COMMONWEALTH OF THE BAHAMAS **2021**

IN THE SUPREME COURT **CLE/gen/626**

Common Law Equity Division

B E T W E E N

DEBORAH M. VOLODZKO

First Plaintiff

AND

STEVE AND CAROLE LEE

Second Plaintiff

AND

ROYAL PALMS CONDOMINUMS PHASE III CONDOMINUM ASSOCIATION

Defendant

Before The Hon. Mr. Justice Neil Brathwaite

Appearances: Lenthera Culmer for the Plaintiffs

Sean Moree, Peteche Bethell for the Defendant

Date of Hearing: 1st December 2022

DECISION

1. In this matter the First Plaintiff became the owner of Unit 2316 in the defendant condominium complex by conveyance dated 15th June 2016. The Second Plaintiffs became owners of Unit 2317 by conveyance dated 19th April 2017. The complex was comprehensively insured, with coverage including catastrophic perils. In September 2019 the development was destroyed by Hurricane Dorian.

2. Insurance proceeds in the amount of $1,442,144.62 were received by the Board with managerial responsibility for the condominium complex in February 2021. However, a dispute has arisen over how those proceeds are to be distributed. The Plaintiffs insist that the distribution should be equal, while the Defendant relies on the Unit Entitlement set out in the Declaration of Condominium as follows:

Unit 2314-10.75%
Unit 2414-14.25%
Unit 2315-10.75%
Unit 2415-14.25%
Unit 2316-10.75%
Unit 2416-14.25%
Unit 2317-10.75%
Unit 2417-14.25%

3. By Originating Summons filed 10th June 2021 the Plaintiffs seek the following:

> **1. That it may be determined whether in the circumstances and upon true construction of a Declaration of Condominium for Royal Palm Condominiums Phase III dated 9 October, 1981 and recorded in the Registry of Records in the City of Nassau in Volume 3525 at Pages 3 to 4G and under the inherent jurisdiction of the Supreme Court and in consideration of the events which have transpired, whether the Plaintiffs are entitled to the following relief:-**
>
> **(1) A Declaration that the Plaintiffs are each entitled to a 1/8 share interest in insurance proceeds resulting from [the] destruction of Royal Palm Condominiums Phase III during the passage of Hurricane Dorian in September, 2019 and held by the Defendant on behalf of Unit Owners in Royal Palm Condominiums Phase 1B.**
>
> **(2) [An] Order (sic) that the Defendant do pay to the Plaintiffs the equivalent of a 1/8th share or One Hundred and Eighty Three Thousand Four Hundred and Ten Dollars and Forty-Three Cents ($183,410.43) in the currency of the Commonwealth of The Bahamas each of the insurance proceeds resulting from destruction of Royal Palm Condominiums Phase III during the passage of Hurricane Dorian in September, 2015 and held by the Defendant on behalf of Unit Owners in Royal Palm Condominiums Phase III**
>
> **(3) Any further relief that the Court deems just and fair in the circumstances; and**
>
> **(4) That the Defendant bears the Plaintiffs costs of this application.**

4. The Originating Summons is supported by the affidavit of Deborah Volodzko filed on 14th June 2021, in which she avers that:

> **4. The Plaintiffs are the legal owners of Units 2316 and 2317 respectively in the Condominium.**
> **5. By virtue of a Declaration of Condominium dated 9th October, 1981 (" the Declaration') Newport Limited subjected and declared all that apartment building consisting eight units situated in Treasure Cay Abaco to the provisions of the Law of Property and Conveyancing (Condominium) Act, 1965 under the name Royal Palms Condominium (Phase III). There is now shown and produced by at (sic) pages 1 to 27 a true copy of the Declaration.**
>
> **6. The terms "Unit Entitlement" and "Unit Percentage" (unit fraction) are defined in the Declaration. The Declaration also declares as follows: "Each Unit Owner shall be obliged to pay to the Management Company a contribution in respect of common expenses which shall be ascertained by multiplying the total of the expenses incurred since the preceding contribution was demanded by the unit fraction of that particular unit." There is now shown and produced at pages 28 to 44 a true copy of the Declaration.**
>
> **7. For in excess of 20 years and most likely since the recording of the Declaration all common expenses including insurance related to the Condominium have been assessed, charged and paid equally by all Unit Owners, irrespective of the Unit Entitlements detailed in the Declaration.**
>
> ...
>
> **9. Post Hurricane Dorian it was agreed that the Condominium would be demolished. All Unit Owners were billed and contributed equally to the demolition costs.**
>
> **10. Despite the equal assessment and payment of common expenses including demolition costs and insurance for the Condominium, by simple majority it has been agreed that Insurance Proceeds would be distributed in accordance with the Unit Entitlement detailed in the Declaration.**
>
> **11. By virtue of the actions of the management company/condominium association and the Unit Owners, in particular the equal assessment, charge and payment of common expenses and insurance premiums for all units in the Condominium since the recording of the Declaration, the Plaintiffs are of the view that the assumed state of fact between all Unit Owners is that the unit entitlement and interest of each unit owner in the common areas of the Condominium and the Insurance Proceeds is equal and equates to a 1/8th**

interest. Further, the Plaintiffs are of the view that the association or any other Unit Owner is estopped by the established convention of the parties from now relying on the Unit Entitlement defined in the Declaration.

5. In response, the Defendant filed the affidavit of David Janney, President of the Condominium Association, in which he avers in part as follows:

6. **The Unit Owners of Phase III do pay the common expenses of the Condominium equally. Both Plaintiffs purchased their units in 2016, so it is unclear how Mrs. Volodzko would be aware of the past practices of the Association, as referenced in paragraph 7 of the DV Affidavit.**

7. **In September, 2019 Hurricane Dorian made landfall on the Island of Abaco (the "Hurricane"). As a result of the Hurricane, the Development sustained significant damages. There was an assessment of the damages sustained by Phase III which determined that more than 75% of Phase III was rendered unfit for occupation.**

8. **On the basis of the destruction to the Development, insurance proceeds were distributed to the Association for use in accordance with the Act (the "Insurance Proceeds").**

9. **On the 7th July, 2020 the Board emailed all Phase III unit holders on the following terms:**

   "We have been requested by our attorney, Erica Paine, to hold a new vote by each condo owner regarding their position c: in rebuilding RP Phase III. Your decision should be based on an estimated cost of $250.00/$3300.00 per square foot, which would be a cost range of $250,000 to $300,000 for a lower unit and a cost range of $312,500 to $375,000 for an upper unit.

   Yes. Rebuilding
   N0. Don't Rebuild"

   Each unit holder responded. 4 unit holders voted to rebuild, 3 voted not to rebuild and 1 unit holder abstained. There is now produced and shown to me a copy of my email and the unit holders responses marked "DFJ-1"

10. **The Association and the Plaintiffs (collectively the "Parties") have sought to negotiate a settlement of their differences with respect to the allocation and application of the Insurance Proceeds. Despite best efforts on behalf of the Board, a negotiated settlement was not achieved.**

11. The DV Affidavit makes certain unsubstantiated and incorrect factual statements and assumptions as to any agreements for the distribution of insurance proceeds with respect to Phase III. The DV Affidavit asserts that "by simple majority it has been agreed that Insurance Proceeds would be distributed in accordance with the Unit Entitlement detailed in the Declaration." There is no such agreement and thus no evidence exhibited to the DV Affidavit of such an agreement.

By letter dated 16th February, 2021 Messrs. McKinney, Bancroft & Hughes ("MB&H") expressed that "there is currently a dispute between certain owners as to allocation of insurance proceeds". The Affiant failed to exhibit or reference this letter. There is now produced and shown to me a true and correct copy of the said letter dated l6'h February, 2021 marked Exhibit "DFJ-2".

12. I cannot explain the letter of 4" August, 2020 from Erica Paine, other than to say that I have never had any direct contact with Erica Paine. I am aware that she represented other Phases of the community but she was not retained by or authorized to act on behalf of Phase III nor was she authorized to send the letter to Mr. Edwards exhibited to the DV Affidavit.

13. I understand from our legal counsel that the issues currently before the Court are mainly questions of law. However, I do believe it germane to inform the Court that the majority of Unit Owners wish to rebuild Phase III and together with the remaining RPC Associations to also rebuild amenities which the community once enjoyed.

6. In seeking to rebut the Janney affidavit, the Plaintiffs proffered the second Volodzko affidavit filed 25th October 2022. In that affidavit, the First Plaintiff avers in part as follows:

4. At paragraph 6 of the Janney Affidavit, he admits to the fact that all common expenses of the Condominium were shared equally by all Unit Owners within Phase 3. I have been advised by previous unit owners that the past practices of the Association have been to share equally all common expenses. Further, I have reviewed minutes of the 1997- 1998 Annual General Meeting of the Royal Palm Association which explicitly states that condo fees and assessments would remain the same and that all unit owners would pay the same amount regardless of unit entitlement. There is now shown and produced to me a copy of the said minutes of the AGM marked *DV-3".

5. The Condominium Associations were collectively insured by Insurance First General Insurance Company Ltd. (Abaco Insurance Agency) by way of Policy No. 9962, with an effective date of coverage being 29th April, 2019. The total

premium payable for the said Insurance was the sum of $178,293.23 which was shared equally among all 80-unit holders across all Phases within the Royal Palm Condominium Association. Each Unit owner was billed individually and directly by the Insurer and required to pay their share of the Insurance premiums separately and directly to the Insurance Company in the amount of $2,228.67. On the 14th May, 2019, I paid my portion of the Insurance premium in the said amount of $2,228.67 directly to Abaco Insurance Agency as was the usual and normal practice. There is now shown and produced to me a copy of the Insurance policy, Invoice and cheque marked "DV-4", "DV-5" and "DV-6" respectively.

6. **That sometime on/about 6th April, 2020 through 9th July, 2020, Insurance proceeds emanating from Hurricane Dorian claim were received from Bahamas First Insurance by the Royal Palm Condominium Association in the amount of $15,813,098.58 to be distributed to the various Phases. Phase III Association was apportioned the total sum of $1,442,144.62 which was transferred to the Defendant's Attorneys sometime on or about 17 February, 2021 where the sum is currently being held in escrow. There is now shown and produced to me a copy of Deed of Release and Indemnity Agreement dated 13th February, 2021 and RPCA Bank Balance sheet marked "DV-7" and "DV-8"**

7. **The Janney Affidavit fails to acknowledge the fact that there was a previous agreement that all unit owners voted yes for the equal division of the insurance proceeds. Paragraphs 11 and 12 of Janney's affidavit are disingenuous as it fails to present a true picture of the state of affairs relating to the division of the Insurance proceeds and the authorization of Attorney Erica Paine of Graham Thompson to Act on behalf of Phase III. In a series of emails dated 4th August, 2020, Mr. Janney indicated that following discussions with some of the upper condo owners, they were all in agreement to vote "yes" to the equal division of the insurance proceeds. He further instructed that the said email be forwarded to Erica Paine so that she can inform "Mr. Edwards," our Attorney that no further action would be needed. I verily believe that it was on the basis of Mr. Janney's instructions via email that Erica Paine drafted the letter dated 4th August 2020. It is therefore curious that Mr. Janney now states that she was not authorized to send the said letter to Mr. Edwards. Additionally, in the emails exhibited to the Janney Affidavit at "DFJ-1", Mr. Janney refers to Erica Paine as "our attorney". There is now shown and produced to me email thread dated 4th August, 2020 marked "DV-9".**

PLAINTIFFS' SUBMISSIONS

7. The Plaintiffs suggest that the issues to be decided are:

1. **Whether the direct invoicing of insurance premiums to the Plaintiffs and direct payment of insurance premiums from the Plaintiffs to the insurers created a direct contractual relationship between the Plaintiffs and Insurer.**
2. **Whether based on a true construction of the Act, insurance premiums count as common expenses and thus fall to be distributed under the purview of the Unit Entitlement clause.**
3. **Whether the equal payment of the insurance premiums by all unit owners entitles each unit owner to equal distribution of the proceeds of the insurance proceeds irrespective of the unit entitlements outlined in the Declaration of Condominium.**
4. **Further or in the alternative whether the Defendants are estopped from relying on the unit entitlement clause as a result of the established practice of equal assessment and payment of common expenses, including and in particular insurance premiums.**

8. The Plaintiffs submit that as the unit holders were billed separately and directly by the insurance company, the contract is between the unit holders and that company, and that the Association is only empowered to receive the proceeds of any insurance taken out by the body corporate. They further submit that the equal sharing of expenses, including the insurance premiums, serves to vary the unit entitlement, so that so that as expenses were shared equally, so benefits should be shared equally.

9. The Plaintiffs further submit that the Defendant is estopped by convention from relying on the unit entitlement. They cite the authority of ***HMRC v Benchdollar Ltd. (2010) 1 ALL ER 174*** at paragraph 52, where Briggs J identified the five elements to be considered in relation to estoppel by convention as follows:

a. **There must be a shared assumption of fact or law that may be discerned from the parties' word or conduct.**

b. **The party alleged to be estopped must be found to have assumed responsibility for the shared assumption in some way, in the sense of conveying to the other party that the shared assumption may be relied upon.**

c. **The party claiming estoppel must have relied upon the assumption in electing to alter their position.**

d. **The alteration of position must have occurred in connection with some subsequent mutual dealing between the parties.**

e. **The party claiming estoppel must suffer detriment or have conferred some benefit on the other party, if the other party were not estopped, thereby making it unconscionable for the other party to assert the true legal or factual position.**

10. The Plaintiffs further cite the decision of Lord Steyn in ***The Indian Endurance (N0. 2), Republic of India v India Steamship Co. Ltd. (1997) 4 All ER 380*** at 391, where His Lordship said "It is settled that an estoppel by convention may arise where parties to a transaction act 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... It is not enough that each of the two parties acts on an assumption not communicated to the other. But it is rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention.

11. The Plaintiffs assert that there was an agreement between unit owners that the proceeds of the insurance would be shared equally, and rely on an email dated 4th August 2020 from the Association's president instructing Erica Paine, an attorney for the Association, to write to the Plaintiffs' Attorney advising of that decision, and a letter of the same date from Ms. Paine to that effect.

12. The Plaintiffs note the equal sharing of expenses, and therefore submit that that equal sharing amounted to an agreement to alter the Unit Entitlement, upon which they relied by making equal payments with respect to all expenses. In the circumstances, they say it would be unconscionable to permit some unit owners to receive payments in unequal portions in excess of others, when all shared equally in the expenses, including the insurance premiums, which they say does not fall within the definition of common expenses in the Declaration of Condominium.

13. The Plaintiffs also submit that the Defendant, by their conduct over the years, have waived the right to rely on the original unit entitlement, and rely on ***Kammins Ballrooms Co. Ltd. V Zenith Investments (Torquay) Ltd. (1971) AC 850*** at page 853, where Lord Diplock said the following:

> **"The second type of waiver which debars a person from raising a particular defence to a claim against him arises when he either agrees with the claimant not to raise that particular defence or so conducts himself as to be estopped from raising it. This is the type of waiver which constitutes the exception to a prohibition such as that imposed by section 29(3) of the Landlord and Tenant Act, 1954, and other statutes of limitation. The ordinary principles of estoppel apply to it."**

DEFENDANT'S SUBMISSIONS

14. In opposing the application, the Defendant submits that the court lacks jurisdiction to grant the relief sought, as the Law of Property and Conveyancing (Condominium) Act 1965, prescribes the manner in which these matters must be determined. They submit that the Association has a duty to insure the complex, and, where less than 75 % of the structure is damaged, to use the proceeds of that insurance to rebuild or repair the building (Section 26 of the Act), or, where there is more than 75 % damage, to apply to have the complex removed from the provisions of the Act, in which case the proceeds could be distributed in accordance with the unit entitlement (section 31of the Act).

15. The Defendant notes that more than 75% of the structure has been damaged, and there is no resolution by at least 90 % of the unit owners, so that the provisions of section 26 would not apply and there could not be any rebuilding. They further submit that no application has been made to remove the complex from the provisions of the Act pursuant to section 31, so that there is no legal authorization to distribute any proceeds.

16. With respect to the unit entitlement, the Defendant relies on section 7(5) of the Act, and submit that the unit entitlement is permanent, and can only be altered with the consent of all unit owners, in a manner satisfactory to the Directors of the Management Company. It is submitted that there has been no such consent and alteration.

17. The Defendant further submit that the doctrine of Estoppel by Convention would not apply, as the same could not be invoked to deny a party the protection of a statute ***(Miah and others v Miah (2020) All ER (D) 75 (Dec)***, and that in this case Parliament has enacted a statutory framework which completely addresses the questions raised by the Plaintiffs. The Defendant say that to go outside that framework would be to ignore the intention of Parliament, and have the effect of rendering the statute nugatory.

18. The Defendant further says that the case of ***Kammins*** does not assist, as in their view the issue of waiver does not arise. They finally submit that any question of overpayments for expenses which were not calculated in accordance with the unit entitlement should have been addressed by an action against the association, but does not amount to an alteration of the unit entitlement.

DISCUSSION

19. In considering this matter, I must say at the outset that I do not accept the argument that the insurance contract was directly between the unit owners and the insurance company as a result of the direct payment of premiums. The contract itself is exhibited to the Second Affidavit of the First Plaintiff, and states that the insured is the Royal Palm Condominium Association. In these circumstances, I see no basis to support the contention that the unit owners are parties to that contract.

20. The law surrounding the ownership in fee simple of units in a multi-unit building is set out in the Law of Property and Conveyancing (Condominium) Act Chapter 139. In that Act, Declaration is defined as "the instrument by which property is subjected to the provisions of this Act and includes such instruments as may from time to time lawfully amend such Declaration." At section 4 the Act says the following:

> **4. (1) A Declaration for the purposes of this Act shall comprise an instrument (which may be in several parts and have annexed thereto such drawings, plans and schedules as may be deemed necessary or convenient) duly executed under seal by the person or persons having the legal and equitable title in fee simple absolute to the property to which the Declaration relates and shall contain the following particulars —**
>
> ...
>
> **(l) the methods consistent with this Act to be observed and the conditions to be fulfilled for the amendment of the Declaration by the unit owners.**
>
> **(2) No such Declaration or any amendment thereof shall be valid or in any way affect the property to which it relates unless and until it is lodged for record in the registry. A fee of five hundred dollars shall be payable for recording any Declaration and a fee of one hundred dollars for recording any amendment thereof.**

21. At Article 25 of the Declaration of Condominium, the declarants have set out a procedure for the amendment of the Declaration, which is that the Declaration can be amended from time to time by a Special Resolution of the Management Company subject to the same being lodged in the Registry of Records within Thirty (30) days from the date hereof.

22. With respect specifically to the unit entitlement, section 7(5) of the Law of Property and Conveyancing (Condominium) Act states the following:

> **(5) The unit entitlement shall have a permanent character and shall not be varied unless all the unit owners affected consent thereto, such consent being given in the manner prescribed by the relevant Declaration.**

23. In my view, it is clear that Parliament intended to set out a scheme whereby persons taking ownership of units in a multi-unit building could govern their affairs. The need for such a scheme is obvious, as the lack of such a framework could lead to anarchy, where persons could each decide the manner in which things might operate. It is also obvious that persons purchasing units in such a building agree at the time of taking title that they would be bound by the covenants in the Declaration.

24. In this case the Plaintiffs in essence contend that the Declaration has been amended by a course of conduct. In my view, the Act and the Declaration clearly set out the manner in which the Declaration, of which the unit entitlement is a part, is to be amended, and there is no evidence that the mandated procedure was followed. It cannot in my view be an accident that the Act says that the unit entitlement is to have a "permanent" character, which intimates that there was a clear intention to ensure that the same could not be changed by mere happenstance or, in this case, a course of conduct. I am therefore unable to conclude that any failure to abide by the unit entitlement set out in the Declaration could in effect amend the Declaration and oblige the parties to divide expenses or entitlements in a different way.

25. The Plaintiffs further suggest that the Defendant, by conduct, have represented that the unit entitlement would not be relied upon, and that everything would be shared equally, and are therefore estopped from reneging on that representation, or alternatively have waived reliance on the unit entitlement. In order for the Defendant to be estopped, or to have waived, the first question is whether there has in fact been a clear representation as suggested by the Plaintiffs.

26. I accept on the evidence that there has been an equal sharing of expenses, with no reference to the unit entitlement. Indeed this is not seriously disputed. However, there is no evidence that the issue of the unit entitlement was considered or raised or mentioned in relation to the sharing of expenses. It seems to be more the case that the issue was never considered.

27. In considering the issue of estoppel, I note the principles set out by Briggs J in the ***HMRC v Benchdollar*** case cited above, requiring there to be a shared assumption of fact or law, for which the party alleged to be estopped has assumed responsibility in some way, and upon which the party claiming estoppel relied in electing to alter their position. In applying those principles to the facts, in the absence of any evidence that the applicability of the unit entitlement was ever raised or considered, I am unable to conclude that there was any shared assumption of fact, or more particularly that the Plaintiffs relied upon that assumption in electing to alter their position. The situation would be very different if the Plaintiffs had protested the equal assessment of expenses, and had been told that everything would be shared equally, but that is not the case.

28. In the case of ***Argo Systems Fze v Liberty Insurance (Pte) and another The Copa Casino All England Law Reports [2012] 2 All ER (Comm)*** at 126, the Court of Appeal of England & Wales considered a situation in which the claimant argued that the first defendant's failure to take a point in proceedings in another jurisdiction, and silence on the point for seven years, amounted to an unequivocal representation that the point would not be relied upon. In reversing the decision of the court of first instance, the court said the following:

> **"The judge had erred in concluding that the first defendant had made an unequivocal representation to the claimant that it no longer intended to rely on its legal rights as a result of the claimant's breach of the no hold harmless warranty. In the absence of special circumstances, silence and inaction were,**

when objectively considered, equivocal and could not, of themselves, constitute an unequivocal representation as to whether a person would or would not rely on a particular legal right in the future. In the instant case, there were no special circumstances that were capable of turning the silence and inaction of the first defendant over a period of almost seven years into an unequivocal representation to the claimant that it did not intend to enforce its strict legal rights based on a breach of the no hold harmless warranty. Moreover, the letter from the first defendant had made no such representation, let alone an unequivocal one. The fact that there was nothing about the breach of the no hold harmless warranty in the United States proceedings did not add anything to that; if there was any representation at all in those proceedings it was equivocal rather than unequivocal. Even taken together, the letter, the United States proceedings and the seven-year silence/inaction remained equivocal. Accordingly, the first defendant was able to plead and rely upon the claimant's breach of the no hold harmless warranty in the instant proceedings and the appeal would be allowed."

29. The Plaintiffs also contend that the Defendant agreed to share the insurance proceeds equally, and rely on the letter of Ms. Paine of 4th August 2020 in which she wrote that "We have been informed by the President of Royal Palm Condominium (Phase III) that he has discussed this matter with the unit owners in Phase III who have indicated that they are agreeable to the insurance proceeds being distributed equally between the owners…"

30. That letter was apparently as a result of correspondence from Mr. Janney of the same date in which he wrote:

> **"Please be advised that the I have been in discussions with some of the other upper condo owners and we are in agreement to vote yes for the equal division of the insurance proceeds between the upper and lower units. Based on the information at hand, I believe the vote will be all in favor or seven in favor with one abstaining vote. Please forward this on to Erica Paine so that she can advise Mr. Edwards that this matter will not require any further action on his part."**

31. In his affidavit, Mr. Janney states at paragraph 12 that he cannot explain the letter of Ms. Paine, had no direct contact with her, and that she was not retained by Phase III or authorized to send the letter. This averment is directly contradicted by the email from him cited above, which, while not directly to Ms. Paine, was sent with instructions to pass the same to her for her to advise Mr. Edwards, who was acting on behalf of the Plaintiffs.

32. In my view the same considerations are applicable to a consideration of estoppel as well as waiver, as, if a defence were waived, the defendant would be estopped from relying upon it. In the instant case there was no unequivocal representation that the unit entitlement would not be

relied upon with respect to the sharing of insurance proceeds. I therefore decline to find that the Defendant is estopped from relying on the unit entitlement in the sharing of insurance proceeds, or that they have waived reliance upon the unit entitlement by a course of conduct.

33. The position is different with respect to the letter from Ms. Paine, which would amount to an unequivocal representation. However, in my view, the email from Mr. Janney which formed the basis of the instructions upon which Ms. Paine acted is not so clear. Mr. Janney says that he has been in discussion with "some" of the upper unit owners, and that he "believes" the vote will be all in favor or seven to one in favor. The fact that he only believes this means in my view that it is equivocal. A further concern is that the powers of the Association are exercisable by a Board, of which Mr. Janney is President. There is no evidence before me that the Board met and authorized the giving of any instructions to Ms. Paine. In the absence of any evidence of such authorization, I am unable to conclude that any unequivocal representation could be made to distribute the insurance proceeds in any particular proportion.

34. The Defendant has also noted that the Act provides for only two options where insurance proceeds are received, namely to rebuild or repair the property, or to apply for the property to be removed from the Act and sold, with the proceeds of sale and the insurance proceeds to be divided among the unit owners. No application has been made to these ends. The Defendant has relied upon the case of ***Miah and others v Miah***, cited above, to say that estoppel by convention cannot be invoked to deny a party the protection of a statute…."

35. The same principle has been expressed by the House of Lords in the case of ***Yeoman's Row Management Ltd v Cobbe [2008] UKHL 55*** at paragraph 29 where Lord Scott of Foscote said the following:

> **"My present view, however, is that proprietary estoppel cannot be prayed in aid in order to render enforceable an agreement that statute has declared to be void. The proposition that an owner of land can be estopped from asserting that an agreement is void for want of compliance with the requirements of section 2 is, in my opinion, unacceptable. The assertion is no more than the statute provides. Equity can surely not contradict the statute."**

36. At Paragraph 81 Lord Walker of Gestingthorpe said:

> **81. "In my opinion none of these cases casts any doubt on the general principle laid down by this House in *Ramsden v Dyson*, that conscious reliance on honour alone will not give rise to an estoppel. Nor do they cast doubt on the general principle that the court should be very slow to introduce uncertainty into commercial transactions by over-ready use of equitable concepts such as fiduciary obligations and equitable estoppel. That applies to commercial negotiations whether or not they are expressly stated to be subject to contract."**

CONCLUSION

37. In the instant case, the course of conduct relied upon is not unequivocal, while the letter from Ms. Paine relies on honor alone, as there is no evidence that anything was done in reliance upon that promise, even if I accepted that it was properly made. I therefore find that an estoppel cannot be relied upon in this case to avoid the requirements of the statute. Those requirements are that an application be made pursuant to section 31 of the Act to remove the complex from the Act, and to have the same sold and the proceeds of that sale, as well as the proceeds of the insurance, distributed.

38. In all the circumstances of this case, I refuse the declarations sought, and dismiss the Originating Summons, with costs to the Defendant to be assessed by the court if not agreed.

Dated this 22nd day of March, A.D. 2024

Neil Brathwaite
Justice