COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division
2020/CLE/gen/No. 01354

BETWEEN:

LUCAYAN TOWERS SOUTH CONDOMINIUM ASSOCIATION

Plaintiff

AND

H. GODFREY WAUGH
WAUGH CONTRACTING COMPANY LIMITED
DOUGLAS PRUDDEN
(OR OTHER OWNER OR OWNERS OF UNIT NO. 1105)

Defendants

AND

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division
2020/CLE/gen/No. 01355

BETWEEN:

LUCAYAN TOWERS SOUTH CONDOMINIUM ASSOCIATION

Plaintiff

AND

GREGG WAUGH
WAUGH CONTRACTING COMPANY LIMITED
DOUGLAS PRUDDEN
(OR OTHER OWNER OR OWNERS OF UNIT NO. 1103)

Defendants

AND

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division
2020/CLE/gen/No. 01357

BETWEEN:

LUCAYAN TOWERS SOUTH CONDOMINIUM ASSOCIATION

Plaintiff

AND

JULIE GLOVER
DWIGHT GLOVER
(OR OTHER OWNER OR OWNERS OF UNIT NO. 907)

Defendants

Before:	The Honourable Mr. Justice Loren Klein
Appearances:	Meryl Glinton for the Plaintiff
	Harvey Tynes QC, with Tanisha Tynes-Cambridge for the Defendants
Hearing dates:	24, 31 March 2021, 22, 23 February 2022

KLEIN, J.

Law of Property and Conveyancing (Condominium) Act 1965—Condominium Association—Notice of Charge—Unpaid assessments for common expenses—Order 14, Rules of the Supreme Court (R.S.C.) 1978—Application for Summary Judgment—Principles—Issue or question in dispute or other issues which ought to be tried—Affidavit supporting or verifying facts—Dispute as to constitution of Body Corporate of Association—Mistake in name of defendants—Amendment—Quia Timet Injunction

INTRODUCTION AND BACKGROUND

Introduction

[1] Before the court are conjoined applications for summary judgment and injunctive relief in respect of charges registered against three sets of unit owners in a condominium complex in Freeport, Grand Bahama, called the Lucayan Towers South Condominium ("LTSC"). The charges are said to arise from unpaid contributions levied by the LTSC Association ("the Association"), which is the plaintiff in these claims.

[2] In addition to the usual issues which arise on summary judgment applications, the matters are bedeviled by the question of whether the plaintiff Association is legally entitled to institute the actions. This is because, for nearly a decade, two rival factions of unit owners have waged a bitter internecine struggle over the right to constitute the Board of Directors of the LTSC Association, and the defendants dispute the legitimacy of the current board.

[3] This dispute has played out in numerous pieces of litigation before the Supreme Court and Court of Appeal. Regrettably, it has split allegiances among members of the Association, resulted in near paralysis of the body corporate, and crippled the finances of the Association.

Procedural Background

[4] The plaintiff issued specially-indorsed writs commencing these actions on 22 December 2020, to which the named defendants in each of the actions entered appearances on 15 January 2021. The defendants have not filed any defences.

[5] By the writs, the plaintiff claimed five main heads of relief against the defendants, which are cast in materially similar terms except for the specific amounts claimed in each action. The first claim was for the amounts said to be owing or, alternatively, the debt as per the notice of charge, or the like amounts as damages, in the respective actions as follows: (i) action no. 01354, the sum of $29,136.96 or alternatively the debt of $25,782.52 [Unit No. 1105]; (ii) action no. 01355, the sum of $31,862.86, or alternatively the debt of $29,568.35 [Unit No. 1103]; and (iii) action no. 01357, the sum of $13,580.06 or the debt of $10,139.85 [Unit No. 907]. Secondly, interest was claimed on these amounts. Thirdly, the plaintiff claimed possession of the units associated with each action as against "*each of the defendants and any mortgagee claiming to be entitled to possession thereof*". Fourthly, the plaintiff sought a declaration that all the rights and privileges of the defendants in respect of the units *qua* owners are liable to forfeiture upon the Body Corporate exercising the right and power under s. 21 of the *Law of Property and Conveyancing (Condominium) Act 1965* ("the Act"), which grants the body corporate a power of sale for the purpose of enforcing a charge. Fifthly and lastly, an order was sought restraining the defendants, etc., from exercising any rights as unit owners, including use of the common property and other facilities, and from entering the building for any of those purposes, until further order.

[6] The summonses for summary judgment were filed 21 January 2021, and *ex parte* summonses for injunctive relief were filed 20 January 2021. The summonses are in materially similar terms and seek summary judgment in respect of the amounts claimed as against each set of defendants. They are supported by the affidavit of Godfrey Bowe filed 20 January 2021 in each matter ("the summary judgment affidavit"). Mr. Bowe swore several other affidavits in support of various aspects of the applications: a second affidavit filed 21 January 2021 (in all three actions); a third affidavit filed 23 February 2021 and a fourth affidavit filed 29 March 2021 (in action no. 01357); and a third affidavit filed 28 February 2022 (in nos. 01354 and 01355) in support of the amendment ("the amendment affidavit").

[7] The summary judgment affidavits set out, among other things, the notices of the charge in respect of each unit, which are all dated the 26 February 2020 and were recorded in accordance with s. 21(2) of the Act (Vol. 5061 of the Registry of Records, at pp. 220-267), and the demand letters issued to the defendants dated 15 December 2020. Other documents relevant to the applications are also exhibited. These include the orders made by then Chief Justice Sir Michael Barnett in consolidated actions 2013/CLE/gen/02044 and 2013/CLE/gen/FP/00230 (the significance of which actions will be explained later); the Court of Appeal's decision arising from those actions in SCCiv. App No.7 of 2015; and the certificate of taxation dated 21 November 2019 in the amount of $44,071.50, representing the taxed costs of the appeal in No. 7 of 2015 and payable by the "2013 Glover Board" (explained below). The second affidavit of Godfrey Bowe exhibited the defendants' responses to the demand letters, and the main purposes of the third affidavit was to put before the court certain documents relevant to action no. 01357 ("the Glover claim"), which I will come to shortly. The fourth affidavit of Godfrey Bowe was filed mainly in response to the Julie Glover affidavit filed on behalf of the defendants. These affidavits will be referred to as necessary in this Ruling.

[8] The plaintiff also filed a notice of objection on 22 March 2021 to the representation of the defendants by the firm of Harvey O. Tynes and Co. In the Notice, the objection was said to be based on the fact that Mr. Tynes QC and his firm were conflicted in the action, as a result of an alleged debt of $2,500.00 (with interest) owed to the plaintiff arising out of an Order made against him by the Court of Appeal in SCCiv. No. 303 of 2016, and therefore the firm should be removed from the record as counsel for the defendants. I indicated at the beginning of the proceedings that I did not think this was a matter that should disqualify counsel for the defendants from appearing, or deter the court from hearing the applications, and I say no more on it.

[9] The defendants filed several documents in response. Firstly, a notice of objection was filed on 6 March 2019, objecting to the capacity of the plaintiff Association to bring the action and proceedings. They also filed cross summonses on 26 March 2021 seeking, *inter alia*, to have the action stayed and the name of the plaintiff struck out, for reasons similar to those indicated in the notice of objection. The evidence filed in support of these applications and in opposition to the plaintiff's application was contained in an affidavit of Julie Glover, filed 17 March 2021, and affidavits of Godfrey Waugh filed 18 March 2021.

The relevant legal and statutory context

[10] The legal framework for the applications is the *Law of Property and Conveyancing (Condominium) Act 1965* ("the Act"). It sets out the statutory conditions for the creation and operation of the legal regime of fee simple ownership of property in a multi-storied building known as a "condominium". The affairs of a condominium are regulated by the provisions of the Act and its governing documents, which are the Declaration of Condominium ("the Declaration"), the byelaws and any rules made in accordance with the Act. The Schedule to the Act contains statutory byelaws which may be adopted, or which may operate in tandem with any byelaws developed by the Condominium Association. Section 13 of the Act provides for the operation of any property constituted as a condominium to be carried out by a body corporate, which may be either a statutory Association or a company formed for that purpose.

[11] The LTSC Association is the statutory body corporate for the purposes of managing the affairs of the Condominium, by virtue of s. 13 of the Act and a Declaration of Condominium dated 4 October 1988, lodged for recording in the Registry of Records on 14 October 1988 (Vol. 5061, pp. 220-835).

[12] The provisions of the Act are well known, and it is only necessary to refer in summary form to several salient sections and the portions of the governing documents that are relevant to these proceedings.

[13] Section 15 of the Act provides for the byelaws of a Condominium to include, *inter alia*, rules for "*the operation of the property*" [15(1)g)] and "*the determination of and collection of the common expenses*" [15(1)(h)]. Article 11(4) of the Declaration provides for unit owners to "*contribute to the common expenses in the proportions set forth opposite each unit number in the Fifth Schedule*" (i.e., the unit entitlement assigned to each unit based on its size or value,

etc., as a proportion of the overall size or value of the condominium complex). Common expenses include the expenses set out in the Fourth Schedule of the Declaration, which are defined to include monies levied or charged to the body corporate on account of a wide variety of items, such as insurance, taxes, utilities and services, including garbage collection, water and sewerage and electricity (unless separately metered), maintenance, realty taxes, remuneration of employees, and costs of any borrowings to carry out the objects and duties of the body corporate, etc.

[14] Section 18 of the Act provides for any contributions levied by the body corporate on a unit owner to be payable within 7 clear days after service of a notice in writing of the levying of the contribution. Further, sub-section 2 provides that:

> "18 (2) Any contribution which has not been paid by a unit owner upon its becoming due may be recovered as a debt by the body corporate in a court of competent jurisdiction and any such action shall be maintainable without prejudice to the rights conferred upon the body corporate by action in a court of competent jurisdiction and any such action shall be maintainable without prejudice to the rights conferred upon the body corporate by section 21 of this Act.

[15] Section 21 prescribes:

> "21(1). Any unpaid contribution due from the owner of any unit together with interest thereon at such rate as may be prescribed by byelaws, shall constitute a charge upon such unit with effect from the date on which such contribution becomes payable and shall rank prior to all other encumbrances on the unit except any charge under section 25(1) of the Real Property Tax Act or any Act amending or replacing the same.
> (2) The charge on a unit in pursuance of subsection (1) of this section shall not become effective until a notice in writing under the common seal of the body corporate is lodged for record in the registry stating– […]
> (3) Such charge shall continue in force until all sums secured thereby with interest shall have been fully paid or until the expiration of six years from the date on which the contribution was levied for the last payment (if any) on account of such contribution was made, whichever first occurs. Upon payment the unit owner shall be entitled on demand to the body corporate to a certificate under its common seal that the amount due has been paid and on lodging such certificate for record at the registry and the payment of a fee of four dollars such charge shall thereupon be satisfied.
> (4) The body corporate shall have the same powers of sale for the purposes of enforcing the change created by sub-section (1) of this section as a mortgagee under the provisions of the Conveyancing and Law of Property Act."

[16] Section 23(1) provides, relevantly, for a unit owner, his tenants, the employees of such owners and tenants and "*any other person who in any manner uses the property*" to comply with any byelaws in force relating to the property. Importantly, section 23(3) provides that:

> "(3) Action to enforce the provisions of this section shall be maintainable by the body corporate acting on behalf of the unit owners or by an aggrieved unit owner."

The test for summary judgment

[17] The principles to be applied on an application for summary judgment are trite and do not require great elaboration. But it is useful to recount the main principles.

[18] Order 14, r. 1 of the Rules of the Supreme Court 1978 ("RSC") provides as follows:

> "(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such claim or part except as to the amount any damages claimed, apply to the Court for judgment against that defendant."

[19] This is augmented by r. 3(1), which provides that:

> "3(1) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim, the Court may give such judgment for the plaintiff against that defendant on that claim or part of as may be just having regard to the nature of the remedy or relief claimed."

[20] It is well established that the court will carefully guard the Ord. 14 jurisdiction, as the effect of a successful application is to deny the defendant his ordinary right to have a trial. As pointed out by Charles J. in *Higgs Construction Company v Patrick Devon Roberts and another* [2020] 1 BHS J. No. 9 (paras. 26, 27):

> "Under O. 14 r 3, the test to be applied by the Court is whether there is any "triable issue or question" or whether "for some other reason there ought to be a trial". If a plaintiff's application is properly constituted and there is no triable issue or question nor any other reason why there ought to be a trial the Court may give summary judgment for the plaintiff.
>
> "It is a well-established principle of law that the Court ought to be cautious since it is a serious step to give summary judgment. Nonetheless, a plaintiff is entitled to summary judgment if the defendant does not have a good or viable defence to his claim. This is also in keeping with the overriding objective of Order 31A to deal with cases justly by saving unnecessary expense and ensuring timely and expeditious disposal of cases. It is also part of the Court's active case management role to ascertain the issues at an early stage and to decide what issues need full investigation at trial and to dispose summarily of the others."

[21] As to the approach of the court in determining Ord. 14 proceedings, it is also useful to bear in mind the observations of Ackner LJ in *Banque de Paris et des Pays-Bas (Suisse) SA v de Naray* [1984] 1 Lloyds Rep. 21, where he said:

> "It is of course trite law that Order 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, *ipso facto*, provide leave to defend; the court must look at the whole situation and ask itself whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendant's having a real or bona fide defence."

This test was subsequently endorsed by the UK Court of Appeal in *National Westminster Bank plc v Daniel* [1994] 1 All ER 156.

[22] In addition to the legal principles set out above, the ability to obtain summary judgment is also subject to several procedural requirements. Order 14 Rule 2 (1) provides that:

> "2. (1) An application under rule 1 must be made by summons supported by an affidavit verifying the facts on which the claim, or the part of a claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be, or no defence except as to the amount of any damages claimed."

Thus, an applicant for summary judgment must first meet the conditions-precedent imposed by rule 2(1), which is that there must be an application made by summons, and supported by affidavit evidence verifying the facts of the claim and stating that in the plaintiff's belief there is no defence to the action.

ANALYSIS AND DISCUSSION

[23] On behalf of the defendants, Mr. Tynes QC vigorously resisted the applications. Firstly, he took several technical objections to their manner and form, which he alleged did not comply with the stipulations of Ord. 14. Secondly, he contended that the defendants had shown cause that there were triable issues and had "otherwise" adduced reasons as to why there should be a trial.

Procedural objections

Compliance with Ord. 14, r. 2: requirement for verifying and confirming affidavit

[24] Starting from the proposition that the Order 14 procedural requirements are mandatory, Mr. Tynes QC argued that neither the affidavit for summary judgment nor, for that matter, any of the additional affidavits filed by the plaintiff, satisfied the requirement of Ord. 14, r. 2(1) to verify the facts on which the claim was based. However, he did not elaborate as to why the affidavit was said to be insufficient, and the court was not referred to any authorities supporting this contention.

[25] The verifying affidavit was made by Godfrey Bowe, a director of the body corporate and manager of the LTSC. It is in a slightly unorthodox form, but the operative paragraphs are in the following terms:

> "1. I am authorized in my aforesaid capacity to make this affidavit in support of an application by the Plaintiff for summary judgment in the action against the Defendants, in accordance with the Summons filed herein in conjunction herewith.
>
> […]
>
> 3. I have read the Writ of Summons and Statement of Claim in the action filed 10th December 2020, (*sic*) and had legal advice as to the significance or otherwise of

> documents mentioned in the Statement of Claim, namely, the Declaration (paragraph 1); the Notice of Charge (paragraph 4); the 15th December 2020 letter (paragraph 5); the Court of Appeal Judgment and the Supreme Court Orders dated, respectively, 4th September 2017 and 28th January 2015 (paragraph 8); the Certificate of Taxation (paragraph 9); the Grand Bahama Power Company electricity account (paragraph 13); copies of which are produced and exhibited hereto marked "GB1" to "GB 7", respectively.
>
> 4. I verily believe that there is no defence to the claims in the action."

[26] For all the zeal with which Mr. Tynes QC pressed this argument, I must say that I am not at all persuaded by it. In the commentary to Order 14 of the Supreme Court Practice 1995 ("The White Book"), para. 14/2/5, there appears the following practice note:

> "Verifying the facts—The verification may be by reference to the facts stated in the statement of claim, thus: "the defendants are justly and truly indebted to the plaintiffs in the sum of £ ....for […] and were so indebted at the commencement of this action. The particulars of the said claim appear by the statement of claim in this action." The affidavit need not set out all the particulars, nor verify the facts except by reference to the statement of claim (*May v. Childley* [1894] 1 Q.B. 451, and see *Murphy v Nolan* 18 L.R. Ir. 468); even when they have been added by amendment (*Roberts v Plant*) [1985] 1 Q.B. 597, C.A.). [Emphasis supplied.]

[27] The issue in *May v Childley* was that the verifying affidavit did not contain the required allegation that notice of a dishonored cheque had been given (required to constitute an action on a dishonored cheque), even though the allegation was contained in the specially indorsed writ. It was argued, therefore, that the verifying affidavit was deficient. Dismissing the appeal from the order of the judge at chambers giving leave to the plaintiff to sign final judgment, Wills J. said [p. 453]:

> "The function of the [verifying] affidavit is to verify the cause of action, and it does not matter that it does not state or verify all the particulars given in the statement of claim or special indorsement. The statement of claim or special indorsement would, it is true, be defective if the allegation of notice of dishonour were omitted, but the verification of the cause of action in the affidavit may be made in general terms."

[28] Thus, the case law clearly supports the position that verification of the claim may be done simply by reference to the statement of claim and can be in generic terms, as was done in this case. I also note, in this regard, that Ord. 14, r. 2 does not require any specific formulation of words for verifying or confirming the facts, and I find that the affidavit is sufficient to verify the cause of action.

Mistake in the names of the defendants

[29] The second point of attack was that there was an error in naming several of the defendants, specifically with respect to actions Nos. 01354 and 01355. In this regard, Mr. Tynes QC referred the Court to the 18 May 2021 affidavits of Godfrey Waugh, filed in both actions, in which he deposes that he is the Vice-President and a Director of Waugh Contracting Company

Limited, whom he states is the owner of the units (1105 and 1103) that are, respectively, the subject of the actions in 01345 and 01355. As may be seen from the intitulements, the summonses name "Waugh Construction (Bahamas) Ltd." as one of the owners, in addition to the other named individuals.

[30] Ms. Glinton countered with several arguments. Firstly, she contended that the defendants had entered unconditional appearances, and therefore must be taken to have waived all antecedent irregularities in the writ. Secondly, she argued that to the extent that there was any mistake in the naming of any of the parties, it had not caused any reasonable doubt as to the party intended to be sued. She then referred the court to the well-known provisions of Order 15, r. 6, and Ord. 20, r. 5. The first provides that no cause or action is to be defeated simply by reason of misjoinder or non-joinder of a party, and the latter empowers the court to grant leave to amend in a number of circumstances, including to allow the substitution of a new party if the court is satisfied that any mistake in naming the party was genuine and not misleading such as to cause reasonable doubt as to the identity of the person intended to be sued.

[31] In light of the reference to the court's amendment powers, I enquired of Ms. Glinton whether she would be seeking an amendment to correct the name in the pleadings. She indicated that to the extent that it was necessary and, in any event out of an abundance of caution, she would seek leave to amend and made an oral motion for leave to amend the names.

[32] Mr. Tynes QC strenuously objected to the application to amend, which he indicated was being made late (at the stage of Ms. Glinton's reply), and which he contended might affect the outcome of the applications. He also claimed that he would need to be satisfied of the specific terms and remit of the proposed amendment, notwithstanding that the question of amendment was only raised in the context of the mistake in the name of one of the defendants.

[33] Having, heard the parties on the question of amendment, I was satisfied that this was a proper case for the exercise of the court's discretion to grant leave to amend. In my judgment, the mistake sought to be corrected was a genuine mistake and it was not misleading so as to cause any reasonable doubt as to the identity of the person or persons intended to be sued (see, for example, *Rodriguez v Parker* [1966] 3 W.L.R. 546).

[34] For example, it was always clear that the plaintiff intended to sue the owner of the units in question. In fact, the names of the defendants were qualified in both of the referenced actions with the parenthetical description "*or other Owner or Owners of* [*the Unit No*.]" Furthermore, the notices of charge were also directed to the owners of the two units in questions, 1103 and 1105. Also, in each case, the respective defendants, or one of them, responded to the demand letters of 15 December 2020. Godfrey Waugh responded to the letter in No. 01354, which was addressed to Mr. H. Godfrey Waugh (Waugh Construction (Bahamas) Ltd.) and Mr. Douglas Prudden. He acknowledged receipt and indicated that "*<u>we</u> respectfully disagree with the amount stated as outstanding and request that you submit a copy of <u>our</u> current statement for apartment 1105 and 1103*" [Emphasis supplied]. The letter was signed by H. Godfrey Waugh. In addition, Gregg Waugh responded in respect of No. 01355, which was addressed to Mr. Gregg Waugh (Waugh Construction (Bahamas) Ltd.) and Mr. Douglas Prudden. Mr. G.

Waugh acknowledged the demand letter and indicated that he disagreed with the amount outstanding and requested a detailed copy of "our" current statement for apartment 1103.

[35] It is also significant, and a matter of which the court takes note, that notwithstanding the averment in the Godfrey Waugh affidavit as to Waugh Contracting Company Ltd. being the owner of both apartments, in the purported requisitions dated 14 September 2017 addressed to the Glinton Board (which is exhibited to the Julie Glover affidavit and which I will come to later), Gregg Waugh signed the requisition (which is sworn before a notary public) as the "*undersigned Unit Owner(s)*" of 1103. In that same requisition, in respect of Unit 1105, Godfrey Waugh signed as the "*undersigned Unit Owner(s)*", although in parenthesis after his signature was added "Waugh Contracting".

[36] In all of the circumstances of this case, I am satisfied that there are no features of injustice that would result from granting leave for the amendment. The persons who are either the owners of the Units or who have purported to be the owners of the units were served with the proceedings and acknowledged them, and therefore ought not to be allowed to set up a technical defence to the claims based on any error in the name of the defendants. I therefore granted leave for the amendments, on the usual terms as to costs and subject to the undertaking of the plaintiff to provide the defendant with the requisite documents for the amendment within two days. This was done, and the summonses and supporting affidavit were eventually filed 28 February 2022 for the purpose of amending the writ to substitute the name "Waugh Contracting Company Limited" for "Waugh Construction (Bahamas) Ltd."

[37] I am fortified in the view that it was proper to allow the amendments by dicta in *Roberts v Plant* (*supra*), in which a strong Chancery bench of the UK Court of Appeal said that while the Ord. 14 jurisdiction must be carefully watched "…*that does not mean that effect will be given to every unsubstantial technicality that may be set up by way of objection to proceedings under the order*."

[38] The issue in that case was that the writ was not properly indorsed, and there was an amendment made without leave to correct it before the adjourned hearing date of the summons for summary judgment. Objection to the amendment was taken at the hearing, but the judge held that the amendment was properly made and granted leave for summary judgment. Dismissing the appeal, Lord Esher MR said [p. 603]:

> "The defendant does not deny that he is indebted to the plaintiff in the amount of the cheque, but he sets up a number of technical defences. He says that when the writ was issued, the plaintiff had not brought himself within the terms of Order XIV., because he had not indorsed on the writ a complete cause of action, not having stated that notice of dishonour was given. It was argued that there was no power of amendment before adjudication on the summons taken out; but the proceedings must be commenced afresh, thereby causing useless expense. <u>In my opinion, the power of amendment in this case is just the same as in any other case. An amendment ought not to be allowed if it will occasion injustice; but if can do no injustice, and will only save expense, it ought to be made</u>." [Emphasis supplied.]

Whether any defence to action

[39] In his oral submissions, Mr. Tynes QC basically conceded that the defendants' affidavits did not condescend to disclosing any defences to the actions. For example, the Julie Glover affidavit focused largely on the objection to the capacity of the Body Corporate, and the only exhibit was the 2017 requisition for the removal of the Board. The Godfrey Waugh affidavit simply took the point as to the mistake in the name of one of the defendants in the two mentioned actions, and the alleged lack of validity of the notices again owing to the dispute over the persons entitled to constitute the Body Corporate. In fact, it seems for the most part that the defendants were content to rely on the procedural and technical objections.

[40] There are two points, however, that I need to address with respect to the issue of whether any real or *bona fide* defence is disclosed by the materials before the court. The first arises out of the second affidavit of Godfrey Bowe which, as indicated, exhibits the defendants' replies to the demand letters (although these were not deployed by the defendants in their affidavits of defence). The defendants, in respect of units 1103 and 1105, state in their reply letters that they disagree with the amounts stated as outstanding. The response in respect of unit 907 was simply that "*any direct response could be delivered after legal advice has been sought*", and nothing is said about the amount. They all requested audited accounts from the body corporate from 2017 onwards.

[41] What is notable about the reply letters is that none of them disputes liability; the first two simply indicate that they disagree with the amount claimed. If it is that the challenge is only to the quantum, then there was an onus on the defendants to put before the court some document or other evidence to show the grounds for disputing the amount, or for disputing liability.

[42] In this regard, reference may be made to the case of *Wallingford v Mutual Society* (1880) 5 App Cas 685, where, in discussing the principles related to an affidavit filed to show cause to defend an Ord. 14 application, Lord Blackburn said (at 704):

> "I think that when the affidavits are brought forward to raise that defence they must, if I may use the expression, condescend to particulars. It is not enough to swear, "I say I owe the man nothing." Doubtless, if it was true…that would be a good defence. But this is not enough. You must satisfy the Judge that there is a reasonable ground for saying so….It is difficult to define it, but you must give such an extent of definite facts…as to satisfy the judge that those are facts which make it reasonable that you should be allowed to raise that defence."

[43] The other point arises in the Glover affidavit and is peculiar to the "Glover application". She deposes that, aware that the common areas of the Condominium Complex were without electrical power for some time, on the 15 February 2021 she delivered to Godfrey Bowe two bank drafts drawn on Fidelity Bank Bahamas Limited payable to the "Grand Bahama Power Company Limited" representing payment of maintenance fees to the Lucayan Towers South Condominium, for which she received receipts from Mr. Bowe.

[44] As mentioned, Mr. Bowe deals with this issue in his third affidavit, which it will be recalled was filed well in advance of the Glover affidavit. There is no need to go into the affidavit in any great detail, but it discloses to the court that Ms. Glover did deliver two bankers drafts to Mr. Bowe, only one of which is relevant for the purposes of these proceedings. This was a draft for a payment of $14,727.03 payable on account of Julie Glover with reference to a particular account with the Power Company. Mr. Bowe indicates, in short, that conscious of the financial straits of the Association, he did accept the drafts and gave receipts, but immediately having examined the matter he realized that the payee was the Power Company, as opposed to the Association, and he could not give (and ought not to have given) a receipt for any payments to the Power Company. He therefore immediately went to return the said drafts to Ms. Glover and to retrieve the receipts, but Ms. Glover refused to take back the drafts or return the receipts.

[45] Mr. Bowe attempted to explain the rationale for the submission of these bankers drafts as follows, while conceding that this was "*but speculation*":

> "No doubt, as I now verily believe, Julie Glover was intending and hoping that eventually I pay the said drafts to Grand Bahama Power Co. Ltd.; and by reducing the amount by which the Plaintiff is currently delinquent in account with the said electricity provided that resulted in suspension of the electricity supply to the property including the building particularly she and Dwight Glover as Unit owners would have absolved themselves of their culpability or fault for the Plaintiff's indebtedness in that regard. It occurs to me she could have paid the money herself to Grand Bahama Power Co. Ltd., and have them credit the said account."

[46] Likewise, I cannot speculate as to what motivated Ms. Glover to deliver the banker's draft endorsed to the Grand Bahama Power Company, and Mr. Bowe's surmising in this regard is of no evidential value.

[47] However, what is plain is that the claim against the Glover defendants related to unpaid contributions for "*common expenses*", which were said to be $10,139.85, in the notice of charge, with an additional $3,440.021 levied at the time of the writ for total arrears of $13,580.06. The fact is that the defendant did not pay, and made no attempt to pay, the monies that were being demanded pursuant to the charge and the demand letter by the Association. Whether this was, as speculated by Mr. Bowe, to avoid recognizing the Association as the lawful body corporate, is neither here nor there. A statutory charge registered against a particular unit could not be discharged by diverting funds to the power company, which in any event might have been intended to pay for electricity personally consumed by the defendants.

[48] It is of some significance, also, that the Glover defendants did not attempt to rely on the bankers drafts by way of set-off, for example, to the plaintiff's claim, and as noted the drafts were disclosed to the court by the plaintiff. In any event, the drafts were not negotiated and it appears that they have now expired.

[49] I therefore do not find that the defendants by their affidavits have disclosed any facts or particulars to show that there is a bona fide defence to the claims.

Whether any triable issues or other reason for a trial

The capacity of the Plaintiff Association to bring the action

[50] As has been adverted to, in addition to the technical objections, the defendants strongly objected to the capacity of the current body corporate to bring these proceedings. This, as Mr. Tynes QC put it, was a fundamental issue and he contended that the defendants had thereby raised a triable issue. In their cross summons filed 26 March 2020, the defendants applied for a stay of the proceedings on the ground that "…*the Writ of Summons herein was issued and all subsequent proceedings thereon in the name of the Plaintiff have been taken without its authority*…".

[51] In the affidavit of Godfrey Waugh, the objection is presented in snapshot as follows:

> "11. At an Annual General Meeting held on the 21 March 2005, Maurice Glinton, Michaela Storr, Gordon Adderley and Godfrey Bowe were elected as the Board of Management of the Association ("The Glinton Board").
> 12. For the next nine years thereafter no Annual General meeting of the Association was held and no new Board of Management was elected.
> 13. Also, the Glinton Board failed to render audited accounts throughout this period in compliance with the provisions of Section 17(2) of the Act.
> 14. I am aware that immediately prior to 14 September 2017, the Glinton Board constituted the Board of Management of the Lucayan Towers South Condominium Association.
> 15. I am also aware that on the 14 September 2017, Unit Owners comprising more than one-half of the total proportion of Unit entitlements made a request in writing requiring the Glinton Board to vacate office as Members of the Board of Management of the Condominium Association pursuant to the provisions of Article V (8) iv of the Declaration of Condominium.
> 16. In spite of the written request made by the majority of Unit Owners on the 14 September 2017, the Glinton Board has continued to hold itself out as the Board of Management of the Association and on the 26 day of February 2020, Maurice O. Glinton and Michaela Virgill Storr purported to execute a Notice of Charge in respect of Apartment Unit Number 1105.
> 17. I am advised by Attorney Harvey O. Tynes and verily believe that the Notice of Charge is an invalid Notice and that this action against the Defendants named herein has been commenced without the authority of the Lucayan Towers South Condominium Association."

[52] In her affidavit, Julie Glover similarly deposed that the Glinton Board continues to hold itself out as the Board of Management of the Lucayan Towers South Condominium Association, in spite of the written request of the 14 September 2017 allegedly made by a majority of owners. She therefore rejects the validity of the notice of charge registered on 26 February 2020 against Unit 907 (owned by her and her husband).

Background to the dispute over the body corporate

[53] To give context to the assertions made in the affidavits of Julie Glover and Godfrey Waugh, and to understand how matters evolved to this point, it is necessary to provide a synopsis of the background history of the dispute. (A detailed account of the background to the leadership dispute may be referenced in the most recent Court of Appeal's decision in SCCivApp No. 37 of 2018.)

[54] The current board of directors ("the Glinton Board" referred to in the Waugh affidavit) was elected at an annual general meeting (AGM) held on 21 March 2005 and were subsequently elected at the 2006 and 2007 AGMs. No further elections were held until the 13 April 2013, when an Extraordinary Meeting was called and elections for the Board of Directors was held. Apparently, Douglas Prudden, Julie Glover, Yasmin Popescu, Linda Carroll-Strachan, Debra Edwards and Chris Rolle were elected ("the Glover Board").

[55] The results were disputed, and the Glover group commenced an action in Freeport on 28 May 2013 [2013/CLE/gen/FP/00230] naturally seeking to validate the results of the meeting and election. In the other corner, the Glinton group commenced litigation action in Nassau on 24 December 2013 [2013/CLE/gen/No. 02044] seeking to invalidate the results of that meeting. The consolidated proceedings came before the then Chief Justice, Sir Michael Barnett, who ordered at a directions hearing that a new AGM be convened for the purposes of conducting the business of the Association, including holding new elections. The 2005 Board, led by Mr. Glinton QC, arranged for the meeting to be held on 28 March 2014, but as a result of a dispute concerning quorum, it was adjourned to 11 April 2014. However, persons in the Glover camp stayed behind at the 28 March 2014 meeting and purported to conduct elections in which they purported to elect the same 2013 Glover board. They also ratified the 2013 AGM at which they were purportedly elected and any subsequent actions taken by that board.

[56] Not surprisingly, the Glinton group again approached the court and the Chief Justice, in a ruling handed down 21 July 2020 after a contested hearing, held that the Glover group was validly elected on 28 March 2014. He further held, however, that the Glinton Board was the valid Board for the period 8 January 2013 to 27 March 2014, in other words that the 13 April 2013 election meeting was not valid. This ruling was appealed to the Court of Appeal by the Glinton Board.

[57] In a decision dated 4 September 2017, the Court of Appeal overturned the Chief Justice's decision that the 28 March 2014 election was valid but did not disturb the findings as to the 2013 election. Therefore, the Glinton Board were effectively restored as the last Board to have been validly elected. An application was made for leave to appeal to the Privy Council, but leave was ultimately refused on 4 December 2018.

[58] As indicated above, however, some of the members of the Association were not happy with the outcome of the Court of Appeal's decision, and on 14 September 2017 (10 days after the Court's ruling) filed a requisition purportedly made by a majority of unit owners (57.51%) to remove the Glinton Board, pursuant to Article 8(5)(iv) of the Declaration. However, matters escalated beyond the filing of the requisition. On 6 November 2017, notice was given by signs posted within and about the Condominium complex of an intended GM of the Body Corporate

scheduled for 15 November 2017, at which it was intended to elect a new board of directors. In advance of the scheduled GM, and at the behest of Ms. Glover, on 7 November 2017 a private security firm was called in (accompanied by police) to change the office locks on the door of the resident manager of the complex.

[59] This triggered another round of legal proceedings. The Glinton Board applied that very day for injunctive relief in Freeport to restrain the Glover Board (along with another member of the Association) from interfering with their functions as the lawfully elected board of directors and from convening general meetings until further order. The LTSCA was named as the first plaintiff, with the Glinton Board as the second plaintiffs, the Glover Board as first defendants, and Ms. Tiffany Dennison as second defendant. A conservatory order was obtained from a single justice of the Court of Appeal restraining the conduct of any meetings until the outcome of the injunction hearing.

[60] On 14 February 2018, the learned Judge hearing the injunction application refused it and dismissed the application. This was appealed to the Court of Appeal, and another interim injunction was obtained from a single Justice of Appeal restraining the Glover Board from interfering with the functions of the Glinton Board and from calling any general or extraordinary meetings pending the determination of the Appeal. In a ruling dated 5 June 2019, the Court of Appeal allowed the appeal and overturned the decision of the Judge in its entirety. Its reasoning, in relevant part, is captured at paragraph 47 as follows:

> "As we see it, had the learned judge examined the Writ of Summons as carefully as she should have done, she would have concluded that the appellants were not seeking a free-standing injunction as she erroneously thought. On the contrary, the appellants were merely preserving their right as the lawful directors of the Association to manage the Association's affairs and to obtain the consequential relief prayed for in their Writ. While this Court's Decision of 4 September 2017 undoubtedly settled the primary dispute as to which group of persons were the validly elected directors of the Condominium Association, it did not follow that there did not exist other serious issues and/or consequential claims remaining in the proceedings which would have grounded the grant of interim injunctive relief. Even the most cursory examination of the pleadings in the court below reveals that there were numerous serious issues, claims and reliefs, still outstanding in the Nassau action which still remained to be heard and disposed of and which were consequential on this Court's having first settled the issue as to which group of persons was the validly constituted board entitled to manage and prosecute the Association's affairs."

[61] By Notice of Originating Motion filed 25 June 2019, the Glover Board applied for leave to appeal the decision of the Court of Appeal to the Privy Council. Before this court, neither counsel was able to indicate with any certainty the current status of the application for leave, but from enquiries made it appears the application is still pending. Interestingly, the main ground of appeal is as follows:

> "1. The Honourable Court of Appeal erred in law in failing to advert to the Applicant's reliance upon the specific provisions of the Bye Laws of the First Respondent Condominium Association namely Article V section 8(4) of the Bye laws and Declaration of Condominium of the First Respondent and the notice given by more than fifty percent

> of the owners of the said First Respondent that each of the directors of the Board of Directors be dismissed for the proposition that the Respondents herein had no authority to act other than to call a general meeting for the purposes of electing a new Board of directors AND that consequently the said Respondents herein had no authority to apply in the Court below for injunctive relief nor any authority to pursue and appeal. "

[62] Thus, the defendants now contend that the question of the meaning and effect of the requisition under Article V(8)(4) of the Declaration on the ability of the current board to institute any action, and in particular to bring the current applications, constitutes a question or dispute which ought to be tried. In fact, the issue had been raised as a preliminary one, but the court indicated that it would decide the issue as a part of the application for summary judgment.

[63] The case law makes it clear that the language of Ord. 14, r. 5 which requires the court to consider whether there was "*an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial*" are words of very wide import (see, for example, *Miles v Bull* (No. 1) [1969] 1 QB 256). But while a court should be slow to determine an application for summary judgment if there is some issue of fact or law raised which ought to be ventilated at trial, it is not unusual for the court to dispose of issues raised in the context of Ord. 14 proceedings which can be done without prolonged examination (see, for example, *British & Commonwealth Holdings plc v Quadrex Holdings Inc. [1989] QB 842).*

[64] In *Easyair Ltd. v. Opal Telecom Ltd. [2009] EWHC 339 (Ch.),* Lewison J. (as he then was), said:

> "vii. […] It is not uncommon for an application [for summary judgment] to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it."

While the judge there was setting out principles in the context of what is now Part 24 of the UK Civil Procedure Rules (which, in several important respects are admittedly not the same as the terms of Order 14), the general observations relating to the discretion of the court, in a proper case, to determine issues that might be raised on such applications are apposite Order 14.

[65] Likewise, to the extent that the capacity of the current Board is a question that needs to be answered for the purposes of these proceedings, I see no reason why the court should not dispose of it. I have heard full arguments from the parties on the point.

Relevant provisions of the Declaration

[66] In this connection, it is useful to set out a few relevant provisions of Article V of the Declaration, which deals with the Board of Management:

> (2) Election and Number of Board Members—The Board shall be elected at the first Ordinary Meeting of the Body Corporate after lodgment of this Declaration and in every

> subsequent year at the first Ordinary Meeting of the year. They shall be elected for a year or until the next Annual General Meeting, or until their successors are duly elected or until the office is vacated as provided under this Article. Until otherwise determined by the Body Corporate in General Meeting the Board shall consist of not less than three (3) nor more than seven (7) Unit Owners.
> […]
>
> (8) Vacancy, removal and disqualification—Subject as otherwise provided by this Article in respect to tenure, the office of a Board Member shall ipso facto be vacated:
> (i) If he becomes bankrupt, or suspends payment, or commits an act of bankruptcy, or makes any arrangement or composition with his creditors.
> (ii) If he becomes lunatic or of unsound mind.
> (iii) If by notice in writing to the Body Corporate he resigns his office.
> (iv) If he is requested in writing by Unit Owners of the Body Corporate holding or representing more than one half of the total proportions of Unit Entitlement to vacate his office.
> (vi) In the event of the Body Corporate in General Meeting fixing shareholding or other qualification for Board Members, he does not acquire the amount of qualifying shares or other qualifications within three months of his appointment or election or if he ceases to hold the required amount of qualifying shares or other qualifications.
>
> PROVIDED HOWEVER that the continuing Board Members may act notwithstanding any vacancy in their body, but, if and so long as their number is reduced below the number fixed by or pursuant to this Article is the necessary quorum of the Board, the continuing Board members or Member may act for the purpose of increasing the number of Board Members to that number, or of summoning a General Meeting of the Company, but for no other purpose."

[67] As indicated, the defendants' contention is that the Glinton Board was effectively removed by virtue of the 14 September 2017 requisition, effective 16 November 2017, after the date passed for the meeting at which new elections were to be held (15 November 2017). Thus, it is argued that Mr. Glinton QC and Ms. Virgill-Storr had no capacity to lodge the notices of charge against the units, which are invalid, and further that the Board has no ability to institute these applications.

[68] Having regard to the Court of Appeal's ruling in the injunction appeal, delivered on 15 June 2019, which confirmed that the Glinton board was the "lawful directors of the Association", I questioned Mr. Tynes QC as to whether this position was maintainable. Very clearly, the Court of Appeal's ruling was rendered in hindsight of the Article 8(5)(iv) requisition, and it appears tolerably clear from material placed before this court that the argument resisting the injunction was largely predicated on this development. However, the defendants maintain the view that the Court of Appeal did not specifically pronounce on the meaning and effect of the Article V(8)(iv) issue, hence the application for leave to appeal to the PC on this point.

[69] Ms. Glinton contended that the effect of the Rulings in the 2015 and the 2017 Appeals, whether or not the latter condescended to commenting specifically on Article 8(5)(iv), made it clear that the Glinton board was still the validly elected board. Therefore, in her view, the question of the requisition does not fall to be determined by this court on the application for summary judgment.

[70] I must indicate that I have great difficulty with the defendants' contentions that as a result of the 14 September 2017 resolution the current board is rendered without lawful tenure. Indeed, the defendants, through counsel, conceded before the Court of Appeal at the hearing that the appeal (which it may be recalled was against the refusal of the lower court to grant an injunction preventing the respondents from, *inter alia*, calling a general meeting for the conduct of elections) had by then been rendered academic as a result of actions taken by the respondents to the appeal. As counsel put it "… *my clients have taken a step in the Supreme Court which acknowledges that they cannot call an election. They cannot call an AGM. All they can do is seek an order of the court requiring the appellants to do what is necessary to cause the AGM to occur*."

[71] The Court of Appeal agreed with this assessment and held that consequently the issue of the injunction had become academic (see para. 26 of the Ruling).

[72] The plaintiff contends that the above representations, and other statements made to the Court of Appeal during argument in the 2018 appeal (which are recorded in the Court's decision), demonstrate that the purported requisition and the notice of an AGM contained therein, were formally abandoned by counsel acting on their behalf. In fact, they say the objection only resurfaced when these proceedings were filed.

[73] Apart from any issue of abandonment of reliance on the 2017 requisition, I agree that it is not properly a matter for the adjudication of this court, for the reasons that follow. In SCCivApp. No. 7 of 2015, the Court of Appeal decided that the Glinton Board was the validly elected board of directors of the Association. The application for leave to appeal that decision to the Privy Council was dismissed by the Court of Appeal on 4 December 2018. In SCCivApp. No. 37 of 2018, the Court of Appeal found that the Glinton Board was well within its legal rights to seek an injunction preventing acts of interference with the performance of its corporate duties. It overturned in its entirety the decision of the trial judge, which was seemingly predicated on a finding that the effect of the requisition was to remove any cause of action in the Glinton board. In its ruling, the Court of Appeal affirmed that the Glinton Board was "*...merely preserving their right as the lawful directors of the Association to manage the Association's affairs and to obtain consequential relief prayed for in their Writ*." A notice of motion to appeal to the Privy Council was filed, but remains outstanding, and no stay of the Court's decision was obtained.

[74] In my judgment, the upshot of this is that this court is precluded from going behind the specific findings and effect of the Court of Appeal's decisions and is bound to accept that the current lawful board of management of the Association is the Glinton Board. To be sure, if the purported representations of the percentages in the requisition are correct and if it were validly done (which the plaintiff disputes), it would constitute grounds for the Board to invoke the democratic process under its Declaration to call for new elections. In fact, it seems that this was the trajectory on which the parties were headed when they last appeared before the Court of Appeal. It is regrettable that this has not yet occurred, but as noted by the Court of Appeal, this was contingent on several events taking place (para. 48):

> "…before the second appellants [Glinton Board] could properly resume their duties as the validly constituted Board of Directors, a proper hand-over to the second appellants and a proper Accounting of the Association's affairs and monies collected by the respondents necessarily had to be made. It also had to be determined, *inter alia*, who the current unit owners were; and secondly, which unit owners were financial and entitled to vote at the Association's meetings. Also to be determined in the proceedings in the court below is what monies had been collected and expended by the respondents during the period when they purported to act as the Association's directors."

[75] It appears that many of these issues are still outstanding between the two groups, and this may therefore explain why certain other steps have not been taken. In fact, speaking to this point in his fourth affidavit, Godfrey Bowe deposed as follows:

> "…[W]e, the current Board are unable to give notice to the Unit Owners of an AGM or even establish quorum, unless and until the Supreme Court determines that issues arising out of the 2013 Actions, including what if anything was the effect of the action taken by the said Julie Glover whilst the 2015 Appeal was pending, and how the purported transactions are to be treated, if held to be valid and binding."

The actions taken while the 2015 Appeal were pending include the purported sales of several units within the condominium, and the validity or otherwise of those sales remains unresolved.

[76] It cannot be gainsaid that, in light of the obdurate and polarizing positions taken by the various camps, the multiple litigation spawned by these conflicts and the 2017 requisitions, it would be in the best interest of the Association (if not crucial to its survival) for the body corporate to seek the mandate of the members through the democratic process ordained by the Declaration. But there are formidable legal and practical reasons why this has not taken place. Be that as it may, until new elections are properly called and conducted, the objection taken in particular to the capacity of Mr. Glinton and Ms. Virgill-Storr, in their corporate capacities, to lodge the notices of charge giving rise to these claims and generally to the capacity of the plaintiff Board to institute and maintain these proceedings, is not sustainable.

[77] I therefore do not find that the requisition issue constitutes a triable issue so as to militate against summary judgment on the claims. Accordingly, I dismiss the defendants' summonses for a stay of the proceedings brought by the plaintiff Association on the grounds that the writs and any subsequent proceedings were taken without requisite authority and refuse to strike out the name of the plaintiff in the writ and subsequent proceedings.

The injunction claim

[78] As mentioned, there was also a claim by *ex parte* summonses filed 20 January 2021 for the grant of injunctive relief pending trial of the action or further order. The interim relief sought were orders suspending the ownership rights of the Unit owners and any other persons lawfully occupying the units or claiming through them, including the use of common property and facilities, and preventing them from entering without the permission of the plaintiff, pending

trial of the action or further order. This order was to stand suspended upon the payment of the debts claimed within 14 days of the making of the order.

[79] However, it is noted that the plaintiff's detailed skeleton argument submitted in support of the application, describe the applications as "*quia timet injunctions pending trial of the Summons for summary judgment or hearing of the substantive application*" [Emphasis supplied.] As part of the rationale for urging the court to grant the relief it was stated that "*Such relief is not unprecedented, the Court having made similar orders in 2006/CLE/gen/FP No.0121 and 2006/CLE/gen/FP No.0127 in practically identical circumstances, all dated 4 April 2007, on applications by the same body corporate against the Unit owners*." However, it does not appear that the orders referred to were productive of any reasoned decisions (as least none were provided to the court), so it is not known what assistance (if any) the court is able to derive from the cited examples.

[80] I do not propose to say very much about the claim for injunctive relief, considering that the summonses for summary judgment have been heard and determined and it seems (at least as the position was put in the written submissions) that the relief was to some extent claimed pending the hearing of the summonses. I am also mindful that the defendants did not address these claims in any significant way. But out of deference to the full submissions of the plaintiff, I will add a few comments.

[81] The technical legal basis on which it is said the injunctions are sought is to prevent the breach of the covenants to pay maintenance assessments for the use and enjoyment of the common property, which are embodied in the declaration and byelaws, and ordained by statute. The common law has been settled for over a century that there is an equitable jurisdiction to grant an injunction (interim or final) to prevent the breach of a covenant. (See, for example, *Doherty v Allman* (1978) 3 App. Cas., Per Lord Blackburn at p. 728-729); and, for an example in the context of a Condominium Association, see the decision of Charles J. in *Hampton Ridge Condominium Association Ltd. v. Terou Bannister and anor.* [2016/CLEg/gen/00406], where an interim and later a perpetual injunction was granted preventing the defendants from renting/leasing out their unit for periods of less than three months contrary to the covenant contained in the Declaration of Condominium.) Indeed, the ability to obtain equitable relief by way of injunction for the breach of any covenant or restriction is specifically provided for at s. 23(4) of the Act.

[82] However, this is the way in which the claim for the injunction was put in the plaintiff's skeleton argument:

> "2.02. The Court is asked to grant mandatory injunctions *quia timet* within its discretionary jurisdiction in circumstances warranted by settled legal principles the House of Lords authoritatively laid down in *Redland Bricks Ltd. v. Morris*: (1) 'A mandatory injunction can only be granted where the claimant shows a very strong probability upon the facts that grave damage will occur to him in the future'; (2) the claimant must also show that damages will not be a sufficient remedy if such damage does happen; and (3) there must be a precision in what the defendant is ordered to do."

[83] It is useful to recall that *Redland Bricks v Morris* was a case where a mandatory injunction had been granted under the second limb of *qui timet* actions identified by the House of Lords—i.e., where damage had already taken place which continued to pose a menace to the plaintiff if remedial action was not undertaken (in that case as a result of excessive excavation works which removed support from the plaintiff's land). In the instant case, the plaintiff says the injunction is necessary to ensure

> "…the Plaintiff's financial integrity against further erosion. Not to do so exempts the Defendants' delinquency and fosters it among other owners, prospectively ruinous of the body corporate. The Court's duty is to enforce the covenants as bargained justice."

[84] It is to be noted, however, that the effect of the injunction sought will be to suspend the ownership rights of use and enjoyment of the Units by the defendants pending trial or until further order—in effect evicting them. In my view, such an injunction does not conduce to securing the enforcement of the covenant to pay and seems to be a backdoor approach to obtaining vacant possession. As noted, the Act provides the legal mechanisms for the body corporate to enforce the covenant to pay maintenance fees and other assessments, and action has been taken by the plaintiff for this purpose. It further provides at s. 21 for the body corporate to exercise a power of sale, similar to that vested in a mortgagee, in the final recourse to enforce the charges. The plaintiff is clearly able to obtain vacant possession pursuant to its statutory power of sale (see for, example, the decision of Gonsalves-Sabola J. in *Bay View Village Management Ltd. v Bannister* (1988) BHS J. No. 77), and indeed this is one of the reliefs sought in the Writ.

[85] In the circumstances, I do not think that the principles distilled from the authorities on *qui timet* injunctions, including the leading decision of *Redland Bricks v Morris*, are easily extrapolated to the facts of the matter before the Court. As was indicated in that case (at p. 665):

> "The grant of a mandatory injunction is, of course, entirely discretionary and unlike a negative injunction can never be "as of course". Every case must essentially depend upon its own particular circumstances."

[86] In my view, it would not an appropriate use of the court's discretion to impose the injunctions sought in the instant case, particularly in light of the fact that the summary judgment applications have been determined. In any event, it seems to me that to grant such injunctions on the basis that the defendants continued occupation of the premises would cause irreparable harm—or, as pleaded in the writ, be "*a detriment to the Body Corporate's very existence as the legal entity and going concern it is meant to be*"—would not be just or equitable, as it would disproportionately shift responsibility for the Condominium's financial woes to a small group of unit owners, when it is clear that the issues are far more generalized and longstanding.

CONCLUSION AND DISPOSITION

[87] In all the circumstances of this case, and for the reasons set out above, in my judgment the defendants have failed to show on the materials before me that they have any bona fide defences to the claims or that there are triable issues in that regard. Neither have they satisfied

the court that are any other reasons why the claims should proceed to trial. I will order summary judgment in the plaintiff's favour for the debts claimed pursuant to the notices of charge with interest. The costs of the summary judgment summonses will be those of the plaintiff, to be taxed if not agreed. I also dismiss the defendants' summonses for a stay of the proceedings, with costs to the plaintiff.

[88] In light of the conclusion I have come to on the claim for injunctive relief, I will hear the parties as to the appropriate cost order on that application.

Klein, J.

7 March 2022