

THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(Civil)

SLUHCV2018/0263

BETWEEN:

THE LANDINGS PROPRIETORS UNIT PLAN NO. 2/2007

Claimant

and

TWO SEAS HOLDINGS LIMITED

Defendant

BEFORE: Her Ladyship, the Honourable Justice Kimberly Cenac-Phulgence
(A JUDGE IN CHAMBERS)

APPEARANCES: Mr. Peter Foster QC with Ms. Rene St. Rose and Mr. Peter
Marshall of Counsel for the Claimant
Mr. Mark Maragh of Counsel for the Defendant
Mr. Adrian Etienne holding a watching brief on behalf of the
Development Control Authority
Mr. Kurt Thomas holding a watching brief on behalf of the
Attorney General

2018: November 30;
2019: February 25.

DECISION

Background

[1] CENAC-PHULGENCE J: On 5th June 2018, the claimant, The Landings Proprietors Unit Plan No 2 of 2007, filed a claim against the defendant, Two Seas Holdings Limited in respect of land registered as Block No. 1257B Parcel No. 182 (**“the Disputed Property”**), seeking: an injunction requiring the defendant to remove

that part of its concrete and other structures built on the Disputed Property, possession of which the claimant is entitled to; damages for trespass; possession of the Disputed Property; and costs.

- [2] The defendant filed a defence thereto on 17th July 2018 in which it denied that the claimant is entitled to any proprietary or possessory right in or over the Disputed Property by either the Condominium Act of St. Lucia ¹ (**“the Act”**) or Condominium Declaration registered on 2nd July 2007 as Instrument No. D2/2007 (**“the Declaration”**) under which the claimant was established. The defendant further asserted that the developer of the condominium, Pigeon Island Development Company Limited (**“PID”**) is the proprietor of the Disputed Property. The claimant filed a reply to the defence on 2nd August 2018. Case management directions were given on 16th July 2018 and the trial of the claim was set for 27th September 2018.
- [3] On 21st September 2018 the defendant filed an application in the matter seeking an order that: PID be substituted as claimant or joined as a party to the proceedings either as claimant, co-claimant or defendant; that the case management timetable be varied so as to extend time for compliance with the relevant deadlines and that the trial dates herein be vacated. In so doing, the defendant challenged the standing of the body corporate to maintain the action. That application is the subject of this decision.
- [4] The essential **grounds of the defendant’s application are that** (a) PID and not the claimant is the registered title owner to the Disputed Property and is therefore the appropriate party to enforce ownership and possession rights in relation thereto; (b) the claimant in its capacity as the body corporate of The Landings Condominium Development (**“the Condominium Development”**) has no standing as it does not own or possess the common property and is not empowered by the Act to enforce property rights in relation thereto; (c) the claimant does not have

¹ Cap 5.05 of the Revised Laws of St. Lucia

standing in relation to the Disputed Property as that Property was removed from the Condominium Development and intended for public use by Cabinet Conclusions Nos. 176 of 2005 and 335 of 2014 and (d) by the **claimant's conduct**, (being the erection of a wall), it has treated the Disputed Property as excluded from property under its management, and has failed to exercise dominion over the Disputed Property for in excess of ten years.

Whether PID may be substituted as claimant, or added as claimant, co-claimant or defendant?

[5] The application can simply be disposed of on the basis of CPR 19.3 (4) which **provides that "a person may not be added or substituted as a claimant unless that person's written consent is filed with the court office."** No such consent has been filed by PID and therefore, the Court cannot consider substituting or adding PID as claimant in the substantive proceedings. The requirement for consent in CPR 19.3 (4) is mandatory.

[6] The defendant contends that the matter does not end there as the Court has the power to add PID as a defendant in the matter, in the event that the requisite consent has not been filed. The Court does not accept this submission. The applicant was unable to provide any authority for this, save that it is a matter of practice. There is no cause of action against PID to make it an appropriate defendant in the matter. Counsel for the claimant confirmed in oral submissions that no purpose could be served by PID being added as defendant, as PID is a unit owner and part of the claimant; the claimant has no action against PID.

Whether the body corporate has standing to maintain the action in trespass?

[7] Intertwined with the issue of substituting/adding PID as claimant is the issue of the standing of the body corporate to bring the action in trespass. This issue had initially **been raised on the defendant's** defence. The Court therefore gave directions for the issue of standing of the claimant to be dealt with along with the application filed on 21st September 2018.

Ownership of Disputed Property

- [8] The defendant claims that PID is the registered title owner of the Disputed Property and therefore the party with the better entitlement to maintain an action in trespass. This assertion is premised on **the defendant's claim that the Disputed Property does not form part of the common property of the Condominium Development as a result of the aforementioned Cabinet Conclusions and the claimant's conduct by** which it was removed.
- [10] PID is not the owner of the Disputed Property as the defendant claims, though **PID's** name may remain on the Title and even though the Disputed Property forms part of the remaining un-built phase of the Condominium Development. The Act is clear that on lodgement of a Declaration, the parts of the property not contained within the limits and boundaries of the units is common property and is held in undivided shares by all the unit owners per section 5(1)(c). The Declaration clearly establishes Block 1257B Parcel No. 182 as the property to which it relates. Therefore, title in the Disputed Property is vested in the unit owners by virtue of the Act and Declaration. The underpinning of the concept of condominium ownership is the common ownership of property.
- [11] PID remaining on the Land Register because the development of the condominium is incomplete cannot override or derogate from the provisions of the Act. Support for this is found in the case of Condominium Plan N. 86-S-36901 v Remail Construction (1981) Inc. relied upon by the defendant:

"I do not think the position of the owner-developer remains unchanged after he starts to sell the units. I think that at that point he has committed the character of the project to that of condominium under the Act and declaration. I think he has also placed himself in a fiduciary relationship to the unit purchasers not only with respect to their units but also with respect to the interests appurtenant thereto. He therefore holds the property in trust for the unit purchasers present and prospective and for the condominium corporation which will come into being upon registration of the declaration. I believe he is under a duty to protect the interest of all unit owners present and prospective and cannot put his own interests in conflict with theirs even although he himself

continues to be an owner as long as any units remain unsold.”²
(emphasis added)

- [12] PID therefore has no better right to title or ownership in or possession of the Disputed Property than any of the other unit owners with whom it owns the Disputed Property jointly.
- [13] For the same reasons, the Cabinet Conclusions cannot operate to remove the Disputed Property from the Condominium Declaration; to terminate ownership of the Disputed Property by the unit owners; or transfer the Disputed Property to some other party. Cabinet Conclusions do not have the force of law and cannot divest a person of property rights. Section 7(2) says that a share in the common property (of which the Disputed Property is part) shall not be disposed of except as appurtenant to the unit to which it relates. Section 5(2) of the Act is clear that, subject to the Act, each unit together with the undivided share in the common property constitutes immovable property and may only be dealt with in the same form and manner as land.
- [14] The Cabinet Conclusions relating to the Disputed Property merely operated to declare a public right of way/access/use over the land, which does not affect ownership. It merely renders the portion of land subject to a right of way. It is even doubted that a Cabinet Conclusion can in any event declare a right without any enabling provision conferring such power to grant a right of way. Interestingly, there is no right of way noted on the Land Register for either the Disputed Property or the **defendant’s property**. Erection of a wall by the body corporate cannot be said, necessarily, to be conduct excluding the Disputed Property from the property belonging to the Condominium Development. This is especially so in the context of the use of that portion as a ‘public right of way’. It is more likely that the erection of the wall was to exclude the public from the rest of the Condominium **Development’s property**.

² Condominium Plan N. 86-S-36901 v Remai Construction (1981) Inc. (1991), 84 DLR (4h) 6 (Sask. C.A.).

Body Corporate Standing

- [15] In response to the application filed by the defendant, the claimant filed an affidavit of Anne Copeland, the Chairman of the Board of the claimant on 28th November 2018. In that affidavit, Ms. Copeland avers that the claimant was duly authorised by the unit owners at an Extraordinary General Meeting held on 13th April 2018 to undertake this legal action. The resolution which is said to have been passed at an Extraordinary General Meeting and exhibited to the affidavit of Ms. Copeland is in the following terms:

“The Board of the Landings Body Corporate is granted the power to initiate such court proceedings as necessary in accordance with local legal advice for and on behalf of the Landings Body Corporate and its Unit Owners and or any resort legal entity against the relevant party to preserve the Landings Body Corporate unit owners property and other interests that will be adversely affected by the Sandals plan and construction bounded with the Landings Resort on the grounds that the said plan and construction is not in accordance with Saint Lucian law and is detrimental to the Landings Body Corporate and the Unit Owners and the Landings Resort.”

- [16] This resolution, it would seem, settles the issue of standing of the Landings Body Corporate to bring the claim as filed, as the body corporate would have been authorised by the unit owners to bring this claim. However, if I am wrong in this regard, I will now consider the submissions in full as it relates to standing.

- [17] In relation to standing, the defendant says that even if the Disputed Property is considered common property, neither the Act nor the Declaration gives the claimant any proprietary or possessory right in the Disputed Property nor charges it with responsibility over the Disputed Property. In support the defendant cites the case of Remail Construction as authority that:

“upon registration of the plan, the condominium and a condominium corporation, which consists collectively of the new owners, come into legal existence. The Corporation’s primary function is enforcement of the by-laws of the condominium corporation and the control, management, and administration of the common property. It does not become the owner of the common property.”

[18] The defendant further highlights the reference by the claimant in its pleadings to the Disputed Property as the **'Claimant's Property'**. However, despite this reference, on a reading of the pleadings, the claimant does not at any time claim ownership of the Disputed Property. Rather the claimant claims possession thereof by virtue of the Act and Declaration which give it responsibility for the control, management and administration of the Disputed Property and in its representative capacity of the unit owners of which it is comprised.

Composition of the Body Corporate and Capacity to Sue

[19] The Act in section 13(1) provides that "the proprietor of all the units described in a Declaration shall, upon lodgement of the Declaration for recording under section 4(2) be established as a body corporate" and in subsection (2) that "the body corporate shall have perpetual succession and a common seal and be capable of suing and being sued in its name".

[20] Therefore, it is all the unit owners who comprise the body corporate and the body corporate has the capacity to sue in its name. The power granted by this section to the body corporate to sue in its own name is wide, having no restriction or condition attached thereto. That power is in no way circumscribed by section 14. Section 13 does not say that it is subject to the provisions of section 14.

Ownership of Common Property

[21] Section 5(1)(c) of the Act provides that one of the effects of lodgement of the declaration is that the parts of the property not contained within the limits and boundaries of the units is considered to be common property for the purposes of this Act and shall be held in undivided shares by all the unit owners in accordance with section 7(1).

Definition of Common Property

[22] **"Common Property" is accordingly defined in section 2** of the Act as so much of a property contained in the declaration relating to the property, as is not contained

within the boundaries of any unit. “Property” is defined as land held in absolute ownership, ... -

- (a) to which a declaration relates; and
- (b) upon which or upon part of which there is erected or is in the course of erection either a building designed for internal subdivision as a multi-unit building, or several buildings, together with all other structures, installations, fixtures, servitudes, rights and appurtenances belonging to or enjoyed with such land and building or buildings.’

Body Corporate Powers in relation to Common Property

- [23] Section 14 of the Act gives the body corporate extensive powers in relation to the common property. Section 14(1)(a) provides that the body corporate shall operate the property for the benefit of all unit owners and be responsible for the enforcement of the bye-laws. Section 2 defines ‘operation’ in relation to a property as the control, management and administration thereof including the maintenance, repair, replacement and improvement of the common property.
- [24] Section 14 further places specific obligations on the body corporate in its operation of the common property for the benefit of the unit owners. The other subsections of section 14(1) require the body corporate to maintain and keep the common property in a state of good and serviceable repair³; to insure and keep insured the buildings to the full replacement value thereof against fire, hurricane and seaways, for which the body corporate is deemed to have an insurable interest⁴; insure against any other risks the unit owners may determine⁵; and to comply with notices or orders of public authorities requiring repairs or work to the property or the building.⁶

³ The Condominium Act, section 14(1)(b).

⁴ The Condominium Act, section 14(1)(c)

⁵ The Condominium Act, section 14(1)(d)

⁶ The Condominium Act, section 14(1)(e)

[25] Section 14(2) provides that the body corporate may, among other functions, establish funds for administrative expenses sufficient in the opinion of the body corporate for operation of the property, for the payment of insurance premiums, for the establishment of reserves for capital improvements or renewals of common property and for the discharge of any other obligations of the body corporate⁷; determine the amounts of money to be raised for these purposes⁸; and raise the amounts of money so determined by levying contributions on the unit owners in **proportion to the unit entitlement of their respective units.**⁹

[26] Apart from the specific powers granted by the Act to the body corporate over the common property, section 14(1)(f) requires the body corporate to carry out the directions of the unit owners expressed by resolution or otherwise as may be prescribed by the Declaration or the bye-laws; and subsection (g) requires it to carry out any other duties prescribed by the Declaration or the bye-laws. Section 14(2)(g) provides that the body corporate may exercise any other powers conferred on the body corporate by the declaration or the bye-laws. By these subsections, the body corporate is required and is given the power to carry out the will and direction of the unit owners.

[27] It is only reasonable, in view of the extent of the obligation of control and management of the common property which the Act places on the body corporate, that it would be given the power to bring an action to protect the common property from acts of trespass, in light of the unrestricted capacity to sue in section 13(2).

[28] Section 23 of the Act is notable in that it provides that an action “shall be maintainable by the body corporate acting on behalf of the unit owners”¹⁰ to enforce compliance with **“any** bye-laws in force relating to the order, conduct and

⁷ The Condominium Act, section 14(2)(a)

⁸ The Condominium Act, section 14(2)(b)

⁹ The Condominium Act, section 14(2)(c)

¹⁰ The Condominium Act, section 23(3)

proper use of the property”¹¹ and with “the covenants, conditions and restrictions set out in the relevant Declaration, bye-laws, or any deed of title relating to the unit.”¹²

- [29] It is also remarkable that section 5(3) of the Act provides that “when a declaration is recorded, it shall be binding on all owners of units in the building to which it relates and shall constitute constructive notice of its provisions to subsequent unit owners and all other persons.” One of the requirements of a Declaration is that it contains **“a description of the property sufficient to identify it and its location precisely, including a survey plan thereof prepared and certified by a licensed surveyor within the meaning of the Land Surveyors Act.”**
- [30] These sections, considered as a whole implicitly give the body corporate the power to bring an action on behalf of the unit owners to protect the common property from damage or injury through its power to enforce compliance with the Declaration, which establishes the particular property as a condominium, and is binding upon the unit owners and all others, and of which all others are deemed to have notice.
- [31] In relation to disposal of common property, section 7(2) says that a share in the common property shall not be disposed of except as appurtenant to the unit to which it relates and in subsection (3) no unit owner or other person shall be entitled to bring any action for partition or the division of any part of or interest in the common property save in the case provided by section [33]. Section 33 grants the body corporate the power to apply to the Court for removal of the property from the Act and partition of the property. Section 33(1) provides that the application of the Act to the property may be terminated by an order of the Court on the application of any interested party where the conditions therein have been

¹¹ The Condominium Act, section 23(1)

¹² The Condominium Act, section 23(2)

satisfied. Section 33(2) provides that the body corporate shall be deemed to be an interested party.

[32] It is clear that the Act does not contemplate disposal or removal of any part of the common property except as appurtenant to the units or on termination of the condominium, application for which the body corporate is entitled to maintain.

[33] Looking at the entire scheme of the Condominium Act, the intention appears to be that the body corporate, comprised of all the unit owners, has the capacity on behalf of all the unit owners, to control, manage, and administer the common property to the full extent, including by bringing an action against third parties to preserve the common property and protect it from damage or injury.

The Declaration

[34] The Declaration is in similar terms to the Act. I highlight the following provisions of the Declaration which in my opinion support a conclusion that the body corporate has the capacity to bring such an action.

[35] **Section 11 of the Declaration, titled “Owners Membership in the Body Corporate”,** states that “the owners for the time being of every unit in the Resort to which this Declaration relates shall ipso facto be a member of the Body Corporate ... which shall be charged with the operation of the Resort by virtue of section 14 of the Act.”

[36] **The Declaration defines the body corporate as “the body made up of each unit owner which oversees, through the Board of Directors, “the Manager” who oversees the operations and management of the Resort”. The Resort is defined as “the immovable property described in the First Schedule hereto together with the buildings and improvements now or hereafter to be made and located thereon and including the rights attached thereto.”** The First Schedule describes the Disputed Property.

- [37] Specifically, section 13 requires the body corporate to maintain, repair, and replace at the expense of the Body **Corporate all the Common Areas**".
- [38] **The Declaration defines the common areas as "all those areas not defined as** Units which make up the remainder of the Resort more specifically described in **clause 6 of the Declaration". Clause 6 says "the Common Areas** include all lands outside the exterior surface of the exterior walls of each building extending to the extent of the development property lines. Common Areas also include but are not limited to all roads, pedestrian pathways, security walls, soft and hard landscaped areas, all walkways, roadways, parking areas, tennis courts, and the entire harbour including the harbour seabed. The Common Area further describes all improvements and facilities of the Resort other than the Units as the same are hereinbefore defined and including easements through Units for conduits, pipes, ducts, plumbing, wiring, and other facilities for the furnishing of utility service to the Units and Common Areas and easements of support in every Unit which contributes to the support of the improvements."
- [39] The Declaration also states that the body corporate is comprised of every unit owner and similarly charges the body corporate with the operation of the property, particularly common property.

Case Law

- [40] There does not appear to be any case law in the EC jurisdiction dealing with the specific issue of the standing of a condominium body corporate to bring such an action against an adjoining owner. However, the position taken is supported by decisions of courts in other jurisdictions, albeit, jurisdictions having legislation that vests ownership of the common property in the body corporate or stipulate the power of the body corporate to bring such action in respect of the common property. Nonetheless, these cases provide some learning on the nature of condominium ownership and the practicality of its treatment as such.

- [41] The Remai Construction case supports the position that the body corporate is entitled to bring a claim in respect of common property, not based on ownership in the common property but based upon a proper interpretation of the Act and the practical realities of condominium ownership. It is authority that where the common property of a condominium development is concerned, given that it is owned by the unit owners jointly as tenants in common, the more practical and sensible approach is that the body corporate maintain such an action.
- [42] This case concerned a dispute between the condominium corporation and the **developer over whether the caretaker's suite** was part of the common property belonging to the owners of the condominium or to the developer, who while the condominium corporation was under its exclusive control, caused the condominium corporation to purchase the suite and to pay the developer from the proceeds of two mortgages placed against the title to it. The first issue the Court considered was whether the condominium corporation had status to sue since it was not, under the terms of the Condominium Property Act, the owner of the common property of the condominium, and since section 16(3) of that Act gave the corporation the status to sue only in respect of damage or injury to the common property.
- [43] In answering the question of standing the court considered that “the judge [below] took too narrow a view of the common law and the provisions of the Act... the provisions of the Act must be interpreted in light of the realities of what actually happens in relationships between developers, purchasers and condominium **corporations.**”¹³
- [44] The Court noted that “**it is true that the judge left open the right of each unit owner** to sue the developer on his individual contract but such a procedure is not practical as it does not take account of the unique features of condominium

¹³ Remai Construction, page 5

development and ownership.”¹⁴ The Court **further noted that “there would be in this case as many as seventy-eight law suits instead of one in respect of the common property in which all unit owners have an interest”**.¹⁵

[45] The court held that

“it would be quite impractical for anyone but the corporation to sue in respect of common property of a condominium since all owners of units hold the common property as tenants in common. That is why section 16(3)(a) is in the Act. It must be interpreted with that purpose in mind. And that compels the conclusion that the legislators intended the subsection to authorize action by the corporation in the circumstances such as exist in this case, notwithstanding that the corporation was not the owner of the common property.”¹⁶

The court found further support for its position in section 14(a)(i) of the Interpretation Act of that jurisdiction, which **it said “in clear unequivocal language confers on all statutory corporations the unfettered power to sue and be sued.”**¹⁷

[46] The Condominium Act of Saint Lucia gives the body corporate the capacity to sue without limiting it to damage or injury to the common property. Likewise, section 19(1)(a)(i) of the Interpretation Act of Saint Lucia, contains a provision similar in all material respects to section 14(a)(i).

[47] Additionally, CPR 8.5(2)(a) provides that where a claimant claims a remedy to which some other person is jointly entitled, all persons jointly entitled to the remedy must be parties to the proceedings unless the court orders otherwise. This would mean that if PID is substituted as the claimant, each and every unit owner would also have to be added as claimants.

[48] The case of 2 Elizabeth Bay Road Pty Ltd. v The Owners - Strata Plan No 73943, concerned a specific section of the Strata Schemes Management Act 1996

¹⁴ Remai Construction, page 5

¹⁵ Remai Construction, page 5

¹⁶ Remai Construction, page 10

¹⁷ Remai Construction, page 10

(NSW) (“the SSM Act”) requiring legal action to be taken by the owners corporation to be approved by a resolution passed at a general meeting of the owners corporation. In this case, no approving resolution had been passed at a general meeting of the owners corporation when the proceedings were commenced in breach of section 80D of the SSM Act. Such a resolution was passed at an annual general meeting of the owners corporation after proceedings had been initiated. Justice of Appeal Barrett, having examined the nature of a strata scheme and the duties and obligations imposed on the owners corporation, was of the view that the initiation of particular proceedings by the executive committee, although performed without authority, is an act that was of its nature, within the powers of the corporation itself. The performance of the act is, however, capable of being ratified by a subsequent resolution passed at a general meeting **of the owners corporation.”**¹⁸

- [49] In *The Owners-Strata Plan No 43551 v Walter Construction Group Limited*, the circumstances were that not all unit owners had a right of action against the developer, some having purchased their units after the defects became manifest. The Court of Appeal held that the characterization of the relationship between the owners corporation and the unit owners for purposes of determining the **owners corporation’s standing to sue turns on an assessment of the whole statutory scheme**, including the powers and duties with respect to common property. The Court of Appeal said this despite section 18(1) of the *Strata Schemes (Freehold Development) Act 1973 (NSW) (“the Freehold Development Act”)*, which provides: **“upon registration of a strata plan any common property in that plan vests in the body corporate for the estate or interest evidenced by the folio of the Register comprising the land the subject of that plan but freed and discharged from any mortgage, charge, covenant charge, lease, writ or caveat affecting that land immediately before registration of that plan”** and section 227 of the SSM Act which provides: **“(1) This section applies to proceedings in relation to common property.**

¹⁸ 2 *Elizabeth Bay Road Pty Ltd. v The Owners - Strata Plan No 73943* [2014] NSWCA 409, paragraphs 52 and 59.

(2) If the owners of the lots in a strata scheme are jointly entitled to take proceedings against any person or are liable to have proceedings taken against **them jointly, the proceedings may be taken by or against the owners corporation.**" After assessing the whole statutory scheme, including the powers and duties with respect to common property, as to whether the body corporate could bring the action, the Court recognized that the body corporate could do so in a representative capacity for the lot owners. The Court further stated that that capacity was not limited by the restrictions of an agency relationship, but that the relationship between the body corporate and the owners extended to that of a trust relationship.¹⁹

[50] The court in Walter Construction Group cited *Carre v Owners Corporation - SP 53020*²⁰, where it was said: **"It is clear from this statutory scheme that an owners corporation is in no sense the beneficial owner of common property. Its ownership is always in a representative capacity identified by the Act as that of "agent", with the lot proprietors as the owners in equity of undivided interests as tenants in common, each identified as having a "beneficial interest".** The restrictions upon alienation and other dealings and the provisions with respect to repair, renewal and replacement proceed on the assumption that **common property exists for the benefit of the lot proprietors as a general body...**" In coming to this conclusion, the Court said: **"It is also relevant to look at the way in which an owners corporation is structured. Its members are the "owners" from time to time of the lots in the strata scheme... Having regard to the definition of "owner", the persons who are the members, in the case of a freehold scheme such as this, are the registered proprietors of the lots... Under clause 18 of Schedule 2, voting at general meetings of an owners corporation is on the basis that, in general, each person voting has one vote for each lot in respect of which the person is entitled to vote; but if a poll is demanded or the legislation requires a special resolution, the**

¹⁹ *The Owners-Strata Plan No 43551 v Walter Construction Group Limited* [2004] NSWCA 429.

²⁰ *Carre v Owners Corporation - SP 53020* [2003] NSWSC 397, paragraphs 29-30

voting power of a person entitled to vote in respect of a particular lot is the unit **entitlement of that lot.**”

- [51] The case of Condominium Plan No. 0020701 v. Investplan Properties Inc.²¹ concerned action brought by a condominium corporation to sue in respect of construction deficiencies and to recover the cost of remedying and repairing same. Section 25(3)(a) of the Condominium Act of Alberta **states that “without limiting the powers of the corporation under this or any other Act, a corporation may sue for and in respect of any damage or injury to the common property caused by any person, whether an owner or not”**. The court noted that the powers of the Corporation and its relationship with unit owners are governed by the Condominium Act. Under section 25(2), a condominium corporation consists of all those persons who are the owners of units in the parcels to which the condominium plan applies or who are entitled to the parcel when the condominium arrangement is terminated pursuant to legislation; a condominium corporation is the statutory manager of the common property, which belongs to the individual owners; the Condominium Act creates a statutory regime to regulate the unique property law issues associated with condominiums; it allows private ownership of individual units and shared ownership of common property; common property is owned by the unit holders as tenants in common and is managed by a condominium corporation; the condominium corporation is the body authorized to act on behalf of a group of individuals in relation to certain matters. On the basis of section 25(3)(a) and the scheme of the Act, the Court concluded that the condominium corporation had a well-recognized right to sue to recover monies it expends to correct deficiencies and defects in the common property. The Corporation, as statutory manager of the common property of The Residence under the Condominium Act, may advance such collective claims without a class action.

²¹ Condominium Plan No. 0020701 v. Investplan Properties Inc., 2006 ABQB 224, paragraphs 5, 26-27

[52] These cases all demonstrate the way in which other jurisdictions have dealt with the practical realities of condominium ownership, that is by vesting the common property in the body corporate or expressly giving the capacity to sue in respect of the common property, in either case achieving the same effect – that the body corporate has the capacity to protect the common property from damage or injury on behalf of the unit owners who comprise the body corporate and are the joint owners of the common property. It is worth noting that despite legislative provisions to this effect, the Court in the cases cited, embarked upon an examination of the entire scheme of the legislation, the peculiar nature and practical reality of condominium ownership, the nature and extent of the powers granted to and duties imposed on the body corporate and the apparent intention arising therefrom. Where the Saint Lucian Act grants the body corporate the wide power to sue in its own name, the learning from other jurisdictions suggests that Act should not be interpreted restrictively but purposively.

[53] The defendant raises several other arguments as to why PID is the party with the better right to bring the claim. One is that the process for compulsory acquisition of the Disputed Property has been initiated having reached as far as second publication. The other is that the claimant claims in its pleadings to be operating the Condominium Development as a hotel, which it is not authorized by the Act, the Declaration or its By-Laws to do and which is therefore ultra vires. In relation to these arguments, the process for acquisition has not been completed. There is therefore no acquisition on the facts before the Court. The fact of operating a hotel ultra vires the Act, Declaration or By-Laws cannot affect the standing of the body corporate to bring the claim though it may affect the quantum of damages to which it may be entitled. The Court therefore did not attach any weight to these submissions.

Conclusion

[54] The Court is of the view, having examined the nature of condominium ownership, what is intended thereby, and the entire scheme of the Act; and having considered

the learning from other jurisdictions in relation thereto, that the body corporate is entitled to maintain an action in trespass in respect of the common property.

Order

[55] Based on the foregoing discussion and for the reasons above, I make the following order:

- (1) The application to join Pigeon Island Development Company Limited (PID) as a party whether as a claimant, co-claimant or defendant is refused.
- (2) The claimant has locus standi to maintain the action in trespass against the defendant.
- (3) Costs on the application shall be in the cause.
- (4) The matter is adjourned for further case management to 7th March 2019 at 9:30 a.m. The location of the hearing is to be notified to the parties.

Kimberly Cenac-Phulgence
High Court Judge

By the Court

Registrar