

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
Common Law and Equity Side  
2012/CLE/gen/FP/273**



**IN THE MATTER of a Conveyance dated the 30<sup>th</sup> June, 2005 made between David Watt Duncan and Ellen Duncan of the one part and Michael Andrew Westenhoefer of the other part and recorded in the Registry of Records in Volume 9308 at pages 314 to 324.**

**AND IN THE MATTER of certain provisions of the Law of Property and Conveyancing (Condominium) Act, Chap. 139 of the Statute Laws of The Bahamas.**

**AND IN THE MATTER of Section 21 of The Supreme Court Act, 1996, Chap. 53 of the Statute Laws of The Bahamas.**

**B E T W E E N**

**MICHAEL ANDREW WESTENHOEFER  
Plaintiff**

**AND**

**CORAL BEACH MANAGEMENT COMPANY LIMITED  
Defendant**

**BEFORE:** The Honourable Justice Petra M. Hanna-Adderley

**APPEARANCES:** Mr. Christopher Gouthro for the Plaintiff  
Mr. Jacy Whittaker for the Defendant

**HEARING DATE:** November 30, 2020

**RULING**

**Application for the Determination of a Preliminary Point**

**Introduction**

1. The Plaintiff is the owner of Apartment Unit 1704, Building A ("**the Unit**"), Coral Beach Apartment Hotel and Condominiums ("**Coral Beach Condominiums**"), situated in the City of Freeport, on the Island of Grand Bahama, The Bahamas. The Defendant is the management company which operates and manages Coral Beach Condominiums.

2. On June 3, 2020 I gave the Plaintiff leave to make application for the determination of a preliminary point of law which would dispose of this action pursuant to a Summons filed on July 4, 2016 and to Order 15, Rule 6 and Order 33, Rule 3 of the Rules of the Supreme Court ("**RSC**").
3. All condominiums in The Bahamas are governed by the Law of Property and Conveyancing (Condominium) Act, Chapter 139 of the Statute Laws of the Commonwealth of The Bahamas ("**the Act**") and its respective Declaration of Condominium (as amended from time to time). Coral Beach Condominiums is governed by a Declaration of Condominium dated December 31, 1968 and recorded in the Registry of Records in Volume 1363 at pages 22 to 170 ("**the Declaration**") and the Amended Declaration ("**the Amended Declaration**") dated February 10, 1978 recorded in the Registry of Records of the said Commonwealth in Volume 3063 at pages 344 to 393 ("**the Governing Documents**"). Clause 5 of the Amended Declaration deals with "RULES RELATING TO RENTAL OR LEASING OF UNITS". Clause 5.10 of the Amended Declaration provides that the Defendant shall deduct 25% from the gross rental income of Condominium Units to cover expenses for services rendered by the Defendant, and the balance of such income is to be credited to any arrears of maintenance or other charges owing by the Unit Owner, and if none, at his request, be forwarded to the Unit Owner or be credited to future maintenance charges.
4. The preliminary point of law to be determined is whether Clause 5.10 is ultra vires the Act.
5. I find that Clause 5.10 of the Amended Declaration is not ultra vires of the Act and that the Plaintiff is bound by the Amended Declaration and by the provisions of the Conveyance. The reasons for my findings are as follows.

### **Statement of Facts**

6. By an Indenture of Conveyance ("**the Conveyance**") dated June 30, 2005 made between the Plaintiff and David Watt Duncan and Ellen Duncan, recorded in the said Registry of Records in Volume 9308 at pages 314 to 324, the Plaintiff purchased the Unit.
7. The Plaintiff commenced this action by way of Originating Summons filed on August 14, 2012. An Amended Statement of Claim was filed on October 17, 2012 and the Plaintiff subsequently filed two Re-Amended Statements of Claim filed on April 11, 2014 and September 10, 2015 respectively. The Plaintiff's claim as pleaded in the last Re-Amended Statement of Claim is for damages resulting from unlawful or overcharged fees between

July 14, 2007 to August 13, 2012 that were not provided for by a Declaration of Condominium dated December 31, 1968 and the Amended Declaration. He also claims loss of rent following the disruption of power which he alleges was caused by the Defendant sometime in July and August 2012. The Defendant filed its Memorandum and Notice of Appearance on the August 20, 2012 and filed its Defence in response to the Re-Amended Statement of Claim on October 8, 2015 ("**Re-Amended Statement of Claim**").

8. On September 15, 2020 the Plaintiff withdrew his claim for the payment of rent in the sum of \$16,000.00 set out in paragraph 5 of the Re-Amended Statement of Claim (that is the Plaintiff's claim in respect of unjust enrichment) on the basis that should the Court grant the application to hear the Preliminary Point and decides that application in the Plaintiff's favour the issue of reimbursement of rent would be determined on an assessment of damages. The claim was dismissed. I also gave the Plaintiff leave to make this application.
9. The Plaintiff relies on his Submissions dated November 27, 2020 and the Defendant relies on its Submissions dated November 30, 2020.

### **Issue**

10. The issue to be determined before me is whether Clause 5.10 of the Amended Declaration is ultra vires to Sections 14(2)(c) and 14(2)(d) of the Act.

### **Analysis and Discussion**

#### **The Law**

11. Order 33, Rule 3 states:-

"The Court may order any question or issue arising in a cause or matter, whether of fact, or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated."

12. Section 14 of the Act states:-

"14. (1) The duties of the body corporate shall include the following —

- (a) to operate the property for the benefit of all unit owners and to be responsible for the enforcement of the byelaws;
- (b) to keep the common property in a state of good and serviceable repair;
- (c) to insure and keep insured the building (in respect of which the body corporate shall be deemed to have an insurable interest) to the replacement value thereof against fire, hurricane and seawave unless the unit owners by unanimous resolution otherwise decide;
- (d) to insure against such other risks as the unit owners may by special resolution determine for which purpose the body corporate shall be deemed to have an insurable interest;
- (e) to comply with notices or orders issued by any competent public authority requiring repairs to or work to be done in respect of the property or the building;
- (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 of the byelaws.

(2) The powers of the body corporate shall include the following —

- (a) **to establish funds for administrative expenses sufficient in the opinion of the body corporate for the operation of the property**, for the payment of any premiums of insurance, for the establishment of reserves for capital improvements or renewals of common property and the discharge of any other obligations of the body corporate;
- (b) to determine from time to time amounts of money to be raised for the purposes aforesaid;
- (c) **to raise the amounts of money so determined by levying contributions on the unit owners in proportion to the unit entitlement of their respective units;**
- (d) **to recover from any unit owner any sum of money expended by the body corporate for repairs or work done by it or at its direction in complying with any notice or order issued by a competent public**



**authority in respect of any part of the property comprising the unit of any unit owner;**

(e) to employ such staff as may be deemed necessary to carry out its duties;

(f) to receive the proceeds of any insurance taken out by the body corporate against the loss or damage of the building in trust for the unit owners in proportion to their respective interests and, subject to the provisions of section 31 of this Act, to apply the same for the repair or reconstruction of the building, and

(g) **to exercise any other powers as may be conferred upon the body corporate by the Declaration or the byelaws.**

**(3) All agreements, decisions and determinations lawfully made by the body corporate in accordance with this Act, the relevant Declaration and byelaws shall be deemed to be binding on all unit owners.” (EMPHASIS MINE)**

13. Clauses 5.8 of the Amended Declaration provides “Hotel service shall not be available for rental apartments (except those in the Hotel Pool). Maid services, and other services are available and such may be arranged for at the Front Desk at the established charges.”

14. Clause 5.9 of the Amended Declaration provides:

“No owner shall rent his unit for short term occupancy on any regular basis (“Short Term” being defined as any rental or occupancy for a period of time less than Thirty [30] days). Such short term rentals shall, however, be permitted from time to time subject to the following:

a) such rentals are to persons not regularly resident on Grand Bahama;

b) the Owner shall have advised the Front Office in advance of the name of the person or persons to whom rented;

c) the period of occupancy;

d) the rental rate charged, or to be charged;

e) whether the rent has been collected in advance by the Owner, or whether the rent is to be collected from the occupant on his arrival or departure.”

15. Clause 5. 10 of the Amended Declaration provides:

"The Company shall deduct twenty-five per cent (25%) from the gross rental, to cover its expenses **for the above services**, and shall credit the balance of the rental to the Owner's Maintenance or other accounts. If no maintenance or other charges are owing by the Owner, such rental income shall be forwarded to the Owner at his request, or credited to future maintenance."

16. The basis of the Plaintiff's claim as found at paragraph 4 of the Re-Amended Statement of Claim is that: "the Plaintiff has been charged various fees and other charges by the Defendant that the Defendant knows are not provided for by the Condo Rules or are contrary to the Condo Rules or otherwise contrary to law." Additionally, at paragraph 6 of the Re-Amended Statement of Claim the Plaintiff also alleges that in June 2012 the Defendant began charging him 25% of the gross rental income of his unit on the basis of an "old provision" of prior bye-laws of Coral Beach whereby unit owners committed their units to the Defendant and the Defendant found guests or tenants and provided daily services and retained 25% of the rentals. He alleges that because the Defendant no longer provides such services, the Defendant is wrong in law and equity for "extracting" the 25% of gross private rental even if the old provision is still applicable.

### **Submissions**

17. Counsel for the Plaintiff, Mr. Christopher Gouthro submits that Section 5.10 of the Amended Declaration is ultra vires the Act for two reasons, firstly, Section 5.10 does not derive its authority from any of the provisions of the Act. He submits that the Act specifies only two ways that the Condominium Association can raise money, i.e. by Section 14(2)(c) raising money by levying contribution according to unit entitlement or by Section 14(2)(d) recovering from a unit owner money for repairs or work done to the unit of a unit owner. It is his submission that Section 5.10 of the Amended Declaration does not fall within either Section 14(2)(c) or (d) of the Act. Moreover he further submits that there is no power given to Condominiums to raise funds against specific owners as opposed to all the owners and such power to raise money cannot be used to discriminate against one owner or a group of owners. Lastly, he submits that the threat of using rental and administration fees against a single owner operates as an arbitrary weapon and thus provides justification for striking such rental and administration fees from the Declarations as being void in the interests of the public generally. He relies on the cases of **Re Basmadjian and York**

**Condominium Corp No. 52 of 1981; The Proprietors, Strata Plan No. 64 v Reef Village Estates Limited Civil Appeal No. 2 of 2015; Couture v TSCC No. 2187.**

18. The case of **Re Basmadjian and York Condominium (supra)** dealt with the Condominium Corporation passing a by-law which purported to levy a monthly rental administration charge against unit owners who leased their units. The applicant refused to pay the additional charge and the Condominium Corporation registered a lien against her unit for arrears of common element expenses. The applicant brought the application to construe the by-law and the Court held that the by-law was ultra vires the Corporation. The Court in making its determination considered the provisions of the Ontario Condominium Act, 1978 Sections 3(5); 28(1) and 28(4). Section 3(5) of the Condominium Act, 1978 states that where any provision in a declaration or by-law is inconsistent with the provisions of this Act, the provisions of the Act shall prevail and the declaration or by-law is deemed to be amended accordingly. Section 28(1) of the Condominium Act, 1978 provides for the board to pass by-laws not contrary to the Act or the declaration and it goes on to make provisions for the ways in which the board may pass these by-laws in compliance with the Act. Section 28(4) of the Condominium Act, 1978 states that the by-laws shall be reasonable and consistent with the Act and the declaration. The Court determined that such by-laws were ultra vires or invalid for being beyond the powers of the Corporation to enact.
19. In **The Proprietors, Strata Plan No. 64 v Reef Village Estates Limited (supra)** the primary issue for determination on the appeal by the Court was whether the strata corporation, a creature of statute could by resolution adopted by a majority of its members, enlarge its powers of collection of assessments to include sanctions for late and delinquent payers. The Court upheld the trial judge's ruling whereby she determined that the Respondent was liable to the Appellant representing fees and assessments charged for the period May 2011 to October 2013 as it related to the 5% late fee and that the amendment to the by-laws was invalid. The Court also determined that the governing legislation in Alberta, in particular sections 39(8) made provisions for a regime to enforce collection of assessments, and section 41 to collect interest on overdue assessments however there were no comparable provisions in the Laws of Belize. The Court stated that this case was a clear case for a comprehensive update of the Strata corporation legislation

to deal with dilatory and delinquent unit holders but the remedy sought lies with Parliament and not the Courts.

20. In **Couture v TSCC No. 2187** the Condominium Corporation development consisted of 44 residential units and 32 parking spaces. These parking spaces were leased to residents on a priority and restrictive basis. Further, nonfunctioning and unlicensed vehicles were not permitted to be stored in the garage to avoid having other residents wait to obtain a spot. After discovering Couture had a vehicle parked that had an expired license plate, two flat tires and was uninsured the Board wrote to her requiring to bring her car into good standing. Another letter was sent advising that her failure to provide the up to date information would result in her parking privileges being withdrawn. Couture responded advising that she did not receive the first letter and she sent the car to be fixed but she took issue with the Board's interpretation of her rights to the parking space and argued she retained exclusive use to the space irrespective of her ownership of the vehicle, working or not. During this time the Board had returned her maintenance cheques (postdated) which had included the parking rent however Couture resubmitted her cheques inclusive of the parking rent. The Board revoked her parking privileges on the basis that she had not provided them with any documentation of her vehicle. A lengthy battle ensued between the parties with Couture refusing to submit her common expense cheques that did not include the parking rent and the Board refused to accept them. The Board refused to enter mediation with Couture and the Board registered a lien against her unit for failing to pay common expenses. The Board levied a \$250 administration fee against Couture to cover the conduct of her husband (he was harassing other residents) and a second lien was registered against her. The matter finally came on for hearing years later and the Court determined that the Board was bound to refrain from termination Couture's rights under the parking lease until the notice period identified in their letter to her had expired; that the Board had acted illegally and oppressively towards Couture, holding that the liens were invalidly registered against title to her unit and used to punish her in legal fees rather than bona fide methods to collect amounts; that the Board acted in violation of its own by-laws by refusing to participate in mediation and arbitration and the repeated administrative fees levied against Couture were held to be ultra vires to the scope of the Board's authority.

21. The by-law to which the Court determined was ultra vires stated "The contravention of any provisions of the Act, declaration, by-laws and/or rules of the Corporation, shall give the Board, subject to its duty to act reasonably in addition to any other rights set forth in the Act and the declaration, the right to: (d) impose an administrative fee of up to \$250 per incident against the owner of a Unit responsible for breach of the Declaration, By-laws and/or rules of the Corporation by the owner...as a reasonable cost incurred by the Corporation for the extra administrative work involved in enforcing the Declaration, By-laws and/or Rules of the Corporation." Justice Myers agreed with Justice Maloney in **Basmadjian v York (supra)** where his Lordship suggested that such by-laws were ultra vires or invalid for being beyond the powers of the Corporation to enact. Justice Myers stated that Counsel for the Board did not point to any provision of the statute that empowers the Condominium Corporation to enact by-laws allowing them to levy administrative fines and these types of fees had the potential to operate as an arbitrary weapon. Thus he viewed the fees as improper and the provision that purported to authorize them as ultra vires of the corporation.
22. The Court ultimately determined that the Board ignored Couture's legitimate expectations and failed to conduct its affairs reasonably and in good faith and was awarded Judgment in the amount of \$15,623.05 representing prejudgment interest inclusive of the return of funds paid out on the liens and \$1,000.00 as nominal damages for oppression. However, each party was left to bear their own costs as a result of their conduct.
23. Counsel for the Plaintiff further submits that the second reason Section 5.10 of the Amended Declaration is ultra vires is that the Act requires assessments and charges to be dollar amounts and that those amounts be apportioned by unit entitlement and not a 25% percentage assessment. Additionally, he submits that Section 5.10 of the Amended Declaration is ultra vires to the constitutional rights of owners as it purports to unjustly restrict the right of owners to dispose of their unit by lease.
24. Mr. Gouthro submits that the singular issue is whether the Act allows rental fees to be charged to a single owner then Section 5.10 of the Amended Declaration is void and all rental fees paid by the Plaintiff to the Defendant must be refunded.
25. Counsel for the Defendant, Mr. Jacy Whittaker in response to the Plaintiff's application submits that the Plaintiff's ownership of the unit is subject to the provisions of the Declaration of Condominium, in particular Clause 20 (e); The Amended Declaration,



Section G; the First Schedule to the Amended Declaration, and in particular subsections 5, 5.1-5.3, 5.5-5.6, and 5.10.

26. Mr. Whittaker submits that the preliminary point is not a "unique legal question" as the issue has been addressed in numerous Bahamian authorities. He refers the Court to **Joan Bowe v Jansel Court Condominium Association 2009/CLE/gen/FP/115** in support of his submission and states that in that case the Court accepted the fact that the Association's authority to levy fees (annual fees for a covered parking space, locker rental and parking fines) could have come from a resolution of its members in a general meeting. He also referred the Court to the case of **Hampton Ridge Condominium Association Limited v Terou Bannister et al 2016/CLE/gen/0406** whereby the Court in that case determined that the unit owners had breached the restrictive covenants contained in the byelaws and the unit owners were bound by the byelaws and the Declaration as all unit owners are bound to adhere to those governing documents. Mr. Whittaker also referred the Court to **Swart and others v. Metaxides (In his capacity and as a representative of six others) and another [2017] 2 BHS J. No. 10** in support of his submission.
27. In **Joan Bowe v Jansel Court Condominium Association (supra)** the Plaintiff was the owner of an apartment in Jansel Court Condominium and was charged a monthly maintenance fee pursuant to the provisions of the Declaration and from time to time the Defendant levied assessment fees on the unit owners of the Condominium. The Plaintiff was granted exclusive use of a locker on the property and a covered parking space, both which attracted a fee. The Defendant wrote to the Plaintiff advising that she was in arrears of her regular maintenance and assessment fees and failing to become current would result in a lien being placed on her apartment. In addition to those arrears she also had accrued unpaid charges for the locker rental, parking fees and parking fines. The Plaintiff admitted to owing the Defendant with respect to the structural assessment fees but refused to pay for the exclusive use of the locker and parking area and the fines levied against her for the parking violations. As a result she sought to challenge the Defendant's authority to firstly charge the aforesaid sums and secondly to recover them by "placing a lien" on her unit. The Defendant contended that the provisions for locker and parking fees were set out in the Condominium's rules and regulations which were in effect from 1984 and each owner including the Plaintiff was provided with a copy of such rules and

regulations and in her application for approval to purchase the apartment agreed to abide by all rules and regulations then in effect or thereafter promulgated by the Board.

28. The Court considered the provisions of the Act in particular Justice Evans considered Section 14(1), (2), (3), Section 18, Section 21, Section 22, clause 13 of the Declaration and paragraph 1 of the by-laws set forth in the second schedule of the Act. The Court determined that the policy regarding the locker rental and parking spaces appeared to have been in place for more than thirty years and was in place when the Plaintiff purchased her unit in or about 1990. Further, the Court stated that 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" to which it was understood to mean that the unit owners may indicate their desires or wishes to the body corporate otherwise than by a resolution. The Court continued that if the members did not agree or accept the decision of the directors as binding on them, they could express their dissatisfaction and resolve to dissolve the policy or rescind the director's decision to impose the charges in a general meeting. The Court stated that the members after 30 years not having directed the Board otherwise seem to have acquiesced. Therefore the Court found that the body corporate had the authority to charge the fees for the exclusive use of a locker and parking space on the common property and the fees were lawful. However, the Court determined that the fees charged for the exclusive use of the lockers and covered parking areas and the fines levied for parking violations were not "contributions" under the Act and should not 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.

29. In **Hampton Ridge Condominium Association Limited v Bannister and another (supra)** the Court determined after hearing all of the evidence and preferring the Plaintiff's evidence to that of the Defendants that the Defendants had breached the restrictive covenant by renting their condominium for periods of less than three months. Justice Charles held that the Defendants were bound by clause 3 of the Declaration and were in breach of the same.

30. In **Swart and others v. Metaxides (In his capacity and as a representative of six others) and another (supra)** the Court of Appeal determined that in this action the Court did not have the jurisdiction to vary a consent order. Further, the Justices of Appeal



determined that the original consent order also did not stand as they stated that the Board ought to have reverted to the body corporate in a general meeting and apprise the unit owners of what they proposed to do and to get approval from them for that action. Therefore, as the Board failed to inform the owners and get their consent for the consent order, it lacked the authority to compromise the action in the manner it did. The Court also determined that the Trial judge lacked the jurisdiction to amend the consent order and the appeal succeeded.

31. It is Mr. Whittaker's submission that the rental fee is provided for in the Amended Declaration and was passed by a member's resolution on February 10, 1978. He submits that if the Plaintiff or any other members of the Defendant wished or wishes to amend or change the governing documents a members' meeting must be requisitioned for a new resolution to be voted on and passed (Articles 51-59 of the Defendant's Articles of Association speaks to members voting and rights at general and extraordinary meetings). He referred the Court to **Lucayan Towers South Condominium Association (a Body Corporate in virtue of the Law of Property and Conveyancing (Condominium) Act) and others v. Prudden and others** [2015] 1 BHS J. No. 103 and **O'Connor and others v Proprietors, Strata Plan No 51 - [2018] 4 WLR 22** in support of his submission.
32. In **O'Connor and others v Proprietors, Strata Plan No 51 (supra)** the Privy Council upheld the validity of a short-term letting by-law made in the Turks and Caicos Islands as a means of protecting residential use within a condominium development.
33. He further submits that the Plaintiff agreed to be bound by the "governing documents", i.e. the Amended Declaration, Byelaws, the Body Corporate's resolutions and Articles of Association when he purchased the unit and as such is bound by the same. He refers the Court to **Swart and others v. Metaxides (In his capacity and as a representative of six others) and another** [2017] 2 BHS J. No. 10; **O'Connor and others v Proprietors, Strata Plan No 51 - [2018] 4 WLR 22**; **Section 23 of the Condominium Act; Knowles v. Town Court Management Company (D/B/A The Town Court Condominium)** [2013] 1 BHS J. No. 206 in support of his submission.
34. Mr. Whittaker also submits that the Plaintiff has had actual or implied notice of the byelaws (Section 5.10) and never contested any payments prior to the action and completed rental applications which provided for the deductions thus accepting that the rentals were

subject to fees. He submits that the doctrines of estoppel and waiver apply and relies on the case of **Joan Bowe v Jansel Court Condominium Association (supra)**.

35. It is also Mr. Whittaker's submission that the Byelaws are not ultra vires and that Plaintiff seeks to ignore Sections 14(3) and 14(1) of the Act in support of his claim. He submits that numerous associations throughout the Bahamas have interpreted Section 14 of the Act as a minimum mandatory requirement and not as a ceiling. He refers the Court to Section 9.6. of **Benion on Statutory Interpretation** which states :- "*When considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment corresponds to its legal meaning, the court should assess the likely consequences of adopting each construction, both to the parties in the case and (where similar facts arise in future cases) for the law generally. If on balance the consequences of a particular construction are more likely to be adverse than beneficent this is a factor telling against that construction.*" He also refers the Court to **R v Committee of Lloyd's, ex p Moran** (1983) Times, 24 June, whereby Mustill J stated:-

*"a statute ... cannot be interpreted according to its literal meaning without testing that meaning against the practical outcome of giving effect to it".*

36. Mr. Whittaker contends that the Act and the governing documents have the same rules of construction such that words are to be given their natural meanings and if they are plain and clear there is no need for other aids of interpretation and therefore the Act and the governing documents are to be read as a whole. He refers the Court to **Abel v Lee** (1871) L.R.6 C.P. 365 at 371. Additionally, he submits that while the Plaintiff places heavy reliance on Section 14 of the Act imposing certain duties on the Defendant, Section 6(4) of the Act states that when recorded a Declaration is binding on all unit owners in the building to which the Declaration relates and constitutes as constructive notice to subsequent purchases and other persons. Further, he submits that the section would also apply to any amendments to the Declaration and the Plaintiff's conveyance would contain a reference to the governing documents. See **Joan Bowe v Jansel Court Condominium Association (supra); Hampton Ridge Condominium Association Limited v Terou Bannister et al 2016/CLE/gen/0406, Section 14 (3)** of the Act.
37. In response to the Plaintiff's reliance on Canadian authorities in support of his submissions Mr. Whittaker submits that the Ontario Act (which the Canadian authorities were determined on) which the Plaintiff relies on is not similar to the Bahamian provisions as

found in the Bahamian Act. He further submits that the Ontario Act provides various statutory measures that do not exist in this jurisdiction, in particular Section 28(4) of the Ontario Act which states "by-laws shall be reasonable and consistent with this Act and the declaration." He also submits that the Plaintiff ignores the threshold question of whether the rental byelaws contained in the Amended Declaration fall within the authority granted to the body corporate by Section 14(1)(f) and (g) and 14(2)(g) of the Act with the latter granting the body corporate to exercise any other powers conferred upon it by the Declaration or the byelaws. It is his submission that the enforcement of the rental byelaws in the Amended Declaration falls squarely within the "duties" and "powers" conferred on the body corporate pursuant to Section 14(1)(f) and (g) and/or 14(2)(g) of the Act and refers the Court to Section 15(2) of the Act.

38. The Defendant in his Written Submissions has referred the Court to several other cases but I did not find them to be helpful to the Defendant's case. **Goodyear v Maynard (supra)** determined that the Declaration was defective as it did not comply with section 4(1)(l) of the Act. The determination in **Lucayan Towers South (supra)** as referred to by Counsel for the Defendant followed an attempt by the parties by way of an application to arrest the Chief Justice's prior judgment to which he determined was an attempt to rehear the matter. While I find it was not a part of his decision, the learned Chief Justice said at paragraph 12 "*I conclude this Ruling with an observation that it is difficult to understand why this matter cannot be resolved. The wishes of the majority of unit owners should prevail and the directors elected by them should run the Association. If unit owners do not agree with decisions of the directors those differences should be resolved within the context of the rules of the Association.*" The learned Chief Justice's remarks were made obiter.

### **Discussion**

39. The Courts are not strangers to these types of matters involving condominium disputes. While Counsel for the Plaintiff has sought to rely on Canadian cases in support of the Plaintiff's contention, it is important to note that those cases were determined based on the statutory regime of the relative province or state. Mr. Gouthro has submitted that the provisions of the Canadian Condominium Act are similar. However, I cannot accept that submission as both Acts are in stark contrast to one another. In particular, the case of **Re Basmadjian and York (supra)** was determined upon consideration of sections 3(5),

28(1) and 28(4) of the Canadian Condominium Act. These provisions highlighted above are not found in the Act and as such I do not find the case nor the Canadian cases to be persuasive authority on the issue.

40. The facts as I accept them to be are that the Amended Declaration of Condominium was made on February 10, 1978 and as such by virtue of Clause 1 *"The Owners of the Apartment units comprising the Coral Beach Apartment Hotel have by unanimous resolution consented to the Amendment of Declaration as hereinafter contained and to the execution by the Management Company of any conveyance or lease or designation on their benefit of the common property affected hereby and attendant to this Amendment..."* Additionally and I accept by virtue of clause 3 it states *"It has also been resolved that the Bylaws as now contained in the Declaration are null and void and are to be hereby deleted and that the Bylaws as contained in the First Schedule hereto (hereinafter referred to as "the said Bylaws") shall henceforth be in force with regard to the Coral Beach Apartment Hotel"*. To my mind, the Plaintiff upon purchase of his unit acquiesced to the governing documents, in particular the Amended Declaration and the subsequent by-laws. I found most persuasive the decision of Justice Evans in **Joan Bowe and Jansel Court (supra)**, where she found that if any members disagreed with any by-law or rule or regulation, the burden was on them to express their dissatisfaction in a general meeting and seek to resolve to dissolve the policy or rescind the Directors decision to impose the subject charges. In the instant case Articles 51-59 of the Defendant's Articles of Association deal with members' voting rights at general and extraordinary meetings which states:-

"51. A quorum shall consist of two or more shareholders present in person or by proxy holding together not less than fifty percent of the issued Class A Shares of the Company.

52. If within half an hour from the time appointed for the meeting a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved; in any other case it shall stand adjourned to the same day in the next week, at the same time and place as the Directors may determine and if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting, the members present shall be a quorum.

53. The President or Vice-President shall preside at every General Meeting of the Company. In their absence the members present shall choose someone of their number to be Chairman.

54. The Chairman may, with the consent of the meeting, adjourn any meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

55. Every question submitted to a meeting shall be decided, in the first instance by a show of hands, and in the case of an equality of votes, the Chairman shall, both on a show of hands and on a poll, have a casting vote in addition to the vote or votes to which he may be entitled as a member.

56. At any General Meeting, unless a poll is demanded as hereinafter provided, a declaration by the Chairman that a resolution has been carried or carried by a particular majority, or lost, or not carried by a particular majority, and an entry to that effect in the book of proceedings of the Company, shall be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against such resolution.

57. A poll may be demanded by any member present in person or by proxy either before or after the declaration of the result of a vote taken by show of hands.

58. No poll shall be demanded on the election of a Chairman of a Meeting, or on any question of adjournment.

59. The demand for a poll shall not prevent the continuance of a meeting for the transaction of any business other than the question on which a poll has been demanded."

41. Section 14(2)(a) of the Act states that one of the powers of the body corporate is to establish funds for administrative expenses sufficient in the opinion of the body corporate for the operation of the property, for the payment of any premiums of insurance, for the establishment of reserves for capital improvements or renewals of common property and the discharge of any other obligations of the body corporate. I am of the view that the 25% deduction from the gross rental to cover "hotel services" (i.e. maid services or otherwise), amounts to administrative expenses for the operation of the property. Section



14(2)(a) itself allows the body corporate to determine the way in which these administrative expenses are to be utilized after it is established.

42. Additionally and more importantly, I also accept Mr. Whittaker's submissions on the applicability of Section 14(3) and 14(2)(g) of the Act and that the enforcement of the rental byelaws provided in the Amended Declaration falls within the duties and powers conferred upon the Defendant under these provisions of the Act. I am also of the view that Section 14(2) of the Act sets out the powers of a body corporate which include any other powers conferred upon it by the Amended Declaration and the Bye-Laws and once lawfully made are binding on all unit owners. As such Section 14 of the Act must be read as a whole.
43. While the Plaintiff alleges that Section 5.10 of the Amended Declaration is ultra vires and as such he has been disadvantaged by it, a read of the provision itself paints another picture. In particular, once the hotel services are paid from the 25% deduction, the balance of the same is applied to the Owner's maintenance or other accounts and if there are no balances owed, the rental income can be forwarded to the Owner or credited to future maintenance as the owner directs. Firstly, the fallacy in the Plaintiff's argument is that these provisions were only applicable to him but no evidence was adduced to establish that only the Plaintiff was subjected to these provisions of the Amended Declaration. Secondly, in what way has the Plaintiff and any other unit owner been disadvantaged by a provision that is to his benefit. At the end of the day the 25% is in some way applied to the unit owner's maintenance or other accounts, if any or is returned to him.
44. Further, as stated above in paragraph 40, if the unit owners took issue with any provisions of the Amended Declaration they were well within their right to convene an AGM, hold a vote and effect such change and this avenue is still open to the unit owners, and such change ought not be made by the Court. In the circumstances, the Plaintiff is bound by what he agreed to upon his purchase of the unit which includes the said processes outlined in the governing documents for a change of policy or provisions in the said governing documents.

### **Conclusion**

45. Having read the pleadings, having considered the evidence, having read the submissions and having heard Counsel and having accepted for the most part the submissions of Mr.

Whittaker and for the reasons stated above I find that Section 5.10 of the Amended Declaration is not ultra vires the Act.

**Disposition**

46. As costs usually follow the event I see no reason to depart from the usual costs order. The costs of the Defendant is to be paid by the Plaintiff, to be taxed if not agreed.

This 9<sup>th</sup> day of August, A. D. 2021

  
**Petra M. Hanna-Adderley**  
**Justice**