COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Side

2020/CLE/gen/00385

IN THE MATTER OF the Declaration of Condominium dated 11 March 2005 (formerly "Ocean Place on the Harbour") situate on Paradise Island, The Bahamas recorded in the Registry of Records in the city of Nassau in Volume 9234 at pages 1-140 as amended by the Amendment dated 18 January 2010 and recorded in the Registry of Records in the City of Nassau in Volume 10984 at pages 393-420 and the Second Supplemental Amendment dated 15 March 2016 and recorded in the Registry of Records in the City of Nassau in Volume 12525 at pages 481-485

AND

IN THE MATTER of section 7 and 31 of The Law of Property and Conveyancing (Condominium) Act CH 139

AND

ONE OCEAN ASSOCIATION

(a body corporate by virtue of the Law of Property and Conveyancing (Condominium) Act CH 139 formally known as "Ocean Place on the Harbour Association")

Plaintiff

AND
QAMEA STANLEY LIMITED
AND
DCC ISLANDS FOUNDATION

Defendants

Before Hon. Mr. Justice Ian R. Winder

Appearances: **Giahna Soles-Hunt with Damani Horton for the plaintiff**
Kevin Moree with Andrew Smith for the first named defendant
Raynard Rigby for Replay Destinations (Bahamas) Ltd (Interested Party)

28 June 2021, 1 July 2021 Closing Submissions 21 July 2021

JUDGMENT

WINDER, J

This is the application of the plaintiff (the Association) seeking an amendment of the Declaration of Condominium of the One Ocean Condominium.

[1.] By a Declaration of Condominium dated 11 May 2005 (the Declaration) the One Ocean Condominium, formerly "Ocean Place on the Harbour" was established. The Declaration was amended on 18 January 2010 and again on 15 March 2016. The Condominium which is multistoried, comprised some 79 units.

[2.] The Architect Certificate was signed by Mr. Leslie Johnson (Johnson) on 21 January 2010. Johnson did not design the building but was engaged to assist the foreign architect that had been hired by the developer. The foreign architect did not sign off on alterations which Johnson made to the plans. Johnson never spoke with the foreign architect.

[3.] In November 2012 the developer and the Association went into receivership.

[4.] In July 2015, Replay Destinations (Bahamas) Limited (Replay) purchased 52 units of the 79 units of One Ocean. At the time of the purchase Replay proposed the renovation of its purchased units inclusive of the penthouse units. The proposal was presented to the Association on 15 October 2015, at an annual general meeting.

[5.] On 9 December 2016 Replay provided further information about the scope of the proposed renovations. A resolution was passed to permit Replay to conduct renovations of its units inclusive of the penthouse units. At the 2016 AGM, Replay agreed to finance other improvements to the Building.

[6.] Plan-It Bahamas (PIB), the architect initially engaged by Replay, had discovered that:

a. On the ninth and tenth floors, there were several infractions of The Bahamas Building Code that had to be brought into compliance;

b. The attic space on the tenth floor was found not suitable for the proposed habitable space under the existing conditions determined during the 'as-built' survey;
c. Due to years of wear and tear and hurricane damage, the covering materials to both the flat and pitched roofs needed to be repaired.
d. The 9th and 10th floors were originally designed and built with an interior switchback staircase and the original developer intended to utilize both floors as contiguous and habitable space. It was discovered that generally the existing fire stairwell within the building stopped short of the 10th floor and direct escape into a protected stairwell was not possible from the uppermost floor as would be required under the Bahamas Building Code.
e. It was also discovered that the machine/equipment rooms for two of the five elevators within the enclosure of the fire escape stairwells, had been constructed inside the escape stairwell and therefore in contravention of the Bahamas Building Code.

[7.] During the renovations, a question arose as to whether the renovations encroached upon and reduced the Common Property and whether the square footage of the penthouse units and units 101 and 109 were accurate. On 28 February 2019 the Board of the Association passed the following resolutions:

a. The Association resolved to amend the Declaration, insofar as may be necessary, to remove all and any doubts as to the location and extent of Common Property and the penthouse units, including the entitlements of the penthouse unit owners and the unit entitlements of all other unit owners.
b. The Association agreed to seek the requisite unanimous (100%) approval of all unit owners required to amend the Declaration and would do so in a timely manner by letter provided to all unit owners in the Condominium, together with proxy forms to assist the owners in the process.
c. If necessary, the Association agreed to pursue remedies available to it in the Supreme Court of The Bahamas pursuant to the Condominium Act, as required, and accordingly, agreed to approve, adopt and carry out the steps detailed in the plan or to take any other reasonable actions that may be necessary to achieve the results contemplated.

[8.] Notices and consent forms were disseminated to all unit owners. 78 of the 79 unit holders consented to the amendment of the Declaration of Condominium. The first named defendant (Qamea) did not consent to the amendment of the Condominum.

[9.] The action was commenced by the Condominium Association by (Re-Amended) Originating Summons seeking the following relief:

a. Pursuant to section 16 (2) of the Law of Property and Conveyancing (Condominium) Act CH 139, ("Act") that the President of the One Ocean Association, being a fit and proper person, be appointed to vote respecting an amendment to the Amendment Resolution in place of those unit owners who have been notified of the Amendment Resolution, but who are not able or could not be traced.
b. An Order that the Declaration of Condominium dated 11 May 2005 of Condominium known as One Ocean (formerly "Ocean Place on the Harbour") situate on Paradise Island, The Bahamas recorded in the Registry of Records in Volume 9234 at pages 1-140 ("Principal Declaration") as amended by the First Amendment dated 18 January 2010 and recorded at the Registry of Records in Volume 10984 at pages 393-420 ("First Amendment") and the Second Supplemental Amendment dated 15 March 2016 and recorded in the Registry of Records in Volume 12525 at pages 481-485 ("Second Supplemental Amendment") (collectively the "Principal Declaration, First Amendment and Second Supplemental Amendment hereinafter referred to as the "Declaration") be amended as set forth in the Third Supplemental Amendment to the Declaration of Condominium of One Ocean and in particular:
    i. Removing and replacing the Second and Third Schedules of the Declaration with the Second and Third Schedules annexed to the supporting Affidavits ("2020 Schedules"); and
    ii. Amending the plans to the Declaration respecting the Penthouse Loft Areas as exhibited to the supporting Affidavits.
c. Alternatively, an Order that the Declaration of Condominium dated 11 May 2005 of Condominium known as One Ocean (formerly "Ocean Place on the Harbour") situate on Paradise Island, The Bahamas recorded in the Registry of Records in Volume 9234 at pages 1-140 ("Principal Declaration") as amended by the First Amendment dated 18 January 2010 and recorded at the Registry of Records in Volume 10984 at pages 393-420 ("First Amendment") and the Second Supplemental Amendment dated 15 March 2016 and recorded in the Registry of Records in Volume 12525 at pages 481-485 ("Second Supplemental Amendment") (collectively the "Principal Declaration, First Amendment and Second Supplemental Amendment hereinafter referred to as the "Declaration") be rectified as follows:
    i. Removing and replacing the Second and Third Schedules of the Declaration with the Second and Third Schedules annexed to the supporting Affidavits ("2020 Schedules"); and
    ii. Amending the plans to the Declaration respecting the Penthouse Loft Areas as exhibited to the supporting Affidavits.

d. An order that the Common Property be re-designated in accordance with the 2020 Plans and the Association effect the necessary transfers of title from the unit owners to the Penthouse unit holders, if necessary.
e. An order pursuant to Section 22 of the Act, granting the One Ocean Association authority to validly and effectively dispose of the interest in the property or the common property by conveyance without the execution by any person having an interest.
f. An order directing the Registrar General to cause the aforementioned transfer instrument and the Third Supplemental Amendment to be recorded and annexed upon the said 2020 Declaration.
g. Such further or other relief as the Court deems just; and
h. An order that the costs of this application be paid out to the funds of the Association.

[10.] Affidavit evidence was filed during the course of the application as follows:

a. Affidavit of Graeme Moran filed 29 September 2020;
b. Affidavit of Andrew Stirling filed 25 September 2020;
c. Supplemental Affidavit of Graeme Moran filed 5 March 2021;
d. Supplemental Affidavit of Andrew Stirling filed 19 April 2021;
e. Second Supplemental Affidavit of Graeme Moran filed 21 April 2021;
f. Affidavit of Miller Rene Mendez Almario 22 April 2021;
g. Affidavit of Lesley Johnson filed 8 June 2021; and
h. Third Supplemental Affidavit of Graeme Moran 24 June 2021.

[11.] At the trial the Association withdrew the relief sought relative to units 101 and 109. Graeme Moran, Andrew Stirling and Lesley Johnson were all cross examined on their affidavits.

[12.] The Association sums up its case as follows:

a. Based upon the evidence before the Court, a change to the Declaration is required. The Association is in a state of flux wherein the Second and Third Schedules of the Declaration do not accurately reflect the actual square footage and unit entitlements.
b. The Association initially based its application on what was found when the penthouse units were inspected at the time in December 2015 and 2019. Based upon the inspection by Replay and PIB, it was discovered that the

disputed areas (as defined below) were not included in the calculation of the square footage of the penthouse units. The original developer not being of assistance and the original architect not being present at the time, the feasible explanation for the exclusion of the square footage was deduced to be due to an error in the calculation.

c. Initially the areas in dispute included:
   (a) Additional terrace spaces 101 and 109 (ultimately removed from the dispute)
   (b) Area under the pitch of the mansard roof (green); and
   (c) Area in central quadrant (purple).

d. It was originally submitted that there had been errors in the architect's certificate filed 21 January 2010 ("Certificate"); however, Mr. Johnson, the original architect on site during the construction of the Building, stated that he "stood by" this Certificate and there were no errors in his calculations of the square footage of the penthouse units.

e. For the purpose of the Application, the Plaintiff is asking this Court to determine the following for the purpose of the relief set out in the Re-amended Originating summons as follows:
   (a) What is the square footage of the penthouse units?
   (b) When did the material changes in the square footage of the penthouse units occur?
   (c) If the changes took place prior to the submission of the Architect's Certificate:
      (a) Is the Declaration void? And if so, the next steps;
      (b) If the Declaration is not void but inaccurate, how should the square footage of the units be amended?
   (d) If the changes took place after the provision of the Architect's Certificate, did they occur prior to the Renovations or as a result of the Renovations.
   (e) If the disputed areas should not have been included in the square footage of the units, should there be a transfer and appropriate compensation for the disputed property?

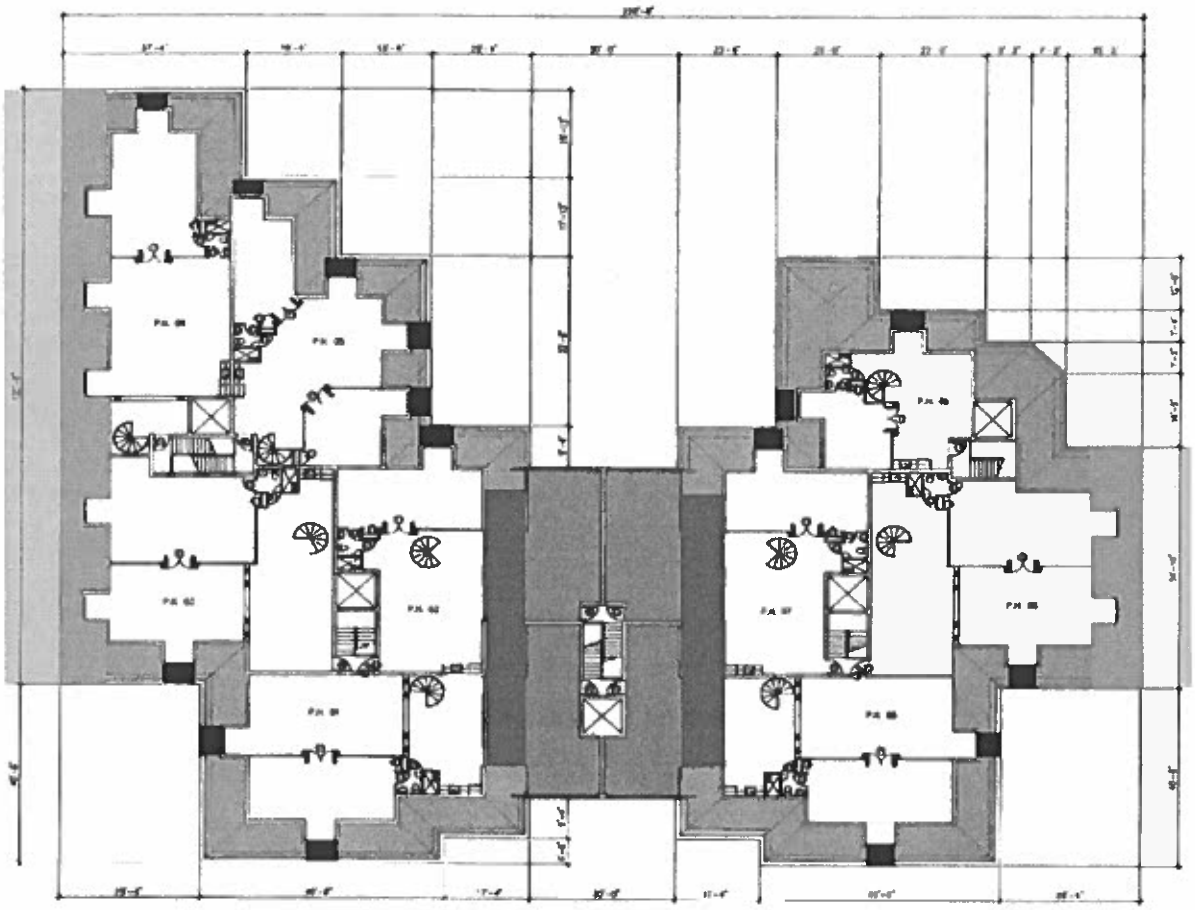
[13.] The three areas being disputed ("disputed areas") in the condominium complex are:

a. Area under the pitch of the mansard roof;

b. Area of 12 ft. extension; and

c. Area of Quadrant.

These disputed areas are shaded in the diagram below:



[14.] The case of Qamea, the only unit owner to oppose the Association's application, is summed up as follows:

a. The Certificate was accurate at the time it was issued; consequently, this action should be dismissed as the Association has based its case entirely on the allegation that the Certificate (and consequently the Declaration) has always been materially inaccurate.

b. Alternatively, if the Certificate was not accurate at the time it was issued then the Declaration has always been materially inaccurate and is void.

c. Further, the relief sought by the Association is misconceived in law and, in any event, should not be granted because to do so would be premature and inequitable.

[15.] Further, Qamea says at paragraphs 25-28 of their submissions:

Inequitable

25. If the Certificate was accurate at the time it was issued, then i) the Green and Purple Areas (as defined in the Johnson Affidavit) are and have always been common property and ii) the renovation to the penthouse units expanded them so that they now partly consist of common property. The Association is asking the Court to order that common property be transferred to the penthouse unit owners for no consideration. As stated in the Almario Affidavit:

> **"14. Based on the information provided in the Stirling Affidavit (see chart at Tab 8), the proposed amendments to the Declaration would result in the penthouse units increasing in size on average by more than 31.5%.**
>
> **15. I do not agree with the penthouse unit owners being gifted property which is owned by all of the unit owners. The significant increase in the size of the penthouse units will substantially benefit that limited group of owners while the other unit owners will not benefit at all.**
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> **16. In fact, the non-penthouse unit owners will suffer a detriment because the additional square footage associated with the penthouse units will result in the dilution of the non-penthouse unit owners' unit entitlement and consequently reduce their ownership in the common property and voting power.**
>
> **17. In my view, this is not equitable."**

26. Furthermore, the Almario Affidavit notes another inequitable outcome if the common property is transferred to the penthouse unit owners without being subject to certain conditions:

> **"19. If Qamea's unit entitlement is larger than it should be then it, along with almost all of the other non-penthouse unit owners, has been paying more than it should have to the Association for all fees, expenses, etc. which are calculated based on unit entitlement while the owners of the units which are to have an increased unit entitlement have been paying less than they should have; the Association has failed to address this consideration in the context of the proposed amendments.**
>
> **...**
>
> **25. If certain unit owners will have their respective unit entitlements diluted while other unit owners benefit from an increase in unit entitlement then the Association ought to conduct a reconciliation whereby the relevant unit owners receive a credit for overpayment while the other unit owners are**

required to pay the difference associated with their underpayment."

Resolving the One Ocean Title Issues

27. As stated in paragraph 6 of the Almario Affidavit:

> **"Qamea wants the discrepancies between the Declaration and the actual size of certain units to be reconciled to remedy the title issues created by such discrepancies but this needs to be done on the correct basis and in a legally effectual and equitable manner."**

28. Should the Court find that the Certificate was accurate at the time it was issued, it is submitted that the following steps ought be taken to resolve the One Ocean title issues:

    a. The Association should have the penthouse units surveyed by a reputable, independent architect (Mr. Stirling has confirmed that PIB was and continues to be retained by Replay which owns all but one of the penthouse units) to determine the total square footage of common property which has been subsumed by the penthouse renovation.

    b. The Association should then obtain an appraisal from a reputable, independent appraiser to confirm the value of that common property. It should be noted that in paragraphs 64 and 66 of the Association's Submissions dated 22 April, 2021 it appears as if the Association recognizes that getting an appraisal is reasonable.

    c. The Association should conduct a reconciliation exercise to account for the respective over/underpayments made by unit owners as a result of the inaccurate unit entitlements.

    d. That information should be disseminated to the members of the Association and a vote taken seeking unanimous consent to transfer the relevant common property to the respective penthouse unit owners for a fair price.

Law Analysis and Disposition

[16.] Section 14 of the Declaration provides a definition for the term "Common Property" as follows:

> 14. Those portions of the said property which do not fall within the boundaries of any Suite as defined herein shall be Common Property and are hereinafter referred to as such and the following provisions shall apply thereto:-
>
> i. The Common Property shall be vested in the various owners for the time being of all the Suites as tenants in common in undivided shares in the proportions set out in the Third Schedule hereto;

ii. Subject as hereinafter provided the Common Property shall be held for the joint use and enjoyment of all the owners of Suites for the time being;

iii. No undivided share in the Common Property may be disposed of in any way except as appurtenant to the Suite to which it related and any assurance mortgage charge or other disposition of a Suite shall operate also to assure mortgage or otherwise dispose of its appurtenant undivided share in the Common Property without express reference thereto; and

iv. The undivided shares into which the Common Property is divided shall not be varied without the unanimous consent of all Suite Holders affected which shall be given in a manner satisfactory to the Directors of the Management Company (as herein defined).

[17.] Section 22 of the Law of Property and Conveyancing (Condominium) Act of the Statute Laws of The Bahamas ("Act') provides:

"22. (1) The owners of all units may by unanimous resolution at a meeting convened by the body corporate for the purpose direct the body corporate-

i. To convey or lease on their behalf common property or any part thereof:

ii. To execute on their behalf a grant of easement or restrictive conveyance burdening the property; and

iii. To accept on their behalf a grant of easement or a restrictive covenant benefiting the property.

(2) The body corporate, if it is satisfied that such resolution is duly passed and that all parties having an interest in the property of which the body corporate has notice have consented in writing to the release of their interest in respect of the land in the proposed conveyance, lease or covenant shall be valid and effective without execution by any person having an interest in the property or the common property, and the receipt of the body corporate for any purchase money , rent, premium or aby other money payable shall be sufficient to discharge and shall exonerate all persons taking under the conveyance, lease or covenant as the case may be from any responsibility for the application of the moneys expressed to have been so received."

[18.] Courts have declined to strike down or void the entire Declaration of Condominium where mere inaccuracies exist. In ***Treco v Shutley*** **[1996] BHS J No 123** the court found that whilst the architect's final certificate appended to the Declaration for the purposes of the Act was inaccurate, the conveyances of the units in the condominium represented valid and enforceable documents which have effectively passed title to the units. According to ***Davis J:***

18 In an issue of this sort, in order to find the answer it is necessary, or at least worthwhile, to examine, even if only cursorily, the purpose, scheme and tenor of the legislation under consideration. What the legislature has clearly done in enacting the 1965 Act is to put in place a scheme and mechanism for giving birth to the concept of the fee simple title to units in a condominium - something unknown to the common law as pointed out by Telford Georges C.J. in the Roberts v. Albacore case referred to above. For this reason the provisions are fairly comprehensive, dealing as they do with various important aspects such as the management of the condominium, the identification of the units and the common areas, the mutual rights and obligations of the unit-owners, the preservation of the character and integrity of the condominium community and most important of all, the creation and transfer of title to a unit in a condominium.

19 The submissions of counsel will now be examined in light of the raison d'etre of the legislation I have just referred to above.

20 Mrs. Hassan's submissions were very terse and to the point, as already stated. The architect's certificate must be completely accurate in what it is certifying. Otherwise it is not a certificate within the contemplation of the Act with the capacity of contributing a vital ingredient necessary for giving life to a Declaration. Or put another way, no degree of inexactitude can be excused or overlooked.

21 It is a puristic and strict approach to interpretation of the statute taken by her.

22 In Mr. Barnett's submissions, at one stage he took the other extreme to Mrs. Hassan's position. He went so far as to say that one ought not to look at or into the certificate at all; this would be going behind the recorded documents, for which, according to him, there is no basis.

23 The Court is unable to agree with the submissions made by Mrs. Hassan or its matching counterpart at the other extreme end made by Mr. Barnett. In the case of the former, the reason is clear if one were to consider the fact that the magnitude and enormity of some condominium schemes are such that it would be an extraordinary thing for deviation in the plans or drawings, however slight, to be a sufficient basis to abort the entire project. This, with respect, could not have been the intention of the legislature. In the case of the latter proposition, that of Mr. Barnett, it is similarly the case. The extreme position cannot be countenanced. Thus the architect cannot with impunity certify compliance when in fact there have been substantial and/or significant variations in the constructed project without the possibility of this having a destructive or deleterious effect on the attempt to create a condominium which could be embraced by the legislation.

24 So the answer to Mrs. Hassan's position is that one bad apple does not spoil the rest. Indeed this is, in a sense, the alternative limb of the proposition argued by Mr. Barnett. It finds favour with the court. He has put it this way:

> "There is no justification for the position that any mistake in the certificate however slight, would have the effect of destroying the validity of the Declaration and the conveyance made under it."

25 Nothing in the evidence supplied in this matter has revealed any encroachment of any unit onto the areas of another, or on any of the common areas. So in truth and in fact none of the unit owners could at any time say that the character or characteristics of Unit 301 has impacted negatively on his unit or the

scheme as a whole or the enjoyment thereof by virtue of alterations in the construction of Unit 301.

26 The finding of the court is that the efficacy of the Declaration in its life-giving function to the condominium has not been impaired by the imperfection in Unit 301 or in the architect's failure to disclose it in his final certificate. The court therefore holds that in the circumstances of this case the transfer of title to the units - in particular Unit 301 is valid.

27 Uppermost in the court's consideration of the matter was the importance of avoiding a construction of the Act which could be said to be doing violence to its letter and/or spirit.

[19.] In **Proprietors Unit Plan No. 10 v Rockley Time Share Cluster G Ltd No 103 of 1985** the Barbados High Court was asked to rectify the Declaration of Condominium to correct inaccuracies. The inaccuracies included the facts that neither the architectural plans nor the unit entitlements matched the as-built structure. According to ***Douglas CJ:***

> The Condominium Declaration was drawn and prepared by an Attorney-at-Law other than counsel now appearing for the Defendant. It contains the most startling inaccuracies. It recites that the company is seised in fee simple in possession free from encumbrances of the parcel of land described in the first schedule. This is simply not true. The property is subject to a mortgage dated the 5 th of November, 1980 made between the defendant and Rockley Club International Limited. It is also subject to two separate transfers of mortgage dated respectively the 6 th of November 1980 and the 24 th of July 1981. It is also subject to certain restrictive covenants. In addition Clause 1 (2) of the Declaration is inaccurate in that the plans referred to thereunder are wrongly described. Clause 2 does not refer to the charges relating to the property described in the first schedule. The first schedule is inaccurate in that the description of the land does not conform to the plan of the land attached to the Declaration. The second schedule contains references to Unit Entitlement, which are not expressed as a percentage, and the designation of the ground floor and first floor units does not conform with the plans of the said units attached to the Declaration.
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> ...
>
> In the instant case, it appears from the affidavit of Mr. Fitzwilliam that by letter dated the 31 st of March, 1983, Messrs. Bayley and Gittens, Attorneys-at-Law, informed each of the unit week owners of Rockley Development Cluster "G" of certain

discrepancies in the Declaration and requested each unit week owner to sign and return a consent enclosed in the letter for the rectification of the Declaration. It further appears that the unit week owners who were present at the annual general meeting of the plaintiff on the 22nd of April, 1983 were asked to sign and return the consent forwarded by Bayley and Gittens. On the 16th of June, 1983 another letter was sent to the unit week owners who had not then returned their consent.

Mr. Fitzwilliam's affidavit also reveals that the plaintiff, by letter dated the 16th of April 1984, notified each unit week owner of its annual general meeting scheduled for the 10th of May, 1984 and of a proposed resolution to authorize the commencement of proceedings to rectify the Declaration. That resolution was passed at the adjourned annual general meeting on the 17th of May, 1984.

According to Mr. Fitzwilliam's affidavit, all the mortgagees have given their written consent, and 79% of the unit week owners who together own 99% of the unit weeks in the condominium have given their written consent to the proposed amendment to the Declaration. None of the unit week owners had objected to the proposed rectification.

...

In sum, the conveyances held by the individual unit owners properly reflect the title, which each one holds as conferred by earlier conveyances. The only defective root of title for the unit owners of Cluster "G" is the Condominium Declaration, which is inconsistent with earlier conveyances. It appears to me that rectification of the Condominium Declaration in the terms proposed would be in the interest of all the unit week owners and mortgagees and would not prejudice their respective rights. It would bring the Condominium Declaration into conformity with the plans appended to it and with the conveyances held by the unit week owners. In the circumstances there will be an order in terms of the draft order submitted.

[20.] Having considered the documents and observed the witnesses as they gave their evidence, I am satisfied that there are inaccuracies contained in the architect's certificate and that the inaccuracies which I have found were in place prior to the certification. I accept the following with respect to the three disputed areas:

Area under the pitch of the Mansard roof

[21.] This area is identified as the space under the pitch of the old mansard roof. Mr. Johnson confirmed that he did not calculate this space as a part of the penthouse unit and did not include it in his calculation. He said that the space is considered attic space and would not be included in the calculation of the square footage. This space was not accessible to anyone other than the adjoining penthouse unit owner.

[22.] As the building went into receivership in November 2012 it was highly unlikely that receivers or the Association made any changes since that period. I find that this area (under the pitch of the old mansard roof) was not completed prior to its acquisition by Replay. I accepted the evidence of Moran that there was no evidence that any construction had taken place in the penthouse nor any sign of walls having been removed. The attic was never built out and the interior space extended to the mansard roof.

[23.] I did not accept Johnson's evidence that there was some maintenance function that this area was needed for.

[24.] Johnson accepted that not measuring to the exterior of the windows or doors on the dormers and to the extent of the balconies was an error. I accepted Johnson's evidence that the attic space could be used for anything by the unit owner including air conditioning ducting to be installed by the unit owner. In his evidence, Johnson said that he did not think that a person could be made to pay for this attic space but that there was nothing to prevent a unit owner from using that space.

[25.] I find that there is no real reason why the unit was only measured up to where the interior walls were intended to be when the unit owner had access to the entirety of the unit up to the roof and the dwarf wall. In as much as it fell within the unit I did not find that it was common property.

Twelve feet terraces

[26.] This area comprises a 12-foot wide strip that appears to have been originally designed to be open roof terraces with a decorative pergola covering that have not been erected on site. Instead, the original developer appears to have pushed the roof out by the 12 foot dimension to the edge of the building, affecting the internal areas of units 903 and 904 on the east and unit 908 on the west.

[27.] This area is likewise only accessible from the interior of the penthouses. It is a reasonable and logical proposition that these areas like any balcony or terrace was to be a part of the suite occasioned by its location within the structure of the Suite. Access points were limited to penthouse suite owners and the design use extending out to the edge of the roof (as it abuts the building).

Quadrant

[28.] I found this area to have the following features:

a. There are privacy walls 8-9ft in height separating each unit (901, 902, 907 and 909).
b. Of penthouse units 901,902, 907 and 909 each have a door to access the quadrant.
c. The only way to access the space was to enter through these penthouse units. There was no way to move from each of the quadrants save for entering through the unit.

I am satisfied that this is the as-built condition of the quadrant which is an area in the center of the building between the 4 penthouses (901. 902, 907 and 909) and each quadrant is accessible only to the unit owner of the respective penthouse. I accepted the evidence that the staircase did not extend to the top floor and was blocked off. A condition which existed prior to the certification. In any event, the way that the stairway access was designed on the plans did not allow access to all of the units because of the style of switchback stairway that was used. This however does not appear to have been the original intent for this space which was likely to be a common balcony.

[29.] However, as the space, albeit outside of the unit, could only be (in the as-built condition) accessed by the respective unit it should now nonetheless belong to the unit as any balcony would and must be calculated as a part of the unit. It is clear however that these common balconies may have been intended to be owned by the Association in common for all unit owners. This intent is now defeated as a result of design flaw and the state of the as-built condition. The quadrant area is and now represents exclusively the balconies for the 4 Suites and should thereby be added as part of the Suites' total square footage and unit entitlements.

[30.] In the circumstances I will order that the value of each quadrant be assessed by an independent appraiser and compensation, for their exclusive use, be provided to the Association by the penthouse owners affected.

Conclusion

[31.] It is clear from my assessment of the evidence that the calculations of the square footage for the penthouse units are inaccurate with respect to each of the three areas in dispute. I find that this is not the case of a declaration being void but merely inaccurate. I am satisfied on the authorities that the jurisdiction exists for the Court to correct such errors in the measurements and the Declaration properly amended so as to afford the Association the opportunity to align the unit entitlements. This is an appropriate case for the exercise of the Court's equitable jurisdiction to order a rectification and amendment of the Declaration. The schedules should also be corrected and accurate penthouse unit plans attached.

[32.] As a result of the inaccuracies, none of the unit owners are paying an accurate amount to the Association respecting any fees associated with the unit entitlements. Those with more square footage ought to pay their fair share of the fees/assessments with effect from the date of this decision.

[33.] This is a proposition that 78 of the 79 unit owners support.

[34.] I will hear the parties, by way of written submission, as to the appropriate directions for the assessment of the quadrant areas. I propose that Qamea be paid 50% of its reasonable costs to be paid by the Association. It is open to the parties to make submissions on costs in the event they wish to advocate for some other order on costs.

Dated this 20th day of December 2021

Ian Winder
Justice