

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION
2019/CLE/gen/00133

BETWEEN

PAULETTE NEWTON

Plaintiff

AND

LAKE CUNNINGHAM ESTATES COMMON AREA MANAGEMENT COMPANY
LIMITED

Defendant

Before: The Hon. Madam Justice G. Diane Stewart

Appearances: Mr. Ashley Williams for the Plaintiff
Ms. Lenise Flowers for the Defendant

Ruling Date: 25th August, 2022

RULING

1. By an Amended Summons filed 10th April 2019, the Defendant, Lake Cunningham Estates Common Area Management Company Limited (**the “Defendant”**) seeks an order setting aside the Plaintiff, Paulette Newton (**the “Plaintiff”**) originating summons filed 25th February 2019 (**the Plaintiff’s OS**) as it is not in conformity with Order 7 rule 2 (1) of the Rules of the Supreme Court (**the “Set Aside Application”**).
2. By the Plaintiff’s OS, the Plaintiff sought the following reliefs against the Defendant:

- a. A Declaration that the Defendant is not the lawful Homeowners Association for the Lake Cunningham Subdivision;
 - b. A Declaration that the Defendant is not the entitled to collect any maintenance charges due and owing to the lawful Homeowners Association for the Lake Cunningham Subdivision;
 - c. An Order restraining the Defendant whether by itself, its agents, servants or otherwise, from impeding the entry of the Plaintiff's lawful guests to the Lake Cunningham Subdivision;
 - d. An Order requiring the Defendant to return to the Plaintiff all maintenance fees paid to it with interest.
3. By Ex- Parte Summons filed by the Plaintiff on 5th February, 2019, the Plaintiff sought an Order to restrain the Defendant whether by itself or by its servants or agents or otherwise from impeding the lawful entry of the Plaintiff's agents, tenants, servants, visitors and licenses into the community and from publishing a document entitled Delinquent List or any similar document until after the trial of this action.
 4. It was ordered on 22nd March, 2019 by the Court that the Plaintiff and her lawful guests shall have unfettered access to the Lake Cunningham Subdivision until a determination has been made on the Plaintiff's application.
 5. The grounds for the Set Aside Application by the Defendant are that after twenty three years of executing the Indenture of Conveyance dated the 15th day of May 1996 with Canadian Imperial Bank of Commerce, Westmoor Limited, Skyline Lakes Home Owners Association Limited (the "Conveyance"), the Plaintiff chose to exercise her rights, title or interest derived from the Conveyance.
 6. Such delay, it claims, is unreasonable and prejudices her rights by her acquiescence and estoppel, contrary to large principles of laches and has redounded to the detriment of the Defendant which places a chilling effect on the

Defendant's civil, legal and constitutional rights contrary to Articles 25, 26, 27 and 28 of the Constitution.

7. The Defendant claims that the Plaintiff's OS should be considered statute barred due to the Conveyance being a sealed instrument as section 5 (2) of the Limitation Act provides that no action should be brought after the expiry of twelve years, where a sealed instrument is involved. Section 5 (2) provides:-

“(2) An action upon an instrument under seal shall not be brought after the expiry of twelve years from the date on which the cause of action accrued:

Provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.”

Therefore the Plaintiff has missed her opportunity to bring said action within the said twelve year period and the action must, mandatorily, be struck out.

8. The Defendant further claims that the Plaintiff's OS violates the Defendant's quiet enjoyment of the property involved situate in the Lake Cunningham Subdivision **(the “Subdivision”)**, contrary to principles of equity, justice and/or law. Additionally, that seeking an injunction against the Defendant and its members from preventing the Plaintiff and her lawful guests' access to the Subdivision is an abuse of process and a detriment to the Defendant.
9. Such an injunction would render the Subdivision unsafe and open to a wave of crime to be perpetrated by those of ill will and super impose a chilling effect on the civil, legal and constitutional rights of the Defendant and its members and disrupt their quiet enjoyment, safety and peaceful co-existence.
10. In any event, the Defendant denies impeding entry to the Plaintiff and her guests and instead contends that it is merely carrying out the spirit and letter of Clause 6 (2) of the Conveyance for the benefit of all of the residents of the Subdivision inclusive of the Plaintiff and her guests.

11. By the Amended Summons filed by the Plaintiff, the Plaintiff sought the determination of the following preliminary questions or issues and a stay of the action until the determination of the same:

- (1) Whether or not the Defendant Company is the Association as provided in the Conveyance of the Plaintiff?
- (2) Whether or not the Defendant Company is a local improvement association as provided for in the Subdivisions (Local Improvement Associations) Act, Ch. 258, statute laws of The Bahamas?
- (3) If the Defendant Company is not the Association in accordance with the Conveyance of the Plaintiff nor a local improvement association in accordance with the Act, is it entitled to collect maintenance fees from the Plaintiff?
- (4) Is the Defendant Company being a Company incorporated on the 26th November 2015, estopped from claiming maintenance fees which it alleges was due and owing to it prior to its incorporation?

Evidence

Plaintiff's Evidence

Affidavit of Paulette Newton filed 5th February 2019

12. Mrs. Paulette Newton, the Plaintiff, made this affidavit in support of an application for interlocutory injunction. By the Conveyance dated 15th May, 1996 between Canadian Imperial Bank of Commerce, Westmoor Limited and Skyline Lakes Home Owners Association Limited of the one part and Clyde Alex Newton and Paulette Elaine Newton of the other part recorded un Volume 6766 at pages 437 to 459 ("**the Conveyance**") became seised with all the parcel or lot of land known as Lot No. 75 situate in the subdivision known as Lake Cunningham.

13. It is the Plaintiff's position that that the Defendant is not cited in the Conveyance as the Home Owners Association nor did the results of a preliminary title search

conducted produce any conclusive evidence that the roadways and verges had been assigned to the Defendant from Skyline Lakes Home Owners Association Limited. The Plaintiff avers that the Certificate of Incorporation for the Defendant Company was not issued until 26th November, 2015, and which entity had previously operated by an unincorporated association in the name of the "Committee". Its Memorandum and Articles of Association indicate that the Company was formed by two homeowners of the Lake Cunningham Subdivision and that the Plaintiff and the other home owners within the Lake Cunningham Subdivision were unaware of the Company's incorporation and were not provided with its Memorandum and Articles of Association.

14. In or around January 2019, the Defendant published and produced a Delinquent List of Residents who are owing the Defendant fees due. The Plaintiff states that she has informed the Defendant that she is not delinquent and has provided them various reasons outlining the rationale for her position and despite these explanations, the Defendant by its agents, servants or otherwise has embarked on a scheme of impeding lawful guests from entry into the Lake Cunningham Subdivision. On a teleconference held on 25th January, 2019, counsel for the Plaintiff informed the chairman of the Defendant, Mr. Lightbourne that the action taken by the Defendant was unlawful and requested that the Defendant cease the obstruction of any lawful visitors from entering Lake Cunningham Subdivision. The Plaintiff and other alleged delinquents on the list were not given an opportunity to address their concerns.

15. The Defendant has since stated that unless restrained by the Court, they intend to continue to impede the access of any lawful visitors and to publish the Plaintiff's name on the list for amounts which are due and owing.

Second Affidavit of Paulette Newton filed 25th February 2019

16. The Plaintiff stated that upon completing the purchase of the property, she along with her now deceased husband was issued a share certificate in Skyline Lakes

Home Owners Association Limited (“Skyline Lakes Association”) and that is the only Association she knew to be the Home Owners Association for Lake Cunningham. She further evidenced that in or about 2000, herself along with other residents of Lake Cunningham formed an ad-hoc body for maintaining the electronic gate at the entrance of Lake Cunningham. During such time all the residents agreed to pay a flat fee for the maintenance of the gate.

In or about 26th November, 2015. Mr. Henry Lightbourne and Mr. Jayson Sweeting both residents of Lake Cunningham formed the Defendant Company. The Plaintiff avers that she along with the other residents, at the time of incorporation of the company were unaware and not supplied with a share certificate in the Defendant Company as was done by the Skyline Lakes Association. Immediately after the formation of the Defendant Company, the Plaintiff began receiving invoices for maintenance charges which included charges that pre-existed its incorporation and which were only to be payable to the Skyline Lakes Association. The Plaintiff informed the Defendant that she would not pay maintenance charges which existed prior to its incorporation as it had no right to claim such charged and/or because such charges could no longer be claimed due to an effluxion of time.

17. The Plaintiff contends that she has paid the Defendant Company the requested monthly fee for most months since its incorporation and that such fees were paid to maintain the gate to Lake Cunningham from which she benefits but were never an admission to an alleged debt. The Plaintiff further contends that she does not believe the Defendant to be the lawful Home Owners Association for Lake Cunningham and that she has never received any written requests from the Association requesting payment in accordance with the Conveyance and the roadways in Lake Cunningham remain vested in the Skyline Lakes Association.

Third Affidavit of Paulette Newton filed 14th March 2019

18. The Plaintiff agreed with Mr. Lightbourne's statement that the Skyline Lakes Association had never made a written request for maintenance fees to be paid to it for the upkeep of roadways within the Subdivision. She however disagreed with the chronological events deposed to by Mr. Lightbourne.
19. In 2002, the ingress and egress into the Subdivision was controlled by each individual resident by transponder. The association referred to in the Conveyance to which maintenance expenses were to be paid to the Skyline Lakes Association and not the Defendant. She was advised that there was no nexus between the two therefore, the Defendant is not legally able to collect fees on behalf of the Skyline Association.
20. In or around 11th February 2009, she did acknowledge a debt of \$6,800.00 which was owing to the Committee. Since her acknowledgement, there was never an attempt by the Committee to recover the debt by way of legal action. She was advised that it was based on simple contract and could no longer be recovered because any action in that regard would be statute barred and the Defendant was not incorporated until the 26th November 2016. It was also no longer able to ratify the simple contract due to the effluxion of time.
21. Since the Defendant's incorporation, there was always a debate between the property owners of the Subdivision and the Defendant with respect to the maintenance fees it could legally collect. Mr. Sidney Collie, an attorney and property owner within the Subdivision, at a meeting held on 11th December 2016, indicated that the Defendant could not legally pursue any amounts incurred prior to its incorporation.
22. The Plaintiff was present and agreed with him. She had also asserted that the Defendant should aggressively pursue all residents who refused to pay the maintenance fees since the Defendant's incorporation. Since the Defendant's incorporation, she has not been delinquent in paying the requisite maintenance

fees although from time to time she fell in arrears. Notwithstanding, she always refused to pay the Defendant any amount which existed prior to its incorporation.

23. The Plaintiff never acknowledged the Defendant as the de facto association which was to be responsible for the collection of maintenance fees. Since its incorporation however, she consistently made payments to the Defendant for the maintenance of the gate.

24. It was incorrect, as the Defendant had submitted that from around 2002 all delinquent property owners were made to attend the gate to collect their guests. From around the year 2002 to 2009, all property owners of the Subdivision were able to control their own access to it via transponder. As far as she was aware, there was never a campaign to have delinquent residents attend the gate for their visitors.

25. While she agreed that her visitors were never denied access, by creating an impediment to entry, the Defendant has substantially affected her quiet enjoyment and that of her family as there were numerous instances where either she or her family members would have to walk from their home to the gate to receive guests, when personal transportation was unavailable.

26. The calling of a police officer for one of her guests was also a breach of her quiet enjoyment. It caused an impediment to access as both residents and visitors assumed that there was a problem at the Subdivision's entrance. She was advised by her visitor at the time, who was her attorney that the disturbance was caused by the impediments to access which were put in place by the Defendant which caused a bottle-neck at the entrance.

27. The Plaintiff averred that she was worried and concerned that access to her and in family in emergency situations would be impeded. She was perplexed to learn from her visitor/attorney that where a delinquent owner was unable to attend the

gate, the only person who could approve access to the Subdivision was Mr. Lightbourne.

Defendant's Evidence

Affidavit of Henry Charles Lightbourne filed 25th February 2019

28. Mr. Henry Charles Lightbourne, the Defendant's Chairman ("**Mr. Lightbourne**") averred that in or about 1996, the Subdivision was laid out. He explained that it is a portion of a larger tract of land situate on the Southern Side of Prospect Park Drive in the Western District of New Providence. Its only entrance was through and over the roadways of the Skyline Lakes Subdivision.
29. It was intended that each purchaser of a lot in the Subdivision would have the benefit of restrictive covenants in the Subdivision which led to the development of the Skyline Lakes Association. All of the burdens and benefits of the said restrictive covenants were borne by the Skyline Lakes Association. The expression association was defined as "*the Association and its successors in title the owner or owners for the time being of the road reservations*".
30. The Subdivision had and continues to have a security booth equipped with security officers at its entrance for the purpose of vetting anyone entering therein. The costs and expenses relative to the security booth and its officers along with the upkeep of the Subdivision were paid by the developer until around the year 2002. The Skyline Association never made any written requests from the purchasers of the lots in the Subdivision.
31. After the developer ceased paying for the maintenance in the Subdivision, inclusive also of manning the security booth, the Lake Cunningham Estates Common Area Management Committee (**the "Committee"**) was formed by residents to act as the de facto association to maintain the expenses of the security booth and its officers along with the repairs and maintenance of the road

reservations, verges and street lights. The Plaintiff's husband (now deceased) was one of the founding members of the Committee.

32. Each purchaser covenanted with the Association, to pay to the Association from time to time, upon a written request, a proportion of the total costs and expenses which were incurred by the Association for repairing and maintaining the road reservations, sidewalks, verges and street lights. Since its inception, the Committee, through written requests, requested that the residents pay a proportion of the total costs and expenses incurred.
33. The Plaintiff along with many other residents in the Subdivision, recognized the Committee as the de facto association and paid money to the Committee towards the settlement of amounts requested. In or about 2008, due to increasing arrears, the Committee sought to enter into arrangements with the residents to pay down on their arrears. On the 11th February 2009, the Plaintiff acknowledged that she owed arrears in the amount of \$6,800.00 and agreed with the Committee to pay those arrears.
34. On 23rd January 2014, the Committee distributed a Delinquency Notice to all residents which notified them of the financial condition of the Committee. A Procedure for Residents not participating in the Security Services Program was adopted and distributed at the security booth to residents of the Subdivision.
35. On the 28th June 2015, the Committee held a meeting with the residents to discuss, inter alia, as the formation of a legal entity to act as a body corporate on behalf of the Subdivision's residents with respect to the restrictive covenants. The majority of the Subdivision's residents agreed with the proposed incorporation. Discussions were held with the Skyline Lakes Association with respect to the legal transfer of all of its right title and interest in of and to the Subdivision, without success.

36. On 20th August 2015, the Defendant was incorporated. By its Articles of Association, every purchaser in the Subdivision is a member of the Defendant. A newsletter was prepared and distributed after the Defendant's incorporation and informed the Subdivision's residents that its Articles of Association was available electronically upon written request or from the office of Collie & Collie Law Chambers, the Defendant's registered office.

37. A meeting was held on 11th December 2016. During the meeting, delinquent accounts were discussed along with the Procedures for Residents not participating in the Security Services Program. By letter dated 1st June 2017, the Defendant wrote to the Plaintiff to offer a forty percent rebate of her arrears to which the Plaintiff did not respond. In November 2018, a special meeting was called by the Defendant's Board of Directors where its financial position was discussed and was held on 2nd December 2018.

38. A General Notice dated 27th December 2018 was distributed at the Subdivision's gate to members which informed them of the policy adopted with respect to delinquent accounts. By letter dated 7th January 2019, the Plaintiff was informed of the said policy but she did not respond. By a written notice dated February 2019, the Plaintiff was notified of her name being added to the list of delinquent residents which would now require her guests to be vetted at the security booth, consistent with the Procedures for Residents Not Participating in the Security Service Program.

39. On 25th January 2019, a visitor of the Plaintiff attended the security booth and requested access to the Plaintiff. The visitor was informed that he would have to directly contact the Plaintiff in order to gain access into the Subdivision. The visitor identified himself as being from the law firm Alexiou Knowles & Co., the Plaintiff's legal representative. In response, the security officer called Mr. Lightbourne and he explained the policy to the visitor, which was that the Plaintiff would have to come to the gate to clear him.

40. The police was subsequently called and attended the security booth. Mr. Lightbourne also explained to him the policy with respect to delinquent residents. In response, the officer agreed that the Plaintiff simply needed to pay her arrears. The visitor was provided with the email address for the Defendant's Board of Directors after requesting to meet with them. Thereafter, no request had been made to date.
41. At all material times the Plaintiff acknowledged the Defendant as the rightful body for the collection of maintenance fees pursuant to the restrictive covenant as evidenced by her execution of the Agreement for Payment of Maintenance Fees dated 11th February 2009 and her continued payments thereafter.
42. Mr. Lightbourne averred that all guests to the Subdivision are vetted by the security officer on duty with the exception of delinquent residents who are required to personally vet their guests being their guests are granted access into the Subdivision. The enjoyment of paying residents would be eroded if delinquent residents' guests were also allowed to be vetted.

Second Supplemental Affidavit of Henry Charles Lightbourne filed 2nd April 2019

43. Mr. Lightbourne averred that the Plaintiff acted contrary to the letter and spirit of clause 6 (2) of the Conveyance, which she breached for more than twenty years.

Clause 6 (2) states:-

"The Purchaser hereby covenants with the Association its successors in title and its assigns that the Purchaser and all persons deriving title under the Purchaser to the said hereditaments will on the written request from time to time of the Association pay to the Association a proportion of the total costs and expenses from time to time incurred by the Association after the 1st day of January, A.D. 1996 in repairing and maintain:-

- (a) the road reservations and the sidewalks and verges (if any) and the drainage thereof;**

- (b) the street lighting (if any) in the said Subdivision; (such total costs and expenses being conclusively certified by the auditors for the time being of the Association) such proportion having the same relation to such total costs and expenses as the total area of the said hereditaments bears to the total area of the entire Subdivision PROVIDED that neither the Purchaser nor the heirs executors administrators or assigns of the Purchaser shall be liable under the foregoing covenant in respect of any request for payment made by the Association after the Purchaser and the heirs executors administrators or assigns of the Purchaser shall have parted with all interest in the said hereditaments; and
- (c) such areas designated on the Plan as "Open Space".

44. The Defendant has incurred expenses of Four Hundred Eighty-One Thousand Two Hundred Fifty-Seven Dollars and Eighteen Cents since 2015 broken down as follows:

- a. January to December 2015 - \$101,660.37;
- b. January to December 2016 - \$103,367.48;
- c. January to December 2017 - \$140,987.22;
- d. January to December 2018 - \$104,647.32;
- e. January to March 2019 - \$30,594.79.

45. The figures were generated by Seaview Management Services Limited who had also indicated an accrued balance of Three Hundred Ninety One Six Hundred Seventy-Two Dollars and Fifty-Eight Cents since the Defendant's incorporation.

Issues

Preliminary Questions

- i. Whether the Defendant Company is the Association as provided in Conveyance of the Plaintiff
- ii. Whether the Defendant Company is a local improvement association as provided for in the Subdivisions (Local Improvement Associations) Act

- iii. Whether the Defendant Company is Association in accordance with the Conveyance of the Plaintiff or a local improvement association in accordance with the Act and is rightfully entitled to collect maintenance fees from the Plaintiff
- iv. Whether the Defendant Company being a company incorporated on the 26th November, 2015 is estopped from claiming maintenance fees which it alleges was due and owing to it prior to its incorporation

Defendant's Summons

- v. Whether the originating summons should be set aside.

Submissions

Plaintiff's Submissions

- 46. The Plaintiff submits that despite commencing an action by originating summons, to reduce the length of the action, the Defendant has taken steps to make the proceedings lengthy. The Court should therefore accede to the Plaintiff's application of a trial of the preliminary questions and issues as the determination of the same will avoid further litigation and save costs for both parties.
- 47. The Plaintiff submits that upon proper construction of her Conveyance, the Local Improvement Association for the Lake Cunningham Subdivision is the Skyline Lakes Association. The Skyline Lakes Association is the legally entitled Home Owners Association for Lake Cunningham.
- 48. The Plaintiff further submits that the Defendant is not a local improvement association under the provisions of the **Subdivisions (Local Improvement Associations) Act, Ch. 258**, as follows-
 - Section 3(1) provides: - "Where lot owners representing not less than sixty per centum of the total number of lots in a subdivision decide to form themselves into an Association for the purposes of this Act, they may submit to the Minister in the prescribed manner a petition to be incorporated as a Local Improvement Association."
 - Section 4(1) provides: - "A petition in writing for the establishment of an Association in any sub-division may be presented to the Minister and shall be signed by owners

representing not less than sixty per centum of the total number of lots in the sub-division who desire to form an Association for the purposes of this Act.”

Section 7 provides: - “(1) Where the Minister decides to grant a petition under this Act, with or without modification, he shall establish the Local Improvement Association for the sub-division to which the petition refers with such style and title, constitution and functions as are set out in the certificate of incorporation issued under his hand and seal.

(2) Such Association shall thereupon be a body corporate under its proper style and title and shall have perpetual succession and a common seal with power to hold land, to sue and be sued in its corporate name and to exercise as a body corporate such functions as may be assigned to it.

(3) The first bye-laws of such Association shall be approved by the Minister.

(4) Upon the incorporation of an Association, it shall be the duty of the Association to lodge for record in the Registry of Records of The Bahamas the certificate of incorporation and the bye-laws of the Association and thereafter the Minister shall cause public notice of the incorporation of the Association and the location of its registered office to be inserted in the Gazette at the expense of the Association.

(5) Upon lodging the certificate of incorporation and the bye-laws of the Association at the Registry of Records, the Association shall pay a fee of forty dollars.”

49. The Company has failed to show any nexus between it and Skyline Lakes Association empowering it to act on its behalf not has it shown that it is a body corporate formed under the Act.

50. The Plaintiff relies on the case of **Watlings Island Property Owners Association v Director of Physical Planning and others [2018] 1 BHS J. No. 96** where Winder J. found:-

“Whilst Watlings asserts that is a company comprised of property owners in the Columbus Landing Subdivisions, it is not the Local Improvement Association contemplated to be representative of lot owners in subdivisions under the legislation. Watlings admits of this fact in its submissions where it says that “it is an association comprising the property owners in Columbus Landings Subdivision in San Salvador, Bahamas, it does not purport to be an association approved under the Planning and

Subdivision Act. The evidence is clear that Watlings is not a body corporate established by virtue of the deeming provisions of the Subdivisions (Local Improvement Association) Act but rather the Companies Act. Not only does Watlings confirm that it is not the relevant Improvement Association, the Director also confirms that this is the case. It would seem to me that if the statute contemplates the creation of a specific type of Association to represent owners of subdivisions it is this association and not any other which would be interested in decisions made by the TPC. This is especially so where the park to be proposed is being deeded to the Treasurer. Surely in these circumstances the Improvement Association under the Subdivisions (Local Improvement Association) Act would be the only type association which could be remotely interested in the decision of the TPC. What is also of note is the fact that land has not been vested in Watlings. The Development of Columbus Landings Subdivision contemplated the acquisition to title to the park areas by Watlings. Clause 4 of the standard conveyance of lots in the Columbus Landings Subdivisions each contain the following clause:

The purchaser hereby covenants with the Vendor that the Vendor whenever advisable may from time to time convey the beach and park areas together with any reserves including any community property thereon together with any roads subject to the right of way appurtenant thereto to a local improvement association consisting of the property owners of the said subdivision for the use and benefit of such property owner and owners and that in this connection the Vendor shall cause to be formed a non-profit local improvement association or corporation to be designated as a Local Improvement Association of the Subdivision of Columbus Landings Three or such other suitable name as may be available therefore whose membership shall consist solely of lot owners in the said subdivision and which association shall have the right of assessment against each property owner of annual conscriptions for the maintenance of the said beaches parks reserves community property and road facilities in the said subdivision..."

51. The Plaintiff submits that the Defendant is not legally entitled to collect maintenance fees from the Plaintiff or any other resident of the Lake Cunningham subdivision.

52. The Defendant alleges that the Plaintiff owes \$12,675.00 in maintenance fees. \$11,650.00 was allegedly owed prior to the incorporation of the Defendant Company. The Plaintiff submits that the Defendant Company being incorporated on 26th November 2015, is estopped from claiming maintenance fees which it alleges was due and owing prior to its incorporation. To rebut the assumption of pre-incorporation contracts, the Defendant relies on **Rolle Family Company v Rolle [2017] UKPC 35**, where the Privy Council held:-

“What is a reasonable time for the purpose of a statutory provision like this must depend on what falls to be done in that time. In the case of section 22, it means a reasonable time for the company to decide whether to adopt the transaction and to take the necessary steps to do so. There are practical reasons why the delay should be as short as is consistent with that object. The temporal limitation is not there for the benefit of the company. It is there for the benefit of third parties dealing with it. The decision whether to adopt a pre-incorporation contract affects the company’s assets and liabilities, and thus the transactions which it is in a position to enter into with third parties. It affects the person who purported to enter into the transaction before the company’s incorporation, who needs to know whether he is to remain personally liable and entitled under the contract or to have his rights and liabilities transferred to the company.”

53. The Plaintiff submits that any amounts which the Defendant Company claims was due and owing to it prior to its corporation cannot be recovered for the following reasons:-

- a) The Defendant Company was not in existence at the time
- b) The Defendant company and the said unincorporated association are two separate and distinct entities, with no clear nexus existing between the two
- c) The Defendant Company was incorporated in 2015, and it would be unreasonable for it to take the benefit for such pre-incorporated contracts due to its own laches
- d) All such amounts which were allegedly due to the said unincorporated association is now statute barred

Defendant's Submissions

54. The Defendant has made an application to set aside the Plaintiff's action in accordance with the principles formulated by Order 18 Rule 19 RSC. It is the Defendant's submission that the Plaintiff's claims are scandalous frivolous and vexatious and an abuse of the Court process.

55. The Defendant also submits that the Plaintiff's claim is statute barred as the Plaintiff for certainly more than twelve years, paid her maintenance fees to the Defendant or to the Committee, other than the Skyline Lakes Association. The Plaintiff did not seek to enforce her right to not pay funds to any other body other than the Skyline Lakes Association. The Defendant relies on **Section 5(2) of the Limitation Act** which provides:-

"(1) The following actions shall not be brought after the expiry of six years from the date on which the cause of action accrued, that is to say — (a) actions founded on simple contract (including quasi contract) or on tort; (b) actions to enforce the award of an arbitrator where the submission is not by an instrument under seal; (c) actions to recover any sum recoverable by virtue of any written law; (d) actions to enforce a recognisance.

(2) An action upon an instrument under seal shall not be brought after the expiry of twelve years from the date on which the cause of action accrued

56. The Defendant contends that the Plaintiff had twenty three years to exercise her rights and claims, and by failing to do so has prejudiced these rights by her acquiescence based on the principles of delay and laches.

57. The Defendant further submits that as the conveyance is an instrument under seal, the said action is in further violation of section 5(2) of the Limitations Act. The Plaintiff is relying on the conveyance which is an instrument under seal and submits that there is a violation as only the association named in the conveyance is the party allowed to collect maintenance fees.

58. The Plaintiff has paid maintenance fees to the Defendant and therefore has recognized this company as the proper home owner association.

59. The Defendant submits the Skyline Lakes Association still exists however, it has not collected any fees, or maintained the common areas and has not functioned as a home owners association regarding Lake Cunningham Subdivision.

60. The Defendant further submits that the Plaintiff's claim is an abuse of the process of the Court and seeks to violate the protection of the Defendant's freedom of movement.

Decision

61. The Plaintiff is a resident of Lake Cunningham Estates Subdivision. The Defendant is a company, incorporated in 2015 and purports to be the Home Owners Association for the Lake Cunningham Subdivision and thus claiming to be rightfully entitled to collect maintenance fees due and owing by the Plaintiff and other residents of the subdivision. An interim injunction was granted restricting the Defendant from denying access to the lawful visitors, tenants, servants and otherwise agents of the Plaintiff.

62. The substantive issues the Court must address are:-

- i) Whether the Defendant Company is the Association as provided in Conveyance of the Plaintiff
- ii) Whether the Defendant Company is a local improvement association as provided for in the Subdivisions (Local Improvement Associations) Act
- iii) Whether the Defendant Company is the Association in accordance with the Conveyance of the Plaintiff or a local improvement association in accordance with the Act and is rightfully entitled to collect maintenance fees from the Plaintiff

- iv) Whether the Defendant Company being a company incorporated on 26th November, 2015 is estopped from claiming maintenance fees which it alleges was due and owing to it prior to its incorporation
- v) Finally whether the Plaintiff's originating summons must be struck out on the grounds relied on by the Defendant.

The Plaintiff's Conveyance

63. In a conveyance dated the 15th May 1996 between Canadian Imperial Bank of Commerce, Westmoor Limited, Skyline Lakes Home Owners Association Ltd., and Clyde A. Newton and Paulette E. Newton, Recital E states:-

"(E) The Vendor has agreed to sell and the Purchaser to purchase first the hereditaments described in the First Schedule hereto (hereinafter referred to as "the said hereditaments") being a portion of the said Subdivision for an estate in fee simple in possession subject as hereinafter mentioned but otherwise free from encumbrances and secondly Two (2) shares in the capital of the Association credited as fully paid (hereinafter referred to as "the Shares") at the price of Fifty Thousand dollars (\$50,000) in the said currency;"

Clause 6 provides:-

"(6) (1) For the purposes of this Clause the expression "road reservations" means all roads and parts of roads (including the respective sidewalks and verges (if any) thereof) shown as aforesaid and the expression "the Association" means the Association and its successors in title the owner or owners for the time being of the road reservations.

(2) The Purchaser hereby covenants with the Association its successors in title and its assigns that the Purchaser and all persons deriving title under the Purchaser to the said hereditaments will on the written request from time to time of the Association pay to the Association a proportion of the total costs and expenses from time to time incurred by the Association after the 1st day of January, A.D. 1996 in repairing and maintaining:-

(a) the road reservations and the sidewalks and verges (if any) and the drainage thereof;

(b) the street lighting (if any) in the said Subdivision; (such total costs and expenses being conclusively certified by the auditors for the time

being of the Association) such proportion having the same relation to such costs and expenses as the total area of the said hereditaments bears to the area of the entire Subdivision PROVIDED that neither the Purchaser nor the heirs executors administrators or assigns of the Purchaser shall be liable under the Association after the Purchaser and the heirs executors administrators or assigns of the Purchaser shall have parted with all interest in the said hereditaments; and

(c) such areas designated on the Plan as "Open Space".

And Clause 10 (c) provides:

"10 (c) "the Association" means Skyline Lakes Home Owners Association Limited and its successors in title the owner or owners for the time being of the road reservations."

64. By the schedule to a conveyance dated the 8th September 1995 between Westmoor Limited and Skyline Lakes Home Owners Association Limited the property conveyed to the Association was described as:-

"All those pieces parcels or strips of land comprising first the roadways of the said Subdivision called and secondly an open space within the said Subdivision known as "LAKE CUNNINGHAM" thirdly certain roadways located between the said Subdivision and Phase I and fourthly certain roadways situate immediately South of Phase I all of which being situate in the Western District of the said Island of New Providence which said pieces parcels or strips of land have such positions shapes boundaries marks and dimensions as are shown on the Plan and the said diagram or plan and are delineated on those parts which are coloured Brown and Yellow on the Plan and those parts which are coloured Brown on the said diagram or plan."

65. It is accepted that the Developer ceased providing maintenance to the Subdivision and further accepted that the existing Skyline Lakes Association ceased providing maintenance. It is also accepted why the Committee was initially established and why subsequently the Defendant was incorporated. The issue, however, is whether or not the Defendant had any legal rights to do what it is doing regardless of the intention.

66. Further, Henry Charles Lightbourne, in his affidavit on behalf of the Defendant, acknowledged Skyline Lakes Home Owners Association as the designated association for the subdivision, when he stated:-

“4. That in such circumstances, the Skyline Lakes Home Owners Association Limited was designated as the association for the Subdivision with all the burdens and benefits of the Restrictive Covenants being those of the Association. The expression Association was defined as “the Association and its successors in title the owner or owners for the time being of the road reservations.”

67. The Defendant Company, Lake Cunningham Estates Common Area Management Company is not the Association named in the Conveyance of the Plaintiff as the Home Owners Association. Therefore in order to determine if the Defendant is rightfully the Home Owners Association there must be an assignment or transfer from Skyline Lakes Association to the Defendant of the property owned by it or an assignment by operation of law. The Court has accepted that Skyline Lakes Association was not functioning as a home owner association for Lake Cunningham Subdivision. The Developer further notified the residents of Lake Cunningham Subdivision that it would no longer pay costs and expenses relative to the security booth and other duties regarding the upkeep of the subdivision. As a consequence, the residents took it upon themselves to form the Committee, which acted as the de facto association.

68. The residents at one point or another, inclusive of the Plaintiff acknowledged the Committee as the de facto home owner association when they paid the maintenance fees to the Committee. Although the Plaintiff and other residents recognized this Committee as the de facto association by paying these sums to the Committee under the law and based on the evidence or lack thereof the Defendant Company as the successor to the Committee was not the rightful home owners association. They have not produced any evidence to the Court which proves the assignment to them of the property comprising inter alia the roadways as set out in the aforementioned Conveyance.

69. The Defendant is not the Home Owners Association named in the Conveyance, or by virtue of any assignment by or transfer from the Skyline Lakes Association to them.

70. On the evidence presented, I am satisfied that the legal and rightful home owner association of Lake Cunningham Estates Subdivision is the Skyline Lakes Association.

Subdivisions (Local Improvement Associations) Act, Ch. 258

71. This Act provides for the formation of local improvement associations for the benefit of lot owners in respective subdivisions. The Defendant Company if established in accordance with this Act could be the home owners association of the Lake Cunningham Estates subdivision.

72. The Act provides:-

Section 3(1): - “Where lot owners representing not less than sixty per centum of the total number of lots in a subdivision decide to form themselves into an Association for the purposes of this Act, they may submit to the Minister in the prescribed manner a petition to be incorporated as a Local Improvement Association.”

Section 4(1): - “A petition in writing for the establishment of an Association in any sub-division may be presented to the Minister and shall be signed by owners representing not less than sixty per centum of the total number of lots in the sub-division who desire to form an Association for the purposes of this Act.”

Section 7: - “(1) Where the Minister decides to grant a petition under this Act, with or without modification, he shall establish the Local Improvement Association for the sub-division to which the petition refers with such style and title, constitution and functions as are set out in the certificate of incorporation issued under his hand and seal.

(2) Such Association shall thereupon be a body corporate under its proper style and title and shall have perpetual succession and a common seal with power to hold land, to sue and be sued in its corporate name and to exercise as a body corporate such functions as may be assigned to it.

(3) The first bye-laws of such Association shall be approved by the Minister.

(4) Upon the incorporation of an Association, it shall be the duty of the Association to lodge for record in the Registry of Records of The Bahamas the certificate of incorporation and the bye-laws of the Association and thereafter the Minister shall cause public notice of the incorporation of the Association and the location of its registered office to be inserted in the Gazette at the expense of the Association.

(5) Upon lodging the certificate of incorporation and the bye-laws of the Association at the Registry of Records, the Association shall pay a fee of forty dollars.”

73. I accept the Plaintiff's evidence that she and the other residents had no prior knowledge of the Defendant Company's incorporation. No evidence was produced by the Defendant to show compliance with this statute. The Certificate of Incorporation is not issued under the hand of the Minister in compliance with this statute.

74. The corporate documents of the Defendant further indicate that it is a company incorporated under the provisions of the Companies Act, 1992. The Articles of Association of the Defendant Company, at Clause 1.2 provides that “the company is organized as a company limited by guarantee pursuant to the Companies Act, 1992.” The Defendant has failed to provide any proof that there exists between itself, the developers and/or Skyline Lakes Association, any relationship or agreement which acknowledges it as the new and current home owners association for the subdivision.

75. At the heart of the matter, the Skyline Lakes Association is still in existence although the Company may not be in good standing. The Plaintiff and other residents were issued shares in that company. The Plaintiff has rights arising for

her membership in that company. No shares were issued by the Defendant after its incorporation. There is nothing to show that the residents of Lake Cunningham Subdivision have a legal or beneficial interest in the Defendant.

76. The evidence presented does not meet the threshold required to demonstrate that the Defendant was formed in accordance with the Act. The Defendant is not a local improvement association as provided for by the Act.

Collection of Maintenance Fees

77. As stated above, the Defendant is not the Association named in the Conveyance to the Plaintiff or even a Local Improvement Association, and therefore it is not rightfully or legally entitled to collect maintenance fees from the Plaintiff or other residents of the Lake Cunningham Estate Subdivision other than voluntary payments given. There is no connection between the Skyline Lakes Association and the Defendant. The Defendant did not produce any record of approval of the Minister responsible for Private Roads and Subdivisions in order to be incorporated as a Local Improvement Association and in order to have the authority to inter alia charge maintenance fees.

78. While the Defendant asserts that it is a company incorporated for the purposes of serving as the home owners association for Lake Cunningham Subdivision, it is not a Local Improvement Association anticipated to be the representative of lot owners in the subdivision under the legislation. The evidence is clear. It is not incorporated under the Subdivision (Local Improvement Association) Act but rather the Companies Act.

79. Winder J., in **Watlings Island Property Owners Association v Director of Physical Planning and others [2018] 1 BHS J. No. 96**, when faced with a judicial review application of a decision to rezone parks in San Salvador, had to determine the locus standi of Watlings to bring the application. He stated that:-

“19. The evidence is clear that Watlings is not a body corporate established by virtue of the deeming provisions of the Subdivisions (Local Improvement Association) Act but rather the Companies Act. Not only does Watlings confirm that it is not the relevant Improvement Association, the Director also confirms that this is the case. It would seem to me that if the statute contemplates the creation of a specific type of Association to represent owners of subdivisions it is this association and not any other which would be interested in decisions made by the TPC...”

80. The Plaintiff has never been obligated to pay maintenance fees due and owing to the Defendant, unless the Defendant had established itself in accordance with the Subdivisions (Local Improvement Association) Act and/or had an agreement with or an assignment of the property previously held by the Skyline Lakes Association so that it could charge and collect maintenance fees and act in the capacity of a home owner association in its stead. The Defendant does not have a sufficient interest or any locus standi to demand and/or collect maintenance fees owing by the Plaintiff and other residents. Any payments previously made by the Plaintiff were made voluntarily by her until she ceased paying them.

81. The Defendant is estopped from demanding and collecting maintenance fees due and owing by the Plaintiff and other residents of Lake Cunningham Subdivision. The Defendant is not entitled to demand and collect maintenance fees from the Plaintiff as it is not the home owners association established either pursuant to the Act or the Conveyance to the Plaintiff.

82. As it is not authorized to collect maintenance fees, I need not address the issue of laches or delay in taking advantage of pre-incorporation contracts, except as it impacts the issue of costs in this matter.

83. Additionally I need not address the Defendant's summons to strike out the Plaintiff's originating summons based on the grounds argued as set out herein, as I have ruled against the Defendant on the preliminary questions or issues. The initial interim injunction continues until such time as the legal structure of the

Defendant changes which enables it to lawfully demand maintenance fees, or the parties consent otherwise.

84. I make no order as to costs, as I am aware of and accept that the Plaintiff initially acquiesced to the actions of the Defendant, its predecessor The Committee, and voluntarily made payments, as well as I am aware that the actions of the Defendant were not based on any malintent.

Dated this *25th* day of *August* 2022


Hon. G. Diane Stewart