EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

[CIVIL]

SAINT LUCIA

CLAIM NO. SLUHCV2021/0044

BETWEEN:

1. **JAMIE AND SUSANNAH LTD.**
2. **PRIESTLEY DESIGNS LTD.**

(Representing owners of villas of the Sugar Beach Resort, Soufriere, Saint Lucia)

Claimants

And

SUGAR BEACH MANAGEMENT LIMITED

Defendant

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini High Court Judge

Appearances:

Mr. Garth Patterson KC, with Mr Mark Maragh and Ms Taylor Laurayne for the Claimants
Mr. Peter Foster KC, with Ms Renee St Rose, Ms Marie-Ange Symmonds and Ms Shari-Ann Walker for the Defendant

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2023: May 22; 23, 24;
June 14;
October 5;6;
November 21;
2024: February 29;
June 4;
2025: June 13

JUDGMENT

[1] **ST ROSE-ALBERTINI, J. [Ag]:** The claimants are owners, for the time being, of villas comprised in the touristic development known as Sugar Beach Resort, in Soufriere. Pursuant to order dated 14th April 2021, the twenty-six claimants listed in the Schedule to the order are represented by Jamie and Susannah Ltd. and Priestley Designs Ltd. (all together "the claimants"). The defendant, Sugar Beach Management Limited ("SBML"), is a company engaged in hotel management services and manages and operates Sugar Beach Resort ("the Resort"). Each of the claimants are party to a Management and Rental Pool Agreement ("the MARPA") with SBML and are suing SBML for breach of the MARPA.

[2] The claimants say that on a true construction of the MARPA: (i) SBML is obligated to maintain, repair and improve the villas including carrying out capital works and repairs; (ii) any costs incurred by SBML in complying with that obligation must be borne by SBML alone, subject only to payment by owners of the maintenance charge; and (iii) SBML is not entitled to charge owners or deduct from the return payable to them for the rental of their villas any costs or expenses incurred in carrying out such works, other than the maintenance charge. The claimants seek declarations and orders to this effect, as well as damages for breach of contract, interest, and costs.

[3] SBML contends that, under the MARPA, its obligations are limited to management of the rental pool operation. Therefore, its obligation to maintain the villas and the maintenance charge payable by owners is in relation to the services provided by it as Manager of the rental pool operation, which is upkeep to prepare the villas for guest occupancy. Capital repairs and works involve substantial changes to the villas and are not general maintenance and upkeep of premises that are the obligations of a manager. SBML contends that the words in the MARPA must be given their natural and ordinary meaning and interpreted to make commercial sense. In so far as the MARPA is silent on works beyond maintenance and upkeep, the owners are obliged to pay all such other costs and SBML is entitled to charge or deduct from the rental pool return, fees, costs, or expenses for capital works. SBML asks that this claim be dismissed with costs.

The Issues

[4] The principal issues for consideration are:

1. Whether, on a true construction of the MARPA, the defendant is under an obligation to maintain, repair and improve the villas?
2. If so, whether on a true construction of the MARPA, the defendant is obligated to carry out capital works and repairs on the villas?
3. If so, whether, on a true construction of the MARPA, the defendant is required to bear the costs of carrying out the capital works and repairs to the villas?
4. Whether the defendant has committed a breach or anticipatory breach of the MARPA by signaling an intention to deduct the costs of replacing the roofs of villas from owners' respective rental revenues?
5. Whether owners are entitled to damages for breach of contract and if so, the quantum of such damages?

Claimants' Case

[5] Between 2008 and 2013, SBML entered into the MARPA with the owners of villas comprising the Resort. The MARPA took a standard form, and was substantially the same between SBML and each owner. Under the MARPA, the owners agreed to commit their respective villas to a rental pool operation managed by SBML, whereby the owners were entitled to occupy their villas for four weeks per year and SBML was entitled to rent the villas for the remainder of the year. SBML was entitled to retain 62.5% of all net rent earned from the rental of the villas (the "Rent") and the remaining 37.5% was to be pooled amongst the owners (the "Pooled Rent"). The owners were entitled to a quarterly distribution of their assigned portion of the Pooled Rent, less a maintenance charge and insurance contribution (the "Owner's Return").

[6] The owners agreed to pay SBML a maintenance charge for upkeep and maintenance of their villas at the end of every quarter. The maintenance charge was US$2 per square foot of the covered area of the relevant villa per year (the "Maintenance Charge"). In exchange

for this payment SBML agreed, inter alia, to provide all services required to maintain the villas to the operating standard. The operating standard was defined as "…..the operating style and standard of the Development which shall conform to the standards, systems, and operating procedures of other leading first-class resort hotels in St. Lucia" ("the Operating Standard"). In furtherance of this obligation, SBML was entitled to "make such repairs and improvements as deemed necessary to maintain the [villas] to the Operating Standard, in its absolute discretion, and without any prior authorization."

[7] Thus, the claimants assert that the MARPA imposed an expressed obligation on SBML to "maintain", which included the obligation to not only "repair" but also "improve" the villas as necessary to maintain them at the Operating Standard. This included carrying out capital repairs and work (the "Capital Works").

[8] Alternatively, the claimants contend that it was an implied term of the MARPA, based on the common intention of the parties, representations made by SBML and the course of dealings between the parties that SBML's obligation to maintain, repair and improve the villas to the Operating Standard would be strenuous and wide-ranging and would include the provision of capital works.

[9] In support, the claimants state that prior to 2008, owners were required to sign a management and rental pool agreement (the "Former MARPA") with Jalousie 1996 Limited ("Jalousie"), from whom they purchased their villas and is the parent company of SBML. The Former MARPA expressly provided that all repairs, restorative maintenance, refurbishment, replacement, or renovations to the villas, save for "preventative maintenance" and replacement of consumable items up to a cost of USD$50, were at the owners' expense. In turn, under the Former MARPA, 50% of the net rental revenue received by Jalousie from rental of the villas was pooled for the benefit of the owners, as opposed to 37.5% under the MARPA. Jalousie retained 50% of the net rental revenue, a smaller profit than what is retained by SBML under the MARPA.

[10] Further, in or around 2008, Jalousie underwent a change of management, and the Resort was extensively refurbished and rebranded. Jalousie, or SBML, or their agents approached existing owners who were party to the Former MARPA, with a view to enticing them to enter

the MARPA, under which SBML would retain 12.5% more of the net rental revenue. In various advertising circulars, Frequently Asked Questions (FAQ) Sheets and email correspondence issued by SBML or its agents, SBML repeatedly stated that owners did not have to pay for upkeep and maintenance of villas, save for the Maintenance Charge. In or around April 2019, Jalousie was purchased by Misland Capital Ltd. ("Misland") and despite the change in management, the MARPA remained in place between the owners and SBML. However, prior to Misland's acquisition of Jalousie, in performing its obligations under the MARPA, SBML always carried out any major repairs, including capital works, to villas, of its own accord and at its own expense, subject only to owners' payment of the Maintenance Charge.

[11] Further, under the MARPA, the only payment obligation imposed on the owners is their quarterly payment of the Maintenance Charge and the Insurance Contribution. Moreover, the MARPA expressly enumerates the financial obligations owed by the owners to SBML. The limited instances in which SBML is entitled to make deductions from the Owners' Return, are (i) the Maintenance Charge and Insurance Contribution; any expense incurred by SBML because of its inability to provide the villa to a guest as a result of the owner holding over beyond its designated occupation period; and (iii) any expense incurred by SBML in removing and storing personal effects left by the owner in the villa.

[12] However, the claimants aver that in February 2020, SBML's agent advised a prospective purchaser of one of the villas that the Maintenance Charge covered only minor maintenance works and any major works (including repairs to the roofs, foundations and plumbing or capital works) would be at the owner's expense. In response to requests for clarification from owners, by emails dated 24th February 2020 and 13th March 2020, SBML's agent confirmed that the Maintenance Charge covered "maintenance" but not "capital spend" or capital repair costs. By emails dated 16th September 2020 and 9th October 2020 from SBML's agent to three different owners, SBML advised that it had undertaken an assessment of the roofs of their respective villas and recommended that entire roofs be replaced at an estimated cost of US$73,630.37; US$72,392.17; and US$38,349.03, respectively. SBML's agent further advised as follows: "This work constitutes a capital item and so does not fall within the scope

of your maintenance charge and as such the cost will be offset against your future rental income."

[13] The claimants say that by these emails, SBML identified works that are necessary to maintain the villas at the Operating Standard and is under an obligation to carry out the repairs identified at its own expense. However, in breach and/or anticipatory breach of the MARPA, by letter dated 4th November 2020, SBML confirmed that it would not be carrying out the repairs at its own cost. By further letter dated 8th January 2021, in breach and/or anticipatory breach of the Agreement, owners were advised that SBML has proceeded with the capital repairs required to maintain the villas but that it would be charging the costs to the owners. SBML has, therefore, evinced its intention to repudiate its obligations under the MARPA by refusing to bear the costs of maintaining the villas at the Operating Standard and by unlawfully deducting those costs from the Owner's Return without any basis, contractual or otherwise. This anticipated breach of the MARPA will inevitably cause owners, including the claimants, loss, and damage.

Defendant's Case

[14] SBML states that it is wholly owned by Jalousie and engages in hotel management services. The Resort is a Viceroy Resort owned by Jalousie, save and except those villas and residences that are owned by third parties. The Resort is managed exclusively by VIH Sugar Beach Ltd. ("VIH"), a company owned by Viceroy Hotel Group ("Viceroy") as a hotel operation pursuant to a Hotel Management Agreement between VIH and Jalousie. Jalousie is not involved in the management of the Resort. Misland is a representative of Jalousie and is also not involved in the management of the Resort.

[15] SBML asserts that on 30th May 2012 and 16th April 2012, Jamie and Susannah Ltd ("JSL") and Priestley Designs Ltd ("PDL") each entered into an Agreement for Sale with Jalousie to purchase parcels of land forming part of the Resort. Pursuant to these Agreements, they each entered into Construction Agreements with Sugar Beach Properties Limited ("the Developer") for the purchase and construction of their villas. They also entered the MARPA with SBML to commit the villas to a rental pool operation by which SBML would rent the

villas to the public. Under the MARPA, JSL and PDL agreed that SBML would delegate its management of the villas to Viceroy. Further, the Agreements for Sale and Deeds of Sale to each of them included covenants in relation to the use and maintenance of their property. SBML states that while the MARPA was in a standard form, most were accompanied by side letters which inserted terms into individual Agreements for Sale, Construction Agreements, and MARPAs. Further, any pre-contractual negotiations between villa owners and SBML are individual and cannot be considered collective terms of the MARPA.

[16] SBML contends that the essential terms of the MARPA are that the claimants shall commit their villa to the rental pool operation; SBML shall operate the Resort to the Operating Standard and the Rental Pool Operation in all its aspects; SBML shall provide managerial and administrative services in respect of the rental pool operation and account to each owner on gross room rental revenue, allowable deductions, and owners distributions in accordance with the Uniform System of Accounts for the Lodging Industry; SBML shall prepare each villa for guest or owner occupancy and provide cleaning services, guest amenities and all other services required to maintain the villa to the Operating Standard; should repairs and improvements to the villas be necessary, SBML may, at its absolute discretion and without prior authorization, make the repairs and improvements necessary to maintain the villas to the Operating Standard; SBML shall be entitled to retain 62.5% of all Rent derived from the rental of the villas and the remaining 37.5% shall be pooled among available villas in the rental pool operation and paid quarterly as owners distributions; and the claimants shall pay the Maintenance Charge and Insurance Charge every quarter for the maintenance, upkeep, and insurance of the villas.

[17] SBML therefore contends that its obligations as stated in the recitals of the MARPA, are to provide services for the management of the rental pool operation for a percentage of the rent derived from the villas. Its obligation to maintain the villas to the Operating Standard is, therefore, in relation to the services to be provided by it as Manager and the Maintenance Charge is in relation to the maintenance and upkeep of the villas to prepare them for guest and owner occupancy. The MARPA does not create an obligation on SBML to make repairs and improvements to the villas, although it retains the right to do so in its absolute discretion

if it deems it necessary to prepare the villas for occupancy. SBML asserts that capital repairs and works include substantial changes to the villas such as changing roofs, beams and structural repairs and are not considered general maintenance and upkeep of premises. SBML is not a landlord or proprietor of the villas, and the claimants retain a proprietary interest in their villas. Thus, capital repairs and works are not obligations of the manager who provides services under the MARPA. SBML states that the words in the MARPA must be given their natural and ordinary meaning. Further, SBML states that the claimants' interpretation of the MARPA as imposing an obligation on it to undertake capital works and repairs in exchange for the Maintenance Charge would make no commercial sense as the cost of replacement of JSL and PDL's roofs far exceed the annual Maintenance Charge payable by each of them. Further, the Maintenance Charge was never intended to include works beyond repair and maintenance.

[18] SBML also states that it was never the common intention of the parties that its obligation to maintain under the MARPA would be strenuous, wide ranging and include the provision of capital works. Contrary to the claimants' assertions, SBML contends that the claimants purchased the villas in 2012 and were not, at any time or at all, subject to any other form of agreement with SBML. Any contract or correspondence is confined only to those who are party to it. Therefore, the claimants cannot rely on the terms of previous contracts to which they were not a party and to which SBML was not a party to establish the common intent of the parties to the MARPA. Further, SBML has never represented to the claimants that it is responsible for the payment of capital works and repairs to the Villas. The correspondence referred to by the claimants predates the Agreement for Sale between the claimants and SBML and was not between SBML or its representatives or affiliates and the claimants and is therefore irrelevant. In any event, the MARPA includes an "entire agreement" clause, which precludes the inclusion of any previous agreements or negotiations into the interpretation of the MARPA.

[19] SBML asserts that the amount payable under the MARPA is based on the fees payable to Viceroy under the Hotel Management Agreement for exclusive management of the Resort which provides for the costs and benefit of being a Viceroy branded resort. This cost

increased significantly from 1st December 2012. Therefore, villa owners' reduced rental return entitlement from 50% under a pre-2008 Rental Pool Agreement to 37.5% under the MARPA is not indicative of an exchange whereby the management company absorbs all maintenance, repair, replacement and refurbishment costs in return for an increased percentage return. Instead, it is reflective of a commercial contract with a new management company with a different villa ownership and corporate management structure. Since becoming a Viceroy branded hotel, the costs in managing the Resort have increased significantly. Equally, the rental pool operation has become increasingly successful, and the villa owners have seen an exponential increase in rental pool returns.

[20] SBML states that the advertisements referred to by the claimants are not pre-contractual representations but general advertisements to the world at large, not intended to have any legal effect. Furthermore, the document contains the express disclaimer, that the information provided is a guide only and SBML and any affiliates or assignees accept no responsibility for the accuracy of the contents and advises all parties to obtain independent professional advice. SBML is accordingly not responsible for the statements therein. Further, SBML states that interpreting the statement that "the cost of maintaining the villa, gardens and furniture will be borne by the hotel" to include capital works regardless of cost makes no commercial sense. SBML also denies that any works undertaken by it on behalf of particular owners in particular circumstances was an express term of the MARPA, or a term implied by representations. SBML further denies that repairs undertaken (which in any event were not capital works) in a third-party villa would confer an obligation on it to undertake capital works on all villas.

[21] SBML contends that in so far as the MARPA is silent on works beyond maintenance and upkeep, the owners are obliged to pay all costs extending beyond maintenance and upkeep of the villas. Thus, it is entitled to charge or deduct from the rental pool returns of the claimants, fees, costs, or expenses for capital works. SBML admits the position taken in letters dated 4th November 2020 and 8th January 2021, that it would not be carrying out capital repairs at its own cost. However, SBML denies that it has committed a breach or anticipatory breach of the MARPA, and denies that any loss and damage will be suffered by

the claimants who are owners of the villas and directly benefit from the replacement of their roofs and capital works to the villas.

Claimants' Reply

[22] The claimants say that the commerciality of the terms of the MARPA must be considered in the whole context. In addition to the Maintenance Charge, SBML receives the majority of all net rent arising from the rental of the villas. The amount earned by SBML per year therefore far exceeds the cost of replacing the roofs. The 12.5% increase alone in the proportion of rental revenue retained by SBML means that this additional amount in 2019 alone was sufficient to cover the cost of replacing the roofs. These facts support their position that the increased revenue entitlement by SBML was the agreed consideration for SBML accepting responsibility for maintaining the villas including undertaking capital works. Further, the claimants state that any increased management fees payable to Viceroy under the Hotel Management Agreement and the increased profits the villa owners have received are both relative to the significantly increased revenues earned by SBML. They deny that the rental revenue payable to SBML under the MARPA is based solely on the fees payable to Viceroy as the revenue received by SBML far exceeds the management fees.

Issues 1, 2 and 3: Whether, on a true construction of the MARPA, SBML is under an obligation to maintain, repair and improve the villas, including carrying out capital works, at its own cost?

[23] The nub of the dispute is the scope of SBML's obligation to maintain, repair and improve the villas, in particular, whether such obligation extends to undertaking capital works. The dispute further concerns the question of whether any obligation on SBML to carry out capital works is covered by the Maintenance Charge paid by the owners, such that any additional cost must be borne solely by SBML, or whether SBML may charge any additional cost to the owners. Resolution of these issues will depend on the proper construction of the relevant provisions of the MARPA.

The Law

[24] The parties are in agreement on the applicable law of contractual interpretation. In their respective submissions, they refer to the same provisions of the **Civil Code**[1] and rely on the same judicial authorities. They, however, ask the court to arrive at different conclusions.

[25] The law relating to interpretation of contracts in Saint Lucia is governed by article 917A of the **Civil Code,** which states that the Law of England for the time being relating to contracts shall, mutatis mutandis, extend to Saint Lucia and articles 918 to 989 and 991 to 1132 of the **Code** shall be construed accordingly. The seminal English authority on contractual interpretation is the case of **Investors Compensation Scheme v West Bromwich Building Society**[2], where Lord Hoffman summarized the fundamental principles as follows:

> "(1) Interpretation is the ascertainment of **the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.**
>
> (2) **The background** was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it **includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.**
>
> (3) **The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent.** They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) **The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The**

[1] Cap 4.01 of the Laws of Saint Lucia
[2] [1998] 1 BCLC 493

meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 3 All ER 352, [1997] 2 WLR 945.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents**. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.** Lord Diplock made this point more vigorously when he said in Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios [1984] 3 All ER 229 at 233, [1985] AC 191 at 201:

'… if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.'"[3]

Analysis

[26] The Court has given due consideration to the evidence, the written and oral submissions, and the authorities cited, in this regard.

[27] In resolving this issue, the Court must determine the meaning the MARPA would convey to a reasonable person having all the background knowledge that would have been reasonably available to SBML and the claimants in the situation they were at the time of executing the MARPA. This background knowledge includes anything that would have affected the way the language of the MARPA would have been understood by a reasonable man, save the previous negotiations of the parties and their declarations of subjective intent. The Court is not obliged to confine the meaning the MARPA would convey to the reasonable person to the dictionary's meaning of the words used. The Court may seek to ascertain what the

[3] Pages 114-115

parties, using those words against the relevant background, would reasonably have understood them to mean.

Situation of the Parties

[28] In relation to the situation of the parties at the time of execution of the MARPA, the claimants were prospective purchasers of property on which a villa was to be built within the Resort. As purchasers, each claimant was to possess the freehold interest in their respective lot and villa. However, the villa was to be subject to a rental pool agreement, whereby the claimants would each be renting their villas to guests of the Resort for a substantial period of the year. SBML, as Manager, would manage the rental pool operation and the rent earned would be apportioned between the claimants and SBML.

Express Terms of the MARPA

[29] Before examining the relevant background, it is necessary to review the content of the expressed provisions of the MARPA and the meaning they convey regarding the obligations imposed on SBML. Both, the English common law, and article 950 of the **Civil Code** provide that in ascertaining the meaning of provisions of a contract regard must be given to the whole.

[30] The relevant provisions of the MARPA are as follows:

(a) Clause 5.1: **The Manager shall have the duty and responsibility to operate the Development to the Operating Standard and the Rental Pool Operation in all its aspects** and, in the operation of both, shall exercise such duty and responsibility utilizing competent and professional personnel and observing the highest standards of the tourist industry.

(b) Clause 5.3: **The Manager shall provide managerial and administrative services in respect of the Rental Pool Operation.**

(c) Clause 5.5: **The Manager shall prepare each Villa for occupancy** by Guests or by The Owner in accordance with this Agreement. **The Manager shall provide during Guest occupancy and Owner Occupancy all Innkeeper's supplies, cleaning supplies, daily**

cleaning services, guest amenities and linen laundry services and all other services required to maintain the Villa to the Operating Standard. Should repairs and improvements be necessary to the Villa, the Manager in its absolute discretion and without prior authorization may make such repairs and improvement as deemed necessary to maintain the Villa to the Operating Standard.

(d) Clause 1.15: **'Operating Standard' shall mean the operating style and standard of the Development which shall conform to the standards, systems and operating procedures of other leading first-class resort hotels in Saint Lucia**, without derogation from the provisions or obligations imposed on the Manager hereunder.

(e) Clause 6.5: At the end of each quarter during the Operating Year, **the Owner shall be obliged to pay the Maintenance Charge and Insurance Contribution to the Manager for the maintenance, upkeep, and insurance of the Property. In meeting this obligation, the Owner hereby consents to the deduction by the Manager of the Maintenance Charge and Insurance Contribution from the Owner's Rental Return due to him/her.** If such deduction is not sufficient to cover the Maintenance Charge and the Insurance Contribution, the Owner shall, within 30 days, remit sums due on presentation of an invoice by the Manager.

(f) Clause 1.9: 'Maintenance Charge' means the sum of US$2 per square foot per year of the covered area of the Villa, to be reviewed every two Operating Years in accordance with All Items Retail Price Index in the United Kingdom.

(g) Clause 4.1: … The Manager shall be entitled to deduct and retain 62.5% from all rent arising from the Rental Pool Operation with the remaining 37.5% of all rent arising from the Rental Pool Operation being pooled among the available villas prior to determining each villa Owners' Return…

(h) Clause 1.13: "Owner's Return" shall mean 37.5% of all rent arising from the Rental Pool Operation for the then current Operating Year… multiplied by the Owner's Share less a deduction of (a) the Maintenance Charge; and (b) the Insurance Contribution.

(i) Clause 14.1: No variation of, or amendment to, this Agreement shall bind either party unless made in writing and signed by both parties.

(j) Clause 14.2: This Agreement (and all documents referred to in it) constitutes the entire agreement and understanding of the parties, and supersedes any and all previous agreements, arrangements and/or understandings (whether written or oral) between the parties.

[31] From the express terms of the MARPA, SBML's duty as Manager is to manage the Development and the Rental Pool Operation. In respect of the rental pool operation, SBML is required to provide managerial and administrative services. Further, it is SBML's duty to prepare the villas for occupancy and provide all services required to maintain the villas to the Operating Standard, including all Innkeeper's supplies, cleaning supplies, daily cleaning services, guest amenities and linen laundry services.

[32] The MARPA then goes on to state that should repair and improvements to villas be necessary to maintain them to the Operating Standard, the Manager may, in its absolute discretion and without prior authorization, make such repairs and improvement. The Operating Standard to which the villas must be maintained by SBML is explicitly stated to concern the operating style and standard of the Development. The said operating style and standard must conform to the standards, systems, and operating procedures of other leading first-class resort hotels in Saint Lucia.

[33] Thus, there is absolutely no expressed obligation on SBML to maintain, repair and improve the villas. At most, there is a discretion to make repairs and improvements, should SBML deem it necessary. It is clear from the expressed provisions of the MARPA that SBML's duties are limited to managing the Resort including the Rental Pool Operation and preparing the villas for occupancy. Preparing the villas for occupancy is expressly stated to include providing various cleaning services including the suppliers, and guest amenity services. Although, the MARPA additionally states the SBML is responsible for *"all other services required to maintain the Villa to the Operating Standard"*, this cannot, to my mind, be interpreted as imposing an obligation to maintain, repair and improve villas, including carrying out capital works. I have arrived at this conclusion for the reasons which follow.

[34] First, the clause *"all other services required to maintain the Villa to the Operating Standard"* must be considered in the context of the duties of SBML, as manager of the Resort and the rental pool operation. I agree that SBML is simply a management company responsible for managerial and administrative services albeit at the highest standard in the tourism industry. This must be contrasted with the claimants' position as registered proprietors of the freehold

interest in their respective villas and, landlord, who is ordinarily responsible for property maintenance, repair and improvement.

[35] Second, the clause must also be interpreted in light of the listed duties which precede it, which are limited to cleaning and amenity services. In coming to this conclusion, I have applied the *ejusdem generis* principle of interpretation. The principle is that where a general word or phrase follows a series of specific words or phrases, the general words are specifically construed as limited, and applicable only to things of the same kind or class as those expressly mentioned. Therefore, I find that the phrase *"all other services required to maintain the Villa to the Operating Standard"* is limited to services of the kind similar to cleaning and guest amenity services and cannot without more be expanded to include capital work and repairs and improvements of the villas.

[36] Third, consideration must be given to the definition of *"Operating Standard"* to which SBML is required to maintain the villas. The Operating Standard relates to operating procedures and systems to be utilized in managing and administering the rental pool operation and the Resort. Thus, maintenance as used in the clause, does not appear to relate to maintenance of the physical structures of the villas but to the operation of the services required to be provided, being cleaning and amenities services and the like.

[37] Fourth and finally, consideration must be given to the remainder of the provision, which deals specifically with maintenance, repair and improvements, and states expressly that conduct of maintenance, repair, and improvements by SBML is discretionary and not obligatory. If maintenance repair and improvement was meant to be subsumed in *"all other services required to maintain the Villa to the Operating Standard"*, it would not have been specifically addressed in the following sentence of the very same provision. In this regard, I find that the principle *"expressio unius est exclusio alterius"* is applicable. It connotes that "the expression of one thing is the exclusion of the other", such that where a contract makes express provision for a particular obligation, there is a presumption that if the parties had intended any other obligation, it would have been expressly stated. Here, such other obligation to maintain and repair was expressly stated and does not support the claimants' contention that SBML is required to maintain repair and improve the villas including capital works.

[38] Further, there is nothing expressed in clause 1.9 of the MARPA, which states the amount of the 'Maintenance Charge', or clause 4.1, which states the proportion of the rent that is retained by the Manager and owner respectively, that sheds light on any obligation on SBML to maintain, repair, and improve the villas to the extent of capital works.

Relevant Background and Common Intention

[39] Next, it is appropriate to consider any relevant background which could shed light on the meaning of the MARPA or affect the interpretation given to its expressed terms. The relevant background includes any knowledge or information which would have been reasonably available to the parties in the situation they were at the time of executing the MARPA, that would have affected the way the language of the MARPA would have been understood by a reasonable man.

[40] I agree that the claimants could reasonably have had knowledge of the terms of the Former MARPA, as compared to the MARPA, even if they were not parties to the Former MARPA. A reasonable and prudent prospective purchaser, expending the purchase price of the villas, would reasonably have conducted due diligence. The claimants who gave evidence confirmed that they did, and I accept that they knew that under the MARPA, owners retained 12.5% less of the rent earned than under the Former MARPA, which, under the MARPA, would accrue to the Manager.

[41] However, I do not agree with the claimants, that because SBML is entitled to retain 62.5% of rent from the villas and the owners are entitled to receive 37.5% necessarily means that SBML is obligated to maintain, repair, and improve the villas. I agree with SBML that it must be taken into account that of that 62.5%, SBML must meet all costs associated with managing, marketing, and operating the Resort at the Operating Standard in accordance with the MARPA. This includes providing all inn-keeper's supplies, cleaning supplies, daily cleaning services, linen and laundry services, all guest amenities, and all other services required to maintain the villas to the standard of a first-class resort. This would also include the cost of marketing the Resort and management fees for the Viceroy brand, labour costs of all employees of the Resort, and other operational expenses of the Resort.

[42] On the other hand, I agree that the minimal maintenance charge of US$2 per square foot per annum would be an insufficient sum to cover the cost of capital repairs if it were intended to be covered by the Maintenance Charge. Mr. Power's evidence, on behalf of SBML, is that the Maintenance Charge paid by JSL is US$3,524.28 per annum and replacement of JSL's roof costs US$35,000.00 Likewise, PDL's Maintenance Charge is US$4,224.80 per annum and replacement of PDL's roof costs US$72,392.17. It is well known that capital repairs often cost substantial sums of money and I agree that such an arrangement would defy commercial sense. Considering that SBML remains the Manager having no proprietary interest in the villas under the MARPA, I find it highly unlikely that this could been contemplated.

Pre-Contractual Negotiations/ Communications

[43] I accept that the court is generally not permitted to consider the previous negotiations of the parties and their declarations of subjective intent. I also accept the qualification to this exclusionary rule articulated by Lord Hoffman in **Chartbrook Ltd v Persimmon Homes Ltd and another (Chartbrook Ltd and another, Part 20 defendants)**[4]:

> "[33] **I do however accept that it would not be inconsistent with the English objective theory of contractual interpretation to admit evidence of previous communications between the parties as part of the background which may throw light upon what they meant by the language they used. The general rule**, as I said in the Bank of Credit and Commerce International case [2001] 1 All ER 961 at [39], **is that there are no conceptual limits to what can properly be regarded as background. Prima facie, therefore, the negotiations are potentially relevant background. … In exceptional cases, as Lord Nicholls has forcibly argued, a rule that prior negotiations are always inadmissible will prevent the court from giving effect to what a reasonable man in the position of the parties would have taken them to have meant…**
>
> [41] … The rule may well mean, as Lord Nicholls has argued, that parties are sometimes held bound by a contract in terms which, upon a full investigation of the course of negotiations, a reasonable observer would not have taken them to have intended…

[4] [2009] 4 All ER 677, paragraphs 33 to 42

[42] **The rule excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant as background was known to the parties**…"

[44] Paragraph 31 of Lord Hoffman's judgment sheds light on the extent to which precontractual negotiations may form part of the relevant background and how the appropriate balance may be struck:

"[31 In Prenn v Simmonds [1971] 3 All ER 237 at 240–241, [1971] 1 WLR 1381 at 1384 –1385 Lord Wilberforce said by way of justification of the rule:

'The reason for not admitting evidence of these exchanges is not a technical one or even mainly one of convenience (though the attempt to admit it did greatly prolong the case and add to its expense). It is simply that such evidence is unhelpful. By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter, are changing and until the final agreement, although converging, still divergent. It is only the final document which records a consensus. If the previous documents use different expressions, how does construction of those expressions, itself a doubtful process, help on the construction of the contractual words? If the same expressions are used, nothing is gained by looking back; indeed, something may be lost since the relevant surrounding circumstances may be different. And at this stage there is no consensus of the parties to appeal to. **It may be said that previous documents may be looked at to explain the aims of the parties. In a limited sense this is true; the commercial, or business object, of the transaction, objectively ascertained, may be a surrounding fact.** Cardozo J thought so in [Utica City National Bank v Gunn (1918) 118 NE 607]. **And if it can be shown that one interpretation completely frustrates that object, to the extent of rendering the contract futile, that may be a strong argument for an alternative interpretation, if that can reasonably be found. But beyond that it may be difficult to go; it may be a matter of degree, or of judgment, how far one interpretation, or another, gives effect to a common intention; the parties, indeed, may be pursuing that intention with differing emphasis, and hoping to achieve it to an extent which may differ, and in different ways. The words used may, and often do, represent a formula which means different things to each side, yet may be accepted because that is the only way to get "agreement" and in the hope that disputes will not arise. The only course then can be to try to ascertain the "natural" meaning. Far more, and indeed totally, dangerous is it to admit evidence of one party's objective—even if this is known to the other party.**

However strongly pursued this may be, the other party may only be willing to give it partial recognition, and in a world of give and take, men often have to be satisfied with less than they want. So, again, it would be a matter of speculation how far the common intention was that the particular objective should be realised.'

[45] As I am not entitled to dissect and analyse the specific wording of statements made in promotional materials and precontractual communication and negotiations between the parties with a view to determining what the contract meant, much of the evidence presented by the claimants concerning negotiation of the MARPA must be accorded very little weight. However, having examined such evidence for the purpose of ascertaining any facts known to the parties that are relevant background, I accept that the claimants would have been aware of SBML's general promotion of care-free home ownership and limited maintenance charges. I would simply say that I am not persuaded that these, without more, would affect the way the MARPA would have been interpreted by a reasonable person regarding SBML' obligations to repair, maintain or improve the villas. Neither reasonably extends SBML's duties over and above the express obligation to provide rental pool management and administrative services and prepare the villas for occupation by providing cleaning services and amenities. It does not transform SBML's absolute discretion to maintain repair or improve the villas as it sees fit into an obligation to do so.

[46] Although, I abide by the warning to take caution in seeking to ascertain the object of the agreement from the parties' precontractual negotiations and communications, I do not agree with the claimants' contention that the background demonstrates that the object and nature of MARPA was for SBML to have effective control over the villas with little reference to the owners, in exchange for the majority of the rental proceeds received or that the owners as landlords would be relieved of their maintenance, repair and improvement obligations, and the costs thereof, in exchange for a relatively small portion of the rental income. There is nothing extraordinary about the MARPA, which would lead to this conclusion. As stated above, the distribution of rent earned does not by itself inevitably lead to this conclusion. Therefore, I am unable to find on a balance of probabilities that the background confirms that the parties placed a particular meaning on clauses 1.9, 5.1 and 5.5 of the MARPA, such

that SBML was responsible for the renovation and refurbishment of the villas or that a reasonable person would construe the MARPA in this manner. Contrary to the claimants' assertion, this is not the only interpretation consistent with business common sense, given that SBML is responsible for all the expenses associated with the operation, marketing, and management of the Resort under the MARPA when compared with the minimal cost of the Maintenance Charge. Thus, construing the contract with a purposive approach or according to commercial sense does not assist the claimants' case.

[47] For completeness, even if I could take into account the declarations and negotiations of the parties, I am not persuaded that it would, in any event, support the claimant's case. Use of terms such as maintenance, renovation and refurbishment of the villas does not necessarily connote capital works and structural repair. These terms just as easily connote cosmetic or superficial upgrades or less onerous repairs. References to maintenance of grounds and gardens and replacing old furniture and redecorating the villas similarly do not, connote capital and structural repairs. I would also simply note that the claimants' evidence is replete with both insignificant and more significant repairs, renovations and refurbishment carried out by SBML such as replacing decking; minor repairs to the roof; painting the villas, replacing exterior patio doors and window, renovations to pool area, and the like. To my mind, these conform to or surpass the meaning the words used would reasonably convey to the reasonable person.

[48] Finally, I agree with counsel for SBML that any precontractual representations could not constitute implied terms or form a collateral contract, given the existence of the entire contract clause included in the MARPA. Nonetheless, for the avoidance of doubt, such an entire agreement clause must be given effect. The entirety of the contractual terms between SBML and the claimants are to be found in the MARPA, by which the parties are bound and not precontractual negotiations as stated authoritatively in **Inntrepeneur Pub Co v East Crown**.[5]

[5] [2000] 2 Lloyd's Law Reports 611

Implied Term by Course of Dealings

[49] I also agree with counsel for SBML that there is no implied term by course of dealings based on the applicable principles summarised by Edwards-Stuart J in **Transformers & Rectifiers Ltd v Needs Ltd**[6], wherein it was stated that a course of dealing does not have to be extensive but must be consistent and unequivocal. Further in **Metaalhandei JA Magnum BV v Ardfields Transport Ltd**[7] it was held that intermittent and isolated affairs over a long period of time were not sufficient to generate a course of dealing.

[50] The evidence of the claimants' witnesses' is that SBML has always undertaken maintenance and repairs including capital repairs at its own cost. Mrs. Priestley, representative of PDL, says that, since purchase of two villas by PDL, she has, on multiple occasions, visited the Resort and noticed that various maintenance, repairs and/or improvements had been made to the villas. Yet, she has never, personally, taken steps to maintain, repair or carry out any works to the villas, nor has she ever even been consulted regarding work done. She has always understood this work to have been done by, or on the instruction of, SBML. PDL has also never been charged for any of the works done to the villas, nor has a deduction ever been made from its rental income with respect to same. She says over the last nine years, SBML has replaced an extensive portion of the decking outside the villas; made minor repairs to the roof of one of the villas; painted the villas several times; and replaced one of the villa's exterior patio doors. She indicated that she did not think capital works were mentioned in the MARPA but believed that she did not have to pay for capital expenses. She did not see a difference between maintenance and capital works, and formed the view that the hotel took a greater revenue than she was given and should pay for all repairs. Mrs Priestly agreed that when she purchased her villa in 2012 the MARPA was in place and she had never been presented with Former MARPA. She accepted that the repair of her roof was done on the understanding that at the conclusion of this case, it would be determined who would pay the cost of replacing the roof.

[6] [2015] EWHC 269 (TCC)
[7] [1988] 1 Lloyds's Rep 197 at 203

[51] Mr. Finch, representative of JSL, says on many occasions over the years, he has requested that SBML change the landscaping around the villas, plant new plants and erect privacy screens in a bid to shield the villas from the road running alongside the villas. All of these works were conducted by SBML, at no additional cost to JSL. Further, SBML has, on its own initiative, carried out major works on the villas, having replaced the wooden floors of the villas on at least one occasion. On the occasions that works were carried out on the villas by SBML, neither he nor his wife were informed of those works in advance. They discovered that works had been done when they visited the villas and noticed changes or improvements. To date, JSL has never paid for, or been asked to pay for, any costs relating to the maintenance, repair, upkeep, or improvement of the villas, which, to his knowledge, have always been borne by SBML.

[52] Ms. Perfect, representative of the claimant Realty Advanced Investments LLC ("RAI"), says that in many instances over the years from 2009, SBML carried out works to the villas ranging from minor maintenance works to what she considered to be capital works at its own expense. Some of the works that were completed by SBML include, among other things: the replacement of the floors of the villas on two occasions; the replacement of the outside decking on several occasions; the installation of a privacy barrier between the two villas; the replacement of the roofs of the villas; improving the windows of the villas; replacing central air conditioning on at least one occasion; relocating the wet bar from outside to inside the villas; improving and upgrading the outside shower for both villas; and maintaining, supplementing, and improving the gardens surrounding the villas. She was never informed in advance that these works would be carried out nor was her permission ever sought. Most of the time she would only learn that works had been done to the villas when she arrived at the Resort and noticed improvements or changes. Further she has never received a bill or been approached in any way in respect of payment for any of the said maintenance, repairs, improvements, or capital works done to the villas. She was aware that SBML had replaced her roof as the original roof did not have any felt tape under the cedar shingles and there were water stains. Thereafter, the existing roof was torn off and a new roof was put on with proper felt. She explained that she believed the roof had to be replaced because they forgot to put the felt underneath the shingles to prevent leaking. She was questioned on whether this was a developer issue, because the developer made a mistake in the installation of the

roof. She responded that she couldn't say if that was true. When asked whether she thought it commercially sensible that SBML pay for the replacement of the roofs of her villas costing US$75,000.00 on an annual maintenance charge of US$4,500.00, she responded that she was giving 62.5% of the revenues to cover just that.

[53] Mr. Cotta, stated that there were examples of capital expenditure done, with no costs passed onto the owners. He accepted that wear and tear corrections were made to his villas and stated that the edge of the swimming pool was converted from a non-infinity edge to an infinity edge, though he was unsure whether this would be classified as maintenance or capital repairs. He accepted that the SBML as manager of the rental pool has no proprietary interest in his villas. When asked if his villas were completely destroyed, and the insurance company did not cover the damage, whether it would make commercial sense that the responsibility to rebuild the units would be that of SBML at its cost, his response was that it would make commercial sense, as SBML has had 15 years at 62.5% of the rental revenue, to build up a capital reserve.

[54] I do not consider that the repairs or improvements made by SBML, according to the claimants, are sufficiently consistent and unequivocal to constitute a term, implied by course of dealing, requiring SBML to maintain repair or improve the villas to the extent of capital or substantial works. Most of the works undertaken by SBML, though significant in some instances, are not explicitly capital or substantial works, which would differ in extent and cost of such works. In any event, the work mentioned by the claimants' witnesses would fall within the category of maintenance, repair, and improvements which SBML is expressly empowered to undertake in its absolute discretion under the MARPA. As carrying out such work is expressly stated to be discretionary, I do not see how, by course of dealing, it can become obligatory. SBML has been operating in accordance with the terms of the MARPA in carrying out the repairs that it saw fit, and not extraneously.

[55] Thus, in all the circumstances, I do not accept that a reasonable person with the background knowledge would construe the MARPA, particularly clauses 5.1 and 5.5 thereof, as imposing an obligation on SBML to carry out and pay for any and all maintenance, repairs and improvements including "capital works" including replacement of the roofs. Therefore there

is no breach of the MARPA by SBML in not carrying out capital works such as roof replacement or signaling its intention not to do so.

Issue 4: Whether SBML has committed a breach or anticipatory breach of the MARPA by signaling an intention to deduct the costs of replacing the roofs of villas from owners' returns?

The Law

[56] According to the learning in **Halsbury's Laws of England,** repudiation of a contract occurs when one of the contracting parties, instead of merely failing to provide due performance at the stipulated time, puts himself in breach by evincing an intention, by words or conduct, of repudiating his obligations under the contract in some essential respect.[8] Repudiation of a contract may occur at the time fixed for performance or before that time. When the breach is committed before the time due for performance, it is known as 'anticipatory breach'. The innocent party is entitled to anticipate the inevitable breach, from which it follows that there is no distinction between the nature of the repudiation which is required to constitute an anticipatory breach and that which is required where the alleged breach occurs after the time for performance has arisen.[9] It is noted that repudiation may be an express renunciation of contractual obligations by one party. However, where the parties genuinely differ as to the meaning of the contract a party will not necessarily be treated as having repudiated, if he refuses to perform except according to his own bona fide interpretation of the contract, although that interpretation turns out to be erroneous.[10]

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[8] Halsbury's Laws of England Volume 22 (2019), paragraph 351.

[9] Halsbury's Laws of England Volume 22 (2019), paragraph 355.

[10] Halsbury's Laws of England Volume 22 (2019), paragraph 353. Woodar Investment Development Ltd v Wimpey Construction (UK) Ltd. (1884) 9 App Cas 605, [1881–5] All ER Rep 106.

Analysis

[57] Despite my findings above, on a proper interpretation of the MARPA, I do not agree with SBML's assertion that it is entitled to carry out capital repairs and deduct it from the villa owners' return. The clause which permits SBML to make such repairs and improvements does not expressly give it authority to charge the costs to the owners and SBML has not provided any basis on which to imply this. The MARPA expressly enumerates the financial obligations owed by the owners to SBML. Under the MARPA, the only payment obligation imposed on the owners is their quarterly payment to SBML of the Maintenance Charge and the Insurance Contribution. Moreover, the MARPA expressly states the limited instances in which SBML is entitled to make deductions from the Owners' Return, which are (i) according to clause 6.5, the Maintenance Charge and the Insurance Contribution; (ii) according to clause 7.2, any expense incurred by SBML because of its inability to provide the villa to a guest as a result of the owner holding over beyond the designated occupation period; and (iii) according to clause 6.3, any expense incurred by SBML in removing and storing personal effects left by the owner in the villa.

[58] I again find the principle of *"expressio unius est exclusio alterius"*, applicable. I agree with counsel for the claimants that the express listing of permitted setoffs in the MARPA raises a strong presumption that SBML is limited to making only such deductions from the Owner's Return as stipulated. Further, I agree with the claimants that an interpretation that vests SBML with the sole and absolute discretion to repair and improve the Villas, at the cost of the Owners, and without reference to them is highly prejudicial and lacks commercial sense. I do not believe this was contemplated by the parties or is commercially sound and is not required for the MARPA to be workable. I am therefore not prepared to imply it in the face of express provisions on costs/charges to be borne by villa owners and what SBML is entitled to deduct from owners' returns.

[59] The claimants' evidence according to Ms. Priestley is that on 9th October 2020, she received an email from SBML's Financial Controller, Mr. Valery Henry ("Mr. Henry") advising that there were leaks in the roof and recommending that the entire roof of each villa be replaced at the estimated cost of US$72,392.17. The email stated that "this work constitutes a capital

item and so does not fall within the scope of your maintenance charge and as such the cost will be offset against your future rental income." Although phrased as a recommendation, Ms. Priestley says she understood Mr. Henry to be saying that the defendant would be replacing the roof of the villas and that, regardless of her views, she would be required to pay for the replacement at the cost fixed by the automatic deduction from her rental return.

[60] The evidence of Mr. Power corroborates this. He says on review of the MARPA, he was of the firm view that the Maintenance Charge and SBML's maintenance and upkeep obligations were restricted to minor or routine repairs. In view of this on 9th October 2020 the Financial Controller under the management of VIH emailed Ms. Priestley notifying of the need for roof repair of PDL's two villas based on several leaks in the roof. Ms. Priestley was notified that this work constituted a capital item which goes beyond the scope of the Maintenance Charge and ought to be borne by PDL and offset against its future rental income. The total estimated cost was US$72,392.17. Mr. Power says by email sent on 16th September 2020, Ian Fletcher, agent of IF Investments Limited was informed that there had been several temporary patches over the years to maintain the integrity of his villa's roof, however, the roof's shingles, which are 10 years old, are towards the end of their expected lifespan and many of the shingles are rotten, compromising the integrity of the roof. A similar email was also sent to Andrew Bevan on 9th October 2020.

[61] He says these requests were made with the intention of roof repairs being carried out by SBML during the low season in 2021 when the hotel was closed to tourists so as to cause the least disruption and loss of revenue. However, PDL and other villa owners declined to pay for roof repairs on the basis that they believed this obligation to be that of SBML and instituted this claim.

[62] Based on the evidence, it is undisputed that SBML took the position that it was not obligated under the MARPA to carry out capital repairs, but that its obligations were limited to minor repairs and maintenance and communicated this to the claimants. As determined above, on a proper construction of the MARPA, SBML is not obligated to carry out capital works and refusal to replace the roofs does not amount to a breach of contract and neither is communicating this position an anticipatory breach of the MARPA. However, Mr. Power

explicitly states that representatives of SBML informed several of the claimants or their representatives – Ms. Priestley, Mr. Fletcher and Mr. Bevan that replacement of their roofs would be conducted by SBML and offset against their future rental income. As SBML's assertion that it was entitled to replace owners' roofs and deduct the cost from owners' returns is not in accordance with the MARPA, this would ordinarily amount to an anticipatory breach of contract. However, considering all the evidence, it appears that SBML was under a misapprehension of the meaning of the contract as it pertains to its right or entitlement to carry out capital repairs and to charge the owners for same by way of deduction. In the circumstances, I find that there is no anticipatory breach of contract.

[63] As previously stated I accept that once repairs and improvements of any kind are undertaken pursuant to clause 5.5. there is no ability to charge the owners or to deducted fees, charges or costs from the owners portion of the pooled rent under the MARPA, save and except what has been reserved by way Maintenance Fees and Insurance Contribution. If SBML elects not to undertake certain repairs or improvements, which may for example be categorized as substantial or capital works, the question then becomes who is responsible by law for undertaking and bearing the works. Case law and the Civil Code, delineates what repair and improvements fall within the responsibility of a landlord and a tenant. It is common ground that under the MARPA the owners are the landlord and SBML the tenant. It is passing strange that such an important matter as structural repairs and major renovations, which are inevitable with the passage of time, was not addressed in the MARPA.

[64] However, I agree with counsel for SBML that the relevant Articles of the Civil Code would be the applicable provision, as the MARPPA is silent on this. Article 1539 stipulates a tenant's obligations to undertake lesser repairs. Under Article 1540 the landlord is obliged, during the lease, to make all necessary repairs, except those which the tenant is bound to make. Thus, any repairs or the cost thereof which may be categorized as the landlord's obligations, which SBML elects not to undertake under clause 5.5 is the responsibility of the owners as landlords. It must be noted that if SBML proceeds to undertake what is by law considered landlord repairs or improvements without authorization and agreement of the owners to bear such cost, such conduct will fall within the scope of clause 5.5 and SBML will be obligated to bear this cost, as the MARPA does not provide for deduction other than that

already indicated by way of the Maintenance Contribution and the Insurance Contribution. It will therefore be prudent that SBML obtains authorization and agreement for payment from the owners before proceeding to undertake any capital repairs or improvements such as roof repairs, which by law are the landlord's obligation, once it has been determined that it will not be undertaking such works under clause 5.5 of the MARPA.

Issue 5: Whether the claimants are entitled to damages for breach of contract and if so, the quantum?

[65] Based on my findings, above it is not necessary to address this issue, however, I wish to note that even if I had found an anticipatory breach of contract by SBML in respect of its expressed intention to deduct the cost of roof repairs from owners' returns, the measure of damages, if any, would have been only nominal.

[66] **Halsbury's Laws of England** states that repudiation will give the innocent party the right to treat the contract as discharged and/or claim damages at his election. If an anticipatory breach goes to the root of the contract, that is, it would constitute a substantial failure to perform, the innocent party may treat the contract as immediately discharged, or may elect to treat the contract as continuing and await the time fixed for performance. [11] Upon an anticipatory breach, the innocent party may also immediately bring an action for damages for the breach, even though his right to damages is then only contingent. The innocent party will generally be entitled to such damages as would have arisen from the non-performance of the contract at the appropriate time for performance.[12]

[67] The authors of **Halsbury's** have noted that there is no clear English authority on whether an anticipatory breach of a minor obligation that does not go to the root of the contract to give rise to the right to terminate, may give rise to an immediate right to damages. **Halsbury's** indicates that the American authorities are against such a right of action, which seems to be the better view.[13]

[11] Halsbury's Laws of England Volume 22 (2019), paragraph 355.
[12] Halsbury's Laws of England Volume 22 (2019), paragraph 359.
[13] Halsbury's Laws of England Volume 22 (2019), paragraph 355.

[68] It is doubtful that conducting capital repairs and charging the owners for such expense would be a breach that goes to the root of the MARPA. It is also doubtful that it would give rise to an immediate right of action for damages. As **Halsbury's** notes there is no authority on the point, and this is not the case in other jurisdictions. Even if it did, it is difficult to see what loss would be suffered by the claimants so as to entitle them to anything more than a nominal award of damages. The claimants have not made any submissions or adduced any evidence in this regard to assist the court.

Conclusion

[69] Based on the foregoing, I make the following orders:

1. The claimants are not entitled to a declaration that, on a true construction of the Management and Rental Pool Agreements, the defendant is obligated under Clause 5.5 to maintain, repair and improve the villas as may be necessary to maintain them at the operating standard of a leading first-class resort hotel in Saint Lucia, including but not limited to carrying out such capital works and repairs as may be so necessary.
2. The claimants are not entitled to a declaration that, on a true construction of the Management and Rental Pool Agreements, all costs to be incurred in maintaining the Villas, including carrying out capital works and repairs must be borne by the defendant alone, subject only to the payment by the owners of the Maintenance Charge as defined by Clause 1.9 and imposed by Clause 6.5 of the MARPA.
3. The claimants are entitled to a declaration that on a true construction of the Management and Rental Pool Agreements, the defendant is not entitled to unilaterally charge to the owners and deduct from the rental return payable to the owners under the Management and Rental Pool Agreements, any fees, costs, expenses, or other sum incurred by the defendant in respect of capital work or repairs or improvements undertaken under clause 5.5.of the MARPA.
4. An injunction is granted permanently restraining the defendant from unilaterally charging to the claimants and deducting from the rental return payable to them under the Management and Rental Pool Agreements, any fees, costs, expenses, or other sum incurred by the defendant in respect of capital work or repairs or improvements.

5. Any repairs or improvements which fall within the scope of landlord obligations under the provisions of the Civil Code, may be borne by the defendant if it elects to undertake such repairs or improvements in accordance with clause 5.5 of the Management and Rental Pool Agreements, otherwise such repairs and improvements and the cost thereof must be borne by the claimants as landlords, and the defendant may obtain the claimants authorization to undertake such repairs, and the arrangement for payment must be agreed in clear and unequivocal terms, prior to undertaking such repairs or improvements.
6. As each side has achieved partial success, they shall each bear their own costs of these proceedings.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar