

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
Common Law and Equity Side  
2020/CLE/gen/FP/00125**



**IN THE MATTER of Mariner's Cove Condominium Complex being destroyed by  
Hurricane Dorian**

**AND**

**IN THE MATTER of Section 26 of the Law of Property and  
Conveyancing (Condominium) Act, Chapter 139, Statute Law of The Commonwealth  
of The Bahamas**

**AND**

**IN THE MATTER of a Special Resolution passed unanimously by the Unit Owners of  
Mariner's Cove Condominium Complex and ratified by the Mariner's Cove  
Condominium Association**

**AND**

**IN THE MATTER of an approved Scheme in accordance Section 26(3) of the Act**

**B E T W E E N**

**MARINER'S COVE CONDOMINIUM ASSOCIATION  
Applicant**

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

**APPEARANCES:** Mr. Terry North for the Applicant

Ms. Constance McDonald, QC for the Leaving Unit Owners/Objectors

**HEARING DATE:** July 29, 2021, September 24, 2021 and May 5, 2022

**RULING**

**Introduction**

1. The parties are before the Court as a result of one of the most devastating hurricanes to hit The Bahamas in recent times. On September 1<sup>st</sup> and 2<sup>nd</sup> 2019, Hurricane Dorian battered the Northern Bahamas remaining stationary over Abaco and Grand Bahama for two days. The days following its passing revealed tremendous damage to homes, business

and the many lives lost as a result. The Applicant, a condominium association comprising of unit owners of a condominium community known as Mariners Cove, located in Treasure Cay, Abaco, suffered tremendous damage to their homes. As a result of the storm's damage, the condominium community was destroyed.

2. The Applicant in this matter seeks two orders, namely an order that the Applicant pay to the leaving unit owners the funds outlined in the approved scheme for their respective unit and unit entitlements less any sums that may be owed to the Bahamian Government such as real property taxes and; an order that upon receiving payment all leaving unit-owners unit entitlement shall be extinguished and the Association be granted leave to amend its Declaration of Condominium to reflect its current state of affairs. The Applicant filed its Originating Summons, Affidavit of Alfred F. Bauer Jr in Support and Certificate of Urgency on October 23, 2020. The Applicant also filed the Affidavit of Nefertiti Miller on February 3, 2021, the Affidavit of Wynsome D. Carey on April 29, 2021 and the Second Affidavit of Alfred F. Bauer Jr. on July 27, 2021. The Applicant relies on its Submissions dated April 29, 2021 and Supplemental Submissions dated September 13, 2021.
3. By a Summons dated March 25, 2021 the leaving unit-owners of the Applicant seeks several orders which include an order that the approved scheme in accordance to Section 26(3) of the Law of Property and Conveyancing (Condominium) Act ("the Act") be set aside or varied on the ground that the leaving unit owners agreed to the scheme based on wholly inadequate and misleading information; an order that the maintenance fees and all related charges payable by the Unit Owners to the Applicant be suspended and the Applicant be estopped from further billing the leaving unit owners until such time as the matter is resolved; an order that any maintenance fees and related charges billed to the leaving unit owners account since the passage of Hurricane Dorian be removed from their statement of account; a declaration that the leaving unit owners are entitled to be compensated for their individual unit entitlement and such further or other relief the Court deems fit. The leaving unit-owners filed the Affidavit of Sophia L. Sears on March 25, 2021, the Supplemental Affidavit of Sophia Sears on July 23, 2021 and the Supplemental Affidavit of Sophia L. Sears on August 6, 2021. The leaving unit-owners also rely on their Skeleton Arguments filed July 23, 2021.
4. During the hearing on July 29, 2021 Counsel for the leaving unit-owners, Ms. Constance McDonald, QC indicated to the Court that these owners did not object to the other parts

of the scheme but their challenge is that the value of the common property be included in the scheme as it relates to payout for leaving unit-owners.

5. Therefore, the Court will consider the Affidavit evidence that is relevant to this very narrow issue.

### **The Applicant**

6. The evidence on behalf of the Applicant is found in the first Affidavit of Alfred F. Bauer Jr. He sets out the documents that governs the Applicant Association. He states in part that the said condominium complex which is governed by those documents were destroyed by Hurricane Dorian on September 1, 2019 and that sometime in October, 2019 the Applicant received a vote of at least ninety percent of all unit-owners, allowing the condominium complex to be rebuilt in accordance with Section 26 (1)(b) of the Act. He further states that on March 17, 2020 by special resolution unanimously passed by all unit-owners a Scheme was approved (the scheme is exhibited) and that the approved scheme is not a complete scheme as architectural and building plans are still to be drawn. He continues that notwithstanding the same, it was determined unanimously by the unit-owners that there should not be a delay in remitting payment to those unit-owners who chose not to rebuild, that all non-returning unit-owners are entitled to the compensation outlined in Exhibit C of the scheme less any outstanding amounts due and owing to the Bahamian Government. He states that the unit entitlements relating to the condominium is reflected in a ratio of 1/77<sup>th</sup> as illustrated in the Third Amended Declaration; that currently of the seventy-seven (77) unit owners, forty-eight (48) unit-owners decided to leave and receive their pay out in accordance with the approved scheme and twenty-six (26) unit owners have agreed to remain and rebuild and three (3) remain undecided.
7. His evidence is that by notice dated June 23, 2020, the Applicant indicated to all unit owners that it would present the approved scheme to the Court to allow the leaving unit-owners to receive their payments and have their unit entitlements transferred to the Association; that despite having an approved scheme it has become necessary to seek the Court's assistance prior to remitting payments to the leaving unit-owners as there are a few unit-owners who have indicated a willingness to challenge the approved scheme. Further, that the reason for the challenging the approved scheme is due to a concern held by some unit owners as it relates to compensation for their respective unit-entitlement or rather a payment for their interest in the land. He continued that by an email dated July



11, 2020 George Erhart, a unit owner wrote to the other unit-owners outlining the mechanisms necessary according to the Applicant's byelaws and the Act allow the scheme to be amended however such an amendment was not successful as there needed to be a seventy-five (75) percent of majority unit-owners as required under the Act by way of special resolution to allow the approved scheme to be amended. That despite having an approved scheme they were advised by Mr. Ashley Williams, an associate of the firm Alexiou, Knowles and they verily belie that the approved scheme should be presented to Court to allow those unit-owners who may wish to challenge the said scheme to do so, that the Applicant seeks the Court's assistance as it relates to remitting pay-outs to unit-owners who are content to be bound by the approved scheme and have no interest in challenging the same. Further, that by virtue of the approved scheme, the Applicant contends that the leaving unit-owners shall be furnished with the agreed upon compensation as outlined in Exhibit C of the approved scheme in accordance with their respective unit-entitlements and upon such payment those respective unit-owner' unit-entitlements shall be transferred to the Applicant.

### **The Leaving Unit-Owners**

8. The evidence of Sophia Sears in part is that she along with her husband Demetrius Sears are the owners of Unit 1106, Mariners Cove Condominium and that she got thirty-seven (37) of the other unit-owners who were leaving to join her so they could get their legal entitlement.

### **The Law**

9. The relevant provisions of the Act are set out below.
10. 26. (1) It shall be the duty of the body corporate promptly to repair or reconstruct the building where it has sustained damage which —
  - (a) renders less than seventy-five per cent of the accommodation in the building unfit for occupation; or
  - (b) is in excess of that prescribed by paragraph (a) and within sixty days of the event causing the damage ninety per cent or more in number of the unit owners have resolved that the building shall be reconstructed.



(2) The proceeds of insurance (if any) shall be used for the purpose of the repair or reconstruction of the building under this section and any deficiency shall constitute common expenses within the meaning of this Act.

(3) Where in pursuance of subsection (1) of this section it becomes the duty of a body corporate to repair or reconstruct the building, the body corporate shall, without undue delay, draw up a scheme for the purpose and if such scheme (either in its original or amended form) is approved by special resolution, it shall be binding on the body corporate and all unit owners. Where such a scheme is not so approved, it shall be the duty of the body corporate to file a scheme in the Supreme Court which may, after hearing any objections on behalf of individual unit owners, settle a scheme which, having regard to the rights and interests of unit owners generally, appears just and equitable for the repair or reconstruction of a damaged building under this section. Such scheme may include provisions for —

**(a) permitting any unit owner whose unit has been damaged and who does not agree to participate in the scheme to convey his unit and his interest in the common property to the other unit owners on the payment of such compensation as the court thinks just;**

(b) the reinstatement of part only of the building; and

(c) the conveyance of the interests of some unit owners to other unit owners in proportion to their unit entitlement.

(4) In the exercise of its powers under subsection (3) the court may make such orders as it deems necessary or expedient for giving effect to the scheme including orders —

(a) directing how insurance moneys received in respect of damage to the building shall be applied;

(b) directing such consequential amendments of the Declaration and byelaws relating to the building as the court deems necessary; and

**(c) imposing such terms and conditions as it thinks fit.**

(5) Where an application to the court is made under this section, any insurer who has effected insurance on the building or any part thereof (being insurance against damage to the building) shall have the right to appear in person or by counsel.

**(6) On any application under this section the court may make such order for the payment of costs as it thinks fit. (emphasis mine)"**

**Issue 1- Whether the Leaving Unit Owners are Entitled to be Compensated for Their Share of the Value of the Common Property in the Scheme**

11. There is no dispute as to the validity of the Declaration of Condominium, the Supplemental Declaration of Condominium, the Second Supplemental Declaration of Condominium, the Amended and Restated Declaration of Condominium and the Third Amended and Restated Declaration of Condominium, all exhibited to the First Affidavit of Alfred J. Bauer Jr.
12. The Board of Directors Resolution containing the scheme proposal was exhibited by the Applicant in the First Affidavit of Alfred J. Bauer Jr. The scheme proposal provides:
  - "1) Every owner will receive the full unit entitlement for their respective unit as shown in Exhibit C less any outstanding accounts receivable owed to the Association and a stipend of \$595.18 as described in Exhibit D;**
  - 2) There will be no additional reserve contribution attached to any unit payout;
  - 3) The Association will purchase/acquire the shed/ garage leases of all unit owners currently holding them. This will be done by dividing the total square footage of the various buildings into the full insurance policy payout to arrive at a per square foot coverage amount. Lease holders will then be paid out based on the square footage of their particular lease holding as shown in Exhibit E;
  - 4) The wi-fi and garage reserves will be redistributed proportionately to those who contributed to them as shown in Exhibit F;
  - 5) Those opting to leave will execute Indenture of Conveyance (together with any other necessary supplementary documents) to the parties and/or entity at the Board of the Association's direction. Those unit owners that opt to leave will surrender their respective interests and/or share in the land on which the development was originally constructed and in the common areas;**
  - 6) Those leaving will receive their respective settlement (as laid out herein) in a timely manner, upon approval of the scheme by the Supreme Court. Those**

**leaving will have no further financial obligation to the Association except for an equal share of any legal fees and court costs in excess of the overall \$53,500 which has been allocated in the scheme. Those choosing to stay and rebuild will establish a new board tasked with developing a reconstruction scheme as well as a new fiscal budget and appropriate maintenance fees (emphasis mine).**

PLEASE NOTE: The vote is only to approve the proposed scheme. All owners will be given a period of time after approval of the scheme by the body corporate to make a decision about whether to stay or leave."

13. Exhibit C provides:

"EXHIBIT C

BREAKDOWN OF UNIT INSURANCE PROCEEDS

Total Insurance Paid for Five Condo Buildings					\$7,087,654.00
Less Transfer Fee for Being Paid in US Dollars (1.25%)					\$ (88,595.67)
TOTAL NET INSURANCE COLLECTED FOR FIVE CONDO BUILDINGS					\$6,999,058.33
NET INSURANCE COLLECTED FOR EACH UNIT TYPE BASED ON UNIT ENTITLEMENT					
Efficiency	\$6,999,058.33	x(780/106,288)	=	\$51,362.95	x5 units \$256,814.75
One					
Bedroom	\$6,999,058.33	x(1,086/106,288)	=	\$71,513.03	x32 units \$2,288,416.96
Two					
Bedroom	\$6,999,058.33	x(1,560/106,288)	=	\$102,725.91	x26 units \$2,670,873.66
1500					
Building	\$6,999,058.33	x(1,934/106,288)	=	\$127,353.78	x14 units \$1,782,952.92

(N.B-Our units total approximately 49,176 SF which amounts to \$142.33 per SF.)"

14. The parties have submitted themselves to the jurisdiction of the Court. Counsel for the Applicant Mr. Terry North submitted that the question arises as to whether under the Act the leaving unit-owners are entitled to be compensated for their unit entitlement in the common property and if so then the scheme should be amended. However, he submitted that if they are not so entitled then the scheme should be left intact as it has been unanimously approved by the Unit Owners. He referred the Court to several provisions of the Act such as Sections 3, 4, 7, 31 and 26. He submitted that on an interpretation of Section 26(3) of the Act that the scheme having been approved is binding on the body



corporate and unit owners and as such the body corporate need not have made the application. However, during the last hearing Mr. North stated that previously the Applicant's position is that they submitted themselves to the Court's jurisdiction for a determination by the Court on the said scheme.

15. Counsel for the leaving unit-owners, Ms. Constance McDonald, QC also referred the Court to the provisions of the Act such as Sections 3, 4, 6, 7 and 26 and submitted that it is clear from the Act that an individual unit entitlement includes not just his unit but his interest also in the real estate which is the property comprised in the Declaration of Condominium. She further submitted that Section 26(3) of the Act provides that the Supreme Court may settle a scheme which appears just and equitable taking into account the full unit entitlement of all unit owners which included not just the money received from the insurance of the building but also included the value of the real estate.

### **Analysis**

16. The scheme proposal at clause 1 provides that every owner will receive the full unit entitlement for their respective unit as shown in Exhibit C. Section 3 of the Act contemplates the definition of unit entitlement as "the unit entitlement of any unit fixed in accordance with the provisions of section 4(4) of this Act for the purposes mentioned in section 7(4) of this Act." Section 4(4) of the Act also provides "The unit entitlement of a unit shall be expressed in the Declaration as a fraction or percentage and shall be fixed either — (a) as the approximate proportion that the estimated value of the unit at the date of the Declaration bears to the then aggregate estimated value of all the units taken together; or (b) as the approximate proportion that the floor area of the unit at the date of the Declaration bears to the then aggregate floor area of all the units taken together but such proportion shall reflect any substantially exclusive advantages that may be enjoyed by one or more unit owners but not all unit owners in a part or parts of the common property." Section 7(4) of the Act also provides "The unit entitlement of any unit shall determine the quantum of the undivided share in the common property appertaining to each unit and, unless the Declaration or the byelaws otherwise provide — (a) the voting rights of the unit owner; and (b) the proportion of the common expenses payable from time to time as contributions by each unit owner."
17. By Clause 18 of the Initial Declaration it states "That the undivided share of any Unit Owner in the common property is herein referred to as his "unit entitlement" and has

been calculated by taking the approximate proportion that the floor area of the unit at the date hereof bears to the aggregate floor area of all the units taken together Provided nevertheless that any substantially exclusive advantages in the common property that may be enjoyed by a unit compared with another unit or units have been reflected in the assessment of such proportion; the resulting fraction is herein referred to as the "unit fraction" of that particular unit. The "unit entitlement" (or "unit fraction") shall have a permanent character and shall not be varied unless all unit owners affected consent in a manner satisfactory to the Directors of the management company." By Clause 2 of the Third Amended and Restated Declaration it states "That for the avoidance of doubt the Association hereby confirms and declares that the unit entitlements with respect to each Unit remain the same as set forth in the Second Supplemental Declaration and each Unit Owner shall henceforth have a corresponding unit entitlement in the Body Corporate."

18. The unit entitlements set forth in the Second Supplemental Declaration provides the unit owner's unit entitlement and the corresponding number of shares in the management company by that unit owner. Clause 2 of the Third Amended and Restated Declaration provides that the unit owner's unit entitlement will remain the same but instead of the corresponding shares in the management company, the unit owner will enjoy a corresponding unit entitlement in the Body Corporate.
19. The Applicant in the scheme proposal at Exhibit C sets out the net insurance collected for each unit type based on unit entitlement. However, no provision was made for the unit owner's corresponding unit entitlement in the Body Corporate (which in accordance with the Second Supplemental Declaration amounts to the corresponding number of shares in the management company).
20. Section 7(5) of the Act provides that "the unit entitlement shall have a permanent character and shall not be varied unless all the unit owners affected consent thereto, such consent being given in the manner prescribed by the relevant Declaration."
21. The provisions of Section 26 (1)(a) and (b) of the Act states that the duty of the body corporate is to promptly repair or reconstruct the building that has sustained damage which renders less than seventy-five per cent of the accommodation in the building unfit for occupation or is in excess of the above and within sixty days of the event causing the damage ninety per cent or more in number of the unit owners have resolved that the building shall be reconstructed.



22. As I understand, Section 26(1)(a) and (b) of the Act merely places an obligation on the body corporate to promptly repair or reconstruct the building that sustained damage and within sixty days of the event ninety per cent or more in number of the unit owners have resolved that the building should be reconstructed.
23. Further, Section 26(3) is two-fold. Firstly, the body corporate is mandated to prepare a scheme for the purpose of repairing or reconstruction the building and such scheme once approved by special resolution is binding on the body corporate and all unit owners. Secondly however, if the scheme is not so approved then the body corporate is mandated to file the scheme in the Supreme Court to settle the same.
24. The portion of the proposed scheme relative to unit entitlements I find fails to encompass the unit entitlement as prescribed by the Act and the governing documents. Further, section 22 of the Act makes provisions for the unit owners to dispose of their interest in the common property in the ways stated which is subject to a unanimous resolution at a meeting conveyed by the body corporate.
25. While the scheme that is now before the Court was "approved" in accordance with the provisions of the Act, the Applicant has submitted itself to the jurisdiction of the Court to ultimately settle the scheme. Therefore, the Court has to have regard to the rights and interests of the unit owners and do what appears just and equitable for the reconstruction of the damaged building. Further, Section 26(4) allows the Court in the exercise of its powers under Section 26(3) of the Act to make such orders it deems necessary or expedient for giving effect to the scheme including directing how the insurance moneys received in respect of the damage to the building are to be applied; directing consequential amendments of the Declaration and byelaws relating to the building as the court deems necessary or imposing such terms and conditions as it thinks fit.
26. It would be remiss of the Court not to remind the parties that one of the essential keys to condominium ownership is that ownership of a unit and its appurtenant common interest cannot be separated and refers to Section 6(3) of the Act which states:-
  - "(3) Subject to the provisions of this Act each unit together with the undivided share in the common property held therewith shall for all purposes constitute an estate in real property which, subject to the provisions of this Act, may devolve or be conveyed, leased, mortgaged or otherwise dealt with in the same manner and form as land."



27. Therefore, I am of the view that the said scheme failed to make provisions for the leaving unit-owners to receive the value of their corresponding unit entitlement in the Body Corporate in accordance with the Second Supplemental Declaration and the Third Amended and Restated Declaration.
28. I thereby order that the said scheme be amended to include the leaving unit-owners corresponding unit entitlement in the common property.

### **Issue 2- Whether the Unit-Owners Are Obligated to Continue to Pay Maintenance Fees**

29. The leaving-unit owners also seek the suspension of the payment of the maintenance fees and all related charges to the Applicant and that the Applicant be estopped from further billing the leaving unit-owners until the matter is resolved and that the said fees and charges billed since the passage of Hurricane Dorian be removed from their statement of account.
30. Mrs. Sophia Sears in her first Affidavit states in part that after the destruction of the condominium the President of the Applicant, Mr. Bud Bauer told everyone that although the condominium was destroyed they must pay their maintenance fees; that her and her husband did not agree and neither did some of the other homeowners because as far as they were concerned there was nothing left to maintain and that Mr. Bauer told them that if they did not pay it would be deducted out of their insurance monies. Exhibited to her first Affidavit was a letter dated October 20, 2019 from the Applicant Board to the owners stating in part **"In accordance with Bahamian Law, each unit owner will be required to pay maintenance fees throughout the time the units are being rebuilt or until the association is dissolved. As in any year, the amount of the maintenance fees will be based on a budget proposed and approved at an annual general meeting."** Mrs. Sears exhibited e-mail correspondence between other unit owners and members of the Board inquiring about the payment of maintenance fees following the passage of Hurricane Dorian and its destruction of the condominium.
31. Mr. Alfred F. Bauer, Jr, in his Supplemental Affidavit stated in part that shortly after Hurricane Dorian in September, 2019 there was a general optimism among the Unit Owners and most were anxious to rebuild; as there was no telling how long it would be before the condominium could be rebuilt the Board decided it was prudent to collect maintenance fees throughout the remainder of the fiscal year which ended March 31, 2019 (2020); that as the budget needed the approval of the unit owners at the Annual

General Meeting, the Board had no right to amend the budget without first holding a general meeting; that the Board decided that it would make sense to continue collecting maintenance fees until the end of the fiscal year; that the Board still had to pay the Office Manager, Paula Thompson, and she was paid through the end of the fiscal year; the Board needed to pay the remainder of the insurance premiums to collect on its claims; the Board was cognizant that it would be incurring demolition costs which would not be covered by the insurance policy. He further stated that these decisions were Board decisions and not his alone. He exhibited to his Affidavit a series of e-mail correspondence and the Board resolutions made in respect of the said maintenance fees.

(1) Email Correspondence from Steve McGrath, Treasurer of Mariners Cove Homeowners Association to all unit owners

"One area of legitimate concern and confusion is the continuance of maintenance fee payments. It may seem counterintuitive to be paying fees for a complex that essentially no longer exists. However I would like to use this forum to clear up some misconceptions. Please give consideration to the following hard realities:

1) We still have a considerable amount of ongoing expenses. Our fiscal year runs from April 1<sup>st</sup> to March 31<sup>st</sup> each year and we determine a working budget prior to the start of that timeframe that determines what maintenance fees will be for that period. We spend a large part of that process trying to keep costs in check despite the fact that each year our expenses go up. Other than including VAT charges, which were completely beyond our control, and a new negotiated garage fee which actually lowered each owner's yearly charge, we have not increased the base fee in over six years.

2) ...Our insurance policy is written to cover our fiscal year. It is paid quarterly. If you have a claim during that timeframe, you still owe the full yearly policy premium even if your property is destroyed. Therefore will still have a \$60,000 payment due for the period from Oct 1<sup>st</sup> 2019 to March 31<sup>st</sup> 2020. Secondly we have significant legal bills moving forward involving recent consultation and interpretation of the Bahamas Condominium Act as well as foreclosure costs on two delinquent properties...Lastly, we are continuing to employ Paula Thompson, partly out of respect for her 32



years of service and also due to the fact that she is still overseeing Mariners Cove matters despite losing everything and shuttling back between Florida and Nassau.

3) Mariners Cove always prided itself on being one of the only associations with a significant emergency reserve fund...Bud Bauer has masterfully negotiated an initial demolition bid of over \$800,000 down to \$248,000....but that fact is that since this work is not covered by our insurance, it represents a huge hit to our existing reserve fund. Additionally ground cleanup has also been performed prior to the building demolition which has also depleted our funds.

4) Because of the known and potentially unknown expenses arising in the last quarter of our fiscal year, it will be necessary to maintain quarterly fees at their current level. In March of 2020, the board will put together a new budget for the upcoming fiscal year with hopefully a clearer understanding of expenses moving forward and establish appropriate maintenance fees at that time.

The cash flow and maintenance fee deposits for this past quarter has been the worst period in memory. I'm hoping that this is due to a level of confusion among the membership and not some concerted effort to avoid paying any more dues. Looking down the road, any individual insurance settlement, whether it's to leave or rebuild, will be debited any outstanding maintenance fee balance."

32. The recorded minutes of an Extraordinary General Meeting of the Board held by phone conference on November 20, 2019 reflect that 39 owners had not paid their quarterly dues, no insurance settlement had been received at that point but it looked that all of the buildings were to be totaled and the garages and office could be built for less than the proposed insurance settlement; the moving forward with Jed & Big Cat as the contractor to demolish the buildings and office building and rebuild the office and the costs; the cost for grass cutting services which was deemed too high; the pumping of the pool.
33. The recorded minutes of an Extraordinary General Meeting of the Board held by phone conference on September 16, 2019 reflect a budget report from Mr. Bauer stating that there was still a lot of expenses that will need to be paid post hurricane such as Paula's salary, computer, grounds maintenance, insurance, increasing legal fees, annual meeting



expenses and location or video conferencing; that they were under insured for the office building and demolition costs may not have been covered under their insurance policy. He further reported that the demolition estimates greatly exceed their hurricane reserve which had a cash total of \$307,000 and they would not be able to recoup the monies from the delinquent accounts of Spencer, Lightbourn and Aston until their units were sold. Further, he reported that they did not have the ability to change the budget without an annual meetings with a motion carried out by an affirmative vote of more than 50% of the members.

### **The Law**

34. Section 3 of the Act defines common expenses as:-

- “(a) all sums lawfully levied against unit owners by the body corporate;
- (b) the expenses of the operation of the property;
- (c) other expenses agreed upon as common expenses by the body corporate;
- (d) expenses declared to be common expenses by the provisions of this Act or by the Declaration or the byelaws

35. Clause 25 of the Initial Declaration of Condominium provides:-

“That all expenses incurred by the Management Company in connection with the discharge of the duties referred to in Clause 24 hereof and any administrative or operational costs incurred by the Management Company are hereinafter referred to as “Common Expenses” which shall include the cost of complying with any Notice or Order issued by the competent public authority and any rates, charges, taxes or assessments on the said property and Buildings as a whole and the Management Company shall be entitled to recover such common expenses from the unit owners for the time being by contributions to be made by each unit holder at whatever intervals the Directors of the Management Company may think fit and the mount of which is to be calculated in accordance with Clause 21 hereof.

Provided however that:

- (a)The Management Company if authorized by its Members in General Meeting may from time to time agree that expenditure for any other purposes may be considered common expenses and any expenses declared to be common expenses by the provisions of the Act or by the Declaration or the By-Laws may be charged as common expenses and recovered from the unit holders.

(b) The expression "common expenses" shall not include the costs of repairs and maintenance work carried out by the Management Company to:

(i) any apartment unit at the request of the owner thereof;

(ii) any conduit, duct, pipe, cable, drain, wire or plumbing or sanitary apparatus situate within any apartment unit which was installed only for the benefit and use of the occupiers for the time being of that apartment unit and no other;

(iii) any portion of the common property or any conduit, duct, pipe, cable, drain, wire or plumbing or sanitary apparatus situate within the Buildings damaged due to the act, neglect or carelessness of any unit owner or his guests, employees, agents or lessees, and all such moneys so expended shall be recoverable from the owner of the relevant apartment unit. "

36. Clause 27 (c) of the Initial Declaration also states that each unit owner shall punctually pay all contributions demanded of him by the Management Company in respect of common expenses in accordance with Clause 21.

37. The Third Amended and Restated Declaration replaced section 26 of the Initial Declaration with the following provisions concerning unit owner contributions. It states inter alia:-

"Each Unit Owner shall be obliged to pay to the agent designated by the Body Corporate the contributions owed by the Unit Owner, each Unit Owner's contributions shall be calculated as follows:

Category A (contribution determined by unit entitlement)

Building Maintenance expenses

Building Insurance costs (including the deductible portion if a claim is made)

Category B (each unit contribute 1/77<sup>th</sup>)

All budgeted expenses

All Common Expenses as herein defined

Category C (each affected Unit Owner contributed 1/2 of cost)

Replacement costs for exterior of unit

Category D (each affected Unit Owner contributes the total costs of purchase, repaid, replacement, installation or lease, as the case may be, of the following):

Windows

Doors

Patios

Decks

Water heater cover

Garages

Hurricane Shutters

Golf Cart Charging Station Costs

(Each Unit Owner shall contribute the amount of damage or repair occasions or necessitated by violation of this Declaration, the Rules or Byelaws by the Unit Owner, the Unit Owner's guests, renters and invitees, including any charges levied, and an amount equal to the deductible portion on the contents of the unit).

Such contributions shall be payable within seven (7) days, unless otherwise determined by the Body Corporate after receipt of notice requesting payment thereof; any unpaid contributions together with interest as prescribed from time to time by the Body Corporate which shall constitute a charge upon the appropriate apartment unit enforceable as a mortgage under seal and ranking prior to all other encumbrances except any charge under Section 12(1) of the Real Property Tax Act."

38. Section 14 of the Act outlines the duties and powers of the body corporate. These duties shall include:-

"1.

(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.”

39. Section 18 of the Act states:-

“(1) Any contribution levied by the body corporate on any unit owner shall be due and payable by the unit owner seven clear days after the service of a notice in writing of the levying of such contribution.

(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 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.

(3) A unit owner shall not have power to exempt himself from his liability to make contributions to the body corporate by waiver of the use or enjoyment of any of the common property or by the abandonment of his unit.”

### **Analysis**

40. Counsel for the parties have not provided the Court with any skeletons or submissions on this issue nor have they pointed the Court to any authorities to aid in the determination on this issue. However, given the evidence before the Court as exhibited to the Second Affidavit of Mr. Bauer, Jr., the clauses relating to common expenses as found in the Initial Declaration and the Third Amended and Restated Declaration and the provisions of the Act, the unit owners were obligated to pay their unit contributions for common expenses after the passage of Hurricane Dorian.
41. The minutes of the Extraordinary Meetings of the Board after September 2019 highlight the mounting expenses faced by the Board and by extension the unit owners following the passage of Hurricane Dorian.
42. The Act at Section 3 defines common expenses and essentially places the identification or acceptance of such expenses at the hands of the unit owners by way of its Declaration.
43. Further, Section 18(3) of the Act places an obligation on the unit owner to make these contributions as he/she does not have the power to exempt themselves from this liability by waiver of the use or enjoyment of any of the common property or by the abandonment of his unit. Moreover, the only evidence before the Court is from the Applicant outlining the mounting expenses and the reasons for the continuation of the payment of the maintenance fees. Additionally, no evidence has been adduced whereby the Applicant sought to pause the maintenance fees for the unit owners for a period of time.
44. Therefore, in consideration of the provisions of the Act and the clauses of the governing documents and the Affidavit evidence of Mr. Bauer in his Second Affidavit which was not disputed, I find that the unit owners were obligated to pay their maintenance fees and all related charges following the passage of Hurricane Dorian in September 2019. Further, I order that those maintenance fees and related charges be deducted from the insurance payout for those unit-owners who are leaving.

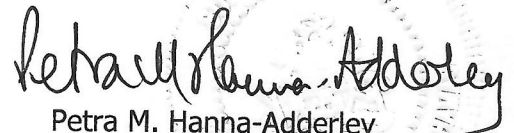
## Disposition

45. In summary, having heard the submissions of Counsel, having read and considered the evidence, having read and considered the relevant provisions of the Act, I order that the approved scheme presented to the Court be revised or amended to include the leaving unit-owners corresponding unit entitlement in the common property and such sum shall be paid from the insurance proceeds or from a source of funding otherwise agreed between the parties (**See Section 26(4)(c) of the Act**).
46. I also order that the unit-owners shall pay their maintenance fees and all related charges and that the said fees be deducted from the insurance payout for the leaving unit-owners, up to and including the date of payment.

## Costs

47. I order that the legal costs of Alexiou, Knowles & Co and McDonald & Co. associated with this application to be paid by the Applicant to be taxed if not agreed (**See Section 26(6) of the Act**).

This 13<sup>th</sup> day of May, A. D. 2022

  
Petra M. Hanna-Adderley  
Justice

