

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
Common Law and Equity Division  
2005/CLE/gen/0069**

**BETWEEN**

**WALLACE I ROLLE**

**First Plaintiff**

**AND**

**KRYSTAL D ROLLE**

**Second Plaintiff**

**AND**

**THE TOWN COURT MANAGEMENT COMPANY**

**Defendant**

**Before Hon. Mr. Justice Ian R. Winder**

**Appearances: Krystal Rolle QC for the Plaintiffs**

**Kahlil Parker QC with Roberta Quant for the Defendant**

**15 February 2021; Closing Submissions March 2021**

**JUDGMENT**

## WINDER J

This is the Plaintiffs' claim for damages and declarative relief against the Defendant arising out of the Plaintiffs' ownership of Unit A-5 in the Town Court Condominium complex.

[1.] The claim of the Plaintiffs is set out in their Statement of Claim (as amended) which provides, in part, as follows:

- ...
2. The Plaintiffs are the owners of Unit A-5 (hereinafter referred to as "The Unit") situated in Block A of the Town Court Condominiums located on Nassau Street, New Providence, Bahamas having acquired the same from Mr. William J. Fijnheer, their predecessor in title.
  3. The Defendant is the body corporate (hereinafter referred to as "the body corporate") which was vested with the powers of management of the Town Court Condominiums. The Defendant was constituted as the body corporate by paragraph 13 of the Declaration of Condominium (hereinafter referred to as "The Declaration") in respect of the Town Court Condominiums dated the 8<sup>th</sup> day of October, A.D., 1978 and recorded in the Registry of Records in Volume 3189 at pages 366 to 405. The Plaintiff will rely on the provisions of the Declaration at the trial of this action for its full terms and effect.

The Plaintiffs' claim for Declaratory relief relative to the Defendant's claim for outstanding Maintenance Fees and its asserted consequent right to be entitled to sell the Unit.

4. The Declarant in the Declaration was Town Court Limited. Town Court Limited was incorporated on the 25<sup>th</sup> day of April, A.D., 1978.
  5. Town Court Limited was struck off the Register of Companies on the 31<sup>st</sup> day of May, A.D., 2002. After it was struck off the Register on 31<sup>st</sup> May, 2002 Town Court Limited was never re-instated.
  6. The Defendant as the body corporate is referred to in the Declaration as the "Management Company". For the purposes of the Declaration and the performance of the functions of the body corporate the term "Management Company" includes any duly appointed "Managers" of the Management Company.
- ...
9. The Plaintiffs and each of them rely inter alia upon Section 13(2) of the Act which indicates that the owners of the units in a condominium will only constitute the body corporate if no body corporate is constituted by the Declaration.

- ...
11. The Plaintiffs will aver that Town Court Limited was not vested with the power to levy contributions or maintenance fees from the Plaintiff in respect of the Unit.
  12. Further, given that the Defendant was duly constituted as the body corporate by the Declaration the owners of the Town Court Condominiums did not constitute the body corporate by virtue of the Declaration or by the Act.
  13. The Plaintiffs will aver that the owners were not vested with the power to levy contributions or maintenance fees from the Plaintiffs in respect of the Unit.
  14. By an Agreement dated the 15<sup>th</sup> day of May, A.D., 1996 (hereinafter referred to as "The Management Agreement") and made between the Town Court Condominium Association expressly referred to therein as "the Owners" of the Town Court Condominiums of the first part and Real Estate International (Bahamas) Company Limited ("Real Estate International") of the second part, "the Owners" appointed Real Estate International as their management agent purportedly with the responsibility for managing the Town Court Condominiums.
  15. The Defendant was not a party to the Management Agreement and none of the signatories thereto stated or purported to be acting as a Manager of the Defendant as envisaged by paragraph 15 of the Declaration.
  16. Thereafter, and at all times material to this action Real Estate International purported to manage and operate the Town Court Condominiums doing so and acting on behalf of the Owners pursuant to the terms of the Management Agreement.

...

The Plaintiffs' Claim against the Defendant for Damages

...

29. The Defendant breached its said statutory duty and the said duty to maintain and repair as contained in the Declaration and it also breached its said duty to keep the property clean, tidy and in a good state of repair.

PARTICULARS

The Defendant breached its said duties by:-

- i. Failing to repair and/or replace the drain pipes and plumbing in Block A and thereby allowing and causing water and waste to leak from the ceiling into the Unit. This failure to repair continued from November, 2000 up to the year 2001 despite repeated written complaints from the Plaintiffs and their predecessor in title.
- ii. Failing to repair drains and plumbing in the main lobby of Block A thereby causing and allowing sewerage to leak down into the lobby.
- iii. Failing to maintain the entrance to, second floor and common areas of Block A in a clean and tidy condition thereby causing and allowing the same to become infested with rodents as well as with a constant foul odor.
- iv. Failing to conduct and carry out the roof repairs in a timely manner.

- v. Failing to carry out required renovations in a timely manner.
30. By reason of matters aforesaid the Plaintiffs suffered loss and damage.

**PARTICULARS OF SPECIAL DAMAGES**

- i. By reason of the Defendant's failure to carry out the aforesaid maintenance and repairs the Plaintiffs incurred expenses by having to carry out plumbing and related repairs themselves in the amount of \$5,946.22.
- ii. The Plaintiffs also incurred loss of rental income by virtue of their inability to rent the Unit and/or to keep the Unit rented which was occasion by the aforesaid conditions in the amount of \$27,733.16 representing the average monthly rental income for the unit of \$\$1,066.66 for a period of 26 months between 2001 and 2004.

TOTAL - \$33,679.38

...

**AND THE PLAINTIFFS AND EACH OF THEM CLAIM:-**

1. A Declaration that the Defendant has not levied any contributions and/or maintenance fees from the Plaintiffs nor from their predecessor in title Mr. William J. Fijnheer in respect of the Unit.
2. A Declaration that the Management Agreement and all subsequent renewals thereof are null and void as being in contravention of and/or inconsistent with the Governing Documents for the Town Court Condominiums and that all acts and purported duties performed by Real Estate International between 15<sup>th</sup> May 1996 and September, 2010, purportedly pursuant to the terms of the Management Agreement (and/or pursuant to subsequent purported renewals thereof) are likewise null and void.
3. A Declaration that the management fees paid to Town Court Limited and to Real Estate International do not constitute "common expenses" as defined and envisaged by the Governing Documents.
4. A Declaration that that (sic) any contributions or maintenance fees purportedly levied by the "Owners" of the Town Court Condominiums and/or by Town Court Limited and/or by Real Estate International purportedly pursuant to the Management Agreement and/or a purported appointment by the Defendant are null and void and/or of no legal effect.
5. A Declaration that the Defendant is not entitled to recover from the Plaintiffs the outstanding maintenance fees purportedly levied by "the Owners" and/or Town Court Limited or by Real Estate International purportedly pursuant to the Management Agreement (or purported renewals thereof) and/or pursuant to a purported appointment by the Defendant as aforesaid.
6. A Declaration that the Defendant is not entitled to exercise a power to sell the Unit on the basis of these contributions and/or maintenance fees allegedly owed by the Plaintiffs and/or which include management fees paid to Town Court Limited and to Real Estate International.
7. Damages for breach of statutory duty and/or breach of the duties imposed by the Declaration.

[2.] The Defendant filed a Defence and Counterclaim (as amended) which provides as follows:

- ...
11. With respect to the contents of paragraphs 14, 15, and 16 of the Statement of Claim, the Defendant admits that it engaged a property management company to assist it in the operation and management of The Town Court Condominium. The unit owners of The Town Court Condominium collectively determined to engage a property management company, to assist with some of the Defendant's administrative and operational functions, including the collection of contributions to the common expenses due and payable by unit owners to the Defendant. The Defendant acted lawfully in engaging a property management company. The Plaintiffs are attempting to cynically capitalize on alleged superficial irregularities on the face of the management contract and the Defendant's billing for outstanding contributions. Furthermore, the Plaintiffs' were at all material times, or reasonably ought to have been, aware that they had to pay contributions toward the common expenses incurred by the Defendant in the operation and maintenance of the Condominium. The Court ought not to entertain their pettifoggery in attempting to justify their extreme and inexcusable delinquency and refusal to pay.
  12. With respect to the contents of paragraph 17 of the Statement of Claim, the Defendant states that Mr. William J. Fijnheer duly paid the maintenance fees demanded by the Defendant with respect to the subject unit prior to the delinquency and accumulation of arrears of contributions complained of herein. The Defendant also confirms that any references by its property management company to 'Town Court Limited' were clerical errors, as the property management company was at all material times acting for and on behalf of the Defendant.
  13. The Plaintiffs place undue emphasis on the allegation that Real Estate International issued Statements of Account stating that they acted on behalf of "Town Court Limited", as they have pleaded their knowledge of the Defendant's property management agreement appointing Real Estate International as the property management company for the Condominium. Town Court Limited was not involved at any stage of the process and it is cynical and self-demeaning for the Plaintiffs to suggest to this Honourable Court that they genuinely believed otherwise. Reference to 'Town Court Limited' was clearly a clerical error on the part of the property management company, which the Plaintiffs, both practicing attorneys, are seeking to dishonestly exploit in order to avoid satisfying the arrears of contributions due and owing to the Defendant with respect to Unit A5 in the Condominium, which stand at \$222,302.39 as at the 1<sup>st</sup> day of October A.D. 2019.
- ...

15. Paragraph 20 of the Statement of Claim only serves to emphasize the trivial nature of the Plaintiffs' claim. The Plaintiffs admit that Unit A5 is in arrears and yet they are seeking to dishonestly and unreasonably avoid the lawful obligation to contribute to the maintenance and operation of The Town Court Condominium.
18. The Plaintiffs have yet to explain how their spurious claims relieve them, as the self-proclaimed owners of Unit A5, of their obligation to pay contributions toward the operation and maintenance of The Town Court Condominium. The Plaintiffs, particularly as attorneys, ought not to feign ignorance of the fact that the arrears of contributions were accruing and were due and owing to the Defendant with respect to Unit A5. Instead of merely alerting the Defendant to the typographical error in its billing, the Plaintiffs sought instead to rely on it as an excuse for not paying their lawful contributions.

...

#### AMENDED COUNTERCLAIM

...

26. The Plaintiffs assert ownership of Unit A5 in The Town Court Condominium, by virtue of which they are indebted to the Defendant in the amount of \$222,302.39 as at the 1<sup>st</sup> day of October A.D. 2019, representing the outstanding contributions to the common expenses of the Condominium due with respect to Unit A5 pursuant to and in accordance with the Defendant's Declaration.

...

[3.] At trial Wallace Rolle (Rolle) gave evidence as the sole witness on behalf of the Plaintiffs. Rolle's evidence in chief was contained in a witness statement which provided, in part, as follows:

...

37. In this action, we do not accept that the "Owners" or the "Town Court Condominium Association" had any powers to manage or operate the Town Court Condominiums which it could in turn delegate to Real Estate International by virtue of the Management Agreement.
  38. However, Real Estate International, pursuant to the Management Agreement, then purported to manage the Town Court Condominiums during the period 1996 up to at least 2010.
  39. Specifically, Real Estate International, during the aforementioned period of 1996 to 2010 purported to act and carryout many of the statutory duties and powers of the body corporate as set out in the Governing Documents.
- ...
43. Consequently, it is our position that any contributions purportedly levied by Real Estate International in pursuance of the Management Agreement (and any purported renewals thereof) or otherwise, are not valid levies

issued by the Defendant in accordance with the Governing Documents and cannot be enforced against us.

44. Our position remains the same even if it is suggested by the Defendant that Real Estate International was appointed by the body corporate because it is our position that any purported delegation by the Defendant of its statutory powers would be inconsistent with the Act and the Byelaws and that any act done by any purported appointee or agent would not be enforceable against us.

#### The Plaintiffs' Claim for Damages

... By the Governing Documents the Defendant was responsible for maintaining and repairing the common property and common areas of the Town Court Condominium. This included among other things the structure of the buildings and all elevators, garbage chutes, conduits, ducts, pipes, and drains.

45. By the Governing Documents the Defendant also had a duty to keep the common areas of the Town Court Condominiums clean, tidy and in a good state of repair.

#### *The Defendant's Failure to Replace/Repair the Pipes*

46. When the Town Court Condominium was originally constructed many of the pipes were the old iron pipes. Over time the iron pipes became corroded which resulted in leaks.

47. This problem occurred in Block A where the Unit is located.

48. As a result of the corrosion of the pipes, whenever the occupants of the units above the Unit flushed their toilet or emptied their bathtub the waste water would leak down into the Unit.

...  
53. When we took possession of the Unit in or about April, 2001 the repairs had not been done and the leak persisted. By that time the ceiling had been substantially damaged in the areas of the bathroom, hallway and one of the bedrooms.

54. After taking possession of the Unit we repaired the leak and the ceiling damage ourselves. We took this step because the problem had persisted for so long and it was clear that the damage to the ceiling was getting worse. Additionally, we knew that it would be virtually impossible to rent the Unit with an ongoing leak of waste water and damaged ceilings throughout the Unit (sic)

...  
56. The plumbing work carried out in the Unit entailed changing the corroded iron pipes and replacing them with PVC pipes. Gaining access to the pipes also involved ripping down the damaged drywall ceiling and cutting away concrete within the ceiling.

57. Once the pipes were replaced we had to then replace the ceiling with new sheet rock and joint compound.

58. The plumbing work was done by a Mr. Pedro Josey. Mr. Josey charged me approximately \$5,000.00 for the plumbing work. This included labour

and materials. I have search my records and was unable to find a receipt from Mr. Josey for the work. ...

- ...
61. I subsequently also incurred the sum of \$246.22 in relation to further plumbing repairs with National Plumbing. ...
  62. The sheet rock and joint compound work which was required to replace the ceiling in the affected areas was done by a carpenter at the approximate cost of \$700.00 for labour and materials.
  63. We are therefore claiming the total sum of \$5,946.22 as damages resulting from the Defendant's failure to carry out the plumbing repairs in accordance with the Governing Documents.

...

The Defendant's Failure to carryout other repairs in a timely manner & Failure to keep common areas in a good state of repair and in a clean and sanitary condition.

65. When the Second Plaintiff and myself purchased the Unit we had no intention of residing there. It was always intended that the Unit would be a rental property for the purpose of generating rental income.

- ...
67. Firstly, the buildings in many respect were in need of repair. One of the major issues was the roof. Additionally, many of the common areas were in dire need of refurbishing.

- ...
69. One specific problem which I recall is that the drains and plumbing in the main lobby of Block A remained unrepaired for a significant period of time and this resulted in the leakage of sewerage into the lobby. As stated above the Unit is in Block A.

- ...
72. The entrance to Block A, the second floor of Block A and other common areas of Block A were consistently in an unclean and unsanitary condition. This resulted in a rodent infestation problem within Block A coupled with a constant foul odor.

- ...
75. These problems persisted at least until the end of 2004 and even thereafter.

- ...
80. During the period when the Unit was vacant I personally showed the Unit to numerous potential tenants. On many occasions as I showed the Unit the individuals complained about the conditions of the building as I have described above and confirmed a lack of interest in renting the Unit for that reason.

81. In the instances where the Leases were executed the tenants remained in occupation on average between 3 to 6 months and then gave notice and vacated the premises. No stay under these Leases exceeded 6 months.



82. In each case the stated reason for leaving was dissatisfaction with the conditions of the property as described above with the exception of the Lease which was for six (6) months.
83. Consequently, during the period between April 2001 and the end of 2004, that is a total period of approximately 44 months, the Unit was unoccupied for a minimum of 26 months using an average stay of 6 months on each of the three (3) leases even though in at least one (1) case I do recall that the stay was much shorter than six (6) months.
84. We are therefore claiming loss of rental income for a period of 26 months between 2001 and 2004.
- ...
86. We therefore claim the sum of \$27,733.16 being the average monthly rental of \$1,066.66 for the 26 months vacancy period during the years 2001 and 2004.
- ...
99. We accept and acknowledge that we are required to pay any contributions duly levied against us by the Defendant in accordance with the Governing Documents excluding "REI Management Fees".
100. We will require the Defendant to fully particularize this sum excluding as aforesaid any amount paid to Real Estate International as fees for their purported management services as well as any purported Special Assessment by Town Court Limited and/or Real Estate International.
- ...

[4.] Under cross examination Rolle stated:

- (1) He was unaware that his predecessor, Fijnheer, paid contributions to the Defendant prior to his taking possession of the unit or that Real Estate International (REI) was the Defendant's management company. He did acknowledge receiving a letter of 30 August 2001, prior to purchase from REI, relative to outstanding fees.
- (2) The repairs being claimed in this action were of a common nature. He was told by the Defendants that they were effecting the repairs. It was their pipes and they had agreed to fix it. They started to fix them and then stopped repairing them. The issues were not confined to his individual unit. There were a number of units on his floor that were having the same issues. Every time the person above him flush, it would come down in his unit. It had nothing to do with the pipes in his bathroom or in their bathroom. It was the common area pipes that were causing the problems.

- (3) He initially thought that the Defendant, the Town Court Management Company was operating the Town Court condominium in which unit A5 is located. He found out differently. REI was operating the company.
- (4) He accepted that it was clear from the agreement that REI was an agent.
- (5) From the agreement, the Town Court Condominium Association is defined as the owners for the time being of the Town Court Condominium.
- (6) When a demand for payment was made it came from REI. At the time of the demand he was aware that REI purported to work for the Defendant.

[5.] Terrance Fountain (Fountain) and Leisa Hall (Hall) gave evidence on behalf of Town Court.

[6.] Fountain's evidence in chief was contained in a witness statement which provided, in part, as follows:

1. I am a Unit owner in the Defendant's Condominium, and I am duly authorized to make this Witness Statement on the Defendant's behalf. The Defendant is the management company of the Condominium, established by its Declaration of Condominium.
2. The overwhelming majority of Unit owners in the Condominium pay their contributions as have been levied by the Defendant over the years, in the same manner as the contributions claimed by the Defendant with respect to Unit A-5 have been, and they continue to pay their said contributions. Even where Unit owners have fallen into arrears, none have adopted the position taken by the Plaintiffs herein, suggesting that someone other than the Defendant was purporting to levy or collect contributions with respect to the Condominium, which has never been, and is not, the case.
3. I myself, in my capacity as then Chairman of the Defendant's Board, executed the Agreement between the Defendant and Real Estate International (Bahamas) Company Limited, dated the 15<sup>th</sup> day of May A.D. 1996, ... While I accept that the said Agreement refers to a "Town Court Condominium Association", I can confirm that, despite this clerical error, it was in fact the Defendant, as the Body Corporate of the Condominium, who determined to and duly engaged Real Estate International (Bahamas) Company Limited. I can confirm that it was the Defendant's Board's decision to engage Real Estate International (Bahamas) Company Limited to assist the Defendant in carrying out its functions.
4. Any reference in statements issued on behalf of the Defendant during the currency of the said Agreement to being "in account with" Town Court Limited, was due to a clerical error. Town Court Limited was neither party to the Defendant's Agreement with Real Estate International (Bahamas) Company Limited nor was it otherwise involved in any way in the

operation or management of the Condominium. The statements issued to Unit owners during the currency of the said Agreement were issued on the Defendant's behalf and were duly paid to the Defendant by the overwhelming majority of Unit Owners, none of whom, aside from the Plaintiffs, ever suggested that they thought the said statements were being issued by someone other than the Defendant or that they would not pay the amounts claimed pursuant thereto because of any such concerns. At all material times the Plaintiffs couched their refusal to pay the arrears due and payable to the Defendant with respect to Unit A-5 as a purported protest concerning alleged issues regarding the maintenance of the Common Areas at the Condominium.

[7.] Under cross examination Fountain stated:

- (1) He bought into Town Court in 1993 and has resided there from 1993 to the present. He has been involved in management from the early 90's as the chairman of the board. He served at two other times as the chairman of the board since then.
- (2) He signed the agreement and at the time didn't note the clerical error.
- (3) When the agreement was signed, they were exiting an arrangement with the persons responsible for building Town Court, ultimately Bethel Estates. The idea was for the owners of Town Court Condominiums, through its board, to take over full management of Town Court. That was the intent.
- (4) They didn't think about the legalese of the name back in 2002.
- (5) Real Estate International provided services for the association, charged fees for those services, and those fees were incorporated in the amounts that the unit owners had to pay. Real Estate International was not a unit owner.

[8.] Hall's evidence in chief was contained in a witness statement which provided, in part, as follows:

...  
4. The significant majority of owners in the Condominium, myself included, pay their contributions as have been levied over the years. The Plaintiffs are the only owners who have taken the position that somehow an entity other than the Defendant was seeking to unlawfully extract funds from them, apparently for purposes other than operation and maintenance of the Condominium. That was not the case. ... By engaging Real Estate International (Bahamas) Company Limited and in attempting to collect the outstanding sums due to the Defendant the subject of the Counterclaim herein, the Defendant's Board was at all material

times, and to the date hereof, merely seeking to ensure the effective and efficient management of the Condominium for the benefit of all Unit Owners.

5. The Defendant determined to engage Real Estate International (Bahamas) Company Limited to carry out management services on behalf of the Unit Owners at the Condominium, which services they duly provided. During the course of their engagement by the Defendant, Unit Owners, myself and the Plaintiffs included, were duly billed by Real Estate International (Bahamas) Company Limited with respect to our common expenses and the significant majority of Unit Owners fulfilled our obligations as owners by paying the said contributions to the Defendant due with respect to our units in the Condominium.

6. While Statement formerly issued by Real Estate International (Bahamas) Company Limited to Unit Owners may have, due to a clerical error, made reference to being "in account with" Town Court Limited, as the Management Agreement itself demonstrated there was no involvement by Town Court Limited, the Declarant, in the operation or management of the Condominium and Real Estate International (Bahamas) Company Limited had no contractual relationship with Town Court Limited with respect thereto.

7. While the Plaintiffs' assert that they acquired Unit A-5 in the Condominium from Mr. William J. Fijnheer in 2001, the Defendant's Agreement with Real Estate International (Bahamas) Company Limited began in 1996. Prior to the Plaintiffs' acquisition of Unit A-5 their predecessor in title paid maintenance fees as billed by Real Estate International (Bahamas) Company Limited in its capacity as agent of the Defendant management company of the Condominium. The debt complained of herein owed by the Plaintiffs with respect to Unit A-5 was deliberately cultivated by the Plaintiffs over the years to the significant disadvantage of their fellow Unit Owners who have been forced to bear the burden of their selfish delinquency.

8. The Plaintiffs maintain herein that somehow the Defendant has breached its statutory or contractual duties owed to them as Unit Owners, when it is in fact serial and significant delinquent Unit owners like the Plaintiffs themselves who financially destabilize the Defendant and make it difficult for the Defendant to maintain the Condominium to the highest standard possible. The sole source of the Defendant's income is the contributions levied to Unit Owners and when Unit Owners, like the Plaintiffs, do not pay the Defendant is less able to perform its duties.

9. Unit A-5 is presently occupied by a Mr. Tereco Bain, a purported tenant of the Plaintiffs, and has at all material times been in near constant, if not constant, occupation by other tenants of the Plaintiffs. The Defendant therefore not only disputes the premise of the Plaintiffs' purported claim for loss of rental income but we also dispute the fact that the said Unit has been empty for any significant period or at all.

10. The Defendant has not to my knowledge breached any statutory or contractual duty owed to the Plaintiffs. On the contrary, the Plaintiffs have willfully refused to meet their statutory and contractual obligations to contribute toward the maintenance and operation of the Condominium and ought not to be heard to complain about the state thereof in the circumstances. The Plaintiffs are

delinquent purported Unit Owners who believe that their self-perceived cleverness can help them escape their lawful obligations. The Plaintiffs' claim is not a principled claim, it is unfair and oppressive, and it has been damaging to harmony and good operation at the Condominium. My fellow Unit Owners are understandably furious at the Plaintiffs' attitude and the sheer scale of their protracted and admitted delinquency. Unit Owners like myself serve on the Defendant's Board voluntarily and we give of our time in service to our fellow Unit Owners, we find cases like this discouraging and harmful to our efforts to build and sustain our community.

11. A copy of the Defendant's Statements of Account with respect to the Plaintiffs and Unit A-5 is at Tab-3 of the Defendant's Supplemental Bundle of Documents, which Statements reflect that the Plaintiffs owe the Defendant \$222,302.39 with respect to outstanding contributions for Unit A-5 as at the 1<sup>st</sup> day of October A.D. 2019. At Tab-2 of the Defendant's Supplemental Bundle of Documents, the Defendant has produced an Annotated Table of the Plaintiffs' Arrears which provides a breakdown of the Plaintiffs' arrears. The said Annotated Table, at page 10 thereof (Page 18 of 127 of the Supplemental Bundle), also provides a breakdown of the maintenance fees payable for units the size of Unit A-5 from December 2000 to present. The Defendant humbly seeks judgment against the Plaintiffs in the said amount with respect to their said indebtedness to the Defendant in accordance with its Counterclaim.

[9.] Under cross examination Hall stated:

- (1) She had no personal knowledge about what happened at Town Court from a management standpoint prior to 2009, as she was not there. The Defendant was a part of the agreement. There is an error in the name but the spirit of the agreement still stands.
- (2) Real Estate International was charging a fee for the services they were providing. The amounts that were paid to Real Estate International were incorporated as a part of the contributions that the unit owners had to pay.

Analysis and disposition

[10.] The issues raised in this dispute are identified by the Plaintiffs as the following:

- i. Whether Town Court Limited did in fact carry out management functions of the Body Corporate?
- ii. If so up to what date were any and all such functions finally relinquished by Town Court Limited?
- iii. Assuming that the powers of the Body Corporate could as a matter of law be delegated (which is denied) was it the Body Corporate who appointed Real Estate International (REI)?

- iv. Whether the fees of REI were in fact included in the sums levied against the unit owners as Contributions?
- v. Whether there was plumbing damage which the Body Corporate was liable to repair and did the Body Corporate undertake such repairs?

[11.] According to the Plaintiffs:

- i. Town Court Limited did in fact carry out management functions at the Town Court Condominiums.
- ii. Town Court Limited was receiving the Contributions up to at least 2010 and likely up to 2011.
- iii. The Reference to the Town Court Condominium Association Was Intentional and Not a Clerical Error.
- iv. REI was not appointed by the Body Corporate, REI was appointed by Town Court Condominium Association.
- v. Billings for Town Court Condominiums were issued by REI.
- vi. REI's fees were included in the Contributions which were levied against unit owners.
- vii. REI was not a unit owner.
- viii. REI like Town Court Limited also usurped the powers of the Body Corporate.

They say that, "the Defendant's case of clerical error on the invoices was severely undermined on cross examination and in any event is palpably bad on the evidence as a whole." They contend that:

- i. The Defendant's witness Leisa Hall admitted on cross examination that she could not confirm clerical error because she was not present at the time.
- ii. The Defendant's evidence demonstrates a lack of awareness of the existence and import of the declaration which is not "clerical" at all.
- iii. The so called clerical error was never corrected after its so-called discernment.

[12.] One of the key issues of fact for determination in this action is the efficacy of the agreement dated 15 May, 1996 made between parties named as the Town Court Condominium Association and REI. The contracting party is expressly referred to as "the Owners" of the Town Court Condominiums and Real Estate International (Bahamas) Company Limited. Under the agreement the owners appointed REI as their management agent with the responsibility for managing the Town Court Condominiums. The Defendant's case is that this was clearly a clerical error and the true contracting parties, as accepted by them were the Defendant and REI.

[13.] I accept the Defendant's contention.

[14.] Whilst I accept Rolle as a truthful witness, the only witness in any position to speak to what transpired at the condominium complex in 1996 was Fountain, who gave evidence on behalf of the Defendant. Rolle could not speak to events concerning the entry into the management agreement or the conduct of the parties under the agreement prior to his purchase of the Unit. I found Fountain to be a truthful and credible witness.

[15.] Having observed the demeanor of the witnesses as they gave their evidence and having considered the submissions of parties, I accept the following facts as true:

- (1) The Defendant is a body corporate and must out of necessity act through the auspices of others. REI was engaged to provide services on behalf of the Defendant, for a period. At no material time, since 2001, was any entity other than the Defendant levying contributions with respect to the subject Unit A5 in the Town Court Condominium. Fountain executed the management agreement with REI in his capacity as Chairman of the Defendant's Board.
- (2) Fijneer, the Plaintiff and most other Unit owners paid contributions to the Defendant through REI. These contributions were received by the Defendant not Town Court Limited nor any entity identified as Town Court Condominium Association. Rolle confirmed that TCL was not claiming any money from the Plaintiffs, but asserted that "*REI was claiming money*". Rolle confirmed that he "*was aware that REI purported to work for the Defendant.*"
- (3) The Defendant, by its Rules and Regulations for the Condominium and (Owner's Manual) as at the 7<sup>th</sup> day of July A.D. 1997, made clear the agency relationship between the Defendant and REI.
- (4) REI was clearly the agent of the Defendant and empowered to manage the day to day operations of the condominium complex on behalf of the Defendant for the collective benefit of the Unit Owners. Mr. Rolle confirms that he thought that the Defendant was at all material times operating the Town Court Condominium, but

asserted that he "*found out differently. REI was operating the company.*" Rolle also confirms that he understood that the management agreement between the Defendant and REI was executed with REI by and on behalf of the owners of the Units in the Town Court Condominium with respect to the management of the Town Court Condominium.

- (5) There was some confusion regarding the precise legal name of the Defendant, reflected in correspondence and in the agreement. The contributions levied upon, and paid by Unit Owners were at all material times ultimately both demanded and received by the Defendant. I accept that the erroneous reference to the Town Court Condominium Association was clerical in nature and likely brought on by the layman involvement in the management of the complex as well as the transient nature of the membership of the Board over time. This resulted in what the Defendant describes as: "*typographical and/or presentational differences between the Defendant's records as produced for Trial, as reflected in the Defendant's Bundle, and the contemporaneous statements issued to the Plaintiffs as produced in the Agreed Bundle of Documents*"

[16.] Upon these facts I find that the declarations sought by the Plaintiff in items 1-5 of the prayers for relief, must fail. In respect of the Defendant's Counterclaim on this issue I accept the Defendant's submission that the anomalies with respect to the presentation of the accounts, concerning the Unit A-5 do need to be accounted for and addressed and may be satisfied by an order for an accounting rather than refusal of the relief sought upon its Counterclaim. This is indeed not a case where the Plaintiffs were challenging the Defendant's presentation of its accounts but rather a refusal to pay the sums claimed based on their view as to the management of the condominium complex.

[17.] I will therefore direct the Defendant to make a proper accounting of the charges levied on the Plaintiffs in the relevant period, as unit owners of Unit A-5, in keeping with their unit entitlement and the sums paid by the other unit owners in the Town Court Condominium. Upon the provision of the accounting the Plaintiffs will be required to



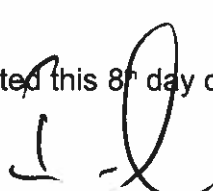
make payment thereon. The parties are invited to agree the terms of the Order failing which I will settle the same.

[18.] Sums charged to the Plaintiffs should reflect their fair share of the expense of operating and maintaining the condominium complex. The Plaintiffs claim damages in the amount of \$33,679.36 to properly maintain the condominium complex. This sum is said to be made up of \$5,946.22 being the costs of making repairs to the common property which they say the Defendant failed to repair and maintain, resulting loss of income of \$27,733.14.

[19.] The evidence of Rolle was not seriously challenged, that the sum of \$5,946.22 was paid to repair corroded waste water pipes and drains in the area above the Unit. I am satisfied that the area was common property and complaints had been made concerning these damaged pipes even prior to Rolle's acquisition of the Unit. I therefore have no hesitation in finding for the Plaintiffs with respect to this claim. Notwithstanding my view, that the nature of the injury would quite naturally cause loss of income, I am not satisfied that sufficient mitigation took place to avoid this loss of income over the two year period claimed. I will make an award of loss of income in the amount of \$20,000.

[20.] I will hear the parties on the question of the appropriate order for costs, by written submissions, within 28 days.

Dated this 8<sup>th</sup> day of April 2022



Ian R. Winder  
Justice