ANGUILLA

IN THE HIGH COURT OF JUSTICE

CLAIM NO.AXAHCV 0088/2006

BETWEEN:

PATRICIA ANN HURST-WILLARD
JOHN WILLARD

Claimants

And

PARAGON HOLDING LTD.

1st Defendant

JOHN M. ERATO

2nd Defendant

MICHAEL SOONS

3rd Defendant

TURTLE'S NEST BEACH RESORT

4th Defendant

Appearances:

Mr. Gerhard Wallbank and Ms. Merlanih Lim for the Claimants
Mrs. Cora Richardson Hodge, Mrs. Tara Ruan and Ms. Sherma Blaize for the First, Second and Fourth Defendants

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2011: March 12
May 23, 24, 25
October 21
2012: June 21

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JUDGMENT

[1] **BLENMAN, J:** This is a claim by Mrs. Patricia Ann Hurst Willard and her husband Mr. John Willard (Mr. and Mrs. Willard) against Paragon Holding Ltd, Mr. John M. Erato, (Mr. Erato) Mr. Michael Soons (Mr. Soons) and Turtle's Nest Beach Resort (hereafter referred to as the defendants) in relation to a Condominium Unit which they have purchased. Mr. and Mrs. Willard complain that the defendants have, among other things, built another building (Building 2) too close to the building or strata lot in which their Condominium Unit 3BE is housed thereby depriving them of their privacy, their right to light and air. Also, they complain that the defendants have encroached on common property of which they are part owners. They have filed a claim against the Defendants for breach of contract; breach of the Condominium Act and breach of the terms of the Instrument/Original Declaration which created the Condominium Development and the strata lots. Mr. and Mrs. Willard seek a number of declarations together with injunctive reliefs against the Defendants jointly and severally. They also seek a demolition order.

[2] The claim was served on all of the Defendants. However, Mr. Soons has not taken any part in the proceedings.

[3] The claim is strenuously opposed by all of the Defendants who maintain that they have committed no breaches whatsoever. They maintain that Mr. and Mrs. Willard are not entitled to obtain any relief.

Issues

[4] The parties have agreed to a number of core issues and they have been crystalized as follows:-

(a) Was the Instrument/Original Declaration lawfully amended by the Declaration filed in the Lands and Survey Department on 7th November, 2006?

(b) If the Amended Declaration is not a proper and lawful amendment, should it be treated as a nullity?

(c) What changes, if any, did the Amended Declaration make to the Instrument/Original Declaration?

(d) Is Building 2 located in accordance with the terms of the Instrument/Original Declaration?

(e) Does the survey diagram (original Form 1) that was prepared by Mr. Cleveland Richards, Licensed Surveyor, memorialize the developmental plan of the project?

(f) What effect, if any, does Building 2's current location have on the enjoyment and value of Mr. and Mrs. Willard's unit.

(g) What remedies, if any, should be granted to Mr. and Mrs. Willard?

Background

[5] Mr. and Mrs. Willard wished to purchase property in an upscale seaside holiday resort in Anguilla. This is what they thought they were purchasing based on several oral and written representations that Mr. Erato made to them before they purchased the Condominium Unit that is the subject matter of the dispute. In fact, they say that Mr. Erato told them that he had extensive experience in developing a multi-million dollar condominium in St. Martin. Further, Mr. and Mrs. Willard say that they learnt from Mr. Erato that Paragon Holding Ltd, Turtle's Nest and Himself were in the process of developing a set of condominiums which were low density tourism based residential properties, they were attracted to the idea and were interested in becoming a unit owner. Other special features they were promised include privacy, seclusion, air, light, views and an ocean front deck and pool.

[6] Paragon Holding Ltd is the legal and equitable owner of the entire property (Parcel 59). Mr. and Mrs. Willard allege that Paragon Holding Ltd is the declarant who executed the Instrument/Original Declaration by which the property was created. They complain, however, that at different points in time Paragon Holding Ltd has used various names. Mr. Erato and Mr. Soons are said to be directors of Paragon Holding Ltd and directors of the company known as Turtle's Nest (Condominium) Co. Ltd. Mr. Erato is said to have held himself out as a director of Paragon Holding Ltd. Paragon Holding Ltd registered a Condominium Development with the Land Registry. The Condominium Development is known as Turtle's Nest (the Property). The Property which is the subject matter of the claim is identified as Registration Section West End, Block No. 17910B, Parcel 59, on Meads Bay Road, Anguilla (Parcel 59). The Property was created by virtue of an Instrument/Original Declaration which had a number of exhibits appended to it.

[7] Mr. and Mrs. Willard's purchased a Condominium Unit 3BE or (Unit 3BE). They hold their unit in common with other tenants who are owners of other units.

[8] Mr. and Mrs. Willard say that Paragon Holding Ltd, acting through Mr. Erato, who held himself out as being authorised to do so, made several representations to them both orally and written and caused them to enter into a contract for the purchase of Unit 3BE, subject to the terms of the Instrument/Original Declaration. In addition, the Defendants had caused other documents to be filed in the Land Registry which documents are consistent with the representations that Mr. Erato had made. Mr. and Mrs. Willard contend that Mr. Erato and Mr. Soons are the alter egos of Paragon Holding Ltd. In addition, Mrs. Willard says that she also consulted the Land Registry and obtained a copy of the Instrument/Original Declaration together with supporting documents that were registered in relation to the Condominium Development which, among other things, contained the original Form 1 Diagram which memorialized the Condominium Development. Mr. and Mrs. Willard say that based on the above representations and the original Form 1 Survey which was annexed to the Instrument/Original Declaration and registered in the Land Registry, they purchased their unit.

[9] Mr. and Mrs. Willard complain that the existing Building 1 in which their unit 3BE is located was designated as Phase I. However, the Building 2 in Phase II was intended, based on the original Form 1 Diagram, to be located in a different area and not in close proximity to their building and to their unit.

[10] Alternatively, Mr. and Mrs. Willard say that the property was created by the Instrument/Original Declaration, By-laws, drawings and plans and was registered with the Land Registry. They say that the property was made subject to the Act, the By-laws and the Instrument. Mr. and Mrs. Willard complain that when the Instrument was registered, the existing building, Building 1 was under construction and nearing completion, the only other building on Parcel 59 was a small sales and construction management office. In accordance with the Instrument/Original Declaration, Parcel 59 was subdivided into 14 strata lots, all housed in a single 4 storey building. The future development plan authorised by the Instrument/Original Declaration is limited to a second strata lot building consisting of 16 units.

[11] Mr. and Mrs. Willard contend that the Defendants have constructed a new structure, namely, Building 2, in clear breach of the Condominium Act, the Instrument/Original Declaration and the Agreement between the parties. It is Mr. and Mrs. Willards' view that the Instrument/Original Declaration limits the number of strata lots and the Condominium Units to no more than 30.

[12] They accept that Section 9 of the Instrument/Original Declaration enables the declarant to develop the Condominium in phases by amendment to the Declaration.

[13] The Instrument/Original Declaration also states as follows:

> "Future Phases: The Declarant reserves and shall have the right, without the consent of any Unit Owner, pursuant to and in accordance with the provisions of this Section 9 to amend this declaration so as to include the Additional Buildings and all roadways, utilities of future phases."

[14] In particular, Mr. and Mrs. Willard say that the development plan that was memorialized in Section 2 of the Instrument/Original Declaration is depicted in the original Form 1 Diagram by Mr. Cleveland Richards, Licensed Surveyor.

[15] Further, Mr. and Mrs. Willard complain that the Defendants have unlawfully sought to amend the Instrument/Original Declaration by filing an Amended Declaration in 2006.

[16] Of importance, they maintain that the Defendants have breached the Agreement and the Condominium Act by constructing Building 2 in the wrong place. More specifically, Mr. and Mrs. Willard say that the Defendants have erected Building 2 without their consent and contrary to the original Form 1 Diagram. The other infractions about which Mr. and Mrs. Willard complain are that the building, consisting of the 16 unit strata building is considerably to the north and west from the location shown on the Richards survey. They also say that the exterior walls of the 16 unit strata lot Building 2 lie a mere 15 feet from the existing building and their unit. The fourth floor of that building would tower over Unit 3BE and that the balcony of the strata lot closest to Unit 3BE is approximately 15 feet away from Unit 3BE's windows and balcony, in breach of their Agreement.

[17] All of the above, Mr. and Mrs. Willard say are in breach of the Instrument/Original Declaration, the Agreement and the Condominium Act. The Defendants have obstructed their use and enjoyment of their unit.

[18] Also, Mr. and Mrs. Willard are concerned that the defendants have published various proposals to develop a third phase or a third building on Parcel 59. This third building is to include two strata lot buildings lying in close proximity to each other at the north end of the parcel and in the same relative position as Building 2. Importantly, they say that in any event, the proposed construction of a third phase/building on Parcel 59 would be in breach of the Instrument/Original Declaration. Amongst other concerns that Mr. and Mrs. Willard have, are that the pool and deck depicted in the original Form 1 Diagram or the Richards survey are not included in the amended original Form 1 Diagram and in their place is the second strata lot building.

[19] Mr. and Mrs. Willard say that while by the Instrument/Original Declaration the development was to have 30 units constructed on Parcel 59, with the defendants' future plan, it is now likely that a minimum of 66 strata units will be built on Parcel 59. Importantly, Mr. and Mrs. Willard seek declarations that Building 2 is not located substantially in accordance with the Instrument/Original Declaration. In addition, Mr. and Mrs. Willard seek an order to have Building 2 demolished and the site rehabilitated. Mr. and Mrs. Willard also seek a permanent injunction preventing Paragon Holding Ltd, Mr. Erato, Mr. Soons and the Turtle's Nest Beach Resort jointly and severally from undertaking any construction on/or development or subdivision of Parcel 59.

[20] For ease of reference, Mr. Erato and Paragon Holding Ltd are also referred to interchangeably individually and jointly as the Defendants.

[21] The Defendants vigorously oppose the claim. They state that Mr. and Mrs. Willard made their initial payment on Unit 3BE before the Instrument/Original Declaration, By-laws, drawings and plans were drawn. The Instrument/Original Declaration had not been submitted to the Land Registry for registration. They say rather, Mr. and Mrs. Willard agreed to purchase Unit 3BE based on the drawings which they had seen in the office of Paragon Holding Ltd and which are referred to

as JE1. Also, the Defendants say that Building 1 and Building 2 were represented on the original Form 1 Diagram in their approximate location and this is consistent with their present location. In any event, the Defendants argue that there is nothing to prevent them from amending the original Declaration in order to build additional structure, Building 2, in the manner in which they did.

[22] The Defendants explain that the Phase 11, strata lot Building 2 is depicted on the original Form 1 Diagram or the Richards' survey by broken lines which signify that the Phase 11 strata lot Building 2 was to be located approximately in that location. They say that by constructing Building 2 on the site which they did, they have not in any way breached the agreement with Mr. and Mrs. Willard, or the Condominium Act, neither have they violated the Instrument/Original Declaration. In support of this contention, the Defendants rely on Section 9B(1) of the Original Declaration which provides that:

> "Paragon reserves the right, without consent of any unit owner, to develop and construct additional buildings and all road ways, utilities and other Common Property in the Future Phases and any such subsequent part of the Condominium."

[23] In any event, the defendants deny that the Instrument/Original Declaration limits the number of Units in the Condominium Development to 30. More significantly, the Defendants deny that they have breached the Instrument/Original Declaration or the Condominium Act, as alleged or at all. The Defendants say that Mr. and Mrs. Willard had actual and/or constructive knowledge of the details of the Instrument/Original Declaration which enabled Paragon Holding Ltd as the Declarant, to amend the Instrument/Original Declaration and to add future phases and additional buildings to the development.

[24] Further, the Defendants say that in 2006 Paragon Holding Ltd lawfully filed an Amended Declaration together with attached drawings and site plans for Phase 11. The Defendants deny that, by constructing Building 2 in the manner which they have, they have breached the Agreement or the Instrument/Original Declaration. They maintain that Section 9B 1 of the Instrument/Original Declaration permits the construction of Building 2. The defendants maintain that Paragon Holding Ltd is permitted to change the location of Building 2, acting pursuant to the Amended Declaration

since it was only an approximate location that was depicted in the original Form 1 Diagram. The Defendants are adamant that they have committed no breaches whatsoever and therefore Mr. and Mrs. Willard are not entitled to any relief. Significantly, the Defendants maintain that the Court should not order the demolition of Building 2 since it would be harsh and unfair to do so.

Evidence

[25] Mrs. Willard testified in support of the claim and was cross examined at length. The following witnesses were also called in support of the Claimants: Mr. Richard Doncaster and Mr. Arthur Tifford. Testifying on behalf of the Defendants were Mr. John Erato; Mr. Cleveland Richards; Mr. Gifford Connor and Ms. Maggie Carotenuto. In addition, the parties have agreed numerous voluminous bundles of documents which were all placed before the Court. The Court was also provided with a report from the demolition expert, Mr. Richard Diven, who was agreed to by the parties.

Court's Analysis and Findings

[26] I propose to briefly review the evidence before determining the findings of fact. In doing this I have paid careful attention to the submissions of learned counsel.

Review of the Evidence

[27] I have carefully reviewed the evidence that was adduced on behalf of the Claimants and the Defendants. I have also given deliberate consideration to the documents and photographic images that were placed before the Court.

[28] I have reviewed Mrs. Willard's witness statement and her evidence both in chief and under cross-examination. I have no doubt that Mrs. Willard is a fairly credible and reliable witness. She did not attempt to mislead the Court in seeking to provide her version of the events. Much of her evidence was corroborated by the documentary evidence that was provided. Her evidence is borne out by the evidence from the other witnesses. Mrs. Willard is obviously a person who pays keen

regard to many details but seems to have been very determined to purchase Unit 3BE. She is clearly very upset with the Defendants and though very mild mannered, she is angry with the Defendants.

[29] However, much of the factual determination does not only turn upon whether the Court believes her. It is apposite to state, however, that a significant amount of findings of fact would turn on the Court's interpretation of the documentary evidence coupled with the assessment of the evidence, utilizing the very helpful submissions of learned counsel.

[30] Mr. Doncaster, who testified in support of Mrs. Willard was a very credible witness. His evidence, though consistent with Mrs. Willard's evidence, was not critical to the proof of Mr. and Mrs, Willard's case. His evidence was very periphery to the main issues that are joined in the case at bar. The matters to which he spoke occurred several years before the parties entered into the agreement. I do not attach great weight to his evidence.

[31] Mr. Arthur W. Tifford who provided the court with evidence in support of the Claimants', on some aspects of the case was not as reliable a witness as he could have been. I have no doubt that he was deliberately enquiring about the purchase of a unit in the proposed Building 3 not having genuine desire to purchase it but rather to obtain critical information/evidence against Mr. Erato and Paragon Holding Ltd. One thing is however clear to me and that is he did not mislead the Court when he indicated that Mr. Erato and Ms. Carotenuto offered to sell him a unit in the proposed third phase/Building 3 of the Condominium. Indeed, I have no doubt that the Defendants tried to sell Mr. Tifford a unit in the proposed third strata lot building. It is clear that both Ms. Carotenuto and Ms. Erato refused to indicate the capacity in which they were negotiating with him.

[32] The Court accepts Mr. Diven's report in which he stated that the demolition would be complicated. He was clear that the removal of the Building 2 is technically feasible although the interconnectedness of Building 2 is so close in proximity to the surrounding structures. Mr. Diven quite candidly indicated that he did not address several critical matters. I will refer to these matters in more detail very shortly.

[33] In giving evidence, Mr. Erato did not paint a very good picture. He prevaricated when answering questions from learned counsel Mr. Wallbank in relation to several important aspects of the defence. He was not as forthcoming with the matters of which he knew a lot about even when pressed in cross-examination. He seemed not to be forthright with Mr. and Mrs. Willard either. The greater part of his viva voce evidence was in direct variance with much of the documentary evidence. Critically, the documentary evidence spoke volumes and conveyed the picture of a gentleman who either was out of his depth in relation to his dealings at one end of the spectrum or at the other end clearly felt that he could have whimsically made the sort of changes that he sought to make. In any event, I did not find him to be a very reliable witness. Also, he seemed not to be very familiar with most of his legal obligations and gave the clear impression that he did not fully appreciate the true extent of his responsibilities or obligations that arose as a consequence of the Instrument/Original Declaration or that are based on the provisions of the Condominium Act.

[34] Most of the witnesses that Mr. Erato called in support of the Defendants did not in any way advance the factual position advocated on behalf of the Defendants.

[35] The first witness Mr. Gordon Grice provided the Court with forthright evidence which clearly did not address most of the issues that are joined. There is no doubt that he played a role in preparing the documents in the very formative period of the Condominium project. He did not appear to have made any significant contribution to the subsequent development of the Condominium Development. In fact, he played a role in preparing the first set of drawings which are not the ones that are very material to this claim. The drawings which he prepared indicate that Mr. Erato always intended to construct 3 strata lot buildings. There is no doubt in my view that Mr. Erato always intended to construct a third strata.

[36] The next witness Mr. Gifford Connor, is the former Registrar of Lands. His period of service coincided with the period during which relevant documents were registered in the Land Registry. He was very forthright and objective. As helpful as he had hoped to be, he was unable to provide much evidence that is relevant to the issues. He was able, however, to indicate that the Instrument/Original Declaration was registered in 2004. He opined that the Amended Declaration

of 2006, should be read together with the original 2004 declaration. Apart from this helpful evidence which is supportive of the Defendant's position, Mr. Connor did not provide the Court with much other relevant information for reasons that will become apparent very shortly.

[37] The next witness, Mr. Cleveland Richards, who was called on behalf of the Defendants struck the court as having the interests of the Defendants to serve. His evidence was not very reliable. There were too many inconsistences with his evidence. He did not appear to pay sufficient regard to relevant provisions of the Act and was surprisingly unfamiliar with the Instrument/Original Declaration, even though he prepared the relevant original Form 1 Diagram to which was appended to the Instrument/Original Declaration.

[38] The next witness Ms. Maggie Carotenuto struck me as quite clever. Most of her evidence did not concern the major issues that are joined between the parties. Even though some of her evidence was helpful, much of it did not relate to the issues that are identified. She obviously was very supportive of the Defendants' position and was not very objective. Her loyalty was clearly with the Defendants and thus influenced her evidence.

[39] The following represents my findings of facts, unless otherwise agreed by the parties:

[40] Mr. and Mrs. Willard desired to purchase an upscale property in Anguilla, in a low density area. While on vacation in Anguilla, they obtained a brochure which advertised the proposed development of a Condominium Development/Resort. Mr. and Mrs. Willard made contact with Mr. Erato who was recognised as being one of the major persons involved in the proposed condominium development known as Turtle's Nest Beach Resort. The proposed development was to be constructed on Parcel 59. Paragon Holding Ltd is the legal and equitable fee simple owner of Parcel 59. The Condominium Development is governed by the Condominium Act 2000. Mr. Erato was very instrumental in the development of the Condominium. Paragon Holding Ltd executed the Instrument/Original Declaration by virtue of which the Condominium was established. The Instrument/Original Declaration was registered in the Land Registry. The Condominium Development at that stage consisted of 14 units. These were all located in the existing Building 1.

[41] Several discussions were had between Mr. Erato and Mr. and Mrs. Willard in relation to the sale of a Condominium Unit 3BE. However, Mrs. Willard seemed not to have been happy with the level of communication between herself and Mr. Erato since she was still living in the USA. She apparently made several enquiries of Mr. Erato in relation to the proposed development and wanted to ensure that the unit that she was about to purchase would satisfy the needs of herself and her husband; particularly in relation to their need for privacy and obtaining a good view of the sea with great access to light and air.

[42] Mrs. Willard was still uncomfortable with the communication that she had received from Mr. Erato so she attended the Land Registry of Anguilla and reviewed the Instrument/Original Declaration together with the documents including the original Form 1 Diagram that were filed in relation to the Condominium Development. It was at this point that she and her husband decided to enter into an agreement of sale in order to purchase Strata Lot 3BE. I have no doubt that she was satisfied with the location of her potential purchase, having perused the Instrument/Original Declaration and the original Form 1 Diagram. She was also pleased with the location of building 1 in which her unit was housed vis – a – vis the proposed building.

[43] Mr. and Mrs. Willard purchased Unit 3BE from the Defendant Paragon Holding Ltd, the owner of the Condominium Development. Upon registration of the Instrument/Original Declaration in October 2004, the Registrar of Lands created the necessary Strata Lot registers. The Registrar of Land recorded the Strata Lot Corporation, Turtle's Nest (Condominium) Co Ltd as the proprietor of the common property. He recorded Paragon Holding Ltd as the proprietor of each of the newly created strata lots. Indeed, the Strata Lot Corporation and subdivisions were created on 14th October 2004 when Mr. Erato registered the Instrument/Original Declaration together with the supporting documentation including its By-laws, the original Form 1 Diagram with the Land Registry. Upon registration, the Instrument/Original Declaration created 14 residential units within an existing 4 story apartment building.

[44] She was also satisfied with the common property which she felt was indicated in the Instrument/ Original Declaration and depicted in the original Form 1 Diagram. The Instrument/Original Declaration that was filed with the Land Registry contained an original Form 1 Diagram dated 14th

November 2003. The original Form 1 Diagram also indicated, in accordance with the declaration, that there was an intention to construct in the future Building 2 and showed where that building would substantially lie.

[45] It is important to reiterate that in the Instrument/Original Declaration, Paragon Holding Ltd reserved the right to construct the additional single 16 unit Strata Lot building, a swimming pool and deck, tennis court, and an office in the future. The Instrument/Original Declaration also designated the commonly owned property as including all of the land within Parcel 59 together with all of the improvements thereon including parking areas, pools, snack bar and walkways.

[46] The original Form 1 Diagram also referred to as the Richards' survey diagram showed the area where Building 2 was to have been substantially located. The Instrument/Original Declaration designated these structures as "Additional Buildings" and "Future Phases". In the Instrument/ Original Declaration Paragon Holding Ltd reserved the discretionary right to phase the construction of the additional building. The Instrument/Original Declaration contained provisions permitting Paragon Holding Ltd to amend the Instrument/Original Declaration.

[47] Mrs. Willard having inspected the documents that had been filed with the Registry of Lands, subsequently entered into a purchase agreement with Mr. Erato in order to buy Unit 3BE. On 8th April 2005, Paragon Holding Ltd and Mr. Erato executed the land transfer to Mr. and Mrs. Willard. In 2006, Paragon Holding Ltd sent out a notice to Mr. and Mrs. Willard which indicated that it intended to construct Building 2. Shortly thereafter, Paragon Holding Ltd began to construct the 16 unit future strata lot Building 2. Mr. and Mrs. Willard however are of the view that Building 2 is not located in the area designated by the original Form 1 Diagram. They complain that the Defendants in constructing Building 2 in its present location, have encroached on the common property. Critically, they say that Building 2 obstructs their view from Unit 3BE. In addition their access to light and natural air are impeded.

[48] On 19th April 2006, upon learning of the location of Building 2, Mr. and Mrs. Willard gave notice to the Defendants that they intended to seek an order of demolition of Building 2. In addition, Mrs. Willard raised a number of concerns.

[49] Shortly after receiving notice of Mrs. Willards' concerns, on 26th July, 2006 without notice to the claimants, Paragon Holding Ltd filed an Amended Declaration with the Land Registry. The Amended Declaration sought to make changes to the Instrument/Original Declaration. Of significance, Mr. and Mrs. Willard complain that it removes from the common ownership all parking areas, yards, gardens and pool, among other things. They say that it also changes the location of Building 2. In addition, they say that the Amended Declaration enables Paragon Holding Ltd to construct units in excess of 30. Mr. and Mrs. Willard also complain that the Amended Declaration also designates a portion of the commonly owned land for future development.

[50] The Defendants maintain that the Instrument/Original Declaration and the Amended Declaration must be read together. This is necessary so as to bring Building 2 within the Condominium Development. The Defendants maintain that the Instrument/Original Declaration merely provided the approximate location of Building 2. They say that there is nothing in the Instrument/Original Declaration which prevents them from changing the location of Building 2; using the additional land for future development and to further subdivide the property by constructing units in excess of 30.

[51] It bears noting that Mr. and Mrs. Willard seek to obtain declarations against the Defendants including that the 2006 Amended Declaration is invalid. They maintain that the Defendants cannot lawfully develop the property outside of the parameters of the Instrument/Original Declaration. In addition, they argue that the Defendants are obliged to confirm to the provisions or By-laws and the Condominium Act. Significantly, they maintain that in constructing Building 2, the Defendants have violated the clear terms of the Instrument/Original Declaration and the Condominium Act. Also, Mr. and Mrs. Willard say that by virtue of the Instrument/Original Declaration, the Defendants are prohibited from constructing in excess of 30 units. Mr. and Mrs. Willard also say that Mr. Erato had begun to market for sale a third strata lot building containing approximately 36 additional Condominium Units, thereby seeking to increase the total number of Condominium Units to 66. Against those allegations, the Defendants deny that they have acted unlawfully, improperly or in violation of the Instrument/Original Declaration or the Condominium Act. They urge the Court not to grant Mr. and Mrs. Willard any of the reliefs that have been sought.

Law

[52] It is important that I briefly review the relevant provisions of the Condominium Act (the Act).

[53] Section 3 of the Act requires that a strata plan must be lodged with the Land Registry and be approved by the Registrar of Lands in order for there to be the creation of the Condominium Development and the Strata Lot Corporation. Section 3 (2) of the Act stipulates that the strata plan should contain drawings and plans. Section 3 (2) (b) of the Act requires the strata plan to delineate the boundaries of the parcel and the location of the buildings in relation to the boundaries.

[54] Section 6(1) of the Act enables a Declaration to be filed in several parts. Section 6(1)(f) of the Act requires a Declaration to include a statement of covenants, conditions and restrictions covering the use, occupancy and transfer of the several units. Section 6(1) (j) requires a Declaration to include the By-laws applicable to the property.

[55] Section 6(2) of the Act states that every Strata Lot Corporation must lodge and record a Declaration or any amendment thereof with the Land Registry.

[56] Section 7 (1) of the Act states that the Declaration should be accompanied by drawings and plans of each floor to comply to the dictates of Section 7.

[57] It is therefore indisputable that a Declaration or an amended Declaration must be filed in relation to any building in order for the building to be included in the Condominium Development. There is consensus that at the time of the filing of the Instrument/Original Declaration, it was agreed that Building 2 was to be a part of the Condominium Development.

[58] It is important that I now pay some attention to the Instrument/Original Declaration, as I hereby do:

[59] The Instrument/Original Declaration and exhibits created 14 residential strata lots within an existing 4 story apartment building. (Existing Building) or Building 1.

[60] It is not in dispute that Mr. and Mrs. Willard's Unit 3BE is located within the Existing Building or Building 1.

[61] By virtue of Section 9 A of Instrument/Original Declaration, Paragon Holding Ltd retained the non-obligatory right to construct in the future, an additional single 16 unit strata lot building, a swimming pool and deck, tennis court, and a manager's office.

[62] Section 2 of the Instrument/Original Declaration states as follows:

> "Description of buildings and Improvements. The Declarant intents (sic), but is not obligated to develop the Condominium in phases by amendment to the Declaration as set forth in Section 9 herein. Phase 1 is initially made subject to the Declaration consists of one(1) Residential/Rental Building, being a Form (4) Story Building with fourteen (14) condominiums therein (the "Existing Buildings" or Building) located on the property. The Declarant may build an additional Phase II consists (sic) of one(1) Residential/Rental Building, Four (4) Story Building with sixteen (16) condominiums therein and a swimming pool, tennis court and Manager's Office ("Future Phases") to be located substantially as shown on the Drawings and Plans to be recorded herewith (the Additional Buildings)

[63] The designated location for the future 16 unit strata lot Building 2 is shown in an original Form 1 Diagram or referred to as Cleveland Richards diagram dated 14th November, 2003, which diagram was appended to the Instrument/Original Declaration.

[64] Section 6 of the Instrument/Original Declaration states as follows:

Drawings and Plans

> "This Declaration shall be amended pursuant to Section 10 hereof at the time or times Future Phases are to be included in the Condominium, by lodging for record a set of Drawings and Plans of each Additional Building in each such Future Phase showing layout locations, designations and approximate dimensions of the Court accompanied by the

certificates and bearing the certification required by the Act and an amended exhibit showing the adjusted unit entitlement of each unit in the Condominium".

[65] By virtue of the Act, read together with the Instrument/Original Declaration, the commonly owned property was to include all of the land except the strata buildings together with the improvements thereon, including parking areas, yards, lawns, gardens, recreational facilities, office, laundry, pool, shack and bar.

[66] Section 9 B(1) of the Instrument/Original Declaration addresses the Declarant's right to develop and construct Additional Buildings. It states as follows:

> "The Declarant reserves and shall have the right without the consent of any Unit Owner, pursuant to and in accordance with the provisions of this Section 9 to develop and construct the Additional Buildings and all roads and other common property thereof and thereon and/or in Future Phases and any such subsequent part of the Condominium".

[67] Having dealt with the relevant provisions of the Act and the relevant sections of the Instrument/Original Declaration, I will now address the issues.

Issue No. 1

Was the Instrument/Original Declaration lawfully amended by the Amended Declaration filed on 7th November 2006?

[68] I have carefully reviewed the submissions and the evidence including documents in relation to this issue. It is clear to me that the Instrument/Original Declaration was lawfully amended. There is no doubt in my mind, that Paragon Holding Ltd had the right to develop the Condominium in keeping with the Instrument/Original Declaration without consulting the Unit Owners. If it were to be otherwise, it would mean that the Unit owners could have prevented Paragon Holding Ltd from constructing Building 2. There is no requirement, in my view for Paragon Holding Ltd to have convened a meeting of the unit owners before amending the Instrument/Original Declaration. I

also have no doubt that Paragon Holding Ltd could properly have amended the Instrument/Original Declaration so as to include Additional Building as was stated in the Instrument/Original Declaration without obtaining the permission of the Unit Owners. I am fortified in this view based on a close reading of Section 9 B (2) of the Instrument/Original Declaration which states that "The Declarant shall not amend this Declaration so as to include Additional Buildings, not built, until the construction of same have been completed sufficiently for the certification of plans provided for in the Act". It is clear to me that in order to bring Building 2, as contemplated in the Instrument/ Original Declaration, within the Condominium Development necessitated the filing of an Amended Declaration.

[69] In view of the totality of circumstances, I accept the submissions of learned counsel Mrs. Cora Richardson Hodge that Paragon Holding Ltd, the declarant was lawfully entitled to amend the Instrument/Original Declaration. My position is reinforced by Section 9 A of the Instrument/Original Declaration which says that by "lodging for record the Unit Deed for his unit, each Unit Owner shall be thereby deemed to have consented to such amendments to the Declaration without the necessity of securing any further consent by such owner".

[70] I have no doubt that the defendants (Paragon Holding Ltd) were permitted, both by virtue of the Condominium Act read together with the Instrument/Original Declaration, to file an Amended Declaration. Based on my review of the totality of evidence and the submissions of learned counsel for both sides and an examination of the Instrument/Original Declaration together with the other relevant documentation, I am not of the view that the defendants were in any way prevented from amending the Instrument/Original Declaration so as to include Building 2. In any event, this much has been conceded by Mr. and Mrs. Willard. The main point of departure between the parties is whether the Defendants were required to obtain the consent of the Unit Owners before amending the Instrument/Original Declaration and secondly whether the Defendants could have properly amended the Instrument/Original Declaration to, among other things, change the location of Building 2.

[71] Mr. and Mrs. Willard say that the defendants' amended Declaration seek to change the original location of Building 2. They say that the Instrument/Original Declaration delineated where Building

2 should have been located. However, contrary to this, the Defendants have located Building 2 in the area demarcated and not substantially in accordance with the original Form 1 Diagram that was attached to the Instrument/Original Declaration. I have no doubt that the Instrument/Original Declaration was lawfully amended so as to include Building 2 into the Strata Lot Corporation or Condominium Development.

Issue No. 2

If the Amended Declaration is not a lawful amendment, should it be treated as a nullity?

[72] In relation to the above conclusion issue No. 2 is now otiose. Accordingly, I refrain from addressing this issue.

Issue No. 3

What changes, if any, did the Amended Declaration make to the original Declaration?

[73] Mrs. Willard gave the main evidence in support of the Claimants contention on this issue. I am satisfied that both by her evidence in the witness statement and her viva voce evidence, particularly under cross-examination that sought to test it, she was persuasive in her position that the original Form 1 Diagram indicated where Building 2 was to be substantially located. Also, I am fortified that this view is correct after a close reading of the Instrument/Original Declaration to which I have already referred and in particular paragraph 2.

[74] For what it is worth, I accept Mrs. Willard's evidence when she told the Court that Mr. Erato had informed her about the development plans of the Strata Lot Corporation. Equally, I accept that he told her that the buildings were to be located in accordance with the depictions of the Buildings in the original Form 1 Diagram of 14th November 2003. I am satisfied that the same original Form 1 Diagram which was shown to Mr. and Mrs. Willard was registered in the Land Registry.

[75] However, I do not accept that the November 2003 original Form 1 Diagram was intended to be the development plan for the Condominium Unit. On this aspect of the case, it is clear that Mr. Richards' evidence is far more attractive and persuasive than Mrs. Willard's. I accept his evidence that the document clearly states that the original Form 1 Diagram depicts the buildings in relation to the boundaries and I unreservedly accept that this is what the November 2003 original Form 1 Diagram was intended to depict and nothing more. In any event, the document speaks for itself.

[76] As the evidence unfolded and based on the submissions of learned counsel Mr. Wallbank and Mrs. Richardson Hodge, it seems to me that quite a few of the objections that Mr. and Mrs. Willard had to the Amended Declaration have faded away. The reason for this is that one of the Defendant's main witness, Mr. Connor, told the court that the Instrument/Original Declaration and the Amended Declaration should be read together. This much the court accepts and further holds that this is a legally permissible way to amend the Instrument/Original Declaration. Also, I have no doubt that the Instrument/Original Declaration and the Amended Declaration can be read together and do form one document. Mr. and Mrs. Willard no longer seem to be taking issue with this.

[77] Accordingly, the major change that the Amended Declaration made to the Original Declaration is to unlawfully and improperly change the location of Building 2. It seems to me that in her closing arguments learned counsel Mrs. Richardson Hodge has quite properly stated that the pool which was located in the November 2003 original Form 1 Diagram was a part of the common property. I have already accepted that the Instrument/Original Declaration is to be read together with the Amended Declaration. Insofar as Mrs. Willard was forced to concede under intense and skillful cross-examination by learned counsel Mrs. Richardson Hodge that there is a swimming pool, it seems to me that the issue in relation to the swimming pool is otiose as urged upon the Court by Mrs. Richardson Hodge.

[78] In relation to purported changes in the common property, it only bears stating that what amounts to common property is a matter of law. To put it another way, it is defined in the Condominium Act. It therefore stands to reason that the Defendants cannot alter what is the common property either unwittingly or inadvertently by simply amending the Instrument/Original Declaration. The strata lot

buildings that are permitted by the Instrument/Original Declaration are finite. It is accepted that the Defendants have not constructed a third strata lot building. Let it be clear that I have no doubt that the Defendants cannot lawfully seek to alter the Condominium Development by simply altering the Instrument/Original Declaration by way of the 2006 Amendment. Whatever terminology the defendants may have used in Section 3 of the Amended Declaration in relation to the definition of "Additional Buildings", it bears reiterating that the Defendants cannot lawfully build a Phase III building irrespective of the private intentions Mr. Erato may have had and which he may have communicated to Mr. Grice in 2004. To put the matter beyond any doubt, the defendants are not permitted to construct in excess of the 30 strata units, that is, 14 in Building 1 and 16 in Building 2. In a word, they are not enabled by the Amended Declaration to construct the third building. I have no doubt that the Instrument/Original Declaration limits the Defendants to the construction of only two buildings, namely, Building 1 and Building 2. The Defendants are further restricted to constructing the second strata lot building in accordance with the original Form 1 Diagram as appended to the Instrument/Original Declaration.

[79] Even though Section 9 (A) of the Instrument/Original Declaration indicates that the Declarant has the right without the consent of any unit owner to amend the Instrument/Original Declaration so as to include additional buildings on or in any number of phases, of necessity, this can only mean the additional buildings as indicated in the Instrument/Original Declaration. I therefore accept the submissions advocated by learned counsel Mr. Wallbank when he quite correctly stated that the Instrument/Original Declaration limits the number of strata lots and concomitant ownership in the Condominium Units to no more than 30 units.

[80] I cannot accept the argument that was forcefully urged on the court by Mrs. Richardson Hodge that there is no restriction on Paragon Holding Ltd insofar as the number of strata lots that can be built. By way of emphasis, the Defendants are restricted to the two Strata Buildings as provided in the Instrument/Original Declaration. Any attempt by the Defendants to construct a Phase III building would be violative of the Instrument/Original Declaration and thereby unlawful. To remove any doubt, I do not for one moment accept that the Richards' survey related solely to Phase 1 strata lot. It speaks clearly to the buildings and their boundaries in Condominium Development.

Issue No. 4

Is Building 2 located in accordance with the terms of the Instrument/Original Declaration?

[81] In view of my previous ruling, I could simply answer this question in the negative. However, it is prudent to be a little bit more expansive and say that it is clear, based on the uncontroverted documentary evidence and Mrs. Willard's oral evidence, that Building 2 is not located substantially in accordance with the position that was stated in the November 2003 original Form 1 Diagram. I do not accept the evidence of Mr. Richards or Mr. Connor when they both sought to convey to the Court that the Building 2 as stated in the Instrument/Original Declaration was only an approximate position. The Instrument/Original Declaration clearly required the Building to be exhibited in the appended diagrams/plan and to be located substantially in accordance with the drawings and diagrams. Paragon Holding Ltd and by extension Mr. Erato simply do not have the luxury of changing the location of Building 2 in the manner in which they did.

[82] It is noteworthy that in their closing submissions, Mr. and Mrs. Willard have conceded that Building 2 did not have to be located precisely as shown in the original Form 1 Diagram, but rather it should have been located substantially in accordance with the diagram. In addition, Mrs. Willard say that Building 2 was to have been located to the back of the Building 1 and 30-35 feet away. However, it is not in dispute that as constructed, it is a mere 15 feet away. This evidence must be reviewed against the fact that Mrs. Willard was forced to resile under strenuous cross-examination from her previous evidence and accept that there was no proper legend to the Form 1 Diagram, neither was the scale for the original Form 1 Diagram accurate. While I have no doubt that Building 2 is now a mere 15 feet away from Mr. and Mrs. Willard's apartment, there is no evidential basis upon which I can properly determine the distance away it was meant to be based on the original Form 1 Diagram. Clearly, however, the original Form 1 Diagram did not countenance Building 2 being located in the position in which it has been constructed.

[83] It bears repeating that I did not believe Mr. Richards when, during intense cross-examination by learned Counsel Mr. Wallbank, he sought to persuade the court that Building 2 was constructed in accordance with the Instrument/Original Declaration. From a mere comparison of the original Form

1 Diagram and the Form 1 that is appended to 2006 Declaration, it is very clear that this is not so. I reiterate that in accordance with the original Form 1, Building 2 should have been constructed in accordance with original Form 1 Diagram of the Strata Plan that was exhibited to the Instrument/Original Declaration, that is to the back of the Building 1. There is no denying that the Instrument/Original Declaration made provision for the construction of Building 2. However, in order for Building 2 to have been lawfully constructed it should have been built in accordance with the original Form 1 Diagram. The fact that the original Form 1 Diagram, the Strata Plan, shows the diagram of the buildings in relation to the boundaries is a sufficient basis for Mr. and Mrs. Willard to have relied on the depictions therein in forming their decision to purchase their unit. I believe them when they say that this was a major factor which influenced their decision to purchase their unit.

[84] Accordingly, the defendants cannot be heard to say that the original Form 1 Diagram merely indicates the approximate position of Building 2. The clear requirement of the law and the Instrument/Original Declaration is that the buildings be located substantially in accordance with the plans and drawings. Insofar as it is the law that all other property apart from the Strata Lot building is common property, it is pretty clear to me that the change in the position of Building 2 would have resulted in the encroachment on the common property. This much is obvious. This is so irrespective of the views the defendants or their witnesses may share. To put another way, in order for the court to have been able to conclude that Building 2 was lawfully constructed, it had to be built in accordance with the November 2003 original Form 1 Diagram. It is insufficient for Building 2 to have been constructed in an approximate position to the location that was designated in the original Form 1 Diagram.

[85] In view of the totality of circumstances, I am not of the view that Building 2 was constructed substantially in accordance with the Instrument/Original Declaration, even making provisions for the error in the scale in the original Form 1 Diagram of November 2003. It is clear that Building 2 was not constructed substantially in accordance with the 14th November 2003 original Form 1 Diagram. (A mere comparison of the original Form 1 Diagram with that of the Form 1 Diagram that was filed with the Amended Declaration of 2006 (the latter which depicts the actual location of Building 1 and Building 2) clearly shows that Building 2 is not constructed substantially in accordance with the original Form 1 Diagram. However, on the evidence presented by Mr. and

Mrs. Willard it is still unclear what distance apart Building 1 should have been from Building 2 based on the November 2003 original Form 1 Diagram.

[86] Also, Mr. Richards' explanations in relation to his use of broken lines and solid lines were not very convincing and this is quite apart from it being very self-serving. Under very skillful cross-examination by learned counsel Mr. Wallbank it was very evident that there were serious inherent inconsistencies in his evidence. As a consequence, I am unable to attach any significant weight to this aspect of his evidence. At the very least, his failure to provide a legend or explanation for the use of the solid lines as distinct from the broken lines can hardly be acceptable. Mr. Richards' explanations as to his use of cartographic conventions did not stand up under skillful and intense cross-examination by Mr. Wallbank. Mrs. Willard's expectation that Building 2 would have been located behind Building 1 was very reasonable and justified.

[87] In the circumstances which unfolded and which I have already indicated, Building 2 was built parallel and in close proximity to Building 1. The fact that a second original Form 1 Diagram was subsequently filed with the Amended Declaration of 2006 does not give legitimacy to the unlawful construction of Building 2. Therefore, I do not agree with learned counsel Mrs. Richardson Hodge that Mr. and Mrs. Willard's objection to the location of Building 2 is without merit.

Issue No. 5

Does the Survey that was filed by Mr. Cleveland Richards memorialize the development plan for the project?

[88] Mr. Richards was very credible on this aspect of the case. On the question of the effect of the Survey, I prefer his evidence to that of Mrs. Willard. I accept that the Strata Plan/original Form 1 Diagram indicated the buildings location in relation to the boundaries. I am not prepared to accept that it memorialized the development plan of the entire project. Mr. Richards is the person who has the expertise and is very reliable on this aspect of the case. However, there is no doubt in my mind that the original Form 1 Diagram indicated not only the boundaries of the buildings but critically where both Building 1 and Building 2 were to be substantially located. As alluded to earlier, I

accept the submissions of learned counsel Mr. Wallbank that Building 2 ought properly to have been constructed substantially in accordance with the original Form 1 Diagram.

[89] I have no doubt that the original Form 1 Diagram was not a development plan for the entire Condominium Development as Mrs. Willard would have me believe. The document, in my view, is self-explanatory. There is no basis for the court to read any words into the clear and unambiguous words that are stated on the document.

[90] In passing, it is important for me to repeat that the original Form 1 Diagram only defines the buildings in relation to the boundaries. I do not believe that Mrs. Willard mis-read the document. She merely presumed that it also showed the location of the pool and deck. I am however not at all persuaded that her latter view of the original Form 1 Diagram is correct, in the face of the very compelling evidence of Mr. Richards. I do not accept that the original Form 1 Diagram document memorializes the development plan. Mrs. Willard struck me as a very careful and meticulous witness who would not have mis-read the document. I accept the submissions of learned counsel Mrs. Richardson Hodge that the original Form 1 Diagram is one component of the Strata Plan.

[91] It is important that I make clear that the intention of Mr. Richards whatever his best motives may have been in utilizing broken lines and solid lines on a very inconsistent basis, is of no moment and for the most part his explanation was very unconvincing, to say the least.

[92] Insofar as there is dispute between Mr. Richards' evidence and Mrs. Willard's view as to what the November 2003 original Form 1 Diagram represents in relation to the location of Building 2, I have no doubt that it would be unreasonable for the court to accept Mr. Richards' explanation. It would be unfair for the Defendants to prevail in their contention that, in the original Form 1 Diagram, Building 2 was placed in broken lines which was meant to indicate the approximate location of Building 2. What is worst is the fact that the Defendants did not provide the intended purchaser with a legend which would have provided that explanation and may well have influenced an intended purchaser. I cannot accept that the positioning of Building 2 in the original Form 1 Diagram, which was lodged together with the Instrument/Original Declaration, merely indicated the general area where the second strata lot building (Building 2) was to be located. The

Instrument/Original Declaration stipulated that the Additional Buildings were required to be located substantially as shown in the diagrams and plans that were filed with the Instrument/Original Declaration.

Issue No. 6

What effect if any does Building 2's current location have on the enjoyment and value of Strata Lot 3BE?

[93] I have already indicated that there is no doubt that Building 2 was not built substantially in accordance with the November 2003 original Form 1 Diagram. Equally, I have already accepted that a part of Building 2 is 15 feet from Mr. and Mrs. Willard's unit. As stated earlier, the evidential basis for me to ascertain the distance between Building 1 and Building 2 as contemplated by the original Form 1 Diagram does not exist. Chief among the reasons for this is the erroneous scale that was placed on the document itself coupled with the failure of both sides to provide the Court with any reliable evidence on this aspect of the claim. I have nevertheless reviewed Mrs. Willard's evidence particularly under intense cross-examination by learned counsel Mrs. Richardson Hodge and formed the view that Mrs. Willard deliberately sought to convey to the Court that the situation is worse than it really is. I have no doubt that she still has a view of the sea, sky and ocean, even though it may not be to the extent that she had wished.

[94] While I do accept that Building 2 is closer to Building 1 and by extension Unit 3BE than was indicated in the original Form 1 Diagram, I do not believe nor accept that Mrs. Willard's view of the sea is as impaired as she would have the court believe. Neither am I of the view that the value of her unit has been diminished, in the absence of any evidential basis for this conclusion. I have no doubt that her privacy has been impacted. Ultimately, her enjoyment of Unit 3BE has been affected.

Issue No. 7

What if, any, reliefs should be granted in respect of Building 2?

[95] Perhaps, it is appropriate for me to state that in their written closing submissions, Mr. and Mrs. Willard have sought to expand the reliefs which they seek to include the following:

(a) Instrument/Original Declaration that the 2006 Amended Declaration is invalid;
(b) The 2006 Amended Declaration is inconsistent with and cannot be read together with the 2004 Instrument/Original Declaration;
(c) The Amended Declaration registered on 7th November 2006 is unlawfully constituted and is invalid;
(d) Injunctive relief requiring Paragon Holding Ltd to demolish Building 2 and remove the associated debris, and restore the premises no later than 6 months from the date of the Court's decision.

[96] However, in their claim, they had originally sought a declaration that Building 2 is not located substantially in accordance with the specifications in the Instrument/Original Declaration including Richards' survey for Additional Buildings and in breach thereof.

[97] In addition, Mr. and Mrs. Willard had sought a permanent injunction against the Defendants, jointly or severally, requiring such of them to cease construction of Building 2 in its present location, the structures already erected to be demolished and the site rehabilitated as a precondition to further development at one or more of the Defendant's expense; a permanent injunction against the Defendants jointly or severally whether for their own account or for the account of others from undertaking any construction on or development or subdivision of Parcel 59 or otherwise diluting the Claimants' share of the common property and voting rights other than in accordance with the Instrument/Original Declaration.

[98] I have already dealt at length with the issue of the lawfulness of the Amended Declaration and whether or not the Amended Declaration could be read together with the Instrument/Original Declaration. In view of the totality of circumstances, I decline to declare that the Amended Declaration is invalid.

[99] Similarly, I do not accede to Mr. and Mrs. Willard's request that I declare that the 2006 Amended Declaration is inconsistent with and cannot be read together with the Instrument/Original Declaration. Further, and for the reasons which I have already provided, I am also not of the view that the Amended Declaration cannot be read together with the 2004 Instrument/Original Declaration.

[100] In relation to the other reliefs that are sought, I have paid careful regard to the very helpful submissions of learned counsel and have given very deliberate consideration to the authorities that have been cited. As stated earlier, in locating Building 2 as they did, the Defendants have clearly breached the Condominium Act and have derogated from the Instrument/Original Declaration and the Agreement. Also, I have paid regard to the evidence that was adduced on behalf of the parties including the fact that during the initial stages of the construction of Building 2, Mr. and Mrs. Willard had requested that the construction of Building 2 be discontinued since it was in breach of the Instrument/Original Declaration. This is to be balanced against the fact that Mr. and Mrs. Willard took no steps to obtain an interim injunction when they could have easily sought to restrain the Defendants from completing the construction of Building 2 so close to their unit.

[101] The fact that the Defendants always intended to build strata lots in excess of 30 is of no moment. It is imperative that they ought to have complied with the Instrument/Original Declaration which, read together with the Condominium Act, clearly prohibit the building of lots in excess of 30 units. On the evidence, it is clear to me that unless restrained, the Defendants do intend to construct the third strata lot building. I therefore have absolutely no hesitation in restraining the Defendants, as I hereby do.

[102] It is instructive that the Defendants caused the Amended Declaration to be filed 90 days after Mr. and Mrs. Willard had given notice of their intention to hold Paragon Holding Ltd to the limitations contained in the Instrument/Original Declaration. Clearly, the Defendants did not address their minds to the necessity of confirming to the Instrument/Original Declaration.

[103] In my view, and with the greatest of respect, Mr. Erato is clearly out of his depths in relation to the statutory and other legal conditions that a developer must satisfy. While some of the breaches

could well have been occasioned deliberately, it is clear to me that he is laboring under some serious misconceptions insofar as his powers and responsibilities are concerned. It would not be an inaccurate description to state that Mr. Erato has made so many blunders in relation to this Condominium Development, that they leave the Court to question whether he had previous experience in this sort of development. I have no doubt that he simply did not consider much of Paragon Holding Ltd's obligations even after the Instrument/Original Declaration was filed. What is more acceptable is that after all of his omissions or alleged breaches were pointed out to him, Mr. Erato sought to remedy them by filing the Amended Declaration of 2006.

[104] In determining what are the other appropriate remedies, I must pay attention to the fact that Building 2 is in close proximity to the Claimants' unit and I have already accepted that it is 15 feet apart. As indicated earlier, what I do not accept is that Mr. and Mrs. Willards' view, air and light are impaired to the extent that Mrs. Willard sought to convey to the Court. It seems to me that in deploying their case in relation to the closeness or otherwise of the unit, they did not anticipate that the Defendants would have accessed Unit 3BE and taken photographs as they did. The Court was therefore provided with numerous photographic images from both sides. I found the evidence that Mrs. Willard provided to the Court under skillful cross-examination by Mrs. Richardson Hodge very helpful. It is clear that Mrs. Willard exaggerated the situation in order to buttress her claim for the demolition order. I am far from persuaded that the situation is as dire as she would have me believe. This does not negate the fact that I believe her when she said that by Building 2 being located so close to her apartment her privacy and the aesthetics of the development have been compromised. However, I do not for one moment believe that her access to light and air have been seriously compromised as she would have me believe.

[105] Of significance is the very curious aspect of this case which is the fact that neither side sought to present the court with reliable evidence which would have assisted in the determination of the distance between Building 1 and Building 2 as depicted in the original Form 1 Diagram. While the Court accepts that the Defendants have maintained that they never intended the original Form 1 Diagram to depict the substantial location of Building 2, there was nothing to prevent them from placing before the Court some credible evidence which may have assisted in terms of the determination of the distance between Building 1 and Building 2 as stated in the original Form 1

Diagram. Equally unreliable was Mrs. Willards's evidence in providing any details in relation to the distance between Building 1 and Building 2 as contemplated by the original Form 1 Diagram.

[106] For what it is worth, it was very instructive that under intense cross-examination by learned counsel Mrs. Cora Richardson Hodge that Mrs. Willard agreed that she and her husband had sent letters to the Defendants, five years before the trial date, demanding the discontinuation of construction of Building 2. I repeat that Mr. and Mrs. Willard sat back and did not seek any interim injunctive reliefs; this much she accepted under cross-examination by Mrs. Richardson Hodge. In passing, it is noteworthy that Mrs. Willard is a Judge. Mrs. Willard also admitted that she knew persons had bought units in Building 2. She was nevertheless adamant that insofar as Building 2 was built on common property, it was unlawfully built and should be demolished.

[107] Accordingly, it now falls to me to determine what is the appropriate remedy that should be granted to the Claimants.

[108] In determining whether I should impose the ultimate sanction, I turn my attention to the Demolition Report of the expert Mr. Diven. He fails to provide any information on the method of demolition that will be used if an order was to be granted by the Court, neither does the Report indicate the demolition costs that would be incurred, it does not provide any information about the permits that are required to be obtained before demolition could be undertaken. Further, the Report does not indicate the availability of the requisite equipment or expertise in Anguilla to carry out any order of demolition. Quite interestingly, the Report indicates that the equipment and labour can be obtained in the United States of America. It is noteworthy that there is absolutely no indication as to whether or not the costs would be astronomical. The Court is left to speculate.

[109] It is apposite to state that the above factors are in no way determinative of this issue as to whether the Court should make a demolition order in relation to Building 2 which has 16 units and in circumstances where a significant amount of the units have been sold. The Court has to examine the entire matter in the round and seek to do justice between the parties. What is of great significance is that the utilities for both buildings are located in Building 2. These include plumbing, water, electricity, cable and sewerage treatment. Should the court be minded to grant the

demolition order it would result not only in the loss of use of amenities to the unit owners in Building 1 but would have a delertious or negative impact on the unit owners in Building 2. By way of emphasis, I state that the financial costs to demolish the building have not been provided. These are all relevant factors to the Court's determination of the appropriate remedies that should be awarded.

[110] I have kept in the forefront of my mind the fact that Mr. and Mrs. Willard say that the defendants ought not to have proceeded with the construction of Building 2 in the face of the letters of protest. The letters clearly requested that the construction of Building 2 should cease. The evidence adduced by the Defendants clearly indicate a lack of appreciation of the obligations that arise as a result of both the Condominium Act and the Instrument/Original Declaration and its exhibits. I accept the Defendants' position that third parties have bought the units in Building 2 and in fact I have no reason to disbelieve that most of the units have been sold. It is clear to me that the defendants were of the view that they could have happily built as many buildings as they wished.

[111] In those circumstances, I have to determine what are the appropriate relief that Mr. and Mrs. Willard should be granted particularly in relation to Building 2. Taken into account the totality of circumstances, including the Report from the expert witness Mr. Diven, it is important that I state that I accept learned counsel Mr. Wallbank's submissions that the Defendants, by constructing Building 2 in the current location, have trespassed on the common property. Equally, I have no doubt that by constructing Building 2 in very close proximity to Unit 3BE, the Defendants have created a nuisance.

[112] By way of emphasis, I state that the Court, having accepted that Building 2 is only 15 feet away from Building 1 and having determined that it should have been constructed further away, I have no doubt that it clearly infringes upon the privacy of the persons who occupy Unit 3BE. It constitutes both a trespass and a nuisance. See ***Bellini Custom Cabinets and Delight Textiles Limited*** 2007 ONCA 4 13. ***Cara Glen Estates Ltd v Mosychuck et al*** 2001 BCSC 761.

[113] While it is of some concern to the Court that third parties have bought units in Building 2, what is of great interest to me however, is the fact that the infractions of which Mr. and Mrs. Willard complain

are not very serious. In the Court's view, they do not warrant the ultimate sanction being granted against the Defendants. This is not in any way to condone the defendants' wrong doing. The Court does not sanction a person trespassing on another's property and thereby infringing that other's rights.

[114] Each case turns upon its own peculiar circumstances. The fact that in a given case the Court held the view that the appropriate relief was a demolition order, does not mean that in every case that is the only or even the appropriate remedy which should be granted.

[115] It is important that I state that insofar as I have accepted the arguments urged on the Court by the Defendants namely that the original Form 1 Diagram was not intended to be a development plan for the Condominium Development, it falls to reason that Mr. and Mrs. Willard could not properly rely on that survey as the basis of the development of the entire development. The Court therefore will not accede to the requests of Mr. and Mrs. Willard to make declarations in relation to the location of the pool and other amenities. In any event, I agree with learned counsel Mrs. Richardson Hodge that these matters were not foreshadowed in the claim and therefore should not be addressed.

[116] In my determination of the issues that have been joined, I have also considered the very well-known principles of trespass and nuisance to which learned counsel Mr. Wallbank has referred. Equally, I have carefully reviewed the authorities in which demolition orders were held to be appropriate. It is the law that a person, by committing a wrongful act, is not entitled to ask the Court to sanction his wrong doing by purchasing his neighbour's rights by assessing damages in that behalf, leaving his neighbor with the nuisance. See ***Jaggard v Sawyer & Anor*** [1994] EWCA Civi.

[117] I am not of the view that the approach taken in the case of ***Clarabell Investments Ltd v Antigua Isle Co Ltd,*** Claim No. HCV 2006/0326, should be adopted in the case at bar. To the contrary, the factual circumstances of that case are clearly distinguishable from those in the case at bar. In that case, the costs of removing the unlawful structure would not have been astronomical as distinct from demolishing an entire building. Also, in that case the Defendant had acted with a degree of

highhandedness in trespassing on the Claimant's property which is not present in the case at bar. Also, in that case there were no third parties likely to be affected by a demolition order. Critically, in the present case a demolition order in relation Building 2 is likely to undermine the use of Building 1. Nevertheless, the court has to take care so as to ensure that even where persons build on lands of others in error, the perception is not given that the Court simply award damages to the persons whose rights have been infringed.

[118] In appropriate circumstances and in order to do justice between the parties, the appropriate order is a demolition order. I am not of the view that there has been any substantial impairment of the view, access to light and air as a consequence of the location of Building 2. On the question of the appropriate remedy, I have given deliberate consideration to the very helpful authorities to which learned counsel Mr. Wallbank has referred. Chief among these are ***Justin Surage v Cendra Charles*** SLUHCV2003/0418; ***Park Lane Ventures Limited*** and **Ian kelvin Locke** [2006] EWHC 1578.

[119] Let it be clear that as a consequence of the quality of the Demolition Report and the inability of Mr. Diven to address many critical matters as alluded to earlier, the Court is unable to attach any significant weight to his report. In any event, I do not for one moment form the view that in the circumstances of this case a demolition order is the appropriate remedy. To make it pellucid, I have no doubt that an award of damages would be appropriate. For the record, it bears stating that I have no doubt that Mr. and Mrs. Willard, due to the fact that they are understandably upset with the Defendants, have tried to paint a more dire and severe situation than is the case. Also, I accept the submissions of learned counsel Mrs. Richardson Hodge that this is not a suitable case for which the Court should grant a demolition order. Demolition orders are routinely granted by the Court in deserving cases in which the circumstances so warrant. I have no doubt that an award of damages would be very adequate and appropriate to compensate Mr. and Mrs. Willard for the inconvenience and losses they have suffered as a consequence of the defendants' unlawful act.

[120] I do not have any hesitation in saying that having carefully reviewed the totality of circumstances, I am of the view that this is not an appropriate case in which to grant a mandatory injunction or a demolition order. See ***Shaw v Applegate*** [1978] 1 All ER 123 and ***Jaggard v Sawyer & Anor***

[1994] EWCA Civi which addresses the failure of a plaintiff to obtain an interim injunction but thereafter seeking a permanent injunction. Both of these cases are very instructive.

[121] For the sake of completeness, I state that at the conclusion of the trial the Court invited both sides to address the possible alternative remedies to the ultimate sanction. Neither side was very helpful in their submissions. Mr. and Mrs. Willard submitted that the Court should make an order which compels the Defendants to exchange their Unit 3BE for another unit. It is not entirely clear on what basis the Court could make such an order, particularly since there is no evidential or legal basis for me to conclude that this order is appropriate. The Defendants for their part maintained that they were not in violation of the Condominium Act nor the Instrument/Original Declaration therefore Mr. and Mrs. Willard are not entitled to any reliefs. Alternatively, learned counsel Mrs. Richardson Hodge urged the Court to award nominal damages without providing the Court with any mathematical figure.

[122] It is clear that both sides adopted extreme and unreasonable positions. The expectation of the Court was that both sides would have provided the Court with helpful submissions on the quantum of damages the Court should order as an alternative remedy. Insofar as the parties have failed to do so, I now invite both sides to provide the Court with brief written submissions together with authorities on the issue of quantum within 21 days of judgment. Also, the parties are requested to address the issue of costs in their written submissions.

Conclusion

(a) There will be judgment for Mr. John Willard and Mrs. Patricia Ann Hurst Willard against Paragon Holding Ltd, John M. Erato, Michael Soons and Turtle Nest Beach Resort (the defendants) jointly and severally.

(b) In view of the foregoing, I make the following orders and declaration.

(i) The 2004 Instrument/Original Declaration can be read together with the Amended Declaration registered in 2006.

(ii) That Building 2 is not located substantially in accordance with the terms of the Instrument/Original Declaration and in particular with the original Form 1 Diagram.

(iii) The Defendants jointly and severally, whether by their servants, their agents or howsoever, are restrained from constructing or undertaking any construction of a third strata lot building on Parcel 59.

(iv) The Defendants jointly and severally, whether by their servants, their agents or howsoever, are restrained from constructing or undertaking the construction of any additional buildings on Parcel 59.

(v) Mr. and Mrs. Willard's application to declare the 2006 Amended Declaration a nullity is refused.

(vi) Mr. and Mrs. Willard's request for a declaration that the original Form 1 Diagram registered with the 2004 Instrument/Original Declaration constitutes the physical building scheme for the Condominium's property is refused.

(vii) Mr. and Mrs. Willard's claim for a demolition order to be made in relation to Building 2 is hereby refused.

[123] The parties are further requested to file and exchange brief submissions together with authorities on the amount of damages the Court should award and the costs, within 21 days of this judgment.

[124] I thank learned counsel for their very comprehensive and extensive submissions.

Louise Esther Blenman

Resident High Court Judge

Anguilla