COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY SIDE

2009/CLE/gen/FP155

IN THE MATTER of a Declaration of Condominium dated the 1st day of October A.D., 1974 recorded in the Registry of Records in Volume 2325 at Pages 566 to 587

AND IN THE MATTER of the Law of Property Conveyancing (Condominium) Act Chapter 124

AND IN THE MATTER of Apartment Unit 435 Jansel Court Condominium

BETWEEN

JOAN BOWE

Plaintiff

AND

JANSEL COURT CONDOMINIUM ASSOCIATION

Defendant

BEFORE: The Honourable Mrs Justice Estelle G. Gray Evans

APPEARANCES: Mr Kevin M. Russell for the plaintiff

Ms Constance McDonald for the defendant

2011: 21 February; 7 March; 27 April; 31 October

JUDGMENT

Evans, J.

1. The plaintiff is the fee simple owner of apartment unit 435 ("the Unit"), Jansel Court Condominium, The Mall Drive, Freeport, Grand Bahama ("the Condominium), which she purchased in 1990.

2. The Condominium was subjected to the provisions of the Law of Property and Conveyancing (Condominium) Act 1965 (as amended) ("the Act") by virtue of a Declaration of Condominium dated 1 October 1974 and recorded in the Registry of Records of the Commonwealth of The Bahamas in volume 2325 at pages 566 to 595 inclusive ("the Declaration").

3. The defendant is the body corporate charged with the operation of the Condominium by virtue of section 13 of the Act.

4. The plaintiff is charged a monthly maintenance fee pursuant to the provisions of the Declaration and from time to time the defendant levies assessment fees on unit owners of the Condominium, including the plaintiff.

5. The plaintiff has been granted the exclusive use of a locker on the Condominium property, for which she is charged an annual fee. She is also charged a fee for use of a covered parking space in addition to which she has been fined for parking violations on the Condominium property.

6. By letter dated 30 April 2009, counsel for the defendant wrote to the plaintiff notifying her that she was in arrears with the payment of her regular maintenance and assessment fees and that as at 14 April 2009 she owed $2,079.20 in structural assessment fees and $7,560.75 in maintenance fees; that $1,679.20 of the structural assessment fees and $6,124.75 of the maintenance fees were, at that time, 90 days past due. Counsel for the defendant advised the plaintiff that if the sum of $9,639.95, together with her collection costs of $150.00, were not settled within fourteen days of the date of the said letter she had been instructed to "take out a lien" on the said apartment without further notice to the plaintiff,.

7. In addition to maintenance and assessment charges, the sum of $9,639.95 also included unpaid charges for locker rental, parking fees and parking fines.

8. The plaintiff commenced this action on 29 May 2009 by an originating summons in which she sought several declarations and orders.

9. The plaintiff also sought an injunction restraining the defendant from placing a lien or charge on the said apartment or advertising, accepting offers or putting to tender or purchase and entering agreements for sale thereof until such time as the application herein is heard and subject to any right, entitlement or relief which the Court might declare and/or grant.

10. The originating summons was not served on the defendant until 22 December 2009, by which time the defendant had already, pursuant to section 21 of the Act, registered a charge against the said apartment as evidenced by the Notice of Charge dated 7 July 2009 and recorded in the Registry of Records of The Bahamas in volume 10941 at pages 388 to 391.

11. The plaintiff admits that she owes the defendant with respect to the structural assessment fees on which she says she has been consistently making payments of $100.00 per month. She avers at paragraph 4 of her affidavit filed on 29 May 2009 that

at the date thereof her maintenance fee account was current. She admits having refused to pay the charges for her exclusive use of a locker and parking area as well as the fines levied against her for parking violations and she challenges the defendant's authority firstly, to charge the aforesaid sums and secondly, to recover them by "placing a lien" on her unit.

12. The plaintiff therefore contends that the aforesaid Notice of Charge is invalid because it includes charges for locker fee rental, parking space rental and parking violation fines.

13. The defendant in answer to the plaintiff's application relies on the affidavits of Virginia Burrows filed on 14 January 2011, 4 March 2011 and 15 March 2011.

14. The defendant contends that this action is merely a stalling tactic by the plaintiff who, on a previous occasion when the defendant registered a charge against the unit, commenced another action against the defendant. Further, the defendant says, the plaintiff, in a ruse to attend and vote at a general meeting, tendered to the defendant a cheque for $9,043.34 covering all of the outstanding charges, including the funds due with respect to the locker and parking; that following the meeting, the plaintiff retrieved the cheque. This has not been denied by the plaintiff.

15. In her affidavit filed 4 March 2011, Mrs Burrows deposes, inter alia, that the provisions for locker and parking fees are set out in the Condominium's rules and regulations, which have been in effect since 1984; that each owner in the condominium, including the plaintiff, was provided with a copy of such rules and regulations; that the plaintiff in her application for approval to purchase the said apartment, agreed to abide by all rules and regulations then in effect or thereafter promulgated by the Board of Directors or any of its committees.

16. Mrs Burrows avers further that the plaintiff, who purchased the said unit in or about 1990, was fully aware of the defendant's charging policy with regard to lockers and parking spaces when she applied for a locker and the covered parking space.

17. The plaintiff admits that she is aware of the defendant's policy with regard to the locker and parking spaces. However, she says that her several requests for proof of the defendant's authority to impose the aforesaid charges and fines with respect to the locker and parking have gone unanswered; hence her reason for commencing this action.

18. Having read the affidavits and the various documents exhibited thereto, I am satisfied that at the commencement of this action, the plaintiff was in arrears with the payment of the maintenance and assessment charges, locker rental and parking fees and fines respectively.

19. I am also satisfied that the defendant, by virtue of the plaintiff's aforesaid arrears of maintenance and assessment fees, had the option either of commencing court proceedings to recover the those arrears pursuant to section 18(2) of the Act and clause 16 of the Declaration or, as it chose to do, to register a charge against the plaintiff's unit pursuant to the provisions of section 21 of the Act.

20. On the hearing of an application by the defendant to strike out the action for want of prosecution, I indicated to the parties that although I was not minded to strike out the action on that ground, having read the file it seemed to me that the real issues between the parties were as follows:

(1) Whether the defendant has the legal right to impose a fee for the exclusive use of the lockers and parking spaces situate in the common area of the condominium complex; and if so,

(2) Whether the defendant could recover such fees by placing a lien or charge on the plaintiff's unit in the same way as it could recover arrears of maintenance and assessment charges?

21. I also indicated to counsel for the defendant that as the plaintiff appeared to have accepted, based on the declarations she sought as well as counsel for the plaintiff's submissions, that the defendant's authority to levy such fees could come from a resolution of its members in a general meeting, it seemed a simple matter for the defendant to search its files for such resolution and produce it to the plaintiff.

22. I therefore adjourned the matter to allow the defendant to conduct its search which resulted in the defendant's affidavits filed on 5 and 14 March 2011 respectively, exhibiting copies of several documents, but, in my view, no "smoking gun". By that I mean that none of the documents produced on behalf of the defendant appears to contain a specific resolution by the members authorizing the defendant to charge a fee for the exclusive use of a locker or a specific parking space on the Condominium property and to permit the defendant to add any arrears of such fees to the maintenance account. Mrs Burrows assured the Court that she had conducted an exhaustive search to locate such a document, but without success.

23. The powers and duties of the body corporate of a condominium, including the defendant, are derived from the Act, the Declaration and the byelaws.

24. Section 14 (1) of the Act provides that the duties of the body corporate shall include, among other things, the following:

> (a) to operate the property for the benefit of all unit owners and to be responsible for the enforcement of the byelaws;
>
> ....
>
> (f) to carry out the directions of the unit owners expressed by resolution or otherwise as may be prescribed by the Declaration or the byelaws, and
>
> (g) to carry out any other duties which may be prescribed by the Declaration or the byelaws.

25. Section 14 (2) of the Act provides that the powers of the body corporate shall include: raising funds by levying contributions on unit owners in proportion to their unit entitlement and recovering from unit owners any sum expended by the body corporate for repairs or work done by it or at its direction (maintenance and assessment charges) and exercising any other powers as may be conferred upon the body corporate by the Declaration or the byelaws.

26. Section 14(3) of the Act provides that all agreements, decisions and determinations lawfully made by the body corporate in accordance with the Act, the Declaration and byelaws shall be deemed to be binding on all unit owners.

27. Clause 13 of the Declaration provides that all the byelaws set forth in the Schedule to the Act "shall be in force as regards the property to which this Declaration relates from the date of the recording thereof in the Registry of Records."

28. Paragraph 1 of the byelaws set forth in the second schedule to the Act provides that the powers and duties of the body corporate shall, subject to any restriction imposed or direction given at a general meeting, be exercised and performed by the Board of the body corporate.

29. By section 18 of the Act, the defendant, as the body corporate, is empowered to recover unpaid contributions as a debt by action in a court of competent jurisdiction and any such action is maintainable without prejudice to the rights conferred upon the body corporate by section 21 of the Act which provides for a charge to be placed on a unit for unpaid contributions.

30. Section 21 also gives the body corporate the same powers of sale for enforcing a notice of charge as a mortgagee under the provisions of the Conveyancing and Law of Property Act.

31. It is accepted that the lockers and parking areas are common property, the use to which each unit owner in the Condominium is entitled on a non-exclusive basis.

32. However, the evidence is that there are insufficient lockers and covered parking spaces to satisfy all owners, so a decision was taken by the Board of Directors more than thirty years ago to charge a fee to those owners who wished to have exclusive use of a locker and a covered parking space, one of whom is the plaintiff.

33. Neither the Declaration nor the byelaws set forth in the second schedule to the Act appears to confer any express duty or power on the body corporate or the Board of Directors to charge a fee for the use of common areas, but the plaintiff accepts that in the absence of any such express provision, the unit owners could, in a general meeting, confer such authority on the body corporate. Indeed one of the declarations sought by the plaintiff is to the effect that any authority to charge or receive fees for parking areas or lockers in the common area can be conferred by resolution of members in a general meeting or extraordinary general meeting.

34. Further, section 22 of the Act provides that the owners of all units may by unanimous resolution at a meeting convened by the body corporate for the purpose direct the body corporate to, inter alia, "...lease on their behalf common property or any part thereof."

35. As indicated, exhibited to Ms Burrows' affidavits were copies of several documents which the defendant says evidence its authority to charge a fee for the exclusive use of lockers and certain parking spaces at the Condominium as well as levy fines for parking violations.

36. For example, in her further supplemental affidavit filed 15 March 2011 Ms Burrows produced copies of Minutes of meetings of the defendant's directors held on 13 November 1975 and 13 October 1976. Of note are the following excerpts:

(1) 13 November 1975 Directors Meeting:

"It was agreed that the following rates for car parking should be introduced as soon as possible:

Under cover on the West side and North sides	$100.00 per annum
Undercover on the East side	$ 75.00 per annum"

(2) 13 October 1976 Directors Meeting

"The Secretary informed the Board that there are 28 lockers in Jansel Court and that there is no record in the office of the person or persons that have use of these. He said that according to the Rules, persons making use of each locker should pay $20.00 per annum and this is not being done. He proposed that at the Annual General Meeting there should be an announcement that those persons making use of the lockers would have to pay $20.00 at the office for the annual rental for 1977. In this way Management will have a record of the people renting and if certain persons making use of the lockers did not come forward within a week to pay the rent the Manger could change the locks and rent them to any other owners that applied. The Board agreed to the proposal."

37. Also exhibited to that affidavit is a copy of an Annual Report for 1976 by H. H. Thompson, Manager, Jansel Court Condominium, in which Mr Thompson reports, inter alia, as follows:

"At the beginning of the year owners of cars wishing to have undercover car parking space available to them were charged $100.00 per annum for each car. This rule was difficult to enforce at first because both owners and tenants had been allowed to park their cars wherever they wished. I am pleased to say that this rule was introduced and is now working extremely well. We should not overlook the fact that $1,454.00 in revenue has been earned this year which went to the credit of the Condominium funds."

38. Then, in her supplemental affidavit filed 4 March 2011, Ms Burrows exhibits a copy of a letter dated 16 January 1984 from the then President of the Association to the owners in which he states, inter alia:

"...in accordance with Jansel Court Condominium Declaration, Bahamian Condominium Act and advice from Coopers & Lybrand, our auditors, **the Board** has unanimously decided the following...

....to increase the regular maintenance as of January 1, 1984:

a. Monthly Maintenance Fees

$137.50 for two bedroom apartment
$110.00 for one bedroom apartment
$ 78.00 for studio apartment

b. Parking Fees

$137.50 for "cage" parking (east side)

$121.00 for covered front parking (west side)
$110.00 for covered North side parking

c. Annual Locker Fees

$40.00 for small lockers
$45.00 for large lockers

39. Also exhibited to that supplemental affidavit is a copy of the Rules and Regulations Governing the use of Apartments and the Common Areas, dated 1989. The Rules are said to have been adopted in accordance with the provisions of the Declaration, the byelaws and the Act. The document also contains a warning that failure to comply "will result in a fine of up to $100 assessed against the owner of the apartment that is involved in the violation."

40. The following Rules are noteworthy:

> "Parking and Car-ports
>
> "No person shall park in any area marked: "No Parking", or in any other area that has been restricted.
>
> Parking alongside the building is not permitted under any circumstances.
>
> Undercover parking spaces are available to the owners ONLY on payment of an annual fee set by the Board of Directors. All other parking areas are for residents of Jansel Court Condominium on a first come basis.
>
> ...
>
> Offenders of any of the foregoing will have their vehicles towed away at the owners' expenses.
>
> Maintenance and Repair Charges
>
> All maintenance charges are due and payable monthly in advance, i.e. January's maintenance charge is due on December 31st. Car parking and locker fees are payable on January 1st each year."

41. Further, exhibited to Ms Burrows' affidavit filed 14 January 2011, is a copy of what appears to be two pages (5 and 6) from minutes of an Annual General Meeting. I say that because there are several references to the "AGM body" and statements to the effect that motions were "unanimously approved" by the "AGM body". There is, however, no indication on the face of the document or in the said affidavit as to its origin or its author, and except for references to reports for the years 2003-2004 and 2004-2005, there is no indication of the date of the document. Ms Burrows refers to it as the "defendant's policy on parking spaces and lockers".

42. The document has not been challenged by the plaintiff and the following excerpt appears to be relevant:

> "The management of parking spaces and lockers is a sensitive issue which the Board of Directors wishes to face squarely in an effort to resolve it in a

fair manner to everyone's satisfaction and in accordance with the existing Condominium Laws and regulations of Jansel Court.

The pertinent facts are as follows: there are 124 condominium units at JC, 78 lockers and 154 cars which park on the premises. We have 41 undercover front parking spaces, 39 backspaces and 87 outside free spaces for a total of 167 parking spaces. We have a waiting list of 13 persons desiring an undercover parking space. Not all owners need or desire or are prepared to pay for either parking space or a locker or both.

A number of general self-evident propositions can at once be formulated:

- There is an insufficient number of both undercover parking spaces and lockers to satisfy all owners.

- It is the view of most owners, a view shared by the Board, that it is patently unfair to charge parking and lockers services to the general maintenance account, thus charging the owners who do not resort to such services. It is for this reason that for over thirty years, the beneficiaries of those services always paid the charges. The Board accordingly intends to continue in the future the policy of payment of services charges by the beneficiaries only."

43. It is, in my view, clear from the foregoing that the decision to charge fees for the exclusive use of lockers and parking areas on the Condominium property originated with the defendant's Board of Directors but it is unclear whether the members ever passed resolutions therefor or whether the Directors' decisions were ratified by the unit owners in general meeting.

44. For example, the copy document referred to at paragraph 37 above also contains the following excerpt:

> "Based upon the foregoing, it is requested that the AGM endorse by resolution the stated policy of the Board as being an appropriate one to follow with regard to parking and locker service charges at JC."

45. And although that document also contains the following statement: "The AGM regards parking and lockers as essential services and as well inspire community use of common spaces" it is unclear whether a resolution by the members was actually passed.

46. Nevertheless, as I said, the policy appears to have been in place for more than thirty years (since 1975) and was certainly in place when the plaintiff purchased her unit in or about 1990. Further, the duties of the body corporate by virtue of section 14 (1)(f) of the Act include "the carrying out of the directions of the unit owners expressed by resolution or otherwise..." I understand that to mean that the unit owners may indicate their desires or wishes to the body corporate otherwise than by a resolution.

47. In this case, the policy, having, apparently, been implemented at the direction of the Board of Directors, could have, and may very well have, been ratified by the members. I say that because Ms Burrows says that it is not easy finding records that go back 30 or more years.

48. It seems to me, that the members, if they did not agree or accept the decision of the directors as binding on them, could easily have, in a general meeting, express their

dissatisfaction and resolve to dissolve the policy or rescind the director's decision to impose the aforesaid charges.

49. Instead, they seem to have acquiesced and to my mind, after 30 years, the members not having directed the Board otherwise are deemed to have given their blessings. In any event, it appears that the majority, if not all but one, of the members have either consented to, or acquiesced in, the imposition of the charges.

50. I therefore find, on the totality of the evidence that the body corporate had the authority to charge the aforesaid fees for the exclusive use of a locker and parking space on the common property and that such fees are lawful.

51. As I understand the provisions of the Act, "contributions" under the Act relates to the "proportion of the common expenses payable from time to time…by each unit owner" in accordance with their unit entitlement, as determined and/or assessed by the body corporate pursuant to section 14(2) of the Act, which are commonly referred to as maintenance and assessment charges payable by all unit owners, and which, according to sections 18 and 21 may be recovered either by court action or by the imposition of a Charge upon the unit with all the powers of sale of a mortgagee under the Conveyancing and Law of Property Act.

52. In my view, the fees charged for the exclusive use of lockers and covered parking areas and the fines levied for parking violations are not "contributions" under the Act and ought, therefore, not to be included as part of the "contributions" or "maintenance and assessment charges" for the purpose of recovery by way of a Charge upon the unit.

53. Indeed, I note from one of the documents provided by the defendant that it was the "view of most owners, a view shared by the Board, that it is patently unfair to charge parking and lockers services to the general maintenance account, thus charging the owners who do not resort to such services."

54. Consequently, in my judgment, the defendant is not entitled to recover arrears of locker and parking rental fees or parking violation fines by a charge or lien on the plaintiff's unit in the same manner as it could for the purpose of recovering arrears of maintenance and assessment charges.

55. Each side will pay its own costs unless good cause to the contrary is shown to this Court by written submissions filed and exchanged within 14 days of delivery of this judgment.

DATED the 31st day of October A.D. 2011

Estelle G. Gray Evans
Justice