

**IN THE SUPREME COURT OF BELIZE, A.D. 2014**  
**CENTRAL DISTRICT COURT**

**CLAIM NO. 268 of 2012**

**BETWEEN:**

**The Proprietors, Strata Plan 64**

**Claimant**

**AND**

**Reef Village Estates Limited**

**Defendant**

**Before:** Hon. Madam Justice Shona Griffith

**Dates of Hearing:** 23<sup>rd</sup> & 24<sup>th</sup> July, 2014

**Appearances:** Mr. Eamon Courtenay S.C. of Courtenay Coye LLP with Ms. Priscilla Banner, Counsels for the Claimant.  
Mr. Darrel Bradley with Ms. Alifa Elrington-Hyde, Counsels for the Defendant

**DECISION**

*Claim for Money - Strata Act, Cap. 196 – Powers and Duties of Strata Corporation – Unit Holders - Liability for Fees and Assessments*

1. This is a claim brought by The Proprietors, Strata Plan 64, (an association of condominium owners), established pursuant to the provisions of the Strata Plan Act, Cap. 196 of the Laws of Belize. The Defendant is Reef Village Estates Limited, a company and the developer of a strata community on the Island of San Pedro, Belize. The claim is for the sum of \$748,674.63 comprising various categories of fees and assessments levied upon the Defendant by the Claimant in the former's capacity as owner of several condominium units within the community. The Defendant disputes owing the amount claimed on several bases, most significantly, the legitimacy of the Claimant's authority to levy fees and assessments, pursuant to Strata Plan Act.

2. The Defendant counter claims in the sum of \$132,970.54 for maintenance fees owed by the Claimants for use of the pool area and washing facilities situated within the strata complex, in respect of which legal title is held by the Defendant. A brief introduction of the facts is first provided, after which the Court outlines the respective cases and submissions of the parties and concludes with its findings and determination of the matter.

### General Factual Background

3. The Defendant Reef Village Estates Ltd, sometime in 2005 commenced construction of a condominium complex in the Island of San Pedro, Belize on land registered as parcel 7-42-5227 San Pedro Registration Section. According to the Defendant, sale of units to the public commenced sometime in 2006. The development was phased and at the date of trial there had been some 114 titles issued for units sold. Titles had been transferred in relation to some but not all of the units sold. The Defendant itself was owner of units within the strata complex, some in its own right and others (according to the Defendant) as a result of titles not yet transferred to purchasers.
4. In May 2008, Reef Village Estates registered the said parcel 7-42-5227 thus bringing into being (pursuant to section 5 of the Strata Act), a body corporate, to be known as 'The Proprietors of Strata Plan 64' ('PSP64'). What thereafter ought to have transpired was for the corporation to have carried out statutorily prescribed functions and duties vis-à-vis the regulation and governance of the strata community. The existence of the corporation was not in fact recognised until several years after, when proprietors sought to organise and govern themselves, then with the benefit of legal advice.
5. So what instead followed after the registration of strata plan 64? In its capacity as developer, the Defendant had undertaken the management of the strata complex after the sale of units commenced and the Defendant's management of the strata complex continued even after the registration of the strata plan, despite the fact that management was statutorily designated to the Corporation that was created in the form of PSP64.

6. According to the evidence of both parties, a limited liability company was incorporated at the instance of several proprietors to take over the management of the complex and this company was incorporated in May, 2011. The subscribers to the Memorandum of Association as well as the first directors of the company, were Ron Sutherland (witness for the Defence) and one Jim Oliver. Within the pleadings and evidence of both sides there was a variance in the position of the parties in relation to the circumstances which gave rise to the incorporation of the limited liability company and at whose behest the company was incorporated.
7. What was apparent however, was that proprietors acting in furtherance of the interests of both parties had participated in the operation of the company, and its intended purpose was to function as the vehicle to be used to manage the strata complex. This conclusion is drawn from the minutes of the meetings of the limited liability company the first of which was held in May, 2011 and continued until July, 2012 when the first meeting of proprietors qua PSP64 was held. The content and effect of these meetings will be examined later on in the Judgment.
8. As far as the Claimant is concerned, decisions relating to the management and administration of the complex such as payment of fees for utilities, maintenance of units and insurance were made by the limited liability company reflecting the decision of the owners of the units of the strata complex, at least for the period May, 2011 to July, 2012. As far as the Defendant is concerned, the limited liability company had no authority to make decisions concerning the management of the strata complex as such matters were statutorily within the purview of PSP64. On this basis therefore the Defendant rejected liability of all assessments made pursuant to decisions taken by the limited liability company as well as those alleged by the Claimant to have been legitimized by the acts of the strata corporation.

9. Against this general background, the Court is called upon to render its decision on the main issue of whether the Defendant, in its capacity as unit holder in the strata complex, is liable for what was assessed as its contribution towards fees and assessments arising out of the ownership and use of the units and other areas of the strata complex. The Court firstly outlines in brief, the respective cases for the Claimant and Defendant together with submissions as to the relevant law as they were presented.

#### Case for the Claimant

10. The claim was first initiated by the Claimant on 12<sup>th</sup> May, 2012 as thereafter amended on 18<sup>th</sup> October, 2012 for the Defendant to pay the sum of \$290,895.19 to the Claimant for fees and assessments arising out of the Defendant's ownership of 10 strata units in Strata Plan 64 ('PSP64') from the period May, 2011 to August, 2012. The 10 units for which the fees and assessments were claimed are A101, A102, A303, B101, C202, C203, F202, I102, Villa 6 and Villa 7. At the trial unit C202 was accepted as not forming part of the claim and as such the claim remained in relation to the 9 other units. By the date of trial the period for which the monies were claimed was extended from August, 2012 to October, 2013 and the total claimed by the time of trial was \$748,674.63.
11. The Claimant also claimed relief inter alia by way of being able to access and rent the units owned by the Defendant and the developer/common areas (of the strata complex) to apply towards the judgment debt; and to discontinue supply of water, electricity and other utilities whilst the amounts owed on the units owned by the Defendant remain outstanding.
12. The Claimant bases its claim on the powers of the strata corporation under section 6(2) of the Act, to levy contributions in respect of maintenance costs for the common property, for insurance of the entire property (section 6(1)) and for late charges on those amounts by virtue of its amended by-laws.

Further, as provided by section 6(3), that upon the passing of a resolution to that effect, such contributions become due and payable, and recoverable as a debt by the corporation from the proprietor against whom the contribution was levied. In particular, the claim was structured in the following manner.

- (i) In furtherance of its powers under the Act, the Claimant states through the evidence of one John Adams, that the Corporation approved its annual budgets (for the years 2011 through 2013), at annual general meetings ('AGMs') held in 2012 and 2013. At these AGMs, the members of the corporation (the proprietors entitled to vote – present or by proxy) approved budgets for maintenance, utilities, special assessments, utilities for common/developer areas in respect of the units and for insurance. The costs apportioned to each proprietor were based on the proportion of the fees assessed against the number of units held by each proprietor.
- (ii) Specifically, the late fees which were charged to the Defendant were properly levied as there were amended by-laws passed by resolution of the corporation at the AGM of 31<sup>st</sup> July, 2012, which approved a 'New Delinquency Policy'. This policy allowed the corporation to charge a 5% late fee (compounded) on assessments remaining unpaid, hence the amounts owed by the Defendant in respect of the maintenance and other costs were subject to a 5% compounded late fee to be added to the principal balance. Additionally, the insurance costs were incurred on behalf of all proprietors and even if the insurance turned out to be invalid, which is not admitted, the cost incurred is nonetheless owed by the Defendant, as a proprietor for whose benefit the insurance premiums were paid.
- (iii) The monies being claimed have in fact already been expended by the Claimant as the maintenance costs, utility fees and insurance premiums had to be paid and were so paid by the cost passing to other unit holders.

- (iv) In respect of the operation of the limited liability company which was incorporated in May, 2011, the Claimant says that this company was de facto operating as the strata corporation given that it was the unit proprietors who attended and voted at the meetings at which budgets and policies were approved. The fact that the memorandum of association of the limited company mirrored the powers of the company set out in section 6 of the Act also lends credence to the intended operation of the company as per the statutory corporation.
- (v) Additionally, the limited liability company operated only for 1 year before the proprietors became aware in July, 2012, of the existence and required operation of the corporation. In respect of the approval of the budget for 2011 and any other decisions taken by the limited liability company within that year, these were approved by the statutory corporation at its AGM on 31<sup>st</sup> July, 2012 as a precautionary measure to ensure their validity. In the circumstances, the Claimant says, any fees based upon actions taken by the limited liability company within that year before the proprietors became aware of the statutory corporation, were valid.
- (vi) The meetings at which these budgets were approved were lawfully held as there was a quorum for each meeting. The quorum comprised one half of the unit holders entitled to vote. The unit holders entitled to vote were titled unit holders in good standing (fully paid up on any contributions owed to the corporation). The minutes of the meeting of 31<sup>st</sup> July, 2012 establish that for the purpose of actual voting, there was unanimous assent by titled unit holders in good standing, to the resolutions made for the purpose of ratifying previous budgetary assessments made by the limited liability company.

- (vii) The remedies sought in addition to claim for the monies owed as fees and assessments – viz – to take possession of and rent out the Defendant’s units in order to satisfy the judgment, and to disconnect supply of utilities to the Defendant’s units – are actions authorized by the amended by-laws of the corporation.

The Case for the Defendant.

13. The Defendant resists liability in respect of the assessments claimed on the basis that the initial actions of the limited liability company were invalid having regard to the functions of the statutory corporation as created by the Act. More particularly, the company had no power to levy fees or assessments as this was a function reserved by law for the statutory corporation. Further, the decisions thereafter taken by the statutory corporation were not effected in compliance with the requirements of the Act (particularly with respect to voting and establishment of quorum) and so were invalid.
14. The Defendant’s case regarding liability addressed the claim in a number of ways, particularly in relation to the late fees, assessments, insurance premiums and irregularities at the corporation’s meetings, outlined in further detail as follows:-
  - (i) As regards the late fees, the Defendant’s contention is that these fees - which were introduced through amended by-laws approved by resolution in AGM dated 31<sup>st</sup> July, 2012 – were invalid. In order to be of effect, section 15(5) of the Act, requires that notification of the amended by-laws be lodged with the Registrar (of Lands) and a corresponding notation of the by-laws be made by the Registrar on the strata plan. This notation of the amended by-laws was not in this case, made by the Registrar until December, 2013. In the circumstances says the Defendant, the amended by-laws upon which the authority to charge late fees was based, did not validly come into existence until December, 2013, a period outside the relevant period in respect of which the claim is made.

- (ii) The assessments (utilities, maintenance, special assessments) were passed by the limited liability company which had no authority to do so. The power to make assessments exists by virtue of the Act so once the strata corporation was not carrying out those powers, the assessments made by the limited liability company were invalid and could not bind the Defendant. In this respect all assessments made prior to July 31<sup>st</sup>, 2012 were unlawfully imposed and furthermore were incapable of being ratified when the statutory corporation commenced in its capacity as such.
- (iii) In relation to the insurance premiums, the Defendant is not liable in this regard as the insurance was invalid. The policy was effected by the limited liability company which had no insurable interest in the subject matter of the insurance – the units. Thus, given that the fact that the policies were in the name of the limited liability company was not in dispute, because the limited liability company was not the owner of these properties, nor did it hold any other interest or have any other connection to the property upon which to give rise to any insurable interest, the policies were invalid and the Defendant could not be asked to contribute towards them. The cases of **Macaure v Northern Assurance Co Ltd et al 1 [1925] All E. R. 51** and **Kosmopoulos v Constitution Insurance Co. [1987] 1 SCR 2** (Canada) were primarily cited in support of this issue of insurable interest.
- (iv) As regards the conduct of meetings at which decisions regarding the ratification of fees and assessments (July 31<sup>st</sup>, 2012), (January, 2013) and (October, 2013), the Defendant states that voting at those meetings was irregularly conducted thus invalidating the decisions taken therein. This claim the Defendant bases on the charge that there was no lawful quorum established. That at all times, regardless of the nature of the vote (whether one requiring unanimity or simple majority), the prescribed quorum should have been more than 50% of all title holders and the Claimant failed to establish that such a percentage was present at the meetings.

- (v) As regards the relief sought by the Claimant against the Defendant the order sought to access and rent out the units held by the Defendant amounts to an order for enforcement which cannot be obtained at the same time as an order for judgment. Additionally, the provisions of section 15(4) safeguard a unit holder's use and enjoyment of his property by restricting the operation of any by-law which in effect affects this right. The remedy sought would in effect dispossess the unit holder thus running afoul of section 15(4).
- (vi) The same position is held in relation to the order sought to discontinue supplies of water and electricity to the Defendant's units. This relief sought is tantamount to an order for enforcement which cannot be obtained at the same time as judgment.

### The Court's Consideration

#### **A The Preliminary Issue:-**

15. The Defendant at the commencement of the case for the Claimant raised a preliminary objection to certain parts of the evidence of John Adams, witness for the Claimant. The preliminary objection was to the admissibility of 3 paragraphs of the witness statement of John Adams. Two of the objections were ruled upon immediately but the Court reserved its ruling in relation to the remaining objection, to be thereafter determined as part of its final disposition of the matter. The Court now sets out the remaining objection and its reserved ruling in relation thereto and also summarises the objections which were ruled upon at the time they were raised.

### The Objections

16. Counsel for the Defendant objected to the admissibility of paragraphs 4, 60 and 62 of the witness statement of John Adams. The objections in relation to the latter two paragraphs were disposed of summarily. The objection to paragraph 60 was its reference to material in the witness statements of other persons, who were no longer attending the trial. Those references the Defendant submitted, could not be made.

It was acknowledged by the Claimant that no references to statements of those persons who would no longer appear as witnesses could be relied upon by the Claimant. The objection was duly upheld. Paragraph 62 was objected to on the basis of containing hearsay and opinion evidence. Counsel for the Claimant responded to the effect that the Court was free to strike paragraph 62 from the record. The Court preferred to acknowledge that the evidence would be attributed whatever weight was appropriate within the circumstances of the case.

17. The objection to paragraph 4 of the witness statement of John Adams however required a greater degree of consideration. The objection was to the reference in paragraph 4 of the amended by-laws of the Claimant as being one of the bases of regulation of the strata lots and common property of strata plan 64 and thereby the Claimant's authority from which to levy its fees and assessments. The objection was based on the fact that reliance upon the amended by-laws had not been pleaded in the statement of claim and had appeared in no other document prior to the witness statement of John Adams. As a consequence it was submitted, the Claimant was to be precluded from relying on the amended by-laws and leading any evidence in relation to same at the trial. In support of his objection Counsel for the Defendant relied upon the authorities of **Hubert Mark v Belize Electricity Limited, Belize Civil Appeal No. 11 of 2009** and **DMV Ltd v Tom L. Vidrine, Belize Civil Appeal No. 1 of 2010**.
18. Counsel for the Defendant acknowledged that the facts of the cases cited were of no relevance to the case before the Court, but that the authorities were advocated more on the basis of the principles stated therein regarding the importance of pleadings. In **Hubert Mark** the Court of Appeal allowed an appeal against a judgment which dismissed a claim on a point not pleaded by the parties to the case. References were made to earlier cases from Barbados which re-emphasised that parties were to be held to their pleadings and cases were not to be allowed to be conducted outside of the issues raised by the pleadings.

19. Counsel for the Claimant responded by asserting a more modern approach to the issue of pleadings, heralded by the introduction of the new Civil Procedure Rules. In relying upon the same authority put forward by the Defendant – **Vidrine** – learned senior counsel referred to the judgment of Morrison JA, which cited with approval remarks made by then Barrow JA in the case of **Eastern Caribbean Flour Mills Ltd v Boyea, OECS Civil Appeal No. 12 of 2006**. Reference was made in both instances to the judgment of Lord Woolf MR in **McPhilemy v Times Newspapers Ltd [1999] 3 All E.R. 775** pertaining to a reduced need for extensive pleadings in light of the use of witness statements. In particular the commentary of Barrow JA, (drawn from McPhilemy) acknowledged in effect, that whilst the role and requirements of pleadings was rendered no different by the stipulated use of witness statements there was no longer a need for extensively particularized pleadings. The purpose of pleadings remained to make clear the general nature of a parties' case, but in order to let the other side know what case it has to meet and therefore prevent surprise at the trial, the pleading must contain the particulars necessary to serve that purpose.
20. The Court has no difficulty with this approach, particularly as it is laid out by its superior Court in **Vidrine**. The Court's understanding of this more modern approach as articulated in the above authorities however, acknowledges that whilst there may be matters introduced by witness statements which amount to no more than particulars of issues already generally pleaded, there may also be those matters, which amount to an alteration of the basis or other fundamental aspect of a party's case. The latter of the two goes beyond expanded particulars, thus the Court must therefore bear this difference in mind when considering any dispute in relation to sufficiency of or deviation from pleadings.
21. In the instant case, the claim is one for monies owed arising from fees charged to the Defendant by the Claimant. The basis of authority by which the fees were charged includes the by-laws of the corporation.

The Defendant's objection is that only in the witness statement of John Adams, filed in November, 2012, did the Claimant make reference to amended by-laws, and these amended by-laws not having formed part of the case as pleaded in the statement of claim (as amended), evidence in relation thereto ought to be disallowed as it altered the basis of the Claimant's claim. Further, had the amended by-laws been pleaded, the Defendant would have been able to structure its case differently in order to address that issue.

22. In respect of the amended by-laws, the claim remains a claim for money owed to the Claimant by the Defendant on several different bases. However, the Court accepts that there would be a difference between the value of that portion of the claim based upon the original statutory by-laws, against that based upon the amended by-laws. The Court is of the opinion that reliance on the amended by-laws by incorporating same in the witness statement when not pleaded in the statement of claim, does not entirely fall within the contemplation of expanded particulars of a matter already generally pleaded as per the 'modern approach' to pleadings discussed in the foregoing paragraphs. The Court however looks at the issue in its entirety.
23. The circumstances herein firstly are that amended by-laws forms only a part of the basis of the Claim. Additionally, the Defendant addresses the issue of the amended by-laws in paragraph 30 of the witness statement of its witness, Jeffrey Pierce. The Defendant in fact therein denies the legitimacy of the amended by-laws and correspondingly denies the validity of the fees and assessments claimed on the basis of these amended by-laws. The Defendant has therefore acknowledged and answered the very material in respect of which it raises its objection, and whether by design or otherwise, has sought at the commencement of the trial, relief which by its nature (a circumscription of the Claimant's case), could have been made at the pre-trial stage.
24. On the whole, the Defendant was obviously aware of the Claimant's reliance on the amended by-laws and cannot therefore be said to have been taken by surprise. Additionally, the Defendant acknowledged and responded to the issue in its own evidence and reliance on the amended by-laws altered the claim only in relation to the

numerical value. The Court considers that because the Defendant in its own witness statement availed itself of a response to the issue of the amended by-laws, the mischief underlying the rules relating to pleadings was not manifest and the Defendant suffered no prejudice. The Court therefore declines to uphold the Defendant's preliminary objection to the Claimant's case proceeding on the basis of the amended by-laws.

## **B The Claim**

25. Having determined the preliminary issue, the Court now commences its consideration of the substantive case and firstly highlights its most relevant findings of fact arising from the evidence led on behalf of both parties:

- (i) The Defendant Reef Village Ltd. registered Strata Plan 64 in May, 2008 on which date the Strata Corporation – Proprietors Strata Plan 64 ('PSP64') by operation of law (section 5 of the Strata Plan Act, Cap. 196, ('the Act'), came into existence.
- (ii) The titleholders of PSP64 were unaware of the existence of the statutory corporation or the statutory framework under which it was supposed to function and operate vis-a-vis the strata community developed by the Defendant.
- (iii) The Defendant Reef Village Estates Ltd. managed the strata development when lots commenced sale in 2006 and continued management of the development after the registration of PSP 64 which occurred in May, 2008.
- (iv) In or around May, 2011, several proprietors formed a limited liability company entitled 'The Proprietors Strata Plan 64 Ltd.' ('the company/PSP64 Ltd.'). The purpose of this company was to operate as the vehicle which would manage the strata community. The objects of the company as stated in its memorandum of association appeared to be extracted from the Strata Act, Cap. 196, particularly section 6 thereof, which set out the powers of the statutory corporation.

It was not conclusive from the evidence, whether it was the titleholders representing the Claimant or representatives of the Defendant who were responsible for the formation of the company. Nonetheless, in spite of the fact that the Defendant (through director Jeffrey Pierce) disclaimed any part in the formation of the company [paragraphs 21 – 26 of the witness statement of Jeffrey Pierce], the Defendant's own witness, Ronald Sutherland, was an initiator of the company and dispelled any malice or intention by the title holders involved in the formation, of subverting the statutory corporation as was the contention of the Defendant. In any event, the Court did not consider the question of who was responsible for the formation of the company to be relevant to its determination of the claim.

- (v) As part of the functions carried out by the company, a number of actions regarding management of the strata development were carried out. These included creation of budgets to account for payment of utilities, maintenance, insurance and other outgoings in relation to the units in the strata community. In particular, a first general meeting of the company was purportedly held in May, 2011 (Witness statement of Ron Sutherland, 'RS4'). No finding in relation to actual business conducted at this meeting is made by the Court on the basis that what is presented as minutes of this meeting appears to be a meeting held via internet chat where neither persons nor procedures at the meeting are properly identifiable.
- (vi) A further extraordinary general meeting of the company is found to have been held in October, 2011. Minutes of this meeting (Annex 75 of Claimant's documents) establish that budgets were presented regarding fees allocated to units including fees for maintenance, landscaping, electricity and water costs. Delinquent unit holders were also identified in relation to some fees and on the agenda of that meeting there was a need identified for by-laws to deal with delinquent accounts.

- (vii) Minutes were presented of Directors' Meetings of the company for dates April 25<sup>th</sup>, 2012; June 28<sup>th</sup>, 2012 and 5<sup>th</sup> July, 2012. Ronald Sutherland and John Adams (witnesses for the Defendant and Claimant respectively) were both directors of the company and participated as such at the said meetings. At these meetings issues discussed included maintenance of the resort, delinquent accounts, input of legal counsel and the convening of the next home owner's meeting in July, 2012.
- (viii) In July, 2012, acting with awareness as to the existence and purpose of the statutory corporation, proprietors of units in the development held the first general meeting as that statutory corporation on 31<sup>st</sup> July, 2012. Minutes reveal that a number of decisions were taken by this meeting. Whether those decisions were lawfully effected and of any legal consequence will be addressed in the Court's determination of the legal issues of the case. The decisions which arose out of that meeting are outlined in the following paragraphs.
- (ix) At this meeting of 31<sup>st</sup> July, 2012, a number of decisions were taken in the form of resolutions passed by votes of members. The question of whether the meeting was properly constituted by required quorum is dependent upon interpretation of the law regarding establishment of a quorum under the Act. This determination is addressed in the Court's discussion on the law, but for the purposes of the Court's findings of fact it suffices to say that the meeting proceeded on the basis that a quorum was properly constituted. It is also found that for the purpose of actual voting only persons entitled to vote were counted. The Defendant's assertion that non titled persons were allowed to vote was found unsubstantiated.
- (x) The resolutions passed at this meeting of 31<sup>st</sup> July, 2012 concerned inter alia:
  - (a) adoption of minutes of prior meetings held by PSP 64 Ltd. – the company;
  - (b) appointment of an Executive Committee comprising 3 titled owners;
  - (c) approval of by-laws previously circulated to members;
  - (d) approval of a special

assessment to offset costs of roof repair; and (e) a new delinquency policy of 5% compounded late fee. The effect of the resolutions is addressed as a matter of law.

- (xi) The Defendant is the holder of the 9 units forming the subject matter of the claim and was regarded by the Claimant as delinquent in having failed to pay assessments made by the Claimant and its predecessor, PSP64 Ltd. As a result, for the meetings at which the Defendant was present (represented by Jeffrey Pierce), no vote was allowed to be cast by the Defendant. At the meeting of January, 2013, the Defendant through Jeffrey Pierce did request a poll which was agreed.
- (xii) The Defendant has in its name, the area which ought to be the common area as defined in the Act. That is, the pool island in the strata development which is registered as parcel number 7-42-6632 San Pedro. There was no evidence as to the basis on which the Defendant acquired title to the pool area in the development.
- (xiii) The Court declines to embark upon any numerical verification of amounts owed and will address this issue further in the judgment.

The issues and applicable law.

26. (a) The main issue in this case is whether the monies claimed from the Defendant in the form of fees and assessments levied in respect of the 9 strata units owned by the Defendant are legally recoverable. The question of whether the monies claimed are legally recoverable from the Defendant is itself dependent on a number of sub-issues expressed as follows:-

- (i) Having regard to the powers and functions vested in the statutory corporation under the Act, what was the legal standing of charges levied against the Defendant by PSP64 Ltd?

- (ii) In respect of the assessments made after the statutory corporation commenced its functions as such, were those assessments (whether in whole or in part) properly charged in accordance with the Act.
  - (iii) In determining whether the assessments and charges levied by the statutory corporation were properly made, what are the powers of the corporation under the Act and were they lawfully exercised.
- (b) To the extent that the Claimant might be found to have a valid claim against the Defendant what are the true amounts owed?
- (c) Is the Claimant entitled to the additional relief sought in the form of accessing and renting the Defendant's units and disconnecting utility services to curtail expenses incurred whilst the debt as claimed remains unpaid.

27. The answers to these issues derive almost entirely from within the Act. The following sections of the Act are extracted as being most relevant in framing the Court's discussion on the law to be applied in determining the claim:-

- (i) Section 2 (definitions)
  - '*common property*' means in relation to any strata plan, so much of the land to which such plan relates as is for the time being not included in any strata lot contained in such plan.
  - '*corporation*' – means, in relation to any registered strata plan, a body incorporated under the provisions of section 5 of this Act.
- (ii) Section 4(1) – "Every strata plan shall...(d) have endorsed upon it a schedule setting out the unit entitlement of each strata lot indicating as a whole number the proportion of the common property allocated to that strata lot;..."
- (iii) Section 4(4) – "The unit entitlement of each strata lot shall, as respects the proprietor of such strata lot, determine – (a) the quantum of his share in the relevant Corporation; and (b) the proportion payable by him of contributions levied pursuant to paragraph (b) of subsection (2) of section 6; and (c) the proportion of land tax and/or property tax payable by him, whether jointly or severally, pursuant to this Act.

- (iv) Section 5(1) – The proprietor (sic) of all the strata lots contained in any strata plan shall upon registration of the strata plan, become a body corporate (hereinafter referred to as a ‘Corporation’) under the name ‘The proprietors, Strata Plan No. \_\_\_...”
- (v) Section 6(1) – Duty of a Corporation to insure the building...
- (vi) Section 6(2) – The powers of a Corporation shall include the following:
  - (a) To establish a fund for administrative expenses sufficient in the opinion of such Corporation for the control, management and administration of the common property, for the payment of any premiums of insurance and for the discharge of any of its other obligations;
  - (b) To determine from time to time the amounts to be raised for the fund referred to in paragraph (a) and to raise amounts so determined by levying contributions on the proprietors in proportion to the unit entitlement of their respective lots;
  - (c) To recover from any proprietor, by an action for debt in any court of competent jurisdiction, any sum of money expended by the Corporation for repairs to or work done by it or at its direction in complying with any notice or order by a competent public or local authority in respect of that portion of the building which constitutes or includes the strata lot of that proprietor;
  - (d) To enter any strata lot and effect repairs or carry out work pursuant to its duty under paragraph (g) of subsection (1).
- (vii) Section 6(3) – “Subject to the provision of subsection (4), a contribution levied pursuant to subsection (2) shall be due and payable on the passing of a resolution to that effect and in accordance with the terms of such resolution, and may be recovered as a debt by a Corporation in an action in any court of competent jurisdiction from the proprietor entitled at the time when such resolution was passed and from the proprietor entitled at the time when such action was instituted, both jointly and severally.

- (viii) Section 6(4) – Duty of Corporation to certify contribution owed by proprietor upon application by proprietor.
- (ix) Section 13(1) – The common property shall be held by the members as proprietors in common in shares proportionate to the unit entitlement of their respective strata lots.
- (x) Section 13(3) – Save as is provided in this Act, no share in the common property shall be disposed of except as appurtenant to a strata lot and any assurance of a strata lot shall operate to assure the share of the disposing party in the common property without express reference thereto.
- (xi) Section 14(1) – The proprietors may by unanimous resolution direct their Corporation to transfer or lease the common property or any part thereof.
- (xii) Section 15(1) – The management and control of the strata lots and common property shall be regulated by by-laws section 15(2) – The by-laws in the 1<sup>st</sup> Schedule shall not be amended except by unanimous resolution.
- (xiii) Section 15(5) – No amendment or variation of any by-law shall have effect until a notification thereof is lodged with the Registrar in the prescribed form and referred to by the Registrar on the registered strata plan.

28. Relevant paragraphs (in brief) under Schedule I to the Act are

- (i) Paragraph 1 – Proprietors’ duties;
- (ii) Paragraph 2&3 - Corporation’s duties (mandatory and discretionary);
- (iii) Paragraph 4 – 12 – General Meetings;
- (iv) Paragraph 10 – a quorum of 50% of persons entitled to vote is required for business to be transacted at a meeting;
- (v) Paragraphs 24 - 33 - Voting. Paragraph 30 – Except where a unanimous resolution is required by or under the Act, no proprietor is entitled to vote at any general meeting unless all contributions payable in respect of his strata lot are paid up.

**Issue (i) - The legal standing of the fees and assessments made by PSP64 Ltd.**

29. It is useful to briefly outline the Court's understanding of the purport and intent of the Strata Act, in order to properly illustrate the context of the Court's reasoning on this issue. 'Strata lot', (strata properly regarded as the plural of 'stratum' - levels), is the term applied to individual units, in what is more commonly known as 'condominium developments'. The conventional single unit of land usually forming the subject matter of land title is transformed in order to deal with the physical layout of the condominium development, which comprises a single parcel of land against which are registered individual titles to 'strata lots', the latter being each condo unit within the development.
30. A statutory regime in the form of the Strata Titles Registration Act, Cap. 196 has been enacted which makes provision for the establishment of a condominium development and thereafter for its management and administration especially given the context of a required co-existence of multiple rights and obligations of the group of owners of individual units within the development. This statutory regime prescribes a method of organization of unit holders, in the form of a statutory corporation, and thereafter continues by prescribing the framework for governance and regulation of the development. Whilst aspects of the statutorily prescribed methods of governance and regulation may be altered by unit owners, the manner in which such alteration is enabled is also prescribed by the Act, with a view to safeguarding the use and enjoyment of all unit holders within the development.
31. Against this backdrop, section 5 brings the statutory corporation into existence by operation of law upon the registration of the strata plan. The powers and duties of the corporation will be examined but it suffices at this juncture to state that the next administrative act required is the convening of the first annual general meeting of the corporation, at which the statutorily designated heart of the corporation – the Executive Committee (paragraph 13 Schedule I) is to be appointed from amongst proprietors (unit title holders).

This Executive Committee is then empowered to exercise the powers and carry out the duties of the corporation (paragraph 13 of Schedule I).

32. The duties of a corporation are set out in section 6 of the Act. Section 6(1)(a-e) speaks to the Corporation's duty to insure the building or buildings which may exist on a strata plan (the parcel of land). Section 6(1)(f-g) prescribes certain duties in relation to repair and maintenance of common areas of the development. The extent of insurance coverage as well as the types of risks to be insured, are also stipulated by section 6(1). One can consider that in relation to conventional titles, the proprietor is free and in some cases (through contractual conditions) obligated to effect insurance upon his property, in the manner and to the extent demanded by his own circumstances or those dictated by the terms of his purchase.
33. Given the unique feature of a condominium development that sees an entire building owned by multiple proprietors in separate and legally distinct units capable of devolution, the Court views that the necessary requirement of insurance is removed from the hands of the individual unit holders and placed into those of the corporation in order to ensure that any failure on the part of an individual proprietor in effecting insurance does not operate to the detriment of the other unit holders. The manner in which the cost of the insurance is to be borne as between the unit holders is also stipulated by the legislation (section 4(4)(b)).
34. As far as the powers of the corporation are concerned, these are set out in section 6(2), firstly (a) – to establish a fund for the control, management and administration of the common property; payment of insurance premiums and for discharge of any of its other obligations. The 'discharge of other obligations' is read, according to the Court's interpretation, as obligations as defined or created under the Act either expressly, or in furtherance of some other enabling provision. Thereafter, the corporation also has the power to (b) – determine what amounts are necessary to satisfy the fund established pursuant to (a), and to levy contributions on proprietors, in proportion to their unit entitlement of their respective lots. The corporation further has power under subsection 3, but consideration of that power is unnecessary for the current case.

35. In terms of any contributions levied pursuant to section 6(2)(b) above, they become due and payable and recoverable as a debt in court upon the passing of a resolution to that effect and may be recovered jointly and severally from a proprietor, either past or present, but so entitled at the time of passing the resolution. Additional duties and powers are provided in paragraphs 2 and 3 of Schedule I to the Act.

These duties and powers however expand upon the substantive duties and powers defined under section 6 and to give effect to the by-laws as may be provided.

36. Against the backdrop of this statutory regime, the Court understands that the capacity to manage and control the strata development is enabled by statute and acts done in furtherance of such management and control must be done in strict compliance with the provisions of the Act. How then is the Court to regard those actions carried out by PSP64 Ltd. between May, 2011 and July, 2012?

37. The first thing that must be considered is that of the separate legal personality of a company. This principle requires no illustration. It is well known. The Claimant submits that the statutory corporation came into being upon registration of the development's strata plan, a conclusion which is inevitable according to the law. The Claimant further submits that the actions taken by PSP64 Ltd were in fact taken at the behest of the very individuals who comprised the members of the corporation. In the circumstances, the Claimant says, the actions taken by PSP64 Ltd were de facto taken by the corporation. The Court does not agree with this proposition for the following reason:-

38. The actions taken by PSP64 Ltd. cannot be separated from the legal personality of the company and thereby attributed to the proprietors of the development unless the proverbial corporate veil is lifted. This should be done, having regard to long standing authority only in exceptional circumstances, where a third party would be unfairly prejudiced. The current situation, whereby the actions of the proprietors in procuring the incorporation of a company to manage their development were done apparently in ignorance of the law, does not amount to a situation in which the Court finds a compelling reason to go behind the veil of incorporation in order to validate the foundation of at least a part of the Claimant's claim.

In the circumstances, any decision made by the company regarding the creation of a budget and imposition of fees cannot, *standing only as a decision of the company*, be legally enforced by the corporation. This begs the question however, as to the issue of *'standing only as a decision of the company'*.

39. Additionally regarding the activities of the company, the Act (Schedule I, paragraph 4) provides that within three months after the registration of a strata plan (the coming into existence of a corporation), a general meeting of proprietors should be held at which time the Executive Committee is to be elected from amongst the proprietors (Schedule I, paragraph 14). Although there is evidence that proprietors gathered as a meeting in furtherance of conducting business as an association through the company, such a gathering does not in and of itself enable the Court to conclude that there were any of the conditions precedent to the lawful constitution of a general meeting of proprietors – namely the satisfaction of a quorum of titled proprietors.
40. Additionally, there was evidence from the minutes of the meeting of 31<sup>st</sup> July, 2012, that what was referred to as the Executive Committee under the company, was not comprised of proprietors, as required by the Act (Schedule I, paragraph 14). As a consequence, as seen from the said minutes, a 'new' Executive Committee had to be elected at that meeting in order to satisfy the requirement of composition of proprietors. In the circumstances, no meeting held prior to that of 31<sup>st</sup> July, 2012 was capable of satisfying the requirements of the Act insofar as the commencement of business by the corporation is concerned.
41. The restated conclusion on this issue, is the actions of the company cannot in law, merely de facto be attributed to the individuals/proprietors for whose benefit the company was incorporated (the proprietors were moreover not even members of the company). Additionally the meetings of the company could not be attributed to the strata corporation, as what could have been the Executive Committee of the Corporation was not at the time the company operated, comprised of proprietors as required by the Act.

42. The Court therefore goes on to assess whether there was any action taken by the corporation which allowed it to as the Claimant advocated – adopt the decisions of the company (or more so in the Court’s view, entitle the Corporation to attribute those decisions made by the company as decisions made by and therefore enforceable by the Corporation). This will be determined on consideration of issues (ii) and (iii) together.

**Issue (ii) & (iii) – The validity of decisions, charges and assessments made by the Corporation according to its powers exercisable under the Act.**

General Meeting of 31<sup>st</sup> July, 2012.

43. The Court considers for reasons stated above in paragraphs 38-42 that the meeting of 31<sup>st</sup> July, 2012 amounts to the first meeting capable of being considered the first general meeting of the Claimant, pursuant to paragraph 4 Schedule I of the Act. The Court firstly considers whether this meeting was in fact lawfully convened pursuant to the provisions of the Act. The first requirement is that of quorum. The parties were at variance in their interpretation of the requirements for a quorum.

44. Counsel for the Defendant submitted that for the purpose of determining quorum, every person who is a titled proprietor must be counted and only when determining voting eligibility does one consider contributions in order to ascertain who is entitled to vote. Counsel for the Claimant of course disagreed with this submission and countered that paragraph 10 of Schedule I spoke to quorum being determined by 50% of titled proprietors entitled to vote being present and paragraph 30 provided that *save for cases of unanimous resolutions*, no proprietor is entitled to vote at any general meeting unless contributions in respect of his strata lot have been duly paid.

45. The Court agrees with the interpretation of the Claimant in respect of the establishment of quorum with one difference arising as a result of nature of the meeting in question.

The slight difference referred to is that given the Court's determination, that prior meetings under PSP64 Ltd could not amount in law to meetings of the corporation (paragraphs 38-42 above), and that the July 31<sup>st</sup> meeting was the first capable on the evidence of amounting to the first general meeting of the corporation, the question of being paid up on contributions does not arise.

46. For that first general meeting, the qualification for quorum would mean titled proprietors. It is not wholly clear from the evidence how many titled proprietors existed relative to registered titles. The Defendant's evidence, which was not contradicted and therefore stands, is that of the 114 titles issued Reef Village Estates Ltd. owns 70 of them. That leaves 44 titles, however it is not apparent from the evidence whether and how many of those 44 titles were owned by more than one person.
47. The Court's interpretation, is that in counting the number of proprietors, proprietor A, for the purpose of counting registered proprietors, is still counted as a single proprietor, regardless of whether proprietor A owns 1 unit or 10 units. The Defendant therefore, when counting registered proprietors, would still be 1 proprietor whether it owned 1 unit or as is the evidence 70 units. How many proprietors accounted for the balance of the 44 units therefore remains unknown.
48. The Court's view in this regard is buttressed by the provisions in Schedule I relating to voting. Each proprietor has one vote, but on a poll, the votes of proprietors shall correspond to their unit entitlements. This allows those proprietors with multiple units or larger units, to have their votes reflected in accordance with the physical proportion of their proprietorship. On a regular vote, a proprietor who owns 10 units, is still a single proprietor. On a polled vote, a proprietor who owns 10 units is reflected in terms of the relative proportion of his overall ownership of units, thus accounting for a larger share of votes than a single proprietor.
49. For purposes therefore of establishing a quorum at that first meeting, at best, there were 45 registered proprietors, at worst less than 45.

The minutes of this 31<sup>st</sup> July, 2012 meeting (page 2) do not clearly establish in the Court's view whether proprietors present owned multiple units. The minute headed 'quorum is in attendance' records a 'Tim M' as '6 titled plus 2 proxy = 8 titled units' along with 5 other named persons listed against 1 unit and a total count of 10 titled owners plus 14 title holders present by proxy. Whether within the persons present there were multiple unit holders and within the persons absent there were multiple unit holders, this was not absolutely clear.

50. This position notwithstanding, the Court considers that the evidence that does exist is that the meeting's count was of 24 paid up title holders. However, even if that count was incorrect for including multiple unit owners, there were additional title holders present who were not counted as eligible to vote. With the Defendant holding 70 of 114 titles, the 50% quorum according to the Court's finding of at worst 45 title holders, would at the most be 23 title holders. On a balance of probabilities therefore, the Court determines that it is at liberty to find that the required quorum of 50% title holders was met at that first meeting on July 31<sup>st</sup>, 2012. There is no indication that the Defendant was present at that meeting, but given the Court's determination in relation to the numerical basis of establishing quorum, the Defendant's absence constituted an absence of one proprietor only.

51. The Court is now at liberty to examine the decisions taken, to assess their validity against the powers as provided by the Act in section 6 and as further defined by paragraphs 2 and 3 of Schedule I. The decisions which fall to be examined are those which form the basis of the fees charged and assessments made against the Defendant and as extracted from the minutes of 31<sup>st</sup> July, 2012 - are listed as follows:-

- (i) Special Assessment for roof repair @ \$13,500 per condo (\$1500 per unit);
- (ii) Adoption of By-Laws
- (iii) New Delinquency Policy
- (iv) Confirmation of May, 2011 budget
- (v) New budget
- (vi) New Executive Committee Board

### Special Assessment for Roof Repair

52. The sum of \$US13,500 was voted by title holders to be payable to offset costs of roof repair. In accordance with section 6(2)(a) of the Act, the Corporation has the power to establish a fund for administrative expenses for the control, management and administration of the common property, for the payment of any premiums and for the discharge of any of its other obligations. Section 6 was discussed earlier above but the Court further examines the section against the question of the validity of the actions taken by the corporation. The fund authorized by section 6(2)(a) applies to 3 categories of expenses – insurance premiums; control, management and administration of common property; and for the discharge of any of the corporation’s other obligations.
53. The expense of roof repair falls under the category of management and administration of the common property. It is to be recalled, that ‘common property’ is specifically defined under section 2 of the Act as including whatever parts of the land do not form parts of a strata lot (individual unit). The roofs of all buildings on the land must be common property and all of the proprietors own and are bound to maintain the roofs of their respective buildings according to their individual unit entitlements.
54. In addition to the subject matter of the expense, the procedure must be followed and to be a contribution payable pursuant to section 6(2), it must have been passed at a general meeting by resolution (ordinary resolution as opposed to unanimous resolution). The levy of a contribution to offset the cost of roof repair in the sum of \$US13,500 was voted on at this meeting and accordingly became payable and capable of recovery by the Corporation as a debt in Court from the proprietors existing at the time the resolution was passed as well as at the time recovery of the debt is sought.

### Adoption of Amended by-laws

55. Based on the provisions of amended by-laws sought to be enforced by the corporation, assessments arising pursuant to the amended by-laws would have taken effect and be capable of recovery from a proprietor. In particular, the amended by-laws provide for methods of recovery and enforcement of assessments including late

fees authorized to be charged thereon. The first question the Court considers in relation to these amended by-laws is - were they validly passed in accordance with the provisions of the Act? In such case, what does the Act require?

56. After the general statement in section 15(1) that the management, administration, use and enjoyment of the strata lots and common property in every strata plan is to be regulated by by-laws – section 15(2) goes on to provide that by-laws include those set forth in the 1<sup>st</sup> Schedule and those set forth in the 2<sup>nd</sup> Schedule. However, the by-laws of the 1<sup>st</sup> Schedule can be amended only by unanimous resolution and those in the 2<sup>nd</sup> schedule can be amended or varied by the Corporation. What is the difference and effect of these 2 stipulations regarding amendment?

57. On examining the two schedules, the by-laws of the 1<sup>st</sup> Schedule confer substantive rights and obligations on proprietors and make provision for the management and regulation of the affairs of the corporation. The by-laws of the 2<sup>nd</sup> schedule on the other hand appear to make provision for the physical use and enjoyment by the proprietor's of their units and the common property. With this view in mind, the Court examines the question of the amendment of by-laws pursuant to section 15 of the Act and assesses the Claimant's submission in relation to its amended by-laws.

58. It is the clear reading of section 15(2), that the amendment of the 1<sup>st</sup> Schedule can be effected only by unanimous vote at a general meeting of the corporation. Further, in accordance with the combined effect of paragraph 30 of Schedule 1 and the definition of 'unanimous resolution' under section 2, a unanimous resolution entitles all title holders to vote and a unanimous resolution requires all votes to be accounted for either in person or by proxy. The Court explains its conclusion by deconstructing the 2 provisions:

(i) Paragraph 30 of Schedule I states

*“Except in cases where by or under this Act a unanimous resolution is required, no proprietor shall be entitled to vote at any general meeting unless all contributions payable in respect of his strata lot have been duly paid”.*

The above is expressed in the negative. The Court reads the provision when stated as a positive as providing thus - where a unanimous resolution is required by the Act, all proprietors, shall be entitled to vote, whether their contributions have been paid or not.

- (ii) The definition of 'unanimous resolution' under section 2 reads  
*' "unanimous resolution" means a resolution unanimously passed at a duly convened meeting of a Corporation at which all persons entitled to exercise the power of voting conferred by or under this Act are present personally or by proxy at the time of the motion'*

This definition is slightly unhappy, but the Court explains its understanding thus: - The ordinary English meaning of 'unanimous' in terms of something agreed by all concerned, is not in issue. The heart of the definition is *'...all persons entitled to exercise the power of voting conferred by or under this Act are present personally or by proxy at the time of the motion'*. Who, are 'all persons entitled to exercise the power of voting'? According to paragraph 30 of Schedule I, this depends on what kind of resolution is being voted on. If it is a unanimous resolution, all proprietors are conferred with the right to vote.

If it is not a unanimous resolution, only paid up proprietors can vote. But the latter is a subset of the former, thus all persons entitled to exercise the power of voting means all proprietors. The definition further requires, that all persons entitled to exercise the power to vote, be present either in person or by proxy, at the time of the motion. In other words, all proprietors must be accounted for, otherwise a unanimous resolution cannot be passed.

59. The Court's view in this regard, finds support when one notices that there are several instances in which a unanimous resolution is required and that the subject matter of those provisions which require a unanimous resolution can clearly be identified as being qualitatively so important, as to require the consensus of all proprietors.

By way of example, though not exhaustive of all the instances in the Act where a unanimous resolution is specified, the Court highlights the following:-

- (i) Section 6(1)(a&c) – to insure differently from the manner specified in the Act, a unanimous resolution is required. The Court has already stated its view in relation to the importance afforded under the Act, to the insurance of buildings of the strata plan;
- (ii) Section 14 – disposition of common property requires a unanimous resolution to transfer or lease common property. The reason for this is presumed to be rooted in section 13(1) – which stipulates that ‘the common property shall be held by the members as proprietors in common in shares proportionate to the unit entitlement of their respective strata lots’. Section 13(1) by operation of law, therefore confers legal interests in the common property upon the proprietors of the strata lots in proportion to their unit entitlement. To alter or affect those legal rights, the Act therefore requires a unanimous resolution.
- (iii) Section 16 – stipulates that to give or accept an easement or restrictive covenant to the burden or benefit of the parcel (the entire strata) a unanimous resolution is required.
- (iv) Section 17(2) – a unanimous resolution is required to destroy a building (or the Court may so decide), but for the proprietors to make such a decision regarding a building – ie, regarding the strata as a whole, a unanimous resolution is required.

60. Based on the above examples, the Court considers that certain kinds of actions which affect the property rights of the proprietors are treated in such a manner by the Act, and intentionally so, that all proprietors must have a part in giving effect to those actions. Finally as illustration in support of its determination, the Court refers to section 8(1) of the Act, which confers the right to vote to a guardian, in the case of a proprietor who is an infant, and to a person authorized in law to control the property of a person who for some other reason (than being an infant), is unable to do so.

Section 8(2), addresses the situation where for some reason, no person is available to vote in lieu as provided by section 8(1) and provides that the Court, on the application of a corporation or some other interested person, where a unanimous resolution is required, shall appoint a fit and proper person to exercise the powers of voting as the Court determines necessary.

61. The point of this illustration, is that section 8(2) provides that the Court 'shall' appoint, where a unanimous resolution is required by the Act; and 'may in its discretion to appoint', in any other case. In other words, the intention appears clear, that at no point in time when a unanimous resolution is required, is any single vote, not to be accounted for in the voting process. Against this reasoning, the Court thus affirms its position that the by-laws contained in Schedule 1, inasmuch as they require a unanimous resolution for amendments, are different in scope and importance from those of Schedule 2, which the Corporation (meaning the Executive Committee by virtue of paragraph 13), can amend.
62. With respect to the amended by-laws in question, these are expressed to be those of the second schedule which can be amended by the Corporation under section 15(2)(b). The assertion by the Corporation that the by-laws of Schedule 2 were those being amended, does not however, prevent the Court from finding otherwise. As already stated the by-laws in Schedule 2 are intended to make provision for the regulation of the physical use and enjoyment by a proprietor of his strata unit and common property.
63. The amended by-laws which were passed to be put into effect by the corporation go beyond mere regulation of the use and enjoyment of a strata unit. In particular, Part 7 of the amended by-laws creates financial obligations, financial penalties and provisions for enforcement of same which seek to affect the legal interests of the proprietors. Specifically, part 7.6 purports to create a charge on a strata unit which is then capable of being enforced through the Manager taking possession of the unit to rent same and applying the proceeds of rent towards the fees and assessments owed.

64. It is the Court's position that the provisions giving rise to the obligations and liabilities sought to be imposed under Part 7 of the amended by-laws, go beyond the scope of Schedule 2 and if at all capable of being created through by-laws, must be so done under Schedule I, which require a unanimous resolution to bring those amendments into effect. Albeit put to a vote at the July 31<sup>st</sup>, 2012 meeting and agreed by all title holders therein determined to be eligible to vote, the effect of the requirement of a unanimous resolution as interpreted by the Court above (paragraphs 50 – 52), is that all registered proprietors' votes (bearing in mind the Court's view that a proprietor nonetheless has a single vote even if multiple units are owned) must be accounted for either in person or by proxy.
65. The Court recalls its earlier finding that a quorum was accepted to have been established for the July 31<sup>st</sup>, 2012 meeting. However, it is also clear from the minutes of that meeting, that not all title holders' votes were cast, which for the purposes of the unanimous resolution, renders the same invalid. Part 7 of the amended by-laws, are therefore found to be outside the scope of Schedule 2 by-laws and even if to be included as an amendment to Schedule 1 by-laws, are found not to have been validly passed by unanimous resolution, as required by section 15(2)(a).
66. The effect of this finding is that any financial obligation which was sought to be based upon Part 7 of the amended by-laws is invalid, unless such financial obligation falls within the scope of section 6(2)(a) of the Act. At this point, the Court acknowledges that reference has been made by the Claimant to paragraph 3(f) of Schedule I, which provides that the Corporation has the discretion to do all things reasonably necessary for the enforcement of the by-laws and for the control, management and administration of the common property. This provision, speaks to enforcement of by-laws in existence whether original or by valid amendment which because of the Court's finding, exempts Part 7. Additionally, the obligations sought to be imposed by Part 7 would not in any event qualify as merely 'that which is reasonably necessary...' as the provisions therein sought to bring into effect new liabilities and obligations on the part of proprietors.

67. Further to the above, the Court accepts the submission of the Defendant, that even if the by-laws were to be considered valid in content and properly passed at the meeting, the provisions of section 15(5) were not complied with, thus the amended by-laws would not have come into effect until December, 2013 which was the time when the Registrar made the entry of the amended by-laws unto the strata plan 64. This submission would be entirely correct, with the result that subject to those also falling under section 6(2)(b), assessments based on provisions within the amended by-laws, would not be lawfully imposed or capable of recovery, until after December, 2013. This submission however, is rendered moot, as the Court has found that the relevant portion of the by-laws upon which the assessments were based required a unanimous resolution of all the proprietors and this was not done.

New Delinquency Policy and Budgets.

68. The meeting of July 31<sup>st</sup>, 2012 also by resolution accepted a 'New Delinquency Policy' of adding on to monies owed by proprietors, a late fee of 5%, compounded, in addition to any court process. The late fee sought to be imposed by the amended by-laws has already been disallowed by the Court. It has already been stated, that outside of the amended by-laws deemed invalid, any assessment or charge sought to be imposed must fall within the purview of the purpose of the fund as provided in section 6(2) of the Act. Without the need for further discussion, the Court finds that a late fee, is not within the contemplation of contributions authorized by section 6(2).

69. As regards the budgets – with respect to May, 2011, the first question is whether it was properly approved at the July 31<sup>st</sup>, 2012 meeting. Thereafter, and with respect to that and subsequent budgets (for the period of the claim), the additional question for consideration is whether the charges and assessments provided for in those budgets are authorized by section 6(2).

70. The compilation of a budget would properly fall within the scope of section 6(2) insofar as it encompasses identification of expenses and levying of contributions from unit holders. The Corporation had the capacity to levy contributions under section 6(2), in respect of all expenses covered thereby, which subsisted from the time of incorporation of strata plan 64 in 2008. A proprietor could therefore be charged a contribution for expenses arising prior to July, 2012 (once properly charged under section 6(2)) from the time they acquired title.
71. As stated earlier in this judgment however, budget items for which proprietors are charged contributions, must be either related to the management, control and administration of the common property, insurance premiums properly incurred under section 6(1) or be contributions otherwise associated with the discharge of other obligations of the corporation. Such other obligations, the Court interprets as other obligations lawfully created or existing under the Act.
72. Any charges for maintenance, security, special assessments for repair, or utility costs must be referable to common property. Charges for insurance are of course specifically enabled under section 6(1) and are recoverable once passed via resolution at general meeting. The approval of the 2011 and other budgets are found to be properly passed at the meeting of 31<sup>st</sup> July, 2012 and thus recoverable in principle. The actual line items which number 1 through 7 would have to be affirmed. In further submissions invited by the Court on this issue Counsel for the Defendant was of the view that most of the items assessed do not relate to expenses in relation to the common property but apply in respect of individual strata units. The Court finds however that the line items as stated above, comprise assessments for general electrical, general water, building/villa painting, waste treatment, repair materials and trash collection. These are found recoverable as they all relate to assessments in respect of common property.
73. In respect of the utilities, Counsel for the Defendant submitted that assessments for utilities for individual units were outside the scope of section 6(2). Counsel for the Claimant on the other hand, alleged that utilities were provided through 'bulk meters' via a system put in place by the Defendant in its construction of the complex.

In particular, the Defendant in managing the complex prior to the company and then the corporation, itself carried out this system and collected utility fees from unit holders to pay over to utility companies. The Court notes however in contrast to this evidence by John Adams, evidence from the minutes of the meeting of 31<sup>st</sup> July, 2012 (page 2 of the minutes), the oral report by Ron Sutherland given to that meeting that all except 9 units were individually metered.

74. The Claimant's assertion of the system of 'bulk meters' is therefore not clearly established on the evidence, in particular, there was no illustration as to exactly how this system of 'bulk meters' managed to attribute utility costs to individual unit holders outside of any question of actual usage. The Court thus agrees with the submission of Counsel for the Defendant and finds that assessments in relation to utilities, as they applied to individual units fall outside of the expenses covered by section 6(2)(b) of the Act.

75. The above notwithstanding, the Court accepts the submission of the Claimant, that to the extent that utilities were consumed by the units owned by the Defendant and paid by the Claimant, any such sums are a debt properly recoverable by the Claimant against the Defendant. The Court would thus allow the costs of utilities attributed to the Defendant's nine units including any penalties charged by and paid to the utility companies, to be recovered from the Defendant. Of course, any utilities consumed by the Defendant in the course of construction from common areas would have been properly charged to the Defendant under section 6(2).

#### Election of Executive Committee.

76. The election of the Executive Committee requires an acknowledgment as to its validity on the basis that it is the Executive Committee which is empowered under the Act, to carry out the functions and duties of the corporation. The Executive Committee was properly elected having been selected from title holders as opposed to the situation existing prior to the July 31<sup>st</sup>, 2012 general meeting.

It is noted that the Executive Committee was to have been elected at the first general meeting of the Corporation which was stipulated to be held within the first 3 months of the establishment of the Corporation (paragraph 14 Schedule I). There is however no sanction imposed by the legislation for failure so to do therefore the provision is regarded as directory therefore the eventual holding of the first general meeting of the Corporation and election of the Executive Committee outside the time stipulated by the Act, nonetheless remain valid.

#### Charges arising from Meeting of January, 2013

77. This meeting approved charges of a special assessment and insurance. The Defendant claims that the meeting was not properly constituted and the decisions taken were invalid as the Defendant's representative Jeffrey Pierce requested a poll of the votes taken and was refused and that the representative was not allowed to vote.
78. In the first instance, there is nothing on the face of the minutes that would cause the Court to question the result stated which was that a quorum check was conducted and found to exist. There was nothing raised on the minutes which required a unanimous resolution, in the circumstances, the quorum was to have been drawn from proprietors in good standing. The meeting is found to have been validly constituted and in accordance with paragraph 30 of Schedule I, the Defendant, having not been fully paid up of his contributions was properly restricted from voting.
79. The only issue the Court finds is that the exercise of the polling of votes does not appear from the minutes to have been correctly carried out. The purpose of a poll of votes is to convert the single vote per proprietor to proportions reflecting unit entitlement, so that proprietors with larger unit entitlement whether arising from larger or multiple units, would have their greater unit entitlement affect the vote.

Notwithstanding that the minutes suggest that the poll was not assessed in the manner statutorily intended, the submission of the Defendant is that he was refused a poll (which in this meeting was untrue) and that had a poll been conducted, the unit entitlement arising out of the 70 units owned by the Defendant would have dominated or in some way affected the vote.

80. The Court finds no merit in this submission for whilst a poll can be demanded by any proprietor present at the meeting, the votes polled would still be those of persons entitled to vote. The Defendant having not been entitled to vote for want of paid up contributions, would not have had a vote to form part of the poll in any event. In the circumstances, contributions levied against the Defendant arising out of this January, 2013 meeting are valid. It is restated that the charges themselves are validated and not any late fees arising therefrom and as was stated with respect to charges levied by virtue of meeting of 31<sup>st</sup> July, 2012, the numerical calculation would have to be affirmed by examination of the line items created in that budget which are the same as those discussed under paragraph 72 above and therefore found recoverable.

General Meeting of 15-16 October, 2013.

81. This meeting gave rise or sought to give rise to another yearly budget, which was approved with the exception of 1 vote. Quorum was determined on the face of the meeting; no decision requiring unanimous resolution was raised on the minutes, thus in the absence of evidence produced by the Defendant regarding the actual number of proprietors eligible to vote the Court finds no reason not to accept the declaration of a quorum on the face of the minutes. As has been discussed in relation to the Court's acceptance of the validity of other budgets, the actual line items are found to fall within the expenses contemplated in section 6(1) and 6(2) of the Act and therefore upheld (paragraph 72 above). The charges for late fees have already been disallowed.

A specific word on insurance.

82. The Court has already found that the corporation validly passed resolutions approving charges assessed prior to its first general meeting in July, 2012, with the corollary that they fall within the charges for expenses within sections 6(1) – insurance and 6(2) – control, management and administration of common property. In respect of the insurance effected in relation to the company, the Court agrees with the submission of the Defendant that the Claimant is unable to recover for fees arising from insurance premiums paid as the insurance contract was entered into by the company with a third party and as such the Corporation being separate from the company, cannot recover.

83. As regards insurance effected thereafter by the Corporation, the Defendant submits that the policy remained in the name of the company and only the renewal certificates reflected the name of the Corporation. The Court finds that contracting party to the insurance policy was thereafter the Corporation, and being statutorily required to effect insurance on behalf of all unit holders, it is entitled to recover the cost of the insurance effected in pursuance of that duty.

Apportionment of Charges Assessed

84. To the extent that charges assessed and contributions levied have been found to have been valid, a question still arises as to the correctness of the apportionment of these charges. As was raised on the minutes of the meeting of 15-16<sup>th</sup> October, 2013, the correctness of applying equal charges to units was questioned, given the provision under the act of apportionment according to unit entitlement. Section 4(4)(b) of the Act provides that the unit entitlement of each strata lot shall determine the proportion payable by him of contributions levied pursuant to section 6(2)(b). This is the provision of the law and it is the Court's finding that the apportionment of contributions must be carried out in this manner.

85. If proprietors agree differently, their alternative regime could subsist as long as they remain compliant. However in the event of an action for recovery of contributions in Court, the Court can find liability only in respect of what the Act provides, unless altered in a manner provided by the Act. The apportionment of the fees and assessments had been questioned in one of the PSP64 meetings and it was pointed out that the actual unit entitlement was not known.

86. The unit entitlement should be ascertainable by this time as it is required by section 4(1)(d) of the Act to be endorsed on the title of each strata lot. The Defendant's contributions must therefore be apportioned according to its unit entitlement.

**Conclusion with respect to the Defendant's liability for fees and assessments claimed.**

87. The Court now summarizes its findings in relation to the liability of the Defendant in respect of the issues broadly identified at paragraph 25 above.

- (i) The decisions of PSP64 Ltd. from which fees and assessments were charged and sought to be recovered from the Defendant cannot by themselves stand as valid and enforceable against the Defendant as the acts of the company were not the acts of the Corporation.
- (ii) However, the decisions of the Corporation from the date of its first general meeting on July 31<sup>st</sup>, 2012 can and did by the resolutions passed at that meeting, bring into effect fees and assessments properly chargeable against the Defendant under section 6(2)(b) of the Act.
- (iii) The Corporation, having legally been in existence since May, 2008 had the power to assess fees to take effect prior to its first general meeting in July, 2012 once such fees were properly chargeable under section 6(2)(b) of the Act.
- (iv) In accordance with sections 6(1) and 6(2) of the Act however, fees are recoverable against the Defendant only for:-

- Insurance effected in the name of the Corporation, including 'special assessments therefor'
- Maintenance, utilities or repair of common areas including 'special assessments therefor' all as are reflected in the proposed budgets from May 2011 to October, 2013.

88. The Defendant will not be liable for fees and assessments arising out of the following:-

- (i) Any penalty of 5% or otherwise as sought to be imposed by amended by-laws.
- (ii) Insurance effected in the name of the limited company.

89. The Defendant is found on the evidence not properly assessed under the Act for fees for utilities for individual units. However, the Court rules that any utilities actually consumed by the Defendant ascertainable by virtue of individual meter charges which were paid by the Claimant are to be repaid by the Defendant. In the event that there are no individual meters via which utilities are charged, the Court nonetheless rules that such utility charges that are attributed to the 9 units owned by the Defendant according to the system of allocation applied by the Corporation (which is accepted as inherited from the Defendant as its predecessor) and which were paid by the Claimant are to be repaid by the Defendant as a debt owed. Late fees or penalties charged by the utility companies and paid by the Claimant to the utility companies are also recoverable.

90. Apportionment of charges properly due as identified above however must be carried out according to the unit entitlement of the 9 units owned by the Defendant, the subject matter of the claim.

91. Regarding the relief sought by the Claimant to access and rent the units of the Defendant and to disconnect utility services to the units in question in order to service and manage the debts owed by the Defendant. The power to carry out these actions was based upon the amended by-laws, part 7. The Court has found that the amended by laws were not properly passed but even if so found, the action contemplated by the Claimant would as submitted by the Defendant run afoul of section 15(4) of the Act.

The further submission of the Defendant to the effect that proposed relief amounts to enforcement at the same time as judgment is obtained therefore need not be considered.

### **The Counterclaim**

92. The counter claim pleaded by the Defendant was based on a claim for fees payable by the Claimant for use and upkeep of the pool area, and bathroom and washing facilities. The Defendant possesses title for this area – termed the pool island. That separate title therefore lies outside the provisions of the Act and the Claimants are not involved in its regulation. Any claim for fees in relation to this area must be shown to be derived from some contractual agreement either between the Corporation as an entity or with individual unit holders. No such agreement has been brought to the Court. In fact no evidence has been supplied by the Defendant in support of its counter claim as a whole. In the circumstances, the counter claim is dismissed in its entirety.

### **The Court's Disposition of the Claim**

93. In giving effect to the Court's findings, the these are the orders of the Court:-

- (a) The Defendant is found liable on the claim herein;
- (b) The extent of the Defendant's liability is limited to fees and assessments charged in relation to the following for the period May 2011 to October, 2013:-
  - (i) Insurance effected in the name of the Corporation, The Proprietors, Strata Plan 64;
  - (ii) Maintenance, utilities and repair in relation to common areas, as reflected in line items 1 through 7 on proposed budgets May 2011 through October, 2013 - including special assessments for roof repair;
  - (iii) Utilities actually paid by the Claimant which are attributable to the Defendant's 9 units including any penalties charged by and paid to the utility providers;

- (c) The Defendant is not liable for the following fees and assessments:-
  - (i) Late fees
  - (ii) Insurance effected in the name of limited liability company, The Proprietors Strata Plan 64 Ltd.;
- (d) The amounts owed by the Defendant at paragraph (b) above shall be quantified by a qualified accountant and the amount quantified by the Accountant shall take into account all sums paid to date by the Defendant on account of the Claim;
- (e) Expert witness Baker Tilly Hulse ('the Accountants') shall be engaged to quantify the sums owing by the Defendant as determined under paragraph (b) above;
- (f) The costs of work carried out by the Accountants in quantifying the Defendant's liability under paragraph (b) above shall be borne by the Defendant on such terms as ordered by the Court;
- (g) The Claimant is awarded interest pursuant to section 166 of the Supreme Court of Judicature Act, Cap. 91 on such sum calculated under paragraphs (b)(i)&(ii) at the rate of six per cent (6%) per annum from May 2011 to the date of judgment.
- (h) The Claimant is awarded interest on the judgment from the date of judgment up until satisfaction of the debt at the rate of six per cent (6%) per annum.
- (i) The Defendant's counter claim is dismissed;
- (j) Costs are awarded to the Claimant on a prescribed basis to be calculated on the amount determined under paragraph (b) less the amount of five hundred dollars (\$500) awarded against the Claimant on 7<sup>th</sup> November, 2014.

- (k) The Parties are to revert to the Court on 19<sup>th</sup> December, 2014 for the Court to make an order as to the amount of the judgment based upon the findings of the Accountant, provided that in the event that the Accountant's report is filed earlier than the time stipulated in the Court's order, the parties are at liberty to request an earlier date for the Court to complete its order in relation to the amount of the judgment against the Defendant.

Dated this 1<sup>st</sup> day of December, 2014.

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**Shona O. Griffith**  
**Supreme Court Judge**