EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA
COMMERCIAL DIVISION

CLAIM NO. SLUHCV2014/0396

BETWEEN:

1. **MALMAISON PROPERTIES LLC**
2. **DRAKE INTERTRADE LIMITED**
3. **DRAKE RESORT LIMITED**
4. **DRAKE MARINA LIMITED**
5. **DRAKE MARINA VILLAGE LIMITED**

Claimants

And

1. **JEFFREY COYNE**
2. **DOUBLOON HOTEL LIMITED (in Receivership)**
3. **DOUBLOON MARINA {ST. LUCIA) LIMITED (in Receivership)**
4. **THE BANK OF NOVA SCOTIA**

Defendants

Appearances:
Mr. Leslie Prospere with Mr Villan Edward for the Claimants
Mr. Deale Lee for the Defendants

2018: January 31
March 28

DECISION IN CHAMBERS

[1] **ST ROSE-ALBERTINI, J. [Ag]:** In this action the claimants seek special damages of $5,441,288.40, general damages, interest and costs from the defendants for the alleged breach of the terms of an Acquisition Agreement (the "AA") executed on 16th March, 2012,

breach of a written undertaking given by the 4th defendant on i he same date and conversion of sums of money in the defendants possession, which the claimants say belonged to them.

[2] The defendants vigorously deny all of the allegations and seek the dismissal of the entire claim, with costs.

[3] Both sides have applied to the Court for the separate trial of preliminary issues pursuant to Rule 26.1 (2) (e) of the Civil Procedure Rules 2000. They have agreed that the issues for consideration concern only matters of law and the interpretation of various clauses of the AA.

The Issues

[4] The defendants' single issue for determination is whether the AA merged and was extinguished in two Deeds of Sale and Assignments of Lease (the "Deeds") executed on 31st July, 2013 and registered in the Land Registry on 21st August, 2013 as Instrument Numbers 3502/2013 and 3503/2013 respectively.

[5] The claimants questions are:-

1. Can the defendants seek to raise the issue of merger after the close of pleadings and without a stand-alone application to the Court.

2. Whether a series of agreed representations, warranties and covenants contained in clauses 5 and 6 of the AA, as amended, required the second and third defendants to provide the claimants with more than unencumbered title to the assets sold, including without limitation, those set out in Schedule A and sub-schedules A-1 to A-9 of the AA.

3. Whether under the terms of the AA the seGOOG--am1-U tfd defendants were obligated to deliver to the claimants all of the assets described in Schedule A and sub-schedules A-1 to A-9 of the AA.

4. Whether a claims fund up to the limit of US$1,750,000.00 set up under clause 6(d) of the AA is only applicable to title defects in the assets sold to the claimants as set forth in clauses 6 (b) and (c) and did not limit the liability for breaches of representation and warranties and/ or failure to perform covenant obligations with respect to other violations including property conditions, repair and maintenance.

5. Is the fourth defendant bound by clause 6 of the AA, as if it were party to it, by virtue of a letter of undertaking given on 16th March, 2012.

Brief Background Facts

[6] To place the issues in context the parties have assisted the Court by presenting a statement of agreed facts, which I have readily adopted.

[7] The second and third defendants Doubloon Hotel Limited ("OHL") and Doubloon Marina (St Lucia) Limited ("DML") respectively were indebted to the fourth defendant The Bank of Nova Scotia **("BNS")** under a Hypothecary Obligation Mortgage Debenture and Floating Charge.

[8] OHL and DML were in a state of financial disarray and unable to meet their debt repayments, which caused BNS to appoint the first defendant Mr. Jeffrey Coyne ("Mr Coyne") as Receiver and Manager by way of a Deed of Appointment consistent with the terms of the hypothec. Mr. Coyne kept OHL and DML operating while searching for a purchaser for the assets of the two companies.

[The first claimant Malmaison Properties LLC ("Malmaisonj entered into negotiations with Mr. Coyne to purchase the assets of DHL and DML. The parties entered into the AA on 16th March 2012, the AA was subsequently amended on 25th May 2012 and again on 25th December, 2012.

[10] BNS was not a party to the AA or any of the later amendments. However on 16th March 2012 (the same date that the AA was executed) BNS issued a duly signed letter of undertaking to Malmaison in which it (BNS) undertook to attend to certain matters addressed in the AA, with respect to relinquishing its interests in the assets of DHL and DML.

[11] OHL (the hotel) and DML (the marina) remained fully operational in the period between the execution of the AA and transfer of all the assets to the claimants.

[12] The claimants all visited and inspected the property on several occasions prior to the closing of the sale.

[13] The sale of the assets was consummated more than one year after the execution of the AA, although the actual date of consummation remains an issue between the parties.

Analysis

Can the defendants raise the issue of merger after the close of pleadings and without a stand-alone application to the Court.

[14] On this issue Mr Lee submitted on behalf of the defendants that merger is a legal principle which could be raised at any time. He argued that it was both unnecessary and inappropriate to plead law or the legal effect of particular facts[1] The statement of claim

[1] Desir v Alcide (2015] UKPC 24

and defence both addFessee--tl'le-Mas the preliminary contract followed by execut0A---0f-- the Deeds, therefore the issue of merger arises logically on the facts.

[15] Although the point was raised by the claimants Mr Prospere on reflection conceded that the doctrine is a legal principle which could be raised and considered at any time, once applicable to the facts presented. That position is supported by the statement of Michel JA in **Benedict Montoute v Vitus Frederick**[2] to wit:-

> *"Although neither of the parties in the court below referred to the merger principle or to the case of* ***Knight Sugar Company, Ltd. v The Alberta Railway*** & ***Irrigation Company,*** *and so the trial judge was not assisted by counsel in this regard and did not himself address either the principle or the case, the fact is that it is* a *legal principle applicable to the facts and circumstances of the case at Bar, which I unhesitatingly adopt and adapt.....*

[16] In view of this the point was no longer contested.

Was the AA merged and extinguished in the Deeds executed on 31st July, 2013.

[17] On this issue Mr Lee advanced the following arguments on behalf of the defiendants:-

(i) Merger is a long established legal principle with continued existence and applicability in this jurisdiction as recognized by the Court of Appeal in the **Benedict Montoute** case which cited the Privy Council decision in **Knight Sugar Company Limited v The Alberta Railway & Irrigation Company**[3] as the leading authority on the subject. There Mitchel JA explained the principle as follows:-

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[2] SLUHCVAP2014/0019 - delivered on 16th January, 2017, unreported, at paragraph 11 of the judgment
[3] [1938] 1 All **ER** 266

"Where parties enter into an agreement for the sale of land, which agreemenhs- intended to lead to the execution of a deed of sale between the parties, the agreement for sale is merged in the executed deed of sale and it is to the deed of sale and not the agreement for sale that one must tum to ascertain the terms of the contract between the parties."

(ii) In the AA the parties contracted for sale of immovable properties in which OHL and DML held freehold and leasehold interests, to be completed by subsequent deeds. As such the AA was intended to culminate in the Deeds. Applying the ruling in **Benedict Montoute,** once the Deeds were executed the AA became merged and extinguished in the Deeds. It is to the Deeds and not the AA that the parties must now look, to ascertain the terms of the completed contract between them.

(iii) The parties went out of the way to record the specific covenants concerning good and marketable title to the immovable property and leasehold interests to ensure those survived beyond completion. That was achieved by repeating almost verbatim clause 5(gg) of the AA in clause 1 of the Deeds[4] which secured the representations, warranties covenants and agreements relating to good and marketable title. Clause 2[5] of the Deeds secured covenants pertaining to the capacity of sellers to assign the leaseholds by ensuring that each such assignment was properly executed and delivered and there was no default in obtaining the necessary consents for proper execution.

(iv) Clause 5 of the AA contains some 34 sub-clauses and although it is stated that the representations, warranties and covenants therein are to survive closing, it is only clause 5 (gg) which was restated in the Deeds.

(v) There was good reason for preserving only these covenants in the Deeds, because the effect of merger by operation of law would have led to the logical and legal conclusion that the Deeds contained the final contract between the parties. By restating in the Deeds the

[4] See page 172 of the Application Bundle
[5] See Clause 2 (al to (e) on pages 172 -173 of AB

cm aflts' cherry picked the covenants that they expressly wanted to ensu-re---Rad survived beyond closing and execution of the Deeds. If the intent in the AA was to exclude merger, the claimants would not have needed to go on to make provisions for survival by restating specific covenants within the Deeds.

(vi) The Deeds were drafted on behalf of the claimants as the purchasers; they chose the form of words and gave final approval of the instrument. It was they who specifically selected, ring-fenced and protected the representations, warranties and covenants that they wished to survive and the meaning and effect should be given to what the parties have done.

(vii) Although the claimants assert that they were seeking to further protect themselves by restating only certain covenants in the Deeds and had they done nothing, the terms of the AA which were expressly stated to survive would have survived, the fact remains that the claimants restated only certain covenants from the AA in the Deeds. By so doing they preserved only the covenants which they believed should have been preserved. Whatever was not preserved must be considered as merged and extinguished in the Deeds, unless something more was done to preclude that outcome.

[18] Mr Propsere contends on behalf of the claimants as follows:-

(i) The defendants have conveniently adopted only a portion of the pronouncement made in the **Knight Sugar Company Ltd** case because the Privy Council in that case also stated that there may be exceptions to the doctrine of merger in instances, where covenants by their very nature or from the express terms of the contract, are intended to survive beyond completion. Clauses 5, 6(a) and 8 of the AA, all expressly provided that certain representations, warranties, covenants and agreements would survive beyond closing and execution of the Deeds.

(ii) The express intention of the parties was for those representations, warranties and covenants to survive the performance of the AA as well as the conveyance of the

immovable properties and assignment of the leasehold interests in the Deeds:- "The clauses are not ambiguously stated. They demonstrate the clear intent between the parties leaving no room to strain the interpretation of the language used to determine their intention. The defendants have deliberately avoided addressing the combined effect of clauses **4,** 5, 6(a) and 8 of the AA which excludes merger and are accepted as exceptions to the doctrine.

(iii) The defendants' assertion that exception does not apply because of the claimants' deliberate act of selected the covenants to be included in the Deeds, remains unsubstantiated in the face of the direct stipulations in the AA.. It is undisputed that DHL and DML were in financial disarray; the properties were not brand new and were being sold as a going concern. The claimants were seeking a bargain and expected the vendors to discharge certain responsibilities, taking into account the circumstances of this sale, one of which was a covenant for good repair stated in clause 5 (bb) of the AA.

(iv) Closing was defined at clause 4 of the AA to include execution of the Deeds and the survival clauses from their expressed wording were intended to go beyond closing. Having recognized the nature of the transaction and the claimants concerns with the current state of the commercial assets they were seeking to purchase, the AA contained at least three specific clauses which preserved pertinent representations, warranties and covenants beyond closing. It was therefore the explicit intention of the parties as stipulated in the AA.

[19] I have examined the legal authorities cited in reference to the doctrine of merger. It is the law that where parties enter into a contract concerning the sale and purchase of immovable property and subsequently execute a deed of conveyance to complete it, the law will presume that they intend the contract to be merged in the deed. In **Knight Sugar Company Limited**[6] the Privy Council explained the principle and exceptions in this way:-

> .. .. ***it is well settled that, where parties enter into an executory agreement which is to be carried out by a deed afterwards to be executed, the real completed contract is to be found in the deed. The contract is***

s See page 269 paragraphs E- Fof the judgemnt

merged in the deed: *Leggott v Barrett (1880) 15 Ch D 111 at p 114 "The most common instance, perhaps, of this merger is a contract for sale of land followed by conveyance on completion. All the provisions of the contract which the parties intend should be performed by the conveyance are merged in the conveyance, and all the rights of the purchaser in relation thereto are thereby satisfied.* ***There may, no doubt, be provisions of the contract which, from their nature, or from the terms of the contract, survive after completion. An instance may be found*** *in* ***Palmer v Johnson,*** *in* ***which it was held that a purchaser could, after conveyance, rely upon a provision of the contract and obtain compensation. The foundation of this decision was that, upon the construction of the contract, the provision for compensation applied after completion.*** *In* ***other words, the parties did not intend it to be performed by the subsequent deed, and it was therefore not satisfied by, or merged in, that deed ....."*** *(Emphasis Added)*

[20] In the **Benedict Montoute** case the Court held that a simple one page agreement for sale of land signed by the appellant on an earlier date had merged with the subsequently executed deed of sale and the later document contained the completed contract between the parties. Consequently the Court looked to that deed to determine the terms of the completed contract between the parties.

[21] The agreement for sale in that case was a simple one page letter agreement which solely concerned the sale of a parcel of land and contained no provision for survival of any provisions. I consider these circumstances to very different to that of the present case where the AA was a verbose and lengthy document, laden with a myriad of warranties, representations and covenants to bring about the desired outcome of the transaction and stating that some of those were to survive closing and execution of the deeds. The AA concerned more than the sale of land and in summary this included unencumbered good and marketable title to the immovable properties and leasehold interests being sold as well as the seamless handover of the operations of the hotel resort and marina facilities, as a going concern.

[22j As I understand the doctrine it is that if parties to a stmpte contract embody the terms in a deed which they all execute, the simple contract is thereby discharged. The rational is that one cannot have two agreements covering the same matters at the same time. However the authorities also accept that the doctrine may not apply in instances where the contractual obligation is such that it cannot be supposed to have been the intention of the parties that it should be fully extinguished by the conveyance.7 Stamp J in Hiss;ett and Another v Reading Roofing Co Ltd[8] noted that if there are matters dealt with in a parole contract which are not covered by the deed the parties to the contract which has been reduced to writing might intend that there should be something in the contract which should exist notwithstanding that it was not put in the contract in writing. The remarks of Bowen LJ in ***Palmer v Johnson***[9] were highlighted in support, as saying:-

> "*.....In the* same *way, when one is dealing with a deed by which the property has been conveyed, one must* see *if it covers the whole ground of the preliminary contract. One must construe the preliminary contract by itself, and see whether it was intended to go on to any, and what, extent after the formal deed had been executed....."*[10] *[Emphasis Added]*

[23] The M contemplated not only the acquisition of immovable property but also "a*// of the assets of OHL and DML of every kind, nature and description, real and personal, tangible and intangible known and unknown including without limitation all of the assets and business of OHL and/or DML dlbla Marigot Bay Hotel, Discovery at Marigot Bay, the Marina at Marigot Bay and the Marina Village* St. *Lucia BWI"* Schedule A and sub-schedules A1 to A9 identify all the assets to be sold including immovables, movables, cash, accounts, notes receivable, intangible personal property, trademarks, franchises, articles of furniture, utensils and fixtures used in the operation of the resort and marina, dormain names, servers, URL's and logos, amongst others.

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[7] Hissett and Another v Reading Roofing Co Ltd [1970] 1 All ER 122 at 127
[8] supra note 7
[9] [1881-85] All ER Rep 719 at 722
[10] See page 127 of the judgment

[24] The claim is based largely on alleged breaches of the M, with respect to clauses 5, - - and 11 which contain the plethora of representations, warranties, covenants and agreements to be performed by DHL, DML and Mr Coyne with respect to conveying marketable title in the immovable property, the assignment of leasehold interests as well as the transfer of several other assets in various forms, not covered by the Deeds.

[25] Clause 5 of the M which concerned obligations of DHL and DML as the first sellers expressly stated:-

> *:in order to induce the Purchaser (and its designees and assigns) to execute and peliorm this agreement, each of OHL and DML (collectively the "First Sellers'? and the BNS Receiver does hereby jointly and severally represent, warrant, covenant and agree* ***(which representations, warranties, covenants and agreements shall be and be deemed to be continuing and survive the execution, delivery and performance of this Agreement and Closing)*** *as follows ....."*[11] *[Emphasis Added]*

[26] Clauses 6 (a) which concerned the obligations of Mr Coyne as the BNS Receiver stated:-

> *:in order to induce the Purchaser (and its designees and assigns) to execute and peliorm this agreement the BNS Receiver hereby represents, warrants, covenants and agrees* ***(which representations, warranties, covenants and agreements shall be and be deemed to be continuing and survive the execution, delivery and performance of this Agreement and Closing)*** *that....."*[12]

[27] Clause 8 which concerned the obligations of Malmaison as purchaser stated:-

> *:in order to induce the Sellers, BNS Receiver and FCB Receiver to execute and peliorm this Agreement, Purchaser does hereby represent, warrant, covenant and agree (which representations, warranties, covenants and agreements shall be and*

[11] See page 26 of Application Bundle
[12] See page 43 of Application Bundle

be deemed to be continuing and survive the execution and delivery of this Agreement and Closing) as follows:-.....''[13]

[28] The claimants say that by virtue of the foregoing clauses the doctrine of merger was without ambiguity excluded by the AA in relation to these clauses and it was within the contemplation of all the parties that these representations, warranties and covenants would survive beyond closing.

[29] The definition of closing is given at clause 4 and it encompasses execution of the Deeds with respect to the immovable properties and assignment of the leasehold interests[14]

[30] The Deed which is recorded as Instrument No. 3502/2013 provided in clause 1 which concerns sale and transfer of immovableproperty that:-

> *".....THE VENDOR does hereby represent, warrant, covenant and agree (which representations, warranties, covenants and agreements* ***shall be and be deemed to be continuing and survive the execution, delivery and recordation of this instrument)*** *that: (a) THE VENDOR owns and has good marketable title in and to THE FREEHOLD PROPERTY free and clear of all liens, claims and encumbrances and rights and options of others; and upon the execution and delivery of this instrument THE PURCHASER shall acquire good and marketable title in and to THE FREEHOLD PROPERTY free and clear of all liens, claims and encumbrances and rights and options of others; (b) the execution, delivery and peitormance of this instrument is within the power and authority of the of THE VENDOR, has been authorized by the taking of all required actions, does not violate the constitutional documents of THE VENDOR or any law or any agreement to which THE VENDOR is a party or by it or its assets are bound....."*[15]

[31] Clause 2 which concerned assignment of rights, title and interest in emphyteutic leases stated:-

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[13] See page 49 of Application Bundle
[14] See pages 19 - 20 of the Application Bundle
[15] See page 172 of Application Bundle

" *THE VENDOR does hereby represent, warrant, covenant and agree (which representations, warranties, covenants and agreements shall be and be deemed to be continuing and survive the execution, delivery and recordation of this instrument) that :.....*"

[32] The Deed which is registered as Instrument No. 3503/2013 preserved the representations, warranties and covenants in relation to the assignment of rights, title and interest in emphyteutic leases and stated in the consideration clause that:-

"*.....THE VENDOR does hereby represent, warrant, covenant and agree (which representations, warranties, covenants and agreements shall be and be deemed to be continuing and survive the execution, delivery and recordation of this instrument) that :.....*"[16]

[33] The Privy Council in the **Knights Sugar Company Ltd** case acknowledged on the authority of **Palmer v Johnson**[17] that exceptions to the principle of merger may exist, where a term of the contract by its very nature survives or where the parties have themselves expressly stated that a term in the contract is to survive beyond conveyance.

[34] I am mindful that it was only the warranties, representations and covenants concerning unencumbered and good marketable title to the immovable and leasehold properties which were restated in the Deeds and expressed to survive beyond execution and registration of the Deeds. It was not the full version of clause 5(gg) of the AA, which itself concerned every piece, part and portion of the "property" where property was defined to include much more that the immovables and leasehold interests transferred in the Deeds.

[35] In my view there were other warranties, representations and covenants unrelated to immovable and leasehold properties which could not have been intended by the parties to be performed and satisfied in the Deeds and the performance of which were stated in the AA to survive beyond closing. Some of them can be found at clause 5 (g) to (k) and clause

[16] *See page 181 of Application Bundle*
[17] (1883) 12 Q.B.D. 32

5-{bb). I amnot persuaded by the defendants' argument that all matters which were not expressly stated to survive in the Deeds were merged and extinguished.

[36] The Deeds only covered part of the transaction which concerned the immovable properties and leasehold interests and insofar as there remained other obligations in clauses 5 and 6 (a) which dealt with assets other than those conveyed in the Deeds which were stated to be able to survive beyond closing, these could not have been merged or extinguished in the Deeds.

[37] I concluded that the AA did not merge in all respects and make the following findings:- (i) with respect to the performance of the representations, warranties and covenants concerning the immovable and leasehold properties conveyed in the Deeds the parties must look to the Deeds for the completed contract; (ii) with respect to the performance of the representations, warranties and covenants concerning assets not transferred in the Deeds and which were stated as surviving beyond closing the parties must look to the AA for the terms of the contract and (iii) any other matters which do not fall within (i) and (ii) above are merged and extinguished in the Deeds.

Did the series of representations, warranties and covenants in clauses 5 and 6 of the AA (as amended) require DHL and DML to provide the claimants with more than unencumbered title to the assets sold, including those set out in Schedule A and sub-schedules A-1 to A-9 of the AA

[38] The defendants argue that clause 5 of the AA contained some 34 sub-clauses comprising a range of representations, warranties and covenants, which for the most part concerned verification that OHL and DML were the lawful owners of the property to be sold and were in fact empowered to sell same; that no debts were owed, save what has been disclosed and there were no eminent action by Government, other agencies or private entities which would affect sale of the property. There are only two clauses which depart from this general theme of good and marketable title and they are clauses 5(bb) and 5(hh) which concern (i) good condition and repair in relation to the buildings, other structures and improvements made on above or beneath the freehold and leasehold properties, (ii) latent

or patent defects in the improvements, Biif-eesi§-A- and as-built conditions in relation to accumulation or run-off of surface and storm water on the property and adjacent lands, (iv) encroachment over the boundary lines, (v) rights of way or easements and (vi) encroachment by adjoining land owners, to name a few.

[39] Sub-clause 5 (bb) Mr Lee contends, must be interpreted in the context of the other sub-clauses in clause 5 which addressed mainly the issue of unencumbered title to the assets listed in sub-schedules A1 to A7 in relation to the defendants. The inclusion of the element concerning encroachment unto adjoining lands and potential claims by adjacent land owners, in that clause, confirms that sub-clause 5(bb) is also aimed at ensuring that no challenges would exist in securing unencumbered title to the property.

[40] Sub-clause 5(hh) he submits only represents that all prior representations are correct and an undertaking to make all the representations again at the closing. It does not impose any obligation other than providing unencumbered title.

[41] Clause 6, Mr Lee says, comprises 4 sub-clauses which are again directed at ensuring that the claimants receive good marketable title and speaks of the sellers conveying acceptable title at closing. Acceptable is defined as good, valid and marketable title in and to the property of OHL and OML. Clause 6 (c) reinforces this by defining defects as *"liens, claims, charges, pledges, security interests hypothecs, mortgages, and encumbrances ....which would or might ....preclude, prevent or limit the ability of the BNS Receiver to satisfy his obligations under subparagraph 6 (b)....."*

[42] He submits that clauses 5 and 6 were unaffected by the amendments to the AA and as such imposed no duty or obligation on the Mr Coyne, OHL and OML beyond providing unencumbered title in the properties sold to the claimants

[43] In answer the claimants submit that the representations, warranties and covenants at clause 5 of the AA did not only speak to unencumbered title to the assets sold.

[44] Of the 34 sub-clauses set out in clause 5 only 3 specifically dealt with unencumbered title while 31 others concerned issues such as formation, authority, finder fee, contracts, litigation, taxes, benefit programs, compensation, financial statements, books and records, real property, trademarks, insurance, liabilities, tax returns, material changes, constitutional documents, licenses, zoning, government consent, accuracy of representations eminent domain, bankruptcy, the BNS debentures and the NS Receiver.

[45] There are specific sub-clauses which speak to other matters, such as clause 5 (bb) which expressly stated that the property was to be sold in good condition and repair amongst other things, which is no less important than the overarching covenants for unencumbered title. Mr Prospere submits that the defendants' obligation was not only to provide unencumbered title to the assets but went beyond that to a number of others matters involved in conveying the assets in acceptable condition.

[46] My reading of the representations, warranties and covenants contained in clause 5 and 6 makes it is easy to conclude that generally the clauses concerned the ability to provide unencumbered title to the property. Their substance clearly goes to the issue of whether the DHL and DML could provide the claimants with unencumbered title in all respects and to ensure that there would be no challenges to the pathway for good and marketable tittle. However interspersed in clause 5 in particular are several others clauses which touch and concern matters relating to latent defects, structural integrity, esthetics, smooth transfer of business operations in relation to employment, accounting documents, franchise, trademarks, unit leases, existing business contracts with service providers and the like. Some of these are captured at clause 5 (g) (h) (i) U) and (k) and seem to facilitate instead a seamless transition into the operations of the businesses already in existence.

[47] Based on the forgoing I am persuaded by the claimants' arguments on this issue and find that DHL and DML were required to provide not just unencumbered title to the immovable assets sold but also acceptable transfer of all the required assets to maintain a full service hotel, marina and commercial facility, which extends also to the personal, tangible and intangible assets listed in Schedule A and the sub-schedules A1 to A7.

Were DHL and DML obligated to deliver to the claimants all of the assets described in Schedule A and sub-schedules A-1 to A-9 of the AA

[48] The claimants' contention here is that the AA at clause 2 made provision for conveyance of the property and clearly stated that upon payment of the purchase price the *"Property"* was to be conveyed to the claimants. The property is defined in the first recital on page 1 of the AA and reads:-

> "..... *all of the property and assets (real, personal, tangible, and intangible) described on Schedule A annexed hereto ('1he "Property'? .....*"

[49] This means that all the assets and property comprised in Schedule A were intended to be sold and transferred to the claimants. It is not disputed that the purchase price was paid and as such the claimants say they ought to receive everything listed in Schedule A.

[50] The defendants' rebuttal is that the entire AA must be read in conjunction with the Schedules to answer this question. The property is defined in the recitals as the property and assets described in Schedule A. Clause 4 of the AA in particular sets out meticulously what is to be delivered by Mr Coyne, DHL and DML to the claimants at closing. What is set out in clause 4 does not coincide in all respects with what is set out in Schedule A. For example in relation to cash, item (i) in Schedule A speaks generally to all cash and accounts and notes receivable as at the closing date.

[51] While the claimants rely on Schedule A and the recitals to say that everything that could possibly be property of the defendants was to be transferred to the claimants on closing, clause 4 sets out the specific detail of exactly what was to be transferred and how it is to be transferred at the closing date. Thus a reference in Schedule A of accounts and notes receivable is provided for at clause 4(b) (0) which makes express provision for how the accounts and notes receivable are to be transferred. While there is no mention of cash in that clause it does arise at 4 (b) (II) which makes specific mention of the particular cash to which Schedule A applies. Since cash is not specifically defined in the AA one cannot merely turn to Schedule A to say that it is a defined list of what is to be transferred without looking to other clauses in the AA. In assessing whether the defendants have transferred

the necessary assets to the claimants one has to turn to clause 4 rather than to Schedule A and recitals because the latter does not override or trump the operative clauses of the AA. Schedule A is merely supportive of clause 4 and where there is uncertainty the explanation or definitionmust be gleaned from clause 4.

[52] The contract was itself exhaustive with unnecessary details but spelt out what was to be transferred in clause 4. The only real issue relates to the cash in Schedule A which is in general terms but clause 4 says what cash is intended to be conveyed and thus the express terms of the AA limits the scope of item (i) of Schedule A.

[53] In addition Mr Lee says, Schedule A-8 & A-9 are not applicable to the defendants and contain a description of immovable properties which do not belong to any of the defendants. These properties belong to other companies involved in the AA under another receivership, who are not parties to the present claim.

[54] I observe in Schedule A the references the sub-schedules AB and A9 concern ownership to parcels of land belonging to other parties not presently engaged in this claim.

[55] I have perused the recitals, clauses and Schedules referred to by Counsels and find merit in the position advanced by the defendants. It is difficult to see how the matters outlined in Schedule A can be viewed in isolation where substantive clauses in the AA speak to how these items are to be treated in terms of scope, content and method of transfer at closing. It is trite law that the terms of a contract must be construed not in isolation but rather in the context of the totality of the contract.

[56] Consequently I am of the firm view that OHL and DML were obligated to deliver to the claimants all the assets stated in Schedule A and the sub-schedules A1 - A? in conformity with the other substantive provisions of the AA which deals with those assets.

1s the--ctaim fund limit of US$1,750,000.00 created under clause 4{d} of the AA only applicable to title defects in the assets sold to the claimants as set forth in clauses 6 (b) and (c) of the said AA and did not limit liability for breaches of representation and warranties and/ or failure to perform covenant obligations with respect to other violations including property conditions, repair and maintenance

[57] In summary the claimants asserts that the point for consideration here is whether there was an absolute limit of US$1,750,000.00 ("the claims fund") for title defects or whether that liability is open ended. The answer, Mr Prospere says, is to be found in clauses 6 (d) and clause 7 of the second amendment to the AA. Clause 6(d) expressly established an absolute limit on the expenses to be incurred by Mr Coyne in meeting the obligations under clause 6 (a) and (b) which included defects. That limit must now be read in conjunction with clause 7 which sought to modify the effect of clause 6(d). He admits that the language is long winded, but clause 7 is applicable to claims which are not covenant claims. Covenants claims are any claims arising from a breach of clauses 9 and 11. The amendment enabled the claimants to pursue any covenant claims or seek a reimbursement in excess of the claims fund limit if the defendants failed to fully and timely perform any of their obligations under clause 6. If however closing is successfully consummated and the defendants fully and timely performed all matters under clause, there is an automatic waive of all covenant claims or any amount in excess of the claims fund limit. Thus the claimants argue that it is still open to them to make a claim against Mr Coyne if there has not been full and timely performance of any obligations under clause 6.

[58] Clause 9 preserved the status quo to DHL and DML operating as going concerns from the date of execution of the AA until closing to avert further ruin of the assets. Clause 11 created obligations on defendants at the time of closing to show that their obligations under the AA had been fulfilled. Clause 6 (b) and (c) spoke to covenants by the parties to give effect to the AA. Clause 6 (a) appeared to prohibit the defendants from making any misrepresentations to the claimants during the term of the AA. Clauses 9 and 11 also refer to 6 (b) & (c) but not to 6(a). The claimants accept that there is an overlap between the obligations in clauses 6, 9 & 11 but this does not extend to 6(a). Thus the claims fund limit

woaldbe applicable only to claims which fall outside of clauses-9, t1 and by extension 6 (b) & (c). The end result being in the event of any misrepresentations and misstatements, a claim arising from clause 6 (a) would be at large and not constrained by the claims fund limit.

[59] Mr Lee in answer says there is no dispute that clause 6 (d) established an absolute limit in relation to claims. It was agreed that a sum from the purchase price would be retained to facilitate or address deficiencies in the performance of the obligations under clauses 6(b) and (c) up to a limit of the sum stated in clause 6(d). That sum would have remained in existence after closing, however clause 7 of the amendment says if Mr. Coyne, OHL and DML fully and timely perform all obligations all claims will be waived. Clause 7 (b) applies to the first sellers OHL and DML, clause 9 to the obligations between the signing of the AA and closing and clause 11 to the obligations between signing of the AA and closing, and immediately prior to the closing. If clause 6 can be seen as encompassing all the obligations under the AA and clause 7 says in the event that the defendants have fully and timely performed at closing the claimants will waive all covenant claims in excess of the limit of the claim fund, then once all obligations were executed as planned the claim fund would remain with the sellers since it set aside from the purchase price. If all obligations are performed as intended under clause 6 there can be nothing left to be done under clauses 9 and 11.

[60] The defendants submit that the problem with the amendment is that the definition of covenant claims under 9 & 11 includes claims under 6 because clause 11 (y) require performance of clauses 6 (b) and (c). By extension claims in respect of breaches under clause 6 (b) and (c) would be constrained by the fund limit. Theses clause referred back to the obligations under clause 6 and they also include performance of clauses 9 & 11. The *effect* of clause 7 therefore is that all claims in relation to clauses 6, 9 & 11 are limited despite the amendment which says it relates to claims under clauses 9 and 11.

[61) Mr Lee invited the court to consider dause---7- as a-dassic case of ambiguity and to apply Article 951[18] of the Civil Code[19] so that the contra preferentem rule will operate in favour of an interpretation against the purchasers who were responsible for preparing the AA and should not be permitted to benefit from the ambiguity in the clause.

[62) I have considered the contending arguments on this point and perused the relevant clauses. As far as I can glean the position stated by Mr Prosper and conceded by Mr Lee to some extent is that there is an overlap between clauses 6 (b) & (c), 9 and 11 of the AA. The essence of clause 6 (a) is not captured in the substance of clauses 9 and 11 and as such could not be considered as forming part of covenant claims. Consequently so long as full and timely performance occurs at closing all covenant claims under clauses 9 and 11 and by extension clauses 6 (b) and (c) which were intended to be covered by the claims fund would be waived and only claims relating to 6 (a) can be pursued.

[63) I am prepared to accept as the most reasonable interpretation of clause 7 that any claims regarding misrepresentations and misstatements arising from 6 (a) would be at large and unfettered by the claims fund limit. Thus any claims falling outside of covenant claims will not be restricted by the limit set.

Is BNS bound by clause 6 of the AA, as if it were party to the AA, by virtue of the letter of undertaking given on 16th March, 2012.

[64) The claimants submit that on 16th March, 2012 BNS provided a letter of undertaking to Malmaison which has caused BNS to be bound by the terms of clause 6 of the AA. There could have been no commercial efficacy to the letter unless there was an intention on the part of BNS to contractually bind itself to certain aspects of the AA. The letter contained the operative section at paragraph 2 and at sub-paragraph 5 BNS expressly stated that it

[18] 951. In cases of doubt, the contract is interpreted against him or her who has stipulated, and in favour of him or her who has contracted the obligation.
[19] Cap 4.01 of the Laws of Saint Lucia

agreed and consented to clauses 2(a}, 4(bJ{i)(-A-,, 8(b) and (c) of the AA. The letter was duly executed by BNS and Malmaison.

[65] To support their position the claimants rely on dicta of Moore-Bick LJ in **Reilly v National Insurnce & Guaranty Corporation Ltd**[20] concerning the interpretation to be given to language used in commercial documents and classified the letter of undertaking as a commercial document. Thus the words therein should be construed in their ordinary and popular sense and in accordance with sound commercial principles and good business sense.

[66] Mr Prospere submits that the language in clause 5 of the letter is unambiguous and begs the question, would BNS expressly agree and consent to certain provisions of the AA for the benefit of the purchasers. The letter was a guarantee for performance of the terms of the AA by Mr Coyne, OHL and DML. Further the undertaking was necessary in a commercial sense to induce the claimants to enter into the AA. At that time DHL and DML were in financial disarray and the business efficacy rule are applicable, in that an officious bystander being made aware of the facts would say that the claimants would not have entered into the transaction if the BNS was not involved. It offered the claimants comfort that the terms of the AA could be performed and its involvement in the transaction was necessary in causing the AA to fructify.

[67] Mr Lee refutes by saying that the undertaking given by BNS simply requires the basic principle of interpretation of what the language in the document should be understood to mean by an ordinary person. BNS was not a party to the AA so despite the fact that the AA made reference to BNS paying for title insurance, there was no way of enforcing that because of the doctrine of privity of contract as provided in Article 955 of the Civil Code [21] To enable performance of these specific things some provision had to be made for BNS to be held responsible for these matters and the letter of undertaking was issued for that purpose. There are specific things that the BNS undertook to do as stated in the letter.

[20] [2008) EWCA Civ1480 at paragraph 10

[21] Article 955. Contracts have effect only between the contracting parties; they cannot affect third persons, except in the cases mentioned in the articles of the Fifth Section of this Chapter

Paragraph 1 the-letter-deals-with things that only SNS could do and are related-to its rights over the property. Clause 2 (a) of the AA has no responsibility for SNS to undertake also at 4(b) (i) (A) there is nothing to be done. At clause 6(b) and (c) there is nothing for to be done and paragraph 5 of the letter is merely saying that SNS agrees and will not object to the matters in these clauses. The operative parts of the letter are in sub-paragraph 1 which says what SNS has to do and demonstrates the business efficacy of the undertaking as otherwise the AA could not be consummated. The intervention of SNS was not required for satisfaction of the matters in paragraph 5 of the letter. The language used in paragraph 5 when contrasted with the other paragraphs makes it clear that there was no intention by SNS to be bound by the provisions of clause 6 of the AA.

[68] In addition Mr Lee submits that terms may not be readily implied into a contract except if the parties intended it to form part of the contract. In support of the defendant's position he relied on the case of **Attorney General of Belize v Belize Telecom Limited** [22] where the Privy Council agreed that:-

> "*.....An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that* a *term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been* a *term that went without saying,* a *necessary term to give business efficacy to the contract,* a *term which though tacit, formed part of the contract which the parties made for themselves .....*"[23]

[69] It could not be said that SNS guaranteed the performance of the clauses in paragraph 5 of the letter when nothing of the sort was stated in the letter. Additionally the concept of the officious by-stander has been frowned upon by recent authorities and the letter works

[22] [2009] UKPC 10 at paragraphs 17 - 21

[23] See:Trollop & Coils Ltd v North West Metropolitan Regional Hospital Board [1973] 1 WLR 601, 609

without implying a guarantee. Even if it does there is no place to infer implied terms into the AA.

[70] I have examined the contents of the letter issued by BNS and conclude that the Bank undertook to perform the matters which were required to be done by it to give efficacy to the AA and gave its approval to some of the terms contained in the AA. That to my mind could not be said to equate to binding oneself as a party to the AA. Applying the principle of privity of contract and the established authorities on implying terms into a contract I would find myself constrained in arriving at the interpretation which the claimants seek to place on the letter of undertaking. It is simply what it was stated to be, an enabling intervention to allow the AA to come to fruition and nothing more.

[71] I concluded that BNS only undertook to carry out certain obligations in relation to relinquishing its interest in the immovable property being sold to the claimants and in no way became a party to or bound itself to the performances of the clause 6 of those mentioned in paragraph 5 of the letter.

Conclusion

[72] I therefore make the following orders:-

1. With respect to performance of the representations, warranties and covenants which concern unencumbered and good marketable title to the immovable and leaseholds properties conveyed in the Deeds, the parties must look to the Deeds for the completed contract.

2. With respect to performance of the representations, warranties and covenants which concern assets not transferred in the Deeds and which were stated as surviving beyond closing the parties must look to the Acquisition Agreement for the terms of the contract.

3. Any other matters in the Acquisition Agreement which do not come within the scope of 1 and 2 above would be merged and extinguished in the Deeds.

4. The second and third defendants were required to provide not only unencumbered title to the immovable assets but also acceptable title to all other assets listed in Schedule A and sub-schedules A1-A7.

5. The second and third defendants were obligated to deliver to the claimants all the assets stated in Schedule A and sub-schedules A1- A? in conformity with the applicable substantive provisions of the Acquisition Agreement which deals with those assets.

6. Any claims regarding misrepresentations and misstatements arising from clause 6 (a) falls outside of covenant claims and will not be restricted by the claims fund limit set out in clause 6(d).

7. The fourth defendant undertook to carry out obligations in relation to discharging its interests in relation to the assets being sold to the claimants and did not become a party to or bind itself to the performance of the clause 6 of the Acquisition Agreement or the other clauses referenced in paragraph 5 of the letter of undertaking.

8. Costs will be cost in the cause.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar