

IN THE SUPREME COURT OF BELIZE, A.D. 2015

CLAIM NO. 213 of 2011

IN THE MATTER of Section 17(1)(a) of the Time Share Act, Laws of Belize.

AND

IN THE MATTER of the recognition and enforcement of rights of timeshare members.

1. LINCOLN CANE VENTURES, LLC CLAIMANTS
2. FEDERIC SPEAKER
3. GLENN R. HAMILTON TRUST
4. DANIEL RUSSELL
5. JOHN MIDLEN, et al

AND

**BRITISH CARIBBEAN BANK INTERNATIONAL LIMITED 1st DEFENDANT/
ANCILLARY CLAIMANT**
MARK HULSE (IN HIS CAPACITY AS RECEIVER OF SUENO DEL MAR LIMITED) 2nd DEFENDANT
SUENO DEL MAR LIMITED 1st ANCILLARY DEFENDANT
(IN RECEIVERSHIP)
JAGUAR RESORTS LLC 2nd ANCILLARY DFENDANT

BEFORE THE HONOURABLE MADAM JUSTICE SONYA YOUNG

Hearings

2015

16th February

12th June

Mr. Michael C.E. Young SC along with Mr. Yohhahnseh Cave for the Claimants.

Mr. Eamon Courtenay SC along with Ms. Pricilla Banner for the first Defendant/Ancillary Claimant.

Mrs. Magali Marin-Young for the second Defendant.

Keywords: Timeshare - Effect of Registration – Timeshare Rights – Timeshare Act 2007 (The Act) –Membership Agreements - Contractual Licence – Stamp Duty Act Cap 64 & Amendment No. 22 of 2005 – Ad Valorem Stamp Duty - Applicability to the Membership Agreements – Effect of Non-payment - International Banking Act Cap 267 – Mortgage Transaction by International Bank - Locus Standi to challenged legality of Mortgage– Void/Illegal Contract

JUDGMENT

1. The Claimants say that from 2005 onwards, pursuant to membership agreements between themselves and the Sueno Del Mar Limited (The Company), they purchased timeshare interests in a San Pedro residential resort known as Sueno Del Mar. By those agreements, the Claimants agreed not to register the said agreements and they never did.
2. Between 2007 and 2008, Sueno Del Mar Holdings LLC (a company incorporated in Nevis) obtained loans totalling US\$4,000,000.00 secured by various mortgages from British Caribbean Bank International Limited (The Bank), for which The Company stood as guarantor and benefitted. The Bank is licenced in Belize under the International Banking Act which restricts its conduct of business with residents.

3. By letter dated 14th July, 2010, the Bank demanded repayment from both Sueno Del Mar Holdings LLC and The Company. Following their failure to comply, The Bank appointed Mark Hulse (The Receiver) as receiver of The Company on 13th September, 2010.
4. On or around November 1, 2010, The Receiver informed the Claimants that The Bank did not recognize their interests or rights as timeshare members and had directed him not to collect any dues from them. By March of the following year the property was advertised for sale and bids were invited. The Receiver has never opened or operated the resort or collected annual dues and other fees. The Claimants have not been allowed to occupy the premises and their personal effects which were stored at the premises have not been accounted for.
5. The Receiver continues to seek a hotel licence in order to operate a hotel at the premises. While the Claimants urge that he ought to secure the registration of the resort as a timeshare accommodation and continue the operation of same. Such registration would be pursuant to The Act which was passed in 2007. It came into force in 2009 expressly to *“regulate the provision of timeshare accommodation in Belize; to provide for the registration of timeshare accommodation developers; to provide for the payment of licensing fees for timeshare accommodation; to provide for the payment of occupancy tax by the holders of timeshare rights; and to provide for matters connected or incidental thereto.”*
6. The Claimants assert that their agreements fit within the statutory definition of timeshare under The Act, so they are entitled to the rights and protections afforded by The Act and in any case they have rights that are to be asserted

in priority to The Bank's mortgage interest. They state further that the mortgages entered into by The Bank were illegal and void since The Company is incorporated in Belize and is therefore resident in Belize. Additionally, The Company benefitted from the said banking transaction, which is also in contravention of the International Banking Act.

7. They seek the following reliefs:

1. A Declaration that the timeshare agreements and the attendant time share rights of the Claimants are legally binding agreements;
2. A Declaration that the timeshare agreements and attendant time share rights of the Claimants be recognized, and enforced by the First and Second Defendants pursuant to section 17(1)(a) of the Timeshare Act in the operation and/or sale of the property and the exercise of any power and right of sale;
3. A Declaration that the timeshare agreements and the attendant time share rights of the Claimants be recognized and enforced against any person including any subsequent purchaser of the Property, successor, assignee or other transferee of any interest therein;
4. A Declaration that the underlying transaction of the Mortgage Instruments and the Mortgage Instruments themselves are illegal and unlawful;
5. An Order that the Mortgage Instruments be cancelled and struck from the public records;
6. An Order that the Defendants vacate the resort;
7. Alternatively, an Order that the Second Defendant re-open and operate the resort in accordance with the membership agreements and time share interest of the Claimants;
8. An Order directing the Second Defendant to provide an Accounting of all Claimants' personal property present at the Property when Second Defendant commenced his duties as Receiver, along with a report as to the conditions and security of the holding area;
9. Damages including unlawful interference with the Claimants' timeshare interests;
10. Interest at such rate and from such date as this Honourable Court Deems fit;
11. Further or other relief;
12. Costs.

8. The Defendants deny all this and contend that because the resort was never registered as a timeshare accommodation under The Act, the Claimants have no timeshare rights or interest. In fact, they hold nothing more than limited

revocable licenses by virtue of their membership agreements which may, in any event, prove to be void as no ad valorem tax was paid thereon nor were they registered. At best, the Claimants are in the position of unsecured creditors and have no locus standi to question the legality of the mortgage. Moreover, even if there was a violation of the International Banking Act, it would not automatically avoid the mortgages since specific penalties are outlined for such violations.

The Issues

9. The parties (excluding the Ancillary Defendants who were not expected to and did not participate in these proceedings) have agreed that the trial be bifurcated and submitted two major issues for consideration.

Timeshare

- (a) *Whether the Claimants' membership interest created under Membership Agreement between the Claimants and the 2nd Defendant in the resort development known as Sueno Del Mar constitute "timeshare" as defined under the Timeshare Act 2007 and whether the Claimants are thereby entitled to the rights and protections afforded to timeshare owners under the said Act"*
- (b) *In the alternative to (a) above, whether the members indeed have any rights to assert in priority to the 1st Defendant mortgage interest.*
- (c) *Whether the Claimants' pursuant to the terms of the membership agreements are estopped from asserting any equitable or other interest in the property and resort owned and operated by Sueno Del Mar Limited;*
- (d) *Whether the Claimants' membership agreements are enforceable there having not been paid thereon ad valorem stamp duty pursuant to s. 71(4) and/or 73:01 (3), (4), (5) of the Stamp Duties Act.*

Mortgage

- (e) *Whether the Claimants have locus standi to challenge the validity of the mortgage International Banking Act; (sic)*
- (f) *Whether the Claimants are barred pursuant to s. 43 of the said International Banking Act, from instituting any suit after 5 years since the accrual of the cause of action, and since the Mortgage Instruments were duly registered at the Land Titles Unit and the Land Registry, the Claimants have at all material times had notice of their existence.*

- (g) *Whether the transaction, which consisted of (i) the borrowing of funds (“the Loan”) by Sueno Del Mar Holdings for the Sueno Del Mar Project (ii) the guarantee of the Loan by Sueno Del Mar Limited (iii) the creation and registration of mortgages on the assets of Sueno Del Mar Ltd. as security for the Loan, was and is illegal and unlawful.*
- (h) *Whether the purported charges and security created by the Mortgage Instruments were void in that (a) they are not within the authorized powers or legal capacity of the First Defendant as holder of a license under the International Banking Act and/or (b) they are illegal and unlawful.*
- (i) *Whether the First Defendant has purported to exercise powers under the Mortgage Instruments and the Second Defendant has entered into possession of the Properties when the Mortgage Instruments were illegal and unlawful.*

10. Due to the nature of the issues the court agreed that the hearing would be mainly by written submissions. Each party was allocated one hour to address the court. One affidavit only was filed by the second Defendant. The court extends its gratitude to all counsel who not only provided full and useful submissions but for the most part adhered to the time limit agreed.

Issue (a): Whether the Claimants’ agreements with The Company constitute “timeshare” as defined by The Act and whether they are therefore entitled to the rights and protections afforded to timeshare owners under the Act.

If it quacks like a duck ...

11. The Claimants submit that essentially “the issue is whether having regard to the facts as reflected in the Membership Documents, the Claimants’ rights and interests constitute timeshare rights under the Act as a matter of law.” I am of the view that the Claimants are mistaken when they purport to ground a conclusion about their rights as timeshare purchasers (specific term used in The Act) solely upon the Agreement between The Company and themselves. Instead, their rights as timeshare purchasers are to be verified and achieved first through the registration of the premises as a **timeshare**

accommodation and then by their contracts which must meet the required standards outlined in Section 16(3) of the Act. We need inquire no further that the precise use of those words “**a timeshare accommodation**” in the The Act itself. Incidentally, The Act does not define timeshare at all and therefore easily reveals the fallacy within the Claimants’ proposal.

12. Timeshare is neither a legal term nor a readily definable legal concept. As a real estate or business concept, it originated in Europe during the 1950’s. Its basic goal was to give several persons an interest in the same premises but in different periods of time. The industry invented a variety of products to sell what they deemed to be timeshare interests. As there were no timeshare laws, rules or policies, any product could be (and was) sold under the guise of timeshare. This creative, new concept was therefore not without its problems and legal uncertainties.
13. In Belize, legislative intervention became necessary. Originally, by an amendment in 2001, ‘timeshare units’ fell within the broad description of tourist accommodation under the Hotel and Tourist Accommodation Act Cap 285. Such a unit, though not defined, was subject to annual registration and required maintenance of certain minimum standards upon registration. This amendment proved unsatisfactory because issues such as marketing and separate tax assessment were not addressed. It was realized that the system needed to be properly regulated and timeshare purchasers and developers needed a clear definition of their rights and obligations.
14. Through The Act the legislators gave legal recognition to certain timeshare schemes and provided a framework in which developers, marketers and

purchasers could operate. It introduced registration requirements stringent enough to reduce violations of the other specialized areas of consumer protection in The Act. It aggressively regulated the content and structure of the timeshare program, ensuring full disclosure of all aspects of the timeshare plan and it instituted a novel tax regime.

15. All this ensured that consumers could now purchase with some confidence in the knowledge that **registered** timeshare accommodations in this particular jurisdiction had met certain standard requirements and they as purchasers were afforded a level of protection which contracts and other arrangements did not easily provide.
16. However, The Act was not primarily for consumer protection (which is not even stated). Its first stated purpose which cannot be overlooked or diminished, was to regulate the **provision** of timeshare accommodation in Belize. Provision, as defined by the Oxford Dictionary is the action of supplying something, arrangements for possible future events or requirements. That brief stated purpose indicates more than one may have originally assumed. It is the foundation on which the interpretation of this Act begins.
17. Since timeshare had never before been legally defined in Belize, The Act first had to determine the exact commodity it intended to regulate. It needed to state precisely what development would be governed by The Act and its attendant registration requirements. It did this by defining timeshare accommodation (not timeshare) in Section 2(1):

“In this Act unless the context otherwise requires timeshare accommodation”

(a) means any accommodation used for human habitation, situated in Belize, used or intended to be used, wholly or partly, by purchasers, all of whom have rights to use, or participate in arrangements under which they may use, that accommodation or accommodation within a pool of accommodation to which that accommodation belongs, for intermittent occupancy periods of short duration:

Provided that a period shall be of short duration if it does not exceed a period prescribed by the Minister by Order published in the Gazette;

(b) includes timeshare interests, membership vacation clubs, fractional interests, membership residential clubs, and other right-to-use time sharing plans:

Provided that the Minister may, by Order published in the Gazette, amend paragraph (b) of this definition.”

18. The Minister has never issued an order, so short duration remains indeterminate. Nonetheless, the definition is sufficiently wide to encompass the spectrum of what is generally considered timeshare accommodation worldwide, with one exception. It does not recognize timesharing through fee simple ownership. It is purposeful that The Act never attempted to define timeshare, because having identified what timeshare accommodation is, The Act then sets out the process by which a timeshare accommodation could legally be created - through the registration of the premises and the registration and licencing of the developer:

*“5. (1) No premises shall be leased, sold or used for the purposes of a **timeshare accommodation** unless such premises and the developer are registered under this Act and a licence is obtained by the developer from the Registrar in that behalf.*

*(2) An application for registration in respect of any premises used for the purposes of **timeshare accommodation** on a day this Act comes into operation shall be made within thirty days of that date.*

19. By Subsection (1) the sale, lease or use of premises as a timeshare accommodation is expressly prohibited without registration and licencing. The section is mandatory (see Section 58 of the Interpretation Act Cap 1).

The Act accepts that there may be premises in use as timeshare accommodation when The Act is passed and it makes provision for the registration and licensing of those premises by Subsection (2). If subsection (2) is complied with and the application is approved, then those premises which formerly were only being used as timeshare accommodation would then achieve the status of a timeshare accommodation for the purposes of The Act. It is important that sale and lease are not included in this Subsection as they are in Subsection (1). Clearly, The Act does not contemplate that a timeshare accommodation could have been leased or sold prior to the passing of The Act.

20. To my mind the registration process is not only intended to screen out projects which pose a hazard to purchasers but it is more a public declaration of the intention of the developer and the states approval of same. The public can know that registered premises, by all appearances, have passed the scrutiny of The Board and attendant legislated rights and privileges are thereby guaranteed. Lending agencies, insurance companies and the like can also know exactly what responsibilities they are taking on when dealing with timeshare property.
21. It is for this reason that The Act does not allow for an established development being used for the purposes of timeshare accommodation to simply be grandfathered in or be deemed a timeshare accommodation without registration. Issues of the retrospective effect of the statute would become apparent. Here would be an Act which would change the character of past transactions carried out upon the faith of the then existing law; *Phillips v Eyre (1870) LR 6 Q.B. 1 per Willes J at 23*. As stated *in*

Bennion on Statutory Interpretation page 316 it would be “*deeming a thing to be what it was not.*” This would lead to a wholly unacceptable result.

22. In fact, a proper consideration of The Act itself reveals a startling distinction between premises used as timeshare accommodation and premises which are a timeshare accommodation. This distinction informs that The Act does not simply accept all timeshare like structures and “aspires” to be “a timeshare accommodation.” That status is acquired through registration and the rights conferred by The Act are reserved for such registered entities only. (All subsequent emphasis mine).

23. Section 6(1) reads:

*“6. (1) Every application for the registration of any **premises as a timeshare accommodation**-*

(a) Shall be made in writing to the Registrar;

(b) ...

*(2) An applicant for registration of any **premises as a timeshare accommodation** shall...”*

24. We note here that it does not say registration of any premises to be used as timeshare accommodation it says registration of premises as “a timeshare accommodation.”

25. The position is further strengthened when one considers:

*“8(3) Where the Registrar is satisfied that an applicant has failed to comply with the requirements of Section 6 the Registrar shall notify the applicant in writing of the grounds which prevent him from registering the premises as **a timeshare accommodation** and state that unless the deficiencies mentioned in the notification are rectified within the time specified therein, the application shall be refused.”*

*“Section 9. (1) Where the Registrar registers any premises as a **timeshare accommodation** in accordance with section 8, he shall issue to the developer a licence in the prescribed form and containing such terms and conditions as may be determined by him.”*

26. And juxtapose 24(1)(a) with (e)

“24.(1) Any person who –

- (a) without lawful excuses (sic) uses any **premises as a timeshare accommodation** when such premises is not registered or when there is not in force a licence granted under this Act in respect of such premises; or*
- (e) continues to **operate a timeshare accommodation** after the licence has been cancelled; suspended or not renewed.”*

27. The difference between the two is pellucid. There is one offence if after The Act comes into force, you “use any premises as a timeshare accommodation” when it is not registered and another when one “continues to operate a timeshare accommodation” after the licence has been cancelled etc. Rationally, if ‘use as a timeshare accommodation’ was the same as ‘operating a timeshare accommodation’ there would be no need to have two separate and distinct offences. Moreover, the Subsection (e) offence does not refer to registration of the premises, only the licencing.

28. Section 24(1)(b) removes any lingering doubt when it speaks of “using or displaying the word “registered” or “licensed” along with the name, title or description of any premises *“purporting to be a timeshare accommodation when such premises is not registered and/or licensed under this Act.”*

29. It therefore appears that the Claimants’ assertion at best could only be that they and the developers may have (since The Act came into effect) been

“using the premises as a timeshare accommodation.” They certainly cannot say that a timeshare accommodation had been in operation since that presupposes registration which the developers for whatever reason, have never done. It also begs the question of why the Claimants’ now require the Receiver to register the premises under The Act and urges the court to so compel him.

30. They submit that as it relates to contracts entered into after The Act came into force, there must be a term implied for the registration of the resort as a Timeshare Accommodation. They further submit that *“this was an obligation not merely for business efficacy ... but for legal efficacy.”* Strangely enough, they do not expand on the “legal efficacy.” However, one can only assume that the need to register in any event is well understood and accepted by the Claimants.
31. The developers in this case had thirty days after The Act came into force in which to apply for registration. From the expiry of that time limit, they (the Developers, the Claimants and any other users) offended against the Act if they used those premises as a timeshare accommodation without a reasonable excuse. But that is a matter for the Board and/or the Registrar of Timeshares. It is of no present concern to this court.
32. Neither is it necessary at this stage to scrutinize the purported “Timeshare Documents.” They add nothing to the issue at hand. Further, such scrutiny would perhaps have been a better task for the Board and or the Registrar of Timeshares, upon an application for registration. It was during that period

that the developers would have had the perfect opportunity to raise all that the Claimants are attempting to raise here.

33. Under The Act, The Board and the Registrar are given special functions which include scrutiny of the agreements, the premises and the amenities, holding discussions with the Developers, making demands to ensure conformity with The Act and thereafter determining whether to reject or accept the application for registration. All of which, with the exception of reading the agreement, the court would not have the luxury of doing.
34. The Claimants seem to be asking that without Registration the court is to determine that the premises indeed meet with the required standards of The Act. I humbly decline such a usurpation. I also decline to embark on any consideration of timeshare rights and interests under The Act for that will be of no assistance here.
35. Furthermore, had the application been made and rejected pursuant to Section 8(3) for failure to comply with the registration requirements, could the Claimants possibly maintain that they were nonetheless timeshare purchasers as they are attempting to do now? The very fact that registration could be refused proves that not all existing structures would achieve the required standard of **a timeshare accommodation**.
36. So although, it may quack like a duck, until it is registered, no amount of quacking and posturing could elevate it to the status of duck, thereby affording the statutorily guaranteed rights.

37. The Claimants raised the issue that an application to be registered had been made but was rejected since the Act had not yet come into force. This seems to be more detrimental than helpful to their case. It seems that both the developers and the Claimants knew of the need to be registered and yet the Claimants cite not a single episode of them agitating to have the premises registered. They exhibited not a single letter, e-mail, or note to the developers or the resort requesting registration. They did not approach the Registrar, the Board or the court to seek assistance. Rather they urge now that they be protected in the very same manner as those who endured the rigors of compliance with The Act. That cannot be.
38. For the very same reasons outlined above, no distinction is to be made between those agreements entered into before or after The Act was passed or came into force. Neither purchased timeshare rights in a timeshare accommodation under The Act. Neither are afforded the protection and rights provided by The Act.
39. Section 17 of The Act offers a new and special protection to purchasers from any financial problems that may affect the developers or the project. Ordinarily in a right to use arrangement, if the developer goes bankrupt, the rights of all purchasers may be terminated. It then depends completely on the terms of the agreement. Through Section 17, the terms of the agreement become irrelevant. The purchaser of registered timeshare rights becomes immune from any such financial problems the project experiences and any new owners must respect their timeshare rights.

40. The Defendants presented the case of *Overseas Property Bond Management Ltd. v Antigua Commercial Bank, Nathaniel “Paddy” Jones et al No. ANUHCV 2006/0552* where the rights of registered timeshare purchasers were explored. It was held that their right of occupation prevailed notwithstanding the foreclosure and or sale of the timeshare property. Although the Antiguan legislation demands the registration of the timeshare rights as charges on the property, this case is instructive in that it supports the need for adherence to the legislative requirements in order to benefit from their comparative special protection section.
41. Since it has already been decided that Sueno del Mar is not a timeshare accommodation under The Act and the Claimants are not purchasers of timeshare rights, issue (b) now falls to be considered.

Issue b: Whether the Claimants have any rights to assert in priority to the first Defendant’s mortgage interest:

42. The Claimants assert that if they cannot have the rights and protections conferred by The Act then by virtue of their membership agreement they acquired a licence for limited and conditional use of units of the Sueno Del Mar property. They urge that if The Act deprives them of these rights it would amount to an arbitrary deprivation contrary to Section 17 of the Constitution.
43. The Claimants also raised issues of the retrospective operation of The Act and the principle against doubtful penalization but I find this contention to be misplaced. I quote from *Bennion on Statutory Interpretation* as presented by counsel – “A retrospective enactment inflicts a detriment for

this purpose “if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation or imposes a new duty or attaches a new disability in regards to events already passed.”

44. It is the opinion of this court that The Act in no way affected, impaired or extinguished any rights or interest created or vested by those agreements nor does it impose new duties or obligations. Perhaps the registration and licencing requirements in The Act may have the effect of merely suspending or hindering the operation of the agreements.
45. However, the onus to perform the contracts entered into with the Claimants remains with The Company. It is The Company which ought to have done all that was required, to ensure that it fulfilled its contractual obligations including, if necessary, full compliance with The Act once it was passed. It was always open to the Claimants to seek the court’s help in enforcing the proper performance of those agreements. They did nothing.
46. Every Claimant would now only be entitled to receive what he or she contracted to receive. It becomes a matter of construction to ascertain the precise nature of the contracted rights and/or interests. Ergo, we must consider the agreement within the framework of the applicable contract and (if necessary) property laws.

The Agreement - what was contracted:

47. Paragraph 73 of the Claimants’ submissions reads:

“None of the members of the Sueno Del Mar Club is given the right of possession of the land of the second Defendant nor any part of it. What the members are

given is the right to use a unit for a short period just as a hotel guest enters into an agreement to use a hotel room for a short period. The parties themselves express in the membership documents that the members acquire “no equity.” The Defendants themselves aver that there is no proprietary interest given to the members.”

48. The submissions continue at paragraph 78:

“But there is the additional point reflected in the membership documents that the members were in effect lending moneys to the second Defendant rather than paying the second Defendant consideration for the second Defendant to forever retain and disburse if it so wished. The moneys loaned are to be automatically refunded after a certain period (30 years) but the member has the right to resign from the club and receive a refund of 80% of the moneys lent (much like a pre-payment penalty).”

49. Although these paragraphs were made in resistance to submissions on the ad valorem tax issue, they speak volumes as to the precise nature of the rights or interests conferred by the agreements. They are statements with which this court concurs.

50. When the distinguishing principle of exclusive possession, as laid down in *Street v Mountford (1985) AC 809*, is applied it is clear that the members have only a revocable licence to use and occupy the premises. They did not pay an upfront purchase price but gave a 30 year unsecured, interest free loan to the developer, a full return of which required continued membership in good standing. One expert refers to this as an ‘attractive high refundable initiation fee’. In return they were allowed membership into the club which had the attendant right to exclusively use a specified unit (of The Company’s choice) for an assigned period of time (commensurate with the membership type). This right could not be assigned.

51. The membership documents provide for the owner and his staff to have unrestricted access to the premises as well as for the provision of a high level of services e.g cleaning, repair, maintenance and payment of utility rates (except telephone). The Company reserved the right in its sole discretion to modify the membership documents including, the plan, which contained the rights of the members. This meant that they could revoke the licence at will. The Company also maintained full control of the Club, the premises and the amenities. There were no expressed or implied rights of exclusive possession.

52. Each Claimant possesses only those limited rights granted by The Company which take effect as a licence. *Ashburn Anslalt v Arnold (1989) Ch 1 at 13* is the modern authority that a contractual licence is personal and does not create an interest in land. So with this particular arrangement, where the developer becomes insolvent, the potential loss to the purchaser could be substantial. The developer retains title and has full control. He realizes any appreciation in the property and could utilize the equity as he desires. Whereas, the purchaser is especially vulnerable to any dealings the developer may have with regard to the title of the property. Safeguards in The Act were intended to protect against this.

53. The Claimants by virtue of their agreements now stand to shoulder a total loss because the developer is unable to meet the financial responsibilities of the project. Their available recourse is to sue the developer (whether through a class action suit or otherwise) for breach of contract, which is not a very promising avenue. The Bank is entitled to take the property without

regard to their licences. They have no rights capable of being asserted in priority to the first Defendant's registered mortgage interest.

54. Because of the decisions on issue (a) and (b) this court finds that issue (c) falls away and need not be discussed. We move now to Issue (d) only because it may impact the Claimants' locus standi to challenge the mortgage.

Issue (d): Whether the Claimants' membership agreements are enforceable there having not been paid thereon ad valorem stamp duty pursuant to s. 71(4) and/or 73:01 (3), (4), (5) of the Stamp Duties Act.

55. The amendments to the Stamp Duties Act which introduced the Sections above were passed on 25th June 2005 and if at all applicable, would apply to any of those agreements entered into by the Claimants after that date. The amendments by their very nature cannot have a retrospective effect.
56. The Claimants here raised the issue of doubtful penalization. They contend that Statutes imposing taxes are to be strictly construed. The language must unequivocally say that the tax must be imposed. If there is any doubt, the person to be penalized must be given the benefit of the doubt. If the Statute is capable of two interpretations, the one most favourable to him must be accepted.
57. Taxing statutes were considered a special class where the literal rule of interpretation was emphasized. In *Cape Brandy Syndicate v IRC (1921) 1KB 64* it was held that: *"In a taxing Statute one has to look merely at what is clearly said. There is no room for an intendment. There is no presumption as to a tax.*

Nothing is to be read in, nothing to be imposed. One can only look at the language used.” This view found support in ***WT Ramsey Ltd. v IRC (1981) UKHL***, “*A subject is only to be taxed on clear words not on ‘intendment or on the equity of an Act ...’*”

58. However, ***Lord Griffiths in Pepper (Inspector of Taxes) v Hart [1993]*** accepted that “*The days have long passed when the courts adopted a strict construction view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and we prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.*” The editors of Cross on ***Statutory Interpretation Third Edition*** agree when they explain at page 173 that: “*... it is clear that the courts nowadays generally adopt a purposive approach even to the construction of penal statutes. For the most part, they seek the interpretation which makes sense of the statute and its purpose and the presumption of strict construction is merely an ancillary aid for resolving difficult cases.*”
59. The initial presumption has always been and remains, that parliament says what it mean and means what it says in a Statute. It is only if there is some ambiguity that we need an interpretive approach. If the Statute is precisely and clearly drafted and offers one reasonable interpretation, then the plain meaning of the provision must prevail. Such a meaning must then be applied to the facts and circumstances of the case.
60. Section 71(4) gives the broad directive to charge ad valorem stamp duty on any declarations of trust or any instrument which passes legal title, equitable interest or passes some interest. It is not material here. Since generally speaking the Sections do not overlap each other, they deal only with the

matter specified therein and go no further. In any event, a general provision must yield to a special provision.

61. According to Section 73:01(3):

Where a company

(a) owns lands; and

(b) sells the shares in the land, or in any development carried out on the land to any person and the persons who purchases the shares or an interest in the development carried out on the land possesses special rights as a result of such purchase which may include –

(j) the right to possession or occupation of a piece or whole of the land;

(ii) the right of access to the common areas of the land;

(iii) any customary rights of shareholders,

there shall be paid by The Company, on the issuance of such shares or interest which create the special rights referred to in paragraph (b), stamp duty at the rates specified in Section 72 for Caricom Nationals and Non-Caricom Nationals (including a company under the control of a Non-Caricom national), as applicable, of the value of the land or the development as the case may be.

(4) Subsection (3) shall apply to a person, a group of persons, an entity or an unincorporated group of persons so that:

(a) references to a “company” shall be read and construed as references to the person, group of persons, entity or unincorporated group of persons; and

(b) references to “shares” shall be read and construed as references to some other mechanisms used to create the special rights specified in subsection (3)(b).

(5) An agreement, instrument, deed or share referred to in subsection (1) or (3) or in Section 71(4) shall unless the stamp duties payable therefor have duly been paid –

(a) be incapable of creating or transferring any legal rights or interests; and

(b) have no effect unless and until registered.

62. Let me state early that this amendment was made before The Act was passed so one cannot expect it to use the term ‘timeshare accommodation’. And perhaps the use of that term would only limit the ambit of the Section. However, when one reads Subsection (3) one cannot but be certain that it relates directly to arrangements such as the membership agreements presently before the court.

63. It begins by explaining that the ownership of the land must rest elsewhere than in the purchasers of the interest or shares. There is no doubt that this is so under the agreements. It then goes on to speak of the various rights which the purchasers may possess which include the right to occupy a piece or the whole of the land, the right of access to the common area, again all parts of the agreed arrangement. Possession is also a right considered but it is not applicable here. There is an “or” appearing after possession and immediately before occupation. They are obviously disjunctive.
64. Finally, it explains how “Company” and “shares” ought to be widely construed. Not only in their ordinary and usual sense but in terms as wide as possible. A valiant and I dare say, successful effort to capture most ‘timesharing’ arrangements conceivable by the industry.
65. The side note, (which acceptably has limited value as a construction aid) refers to Section 73:01 as “Stamp Duty on other dealings in or affecting land.” It is preceded by a section noted as “Stamp duty on transfer of land.” We are therefore certain that Section 73:01 would not deal with the outright transfer of land.
66. Section 73:01 was discussed in the Belizean High Court case of *John Diaz v Ivo Tzankor et al Claim No. 186 of 2007*. I agree with the statement echoed by Justice Sir John Muria, particular with reference to Subsection (1), that the provision is designed “to deal with the mischief of avoiding stamp duty by purchasers who bought land, acquired the right of possession and yet do not go into immediate possession.”

67. I cannot seriously assume or accept that that statement could possibly have been made in reference to Subsection (3), as the Claimants in this case postulate. Not only because I hold a vastly different view, but also because Subsection(3) does not require the purchasers to pay any stamp duty. The Company is the one seized of this responsibility. Since the sections we are considering were not discussed in that judgment, I find it useful only as guidance on the application of Subsection (5).
68. Subsection (2) however seems in the measured view of this court to be the legislator's response to the unregulated 'timeshare' industry as it then existed. By ensuring that the owners of land paid stamp duty each time they sold any "shares" in a development and by mandating in strong and clear terms that these particular agreements were to be registered, the difficult issues of revenue and notice were appropriately dealt with. So integral was the need for payment that non-compliance made the agreement incapable of passing any legal rights or interests.
69. Counsel for the Claimants urge that a requirement for payment of the ad valorem tax would have a manifestly absurd effect in light of The Act and its requirement for payment of occupancy tax only by the purchasers. Again I am of the view that he has misunderstood.
70. The Act at Section 15(1) states:
- "There shall be paid by each holder of timeshare rights for each period during which such holder of timeshare rights shall be entitled to occupy a timeshare unit, a tax (to be called "occupancy tax") at the rate of six per cent of the total amount payable under the sales agreement by, or on behalf of, a purchaser under section 16(3) of this Act."*

71. And Section 16(8) assures that:

“The purchase price for timeshare rights paid by a purchaser under a sales agreement, and any other monies, charges or fees paid by a purchaser under this Act, shall not be liable to general sales tax, or any other tax or impost, other than the occupancy tax provided in this Act.”

72. These sections refer to the tax a purchaser pays and mandates that monies paid by the purchaser, is not liable to any other tax or impost. Section 73:01(3), however, requires The Company to pay (not the purchaser) and what is taxable is not monies paid by the purchaser but rather the value of the interest or share sold in the land or the development.

73. This court finds the language of Subsection 3 to be unambiguous and that the Claimants membership agreements fall squarely within the four corners of the provision and are subject to the ad valorem tax.

74. When each of those Claimants contracted not to register their agreement they agreed knowingly or not, to allow The Company to keep private that which the law demanded to be made public, to defraud the revenue and consequently to deny themselves even the rights they contracted for.

75. The importance of obtaining sound legal advice before contracting is impressed. The contracts not having been registered and the ad valorem tax not having been paid renders them useless at this time.

Issue (e) whether the Claimants have locus standi to challenge the validity of the mortgage – International Banking Act:

76. The Claimants submit that they have “more than a sufficient interest in the matter of the validity of the mortgage. Indeed they have a substantial interest..... The clear position of the Defendants is to ignore the rights of the Claimants and to sell the property free of those rights.”
77. They ask the court to be cognizant of the increasingly liberal view taken by the courts, on the issue of standing in cases such as *Edward Philip Mathurin et or v Magdalene Wilson Civil Suit 326/1999 (St. Lucia) and Jemima Bacchus et or v RBTT Bank Caribbean Ltd (matters considered together) 254/2011, 280/2011 and 301/2011 (St. Vincent and the Grenadines)*.
78. But as liberal a view as was taken in *Edward Philip Mathurin (ibid)* the court still found that some sufficient interest must be proven. Barrow J gives this salutary warning: “*There must be a limit to the category of persons who can be allowed to litigate an issue otherwise any idle or completely unconnected person would be able to mount a challenge to something with which he has not the slightest legally recognizable connection.*”
79. The Claimants presented the case of *Rolls Royce PLC v Unite The Union [2009] EWCA Civ 387* and urged that the court ought to be guided by the principles outlined therein when considering whether a “sufficient interest” had been established in applications for declaratory judgments in private law matters.

80. Here, the Union and the Company (both parties to the matter) had negotiated a redundancy agreement. They both had a direct interest in the agreement although the Union was not a party thereto. The Court entertained the appeal. It recognized that it was being asked to construe a statutory instrument, the interpretation of which was not only one of the court's proper functions but also a matter of public importance. Moreover, although it was a private rather than a public law matter, its determination would affect a large number of persons and ought to be viewed as exceptional.

81. Having considered a significant number of cases Lord Justice Wall at paragraph 120 concisely and precisely concluded:

"I think that the principles in the cases can be summarised as follows: (1) the power of the court to grant declaratory relief is discretionary. (2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant. (3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question. (4) The fact that the claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to an application for a declaration, provided that it is directly affected by the issue. (5) The court will be prepared to give declaratory relief in respect of a "friendly action" or where there is an "academic question" if all parties so wish, even on "private law" issues. This may particularly be so if it is a "test case", or it may affect a significant number of other cases, and it is in the public interest to decide the issue concerned. (6) However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected are either before it or will have their arguments put before the court. (7) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised. In answering that question it must consider the other options of resolving this issue."

82. The court accepts this guidance and willingly applies the principles to the case at hand. We begin by accepting that the Claimants are not only asking for declarations in relation to the mortgages, but also enforcement orders.

Then consider that the mortgage agreements were made between The Bank, Sueno LLC (Nevis) and The Company. They are the ones who would ordinarily find issue with such a contract. The resolution of such issues usually requires the inclusion of the parties to the agreement. Yet neither The Company nor Sueno LLC (Nevis) are parties to this claim. As such, they have no voice and are unable to put their arguments before the court. The Claimants, who are not privy to nor have any third party interest in the contracts, dispute only with The Bank. Is this fair. Should a declaration and consequential orders be made in these circumstances!

83. The court's declaration on the legality or otherwise of the mortgage agreements will not assist or affect the Claimants in any way as they are mostly the holders of ineffective agreements. This court also considers if there was in fact some illegality but the parties to the mortgage were in pari delicto and were both at fault or there was some fraud. Could a safe finding be made one way or the other in this matter from what has been presented to the court? And if it could be made, what could in reality be done about it.
84. The illegality of a contract goes to enforceability. This means neither misbehaving party can recover. So when the Claimants ask that the Defendants be ordered to vacate the premises, are they assuming that the property would somehow be magically restored to the ownership of The Company? Such an expectation is incomprehensible and defies logic.
85. The declaration sought cannot really right the wrong if it has occurred. And making a consequential order that the instruments be cancelled and struck from public record will not be of significant help to the Claimants. "*A court*

will not grant relief to a Plaintiff whose claim is too indirect or unsubstantial and would not give him relief in any real sense, that is relieve him from any liability, disadvantage or difficulty ...” Withfield v Attorney General of Bahamas 44 WIR 90.

86. More importantly, the International Banking Act states at Section 22(2) that the onus is on the licensee (The Bank) to establish residency and beneficial interest to the satisfaction of the Central Bank (not the court), these are clearly issues of fact. So should the court intervene where the Central Bank has not seen it fit so to do or before it has found it necessary so to do. And is the court to intervene at the behest of virtual strangers.
87. The Central Bank to my mind is the correct entity to challenge such a transaction with an International Bank. It cannot reasonably be open to all persons occupying property mortgaged with an International Bank to approach the court stating that, in their view, the mortgage is illegal and ought to be struck from the register.
88. Master Actie held a similar view in *Jemima Bacchus et or (ibid)* when she considered the standing of policy holders, as opposed to the Supervisor of Insurance, to bring a claim against a trustee for breach of duties under the Insurance Act. She concluded at page 21, *“I am of the view that where there is an alleged breach by the trustee of the trust, which is subject to Section 32 of the Act and to the terms of the contract entered into by the parties, it is the supervisor under the normal contract law who has locus standi to pursue the trustee. Parliament could not have intended that numerous policy holders affected by a trustees’ breach institute individual claims against the trustee even before or together with the Supervisor.”*

89. When one considers the International Banking Act, it is a strict and strenuous piece of legislation, forcefully regulated and controlled by the Central Bank. The licensees are subject to audits, examiners and other compliance mechanisms that leave little room for violation. The Claimants have brought no evidence to show that the Central Bank has deemed the mortgages to be in contravention, whether through its directive, indictment, prosecution or revocation, of The Bank's licence. Yet, they ask that this court intervene with limited evidence, limited parties and even less authority. I should think not. It must be stated, for completion, that my decision would have been no different had the membership agreements been effective.
90. I do not find this case to be exceptional or to be a proper one for the exercise of the court's discretion and I respectfully decline to exercise same. In similar vein, I also decline to address issues (f) thru (i) as they must all fall away.

CONCLUSION:

91. **Issue (a)** – The membership agreements do not constitute the purchase of timeshare accommodation under The Act and the Claimants are not entitled to the rights and protections afforded to timeshare purchasers under The Act.
- Issue (b)** – The Claimants by virtue of their membership agreements have no rights to assert in priority to the first Defendant's mortgage interest.
- Issue (c)** – falls away.
- Issue (d)** – The Claimants' membership agreements entered into after the Stamp Duties Amendment Act was passed are unenforceable as no ad valorem tax was paid thereon.

Issue (e) – The Claimants do not have locus standi to challenge the validity of the mortgage.

Issued (f) thru (i) fall away.

92. **IT IS HEREBY ORDERED AND DECLARED:**

1. The Claimants' membership agreements with Sueno Del Mar Limited do not constitute "timeshare" rights and/or interests as provided for in the Timeshare Act and the Claimants are therefore not entitled to the rights and protections afforded to timeshare owners under the said Act.
2. The Claimants' do not have any rights to assert in priority to the 1st Defendant's mortgage interest over the resort development on Parcel 4483, Block 7, San Pedro Registration Section owned by Sueno Del Mar Limited ("Sueno's property").
3. The Claimants' membership agreements are unenforceable, there having not been paid thereon any ad valorem stamp duty pursuant to the Stamp Duties Act (as Amended).
4. The Claimants' lack locus standi to challenge the legality of the 1st Defendant's mortgage over Sueno's property.
5. The relief sought by the Claimants at paragraphs 1, 2, 3, 4, 5, 6, 7, 9 and 10 are dismissed.
6. Costs to the Claim to be considered by written submissions to be delivered and exchanged on or before 25th June, 2015.
7. Ancillary Claim is withdrawn and each party to bear its own costs.

Observations

93. While this matter was being considered, amidst the present scarcity of case law, and the virtual newness of The Act when these proceedings began in 2011, certain observations surfaced which could not easily be quieted. I feel compelled to state the following which have serious implications, not only for purchasers and developers, but for other associated entities as well. Some of these observations may no longer have relevance today.

94. The significance of The Act is in its capacity to balance the need to regulate this growing industry with consumer protection. The administration of The Act is the responsibility of the Board and the Registrar, yet they are given no pre-emptive investigatory, injunctive or enforcing powers over existing developments. Even where the development is registered there is no statutory requirement for the developer to display or disclose his personal status or that of the development whether at his place of business, in his adverts or other documents. Mechanisms should be put in place to ensure that consumers are made aware.

95. The obligations imposed on the timeshare schemes are understandably complex and numerous. However, certain requirements may not be applicable to already existing arrangements. Nonetheless, there are no waivers or regulatory exemptions provided to facilitate the registration process (except as it relates to public offering statements under Section 14 of The Act). It is noted in this case that the application for registration should have been filed within 30 days. A one month transition period seems incredibly short when one considers what is required.

96. The Act by Section 16 (4) makes it mandatory for a timeshare developer to submit copies of all executed timeshare agreements; Section (4) says that this information must be recorded in the Register of Timeshare and Section 16(6) says sales agreements are invalid if Section 16 is not complied with. Yet, there is no statutory manifestation of the registration of the sales agreements, for e.g. a certificate of registration. It ought to be mandatory for purchasers to be provided with such a document. They need to know that a developer has done what the law requires him to do.

SONYA YOUNG
JUDGE OF THE SUPREME COURT

