COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 54 OF 2023

B E T W E E N

LITTLE BAY PARTNERS LLC

Appellant

AND

BESING SHORES LTD.

Respondent

BEFORE: **The Honourable Mr. Justice Evans, JA**
The Honourable Mr. Justice Smith, JA
The Honourable Mr. Justice Turner, JA

APPEARANCES: **Mr. Brian Simms, KC with Mr. Valdere Murphy, Counsel for the Appellant**

Mrs. Gail Lockhart-Charles, KC with Mrs. Syann Thompson-Wells, Counsel for the Respondent

DATES: **6 November 2023; 6 February 2024**

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Civil appeal – Agreement for sale – Discretion to accept or reject expert evidence – Appellate caution – Judicial deference – Whether the difference in property size is covered by the term "more or less" as used in the Agreement for Sale – Special damages

The Appellant/Vendor agreed to sell, and the Respondent/Purchaser agreed to buy 2.355 acres of land in Harbour Island. The Purchaser paid a deposit of 10% of the purchase price. Subsequently, the Purchaser became aware that the property was 6,359.76 square feet less than 2.355 acres. The decrease in size was along the beachfront of the property. As a result, the Purchaser sought to rescind the agreement for sale, the return of his deposit and consequential special damages. The Vendor resisted the claim and counterclaimed for the forfeiture of the deposit.

The trial judge found that the difference in size was substantial and ordered, inter alia, that the Agreement for Sale be rescinded, and the Vendor was ordered to repay the deposit with special damages to be assessed. The Vendor now appeals the decision of the trial judge.

There were three issues to be decided by the Court on appeal: 1) Whether the trial judge ought to have rejected the evidence of an expert witness of the Vendor; 2) Whether the shortfall of 6,359.76 square feet in the description of the property was caught by the words "more or less" in the Agreement for Sale; 3) Whether the trial judge ought to have dismissed the claim for further 'special damages' instead of referring the claim to the Registrar for assessment.

Held: Appeal allowed in part; the Purchaser is entitled to the return of its deposit and the orders awarding special damages and costs in the court below are set aside. All other orders of the trial judge are affirmed. The Court will hear the parties on the issue of costs both here and below. Written submissions on costs are to be provided within seven days from today's date.

Whether to accept or reject the evidence of an expert witness is a matter for the discretion of the trial judge. The trial judge's analysis and application of the principles in relation to the exercise of her discretion was correct, or at the very least was not plainly wrong and the Court sees no reason to overturn that decision.

The trial judge found that the difference in the size of the property was not covered by the words "more or less" which were used in the Agreement for Sale. This finding of fact by the trial judge is not wrong and there is no reason to differ from it.

The trial judge gave no reasons as to why she decided to refer the question of the special damages claim for assessment by a Registrar. In these circumstances, this issue is now at large, and it is open for re-consideration by the Court. The Purchaser provided no receipts to verify the special damages claim. Further, even the professional witnesses of the Purchaser failed to give any evidence of their fees.

Armchair Passenger Transport Ltd. v Helical Bar PLC and anor. [2003] EWHC 367 (QB) considered
Bahamasair Holdings Ltd v. Messier Dowty Inc. [2018] UKPC 25 considered
Bain and others v Fothergill and others [1874-80] All ER Rep 83 considered
Charlene Rahming v Bahamas Ferries Ltd. BS 2018 SC 18 considered
Colin Wright et. al. v The Bahamas Communications and Public Officers Union Plan & Trust
EXP v Barker [2017] EWCA Civ 63 mentioned
Fund SCCivApp Nos. 111, 128, 157 and 158 of 2018 considered
Toth v Jarman [2006] EWCA Civ 1028 mentioned

J U D G M E N T

Judgment delivered by the Honourable Mr. Justice Smith, JA:

INTRODUCTION

1. The Appellant (Vendor) and the Respondent (Purchaser) signed an agreement for the sale of property in Harbour Island at the price of U.S. $4.8 million. The Purchaser paid a deposit of U.S. $480,000.00 to the Vendor.

2. The signed agreement for sale stated that the property being sold was 2.355 acres. However, the purchaser later discovered that the property in question was 6,359.76 square feet less than 2.355 acres, and that this decrease in size occurred along the beachfront area of the property.

3. As a result of this discrepancy, the Purchaser claimed to be entitled to rescind the agreement for the sale of the property and also sought the return of his deposit of U.S. $480,000.00 and consequential special damages.

4. The Vendor resisted the Purchaser's claim and counterclaimed for the forfeiture of the deposit of U.S. $480,000.00.

5. The trial judge, Charles, J. (as she then was), decided that the difference in the size of the property, specifically so along its beachfront, was substantial and was not caught by the words **"more or less"** as used in the Agreement for Sale.

6. The trial judge ordered that the Agreement for Sale be rescinded, and that the Vendor repay to the Purchaser the deposit of U.S. $480,000.00 together with special damages associated with the transaction to be assessed by the Registrar upon the production of invoices. The trial judge also awarded the Purchaser the costs of the claim, interest upon the sum of U.S. $480,000.00 and the special damages as proved.

7. The Vendor now appeals the decision of Charles, J. Even though the Notice of Appeal states 10 grounds of appeal, these 10 grounds of appeal, are variations on 3 issues which can conveniently be stated as follows:

> (A) Whether the trial judge ought to have rejected the evidence of an expert witness of the Vendor, one Mr. Teofilo Victoria;
>
> (B) Whether the shortfall of 6,359.76 square feet in the description of the property was caught by the words "more or less" in the Agreement for Sale;
>
> (C) Whether the trial judge ought to have dismissed the claim for further 'special damages' instead of referring this claim to the Registrar for assessment.

8. It is my opinion that:

> (A) The trial judge was entitled to accept the evidence of Mr. Teofilo Victoria;

(B) That the trial judge's decision that the shortfall of 6,359.76 square feet in the description of the property was "too substantial" to be encompassed by the words "more or less" was not plainly wrong and cannot be set aside;

(C) Save for repayment of the deposit of U.S. $480,000.00 to the Purchaser, I disallow the rest of the special damages claimed by the Purchaser.

9. As a result, I allow the appeal in part namely, with respect to the orders of the trial judge as to the 'further' "special damages claims" and the costs of the action. I affirm all the other orders of the trial judge. I would hear the parties on the question of costs. Written submissions on costs are to be provided within seven days from today's date.

BACKGROUND FACTS

10. By a written agreement dated 2 May 2019, the Vendor agreed to sell to the Purchaser a property at Little Bay, Harbour Island for the price of U.S. $4.8 million. Pursuant to the Agreement for Sale, the Purchaser paid a deposit of U.S. $480,000.00 to a Stakeholder.

11. The property was described as follows:

> **"ALL THAT piece parcel or lot of land comprising Two and Three Hundred and Fifty-five Thousandth (2.355) Acres being Parcel Number One (1) on the Plan of the Subdivision by Bahamas Calypso Music Limited of a portion of Lot Number Seventeen (17) and a portion of Lot Number Eighteen (18) in a Plan of Harbour Island one of the Islands of the Commonwealth of The Bahamas and bounded NORTHWARDLY by Parcel Number Four (4) of the said Subdivision and running thereon Three Hundred and Forty-four and Sixty-nine Hundredths (344.69) feet more or less to the Harbour at High Water Mark EASTWARDLY by a Twenty (20) foot wide right of way now formerly the property of Bahamas Calypso Music Limited and running thereon Two Hundred and Fifty-seven and Eighty Hundredths (257.80) feet SOUTHWARDLY partly by the Eastern and the Western portion of Parcel number One A (1A) of the said Subdivision now the property of the Vendor and now or formerly the property of the said Bahamas Calypso Music Limited respectively and partly by a road reservation and running thereon jointly from the said Twenty (20) foot wide right of way to the Harbour at High Water Mark Three Hundred and Seventy-one and Fifty-**

> **one Hundredths (371.51) feet <u>more or less</u> and WESTARDLY by the Harbour and running thereon Two Hundred and Seventy-four and Fifty-one Hundredths (274.51) feet <u>more or less</u> which said piece parcel or lot of land has such position shape marks boundaries and dimensions as are shown on the diagram or plan attached to an Indenture of Conveyance dated the 1st day of November, 1990 made between Ingrid Hamilton of the one part and Regina Choukroun of the other part and now of record in the Registry of Records in the City of Nassau in the Island of New Providence another of the islands in the said Commonwealth in Volume 5546 at pages 167 to 174 and is delineated on the part which is coloured PINK thereon…" [Emphasis Added]**

12. Item 11 (2) of the schedule of the agreement provided that:

> **"Item 11 Special Conditions**
>
> **…**
>
> **(2) …The Purchaser may (But is not obligated to), at its own cost and expenses. (i) obtain an up to date survey plan…"**

Pursuant to this provision, the Purchaser commissioned a survey from one Donald Thompson. In his Witness Statement, Mr. Thompson stated that on 20 May 2019 he carried out a survey of the property in question **"and determined that the property is 2.209 acres, 6359.76 square feet less than the 2.355 acres stated in the Agreement for Sale."**

13. The discrepancy in size was in respect of the beachfront area of the property, which the Purchaser regarded as significant and material. However, the Vendor did not agree with this assessment. The Vendor insisted that the parties did not agree to purchase the exact amount of 2.355 acres but an area of 2.355 acres **"more or less"** and that the discrepancy in the size of the land fell well within that description of 2.355 acres **"more or less."**

14. As a result, the Vendor, on 12 September 2019, issued a Notice to Complete the Agreement for Sale within 21 days pursuant to clause 11 of the Agreement for Sale.

15. On 17 September 2019, the Purchaser rescinded the Agreement via letter from its attorney.

SUMMARY OF THE FINDINGS OF THE TRIAL JUDGE

16. The trial judge heard the evidence and arguments of the parties and made the following findings with respect to the 3 issues that I stated at paragraph 7 above:

(A) With respect to the evidence of Mr. Teofilo Victoria the trial judge analyzed his evidence and also the objections against and for its admissibility and reliability at paragraphs 12-32 of her judgment then at paragraph 97 she indicated that she accepted his evidence.

(B) With respect to the issue of the shortfall of 6,359.76 square feet in the acreage of the property in question, the trial judge devoted the substantial part of her judgment to analyzing the evidence, the law and the submissions presented by the parties. In paragraph 95 of her judgment, the trial judge stated that on a balance of probabilities she preferred the evidence presented by the Purchaser and as a result at paragraph 101, she found as a fact that the discrepancy of 6,359.76 square feet did not fall **"within the meaning "more or less" as used in the Agreement."** Therefore, the trial judge decided that the Purchaser was entitled to rescind the Agreement for Sale and the return of his deposit of U.S.$480,000.00.

17. With respect to the other special damages claimed, the trial judge was of the view that there were **"associated pre-sale expenses."** and "**Had the sale gone through, all these expenses such as architectural and design fees, surveyor costs, shipping calls and transaction legal fees would have been borne by Besing Shores as stipulated in the Agreement."** She therefore ordered that the Purchaser produce all invoices within 21 days and that special damages should be assessed by the Registrar.

ANALYSIS

Issue A: The evidence of Mr. Victoria

18. Teofilo Victoria gave a Witness Statement on behalf of the Purchaser. He is a qualified Architectural and Urban Designer. In his written statement he testified to the significance of the reduction in the size of the property in question especially along the beachfront. This, he opined, would cause a serious limitation on the use and enjoyment of the property.

19. The Purchaser applied to have Mr. Victoria deemed as an expert and from the outset the Vendor objected to this. Originally, the objection was based upon an allegation that Mr. Victoria did not have a license to engage in any architectural practice in The Bahamas. However, this was correctly overruled by the trial judge on the ground that his testimony in court was not engaging in architectural practice in The Bahamas but was only limited to giving expert evidence.

20. The trial judge deemed Mr. Victoria to be an expert in his field and he was duly cross-examined. In the course of cross-examination, it emerged that, Mr. Victoria, his wife and his

firm had been engaged to work on behalf of the Purchaser over the past 9 years and more specifically, in respect of the purchase of this property.

21. The Vendor then renewed its objection to the evidence of Mr. Victoria, this objection both before the trial judge and also on appeal related to the admissibility of, or alternatively, the weight (if any) to be attached to the evidence of Mr. Victoria.

22. The trial judge correctly cited the principles in respect of her discretion to accept or reject the evidence of Mr. Victoria. These principles were succinctly stated by Nelson, J. in **Armchair Passenger Transport Ltd. v Helical Bar PLC and anor.** [2003] EWHC 367 (QB) at para 29 they are:

> **"29. …**
>
> **i) It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings.**
>
> **ii) <u>The existence of such an interest, whether as an employee of one of the parties or otherwise, does not automatically render the evidence of the proposed expert inadmissible. It is the nature and extent of the interest or connection which matters, not the mere fact of the interest or connection.</u>**
>
> **iii) Where the expert has an interest of one kind or another in the outcome of the case, the question of whether he should be permitted to give evidence should be determined as soon as possible in the course of case management.**
>
> **iv) The decision as to whether an expert should be permitted to give evidence in such circumstances is a matter of fact and degree. The test of apparent bias is not relevant to the question of whether or not an expert witness should be permitted to give evidence.**
>
> **v) The questions which have to be determined are whether: (i) <u>the person has relevant expertise</u> and (ii) <u>he or she is aware of their primary duty to the Court if they give expert evidence, and willing and able, despite the interest or connection with the litigation or a party thereto, to carry out that duty.</u>**

> **vi) <u>The Judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the Civil Procedure Rules.</u>**
>
> **vii) If the expert has an interest which is not sufficient to preclude him from giving evidence the interest may nevertheless affect the weight of his evidence. [Emphasis added]**

23. At paragraphs 28-32 of her judgment the judge applied these principles to the evidence of Mr. Victoria. More specifically, she recognized his connections to the Purchaser and stated at paragraph 28:

> **"[28] …The question whether Mr. Victoria is able to give expert evidence depends on whether (i) it can be demonstrated that he has the relevant expertise and (ii) that he is aware of his primary duty to the Court is to give expert evidence."**

24. Then at paragraph 30 the trial judge stated that:

> **"[30] He (Mr. Victoria) has indicated to the Court that he understands his role as an expert witness. I believe him… The fact of his firm's connection with Besing Shores (the Purchaser) might affect what weight, if any, the Court, as the arbiter, attaches to his evidence and opinions."**

25. Further, at paragraph 32 the trial judge stated:

> **"[32] …I shall consider the various factors when assessing his reliability including his qualifications and experience as an expert, the methodology used, the evidence upon which he relies and any limitations of uncertainties associated with his evidence. I shall also keep a close eye on his objectivity particularly in giving opinions. At the end of the day, I shall determine what weight, if any, to give his evidence. That said, based on his qualifications and experience and the fact that he acknowledges that he owes a duty to the court, I will deem him an expert in Architectural Urbanism and Planning."**

26. Finally, at paragraph 97 of her judgment the trial judge exercised her discretion correctly, in my view, to accept the expert evidence of Mr. Victoria, and I quote where she said:

> **"[97] Although Mr. Victoria's impartiality and independence was challenged, on the contrary, he gave evidence in a clear and straightforward manner. He was calm and collected and I accept his expert testimony. In paragraph 7 of his Witness Statement, he stated that the reduction of 6,359.76 square feet of property along the Bayfront does not allow for the supporting structures that Besing Shores intended to build. In summary, he states that the 6.2% difference between the Survey of 1990 and the current survey of 2019 is significant and could in no way, be considered a "slight" or "unimportant" inaccuracy especially when considering its impact on the enjoyment of the bay front. He surmised that it would cost approximately $90,000.00 to demolish the existing concrete ramp and to erect a new ramp would cost about $130,000.00. He estimates that the total cost would be approximately $220,000.00 and the relocated access ramp would further limit the buildable area of the Property. He was challenged as to these figures but Little Bay did not provide and (sic) opposing figures so I accept Mr. Victoria's evidence in this regard."**

27. I am of the view that the trial judge's analysis and application of the principles in relation to the exercise of her discretion was correct, or at the very least was not plainly wrong and I see no reason to overturn that decision.

28. As the court has stated on numerous occasions:

> **"18. …As an appellate court we are not entitled to substitute our own decision for that of the judge merely because we would have exercised the discretion differently. The principles (which are set out in the case law authorities too numerous to mention) establish that our function is primarily a reviewing function. The judge's decision should not be interfered with unless we are satisfied that the judge erred in principle by giving weight to something which she ought not to have taken into account or by failing to give weight to something which she ought to have taken into account; or her decision is plainly wrong. [See for example Charles Osenton & Co. v. Johnson [1942] AC 130, 138 per Viscount Simon LC; Birkett v. James [1978] 297, 317 per Lord Diplock. Similar guidance is found in the recent Privy Council decision from this jurisdiction in**

Bahamasair Holdings Ltd. v. Messier Dowty Inc. [2018] UKPC 25.

See the decision of Crane-Scott JA in **Colin Wright et. al. v The Bahamas Communications and Public Officers Union Plan & Trust Fund** SCCivApp. Nos. 111, 128, 157 and 158 of 2018.

29. The Vendor, both in written submissions and orally, also submitted that the failure of the Purchaser and/or Mr. Victoria to reveal Mr. Victoria's connections to the Purchaser and his interest in the case before his cross-examination ought to be viewed as a serious non-disclosure, such as would disqualify the court from accepting his evidence.

30. However, this is a matter within the discretion of the trial judge who would apply the same principles as stated before in coming to a decision on the admissibility of the expert evidence. (see **Toth v Jarman** [2006] EWCA Civ 1028 and **EXP v Barker** [2017] EWCA Civ 63).

31. As I stated before, the trial judge's analysis and application of the principles even in the face of this **"non-disclosure"** was not plainly wrong, and the exercise of her discretion to accept the expert testimony of Mr. Victoria, cannot, in my view, be faulted.

Issue B: Was the shortfall of 6359.76 square feet encompassed by the words "more or less"?

32. The Purchaser alleged that he:

> **"..intended to build a dock and accessory structures along the bay front of the Property that would support various boating activities including a palapa for lounging and dining by the bay, various storages for boat supplies, kayaks, paddle boards, paddles, snorkel equipment and life vest, fish cleaning, and outdoor shower, etc., and I am advised that, as stated in Teofilo Victoria's Witness Statement, the reduction of 6,359.76 square feet of property along the bayfront does not allow for the construction of these supporting accessory structures".**

Therefore, this reduction in size was substantial and material and could not be encompassed by the words **"more or less"** as used in the Agreement for Sale.

33. The Vendor alleged that:

> **"Put simply, the reduction in the size of the Property does not significantly impact the value of the Property given that the water frontage remains the same in both Surveys**

> **and the reduction does not materially impact the ability to construct dwellings on the Property."**

Therefore, the reduction in size was caught by the words **"more or less"** in the Agreement for Sale.

34. Counsel for the Vendor referred the Court in great detail to six Canadian cases which dealt with the meaning of the words **"more or less"** when used, inter alia, in an agreement for sale. These cases produced different results depending on the specific facts before the court. Both sides accept that these cases show that: (a) as the trial judge stated at paragraph 52 of her judgment:

> **"[52] This question whether a size discrepancy is significant to entitle a purchaser to avoid the transaction is a question of fact and will depend on all the circumstances of the case."**

(b) there was no contradiction by either side of the trial judge's acceptance of the principle that a purchaser is not bound to reveal or communicate his intended use of property to the Vendor. (See paragraphs 48 and 49 of the judgment).

35. In the present case, the trial judge meticulously set out, considered and analyzed the evidence of all the expert and non-expert witnesses. In fact, she devoted the majority of the judgment to this exercise (20 pages). In the end and on a balance of probabilities, the trial judge preferred the evidence of the Purchaser and its witnesses over the evidence of the Vendor and its witnesses. (See paragraph 95 of the judgment).

36. Of note, is the trial judge's detailed consideration and acceptance of the evidence which indicated that the reduction of 6,359.76 square feet in the size of the property occurred along the beachfront of the property. Beach front access is a very material aspect of properties on Harbour Island. This reduction left little beach front access for the Purchaser. Specifically, the trial judge accepted that the reduction in beach front access was made more egregious because the flat buildable area of the land now had to be accessed via a sharp rise of over 35 steps. This did not allow the Purchaser sufficient space for some of the supporting structures on the beach front as mentioned at paragraph 32 above which the Purchaser had intended to construct there. Further, it would be impractical to put some of these structures so far and so high above the beach front.

37. The trial judge therefore held at paragraph 101 of the judgment:

> **"[101] Considering all the evidence and the applicable law with respect to the meaning of the words "more or less", on a balance of probabilities, I find as a fact that the**

> **difference between the size of the Property as reflected in Second Thompson Survey (as well as the First Thompson Survey) and the size of the Property as reflected in the Agreement (and the Chee-A-Tow Surveys) do not fall within the meaning of "more or less" as used in the Agreement. The discrepancy of 6,359.76 (or even 6,272.64) square feet could not be considered as slight or unimportant**".

38. No useful purpose would be served to repeat or analyze the exercise performed by the trial judge. Suffice it to say that her analysis of the evidence and findings of fact are, in my opinion, not plainly wrong and I see no reason to differ from them.

39. The dicta of Lord Kerr in the case **Bahamasair Holdings Ltd v. Messier Dowty Inc.** [2018] UKPC 25 at paragraph 36 are opposite here; namely:

> **"36. …**
>
> **1. …[A]ny appeal court must be extremely cautious about upsetting a conclusion of primary fact. Very careful consideration must be given to the weight to be attached to the judge's findings and position, and in particular the extent to which, he or she had, as the trial judge, an advantage over any appellate court. The greater that advantage, the more reluctant the appellate court should be to interfere …" - Central Bank of Ecuador v Conticorp SA [2015] UKPC 11; [2016] 1 BCLC 26, para 5.**
>
> **2. Duplication of the efforts of the trial judge in the appellate court is likely to contribute only negligibly to the accuracy of fact determination - Anderson v City of Bessemer, cited by Lord Reed in para 3 of McGraddie."**

40. The Vendor submitted in 8 grounds of appeal as to why the trial judge ought not to have accepted the case of the Purchaser. I have already dealt with 2 of them in respect of the trial judge's acceptance of the evidence of Mr. Victoria at issue A above. These other 6 grounds are lacking in merit, and I will deal with them in a summary way:

41. (i) The Vendor contends that the trial judge failed to properly consider and apply the **"more or less"** authorities. As I indicated above, both sides agreed that the issue was one of fact depending on the circumstances of this case. The trial judge expressly recognized this at paragraph 52 of the judgment and (as I stated at paragraphs 30 and 31 above) properly considered the specific facts of this case and came to a decision. She was not bound to slavishly follow any of the cited cases. This argument is without merit.

42. (ii) (iii) (iv) The trial judge disregarded the Vendor's evidence that:

(a) the Purchaser could still build his structures.
(b) the linear footage and valuation of the property would remain the same despite the shortfall in acreage;
(c) the Vendor's experts, Mr. James Mosko and Mr. Elbert Thompson both supported the Vendor's position on the meaning of **"more or less"**

43. However, as I stated above, the trial judge gave a detailed and meticulous examination of all the evidence, including the evidence of the Purchaser's experts, Mr. Victoria and Mr. Oswald Thompson. Having done this analysis, she preferred the evidence of the Purchaser and its experts, over the evidence led by the Vendor and its experts. She has properly used her advantage of having seen and heard the witnesses and her decision, in my view, cannot be faulted or was not plainly wrong.

44. (v) The driveway issue: The Purchaser pleaded and led evidence to the effect that a portion of the driveway to the property had to be repositioned as it encroached on the other property. This would cost about $220,000.00 to correct. The Vendor submitted that the trial judge wrongly confused this driveway issue with the reduction in frontage issue in coming to her decision.

45. Again, this argument is without merit. There was no doubt that the reduction in acreage of 6,359.76 square feet occurred only along the beachfront area of the property. Neither party contended otherwise. However, and perhaps infelicitously, the trial judge mentioned this issue with respect to the driveway in the same paragraph where she discussed her acceptance of Mr. Victoria's evidence. This was because the expert evidence on the repositioning of the driveway and its associated costs came from Mr. Victoria, and the trial judge was stating that she was accepting Mr. Victoria's evidence on both the driveway issue and the effect of the reduction in size of the beachfront area.

46. There was no conflation of the two issues by the trial judge.

47. (vi) Steps taken by Mr. Besing on behalf of (the Purchaser) after becoming aware of the reduction.

48. The Vendor made reference to the fact that after becoming aware of the reduction, Mr. Besing took steps for some months, to try to complete the agreement, such as obtaining permits and approvals for development of the property. The Vendor contends that the trial judge failed to consider this in coming to her decision.

49. However, these acts are at best equivocal on the issue of the importance and significance of the reduction in size of the property. Specifically, on whether the Vendor's intended use for

the beachfront area of the property was still achievable. In any event, the Purchaser acted properly in trying to ascertain his position and mitigate any possible losses.

50. I am of the view that these actions of the Purchaser did not, on the present facts, negate the trial judge's preference for the Purchaser's evidence over the evidence of the Vendor and her consequent findings of fact.

Issue C: The referral of the claim for special damages to a Registrar for assessment

51. On the admitted pleadings and evidence, the Purchaser made a deposit of US $480,000.00 toward the purchase of the property. This deposit was held by a stakeholder.

52. If, as I have decided, the Vendor's appeal fails with respect to the validity of the Agreement for Sale, there is no questioning that the Purchaser is entitled to the return of its deposit of US$480,000.00.

53. This issue which is now in focus relates to the balance of the Purchaser's claim for special damages as set out in the Purchaser's Statement of Claim which are as follows:

(i)	**Architectural and Design Fees**	**34,652.76**
(ii)	**Surveyor's fees**	**9,555.00**
(iii)	**Shipping and calls**	**272.04**
(iv)	**Transaction legal fees**	**21,828.75**

54. Again, there is no dispute that, under what is known as the rule in **Bain and others v Fothergill and others** [1874-80] All ER Rep 83, while a purchaser cannot generally recover special damages in respect of the loss of bargain, he can recover as special damages, the deposit paid as well as the expenses incurred in respect of the aborted sale.

55. In this case, the expenses which he claims to have incurred as a result of the aborted sale (the special damages claim) are those just mentioned in paragraph 53 above.

56. In paragraph 115 of her judgment the trial judge set out her decision on the special damages claim as follows:

> **"[115] …Consequently, Besing Shores (the Purchaser) was entitled to avoid the transaction and receive its deposit back as well as all of the associated pre-sale expenses. Had the sale gone through, all of these expenses such as architectural and design fees, surveyor costs, shipping calls and transaction legal fees would have had to be borne by Besing Shores as stipulated in the Agreement.**

[116] I will make an order for Besing Shores to produce all invoices within 21 days hereof so that special damages can be assessed by the Registrar if there is no agreement by the parties."

57. While the trial judge did have the jurisdiction to refer the assessment of the special damages claim to a Registrar (see The Rules of the Supreme Court Ch 53-2 Order 37 Rules, 1 and 4), Counsel for the Vendor referred the Court of Appeal to the countervailing principle that special damages must be specifically pleaded and proved. Counsel submitted that while the special damages claim was pleaded, the Purchaser failed to lead, any, or any proper evidence on this claim, and it should be disallowed.

58. This principle with respect of the proof of special damages has been often referred to and I need only cite the case of **Charlene Rahming v Bahamas Ferries Ltd**. BS 2018 SC 18 where Charles, J. (as she then was) stated:

"55. It is trite law that special damages must be strictly proved. The court should be very wary to relax this principle: Radcliffe v Evans (1892) 2 Q.B. 524. What amounts to strict proof is to be determined by the court in the particular circumstances of each case: Walters v Mitchell (1992) 29 JLR 173; Grant v Motilal Moonan Ltd and Another (1988) 43 WIR 372."

59. In the same case, Charles, J. cited with approval dicta from Sir Michael Barnett, CJ (as he then was) at paragraph 46 which is very apposite here; and I quote:

"46. In Michelle Russell v (1) Ethylyn Simms and (2) Darren Smith [2008/CLE/gen/00440] Sir Michael Barnett, CJ at [43] stated as follows:

'It is settled law that special damages must be pleaded and proven. The Court of Appeal in Lubin v Major [No. 6 of 1990] said:

43. From the above reasoning, it is clear that what the learned Registrar is saying, correctly in our view is that a person who alleges special damage must prove the same. It is not in general sufficient for him merely to plead special damage and thereafter recite in oath the same facts, or give evidence in an affidavit without any supporting credible evidence aliunde, and sit back expecting the tribunal of

> **fact to accept his evidence as true in its entirety…"**

60. Unfortunately, as my citation of the decision of the trial judge on the issue indicated, the trial judge provided no reasons as to why she decided to refer the question of the special damages claim for assessment by a Registrar.

61. In these circumstances this issue is now at large, and it is open to the Court of Appeal for our re-consideration.

62. In the present case, the only evidence led on the special damages claim was (i) a paragraph in the witness Statement of Gil Besing (the Purchaser's representative) where at paragraph 20 he merely stated that:

> **"20. ...I have incurred substantial further expenditure in connection with the Agreement for Sale including Architectural and Design fees in the amount of $34,652.76, Surveyor costs in the amount of $9,555.00, transaction legal fees in the amount of $21,828.75 and $272.04 for Shipping and calls."**

and (ii) in cross examination the following is set out:

> **"Q. Mr. Besing, did you provide your attorneys with receipts, which evidence those costs?**
>
> **A. I'm sure I did**
>
> **Q. I'm only asking because there's been no documents or invoices disclosed which correlate with those figures.**
>
> **A. Well, we'll be happy to provide them. Yes."**

63. Further, I note that in their Witness Statements, none of the professional witnesses who could have verified the bulk of the special damages claim, indicated what were the fees that they charged the Purchaser for their services.

64. This has been very hotly contested litigation and the Purchaser, and his attorneys knew that they were required to prove their claim. As was cited in the case **Rahming v Bahamas Ferries** cited at para 58 above:

> **"53. …This is unlike the position of a 'sidewalk or push cart vendor.' It is impossible to imagine any insuperable**

> **difficulty which would preclude the plaintiff from obtaining some record of her payment.**
>
> **In this case it was not unreasonable to demand of the plaintiff more than her assertion."**

65. The Purchaser provided no receipts to verify the special damages claim. Further, even the professional witnesses of the Purchaser failed to give any evidence of their fees.

66. This is a case where, as the quotes cited above applies, namely:

> **"46. …It is not in general sufficient for him (the Purchaser) merely to plead special damage and thereafter recite in oath the same facts or give evidence in an affidavit without any supporting credible evidence aliunde, and sit back expecting the tribunal of fact to accept his evidence as true in its entirety.**
>
> **…**
>
> **53. … In this case it was not unreasonable to demand of the plaintiff more than (its) mere assertions."**

67. Therefore, save for the return of the deposit of US $480,000.00, I would disallow the rest of this claim for special damages.

CONCLUSION

68. I allow the appeal in part, and order as follows:

With respect of the orders of the trial judge dated 28 February 2023, the orders stated at paras 6 and 8 namely, that:

> **"6. The Plaintiff is entitled to special damages, specifically, architectural and design fees, surveyor costs, shipping and calls and transaction legal fees (the Pre-Sale Expenses") such damages to be assessed by the Registrar if not agreed and the Plaintiff shall produce all invoices evidencing the PRE-Sale Expenses within 21 days of the date hereof so that the said damages can be assessed by the Registrar if there is no agreement by the parties.**
>
> …

> **The Plaintiff is awarded its costs of the action such costs to be paid by the Defendant and to be taxed if not agreed."**

are set aside.

69. The other orders of the trial judge are affirmed.

70. I will hear the parties on the question of costs both here and below. Written submissions on costs are to be provided within seven days from today's date.

The Honourable Mr. Justice Smith, JA

71. I agree.

The Honourable Mr. Justice Evans, JA

72. I also agree.

The Honourable Mr. Justice Turner, JA