COMMONWEALTH OF THE BAHAMAS **2017/CLE/gen/FP/00057**

IN THE SUPREME COURT

Common Law and Equity Division

IN THE MATTER OF the Conveyance dated the 1st day of January, 1983 made between the Grand Bahama Service Company Limited and the Hotel Corporation of The Bahamas and confirmed by a Confirmatory Conveyance dated the 23rd December, 1996 between the same parties and now of record in the Registry of Records of the Commonwealth of The Bahamas in Volume 6901 at pages 407 to 441

AND IN THE MATTER OF the Conveyance dated the 21st December, 1990 made between the Hotel Corporation of The Bahamas and Princess Casinos Ltd and now of record in the said Registry of Records in Volume 5640 at pages 307 to 325

AND IN THE MATTER OF the Conveyance dated the 5th day of May, 2000 made between the Second Plaintiff of the one part and Sunrise Properties Limited of the other part and now of record in the Registry of Records of the Commonwealth of The Bahamas in Volume 7803 at pages 494 to 507

AND IN THE MATTER OF the Collateral Security Debenture and Legal Mortgage dated the 5th day of May, 2000 made between Bahamia Casinos Limited (formerly known as Princess Casino Ltd) and Lehman Brothers Holdings Inc. and now of record in the said Registry of Records in Volume 7804 at pages 40 to 61

AND IN THE MATTER OF the Conveyance dated the 7th day of November, 2007 made between Lehman Brothers Holdings Inc. and the Defendant and now of record in the said Registry of Records in Volume 10588 at pages 26 to 35

BETWEEN

THE GRAND BAHAMA PORT AUTHORITY, LIMITED

1st Claimant

AND

FREEPORT COMMERCIAL AND INDUSTRIAL LIMITED

2nd Claimant

AND

HARCOURT RESORTS BAHAMAS LIMITED

Defendant

Before:	The Hon. Madam Justice Petra Hanna-Adderley
Appearances:	Robert Adams KC, and with him Mr. Edward Marshall for the Claimants
	Ms. Gail Lockhart-Charles KC, and with her Ms. Syann Thompson-Wells for the Defendant
Hearing Dates:	18, 19, and 20 September 2023
Submissions filed:	31 January 2025 for the Claimants
	17 February 2025 for the Defendant

JUDGMENT

Hanna-Adderley, J

This is an action for the re-entry and repossession of land for the non-payment of arrears of service charges.

Introduction

[1.] The 1st and 2nd Claimants at all material times were companies incorporated under the laws of the Commonwealth of The Bahamas and carrying on business in the City of Freeport, in the Island of Grand Bahama, one of the Islands in the said Commonwealth. The Defendant at all material times was also a company incorporated under the laws of the Commonwealth of The Bahamas and carrying on the business of a resort developer in the said City of Freeport.

[2.] The Claimants contend that despite their lawful demand over the years the Defendant has failed to pay long overdue arrears of service charges on land which was conveyed to it, and that they are now entitled in law to payment of the arrears or immediate possession of the land to which the services charges attach.

[3.] The Defendant contends that the Claimants purport to be enforcing under the authority of an assignment of which they have not been given written notice as required by law and is therefore invalid, thereby disentitling the 1st Claimant from bringing proceedings in its name, and even if the assignment was effectual to convey the right to collect arrears, on its true construction it did not convey the right to reenter and take possession of the land. Accordingly, they contend that the Claimants have no right to immediate possession of the land in question. Furthermore, they submit that it would be wholly inequitable to grant the full arrears of service charges claimed because many of the services to which they were to be supplied have not been provided. Finally, the Defendant claims that recovery of some of the arrears is statute barred.

[4.] The land in question comprises Lot 11M, Block M, a 2.493 acre parcel and Lot 2B, Block M, a 1.234 acre parcel, both located in the Central Area of the City of Freeport, in the Island of Grand Bahama aforesaid. According to the Claimants the Lot 11M Service Charges due and payable stand at $1,110,566.74 as at 24 August 2023, and Lot 2B Service Charges due and payable stand at $52,414.89 as at 24 August 2023. The balance on both accounts is continuing to grow.

Statement of Facts

[5.] The action was commenced by way of Originating Summons issued on 22 March 2017.

[6.] On 13 July 2018, an Order was made herein directing, among other things, that the Action be continued as if it was begun by Writ of Summons. Pursuant to that Order, the Statement of Claim was thereafter filed and served on 14 May 2019.

[7.] The relief sought by the 1st Claimant is as follows -

(i) Possession of all that land containing Two Acres and Four Hundred and Ninety-three Thousandths of an acre (2.493 acres) being Lot numbered 11 situate in Block "M" in the Central Area of the City of Freeport on the Island of Grand Bahama ("**Lot 11M**");

(ii) A Declaration that, in the events that have happened, all rights title and interest of the Defendant in Lot 11M has been extinguished and the 1st Claimant holds fee simple title to Lot 11M as if the subject title documents [1983 Conveyance, the 1990 Conveyance, the Lot 11 Debenture, and the 2007 Conveyance, hereinafter fully described] applicable to the same had never been executed;

(iii) Alternatively, payment in full of the arrears of service charges that are due and owing for Lot 11M;

(iv) Interest on the arrears of the said service charges pursuant to statute;

(v) Such further or other relief as this Court may deem fit or just; and

(vi) Costs

[8.] The relief sought by the 2nd Claimant is as follows-

(i) Possession of all that land containing One Acre and Two Hundred and Thirty-four Thousandths of an acre (1.234 acres) being Lot numbered 2B situate in Block "M" in the Central Area of the City of Freeport on the Island of Grand Bahama ("**Lot 2B**");

(ii) A Declaration that, in the events that have happened, all rights title and interest of the Defendant in Lot 2B has been extinguished and that the 2nd Claimant holds fee simple title to Lot 2B as if the subject title documents applicable [the 2000 Conveyance, the Lot 2B Debenture, and 2007 lot 2B Conveyance hereinafter fully described] to the same had never been executed;

(iii) Alternatively, payment in full of the arrears of service charges that are due and owing for Lot 2B;

(iv) Interest on the arrears of the said service charges pursuant to statute;

(v) Such further or other relief as this Court may deem fit or just; and

(vi) Costs

[9.] By its Amended Defence filed herein on 20 September 2023, the Defendant –

(i) denies that 1st Claimant has the right to claim possession of Lot 11M as the right to repossess Lot 11M was not assigned to the 1st Claimant by virtue of the Deed of Assignment dated 11 November 1987 ("**the Assignment**") as alleged or at all; alternatively, the Assignment was not valid or effectual in law as no notice was given to the Defendant as required by Section 2 of the Chose in Action Act;

(ii) denies that the Claimants have the right to collect services charges as claimed on the ground that the corresponding services which entitle the Claimants to collect such charges have not been provided by them or anyone else;

(iii) asserts that the Claimants by their conduct and representations waived the strict enforcement of their legal rights with respect to the arrears of service charges being claimed;

(iv) asserts the amounts being claimed by the Claimants as arrears of service charges have been inflated, are wrongly calculated, are not due and are unsupported by the applicable title documents;

(v) asserts the Claimants' claims for payment of the outstanding service charges due and owing for Lots 11M and 2B are statute barred.

The Evidence

[10.] The Claimants rely on the Witness Statements of Miss Karla McIntosh, Vice President of Legal Affairs for the Claimants; Mr. Dwight A. Malcolm, Collections Manager for the Port Group Limited, Collections Department; and Ms. A. Gwenique Musgrove, Finance Controller of the Grand Bahama Port Authority Group of Companies. They all gave viva voce evidence and were cross-examined.

[11.] In her evidence-in-chief Miss McIntosh set out the title history of Lots 11M and 2B, the relevant clauses pertaining to the collection of service charges and the right to re-enter and repossess the lots in the 1983 Conveyance and the 2000 Conveyance, and the assignment of the right to collect services charges by way of the Assignment. She set out the history of the non-payment of the service charges and the arrears; the interaction and letters passing between Mr. Malcome and the former CEO of the Defendant, Mr. Donald Archer in Mr. Malcolm's attempts to collect the service charges and her involvement in the matter by way of the Demand letters sent to Mr. Archer; and that the arrears of service charges stands, at 25 August 2023, for Lot 11M, at $1,110,566.74 and for Lot 2B, at $52,414.89.

[12.] Under cross-examination Miss McIntosh's evidence is that the 1st Claimant, as regulator, is responsible for the maintenance of the City of Freeport as a whole within the 235 square miles. It pave roads. It cuts verges. It deals with street lights. It picks up trash. So generally, it maintains Freeport, the Port Area. That one of its entities has the responsibility for the maintenance and upkeep.

[13.] That there have been complaints received from property owners within the Port Area about the lack of maintenance and upkeep. That the 1st Claimant maintains the city based on the amount of funds that are available to do it. That in a perfect world everything would be done; but the Claimant can only do as much as it can with the resources that it has. That does not mean that because there are complaints that maintenance is not being done.

[14.] Mrs. Lockhart-Charles KC took the Witness to the Assignment and while she agreed that the reference to service charges therein was a reference to money due or to become due for services charges assigned by The Grand Bahama Services Company Limited to the Hotel Corporation of The Bahamas, she stated that her understanding of the effect of the Assignment was that it also assigned whatever interest, title and obligation that pertained to the service charges, as recited in the 1983 and 2000 Conveyances to the Claimants.

[15.] Mr. Malcolm stated in his Witness Statement that the Customer Service Department of the Grand Bahama Development Company ("**Devco**") was, among other things, the collection agent of the 1st and 2nd Claimants in relation to the annual service charges. That such annual service charges are payable by all persons or entities who have purchased property in the port area from either the 1st or 2nd Claimants to be used for the construction, maintenance, improvement and operation of the roads and utilities within the subdivisions where such property is located which includes, but is not limited to, the verges, sidewalks and service conduits in these areas.

[16.] Mr. Malcolm chronicled the sale of the subject lots to the Defendant by Lehmand Brothers and he exhibited a map of the subject lots; the demand letters from Devco in respect of the arrears of services charges; the fact that when the property was sold to the Defendant the Defendant paid off the outstanding arrears of service charges in full without asserting that such service charges were only payable by it when the casino was operational or any objection at all. He chronicled his interaction with Mr. Archer who on 18 September 2012 indicated that the Defendant intended to address the issue of the outstanding services charges when the resort was either re-opened or sold. He chronicled the requests for "write offs" and reduction of service charges by the Defendant and the offers of substantial discounts, none of which were taken advantage of by the Defendant. That as of the 25 August 2023 the arrears stood for Lot 11M, at $1,110,566.74 and for Lot 2B, at $52,414.89.

[17.] Under cross-examination he stated that his understanding was that Devco was a sister company of the Claimants; one of the group of companies. That he was assigned a portfolio from the Devco portfolio of collections of service charges. These service charges were due to 2nd Claimant, the 1st Claimant and Port Group Limited. That the subject property was not purchased by the Defendant from the Claimants. That he was aware of the closure of the road to West Sunrise Highway. That he could not speak to whether since the road has been closed there has been no services rendered by the 1st Claimant to that property. That he could not say who maintains it but that it is well maintained. It was sold to the hotel to build an inland beach for their property. That was the reason why the road was closed. That the portion of the road that is there is maintained. The portion that was closed now belongs to the hotel. He did not know whether the 1st Claimant

provided services since the road was closed. The road that was sold is no longer a road. He did not know the amount of the annual service charges.

[18.] Mr. Malcolm stated that he would review the client account and whatever balance was there he would contact the customer to work out an arrangement or to collect in full on those balances, but that he did not calculate the billing. He would contact the client as he worked the accounts. That the Finance Department prepared the billings. That he was aware that the conveyances make provision for the service charge to be adjusted up or down, that is, according to the Cost of Living Index. That his understanding is that service charge is a condition of purchase. That the moneys were used for the construction, maintenance, improvement and operation of the roads and utilities. If a customer has a query he would forward the inquiry to the Finance Department for investigation.

[19.] Ms. Musgrove stated in her Witness Statement that as the Financial Controller of the Grand Bahama Port Authority Group of Companies her duties and responsibilities include, among other things, having oversight of maintaining and preparing the financial records and accounting systems in relation to the Claimants. That she has served in this position since 2014. Prior to that she was employed by the 1st Claimant as Senior Financial Analyst. That she is familiar with the service charge accounts maintained by the Claimants in respect of the subject lots.

[20.] That generally speaking, to calculate the yearly service charges payable by a property owner to the Claimants first she would review the terms of the applicable deed of conveyance to ascertain the amounts stipulated by the parties as payable, the dates when the service charge is payable and whether the service charge amount is subject to a periodic review and adjustment by reference to the United States Cost of Living Index number ("**USCLI**") or as in the case of Lot 11M, the Retail Price Index of The Bahamas ("**RPIB**"). That once that information or data is ascertained from the relevant deed of conveyance, a member of the Group Finance Department, whom she supervises, inputs the information/data into the group's computer system which operates 'Sage, Accpac', an accounting software programme.

[21.] That by use of the accounting software programme the amount of service charge payable is calculated for billing purposes. Since the introduction of VAT in 1 January 2015, the accounting software programme also calculates the VAT to be included on the service charges billable. Further, as the VAT rate has been adjusted by The Bahamas Government, the VAT rate applied by the accounting software has been similarly adjusted, updated. The accounting software programme also allows for payment made on a service charge account to be recorded.

[22.] That the software programme also issues a reminder notice when a period review and adjustment is required with reference to the RPIB and USCLI. In the event such review is required a member of the Group Finance Department ascertains the applicable USCLI or RPIB number and the new amount of service charges payable is calculated and entered into the accounting software programme for billing. She confirmed that the said accounting processes were duly followed by the Claimants to quantify the amount of service charges payable by the Defendant in relation to Lot 11M and Lot 2B.

[23.] Ms. Musgrove also confirmed that neither Claimant charges interest on arrears of service charges. That she personally reviewed the state of the service charges accounts relating to Lot 11M and Lot 2B. That following her review she printed from her computer and emailed to Miss Karla McIntosh copies of the statements of account appearing in the Claimants Supplemental Bundle of Documentary Evidence for Use at Trial. That at the material time her computer at the 1st Claimant's office was in good operation and good working order. That the service charge due and payable by the Defendant to the 1st Claimant in respect of Lot 11M as that 1 July 2023 was $1,110,566.74 and in respect to Lot 2B the total amount of service charges payable by the Defendant to the 2nd Claimant as at May 2023 was $52,414.89.

[24.] Under cross-examination Mrs. Lockhart-Charles meticulously took Ms. Musgrove through the Statements of Account for Lot 11M and Lot 2B. Ms. Musgrove stated, in part, that the annual service charge for Lot 11M, inclusive of VAT at a rate of 10% thereof, was $92,745.40. That the amount, exclusive of VAT, was $84,314.00.

[25.] That the 1983 Conveyance at paragraph F states the amount of the annual service charge was to be $36,000.00. That the Statement of Account exhibited to her Witness Statement indicates a change in the annual service charge. The first service charge was billed on 27 May 1983. The first increase was in July 1993 in the sum of $2,075.15. The next increase was in July 1996 in the sum of $1,802.85. From 1993 to 1996, the increase was $2,075.15. From 1996 to 1999 it was $1,802.85. The next increase was in 1999 in the amount of $1,277,00. The next increase was in July 2002, an increase of $3,962.00. There was no VAT. The next increase was in July 2005 in the sum of $3,680.00.

[26.] Ms. Musgrove stated that for the year 2006, the amount billed was $53,952.00. There was no VAT in 2006. That the escalation on the 2006 amount was based on the Conveyance which indicates that it should escalate every 3 years after the application of the RPIB, which she believed was made public by the Department of Statistics. That amount did not change in 2007.

[27.] That in 2008 having applied the RPIB, the amount increased by some $3,000.00 to $56,707.00. The next increase took place in July 2011, in the sum of $1,634.00. That the next increase in 2014 is related to the USCLI. From July 2011 to January 2014 there was an increase of $1,634.00. In January 2015 VAT was applicable. So, the amount shown in January of 2015 also includes VAT. In January of 2015, the amount reflected there is not an increase. That is the introduction of VAT, in the amount of 7.5%. So, the next increase would have been July 2020 in the sum of $4,162.00, which included VAT but no change in the service charge itself. That in 2023 there was a large increase in the sum of $5,903.00. So, from 2020 to 2023 there was an increase of $5,903.00 exclusive of any VAT.

[28.] In July 2002 the amount of the service charge was $50,272.00 for that period, the annual amount. The increase of $3,680.00 represented a 7.32% increase. That the information that is input would be the RPIB at the date of the Conveyance (1983), and the service charge amount per the Conveyance. Those two are entered into the system and from there they would also include the date that it should escalate. That at 1 July 2005, the system will calculate again, based on the input of the current Retail Index, compare the current Retail Index with the starting Retail Index, which

was called the Retail Index at the date of the Conveyance, and process the increase from there. The $36,000.00 is the base figure, then that figure is increased. So, you go back to 1983 every time. That there is an automatic increase to the next three years because that is increased incrementally from the last billing.

[29.] The United States also publishes a Retail Index so some of the company's contracts are on US rather than the RPIB. Lot 11M is subject to the RPIB. The RPIB is applicable to the entire Bahamas. The USCLI applies if the contract speaks to that. That the RPIB information is input in the system periodically.

[30.] Under re-examination by Mr. Adams, the Witness was asked to read recital D of the 5 of May 2000 Conveyance between the 2nd Claimant and Sunrise Properties Limited (re Lot 2B) which states that the yearly service charge in the sum of $2,000.00 shall be increased or decreased every 3-year period in proportion to any increase or decrease in the USCLI number prevailing at the end of each 3-year period. That the amount of $26,976.00 set out in Invoice 112007 represents a semi-annual amount.

[31.] The Defendant relies on the Witness Statement filed 18 September 2023 and the Affidavit filed 28 November 2017 of Mr. Donald Archer, former CEO and President of the Defendant. Mr. Archer gave viva voce evidence and was cross-examined. In his evidence-in-chief Mr. Archer acknowledged the existence of the 1983 Conveyance and the subsequent Confirmatory Conveyance dated 23 December 1996. He acknowledged the services charges provision on the conveyance and that the same was subject to the RPIB and stated that therefore, the economic stability of Grand Bahama would have a direct impact on the increase and/or decrease of the service charges levied. That the property was ultimately purchased from and conveyed to the Defendant by Lehman Brothers Holdings Inc.

[32.] That the agents of the Defendant, after querying the exorbitant service charge on Lot 11 in comparison to all other surrounding lots, were advised in the meeting which took place some time in 1983 between Mr. John price and others and himself that because there was no casino tax levied, the Claimants sought a very high service charge over that particular lot to gain revenue from the

casinos operation. That it was not therefore the standard service charge required for a lot of that size, description and location, but more so an opportunity to make money off the then hotel operation as at that time; there was no hotel tax or casino tax in Freeport.

[33.] That in August and September 2004 Grand Bahama suffered devastating damage by hurricanes Frances and Jeanne, which caused significant damage to the hotel and casino and all operations at the casino on Lot 11 as well as all hotel operations in general ceased immediately. The casino and hotel in general remain closed to date despite numerous attempts at repairing all damage. Attempts at reopening the hotel and or finding a suitable buyer for the same have also been unsuccessful as the economy in Freeport has yet to improve significantly. That despite its closure at the time of the purchase of Lot 11 in November 2007 by the Defendant, all service charges due and owing on the property were paid and the balance owed to the 1st Claimant was cleared.

[34.] That the Defendant does not deny there being service charges owing to the 1st Claimant over Lot 11, but does refute the amount claimed given the following: (a) since the Hurricanes in 2004 the property has not been operational and therefore the Defendant has been put at a significant disadvantage of not having the income to pay for the exorbitant service charge unfairly levied by the 1st Claimant to collect revenue from an operating casino; (b) not once has there been a decrease of the service charge levied reflective of the economic impact of the hurricanes and further, in breach of the three-year requirement of any increases or decreases, the 1st Claimant more recently raised the fact that this service charge levied over Lot 11 was not only raised in July 2014, before three years had expired to do so, and was subsequently raised again in January 2015; (c) that there have been no services provided to the Defendant since its purchase of Lot 11 and thus the Defendant disputes the amount levied and questions the validity of the service charge levied when those services have been provided in exchange for payment of the same.

[35.] That the Claimants claim is based in contract which attracts a limitation period of 6 years. The Claimants were aware the Defendant's inability to pay since 2008 and has only in 2017 taken court action.

[36.] That Lot 2B was conveyed to the Defendant in or about early November 2007 and was subject to the annual service charge of $2,000.00 to be increased or decreased every 3 years in proportion to the increase or decrease of the USCLI. At the time of purchase by the Defendant any arrears of service charges was paid by the prior property owner and essentially was re-started from December 2007 for the Defendant and therefore, do not total the amount claimed by the 2nd Claimant. That the service charge for Lot 2B has been increased more regularly than the 3 year increments and on some instances, even increased annually. That the 2nd Claimant is claiming services charges owed over and above the 6 year limitation required in contract claims of this nature.

[37.] That the Defendant denies the sums claimed and continues to try to find a buyer for the properties and has continued to notify the Claimants of this intention. That the Defendant refutes the total amount owed given that the service charges being claimed are well beyond the six year limitation period, are exorbitant and unequal to market value and or unequal to service charges billed on similar lots within the subdivision and are being billed for services and utilities not being supplied to the Defendant.

[38.] That to the best of his knowledge no Notice was ever given to the Defendant that the Service Charge provisions contained in the Conveyances of Lot 11 from the Grand Bahama Service Company Limited to The Hotel Corporation of The Bahamas, had ever been assigned.

[39.] Under cross-examination Mr. Archer stated, in part, that before he retired from the Defendant he was also a Director of the company and in fact he was specifically the Managing Director. That prior to being employed by the Defendant he had been employed by two prior owners namely, Princess Casino and Driftwood. That his original start date and affiliation and association with the property was in 1970 and that affiliation and association continued straight up to his retirement. That he retired in January of 2023.

[40.] That at the time the property was purchased by Driftwood there was an operating casino and hotel and services were rendered for the roadway, verges and properties by the Claimants that, in his words "drew service charges". He went on to say that by his use of the words "drew service charges" he meant that service charges were payable based on services being rendered. That he disagreed with the suggestion by Mr. Adams that service charges in relation to Lot 11M were not payable on the condition that services were to be rendered, and that service charges in relation to the road way and the verges were not payable dependent on services being rendered. He disagreed that service charges were not conditioned on the hotel being in operation. He also disagreed that payment of service charges on Lot 2B were not conditioned upon the hotel or the Casino being in operation.

[41.] Mr. Archer stated that when the Defendant purchased the property the hotel had been closed for 3 years. That the hotel had been closed following the impact of hurricane Frances and Jeanne and had not reopened before the sale to the Defendant. That notwithstanding that the hotel had been closed for 3 years, when the Defendant purchased it the Defendant paid all of the then outstanding service charges in relation to Lot 11M.

[42.] Mr. Archer stated that Sunrise Properties and Driftwood received periodic bills for the payment of service charges for Lots 11M and 2B during the time of their ownership. He disagreed with the suggestion by Mr. Adams that the payment of $107,000.00 for arrears of service charges at the closing is not evidence that the Claimants were aware that service charges were not due. Mr. Archer stated that the payment was made in order not to interfere with sale and that it was paid by the seller, the previous owner. Mr. Archer agreed that when a discount of 20% was offered by the Claimants on the services charges the Defendant failed to take advantage of it. Mr. Archer maintained that USCPI calculations and adjustments had not been provided for in 20 years.

[43.] Mr. Archer maintained that no notice was ever given to the Defendant that the service charge provisions in the Conveyance relating to Lot 11M from the Grand Bahama Service Company Limited to the Hotel Corporation Bahamas had ever been assigned. That when he wrote Mr. Ian Rolle on 13 January 2010 requesting that the service charges be waved until the hotel and

the casino became operational, for Lot 11M does not amount to evidence that he became aware that that the service charges obligation had been assigned to the 1st Claimant by the Grand Bahama Service Company.

[44.] Under Re-Examination Mr. Archer denied ever having seen the Assignment or being aware of its existence.

Summary of the relevant title Documents

Lot 11M

[45.] All parties agree that Paragraph 3 of the Statement of Claim correctly recites the relevant Lot 11 title history as recited in the Claimant's Skeleton Arguments as follows:

"By an Indenture of Conveyance dated 1 January 1983, and made between The Grand Bahama Service Company Limited and The Hotel Corporation of The Bahamas and confirmed by a Confirmatory Conveyance dated 23 December1996 between the same parties and now of record in the Registry of Records of the Commonwealth of The Bahamas in Volume 6901 at pages 407 to 441 (**"the 1983 Conveyance"**), all that lot of land containing Two Acres and Four Hundred and Ninety- three Thousandths of an acre (2.493 acres) being Lot numbered 11 situate in Block "M" in the Central Area of the City of Freeport in the Island of Grand Bahama as delineated and shown on the plan attached to the 1983 Conveyance ("Lot 11M") was conveyed to the said The Hotel Corporation of The Bahamas in fee simple."

[46.] The property was conveyed to the purchaser subject to the uses set out therein, which include Clauses 1 (1) and (4) which provide as follows: SUBJECT TO THE USES following that is to say: Clause 1(1):

to the use that the Vendor and its assigns may henceforth receive for the term of 99 years from the date hereof out of the said hereditaments a yearly service charge of $36,000 (**"the said yearly service charge"**) for the first 3 years of the term hereby stipulated with adjustments every 3 years thereafter to reflect an increase or decrease in the Retail Price Index for The Bahamas PROVIDED HOWEVER that in no event shall the said yearly service charge at any time be less than $36,000.00 and PROVDED FURTHER that the said yearly service charge shall during the term hereby

stipulated be paid in equal half-yearly payment on 1 January and the 1 July in each and every year free from all deductions whatsoever the first of such payment to be made on 1 January 1983. ("**the Lot 11M Service Charge**").

Clause 1(4):

to the further use that if the said yearly service charge or any part there shall at any time or times remain unpaid for 2 years after any of the days hereinbefore appointed for the payment thereof then and in every such case although there shall not have been any legal demand therefor it shall be lawful for the Vendor and its assigns at any time or times during the life of the survivor of the issue now living of HM Queen Elizabeth II or within 21 years after the death of such survivor to enter into and upon the said hereditaments or any part of the same in the name of the whole and the same to have again repossess and enjoy as if these presents had never been executed.

[47.] The sale of Lot 11M was confirmed by a Confirmatory Conveyance ("**the Confirmatory Conveyance**") (p 51-66 of the 1st and 2nd Claimants' Bundle of Documentary Evidence for Use at Trial) which once again conveyed the property to the use that the Grand Bahamas Service Company Ltd might receive an annual service charge of $36,000.00.

[48.] The 1st Claimant contends that it has the right to receive the Service Charge and the right to repossess Lot 11M because these rights were assigned to it by The Grand Bahama Service Company Limited by the Assignment.

[49.] The parties to the Assignment are the Grand Bahama Service Company Limited and 1st Claimant. The Assignment is in the following terms:

"WHEREAS:-

1. G.B. Service and Port Authority both belong to the Port Authority Group of Companies.

2. G.B. Service by certain Deeds of Conveyance as of now and to be made in the future is entitled to collect service charges of varying amounts under the terms of such Conveyances.

3. The Port Authority has a continuing responsibility for the upkeep of roads and general maintenance within certain parts of the Port Area.

4. It has been agreed between the parties hereto that G.B. Service shall assign such service charges to which it is now entitled and to which it will become entitled to the Port Authority in order to defray part of the expense of such upkeep and maintenance as aforesaid.

NOW THIS INDENTURE WITNESSETH as follows:- In consideration of the premises and for other good and valuable consideration G.B. Service hereby assigns, transfers and sets over unto the Port Authority **all service charges now due and to become due in the future in favour of G.B. Service** TO HOLD the same unto and to the use of the Port Authority absolutely. (**emphasis added**)."

[50.] Thereafter, by a Conveyance dated 21 December 1990, made between The Hotel Corporation of The Bahamas and Princess Casinos Ltd, Lot 11M was conveyed in fee simple to Princess Casinos Ltd. subject to the payment of the Lot 11M Service Charge and the provisions for recovery thereof as provided for in the 1983 Conveyance.

[51.] By a Collateral Security Debenture and Legal Mortgage dated the 5 May 2000 made between Bahamia Casinos Limited (formerly known as Princess Casinos Ltd) and Lehman Brother Holdings Inc. ("**the Lot 11M Debenture**") Lot 11M was conveyed in fee simple to Lehman Brothers Holdings Inc for the purpose of securing certain principle monies and interest and therein contained and subject to a proviso for redemption as therein set out.

[52.] By a Conveyance dated the 7 November 2007 made between Lehman Brothers Holding Inc. and the Defendant. ("**the 2007 Lot 11M Conveyance**") Lot 11M was conveyed in fee simple to the Defendant subject to the payment of the Lot 11M Service Charges and the provisions for recovery thereof as provided for in the 1983 Conveyance.

Lot 2B

[53.] All parties agree that Paragraph 9 of the Statement of Claim correctly recites the relevant Lot 2B title history as recited in the Claimant's Skeleton Arguments as follows, that is, by a Conveyance dated 5 May 2000, made between 2nd Claimant and Sunrise Properties Limited ("**the 2000 Conveyance**"), Lot 2B was conveyed to the said Sunrise Properties Limited in fee simple.

[54.] Clause 1 (1) of the 2000 Conveyance provides that:-

> "1. In pursuance of the said agreement and in consideration of the sum of One Hundred and Eighty-eight Thousand Dollars ($188,000.00) now paid by the Purchaser to the Vendor ... and in consideration of the service charge hereinafter contained and of the Purchaser's covenant to build set out in Clause 5 hereof and the Purchaser's covenants hereinafter contained the Vendor as BENEFICIAL OWNER hereby grants and conveys under the Purchaser ALL the said hereditaments ....TO HOLD the same unto the Purchaser fee simple SUBJECT to the restrictive covenants set out in the Second Schedule hereto TO THE USES following that is to say:-
>
> (1) TO THE USE that the Vendor and its assigns may henceforth receive for the term of Ninety-nine (99) years from the date hereof out of the said hereditaments a yearly service charge of Two Thousand Dollars ($2,000.00) (hereinafter referred to as "the said yearly service charge") for the first Three (3) years of the term hereby stipulated with adjustments every Three (3) years thereafter to reflect an increase or decrease in the Cost of Living Index Number as published by The United States Bureau of Labour **PROVIDED HOWEVER** that in no event shall the said yearly service charge at any time be less than Two Thousand Dollars ($2,000.00) and **PROVIDED FURTHER** that the said yearly service charge shall during the term hereby stipulated be paid in equal half yearly payments on the First day of May and the First day of November in each and every year free from all deductions whatsoever the first of such payments to have been made on the First day of November, A.D., 2000. ("**the Lot 2B Service Charge**")".

Clause 1 (4) of the 2000 Conveyance provides that:-

"(4) **TO THE FURTHER USE** that if the said yearly service charge or any part thereof shall at anytime or times remain unpaid for two (2) years after any of the days hereinbefore appointed for the payment thereof then and in such case although there shall not have been any legal demand therefor it shall be lawful for the Vendor and its assigns at any time or times during the life of the survivor of the issue now living of Her Majesty Queen Elizabeth II or Twenty-one (21) years after the death of such survivor to enter into and upon the said hereditaments or any part of the same in the name of the whole and the same to have again repossess and enjoy as if these presents had never been executed;"

[55.] By a Collateral Security Debenture and Legal Mortgage dated 5 May 2000, made between Sunrise Properties Limited and Lehman Brothers Holdings Inc. ("**the Lot 2B Debenture**") Lot 2B was conveyed in fee simple to the said Lehman Brothers Holdings Inc. for the purpose of securing certain principal monies and interest as therein contained and subject to a proviso for redemption as therein set out.

[56.] By a Conveyance dated 7 November 2007, made between Lehman Brothers Holding Inc. and the Defendant ("the 2007 Lot 2 B Conveyance") Lot 2B was conveyed in fee simple to the Defendant subject to the payment of the Lot 2B Service Charge and the provisions for recovery thereof as provided for in the 2000 Conveyance.

[57.] After an exchange of e-mails and letters over a few years, by letters dated 6 February 2013 and 28 April 2015, demand was made to the Defendant by the 1st Claimant for payment of the outstanding arrears of the Lot 11M Service Charge which the Defendant has failed and/or refused to pay.

[58.] Similarly, by letters dated 18 February 2014, and 28 April 2015, demand was made to the Defendant by the 1st Claimant for payment of the outstanding arrears of the Lot 2B Service Charge.

Issues to be determined

[59.] The issues to be determined are as follows:

(i) What is the legal effect of the Lot11M Service Charge and the Lot 2B Service Charge?

(ii) As to their legal nature and effect do the Lots 11M and 2B Service Charges have all the characteristics of a rentcharge?

(iii) Was the Lot 11M Service Charge and the Lot 2B Service Charge lawfully assigned by Grand Bahama Service Company Limited to the 1st Claimant by virtue of the purported assignment and was notice of the same given to the Defendant?

(iv) If the purported assignment was valid did it transfer "all the rights and entitlements of the service charge?

(v) If the Service charges were lawfully assigned is the 1st Claimant entitled to a declaration that in the events which have happened, all rights, title and interest of the Defendant in Lot 11M and Lot 2 B Service Charges have been extinguished and the 1st Claimant holds the fee simple title to those lots as if the 1983 Conveyance, the lot 11M Debenture and the 2007 conveyance had never been executed?

(vi) Is the 1st Claimant entitled to re-enter and repossess Lot 11M and lot 2B as a result of the Defendant's failure and/or refusal to pay the arrears of the Lot 11M and the Lot 2B Service Charges?

(vii) Alternatively, is the Defendant obligated to pay in full the arrears of the Lot 11M Service Charge and Lot2 B Service Charge?

(viii) Are the 1st Claimant's claims herein for possession of Lot 11M, and Lot 2 B payment of arrears of Lot 11M and Lot 2B Service Charges, statute barred?

Submissions

What is the legal effect of the Lot 11M Service Charge and the Lot 2B Service Charge?

[60.] The Claimants claim that the Service Charges in this case are rentcharges which run with the land. The conveyances say as much. In the 1983 conveyance Clause 1(1) provides:

> ***"1(1):to the use that the Vendor and its assigns may henceforth receive for the term of 99 years from the date hereof out of the said hereditaments a yearly service charge of $36,000"***

And in the 2000 Conveyance:

> ***"which run with the land".***

As such they are concerned with service charges which run with the land and are not tied to services rendered.

[61.] The Claimants rely on a recent case from this court and I will simply repeat Counsel for the Claimants, Mr. Robert Adams KC's arguments verbatim hereunder.

[62.] The legal nature of the Lot 11M and 2B Service Charges and, in particular, whether or not such service charges in a conveyance of land possess the characteristics of a 'rentcharge', has been judicially determined by the Court in ***Princess Villa Limited v Wittman and another*** [2012] 1 BHS. J. No. 7618.

[63.] In that case, the Plaintiff purchased various properties in fee simple under the terms a Conveyance dated 22 April 1999, the terms of which specified, inter alia, that the properties being conveyed thereunder were subject to certain uses, one of them being that the vendor, from that date, would be entitled to receive an annual service charge out of the hereditaments.

[64.] At paragraph 41 of that decision, Justice Gray-Evans (as she was then) held that the service charges in 22 April 1999, conveyances appeared to have all of the characteristics of a rent charge and not a charge for services for the following reasons:-

> (i)There were annual payments expressed to be, "...out of the hereditaments...";
>
> (ii) There existed no relationship of landlord and tenant between the relevant parties;

(iii) The properties conveyed were conveyed in fee simple with the vendor retaining no reversion in the land but reserving to it, or its assigns, a certain sum with the provision that if such sum fell into arrears for a period of 120 days it would be lawful for the vendor to re-enter and repossess the subject properties; and

(iv) The power in the conveyance to re-enter and repossess did not offend against the rule of perpetuity.

[65.] Like the 'service charge' in the **Princess Villa** case, the Lot 11M and 2B Services Charges are annual payments to the Claimants expressed to be, ***"...out of the said hereditaments..."***.

[66.] Also, when Lots 11M and 2B were conveyed to the Defendant they were conveyed in fee simple. There is no relationship between any of the parties which may be properly described as that of landlord and tenant.

[67.] Further, in each instance, Lots 11M and 2B were conveyed without the vendors retaining a reversionary interest in the land. Rather, the vendors expressly reserved unto themselves, or their assigns, the Lot 11M and 2B Service Charges with the provision that if the same should remain unpaid for a period of more than two (2) years, it would be lawful for them, or their assigns, to re-enter and re-possess the lots.

[68.] Finally, Mr. Adams KC argues, it is manifestly evident that the powers to re-enter and repossess Lots 11M and 2B reserved by the 1983 and 2000 Conveyances for non-payment of the Lots 11M and 2B Service Charges do not offend against perpetuity given that the perpetuity period during which such charges are payable is expressly stated as being 99 years and that the right to re-enter and repossess is only valid during the life of the survivor of the issue now living of Her Majesty Queen Elizabeth II or within twenty-one (21) years after the death of such survivor.

[69.] The decision made by Justice Gray-Evans, and in particular with respect to the nature of the subject service charges, was subsequently upheld by the Court of Appeal (Allen P, Blackman, John JJA).

[70.] Counsel for the Defendant, Mrs. Gail Lockhart-Charles KC referred to Section 10 of the Conveyancing and Law of Property Act Ch 138 which provides that the benefit of every covenant or provision, including conditions of reentry, is annexed to and goes with the reversionary estate in the land, but the assignment document does not explicitly transfer the reversionary estate or the right of re-entry to the GBPA, it only assigned the right to collect service charges. The 1st Claimant therefore does not have the right to reenter the property for the non-payment of the service charges.

[71.] The Claimants point out that in the **Princess Villa** case, as in this case, the reversionary estate was not retained and based on similar wording in the conveyances to uses the Learned Judge found at paragraph 89:

> ***"89. I have found that the estate conveyed to the plaintiff by the conveyance was not an estate in fee simply absolute but an estate in fee simply on condition subsequent. I have also found that the service change[sic] is a rentcharge."***

Could Grand Bahama Service Company Limited assign its rights and was the Assignment adequate to do that?

[72.] The Court did not perceive that any issue was raised by the Defendant that theGrand Bahama Service Company Limited could not assign its rights or that it did not use the right words of limitation for an absolute assignment, namely, for example in the 11 November 1987 Assignment Grand Bahama Service Company Limited expressly **"... assigned, transferred and set over unto....."** the 1st Claimant the Lot 11M Services charges. The right to assign is contemplated in the documents themselves. Clause 1(4) of the 1983 Conveyance reads:

> ***"(1) TO THE USE that the Vendor and its assigns may henceforth receive for the terms of Ninety-Nine (99) years from the date of the said Indenture out of the said hereditaments a yearly service charge..."***

[73.] The issues raised by the Defendant in respect of the Assignment was whether written notice of the Assignment was given to the Defendant as required by law, and even if notice was deemed to have been given, having regarding to the wording in the assignment document, whether it passed all the rights and remedies of the Grand Bahama Service Company Limited, in particular the right to reentry and repossession.

[74.] The Defendant submits that service charges are a chose in action and by virtue of Section 2 of The Choses in Action Act Chap 148 Grand Bahama Service Company Limited was required to give the Defendant notice of the assignment and has failed to do so. The relevant provision in the Act is as follows:

> ***"s.2. Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law... to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor"***

[75.] The Claimants accept that notice of the assignment had to be given, however they maintain that, in light of the evidence adduced the Defendant is not able to rely on the Act because it is estopped from doing so by virtue of the principle of "estoppel by convention' .

[76.] The evidence on which the Claimants rely shows that :-

(i) On 9 November 2007, Counsel for the Defendant wrote directly to the Grand Bahamas Development Company, which, as confirmed in cross-examination by Mr. Dwight Malcolm, was the entity tasked by, inter alia, the 1st Claimant to collect annual service charges on its behalf. The letter enclosed payment in the amount of$107,904.00 to satisfy the outstanding service charge due on Lot 11M. the Claimants say that by paying the arrears Lot 11M Service Charges, it showed

that the Defendant assumed that the Lot11M Services charges were in fact payable to the 1st Claimant;

(ii) Further, on at least two separate occasions after that the Defendant wrote directly to the 1st Claimant requesting, in the first instance, a complete waiver of the Lot 11M Services Charges and in the second instance, a reduction of the Lot 11M Service Charges. Again, by asking the 1st Claimant to either waive or reduce the Lot 11M payment of Survive Charges the Defendant communicated to 1st Claimant that it understood that it had the lawful right to collect payment of the Lot11M Service Charges and that the 1st Claimant had the right to enforce payment of the same.

(iii) Moreover, on 8 June 2010, 31 October 2012 and 11 June 2015 the 1st Claimant wrote directly to the Defendant denying the Defendant's request for wither a waiver or a reduction of the Lot11M Service Charge and demanding payment in full, within 30 days. In responding to the Defendant's request for a waiver or reduction of the Lot 11 Services Charges, it is clear that the 1st Claimant was likewise of the same understanding that the right to collect payment of the Lot 11M Service Charges had been lawfully assigned and vested in them; and the 1st Claimant had a right to enforce payment.

[77.] Leading up to those letters as seen above the Defendant was a party as purchaser of Lot 11M and Lot 2B by the 2007 Lot 11 Conveyance and the 2007 Lot 2B Conveyance. Each of the conveyances contained the provision for the payment of service charges on the land. By letter dated 8 October 2009 the customer Service Manager of the 1st Claimant Mrs. Christine van der Linde wrote a friendly letter to the Defendant reminding it of its duty to pay the service charges which on Lot 2B at the time was $1,415.00.

[78.] By reply letter dated 13 January 2010 the Chief Executive Officer of the Defendant, Mr. Donald Archer, replied requesting the 1st Claimant to consider waiving the service charge or reducing the figure until it was able to commence its Hotel and Casino project.

[79.] By letter dated June 8 2010, the 1st Claimant agreed to discount the annual service charge fee by 20% until development occurred, and to discount by 20% the outstanding balance if settled within 30 days. At that stage the balance on accounts was B$118,450.40.

[80.] This was followed up by a series of e-mails: 24 April 2012 from the 1st Claimant sending statements; 25 April 2012 acknowledgement of the statements by the Defendant asking if the 1st Claimant would consider writing of the balance because the resort had been closed; 1 May and 14 September 2012 stating the amount was then $300,000.00 and demanding payment; 18 September 2012 expressing its intent to deal with the service charges when the property is reopened or sold, and from the 1st Claimant to the Defendant, reminding it of the Agreement in 2007 (3 years after the hotel closed) to pay services charges contained in its Conveyance for 99 years.

[81.] The Claimants contend that on these facts the Defendant is estopped by the doctrine of 'estoppel by convention' from relying on Section 2 of the Choses In Action Act.

[82.] Each party accepted the authority of the UK Supreme Court case of ***Tinkler v Commissioner for her Majesty's Revenue and Customs*** [2021] UKSC 39 for the principle of estoppel by convention. In ***Tinkler's case*** at paragraph 39, Lord Steyn gives a simple definition of the principle in ***Republic of India v India Steamship Co Ltd (No 2) (The Indian Indurance)*** as follows:

> ***"Lord Steyn set out the elements of the doctrine in clear and simple form in the following way, at p 913:***
> ***'It is settled that an estoppel by convention may arise where parties to a transaction at on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption.(authorities). It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted***

by both parties that a concluded agreement is not requirement for an estoppel by convention."

In **Tinkler's** case, the taxpayer made representation to Her Majesty's Revenue Commissioners as though the statutory notice requirement had been fulfilled, and it ultimately held that the taxpayer was estopped from denying that the statutory notice requirement had been satisfied. After making such representations, the taxpayer could not later assert that the statutory notice requirements were not fulfilled.

[83.] The Claimants submitted that the Defendant is likewise estopped from denying the statutory notice requirement imposed by Section 2 of the Choses In Action Act. The notice was confirmed, they say, in this case by various representations made by the Defendant to the 1st Claimant, including its request for a waiver or reduction of the Lot 11M Service Charges. They conclude that this made it clear that the Defendant acknowledged the 1st Claimant as the lawful party entitled to collect payment of the Lot 11M Service Charges. It matters not that the assumption was initiated by 1st Claimant. One of the reasons why the Supreme Court allowed the appeal in **Tinkler's** case is because the Court of Appeal had placed too much emphasis on the fact that HMRC had initiated the assumption.

[84.] An obvious benefit to the Defendant is that it has not paid services charges since 2007, and a detriment to the Claimants is that they have not received any service charges payments from the Defendant since 2007 and have been forced to take this action.

[85.] In **Tinkler's** case, the argument was also advanced that the rules covering estoppel by convention cannot operate so as to "out plank" a statutory notice requirement. The argument, however, failed. Lord Burrows at paragraphs 81 and 82 explained, relying on a purposive interpretation of the provision, that if the statute was not mandatory on the manner of giving notice, evidence that notice was given in another way or by actual knowledge of the person entitled to the notice was enough. He said in part at 82:

"...Even if, contrary to the view taken in the last paragraph, the purpose of section 9A [the notice provision] would otherwise be undermined by the operation of the estoppel by convention, there cannot be any conceivable undermining of the statutory purpose once the taxpayer actually knows of the enquiry. After November 2005, therefore , there has been no conceivable statutory reason why the taxpayer should be protected by rejection of the operation of estoppel by convention"

Did the Assignment pass the right to re-enter and repossess for non-payment?

[86.] The Claimants contend that the answer to this question appears on the plain reading of section 2 of the Choses in Action Act itself. The relevant part of section 2 provides that the assignment:-

"... shall be, and be deemed to have been effectual in law... to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give good discharge for the same, without the concurrence of the assignor."[underline added]

They argue that by operation of law, a valid assignment of a chose in action transfers the legal right to the debt or chose in action as well as "all other legal and other remedies' relating to such right". In this case it includes the right to re-enter and repossess the Lot 11M and Lot 2B for non-payment. The Claimants contend that any argument to the contrary is inconsistent with the proper interpretation of section 2 of the Choses In Action Act and is utterly unsustainable.

Are the Claimants now entitled to re-enter and repossess Lot11M and Lot 2B?

[87.] The periods of time that must elapse before the Claimants become entitled to re-enter and repossess Lots 11M and 2B due to non-payment of the service charges are specified in clause 1(4) of the 1983 Conveyance and Clause 1(4) of the 2000 conveyance respectively (see text above at paragraphs [20] and [28]. Both clauses provide the Claimants' right to re-enter and repossess

becomes exercisable by them if the service charges remain unpaid for two (2) years from the date they fell due without the need for there to be a formal demand [**underline added**].

[88.] The evidence adduced at trial shows that the Defendant has not made any further payment of the Lot 11M and Lot 2B Services Charges since 21 November 2007. It is therefore also manifest that the Lot 11M and Lot 2B Service Charges stood owing and unpaid for more than two(2) years prior to the commencement of this action. Accordingly, the Claimants contend that their right to re-enter and repossess Lots 11M and Lot 2B for non-payment of service charges has crystalized.

Analysis, Discussion and Conclusions

The Law

[89.] As correctly stated, in my view, by Evans J, as she then was, in ***Princess Villa Limited v Whittman and another*** [2012] 1BHS J. No 76 :

> ***"90. A rentcharge is an incorporeal hereditament and as such is an interest in land and subject to the law of real property. Megarry and Wade on the Law of Real Property (7Edition 2008) at page 755 say that : "a rent reserved by a lease is annexed to the reversion in the land, while the rentcharge stand on its own as incorporeal hereditament". At page 751, the learned authors say that one of the distinguishing features of the incorporeal hereditament is that the law of real property applies to them, just as it applied to corporeal land. The authors note that rentcharges are included amongst the list of incorporeal hereditaments that "are important interests in land".***
>
> ***92. As an interest in land, it is capable of being conveyed or assigned or devised..."***

[90.] The Bahamas Court of Appeal (Allen P Blackman John JJA) in ***Princess Villa Limited v Whittman and another*** (SCCivApp No 124 of 2012) up held Evans, J's judgment holding, contrary to the view maintained by the appellant in the case, that rentcharges are a part of our law and the judge was right to classify the services charges in the case as rentcharges. The Court also referred to the definition of Rentcharge in the Limitation Act and in **Juanita Knowles v Bahama Reef Development Co** BS 1993 SC 84 and **Griffin v Martin** SC/ CLE/FP/234 of 1997.

Estoppel by Convention

[91.] The Claimants raised the issue of the equitable doctrine of 'estoppel by convention' in an effort to meet the contention of the Defendant that no written notice of the assignment was given to it, and therefore under s. 2 of the Choses In Action Act the assignment had no effect. The ***Tinkler*** case is a leading case on estoppel by convention. One of the three issues with which it dealt was what were the requirements in English Law to establish estoppel by convention. In that case the court was required to consider the question of whether a party was estopped from denying that a statutory requirement to provide notice had been fulfilled in light of the evidence. In arriving at their decision on that question, their Lordships decided that on the following 5 principles as set out in the headnote:

"In the context of non-contractual dealings, an estoppel by convention would arise where

(i) there was a common assumption of fact or law by the party raising the estoppel ("C") and the party against whom the estoppel was raised ("D") and it was made clear, by words or conduct that could be said to have crossed the line between them, that they shared that common assumption,

(ii)D had conveyed to C that D expected C to rely on the sharing of the common assumption such that D might be said to have assumed some element of responsibility for C's reliance on the common assumption,

(iii)C had in fact relied on that common assumption rather than merely upon its own independent view of the matter,

(iv)that reliance had occurred in connection with some subsequent mutual dealing between C and D, and

(v)C had thereby suffered some detriment, or D received some benefit, in such a way as to make it unconscionable for D to assert the true legal or factual position; that underpinning the first three of those principles was the idea that C not only had been strengthened or influenced in its reliance on the common assumption by the knowledge that D was affirming it, but also that D must have intended or expected that that would be the effect on C of its affirmation of the common assumption, so that one could say that D had assumed some element of responsibility for C's reliance on the common assumption; that, further, circumstances could arise where,

even if all the other elements of estoppel by convention could be made out, the conduct of the party raising the estoppel would make it unconscionable for that party to rely on the doctrine."

[92.] As pointed out by Mrs. Lockhart-Charles KC, further statements arising from the principles include:

"(i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them and the crossing of the line between the parties may consist of either words, or conduct from which the necessary sharing can be properly inferred.

(ii) The expression of the common assumption by the party alleged to have been estopped must be such that they may properly be said to have assumed some element of responsibility for it in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.

(iii)) The person alleging estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.

(iv) The reliance must have occurred in connection with some subsequent mutual dealings between the parties.

(v) Some detriment must thereby have been suffered by the person alleging estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.

Discussion

Are the Service Charges Rentcharges?

[93.] Having considered the authorities and reviewed the evidence the Court finds that the service charges in this case have all the characteristics of rentcharges and are rentcharges. See the characteristics of a rencharge as correctly identified in the **Princess Villa** case at paragraph [38] above, and the arguments advanced at paragraph [39] to [45] which the court accepts as correct, in concluding that this case satisfies those characteristics.

Is the Claimants right to services charges contingent upon provision of services?

[94.] Some evidence was presented by the Defendant (Mr. Archer) that the services promised were not provided and so the Claimants if due arrears are not due the quantum of the arrears claimed or any at all. Since the service charges are rentcharges issuing out of the land, as a matter of law, the right to collect payment of the same is not conditional upon the provision of services. The terms of the clauses imposing the obligation to pay the Lot 11M and 2B charges do not make the Claimants' right to collect payment of such service charges contingent upon the provision of services by the Claimants to the said lots.

[95.] In any event the evidence adduced at trial shows that the Claimants did provide services that, in fact, benefit the Lots situated in the Central Area of Freeport Subdivision. Mr. Malcolm in examination-in chief pointed to correspondence from Mrs. Van der Linde, then manager of Devco, to the Defendant where she pointed out that :

> ***"Service charge moneys collected by the Lucaya Service Company Limited on behalf of the Grand Bahama Port Authority are used to maintain and repair roads and utilities. They are also used to maintain, improve, construct and operate facilities for the general welfare of lot owners in all subdivisions developed or to be developed in the future by the Grand Bahama Port Authority. Lot owners should note that service charge expenditure is not limited to the maintenance and improvements of the area in which the lot is located."***

Specific services included the construction, improvement and maintenance of roads, verges, sidewalks and service conduits of that subdivision.

[96.] If a separate binding agreement was made to provide certain services which were not provided perhaps it may be appropriate to sue for breach of contract, but it does not affect the service charges due. In the circumstances, the Defendant is liable to pay the Claimants in full. The Court therefore does not find it relevant to delve into that evidence relating to what service were or were not rendered.

[97.] The Claimants contend that in this case the Defendant cannot reasonably deny that by 13 January 2010 it knew that the right to collect the service charge had been assigned because by letter on that date it wrote to 1st Claimant requesting that it consider waiving the service charge on Lot 2B until such time as it could commence its hotel and casino project. A reasonable inference on a balance of probability is that the Defendant knew that rights and remedy connected to the services charges had been assigned to the 1st Claimant. Otherwise why would it write to the 1st Claimant. The Defendant said it could have been because it was generally known that they were the same group of companies. In other words, their action was consistent with their being an "agent" for the company and not necessarily because the rights had been assigned. Mrs. Lockhart–Charles KC expressed the view that those facts do not in any way support a common assumption shared between the parties that the Service Charges had been assigned to the 1st Claimant. The court accepts the argument that they are equally consistent with an assumption that the 1st Claimant was acting as agent. However, it is reasonably undeniable that they indicated that there was a common understanding that the 1st Claimant could collect the Services Charges. What it did not answer was whether there was an assignment of the remedies for non-payment.

Is the Assignment effective?

Written Notice

[98.] Although on the evidence it is evident that the parties accepted that the 1st Claimant had the authority to collect the service charges, yet, as correctly argued by Mrs. Lochart-Charles KC, that could have been due to an agency arrangement by companies in the same Group and did not necessarily mean that an assignment was made, or, if made, that written notice of the assignment had been given to the Defendant.

[99.] Contrary to the argument of the Defendant, written notice of the assignment was in fact given. Section 2 of the Choses In Action Act does not mandate which form the written notice should take, so written notice can be given in many forms. In this case it was given to the Defendant's predecessor in title by recording in the public record. According to the affidavit of Miss Karla S. McIntosh the right to the service charges was conveyed by an Assignment from The Grand Bahama Service Company Limited to the 1st Claimant dated 11 November 1987 and is of

record in the Registry of Records in Volume 4922 at pages 573 to 576. On the face of the document which was in evidence the Assignment was lodged for record on 2 March 1988 and recorded on 11 March 1988. In light of the conveyances having forecast that an assignment would be made to the 1st Claimant, when it purchased the property in 2007 from its predecessor in title Lehman Brothers Holdings Inc. as disclosed in paragraph 52 above, a diligent search by the Defendant ought to have been done to see if such an assignment was in fact made. Such a search would have disclosed the notice.

[100.] Therefore, there is no need to invoke the equitable doctrine of estoppel by convention. The assignment is valid and effective and became effective on 11 March 1988.

Does the Assignment pass the right to re-enter and repossess the properties?

[101.] On the issue of whether the assignment passed the right to reenter and repossess the properties, Section 2 of the Choses In Action Act provides that "***any absolute assignment, by writing under the hand of the assignor ... of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor... shall be, and be deemed to have been effectual in law... to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.***" [underline added]

[102.] Registration in the public records is express written notice to members of the public. Such express notice having been given, it follows by virtue of the provision of the section that the Assignment passed and transferred "all legal and other remedies for the same". One of those legal remedies is a right to reentry and repossession.

[103.] The section provides that this right passes "...***from the date of such notice.***" The effective date of the transfer of these powers was therefore the date of recording in the public record, which as stated above was 11 March 1988. The current efforts to enforce the rentcharge by re-entry and possession is therefore well within the lawful powers of the 1st Claimant as a valid assignee.

Are the arrears statute barred?

[104.] Although in paragraph 3.5 of its Amended Defence the Defendant avers that the monetary arrears claimed by the Claimants are statute barred they did not condescend to skeleton arguments in support of that claim. Nevertheless, the Claimants set out the following answer to that claim:

(i) It is settled law that a 'rentcharge 'is an interest in land.

(ii) In addition, in section 2 of the Limitation Act "Land" is defined as including, inter alia, rentcharges. Further, section 2 of the Limitation Act defines "rentcharges" as "...any... periodic sum of money charged upon or payable out of land, except a rentservice or interest on a mortgage or on any other charge on land". The Claimant therefore submitted that it is section 16(3) of the Limitation Act that prescribes the limitation period representing actions to enforce payment of a rentcharge, which includes the Lots11M and 2B Service Charges. The section provides:

"16(3) No action shall be brought by any person to recover any land after the expiry of twelve years from the date on which the right of action accrued to such person or, if it first accrued to some other person through whom such persons claims, to that person".

(iii) In addition, it must be noted that section 5(2) of the Limitation Act also prescribes a limitation period of twelve(12) years for claims based on instruments made under seal.

(iv) The 1st Claimant's claim against the Defendant arose on 1 January 2008 when the Defendant failed and/or refused to pay the Lot 11M Service charges due. Twelve (12) years from 1 January 2008 is 1 January 2020.

(v) The 2nd Claimant's claim arose on 1 May 2008 when the Defendant failed and/or refused to pay the Lot 2B Service Charges due. Twelve (12) years from 1 May 2008 is 1 May 2020.

(vi) This action was commenced by the Claimants in 2017. It cannot be rightly disputed that the action was brought in time.

Conclusion

[105.] For the reasons discussed above the court makes the following decisions:

(i) The legal effect of the Lot11M Service Charge and the Lot 2B Service Charge is that they are rentcharges.

(ii) The Lot 11M Service Charge and the Lot 2B Service Charge were lawfully assigned by Grand Bahama Service Company Limited to the 1st Claimant by virtue of the Assignment dated 11 November 1987 and notice of the same was given to the Defendant.

(iii) The Assignment was valid and transferred "all the rights and entitlements" of the service charge.

(iv) The 1st Claimant is entitled to a declaration that in the events which have happened, all rights, title and interest of the Defendant in Lot 11M and Lot 2 B Service Charges have been extinguished and the 1st Claimant holds the fee simple title to those lots as if the 1983 Conveyance, the lot 11M Debenture and the 2007 conveyance had never been executed.

(v) The 1st Claimant is entitled to re-enter and repossess Lot 11M and lot 2B as a result of the Defendant's failure and/or refusal to pay the arrears of the Lot 11M and the Lot 2B Service Charges.

(vi) Alternatively, the Defendant is obligated to pay in full the arrears of the Lot 11M Service Charges and Lot 2B Service Charge.

(vii) The 1st Claimant's claims herein for possession of Lot 11M and Lot 2B payment of arrears of Lot 11M and Lot 2B Service Charges, are not statute barred.

Disposition

[106.] As the Assignment covered "all service charges now due and to become due in the future , for the reasons given above the Court hereby makes the following Orders:

(i) The 1st Claimant's and 2nd Claimants claims herein for possession of Lot 11M and Lot 2 B and payment of arrears of Lot 11M and Lot 2B Service Charges are not statute barred.

(ii) The 1st Claimant is entitled to a declaration that in the events which have happened, all rights, title and interest of the Defendant in Lot 11M and Lot 2 B Service Charges have been

extinguished and the 1st Claimant holds the fee simple title to those lots as if the 1983 Conveyance, the lot 11M Debenture and the 2007 conveyance had never been executed.

(iii) The 1st Claimant is entitled to re-enter and repossess Lot 11M and lot 2B as a result of the Defendant's failure and/or refusal to pay the arrears of the Lot 11M and the Lot 2B Service Charges.

(iv) Alternatively, the Defendant is obligated to pay in full the arrears of the Lot 11M Service Charges and Lot2 B Service Charge. However, the Claimants claimed reentry and possession, and payment of the arrears in the alternative. The Court will grant the primary claim and therefore, exercises it discretion not to pronounce on the alternative claim of payment of the arrears.

(v) The 2nd Claimant is entitled to Possession of all that land containing One Acre and Two Hundred and Thirty-four Thousandths of an acre (1.234 acres) being Lot numbered 2B situate in Block "M" in the Central Area of the City of Freeport on the Island of Grand Bahama ("**Lot 2B**");

(vi) A Declaration that, in the events that have happened, all rights title and interest of the Defendant in Lot 2B has been extinguished and that the 2nd Claimant holds fee simple title to Lot 2B as if the 2000 Conveyance, the Lot 2B Debenture, and 2007 lot 2B Conveyance had never been executed;

(vii) Costs shall be paid by the Defendant to the Claimants such costs to be assessed by the Deputy Registrar if not agreed.

[107.] Finally, the Court thanks Mr. Adams KC and Mrs. Lockhart-Charles KC for their well prepared and thoughtful Submissions which were extremely helpful to the Court in determining the many issues that arose in this action.

Dated this 22nd day of August A.D. 2025

Petra M. Hanna-Adderley

Petra M. Hanna-Adderley
Judge