COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2021/CLE/gen/01318

IN THE MATTER of the Law of Property and Conveyancing (Condominium) Act, Chapter 139, Statute Law of The Commonwealth of The Bahamas (***the Act***). **IN THE MATTER** of the Declaration of Condominium dated the 31st day of August A.D. 1998 made under the Act, recorded in Volume 7610 at pages 485 to 524 (***the Declaration***) establishing "*Bimini Sands Phase II Condominium Association*", situate on the Island of Bimini (***the Condominium***). **IN THE MATTER** of Unit 12 F of the Condominium (***the Unit***). **IN THE MATTER** of a purported Notice of Charge perfected against the Unit by the 1st Defendant and Recorded in Volume 13517 Pages 696 to 700 respectively (***the Purported Charge***).

BETWEEN

STEVEN M. CHESS
KAREN CHESS

Claimants

AND

BIMINI SANDS PHASE II CONDOMINIUM ASSOCIATION

First Defendant

AND

BIMINI SANDS HOA PHASE 2 INC.

Second Defendant

Before:	**Her Ladyship The Honourable Madam Senior Justice**
	Deborah Fraser
Appearances:	**Mr. Kahlil D. Parker KC with Ms. Roberta Quant for the Claimants**
	Mr. Raynard Rigby KC with Ms. Asha Lewis for the First Defendant
	No Appearance for the Second Defendant
Judgment Date:	**30 November 2023**

Section 13, 14, 21, and 27 of Law of Property and Conveyancing (Condominium Act) Act – Operation and Management of Condominium – Validity of Charge on Condominium Unit – Sale of Condominium Unit – Appointment of Administration – Declaration of Condominium

JUDGMENT

1. This is an action brought by Steven M. Chess and Karen Chess ("**Claimants**") disputing the Purported Charge over and attempts to sell the Unit by Bimini Sands Phase II Condominium Association ("**Association**") and Bimini Sands HOA 2 Inc. ("**HOA 2**" and collectively, "**Defendants**"). The Claimants also allege that the Association has failed to properly, reasonably, and lawfully operate and manage the Condominium in accordance with the Declaration and the statutory and common law rights of the Claimants and other unit owners of the Condominium. They request several reliefs which will be expounded upon below.

Background

2. The Claimants are the owners of Unit 12F of the Condominium by virtue of an Indenture of Conveyance dated 01 November 2000 made between South Bimini International Limited of the one part and the Claimants of the other part and recorded at Volume 8055 at pages 154 to 175 in the Registry of Records in the city of Nassau in the Commonwealth of The Bahamas ("**Conveyance**").

3. The Association is the Body Corporate established by clause 13 of the Declaration and section 13 under the Act. Clause 13 of the Declaration provides:

> **"…Each Unit Owner shall by virtue of his ownership of a Unit be as of right a member of the Association and be entitled to exercise his voting rights in the manner prescribed by the Act and the Byelaws and shall be subject to all obligations of a Unit Owner in accordance with and by virtue of the Act."**

4. Bimini Sands HOA Phase 2 Inc. ("**HOA 2**") is a non-profit corporation incorporated on or about 29 April 2019 in Florida, the United States, for the purposes of operating as a "home owners association". The Claimants allege that the Purported Charge on the Unit has been perfected and recorded pursuant to and in accordance with contributions unlawfully levied by HOA 2 in breach of the Declaration and *ultra vires* the Act.

5. By virtue of their ownership of the Unit, the Claimants are also bound by the terms of the Declaration. Under the terms of the Declaration, each unit owner is obliged to pay certain fees for, *inter alia*, maintenance of the Condominium.

6. On or about 27 August 2021, the Claimants received a letter ("**Letter**") from Mr. Adam Cafferata of Cafferata & Co stating as follows:

> **"We have been instructed by Bimini Sands Phase 2 Home Owners Association and understand that a Lien has been placed on the Unit. The Association is giving you a further fourteen (14) days to settle the arrearages as set out in the copy Maintenance Charges statement**

attached, or to come to a suitable agreement with the Association regarding the same, before the Unit is advertised in the local newspaper for sale to the highest bidder…."

7. After receiving the letter, the Claimants instructed Cedric L. Parker & Co who, on 08 September 2021, wrote back to Mr. Cafferata requesting more time to reply to the Letter as they required an opportunity to review the file prior to taking any further steps.

8. The Claimants allege that, despite this request, on 02 November 2021, Mr. Cafferata sent a letter to the Claimants (and by email to the Claimants' Counsel) and their counsel stating the following:

> **"As no action has been taken by yourselves in connection with our letter dated 27th August, 2021, and the Maintenance Charges remain outstanding, the Condominium Association has advertised your Unit for Sale, and has just accepted a bid for the same. We have been instructed by the Board of Bimini Sands Phase 2 Homeowners Association to let you know that unless the arrearages are brought current by close of business within seven (7) days from today's date, being Tuesday 9th November 2021, the Board will proceed with the Sale without further Notice to you…"**

9. The Claimants, through their counsel and personally, raised several concerns and objections regarding the management and operation of the Condominium, which they allege impact the lawfulness and validity of the Purported Charge. They also requested a current statement of the Claimants' purported arrearages being demanded pursuant to which the Association sought to sell the Unit.

10. The Claimants have wired the purported outstanding funds owed in the amount of $33,350.33 to the Association's Counsel's client account and prepared to have same paid into court if required.

11. On 04 November 2021, the Claimants filed an Originating Summons against the First and Second Defendants requesting the following reliefs:

> **"(1) A Declaration that the First Defendant has not levied any contributions and/or Common Expenses from the Claimants pursuant to and/or in accordance with the Declaration or the Act with respect to the Unit.**
>
> **(2) A Declaration that the Second Defendant's purported operation and/or management of the Condominium and demands of contributions and/or Common Expenses levied from the Claimants and Unit Owners in the Condominium is ultra vires the Act and the Declaration, and unlawful, null void and of no legal effect.**
>
> **(3) A Declaration that the Purported Charge issued by the First Defendant pursuant to purported contributions and/or Common Expenses levied by the Second Defendant is ultra vires the Act and the Declaration, and unlawful, null void and of no legal effect.**

(4) A Declaration that the Purported Charge issued by the First Defendants has not become effective having been issued in breach of section 21(2) of the Act having not been issued under the common seal of the First Defendant and failing to state the date on which the purported amount due became payable.

(5) An Order that the First Defendant produce to the Court and the Claimants an audited account of its operation and management of the Condominium from the 1st day of November A.D. 2000 to date pursuant to and in accordance with section 17 of the Act and/or under the inherent jurisdiction of the court.

(6) An Order that the Second Defendant produce to the Court and the Claimants an audited account of its purported operation and management of the Condominium from the 1st day of November A.D. 2000 to date pursuant to and in accordance with section 17 of the Act and/or under the inherent jurisdiction of the court.

(7) A Declaration that the First Defendant is not entitled to recover from the Plaintiffs contributions and/or Common Expenses not levied by the First Defendant in accordance with the Act and the Declaration.

(8) A Declaration that the First Defendant is not entitled to recover from the Claimants contributions and/or Common Expenses levied by the Second Defendant.

(9) A Declaration that the Defendants are not entitled to exercise a power to sell the Unit on the basis of contributions and/or Common Expenses purportedly levied by the First Defendant and/or Second Defendant in breach of the Act and the Declaration.

(10) An injunction prohibiting the Defendants from selling, purporting to sell, or otherwise interfering with the Unit and/or Claimants' interest in the Unit pursuant to the Purported Charge.

(11) A Declaration that the First Defendant has failed to operate the Condominium for the benefit of all unit owners in accordance with the Declaration and the Act.

(12) An Order appointing an Administrator for the operation of the Condominium pursuant to section 27 of the Act until further or final Order of the Court herein.

(13) Damages for breach of contractual and statutory duty by the First Defendant of its duties imposed by the Act and Declaration.

(14) Damages.

(15) Costs.

(16) Such further or other relief as the Court may deem just."

12. The Claimants have also expressed concerns about the legality of the Second Defendant's purported management of a Bahamian Condominium from Florida and have

disputed its ability to levy contributions from the Claimants and to collect funds direct to US accounts with respect to the Condominium.

13. It is also important to note that on 05 November 2021, Charles Snr. J (as she then was) granted an injunction to the Claimants preventing the Defendants, its servants or agents from interfering with or selling the Unit ("**Injunction**") pending an inter partes hearing. On 16 November 2021, the Injunction was extended until further order of the Court.

Issues

14. The issues that the Court must decide are (i) Whether the Association has levied any contributions and/or Common Expenses from the Claimants pursuant to and/or in accordance with the Declaration or the Act with respect to the Unit? (ii) Whether the management of the Condominium by HOA 2 and it levying, demanding and collecting any fees on behalf of the Association is ultra vires the Declaration and/or the Act? (iii) Whether the Purported Charge is valid? (iv) Whether the Association may advertise and sell the Unit based on the Purported Charge and purported outstanding fees owed by the Claimants to the Association? (v) Whether an injunction ought to be granted preventing the sale of the Unit based on the Purported Charge? (vi) Whether the Association ought to produce audited accounts of its management to the Claimants? (vii) Whether HOA 2 ought to produce audited accounts of its management to the Claimants? (viii) Whether an order should be granted appointing an Administrator to operate the Condominium pursuant to section 27 of the Act? (ix) Whether the Claimants are entitled to damages?

Evidence

Claimants' Evidence

15. The Claimants filed the Affidavit of Shelly Beadle on 04 November 2021 ("**First Beadle Affidavit**"). It provides that: (i) the Claimants are the owners of the Unit by virtue of the Conveyance (which is exhibited to the affidavit); (ii) the Association is a body corporate established by clause 13 of the Declaration (the Declaration and Bye Laws of the Association are exhibited to the affidavit). Further, despite the Claimants repeated complaints, individuals failing to demonstrate their ownership of any unit(s) in the Condominium have been purporting to act for and behalf of the Association, which company has failed to operate in a manner so as to afford the Claimants their rights as owners of the Unit; and (iii) HOA 2 Inc. is an American non-profit organization incorporated on or about 29 April 2019 in Florida, the United States.

16. The First Beadle Affidavit further provides that: (i) Mr. Cafferata on 02 November 2021 provided the Claimants with a "Homeowner Ledger" (by email) from Ms. Sandra Mayer of I & S Management, Inc., a property management company operating out of Florida USA; (ii) Mr. Cafferata stated in the 02 November 2021 email that taking issue with the board for the Association does not excuse the Claimants from paying their outstanding maintenance charge; (iii) HOA 2 Inc. is a stranger to the Declaration, thus has no lawful right or authority to operate the Condominium or to levy, demand, and/or receive funds with respect to the operation and management of the Condominium established in Bimini, The Bahamas; (iv) the Homeowner Ledger does not reflect the Value Added Tax that would be payable with respect to maintenance charges lawfully levied with respect

to a condominium in The Bahamas nor does it display a Tax Identification Number (TIN) which is required by law; and (v) the Claimants have expressed substantive concerns about the legality of HOA 2's purported operation of a Bahamian Condominium from Florida and has disputed its ability to levy contributions from the Claimants and to collect funds directed to US accounts with respect to a Bahamian Condominium ultra vires the Declaration and the Act.

17. The First Beadle Affidavit also provides that: (i) the Claimants dispute the legality of Ms. Sandra Mayer and I & S Management Inc.'s purported management of the Condominium, which is an American company operating from Fort Lauderdale, Florida, USA; (ii) the Claimants have duly maintained their Unit and satisfied their contributions with respect to the operation and management of the Condominium; and (iii) the Claimants have wired the $33,350.33 demanded by HOA 2 Inc. to their counsel's Client's Account and are prepared to have the same paid into Court.

18. The Claimants also filed the Second Affidavit of Shelly Beadle on 05 November 2021. The purpose of the affidavit is to exhibit the Purported Charge.

19. The Claimants also filed the Affidavit of Alexandria Fernander on 04 August 2022. It exhibits an email dated 16 February 2022 from Ms. Patricia Jackson of Inland Revenue, Legal Compliance Consultant, to the Claimants' Counsel confirming that the administration of condominiums is a taxable activity and that persons who are responsible for such administration are required to register and account for Value Added Tax, regardless of turnover.

The Association's Evidence

20. On 23 November 2021, the Association filed the Affidavit of Tricia Cargill-Johnson ("**Cargill-Johnson Affidavit**"). It states that: (i) by Order made on 17 October 2022 by The Honourable Madam Senior Justice Indra Charles (as she then was) ("**October 2022 Order**"), the Association provided replies to interrogatories from the Claimants; (ii) Ms. Lea Robertson (one of the elected directors of the Association) (Ms. Robertson) confirms that the Association's bank account was opened at JP Morgan Chase Bank; (ii) the account was opened after the decision was made by the board of the Association on 25 March 2019 to operate an account in the USA and to establish a nonprofit in the USA. The primary reason was the closure of the RBC branch in Bimini and the fact that all or the majority of unit owners of Phase II are residents of Florida, USA; (iii) the non-profit organization is HOA, which is wholly owned by the members of the Association and controlled by the Association's directors; (iv) there is a services agreement between I & S Management and HOA 2 dated 22 May 2019; (v) the agreement essentially provides terms on how I & S Management was to manage the Association's bank account in the USA and to make payment to service providers on behalf of the Association. Balance sheets for the Defendants are exhibited to the Cargill-Johnson Affidavit.

21. On 30 November 2021, the Association filed the Affidavit of Tricia Cargill-Johnson ("**Second Cargill-Johnson Affidavit**"). It provides that: (i) on 26 November 2021, Ms. Linda Wilson executed a substantive affidavit addressing the matters in this action ("**Wilson Affidavit**"); (ii) the Wilson Affidavit was executed by Ms. Linda Wilson and notarized and steps were taken to have the affidavit apostilled; (iii) the apostilling may take time due to the COVID-19 pandemic; (iv) out of an abundance of caution, the

Wilson Affidavit was exhibited to the Cargill-Johnson Affidavit and that the Association's counsel will seek leave to rely on the Wilson Affidavit.

22. The Wilson Affidavit provides that: (i) Linda Wilson is a duly elected member of the Board of Directors of the Association; (ii) Bimini Sands Phase II Condominium has a total of 18 Units in Phase II. There are a total of 214 Units in 15 Phases in the Bimini Sands Development, numbered chronologically. Each Phase has its own and separate Association.; (iii) Most if not all of the unit owners are residents of Florida, USA; (iv) members of the Board of Directors of Phase 2 were elected to the Board of Directors of the Phase II Association on 17 August 2019; (v) Board members were re-elected at the annual general meeting on 23 August 2021. Serving as directors along with myself are Robert Dunshee, Carl Pyatt and Lea Robertson (with minutes of the meeting exhibited); On or about March of 2019, the then Board decided to open a bank account in Florida to collect the maintenance fees from the Association members; (vi) all Association funds were co-mingled into a single account. As most HOA boards felt it would better serve their members if each HOA was in control of its own funds, the resolution was agreed upon due in part for Phase 2 members to have control and insight into their own bank account and the ease by which the funds could be deposited in the Florida account by the unit owners – who mostly reside in Florida.

23. The Wilson Affidavit further provides: (i) A non-profit company was incorporated in Florida in the name of Bimini Sands HOA Phase 2 Inc. in order to open a bank account and the bank account was opened at Chase/JP Morgan Bank. I& S Management was appointed to send out bills for maintenance dues, aggregate funds, pay accounts and do the bookkeeping for this bank account; (ii) Once maintenance fees were collected in the account, the fees were paid over according to the agreement to the on-site property management team in The Bahamas which was responsible for maintaining the Condominium; (iii) the Association is control and managed by a board of directors elected from its owners; (iv) on 01 August 2019, the Association hired Bimini Cove Resort and Marina Ltd (a division of Prestige Worldwide Resorts) ("Bimini Cove") to provide maintenance services to the Condominium; (v) Bimini Cove is paid monthly from the Association's account at Chase bank in Florida. Bimini Cove has the contractual responsibility of maintaining the common property of the Condominium (the agreement is exhibited to the affidavit); (vi) the Association through the elected board of directors, has the authority to delegate any of its functions and responsibilities with respect to the management and operations of the Association.

24. The Wilson Affidavit also states: (i) the Claimants received regular monthly statements of their HOA fees by email. The invoices showed that the fees were in relation to the Condominium and were issued in the name of Bimini Sands HOA Phase 2 Inc.; (ii) all unit owners received a similar invoice and settle the same upon receipt. The invoices were forwarded by email from the Phase II Association to the Plaintiffs (the statements are exhibited to the affidavit); (iii) a general meeting held on 17 August 2019 clarified that the role to be played by Bimini Sands HOA Phase 2 Inc. and the Association; (iv) As the Claimants refused to pay the monthly maintenance fees for several years, a charge was placed on the Unit; (v) the Claimants were notified of this prior to the charge being placed on the Unit (though there are no dates or documents evidencing when notification occurred); (vi) the Claimants' default in payment span over several years and therefore

they are in breach of their obligation under the Declaration to make timely payment; and (vii) the final notice forwarded to the Claimants on 13 September 2019 showed that the balance then owing was $11, 868.12. The final notice also noted that the HOA 2 is the financial manager of the Association. This, according to the affidavit, reflected the status of the relationship between the parties and made it clear of the role played by the HOA Phase 2 Inc. (financial statements sent to the Claimants are exhibited).

25. On 09 January 2023, the Association also filed the Affidavit of Shade Munroe ("**Munroe Affidavit**") which provides that: (i) in furtherance of the October 2022 Order, the Association provides (and exhibits) copies of the accounts and records maintained by the Association with respect to the receipts and expenditures arising from the operation of the Condominium from 2017 to 09 January 2023 along with copies of the Associations budget adopted by the board of directors of the Association from 01 October 2017 to 09 January 2023.

Submissions

Claimants' Submissions

26. The Claimants' counsel submits that the Association acted in breach of the Claimants' substantive procedural and legal rights under the Declaration and the Act by the issue of the Purported Charge against the Unit and threatening to sell it.

27. Counsel further asserts that Parliament did not intend that the decisions or actions of any person or entity, other than a body corporate properly constituted in accordance with the Declaration and the Act, would be binding on unit owners in a condominium.

28. He then cites **section 14(3) of the Act** which, in essence states that all agreements made lawfully by the Association is binding.

29. Counsel also relies on the case of **Cannes Resort (Freeport Ltd.) v Gaudet [2004] BHS J No. 106** at paragraph 33 for the following proposition:

> **"Relying on the principles of company law as seen in the cases of Welton v Saffrey [1897] AC 299, In re Peveril Gold Mines [1898] Ch. D. 122 and more recently in Russell v Northern Bank [1992] All ER 161 any attempt to enforce on all unit owners that which is at variance with the statutory conditions is invalid."**

30. Counsel contends that the Claimants have raised clear and cogent concerns about the lawfulness and validity of the Purported Charge as well as the Association's operation and management of the Condominium. He then cites **clause 16(d) of the Declaration** which requires the Association to keep detailed and accurate accounts and records of all receipts and expenditures of the Association annually.

31. Claimants' counsel submits that the Association failing to demonstrate that it maintains and operates an account in the Commonwealth of The Bahamas, or at all, exemplifies the need for judicial intervention by means of a Court appointed administrator pursuant to section 27 of the Act. This, Counsel submits, is to ensure that the Association's operation and management of the Condominium is brought into conformity with the Declaration and the Act.

32. He then submits that the significance of HOA 2 being a stranger to the Declaration, the Act and the Claimants is demonstrated by the case of **Seaport Construction Co. v Residential Resort Developments Ltd. (In Liquidation) [1988] BHS J. No. 155**. There, at paragraph 7,the Court held that:

> **"Under the Act, a Body Corporate by virtue of section 13 may comprise all the unit owners, or it may be a company incorporated under the Companies Act. In the latter case every unit member is by virtue of section 13 of the Act ipso facto a member of the company. Admittedly, a company incorporated under the Companies Act is, in law, a person quite distinct from its members but, I venture to think that for the purposes of the Act, the incorporation of the unit owners is…mechanics. They continue to act but do so through the company. I, therefore, consider that an incorporated Body Corporate is as consistent with the provisions of the Act as is an unincorporated Body Corporate."**

33. Counsel submits that HOA 2 is not merely a service provider, but a Homeowners Association. He advances that, if this were the case, the Claimants would be *ipso facto* members of the HOA 2, which they are not seeking. Counsel submits that the Claimants are seeking to bring an end to HOA 2's unreasonable and unlawful interference with the affairs, funds, operation and management of the Condominium.

34. Counsel then submits that a bank account was not opened by the Association and that it did not appoint I & S Management to send out bills for maintenance dues, aggregate funds, pay accounts and to do the bookkeeping for this account which was all done by and on behalf of HOA 2 (which counsel maintains is a stranger to the Act, the Declaration and the Claimants).

35. Counsel also asserts that the Association's agreements, decisions and determinations must be construed so as to determine whether they are lawfully made and in accordance with the Act, Declaration, and byelaws. He further submits that the involvement of HOA 2 as well as the Association's failure and refusal to charge, collect and account to the Plaintiffs for Value Added Tax renders its entire maintenance fee collection regime unlawful and ultra vires the Act, the Declaration, and byelaws.

36. Counsel further asserts that it is not open to the Association to insist that the Claimants pay their monies into the HOA 2's account in Florida or otherwise condone or participate in its unlawful operation and management of the Condominium.

37. Counsel then analyzes evidence as provided in the exhibit of the Cargill-Johnson Affidavit (the exhibit being the unfiled Wilson Affidavit). Counsel asserts that at paragraph 8 of the Wilson Affidavit, she states that: "once the maintenance fees were collected in the account, the fees were paid over according to the agreement to the on-site property management team in The Bahamas which was responsible for maintaining the property". Counsel submits that the Association has provided no visibility into or accountability with respect to any of these purported arrangements and in the absence of the Association maintaining and supplying properly audited accounts and records of its operation and management of the Condominium, the Claimants are being disenfranchised with respect to the rights as unit owners.

38. Counsel also asserts that, though the Wilson Affidavit suggest that a contract exists between Bimini Cove Resort and Marina Ltd. and the Association, no such contract has been placed into evidence before this Court. He further contends that, while the Association is empowered to delegate certain functions and duties, such delegation must be lawfully and reasonably effected and fully accounted for to the unit owners.

39. With respect to paragraph 17 of the Wilson Affidavit, counsel notes the reference to the opening of the Chase bank account. Counsel asserts that, though the Association is indeed empowered to open the Chase account for the operation of the Association and the maintenance of the Condominium, it was the HOA 2, which opened the account and it had no power to do so.

40. Counsel also highlights paragraph 23 of the Wilson Affidavit which provides that: "HOA 2 was properly delegated and authorized by the Association to collect fees from the owners. It does not act as the Association but serves a delegated function". Counsel asserts that the HOA 2 Inc. does not have a contract with the Association "to collect fees from the owners" nor does it have any staff, license, or record of ability to carry out the said function. Counsel further submits that it was HOA 2 Inc. that issued demands for payment to the Claimants, but I & s Management Inc., which company does not have a contact with the Association (but does have one with HOA 2 Inc.). Counsel submits that, HOA 2 Inc. being a stranger to the Declaration, the Act and the Claimants, the entire arrangement is ultra vires the Act.

41. Counsel asserts that in the Association's written submissions, it admits that it does not presently have a bank account.

42. Counsel also highlights that the Association admitted in its written submissions that: "The Association's Board of Directors passed a resolution for accounts not to be audited principally due to the costs of audited accounts." Counsel then cites **Clause 16D of the Declaration**, which essentially states that the Association is required to produce audited accounts.

43. Counsel submits that it is therefore not open to the Association to flagrantly disregard the Association's statutory and contractual duties in this regard, and such a resolution is clearly ultra vires the power of the Board and demonstrates the deliberate and egregious nature of the Association's dereliction of its duties and the need for judicial intervention.

44. Counsel further asserts that the Association's failure, refusal, and inability to produce audited accounts upon request, demonstrates the state of affairs obtaining with respect to the operation and management of the Condominium. Counsel contends that the Claimants are entitled to insist on strict compliance with the Declaration, the Act and Bahamian law in the operation and management of the Condominium and the Claimant's appurtenant interest in the Common Property of the Condominium, represents a significant financial investment which is being imperiled by the Association's protracted unlawful operation and management of the Condominium.

45. Counsel further submits that the interest in the Claimants unit and the common property that will be chargeable with the outstanding taxes due and payable to the Bahamian Government. The Claimants, Counsel submits, are not obliged to participate in any tax evasion scheme being operated by the Association.

46. Counsel then draws the Court's attention to **section 27(2) of the Act** in relation to the appointment of an administrator to manage the Association and the Condominium.

47. Counsel submits that the Claimants have discharged their burden of proof by showing why an administrator(s) ought to be appointed. The Condominium requires management that is concerned with substantive and meaningful compliance with the Declaration, the Act and Bahamian law.

48. Counsel for the Claimants further assert that the Association failed to produce a stamped original of the Purported Charge so as to confirm whether it has been duly issued under the common seal of the Association and does not state the date on which the purported amount due became payable, and is therefore effective in accordance with section 21(2) of the Act.

49. Counsel also submits that the Association did not produce to the Court or the Claimants an audited account of its operation and management of the Condominium from 01 November 2000 to date as required under section 17 of the Act and/or the Declaration or audited accounts for any shorter period.

50. Counsel concludes by requesting the Court to grant the reliefs sought in the Originating Summons.

The Association's Submissions

51. The Association's counsel submits that the Claimants' action is without merit. He submits that the Declaration expressly affords the Association the right to levy and collect common expenses.

52. Counsel then cites Clause 15 of the Declaration, which Counsel submits empowers the Association to delegate its powers to any other person/entity to manage the operation of the Condominium, establish funds for the operation and maintenance of the Condominium and make demand upon and recover from each Unit owner such contributions.

53. Counsel then submits that clause 18 of the Declaration empowers the Board of Directors the Association ("**BOD**") to set the common expenses and any outstanding balance would be a charge on a unit.

54. Counsel then asserts that the Byelaws of the Declaration renders the BOD as the body to exercise "the powers and duties of the body corporate" that is, the Association. Counsel then cites **sections 13, 14 and 21 of the Act**, but for brevity, I will only highlight the salient portions of the Act for the purposes of this judgment later in the discussion section of my judgment.

55. Counsel then relies on the case of **Apartment Block G Delaporte Point Development v Delaporte Point Limited [2011] 2 BHS J. No. 37 ("Delaporte")**, where Barnett CJ (as he then was) addressed the legal ambit of a board of directors of a Homeowners Associations' powers:

> **"15. Although the claim was made in the Originating Summons that entering into the Management Agreement was ultra vires the Memorandum and Articles of Association of the Defendant Company, the**

Plaintiff really did not pursue that claim either in its written or oral submissions. In my judgment the ground was unsustainable. Clause 3 (b) of the Memorandum of Association states:

To manage Delaporte Point aforesaid and to collect the rents and income thereof and to supply the owners and occupiers of the dwelling houses and apartments comprised therein necessary and desirable services and supervision in connection therewith.

21. It is not the function of this Court to determine how the Defendant Company should carry out its managerial responsibilities and the charges it should make. That is the duty of the board of directors of the Defendant Company. The Court's duty is to determine whether what they have done violates the legal rights of the Plaintiff as alleged by them in the Originating Summons; was it unfair and oppressive conduct within the meaning of section 280 of the Companies Act. "

56. Counsel submits that the Association has no limitation in its power of delegation. The power to delegate under clause 15 (c) of the Declaration allows and empowers the BOD to authorize HOA Phase 2 Inc. to send out invoices to Unit Owners and to collect the common expenses from Unit Owners; and in fact, to carry out any of the functions (or all) of the Association.

57. Counsel further asserts that there is no wording in clause15(c) of the Declaration which seek to limit the power of delegation on the BOD. Counsel submits that, the power of delegation extended to the "management and operation of the Condominium" and therefore no sustainable argument can be made as to the proper exercise of the powers.

58. Counsel also submits that the evidence before the Court shows that the Association delegated the power to collect common expenses to HOA 2 as well as to pay them over to the maintenance provider. This, counsel asserts, was a proper exercise of the power of delegation.

59. With respect to whether the Purported Charge was effective, counsel cited the case of **Edelweiss Chalets Condominium Association v Davis [1998] BHS J. No. 50** for the following:

"The salient part of that statement is to the effect that that section requires by way of conditions precedent to the exercise of the power of sale that notice should be given demanding payment — and that there should be default in payment for three months after such service.

Section 22(1) of the Conveyancing and Law of Property Act, Chapter 123 does not require that any period for payment be fixed or stipulated by the notice. It merely prohibits the exercise of the power of sale until notice demanding or requiring payment has been served and default made for 3 months after such service. In this matter, the fact that the plaintiff's notice demanding payment fixed 'one month' as the period within which the outstanding amount of $9,543.30 should be paid in no way affects the validity of the notice, for the plaintiff did not proceed to exercise its power of sale until about nine (9) months after the service of the Demand Notice on the first defendant.

> **It has not been denied by the first defendant that a Demand notice or payment, as stated by the plaintiff, was served on her on the 3rd October, 1995…There is no evidence from the 1st defendant that she has made any payment from the service of that notice or that she did tendered any payment from the service of that notice or that she tendered any payment prior to the entering into the contract of sale of the unit by the plaintiff.**
>
> **…I have also come to the conclusion that the fact that the first defendant disputes the amount of service charges outstanding does not affect the validity of the plaintiff's exercise of its power of sale: (See Gill v. Newton (1866) 14 W.R. 490).”**

60. Counsel contends that the notice lodged on 06 April 2021 for recording in the Registry of Records is in strict compliance with section 21 of the Act. On its face, counsel submits, the seal of the Association is on the Notice of Charge and it states that “such payment has been due for a period exceeding six (6) months from the date hereof…” Counsel states the requirements of the Act were fulfilled as the six months date is adequate in providing a reference point as to when the payment became due.

61. Counsel then provides the case of **Theriez v Kings Bay Condominium Association [2005] 6 BHS J. No. 400 (“Theriez”)** for the following:

> **“11 Again, counsel for the plaintiff submitted, there is no such thing as a “Notice of Lien”. The Act does not create a “lien”. The Act speaks only of a charge and a notice is only prescribed in relation to the imposition of a “charge” on a “unit.” The Notices of Lien fail to state the unit designation. The Notices of Lien fail to state the amount due and the date on which it was payable. The 1997 Notice purports to simply state a total amount of $1,496.24 being due in respect of “monthly service charges to the Management Company known as Kings Bay Condominium Association”. The 1992 Notice similarly states $3,548.77. Neither of them specify what those sums represent, how they come to be due, for what period, or how it is made up. Further they state that they have been due for a period of “6 months” and “7 months” respectively and therefore does not state the date on which they were payable…**
>
> **16 In so far as the lien is concerned it is noticed that on the face of the document it is clearly stated “Notice of Charge”. And an analogous right similar to a non-possessory lien is often described by statute as a charge. Therefore, I have no hesitation in coming to the conclusion that in the instant case both terms are used interchangeably. In my opinion the Notice of Charge fully complies with section 21(2) of the Act and associated costs are recoverable by the Association only if agreed or taxed.”**

62. Counsel then submits that there is no legal basis to appoint an administrator in this case. He provides section 27 of the Act and submits that there is no evidence before the Court

that the Association acted towards the Claimants with bias compared to its dealings with other unit owners.

63. Counsel further submits that there is no basis for the existing injunction. He asserts that the overwhelming evidence reflects that there was sufficient grounds to justify the Association in procuring a lien on the Unit arising from the default of the payment of the common expenses.

64. Counsel further submits that the evidence also demonstrates that the Claimants were aware of the amounts owed and even though they "questioned" the operations of the Association, this alone could not allow them to refuse to pay the common expenses.

65. In relation to the Value Added Tax issue, counsel contends that the purported absence of VAT is an immaterial issue to justify either non-payment or to question the legal premise of the notice on the Unit.

66. Counsel further asserts that the Claimants have no justifiable reason(s) to refuse to pay the levied fees which they knew at all material times were common expenses for the Condominium. The right to charge and levy such expenses is clearly set out in the Declaration.

67. Finally, counsel concludes by requesting that this action be dismissed.

DISCUSSION AND ANALYSIS

(i) Whether the Association has levied any contributions and/or Common Expenses from the Claimants pursuant to and/or in accordance with the Declaration or the Act with respect to the Unit.

(ii) Whether the management of the Condominium by HOA 2 Inc. and it levying, demanding and collecting any fees on behalf of the Association is ultra vires the Declaration and/or the Act?

68. These two issues are intimately linked and I shall therefore deal with both under the same heading. There does not appear to be any dispute regarding the legality or the binding effect the Declaration has on the Claimants. Thus, I will not address it. I will now examine the relevant excerpts from the Declaration and its applicability to the Claimants based on the current circumstances.

69. The Claimants have brought this claim alleging that the Association is acting ultra vires of the Declaration and the Act for several reasons. One such contention is that HOA 2 is a non-resident U.S. company purporting to collect dues from Home Owners when they are not empowered to do so by the Declaration or any law. Also, it has opened a bank account in Florida, which the Claimants believe is not lawful as it is a stranger to the Declaration, the Act and unit owners and ought not be performing any such acts/duties on behalf of the Association.

70. The Association forms the view that it has legally incorporated a U.S. entity and, by resolution, agreed to open a bank account in the U.S. for the management of the Association's funds.

71. Determining these issues will require a close examination of the relevant provisions of the various documents and the Act. I will do so now.

72. I draw the parties' attention to the express and unambiguous wording of **clause 15 (c) and (e) of the Declaration**:

> **"15. The Association shall have all powers conferred upon it by the Act, the Byelaws and this Declaration which shall include the following specific powers:**
>
> **…(c) To delegate to any person or entity its powers and responsibilities with respect to the management and operation of the Condominium on such terms and conditions as shall be determined by its Board …**
>
> **(e) to make demand upon and recover from each Unit Owner his contribution in respect of Common Expenses (as hereinafter defined) as well as any unpaid contributions due from any Unit Owner together with interest thereon at the rate specified in the Byelaws…from the date such contribution was due down to the date such unpaid contribution is actually received by the Association and to enforce any charge in respect of unpaid contributions and interest (emphasis added)."**

73. I also remind myself of **section 14(3) of the Act**:

> **"…agreements, decisions and determinations lawfully made by the body corporate in accordance with this Act, the relevant declaration and byelaws shall be deemed to be binding on all unit owners (emphasis added)."**

74. **Clause 17 of the Declaration** provides:

> **"17. All expenses incurred by the Association in connection with the exercise of its powers and the discharge of its duties (and any other administrative or operational costs incurred by it or its agents in the management and operation of the Condominium) are hereinafter referred to as "Common Expenses" which shall be recoverable from the Unit Owners for the time being under procedures to be determined by the Board of the Association provided however that:**
>
> **(a) The Members in General Meeting may from time to time agree what additional Condominium expenditures shall be considered Common Expenses; and**
>
> **(b) Common Expenses shall not include the cost of repairs to or replacements with respect to:**
>
> **(i) Any Unit, where initiated at the request of and for the exclusive benefit of the Unit Owner;**
>
> **(ii) Any conduit, duct, pipe, cable, drain, wire or plumbing or sanitary or air-conditioning apparatus situate within any Unit installed for the exclusive benefit of the Unit Owner;**

(iii) Any portion of the Common Property or any conduit, duct, pipe, cable drain, wire or plumbing or sanitary or air conditioning apparatus situate within any Unit damaged due to the act of any Unit Owner or his guests, employees, agents or lessees

And all such moneys so expended shall be recoverable from the Unit Owner responsible therefore (emphasis added)."

75. Furthermore, **Clause 18 of the Declaration** reads as follows:

> **"18. The Board of the Association shall on or before the 1st October of each year adopt a budget and an estimate of Common Expenses for the Condominium for the ensuing calendar year which shall be delivered to each Unit Owner on or before the 31st October next following. Such budget and estimate of Common Expenses shall be subject to amendment from time to time during the year by the Board of the Association as the circumstances may dictate on due notice to each Unit Owner. Each Unit Owner shall pay to the Association, commencing on the 1st November next following and quarterly in advance thereafter, one-fourth of his pro rata share of the then current estimate of Common Expenses according to his Unit Entitlement. All contributions to Common Expenses shall be due and payable on the First day of each quarter and no reminder notice will be sent to the Unit Owners. Any unpaid contributions together with interest thereon as prescribed by the Byelaws of the Association shall constitute a charge upon the related Unit enforceable under the Act as a mortgage under seal ranking prior to all other incumbrancers except any charge under Section 19 () of the Real Property Tax Act (Chapter 339) (emphasis added)."**

76. Clause 7 of the Conveyance, which the Claimants have executed, state that the Claimants would be liable to pay all assessments and other charges levied by the Association pursuant to the Declaration and the Act.

77. After carefully considering the law and the evidence before me, I agree with the Association that it has legally incorporated a U.S. entity (being HOA 2) and authorized the opening of a U.S. bank account for the purpose of managing, collecting and levying all funds for and on behalf of the Association. According to the evidence provided in the Cargill-Johnson Affidavit and the exhibited resolution of the Board (dated 25 March 2019), the main reason why the board decided to establish a non-profit organization in the U.S. and open a U.S. bank account was because most of the unit owners live in Florida, U.S.A. and the RBC branch in Bimini closed down.

78. It should also be noted that **clauses 1(1) and 2(3) of the Byelaws of the Bimini Sands Phase II Condominium Association II** ("**Byelaws**") provide:

> **"1. (1) The powers and duties of the body corporate shall, subject to any restriction imposed on direction given at a general meeting be exercised and performed by the Board of the body corporate…**
>
> **2. (3) All acts done in good faith by the Board shall, notwithstanding it be afterwards discovered that there was some defect in the appointment or continuance in office of any member of the Board's proceedings be as**

valid as if such member had been duly appointed or had duly continued in office or as if the proceedings were regular (emphasis added)."

79. Accordingly, the BOD is not only empowered to act for the Association, but may also delegate its powers to ***any*** person or entity. There are no restrictions or requirements stating that the person or entity must be a Bahamian citizen, a Bahamian entity or otherwise. Thus, the Association may delegate its powers to HOA Phase II Inc. (despite it being a U.S. entity) and has done so.

80. Furthermore, by virtue of section 14(3) of the Act, any decision made by the BOD is binding on all unit owners. As stated previously, a resolution was made and passed by the BOD, thus evidencing a decision made by them to delegate its powers to HOA 2 - which this Court deems lawful and binding on all unit owners. The Claimants' counsel argues that there is no agreement as between the Association and HOA 2 regarding its services. The need for any agreement as between the two entities is obviated by the aforementioned resolution which empowers HOA 2 to act for the Association with respect to collection and demand for any fees/dues from unit owners. By way of the resolution and HOA 2 acting and collecting fees in accordance with the resolution, it is apparent that the Association has consented to such acts on its behalf and endorses them.

81. This also includes HOA 2's agreement with I & S Management. By virtue of the aforementioned clauses from the Declaration, the Byelaws the relevant section of the Act, and the resolution, HOA 2 validly and legally executed an agreement with I & S Management (on behalf of the Association) whereby I & S Management may send notices regarding dues to unit owners and demand payment of same.

82. Also, any acts done by the Board, once done in good faith, shall be deemed valid. Despite the Claimants' criticisms of the Association's decision regarding the U.S. account and incorporation of HOA 2. I find no unlawful act or any bad faith. They have provided feasible reasons for the establishment of such an entity and account (as mentioned above).

83. I reiterate Barnett CJ's (as he then was) pronouncements made in the ***Delaporte*** decision:

> **"21. It is not the function of this Court to determine how the Defendant Company should carry out its managerial responsibilities and the charges it should make. That is the duty of the board of directors of the Defendant Company. The Court's duty is to determine whether what they have done violates the legal rights of the Plaintiff as alleged by them in the Originating Summons…(emphasis added)"**

84. Accordingly and based on my analysis and understanding of the evidence and the law, such acts by the Association (and by extension, by HOA 2) are legally in pursuance of levying, managing and collection of funds for the benefit of the Association. The Association is therefore in compliance with the Act, Byelaws and the Declaration. Its acts are thus deemed valid, legal and binding and does not violate the legal rights of the Claimants.

85. I also note that the Claimants were made aware as early as 2019 of the outstanding debt they owe to the Association, yet payment was not made to date. I am aware that the Claimants sent funds to be held in escrow to the Association's attorneys. The Claimants owe the Association the outstanding contributions. The Claimants are therefore ordered to make payment of the full outstanding amount within sixty (60) days from the date of this judgment.

(iii) Whether the Purported Charge is valid?

86. The Claimants challenge the validity of the Purported Charge. They claim that there is no stamped original of the Purported Charge confirming that it had been duly issued under the common seal of the Association nor does it state the date on which the purported amount became due.

87. According to **section 21 of the Act**:

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

88. According to the Defendants' Counsel, the Notice of Charge (which is exhibited to the Shelly Beadle Affidavit) was lodged for recording in the Registry of Records in the city of Nassau, New Providence on 06 April 2021. It has, in fact, been recorded in the Registry

of Records on 07 April 2021 in book 13517 at pages 696 to 700. On the face of it, it is difficult to tell whether or not the seal of the Association is affixed to the Notice of Charge, however I note that there is an accompanying witness affidavit evidencing that Ms. Linda Wilson saw Mr. Kyle Pyatt (a director of the Association) sign execute and deliver the Notice of Charge. The accompanying witness affidavit also notes that Ms. Linda Wilson saw the Common Seal of the Association affixed to the Notice of Charge. This is sufficient evidence that such seal was placed on the Notice of Charge. Accordingly, the first limb, as required under the Act, is satisfied.

89. I now turn to whether the name of the body corporate and the address of the property in question is stated in the Notice of Charge. It is apparent on the face of the document (on the first page of the operative part of the Notice of Charge) that both the Association's name as well as the address of the Unit are included in the Notice of Charge.

90. With regard to sections 21(2) (b), and (c) of the Act, these too are satisfied as the recording pages and volume of the Declaration are included in the Notice of Charge, along with the Claimants' names and unit designation along with the amount that was outstanding as at the date the Notice of Charge was lodged for recording. As the Claimants' Counsel highlights, there is no specific date indicating when the outstanding funds became due and owing on the Notice of Charge. This would appear to be in contravention of section 21(2) (d). The Notice of Charge does, however, state that *"such payment has been due for a period exceeding six (6) months from the date hereof…"*

91. Notwithstanding that the specific date that the outstanding amount was due is excluded, I am of the view that the Association still complied with the terms of section 21(2)(d) of the Act. I apply and rely on the rationale of Mohammed J in ***Theriez*** where he ruled that the Notices of Charge in the case stated that the funds were owing for "6 months" and "7 months" respectively. His Lordship formed the view that, by such language, there was compliance with section 21(2). I concur. The Notice of Charge expressly states that the funds were due and owing for a period exceeding 6 months from the date of the Notice of Charge, which is a fact based on the evidence before me.

92. Further, I believe the principle ***Utres magis valeat quam pereat***. – (It is better for a thing to have effect than to be made void) is applicable to the instant case. Essentially, the principle is based on the presumption that Parliament will not legislate in vein. In **Noakes v Doncaster Amalgamated Collieries, Ltd. [1940] All E.R. 549 at p. 544**, Viscount Simon L.C, made the following pronouncements:

> **"… if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result."**

93. I do not believe it was Parliament's intention to have a Notice of Charge, which complies with all other pre-requisites under the section 21 of the Act, to be invalid because it did not specifically express a date in the Notice confirming when the amount outstanding was due – especially when the Notice is not utterly silent on a date. It states that the

dues were outstanding for over 6 months. Again, this is a fact. I will not allow strict adherence to an Act to invalidate an otherwise valid Notice of Charge.

94. In accordance with the Act, the Notice of Charge was lodged for recording, bore the name of the Association, referenced the Declaration, named the Claimants and the Unit and stated the outstanding amount.

95. I note that the Claimants' Counsel states that the Defendants never produced a stamped original of the Purported Charge so as to confirm whether it has been duly issued under the common seal of the First Defendant and states the date on which the purported amount due became payable, and is therefore not in compliance with section 21(2) of the Act. I have already examined the relevant documents and confirmed that there is compliance with section 21(2) of the Act as the ***Notice of Charge*** (and not a Charge) was recorded and had all information as required and in accordance with the aforementioned section of the Act.

96. Section 21(1) of the Act states that any unpaid contribution ***shall constitute a charge upon such unit with effect from the date on which such contribution became payable***. This means that a charge automatically attaches to any unit when a unit owner fails to pay any prescribed contribution. There is no need to record any charge. Accordingly, that submission is without merit.

97. In the premises, there is compliance with the Act. I see no reason why the Notice and the Purported Charge would not be deemed valid. I rule that the Purported Charge and the Notice of Charge are valid, legal and binding.

(iv) Whether the Association may advertise and sell the Unit based on the Purported Charge and purported outstanding fees owed by the Claimants to the Association?

98. Having ruled that the Notice of Charge is valid, legal and binding, the automatic charge on the Unit is effective. Consequently, the First Defendant may advertise and sell the Unit based on the Charge due to the outstanding fees owed by the Claimants to the Association.

99. The Association is empowered to sell the Unit by virtue **of Section 21(4) of the Act**. That provision reads as follows:

> **"(4) The body corporate shall have the same powers of sale for the purpose of enforcing the charge created by subsection (1) of this section as a mortgagee under the provisions of the Conveyancing and Law of Property Act."**

100. In relation to power of sale, the relevant provisions of the **Conveyancing and Law of Property Act, 1909** ("**CLA**") are **section 21(1) (a), 22(1) and 23(1).** These provisions are to stand *mutatis mutandis* in relation to the body corporate – being the Association – when exercising a power of sale of a condominium unit.

101. Those sections provide:

> **"21. (1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they**

had been in terms conferred by the mortgage deed, but not further (namely) —

(a) a power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby…

22. A mortgagee shall not exercise the power of sale conferred by this Act, unless and until —

(1) notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service;

23. (1) A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests and rights to which the mortgage has priority, but subject to all estates, interests and rights which have priority to the mortgage (emphasis added)."

102. The Claimants have had notice of outstanding fees for some time. There are multiple instances of notices sent to the Claimants in the evidence. On 05 May 2021 by email from I & S Management Inc. (an agent of the Association) the Claimants were notified of their outstanding dues. Thereafter, another notice followed on 27 August 2021 by way of demand letter from Mr. Cafferata (an attorney who represented the Association) of Carrerata & Co. According to the Cargill-Johnson Affidavit at exhibit LW-6 (being an exhibited attached to the exhibited Affidavit of Linda Wilson), the Claimants were also notified by another email sent from I & S Management on 15 November 2021 of the sums they owed at that time. Accordingly, more than three months have elapsed since such dates (along with the date on the Notice of Charge – being 06 April 2021) and payment remains outstanding. Based on the foregoing, section 22(2) of the CLA has been complied with by the Association.

103. As the Association has complied with the law in relation to the filing of the Notice of Charge and ensured the requisite notice period elapsed prior to proceeding with any sale of the Unit, I rule that the Association is empowered to both advertise and sell the Unit based on the Claimants' failure to pay their outstanding contributions.

(v) Whether an injunction ought to be granted preventing the sale of the Unit based on the Purported Charge?

104. Having ruled that the Association's Notice of Charge is valid and binding and that the charge itself automatically attached once the Claimants failed to pay the requisite sum due, the Association is legally empowered to sell the Unit.

105. In the premises, there is no need to grant an injunction preventing the sale. The Association may sell the Unit in order to recover the contributions owed by the Claimants, should they not pay the outstanding contributions.

106. The Injunction presently in place is hereby lifted. In reliance on principles emanating from ***D.B.S. Builders and Developers Company Limited v Beauport Investment Company Limited SCCiv App No. 39 of 2002***, Pursuant to their undertaking as to damages, I will order that the Claimants pay damages (if any) suffered by the Association resulting from the Injunction being granted. Such damages are to be assessed by the Registrar.

(vi) Whether the Association ought to produce audited accounts of its management to the Claimants?

(vii) Whether HOA 2 ought to produce audited accounts of its management to the Claimants?

107. These two issues are related and thus shall be addressed under the same heading. According to **section 16 (d) of the Declaration**:

> **"In addition to the duties imposed on the Association by the Act and its Byelaws, the Association shall be responsible for:-**
>
> **(d) Maintaining detailed and accurate accounts and records in chronological order of the receipts and expenditures arising from its operation of the Property and Buildings. Such accounts and records and any vouchers authorizing any payments shall be available for inspection by any Unit Owner at all reasonable times. <u>Annual accounts duly audited by a qualified auditor shall be rendered by the Association to all Unit Owners at least once in every year</u>.(emphasis added)"**

108. It cannot be refuted that the Association is obliged to provide every unit owner with audited accounts by a qualified auditor. I do, however see that the Defendants claim a resolution was passed stating that accounts no longer needed to be audited due to the high expense in providing such audited accounts. This resolution is not before me. I note a number of financial reports for the years 2019 to 2022 have been tendered into evidence by the Association. It is, however, unclear if the financial reports are audited. I note a detailed, but unaudited, financial report dated 31 January 2019 (prepared by KW Property Management and Consulting) was exhibited to the Affidavit of Tricia Cargill filed on 23 November 2022. There is also a reconciliation report prepared by I & S Management, Inc. dated 29 October 2021 exhibited to the aforementioned affidavit. It is unclear if this report has been audited.

109. I have not seen any audited financial reports going back to 01 November 2000. However, according to sections 15 (2) (a), (b), and (c) of the Financial Transactions Reporting Act, 2018 ("**FTRA**"), financial institutions (which the Association would fall under by virtue of section 4(b) of the FTRA) are required to hold records of facility holders (in this instance, being all unit owners of the Condominium) for at least five (5) years from the date of transactions. Accordingly and as all unit owners are entitled to such reports, I will order that the Association provide all audited reports from 01

November 2019 to present to the Claimants within sixty (60) days from the date of this judgment (unless this has already been done).

(viii) Whether an order should be granted appointing an Administrator to operate the Condominium pursuant to section 27 of the Act?

110. **Section 27 of the Act** provides:

> **"27. (1) The body corporate or any judgment creditor of the body corporate or any person having an interest in any unit may apply to the Supreme Court for the appointment of an administrator or administrators for the operation of the property.**
>
> **(2) The court may in its discretion on cause shown, appoint an administrator or administrators for an indefinite or a fixed period on such terms and conditions as to remuneration or otherwise as the court thinks fit. The remuneration and expenses of any such administrator shall form part of the common expenses within the meaning of this Act.**
>
> **(3) The administrator or administrators shall, to the exclusion of the body corporate, have the powers and duties of the body corporate or such of those powers and duties as the court shall order and the administrator or administrators may delegate any of the powers so vested in him or them as the case may be.**
>
> **(4) The court may in its discretion on the application of an administrator or any person referred to in subsection (1) of this section, remove or replace an administrator.**
>
> **(5) On any application made under this section the court may make such order for the payment of costs as it thinks fit."**

111. The Claimants must show cause as to why it would be appropriate for this Court to appoint an Administrator in place of the Association to manage the Association. I note in the Claimants' written submissions that the Claimants' Counsel submits that they have shown cause because: (i) the BOD lacks the ability to manage the affairs of the Association; (ii) there is substantial misconduct or mismanagement; and (iii) the existence of struggle within the Association amongst competing groups impedes or prevents proper governance of the Condominium.

112. I am not persuaded by these submissions. No mismanagement or inability to manage the affairs of the Association has been evidenced nor am I satisfied that the Association has done anything unlawful. The Association has lawfully appointed HOA 2, engaged I & S Management to issue notices for payment of and demands for such payments and annual general meetings are regularly held by the Association.

113. Though the Claimants may be dissatisfied with the manner in which the Association is managing the Condominium, it does not rise to the level of mismanagement and I do not agree that there is reason to appoint an administrator.

114. As no cause has been shown for the appointment of an administrator, I will not make such an order.

(xi) Whether the Claimants are entitled to damages?

115. As the Claimants have not evidenced any loss or injury, there is no reason to make any award of damages.

(xii) Other Matters

116. In their written submissions, the Claimants also assert that the Association is not registered under the Value Added Tax ("**VAT**") Act, 2015 even though it ought to be. Neither parties' counsel expanded on the point. In any event, the **VAT Guidance for Land and Property dated 01 January 2017 at page 6** provides that the management of property is a taxable activity and subject to VAT. This includes condominium management fees, fees for use of communal areas, maintenance, repairs and administrative charges. Accordingly, the Association should register and charge VAT on such fees, once the necessary requirements under the VAT Act are satisfied.

Conclusion

117. Based on the evidence before me and the applicable law, I make the following orders:

(a) The Claimants are hereby ordered to pay any outstanding fees owed to date to the Association within sixty (60) days from the date of this judgment, failing which, the Association is at liberty to advertise and sell the Unit in accordance with the terms of the Declaration and the Act.

(b) If audited financial reports and accounts have not been provided by the Association to the Claimants to date, it is so ordered that such audited financial reports and accounts for the years 2019 to present date be produced and provided by the Association to the Claimants within sixty (60) days from the date of this judgment.

(c) Unless this has already been done, audited financial reports and accounts between 2019 to date of HOA 2 must also be produced and provided by the Association to the Claimants within sixty (60) days from the date of this judgment.

(d) The Injunction is hereby discharged. The Claimants shall pay damages, if any, suffered by the Association as a consequence of the Injunction. Such damages are to be assessed by the Registrar.

118. Based on the orders made, I invite the parties to prepare written submissions as to the appropriate order for costs. Written submissions are to be prepared, laid over to the Court and exchanged by the Parties within six (6) weeks from the date of this judgment.

Senior Justice Deborah Fraser

Dated this 30th day of November 2023