EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2008/0009

BETWEEN:

THE PROPRIETORS, CONDOMINIUM PLAN NO. 2/1989

Appellant

and

TRINITY INVESTMENT COMPANY LIMITED

Respondent

[1] TRINITY INVESTMENT COMPANY LIMITED
[2] OREST BEDRIJ
[3] OKSANA BEDRIJ
[4] CHRYSTYHNA BEDRIJ
[5] ROKSSANA BEDRIJ

Respondents

and

[1] THE PROPRIETORS, CONDOMINIUM PLAN NO. 2/1989
[2] JOHN FIRTH
[3] TOM KEPLER
[4] JOHN GREAVES
[5] SAL ROSA

Defendants/Appellants

Before:
The Hon. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mr. Mario Michel — Justice of Appeal
The Hon. Mde. Gertel Thom — Justice of Appeal

Appearances:
Mr. Dane Hamilton, QC, with him, Mr. D. Raimon Hamilton for the Appellants
Mr. Kendrickson Kentish, with him, Ms. Kathleen Bennett for the Respondents

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2015: March 12;
2016: September 19.

Civil appeal – Breach of statutory duty – Section 5(1)(d) of the Registration of Condominium Titles Act – Whether directors personally liable for breach of statutory duty by Corporation – Liability for breach of trust as constructive trustee – Claimant's entitlement to unspecified special damages – Obligation by unit holders of a condominium to pay homeowners fees – Power of proprietor of a condominium to impose penalties on homeowners

On 12th June 2002, The Proprietors Condominium Plan, No. 2/1989 ("the Corporation") commenced proceedings against Trinity Investment Company Limited ("Trinity Investment") for the sum of US$99,695.69, being monies due and owing to the Corporation by Trinity Investment in respect of maintenance fees, utility charges and late penalties, as of 1st June 2002, with interest at the rate of 18% per annum. On 11th November 2002, Trinity Investment filed a defence and counterclaim seeking a declaration that Villa No. 21 ("Villa 21") (Trinity Investment's villa in the condominium) be deemed to have been destroyed during the period June 1996 to January 2002 and for an order that Trinity Investment's obligation to pay fees and assessments and other financial obligations had been suspended from June 1996 to December 2000.

Trinity Investment and its shareholders (collectively "the Respondents") subsequently instituted proceedings against the Corporation and its directors (collectively "the Appellants") for an order that the Appellants pay to the Respondents, damages for the cost of fully repairing and reinstating Villa 21; a declaration that Trinity Investment's obligation to pay fees and assessments had been suspended from June 1996 until reinstatement of Villa 21; damages for loss of use and enjoyment of Villa 21; and damages.

The claims and counterclaims were consolidated and following the trial of the consolidated matters, the learned trial judge made a number of orders. She dismissed the claim for a declaration that Villa 21 be deemed to have been destroyed within the meaning of section 14(2)(c) of the Registration of Condominium Titles Act ("the Act") as well as the claim that Trinity Investment's obligation to pay the maintenance fees, late fees and assessments and interest had been suspended. The learned trial judge ordered judgment in favour of the Corporation against Trinity Investment for damages in the sum of US$170,163.06, together with interest at the rate of 6% per annum from the date of judgment, and made a declaration that the directors of the Corporation acted in breach of the Act in applying part of the insurance proceeds towards the liquidation of debts owed by the Corporation and not for reconstructing or reinstating Villa 21. The learned trial judge also ordered judgment in favour of the Respondents against the Appellants for damages in the sum of US$85,000, with interest at the rate of 6% from the date of judgment.

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Both the Appellants and the Respondents were dissatisfied with the learned trial judge's orders and appealed her decision on a number of grounds.

Held: Allowing the appeals in part and making the orders contained in paragraph 72 of this judgment, that:

1. When a defendant raises the Statute of Limitations in a claim instituted against him, the onus is on the claimant to prove that the cause of action accrued within the period of limitation. However, where the claimant provides evidence which leads to a reasonable inference that the cause of action accrued within the limitation period, the burden passes to the defendant to establish that the apparent accrual of the cause of action within the limitation period is misleading and that in reality the cause of action accrued at an earlier date. In the present case, the Appellants, as defendants in the court below, did not discharge the burden of establishing that the cause of action in fact accrued before the commencement of the period of limitation.

   Cartledge (Widow and Administratrix of the Estate of Fred Hector Cartledge (*deceased*)) and Others v E. Jopling & Sons, Ltd [1963] 1 All ER 341 applied.

2. Section 4 of the Registration of Condominium Titles Act provides that a proprietor of condominium lots acquires its own legal personality separate from that of its members or directors. Further, section 5(1)(d) of the Act places the obligation on the body corporate to apply insurance proceeds in rebuilding and reinstating property. Accordingly, any failure to do so results in a breach by the body corporate. Consequently, in this case, the Corporation, by virtue of section 5(1)(d) of the Act had an obligation to apply the insurance proceeds in rebuilding and reinstating the property, however, the directors of the Corporation had no such statutory duty to use insurance proceeds for any purpose. Therefore, the learned trial judge erred when she assimilated the position of the Corporation with that of the directors of the Corporation.

   Section 5(1)(d) of the Registration of Condominium Titles Act applied.

3. A person who assists with knowledge in a dishonest and fraudulent design on the part of trustees of a trust will be liable for the breach of trust as a constructive trustee. Therefore, where a fraudulent breach of trust known by a director to be fraudulent is done by a company at the direction of the director, so that the director is not only a party to it but the instigator of the fraudulent breach of trust and benefits from it, he is to be held liable. In the present case, the learned trial judge found that the directors acted honestly and in the best interests of the homeowners when, as directors of the Corporation, they facilitated the use of the insurance proceeds to liquidate some of the Corporation's debts. Accordingly, there was no fraudulent breach of trust known by the directors to be fraudulent and perpetrated by the Corporation at the direction of its directors.

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Glenko Enterprises Ltd v Keller and Another 2000 MBCA 7 applied; Barnes v Addy (1874) LR 9 Ch App 244 applied; Scott and Scott v Riehl and Schumak (1958) 15 DLR (2d) 67 (BCSC) applied.

4. If a claimant is to be awarded a sum of money claimed in special damages, he must substantiate it by evidence on which the court can rely. However, if the claimant fails to do so, he or she does not become disentitled to damages for loss suffered by him or her, but the court is entitled to disregard the specific amounts claimed by him or her and make such award in respect of the losses suffered by the claimant as the court considers reasonable in the circumstances. This is what the learned trial judge did in the present case. There was no basis therefore to **interfere with the learned trial judge'**s award of damages to the Respondents against the Appellants.

5. An appellate court should not reverse the finding of a trial judge as to the quantum of damages because it thinks that it would have awarded a different sum if it tried the case at first instance. An appellate court will only be justified in reversing the amount of damages awarded by a trial judge where the appellate court is convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small so as to make it an entirely erroneous estimate of the damages to which a claimant is entitled. In the present case, there was no basis upon which it could be said that the trial judge acted on any wrong principle of law, or that the amounts she awarded for the costs associated with the reinstatement and refurbishment of Villa 21 were so extremely high or so very small so as to make it an entirely erroneous cost estimate of the damages to which the Respondents were entitled. Accordingly, there was no ba**sis to interfere with the trial judge's award with respect to those claims.**

   Flint v Lovell [1934] All ER Rep 200 applied.

6. In this case, the learned trial judge heard the evidence of the witnesses, had the opportunity to observe their demeanour and to make assessments of their credibility. She also had several documents before her in relation to the condition of Villa 21 after the passage of a hurricane and the removal of its roof. On this basis the learned trial judge made the factual findings that she did in relation to Villa 21. Accordingly, there was no basis to interfere with the factual findings made by the learned trial judge.

7. Unit holders in a condominium cannot lawfully refuse to pay fees that are levied against their property on the basis of any perceived grievance they may have with the proprietors of the condominium. In the present case, the alleged breaches of duty by the Corporation did not justify the unit holders withholding of the common charges payable by them. Accordingly, the learned trial judge did not err in declining **to decide that Trinity Investment's obligation to pay the maintenance** fees, late fees and assessments and interest had been suspended.

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Towers Condominium Association v Lawrence 32 V.I. 185, 188 (V.I. Terr. Ct. 1995); 1995 VIR 185 applied.

8. Neither section 5 of the Act nor section 1(b) of the First Schedule of the Act gives power to the Corporation to impose any kind of penalties on the homeowners whether by way of late penalty fees or late interest. The imposition of penalties and special rates of interest could only be justified if authorised by applicable legislation or by agreement between the party owing and the party claiming. In the present case, the applicable legislation does not authorise the imposition of any penalties or special rates of interest, nor was there agreement between the Corporation and the Respondents. Consequently, there was no justification for the claim by the Corporation for late penalty and late interest or any basis for an award to the Corporation in respect of this claim.

JUDGMENT

[1] MICHEL JA: On 12th June 2002, The Proprietors Condominium Plan, No. 2/1989 (referred to here and in the court below as "the Corporation") instituted proceedings against Trinity Investment Company Limited (referred to here and in the court below as "Trinity Investment"). The claim was for the sum of US$99,695.69 (or its equivalent EC$269,178.36) being monies due and outstanding to the Corporation by Trinity Investment as proprietors of a condominium unit, representing maintenance fees, utility charges and late penalties as of 1st June 2002, with interest at the rate of 18% per annum from 1st June 2002 until judgment, or such other rate as the court may allow. On 11th November 2002, Trinity Investment filed a defence and counterclaim joining issue with the Corporation on its claim and seeking a declaration that Villa No. 21 ("Villa 21") (being Trinity Investment's villa in the condominium) be deemed to have been destroyed during the period June 1996 to January 2002 and an order that Trinity Investment's obligation to pay usual fees and assessments, insurance premiums and certain other financial obligations, had been suspended from June 1996 to December 2000. On 2nd June 2003, the Corporation filed a reply and defence to counterclaim joining issue with Trinity Investment on its defence and counterclaim.

[2] On 19th June 2002, Trinity Investment and its shareholders (collectively referred to as "the Respondents") instituted proceedings against the Corporation and its

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directors (collectively referred to as "the Appellants") for: (1) an order that the Appellants pay to the Respondents damages for the cost of fully repairing and reinstating Villa 21 for the use and enjoyment of the Respondents as a condominium, with interest; (2) a declaration that by reason of the wrongful acts of the Appellants and the consequent deprivation to the Respondents of the use and enjoyment of Villa 21, Trinity Investment's obligation to pay usual fees and assessments had been suspended from June 1996 until reinstatement of Villa 21 or payment of damages or as the court sees fit; (3) damages for loss of use and enjoyment to the Respondents of Villa 21 and for mental stress to the Respondents other than Trinity Investment; and (4) damages. On 3rd October 2002, the Appellants filed a defence to the Respondents' claim alleging that the claim is statute barred and disputing Trinity Investment's alleged losses. The Appellants, in their defence, also denied that they acted unlawfully and contended that the Respondents were not entitled to any of the declarations that they claimed.

[3] The claims and counterclaims instituted by the parties hereto were consolidated and heard together in February 2007, and judgment was delivered in the matter on 29th February 2008. In her judgment, the learned trial judge made the following orders:

(1) The claim for a declaration that Villa 21 be deemed to have been destroyed within the meaning of section 14(2)(c) of the [Registration of Condominium Titles Act][1] (hereafter "the Act") is dismissed;

(2) The claim that Trinity Investment's obligation to pay the maintenance fees, late fees and assessments and interest had been suspended is dismissed;

(3) Judgment is hereby ordered in favour of the Corporation against Trinity Investment for damages in the sum of US$170,163.06,

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[1] Cap 376, Revised Laws of Antigua and Barbuda 1992.

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together with interest at the rate of 6% per annum from the date of judgment;

(4) It is declared that the directors of the Corporation acted in breach of the statute in applying part of the insurance proceeds towards the liquidation of debts owed by the Corporation and not for reconstructing or reinstating the damaged Villa 21;

(5) Judgment is ordered in favour of the Respondents against the Appellants for damages in the sum of US$85,000, with interest at the rate of 6% from the date of judgment;

(6) The claim that Trinity Investment's counterclaim and the Respondents' claim are statute barred is dismissed;

(7) The parties are to bear their own costs.

[4] By notice of appeal dated 20th May 2008, the Appellants appealed against the judge's award of US$85,000 to be paid to the Respondents and against the order that the directors of the Corporation are jointly and severally liable for the breach of statutory duty in applying part of the insurance proceeds towards the liquidation of debts owed by the Corporation and for not reconstructing or reinstating the damaged Villa 21.

[5] The Appellants' grounds of appeal are as follows:

"(a) That the Learned Trial Judge erred in the exercise of discretion in [ordering that]:

(i) the sum of US$50,000.00 (Fifty Thousand Dollars United States Currency) represented a reasonable amount to award Trinity Investments Company Limited/the Bedrij family as damages representing cost to reinstating the villa;

(ii) the sum of US$10,000.00 (Ten Thousand Dollars United States Currency) represented a reasonable amount to award same as damage for the replacing of the furniture and fixtures;

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(iii) the sum of US$5,000.00 (Five Thousand Dollars United States Currency) represented a reasonable amount to award same as damages representing freight charges, taxes and duties;

(iv) the sum of US$18,000,00 (Eighteen Thousand Dollars United States Currency) represented a reasonable amount to award same as damages representing loss of use of the villa;

(v) the sum of US$2,000.00 (Two Thousand Dollars United States Currency) represented a reasonable amount to award same as damages representing cost of supervision provided in reinstatement.

"(b) That the Learned Trial Judge erred in law in finding, on the basis of the evidence in the case, that personal liability be affixed on the named Defendant directors FIRTH, KEPLER, GREAVES and ROSA for the breach of statutory duty in applying part of the insurance proceeds towards the liquidation of debts owed by the Corporation and for not reconstructing or reinstating the damaged Villa 21.

"(c) That as a result of the Learned Trial Judge's errors of fact and/or law:

(i) the individually named Defendants FIRTH, KEPLER, GREAVES and ROSA are rendered personally liable for the aforesaid sum of US$85,000.00 (Eighty Five Thousand United States Currency);

(ii) the Appellants have been ordered to pay the overall sum of US$85,000.00, which sum is unjustifiable in all the circumstances herein."

[6] By counter notice of appeal dated 6th June 2008, the Respondents appealed against the learned trial judge's orders that Villa 21 was not deemed to be destroyed within the meaning of section 14 (2)(c) of the Act; that Trinity Investment's obligation to pay maintenance fees, late fees and assessments and interest had not been suspended; and that the Corporation was entitled to damages from Trinity Investment in the sum of US$170,163.06, together with interest thereon at the rate of 6% from the date of judgment.

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[7] The Respondents' grounds of appeal are as follows:

> "(a) In respect of 2(a)(1) the decision is unreasonable and against the weight of the evidence.
>
> "(b) In respect of 2(b)(1) the Learned Trial Judge erred in so holding.
>
> "(c) In respect of 2(b)(2) the Learned Trial Judge erred in so holding and in making this determination gave little or no weight to the evidence that Villa 21 had been uninhabitable.
>
> "(d) In respect of 2(b)(3) the Learned Trial Judge erred in so holding and in making this determination failed to consider the lack of particularity in the evidence supporting the Appellant's claim.
>
> "(e) In respect of 2(b)(4) the Learned Trial Judge erred in so holding."

[8] Although the Appellants never took issue in their notice of appeal with the trial judge's ruling that the Respondents' claim and counterclaim were not statute barred, in his written and oral submissions on behalf of the Appellants, Mr Dane Hamilton, QC, argued that the trial judge was right in coming to the conclusion that the applicable law relating to limitation was the 1939 UK Limitation Act (which was received by and formed part of the laws of Antigua and Barbuda prior to 1967) and that the relevant limitation period is six years from the accrual of the cause of action (whether the action lies in contract or in tort) but that the trial judge erred in ruling as he did. He argued that the limitation period began to run when the roof of the building was removed in May 1996 and had expired by the time that the Respondents' claim was filed over six years later in June 2002.

[9] The first difficulty I have with this submission and argument by learned Queen's Counsel, Mr. Hamilton, is that there was no mention in the Appellants' notice of appeal of any intention to challenge this ruling by the trial judge and no ground of appeal making the judge's ruling in that regard an issue in this appeal. There was also, as a result, no submission in response by the Respondents.

[10] The second difficulty I have with this submission and argument by learned Queen's Counsel is that the factual substratum of it was undermined, not by the

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Respondents, but by learned Queen's Counsel himself who, at paragraph 12(ii) of his written submission, stated that the judge found as a fact that the Corporation had removed the roof of Trinity Investment's villa in June 1996 (and not May 1996) and at paragraph 13 of his submissions stated that these findings of fact by the trial judge (including the finding that the roof was removed in June 1996) ought not to be disturbed by this Court.

[11] Once it is determined, as the trial judge did on the evidence before her, that the roof was removed in June 1996, and it is established, as would be apparent from the claim form, that the claim against the Appellants was instituted by the Respondents on 19th June 2002, with no indication that the date in June 1996 when the roof of the building was removed was a date prior to 20th June 1996, then the Appellants cannot avail themselves of the defence of limitation; their allegation that the roof was removed in May 1996 having been rejected by the trial judge. It is true that, as stated by Lord Pearce in the House of Lords in the case of Cartledge (Widow and Administratrix of the Estate of Fred Hector Cartledge (*deceased*)) and Others v E. Jopling & Sons, Ltd:[2] 'when a defendant raises the statute of limitation the initial onus is on the plaintiff to prove that his cause of action occurred within the statutory period.' But where, as in the present case, the court has rejected the evidence of the Appellants that the roof was removed in May 1996 and accepted the evidence of the Respondents that the roof was removed in June 1996, and where the evidence of the Respondents' witnesses[3] leads to a reasonable inference that the roof was removed in the latter part of June 1996, which is likely to have been at a date after 19th June, then – in the language of Lord Pearce in the House of Lords in the Cartledge case – 'the burden passes to the defendants to show that the apparent accrual of a cause of action is misleading and that in reality the cause of action accrued at an earlier date.'[4] The Appellants (as defendants to the claim by the Respondents) had failed to show that the cause of action accrued at a date earlier than 19th June 1996.

[2] [1963] 1 All ER 341 at p. 352.
[3] See Record of appeal, vol. II at pp. 53 and 70.
[4] Cartledge (Widow and Administratrix of the Estate of Fred Hector Cartledge (*deceased*)) and Others v E. Jopling & Sons, Ltd [1963] 1 All ER 341 at p. 352

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[12] On the authorities, a statement of principle can be made that when a defendant raises the statute of limitations in a claim instituted against him, the onus is on the claimant to prove that the cause of action accrued within the period of limitation. But where the evidence led by the claimant leads to a reasonable inference that the cause of action accrued within the limitation period, the burden passes to the defendant to establish that the apparent accrual of the cause of action within the limitation period is misleading and that in reality the cause of action accrued at an earlier date. The Appellants, as defendants in the court below, did not discharge the burden of establishing that the cause of action in fact accrued before the commencement of the period of limitation.

[13] Of course, in this case the Appellants must also contend with the ruling by the trial judge that, having removed the roof of the building in June 2006, the Corporation was under a continuing duty to replace the roof of Villa 21 and to reinstate it to its pre-hurricane state (see paragraph 117 of the judgment).[5] This duty, the trial judge found, continued for as long as the roof to the villa remained off, and time did not therefore begin to run until the roof was restored.

[14] I have some difficulty though with the trial judge's ruling on this point, because the consequence of it being correct is that, if the roof had not been restored there would be no limitation on when an action could be brought by Trinity Investment for the Corporation's failure to replace the roof, because the cause of action would arise from the moment the roof is removed on the building and would persist for as long as the roof is off the building. The only way in which the six-year limitation period which the learned trial judge found to be applicable in this case would have kicked in is if Trinity Investment had instituted proceedings against the Corporation for the removal of the roof, not after six years since the roof was removed, but after six years since it was restored. This conclusion, I believe, would be difficult to fathom.

[5] See Judgment at para. 117.

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[15] For my part, I am of the view that time would begin to run, not from the time that the roof was removed, but from the moment when loss or damage ensues from the removal of the roof, which is really what would create a cause of action, as opposed to time running only from the moment when the roof is restored, which could hardly be the circumstance giving rise to a cause of action.

[16] Section 2 (1) of the UK Limitation Act 1939 (which the learned trial judge found to be the applicable law in this case) provides that actions founded in contract or tort cannot be brought 'after the expiration of six years from the date on which the cause of action accrued.' The cause of action in this case would not yet have accrued when the roof of the villa was removed for the purpose of repairing the building, nor could it only have accrued when the roof was restored. The cause of action would have accrued when Trinity Investment suffered loss and damage as a result of the roof of its villa being removed and not restored timeously.

[17] In view though of the fact that this finding by the trial judge was not appealed by the Appellants, and the Appellants' difficulty with it only surfaced in the submissions by learned Queen's Counsel on behalf of the Appellants, and in view of the undermining and consequential collapse of the factual substratum of Queen's Counsel's submission, I find it unnecessary to make a specific finding on the issue (rendered academic) of whether the Respondents' claim would have been statute barred had the roof of the building been removed in May 1996, and not in June 1996, and had the Appellants taken issue with the judge's finding in its notice of appeal.

[18] Learned Queen's Counsel for the Appellants having referred in his submissions to the case of Huyton and Roby Gas Co v Liverpool Corporation,[6] which was relied on by the Respondents in the court below, I pause merely to say that I agree with Mr. Hamilton, QC, that the facts and circumstances of that case are not apposite to those of the present case – Huyton v Liverpool Corporation dealing with the

[6] [1926] 1 K. B. 146.

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continuing duty of a municipal corporation to remedy the neglect of its statutory obligations in relation to works undertaken by the statutory corporation.

[19] The second major attack on the judgment of the trial judge is on her ruling that the named directors of the Corporation (who were the second, third, fourth and fifth named defendants in the proceedings instituted by the Respondents against the Appellants) are jointly and/or severally liable for the breach of statutory duty in applying part of the insurance proceeds towards the liquidation of debts owed by the Corporation and for not reconstructing or reinstating the damaged Villa 21. This formulation of the trial judge's ruling is extracted from paragraph 2(b) of the Appellant's notice of appeal, but the actual ruling of the trial judge is differently formulated and, for the sake of clarity and accuracy, I shall quote and address the formulation of the judge's ruling as contained in paragraph 128 (d) of her judgment, as follows:

> "In relation to Claim No. 0330/2002, it is hereby ordered and declared that the Directors of Proprietors Condominium Plan No. 21/1989 acted in breach of the statute in applying part of the insurance proceeds towards the liquidation of debts owed by the Corporation and not for reconstructing or reinstating the damaged Villa 21."

[20] The Appellants' second ground of appeal, ground (b), which addresses this finding by the trial judge, reads as follows:

> "That the Learned Trial Judge erred in law in finding, on the basis of the evidence in this case, that personal liability be affixed on the named Defendant directors FIRTH, KEPLER, GREAVES and ROSA for the breach of statutory duty in applying part of the insurance proceeds towards the liquidation of debts owed by the Corporation and not for reconstructing or reinstating the damaged Villa 21."

[21] The thrust of Mr Hamilton's submission on this ground of appeal is that the directors of the Corporation, when faced with the real risk of having the utility services to the condominiums terminated and the risk eventually of the possible closure of the entire property, acted honestly in what they thought was in the best interests of the homeowners (including Trinity Investment) in applying part of the insurance

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proceeds towards the liquidation of debts owed by the Corporation and not for reconstructing or reinstating Trinity Investment's villa.

[22] Mr. Hamilton submitted that the factual finding that the directors acted honestly in what they thought was the best interests of the homeowners was made by the trial judge. In fact, the trial judge's exact words in addressing the decision of the Corporation to apply part of the insurance proceeds as it did are contained in paragraph 37 of her judgment, as follows:

> "The Corporation in so doing acted in good faith. I am not persuaded, as learned counsel Mr Kentish would have me believe, that the directors either acted negligently or dishonestly, to the contrary they used their best judgment in circumstances of the case in seeking to effect repairs to the damaged property including Villa 21."

[23] Mr. Hamilton also submitted that the trial judge's finding on the directors' liability was entirely based on equitable principle, but that she lost sight of or failed to advert to the important equitable principle that "he who comes to equity must do equity". He submitted that, as of July 1996, Trinity Investment was aware that the insurance proceeds received by the Corporation were insufficient to reinstate and restore the Pillar Rock Condominium as a whole and that the Board of the Corporation was seeking to raise money by way of loans, bonds and assessments, but from the beginning of July 1996 Trinity Investment failed to pay their monthly fees, they failed to pay the assessment approved by the homeowners on 21st July 1996, and failed to make any contribution to the efforts of the Corporation to raise funds to reinstate and restore the condominiums, but insisted that the roof of their villa be first restored. This, Mr Hamilton submitted, meant that Trinity Investment was not doing equity and should not therefore be given equitable relief.

[24] Mr. Hamilton further submitted that the decision of the Corporation to apply part of the insurance proceeds to pay off urgent debts was ratified by the homeowners (by majority vote) at an emergency meeting held on 21st July 1996, which manifests the consent, concurrence and/or acquiescence of the beneficiaries in the act of the trustee constituting the alleged breach

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[25] In these circumstances, Mr Hamilton submits, the directors of the Corporation ought not to be affixed with personal liability for the Corporation's breach of its statutory duty in applying part of the insurance proceeds towards the liquidation of debts owed by the Corporation and not for reconstructing or reinstating Trinity Investment's damaged villa.

[26] In his written and oral submissions on behalf of the Respondents, learned counsel Mr. Kendrickson Kentish, submitted that the premise of his clients' case against the directors of the Corporation is that the insurance proceeds received by the directors in settlement of claims made in the aftermath of Hurricane Luis were held on trust. He submitted that section 5(1)(d) of the Act provides that it is the duty of a condominium corporation to apply insurance money received by it in respect of damage to the property in rebuilding and reinstating the property and that the insurance proceeds must therefore be applied solely in accordance with this statutory provision.

[27] Mr. Kentish proceeded in his written submissions to state that the insurance proceeds received by the directors would have been held on trust as the Corporation could only have applied the proceeds to the purpose specified in the Act, for the benefit of all of the condominium owners. He stated too that a claim in "knowing assistance" is sufficient to establish a constructive trust and that the directors, knowing that the insurance proceeds were to be applied to a specific purpose, caused the Corporation to apply those monies to purposes which were contrary to law.

[28] At paragraph 111 of her judgment, the learned trial judge stated that the directors, "having obtained compensation from the insurance company for the damage suffered as a consequence of the hurricane, failed to apply part of the insurance monies, in accordance with section 5(d) of [the Registration of Condominium Tiles Act], towards the reconstruction or reinstatement of the properties" and that instead, "the directors ill-advisedly utilized a portion of the moneys toward liquidating the Corporation's indebtedness to the utilities companies and to pay off the telephone

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company for arrears". The learned trial judge proceeded throughout paragraph 111 and the ensuing paragraph 112 to refer to the directors' utilization of part of the insurance proceeds to pay outstanding debts of the Corporation, and then declared that the directors acted in breach of the statute by applying part of the proceeds of insurance in the manner that they did.

[29] The learned trial judge erred in my view by assimilating the position of the Corporation with that of the directors of the Corporation. The Corporation once established, in accordance with section 4 of the Act, acquires its own legal personality separate and apart from that of its members or directors. Section 5(1)(d) of the Act fixes the obligation on the Corporation to apply the insurance proceeds in rebuilding and reinstating the property and any failure to do so results in a breach by the Corporation of its statutory duty. The directors have no statutory duty to utilize insurance proceeds for any purpose. The trial judge therefore erred when, in paragraph 112 of her judgment, she acceded to the request of Counsel for the Respondents to declare that the directors of the Corporation breached their statutory duty by utilizing a portion of the insurance proceeds to pay some of the Corporations' debts. Accordingly, paragraph 128(d) of the judge's order declaring that the directors 'acted in breach of the statute in applying part of the insurance proceeds towards the liquidation of debts owed by the Corporation and not for reconstructing or reinstating the damaged Villa 21' is set aside.

[30] A different question arises though as to whether the directors of the Corporation gave knowing assistance to the Corporation in the latter's breach of a constructive trust in not applying the entire insurance proceeds to the reconstruction and reinstatement of the villas damaged by Hurricane Luis, including Villa 21. It was open to the learned trial judge to make such an order, because averments to this general effect were contained in the Respondents' statement of claim and in the submissions made to the learned trial judge in the court below by the Respondents' counsel.

[31] Before this Court, Mr Kentish argued that a person who does not directly engage in a breach of trust or fiduciary duty may be called to account for his actions as

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accessory. He submitted that this cause of action was extensively examined by Huband JA in the Manitoba Court of Appeal in the case of Glenko Enterprises Ltd v Keller and Another,[7] where the court held that a director can be held liable for the actions of the corporate entity, in the absence of specially imposed statutory liability, where the director knowingly assists the company's breach of trust.

[32] In the Glenko Enterprises Ltd case, the director whom the court determined had knowingly assisted the company in a breach of trust, knew of the trust, knew that the actions which the company was undertaking at his direction constituted a breach of trust, had a financial interest in the company's application of trust funds in the way that it did, and was not honest in his dealings with the tainted transactions. The Manitoba Court of Appeal referred to the English case of Barnes v Addy,[8] where Lord Selborne LC enunciated the standard which has been followed in several English cases, that persons who 'assist with knowledge in a dishonest and fraudulent design on the part of the trustees'[9] will be liable for the breach of trust as constructive trustees. The court also made reference to the Canadian case of Scott and Scott v Riehl and Schumak[10] where the British Columbia Supreme Court concluded, in effect, that where a fraudulent breach of trust known by a director to be fraudulent is done by a company at the direction of the director, so that the director is not only a party to it but the instigator of the fraudulent breach of trust, and benefits from the breach, he is to be held liable.

[33] On the facts of the present case, the trial judge found that the directors acted honestly and in the best interests of the homeowners when, as directors of the Corporation, they facilitated the use by the Corporation of part of the insurance proceeds to liquidate some of the Corporation's most pressing debts, including debts due to its utility service providers, so as to avert the termination of utility services to the condominiums, and to avert the risk of possible closure of the entire property.

[7] 2000 MBCA 7.
[8] (1874) LR 9 Ch App 244.
[9] At p. 252
[10] (1958) 15 DLR (2d) 67 (BCSC).

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[34] There were no circumstances, such as those in Glenko Enterprises Ltd, where the directors knew of the trust, knew that the application of part of the insurance proceeds to liquidate urgent debts constituted a breach of trust, had any financial interest in the Corporation's use of part of the funds to liquidate debts, and were dishonest in their dealings with the insurance proceeds. In fact, soon after a portion of the insurance proceeds was utilized for debt liquidation, the directors convened a meeting of the homeowners (who are the members of the Corporation) to ratify the decision to so use the insurance proceeds, and the decision was ratified by the overwhelming majority of the homeowners.

[35] There was also, in this case, no assistance knowingly rendered by the directors of the Corporation in a dishonest and fraudulent design on the part of the trustees, as enunciated by Lord Selborne LC in Barnes v Addy as the standard followed by English authorities by which to determine whether directors would be affixed with personal liability for a company's breach of trust. In fact, there was no dishonest and fraudulent design on the part of either the company or its directors, but only an honest attempt to act in the best interests of the members of the Corporation.

[36] So too, there was no fraudulent breach of trust known by the directors to be fraudulent and perpetrated by the Corporation at the direction of its directors, so that the directors were not only parties to the fraud but the instigators of it and benefited from it, as was the situation in the Scott and Scott case.

[37] On the facts and in the circumstances of this case, therefore, the court could not properly have determined that the directors of the Corporation had given knowing assistance to the Corporation in the latter's breach of a constructive trust in not applying the entire insurance proceeds to the reconstruction and reinstatement of the villas damaged by Hurricane Luis, including Villa 21.

[38] The other order made by the learned trial judge that was challenged by the Appellants, is the award of damages to the Respondents against the Appellants in the sum of US$85,000, together with interest at the rate of 6% from the date of judgment. In their grounds of appeal, the Appellants contend that the learned trial judge erred in

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the exercise of discretion in awarding: (i) the sum of US$50,000.00 as a reasonable amount to award the Respondents as damages representing the cost of reinstating the villa; (ii) the sum of US$10,000.00 as a reasonable amount to award the Respondents as damages for replacing furniture and fixtures; (iii) the sum of US$5,000.00 as a reasonable amount to award the Respondents as damages representing freight charges, taxes and duties; (iv) the sum of US$18,000.00 as a reasonable amount to award the Respondents as damages representing loss of use of the villa; and (v) the sum of US$2,000.00 as a reasonable amount to award the Respondents as damages representing the cost of supervision provided for the reinstatement of Villa 21.

[39] Having set aside the trial judge's order fixing personal liability on the directors for the Corporation's breach of trust in failing to apply all of the insurance proceeds to the reconstruction and reinstatement of the villas, there is now no basis for fixing the directors with personal liability for damages resulting from the Corporation's failure to reconstruct and reinstate Villa 21, timeously or at all. I will therefore deal only with the justification for and quantum of the damages' awards.

[40] The learned trial judge clearly provided the justification for the awards when she stated, at paragraph 118 of her judgment, as follows:

> "In view of my findings that the corporation failed to repair the roof of Villa 21 in a timely manner, I have no doubt that it breached the continuing duty that it owed to Trinity Investment and for which breaches Trinity Investment is entitled to be granted relief by the Court."

[41] As to quantum, the learned trial judge rejected all of the amounts claimed by the Respondents by way of special damages on the basis that the evidence in support of the amounts claimed was either unreliable or unavailable. She proceeded however to make awards in such amounts as she considered reasonable in respect of all of the items for which the Respondents claimed damages.

[42] The thrust of the Appellants' submissions on this issue appeared to be that, since the trial judge found that the amounts claimed by the Respondents as special damages

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were unsubstantiated or unreliable, the trial judge should have disallowed the claims in full and not make any award in respect of them.

[43] This approach advocated by the Appellants is not however justified in law. The claim by the Respondents for special damages in a stated amount is a pleading requirement, which has been satisfied. If, however, a claimant is to be awarded the sum claimed by him, he must substantiate it by evidence on which the court can rely. If he fails to do so, he does not thereby become disentitled to damages for loss suffered by him, but only that the court becomes entitled to disregard the specific amounts claimed by him and to make such award in respect of the losses suffered by the claimant as the court considers reasonable in the circumstances. This is precisely what the learned trial judge did in her judgment.

[44] With respect to the loss suffered by the Respondents by having to incur the cost of reinstating Villa 21 consequent on the failure of the Appellants to do so, the trial judge held, at paragraph 121 of her judgment, that: 'taking into consideration the totality of the evidence including the estimates presented, I am of the view that the sum of US$50,000.00 … is a reasonable amount to award [the Respondents] as damages representing cost to reinstating the villa.'

[45] With respect to the loss suffered by the Respondents by having to incur the cost of refurbishing Villa 21, the learned trial judge said, at paragraph 123 of her judgment, that: 'I would … allow the sum of US$10,000 … as damage for the replacing of the furniture and fixtures'.

[46] With respect to the loss suffered by the Respondents by having to incur the cost of the freight charges, taxes and dues in the importation of the materials used in the reinstatement and refurbishing of Villa 21, the learned trial judge said, at paragraph 124 of her judgment, that – "I would … award a nominal sum of US$5,000.00 … for freight charges, taxes and duties".

[47] With respect to the Respondents' loss of use of Villa 21 for having been deprived of the use of their villa, the learned trial judge held, at paragraph 126, as follows:

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> "I am prepared to allow for a monthly rental in the sum of US$1500 … I am of the view that … a period of 12 (twelve) months is a reasonable time for which [the Respondents] should receive compensation … Accordingly, I will utilize the sum of US$1,500 per month which in my view is a reasonable sum, for the rental and applying that 12 (twelve) months I would therefore award Trinity Investments damages in the sum of US$18,000 … for the loss of use of the Villa."

[48] As to whether an appellate court ought to interfere with the quantum of damages awarded by the trial judge in a case such as the present one, the classic statement of the grounds upon which a court of appeal will interfere appears in the judgment of Greer LJ in the Court of Appeal in England in the case of Flint v Lovell[11] where he stated that:

> "this Court will be disinclined to reverse the finding of a trial judge as to the amount of the damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. To justify reversing the trial judge on the question of the amount of damages it will be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."[12]

[49] I can find no basis in the present case to say that the trial judge acted on any wrong principle of law or that the amounts she awarded for the cost of reinstating Villa 21, the cost of refurbishing it, the freight charges, taxes and dues incurred, and for the loss of use of the villa during the time that it was rendered unusable were so extremely high or so very small as to make it an entirely erroneous estimate of the damages to which the Respondents are entitled. There is no basis therefore to interfere with the trial judge's awards with respect to any of these claims.

[50] With respect to the losses allegedly suffered by the Respondents for having to incur the cost of supervising the reinstatement of Villa 21, the learned trial judge said, at paragraph 127 of her judgment, that: 'there is no evidence as to the nature of the supervision … provided. Neither was the court presented with any evidence to prove

[11] [1934] All ER Rep 200.
[12] At pp. 202 – 203.

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that monies were expended by [the Respondents] on the supervision of the reconstruction.'

[51] In these circumstances, the learned trial judge, having found that there was no evidence to prove that monies were expended by the Respondents on the supervision of construction, ought not to have made any award on this claim. There is no issue here about the quantum of the award made by the trial judge so as to invite consideration of whether the judge acted upon some wrong principle of law or whether the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damages to which the Respondents are entitled. Instead, the issue is whether an award ought in the first place to have been made. The trial judge determined that there was no evidence to prove that there was any loss suffered by the Respondents for the cost of supervision of the reinstatement of the villa and she ought therefore to have rejected any claim in that regard.

[52] The award of US$85,000.00 made by the trial judge for all of the losses suffered by the Respondents in relation to the reinstatement and refurbishment of Villa 21 is therefore varied to the extent that the sum of US$2,000.00 is deducted therefrom, leaving a balance of US$83,000.00.

[53] This then exhausts the substantive issues raised on behalf of the Appellants in their notice of appeal and in the written and oral submissions made on their behalf. In the **result, the Appellant's appeal is allowed to the extent that**: (1) **the trial judge's order** declaring that the directors of the Corporation acted in breach of the statute in applying part of the insurance proceeds towards the liquidation of debts owed by the Corporation and not for reconstructing or reinstating the damaged Villa 21 is set aside; and (2) the **trial judge's order giving judgment in favour of the Respondents agains**t the Appellants and, in so doing, awarding damages to the Respondents in the sum of US$85,000.00, together with interest at the rate of 6% from the date of judgment, is set aside and substituted with an order awarding damages of US$83,000.00, together with interest at the rate of 5% per annum from the date of judgment, to be paid by the Corporation to

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the Respondents. The Appellants' appeal against the trial judge's ruling that the Respondents' claim is not statute barred is however dismissed.

[54] In their counter notice of appeal and in their submissions on appeal, the Respondents challenged the trial judge's finding that Villa 21 was not deemed to be destroyed within the meaning of section 14(2)(c) of the Act. The thrust of the Respondents' submissions on this issue is that on a preponderance of the evidence before the court, the villa was destroyed within the meaning of the Act and that the trial judge ought to have so found.

[55] Of course, in making this submission the Respondents are asking this Court to overturn a factual finding made by the trial judge that there was no evidence before the court on which it could properly conclude that Villa 21 was destroyed within the meaning of the Act as a result of the damage inflicted by Hurricane Luis. The trial judge heard the evidence of the witnesses in the case, had the opportunity to observe their demeanour and to make assessments on their credibility; she had as well several documents before her touching on the condition of Villa 21 after the passage of the hurricane and the removal of its roof; and, against that background, she made the factual finding that she did. Having regard to the (by now) trite principles on the circumstances in which an appellate court will overturn factual findings made by a trial judge, I find no basis to interfere with the factual findings of the trial judge on this issue.

[56] I also find no basis to interfere with the judge's finding on the law on this issue, in terms of her interpretation and analysis of the legislative intent in the enactment of section 14 of the Act and her conclusion in consequence that there was no basis on which she should determine that it was just and equitable that Villa 21 be deemed to have been destroyed, whether at the time of the trial of the case or at any period following the passage of Hurricane Luis and the removal of the roof of the villa.

[57] In their counter notice of appeal and in their submissions on appeal, the Respondents also challenged the trial judge's finding that Trinity Investment's obligation to pay the maintenance fees, late fees and assessments and interest should not have been suspended while Villa 21 was destroyed. The thrust of the Respondents' submissions

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on this issue was that, whilst they acknowledge that a condominium corporation has the power to impose assessments, the assessments must be for a lawful purpose and that, on the evidence which was before the court, the assessment of US$18,000.00 imposed **by the Corporation was an unlawful exercise of the Corporation'**s powers and was invalid.

[58] The evidence which learned counsel for the Respondents referred to is evidence that the Corporation unlawfully applied the insurance proceeds to purposes which were not sanctioned by law; that the assessment was intended to make up the shortfall in income arising from the unlawful application of the insurance proceeds; and that at the date of the assessment, the Corporation had not presented any audited accounts so as to justify the need for the assessment.

[59] On this issue, the Appellants contend that section 5(2) of the Act clearly gives to the Corporation the power to determine the amounts to be raised for the carrying out of its functions under the Act and to levy contributions on the homeowners in proportion to the unit size of their condominium lots. They contend further that the trial judge found as a fact that the homeowners, by an overwhelming majority, passed a resolution approving an assessment, which assessment was made in accordance with the Act and, they submit, the Act gives no power to any homeowner to withhold payment of assessments or levies for any reason whatsoever.

[60] The ruling by the trial judge on this issue, that the Corporation is empowered to make assessments and levy contributions on the proprietors in accordance with section 5 of the Act, is beyond challenge, as is her ruling that Trinity Investment is obligated to pay the amounts levied. At paragraph 106 of her judgment, the learned trial judge specifically reiterated, rightly so in my view, that homeowners cannot lawfully refuse to pay fees that are levied against their property on the basis of any perceived grievance they may have. She further reiterated the position advanced by the judge in the Territorial Court of the Virgin Islands in the case of Towers Condominium Association v Lawrence[13], that alleged breaches of duty by the Association – such as those alleged

[13] 32 V.I. 185, 188 (V.I. Terr. Ct. 1995); 1995 VIR 185.

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by Trinity Investment in this case – did not justify the unit holders withholding of the common charges payable by them.

[61] The trial judge did not err therefore in declining to decide that Trinity Investment's obligation to pay the maintenance fees, late fees and assessments and interest had been suspended, and the appeal against her ruling on this issue is accordingly dismissed.

[62] The remaining issue for consideration is the Respondents' challenge of the trial judge's order that Trinity Investment is to pay damages to the Corporation in the sum of US$170,163.06 together with interest at the rate of 6% per annum from the date of judgment. The Respondents' ground of appeal against this order is that the learned trial judge erred in finding that the Corporation was entitled to damages from Trinity Investment in the sum of US$170,163.06 and that in making this determination the trial judge failed to consider the lack of particularity in the evidence supporting the Corporation's claim.

[63] The first difficulty I have with the figure of US$170,163.06 is that it is a very specific figure, down to the second decimal point, but I have absolutely no idea, after several reads of the judgment, as to how the figure of US$170,163.06 was arrived at. I have not seen the figure explained anywhere in the body of the judgment, the statements of case, witness statements or notes of evidence in the court below, nor does it appear to be the aggregate of any amounts claimed or otherwise addressed in the course of the trial or the judgment resulting from it.

[64] It is worthy of note that none of the parties to the appeal has taken any issue with the mathematical derivation of the figure itself, but only with its legal justification. This does not, however, relieve this Court from the obligation of determining whether the trial judge erred in making an award of damages to the Appellants on the facts and circumstances of this case and/or whether she erred in her determination of the quantum of the award.

[65] In the submissions made to this Court on behalf of Trinity Investment, learned counsel, Mr Kentish, submitted that the assessment of US$18,000.00 (which was in fact

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US$18,840.00) was unlawful and invalid. He also submitted that the claims for interest (presumably the sum of US$48,527.74 for late interest and/or the interest rate claimed of 18% per annum) and penalties (presumably the sum of US$3,500.00 for late payment) were usurious and unlawful.

[66] It is not in dispute that the Corporation had the legal right, by virtue of section 5 of the Act, to levy contributions on the homeowners. It is also beyond dispute that the Corporation had the legal right, consonant with section 1(b) of the First Schedule to the Act, to recoup amounts due for rates, taxes, charges, outgoings and assessments payable in respect of a condominium lot. The Corporation's right to impose penalties on the homeowners, by way of late penalty fees and late interest, is however disputed by the Respondents.

[67] Section 5 of the Act, from which the Corporation derives its power to levy contributions on the homeowners, does not give any power to the Corporation to impose any kind of penalties on the homeowners, whether by way of late penalty fees or late interest. Section 1(b) of the First Schedule does not give any such power either. The power specifically given to the Corporation under section 5 of the Act to address non-payment by proprietors of contributions levied by the Corporation is to recover the amounts levied 'by an action for debt in any court of competent jurisdiction'. Although an action for debt of an amount due by one party to another could and would normally include a claim for interest on the debt from the due date of the debt to the date of judgment, the imposition of penalties and special rates of interest could only be justified if authorized by any applicable legislation or by agreement between the party owing and the party claiming. As indicated, the applicable legislation does not authorize the imposition of any penalties or special rates of interest in respect of any debts due to the Corporation by the homeowners, and a resolution of the Corporation or its members, to which the Respondents never consented, could not constitute an agreement between the Corporation and the Respondents for the imposition of penalties and special interest rates on outstanding amounts due by the Respondents to the Corporation. There is no justification therefore for the claim by the Corporation in its statement of claim for "late

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penalty" of US$3,500.00 and "late interest" of US$48,527.74, or any basis for an award to the Corporation in respect of this claim.

[68] The trial judge made a factual determination that the Corporation had properly levied against the Respondents (in accordance with its powers under section 5(2)(d) of the Act, and consonant with the provisions of section 1(d) of the First Schedule) the amounts claimed in its statement of claim by way of maintenance charges, assessments, property tax, insurance and electricity, together totalling US$49,853.53. In its statement of claim, the Corporation had conceded that a payment or payments totalling US$3,529.94 had been made by the Respondents towards the debt due, but that there was a balance previously due of $1,091.39, resulting in a net reduction of $2,438.55 from the debt due by the Respondents to the Corporation. The learned judge was therefore entitled to make an award to the Corporation, as a debt due by the Respondent to the Corporation, of the aggregate of these amounts totalling US$47,414.98. Added to this debt of US$47,414.98 would be interest at the normal court rate in Antigua and Barbuda of 5% per annum from the date the debt became due to the date of the judgment, there being no justification provided for the interest rate claimed of 1.5% per month.[14] As per the Corporation's statement of claim, the date by which the amounts were due and from which interest would run is 'from the 1st day of June 2001', whilst the judgment in the court below was dated 29th February 2008. This would yield a total interest entitlement of US$16,002.55 (5% interest per annum for 6 years and 9 months on US$47,414.98) and a total award therefore of US$63,417.53.

[69] This is the extent of the award which the trial judge was entitled to make to the Corporation as a debt due to them by the Respondents and she therefore erred in making an award of damages to the Corporation in the sum of US$170,163.06. The Corporation, in any event, did not claim damages, but claimed a debt which it said was due to it. There was no basis therefore, as a matter of law, for making an award of damages in favour of the Corporation

[14] See section 27 of the Eastern Caribbean Supreme Court Act, Cap. 143 Revised Laws of Antigua and Barbuda 1992 and section 7 of the Judgments Act, Cap. 227 Revised Laws of Antigua and Barbuda.

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[70] The appeal against the order of the trial judge awarding damages to the Corporation of US$170,163.06 is accordingly allowed; her award in that regard is set aside and substituted for an award of US$63,417.53 (or its EC equivalent of $172,140.87) as a debt due by the Respondents to the Corporation, together with interest to the date of judgment.

[71] As a matter of law, and in accordance with the Judgments Act,[15] all money judgments in Antigua and Barbuda carry interest at the rate of 5% per annum from the date of judgment to the date of payment and this need not be specified in a judgment or order.

[72] For the purpose of clarity, I will conclude by repeating the determinations which I have made on each of the six orders made by the trial judge in the court below which were appealed before this Court:

(1) On the order refusing to declare that Villa 21 was deemed to have been destroyed within the meaning of section 14(2)(c) of the Registration of Condominium Titles Act of Antigua and Barbuda, the Respondents' appeal is dismissed and the order of the trial judge is affirmed.

(2) On the order declining to declare that Trinity Investment's obligation to pay the maintenance fees, late fees and assessments and interest had been suspended, the Respondents' appeal is dismissed and the order of the trial judge is affirmed.

(3) On the order awarding damages to the Corporation against Trinity Investments in the sum of US$170,163.06, together with interest at the rate of 6% per annum from the date of judgment, the Respondents' appeal is allowed, the order of the trial judge is set aside and substituted for an award of $171,227.33 (being the EC equivalent of US$63,417.53).

(4) On the order declaring that the directors of the Corporation acted in breach of the statute in applying part of the insurance proceeds towards the liquidation of debts owed by the Corporation and not for constructing

[15] Cap. 227 Revised Laws of Antigua and Barbuda, 1992.

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or reinstating the damaged Villa 21, the Appellants' appeal is allowed and the order of the trial judge is set aside.

(5) On the order awarding damages to the Respondents against the Appellants in the sum of US$85,000.00, together with interest at the rate of 6% per annum from the date of judgment, the Appellants' appeal is allowed to the extent that the order of the trial judge is varied by awarding damages against the Corporation solely and in the sum of $224,100.00 (being the EC equivalent of US$83,000.00).

(6) On the order refusing to declare that the Respondents' claim against the Appellants and Trinity Investment's counterclaim against the Corporation are statute barred, the Appellants' appeal is dismissed and the order of the trial judge is affirmed.

[73] As to costs on this appeal, both parties prevailed on some aspects of the appeal and not on others, so I will maintain the posture taken by the trial judge in the court below and order that the parties are to bear their own costs here, as in the court below.

Mario Michel
Justice of Appeal

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Gertel Thom
Justice of Appeal

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