance.

(b) Denied having taken funds from the Claimants to pay off Nova Scotia Belize.

(c) Alleged that some of the Claimants were at the time affected by a conflict of interest such that would make any transfer of lots to them invalid, self-serving and thereby illegal and was in any event unenforceable and contrary to Section 55 of the Law of Property Act Cap 190, because it was an oral contract of land (not in writing as required).

(d) Alleged that the Agreement could not have been entered into by the Defendant as at the time of the alleged agreement the Defendant was not the owner of the claimed lots and also was based on an error as to who was the owner.

(e) Alleged that the claimed lots are in any event not the registered properties of the Defendants and are still subject to charges.

[15] On the 10th April 2013 a Reply was filed by the Claimants in which the Claimants alleged that the Claimants acted to safeguard the interests of the Defendant, that the alleged agreement was evidenced in writing by a resolution of the Defendant dated 3rd March 2001. Also that if title to the claimed lots have not been vested in the Defendant and is not free and clear of mortgages, that this was due to lack of diligence of the Defendant and maintained that the Claimants advanced monies to Nova Scotia Belize under the alleged agreement.

[16] The Defendant (by its present Board of Directors) therefore opposes the claims by the Claimants and raises many issues of fact and law (including breach of fiduciary duty) in support of its defence of the claim.

[17] On the 16th April 2013 the parties agreed to proceed with an expedited hearing of the action and thereby agreed to extend the injunction along with directions for such expedited hearing on the 6th June 2013.

[18] With a few hiccups the parties made full disclosure and filed evidence in support of their respective cases.

[19] The Claimant called 3 witnesses in support of its case: Daniel Weflen and David Crowther (respectively the 4th and 2nd Claimants), and Michael C. Young (at one time the Attorney for the Claimants).

[20] The Defendant called 2 witnesses in support of its case: Brent Mayall (the Treasurer of the Defendant Company) and Peter Reynolds (a current Director of the Defendant Company).

[21] The parties filed their written submissions and made oral submissions and the Court reserved its decision which is now delivered.

[22] All of the many factual and legal issues raised by the Defendant, if they were fully investigated in this judgment, would make it unduly complicated and would not readily get to the central issue(s) of this case.

[23] In particular the general background of the claim is not for the main part in dispute, and a large section of that which is disputed can be unraveled by reference to contemporaneous documentation and other evidence before the Court, which establish a clear picture as to the surrounding circumstances of the case.

[24] I will therefore now summarise the background to this case, which, where it has been disputed by either party, may be considered findings of fact by me.

Background

[25] The Defendant was formed in or around February 1995 to hold title to the land development project. The Defendant was formed by a related company[1] with this related company holding 497 shares in the Defendant and with Sylvia M. Wright, Kenneth Wright and Bruce Wright each holding 1 share.

[26] The Defendant was upon formation governed by Articles of Association signed on the 8th February 1995, which does not contain any prohibition, restriction or requirement in relation to directors' duties and dealings in relation to the Defendant[2].

[1] Myacan Holdings Limited (formed under the International Business Companies Act as a holding company for the Defendant).

[2] There was evidence before the Court that there may have been another Articles of Association which may have been applicable to the Defendant but no such other Articles of Association was put into evidence.

[27] The project was acquired by the Defendant from W. Ford Young and Carolyn Young as evidenced by Transfer Certificate of Title dated the 15th day of May 1995, Volume 29 Folio 49.

[28] The project was to consist of the subdivision of the 96 acre parcel into lots, the transfer of a beach front lot to each shareholder, the construction of houses and a hotel, and such other development as may be determined thereafter.

[29] A subdivision of the properties, which the Defendant held, was made by a licensed surveyor, Lloyd Tingling, who prepared two survey plans setting out Lots Numbering A-C and 1-124:

(i) Plan dated 1st July 1996 authenticated and registered as Entry No. 2775 Register 15; and

(ii) Plan dated 1st July 1996 authenticated and registered as Entry No 2768.

[30] A number of investors were invited to contribute to and participate in the land development project and those that did (apparently over 50 persons) became shareholders of the Defendant and were to (and possibly did[3]) receive a beach front lot of land.

[31] At the first AGM of the Defendant Kenneth Wright, Bruce Wright (his brother) and one Don Currie were elected as Directors of the Defendant and Kenneth Wright was entrusted with the management of the project in Belize.

[32] Between the 18th day of November 1996 and the 28th day of August 1997 the then Directors of the Defendant Company included Kenneth Wright, who together with his wife Sylvia Wright ("the Wrights"), had effective control of the management of the Defendant Company and apparently used such control to transfer legal title of 11 or 12 lots of land (including the claimed lots) in the project to themselves.

[33] Kenneth Wright and Sylvia Wright later mortgaged to Nova Scotia Belize 12 beach front lots which were all a part of the project including lots B, 39, 56, 57 58 and 61 as well as 6 other lots ("the mortgaged lots") as a result of which the mortgaged lots were held as collateral security for a debt due to the Bank of Nova Scotia by the Defendant, by virtue of 2 deeds of Mortgage dated the 18th day of November 1996 and 28th day of August 1997, respectively.

[3] The evidence is unclear on this minor point.

[34] On the 19th February 1998, there was a Directors Meeting held at 2001 Roberts Road, Nanoose Bay, BC at which time the Directors were Notel Potgieter (Chairman), Joe Balasa and Daniel Weflen (Secretary/Treasurer) (all present at the meeting) and Don Currie and Kenneth Wright (who were both absent from the meeting)

[35] It would appear that dissatisfaction arose with the way in which the Wrights were managing the affairs of the Defendant Company which led to Kenneth Wright being ultimately removed as a director of the Defendant at an AGM on the 13th September 1998 and being replaced by persons which included the 1st Claimant and 4th Claimant.

[36] In early April 2000, in relation to a default on the above debt due to Nova Scotia Belize, there was an advertisement for the sale of the mortgaged lots by public auction which was to take place on the 10th April 2000.

[37] At the time of publication of the auction sale in the newspapers by Nova Scotia Belize, the Wrights, and not the Defendant, undoubtedly had legal title to the mortgaged lots.

[38] The 1st Claimant, found out about the advertised sale of the mortgaged lots, at which time the Defendant may not have had the funds to satisfy the debt to the Bank of Nova Scotia (which I will deal with more fully later) and immediately sought to raise the funds from persons which included its shareholders/directors.

[39] On the 10th April 2000 Michael Young of Young's Law Firm, on behalf of the Defendant, successfully approached the bank of Nova Scotia to stop the auction sale of the mortgaged lots.

[40] In an Action (No. 254 of 2000) which was instituted on the 16th day of June 2000 by, inter alia, the Defendant (alleging fraud, unlawful and unauthorized acts by the Wrights in making the transfers) sought several reliefs including a declaration from the Court that the transfers of title to lots 39, 55, 56, 58, 61, 62, Lot B, 9 29, 30 and 37 ("the Wright acquired lots") by the Wrights , to themselves, was void and an injunction was sought to restrain the Wrights from selling the Wright acquired lots. This case went through is various stages (including the granting of an injunction and eventually being set down on the 19th January 2001 for trial).

[41] There is an alleged directors' resolution of the Defendant, which is central to the determination of this case. The Directors allegedly had a meeting on the 3rd March 2001,

it is claimed by the Claimant and disputed by the Defendant, and decided to transfer and assign the following lots ("the resolution lots") of the Defendant to the following persons:

Lot B to Noel Potgieter

Lot 39 to Roy Siddick

Lot 56 to Dave & Isabella Crowther

Lot 57 to Dan and Laurie Neubauer

Lot 58 to Dan & Barb Weflen

Lot 61 to Peter & Nellie Dekens

[42] There was an AGM in 4th March 2001 in Vancouver at which various reports were made including a Directors' report by Noel Potgieter. In the Directors' report Noel Potgieter alludes, in retrospect, to his attention having being drawn to an ad in the local newspapers of "a Public auction sale of 6 Mayacan lots by the Bank of Nova Scotia" in relation to $78,000.00 of debt incurred by Kenneth Wright on behalf of the Defendant and at the 11th hour, after 48 hours to finalise an arrangement of the payment of $4,000.00, arranged by director Weflen, the lots were withdrawn. In the report, debts of the Defendant of over US$ 500,000.00 were mentioned including to the shareholders for contributions "to the various fund drives we have had" which debts:

> *"are all due by October of this year, and must be addressed thoroughly, and come to a final resolution thereof.. The Directors are working on a solution to the debt problem, as it directly affects any development on the property itself".*

[43] By a letter dated 8th May 2001 (with a Statement of Account enclosed) from Young's Law Firm to Daniel Weflen, Noel Potgieter, the Defendant Company and Mayacan Holdings Limited, Youngs Law Firm detailed the steps they had taken "to avoid sale of the properties subject of the Mortgage to Bank of Nova Scotia" and to commence an action commenced by the Defendant against the Wrights and Kerr and Kerr Company Limited and enclosed the documents which had been filed in relation to all of, and their costs for, doing same.

[44] By a letter dated 25th June 2001, written to Michael Young, by Daniel Weflen on behalf of the Defendant, he states as follows:

"When the bank receives these funds from the people in Canada is there or what assurance do these people receive that they have for these lots that were to be auctioned. Does the bank actually hold the titles to these lots and do they or your firm transfer these lots to the individuals, or is Mayacan wholly responsible to do that? Please explain what procedure follows after the Bank is paid out? Does or is there any possibility that Ken Wright walks away with his mortgage paid out by these people in Canada? What protection if necessary, is required to protect these people or is there any reason for these people to have concerns?"

[45] Mr. M. C. Young replied to the letter of 25th June 2001 by letter dated 17th July 2001, in which he stated:

"Once the Bank receives the funds for the lots there is no guarantee that the specific lots will be transferred to the particular individuals who desire the same and contributed money to settle the debt to the Bank. Presently there is a Court Injunction preventing the sale by Mr. Kenneth Wright for the properties which are mortgaged. Therefore, notwithstanding the discharge of the debt to the bank, Mr. Wright will still not be able to sell the lots or any of them. The rights in relation to the lots will depend on the determination by the Court of the case against Mr. Wright. The Company itself has obligations to those person who have contributed to saving the lots but the Company cannot freely exercise its powers in relation the said lots until, as said, the case is determined. I would be grateful if you indicate your intention because the Bank has restrained itself from further action because of my assurances and the good relationship I have with them."

[46] According to a hand written note, verified by the signatures of the various persons/directors dated 16th September 2001, a meeting of the directors of the Defendant was held on the 16th September 2001 by telephone at which the following decision was made:

"to place a first charge, mortgage or such instrument against the six lots of land present held by the Nova Scotia Bank in Belize so that the six individual parties

who did pay the Bank of Nova Scotia in Belize the funds to release these six notes being beach front and did so and removed the financial obligations so secured by by Ken Wright using Mayacan Dev. Co name. Mayacan shall ensure that the beneficiaries for any charges and instruments shall be David & Ria Crowther, Dan Newbuger, Dan Weflen and Barbara Weflin Peter Dekens & Ann Potgeiter Roy & Cathrine Siddick"

[47] By a letter from Youngs Law Firm dated 24th September 2001 (with enclosed cheques for a total of BZ$16,033.59) the Defendant finally settled the indebtedness to the Bank of Nova Scotia.

[48] The Action in Claim No. 254 of 2000 was eventually settled by consent Order dated 12th November 2004 to which a Settlement Deed was attached and which formed part of the Order (and the terms of which was thereby consented to by the parties to the action by their Attorneys therein on the same day) ("the Consent Order").

[49] Under this Consent Order it was thereby ordered that, apart from lot B (which was not included), all of the Resolution lots, as well as lot 9 (which comprised the claimed lots without lot 39) be transferred to the Defendant (or nominees) ("the Defendant's Consent Order lots").

[50] In response to a letter from Michael Young dated 19th April 2005 (enquiring in whose name(s) the Defendant wished Lots 9, 39, 56, 57, 58 and 61 to be vested and the consideration of each lot), by a letter from Daniel Weflen to Michael Young (signed by the directors Daniel Weflen, Peter Dekens and Roy Sidick) it was confirmed in writing that three of the five Directors had agreed that the consideration for the lots, in accordance with their calculations, was $100,960.00 divided by six = $16,713.00 per lot in Belize dollars and that the names of the six parties as follows:

Lot 9 Noel and Ann Potgieter
Lot 39 Roy Sidick and Kathrine Sidick
Lot 56 David and Isabella Maria Crowther
Lot 57 Danny M. and Katherine E Neubauer
Lot 58 Daniel M. Barbera J. Weflen
Lot 61 Peter and Tryntje Dekens

And that there was a Directors Resolution regarding these properties on September 16, 2001.

[51] It is to be observed that this allocation was clearly at odds with the terms of the resolution lots (which had allocated lot B and not lot 9 to Potgieter) but was consistent with the Claimed lots save that the Defendant's Consent Order lots was in accordance with the claimed lots, apart from the latter, which had made an allocation to the Siddicks of Lot 39.

[52] The Order of the 12th September 2005 was followed by a further Order of the Chief Justice dated 7th December 2009, made on the application of the Defendant, in which the Chief Justice ordered the Wrights to comply with the Consent Order failing which the Registrar of the Supreme Court was ordered to execute all the relevant documents referred to in the Deed of Settlement.

[53] The order dated 7th December 2009 has still not been complied with by the parties.

[54] The Defendant's Consent Order lots have not been vested in the Defendant because of the Defendant's failure to enforce compliance of these orders for one reason (which may be lack of readily available cash to discharge its liabilities which included those for legal fees to their Attorneys Youngs Law Firm), or some another reason (which may well have included lack of diligence - as alleged by the Claimants - in enforcing the Court's orders). Lot B (included in the mortgaged lots, the resolution lots and the Wright lots) is not required to be transferred under the Consent Order and is due to be retained by the Wrights.

[55] In a letter dated the 21st of April 2010, the then Chairman of the Defendant Company, wrote to the shareholders of the Defendant company advising them, inter alia, of the status of the company and advising them as follows:

"I can now report to you that on December the 7th 2009 the Court in Belize signed off on the Court Order that Ken Wright refused to sign. Mr. Wright is to receive 12 back lots which was agreed and voted on by members of Apex trust. In exchange, Mayacan received six of Ken Wright's Shares of Mayacan Holdings Ltd and two shares of Mayacan Development LTD. And a release of mortgage put on Mayacan property (in the name of Mayacan) for which he was claiming $450,000.00 US in back wages. This was

the reason for Mayacan going to Court. There are now no other encumbrances or ongoing litigation proceedings against Mayacan"

....

"There is one more hurdle to cross. In the year 2000 a foreclosure notice appeared in a Belize newspaper from the Bank of Nova Scotia for 6 lots on Mayacan lands to be auctioned off in a public sale. These 6 lots were owned by Ken Wright."

"Noel Potgieter, who was then Chairman of the Board, tried to stop the sale. (Please note Noel's letter to the shareholder dated 19th September 2000) the bank gave Noel two days to pay off the bank otherwise they would go to public auction. At that time Mayacan had no money to purchase these 6 lots. Just as we have no money today to pay our debts."

"Noel asked Dan Weflen to find people to purchase the lots. I was one of the shareholders who purchased a lot. The money had to be in Belize in two days and once the money was paid, the designated buyers did not get their lots signed over to them, but only paid off the loan and interest of Ken Wright mortgage. The lots stayed in his name and he was given back titles which were being held as security. Because the mortgage Ken Wright took out was in Mayacan's name, these lots became involved as part of the Court case."

".....It was decided by the lawyers and Mr. Brandt that the 6 lots should be held in trust until the accounting from the lawyers explained how the funds sent down by the designated buyers were distributed to the Bank of Nova Scotia as some of the funds were held back by the lawyers. Once we have this information, your board of Directors is recommending to the shareholders that the lots be signed over to the designated buyers forthwith and that we move forward with marketing the Mayacan lands, thus avoiding any further litigation to our company."

[56] On the 6th June 2010 the Defendant held an AGM at North Vancover BC, at which a quorum was found to exist, and were present its shareholders (including Kenneth Wright and Brent Mayall being present) and directors Roy Sidick (Chairperson) Brent

Mayall, Greg Brandt (Secretary), Al Campbell and Cy Hoffman. The Secretary reported to the meeting:

> *"..that the Court case with Mr. Wright is completed …that the land transfer of the 6 lots had not yet completed as of the AGM because of waiting for a reproduction of the original CTC in order to register the lots. As well there is still the issue of the Lawyers accounts on the transfer costs associated with the payout of the bank of Nova Scotia mortgage….that the current Board supports the Court Order dated 7th of Dec. 2009 and will transfer the lots when the accounts are straight and complete. - Asked the shareholders if there were any objections to the Directors completing the transfer of the 6 lots into the ownership of the "nominees" appointed by the Board on Sept. 16th, 2001. No objections were raised. - Mr. Wright did not object to the transfer of the lots."*

[57] By a memorandum of the Chairman of the Defendant (Roy Sidick) dated 25th May 2011, the date of the next AGM was announced (Sunday June 26. 2011 at 1:15 PM at the North Vancouver Recreation Centre) and it was noted that:

> *"lot transfer has not yet to be completed due to the fact that we have not received the Statement of Accounts from Young's Law Firm. We have repeatedly asked them for this statement and have even requested assistance from our corporate lawyers in Belize, all to no avail. Young's Law Firm keeps promising to send them but they have not complied with our request to date. The result is that the transfer of lots has not yet been completed. We hope for a resolution to this hardly in the near future. Unfortunately, we have received a letter dated March 17, 2011 from a lawyer in Belize representing five of the six individuals who have purchased these lots, threatening legal action within 30 days unless we comply with the Court Order. The intention of the Board has always been to comply with the Court Order subject to our due diligence regarding the Statement of Accounts. To date there has been no notice of any Court action, only the threat of action."*

[58] By a memorandum of the Chairman of the Defendant (Roy Sidick) dated August 22, 2011, it was announced that the Defendant's property had been listed for sale.

[59] The Defendant Company then entered into negotiations to sell the project, including the mortgaged lots (apart from lot B) that were to be transferred to the Claimants, for the sum of US$10,000,000.00.

[60] By a memorandum of the Defendant dated November 1, 2012, the shareholders of the Defendant were advised that the Board of Directors had called a Special Meeting to be held on November 10, 2012 at Karen Magnussen Community Recreation Centre North Vancouver, BC at 1:00 PM) for the purpose of reviewing and voting upon whether or not to accept an Offer to Purchase "our property" for $10 million US cash, which offer they received on October 29, 2012. It was also stated that the sale would include all or most of the individually titled beach front and back lots owned by individuals. The terms of a resolution was also recommended.

[61] On the 4th January 2013, the Chairman of the Board of Directors of the Defendant Company circulated an e mail to the shareholders of the Defendant Company, indicating among other things, that the Purchase Agreement is expected to be executed within 90 days of the vetting of the agreement by their attorney.

[62] On or about the 8th of February 2013, Young's Law firm provided to the Defendant company, by way of a memorandum, an explanation of its actions in relation to the Claim no 254/2000 and that the Defendant company has no reason or no good reason to continue withholding title from the Claimants, title to any right, title or interest which it may have in the mortgaged lots.

[63] Finally on the 4th of April 2011, by way of an email addressed to the shareholders of the Defendant Company, Greg Brandt advised as follows:

> *" It is unfortunate that there are interests that want to bring litigation towards Mayacan over the transfer of six water front lots to the six private investors. For this reason I must be general in my comments as these emails must be deemed to be public and there are interests with this email chain that are claimants. But I will say this much, we would like this issue settled and you all will remember that at the last AGM just before the meeting ended I asked the shareholders present if there were any*

objections to the transfer. To my surprise there was no objection. I have also polled the Board and the majority agreed to the transfer at the time I asked."

Some Other Issues

[64] There is, however a number of outstanding questions, which may in addition be readily disposed of by reference to the evidence before the court .

[65] Such questions by reference to the evidence before the Court include the following:

- Whether on or about 6th April 2000 the Defendant company had the necessary funds to satisfy the loan at the bank.
- Whether the Defendant company invited investors (including the Claimants) to contribute to the sum required for the payment of the Mortgage.
- What was the rate of interest which investors could obtain in Belize at about April 2000.
- Whether it was the Claimants or the Defendant that paid out Bank of Nova Scotia for the discharge of the charges.

[66] The latter questions can, I believe, be quickly disposed of, as I am satisfied, and so find, that on or about 6th (including the10th) April 2000 the Defendant company did not have the necessary funds to satisfy the loan at the bank; apart from the advances which the Claimants undoubtedly made to the Bank to satisfy the indebtedness to the bank.

[67] I find (as I have not seen any credible evidence to suggest otherwise) that the Defendant Company did not have the necessary funds to satisfy the loan to the bank and that a number of the directors genuinely felt that something had to be quickly done (within a matter of days) to prevent the bank from selling the lots of land, which lots, as later proved to be the case, were at all material times liable to be transferred to the Defendant by reason of things wrongly done by the Wrights in transferring these lots of lands to themselves.

[68] I also find , and I have no hesitation in accepting, what I consider to be the very credible evidence of the 4th Defendant (Daniel Weflen), the 2nd Claimant (David Crowther), both substantiated by ample documentary evidence, and the evidence of Mr. Michael Young, that the Defendant solicited funds from the Claimants (and Roy Sidick) and the

Claimants made payments (in the order of $14,000.00 which were made from time to time by the each of the Claimants and Roy Sidick) to settle the mortgage debt due to the Bank of Nova Scotia.

[69] I also accept that this debt to the Bank of Nova Scotia was ultimately fully discharged in full from payments by the Claimants and Roy Sidick, for which a Statement was provided by Young's Law Firm on behalf of the Defendant and receipts were provided to the six individuals (including the Claimants).

[70] Indeed Brent Mayall, in giving evidence for the Defendant as its treasurer, accepted in his testimony that the debt was paid off by Daniel Weflen and his group – albeit as he claims in error for a debt secured by lots privately owned by Kenneth Wright and Sylvia Wright.

[71] There appears to be merely technical objections mounted by the Defendant as to lack of proof of payment (such as discrepancies as to the amounts which were paid, and that there are no bank records showing funds ever having passed through the Defendants bank accounts, and the receipts do not show the Claimants' names). But it is nowhere suggested that the debts were paid off by the Defendant.

[72] I am also satisfied, for the same reasons, that the Claimants (and Roy Sidick), rather than the Defendant, did provide the funds to discharge the debt due to the Bank of Nova Scotia (and which had been created by its then director Kenneth Wright) which discharge was a benefit to the Defendant as it was liable for these sums under the mortgage with the Bank of Nova Scotia.

[73] I am not satisfied, however, that objectively it would have been as disastrous to the affairs of the Defendant (as appeared to be the perception at the time) for the mortgaged lots to be sold by public auction; and I consider that it may indeed have been preferable, and a more transparent option for the Director Claimants (including Roy Sidick) to have bought the lots at the public auction rather than proceed by the more debatable and (as it turned out) problematic route, of the directors attempting or purporting to purchase these lots from the company - with the risk that it could be overturned for self or insider dealing by directors.

[74] I am willing, to accept the unchallenged evidence of the 2nd Defendant (David Crowther) at the close of his cross-examination, that at the time that he and his wife purchased the

lot they did not consider it was in investment; that they wanted to build a house and were able to get 13% in Belize on investments.

[75] In addition I have determined that the Order of the Chief Justice dated 12th September 2005 and of his further Order dated 7th December 2009, as a matter of law, conclusively decided the question raised by the Defendant as to whether the Claimants were laboring under the mistaken belief that the lots claimed were company property, which mistake, they have claimed, effectively defeats the Claimants claim for specific performance of any agreement for the transfer of the lots in question.

[76] I find that in fact, a part of the settlement deed, which formed a part of the Order of the Court dated the 12th of November 2004, and specifically by paragraph 4.0, Kenneth Wright was Ordered to "execute all instruments requisite to release MDCL from the Mortgage dated the 26th day of May 1997 in favor of Kenneth Wright and Sylvia Wright and the Mortgage Debt and interest claimed therein and the said Mortgage shall be cancelled."

[77] Furthermore, I find the Order of the Court dated the 12th of November 2004, is also determinative of the question of the Defendant's entitlement to the lots, where at paragraphs 8.2 and 8.3 of the said settlement deed, it was provided as follows:

> " 8.2 KW shall transfer the above designated lots to MDC free and clear of all encumbrances.
>
> 8.3 KW will bear the stamp duty and recording costs of the cancellation of the Mortgage of 26th May 1997 in favor of KW and Sylvia Wright and the cancellation of the Mortgages in favor of the Bank of Nova Scotia."

[78] I therefore have no hesitation in finding, on the balance of probabilities, that the Defendants have a beneficial interest under the Court Orders of the then Chief Justice, to the Defendant's Consent Order lots (which does not include lot B of the resolution lots but which includes lot 39 which is not included in the claimed lots).

[79] I therefore find that the Defendant has a beneficial interest in all of the mortgaged lots, apart from Lot B.

[80] This latter finding negates what has been raised by the Defendant, and disputed by the Claimants, that the Wrights had the authority to transfer and mortgage the mortgaged lots.

[81] Thus this finding is determinative of the question raised by the Defendant that the Defendant did not have title to the mortgaged lots and that the Claimants were laboring under some kind of mistake as to the nature of the transaction which the Claimants thought they were entering into when they provided funds to discharge the mortgage or the liability due to the Bank of Nova Scotia (and therefore that the Defendant did not have the right or power to transfer the mortgaged lots to the Claimants as such lots belonged to the Wrights).

[82] This Court considers that it is bound on these latter questions by the later Order of this Court made by the then Chief Justice in Action No. 254 of 2000 commenced on 16th/23rd June 2000.

[83] I therefore have no hesitation in finding, on the balance of probabilities, that the Defendants have a beneficial interest under the Court Orders of the then Chief Justice, to the Defendant's Consent Order lots and under the later order of the Chief Justice for compliance with the earlier order.

[84] I have as a result found, as a fact, that the title to the Defendant's Consent Order lots has not been vested in the Defendant because of the Defendant's failure to enforce compliance of these orders for one reason (which may be lack of readily available cash to discharge its liabilities which included those for legal fees to their Attorneys Young's Law Firm) or some another reason, which may well have included lack of diligence as alleged by the Claimants) in enforcing the court orders.

The Central Questions of this case

[85] I consider, and I believe it is accepted by the parties, that the central factual question for determination of the Court in the present case is whether the Defendant had expressly agreed (particularly in writing by resolution allegedly made on 3rd March 2001) that in exchange for the payment of the debt due to the bank and the discharge of the mortgages, that they would be given title to the said lots held as security.

[86] Also connected to this question is whether the resolution in writing dated 3rd March 2001 was illegal and a self-serving attempt by its directors to take company property for themselves. This is a mixed question of fact and law.

[87] In addition, the question arises whether the Claimants entered of their own free will and accord, into negotiations with Nova Scotia Belize to pay off the loan balances without any exchange agreement with the Defendant Company, to exchange titles for payment made to the Bank, because Noel Potgieter and Daniel Weflen were members of the Defendant's Board of Directors and intended to transfer these parcels to themselves after paying off the mortgages.

[88] Further, whether the Defendant company made any express representations to Nova Scotia Belize or to the Claimants to contribute to paying off the mortgage and whether the Claimants sometime between May and July 2000, relying on any express representation by the Defendant company, each contributed over $9,000.00 United States dollars to the Defendant.

[89] This is where the dispute in effect really comes alive in relation to the case which was fiercely fought on both the facts and the law and which raises these latter vexed issues for determination by the Court, as well as the questions whether the Claimants have suffered loss and damages and are entitled to have their costs of these proceedings.

[90] Essentially, therefore, the Claimants contend that they are entitled to the claimed lots under a written agreement with the Defendant company, under which the Claimants agreed to pay off the debt to the bank in return for these lots; while the Defendant contends that the Claimants did not make an enforceable agreement with the Defendant company and that they are not entitled to the claimed lots for the above reasons of both fact and law.

[91] I will follow the Claimants two- issue approach for the determination of this case, which are as follows:

(a) Is the resolution for the Defendant Company, allegedly made on the 3rd March 2001, a sufficient memorandum in writing to satisfy the requirement of the S. 55(1) pf the Law of Property Act, Cap. 190 of the Laws of Belize Revised Edition 2000?; and

(b) Whether the Resolution allegedly made on the 3rd March 2001 constitutes a breach of directors (fiduciary) duties?

[92] I will now set out the applicable law on the these two issues before discussing and arriving at a conclusion on the outstanding factual issues connected with them and applying the law to the facts .

The Law

[93] Section 55(1) of the Law of Property Act, Cap. 190 provides as follows:

> *"No action may be brought upon any contract for the sale or other disposition or land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charge or by some other person thereunto by him lawfully authorised.*

[94] I agree with Counsel for the Claimants that the written note or memorandum does not require a special format or special wording but merely requires that the agreement, memorandum or note, must be in "writing and signed by the person creating or conveying it"

[95] I also agree with the conclusion of law of the honourable Justice Oswell Legall, in the Belize case of Claim No. 151 of 2011 Kenneth Haduiak & Jeanne Hadubiak V Renita Dellacca, Cynthia Reinert & Southwind Properties Limited:

> *"It is well established that the required contents of a note or memorandum under section 5(1) of the Act, in relation to a contract of sale of property [read land] are the identities of the parties, the consideration or price of the property[4] material terms of the contract; and a description of the property[5] See Re: Lindrea 1913, 109 LT 623 Stabroek trading estate Ltd v. Eggleton 1983 1 AC 444, Hawking v. Price 1947 Ch. 281 and Plant v. Bourne 1897, 2 Ch. 281.*

[96] The law in relation to the fiduciary duties of the directors has a long and very well established history (going as far back as 1854[6]) and is now fairly settled as to its application.

[4] Which should be read to refer to "land" as required by Section 55(1) of the Law of Property Act, Cap. 190
[5] Ibid.
[6] See Aberdeen Railway Co. v. Blaikie Bros. (1854) 1 Macq. H.L. 461 at 471-472.

[97] The fiduciary duties of directors is based on the strict equitable principle in trust law which, in some ways in analogous to trustees, and who like a trustee is forbidden from making a profit out of his trust unless the trust instrument, in this case the articles of association, so provides, and such a director must not allow his personal interest and duty to the shareholders to conflict . See the House of Lords decision of Guinness plc v Saunders [1990] 2 AC 663 per Lord Templeman, who delivered the leading decision of this august body, and in which he quotes with approval the views of Lord Herschell who asserted that this principle:

> *" is based on the consideration that, human nature, being what it is, there is danger, in such circumstances, of the person holding a fiduciary duty being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect It has, therefore been deemed expedient to law down this positive rule. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrongdoing"*

[98] As noted, one exception to this rule is where the Articles of Association of a company may relax this rule of equity, another is where a majority of directors (presumably who are not themselves interested in the profit) or the shareholders or voting majority of the shareholders had sanctioned or ratified the profit as happened in the case of In re Duomatic Ltd. [1969] 2 Ch. 365., also refered to in the decision of Lord Templeman in Guinness plc v Saunders. There may be other exceptional highly cases.

[99] A further exception to this rule was claimed in another House of Lords decision: Regal (Hastings) Ltd. V. Gulliver And Others, All England Law Reports 1942 Volume 1 377, in which Vicount Sankey, expressed the following opinion:

> *"It was then argued that it would have been a breach of trust for the respondents as directors of Regal, to have invested more than £2,000 of Rogues money in Amalgamated, and that the transaction would never have been carried through if they had not themselves put up the other £3,000. Be it so, but it is impossible to maintain that, because it would have been a breach of trust to advance more than £2,000 from Regal and that the only way to finance the matter was for the directors to advance the balance themselves, a situation arose which brought the*

respondents outside the general rule and permitted them to retain the profits which accrued to them from the action they took. At all material times they were directors and in a fiduciary position, and they used and acted upon their exclusive knowledge acquired as such directors. They framed resolutions by which they made a profit for themselves. They sought no authority from the company to do so, and, by reason of their position and actions, they made large profits for which, in my view, they are liable to account to the company."

[100] Lord Russell of Killowen, who appeared to have expressed an opinion which was supported by a majority of their Lordships in Regal (Hastings) Ltd. V. Gulliver And Others, stated:

"directors standing in a fiduciary relationship to Regal in regard to the exercise of their powers as directors, and having obtained these shares by reason and only by reason of the fact that they were directors of Regal and in the course of the execution of that office, are accountable for the profits which they have made out of them."

[101] I therefore accept, as stated by the Claimant, that the starting point for dealing with this issue would be to examine the Articles of Association to determine whether the company imposed any restriction/requirement in relation to the duties of directors of the company, and that the Articles of Association does not place any such restriction, leaving the question to be resolved by reference to the common law or the developed principles of equity which the Courts have evolved to regulate such matters.

[102] I also accept, as submitted by the Claimants, that the duties imposed by the laws of equity, on directors of a company, includes the fiduciary duty to act in good faith in the best interest of the company and also to avoid a conflict of interest. That a director of a company must act bona fide in the interests of and for the benefit of the company.

Findings of fact in relation to the central questions of this Case

[103] I am satisfied, on the evidence, and I so find, that:

(a) at the time that the Claimant shareholders/directors of the Defendant company individually contributed to the necessary funds required to discharge the mortgages held by Nova Scotia Belize, on property of the Defendant Company,

that there was no agreement or understanding with the company that they were purchasing specific lots in the Defendant, much less the claimed lots.

(b) In the first place there was no direct evidence about purchasing specific lots from any of the witnesses and what evidence there was (from Daniel Weflen) suggested that a lot would be given as security. The evidence of David Crowther was equivocal on this point and he was under the impression that he would be purchasing a lot from Nova Scotia Belize (which turned out to be erroneous as a decision was taken to stop the auction sale).

(c) on the evidence it is clear to me that the raising of the monies was done quickly and without there being a clear understanding as to the basis on which the monies were being advanced and as to what would be given in return. Also there was much inconsistency in relation to what comprised the resolution lots, (lots B and 29 being included and allocated to Noel Potgieter and Roy Siddick respectively), the claimed lots (lot 9 being allocated to Noel Potgieter) and the Defendant's Consent Order lots (lots 9 and 39 being included).

(d) it may, however, have been the reasonable understanding of the 2nd Defendant, who was not a shareholder/director of the Defendant, by reason of things which may have been said to him by one or more of the Defendant's Directors, that he was purchasing a lot in the Defendant, either from Nova Scotia Belize or otherwise. I consider that the Defendant David Crowther is in entirely a different position to the other Claimants and Roy Siddick as he was not a director of the Defendant, and therefore an outsider to the company to whom the principles of equity (particularly fiduciary duty) do not apply.

(e) on the evidence, that the decision to transfer lots to the Claimants and Roy Siddick took place much later and was probably made some time after the monies were paid by the Claimants and Roy Siddick (but before the first Court Order in Action Number 254 of 2000).

(f) this decision to transfer was probably initiated by the 1st Claimant, possibly on the advice of Mr. Michael Young, and that was how it came to be decided by some of the directors, to make a directors resolution to assign and transfer the lots in question to the Claimants and Mr. Siddick, by the device of a resolution of

directors, by which the purported agreement with the Defendant came about with these persons to assign and transfer the resolution lots to them (based on incomplete information as to the legal or beneficial interest which the Defendant may have in the various lots of land as lot B was allocated to Noel Potgieter and lot 39 was allocated to Roy Siddick). This conclusion certainly explains why, as pointed out by the witness for the Defendant (Brent Mayall) there are no records of any kind (Notice of Meeting, Agenda or Directors Minutes) whether registered or otherwise, indicating that a Directors' Meeting was held on March 3, 2001.

(g) the decision to make a directors resolution was possibly done in good faith to protect the Claimant's (and Roy Siddick's) interest (including the 2nd Defendant) and to ensure all things went through as intended to safeguard the Defendant company from what they considered was the loss of control of property of the Claimant, possibly on the advice of Michael Young. Consequently it was decided to assign and transfer the resolution lots to the named individuals who had advanced monies to Nova Scotia Belize to discharge the liabilities against the Defendant.

[104] As such, I find that the resolution was entered into and that the Defendant Directors' Resolution, which the Defendant rightly observed is undated, was indeed a resolution of the Defendant Company, signed by four (4) of its five (5) directors, with each of such directors having a personal interest in the subject matter of the resolution, as they stood to benefit from the lots which were sought to be transferred and assigned to the 6 named individuals (including to themselves and some of their spouses).

[105] On the question of benefit to the Claimant directors, I am unable to precisely quantify the financial benefit to the Claimant directors as there was no specific evidence to deal with this issue. However, it could be readily be inferred from the evidence, and what was being offered by the potential buyer of the project, and also the offer which was made to the Claimants and rejected by them, that there was a significant financial increase in the price of the claimed lots over what was paid for them by the Claimants.

[106] I also find that consideration for the purported transfers and assignments was for the repayment of a loan (likely unauthorized by the Defendant Board of Directors) for the Defendant and signed for by Kenneth Wright, as stated by the written resolution.

[107] It will be seen from my findings above that I am also satisfied that this resolution, together with other written memoranda and notes signed by the directors and thereby representatives of the Defendant, as the party to be charged or duly authorised by the Defendant, evidences or incorporates an agreement for the transfer or assignment of the resolution lots to named individuals.

[108] As noted above there is a discrepancy in relation to the lot to be transferred and assigned to Noel Potieter being variously Lot B and Lot 9. There is also some considerable doubt as to whether the Defendant is the beneficial owner of Lot B and therefore whether the Defendant has or is ever likely to have the power to transfer Lot B (hence the later substitution of Lot 9).

[109] I accept however that things were afterwards said and done by directors and shareholders of the Defendant in pursuance of the understanding to transfer and assign lots to the Claimants and Roy Siddick (including the insertion of assignees into the Consent Order).

[110] I find that this understanding may have been beneficial to the Claimants but it was primarily done to protect the interests of the Claimants and not to primarily benefit or protect the Defendant although it may have been perceived as having this result - as ultimately it may have resulted in the Defendant company being able to market its property (including the mortgage lots, the resolution lots and the claimed lots) to thereby obtain an enhanced price for its whole property which was the ultimate objective, and result of Action 254 of 2000.

[111] The question then arises whether a majority of directors, who were not themselves interested in the acquisition of the claimed lots, sanctioned or ratified the decision to assign and transfer these lots to the named individuals. The answer to this is clear, that all of the directors voting on the directors resolution had a personal interest in the subject matter of the resolution and that the only person that did not have such an interest was the 2nd Defendant David Crowther who was an outsider to the Defendant Company.

[112] The question further arises whether the shareholders or voting majority of the shareholders had sanctioned or ratified the assignment or transfer of the claimed lots to the named directors and to David Crowther.

[113] On this latter issue the evidence is far from clear or satisfactory. There is evidence that there was an AGM of the Defendant company on the 4th March 2001, just over one

month after the alleged directors' resolution, assigning and transferring the resolution lots to the named individuals, but there is no evidence that any such resolution of directors was put to the shareholders at this AGM for ratification.

[114] Also there is no evidence before me of any Notice of the Defendant's AGM slated for the 6th June 2010, and there is therefore no evidence that there was an agenda item to ratify the director's resolution of the 3rd March 2001. It therefore appears that the request of the shareholders for any "objections to the Directors completing the transfer of the 6 lots into the ownership of the nominees appointed by the Board on Sept, 16, 2001" was sprung on the shareholders and was not the product of a proper deliberative process of the AGM. In this circumstance I do not consider that this would constitute due ratification of any decision of a Board of Directors but rather that this was done by stealth and cannot be said to override the strict rule of equity prohibiting self-dealing by directors of a company. In any event I am not satisfied that the decision (as minuted)[7] constitutes due ratification by the shareholder of the director's resolution of the 3rd March 2001 as in all the circumstances of the case this appears to be a negative resolution not a positive one of ratification.

[115] I was somewhat troubled by the decision to transfer the mortgaged lots to the Claimants (apart from to the 2nd Defendant for whom I have considerable sympathy) and Roy Siddick. But on careful analysis, and on balance, I am not satisfied that this decision to transfer rises to the level of the Claimants taking advantage of the Defendant by abusing their fiduciary duties to the Defendant.

[116] I am confirmed in this latter view because of the contrasting position of the 2nd Defendant who was neither a shareholder nor a director (clearly an outsider of the Defendant company and is not affected by the allegations of insider dealing with the Defendant) who is, in my view entitled to his allocated lot as the resolution of directors is sufficient evidence of an agreement by the Defendant with him (as an outsider) to obtain this lot. Further that it would be unjust, in all the circumstances of the case for him to be denied the fruits, profits or benefit of his investment.

[7] That "No objections were raised. – Mr Wright did not object to the transfer of the lots"

Conclusions

[117] I therefore conclude that the 2nd Defendant entitled to lot 56 of the claimed lots by and under an agreement made between him and the Defendant which is evidenced by the directors resolution made as of 3rd March 2001 that in exchange for paying the Bank of Nova Scotia a sum of approximately $16,713.00, which was later made certain by the parties and confirmed in written correspondent by the Defendant under the hands of its directors of the Defendant and which was advanced by the 2nd Defendant as agreed towards the mortgage foreclosure sums, legal fees, initial fees associated with associated with 6 beachfront lots, and the auctioneer's fees, and that the 2nd Claimant is thereby entitled to a transfer of said lot 56 of the claimed lots.

[118] I therefore dismiss the 1st, 3rd, 4th and 5th Claimants' claim to be entitled to lots 9, 57, 58 and 61 respectively of the claimed lots as claimed by and under a purported agreement made between the 1st, 3rd, 4th and 5th Claimants as I consider such an a agreement is invalid and unenforceable in law and equity as it would have been made in circumstances of conflict of interest and thereby in breach of their fiduciary duty to the Defendant, and in any event was not properly ratified by the shareholders of the Defendant.

[119] I do find, however, that the 1st, 3rd, 4th and 5th Claimants are each entitled to be repaid the sum of $16,713.00, which I find that each of them advanced towards the mortgage foreclosure sums, legal fees, initial fees associated with associated with 5 beachfront lots, and the auctioneer's fees, and interest on such sum at the rate of 13% per annum from April 2000 until final payment.

[120] I will therefore decline to grant specific performance of the agreement purportedly made between the 1st, 3rd, 4th and 5th Claimants and the Defendant as claimed and for the transfer to the 1st, 3rd, 4th and 5th Claimant lots 9, 57, 58 and 61 respectively of the claimed lots.

[121] In the above circumstances the 2nd Defendant is entitled to his costs of the action to be agreed or failing agreement, his prescribed costs based on the assessed present day value of said lot 56.

[122] I also find that each of the 1st, 3rd, 4th and 5th Claimants and the Defendants shall bear their own costs as each of them have not wholly succeeded in their respective claims and defence.

Orders

[123] I therefore hereby declare that the 2nd Defendant is the beneficial owner of lot 56 of the claimed lots by and under an agreement made between the 2nd Claimants and the Defendant wherein the Defendant agreed by directors resolution made as of 3rd March 2001 that in exchange for paying the Bank of Nova Scotia a sum of approximately $16,713.00, which the 2nd Claimant did advance, towards the mortgage foreclosure sums, legal fees, initial fees associated with associated with 6 beachfront lots, and the auctioneer's fees, that the Defendant would transfer to the 2nd Claimant lot 56 of the claimed lots , as evidenced by Directors resolution of April 2001.

[124] I therefore grant specific performance of the said agreement made between the 2nd Claimants and the Defendant that the Defendant would transfer to the 2nd Claimant lot 56 of the claimed lots, as and when lot 56 is transferred to the Defendant, or alternatively at the option of the 2nd Defendant that the 2nd Defendant is entitled to select any other beach front lot which is at present or at any time in the name of the Defendant.

[125] I therefore dismiss the 1st, 3rd, 4th and 5th Claimants' claim to be the beneficial owners of lots 9, 57, 58 and 61 respectively of the claimed lots by and under a purported agreement made between the 1st, 3rd, 4th and 5th Claimants and the Defendant wherein the Defendant allegedly agreed by directors resolution made as of 3rd March 2001 that in exchange for paying the Bank of Nova Scotia a sum of approximately $16,713.00, which each of the 1st, 3rd, 4th and 5th Claimants advanced, towards the mortgage foreclosure sums, legal fees, initial fees associated with associated with 5 beachfront lots, and the auctioneer's fees, that the Defendant would transfer to the 1st, 3rd, 4th and 5th Claimants lots 9, 57, 58 and 61 of the claimed lots , as evidenced by Directors resolution of April 2001, as such agreement was unenforceable as any such agreement was unauthorized by the Defendant (and would in any event have been in breach of their fiduciary duty to the Defendant) and was not properly ratified by the shareholders of the Defendant.

[126] I find, however, and hereby order that the 1st, 3rd, 4th and 5th Claimants are each entitled to be repaid the sum of $16,713.00, which I find that each of the 1st, 3rd, 4th and 5th Claimants advanced, towards the mortgage foreclosure sums, legal fees, initial fees associated with associated with 5 beachfront lots, and the auctioneer's fees, and award interest thereon to each of the 1st, 3rd, 4th and 5th Claimants on such sum at the rate of 13% per annum from April 2000 until final payment.

[127] I therefore decline to grant specific performance of the agreement purportedly made between the 1st, 3rd, 4th and 5th Claimants and the Defendant wherein it was alleged that the Defendant agreed by directors' resolution made as of 3rd March 2001, that in exchange for each of the said Claimants paying the Bank of Nova Scotia a sum of approximately $16,713.00 towards the mortgage foreclosure sums, legal fees, initial fees associated with associated with 4 beachfront lots, and the auctioneer's fees, that the Defendant would transfer to the 1st, 3rd, 4th and 5th Claimant lots 9, 57, 58 and 61 respectively of the claimed lots , as evidenced by Directors resolution of April 2001.

[128] I order that the Defendant pays the 2nd Defendant his costs to be agreed or failing agreement, his prescribed costs based on the assessed present day value of said lot 56.

[129] I order that each of the 1st, 3rd, 4th and 5th Claimants and the Defendants bear their own costs as each of them have not wholly succeeded in their respective claims and defence.

[130] It follows from the above orders that the injunction on the claimed lots (save and except lot 56) is discharged.

[131] I am prepared to hear the parties in relation to the final terms of the order if they cannot agree on its terms.

[132] I am grateful to Counsel on both sides for their cooperation and general conduct of the case that has enabled this case to be fast tracked and completed with expedition.

The Hon Mr. Justice Courtney A. Abel (Ag)