ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2004/0307

THE PROPRIETORS CONDOMINIUM PLAN NO. 24/1989

Claimant

And

ARTHUR REYNOLDS
SELENA SAMOIS

Defendants

Appearances:

Mr. Clement Bird for the Claimant
Mr. Hugh Marshall Jnr. and Mrs. Cherissa Roberts for the First Defendant
Mr. Kendrickson Kentish for the Second Defendant

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2007: January 22nd
April 30th

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JUDGMENT

[1] Blenman, J; The Proprietors Condominium Plan No. 24/1989 (the Proprietors Condominium) is a Corporation registered under the Registration of Condominium Titles Act, Cap 376 Laws of Antigua and Barbuda (The Condominium Act) being a Condominium Plan situate at Yeptons, St John's., Antigua ("the Condominium"), charged with the responsibility for the control, management and operation of the said Condominiums. The Condominium is also referred to as the Pillar Rock Condominium (or Pillar Rock) and has a management committee referred to as the Pillar Rock's executive committee (at times the committee is also referred to as Pillar Rock).

[2] The Proprietors Condominium alleges that Mr. Arthur Reynolds (Mr. Reynolds) and Ms. Selena Samois (Ms. Samois) are the beneficial and/or registered owners of land situate at Yeptons and registered in the Land Registry: Registration Section: Five Islands; Block 54 1292A; Parcel 419 (Parcel 200), which parcel though a 'freehold' property and not subject to the condominium plan is physically located within the Condominium Plan's boundaries, and upon which land sits a dwelling consisting of three apartments.

[3] The Proprietors Condominium contends that it established running accounts for the payment by all condominium owners, pursuant to the powers conferred on it by the Act and the Condominium by-laws, for their respective share of the common administrative expenses for the services provided which services include, but are not limited to, the provision of water, gas and electricity services, housekeeping, common areas maintenance, rental pool management, office, security, generator and garbage disposal services.

[4] The Proprietors Condominium contends further, that by virtue of Parcel 200's physical location within the boundaries of the Condominiums, it has from the inception to date been obliged to provide most of the services stated above to the Mr. Reynolds and Ms. Samois' property, and has consistently billed them for the said services rendered, notwithstanding that the Parcel 200 did not form part of the official Condominium Plan. Their account was originally billed at the rate of US$550.00 per month from July 1995, to which monthly amount Mr. Reynolds and Ms. Samois made payment up to July 1996. In or about September 1996, they unilaterally reduced their monthly payments to US$500.00 per month which payments were made until June 1997 when by a further unilateral decision on their part, the monthly amount was further reduced to US$220.00. In January 1999 Proprietors Condominium Plan advised Mr. Reynolds and Ms. Samois that they had revised the rate to US$480.00 per month. Mr. Reynolds and Ms. Samois made payments on the account until December 1998, but have failed thereafter to make any payment whatsoever.

[5] Proprietors Condominium complains that it has made demand of Mr. Reynolds and Ms. Samois for the payment of the outstanding balances which demands have been ignored. The Proprietors Condominium states that it is obliged to provide the services to Mr. Reynolds and Ms. Samois and accordingly it is entitled to be paid for and to recover the payment as debt due at the rate of US$480.00 per month, or in the alternative, such reasonable amount as would reflect the fair value for the services provided.

Particulars

Amounts Billed from 5th January 1999 to July 2004

Maintenance charges		32,160.00
Stamp Duty		55.80
Title Search		50.00
	Balance	US$32,265.80

[6] Accordingly, Proprietors Condominium seeks the following reliefs:-

(a) A Declaration that it is entitled to the amount of EC$87,117.66 or its equivalent US$32,265.80, as a debt due for maintenance and other services rendered to Mr. Reynolds and Ms. Samois; alternatively, a Declaration that Proprietors Condominium is entitled to be paid a fair sum on a monthly basis as compensation for the services rendered as aforesaid.

(b) An Order that Mr. Reynolds and Ms. Samois do pay to Proprietors Condominium the amount of EC$87,117.66 or its equivalent US$32,265.80; alternatively, such figure as to the Court may seem just and equitable in the circumstances, from January 1999 to July 31st 2004.

Mr. Reynolds' Defence

[7] Mr. Reynolds denies the he either jointly or severally owes any monies whatsoever to Proprietors Condominium. He contends that Parcel 200 is not a part of the Condominium Plan and is therefore not liable to pay any fees whatsoever.

[8] Mr. Reynolds further contends that during the period September 1994 to September 1995 Proprietors Condominium by agreement with him provided some services to wit, utilities, common area, garbage collection services and general management of his unit. These services terminated on the passage of Hurricane Luis in September, 1995 when as a result of the hurricane Proprietors Condominium services were suspended. Thereafter, the parties failed to enter into a new agreement and Proprietors Condominium failed to deliver any services to him whatsoever. Mr. Reynolds says that he is solely responsible for the provision to Parcel 200 of electricity, water, cooking gas, maintenance, gardening, maid

services, and Proprietors Condominium in no way has any dealings with Parcel 200 (which Parcel he says belongs to him exclusively).

Ms. Samois' Defence

[9] In defence, Ms. Samois denies opening a running account with the Proprietors Condominium. She contends that Mr. Reynolds unilaterally, and without her knowledge approval, nor concurrence contracted with the Proprietors Condominium for the provision of miscellaneous services. Ms. Samois further contends that Proprietors Condominium is not entitled to any relief against her as she never enjoyed possession of the property and never treated with Proprietors Condominium for the provision of services to the property. She admits that at all material times, Mr. Reynolds and she were the registered joint proprietors of 200, now parcel 419. However, since in or about 1995 Mr. Reynolds has assumed exclusive possession and control of the said Parcel 200 and he has changed the locks and denied the other joint proprietor access to the property.

[10] Ms. Samois further contends that in ANUHCV 2004/0421 she has sought an order severing the joint proprietorship also an order declaring that any and all maintenance fees incurred by Mr. Reynolds do stand as a charge against his interest in the property. Accordingly, she contends that she is not liable to the Proprietors Condominium as pleaded, or at all.

Issues

[11] The issues before the Court are as follows:

(a) Whether Proprietors Condominium is entitled to the declaration that it is entitled to $87,117.60 as a debt due for maintenance and other services rendered;

(b) Alternatively, whether Proprietors Condominium is entitled to be compensated on a monthly basis for the services it provides to Mr. Reynolds and Ms. Samois;

(c) Whether in the circumstances which obtain the Court should order Mr. Reynolds and Ms. Samois to pay Proprietors Condominium the sum of $32,265.80US as claimed or should the court Order them to pay some other sums that it deems just.

Law

[12] I propose to now address the relevant statutory provisions.

The relevant law is the Condominium Act.

Section 2 of the Condominium Act "common property" is defined as;

> "All the property, real and personal, intended for common use save and except all condominium lots contained in the property."

"Condominium" means:

> "An estate in fee simple for life or for a term of years, as the case may be, in real property consisting of an undivided interest in common in a portion of a parcel of real property together with a separate interest in space in a residential, industrial or commercial building on such real property (such as an apartment, office or store) and may, in addition include a separate interest in other portions of such real property."

"Condominium lot" means

> "A part of the property intended for any type of independent use, including one or more rooms or spaces in the building."

"The corporation" means

> "In relation to any registered condominium plan, the body incorporated by section 4."

"Executive committee" means:

> "The executive committee of the corporation constituted under the First Schedule."

"Unanimous resolution" means:

> "A resolution unanimously passed at a duly convened meeting of the corporation at which all persons entitled to exercise the power of voting conferred by or under this Act are present personally or by proxy at the time of the motion."

[13] Section 3(1) of the Condominium Act states that:

> "Land may be subdivided in condominium lots in accordance with a condominium plan registered in the manner provided under this Act."

[14] Section 4(1) of the Condominium Act provides:

> "The proprietors of all the condominium lots contained in any condominium plan shall, upon registration of the condominium plan, become a body corporate (hereafter referred to as "the corporation")

under the name "The Proprietors, Condominium Plan No. "(with the appropriate number of the condominium plan inserted in the blank space)."

[15] Section 5(1) of the Condominium Act states that the duties of the Corporation shall include the following:

> (a) to insure and keep insured the property to the replacement value thereof against fire, earthquake, hurricane and such other risks as may be prescribed, unless the proprietors by unanimous resolution otherwise determine.
>
> (b) To effect such insurance as it may be required by law to effect.
>
> (c) To insure such risks other than those referred to elsewhere in this subsection as the proprietors may from time to time by majority resolution determine.
>
> (d) Subject to the provisions of section 14 and to such conditions as may be prescribed, to apply insurance money received by it in respect of damage to the property in rebuilding and reinstating the property so far as it may be lawful to do so.
>
> (e) To pay premiums on any policies of insurance effected by it.
>
> (f) To keep in a state of good and serviceable repair and properly maintain the common property."

[16] Section 5(2) of the Condominium Act states that the powers of the corporation include the following:

> "(a) The establish a fund for administrative expenses sufficient in the opinion of the corporation for the control, management and administration of the common property, for the payment of any premiums of insurance and for the discharge of any of its other obligations.
>
> (b) To determine from time to time the amounts to be raised for the fund referred to in paragraph (a) and to raise the amounts so determined by levying contributions on the proprietors in proportion to the unit entitlement of their respective lots.
>
> (c) To recover from any proprietor, by an action or debt in any court of competent jurisdiction, any sum of money expended by the corporation for repairs to or work done by it or at its direction in complying with any notice or order by a competent public or local authority in respect of that

portion of the building which constitutes or includes the condominium lot of that proprietor.

(d) To recover from any proprietor, by an action for debt in any court of competent jurisdiction, any sum of money levied by the corporation on the condominium lot of that proprietor for:

(i) The control, management and administration of the common property.

(ii) The payment of any premium of insurance

(ii) The discharge of any of the other obligations of the corporation under and by virtue of this Act.

(e) To enter any condominium lot when necessary in connection with the maintenance, repair or construction of the common property or to carry out work pursuant to its duty under paragraph (g) of subsection (1).

(f) To execute and deliver contracts, deeds, leases, mortgages and other instruments by one or more duly authorized members of its executive committee or other duly authorized agents.

(g) To purchase one or more condominium lots and to acquire, lease, mortgage and sell and convey the same."

Evidence

[17] Mr. John Firth (Mr. Firth) testified on behalf of Proprietors Condominium and Mr. Reynolds testified on his own behalf. Ms. Samois made a no case submissions and elected to rely on her submissions and not testify (even though she had caused a witness summary to be filed, by her mother Yvonne Hadeed Reynolds, on her behalf).

Mr. Firth's Evidence

[18] I am of the view that it is important that I state in some detail, Mr. Firth's evidence. In his witness statement he said as follows:

"I live at Pillar Rock Condominiums ("Pillar Rock") at Yeptons, Antigua. I presently serve as the General Manager of the property. I have been serving in this capacity since June 1996. At all material times, I have been the owner of a condominium lot, member of the homeowner's association, and a member of the Pillar Rock's Executive Committee.

I am aware that Arthur Reynolds and Selena Samois are the registered joint owners of the property commonly called Parcel 200 at Yeptons, Antigua. The actual legal description is Registration Section: Five Islands; Block 54 1292A; Parcel 419. I know Arthur Reynolds. To the best of my knowledge, I have never met Selena Samois, although I have received correspondences from her and her solicitors, and have dealt with her mother Yvonne 'Bonnie' Hadeed Reynolds.

This property, 'Parcel 200' although 'freehold', is physically sited within the boundaries of Pillar Rock. The original developer Hog John Bay Development Company Limited, for their own peculiar reasons, when constructing the condominiums complex, created several such freehold parcels, leaving them out of the original submissions to the Land Registry which created the Condominium Plan ('the Plan")

Pillar Rock's operations are financed by maintenance fees charged to the component units. The former practice, to 2002, was to charge each unit owner according to the unit's square footage, on advice of Counsel; this practice was then changed to reflect a charge based on share allocation as indicated by the Plan. The rate is based on US$70.00 per share. The units are divided into the following designations – Villas, Mini Villas and Studios. Villas and Mini Villas each have 5 shares, whilst Studios have 3 shares under the Plan. Accordingly, Villas and Mini Villas each pay US$350.00, while Studios pay US$210.00

The maintenance services to which the fees are applied as follows:

Access
Common Areas Maintenance
Garbage removal/sanitation
Gardening
Generator
Office
Parking
Pool
Security
Sewage

"There is existing general access to Pillar Rock via a public road situated at the eastern side of the property. However, in order to secure more convenient access, the homeowners have over the years rented adjoining, privately owned lands for use as an alternative entrance, this alternative entrance is the entrance presently used by most owners, occupiers and/or visitors to the premises, including those using and/or visiting Parcel 200. The rental commenced in or about 1983. Parcel 200 was then owned by JIM BRODIE, a shareholder in the development company.

For the benefit of the owners/occupiers and visitors to Pillar Rock, it is necessary to maintain the physical environment. In this respect the grounds are kept in a clean and neat manner; the pathways throughout the property, maintained. The pathways lead throughout the property, to specific parts of the common areas such as the pool and pool deck, and to the beach, to the parking areas.

Security is provided by a manned security patrol for 11 hours each day from dusk to dawn. There is a swimming pool and pool deck, an automatic stand-by generator, and a common area utilized for storage and removal of garbage. There is also a common sewage system servicing the entire community. The office is located at the pool deck, obliquely across from Parcel 200. Management is responsible hire/pay staff and security, to ensure the cleaning and maintenance of the common areas walkways, pool area, generator parking area and sewage plant; to attend to operating expenses/bills and to act as a repository for mails delivered to the condominiums.

By virtue of its physical location, Parcel 200 is 'smack dab' in the middle of Pillar Rock. We are aware that Parcel 200's own garden is maintained by their own gardener. We are also aware that the property has its own electricity supply, and back up generator. I am aware that 1st Defendant engineered a separate water supply to Parcel 200. He did so by running a line over property belonging to adjacent landowners, and through Pillar Rock itself. I am not aware whether he had permission so to do from those landowners, but he certainly did not request permission from Pillar Rock to do so.

Apart from these services maintained on its own behalf, and notwithstanding Mr. Reynolds' protestations, or anything written to the contrary, we are certain that Parcel 200 is inexorably tied into, and continues to benefit from its position within Pillar Rock's physical boundaries.

To access Parcel 200 from the leased access area, and from Parcel 200 itself to the garbage disposal area, pool and/or beach necessitate passage over the common areas pathways. It is disingenuous on the part of the Defendants to suggest that this is not an assessable benefit derived from Pillar Rock. Similarly, Parcel 200 does not maintain separate security at its property. It depends on the security officer hired by Pillar Rock. The common areas lighting assists the Defendants in this regards as well.

To my knowledge, the said gardener and female companions, as well as houseguests at Parcel 200 have customarily used the pool and pool deck facilities. The garbage removal facilities have also been used by its

occupants. From time to time, the office receives mail for the 1st Defendant which have been duly kept and/or delivered accordingly. Further, the 1st Defendant has on occasion requested service of the office.

Similarly, we believe that the unit is attached to the common sewage system. There are some 4 sewage lines running through Parcel 200. Unsuccessful attempts have been made over the years to co-ordinate testing to establish them to be part of the common system, as we have been unable to do so owing to clashes in schedules with the various persons who would have had to attend. In any event, there is no independent 'soak away'/cistern visible at the property which would indicate that it had its own separate sewage disposal system.

From my own observations, I am aware that the waste water from his washing machine runs under our parking lot, and exists into privately owned land to the south western side of Pillar Rock. I believe that if there was or had been a separate 'soak away'/cistern set up at the property, the waste water would have been directed through that system, and not as obtains, run freely as it does.

Owing to the said physical location, short of erecting a 50 foot tall fence around the perimeter of Parcel 200, the Condominium Plan truly has no option but to provide services to the Defendant's property, whether it wishes so to do or not.

Parcel 200 is 2 storey building, consisting of 3 individual, self contained apartment units, 2 of which are located on the lower floor, the website itself stated that the self contained (upper) guest apartment "…can be rented separately for US$1,500 monthly …" and that "…the main portion… rents for US$2,500 monthly or the entire villa, with the guest apartment is US$3,500 monthly…" In any event, our calculations indicate that were the property to be a condominium unit and part of the Plan, it would approximate 14 shares, and be subject to a monthly maintenance charge of US$980.00

There have been in the past, and are presently existing, 'maintenance' arrangements with freehold property owners at Pillar Rock. Indeed, the development company (of which 1st Defendant has been principal) was ordered by this Honourable Court in ANUHCV334/2001 – the Proprietors v Hog John Bay Development Ltd., to make payment of outstanding sums similarly claimed by Condominium Plan, in respect of the property known as the "Pavilion" restaurant, for services similarly rendered.

The first Defendant accordingly is well aware that this Honourable Court has previously indicated that in law there must be payment made in respect of services rendered to his property. Further, the 1st Defendant's

own (then) lawyer, Alfred McKelly James had rendered an opinion to him which stated this.

When Mr. Reynolds and Ms. Samois acquired parcel 200 in 1994, it was confirmed to us by Yvonne 'Bonnie" Hadeed Reynolds aforesaid, that the existing agreement had called for monthly 'maintenance' fees of US$375.00, rising thereafter to US$435.00 in 1995. In July 1995, the rate was increased once more to US$550.00 monthly. I personally confirmed this in writing to Mr. Reynolds and Yvonne "Bonnie" Hadeed Reynolds, as did our then Manger Conrad Hinckley. This agreement is also evidenced by the Parcel 200 account statement.

In September 1996, Mr. Reynolds advised us by letter, that he was reducing the monthly fee to US$500.00 which was paid until June 1997, at which point a further unilateral reduction was made to US$220.00. We do not believe that this amount represents fair value for the services Mr. Reynolds and Ms Samois have been receiving from Pillar Rock. This is why we have moved this Honourable Court to determine what a fair value would be.

In or about August 1999 I contacted Ms. Samois through her mother Yvonne "Bonnie" Hadeed Reynolds seeking her assistance in paying the outstanding sums then due. The sums claimed were based on the monthly fee of US$480.00, late penalty and late interest in the approximate overall arrears of US$4,920.00. In response, Ms. Samois gave specific instructions that, without waiver of the late penalty and interest fees, we should rent the apartments and utilize the monies generated to pay off the outstanding sums, and thereafter apply the rent to ongoing fees.

However, we did not do so. We were interested in obtaining the outstanding sums, not necessarily taking control of the property. This was also in the face of advice from Ms. Samois solicitor's directions that she was legally entitled to issue the instructions. Neither did she nor her agents at any time indicated any dissatisfaction, nor query the basis of the calculations of US$600.00, which sum was reduced by 20% getting a figure of US$480.00 monthly.

Mr. Reynolds and Ms. Samois have failed to make any payment since December 1998. Our solicitors have written to Ms. Samois solicitors, outlining our rationale for the amounts sought of Parcel 200, and we asked that this Honourable Court accept this basis in its determination. The overall amount claimed as at July 2004 on issue of the Claim, based on US$480.00 monthly, was US$32,265.80. As at the date of this Statement this has risen by a further US$11,520.00 to US$43,785.80. I would ask this Honourable Court to add the monthly sum of US$480.00 thereafter, until such time as the matter is finally heard."

[19] Mr. Firth stated, further, in his evidence in chief, that there are parking facilities provided on the eastern side of the building. There is no APUA at Pillar Rock so Proprietors Condominium has made arrangements for water to be taken to a common area and thereafter it would distribute the water. He said that it always treated Mr. Reynolds as the owner of Parcel 200; he also approached Mrs. Yvonne Reynolds concerning Parcel 200 and had received correspondence from her subsequent to his approach in an attempt to recover the sum claimed. Mr. Firth said that it was now his evidence that there was no agreement between Mr. Reynolds and Pillar Rock through which Mr. Reynolds ceased paying $US500 per month and began paying $US200 per month.

[20] During the cross examination of Mr. Firth by Learned Counsel Mr. Marshall Jnr. Mr. Firth stated that he was claiming fees for the period January 1999 – July 31st, 2004. Mr. Firth denied that after Hurricane Luis struck in 1995 that Proprietors Condominium ceased offering many of the services it did; he said that security services; cooking gas; maid services, garbage collection services continued during and after the Hurricane. Mr. Firth disagreed that the Mr. Reynolds had initially agreed to pay maintenance in the sum of US$220. per month and this figure was eventually reduced to US$200. He was shown some statements of account that he had produced, and he was forced to admit that they indicated and reflected that Mr. Reynolds' for the months of September and October had paid US$200 and US$220 respectively but Mr. Firth denied that this was by agreement.

[21] During further cross examination by Mr. Marshall Jnr., Mr. Firth admitted that the fees imposed were unilaterally imposed. He agreed that for a period of time he charged Mr. Reynolds and Ms. Samois US$480. monthly. Mr. Firth admitted that under the relevant legislation Proprietors Condominium had no authority to deal with Parcel 200 so he had to reach an agreement with its owners for the services that Proprietors Condominium provides. Up to the date of trial, Proprietors Condominium was forwarding invoices to Parcel 200 for maintenance services and he denied that Proprietors Condominium has ceased to provide security and other services to Parcel 200. Mr. Firth tried very hard to persuade the Court that the sewerage system provided by Proprietors Condominium was

connected to Parcel 200 even though "his investigations did not prove whether or not it was so connected". He nevertheless maintained that Mr. Reynolds used the common driveway that Proprietors Condominium has provided; while Proprietors Condominium does not maintain Mr. Reynolds' garden, on occasion he has had to cut the bougainvillea that grows over the restaurant. Mr. Firth explained that he does not paint outside of Mr. Reynolds' house as he does for the Homeowners and, as a result of this together with other reasons he has given Mr. Reynolds a 20% reduction in his maintenance fees. Mr. Firth was forced to admit that Proprietors Condominium is not providing any services directly to Parcel 200 and that any services that Parcel 200 benefits from is purely incidental to Proprietors Condominium providing services to the other Home Owners. He said that he doesn't provide water, electricity, telephone or maid services to Parcel 200.

[22] Mr. Firth was then cross examined by Learned Counsel Mr. Kendrickson Kentish and he said that from 1999 to the date of the trial Proprietors Condominium has provided the following services to Parcel 200 namely; security, garbage, sewerage, office landscaping, office services and path lights. He, however, admitted that Proprietors Condominium has no contract with Ms. Samois to provide her with any services and that he had never seen her use the pool for example; nevertheless, he said that he was asking the Court toward a sum for the services provided to the people who own Parcel 200 and Ms. Samois is one of its owners. He resiled from his position and then said that they provided services to Parcel 200.

[23] Mr. Firth accepted, during strenuous cross examination by Mr. Kentish that, while Ms. Samois is one of the registered owner of 20, he is aware that Ms Yvonne Reynolds, who is the former wife of Mr. Reynolds, and Ms. Samois (both of whom have been denied access to Parcel 200 by Mr. Reynolds since 1995) have not personally enjoyed the benefits of the services. Yet, Mr. Firth maintained that the Proprietors Condominium provided services to Parcel 200 and Ms. Samois is indebted to Proprietors Condominium since her name is on the title to Parcel 200. Mr. Firth stated that even after his attorney had written the letter threatening to terminate the services that Proprietors Condominium was providing to

Parcel 200 yet it continued to provide various services to Parcel 200 thereby increasing Parcel 200's indebtedness to Proprietors Condominium.

[24] Mr. Firth, during further vigorous cross examination by Mr. Kentish, was pressured into admitting that had Proprietors Condominium terminated its services to Parcel 200 the additional debts would not have been incurred. However, he explained that some of the services that Proprietors Condominium provides, and from which Parcel 200 benefits cannot be terminated; these include the use of the parking lot, use of the pool, and the common walkways. He maintained that Proprietors Condominium provides access to the beach. While Mr. Firth was clear that Proprietors Condominium provides office services to Parcel 200; in fact he said that Mr. Reynolds collects his mails from the office, he admitted yet again that he had never seen Ms. Samois using the access to the beach or for that matter any of the facilities. He has never sent Ms. Samois any invoice. He pointed out that the owners of Parcel 200 are the only owners of freehold property who have refused to pay the fees charged, other similarly circumstanced freehold owners, who benefit from the services provided by Proprietors Condominium, are billed similarly and they pay their fees. Mr. Firth agreed that he had no way of knowing whether correspondence which was purported to have been signed by Mrs. Yvonne Reynolds was indeed signed by her. However, Mr. Firth said that at all material times he communicated with Mr. Reynolds on behalf of Ms. Samois.

[25] In re-examination Mr. Firth stated that it is impossible for Proprietors Condominium to discontinue providing some of the services to Parcel 200 due to its proximity to the Condominiums.

Mr. Reynolds' Evidence

[26] Similarly, I am of the view that it is necessary to refer to Mr. Reynolds' evidence in some detail; he adopted the witness summary that was filed on his behalf.

The witness summary stated as follows:-

> "Mr. Reynolds acquired the property from a Mr. Jim Brodie in or about September 5th 1994. At this time the property was not part of the

Condominium Plan as it had an Absolute registration under the Registered Land Act of Antigua and Barbuda Cap Registration Section – Five Islands, Block 54 1292A, Parcel 200 (now reflected in the Register as 418).

At the time of purchase it was made clear to Mr. Reynolds that he was under no obligation to pay maintenance to Proprietors Condominium as the property was not part of the Condominium Registration and he did not form a part of the Association and was not entitled to participate in its affairs.

By Agreement Proprietors Condominium initially provided certain services to Mr. Reynolds' property for which he, who was in actual occupation, paid the sum of US$550 monthly. These services included property management, water supply, maintenance of Mr. Reynolds' yard and building exterior, garbage disposal and other miscellaneous services.

Following Hurricane Luis in September 1995 all services were interrupted for an extended period, the exact duration, Mr. Reynolds cannot now recall, whereupon he at his expense arranged for direct utility services from APUA to the property and assumed sole responsibility for the maintenance of the building and grounds. Thereafter by Agreement, Mr. Reynolds made a voluntary monthly contribution of US$200 to Proprietors Condominium, toward the costs of the Common Elements and Services; which contribution was increased in February 1998 to US$220 and paid through December 1998. These services resumed and continued until unrelated matters gave rise to a personal dispute between Management of Proprietors Condominium and Mr. Reynolds.

Thereafter in or about September 2000 the Proprietors Condominium first demanded and in January 1999 it unilaterally imposed a charged of US$480.00 (440.00) monthly for unspecified services. There was no Agreement to charge or pay this US$480.00 for such services and Mr. Reynolds by letter dated the 12th day of December 1998 requested all services cease and withdrew his offer to make any further contribution whatever to Condominium Plan. Thereafter Mr. Reynolds has received no services whatsoever from Pillar Rock Condominium Association.

By letter of Clement Bird, attorney at law for Proprietors Condominium dated December 5th 2000 confirmed that No services would be given to Mr. Reynolds. In fact no services have since that date been given to Mr. Reynolds by Proprietors Condominium. Instead the Proprietors Condominium has left construction debris in front of Mr. Reynolds' door and denied him access to the Car Park and has generally made the enjoyment of his premises difficult and uncomfortable if not impossible.

> The Proprietors Condominium continues to demand US$480.00 per month for the very services it denies the Mr. Reynolds of and for which he had not agreed to accept even to this day.
>
> At the time of purchase from Mr. Brodie, Mr. Reynolds was of the understanding that the property enjoyed benefits from the surrounding lands in terms of access by way of easements set forth by the Declarant in the Condominium Plan of Pillar Rock No. 24/1989."

Cross Examination of Mr. Reynolds

[27] Mr. Reynolds during cross examination by learned Counsel Mr. Clement Bird said that when he purchased Parcel 200 he was advised by his attorney that he had no obligation to pay fees. Mr. Reynolds admitted that Parcel 200 is surrounded by Pillar Rock and it is beneficial to his property that Pillar Rock maintains its property and vice versa. He stated that originally they came to an agreement in relation to the provision of miscellaneous services these included access to his property; parking of vehicles; use of the swimming pool. However, after the passing of Hurricane Luis the services that were originally provided were disrupted and thereafter he "organized" his own electricity by means of generator. He always paid Pillar Rock separately for its provision of electricity services; this was separate from the maintenance fees that he paid. Mr. Reynolds said that he painted his own house, even though as a courtesy he had used the paint that he obtained from Pillar Rock; he felt that he was doing a service to Pillar Rock by using the colour of their paint. After the hurricane, Pillar Rock had provided generated electricity but the service was less than adequate since the generator malfunctioned at times. He agreed that originally Proprietors Condominium collected the garbage; however, the swimming pool was not in a condition to be used. Mr. Reynolds did not deny that security services were provided after the hurricane but said that he does not benefit from the security services that are provided; parking next to his home was also available and he had the use of the driveway that is provided by Proprietors Condominium. There were other common amenities that were available to everyone; some of the amenities were paid for in addition to the maintenance fees.

[28] Mr. Reynolds was forced to admit during vigorous cross examination by Mr. Bird that in advertising for the sale of his property that he had stated that a number of services were

available; he conceded that the self same services were offered by Proprietors Condominium. He agreed that nowhere in the advertisement did he say that the persons who were likely to acquire Parcel 200 would have been required to enter into separate contracts in relation to the acquisition of the services, even though he was of the view that he was merely informing intended purchasers/tenants that the services are available if persons wished to avail themselves of the services. He maintained that he advised persons that those services were not subscribed by him but that it was something that they may wish to do. He acknowledged that the driveway that he uses is paid for by the Homeowners. He used the parking lot based on the permission he had obtained from some of his friends who are Homeowners. He denied that at present he uses the garbage facilities and said that he was unaware that his maid and handyman use it.

[29] Mr. Reynolds next stated that he has been trying to reach an agreement with Pillar Rock and has been suggesting the payment of reasonable fees for the services provided and that this is so whether or not he benefits from the services. While he has only had tenants at Parcel 200 once, and only for a period of 2 months last year, he was unaware that his family or guests have recently used the pool at Pillar Rock. He said that he has requested both verbally and in writing that Pillar Rock ceased providing Parcel 200 with services. He was adamant that he has received no service from Pillar Rock and as a consequence owes no money to Pillar Rock. He was of the view that he is entitled to have access to the car park, as of right, since there is a right of easement over same. Mr. Reynolds took no issue with the statement that the cost of maintaining the area has been financed by the Homeowners and these costs have been contributed to by freehold owners including himself.

[30] Mr. Reynolds was forced to reveal that he used to be a member, director and shareholder of Hog John Bay Company which was the company that developed the entire Condominium Property of Pillar Rock. He however denied having any knowledge of the alleged inter connection between Parcel 200's sewerage system to Pillar Rock's sewerage system. He was convinced that the rates Proprietors Condominium has imposed on the Homeowners are too high. Infact, "if he were to have his way he would fire all of the

directors". He stated that originally he had chosen to pay the maintenance fees to Pillar Rock, because "he liked to be a good neighbour" Further, when he purchased the Parcel 200 in 1994, he had agreed to pay the maintenance fees because he was getting value for services. Even though he is not pleased with the services that he receives he has offered to make a voluntary contribution for the services offered; in fact he offered to pay US$200 which sum the association accepted; he was adamant that he did not force the Homeowners to accept US$200 or get nothing.

[31] Mr. Reynolds said that initially, he had stopped paying the US$550 after the passage Hurricane Luis and this was in October 1995, he resiled from that position and agreed that he had paid maintenance fees in July 1996. He agreed that his parcel is quite sizable but he does not agree that he should pay the amount of fees asked of him. He however, conceded that the Homeowners had granted him a 20% discount due to the fact that he was not benefiting from all of the services provided; the sum that he believes that he should pay to the Proprietors Condominium is far less than the sum the owners of the smallest studio pays, even though Parcel 200 is at least (four) 4 times as big as the smallest studio.

[32] During cross examination by Learned Counsel Mr. Kentish, Mr. Reynolds said that he bought Parcel 200 in 1994 but he does not agree that he and Ms. Samois are the owners. In fact, he strongly disputes this. In his view, Ms. Samois has nothing to do with the dispute between himself and Pillar Rock. This is so even though the Land Registry reflects himself and Ms. Samois as the joint proprietors. Further, between 1999 and the date of the trial Ms. Samois has never occupied Parcel 200 neither has she enjoyed or benefited from any of the services provided by Pillar Rock. In his view, he has conducted and held himself out as the owner of Parcel 200 and Pillar Rock has treated him as such. In fact, even the communication that purported to emanate from Mrs. Reynolds it was he (Mr. Reynolds) who was its author and not his wife Mrs. Reynolds.

Mr. Reynolds' Submissions

[33] Learned Counsel Mr. Marshall submitted as follows:

Condominium is created by the Proprietors Condominium Act. Proprietors Condominium by law is vested with the authority over Condominium Lots to charge for maintenance and other related services. Mr. Reynolds' property is not registered under the Condominium Act and as such, does not come under the authority of the Proprietors Condominium. Proprietors Condominium by express agreement had provided services to Mr. Reynolds and they were paid for at various levels and rates up to the end of December 1998. Mr. Marshall further submitted that page 80 of the Trial bundle shows the statement produced by Proprietors Condominium; this shows that no payments were made by Mr. Reynolds following the charge of $400.00. Proprietors Condominium has not in any way, in its Statement of Claim or Claim Form, particularized the amounts charged but claims a blanket US$480.00 per month.

[34] Mr. Marshall also referred the Court to the fact that Proprietors Condominium in the Witness Statement of John Firth at paragraph 9 stated:

> "…we are aware that Parcel 200's own garden is maintained by their own gardener. We also aware that the property has its own electricity supply and back up generator. I am aware that the First Named Defendant engineered a separate water supply…"

In examination, Mr. Firth said:

> "…no, we do not maintain the garden, …" "yes, it is correct that we are not providing any services. Yes, it is true that any services provided are incidental to other home owners…" "No, we do not supply water, electricity or telephone to 200. they have their own." "…We have no dealings whatsoever with the First Named Defendant Property."

A further examination of Mr. Firth's testimony will show that Proprietors Condominium seeks compensation for the mere electrical appearance and proximity of their project to Proprietors Condominium property. Additionally, Proprietors Condominium seeks compensation for pathways made available to the Mr. Reynolds and Ms. Samois, but not established or maintained for Mr. Reynolds or Ms. Samois.

[35] Mr. Marshall next said that upon a review of the evidence the following legal issues arise:

(a) What is the cause of action?
(b) Can a Quantum Merit principal apply?

Cause of Action

[36] Mr. Marshall submitted that the cause of action that arises on the facts is contract. Halsbury's Laws of England, 3rd Edition, Volume 8 paragraph 90, defines a contract as "an agreement made between two or more persons which is intended to be enforceable at law, and is constituted by the acceptance by one party of an offer made to him by other party to do…some act." The offer and acceptance may either be expressed or inferred by implication from the conduct of the Parties." The Claim Form at paragraph (1) refers to a 'debt'. Black's Law Dictionary, 6th Edition. defines a debt as a sum of money due by certain and expressed agreement. The evidence is clear and undisputed that there exists no agreement, either implied or expressed for the Proprietors Condominium to render to Mr. Reynolds and Ms. Samois, any services for which they will pay Proprietors Condominium. Simply put, Proprietors Condominium, has failed to establish the necessary elements of a contract from which a debt can be implied or ascertained. Mr. Marshall said that it is important to note the words of Justice Barrow in the Court of Appeal decision of Knowles v Knowles, where he says at paragraph 13:

> "It is appropriate, at this juncture, to mention a troubling aspect of the judge's decision. The judge decided the case upon the basis that the appellant and the mother led the respondent to believe that they would give the house to the couple and thereby actively encourage the couple to do the works over the years. This was not the case that the respondent brought. The statement of claim is pellucid in its claim (own emphasis) that at the time the couple took up residence in the house the couple understood "it was the understanding" that they would own property. There was no case made in the statement of Claim that the respondent was induced or led to believe, by silence and inaction, that the house would be given to them. The respondent's case was that from the very beginning, before there was any silence, acquiescence or inaction, she and her husband understood that the house would be given to them. The respondent's case was that from the very beginning, before there was any silence, acquiescence or inaction, she and her husband understood that the house would be given to them. Counsel for the appellant has made no issue of this situation but it cannot be a satisfactory situation that one case is 'pleaded' and the judgment is pronounced on a different case. The judgment shows the embarrassment that this situation caused. The Statement of Claim should either have been amended or, if it was too late to amend, the claimant should have been confined to the case contained in the Statement of Claim.

Mr. Marshall said that, accordingly, Proprietors Condominium is limited to its pleadings. The pleadings of the Proprietors Condominium lay no basis for a contract and there is no evidence that the parties agreed to any maintenance charges or services for the relevant period.

Quantum Meruit

[37] Next, Mr. Marshall dealt with the legal principal of Quantum Meruit. He referred the Court to Halsbury's Laws of England, 3rd Edition, Volume 1, Paragraph 44, defines quantum merit as an "Assumpsit". An Assumpsit is a cause of action that lays for the recovery of damages for the breach of a promise, express or implied, it is a special development of the action on the case. The non-fulfillment of a promise being in the nature of a deceit… "…."common assumpsit includes in-debitatus assumpsit and quantum merit." Mr. Marshall submitted that this doctrine cannot assist Proprietors Condominium. In order for Indebitatus Assumpsit to apply and benefit Proprietors Condominium, it must first plead it. Proprietors Condominium has not pleaded assumpsit indebitatus. Additionally, it is clear that neither Ms. Samois nor Mr. Reynolds should pay any maintenance fee and in particular one of US$480.00 monthly for the period contained in the Claim Form. The doctrine cannot apply as no debt has arisen. Quantum meruit cannot assist Proprietors Condominium. In order for Quantum Meruit to apply, there must already exist a contractual relationship that has left the price for the service undetermined. In the case at bar, there is no contractual relationship.

Other Miscellaneous Points

[38] Next, Mr. Marshall stated that Proprietors Condominium seeks a 'fair' sum for services rendered. There is no legal doctrine that gives rise to a cause of action based upon a "fair" sum. If Proprietors Condominium seeks to invoke equity, then it must specifically plead the equitable doctrine it relies upon. In the absence of any such plea, it is safe to submit that no equitable doctrine can now be invoked to assist the Proprietors Condominium. Additionally, particular regard must be had to the evidence of John Firth in cross examination when he says:

> ""yes, it is correct that we are not providing any services. Yes, it is true that any services provided are incidental to the other home owners.."

> "no, we have no dealings whatsoever with the First named Defendant property"

[39] Mr. Marshall said that Mr. Reynolds stated in his witness statement at paragraph 6 as follows:

> "By letter of Clement Bird, Attorney at law for the Claimant, dated December 5th 2000, the Claimant confirmed that No services would be given to the First named Defendant [Ex. Page 46-47]. In fact no services have since that date been given to the First named Defendant by the Claimant."

Finally, Mr. Marshall submitted that despite the absence of delivery services to Mr. Reynolds, Proprietors Condominium Plan continues to seek monies as if there was the provision of services.

Ms. Samois' Submission

[40] Learned Counsel Mr. Kendrickson Kentish stated that Ms. Samois denies liability for any debts or services. Mr. Kentish said that the primary issues for the consideration by the Court are:

(a) Has Proprietors Condominium established a Cause of Action?

(b) Was Ms. Samois a party to a contract with Proprietors Condominium

(c) Is Ms. Samois by reason of her status a joint proprietor liable to Proprietors Condominium for the debts incurred (if any) by Mr. Reynolds?

[41] Mr. Kentish said that a review of the evidence will reveal that Mr. Firth, in his evidence in chief and under cross examination accepted or asserted that Proprietors Condominium had not entered into any contractual relations with Ms. Samois in respect of the subject matter of this claim. He had never met Ms. Samois and he had never seen her on the property. Mr. Firth was aware that Mr. Reynolds had excluded Ms. Samois and her mother from the property. He had not seen Ms. Samois enjoying any of the services which form the basis of this claim. He was not able to credibly or sensibly explain the computation of the sums claimed against Mr. Reynolds and Ms. Samois. Proprietors Condominium's solicitor having written to Mr. Reynolds terminating the services offered yet Proprietors

Condominium continued to provide some services to Mr. Reynolds and thereby failed to mitigate any loss which may have accrued to Proprietors Condominium.

[42] Mr. Kentish next stated that at the time of trial, the only "services" being enjoyed by Mr. Reynolds were:

(a) Access to the beach via Proprietors Condominium property – this was something which could have been prevented or restrained, and in any event was enjoyed solely by Mr. Reynolds.

(b) The use by Mr. Reynolds' maids of Proprietors Condominium garbage receptacle – this also could have been prevented or restrained.

(c) The lighting of pathway near to Mr. Reynolds' property – this was not an intentional or direct service to either of Mr. Reynolds or Ms. Samois and was merely incidental to services provided to Mr. Reynolds, Ms. Samois' members.

(d) Office services – this related solely to the preparation of invoices stating the amount allegedly owned to Proprietors Condominium.

(e) Parking – this could have been prevented or restrained, and in any event was enjoyed solely by Mr. Reynolds.

[43] Mr. Kentish further submitted that Mr. Firth did not give any evidence explaining the basis of his claim for interest at the rate of 10%.

[44] Further, no evidence has been led establishing that at the time Mr. Reynolds, Ms. Samois purchased the property from Mr. Jim Brodie that they were subject to any restrictive covenants which imposed upon them an obligation to pay any maintenance fees. Mr. Reynolds in his evidence in chief and under cross examination accepted or asserted that he in fact authored the letter that was purported to have signed by Mrs. Reynolds, in fact he also used an electronically generated version of his former wife's signature and placed it on the letter. Though he and Ms. Samois were joint proprietors of Parcel 200 he had excluded her from the property. Ms Samois has had nothing to do with this dispute. Accordingly, Mr. Kentish submitted that the evidence established that Ms. Samois had no contractual relationship with the Proprietors Condominium. Ms. Samois never enjoyed any

of the services offered or provided by Proprietors Condominium; notwithstanding her status as a titleholder, she has been forcibly excluded from occupation of the property.

Cause of Action

[45] Mr. Kentish said that Ms. Samois adopts Mr. Reynolds's submissions on this issue.

Was Ms Samios a party to a Contract with Proprietors Condominium?

[46] Mr. Kentish further stated that the essential legal issue is Privity of Contract. In Chitty on Contracts 28the ed. (para 19-022) the scope of the doctrine of privity is put this way:

> "The common law doctrine of privity means, and means only, that a person cannot acquire rights, or be subjected to liabilities arising under a contract to which he is not a party."

The effect of the doctrine can only be avoided or modified by Parliament. In this regard, it is significant to note that the main purpose of the Landlord and Tenant (Covenants) Act 1995 of the United Kingdom is to change, and indeed to cut down, the law relating to privity of contract in relation to leases and to make certain covenants enforceable against any owner or occupier of the demised property who is not a party to the lease. See: Oceanic Village Ltd. v United Attractions Ltd [200] Ch 234 at 242 No similar or analogous legislation exists in Antigua and Barbuda. The Proprietors Condominium, in trying to surmount the difficulty posed by the doctrine of privity, has suggested that the Proprietors Condominium provided services to "Parcel 200" and that the owners thereof are liable to compensate him for those services. This argument conveniently ignores the fact that a contract can only be entered into by persons. In other words, the issue before the court is not to which property the relevant services were provided, but rather, to whom were the relevant services provided. The evidence before the Court also establishes that Ms. Samois gave no consideration for, and did not enter into, a contract with the Proprietors Condominium. Mr. Kentish submitted that on that basis, the claim against Ms. Samois should be dismissed.

Is Ms. Samois by reason of her status as joint proprietor liable to the Proprietors Condominium for the debts incurred (if any) by Mr. Reynolds?

[47] Next, Mr. Kentish submitted that had Ms. Samois' title been subject to a restrictive covenant to pay maintenance fees Proprietors Condominium would have been legally entitled to pursue this claim. A long established anomaly in English common law concerns the burden of restrictive covenants on land. At Common law, the burden of restrictive covenants does not run with the land. In other words, a successor in title of a covenantor is not bound by the covenants entered into by his predecessor in title. At equity however, the burden of a restrictive covenant entered into by the owner of real property with the owner of neighbouring property imposes an equitable obligation on the former which is enforceable against all successors in title except for bona fide purchasers for value without notice. See: Commonwealth Caribbean Property law by Gilbert Kodilinye at pages 142 – 143. Mr. Kentish next, submitted that as Proprietors Condominium case does not fall within this exception to the privity doctrine, the claim is unsustainable and should be dismissed.

Mitigation of Damages

[48] The evidence established that in 2000 Proprietors Condominium's solicitor gave notice that all services would be terminated. This, Proprietors Condominium failed to do. Ms. Samois ought not to be penalized for Proprietors Condominium's failure to mitigate its losses (See: Dictum of Saunders JA in International Motors Ltd v Thomas Civil Appeal No. 7 of 2002 at para 16)

Interest and Costs

[49] Proprietors Condominium claimed interest on any sums due at the rate of 10% per annum. Mr. Kentish asked the Court not to award interest at 10% since Mr. Firth has not provided any evidence establishing that this is the rate at which he would have had to borrow the sum claimed. In the absence of such evidence, Mr. Kentish submitted that the claim for interest must fail (See: Phillip v Armstrong and Armstrong ANUHCV 1997/0135 at para 11).

[50] Mr. Finally submitted that in the circumstances, Ms. Samois is not liable to the Proprietors Condominium and the Claim against her should be dismissed together with prescribed costs, as agreed.

Proprietors Condominium's Submissions

[51] Learned Counsel Mr. Bird stated that the issue is whether or not Mr. Reynolds and Ms. Samois have and do continue to derive benefit and if 'yes' the extent of the benefit derived, and consequential liability to pay either the sum claimed, or such sum as the Court may deem equitable.

Agreement

[52] Mr. Bird stated that, based on the evidence, it is clear that by mutual agreement in 1995, US$550.00 was paid monthly for services rendered to Parcel 200. The basis of computation was its square footage, as obtained with the other units on the property, whether freehold or condominium. Mr. Bird, next, stated that Proprietors Condominium contends that it has, and presently supplies the following to the use/benefit of Parcel 200 – access/parking, common areas maintenance, garbage removal/sanitation, gardening, office services, pool, security, sewage facility.

[53] Mr. Bird reviewed Mr. Reynolds evidence under cross examination said that in a nut shell it is as follows: (a) Access/parking – He admits using the leased access way and parking area (he asserts that this is at the invitation of other, unnamed condominium owners). Further, by solicitor's letter he acknowledged that this should be paid for. (b) Common areas – Mr. Reynolds admits use of the common pathways throughout the property, as it is more convenient to use these than the public access otherwise provided. Mr. Reynolds admits also that the maintenance and upkeep of the common areas, cutting of grass, etc, redounds to the ambiance and benefit of Parcel 200. (c) Garbage removal/sanitation – Mr. Reynolds denies that either he or his guests use the complex's garbage facilities. He cannot, however, deny that his servants (maid/gardener) and rental tenants habitually made use thereof, as asserted by Proprietors Condominium and as shown in the photograph of cardboard box bearing his name at the dumpsite. Mr. Bird submitted that on

the balance of probabilities, Parcel 200 has enjoyed the incidence of this service throughout and ought to pay for same. (d) Gardening – The gardening specific to Parcel 200 has not been undertaken by Proprietors Condominium since 1995/6, which Proprietors Condominium has admitted. (e) Pool – Mr. Reynolds denies that either he or his guests use the pool or deck area. He cannot however deny Proprietors Condominium's eye-witness account of his rental tenants, gardener and friends enjoying same. Further, his website expressly identified the pool as an available amenity. Mr. Bird, next, submitted that on the balance of probabilities Parcel 200 has enjoyed the use of the pool/deck throughout, and ought to pay for same. (f) Security – In 30 years, Mr. Reynolds said he has never felt the need for security. It was put to him that (a) the solicitor's letter accepted security as a service received, to be paid for; (b) that the comprehensive list of services he claimed not to receive did not so list security; and (c) that his website expressly referred to security as an available amenity. Mr. Bird further submitted that Parcel 200 has enjoyed the incidence of security service throughout, and he ought to pay for same. (g) Sewage – Mr. Firth conceded under cross examination that their investigations had failed to establish conclusively that the sewage system was connected to Parcel 200, and that they were uncertain whether they were providing same. Mr. Firth's evidence-in-chief underpinned his belief as to why Parcel 200 was tied into the system, which evidence Mr. Reynolds and Ms. Samois utterly failed to challenge in cross-examination, far less to advance any alternative theory yet, Mr. Bird submitted that on the balance of probabilities Proprietors Condominium has proved that Parcel 200 is 'tied' into the common sewage system, and ought to pay for same. (h) Office services – Mr. Reynolds denies receiving benefit therefrom.

[54] Further, Mr. Bird submitted that Parcel 200 does enjoy the benefit to the offices services and should pay for the same. Mr. Bird stated that much was, made of the Properties Condominium purporting to withdraw its services in 2000. Proprietors Condominium's uncontroverted evidence is that this was not done, and in any event it would have been impractical to do this. Mr. Firth under cross examination by Mr. Marshall acknowledged that whilst the solicitor's letter did so state, this was never done. The only change being a "redirecting of the mail'. There was no effort to block access/parking; to bar the pathways.

He further indicated (to Mr. Kentish) that (as manager) he was not going to "stand at the end of the driveway and say they couldn't come up nor "call the police" he "didn't instruct the security to stop him" because he "didn't want to get into confrontation" Mr. Reynolds acknowledged under cross examination by (Mr. Bird) that Proprietors Condominium would have to erect a 50 foot fence to halt service "if the law allowed it" – a sentiment also echoed in respect of the sewage plant. Mr. Bird asked the Court to note particularly that when Mr. Reynolds was asked 'why' he paid maintenance at all (since he were of the view that he didn't have to), asserted "because he wanted to be a good neighbour"

[55] Accordingly, Mr. Bird submitted that it is clear that Parcel 200 enjoys the majority of the common amenities paid for by the surrounding condominium and other freehold properties – save and except for the provision of generator supply, gardening, and exterior walls painting. In support of his contention, Mr. Bird referred the Court to the fact that Mr. Reynolds' website advertises to the world at large, that Parcel 200 is available for rent/purchase with "full service, including security, grounds maintenance and pool available through the condominium management." Mr. Bird says that it is not proper for the Court to interpret this as intending that tenants would arrive at the property, to negotiate a separate maintenance fee for use of the pool and for access etc., on their own. Mr. Bird therefore submitted, that the only logical interpretation is an attempt to use the services received by Parcel 200, freely to his benefit.

[56] In support of his arguments, that there was an agreement in existence between Proprietors Condominium's and Mr. Reynolds and Ms. Samois, Mr. Bird referred the Court to Chitty on Contracts Vol 1, 29th ed., para 29-073 – the Court may infer the existence of a contract to pay for services from the facts of the particular case, which obligation may arise from an implied request therefor. In Halsbury's Laws of England Vol 9(1) 4th ed., para. 619, it states that "…where the plaintiff voluntarily does work for the benefit of the Defendant's property, the Defendant may adopt the benefit of it in such way as to give rise to the inference of a contract to pay.." Mr. Bird advocated that in the face of (a) the website offerings to the world at large, (b) admitted usage of common areas, leased driveway and parking facilities; (c) usage of the pool, deck and garbage facilities by

servants and tenants; (d) an acknowledged obligation to pay for security and access; and (e) refusal to allow for the 'dye' test of sewage; all jointly and or severally amount to conduct of a nature that the Court may reasonably attribute an implied, if not overt request. Additionally, in face of the opinion letter it is common ground that the parties have always sought to arrive at a negotiated consensus as to quantum to be charged, and not whether services were received. It is the breakdown in negotiations which have rendered it necessary for the Court's intervention; the issue has never been whether services are given, but what services, and the cost therefore. In further support of his argument, Mr. Bird referred the Court to The Proprietors Condominium Plan No.24 v Hog John Bay Development Ltd in which the Claimant (herein) issued a similarly pleaded claim against another freehold property. The parties previously had an agreement for services, which agreement Mr. Reynolds' company unilaterally ended. Proprietors Condominium having obtained default judgment, Mr. Reynolds sought leave to have this set aside, and to file a defence. In a preliminary ruling on 14th February 2003, the learned Justice Joseph-Olivetti restated the respective positions – Mr. Reynolds, Ms. Samois.. The cost of the services was to be agreed between the parties and that was never agreed…the charges as claimed… are unilaterally imposed on Mr. Reynolds and is neither the subject of a contract nor an agreement…" Mr. Reynolds, Ms. Samois – the correct approach was not to set aside judgment, but if anything at all, an adjustment of the sum due and outstanding. The Learned Justice opined that "…having regard to the nature of the services there can be no real dispute that Proprietors Condominium was entitled to some payment for the provision of same…" and (a) declined to grant leave to file the defence, (b) granted a declaration of the Claimant's entitlement, (c) ordered the issue of compensation to be assessed anew.

[57] Mr. Bird said that in the case at Bar, Ms. Samois elected not to present evidence. A 'no case' submission on her behalf advanced the argument that, as the evidence disclosed that she had never personally entered into a contractual arrangement and that she had been denied use of the premises, there was no evidence of her having benefited in any way from the services, and accordingly she was an unnecessary party to the action. Mr. Bird said that the claim is against the registered proprietors of property, for services rendered thereto. Mr. Bird said that an issue of whether or not an owner of property has

been unfairly treated with respect thereto by another, is not an issue before the Court. Proprietors Condominium proceeded against the registered, absolute owners of 200, not against the world 'at large'. Pursuant to s. 38 of the Registered Land Act. Cap 374 Proprietors Condominium maintains that it is not obliged to look behind the Register in respect of the beneficial ownership of the property. Mr. Bird submitted that the uncontroverted evidence before the Court is that upon contacting Samois, she clearly acknowledged ownership and liability for the outstanding sum due; and issued written instructions thereon. At no time was there a denial of the debt, or the rationale therefore. The sole query was to confirm the amount. There has accordingly been an acknowledgement of the debt. Mr. Bird therefore, submitted that Ms. Samois cannot approbate, and deprecate. Having acknowledged the debt and given instructions thereon, she may not now assert a lack of responsibility.

Quantum Meruit

[58] Mr. Bird argued that a 'fair' sum cannot be deduced in a vacuum – this must be founded by some formula, and the fairest 'means' is that used by Proprietors Condominium, to wit, apportioned according to a common formula shared by all at the complex (including freehold). Proprietors Condominium uncontroverted evidence is that (a) the annual homeowners meeting sets the overall maintenance budget, which is then apportioned on a per share basis amongst the various units (including freehold, and Parcel 200); (b) that in this manner Parcel 200"s apportioned rate of shares equals US$840.00 per month; (c) no disagreements have arisen between either condominium owners, or the other freehold owners. The sole dispute has been with Parcel 200. In acknowledgement that Parcel 200 does not receive generator, specific gardening and exterior wall painting, its apportioned bill has been discounted by 20%, to US$672. Mr. Reynolds' evidence in chief does not advance an alternative method. Under cross examination he stated that in paying US$200.00/US$220.00 he used the rate paid by the smallest unit at the complex – a Studio – and discounted that by 20% accordingly. Since it accounted for "…0 shares…" he could assign such rate as he chose – even as he accepts that parcel 200 is four (4) times a Studio's size, and would in the ordinary scheme of things have approximated 14 shares (US$840.00)

[59] Mr. Bird, posited that in determining the amount of money Mr. Reynolds and Ms. Samois should pay to Proprietors Condominium the Court should pay regard to the dicta in Serck Controls Ltd. v Drake and Scull Engineering Ltd Per Judge Hicks QC at pages 109-110

> "A quantum meruit claim may, however, arise in a wide variety of circumstances, across a spectrum which ranges at one end from an express contract to do work at an un quantified price, which expressly or by implication must then be a reasonable one, to work (at the other extreme) done by an uninvited intruder which nevertheless confers on the recipient a benefit which, for some reason, such as estoppel or acquiescence, it is unjust for him to retain without making restitution to the provider… at the first end of the spectrum…the measure should clearly be the reasonable remuneration of the Claimant; at the other it should be the value to the Defendant. In between there is a borderline, the position of which may be debatable."

Interest rate

[60] Under the Eastern Caribbean Supreme Court Act, Cap 27, stated Mr. Bird, the court has the discretion in the award of interest, particularly in respect of interest prior to judgment. In the Proprietors Condominium Plan No 24 v Hog John Bay Development Ltd, Justice Joseph-Olivetti determined that the 'contract' in question was commercial in nature; that the Claimants had been kept out of pocket for a considerable time (since 2000) and awarded interest at the rate of 10% per annum until Judgment. He submitted that this is similarly a fit case for the Court to make such a discretionary award of interest.

Court's Analyses and Findings

[61] I have reviewed the evidence in its entirety and have paid particular regard to the very helpful submissions advanced by all counsel. The following represents my findings of facts. The Proprietors Condominium has at all material times provided services to Homeowners. Parcel 200 is situate near the Homeowners' properties and by agreement Proprietors Condominium has provided services to Mr. Reynolds. The registered owners of Parcel 200 are Mr. Reynolds and Ms. Samois even though Ms. Samois has not lived at Parcel 200 since 1995, due to the fact that there is a dispute, Mr. Reynolds treats Parcel 200 as if it were his sole property. I also accept that he has prevented either Ms. Samois or her mother Mrs. Reynolds from entering Parcel 200. Proprietors Condominium has divided the Condominium units into shares with the studio being the smallest unit. Fees

are charged by Proprietors Condominium to the units based on the square footage. Parcel 200 does not fall within the ambit of the Condominium Act in so far as it is not part of the Condominium Plan it is however, approximately four times the size of the smallest studio and the fees that Proprietors Condominium would have charged for the services provided to Parcel 200 (which would approximate to 14 shares) are US$840. From time to time the executive of Proprietors Condominium have reviewed the fees payable by Homeowners and these fees have been accepted by the Homeowners and paid by them; freehold members who do not fall within the Plan have contracted separately with Proprietors Condominium for the provision of services.

[62] Mr. Reynolds had entered into an agreement with Proprietors Condominium for the provision of various services. I am also satisfied, that initially he paid a monthly sum of US$550, until 1996, for services which included the following services: use of common parking area, maintenance of common area, garbage removal, sanitation, gardening, provision of generated electricity, office services, pool, security. Hurricane Luis had disrupted the services. Sometime thereafter Mr. Reynolds refused to pay the sum of US$550. but instead started to pay US$500; this latter sum was accepted by Proprietors Condominium. After Hurricane Luis had struck in September 1995 and the services provided by Proprietors Condominium were somewhat disrupted, Proprietors Condominium was able to resume its provision of some of the services (which it originally provided). After the hurricane, Mr. Reynolds further reduced his monthly payment to Proprietors Condominium. By now Mr. Reynolds payment was substantially reduced, Proprietors Condominium was unhappy with the reduction it nevertheless accepted the reduced payments.

[63] I have no doubt that Proprietors Condominium was thereafter able to resume the provision of most of its services to the Homeowners and ultimately to Parcel 200 the latter which due to its location benefits from the services which include the access to parking, use of common areas, garbage removal, office services and path lights. I also accept that guests of Parcel 200 have utislised the pool facility. Mr. Reynolds, among other reasons, and in an attempt to justify the further reduction in his payment of fees has sought to provide

some of his own services and has succeeded in this regard. A dispute having arisen between the parties, Proprietors Condominium caused a letter to be written to Mr. Reynolds in which it threatened to withdraw the services that it was providing to Mr. Reynolds. I accept as a fact that it would be impracticable if not impossible for Proprietors Condominium to discontinue some of the services provided to Mr. Reynolds (in relation to Parcel 200). I am also satisfied that Mr. Reynolds is aware that he enjoys most of the amenities provided by Proprietors Condominium save and except gardening, painting of external walls, the provision of water, gas and electricity. More particularly, Mr. Reynolds is aware of the use of the common areas, the parking lot, office facilities and garbage facilities by guests of Parcel 200. I also am equally satisfied that Mr. Reynolds continues to benefit from the services that Proprietors Condominium provide and have absolutely no doubt that he is obliged to pay for the services which he enjoys. In fact, Mr. Reynolds has admitted that there have been several negotiations between himself and Proprietors Condominium aimed at agreeing on the amount of fees that he should pay Proprietors Condominium for the services that he receives.

[64] Accordingly, I am of the respectful view that even though Parcel 200 does not fall within the ambit of the Condominium Act, it is fair and just for Proprietors Condominium to utilize the square footage as the basis on which to charge Parcel 200 fees. As stated earlier, I accept, without reservation, that it is impossible and borders on the impossibility to discontinue the provision of some of the services/facilities to Parcel 200. Also, I am not at all of the view that Mr. Reynolds could unilaterally determine what fees are reasonable and thereby insist on paying those fees.

Agreement

[65] By way of emphasis, I accept that Parcel 200 doesn't come within the ambit of the Condominium Act this; this however, does not negate the fact that persons who strictly do not fall within the jurisdiction of the Act can, contract privately and, incorporate terms of the legislation into the contract. This brings me now to determine whether Proprietors Condominium had any agreement/contract with Mr. Reynolds and/or Ms. Samois to

provide the services which it did and if so whether there was any express agreement in relation to the remuneration for the services.

[66] I have given further and very careful consideration to the evidence adduced by Mr. John Firth and Mr. Reynolds and have no doubt that Mr. Reynolds contracted with Proprietors Condominium for the provision of services to Parcel 200. This agreement exists between the parties and was honored by the parties until a dispute arose between them. I am however unable to find that the parties agreed that Mr. Reynolds was to have paid a specific fee; I am equally satisfied that Mr. Reynolds agreed to pay a reasonable fee as charged by Proprietors Condominium. I am fortified in my view by the fact that Proprietors Condominium did provide several services to Parcel 200 and Mr. Reynolds dutifully paid the fees charged, before the dispute between the parties developed.

[67] It is the law that a contract to pay for services may be inferred from the facts of the particular case. Alternatively, where the plaintiff voluntarily does work for the benefit of the defendant's property, the defendant may adopt the benefit of it in such a way as to give rise to the inference of a contract to pay. Applying the above principles to the case at Bar I have no doubt that there was an agreement between Proprietors Condominium and Mr. Reynolds that Proprietors Condominium would provide services to Mr. Reynolds and that he would pay for those services. Accordingly, I have no difficulty in declaring that Mr. Reynolds is obliged to pay Proprietors Condominium for the services it rendered to him.

Remuneration/Quantum Meruit

[68] Having determined that Proprietors Condominium provides services and facilities to Mr. Reynolds, I am now left to determine whether the fees claimed by Proprietors Condominium are reasonable and if so who is liable to pay those fees, if any. Proprietors Condominium has sought to persuade me that due to the fact that Parcel 200 does not receive generator, specific gardening and exterior wall painting, its bill has been discounted by 20% to US$672 and that is a reasonable sum. The original figure of US$840 that is attributed to Mr. Reynolds seems a bit on the high side. However, I am satisfied that the parties contracted that Proprietors Condominium would provide the

services and that Mr. Reynolds would pay a reasonable sum for those services. In Way v Lolita [193] 3 ALL ER 759 it was held that in a contract for work done, if no scale of remuneration is fixed, the law imposes an obligation to pay a reasonable sum." In Chitty on Contracts General Principles Twenty Seventh Edition at page 84 in dealing with the issue of quantum meruit the authors stated that:

> "The circumstances must clearly show that the work is not to be done gratuitously before the Court will, in the absence of an express contract, infer that there was a valid contract with an implied term that reasonable remuneration will be paid"

[69] I am guided by these principles and apply them in the case at bar. It is the law that if a suit on a contract is not available, a Claimant may sue on a quantum meruit for the value of the services already rendered. I am of the respectful opinion that the principle of quantum meruit is applicable to the case at bar. In this regard, I adopt the dicta of Hicks QC as stated in Serck Controls Ltd v Drake & Scull Engineering ibid. I state further that quantum meruit, as used in the case at bar, in my respectful view to be referable to the contractual relationship that exists between Proprietors Condominium and Mr. Reynolds. Even if I am wrong, I am of the respectful view that it is reasonable for Proprietors Condominium to rely on its past relationship with Mr. Reynolds as the basis for saying that he is liable to pay for the services that he has received to do otherwise would be to enable Mr. Reynolds to be unjustly enriched.

[70] In my determination of what is a reasonable sum to be awarded to Proprietors Condominium, I accept that Mr. Reynolds previously paid $US550 as maintenance fees which he reduced to US$500. He paid the maintenance fee of US$500 until 1997 and thereafter sought to reduce it further to US$220 and then to US$200. By way of emphasis, Proprietors Condominium was left with no alternative than to accept whatever payments it received even though it felt that Mr. Reynolds was acting unreasonably. I am also satisfied that Mr. Reynolds has failed to effect any payment to Proprietors Condominium since December 1998.

[71] I am not of the view that Proprietors Condominium is entitled to receive from Mr. Reynolds the sum of US$672 per month as they have sought. In my view US$480 monthly is a fair

sum. Neither am I persuaded that Ms. Samois who has not occupied Parcel 200 nor benefited from the services that Proprietors Condominium provides should be made to pay for the fees incurred, particularly since she has been excluded from Parcel 200 by Mr. Reynolds, Mr. Bird's argument would have been more persuasive if, as title owner, Ms. Samois had benefited from the services. I therefore accept Mr. Kentish's submissions that due to the nature of the cause of action, and the applicable principles the person who should be liable to offset the maintenance fees incurred is Mr. Reynolds. In my respectful view, it would be unjust to expect Ms. Samois to pay for services from which she does not benefit and which Mr. Reynolds exclusively enjoys, particularly since she did not contract for those services. To put the matter beyond doubt the quantum meruit principle operates in relation to parties and does not attach itself to things in the way that actions in rem do. It is clear to me that Ms. Samois is not privy to the contractual relationship that exists between Proprietors Condominium and Mr. Reynolds. She therefore cannot be held liable under a contract to which she is not a party.

[72] Further, taking into consideration all of the facts as stated above I am of the considered opinion that Mr. Reynolds ought to pay Proprietors Condominium the sum of US$480 per month with effect January 1999 to 31st July 2004 which sum I have no doubt is reasonable for the services of garbage collection, use of pool, use of the parking lot , office facility, access to the beach and for being able to benefit from the other miscellaneous services that Proprietors Condominium provides to him from time to time. Accordingly, I am of the view that Proprietors Condominium is entitled to a declaration that Mr. Reynolds is liable to pay Proprietor Condominium a monthly fee in the sum of US$480 per month from January 1999 to 31st July 2004. I am however not of the view that the Proprietors Condominium should be able to obtain the increases fees as suggested by Mr. Bird.

[73] I am of the further view that due to the fact that Mr. Reynolds is receiving reduced services from Proprietors Condominium he should be made to pay a reduced sum as fees with effect 1st day of August 2004. I have to seek to determine what a reasonable sum (is taking into consideration that Mr. Reynolds has further reduced the services that he receives from Proprietors Condominium). In the totality of circumstances, I am of the view

that a monthly sum of US$300. is reasonable for Mr. Reynolds to pay Proprietors Condominium for the services he received from the 1st August 2004 to the date of judgment.

Interest

[74] I am of the further view that in the exercise of my discretion, Proprietors Condominium No. 24/1989 is entitled to receive interest on both of the above sums from the date of filing the claim that is, from 26th July 2004 to the date of judgment at the rate of 5%.

Conclusion

[75] For the foregoing reasons, I give the following judgment:

(a) It is hereby ordered and declared that Proprietors Condominium Plan No. 24 of 1989's claim against Ms. Selena Samois is dismissed together with prescribed costs, as agreed.

(b) It is hereby ordered and declared that Mr. Arthur Reynolds is obligated to pay the Proprietors Condominium Plan No. 24/1989, the monthly sum of US$480.00 with effect from the 5th January 1999 to 31st July 2004 for service rendered.

(c) It is further ordered and declared that Mr. Arthur Reynolds is obligated to pay Proprietors Condominium Plan No. 24/1989 the monthly sum of US$300.00 with effect from 1st day of August 2004 until date of judgment for further services rendered.

(d) In the exercise of my discretion I award on the interest on both sums from the date of filing the writ namely the 26th July 2004 to the date of judgment 30th April 2007 at a rate of 5%.

(e) Mr. Arthur Reynolds is to pay the Proprietors Condominium Plan No. 24/1989 prescribed costs as agreed.

[76] I commend all learned counsel for their industry.

Louise Esther Blenman
High Court Judge