

SUPREME COURT OF SEYCHELLES

Reportable/Not Reportable/Redact
[2024]
CS68/2021

In the matter of:

SALMAN JASSEM AL DARWISH
(*Clifford Andre*)

Plaintiff

and

EDEN ISLAND VILLAGE
MANAGEMENT ASSOCIATION
(*Tamara Christen*)

Defendant

Neutral Citation: Al Darwish v Eden Island Village Management Association (CS68/2021)
[2024] (24 January 2024).

Before: Carolus J

Summary: Injunctive Relief by way of plaint – Breach of Constitution of
Association.

Heard: 28th June & 18th July 2022

Delivered: 24 January 2025

JUDGMENT

E. CAROLUS, J

Background & Pleadings

Plaint

[1] The plaintiff Mr Al Darwish, has filed a plaint against the defendant, the Eden Island Village Management Association (“EIVMA”), in which he avers that he owns Villa No. 48 located on parcel V19213 on Eden Island, including leased berth on Eden Island from Eden Island Development Company (Seychelles) Limited which he purchased for a consideration of USD4,250,000. The transfer of the property to the plaintiff was registered on 25 November 2015. EIVMA is the association of homeowners of which the plaintiff became a member by virtue of Clause 7 of the EIVMA constitution.

[2] The plaintiff avers that he built a corrugated iron shelter to store his jet ski in, which he claims is well established, constitutes no danger and is of a colour and design to fit the

surroundings. He avers that on 2 July 2021, he received an email from one Mr De Clarisse informing him that his request to build a shelter for his jet ski in the private marina had been rejected by the Aesthetic Committee for aesthetic and safety concerns. He requested clarification from the EIVMA regarding the safety concerns in order to cure them, but instead he was asked to remove the jetski shelter, failing which the EIVMA itself would remove it and bill him for the removal. By email dated 6 July 2021 to Mr. De Clarisse, he requested information as to what needed to be done to improve the shelter to the satisfaction of the EIVMA for which he was prepared to bear the cost. However, this was not met with any response.

[3] In terms of the plaint the plaintiff prays for the following orders:

- (a) An Interlocutory Injunction preventing the Defendant from demolishing the structure erected by the Plaintiff.*
- (b) An order, ordering the Defendant to provide the Plaintiff with requirement as to the safety of the said structure and how it can be improve (sic).*
- (c) Any other order as this Honourable Court deems fit.*

Statement of Defence

[4] The EIVMA has filed a statement of defence and a counterclaim. It does not dispute that the plaintiff purchased parcel V19213 but it is averred that the berth is not located on that parcel and is leased the EIVMA. It is averred that the agreement of sale together with the berth lease were registered.

[5] It is admitted that the plaintiff is a member of the EIVMA, and averred that by virtue of the provisions of the agreement of sale entered into by the plaintiff on 30th June 2015 for the purchase of the villa, he agreed to become a member of the EIVMA and to comply with its constitution and rules made thereunder. It was also an express condition of the transfer deed effecting the transfer of the villa that the transfer was subject to the terms and conditions of the agreement of sale of 30th June 2015, and further that plaintiff would automatically become and remain a member of the EIVMA and be subject to its constitution. As such the plaintiff is a member of the EIVMA and bound by its constitution and rules made thereunder.

[6] In regards to the erection of the structure by the plaintiff, it is averred that the plaintiff as a member of the EIVMA has a legal obligation to follow its constitution and rules

made thereunder, which he failed to do and as such is in breach of the constitution and such rules. It is further averred that:

- a. The berth is situated in the residential development component of the development as defined by the constitution;*
- b. The berth is a common area as defined by the constitution; under the control of the Defendant, for which any alteration or improvement requires the consent of the Defendant and the Plaintiff failed to obtain this consent.*
- c. Pursuant to the constitution, any alteration or improvement to the Plaintiff's berth, must be carried out in accordance with the constitution and design guidelines where the latter forms an integral part of the constitution, in particular:
 - (i) It is a requirement that the Plaintiff follows the section III building plan approval procedure; and*
 - (ii) Obtains approval from the eden island aesthetics committee of the defendant before proceeding with the construction.**
- d. In breach of the provisions of the constitution and design guidelines, the plaintiff erected the jet ski shelter, and then after the fact, sought approval from the eden island aesthetics committee of the Defendant.*
- e. Acting within its mandate, the eden island aesthetics committee of the Defendant did not approve the request for aesthetic and safety concerns and acting through the general manager, required the plaintiff to dismantle and remove the structure, which the Plaintiff, again in breach of its obligations failed to do.*
- f. In further breach of the design guidelines, the Plaintiff failed to follow the appeals process thereunder and instead filed a suit in the Supreme Court ...*

[7] The plaintiff's claim that he was not informed of the safety concerns even after making a request for the same but instead told to remove the structure, are denied. It is averred that:

- a. The Plaintiff was informed that the strong winds were of concern;*
- b. The Defendant acted within its rights under the constitution, design guidelines and mooring and conduct rules in instructing the Plaintiff to dismantle and remove the jetski shelter and should the Plaintiff fail to do so that the Defendant would do so.*

- c. *The Defendant acted within its rights under the constitution, design guidelines and mooring and conduct rules in billing the plaintiff for its dismantling and removal.*

[8] The EIVMA admits that the Plaintiff emailed Mr De Clarisse on 6 July 2021 but avers that he failed to abide by the Constitution, design guidelines and mooring and conduct rules and is in breach of them.

[9] The EIVMA seeks the following remedies in its statement of defence:

- a. *to dismiss the plaint in its entirety with costs;*
- b. *to order that the jet ski shelter is dismantled and removed at the plaintiff's cost;*
and
- c. *make any such order as this honourable court deems fit.*

Counterclaim

[10] In its counterclaim the EIVMA avers that it is an Association registered under the Registration of Associations Act whose rules are set out in its Constitution which are binding on it and its members, and that the plaintiff/counter-defendant is the registered owner of parcel 19213 known as villa 48 and lessee of berth number 237. It avers that by virtue of an agreement of sale dated 30th June 2015 for the purchase of the villa and lease of the berth, the defendant agreed to become a member of the EIVMA and to comply with the provisions of its constitution and rules made thereunder. The plaintiff/counter-defendant, represented by a power of attorney accepted the transfer of the villa and the agreement for the lease of the berth. It was also an express condition of the transfer that the plaintiff/counter-defendant would become a member of the EIVMA and be bound by its constitution and rules made thereunder.

[11] It avers that rights to the berth was obtained from the Eden Island Development Company (Seychelles) Limited ("EIDC") who then transferred the property on which the berth is located to EIVMA which is now the lessor.

[12] It avers that in terms of the EIVMA's constitution, the berth is defined as a common area, and therefore under the control of the EIVMA, and that any alteration or improvement thereto requires its consent. In breach of its obligations under the constitution, the plaintiff/ counter-defendant erected a jet ski shelter without first seeking the consent of the EIVMA.

[13] It is also averred that the plaintiff/ counter-defendant has an obligation, before effecting any improvement to the berth located in the common area and in the residential development component as defined in the constitution, to first follow the constitution and design guidelines. In particular, it is required to follow section III of the building plan approval procedure; to obtain prior approval of the Eden Island Aesthetic Committee, and if the Committee denies its request, to follow the appeals procedure under section III of the building plan approval procedure of the design guidelines.

[14] In breach of the provisions of the constitution, rules and design guidelines, the plaintiff/ counter-defendant erected the jetski shelter and then after the fact, sought approval from the Eden Island Aesthetic Committee of the EIVMA. The Committee, acting within its mandate, did not approve the request because of aesthetic and safety concerns. Acting through the General Manager, it required the plaintiff/counter-defendant to dismantle and remove the structure, which the plaintiff/ counter-defendant again in breach of its obligations failed to do and instead filed a suit in the Supreme Court. By filing the suit instead of following the appeals process under the design guidelines, the plaintiff/ counter-defendant further breached the design guidelines.

[15] On that basis the EIVMA prays this court to:

- a. *Declare that the defendant is in breach of the [EIVMA] constitution and rules made thereunder;*
- b. *Order that the Defendant dismantles and remove the jetski shelter at its own cost;*
- c. *Order that the defendant abides by the constitution and all the rules made thereunder; and*
- d. *make any such order as this honorable court deems fit.*

Defence to Counterclaim

[16] The plaintiff/counter-defendant opposes the counterclaim and has filed a reply thereto. He claims that he was never given a copy of the EIVMA's Constitution until he requested one on 6th July 2021.

[17] He avers that he has an agreement for the lease for berth number 237 with EIDC, and has no knowledge of the ownership of the berth being transferred to EIVMA by EIDC. Further that in the agreement of sale which was signed by the plaintiff/counter-defendant on 29th June 2015 the proposed parcel was 48 and not 19213.

- [18] He denies that he agreed to or became a member of the EIVMA and that he is bound by its Constitution and rules. He avers that the agreement that he signed stated that "*the Seller has formed or is about to form the ASSOCIATION to administer, manage and control the residential development*" but that he was never informed when and if it had been formed. Further as he was never given a copy of the constitution, the information contained therein was not available to him and he could not be expected to have any knowledge of the same. He only received a copy on 6th July 2021 after he had requested for one at the time that issues with the shelter arose. He also avers that he has never been given a copy of the Rules by the EIVMA and therefore cannot be aware of something made under the constitution by the EIVMA.
- [19] The plaintiff/counter-defendant avers that the EIVMA had undertaken to provide facilities for him to move his jet skis from the berth area to his property, as the jet skis are expensive and have sensitive equipment which are damaged if left exposed to the sun. He claims that in fact, the equipment on his jetskis had to be replaced as they were affected by exposure to the sun and rain.
- [20] He avers that he was never represented by a power of attorney for the signing of the agreement for lease of the berth, and further that there was no transfer agreement for the berth: the transfer agreement was only for the villa, which furthermore stated that the Agreement of Sale dated 30th June 2015 would be registered simultaneously with the said transfer which was not done rendering the Agreement of Sale null and void.
- [21] He denies that there is any provision of the EIVMA's constitution that requires obtaining prior consent of the EIVMA for making alterations to a berth. He further avers that the berth was leased, and the structure was on the plaintiff/counter-defendant's property and not on the EIVMA's property. The shelter was on the plaintiff/counter-defendant's pontoon and made no alteration of any structure of the EIVMA's.
- [22] He denies that he has breached any of his obligations by erecting a shelter without first obtaining the consent of the EIVMA, as he was granted permission to have the pontoon which is his property and the shelter is on the pontoon which is not the EIVM's property.

- [23] He claims that the shelter on his pontoon is not an improvement to the berth for which the procedures under the constitution, rules made thereunder and guidelines are required to be followed. The shelter was on his pontoon and to provide shelter for his personal property i.e. his two jet skis. He avers that no rules exist in regards to the erection of such a structure and that he has done nothing wrong and is not in breach of any rule.
- [24] He denies that he breached the provisions of the constitution, rules, and design guidelines by first erecting the shelter and seeking approval afterwards. He avers that he was in contact with the association as they had contacted him regarding the shelter and he had asked them what issues there were which they have failed to provide to date.
- [25] He avers that he filed a court case so that the court could adjudicate on the matter. He avers that he had no obligation to deal with the Aesthetics Committee as there is no such requirement in the Agreement which was never registered in any case. Furthermore, he was under no obligation to follow the appeals process under the design guidelines, as the agreement states that one may go to the court for redress on any issue.
- [26] The plaintiff/counter-defendant prays for the dismissal of the counterclaim in its entirety and for the following orders:
- i. *The Counterclaimant refrains from touching the said shelter without the written consent of the Defendant.*
 - ii. *That the costs of any removal and re-instatement of the said shelter be borne by the Counterclaimant.*
 - iii. *Order that any documents, constitution bye-law, rules made by the Counterclaimant be sent to the Defendant.*

Evidence

Testimony of the Plaintiff/Counter-Defendant

- [27] The plaintiff/counter-defendant is a business man and owns property on Eden Island namely villa 48. He produced Exhibit P1 - transfer deed dated 10th November 2015, evidencing the transfer of Title V19213 from Eden Island Development Company (Seychelles) Limited to the plaintiff/counter-defendant for a consideration of USD4,250,000. The deed contains a clause stipulating that *"The transfer is subject to the terms and conditions incorporated in the Agreement of Sale dated 30th June 2015 between the Transferor and the Transferee which will be registered simultaneously with*

the transfer of this Title ... ". The deed specifies that the transfer is also subject to certain restrictive covenants contained in the deed which are binding on the Plaintiff. Of relevance is A2 which stipulates that *"The Transferee shall automatically become and shall remain a member of the Association and shall be subject to its constitution until he ceases to be an owner ..."*

- [28] The plaintiff/counter-defendant also pays a monthly sum of USD70 for a berth in the marina. He has a floater in the berth area which is secured by means of screws. The EIVMA are aware of the floater and it is accepted by them. He keeps his two jet skis on the floater because they are not supposed to be kept in the water all the time. He built a shelter on the floater to protect his jet skis from the sun which caused damage to the paintwork and electronic dashboard of the jetskis. A component of the dashboard had to be replaced which cost USD10,000. He was advised by the manufacturer to keep the jet skis out of direct sunlight. The plaintiff/counter-defendant enquired from the person in charge of the marina as to what could be done, but receiving no response, proceeded to install the shelter which is made of material for that specific purpose, and which is affixed to the floater by means of screws. The roof of the shelter is about 1.5m high, is made from the same material which is used for the villas on Eden Island and is of the same quality.
- [29] He produced Exhibit P2 - the sales documentation which the plaintiff/ counter-defendant confirms he received when he purchased the property. It comprises a Contract Schedule, Agreement of Sale (Villa) and Agreement of lease (Berth). The Village Management Association constitution is annexed to the Agreement of Sale as Annexure 2.B, together with various other annexures. Also annexed to the Agreement of Lease are the Mooring Areas and Waterways Conduct Rules Annexure 3.A and a Mooring Plan for Berths 199 to 212 & 258 – 263 (Annexure 3.B). For ease of reference, the Court has numbered the pages of Exhibit 2 in blue ink at the top of each page, to which it will refer.
- [30] The plaintiff/ counter-defendant, referring to Annexure 2.E (Exhibit 2, pg 84) which is a Subdivision Plan dated 30th May 2015 which he described as the Master Plan for the whole Eden Island project, stated that there is a slipway included in the plan, but was unable to indicate its exact location thereon.

- [31] He confirmed that the floater on which he erected the shelter for his jetskis is on the water and not on land. It was therefore not an improvement on "DEVELOPED LAND" (as defined in clause 1.1.22 of the constitution which speaks about "PARCELS") which requires prior written approval of the Board as per Clause 11.3 of the constitution.
- [32] He produced Exhibits P3 (a), (b) and (c) - a series of three pictures taken by him showing the damage to his jet ski. The pictures were taken sometime in June or July 2021 almost one year after he started keeping the jet ski on the floater, and before he erected the shelter to protect it from the sun. He testified that Exhibit P3 (a), (b) shows sun damage to the electronic dashboard which had to be replaced and Exhibit P3(c) shows where the paint was peeling because of exposure to the sun. He stated that he showed the person in charge of the marina, who he thinks is called Francis, the damage to his jet ski.
- [33] He produced Exhibit P4 – an invoice from Al Badi Trading & Cont. Co., Ltd dated 07/06/2018 for a Yamaha water vehicle in the sum of 156,000.00 Qatari Riyals, and Exhibit P5 - another invoice from the same supplier dated 09/06/2021 for a display unit in the sum of 10,000 Qatari Riyals to show that following the damage shown in exhibit P3, it was necessary to make repairs to the jet ski.
- [34] The plaintiff/counter-defendant also produced a bundle of emails sent between 2nd July 2021 and 7th July 2021 as Exhibit P6 to show the communications between himself and the EIVMA regarding the shelter. He stated that he communicated with Mr Charles De Clarisse, the General Manager of the EIVMA and one Francis.
- [35] The first email was sent on 2 July 2021 at 4.30pm, from Mr De Clarisse informing the plaintiff/counter-defendant that his request for the erection of a corrugated iron shelter for his jetski in the private marina had not been approved by the Aesthetics Committee. He stated that *"On top of the Aesthetics concerns, several safety concerns were also raised when it comes to the structure"*. Mr De Clarisse then proceeded to instruct the plaintiff/counter-defendant to *"urgently have the structure demolished before any incidents occur"* and to inform him that *"If it is not removed by Monday at midday, VMA will have no option but to proceed and remove it and charge you."* He stated that *"As you know with the strong winds we are experiencing at this time of year, this becomes even more urgent. The safety of our residents is of paramount importance and*

cannot be compromised.” and further drew to his attention that “the berth areas are considered as common areas that homeowners are not allowed to alter without the consent of the VMA”.

- [36] The plaintiff/counter-defendant responded to Mr De Clarisse by email of 4 July 2021 at 10.47am stating that he was not in Seychelles and not to demolish the structure without his approval, failing which Mr De Clarisse would be held responsible and legal action taken. In a follow up email at 12.04pm on the same day, the plaintiff/counter-defendant requested to be provided with the safety concerns raised by the Aesthetics Committee in writing. He also stated that *“I purchased this property and own it, and have the rights to do what I want on my property”* and further that *“There is no clause in the agreement showing that I should take approval to build or erect anything in my property.”*
- [37] By email of 6 July 2021 at 2.12pm, Mr De Clarisse sent a reproduction of Clause 15 of the EIVMA’s constitution to the plaintiff/counter-defendant to confirm that *“mooring areas [where the jetski shelter was erected] are common areas under the management of the VMA”*. In respect of the query regarding the safety concerns, Mr De Clarisse stated that the *“flimsy installation can easily be blown off and injure someone and cause damage to boats/property nearby”*. In the same email, he instructed one France to *“Please proceed to urgently remove the illegal structure and put neatly the materials out of sight in a safe location ...”*.
- [38] The plaintiff/counter-defendant responded on the same day at 3.01pm saying he was reviewing the matter and until then not to demolish the structure without his written approval. He also stated that he did not have the Constitution from which Clause 15 was taken, and requested it to be sent to him.
- [39] On the same day at 3.09pm Mr De Clarisse responded, stating that the VMA did not need the plaintiff/counter-defendant’s approval to remove the structure since his jetskis were moored in the basin (mooring area) which is a common area belonging to the VMA. He reiterated that *“Apart from everything else the structure poses a safety risk and therefore needs to be removed immediately”*.
- [40] Still on the 6th of July, the plaintiff/counter-defendant replied to Mr De Clarisse’s email at 7.10pm informing him, in regards to his concerns that the structure could be blown

off by the strong winds, that *“the structure is made on the floater strong and firmly fixed with the same colour and materials used in the island. Also I am using the same structure in my country for the last 8 – 9 years and never had any problem during strong wind and storm. So I am well aware of what I have done, no damage can cause to the boats or property nearby since the structure is far from houses and perfectly erected.”* In the same email, the plaintiff/counter-defendant suggested three solutions on how to protect the valuable belongings of the owners, instead of just informing him of a decision that the Aesthetic Committee had taken to *“reject [his] structure”* whereas there had been no committee or assembly meetings in the last two years. These suggestions are as follows:

1. *You have to provide a slippery ramp where jetski/boat owners can tow their jetski to their units and can safely protect from the heat of the sun.*
2. *Provide or allow me in the beach near to my villa with tiles or wood so that I can move out my jetski in a trailer to my villa for securing from the heat of the sun.*
3. *Provide me with a design of the structure to safeguard the jetski from the heat of the sun according to the environmental condition and I am ready to pay for it.*

[41] By email of 7 July 2021 at 10.33am, Mr De Clarisse informed the plaintiff/counter-defendant that his suggestions would be put through to the Aesthetics Committee for their consideration. In addition, he reiterated the VMA’s intention of removing the structure at the plaintiff/counter-defendant’s cost as per the Aesthetics Committee’s instructions, and the necessity of doing so *“to safeguard the Aesthetics and Design Guidelines of Eden Island as well as the safety of everyone”*.

[42] At 12.40pm on the same day, the plaintiff/counter-defendant replied querying the safety concerns highlighted by Mr De Clarisse in his email sent at 10.33am. He reiterated that his jetski shelter should not be removed without his approval as his lawyer would be communicating with him on about the issue.

[43] Interestingly, Mr De Clarisse responded at 2.18pm on the same day stating that *“Your structure is not being removed for safety reasons ... but rather non-compliance to the Aesthetics and Design Guidelines”*. He proceeded to inform the plaintiff/counter-defendant that the VMA Rules which apply to all home owners also apply to him, and

remind him that the mooring berth is not his property but simply leased to him by the VMA.

- [44] At 3.01pm, the plaintiff/counter-defendant replied that he was well aware of the VMA rules. He further agreed that the mooring berth was not his property but stated that it had been leased to him and that he had erected the structure on his floater, and if it did not comply with the Aesthetic guidelines, the same must be sent to him, presumably for him to ensure compliance with the same.
- [45] The plaintiff/counter-defendant further produced Exhibit P7 which comprises a series of email exchanges between 11 July 2021 and 27 July 2021. It starts with an email sent on 11 July 2021 at 5.50pm, by the plaintiff/counter-defendant to Mr De Clarisse stating that he had been informed by the caretaker of his villa that the structure sheltering his jetski was going to be removed and instructing Mr De Clarisse not to proceed with the same. He also stated that his lawyer would communicate with Mr De Clarisse on the subject.
- [46] On Monday 12 July 2021, the 'deadline day' for demolition, the plaintiff/counter-defendant's lawyer Mr Clifford Andre, emailed Mr De Clarisse at 10.11pm, communicating his instructions from the plaintiff/counter-defendant, which was essentially that no lawful reason had been provided to the plaintiff/counter-defendant for demolition of the structure; that no plausible reason had been given as to why the structure is unsafe; that any demolition of the same is illegal; and serious consequences would ensue which include compensation to the Plaintiff. Additionally, Mr Andre highlighted that he is sending the email communication before the "midnight Monday" deadline.
- [47] On the 13th July 2021, Mr Andre on behalf of the plaintiff/counter-defendant once again emailed Mr De Clarisse at 1.49pm. In the email, he states that despite the plaintiff/counter-defendant's email seeking written clarification regarding the safety concerns expressed in regards to the structure, nothing has been forthcoming. There had also been no response to the plaintiff/counter-defendant's email of 6th July 2021 making certain suggestions to resolve the issue for which he was prepared to bear the cost. Mr Andre further stated that his client had acted within his powers and in accordance with the sale agreement and that as a property owner he was entitled to

enjoy is property without hindrance from anyone. He requested that consideration be given to keep the structure, and that any concerns raised in regards to it be put in writing and sent to himself and the plaintiff/counter-defendant for rectification if considered reasonable.

- [48] In response, by email sent on the same day at 3.39pm Mr De Clarisse stated that according to the email sent to the plaintiff/counter-defendant, the deadline for the demolition was "Monday Midday" and not "Monday Midnight" as stated by Mr Andre; that the Aesthetics Committee did not approve the structure as it not comply with the Design Guidelines of Eden Island; that even if the structure was safe, it would still have to be removed as it did not comply with the Design Guidelines; that the berth mooring is the property of the VMA as it forms part of Common areas and not the homeowner's property; and that the structure would be removed at the plaintiff/counter-defendant's cost.
- [49] By email of 23 July 2021, Mr Andre informed the plaintiff/counter-defendant that an application for a permanent order not to demolish the structure had been filed against the VMA, and that another one for an interim injunction would be filed when they got an affidavit sworn by him.
- [50] On 27 July 2021 at 12.47pm, Mr De Clarisse seemingly replies to the plaintiff/counter-defendant's email of 7 July 2021, stating that the "*jetski cover*" was removed on 26 July 2021; that the material for the cover had been neatly placed at V48; and that the cost for its removal would be invoiced to the plaintiff/counter-defendant's levy account.
- [51] Mr De Clarisse's email of 27 July 2021 was communicated to Mr Andre by the plaintiff/counter-defendant. On the same day at 6.50pm, Mr Andre emailed Mr De Clarisse reproaching him of having removed the structure despite being aware that there was an application pending before the court for an interlocutory injunction which was due to be heard in September of the same year, and furthermore now wanting his client to bear the cost for the removal. Mr Andre requested that the structure be restored to its original position until the final determination of the case, and further stated that his client should not be invoiced.
- [52] The plaintiff/counter-defendant testified that there has never been any security issues with the roofing through all kinds of weather including rain and storms. Neither had he

been informed of any harm caused by it. He further confirmed that he did ask the EIVMA's representatives, as evidenced by the emails adduced in evidence in Court (Exhibit P6), for a solution in respect of the preferred design and make-up of the jetski shelter but that this was never provided to him. The plaintiff/counter-defendant also stated that Mr De Clarisse had suggested he put his jetski at his villa but that he had informed Mr De Clarisse that there was no slipway that would facilitate this as there was supposed to be. It is his testimony that Mr De Clarisse said that the slipway would be made although he was unsure when this would be done. He confirmed having told Mr De Clarisse that if a slipway was provided, he would be in a position to move his jetski and put in in the yard of his villa.

[53] He further confirmed that he was asking the Court to prevent the EIVMA from removing or asking him to remove the roofing on the jetski shelter.

[54] In cross-examination the plaintiff/counter-defendant confirmed that the Contract Schedule of the Sales Agreement dated 30th June 2015 bore stamps from the Land Registry (Exhibit 2, pg 3), thereby showing that the Sales Agreement had been registered on 25th November 2015, simultaneously with the transfer deed for V19213 (exhibit P1), contrary to what had been averred at para 5 of his Reply to Counterclaim namely that exhibit 2 had not been registered. He explained that the copy of the Sales Agreement that he had been given had not been registered, hence the averment.

[55] He also agreed that as per the transfer deed (Exhibit P1) the transfer was subject to the terms and conditions of the Sales Agreement (Exhibit P2) as well as the restrictive covenants in the transfer deed itself, including that as the transferee he would automatically be a member of the EIVMA and abide to its constitution. However he claimed that he was only given a constitution of the EIVMA after he requested for one after the conflict with the EIVMA.

[56] He admitted that it was his signature affixed to the Contract Schedule in Exhibit P2 (pg 3), and further agreed that he had signed the offer to purchase (Exhibit P2, pg 6), which offer was "*subject to the terms and conditions set out in the CONDITIONS OF SALE and the ANNEXURES, which form part of this AGREEMENT*". Further that the acceptance of the offer was signed by the seller Eden Island Development Company (Seychelles) Limited (Exhibit P2, pg 7).

- [57] The plaintiff/counter-defendant's attention was drawn to the Table of Contents (Exhibit P2, pg 2) in which Annexure B – the Village Management Association Constitution was stated to be a "*separate document*" i.e. not included with the Sales Agreement. He admitted having signed the "*ACKNOWLEDGEMENT BY PURCHASER*" which states "*he has read the ANNEXURES contained herein and has familiarised himself with the content thereof*" which is dated 29th June 2015 (Exhibit 2, pg 55). However, he stated that he had just signed the papers and that even if the annexures had been there he did not go through them. He also accepted that as a businessman he knows that when he signs a document he is bound by it, and that by signing the acknowledgement and the Sales Agreement he agreed to become a member of the EIVMA and to abide by its rules.
- [58] The plaintiff/counter-defendant's attention was further drawn to clause 10 of the Sales Agreement titled "EDEN ISLAND VILLAGE MANAGEMENT ASSOCIATION" (Exhibit 2, pg 19), and agreed that by signing the Sales Agreement he had agreed, by virtue of this clause, to become a member of the EIVMA and to abide by all the rules of its constitution.
- [59] The plaintiff/counter-defendant also agreed that his averment at para 3 of his Reply to Counterclaim, that he "*was never informed when and if the Association had been formed and had never been given a copy of the constitution*" was incorrect, and further that contrary to what he had stated in the same para that "*therefore the information in the constitution was not available to him, therefore he is not expected to be aware of what is in it*" he was well aware of the constitution, knew that it was the constitution and had agreed to be bound by it.
- [60] The Certificate of Registration of the 'EDEN ISLAND VILLAGE MANAGEMENT ASSOCIATION' dated 1st August 2007 certifying that it had been registered under the provisions of the Registration of Associations Act was produced as Exhibit D1 through the plaintiff/counter-defendant. He agreed that the association was registered even before he purchased his villa in 2015, that upon such registration the registration document became a public document in the public domain, and that therefore he was deemed to be aware of its existence.

- [61] In regards to the “AGREEMENT OF LEASE BERTH” (Exhibit P2, pg 37) the plaintiff/counter-defendant agreed that he had signed the “OFFER TO LEASE” (Exhibit P2, pg 38) on the 29th June 2015, which stipulates that *“The LESSEE hereby offers to lease the BERTH from the LESSOR, subject to the terms and conditions as set out in the CONDITIONS OF LEASE and the ANNEXURES, which form part of this AGREEMENT”*. The offer was accepted on 30th June 2015 by Eden Island Development Company (Seychelles) Limited as the lessor (Exhibit P2, pg 39). He confirmed that he himself had signed the “OFFER TO LEASE” and not another person authorised by a power of attorney. He also confirmed as stated at para 5 of his Reply to Counterclaim, that there was no transfer agreement for the berth which was merely leased to him, by way of a lease agreement as shown by the Contract Schedule (Exhibit 2, pg 4) and the “AGREEMENT OF LEASE BERTH” (Exhibit 2, pgs 37 – 53).
- [62] His attention was also drawn to the following definition of “LEASED AREA” at clause 2.1.30 of the “CONDITIONS OF LEASE” (Exhibit 2, pg 42) as meaning *“the BERTH specified in I of the CONTRACT SCHEDULE”* (Exhibit 2, pg 4) which in turn specifies that the “LEASED AREA” is as shown on the MOORING PLAN as BERTH number 237. His attention was further drawn to the following definition of “BERTHING RIGHT” at para 2.1.7 of the “CONDITIONS OF LEASE” (Exhibit 2, pg 41) that is, *“means the LESSEE’S sole and exclusive right to the use and enjoyment of the LEASED AREA in accordance with the provisions of this AGREEMENT”*, and it was pointed out to him that his berthing right as a lessee was purely a right to use and enjoy the area.
- [63] The plaintiff/counter-defendant’s attention was further drawn to clause 16.3 of the constitution (Exhibit 2, pg 70) which he agreed further showed that he only had “use rights” in respect of the berth, as it provides *inter alia* that the maintenance costs for each BERTH and administrative charges connected shall be borne by *“the MEMBER who has the use rights in respect of such BERTH in terms of the relevant BERTH LEASE”*.
- [64] The plaintiff/counter-defendant agreed that his berth is in a mooring area which is categorised as a common area under clause 15 of the EIVMA constitution headed COMMON AREAS, in particular clause 15.1. (Exhibit 2, Pg 69) which reads:

15.1 The DEVELOPER may, free of consideration and at any time, transfer ownership of all or any of the COMMON AREAS to the ASSOCIATION if and when the DEVELOPER may deem fit including:

[...]

15.1.4 the MOORING AREAS;

15.1.5 the WATERWAYS;

15.1.6 PARCELS designated by the DEVELOPER for ASSOCIATION use; and

16.1.7 any other areas designated as COMMON AREAS by the DEVELOPER.

[65] He agreed that Exhibits D2 and 3 showed that the mooring area that he used (V19971) was transferred to the EIVMA, in accordance with the said clause 15 of the constitution. Exhibits D2 and 3 were initially admitted as items through the plaintiff/counter-defendant and subsequently produced as exhibits by Mr De Clarisse. Exhibit D2 is a Certificate of Official Search dated 7th June 2022 in respect of Title V19971 stating that the proprietor is Eden Island Village Management Association. Exhibit D3 is a transfer deed dated 2nd August 2017 for the transfer of Title No. V19971 from EDEN ISLAND DEVELOPMENT COMPANY (SEYCHELLES) LIMITED to EDEN ISLAND VILLAGE MANAGEMENT ASSOCIATION for nil consideration.

[66] The plaintiff/counter-defendant confirmed that V19971 was indeed the mooring area used by him by reference to the Subdivision Plan of Eden Island annexed to the Sales Agreement as Annexure E (Exhibit 2, pg 84), on which he identified the position of his villa on parcel V19213, as well as the mooring area in which his berth was located, namely on V19971 in Basin 2. He then identified the same on the location plan initially admitted as an item through the plaintiff/counter-defendant and subsequently produced as Exhibit D4 by Mr De Clarisse.

[67] The plaintiff/counter-defendant admitted that the damage to his jet ski as shown in Exhibits P3 (a), (b) and (c) was caused by the sun and not by the EIVMA.

[68] He admitted that the Design Guidelines initially admitted as an item through him and then produced as Exhibit D6 by Mr De Clarisse, formed part of the constitution of the EIVMA by virtue of clause 11 of the constitution (titled DESIGN GUIDELINES) and was therefore binding on him. However, he claimed that he had asked Mr De Clarisse for them but had not been provided with the same. It was put to him that he had a duty to ask for them as he had agreed to comply with them when he agreed to become a member of the EIVMA and to be bound by the constitution and the rules made

thereunder. He replied that the EIVMA also had a duty to provide the guidelines to him and they should have provided him with a copy together with the contract and all other documentation, but that although they had said that they would sent it to him they had not done so. It was also put to him that the Design Guidelines are available on the EIVMA website and asked why he did not check there, and he replied that he was not informed of the same. It was further put to him that he had breached his duty as a home owner to be aware of all the rules that applied to him and to abide to them, and he maintained that he is not the one who has to search for all the documents containing the rules and requirements he has to abide by, but it was the EIVMA who should have provided it to him.

[69] The plaintiff/counter-defendant's attention was further drawn to Clause 11.2 of the constitution which stipulates that "*All IMPROVEMENTS on the DEVELOPED LAND shall comply with the provisions of the DESIGN GUIDELINES*", and to the definition of the term DEVELOPED LAND in clause 1.1.22 of the constitution which includes "*PARCELS which have been transferred to the ASSOCIATION as COMMON AREAS*". He agreed that he had previously testified that his berth is located in a "COMMON AREA", and further agreed that "COMMON AREAS" form part of "DEVELOPED LAND" as defined in clause 1.1.22. He also agreed that the term "IMPROVEMENTS" as defined in clause 1.1.31 would include any structure on any "PARCEL" or on the "COMMON AREAS".

[70] The plaintiff/counter-defendant agreed that he had put a pontoon in his berth area for which he had permission, and that his jet skis are placed on top of the pontoon and he had to prevent the sun from damaging them. However, he disagreed that the structured erected on the pontoon for that purpose was an "IMPROVEMENT" within the meaning of clause 1.1.31 and stated that the pontoon is designed in such a way that a shelter can be installed on it which is what he did for the purpose of protecting his jetski. He stated that it was rather an accessory that can be put on the pontoon, that can be built thereon and a shed put on top. It was nonetheless put to him that anything falling under the definition of improvement in clause 1.1.31 must comply with the DESIGN GUIDELINES to which he replied that at that point he had not yet received the same.

[71] The plaintiff/counter-defendant's attention was further drawn to Clause 11.3 of the constitution which lays down the requirement for "*prior written approval of the plans*

and specifications” by the EIVMA Board for any “*construction, erection or alteration of, or addition to, any IMPROVEMENTS on the DEVELOPED LAND*”. The plaintiff/counter-defendant maintained that the shelter on his pontoon was not an alteration requiring approval under clause 11.3, and stated that for there to be an alteration, there would have to be a change to the base of the pontoon/floater.

[72] He admitted that he never received approval of the Board of the EIVMA for the erection of the structure but claimed that in any case, they never responded to anything.

[73] The plaintiff/counter-defendant admitted that the Design Guidelines (Exhibit 6) apply to “*pontoons, boat storage and boat lifts*” in terms of the SECTION I, clause 1.1.4 (d) of the said Guidelines. He also agreed that the shelter was erected on his *pontoon* as stated at paragraphs 7, 8 and 9 of his Reply to Counterclaim, and therefore the Design Guidelines applied thereto in terms of section 1.1.4 (d) of the said Guidelines, but stated that he had obtained permission to install the pontoon.

[74] It was put to him that having obtained such permission, before changing anything whether by erecting a shelter or anything else on it, he would have to follow the Design Guidelines which he agreed was the correct procedure. He further agreed that he would therefore have to comply with SECTION III of the said Guidelines, which sets out the BUILDING PLAN APPROVAL PROCESS and which provides at clause 1.1.1 (a) that “*All plans and specifications ... in respect of any proposed Works ... shall be submitted , by the registered Homeowner/Member, to the General Manager ...*” and at clause 1.1.1 (d) that “*When satisfied that the required information is present, the General Manager shall submit the Plans, together with his/her recommendations, to the EIAC*”. The EIAC is defined at SECTION I, clause 1.1.6 as the EDEN ISLAND AESTHETIC COMMITTEE. He admitted that before making any changes to his pontoon i.e. to erect the shelter, he did not first obtain the permission of the EIAC, but claimed that he had told Mr De Clarisse and the Manager (presumably of the marina) that his jetskis were being affected by the sun and that something had to be done about it but they had not responded. He further accepted that he had not submitted the plans and specifications to the EIAC through the General Manager, and therefore could not have been given permission to erect the shelter, but explained that there is no design for the shelter as such and that the shelter is only an accessory that is put on the pontoon, which he confirmed he did not have permission to do.

- [75] The plaintiff/counter-defendant also accepted that he did not follow the appeals procedure under SECTION III, clause 1.1.1 (h) to (k) of the Design Guidelines, but denied coming to court straightaway. He stated that he wrote to the EIVMA requesting that they provide him with an appropriate design or other solution but did not receive any response. He stated that he had been forced to come to court because nobody was responding to his enquiries, and explained that if there had been someone assisting him to find a solution he would not have found it necessary to do so. He stated that if he had a copy of all these rules which the EIVMA is claiming he breached, he would have followed the proper procedure, but reiterated that because there was no response from them in regards to his enquiries, he had no option but to file the court case. He stated that he did not invest in a house in Seychelles to have to come to court because of a dispute relating thereto. As a foreigner, he is supposed to obey the law of the country but he had to go to court find out what he had done wrong and to vindicate his rights.
- [76] The plaintiff/counter-defendant states that he does not recall Mr De Clarisse informing him that he should have submitted his designs to the Aesthetics Committee and that he had done it on his behalf. His attention was drawn to the email dated Friday 2nd of July sent at 4.03pm (Exhibit P6) in which Mr De Clarisse informed him that he had submitted his *"request for the erection of the corrugated iron shelter for [his] jetski in the private marina to the Aesthetics Committee"*. He said that it is Mr. De Clarisse who claims that he had done so, implying that there was no agreement between them for Mr. De Clarisse to submit the request on his behalf and that Mr. De Clarisse did not submit the request, despite saying so in the email. The plaintiff/counter-defendant agreed that he was informed that he needed to remove the shelter in that email.
- [77] His attention was drawn to clause 29.1 of the EIVMA constitution provides for Notice to be given to a member who breaches any provision of the constitution or the rules and/or regulations made thereunder, the DESIGN GUIDELINES, or any applicable laws, by-laws or regulations, to remedy such breach. It was put to him that the email dated Friday 2nd of July sent at 4.03pm (Exhibit P6), served as Notice under clause 29.1 by the EIVMA acting through its General Manager, to remedy the breach to the constitution. He stated that the email did not mention any breach of the constitution as the reason for refusing approval for erection of the shelter but rather cited aesthetic and safety concerns. He also pointed out that the email was sent after he left the country and

he was not informed that he should demolish the structure while he was still in the country.

- [78] The plaintiff/counter-defendant's attention was further drawn to clauses 29.1.1 and 29.1.2 of the EIVMA constitution which states that, failing timeous compliance by a member to remedy a breach after Notice has been served under clause 29.1, the EIVMA may take the necessary action to remedy the breach or call upon the member to do so. It was put to him that the EIVMA therefore acted in accordance with the constitution by asking him to remove the structure, and by removing it themselves when he did not do so within the given deadline of Monday at midday. He replied that if the constitution says so, they have done it. He agreed that he had not removed the structure but pointed out that he had asked the EIVMA not to touch it until his lawyer spoke to them and they came to an arrangement for a solution. He did not agree that he was the one in breach of the EIVMA constitution, rules and Design Guidelines.
- [79] He further stated that there was many things that the EIVMA should discuss with the homeowners, and that they should make time to address their problems instead of ignoring them. He claims that there is lack of communication, misunderstanding, and disrespect on the part of the EIVMA General Manager when handling these issues which is what pushed him to come to Court.
- [80] In regards to the aesthetic concerns pointed out in the email of the 2nd of July 2021 (Exhibit P6), the plaintiff/counter-defendant stated that no explanation was given as to the reason for such concerns. He stated that the material which he used for the shelter is similar to that used on the roofs of the houses on the island, and opined that it was a matter of personal taste.
- [81] He stated that in any event there are no guidelines or designs for such things because he asked to be provided with the same and there was no response. It was put to him that the purpose of the Design Guidelines is to enable him to be provided with an appropriate design, and if he had followed the procedure he would have been provided with the guidelines and design. He maintained that there were no designs.
- [82] He admitted having asked for the design later in July after having erected the structure, and around the time when he filed the court case, as he was not being provided with them by the EIVMA and he wanted to prevent the structure from being dismantled.

- [83] He also stated that he did not provide anything to the Aesthetic Committee, the EIVMA or its General Manager to show that the structure was safe and sound. However, the Marina Manager, France, carried out an inspection of the structure in his presence and told him that the wind will blow it away but after almost a year the structure is still standing after withstanding strong winds.
- [84] It was put to the plaintiff/counter-defendant that in order for the Aesthetic Committee to approve a structure they would need to know that it is safe, which they could not have known without the relevant information being submitted by him. He maintained that the structure was safe, and complained that nobody from the EIVMA including the General Manager made time to discuss the safety measures with him. He stated that home owners are usually in Seychelles for a short period, and that whenever they ask for a meeting or an appointment they are told that the EIVMA representatives are busy or they take a long time to set up the meeting. He states that as a homeowner his requests have to be taken seriously and dealt with immediately. When he queried what safety measures needed to be taken, he should have been informed.
- [85] He denied that after he had started putting up the structure, the General Manager asked him to halt the works and follow the correct procedure by sending the required documentation to the Aesthetic Committee, so that they could approve the submitted design. He claims that the General Manager just told him that he was not supposed to erect the structure and to remove it. He did not even take the time to discuss it with him and explain why it had to be taken down or to find a solution.
- [86] He stated that the General Manager never sat with him to explain anything, that he was made to wait for hours before he met with him, and he was very arrogant. He stated that he has the right to be treated with respect and that the General Manager should have taken the time to discuss the issue and resolve it. He had an issue where his jetskis were being damaged and it was brought to the General Manager's attention who should have come up with an immediate solution.
- [87] He disagreed that in order to put up the structure on his pontoon he needed to follow the EIVMA Constitution and the Design Guidelines. He further disagreed that upon receiving the email of the 2nd of July 2021 notifying him that the Aesthetic Committee had not approved the structure, he ought to have dismantled it and followed the

appropriate rules of appeal under the Design Guidelines. He stated that the Aesthetic Committee was bound to give him reasons for not approving the structure and also provide him with a solution. They are not supposed to apply the rules in such a way that the needs of the owners are ignored. When it was put to him that he was not supposed to ignore the rules either he replied that the EIVMA should also not ignore the requests of homeowners, and provide them with the comfort and convenience that motivated them to invest in the properties, instead of making them struggle.

- [88] In re-examination, the plaintiff/counter-defendant's attention was brought to the "TABLE OF CONTENTS" at page 2 of Exhibit P2, more specifically the note that states that "ANNEXURE 2.B, 2.E to 2.K (AGREEMENT OF SALE), and 3.A and 3.B (AGREEMENT OF LEASE) will be provided separately and are to be signed in full by the PURCHASER". The aforementioned annexures are listed in the "TABLE OF CONTENTS" as 2.B: VILLAGE MANAGEMENT ASSOCIATION: CONSTITUTION; 2.E: SUBDIVISION PLAN; 2.F: BUILDING LAY-OUT PLAN; 2.G: FLOOR PLANS; 2.H: VERTICAL SECTION; 2.I: SPECIFICATIONS; 2.J: SITE PLAN; 2.K: SCHEDULE OF FINISHES; and 3.A: CONDUCT RULES; 3.B: MOORING PLAN, and are stated to be "Separate Documents". The plaintiff/counter-defendant stated that he was never provided with or signed any of the Annexures as stated in the note, and concluded that there was non-compliance in that regards.
- [89] Pursuant to the email of 2nd July 2021 sent at 4.03pm (Exhibit P6), in which Mr. De Clarisse instructed the plaintiff/counter-defendant to demolish the structure, which he refused to do and informed Mr. De Clarisse that his lawyer would handle the matter, the EIVMA dismantled the structure and a court case was filed pursuant to which the Court ordered the EIVMA to put the roof back on the floater until final determination of the case. It was not the plaintiff/counter-defendant who purposefully went against the EIVMA's instructions.
- [90] As to the difference between a floater and a pontoon, the plaintiff/counter-defendant explained that he uses the floater to put his jetski to keep it out of the water. The pontoon is the walking area at the marina to which the floater is secured. If the floater is detached from the pontoon it will float away from it. The poles supporting the roofing were placed on the floater which is designed specifically for such attachments to support the roof. They are meant for that purpose and just have to be screwed onto the floater. The

floater belongs to the plaintiff/counter-defendant and not to the EIVMA but he rents the berth where his floater is attached to the pontoon.

- [91] He confirmed that the roof he used is similar to the roof that is being used for the houses on Eden Island and that he purchased them in Seychelles.
- [92] He stated that the floater with the roofing on top is similar to a boat with a canopy on top of it. The situation of the floater with the roofing being attached to the pontoon is the same as a boat with a canopy being docked to the pontoon.
- [93] He confirmed that because he was not given any of the annexures to the Sales Agreement, which he was supposed to have received, he was not aware of the procedures to be followed to obtain approval for installing the roofing on top of his floater. Having been informed that there were certain procedures that he had to follow, he requested for a copy of the constitution and was given one around the 6th of July 2021, after the EIVMA dismantled the shed from his floater and put it in the yard of his house. He also did not sign the constitution or return a signed copy to the EIVMA, as required by the Sales Agreement.
- [94] He stated that he has not done anything wrong and that the issue escalated to where it is now because nobody responded to his queries and concerns. By way of example, he cited his email 4th of July 2021 sent at 12:04pm (Exhibit P6) in which he sought clarification as to the safety concern in respect of the structure erected on his floater, to which he received no response. In that email he also stated that he had the right to do as he wanted on his property, and that there was no clause in the Sales Agreement requiring him to obtain approval to build or erect anything on his property. He agreed that he made that statement because he only received a copy of the EIVMA constitution on the 6th of July 2021 and never received the Design Guidelines. The plaintiff/counter-defendant further stated that if the security concerns had to do with the wind, the shelter is still intact and has not yet moved or blown away even with strong winds.
- [95] He confirmed that the shelter is on his floater which is not part of the common area. If the floater is unscrewed from where it is attached, the shelter will move with the floater.

- [96] The plaintiff/counter-defendant confirmed having had a discussion with Mr De Clarisse for an alternative to store his jetski out of the sun, in which Mr De Clarisse suggested that he keep his jetski at his villa, pursuant to which he had requested to be provided with a slipway to facilitate the same. The said discussion took place after Mr. De Clarisse had informed him of the Aesthetic Committee refusal to approve his request regarding his shelter. He stated that by email dated 6th July 2021 at 7.10pm (Exhibit P6), he had made suggestions to Mr De Clarisse regarding the slipway, all of which are feasible and for which he was prepared to bear the cost but which he never received any reply to.

Testimony of Mr Adanan Islam Halil

- [97] Mr Adanan Islam Halil testified on behalf of the plaintiff/counter-defendant. He stated that he built the shelter on the floater in August 2021 and that it was very strong. In cross-examination, the witness testified that he did not have any engineering diagrams or report to show how strong the shelter is. He also stated that to put up the structure he used iron and some screws and that no matter the type of iron used, rusting will occur because of the salt in the environment. He added that any weakness from corrosion would only occur in about five years or so and not immediately.

Testimony of Mr Charles De Clarisse

- [98] Charles Claude De Clarisse, the General Manager of the EIVMA for the last 8 years testified on its behalf. He explained that EIVMA is an association that represents the owners of properties on Eden Island who are its members. He stated that the EIVMA provides certain services to its members, services the common areas at Eden Island and is responsible for collecting levies from its members and sends invoices/ statements of account to them for that purpose.
- [99] He stated that the role of the EIVMA is set out in its Constitution (Exhibit P2) and that its objects are contained in clause 4 thereof. These objects include “*the control of the aesthetic appearance of the DEVELOPMENT*” (clause 4.1.2); “*the maintenance and control of the COMMON AREAS, MOORING AREAS and/or WATERWAYS* (clause 4.1.5); and “*the control over the compliance and the enforcement of the DESIGN*

GUIDELINES” (clause 4.1.8). He confirmed that the EIVMA performs these roles on a daily basis.

[100] He also confirmed that the plaintiff/counter-defendant Mr Salman Al Darwish is a property owner on Eden Island, and automatically became a member of the EIVMA and agreed to be bound by the provisions of its constitution, when he signed the Agreement of Sale dated 30th June 2015 (Exhibit P2). He also confirmed having received the “ACKNOWLEDGMENT BY PURCHASER” (Exhibit P2, pg 55) in which the plaintiff/counter-defendant acknowledged that he has read the annexures to the Agreement of Sale and familiarized himself with the contents thereof.

[101] Mr De Clarisse explained that common areas on Eden Island comprise facilities that do not belong to the owners, such as landscaping, infrastructure and berth areas, and are owned by the EIVMA, as provided for in its constitution. During the development phase the common areas are owned by the developer EIDC but are transferred by the developer to the EIVMA on completion of the development.

[102] He confirmed that the area where the plaintiff/counter-defendant keeps his jet skis is an area in the marina owned by the EIVMA, which it leases to its members. The area is known as Basin 2 and is registered as parcel V19971 in the name of the EIVMA. He produced the Certificate of Official Search dated 7th May 2022 in respect of Title V19971 as Exhibit D2 in which the EIVMA is stated to be the proprietor thereof. He also produced the transfer deed dated 2nd August 2017 evidencing the transfer of Title V19971 from EIDC to EIVMA as Exhibit D3. The transfer deed subjects the transfer to terms and conditions to be registered as a Restrictive Agreement in the Encumbrance Section of Title V19971, and which are binding on EIVMA’s successors in title. The conditions are as follows:

- 1. The transferee of the land parcel comprised in the abovementioned Title shall not be entitled to deal (as defined in the sale agreement(s) for Eden Island at the time of this registration of transfer) with the land parcel for any reason whatsoever;*
- 2. The Transferee shall not during the development period (as defined in the sale agreement(s) for Eden Island at the time of this registration of transfer), alter the access to and from the land parcel without prior written consent of the Transferor;*

3. *The Transferee shall not, at any time in the future after this registration of transfer, for any reason whatsoever, change, alter and or amend the zoning and or use of the land parcel comprised in the abovementioned Title from open space, and or from the zoning and or use of the land parcel comprised in the abovementioned Title as it was at the time and date of this registration of transfer, to any other use and or zoning whatsoever without the prior written consent of the Transferor.*

- [103] He also produced a location plan dated 1st June 2022 which was certified by the Director of Surveys as Exhibit D4, showing the position of Basin 2 and parcel V19971 as well as the position of the plaintiff/counter-defendant's villa. He further produced the Cadastral Plan for parcel V19971 as Exhibit D5.
- [104] Mr De Clarisse agreed that as per clause 9.1 of the constitution "*Every MEMBER is obliged to comply with the provisions of this CONSTITUTION and all rules and/or regulations made in terms of this CONSTITUTION*". Further that in terms of clause 9.1.4 "*Every MEMBER is obliged to comply with any directive given by the ASSOCIATION and/or the BOARD in enforcing the provisions of this CONSTITUTION and/or any rules and regulations made in terms of this CONSTITUTION*". He also confirmed that in his role as General Manager he assists with the enforcement of the provisions of the constitution, and went to explain that the present proceedings concern a breach of the EIVMA constitution by a member, namely the plaintiff/counter-defendant Mr. Darwish, who erected a structure in a common area which is the property EIVMA.
- [105] He explained that a "*berth*" refers to an area in the basin which belongs to the EIVMA that it leases to its members for their enjoyment. He confirmed that according to clause 16.3 of the constitution (Exhibit 2, pg 70), "*WATERWAYS AND MOORING AREAS*" are maintained by the EIVMA.
- [106] He further confirmed that the EIVMA is the owner of the berths and leases them to its members, who as per 16.3 only have a right to use the berths. To his knowledge, the plaintiff/counter-defendant has no rights in regards to the berth leased to him other than the right to use it.
- [107] The Design Guidelines was produced as Exhibit D6. Mr De Clarisse stated that the Design Guidelines governs the role of the Aesthetic Committee of which he is a member, and which ensures that the constitution and the Design Guidelines are

complied with. A member wishing to make any alterations to the berth leased to him would need to apply to the Aesthetic Committee for approval to effect such amendment. After considering the application, the Committee decides whether to approve them or not, and communicates its decision to the applicant in writing. Given that the alterations effected by the plaintiff/counter-defendant was in a common area, approval of the Aesthetic Committee was required under section 1, para 1.2 of the Design Guidelines (which requires prior approval in accordance with the Section III (Building Plan Approval Procedure) for any construction, erection or alteration of, or addition to, any improvements).

[108] Mr. De Clarisse stated that while the shelter built by the plaintiff/counter-defendant on his floating dock required the approval of the Aesthetic Committee as it is an alteration on the common area belonging to the EIVMA, in contrast no permission was required for the plaintiff/counter-defendant to install the pontoon to put his jet skis on, as it forms part of the water area that he is leasing. He added that many members have a pontoon that they put their jet skis on, and that the Aesthetic Committee would have oversight over any alteration to their floater or pontoon, as it would change the appearance of the basin which is a common area.

[109] Mr De Clarisse stated that the plaintiff/counter-defendant never approached the Aesthetic Committee before putting up his shelter. It was only when it came to his attention that the shelter was being erected at the berth leased to the plaintiff/counter-defendant, that he asked the person doing the works (Mr Adanan) to stop the works pending clarification from the owner, and to ask the owner to come and see him. The plaintiff/counter-defendant came to see him half an hour later. Another reason for asking Mr Adanan to stop was his lack of a work permit.

[110] Mr De Clarisse denied that he made the plaintiff/counter-defendant wait a long time before seeing him. He claimed that as soon as the works were put on hold, the plaintiff/counter-defendant came to the EIVMA office, and was immediately explained why he could not continue with the works and the process that he should follow. The understanding was that the works would be kept on hold while Mr De Clarisse liaised with the Aesthetic Committee on behalf of the plaintiff/counter-defendant who would wait for a response from the committee before resuming the works. However, the

building of the structure was completed on the same day instead of waiting for the committee's decision.

[111] Mr De Clarisse stated that he did not submit a plan to the Aesthetic Committee but sent pictures of the already erected structure to the members of the committee for them to ascertain whether it was acceptable to them. The Committee did not give their approval and he informed the plaintiff/counter-defendant by email dated Friday 2nd July (Exhibit P6) that his request has not been approved due to aesthetic and safety concerns. The plaintiff/counter-defendant stated that his lawyer would take up the matter, and subsequently the matter was taken to court by.

[112] Mr De Clarisse explained that aesthetic concerns have to do with the appearance of a proposed addition or alteration, and whether the proposed design is in accordance with the existing design of Eden Island. As to the plaintiff/counter-defendant's explanation that he used corrugated iron sheets of the same colour and type as is used on other buildings in the village, Mr De Clarisse stated that there are no roofing sheets on any berth in Eden Island, or for that matter anywhere in Seychelles that he knows of. He stated that this is the first time that a shelter using corrugated iron sheets has been erected in a marina. There is no other similar structure in the Eden Island marina and therefore it does not fit in with the rest of the marina.

[113] He also explained that the structure that was used to support the roofing sheet is not used in the marina, one of the reasons being that it is made of galvanized tubing which is highly corrosive in saline environments and will not last long.

[114] Mr De Clarisse confirmed that the plaintiff/counter-defendant never submitted a plan to the Aesthetic Committee.

[115] At one point in time, the EIVMA dismantled the structure, and the court ordered its reinstatement, which the EIVMA complied with. Mr De Clarisse confirmed that none of the actions that he had taken with regards to the structure were contrary to the constitution or the rules made thereunder, and that he followed the words of the constitution to the letter. Consequently he asked the court to rule in favour of the EIVMA and to order the structure to be demolished.

- [116] In cross-examination, Mr De Clarisse confirmed that the registered Contract Schedule (Exhibit P2, pg 3) in the Sales Agreement was signed only by the plaintiff/counter-defendant as the purchaser and the Land Registrar and not by the seller. He stated that the registered Contract Schedule was provided to the EIVMA by the EIDC, after the sale was concluded between the EIDC and the plaintiff/counter-defendant. He also confirmed that the EIVMA has all the sales documentation pertaining to the sale of villa 48 to the plaintiff/counter-defendant including the Sales Agreement and title deed.
- [117] He could not confirm whether the plaintiff/counter-defendant had received a copy of the EIVMA constitution prior to July 2021, when he sent the plaintiff/counter-defendant one following his request for the same. He stated that the constitution is sent by the seller EIDC to purchasers of property but would not know whether this was done in this case.
- [118] In relation to what he had stated in examination-in-chief, that after it was brought to his attention that a structure was being erected on the plaintiff/counter-defendant's floater, he went to see for himself and told the person carrying out the works to tell the plaintiff/counter-defendant to come and see him, Mr De Clarisse confirmed that the plaintiff/counter-defendant came after about 20 minutes and was asked to stop the works, and told of the procedure to be followed for any alteration to or erection of any structure, in line with the EIVMA constitution and Design Guidelines with reference to the Aesthetic Committee. This was sometime in July.
- [119] Mr De Clarisse stated that it could have been the EIVMA which sent a copy of the constitution to the plaintiff/counter-defendant on the 6th July 2021, after he had stated that he did not have a copy. He was asked why he did so, instead of asking the EIDC if it had not sent a copy to the plaintiff/counter-defendant or if it had any signed documentation to show that he had been sent a copy, after he had stated that it is not the responsibility of EIVMA but of the seller. He stated that the constitution is not signed by any member and the EIVMA can send a copy of its constitution to any of its members. It was then brought to his attention that it was stated as a Note to the Table of Contents in the Sales Agreement (Exhibit P2, pg 2) that "*ANNEXURE 2.B. [VILLAGE MANAGEMENT ASSOCIATION: CONSTITUTION] will be provided separately and are to be signed in full by the PURCHASER*".

- [120] Mr De Clarisse confirmed that plaintiff/counter-defendant asked for a copy of the constitution while he was in Seychelles and was sent one by email on 6th July 2021 after he had left the country.
- [121] As to why Mr De Clarisse had not given him a hard copy when he came to the EIVMA office instead of emailing it, he stated that it is a 30 pages document, and that they send a soft copy to members. It was put to him that he could easily have shown him the provisions of the constitution which he allegedly breached and he replied that he did explain those to the plaintiff/counter-defendant and also made reference the Design Guidelines and the Aesthetic Committee. He explained the whole process that should be followed and felt no need to show him a hard copy of the constitution.
- [122] It was put to Mr De Clarisse that the plaintiff/counter-defendant was never informed at their meeting at the EIVMA office of any breaches to the constitution caused by erecting the structure, and that he was just told to stop the works. He stated that the reason why the plaintiff/counter-defendant was asked to put the work on hold was because the process laid out in the constitution and the Design Guidelines had not been followed and the application to the Aesthetic committee not made. Although he was not shown the actual provisions of the constitution he had breached, reference was made thereto and he was sent a copy of the constitution to familiarise himself with its contents.
- [123] Mr De Clarisse confirmed that the plaintiff/counter-defendant never submitted anything to the Aesthetic Committee, but that Mr De Clarisse himself submitted photographs of the already erected structure to the Committee on his behalf. He stated that “we” took photographs of the erected structure and sent them the Aesthetic Committee explaining that the structure had already been erected and asking if the Aesthetic Committee would consider it or not.
- [124] It was put to him that the plaintiff/counter-defendant never authorised him to submit anything on his behalf, and he replied that this was what was proposed to the plaintiff/counter-defendant at the meeting between them. He agreed that the procedure under the rules is for the home owner to submit an application to the EIVMA which then forwards it to the Aesthetic Committee, and admitted that nothing was sent to the EIVMA by the plaintiff/counter-defendant, but maintained that he only did what was

agreed upon at the meeting i.e. to submit the photographs on the plaintiff/counter-defendant's behalf. He clarified that the pictures were not sent to him by plaintiff/counter-defendant.

[125] Mr De Clarisse confirms that thereafter he sent an email to the plaintiff/counter-defendant informing him that the Aesthetic Committee has not approved the shelter he had erected on his floater for aesthetic and safety reasons. As to when the meeting of the Aesthetic Committee taking that decision was held, he stated that the Aesthetic Committee does not meet physically but works via email which is sent to all members of the Committee, and therefore there are no minutes of meetings. He did not have proof of the email he had circulated to the Aesthetic Committee members and their responses, and it was put to him that there was never any correspondence between him and the Aesthetic Committee in that regard and he simply sent the email to the plaintiff/counter-defendant to tell him his request had not been approved. Mr De Clarisse stated that he did not have such proof with him at that precise moment but maintained that the exchange of emails did take place and that the decision taken was by the committee.

[126] Mr De Clarisse admitted that the EIVMA does not own the floater that the plaintiff/counter-defendant's jetski is on, but stated that although the floater is the plaintiff/counter-defendant's property, it is not correct to say that whatever he does on there is his business because the floater is in the common area. He confirmed that a boat owner who parks his boat in the common area can make alterations to his boat or the structure of his boat without having to ask for the EIVMA's approval but clarified that any alterations affecting the aesthetics of the surrounding area as well as the whole of Eden Island needs permission.

[127] He confirmed that the roofing of the houses next to Basin number 2 are the same colour and of the same material (corrugated iron sheet) as the roofing on the plaintiff/counter-defendant's floater.

[128] He also confirmed that it is the responsibility of the owner of any floater docked to the pontoon to maintain it and any jet ski kept on it. However he stated that the actions of the plaintiff/counter-defendant did not amount to taking care of his floater that was docked to the pontoon in basin number 2, as he made an alteration to the floating board

by erecting a structure thereon. For clarification, he explained that the pontoon is a floating structure to which the floater is bolted by means of screws.

[129] Mr De Clarisse agreed that the communications between the Aesthetic Committee members regarding the shelter erected by the plaintiff/counter-defendant and in which they are trying to find a solution to the issue are contained in emails sent in September (Exhibit D7). It was pointed out to him that the date of these emails are much later than 2nd July 2021 when he informed the plaintiff/counter-defendant that his request for approval of his structure had not been approved. He therefore admitted not having any proof that the Aesthetic Committee had been consulted prior to the date of these emails in September, although he maintained that the decision was made by the committee and not solely by him.

[130] Mr. De Clarisse agreed that nowhere in the Eden Island Design Guidelines (Exhibit D6), in section 1, para 1.1.6, does it say that the Eden Island Aesthetic Committee shall consider applications for alterations, additions or renovation by email consultation. However, he stated that it was decided to conduct meetings in this manner by the members of the committee including Mr De Clarisse himself, Brian Howard the officer of the EIVMA Board who was the chairperson of the committee, Christian Neethling the Control Architect, Craig Heeger the Chairman of the Developer and Bernard Pool the Chairman of the EIVMA Board. He confirmed that any correspondence prior to the 2nd of July 2021 in respect of aesthetic issues in relation to the shelter erected by the plaintiff/counter-defendant would have gone to all of them.

[131] Mr. De Clarisse agreed that. He also agreed that if as claimed by the plaintiff/counter-defendant he never had a copy of the EIVMA constitution prior to being given one by him, the plaintiff/counter-defendant would not have known what was required of him by the constitution. He further agreed that it is the right of a homeowner to be advised in an amicable way of anything that he should be doing where he lacks knowledge of the same. However, he disagreed that the plaintiff/counter-defendant's concerns were not attended to despite coming to the EIVMA office on numerous occasions.

[132] In re-examination Mr. De Clarisse confirmed that the EIVMA is a registered association, and confirmed that in terms of section 11 of the Registration of

Associations Act, a member of the EIVMA is bound by its constitution whether or not the member signs it.

[133] Mr De Clarisse stated that he never have any bad intentions towards the plaintiff/counter-defendant and that he tried to help him as much as he could. By submitting the photographs to the Aesthetic Committee, his only intention was to help.

[134] He confirmed that he is a member of the Aesthetic Committee by virtue of his position as General Manager of the EIVMA, and he participates in the proceedings of the Committee in that capacity whether the proceedings are conducted by email or in person. He confirmed that the actions that he has taken in regards to the shelter erected by the plaintiff/counter-defendant, as shown by the emails exhibited, were taken in his capacity as a member of the Aesthetic Committee and not in his personal capacity. He further confirmed that the decision refusing approval for the shelter erected by the plaintiff/counter-defendant was a decision of the Aesthetic Committee and not his sole decision, and that he had been acting in his capacity as a member of the Committee when he informed the plaintiff/counter-defendant of the same.

[135] He explained that even before he submitted the photograph to the members of the Aesthetic Committee, two members of the Committee (the Control Architect and the Chairman of EIDC) had already sent photographs to the EIVMA asking if the EIVMA was aware of this illegal installation. Therefore it was not solely him and in his personal capacity who rejected approval for the shelter.

Q: He further explained that, despite the improvement being made on the plaintiff/counter-defendant's property which is his floater, such improvement falls within the jurisdiction of the Aesthetic Committee because it was done in a common area which is the property of the EIVMA. He confirmed that because the floating dock is within the common area, the Aesthetic Committee has oversight on what happens on it.

Testimony of Mr Christian Neethling

[136] Mr Christian Neethling is another member of the Aesthetic Committee which he states comprises board members. He is an architect by profession. According to Mr Neethling owners wishing to make changes to their properties need to apply to the Aesthetic Committee for approval before proceeding with any construction. The Aesthetic Committee looks purely at the aesthetics of the proposed structure to see if it fits in with

the common aesthetics of Eden Island as provided for in the Design Guidelines. If approval is granted by the Aesthetic Committee, further approval is then required by any relevant authorities in the Seychelles.

[137] Mr Neethling stated that he sits on the Aesthetic Committee in the capacity of Control Architect. He explained that the architectural company that he works for wrote the Design Guidelines (Exhibit D6) which basically provides guidance to home owners who wish to build a new structure or make any changes to an existing one. When an application is submitted to the Aesthetic Committee and the proposed construction does not fall within the normal guidelines and is so to speak in a *grey area*, the committee will seek the opinion of the Control Architect who will advise them accordingly.

[138] Mr Neethling confirmed that the Design Guidelines would apply to moorings and berths used by members as moorings fall within the common areas of the marina. The Aesthetic Committee has a say in regards to all common areas on Eden Island, as well as aspects of private property which are visible to the public.

[139] As to the reason why a committee would need to have oversight on the external appearance of a development, Mr Neethling explained that the whole island was conceived with a certain aesthetic in mind, and was conceptualized with a very specific urban design, a specific architectural character, and specific colour schemes which extends as far as the colour of buggies driven on the island. This is to preserve the aesthetics and the concept of the development which is what all home owners bought into. The purpose of the Aesthetic Committee is to safeguard against anyone contravening that aesthetic character of the place, by assisting home owners to achieve what they want within the aesthetic guidelines that the committee wants to maintain.

[140] Mr Neethling stated that he became aware of a structure erected by the plaintiff/counter-defendant on his berth, after it had already been installed, although he is not aware of any application made to the Aesthetic Committee for the same. It was brought to his attention by email.

[141] Once the structure was erected, the Aesthetic Committee, by a fairly unanimous decision, decided that the structure was not visually acceptable to them. The decision was not solely that of Mr. De Clarisse but was a decision of the whole committee. Mr Neethling opined that the main issue arises from the fact that the structure was built

without prior approval. He stated that for example a person who wants to build a house does not build it first and then then wait for the authorities to inform him that he can keep it. The person has to make an application and submit building plans designed by a competent structural engineer, and obtain approval from the authorities before he starts building. If the person erects a structure without the approval of the authorities, they can order that the works be stopped, in some cases apply penalties, and give the person time to rectify the structure or submit building plans for approval, after which time the works can proceed. He stated that in the present case, the issue boils down to the fact that a structure was erected without prior approval of the Aesthetics Committee, that the approval should have been sought before erecting the structure at which stage the applicant should have proven to the committee that the design of the structure was acceptable, and not as it happened, for the Committee to now prove that the structure should not have been erected in the first place.

[142] The other reason why the structure was not approved by the Aesthetic Committee is because of the aesthetics, that is, its appearance. Mr Neethling stated that it looked out of place in the marina, that it is a “daring” structure that has a negative appearance on the ambiance of the marina. However he reiterated that the main issue is really the fact that a structure was built without prior approval, which is really what triggered the whole process.

[143] Mr Neethling stated that he has gone to see the structure in his capacity as Control Architect and was struck by the roof covering, which he states is the biggest problem for him in terms of its appearance. It looks very out of place. In a marina you do not have boats with corrugated roof sheet on them. He stated that the structure was still not acceptable despite the plaintiff/counter-defendant having used the same type and colour of roofing as the homes in the area because the red corrugated roof sheet is intended for buildings and not to be put on a structure in a marina. It is not a material that is used for example on boats or yachts. The corrugated roofing sheet is out of place in the marina and detracts from the environment. Just because certain material is used elsewhere on the island does not mean that it can be used in all areas. Each area and situation has to be assessed individually hence the importance of the Design Guidelines: the marina has a very specific aesthetic: the canopies and covers for the boats are normally made of

canvas or a type of fiber glass, and the type of covering is important so that they harmonise with each other as they are all similar in terms of aesthetics.

[144] The safety concerns arose from the fact that since no application was made, no structural drawings designed by a qualified structural engineer were submitted. Mr Neethling stated that any structure that is in the public domain needs to be designed by a structural engineer to ensure that it is safe. Not having seen any documentation, he is not in a position to say whether or not it is safe as he does not know whether it was designed by a qualified structural engineer.

[145] As to the difference between a pontoon (used by the plaintiff/counter-petitioner in pleadings) and a floating dock (used by the plaintiff/counter-petitioner in his testimony), Mr Neethling states that it is a question of semantics of language, and opined that in the Eden Island context a pontoon is a walkway which cannot be obstructed and needs to be clear in case of emergency, for example to use as an exit if a boat is on fire. A floating dock is really a dock on which you put either a boat or a jetski, and can be either be permanently fixed or not. Floating docks are very common on Eden Island and the Design Guidelines apply to them, especially if a person wants to change them in any way.

[146] Mr Neethling stated that the plaintiff/counter-petitioner has placed a structure on his floating dock, and he considered that the Design Guidelines apply to the floating dock because the structure is connected to it irrespective of whether it is considered as a dock or a pontoon. The Design Guidelines apply simply because the people living in that area see or look onto this structure, which is part of the visual set up of the whole composition of the surrounding environment.

[147] Mr Neethling stated that he is not aware of any appeal made against the decision of the Aesthetic Committee rejecting the improvements made by the plaintiff/counter-petitioner, or of any new documents submitted to the Aesthetic Committee.

[148] As to whether the structure poses any danger other than flying away with the wind, Mr Neethling stated that there are many dangers with a floating structure: for example a passerby can cut his head on the roofing sheet. There are also many boating accidents that can happen. However the main issue has to do with the structural integrity of the structure.

[149] In cross-examination, Mr Neethling confirmed that he was first informed of the issue regarding the plaintiff/counter-petitioner via email of 22nd of July 2021 (pg 5 of Exhibit D7 which he produced together with other emails as a bundle). He stated that he would not necessarily have seen other correspondence from other members of the Aesthetic Committee sent prior to or on the 22nd July 2021. He explained why by giving the example of a home owner wishing to install a new window in his bedroom. If the window conforms to the aesthetics of Eden Island in that it is a standard Eden Island window made of the same material and of the same colour as other windows on the island, the home owner simply applies to the Aesthetic Committee which approves it. As there is no need to seek his opinion on the matter, it is approved without his being informed of or knowing about the matter. It is only when things are not necessarily clear and a second opinion is needed because the home owner might appeal the decision, that his opinion is sought.

[150] Exhibit D7 is a set of email exchanges among the Aesthetic Committee members between 22 July 2021 and 28 September 2021. Mr De Clarisse emailed the committee and their legal counsel Ms Tamara Christen on 22 July 2021 at 16.01hrs stating that the EIVMA has received summons to appear in Court the next day at 9am. He explained that this was because the plaintiff/counter-petitioner was unhappy about the decision of the Aesthetic Committee to remove his jetski shelter. He further attached the decision of the Aesthetic Committee, the photo of the jetski and what he termed "*some history*" (although the court did not have sight of the attachments). He also highlighted a "*few facts to remember*" and listed them as follows:

1. *He did not request any permission to the VMA before erecting*
2. *He did not submit any drawing to the VMA*
3. *I am not sure if he needs Seychelles Planning Authority Approval for this.*

[151] He also stated that the constitution is very clear, and that he had explained this to the plaintiff/counter-defendant. He also stated that the structure was about to be dismantled the next day but that this had been put on hold.

[152] At 14.20hrs, in response to the above email, Mr Neething shared his views on the matter. He stated that the plaintiff/counter-defendant needed to submit prior to construction all documents and drawings prepared by a qualified structural engineer to show that the structure is sound and can withstand Seychelles wind loads and basin

water movements. He added that the structure is not temporary in nature since it has roof sheeting fixed to a steel structure and thus would have required approval by the Planning Authority.

[153] The next day, i.e. 23 July 2021 Mr Brian Howard sent his views on the matter through an email sent at 12.43hrs. In it, he stated that *“Mr Salman Jassem Al Darwish seems to be rather arrogant in this matter.”* He added that *“We need to stick to our decision in this matter no matter what he threatens and as to a court appearance, I would suggest our argument is clear and our defence of the rules we wish to apply are sound.”*

[154] On 27 September 2021 at 13:55 hrs, an email was sent to the Aesthetics Committee by Mr De Clarisse in which he suggested a solution and attached some pictures to consider. In response to this, Mr Brian Howard at 16.07 replied with *“a resounding No”* and stating that *“they should get small boat covers for each jetski”*. Mr Neethling (email of 28th September 2021 at 9.15) and Mr Howard (email of 28th September 2021 at 12.57) shared similar views to the effect that any type of roof covering might be problematic for wind loads in the basin, unless the same is designed by a structural engineer and can *“withstand hurricane type of environments”* and further that Mr De Clarisse’s suggestion could result in many different types of roof covers being installed except if there one specific supplier or design allowed. In his email Mr Neethling further emphasised the safety concerns posed by such a structure and the implications thereof.

[155] Mr Neethling confirmed that the Aesthetics Committee’s role is to give guidance and approve applications subject to the further approval of the Planning Authority where this is required.

[156] He reiterated that he is not aware of any application made by the plaintiff/counter-petitioner or any other person on his behalf.

[157] He confirmed that the Design Guidelines and constitution lay down the requirement that a home owner needs to make an application to the Aesthetic Committee in respect of any proposed development on his property.

[158] He also stated that he is an architect licensed by the Seychelles Licensing Authority, that he operates his own business and also works for the developer the Eden Island Development Company.

[159] He stated that he has known the plaintiff/counter-petitioner personally since he purchased his villa 5 or 6 years ago, and that he has had several interactions with him over the years. He agreed that when his villa was being built, the plaintiff/counter-petitioner wanted a number of alterations to be done to the villa, and ensured that the proper procedures were undertaken by the developer to obtain approval for the same. He also agreed that in his interactions with the plaintiff/counter-petitioner during that time, he found him to be a law abiding person and home owner of Eden Island. Mr Neethling added that because the plaintiff/counter-petitioner ensured that everything was done in accordance with the laws of Seychelles and the laws and rules applicable to Eden Island when his villa was built, he found it very strange that he had not submitted an application to build the Jetski shelter. He stated that it was not the way he knew the plaintiff/counter-petitioner to do business and found it out of character. It was put to him that the reason why the plaintiff/counter-petitioner did not make an application to the Aesthetic Committee is because he was unaware that he was required to do so as he was only given a copy of the EIVMA constitution on 6th July 2021, to which he responded that it was impossible for him to know why the plaintiff/counter-petitioner did or didn't do something.

[160] As to why it was felt that the shelter or the roofing of the shelter was not appropriate, Mr Neethling stated that this was for various reasons all of which are equally important. He stated that first an application needs to be made and approved. Secondly the material for the roof was not appropriate. Thirdly, because it is in the public domain the structure needs to be signed off by a Structural Engineer which was not done. He stated that as an architect he would never vouch for the integrity or strength of any structure without a Structural Engineer signing off on it, and that in all his private professional work, he always gets this done especially when it is the public domain.

[161] As to the example given by Mr Neethling of the roofing cutting someone's neck, as one of the reasons as to why approval was not granted, he clarified that it is difficult to say all the different ways in which a structure can endanger people's health. He stated that people can get injured in all kind of ways on boats, and there are many different examples of boating accidents and accidents on the water. It is impossible to protect people against all types of accident and the only thing that we do have any control over and can insist on is the safety of the structure.

- [162] As to the plaintiff/counter-petitioner having requested for the safety measures that he could adopt at his own cost which the Aesthetic Committee never provided, he stated that the plaintiff/counter-petitioner should have provided the structural design for approval first, as opposed to building the structure first and thereafter for the Aesthetic Committee to show him how to improve it to make it safe, and that it was also a question of procedure.
- [163] As to one the suggestions made by the plaintiff/counter-petitioner to Mr De Clarisse in the email of 6th July 2021 at 7:10pm (Exhibit P6), to *“provide [him] with the design of the structure to safeguard the Jetski from the heat of the sun according to the environmental condition and I am ready to pay for it”*, Mr Neethling stated that he is not aware of any response from the Aesthetic Committee. He explained that the Aesthetic Committee does not have or keep designs as solutions to possible problems that home owners may encounter. A home owner looking for a solution to a particular problem needs to appoint at his/her own cost the relevant professionals whether it is a Structural Engineer, Civil Engineer or an Architect to make a design which is then submitted to the EIVMA Aesthetic Committee for approval. If the EIVMA were to provide the designs to the plaintiff/counter-petitioner it would have to appoint a Structural Engineer or a Marine Engineer to design a roof structure as there is no preset design for such a structure.
- [164] As to whether the plaintiff/counter-petitioner should not have been told, as Mr Neethling was now saying, to get a Structural Engineer and a Marine Engineer to design a roof structure which would then be sent to the Aesthetic Committee for approval, instead of having to come to Court, he stated that the real issue is that the structure was already assembled and that there was no scientific basis on which to say that the structure was a safe and sound one, hence the reason it was dismantled which led to the matter being taken to court. He further stated that due to the injunction being granted by the court preventing the dismantling of the structure, there is now a structure in the public domain which has not been signed off by a competent professional, which is the issue in question and not about providing advice or anything of the sort.
- [165] Mr Neethling also stated that in his opinion there are many things that could have been done better, that ideally he would have been called and gone to speak to the home owner right from the start, and given him his opinion on how the matter could be rectified.

- [166] As to whether as an Architect working with the developer, he agreed that a home owner who did not have the Design Guidelines and hence did not know everything that he was required to do, should be guided by the EIVMA when they go wrong, as the EIVMA is an association of the home owners who are its members and paying a monthly membership fee for their services, he stated that he did not take part in the conversation between the EIVMA and the plaintiff/counter-petitioner and is not aware how or if he was or was not given advice.
- [167] Speaking in his personal experience, he stated that the situation can be rectified firstly by the steel post being signed off by a Structural Engineer or a Marine Engineer who can certify that it is safe and sound. Secondly the roof covering should be replaced with a light material suitable for a marine environment such as a canvas type material or a suitable type of fiberglass. The structure should be affixed with the right kind of screws to prevent galvanic corrosion. A drawing of the whole thing should be submitted to the Aesthetic Committee showing how the proposed structure/shelter is going to look and giving details of what material it will be made of. Once it is approved then the structure/shelter is manufactured.
- [168] He stated that does not know if the aforesaid matters were communicated to the plaintiff/counter-petitioner either by the Aesthetic Committee or the EIVMA as he only became aware of the matter by the email of 22nd July 2021. He was not part of the conversation prior to that and was not aware what was communicated to the plaintiff/counter-petitioner. He also never saw an application submitted to the Aesthetic Committee by the plaintiff/counter-petitioner.
- [169] In re-examination, Mr. Neethling confirmed that the Design Guidelines were not followed by the plaintiff/counter-petitioner. If they had been followed and the application process was followed the matter would not be before the court. He confirmed that if an application had been submitted as per the design guidelines he would probably have seen it as it is not a "*normal*" structure and is of the type where he would normally be consulted. He further confirmed that this type of structure requires oversight of the Aesthetic Committee, and as far as he knew no documents or application were submitted prior to the structure being erected. -

[170] The Court further asked the witness if an application had been made with a proper structural plan and the Aesthetic Committee considered it secure from a safety point of view but considered that it did not fit in with the aesthetics of Eden Island, would the Committee have just refused the application outright or made suggestions to make it compliant with the aesthetics. He replied that normally the applicant would be informed on how to make the structure compliant in terms of the colour scheme, or material that should be used.

Submissions

[171] Counsels for both parties made written submissions which I have carefully considered while making the analysis below.

Analysis

[172] The plaintiff/counter-defendant is a property owner on Eden Island more specifically Title No. 19213, on which his villa (villa 48) stands. He also leases a berth (No. 237) in the marina at Eden Island. The berth is located on Title V19971 in Basin No.2. He installed at his berth what he refers to as a “pontoon” in his Reply to Counterclaim, and as a “pontoon”, “floating dock” and “floater” in his testimony. He erected a shelter on that floating dock to protect his jetskis from the elements, as they sustained damage from being exposed to the sun, necessitating the replacement of damaged parts which was costly. The shelter consists of metal posts which support a roof made of corrugated iron sheet.

[173] The defendant/counter-claimant, the Eden Island Village Management Association (“EIVMA”), claims that the plaintiff/counter-defendant has erected the shelter in breach of his obligations as a member of the EIVMA under its constitution and the rules made thereunder, by which he is bound. In particular the EIVMA reproaches the plaintiff/counter-defendant of not following the Design Guidelines, which it claims are an integral part of the Constitution, firstly by not following the Section III Building Plan Approval Procedure, and secondly by not obtaining the approval of the Eden Island Aesthetics Committee of the EIVMA before erecting the shelter.

[174] The first issue for this Courts determination is whether the plaintiff/counter-defendant is a member of the EIVMA and therefore bound by the provisions of its constitution and the rules made thereunder.

[175] In that regard I note that in contradiction to the plaintiff/counter-defendant's averment at para 2 of the Complaint that "... the Plaintiff became member [of the EIVMA] by virtue of clause 7 of the Village Management Association Constitution", the plaintiff, at paragraph 3 of his Reply to Counterclaim, "vehemently denied" paragraph 3 of the Counterclaim which states that "By virtue of an agreement of sale entered into on the 30th June 2015 for the purchase of the villa and lease of the berth, the Defendant agreed to become a member and is a member of the counterclaimant and to comply with the provisions of the constitution and rules made thereunder". Counsel should take care when drafting, to ensure that there is consistency in his pleadings.

[176] In his Reply to Counterclaim, again at para 3, the plaintiff/counter-defendant avers that "he did sign an agreement which stated that the Seller has formed or is about to form the ASSOCIATION to administer, manage and control the residential development. However, the Defendant was never informed when and if the Association had been formed and had never been given a copy of the constitution, therefore the information in the constitution was not available to him, therefore he is not expected to be aware of what is in it. The said constitution was only provided to the Defendant on the 6th July 2021 after he requested for same during the time the issue of the shelter was alive. The defendant avers that no rules by the Counterclaimant was ever circulated nor distributed to him, therefore he cannot be aware of something which is or was made by the Counterclaimant under this constitution".

[177] The agreement that the plaintiff/counter-defendant admits signing is clearly the "Agreement of Sale: Villa" contained in Exhibit P2. He signed the Offer to Purchase at para 1 of the Signature Document (pg 6 of Exhibit P2) on 29th June 2015 which offer was accepted by the Seller at para 3 of the Signature Document on 30th June 2015 (pg 7 of Exhibit P2). The Agreement of Sale was registered on 25th November 2015 (pg 3 of Exhibit P2).

[178] Clause 10 of the Conditions of Sale contained in the "Agreement of Sale: Villa" (pg 19 of Exhibit P2) makes provision for the Eden Island Village Management Association as follows:

10. EDEN ISLAND VILLAGE MANAGEMENT ASSOCIATION

10.1 The SELLER has formed or is about to form the ASSOCIATION to administer, manage and control the RESIDENTIAL DEVELOPMENT.

- 10.2 *It is an express condition of the AGREEMENT that the PURCHASER shall –*
- 10.2.1 *on the DATE OF TRANSFER automatically become a member of the ASSOCIATION;*
- 10.2.2 *for as long as the PURCHASER is the OWNER of the PARCEL, remain a member of the ASSOCIATION, and be bound by, conform and comply with, the CONSTITUTION.*

[179] The transfer deed for the transfer of Title No. 19213 from the EIDC to the plaintiff/counter-defendant (Exhibit P1) signed on 10th November 2015 and registered on 25th November 2015 stipulates that:

The Transfer is subject to all the terms and conditions incorporated in the Agreement of Sale dated 30th June 2015 ("the Agreement") between the Transferor and the Transferee which will be registered simultaneously with the transfer of this Title and more specifically to the following conditions imposed by the Transferor and to be registered as a Restrictive Agreement in the Encumbrance Section of the abovementioned Title, and which shall be binding on the Transferee's successors, in title:

- 1. *[...]*
- 2. *The Transferee shall automatically become and shall remain a member of the Association and shall be subject to its constitution until he ceases to be an owner as aforesaid and shall not deal with the parcel with any person who has not bound himself, to the satisfaction of the Association, to become a member thereof;*

[180] Clauses 7 and 9 of the EIVMA constitution (pgs 63 & 64 of Exhibit P2) further provide in relevant part:

7. *MEMBERSHIP*

7.1 *The ASSOCIATION shall have as its MEMBERS –*

7.1.1 *[...]*

7.1.2 *every freehold title owner of a SINGLE RESIDENTIAL PARCEL upon registration of transfer of the relevant PARCEL into its name ...*

9. *OBLIGATIONS OF MEMBERS*

9.1 *Every MEMBER is obliged to comply with –*

9.1.1 *the provisions of this CONSTITUTION and all rules and/or regulations made in terms of this CONSTITUTION.*

[...]

9.1.4 *any directive given by the ASSOCIATION and/or the BOARD in enforcing the provisions of this CONSTITUTION and/or any rules and/or regulations made in terms of this CONSTITUTION.*

[181] It is clear from all the above that the plaintiff/counter-defendant, upon the registration of the transfer deed of Title No. 19213 on 25th November 2015, not only became a home

owner on Eden Island but also a member of the EIVMA, on whom the provisions of the EIVMA constitution as well the rules and regulations made pursuant to the constitution (including the Design Guidelines) were binding. As regards the Design Guidelines, clause 11.1 of the constitution reads in relevant part as follows:

11.1 For the purposes of maintaining the high standard of the appearance and design of the DEVELOPMENT and of ensuring an attractive and harmonious appearance thereof, during the DEVELOPMENT PERIOD, only the DEVELOPER may issue DESIGN GUIDELINES. The DESIGN GUIDELINES shall constitute an integral part of this CONSTITUTION ...

[182] Section 1, para 1.2 of the Design Guidelines reiterate that they are an integral part of the constitution. The relevant part thereof reads:

These guidelines should be read in conjunction with the Constitution and in the context of an environment that has already been established with specific values and principles

The Design Guidelines constitute an integral part of the Constitution ...

[183] I do not find any merit in the arguments of the plaintiff/counter-defendant that he was not bound by the provisions of the constitution and the rules and regulations made thereunder because he “*was never informed when and if the Association had been formed*”; that he was only given a copy of the constitution on 6th July 2021, and therefore prior to that “*the information in the constitution was not available to him, therefore he is not expected to be aware of what is in it*”; and that “*no rules by [the EIVMA] was ever circulated nor distributed to him, therefore he cannot be aware of something which is or was made by the [the EIVMA under this constitution]*” (para 3 of Reply to Counterclaim). This is for the following reasons.

[184] The plaintiff/counter-defendant does not claim he did not have a copy of the “*Agreement of Sale: Villa*” (pg 5 etc. of Exhibit P2) which he signed (pg 6 of Exhibit P2), or the transfer deed for the transfer of Title No. 19213 from the EIDC to the plaintiff/counter-defendant (Exhibit P1) which was signed on his behalf by a representative authorised by a power of attorney, or that he was not aware of or did not understand their contents. As stated, it is clear from Clause 10 of the “*Conditions of Sale*” contained in the “*Agreement of Sale: Villa*” (pg 19 of Exhibit 2) as well as the transfer deed (Exhibit P1) that by virtue of these documents and the EIVMA constitution, he became a member of the EIVMA and was bound by the provisions of

its constitution as well the rules and regulations made thereunder. He not only knew of the existence of the EIVMA from these documents, but also became aware that as a member thereof he was bound by its constitution the rules and regulations made thereunder. In my view, it was therefore incumbent on the plaintiff/counter-defendant, if he was not given a copy of the constitution and the rules and regulations made thereunder, to ensure that he was provided with the same, so that he at least knew of his obligations under that constitution and its rules and regulations. He cannot be heard, almost eight years after signing the "*Agreement of Sale: Villa*", to say that he did not receive a copy of the constitution or the rules and regulations made thereunder and therefore could not be expected to know what they contained, to justify his non-compliance thereto. I note that under clause 8.3 of the constitution a member of the EIVMA has "*the right to inspect and/or receive copies of ... any rules of the ASSOCIATION*". Furthermore, bearing in mind that the plaintiff/counter-defendant is a businessman, and having had the opportunity to observe in court and finding him to be an assertive person with a somewhat forceful character who does not seem to be easily intimidated, I find it highly implausible that having invested a sum of USD4,250,000 in a property, he would not insist that he is given all the documentation related thereto, and familiarise himself with it.

[185] I also take note that in cross-examination the plaintiff/counter-defendant admitted that he was aware of the constitution, knew that it was the constitution and had agreed to be bound by it (pg 34 of proceedings 28th June 2022, 10 am). Still in cross-examination he also agreed that even though he did not sign the constitution of the association, he would have been bound by it and its rules by virtue of being a member of the said association, of which he automatically became a member by virtue of the Sale Agreement. (pg 36 of proceeding of 28 June 2022, 10am).

[186] I further take into account that the EIVMA was registered as an association on 1st August 2007 as evidenced by its Certificate of Registration (Exhibit D1), whereas the "*Agreement of Sale: Villa*" was signed by the plaintiff/counter-defendant on 29th June 2015 (pg6 of Exhibit P2), almost eight years later. This means that at the time of signing of the "*Agreement of Sale: Villa*" the EIVMA constitution had been in existence for quite some time. Section 5(1) of the Registration of Associations Act provides that:

5.(1) *The rules of every association seeking registration under this Act ... shall, on the association being registered, become the rules of the association.*

[187] Section 11 of the same Act provides:

11. *The rules for the time being of any registered association shall bind the association and every member thereof ...*

[188] By virtue of these provisions, the provisions of the EIVMA constitution were binding on its members including the plaintiff/counter-defendant, irrespective of whether or not he was aware of its existence or the contents of its provisions.

[189] The Table of contents forming part of the "*Sales Documentation: Villa*" (pg2 of Exhibit P2) shows that "*Annexure 2.B: Village Management Association: Constitution*" is one of a number of Annexures to the "*Agreement of Sale: Villa*". There is also a note at the bottom of the Table of contents which states that "*Annexures 2.B, 2.E to 2.K (Agreement of Sale), and 3.A and 3.B (Agreement of Lease) will be provided separately and are to be signed in full by the Purchaser*". In re-examination the plaintiff/counter-defendant stated clearly that he had not been provided with any of these Annexures including the EIVMA constitution for signature or been given a copy thereafter (pgs 30 & 31 of proceeding of 18 July 2022, 9.30am). However, I note that copies of Annexures 2.E to 2.J signed by the plaintiff/counter-defendant have been exhibited (Exhibit P2) although the copy of the EIVMA constitution exhibited was not signed by the plaintiff/counter-defendant. The fact that plaintiff/counter-defendant signed some of the annexures but then says he was never given any of them for signature throws doubt on the veracity of his claim that he never received copies of any of the annexures including the constitution. I also take note of the "*Acknowledgement by Purchaser*" (pg 55 of Exhibit P2) in which the plaintiff/counter-defendant "*acknowledges and agrees that he has read the Annexures contained herein, and has familiarised himself with the content thereof*". The "*Acknowledgement by Purchaser*" was signed by the plaintiff/counter-defendant on 29th June 2015 i.e. the same date that he signed the Offer to Purchase at para 1 of the Signature Document (pg 6 of Exhibit P2), which makes it more likely than not that he was at the very least aware of the EIVMA constitution. I do not believe, as he stated in cross-examination, that he just signed the "*Acknowledgement by Purchaser*" without going through the Annexures (pg32 of proceedings of 28th June 2022 at 10am). As pointed out to him by counsel for EIVMA,

as a businessman he must be aware of the dangers of signing documents without going through them, as once signed they are binding on him (pg33 of proceedings of 28th June 2022 at 10am).

[190] Having found that as a member of the EIVMA, the plaintiff/counter-defendant was bound by the provisions of the constitution and the rules and regulations made thereunder, the court now has to find out whether as claimed by the EIVMA, he breached such constitution, rules and regulations by making an alteration or improvement (the structure erected on the floating dock attached to a pontoon) in a common area, without following the section III Building Plan Approval Procedure in the Eden Island Design Guidelines and first obtaining the approval of the Aesthetic Committee.

[191] It is common ground that the structure erected by the plaintiff/counter-defendant was erected on his floating dock which is his property. The floating dock was installed at berth (No. 237) which was leased to the plaintiff/counter-defendant by the EIDC (pgs 37 etc. of Exhibit D2). The berth is located in Basin No.2. on Title V19971 which at the time of the signing of the lease in 2015 was in the ownership of the EIDC but was transferred to the EIVMA on 2nd August 2017 (Exhibit D3). The floating dock is secured to a pontoon by means of screws.

[192] In cross examination the plaintiff/counter-defendant admitted that his berth is in a mooring area which is categorised as a common area under the constitution. "LEASED AREA" is defined in clause 2.2.30 of the "CONDITIONS OF LEASE" (Exhibit 2, pg 42) as meaning "*the BERTH specified in I of the CONTRACT SCHEDULE*" (Exhibit 2, pg4), which in turn specifies that the "LEASED AREA" is as shown on the "MOORING PLAN" as BERTH number 237. The "MOORING PLAN" is exhibited as Annexure B to the "*Agreement of Lease: Berth*" (pg 102 of Exhibit 2). This confirms that the plaintiff/counter-defendant's berth is in a mooring area.

[193] "*MOORING AREAS*" are defined in clause 1.1.39 of the constitution as meaning "*the BERTHS, primary and secondary breakwater, wave attenuator, harbour entrance and lights, together with all ancillary facilities located within those areas*".

[194] “COMMON AREAS” are defined in clause 1.1.13 of the constitution as meaning “those areas of the DEVELOPMENT ... including any IMPROVEMENTS that may have been erected on or made to such COMMON AREAS”.

[195] Clause 15 of the constitution further provides:

15. COMMON AREAS

15.1 The DEVELOPER may, free of consideration and at any time, transfer ownership of all or any of the COMMON AREAS to the ASSOCIATION if and when the DEVELOPER may deem fit including -

[...]

15.1.4 the MOORING AREAS;

15.1.5 the WATERWAYS;

15.1.6 PARCELS designated by the DEVELOPER for ASSOCIATION use; and

15.1.7 any other areas designated as COMMON AREAS by the DEVELOPER.

15.2 The risk in all COMMON AREAS shall pass to the ASSOCIATION upon formation of the ASSOCIATION, from which time the ASSOCIATION (notwithstanding ownership in the COMMON AREAS) shall be solely responsible for the maintenance, repair, and upkeep thereof, as well as the payment of rates and taxes (if any) and all other charges attaching thereto.

15.3 Notwithstanding any other provision to the contrary contained in this CONSTITUTION, it is recorded that the COMMON AREAS shall remain COMMON AREAS after the DEVELOPMENT PERIOD and that the ASSOCIATION may never convert or change same to anything other than COMMON AREAS, at any time.

[196] It is clear from these definitions that the floating dock of the plaintiff/counter-defendant is in a common area. The argument of the plaintiff/counter-defendant is that because he has erected the structure on the floating dock that belongs to him, the structure has not been erected on a common area. With respect, if the floating dock is in a common area, then any structure erected thereon must be considered to be in the common area regardless of whether it is affixed on the common area itself or on something else within that common area.

[197] Clause 11.2 of the constitution stipulates that:

11.2 All IMPROVEMENTS on the DEVELOPED LAND shall comply with the provisions of the DESIGN GUIDELINES.

[198] “IMPROVEMENTS” are defined in clause 1.1.31 of the constitution as follows:

1.1.31 *IMPROVEMENTS means all and any DWELLINGS, buildings or other structures on any PARCEL or on the COMMON AREAS, including landscaping and planting, roads, pavements, irrigation, infrastructure services and or similar structures;*

[199] The term “DEVELOPED LAND” is defined in clause 1.1.22 of the constitution as follows:

1.1.22 *DEVELOPED LAND means all those PARCELS which have been -*
1.1.22.1 *Transferred to MEMBERS;*
1.1.22.2 *Transferred to the ASSOCIATION as COMMON AREAS; or*
1.1.22.3 *Registered as CONDOMINIUM PROPERTIES.*

[200] “PARCEL” is defined at clause 1.1.43 as –

1.1.43 *“PARCEL” means any parcel (as that term is defined in the LAND REGISTRATION ACT) within the DEVELOPMENT, together with all IMPROVEMENTS (if any) thereon.*

[201] Under the Land Registration Act, “parcel” means “an area of land (a) separately delineated on the registry map; or (b) separately shown and identified by number on a demarcation map within the meaning of Adjudication of Title Decree”. Under that Act, “land” includes “land covered with water, all things growing on land and buildings and other things permanently affixed to land and also an undivided share in land”. In terms of that definition, it would seem therefore, that parcel V19971 where Basin 2 and the berth leased to the plaintiff/counter-defendant is located, is considered as a parcel under the Land Registration Act. This puts paid to one of the plaintiff/counter-defendant’s argument that the floating dock on which he erected the shelter for his jetski is on the water and not on land, and is therefore not an improvement on “DEVELOPED LAND” (as defined in clause 1.1.22 of the constitution which speaks about “PARCELS”), which requires prior written approval of the Board as per Clause 11.3 of the constitution.

[202] It is clear from the above provisions that the structure erected by the plaintiff/counter-defendant falls within an “IMPROVEMENT” on “DEVELOPED LAND” within the meaning of clause 11.2 of the constitution which required compliance with the DESIGN GUIDELINES.

[203] Clause 11.3 of the constitution further stipulates that -

11.3 No construction, erection or alteration of, or addition to, any IMPROVEMENTS any improvements on the DEVELOPED LAND ("WORKS") may commence or be carried out without the prior written approval of the plans and specifications in respect the WORKS by the DEVELOPER, for the duration of the DEVELOPMENT PERIOD and thereafter by the Board. In this regard, a full set of proposed plans and specifications in respect of the WORKS prepared in accordance of the DESIGN GUIDELINES shall, for the duration of the DEVELOPMENT PERIOD, be submitted to the DEVELOPER, and thereafter, to the BOARD.

[204] Section 1, para 1.2 of the Design Guidelines state in relevant part:

[...]

No construction, erection or alteration of, or addition to, any improvements (as defined in the Constitution) in the Residential Development Component of Eden Island may be commenced or carried out without being first approved in accordance with the procedure set out in Section III (Building Plan Approval Procedure) of these Design Guidelines.

[...]

[205] Section III (Building Plan Approval Procedure) of the Design Guidelines sets out the Plan Approval Process at para 1.1.1. Sub-paras (a), (d), (e), (f) and (g) states that –

(a) All plans and specifications ('PLANS') in respect of any proposed works (as defined in the Constitution and/or herein) shall be submitted, by the registered Homeowner/Member to the General Manager ...

[...]

(d) When satisfied that the required information is present, the General Manager shall submit the Plans, together with his or her recommendations, to the EIAC.

(e) The EIAC shall consider the compliance of the Plans with these Design Guidelines and announce to the General Manager whether the Plans are compliant or not.

(f) Should the EIAC reject the application, the Committee shall also inform the General Manager of the extent and details of such non-compliance.

(g) After such announcement by the EIAC, the General Manager shall inform the Homeowner/Member of the EIAC's decision.

[206] There is no doubt that being bound by the provisions of the constitution and the rules and regulations made thereunder, the plaintiff/counter-defendant was bound to follow the procedures prescribed by the constitution and Design Guidelines before erecting the structure. By erecting the structure on the floater without following such procedures

and obtaining the approval of the Board and the Aesthetic Committee, it breached the provisions of the constitution and Design Guidelines.

[207] There is further no doubt that the Aesthetics Committee have the final say about whether any such structure fits in with the aesthetics of Eden Island, which I agree was promoted with a certain aesthetic in mind, on the basis of which property owners purchased their property and which therefore has to be maintained. In that regard, clause 4.1.2 of the constitution states that one of the objects of the EIVMA is *"the control of the aesthetic appearance of the Development"*. Section 1, para 1.2 of the Design Guidelines also provides that *"These guidelines should be read ... in the context of an environment that has already been established with specific values and principles"*. The maintenance of the aesthetics of the Eden Island is done by following the procedures prescribed by the EIVMA constitution and the Design Guidelines. By not complying with the same, I find that the plaintiff/counter-defendant breached the constitution and the Design Guidelines.

[208] I note that one of the remedies sought by the EIVMA in its Counterclaim is a declaration *"that the defendant is in breach of the [EIVMA] constitution and rules made thereunder"*. This Court has made such a finding. The EIVMA, in terms of its Counterclaim, further seeks an order *"that the Defendant dismantles and remove the jetski shelter at its own cost"* This is line with the section 1, clause 1.2 of the Design Guidelines which states that:

[...]

Should a Homeowner/Member of the VMA contravene the regulations set out herein, the property shall be restored to its original state at the expense of the Homeowner/ Member of the VMA.

[209] However, the matter is not so simple. The fact remains that the plaintiff/counter-defendant is a homeowner and lessee of a berth with certain rights. It is not disputed that the sun has caused damage to his jetski, and curiously for the location of the property and the type of development on it, there are no facilities provided such as a slipway to enable him to transport his jetski to his villa where they could be kept out of the sun, to prevent such damage. In my view, he is entitled to be able to have his jetski kept in a safe place where no damage will be caused to it. In coming to a decision in this matter, this court has to balance such entitlement of the plaintiff/counter-defendant

with his obligations under the constitution and the rules and regulations made thereunder.

[210] I note that the EIVMA has argued that the plaintiff/counter-defendant as a lessee only has the right to use and enjoy the leased area and not to erect anything on it. It is my view that the right to use and enjoy the berth carries with it the right to do anything else which is the natural consequence of such rights, provided this is done in accordance with the applicable rules. As stated, as a lessee he is entitled to have a safe place to keep his jetski.

[211] It is my view this is a matter which could have been resolved by the parties who could have reached a mutually agreeable solution without having recourse to the courts, if the EIVMA through its General Manager had been more open to discussion and more cooperative, instead of just insisting on the demolition of the structure. I would go as far as saying that the behaviour of Mr De Clarisse, who in my view, certainly could have been more helpful, showed a certain degree of bad faith.

[212] After consistently maintaining that the dismantling of the structure was because of safety and aesthetic concerns (see emails of 2nd July at 4.03pm, 6th July at 2.12pm & 3.09pm and 7th July at 10.33am 2021 – Exhibit P6), after he is asked for an explanation in regards to the “*safety measures*” (email of 7th July at 12.40 pm- Exhibit P6) he states that “*Your structure is not being removed because of safety reasons it pauses (sic) but rather noncompliance with the Aesthetics and Design Guidelines*” (email of 7th July 2021 at 2.18 pm - Exhibit P6). Although some explanation was given as to the safety risks of the structure i.e. that “*with the strong winds the very flimsy installation can easily be blown off or and injure someone or cause damage to boats/property nearby*” (email of 6th July at 2.12 pm- Exhibit P6), he gave no explanation as to the aesthetic concerns but rather reliance was placed on non-compliance with the Design Guidelines, in that the plaintiff/counter-defendant had not submitted his plans for the structure prior to erecting the structure.

[213] The EIVMA was unable to provide any proof that discussions had taken place between the Aesthetic Committee members in regards to the erection of the structure prior to Mr De Clarisse’s email informing the plaintiff/counter-defendant that his request had been rejected (email of 2nd July 2021 at 4.03pm – Exhibit 6), which puts in doubt whether

the other Aesthetic Committee members were consulted prior to that email being sent. In fact Mr Neethling, the Control Architect sitting on the Aesthetic Committee testified that before receiving the email of 22nd July 2021 sent at 16.01 (Exhibit D7), he had received no communications regarding the issue. He explained that he is not consulted in each and every case referred to the Aesthetic Committee as some matters do not require his expertise, but I would have expected that to be the case in these circumstances especially as it was then deemed necessary that he be involved in the same, as shown by the fact that he was sent the email of 22nd July 2021. Mr Neethling's testimony contradicts that of Mr De Clarisse that before he submitted the photographs for the consideration of the committee which led to the decision communicated to the plaintiff/counter-defendant by email of 2nd July 2021 at 4.03pm, the Control Architect had already set photographs to the EIVMA asking whether he was aware of the installation. Mr Neethling's testimony is that he only became aware of it on 22nd July 2021.

[214] Furthermore, in his email of 6th July 2021 sent at 7.10p.m (Exhibit P6), the plaintiff made the following proposals to Mr De Clarisse as a solution to the issue of the sun causing damage to his jetski, to which he states he never received any reply -

1. *You have to provide a slippery ramp where jetski/boat owners can tow their jetski to their units and can safely protect from the heat of the sun.*
2. *Provide or allow me in the beach near to my villa with tiles or wood so that I can move out my jetski in a trailer to my villa for securing from the heat of the sun.*
3. *Provide me with a design of the structure to safeguard the jetski from the heat of the sun according to the environmental condition and I am ready to pay for it.*

[215] These proposals show his willingness to settle the matter amicably. I note that Mr De Clarisse responded that the proposals would be put forward to the Aesthetic Committee for consideration (email of 7th July 2021 at 10.33 am – Exhibit 6) but that nothing further is said of the matter. It seems that Mr De Clarisse only made proposals for a solution under the threat of court action (Exhibit D7).

[216] Mr De Clarisse's obstructiveness is made more evident by the testimony of Mr Neethling who opined in cross-examination that there are many things that could have been done better, that ideally he would have been called and spoken to the homeowner at the very beginning, and given him his opinion on how the matter could be rectified (pg 69 of proceedings of 18th July 2022 at 1.45 pm).

[217] The lack of good faith of the EIVMA is also shown in the dismantling of the structure on 26th July 2021 by after they had already received summons for the present case CS68/2021, as shown by the record, in which one of the remedies sought by the plaintiff/counter-defendant is an injunction preventing the EIVMA from demolishing the structure he had erected, although I note that at that point in time there was no order preventing the EIVMA from doing so.

[218] Article 1134 of the Civil Code of Seychelles provides: *“Agreements lawfully concluded shall have the force of law for those who have entered into them. They shall not be revoked except by mutual consent or for causes which the law authorises. They shall be performed in good faith”*. In *University of Seychelles, American Institute of Medicine Inc. Ltd v Government of Seychelles* (CS 97/2011) [2018] SCSC 8053 (28 January 2018), Renaud J, as he then was, stated at paras 48 and 49:

48. ...pursuant to Article 1134 of the Civil Code all contracts include an implicit duty to act in good faith ... During a contract, the parties owe each other a duty of good faith regarding performance of the obligations that form the basis of the contract. This duty of good faith has its roots in French jurisprudence and implicates a duty to cooperate – which can be more or less accentuated depending on the nature of the contract between the parties. See commentary and cases cited in F. Terré, P. Simler & Y. Lequette *Droit civil: Les obligations* (10th ed., Dalloz 2009), at pp. 458-461.

49. This duty of cooperation implies a duty for a contracting party to facilitate or at very least not to frustrate the execution of the contract of his co-contractor.

[219] The *“Agreement of Sale: Villa”* (Exhibit P2) and the transfer deed (Exhibit P1) between the EIDC and the plaintiff/counter-defendant is subject to the Article 1134. By virtue of those agreements, although the EIVMA was not, strictly speaking, a party to the agreements, the plaintiff/counter-defendant became one of its members on which its constitution and rules and regulations became binding, thereby imposing certain obligations on both the EIVMA as a homeowner’s association and the plaintiff/counter-defendant as a member thereof for the proper performance of these two agreements. In the circumstances I find that the obligation of performance in good faith under Article 1134 was extended to the EIVMA in the performance of its obligations under its constitution, which the EIVMA failed to comply with, as explained above.

[220] In the more recent Court of Appeal case of *Monthy v Government of Seychelles* SCA 37/2019 [2021] SCCA 73 (17 December 2021), Twomey JA, in considering the

requirement of good faith in the performance of contractual obligations in Article 1134 stated:

[25] *The Code however does not provide for a definition of either good or bad faith. The concept is certainly moral or ethical and its meaning after transposition into law generally implies honesty and integrity in one's legal obligations. A dictionary meaning of good faith is that "good faith may require an honest belief or purpose, faithful performance of duties, observance of fair dealing standards, or an absence of fraudulent intent."*

[26] *French jurisprudence interpreting the concept of good faith in contractual law has inferred duties of loyalty and cooperation between the parties in the execution of contracts. As summarised by Terré: "La jurisprudence ne déduit d'ailleurs de cette référence à la bonne foi que des conséquences limitées, y découvrant un devoir de loyauté qui pèse sur chacun des contractants et qui permet, de manière en quelque sorte négative, de sanctionner la mauvaise foi, la mauvaise volonté de ceux-ci dans l'exécution des contrats, ainsi qu'un devoir de coopération entre les contractants..."*⁵

[27] *In other words, case law deduces from this reference to good faith only limited consequences, discovering in it a duty of loyalty which weighs on each of the contracting parties and which allows, in a somewhat negative manner, the sanction of bad faith, the unwillingness of parties in the execution of contracts, as well as a duty of cooperation between the parties to a contract."*

[221] She went on to observe that "Closely linked to the concept of good faith is the principle of fairness extolled by Article 1135". Article 1135 provides that "Agreements shall be binding not only in respect of what is expressed therein but also in respect of all the consequences which fairness, practice or the law imply into the obligation in accordance with its nature". She then stated that "Agreements therefore ... have to be executed fairly, judiciously and with good faith to balance any potential inequalities in the contract."

[222] Twomey JA proceeded to consider the facts of that case and stated that "The necessary inference from these facts was the bad faith of the Government and the unfairness of its actions." In allowing the appeal it was held that "There was clearly bad faith and unfairness on the part of the Government".

[223] Similarly, in the present case, I find that there was an element of bad faith on the part of the EIVMA and unfairness in its insistence to stick to the letter of the constitution when it could have resolved this matter amicably.

[224] The EIVMA has also pleaded that the plaintiff/counter-defendant has not complied with the appeals procedure under the Design Guidelines and has instead brought the matter to court, and in so doing has breached the Guidelines. SECTION III, clause 1.1.1 (h) to (k) of the Design Guidelines provides:

1.1.1 PROCESS

[...]

- h) *If dissatisfied with the decision [of the Aesthetic Committee], the Homeowner/Member may refer the decision of the EIAC back to the VMA Board for reconsideration.*
- i) *The VMA Board shall either endorse the EIAC's original decision, which decision shall be final and binding on the Homeowner/Member or it may refer the decision back to the EIAC for reconsideration.*
- j) *If referred to the EIAC, the EIAC shall reconsider their decision and may reaffirm or change its original decision*
- k) *Should the EIAC reaffirm its decision, the application shall be referred back to the VMA Board who shall make a final decision on the compliance of the Plans with the Design Guidelines.*

[225] I take note that the constitution in clause 30 makes provision for arbitration of “any dispute of any nature whatsoever” between the EIVMA and a member, but allows a party to seek interim relief on an urgent basis from a court of competent jurisdiction, which the plaintiff/counter-defendant did in MA201/2021. Although in the plaint the plaintiff/counter-defendant prays for *inter alia* “An Interlocutory Injunction preventing the defendants from demolishing the structure erected by the Plaintiff”, in my view this was a mistake and he ought to have asked for a *permanent* injunction as an interlocutory injunction had already been granted in MA201/2021 pending determination of the principal suit. While interim or interlocutory injunctive relief is normally granted for shorter periods of time, often until determination of a matter, a permanent injunction is a permanent relief granted after a final adjudication of the parties’ legal rights. It is clear therefore that the plaintiff should have sought a *permanent* prohibitive injunction restraining the Defendant from demolishing the structure erected by him which would apply for the future after final determination of the parties’ rights. Be that as it may, this Court considers that by not raising the issue of this court’s jurisdiction to hear the matter, the EIVMA has waived its right to invoke clause 30 of its constitution.

[226] We are therefore left with the appeals process under the Design Guidelines, which in my view does not exclude the jurisdiction of this Court. There is nothing in the Design

Guidelines to suggest that, and furthermore the provisions of the Design Guidelines relating to appeals are not couched in mandatory terms. In any event, it is generally accepted that no application in terms of the guidelines was made. The plaintiff/counter-defendant says that he did not make any application. Mr De Clarisse testified that he submitted photographs of the structure on the plaintiff/counter-defendant's behalf to the Aesthetic Committee. Mr Neethling on his part, has made it clear that no proper assessment can be made of the soundness of the structure in order to approve the design of such structure in absence of a proper structural plan drawn up by a structural engineer. To go through the appeal process would therefore have served no useful purpose.

[227] In terms of the plaint plaintiff/counter-defendant prays the court for the following orders:

- (a) *An Interlocutory Injunction preventing the Defendant from demolishing the structure erected by the Plaintiff.*
- (b) *An order, ordering the Defendant to provide the Plaintiff with requirement as to the safety of the said structure and how it can be improve (sic).*
- (c) *Any other order as this Honourable Court deems fit.*

[228] As stated, the EIVMA, in its counterclaim, in addition to a declaration that the plaintiff/counter-defendant has breached its constitution and rules, also seeks an order that the jetski shelter be dismantled and removed by the plaintiff/counter-defendant at his own cost, and for him to be ordered to abide by the EIVMA constitution and rules. Both parties move for such other orders as this court deems fit.

[229] Mr Neethling made some valid points in regards to the necessity of submitting plans for any proposed structures. He stated that without such plans which have not been prepared or signed off by a qualified structural engineer, it will not be possible to assess the soundness or safety of the structure of the structure. He also stated that it is the responsibility of the person proposing to erect such structure to come up with the design therefor through a structural or marine engineer as the Aesthetic Committee does not keep designs to cater to every kind of structure that a member may want to construct. In the circumstances it would be up to the plaintiff/counter-defendant to come up with the designs for the proposed structure, which should comply with the Design Guidelines.

Decision

[230] In the circumstances and for the reasons given, I make the following Orders:

- (a) The plaintiff/counter-defendant shall follow the procedure under the EIVMA constitution and the Design Guidelines, and any other applicable rules (which the EIVMA shall ensure that the plaintiff/counter-defendant is provided a copy of) and submit the necessary application and documentation as required by the foregoing, for the erection of a structure at berth (No. 237) leased to him, for the purpose of protecting his jetski(s), not later than three weeks after the date of this judgment.
- (b) The defendant/counterclaimant EIVMA shall not dismantle or interfere in any way with the existing structure erected on the floating dock of the plaintiff/counter-defendant located at the berth (No. 237) leased to him, until three weeks after the Building Plan Approval Procedure under the Design Guidelines has been completed, and the Aesthetic Committee of the EIVMA has made a final determination in regards to the plaintiff/counter-defendant's application, which determination has been communicated to the plaintiff/counter-defendant in writing, subject to para (c) below. The plaintiff/counter-defendant shall be responsible for ensuring that the structure poses no danger to any person or property.
- (c) Upon the determination of the Aesthetic Committee having been communicated to the plaintiff/counter-defendant, the plaintiff/counter-defendant shall not later than three weeks after such communication, comply with the directions of the Aesthetic Committee in regards to the dismantling, modification or alteration (as the case may be) of the existing structure, or in regards to any other structure to be erected, at berth (No. 237) leased to the plaintiff/counter-defendant, at the plaintiff/counter-defendant's cost.
- (d) In the alternative to para (a), (b) and (c) above, and subject to the agreement in writing of the parties, the defendant shall provide appropriate means to the plaintiff/counter-defendant to be able to transport his jetski(s) to his villa, at his own cost.


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E. Carolus J

Signed, dated and delivered at Ile du Port on 24th January 2025.