

IN THE COURT OF APPEAL OF BELIZE AD 2016
CIVIL APPEAL NO 2 OF 2015

THE PROPRIETORS, STRATA PLAN NO. 64

Appellant

v

REEF VILLAGE ESTATES LIMITED

Respondent

BEFORE

The Hon Mr Justice Sir Manuel Sosa
The Hon Madam Justice Minnet Hafiz-Bertram
The Hon Mr Justice Christopher Blackman

President
Justice of Appeal
Justice of Appeal

E H Courtenay SC and P Banner for the appellant.
D Bradley for the respondent.

21 June 2016 and 4 November 2016

SIR MANUEL SOSA P

[1] I have read, in draft, the judgment of Blackman JA and concur in the reasons for judgment given, and the orders proposed in it.

SIR MANUEL SOSA P

HAFIZ-BERTRAM JA

[2] I have read, in draft, the judgment of Blackman JA and concur in the reasons for judgment given, and the orders proposed in it.

HAFIZ-BERTRAM JA

BLACKMAN JA

[3] The primary issue for determination in this appeal is whether a strata corporation, a creature of statute, could by resolution adopted by a majority of its members, enlarge its powers of collection of assessments to include sanctions for late and delinquent payers.

[4] On 31 July, 2012 the appellant at a general meeting of its members adopted several resolutions among them, a resolution to amend the Byelaws and a resolution for a charge of 5% compounded, on outstanding amounts due on assessments.

[5] Thereafter, the appellant The Proprietors, Strata Plan No. 64, an association of condominium owners, by an amended claim form dated 18 October, 2012 sought, inter alia, to recover from the respondent the sum of \$748,674.63 owed for strata fees, late fees, assessments, special assessments and/or utility expenses together with interest on the sums owed for the period May 2011 to August, 2012. The respondent in its defence, denied the indebtedness, made a counterclaim for damages and sought a declaration that the resolutions adopted at the AGM of the appellant were void and of no legal effect.

[6] In her judgment dated 1 December, 2014 **Griffith J** determined that the respondent was liable to the appellant in the sum of \$287,542.17, being fees and assessments charged for the period May 2011 to October, 2013; insurance effected in the name of the appellant and utilities actually paid by the appellant in respect of certain of the respondent's 9 units including any penalties charged by and paid to the utility providers. The court however held that the respondent was not liable for the late fees and assessments or insurance effected in an entity called The Proprietors Strata Plan 64, Ltd. The respondent's counterclaim was dismissed.

[7] The appellant's Notice of Appeal dated 28 January 2015 containing seven grounds of appeal, are limited to three discrete concerns:

- (a) The validity of the 5% late fee charged by the appellant on the outstanding arrears due by the respondent;
- (b) The finding by the trial judge that the amendment to the Byelaws was invalid; and
- (c) Whether the appellant was entitled to recover the fees for insurance premiums paid to insure the units owned by the respondent.

[8] At the hearing of the appeal Mr. Courtenay acknowledged that if the basis for the late fee was not upheld, he would not be able to challenge the finding of invalidity by the trial judge relating to the amendment to the Byelaws. On that footing, the appeal has been concerned with the fee validity issue and the recovery of insurance premiums.

Validity of the 5% late fee.

[9] Counsel for the appellant both in his written and oral submissions, submitted that the Learned Trial Judge erred in law in making the finding that the charging of a late fee of 5% in the manner in which it was done - by resolution at an annual general meeting - was not contemplated by the Strata Act. He contended that the appellant was lawfully empowered pursuant its duties and powers under the Strata Act, particularly Section 6 of the Act, to pass a resolution levying a late fee against delinquent accounts such as the Respondent's. Section 6 provided that:

“6. (1) The duties of a corporation shall include the following-

(a)...

(f) to keep in a state of good and serviceable repair and properly maintain the common property;

(2) The powers of the Corporation shall include the following -

(a) to establish a fund for administrative expenses sufficient in the opinion of the Corporation for the control, management and administration of the common property, for the payment of any premiums of insurance and for the discharge of any of its other obligations;

(b) to determine from time to time the amounts to be raised for the fund referred to in paragraph (a) and to raise amounts so determined by levying contributions on the proprietors in proportion to the unit entitlement of their respective lots;

(3) Subject to the provision of subsection (4), a contribution levied pursuant to subsection (2) shall be due and payable on the passing of a resolution to that effect and in accordance with the terms of such resolution and may be recovered as a debt by a Corporation in an action in any court of competent jurisdiction from the proprietor entitled at the time when such resolution was passed and from the proprietor entitled at the time when such action was instituted, both jointly and severally.”

[10] Counsel further noted that the By-laws in the First schedule of the Strata Act also provided that “The Corporation may (f) do all things reasonably necessary for the enforcement of the by-laws and the control, management and administration of the common property.” In that regard, Counsel urged that Section 6 and regulation 3 are to be construed very broadly and purposively, and consequently the provisions make it plain that the appellant was empowered in a case such as the present, to levy a late fee charge so as to act as a disincentive for non-payment by members and also to enforce payment by members through that disincentive. Moreover, Counsel observed that the by-laws provide that proprietors must pay the fees assessed against them and in order

to enforce that obligation and also to ensure that it is able to manage and administer the common property, the appellant was empowered to resolve in its Annual General Meeting that a late fee of 5% was applicable on delinquent accounts. He further submitted that the late fees were within the purview of section 6 of the Strata Act and regulation 3 of the Schedule I of the By-laws.

[11] In support of these propositions, Counsel relied on the Canadian case of **Condominium Plan No. 8210034 v. King and others** [2012] ABQB 127; 75 Atla. L.R (5TH) 154. In the foregoing case, the question for determination was whether “enhanced collection byelaws” were intra vires the condominium corporation. Mr. Courtenay particularly relied on paragraphs 41 to 46, to support his submission, of which 41 to 45 are now reproduced.

“The recovery of unpaid rent by means of a contractual charge

41 *In addition to recovering expenses by way of assessment, condominium corporations also pass by-laws creating a contractual charge to assist them in collecting debts owed to them for things such as unpaid rent. Unlike a statutory charge, a contractual charge would rank behind existing registered mortgages against the unit in question.*

42 *Unpaid rent claims can arise, for example, where the condominium corporation rents common property to a unit owner upon which the unit owner parks a motor vehicle.*

43 *Section 50 of the Act expressly allows for a condominium corporation to rent out common property to a unit owner. I believe that, inherent in this, is the right of a condominium corporation to take steps to collect unpaid rent.*

44 *What many condominium corporations have done to collect unpaid rent is to pass a bylaw which grants a contractual charge against the unit to support payment. The bylaws form a contract between the condominium corporation and all the unit owners: see subsections 32(2) and 32(6) of the Act. I know of no reason why obtaining this contractual charge should be considered ultra vires of the corporation.*

The recovery of unpaid fines by means of a contractual charge

45 *A condominium corporation is given the responsibility for the enforcement of its bylaws (section 37(1) of the Act). It is expressly given the right to impose monetary sanctions on owners, tenants and invitees of the owners or tenants who fail to comply with the bylaws: see section 35(1) of the Act.”*

[12] A close analysis of the decision however underscores that the governing legislation being considered was the Condominium Property Act, R.S.A 2000 of Alberta, Canada. Consequently, save for the comment at paragraph 4 of the decision which is relevant to the instant case, that “condominium corporations are created by...Act...they do not have the power of natural persons and can only exercise the powers granted to corporations by the Act,” there are no overarching principles to be extracted from the decision that are supportive of the appellant’s contentions.

[13] Moreover, the enhanced provisions in the Alberta legislation such as section 39(8) which provides a regime to enforce collection of assessments, and section 41 to collect interest on overdue assessments have no comparable provisions in the Laws of Belize. There is a clear case for a comprehensive update of the Strata corporation legislation to deal with dilatory and delinquent unit holders to address the issues so cogently and articulately expressed by Senior Counsel. The remedy however, lies with Parliament not the courts.

[14] As a consequence the challenge to the learned judge’s ruling fails.

The Insurance Issue

[15] At paragraph 82 of the decision, **Griffith J** disallowed the appellant’s claim for reimbursement of insurance premiums incurred prior to the July 2012 resolution by the Strata Corporation. Mr. Courtenay submitted that the insurance policy with the 250 company, a wholly owned subsidiary of the Strata Corporation specifically covered the units in the Reef Village Strata Complex. Consequentially, in equity the appellant was

entitled to the reimbursement of insurance premiums expended on the respondents' properties.

[16] Mr. Bradley for the respondent submitted that it is a basic principle in insurance law that the person taking out an insurance policy must have an insurable interest in the property covered by insurance for the coverage to be valid.

[17] Mr. Bradley's submission is supported by the House of Lords decision of **Macura v. Northern Assurance Co Ltd** et al [1925] All. E.R. Rep 51 where at page 55, letter **d**, Lord Sumner commented that though '*he owned almost all the shares in the company, and the company owed him a great deal of money, neither as creditor nor as shareholder, could he insure the company's assets.*' Further on the same page at letter **h** Lord Wrenbury succinctly stated the principle that '*the incorporator, even if he holds all the shares, is not the corporation and that neither he or nor any creditor of the company has any property, legal or equitable, in the assets of the corporation.*'

[18] I find no basis to disturb the trial judge's finding in relation to this ground, and accordingly this ground of appeal also fails.

[19] In the result, the appeal is dismissed with costs to the respondent, to be taxed in the absence of agreement. The orders of the trial judge in the court below are affirmed. I would further order (a) that the above order as to costs be provisional in the first instance but become final after 14 days from the date of delivery of this judgment, unless either party shall file an application for a contrary order within the said period of 14 days and (b) that, in the event of the filing of such an application, the matter of costs shall be determined on the basis of written submissions to be filed and delivered in 14 days from the filing of the application.

