

EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF SAINT CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE
SAINT CHRISTOPHER CIRCUIT
(CIVIL)

CLAIM NO. SKBHCV012/0156

BETWEEN:

HALF MOON BAY HOME OWNERS COMPANY LIMITED

Claimant

AND

PLATINUM PROPERTIES INC

Defendant

Appearances:

Mr Damian Kelsick and Ms Keisha Spence of Kelsick Wilkin and Ferdinand for the Claimant
Mr Fitzroy Eddy for the Defendant

2013: May 02;

November 27;

JUDGMENT

[1] **THOMAS, J. (AG):** Half Moon Bay Home Owners Company Limited filed a claim form on 24th April, 2012 seeking the following declarations:

- (a) That upon the true construction of the wording of Easement A (ii) – noted on the defendant's Certificate of Title, the claimant can lawfully disconnect or otherwise deny Lot 14 of the Half Moon Bay Villa Development use of the sewage system of the development.

- (b) Also, the claimant claims the sum of US\$11,285.06 being the arrears for maintenance fees for the period 31st October, 2009 to 3rd January 2012 owed to the Defendant by the claimant.
- (c) Interest on the said arrears for maintenance fees of US\$11,285.06 at such rate and for such period as the court may think fit pursuant to the powers conferred by section 29 of the **Eastern Caribbean Supreme Court (St. Christopher and Nevis Act)**, Cap. 3.11.
- (d) Costs, and
- (e) Such further or other relief as the Honourable Court may deem fit.

STATEMENT OF CLAIM

- [2] In its Statement of Claim Half Moon Bay outlines its relationship with Half Moon Bay Villa Development as being its management company. And further the defendant, Platinum Development Inc. ("Platinum") is owner of Lot 14 thereof.
- [3] The claimant avers that because of a certain easement endorsed on the defendant's Certificate of Title, certain fees are payable and which the defendant has failed to pay despite several requests and demands.

Defence

- [4] It is the averment of the defendant that by virtue of Easement A(i) and (ii) of the Easements of Half Moon Bay Villa Development endorsed on the Certificate of Title that it has certain rights to go pass over the roads, paths and walkways of the said development and to use the sewage system.
- [5] It is the further averment of the defendant that it has no access to its property via any roads, paths and walkways of the Half Moon Bay Villa Development. It is also denied that it owes the fees claimed and contends that for the period in issue, being October 31, 2009 to January 3, 2012, it was not the registered proprietor.

- [6] Accordingly, the defendant denies that the claimant is entitled to the reliefs sought and for "clarity" and the defendant further denies that the claimant is entitled to the sums claimed.

Counter Claim

- [7] By way of counter claim the defendant seeks the following
- (i) A Declaration that the claimant [defendant by counterclaim] provide to the defendant [claimant by counterclaim] proof that it is the management company provided for pursuant to the Easement of Half Moon Bay Villa Development;
 - (ii) A Declaration that the claimant [defendant by counterclaim] be prohibited from requiring the defendant [claimant in counterclaim] from becoming shareholders and or members of the claimant [defendant by counterclaim];
 - (iii) A Declaration that the claimant [defendant by counterclaim] be prohibited from requiring the defendant [claimant by counterclaim] to name the management company as loss payee in respect of claims for loss or damage to insurable structures of the defendant [claimant by counterclaim] property;
 - (iv) A Declaration as to what charges, if any that Half Moon Bay Limited could levy on the defendant's [claimant by counterclaim] property;
 - (v) An injunction restraining the claimant [defendant by counterclaim] by itself or by its servants or agents or otherwise from disconnecting access to sewer and or water;
 - (vi) Costs of this action; and
 - (vii) Such further and other relief as this Honourable Court deems just.

- [8] Pledged at paragraph 17 of the said counterclaim is the following:
- "17. In consequence of these matters, the defendant [claimant by counterclaim] has been greatly disturbed in the enjoyment of its property and it has been subjected to much inconvenience and discomfort causing the defendant [claimant by counterclaim] loss and damages".

Defence to Counterclaim

- [9] In respect to paragraph 15(1) of the defence and counterclaim Half Moon Bay Home Owners Company Limited avers that: "by letter dated August 1, 2005 Half Moon Bay Limited turned over its obligations and duties in relation to Half Moon Bay Villas to Half Moon Bay Home Owners Company Limited, the defendant by virtue of the counterclaim herein".
- [10] With respect to paragraphs 15(ii) and (iii) of the counterclaim the defendant contends that it never actually insisted that the claimant become a shareholder and/or member of Half Moon Bay Home Owners Company. Further, that despite the provisions of the Half Moon Bay Villas standard maintenance agreement it has never insisted on requiring the claimant names it as loss payee in respect to any loss or damages to insurable structures of the claimant's property.
- [11] As regards to paragraph 15 (iv) of the counterclaim, the defendant says that the Half Moon Bay Standard Maintenance Agreement governs the process of levying maintenance fee and the amount of fees charged in respect of each villa at Half Moon Bay Villa Development.
- [12] Finally at paragraph 5 of its defence to counterclaim the defendant denies it caused, contributed to or is responsible for any or any alleged disturbance in the claimant's enjoyment of its property.

EVIDENCE

- [13] Scott Jaynes in his witness statement says that he had been appointed President of Half Moon Bay Home Owners Association by the company's Board of Directors.

- [14] Scott Jaynes explains the process of easements and covenants being noted on the Certificate of Title issued under the **Title by Registration Act** with respect to each unit owner, and the right thereunder. The witness explains further that the defendant, Platinum Properties Inc. is owner of unit 14 with the easements and covenants noted as aforesaid. And a further notation on the Certificate of Titles concerning the "failure by the [owners] of their successors to pay the maintenance cost and the legal consequences thereof to the unit owners.
- [15] The Standard Maintenance Agreement to which each unit is required to be a party in order that the rights and easements granted is elaborated by the witness. And he further explains that the exercise of the rights is conditional on the payment, by the purchaser or his successor in title, of charges to the management company.
- [16] The basis of the maintenance fees is next explained by the witness and further with respect to a two-bedroom unit the see if US\$913.00 per quarter which was adjusted to US\$1245.00. Such fees apply unit 14 and owed by the defendant.
- [17] At paragraph 17 the evidence is as follows:
- "17. A review of the financial records of the claimant shows that the owner of Villa No. 14 had not paid any maintenance fees for the period 31st October, 2009 to 3rd January 2012. The amount outstanding for the said period is US\$11,285.06".
- [18] In further evidence the witness details the efforts made to be owed by the defendant.
- [19] Under cross-examination Scott Jaynes testified, in relation to paragraph 17 of his witness statement, that as of October 31, 2009 Platinum was not the owner prior to that. He went on to say that we bill the personal owner and when we found out we changed it to Platinum. He continued: "Platinum had to pay prior to September 6, 2009. We were never informed of the change of the current owner". The witness ended by saying that it was not known when to start billing Platinum.

- [20] With respect to paragraph 7 of his witness statement Scott Jaynes testified that he had no idea as to where the maintenance agreement between Platinum and Half Moon Bay might be.
- [21] As regards to the road in the development Scott Jaynes explained that there is no restricted access and that the roads are all public roads doe the Half Moon Bay Development but they were not assigned with the villas.
- [22] On being cross-examined in relation to paragraph 4 of his witness statement, Scott Jaynes said that he has a right to charge fees prior to August 6, 2010 as it was not known when the transfer took place as they were never advised as to the new ownership.
- [23] In giving further evidence about the roads, the witness said as follows: "Villa #14 faces the road. It faces Half Moon Bay Road. It is a public road. The owner can access the property. It is a very steep hill-side. There is no direct access to villa #14".

Annessa Hazelle

- [24] In her witness statement Anessa Hazelle says she is the accountant at Half Moon Bay Home Owners Company Limited, being the property management company responsible for the day-to-day operations of Half Moon bay Development.
- [25] In further evidence the witness detailed her responsibilities as the accountant, includes the sending of invoices to villa owners and monthly and quarterly statements. The witness also gives evidence as to the indebtedness with respect to villa #14 as being US\$11,285.06 being maintenance fees outstanding for the period October 31, 2009 to January 2012".
- [26] Under cross-examination in relation to paragraph 4 of her witness statement, the witness said that she did take steps to verify the amount owed by Platinum and to find out when then owner was liable.

- [27] Finally, the witness testified that she would have checked the balances as an accountant.

Nicholas Dupra

- [28] This witness testified that he is the facilities manager of Half Moon Bay Home Owners Company Limited and outlines his responsibilities.

- [29] According to the witness there are four sewage plants on the premises of Half Moon Bay Villas Development for which he is responsible to monitor and maintain. He says further that the plants cost approximately US\$9700.00 to maintain.

- [30] In cross-examination Nicholas Dupra gave evidence as to the security on the property, being two guards for the period 8:00 p.m. to 6:00 a.m. According to the witness the guards have to show reports.

- [31] In terms of the facilities at the Half moon Bay the witness explained that some are shared, including the upkeep of lights. The witness explained further that the owners do not directly pay for the street lights. Instead they pay for the maintenance.

Sonia Carr

- [32] Sonia Carr, as stated in her witness statement, is a director of Platinum Properties Inc. of Hamilton Estate, Charlestown, Nevis.

- [33] With respect to ownership of villa #14, the witness says that on August 6, 2010 Platinum Properties Inc. became the registered proprietor of Lot 14 (with villa thereon) of Half moon Bay Villa Development, Frigate Bay.

- [34] At paragraph 3 of the witness statement Sonia Carr says that the maintenance fees claimed from Platinum Properties relate to a period when Platinum Properties was not the registered proprietor of villa #14.¹

¹ The following paragraphs of the witness' witness statement was struck out by order on the day of the trial.

[35] At paragraph 5 of her said witness statement, Sonia Carr gives the following piece of evidence:

"5. There has been no production by the claimant of any maintenance agreement that was executed by Daniela Dadurian the original owner of Lot No. 14 that Platinum Properties Inc., is purported to be governed by".

[36] A meeting of Half Moon Bay Home Owner's Company Ltd held on April 26, 2011 is mentioned at paragraph 8 of Sonia Carr's witness statement and mention made of certain aspects of the minutes of said meetings.

[37] At paragraphs 13 to 16 of the said witness statement, the witness advances certain positions with respect to villa #14. In terms of access, the witness says that there is no access to the villa via any roads, paths and or walkways at Half Moon Bay Villa Development. With respect to the sewage system, the witness says that Platinum "is not averse to paying reasonable fees for the use and maintenance of the sewage system". However, as regards to the operation and maintenance of the central sewage system, roads, water, security, gifts for employees, landscaping, gardening, and liability insurance for the directors of Half Moon Bay Home Owners Ltd".

[38] At paragraph 19 of the witness statement, Sonia Carr denies that Platinum Properties Inc, owes US\$9,777.00 (XCD \$26,398.28) as of November 15, 2011 and or any maintenance fees to Half Moon Bay Home Owners Company Limited. And further at paragraph 20 the matter of the "mandated membership of Half Moon Bay Home Owners Company Ltd is raised and rejected. This rejection elaborated upon at paragraph 26 and 27 of said witness statement.

[39] The implications of Half Moon Bay Home Owners Company, being the management company are raised by the witness at paragraphs 28 to 34. And with respect to the said company the witness says *inter alia*;: "This company is not owned, operated and or controlled by the homeowners of Half Moon Bay Villas. The homeowners cannot control the running of a private company which they do not own".

- [40] Finally, the witness denies that Half Moon Bay Home Owners Company Ltd is entitled to the relief sought in the particulars of its claim or any relief whatsoever.
- [41] Under cross-examination Sonia Carr testified that she became involved in the lot 14 by managing it for someone else for about a year plus. And in further evidence the witness detailed her involvement and her subsequent ownership thereof.
- [42] In relation to the easements as noted on the Certificate of Title, the witness said she understood what it means. In this connection the witness gives this evidence: "Prior to my taking over from the person who was dealing with Ms Dadurian, she had some outstanding payments. I am aware that the unpaid fees would become a charge on the property".
- [43] The witness ended her testimony by saying that she should pay for a service if she gets it but she is not getting the service for which she is being charged.
- [44] There was no re-examination

ISSUES

- [45] The following are the issues for determination:
- (1) Whether by virtue of the content of Easement A(ii) noted on the defendant's Certificate of Title and the legal import of the Standard Maintenance Agreement the claimant can lawfully disconnect or otherwise deny Villa No. 14 of Half Moon Bay Development use of the sewage system of the development;
 - (2) Whether the defendant is indebted to the claimant in the sum of US\$11,285.06 or any other amount plus interest thereon being the arrears for maintenance fees with respect to the period October 31, 2009 to January 3, 2012.
 - (3) Whether the defendant is entitled to succeed on its counterclaim.

ISSUE NO.1

Whether by virtue of the content of Easement A(ii) noted on the defendant's Certificate of Title and the legal import of the Standard Maintenance Agreement the claimant can lawfully disconnect or otherwise deny villa No. 14 of Half Moon Bay Development use of the sewage system of the development

Submissions

- [46] The submissions on behalf of the claimant seek to begin with the making of a distinction between 'Villa Development' in order to distinguish it from condominium developments which are governed by the **Condominium Act**². The submissions go on to say that land compromising the Development is governed by the **Title by Registration Act** under which, by virtue of section 8, all noting by the Registrar of Titles are indefeasible which term is defined in the First Schedule to the said Act.
- [47] The submissions continue thus:
- "9. Not being a condominium project, all property not transferred to the owners of the villas remain vested in the developer. In other words, the areas designated as common areas are not vested in the homeowners pursuant to the provision such as section 11(9) of the Condominium Act which provides that '[T]he owners are hereby declared to be tenants in common of the common area'.
10. All rights of villa owners over the lands of the developer are created by way of easements and similarly, all restrictions are effected by way of restrictive covenants. Therefore there are noted on the Certificates of Titles of all units of the development, various easements and restrictions, including the easement in favour of the Claimant referred to in paragraph 3 above. The rights of the villa owners, including the Defendant, to use the property of the developer is therefore restricted to and governed by the terms of the said easements".
- [48] On the sub-issue of the right of the claimant to disconnect the defendant from the sewage system the submissions continue thus:

² Cap. 10.03, Revised Laws of Saint Christopher and Nevis, 2002

- "11. The Defendant by virtue of a Certificate of Title dated 6th August 2010 and registered in Book J3 Folio 343 of the Registrar of Titles for the Island of Saint Christopher is the registered proprietor of all that lot piece of parcel of land with villa thereon described as Lot 14 of Half Moon Bay Villa Development.
- 12. On the Claimant's title is noted the easement referred to in paragraph 3 above. As a result of the provisions of the Titles by Registration above as to indefeasibility, the easement cannot be challenged in any court of law on the ground that it is not an encumbrance on the said land; except on the ground of fraud connected with the issue of each Certificate of Title to the registered proprietor has been superseded by a title acquired under the Limitation Act, Cap. 5 .09 by the person making the challenge.
- 13. The defence and counterclaim filed by the Defendant on 4th June 2012 does not raise the issue of fraud. Hence, there is no challenge that easement is duly noted on the Defendant's Certificate of Title. In fact it is not in the interest of the Defendant to challenge the notation of the easement as the Defendant appears to wish to continue to avail herself of the right conferred by the easement.
- 14. What the Defendant appears to wish to do is avail herself of the right but not to be bound by the condition upon which the easement is granted, i.e. the payment of maintenance fees".

[49] The submissions go on to examine the implication of a positive covenant and the cases of **Austerberry v. Corporation of Oldham**³, **Halsell v Brisell**⁴ and **Rhome and others v Stephens (Executrix of Mrs. M Bernard, deceased)**⁵ in relation to positive covenants.

[50] The submissions end in this way:

"In the present claim the right to enjoy the use of the sewage is an easement granted to the Defendant. However, as mentioned above the right is additional upon the payment of the prescribed maintenance fees. It is therefore submitted that the Defendant's failure to pay the said maintenance fees that is demanded by the Claimant allows the Claimant to deny the Defendant the enjoyment of the said sewage system. No payment means that the Claimant has failed to satisfy in order to exercise the right to use the sewage system".

³ 29 Chp 750

⁴ [1957] CL 169

⁵ [1994] 2 AC 310

- [51] The submissions on behalf of the Defendant address the matter of easement frontally. They begin with a statement of the principle that the law does not recognize positive easements in that a right will not be held to be an easement if it requires expenditure of money by the grantor. The submissions go on to state that an easement must be negative from the point of view of the servient owner, that is, it must not involve the servient owner in any expenditure. And by the same token, a servient owner is under no obligation to carry out any maintenance or construction work which may be needed for the enjoyment of the easement.
- [52] In dealing with the exceptions to the general rule, two recognized exceptions are noted:
- "(1) Where there is an easement of fencing, the servient owner is bound to maintain the fence for the benefit of the dominant tenants, notwithstanding that the maintenance will involve expenditure of money; and
 - (2) Where the parties have expressly or impliedly agreed that the servient owner is to be responsible for the maintenance; for example, a local authority which has apartments in a high-rise building to tenants was held liable as under an implied covenant to maintain easements of access over the common parts of the building."

Reasoning

- [53] It is abundantly clear from the **Title by Registration Act** that titles entered in the register of titles are indefeasible and can only be challenged on very narrow grounds, including an allegation of fraud. In this connection one of the submissions on behalf of the claimant make the point that in its defence the defendant did not allege fraud so that the rule as to indefeasibility stands. The court agrees.
- [54] The focus must now be on the easement in issue as noted on the register in relation to villa No. 14, Half Moon Bay Development.

Easement A(ii)

- [55] As noted before, there are certain easements, in relation to the villas comprising Half Moon Bay Development, which are noted on the relevant Certificates of Title and by extension on the land register.
- [56] Easement A (ii) falls within this category. It falls under the rubric "EASEMENTS OF HALF MOON BAY VILLA DEVELOPMENT" and reads thus:
- "A. The Registered Proprietors⁶ have full right and liberty in common with Half Moon Bay Limited and all other persons having like right and subject to the rules of Half Moon Bay Villa Development as may be prescribed from time to time the management company of the said development and conditional upon the payment of the Registered Proprietors to the said management company of maintenance fees in accordance with the Standard Maintenance Agreement of the said development ...
- (i) To go pass over the roads, paths and walkways of the said development to gain access to the land thereby transferred.
- (ii) To use the sewage system to which the said development is from time to time connected".
- [57] The court notes *ab initio* that the easement in issue does not require the court to make a determination as to whether it satisfies the law as to its content or method of creation. On the contrary, the covenants are granted by Half Moon Bay Development. Indeed, this accord with the learning that: "Unless arising by statute, implication or prescription all legal easements and legal profits *a pendre* must be created by deed. There is no exception to this principle ...".⁷ And further than that, the umbrella words to the easements and covenants forming part of the Certificates of Title makes the grant conditional on the payment of maintenance fees in accordance with the Standard Maintenance Agreement.
- [58] The matter then comes down to the status of an easement by way of maintenance fees bearing in mind the indefeasibility of the Certificate of Title to Villa No. 14 Half Moon Bay Development

⁶ Sic

⁷ See: Gray Elements of Land Law, (3rd ed) at para 5.2.7

- [59] The grant of an easement must necessarily bring with it the necessary law unless it is excluded.
- [60] Both sides in their submissions refer to the law surrounding a positive easement, with the narrow rule being that the law does not recognize a positive easement, being one that requires the expenditure by the servient owner.
- [61] It is also submitted on both sides that there are exceptions to positive covenants. This is illustrated in the case of **Rhome and another v. Stephens (Executrix of Mrs. M Bernard, deceased)** in which Lord Templeman after an examination of the relevant cases said this:

"It was held that the defendant could not exercise the rights without paying his costs of ensuring that they could exercise. Conditions can be attached to the exercise of a power in express terms or by implications. **Halsall v Brizell** was just such a case and I have no difficulty in agreeing with the decision. It does not follow that any condition can be rendered enforceable by attaching it to a right nor does it follow that every burden imposed by a conveyance may be enforced by depriving the covenant's successor in title of every benefit which he enjoyed there under. The condition must be relevant to the exercise of the right".

- [62] Learned counsel for the defendant, as noted above, cited as an exception to a positive covenant as where the parties have expressly or impliedly agreed that the servient owner is to be responsible for the maintenance. To that must be added the following dictum of Lord Templeman in **Rhome v Stephens**⁸:

"Equity cannot compel an owner to comply with a positive covenant entered into by his predecessors in title without flatly contradicting the common law rule that a person cannot be made liable upon a contract unless he were a party to it. Enforcement of a positive covenant lies in contract; a positive covenant compels an owner to exercise his rights. Enforcement of a negative covenant deprives the owner of a right over property."

- [63] It is clear to the court that the maintenance fees prescribed under the Maintenance Agreement are central to the easement to use the sewage system. And at paragraph 2 of the terms of the easements the following is duly stated:

⁸ [1994] 2 WLR 429

"That failure by the Purchasers or their successors in title to pay any maintenance costs or other sum due by them under the Maintenance Agreement shall give rise to a charge on [the] land and building hereby transferred which charge shall be enforceable as an encumbrance and shall give the management company a sufficient interest in the land and building hereby transferred to sustain a caveat on the Certificate of Title".

- [64] Given the rule that the enforcement of a positive easement lies in contract, the Maintenance Agreement comes further into focus. By way of example a copy of this document is an exhibit to Scott Jaynes' witness statement⁹. This document bears the following headings:

**"STANDARD MAINTENANCE AGREEMENT (MANDATORY
AGREEMENT OF ALL UNIT OWNERS)"**

- [65] Then comes the following:

"AN AGREEMENT made this ... day of ... 2008 BETWEEN HALFMON
BAY HOME OWNERS COMPANY LTD a company duly incorporated
under the laws of and registered in St. Christopher and Nevis and having
its registered office at Villa #3, Half Moon Bay Villas Frigate Bay, St. Kitts
(hereinafter called "the Management Company") and Stephen and J Delay
(hereinafter called ("the unit owner") owner of Unit No. 20A Half Moon
Villas (hereinafter called (the development) WHEREAS the unit owner has
purchased from the initial owner or the original developer of the
Development Unit No. 20A and agrees to the Easements and Restrictive
Covenants of the Development as shown below and WHEREAS this
agreement is the standard agreement applicable to all units in the
Development and is intended to ensure the proper and efficient
maintenance and management of the Development for the benefit of all
unit owners therein".

- [66] The agreement contained Restrictive Covenants and then comprehensive statements as to what the parties agreed on. Of, immediate relevance are clauses 5(iii), 5(x) and 5(xi).
- [67] Clause 5(iii) says that the maintenance costs shall be borne between the units on a *pro rata* basis dependant on the total number of bedrooms in each unit. Clause 4(iv) shall give rise to a charge on the unit which charge shall be enforceable as an encumbrance and shall give the management company a sufficient interest in

⁹ In his witness statement at para 7 Scott Jaynes says that the copy of the Standard Maintenance Agreement is by way of example. It relates to Villa No. 20A.

the unit to sustain a caveat on the Certificate of Title of the unit. And clause 5(xi) prohibits the unit owner from selling, assigning or transferring his interest in the unit until all maintenance charges and all sums due pursuant to Clauses 4(i), 4(iii) and 4(iv) are paid in full to the management company.

[68] It is clear therefore that a methodology exists for dealing with a situation where there is a failure to pay maintenance costs. And preventing the unit owner from using the sewage system to which the development is connected is not an option.

[69] But beyond that, Scott Jaynes under cross-examination said this in relation to Villa No. 14, and paragraph 7 of his witness statement:

"I have no idea as to where the agreement might be between Platinum and Half Moon Bay. I do not know of the existence of one".

[70] And Sonia Carr under cross-examination denied signing a contract in 2009. Thus in the circumstances learned counsel for the defendant submits that the defendant that the defendant did not sign a standard maintenance agreement, nor did immediate past previous owner, who purchased directly from Half Moon Bay Limited sign agreement.

[71] Contextually the submission on behalf of the claimant is couched in these terms:

"There is no principle of law which avoids a binding agreement by a party to do any of the matters referred to in the declaration sought. The Defence is premised on the Defendant being bound by the Standard Maintenance Agreement and there is no evidence whatsoever on which the Defendant can rely to relieve it from its contractual obligations".

[72] The language of the submission is undoubtedly concise and brilliant but there are serious hurdles to cross. Indeed, there is no rule of law which suggests that the submission has so crossed. What must happen, however, is a brief re-examination of the defence.

[73] At paragraph 6 of the defence, paragraph 4 of the statement of claim is admitted. This deals with the easements granted as endorsed on the certificate. At paragraph 7 the defendant avers that during the period claimed for maintenance

fees, the defendant was not the registered proprietor. And further at paragraph 8 oral requests for payment of fees is denied; but at paragraph 9 receipt of a letter from the claimant's attorney-at-law is admitted. In the remainder of its defence an attack on the governance of the developments is unleashed.

- [74] It is clear to the court that the admissions by the defendant are in relation to the Certificate of Title and there is no mention of any agreement being executed. This agreement, as noted before is mandatory and provides, *enter alia*, for the levying of fees on villa owners and generally for the governance of the development. In any event the court cannot accept that these admissions by the defendant can contradict or over ride the clear and unequivocal evidence of Scott Jaynes that he have no idea where the agreement between Platinum and the claimant might be. Add to this Sonia Carr's evidence that she did not sign such an agreement. And it is trite law that the onus in its entirety is on the claimant.

Conclusion

- [75] It is therefore the determination of the court that Easement A(ii) as endorsed on the defendant's Certificate of Title has attached to it a methodology to enforce payment of maintenance fees as prescribed under the Standard Maintenance Agreement which does not include preventing the use of the sewage system. In any event, there is no evidence that the defendant executed the mandatory Standard Maintenance Agreement; this removes the legal basis to recover maintenance fees which are prescribed under the said agreement.

ISSUE NO. 2

Whether the defendant is indebted to the claimant in the sum of US\$11,285.06 or any other amount plus interest thereon being the arrears for maintenance fees with respect to the period October 31, 2009 to January 6, 2012

[76] Because of the court's determination on the first issue this issue has become largely academic. However, the court will re-state the finding of fact that because there is no evidence that the defendant executed the mandatory Standard Maintenance, there is no obligation for the defendant to pay the prescribed fees claimed.

ISSUE NO. 3

Whether the defendant is entitled to succeed on its counterclaim

[77] In light of the rulings on the claimant's claim, the court will exercise judicial restraint because some of the reliefs sought are not properly before this court, while others are addressed by the rulings given.

ORDER

[78] **IT IS HEREBY ORDERED AND DECLARED** as follows:

- (1) Easement A(ii) as endorsed on the defendant's Certificate of Title has attached to it a methodology to enforce payment of maintenance fees as prescribed under the Standard Maintenance Agreement which does not include preventing the use of the sewage system by the defendant;
- (2) There is no evidence that the mandatory Maintenance Agreement was executed by the defendant which removes the basis for the recovery of such fees which are prescribed under that Agreement;
- (3) The Defendant is not indebted to the claimant in the amount of US\$11,385.06 or at all;
- (4) The court exercises judicial restraint with respect to the defendant's counterclaim because some of the reliefs sought are not properly before this court and the rulings while others are addressed by the said rulings;
- (5) The claimant must pay the defendant prescribed costs based on the value of the claim.

Errol L.Thomas
High Court Judge (Ag)