COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2010/CLE/gen/FP00266

BETWEEN

CORAL BEACH MANAGEMENT COMPANY LIMITED

Plaintiff

AND

BAREFOOT POSTMAN LIMITED

1st Defendants

AND

TYRONE LIVINGSTONE ANDERSON

2nd Defendants

AND

MARIE CAROLINE ANDERSON

3rd Defendants

BEFORE	The Honourable Mrs Justice Estelle Gray-Evans
APPEARANCES:	Mr Frederick R. M. Smith QC with Mrs A. Kenra Parris Whittaker for the plaintiff Mr R. Rawle Maynard for the 2nd and 3rd defendants
HEARING DATES:	27 October 2011; 28 February 2012:

RULING

(Application for leave to enter judgment in default of defence)

Gray Evans, J

1. This is an application by the plaintiff pursuant to Order 19 rule 7 of the Rules of the Supreme Court ("RSC") for judgment in default of defence.

2. The plaintiff commenced this action by a specially indorsed writ of summons on 10 November 2010 in which its claim was stated as follows:

   (1) The Plaintiff is and was at all material times a limited liability company incorporated under The laws of the Commonwealth of the Bahamas and vested with the power to operate all that condominium property known as Coral Beach Apartment Hotel ("the Condominium") situated at Lots 31 Coral Road and 32 Sea Fan Lane, Lucayan Beach West Subdivision, Freeport, Grand Bahama, Bahamas pursuant to a Declaration of Condominium dated 31st December, 1968 ("the 1968 Declaration") and recorded in the Registry of Records of the Commonwealth of the Bahamas in Volume 1363 at page 22 to 170 and pursuant to the Law of Property and Conveyancing (Condominium) Act, 1965 ("the Act").

   (2) The 1968 Declaration is supplemented by an Amended Certificate of Special Resolution dated the 14th day of March, 1970 and recorded in the Registry of Records aforesaid in Volume 1602 at pages 419 to 421 and by an Amendment of Declaration of Condominium dated the 10th day of February, 1978 ("the 1978 Amendment of Declaration") and recorded in the Registry of Records aforesaid in Volume 3063 at pages 344 to 393 and further by an Amendment of Declaration dated the 11th day of February, 2003 and recorded in the Registry of Records aforesaid in Volume 8598 at pages 280 to 288.

   (3) The Defendants are and were at all material times unit owners in the Condominium as hereinafter indicated.

   Unit 2716

   (4) By a Deed of Conveyance dated 7th January, 1971 (" the 1971 Conveyance ") made between Coral Beach Limited ("CBL") of the one part and Andrew Kalman ("Kalman") of the other part and recorded in the said Registry of Records in Volume 1692 at pages 64 to 70 CBL conveyed unto Kalman *inter alia* the apartment unit numbered 2716 ("Unit 2716") in the Condominium together with the balconies terraces patios and other areas assigned thereto on the plants and drawings annexed to the 1971 Conveyance (together "the balconies terraces and patios assigned to Unit 2716") together with the undivided share in the common property of the Condominium together with the rights of way specified in the Schedule of the Conveyance dated 7th November, 1967 ("the 1967 Conveyance") made between the Grand Bahama Port Authority, Limited of the one

part and CBL of the other part and recorded in the said Registry of Records in Volume 1215 at pages 7 to 22.

(5) Under clause 3 of the 1978 Amendment of Declaration the Plaintiff declared *inter alia* that certain common property areas coloured red and blue on the plans attached to the 1978 Amendment of Declaration would no longer form part of the common property of the Condominium provided that the Plaintiff may at its discretion designate, sell or lease any of those areas for the exclusive use of any particular unit owner whose unit abuts, is contiguous to or is adjacent thereto subject to such uses, exceptions and reservations as the Plaintiff may decide.

(6) The areas that the Plaintiff declared as no longer forming part of the common property of the Condominium as aforesaid included the balconies terraces and patios assigned to Unit 2716.

(7) By a Deed of Conveyance dated 24th September, 1985 ("the 1985 Conveyance for Unit 2716") made between Kalman of the one part and the 1st Defendant of the other part and recorded in the said Registry of Records in Volume 4383 at pages 460 to 466 Kalman conveyed unto the 1st Defendant Unit 2716 together with the balconies terraces and patios assigned to Unit 2716 together with the appurtenances thereunto belonging and together with the unit entitlement ascertained by reference to the 1968 Declaration and together with the rights of way and other rights of way more particularly described and referred to in the 1971 Conveyance.

(8) By another Deed of Conveyance dated 24th September, 1985 ("the 1985 Conveyance for the North Lobby") made between Kalman of the one part and the 1st Defendant of the other part and recorded in the said Registry of Records in Volume 4383 at pages 413 to 417 Kalman conveyed unto the 1st Defendant the Lobby area situate at the North End of Building B of the Condominium ("the North Lobby").

(9) By a Deed of Settlement Compromise and Release dated 25th September, 1985 ("the 1985 Deed of Settlement") made between *inter alia* the Plaintiff of the one part and the 1st Defendant of the other part and recorded in the said Registry of Records in Volume 4383 at pages 395 to 409 it was agreed *inter alia* that the maintenance fees payable at the time by the 1st Defendant to the Plaintiff in respect of the Penthouse described in the 1985 Deed of Settlement as including Unit 2716 and 6 other units located on the 7th floor of Building B of the Condominium together with the balconies, terraces, patios and other areas assigned to Unit 2716 and the other said 6 Units by virtue of the 1971 Conveyance and together with the North Lobby, would be increased to include maintenance fees ("Additional Maintenance Fees") for the 1st Defendant's exclusive use of the said balconies, terraces, patios and other areas assigned to Unit 2716 and the other 6 units and also for the 1st Defendant's exclusive use of the North Lobby.

(10) The 1985 Deed of Settlement provided *inter alia* that the Additional Maintenance Fees would be apportioned between each of the 7 Units on the 7th Floor of Building B of the Condominium and the North Lobby.

(11) Subsequent to the execution of the 1985 Deed of Settlement the Plaintiff and the 1st Defendant agreed that the Additional Maintenance Fees would be apportioned equally between Unit 2716 and the other 6 Units on the 7th Floor of Building B of the Condominium. The Plaintiff and the 1st Defendant further agreed that the Additional Maintenance Fees as apportioned would paid by the 1st Defendant into a separate account created by the Plaintiff and designated as Account No. 2717.

(12) By a Deed of Conveyance dated 28th February, 2006 ("the 2006 Conveyance") made between the 1st Defendant of the one part and the 2nd and 3rd Defendants of the other part and recorded in the said Registry of Records in Volume 10185 at pages 360 to 372 the 1st Defendant conveyed unto the 2nd and 3rd Defendants Unit 2716 together with the unit entitlement in the common property of the Condominium declared to be an appurtenance thereto together with the appurtenances thereunto belonging and together with the easements and rights of way mentioned in the 1967 Conveyance.

(13) By the date of the 2006 Conveyance, the monthly Additional Maintenance Fees apportioned between Unit 2716 and the other 6 Units on the 7th Floor of Building B of the Condominium were in the sum of $101.90 per unit.

(14) From or about 5th May, 2006 the 1st Defendant ceased paying the Additional Maintenance Fees as apportioned to Unit 2716.

(15) It was an express term of the 1985 Deed of Settlement that the terms thereof (including those regarding the payment of Additional Maintenance Fees as aforesaid) were binding on the representatives, servants, agents, assigns and successors in title of the respective parties thereto.

(16) Whereas under the 1985 Conveyance for Unit 2716 Kalman expressly conveyed unto the 1st Defendant title to the balconies terraces and patios assigned to Unit 2716, the 1st Defendant on the other hand did not convey (under the 2006 Conveyance or otherwise) its title to the balconies terraces and patios assigned to Unit 2716.

(17) Accordingly title to the balconies terraces and patios assigned to Unit 2716 remains vested in the 1st Defendant who remains liable (under the 1985 Deed of Settlement) to pay to the Plaintiff the Additional Maintenance Fees as apportioned to Unit 2716.

(18) In addition to several demands made upon the 1st Defendant in respect of outstanding Additional Maintenance Fees apportioned to Unit 2716, the Plaintiff as a cautionary measure has on past occasions also made demands upon the 2nd and 3rd Defendants in respect of such outstanding Additional Maintenance Fees but like the 1st Defendant, none of the Plaintiff's demands were met by the 2nd and 3rd Defendants.

(19) Effective 1st August, 2008 the Plaintiff increased the Additional Maintenance Fees apportioned between Unit 2716 and the other 6

Units on the 7th Floor of Building B from the said sum of $101.90 per month per Unit to $122.28 per month per Unit.

(20) Despite several requests, the 1st Defendant has refused and or neglected to pay to the Plaintiff the Additional Maintenance Fees apportioned to Unit 2716 resulting in present arrears of $6,039.71 comprised as follows:

Additional Maintenance Fees apportioned to Unit 2716 from 5th May, 2006 pro rated to 31st May, 2006 at $101.90 per Month	$ 88.75
Additional Maintenance Fees apportioned to Unit 2716 from June 2006 to July 2008 at $101.90 per month	$ 2,649.40
Additional Maintenance Fees apportioned to Unit 2716 from August 2008 to October, 2010 at $122.28 per month	$ 3,301.56
TOTAL	$ 6,039.71

Unit 2714

(21) By the 1971 Conveyance CBL conveyed unto Kalman *inter alia* the apartment unit numbered 2714 ("Unit 2714") in the Condominium together with the balconies terraces patios and other areas assigned thereto on the plans and drawings annexed to the 1971 Conveyance (together "the balconies terraces and patios assigned to Unit 2714") together with the undivided share in the common property of the Condominium together with the rights of way specified in the Schedule of the 1967 Conveyance.

(22) Under Clause 3 of the 1978 Amendment of Declaration the Plaintiff declared *inter alia* that certain common property areas coloured red and blue on the plans attached to the 1978 Amendment of Declaration would no longer form part of the common property of the Condominium provided that the Plaintiff may at its discretion designate, sell or lease any of those areas for the exclusive use of any particular unit owner whose unit abuts, is contiguous to or is adjacent thereto subject to such uses, exceptions and reservations as the Plaintiff may decide.

(23) The areas declared as no longer forming part of the common property of the Condominium as aforesaid included the balconies terraces and patios assigned to Unit 2714.

(24) By a Deed of Conveyance dated 24th September, 1985 ("the 1985 Conveyance for Unit 2714") made between Kalman of one part and the 1st Defendant of the other part and recorded in the said Registry of Records in Volume 4383 at pages 453 to 459 Kalman conveyed unto the 1st Defendant Unit 2714 together with the balconies terraces and patios assigned to Unit 2714 together with the appurtenances

thereunto belonging and together with the unit entitlement ascertained by reference to the 1968 Declaration and together with the rights of way and other rights of way more particularly described and referred to in the 1971 Conveyance.

(25) By the 1985 Conveyance for the North Lobby Kalman conveyed unto the 1st Defendant the North Lobby.

(26) By the 1985 Deed of Settlement it was agreed *inter alia* that the maintenance fees payable at the time by the 1st Defendant to the Plaintiff in respect of the Penthouse described therein as including Unit 2714 and 6 other units located on the 7th floor of Building B of the Condominium together with the balconies, terraces, patios and other areas assigned to Unit 2714 and the other said 6 units by virtue of the 1971 Conveyance and together with the North Lobby, would be increased to include Additional Maintenance Fees for the 1st Defendant's exclusive use of the said balconies, terraces, patios and other areas assigned to Unit 2714 and the other 6 units and also for the 1st Defendant's exclusive use of the North Lobby.

(27) The 1985 Deed of Settlement provided *inter alia* that the Additional Maintenance Fees would be apportioned between each of the 7 Units on the 7th Floor of Building B of the Condominium and the North Lobby.

(28) It was an express term of the 1985 Deed of Settlement that the terms thereof (including those regarding the payment of Additional Maintenance Fees as aforesaid) were binding on the representatives, servants, agents, assigns and successors in title of the respective parties thereto.

(29) Subsequent to the execution of the 1985 Deed of Settlement the Plaintiff and the 1st Defendant agreed that the Additional Maintenance Fees would be apportioned equally between Unit 2714 and the other 6 Units on the 7th floor of Building B of the Condominium. The Plaintiff and the 1st Defendant further agreed that the Additional Maintenance Fees as apportioned would be paid by the 1st Defendant into a separate account created by the Plaintiff and designated as Account No. 2717.

(30) By the 2006 Conveyance the 1st Defendant conveyed unto the 2nd and 3rd Defendants Unit 2716 as described in paragraph 12 above.

(31) By the date of the 2006 Conveyance, the monthly Additional Maintenance Fees apportioned between Unit 2714 and the other 6 Units on the 7th Floor of Building B of the Condominium were in the sum of $101.90 per unit while the monthly maintenance fees levied by the Plaintiff on Unit 2714 in accordance with its unit entitlement ("Ordinary Maintenance Fees") and pursuant to section 14 of the Act were in the sum of $196.00.

(32) From or about 5th May, 2006 the 1st Defendant ceased paying the Additional Maintenance Fees apportioned to Unit 2714 and the Ordinary Maintenance Fees levied on Unit 2714.

(33) Effective 1st August, 2008, the Plaintiff increased the Additional Maintenance Fees apportioned between Unit 2714 and the other 6 Units on the 7th Floor of Building B from the said sum of $101.90 per month per Unit to $122.28 per month per Unit. Also the Ordinary Maintenance Fees levied on Unit 2714 were increased from the said sum of $196.00 per month to $235.00 per month.

(34) By a Deed of Rectification and Confirmation dated 18th May, 2009 ("the 2009 Deed of Rectification") made between the 1st Defendant of the one part and the 2nd and 3rd Defendants of the other part and recorded in the said Registry of Records in Volume 11002 at pages 436 to 445 the 1st Defendant purported to amend the 2006 Conveyance by adding a transfer of the 1st Defendant's title in Unit 2714 together with the respective unit entitlement in the common property of the Condominium declared to be an appurtenance thereto together with the appurtenances thereunto belonging and together with the easements and rights of way mentioned in the 1967 Conveyance.

(35) Regulation 6.4 of the byelaws governing the Condominium ("the Byelaws") provides that no closing shall take place on the sale of any unit until the then owner of record has first submitted to the Board of Directors of the plaintiff information regarding the prospective purchaser.

(36) Regulation 6.5 of the Byelaws provides *inter alia* that the Board of Directors of the Plaintiff reserves the right to reject any prospective purchaser for cause and that the approval or rejection of any prospective purchaser by the Board of Directors of the Plaintiff shall be in writing.

(37) Regulation 6.8 of the Byelaws provides *inter alia* that the Board of Directors of the Plaintiff reserves the right not to recognize any sale or transfer of any apartment unit if the established procedures are not followed.

(38) Whereas the 1st Defendant complied with Regulation 6.4 of the Byelaws in respect of its sale of Unit 2716 to the 2nd and 3rd Defendants (for which approval was duly granted by the Plaintiff pursuant to Regulation 6.5 of the Byelaws) the 1st Defendant did not comply with Regulation 6.4 of the Byelaws in respect of its purported sale of Unit 2714 to the 2nd and 3rd Defendants by way of the 2006 Conveyance as purportedly amended by the 2009 Deed of Rectification.

(39) The 1st Defendant's failure to comply with the Byelaws as aforesaid also contravened section 23 of the Act which requires *inter alia* Unit owners to strictly comply with conditions and restrictions set out in the byelaws governing a condominium property.

(40) The Plaintiff only became aware of the existence of the 2009 Deed of Rectification on or about 22nd September, 2010 when Dupuch & Turnquest & Co., the attorneys acting for the Defendants in the purported sale of Unit 2714 as aforesaid wrote to the Plaintiff advising them of the said 2009 Deed of Rectification.

(41) By a letter dated 21st October, 2010 the Plaintiff in pursuance of Regulation 6.8 of the Byelaws advised *inter alia* the Defendants that the Plaintiff did not recognise the 1st Defendant's purported sale of Unit 2714 to the 2nd and 3rd Defendants by way of the 2006 Conveyance as purportedly amended by the 2009 Deed of Rectification on the basis that the 1st Defendant had failed to comply with Regulation 6.4 of the Byelaws. The Plaintiff also advised the Defendants that it would continue to treat the 1st Defendant as the owner of Unit 2714 for all intents and purposes.

(42) Prior to the foregoing letter, the Plaintiff had written to the Defendants on various occasions indicating that notwithstanding the 2nd and 3rd Defendants' use and/or occupation of Unit 2714 the Plaintiff did not recognise the 2nd and 3rd Defendants as lawful occupants or the legal and beneficial owners of Unit 2714.

(43) The 1st Defendant has not conveyed its title to the balconies terraces and patios assigned to Unit 2714 therefore it remains liable (under the 1985 Deed of Settlement) to pay to the Plaintiff the Additional Maintenance Fees apportioned to unit 2714.

(44) Additionally, as the Plaintiff does not recognise the 1st Defendant's purported sale of Unit 2714 to the 2nd and 3rd Defendants as aforesaid, the 1st Defendant remains liable (under section 18 of the Act and clause 22 of the 1968 Declaration) to pay to the Plaintiff Ordinary Maintenance Fees and special assessments in respect of Unit 2714.

(45) From or about May, 2006 to about December, 2009, the Plaintiff erroneously accepted payments from the 2nd and 3rd Defendants on account of Unit 2714.

(46) Upon realising this error the Plaintiff by a letter dated 7th December, 2009, wrote to the 2nd and 3rd Defendants indicating that the payments they had made to the Plaintiff on account of Unit 2714 had been accepted in error as the Plaintiff did not recognise the 2nd and 3rd Defendants' occupation or purported ownership of Unit 2714.

(47) Accordingly, from or about February, 2010, the Plaintiff ceased accepting payments from the 2nd and 3rd Defendants on account of Unit 2714.

(48) Unit 2714 like all other units in the Condominium is equipped with a separate electric meter as required by Regulation 2.8 of the Byelaws.

(49) Each unit owner is thereby responsible for the cost of his or her own power usage.

(50) Collection of electricity dues is by way of an established practice whereby the electricity provider charges the Plaintiff for power usage of the entire Condominium (including that of the individual units therein) and in turn the Plaintiff charges each unit owner for his or her power usage according to his or her meter reading on a monthly basis.

(51) In the premises the 1st Defendant's account as pertains to Unit 2714 is presently in arrears as follows:

Additional Maintenance Fees apportioned to Unit 2714 from 5th May, 2006 pro rated to 31st May, 2006 at $101.90 per month	$ 88.75
Additional Maintenance Fees apportioned to Unit 2714 from June 2006 to July 2008 at $101.90 per month	$ 2,649.40
Additional Maintenance Fees apportioned to Unit 2716 from August 2008 to October, 2010 at $122.28 per month	$ 3,301.56
Ordinary Maintenance Fees from February 2010 to October 2010 at $235.94 per month	$ 2,123.46
Special assessments levied on 1st June, 2009 1st February, 2010 and 1st June, 2010	$ 1,658.30
Power charges for the period 1st July, 2007 to 1st October, 2007	$ 337.50
TOTAL	**$10,158.97**

(52) Despite several demands, the 1st Defendant has refused and or neglected to pay to the Plaintiff the said outstanding aggregate sum of $10,158.97 or any part thereof.

(53) By reason of the foregoing matters, the Plaintiff has and continues to suffer loss.

And the plaintiff claims:

(a) A declaration that title to the balconies, terraces and patios assigned to Unit 2716 remains vested in the 1st Defendant.

(b) The aggregate sum of $6,039.71 against the 1st Defendant in respect of the balconies, terraces and patios assigned to Unit 2716.

(c) Interest on (b) above pursuant to the Civil Procedure (Award of Interest) Act, 1992.

(d) A declaration that the purported sale of Unit 2714 by the 1st Defendant to the 2nd and 3rd Defendants by way of the 2006 Conveyance as purportedly amended by the 2009 Deed of Rectification is void on the basis that:

1. The 1st Defendant failed to comply with Regulation 6.4 of the Byelaws; and that

2. No approval was granted by the Plaintiff to the 1st Defendant as required by Regulation 6.5 of the Byelaws.

(e) A declaration that title to the balconies, terraces and patios assigned to Unit 2714 remains vested in the 1st Defendant.

(f) The aggregate sum of $10,158.97 against the 1st Defendant in respect of Unit 2714 and the balconies, terraces and patios assigned to Unit 2714.

(g) Interest on (f) above pursuant to the Civil Procedure (Award of Interest) Act, 1992.

(h) Costs.

(i) Such further and other relief as this Honourable Court shall deem appropriate.

3. Although appearances were entered in November 2010 by the first defendant and in December 2010 on behalf of the 2nd and 3rd defendants, at the date of the hearing the time for filing a defence had long since passed and none of the defendants had filed a defence. Further, although the plaintiff's summons was served on the Registered Office of the 1st defendant on 22 February 2012, as evidenced by the affidavit of Bavardo Forbes filed herein on 28 February 2012, no one appeared on its behalf.

4. By its Summons filed 18 February 2011 the plaintiff sought the reliefs set out at paragraph 53 (a) through (i) of its statement of claim. However, at the commencement of the hearing the plaintiff abandoned its claims at sub-paragraphs (b) and (c) of the statement of claim, namely:

   a. The aggregate sum of $6,039.71 against the 1st Defendant in respect of the balconies, terraces and patios assigned to Unit 2716.

   b. Interest on (b) above pursuant to the Civil Procedure (Award of Interest) Act, 1992.

5. The plaintiff also abandoned its claim for Additional Maintenance Fees for the balconies, terraces and patios assigned to Unit 2714 as set out in paragraphs 51(a) to (c) inclusive of the statement of claim. Consequently the sum of $10,158.97 claimed in paragraph 53(f) of the statement of claim was revised to $4,119.26 (to reflect the total of the remaining amounts claimed under paragraph 51 of the statement of claim) and the words: "and the balconies, terraces and patios assigned to Unit 2714" appearing in the said paragraph 53(f) were disregarded.

6. In the result, the plaintiff seeks the following reliefs:

(a) A declaration that title to the balconies, terraces and patios assigned to Unit 2716 remains vested in the 1st defendant.

(b) A declaration that the purported sale of Unit 2714 by the 1st defendant to the 2nd and 3rd defendants by way of the 2006 Conveyance as purportedly amended by the 2009 Deed of Rectification is void because:

i. The 1st defendant failed to comply with Regulation 6.4 of the Condominium Byelaws; and

ii. No approval was granted by the plaintiff to the 1st defendant as required by Regulation 6.5 of the Byelaws.

(c) The aggregate sum of $4,119.26 against the 1st defendant in respect of Ordinary maintenance fees, special assessments and power charges for Unit 2714 together with interest pursuant to the Civil Procedure (Award of Interest) Act, 1992. The said sum of $4,119.26 is made up as follows:

Ordinary Maintenance Fees from February 2010 to October 2010 at $235.94 per month	$2,123.46
Special assessments levied on 1st June, 2009 1st February, 2010 and 1st June, 2010	$1,658.30
Power charges for the period 1st July, 2007 to 1st October, 2007	$ 337.50
TOTAL	$4,119.26

(d) A declaration that title to the balconies, terraces and patios assigned to Unit 2714 remains vested in the 1st Defendant.

(e) Costs.

7. The material facts gleaned from the statement of claim are that: Units 2714 and 2716 in the Coral Beach Apartment Hotel ("the Condominium"), inter alia, along with the respective balconies, terraces, patios and other areas assigned thereto were purchased by Andrew Kalman from Coral Beach Limited in 1971.

8. In 1985, Mr Kalman, who also owned the "North Lobby" of the Condominium, conveyed his interest in the aforesaid Units, their respective balconies, terraces, patios and other areas assigned thereto, along with the North Lobby, to the 1st defendant.

9. Also in 1985, the plaintiff and the 1st defendant in a deed of settlement, compromise and release, agreed that the maintenance fees payable by the 1st defendant with respect to seven units owned by the 1st defendant, including Units 2714 and 2716, would be increased to include "additional maintenance fees" for the exclusive use by the 1st defendant of the balconies, terraces, patios and other areas assigned to the said units and for the 1st defendant's exclusive use of the North Lobby, such maintenance fees to be apportioned between the said seven units and paid into an account No. 2717.

10. In or about 2006, the 1st defendant conveyed Unit 2716 to the 2nd and 3rd defendants together with the unit entitlement, but did not specifically convey the balconies, terraces and patios assigned thereto.

11. By a deed of rectification, dated 18 May 2009, between the 1st defendant and the 2nd and 3rd defendants, the 1st defendant amended the 2006 conveyance to the 2nd and 3rd defendants by adding a transfer of the 1st defendant's title in Unit 2714 together with the unit entitlement, but, apparently, still did not specifically include the balconies, terraces and patios assigned to the Units.

12. Permission was obtained from the plaintiff's Board of Directors in accordance with the provisions of the byelaws for the sale of Unit 2716 to the 2nd and 3rd defendants, but, it is alleged that no such permission was sought or obtained with respect to Unit 2714.

13. The plaintiff alleges that it only became aware of the purported transfer in September 2010 when it received a letter from the defendants' then attorneys, DuPuch and Turnquest and Co., advising of the aforesaid deed of rectification. The plaintiff says it responded in its letter dated 21 October 2010, advising that it did not recognize the 1st defendant's purported sale of Unit 2714 to the 2nd and 3rd defendants because the defendants had failed to comply with Regulation 6.4 of the Byelaws, which provides that no closing shall take place on the sale of any unit until the then owner of record had first submitted to the Board of Directors of the plaintiff information regarding the prospective purchaser and that the plaintiff would continue to treat the 1st defendant as the owner of Unit 2714 for all intents and purposes.

14. The plaintiff is entitled to be paid ordinary maintenance fees for each of the apartments in accordance with their respective unit entitlement plus the

apportioned additional maintenance fees with respect to the balconies, terraces, and patios assigned to the said Units.

15. The plaintiff alleges that the 1st defendant stopped paying maintenance fees with respect to the said Units, as well as the balconies, terraces, and patios assigned thereto, from or about 5 May 2006.

16. He plaintiff alleges further that demands for payments were made of the 1st defendant as well as the 2nd and 3rd defendants in respect of the additional maintenance fees apportioned to Unit 2716. The plaintiff contends that the demands made on the 2nd and 3rd defendants were as a "cautionary measure".

17. Further, from or about May 2006 until December 2009, the plaintiff accepted payments from the 2nd and 3rd defendants on account of the maintenance fees with respect to Unit 2714. The plaintiff says it accepted those payments "erroneously" and when it realized its error it wrote to the 2nd and 3rd defendants indicating that the payments had been accepted in error as the plaintiff did not recognize their occupation or purported ownership of Unit 2714. The plaintiff says it stopped accepting payments from the 2nd and 3rd defendants with respect to Unit 2714 from or about February 2010.

18. The plaintiff alleges that despite several demands of the 1st defendant, the fees remain unpaid and says that by October 2010, the arrears of fees due and owing to the plaintiff with respect to Unit 2714 amounted to $4,119.26. The plaintiff contends that the 1st defendant remains the owner of Unit 2714 and is, therefore, liable to pay the amount due.

19. In the result, the plaintiff says it is entitled to the relief sought.

20. As indicated, this is an application for judgment in default of defence pursuant to RSC Order 19 rule 7 and the rule is that no evidence is allowed. The plaintiff must, on the face of its statement of claim, be entitled to the relief claimed.

21. The 1st defendant has chosen not to participate in these proceedings and although counsel for the 2nd and 3rd defendants invited the court to do so, I will not speculate as to the reason for the 1st defendant's non-participation.

22. On the other hand, the 2nd and 3rd defendants, who appear most likely to be affected by the declarations sought by the plaintiff herein have asked that the action against them be dismissed as disclosing no reasonable cause of action. The 2nd and 3rd defendants application is brought pursuant to RSC Order 18 rule 19(1)(a) which provides that the Court may at any stage of the proceedings order

to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that it discloses no reasonable cause of action.

23. In Mr Maynard's submission, the statement of claim contains no allegation of a breach of contract or the commission of a tort by the 2nd and 3rd defendants, nor, he points out, is any declaration being sought in the statement of claim against the 2nd and 3rd defendants personally. Mr Maynard submits further that as no claim has been made against the 2nd and 3rd defendants in the statement of claim there was nothing for them to defend and therefore there could be no default on their part.

24. Consequently, Mr Maynard submits, the writ and statement of claim as against the 2nd and 3rd defendants should be struck out as disclosing no reasonable cause of action against them

25. Counsel for the plaintiff disagrees. In her submission, because the declaratory reliefs which the plaintiff seeks, namely:

    a. A declaration that title to the balconies, terraces and patios assigned to Unit 2716 remains vested in the first defendant; and

    b. A declaration that the purported sale of Unit 2714 to the 2nd and 3rd defendants is void on the basis that they did not comply with the relevant regulations;

affect the rights of the 2nd and 3rd defendants, the plaintiff does have a cause of action against them.

26. In any event, counsel for the plaintiff submits that even if no claim was made directly against the 2nd and 3rd defendants in the statement of claim, whenever a declaration affects the rights of a party, such party "must" be included in the action: See London Passenger Transport Board v Moscrop [1942] AC at page 332, 345; even if no cause of action exists against them: See Guaranty Trust Company of New York v Hannay & Co. [1915] 2 K.B. 536.

27. In response, Mr Maynard submits that the fact that the plaintiff is claiming that the 1st defendant owns the apartments and is asking for judgment against the 1st defendant for fees in respect of the apartments, clearly shows that the plaintiff does not recognize the 2nd and 3rd defendants as having any interest in the apartments. He, therefore, maintained his argument on behalf of the 2nd and 3rd

defendant that the action against them should be dismissed as there is no claim against them.

28. In the case of London Passenger Transport Board v Moscrop relied on by the plaintiff, Viscount Maugham at page 345 said:

> "I also think it desirable to mention the point as to parties in cases where a declaration is sought. The present appellants were not directly prejudiced by the declaration and it might even have been thought to be an advantage to them to submit to the declaration, but, on the other hand, the persons really interested were not before the court, for not a single member of the Transport Union was, nor was that union itself, joined as a defendant in the action. It is true that in their absence they were not strictly bound by the declaration, but the courts have always recognized that persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence, and that, except in very special circumstances, all persons interested should be made parties, whether by representation orders or otherwise, before a declaration by its terms affecting their rights is made."

29. Further, RSC Order 15 rule 17 provides that:

> "No action or other proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding a declaration of right whether or not any consequential relief is or could be claimed."

30. And in the case of Guaranty Trust Company of New York v Hannay & Co it was held by Pickford and Bankes LJJ, Buckley LJ dissenting, that the court has power to make a declaration at the instance of a plaintiff though he has no cause of action against the defendant.

31. After reviewing the earlier authorities, Pickford, LJ concluded:

> "I think therefore that the effect of the rule [English Rules, Order 25 rule 5, our Rules, Order 15 rule 7] is to give a general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject-matter of the declaration."

32. In light of the aforesaid authorities I inquired of Mr Maynard whether the 2nd and 3rd defendants' would maintain their position. In response he said that although he had not had an opportunity to read the authorities, having only been provided with them the morning of the hearing, his submission was that "ought to be named as a defendant" was not the same as "against the defendant"; that it was clear that the purpose of the rule is that someone with an interest should be

named, but that did not mean that there was a claim against that person. In his further submission, as I understand him, unless a cause of action is shown in the statement of claim, there is no case for the defendants to answer and in that case, there can be no default on their part. Mr Maynard pointed out that in any event, the 2nd and 3rd defendants' relationship is with the 1st defendant exclusively.

33. In response to that submission, Mr Smith QC argues that the Declaration of Condominium and the Byelaws tie each owner as purchaser and/or seller into the contractual matrix set out in the declaration; so that although the 1st defendant may be the one selling the Units to the 2nd and 3rd defendants, the Units are sold through and with the concurrence of the plaintiff – the vendor agrees not to sell and the purchaser agrees not to buy without the approval of the plaintiff. Therefore, Mr Smith QC submits, there is privity of contract between the three of the parties to the extent that the plaintiff must approve the purchaser, hence the reason that they are all parties to this action.

34. From the authorities cited it is clear that: Firstly, all persons interested or who may be indirectly prejudiced by a declaration made by the court in their absence, should, except in very special circumstances, be made parties, before a declaration by its terms affecting their rights is made; and secondly, the court has the power to make a declaration of right even where no cause of action is shown.

35. The plaintiff seeks declarations to the effect that the sale by the 1st defendant to the 2nd and 3rd defendants of Unit 2714 is void and that the balconies, terraces and patios assigned to Unit 2714 and Unit 2716 respectively are still owned by the 1st defendant.

36. The 2nd and 3rd defendants claim to be the owners of Units 2714 and 2716 as well as the balconies, terraces and patios assigned thereto. Although they did not file an affidavit in support of their application to strike out the action as against them, the 2nd and 3rd defendants did file an affidavit in October 2011 in support of a summons for leave to join the law firm of DuPuch and Turnquest and Company as a defendant to this action and they aver, inter alia, that: "DuPuch and Turnquest and Company can and will provide a good and valid defence to the plaintiff's claim". That application was not pursued, but as counsel for the plaintiff pointed out, the 2nd and 3rd defendants in their affidavit averred that their "interest in this matter is that of a party entitled to redeem the property having only an equity of redemption while First Caribbean International Bank holds the legal title

to the property." I also note here that the Registered Office of the 1st defendant is situate at the Chambers of DuPuch and Turnquest and Company.

37. As I understand the aforesaid authorities, the reason for joining parties in an action is to ensure that they have an opportunity to answer the allegations if any, made, or to assert their rights, if any, in the plaintiff's claim; that is, to be given an opportunity to be heard with respect to their interest. It is also to ensure that they have notice of the claim being made that affects their interest. In that regard, I accept counsel for the plaintiff's submission that if the 2nd and 3rd defendants had not been added as parties to this action, they may not have become aware of, and, therefore, would not have been given the opportunity to defend, the same.

38. It is clear, in my view, that the 2nd and 3rd defendants, who claim to be the owners of the Units and the terraces, balconies and patios assigned thereto, over which this court is being asked to make declarations, have an interest in these proceedings. However, as I indicated the reason for joining them would be to give them an opportunity to be heard with respect to such interest. If, however, they choose, as they have done, not only to not participate in these proceedings, but also by asking that the action against them be dismissed, I see no alternative but to accede to their request and to strike out this action as against the 2nd and 3rd defendants as disclosing no cause of action against them.

Summary judgment

39. In regard to its application for summary judgment, counsel for the plaintiff made the following observations and/or submissions:

    (1) When the 1st defendant, Barefoot Postman Limited, conveyed Unit 2716 to the 2nd and 3rd defendants, the Andersons, it did not convey its title to the balconies, terraces and patios assigned to Unit 2716 and neither has it done so since. Therefore, the 1st defendant remains liable under the 1985 Deed of Settlement to pay to the plaintiff the Additional Maintenance Fees to Unit 2716.

    (2) It is on that basis that the plaintiff seeks a declaration that title to the balconies, terraces and patios assigned to Unit 2716 remains vested in Barefoot.

    (3) In light of the 1st defendant's contravention of section 23 of the Act by failing to comply with Regulation 6.4 of the Byelaws before its purported sale of Unit 2714 [by way of the 2006 Conveyance as purportedly amended by the 2009 Deed of Rectification]; and, in view of the plaintiff having exercised its right not to recognize the said purported sale, the plaintiff seeks a declaration that the purported sale of Unit 2714 is void on the basis that:

(a) Barefoot failed to comply with Regulation 6.4 of the Byelaws; and that

(b) No approval was granted by the plaintiff to the 1st defendant as required by Regulation 6.5 of the Byelaws.

(4) It is also on the basis of the plaintiff's non recognition of the purported sale of Unit 2714 and the fact that the 1st defendant has never conveyed the balconies, terraces and patios assigned to Unit 2714 that the plaintiff claims as against the 1st defendant, the aggregate sum of $4,119.26 comprised of unpaid Ordinary Maintenance Fees levied on Unit 2714 pursuant to section 14 of the Act and unpaid Additional Maintenance Fees apportioned to Unit 2714 in pursuance of the 1st defendant's liability for the same under the 1985 Deed of Settlement. The plaintiff also claims statutory interest.

(5) On the statement of claim alone, the plaintiff has made out a case for the reliefs sought therein and this Court is invited to exercise its discretion in favour of the plaintiff by granting judgment as prayed, with costs.

40. RSC Order 19 sets out the procedure for applications in default of pleadings. Rule 1 deals with default in serving the statement of claim; rules 2 through 5 deal with default in serving a defence in relation to specific claims, that is: claims for liquidated demand, unliquidated demand, detinue and possession of land only. Rule 7, on which the plaintiff relies, deals with claims "of a description not mentioned in rules 2 through 5".

41. Rule 7(1) and provides as follows:

> "...if the defendant or all the defendants (where there is more than one) fails or fail to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these Rules for service of the defence, apply to the Court for judgment, and on the hearing of the application the Court **shall** give such judgment as the plaintiff appears entitled to on his statement of claim."

42. Although paragraph (1) of Rule 7 is expressed in mandatory terms, in the case of Wallersteiner v Moir; Moir v Wallersteiner and others [1974] 3 All ER 217, Lord Denning MR explained that it is clear from the authorities that the word 'shall' is not imperative but directory and the Court has a discretionary power to grant judgment or to extend a party's time to plead when it is just to do so.

43. In the case of Gibbings -v- Strong (1884) 26 Ch. D. 66, 69, the Earl of Selborne, L.C., said:

> "This means that the Court is to exercise some judgment in the case: it does not necessarily follow the prayer, but gives the plaintiff the relief to which, on the allegations in his statement of claim, he appears to be entitled. On a summons for judgment therefore the judgment is not given as a matter of course. The Court has to exercise some judgment.

44. In Charles -v- Shepherd [1892] 2 Q.B. 622,624, Lord Esher, M.R. said:

> "We have consulted the members of other divisions of the Court of Appeal upon the question of the construction to be placed upon Order XXVII. , r. 11, and we are of opinion, upon the construction of that rule- first, that the Court is not bound to give judgment for the plaintiff, even though the statement of claim may on the face of it look perfectly clear, if it should see any reason to doubt whether injustice may not be done by giving judgment; it has a discretion to refuse to make the order asked for..."

45. Therefore just because the plaintiff's application is not opposed, does not mean that it is automatically entitled to the relief it seeks; the Court is nevertheless obliged to consider the application on its merits.

46. Evidence is not permitted in applications under RSC Order 19 rule 7. Rule 7(3) provides that an application under paragraph (1) must be by summons or motion. According to the 1976 English Rules, at a meeting of the Judges, a majority decided that the Court cannot receive any evidence in cases [under RSC Order 19 rule 7(1)], but must give judgment according to the pleadings alone: (Smith v. Buchan, 58 L.T. 710; Young v Thomas [1892] 2 Ch. 135, C.A.). It is therefore not necessary on the hearing of the summons or motion for judgment to prove the case by evidence (Webster v Vincent, 77 L.T. 167). See note 19/7/10 to 1976 Supreme Court Practice (English) at page 328.

47. On the other hand, it is clear from the authorities that the Courts are wary of granting declaratory relief without evidence and although this is only a rule of practice, not a rule of law, it should be followed 'where the claimant can obtain the fullest justice to which he is entitled without such a declaration.'(per Millet J., in Patten -v- Burke Publishing Co. Ltd. [1991] 2 All E.R. 821, 823).

48. In Patten v Burke Publishing Co Ltd, Millett J said that the court would not grant declarations ordinarily by consent or therefore, by implication, where a defendant is absent and in default.

49. As I understand Millett J's comments, in exercising its undisputed discretion to grant declarations, the court should not grant a declaration simply because parties agree or simply because one party seeks a declaration in the absence of the other party who is in default. In other words, the court should in each case satisfy itself that the legal basis for the declaration is present on the facts and the law, and should then determine whether in all the circumstances it is appropriate to grant the declaratory relief sought.

50. Notwithstanding counsel for the 2nd and 3rd defendants' position that the statement of claim discloses no cause of action against them, he, nevertheless urged this court not to make the declarations sought for the reason that, in his view, this court was being misled. He also informed the court that there was a pending action between the defendants, namely Action No. 288 of 2008, which may be prejudiced if this Court were to give the declarations sought.

51. Notwithstanding counsel for the plaintiff objecting to counsel for the 2nd and 3rd defendants referring to the aforesaid action from the bar and not by way of affidavit, I am mindful that, in the exercise of its discretion, the Court may, where there are matters affecting other parties waiting to be decided, order the motion to stand over until trial (Verney v Thomas, 36 W.R. 398), or to stand over generally (Jenney v Mackintosh, 61 L.T. 108), See note 19/7/11 English Rules 1976 Supreme Court Practice).

52. I, therefore, had a look at the file in Action No. 288 of 2008.

53. I discovered that that action was commenced on 8 December 2008 by the firm of counsel for the 2nd and 3rd defendants by a vendor/purchaser summons pursuant to section 4 of the Conveyancing and Law of Property Act. The parties to the action are the 2nd and 3rd defendants as plaintiffs, the 1st defendant and DuPuch and Turnquest and Company as defendants. However, except for the appearances entered on behalf of the defendants in that action on 24 December 2008, nothing further has been done on the file.

54. In any event, it seems to me that that action may have been overtaken by the above-mentioned deed of rectification.

55. In my judgment, therefore, that action is not a pending action as intimated by Mr Maynard or such that should prevent me from granting relief in this action.

56. In any event, in the circumstances of this case, the 2nd and 3rd defendants having been dismissed, on their own application, from this action and the defendants having failed to file a defence, I see no reason for this matter to go to a trial.

57. On the face of the pleadings, I find that the plaintiff is entitled to a declaration that title to the balconies, terraces and patios assigned to Unit 2714 and Unit 2716 respectively remains vested in the 1st defendant.

58. However, as regards the declaration sought in respect to Unit 2714, I am not so persuaded, that is: a declaration that the purported sale of Unit 2714 by the 1st defendant to the 2nd and 3rd defendants by way of the 2006 conveyance as purportedly amended by the 2009 deed of rectification is void.

59. The basis on which the plaintiff says it is entitled to that declaration is the failure by the defendants to comply with the provisions of Regulation 6.4 of the byelaws, which required them to submit information regarding the 2nd and 3rd defendants as proposed purchasers of Unit 2714, and the plaintiff, in accordance with Regulation 6.8, having exercised its right not to recognize the purported sale or transfer of the title to Unit 2714 to the 2nd defendants.

60. The plaintiff also relies on the provisions of Section 23 of the Law of Property Conveyancing (Condominium) Act chapter 138, which require unit owners to be subject to and comply with the Condominium byelaws and to strictly comply with the covenants, conditions and restrictions set out in the relevant Declaration of Condominium.

61. On the face of the statement of claim, the defendants having failed to comply with the provisions of Regulation 6.4 aforesaid, the plaintiff is entitled to treat the 1st defendant as the owner of Unit 2714. However, I must confess to a certain degree of uneasiness in making a declaration in the terms prayed for by the plaintiff, that is that the sale transaction between the 1st defendant and the 2nd and 3rd defendant is void, particularly at the instance someone who was not a party to transaction between the 1st defendant and the 2nd and 3rd defendants as vendor and purchaser respectively.

62. Fortunately, in the exercise of my discretion I am not bound to follow the plaintiff's prayer for relief, notwithstanding there is no opposition to the same in

that the defendants have not filed a defence. I am at liberty to give such relief as the plaintiff appears entitled to on his statement of claim.

63. In my judgment, the relief to which the plaintiff is entitled with respect to Unit 2714 is to the effect that: The 1st defendant having failed to comply with Regulation 6.4 of the Condominium Byelaws and no approval having been granted by the plaintiff to the 1st defendant as required by Regulation 6.5 of the Byelaws for the sale of Unit 2714 by the 1st defendant to the 2nd and 3rd defendants, the plaintiff is entitled, pursuant to its rights under Regulation 6.8 of the Byelaws, to continue to treat the 1st defendant as the owner of the Unit 2714 and in those circumstances, the plaintiff is entitled to continue looking to the 1st defendant for payment of any maintenance fees in respect to that Unit.

64. In the result, I grant the following relief:

    a. A declaration that title to the balconies, terraces and patios assigned to Unit 2714 remains vested in the 1st defendant;

    b. A declaration that title to the balconies, terraces and patios assigned to Unit 2716 remains vested in the 1st defendant;

    c. A declaration that the plaintiff is entitled to hold the 1st defendant as the owner of Unit 2714 notwithstanding the purported sale thereof to the 2nd and 3rd defendant, the defendants having failed to obtain the approval of the plaintiff for the said sale.

65. Further, the 1st defendant having failed to file a defence to the plaintiff's claim for arrears of maintenance, the plaintiff is granted leave to enter judgment against the 1st defendant for the sum of $4,119.26 being arrears of maintenance with respect to Unit 2714 together with interest pursuant to the Civil Procedure (Award of Interest) Act, 1992.

66. The costs of this action are to be paid by the 1st defendant, to be taxed if not agreed.

DELIVERED this 14th day of May A.D., 2012

Estelle G. Gray-Evans

Justice