

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **CIVIL DIVISION**

3 **CAUSE NO G413 of 2013**

4 **BETWEEN**

5
6 **CARL CLAPPISON AND SEA GRAPE ESCAPE LIMITED**

7 **PLAINTIFFS**

8 **AND**

9 **(1) THE PROPRIETORS, STRATA PLAN No.381**

10 **(2) THOMPSON RESORTS LIMITED**

11 **(3) CASTAWAYS' TIMESHARE LIMITED**

12 **DEFENDANTS**
13
14
15

16 **IN OPEN COURT**

17
18 **Appearances:**

Mr. James Kennedy of Samson & McGrath for the Plaintiffs.

19 Mr. Matthew Dors of Ritch & Connolly for the First Defendant.

20 Mr. Ian Huskisson and Ms. Charmaine Richter of Travers Thorp Alberga
21 for the Second Defendant.

22 Mr. Hector Robinson and Ms. Alexandra Coe of Mourant Ozannes for the
23 Third Defendant.
24

25 **Before:**

The Hon. Justice Ingrid Mangatal

26
27 **Heard:**

29 and 30 October 2015

28
29 **Draft Judgment**

30 **Circulated:**

6 May 2016

31
32 **Judgment**

33 **Delivered:**

17 May 2016
34
35



36 **HEADNOTE**
37

38 *Statutory Interpretation – Strata Titles Registration Law 1973, s. 15(2)(a) – Strata Titles Registration Law (2013*
39 *Revision). s.3(2A) and s.21(2)(a) - Amendment of By-laws by Developer whilst 100% owner of units in Strata Plan*
40 *according special rights to itself, affecting voting rights of other proprietors and composition of Executive*
41 *Committee - Whether ultra vires – Need to Construe Statutory Provisions in their Context - Court to have regard*
42 *to purpose both of Statute and particular provision*

3
4
5 **JUDGMENT**

6 1. The Plaintiff Carl Clappison ("Mr. Clappison") and his wife each own a 1/6th share of
7 Registration Section Colliers, Block 73A Parcels 39H45 and 39H46. These parcels of
8 land are situated within a strata development known as Castaways' Cove, in East End,
9 Grand Cayman. Mr. Beric Evans was, at the time of filing of the Originating Summons
10 one of the Plaintiffs in this matter, he having indicated that he was the registered owner
11 of a ½ share of Registration Section Colliers, Block 73A Parcels 39H29 and 39H30 along
12 with his wife. However, Mr. Evans transferred his interest in those parcels to Sea Grape
13 Escape Limited ("Seagrape") as of 5 May 2015. Seagrape owns one unit. At trial, the 2nd
14 Defendant applied to have the 2nd Plaintiff struck out. This prompted an application by
15 Seagrape to be substituted. I granted Seagrape's application, and ordered Seagrape
16 substituted for Beric Evans, with costs of the application, and any costs thrown away to
17 be the Defendants', to be paid by Beric Evans, to be taxed if not agreed.

18 2. The Originating Summons in this matter seeks the following relief and determination of
19 questions:

20 "1. That the Court appoints an[sic] BCQS Property Management as
21 administrator to act in place of the Executive Committee of the
22 Proprietors, Strata Plan No. 381 for an initial period of one year
from the date of making this Order.

23 2 A declaration that Bye-law 2 is ultra vires the powers and duties of
24 the Proprietors, Strata Plan No. 381 as being inconsistent with the
25 Strata Titles Registration Law and that it be removed from the bye-
26 laws.

27 3 Such further and other relief that the Court deems fit.

28 4 An order that the costs of and incidental to this application are paid
29 by the Proprietor, Strata Plan No. 381."
30
31

32 3. Affidavit evidence was filed on behalf of the Plaintiff, and the 2nd and 3rd Defendant. On
33 the 21 April 2015 I heard a contested application made by the Plaintiffs seeking to have
34 cross-examination at trial of the following persons on their respective affidavits:

35 (a) Carl Clappison;





- 1 (b) Kel Thompson;
2 (c) Joanne Connolly.
3

4 4. On the 4 May 2015, I granted the Plaintiff's application and handed down a written ruling
5 in which I indicated that whilst the relief sought and affidavit evidence demonstrate that
6 most of the matters requiring determination by the Court involve issues of law, there are
7 some questions which may require determinations of fact. These questions I referred to as
8 being :

- 9 a. Whether specific or manifold instances of inappropriate or excessive
10 billing of expenses to owners have occurred;
11 b. Whether substantial misconduct or mismanagement, or both, in the
12 affairs of the Corporation, has been demonstrated.
13

14 5. At trial, both Mr. Clappison and Mr. Thompson were cross-examined. At the end of the
15 day, Ms. Connolly was unable to give evidence on behalf of CTL, and thus her Affidavit
16 was withdrawn.
17

18 **DRAMATIS PERSONAE**
19

20 6. The Plaintiffs are the registered proprietors of shares in units H45, H46, H29 and H30 of
21 Strata Plan No. 381, also known as Castaways' Cove.
22

23 7. The first Defendant is a body corporate consisting of all the Strata Proprietors contained
24 in Strata Plan No. 381.
25

26 8. The second Defendant, Thompson Resorts Limited ("TRL") has involvement in this
27 matter in a number of capacities as follows:

- 28 (a) As the original owner of the land and developer of the Strata;
29 (b) As the legal or beneficial owner of at least 12 units at the Strata;
30 (c) It manages the Strata through the Strata Management Agreement, which was
31 entered into in December 2003;



- (d) It operates the Rental Pool Agreement with individual owners;
- (e) It owns and operates the Reef Resort.

9. The Third Defendant, Castaways' Timeshare Limited ("CTL") is a Cayman Islands incorporated limited liability company. It owns four units in the Strata Development No. 381.

10. In his first affidavit at paragraph 17 Mr. Clappison states that TRL or its nominee or assigns is still the owner of approximately 12 units in the Strata. Some units, he states, have been sold by TRL as timeshares by CTL, a company formed by TRL for this purpose.

11. Castaways' Cove is the name by which the Strata Plan No. 381 is commonly called or known.

12. The Reef Resort is a timeshare Resort adjacent to the Strata, owned and operated by TRL.

13. Kel Thompson is the Managing Director and/or directing mind of TRL and a member of the Executive Committee of the Strata from its formation, right up to the time of the hearing.

ISSUE - WHETHER BY-LAW 2 IS ULTRA VIRES THE POWERS AND DUTIES OF THE PROPRIETORS STRATA PLAN NO. 381 AS BEING INCONSISTENT WITH THE STRATA TITLES REGISTRATION LAW

14. I intend to deal with this issue first, as it is the main legal issue involved in this case. This question is a very important one, not only for the parties involved in this case. Indeed, it may hold significance for other developments in the Cayman Islands where the strata development is part of a resort. The evidence in this case reveals that it is common



practice in respect of such resorts to appoint a manager to manage the operations, as well as conferring enhanced rights on the developer of the resort.

I wish to thank Counsel for the extraordinary level of research and assistance, and the high quality legal analysis presented in the Skeleton Arguments. This is not a straightforward case. The issue surrounding By-Law 2 involves principles of statutory construction, and no decided case cited, local or otherwise, is directly on point. It is my view that the *ultra vires* issue involves the analysis of the Law as it existed at the time when the by-laws were amended, as well as the present state of the Law at the time of this application. On the other hand, the relief seeking to have an administrator appointed in place of the Executive Committee depends upon the Law in its present form at the time of application. Thus, *the Strata Titles Registration Law* ("*the STRL*") has been examined in its various revised and amended forms.

SOME RELEVANT BACKGROUND

16. Castaways' Cove was developed in phases adjacent to and forms part of a commonly managed beach side holiday resort with The Reef, situated in East End, Grand Cayman. The Reef was developed by TRL on Block 73A Parcel 80 and comprises 30 two-bedroom apartments which can be divided into 60 rooms.

17. TRL is the registered proprietor of the Reef, which is not a strata development. The Reef is owned and managed by TRL. TRL, by way of a membership plan, confers vacation residence rights to participants in a manner similar to a timeshare arrangement.

18. Castaways' Cove was developed, as a strata development after TRL developed the Reef. Castaways' Cove was developed on Block 73A Parcel 39. It is made up of 53 two bedroom condominiums, 39 of which may be divided and rented as two separate units. Pursuant to a Strata Management Agreement dated 12 December 2003, between Castaways' Cove and TRL, Castaways' Cove appointed TRL as the manager of the

development, for a term ending 2050, with a right of successive renewal for successive periods of five years each.

19. TRL manages a rental pool whereby owners of individual units in Castaways' Cove appoint TRL the exclusive agents for the rental of their units. A majority of the units within Castaways' Cove are members of the rental pool. The units within the rental pool are let for short term holiday rental and are managed together with the rooms at the Reef as one single resort to which guests are assigned interchangeably upon reservation.

20. Both Castaways' Cove and The Reef share a number of common facilities and amenities, including the beach and tennis court.

21. The combined Resort comprising The Reef and Castaways' Cove is now affiliated with the Wyndham International Resort chain through a franchise agreement. The agreement leaves continued management of the Resort to TRL but requires that the management be maintained to the Wyndham standard.

THE CASTAWAYS' COVE BY-LAWS

22. On 20 October 2003, when TRL owned 100% of the units' entitlements, a unanimous resolution was passed amending the by-laws contained in Schedule 1 and in Schedule 2 of *the STRL* to adopt the by-laws which at present govern the management and administration of Castaways' Cove. The amendments were as follows:

"Clause 2

Notwithstanding anything to the contrary in these by-laws, until the Developer is no longer the registered proprietor of one of the Strata Lots comprising the apartments or for the lifetime of the Resort, whichever first occurs, the following provisions have effect and will prevail:





1 (1) *Extraordinary general meetings of the Corporation may be called*
2 *only at the Developer's sole discretion:*

3 (2) *At any general meeting the Developer will on a poll be entitled to*
4 *such number of votes as is equal to all of the votes cast at the*
5 *meeting by persons other than the Developer plus two additional*
6 *votes;*

7 (3) *Annual General Meetings of the Corporation shall not transact*
8 *any special business but shall be restricted to the consideration of*
9 *the accounts alone; and*

10 (4) *The Executive Committee must consist of five (5) persons, three of*
11 *whom will be nominated by the Developer. If the Developer is the*
12 *registered Proprietor of at least one of the Strata Lots comprising*
13 *the apartments after December 31, 2010 then the Executive*
14 *Committee must consist of five(5) persons, two(2) of whom will be*
15 *nominated by the Developer."*

16
17 *"The Resort" is defined to mean "The Reef".*

18 *The "Lifetime of the Resort" is defined to mean "the fifty year period from 3 June 2000 through 2*
19 *June 2050 during which time the Membership Program will be operated at the Resort under the*
20 *management of the Developer".*

21 *"The Membership Program" is defined to mean "a program whereby members are guaranteed*
22 *the exclusive use of all recreational facilities and other amenities of the Resort".*

23
24 *Clause 3(13)*

25 *"3. The Corporation must-*

26 *(13) enter into a Management Agreement with Thompson Resorts Ltd for*
27 *the running and operating of the Development and for the enjoyment*
28 *of it by its members."*

29 *Clause 46(3)*

30 *46. The Corporation shall-*

31 *(3) consent to the Executive Committee entering into a management*
32 *agreement with Thompson Resorts Ltd. or other hotel management*
33 *company for the management of Castaways' Cove Condominium*



Development and the Apartments upon such terms as the Executive Committee shall in their absolute discretion deem appropriate."

3

4 THE LEGISLATIVE BACKGROUND

5 23. At the time of the unanimous resolution adopting the by-laws set out above, the Law in
6 effect was *the Strata Titles Registration Law, 1973* (" *the 1973 Law*"), as amended by
7 *the Strata Titles Registration (Amendment) Law, 1983* (*Law 1 of 1983*); as further
8 amended by *the Strata Titles Registration(Amendment) Law, 1994*.

9

10 24. There were subsequent amendments to the Law, notably *the Strata Titles Registration*
11 *(Amendment) Law, 2005*. *The 1973 Law* and the subsequent amendments were revised
12 and consolidated in *the Strata Titles Registration (Amendment) Law, 2012* and the *2005*
13 *Revision* and subsequent amendments were revised and consolidated in *the Strata Titles*
14 *Registration Law (2013 Revision)*.

15

16 25. Section 57(1) of *the Interpretation Law* states that the preamble to any Law may be
17 referred to for assistance in explaining the scope and object of the Law. The preamble to
18 *the 1973 Law*, and the Memorandum of Objects and Reasons provide as follows:

19

20

"MEMORANDUM OF OBJECTS AND REASONS

21

Neither the Registered Land Law, 1971 nor the conveyancing practice of
22 *the common law make provision for the subdivision of freehold land*
23 *horizontally. However, in many countries, special statutory provision is*
24 *made to solve this difficulty and, there being a strong demand for such*
25 *statutory provision in the Cayman Islands, it is sought to introduce this*
26 *Law".*

27

28

**"A LAW TO FACILITATE THE SUB-DIVISION OF LAND IN STRATA AND THE
29 DISPOSITION AND REGISTRATION OF STRATA TITLES AND FOR MATTERS
30 INCIDENTAL THERETO."**

31



26. At the time that the amendments to the by-laws was carried out, *the 1973 Law*, as amended, provided in section 2 a definition of a strata as being a reference to titles of ownership of not less than four self-contained units for residential or business purposes, business purposes including office accommodation, shops, and warehouses, but excluding any part of a hotel.

The units:

"(a) which are either:

(i) detached buildings or divisions or subdivisions of one or more buildings; or

(ii) divisions or subdivisions of a parcel (including any building, other than a hotel thereon); and

(b) which may be divided horizontally or vertically from, and may have a common roof and common foundations with one or more such units, and may share the use of service buildings and other facilities in common,

The units being located on a single parcel of land and under the management of a corporation established under this Law".

27. "Strata lot" was defined as meaning a horizontal or vertical subdivision of a parcel which is shown on a registered plan as a strata lot.

28. Part III, section 5 provided for the establishment of a corporation as follows:-

"Establishment of a corporation

5(1) *The proprietors of all the strata lots contained in any strata plan shall, upon registration of the strata plan become a body corporate (hereafter referred to as "a corporation") under the name "The proprietors, Strata Plan No. "(with the appropriate number of the strata plan inserted in the blank space).*

(2) *Every corporation shall have perpetual succession and a common seal and be capable of suing and being sued in its name.*

(3) *The provisions of any enactment providing for the incorporation, regulation and winding-up of companies shall not apply to corporations.*

1 29. Section 6 indicates some of the duties of the corporation, and these include maintaining
2 the common property, establishing a fund for administrative expenses and levying
3 contributions from the proprietors in proportion to the units entitlement of their respective
4 lots.

6 30. What was then Part V of the Law dealt with management and administration, and Section
7 15 of *the 1973 Law* made provision for by-laws, as follows:

9 "By-laws

10 15(1) *Subject to this Law, the control, management, administration use*
11 *and enjoyment of the strata lots and the common property*
12 *contained in every registered strata plan shall be regulated by bye-*
13 *laws.*

14 (2) *The by-laws shall include –*

- 15 (a) *the by-laws set forth in Schedule 1, which shall not be*
16 *amended or varied except by unanimous resolution;*
17 (b) *the by-laws set forth in Schedule 2, which may be*
18 *amended or varied by the corporation.*

19 (3) *Until by-laws are made by a corporation in that behalf the by-laws*
20 *set forth in the First Schedule and the Second Schedule shall as*
21 *and from the registration of a strata plan be in force for all*
22 *purposes in relation to the relevant parcel and the strata lot and*
23 *common property therein.*

24 (4) *No by-law shall operate to prohibit or restrict the devolution of*
25 *strata lots or any dealing therewith or to destroy or modify any*
26 *easement implied or created by this Law.*

27 (5) *No amendment or variation of any by-law shall have effect until*
28 *the relevant corporation has lodged with the Registrar a*
29 *notification thereof in such form as may be prescribed and until*
30
31



1 *the Registrar notifies the corporation that he has made reference*
2 *thereto on the relevant registered strata plan.*

3 (6) *Every corporation shall, on the application of a proprietor or any*
4 *person authorized by him, make available for inspection the by-*
5 *laws for the time being in force.*

6 (7) *By-laws for the time being in force shall bind every corporation*
7 *and the proprietors to the same extent as if such by-laws had*
8 *respectively been signed and sealed by such corporation and each*
9 *proprietor and contained covenants on the part of such*
10 *corporation with each proprietor and on the part of each*
11 *proprietor with every other proprietor and with such corporation*
12 *to observe and perform all the provisions of the by-laws."*



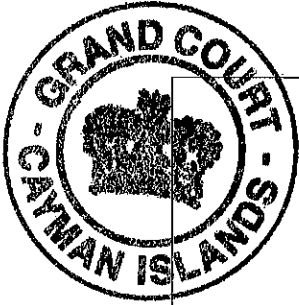
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14 **THE PLAINTIFFS' SUBMISSIONS**

15 31. In his comprehensive written Skeleton Argument, Mr. Kennedy provided a very useful
16 summary of the Plaintiffs' position on the *ultra vires* issue. He states that the by-laws as
17 amended are autonomic legislation with both a public law and a private law element. It is
18 argued that the power to amend the by-laws is required to be exercised in accordance
19 with the intent of the enabling legislation. Further, that the power to amend the by-laws
20 has also to be exercised in good faith and with regard to the interests of the owners as a
21 whole. Mr. Kennedy submits that the amendments fall foul of these requirements and
22 should be set aside.

23
24 32. Mr. Kennedy's Skeleton Argument usefully sets out in Table form a contrast of the
25 amended by-laws, with those set out in the Schedule to *the 1973 Law*. The Table is
26 reproduced as follows:
27



Subject	The Strata Titles Registration Law- By-laws in Schedule One	The Amended By-laws
Duration of By-Laws		Commencement Conditions Precedent 2. Notwithstanding anything to the contrary in these by-Laws, until the Developer is no longer the registered proprietor of one of the Strata Lots comprising the apartments or for the lifetime of the Resort, whichever first occurs, the following provisions have effect and will prevail:-
EGMs	7. Every corporation may, whenever it thinks fit, and shall, upon a requisition in writing made by proprietors entitled to twenty-five percent of the total unit entitlement of the strata lots, convene an extraordinary general meeting.	(1) Extraordinary general meetings of the Corporation may be called only at the Developer's discretion;
General Meetings	24. At any general meeting a resolution by the vote of the meeting shall be decided on a show of hands unless a poll is demanded by any proprietor present in person or by a proxy. Unless a poll is so demanded a declaration by the chairman that a resolution has,	(2) At any general meeting the Developer will on a poll be entitled to such number of votes as is equal to all of the votes cast at the meeting by persons other than the developer plus two additional votes.



	on a show of hands, been carried shall be conclusive evidence of the fact without proof of the number or proportion of votes recorded in favour of or against such resolution. A demand for a poll may be withdrawn. 25. A poll, if demanded, shall be taken in such manner as the chairman thinks fit, and the result of the poll shall be deemed to be the resolution of the meeting at which such poll was demanded.	
Special business	9. All business shall be deemed special that is transacted at an annual or extraordinary general meeting, with the exception of the consideration of accounts.	(3) Annual General Meetings of the Corporation shall not transact any special business but shall be restricted to the consideration of the accounts alone;
Executive Committee	14. The executive committee shall consist of not less than three nor more than nine proprietors and shall be elected at the first general meeting of the corporation and thereafter at each annual general meeting.	(4) The executive committee must consist of five (5) persons, three of whom will be nominated by the Developer. If the Developer is the registered proprietor of at least one of the Strata Lots comprising the apartments after December 31, 2010 then the executive committee must consist of five (5) persons,



		two(2) of whom will be nominated by the Developer.
--	--	--

1
2 33. Mr. Kennedy argues that the cumulative effect of these amendments is significant. At
3 paragraph 24 of his written Skeleton Argument, the effect of paragraph 2 of the by-laws
4 is summarized by Counsel as follows:

5 "...

6 Meetings of the Proprietors

7 (a) *The only business that can be conducted at an AGM is the*
8 *consideration of accounts.*

9 (b) *When considering the accounts (i.e. the resolution to approve the*
10 *accounts) the Developer can call a poll and will carry the motion by*
11 *virtue of 2(2). Therefore any objection to the accounts can be*
12 *overridden. This is particularly significant here as at around the same*
13 *time TRL amended the bye-laws (a time when TRL was still the sole*
14 *proprietor) it entrenched itself as the provider of Management*
15 *Services to the Strata for which it charges all owners. The charges are*
16 *therefore incapable of proper scrutiny or objection.*

17 (c) *If an owner wishes to propose any other resolutions or discuss any*
18 *other business this is deemed special business and requires an*
19 *extraordinary general meeting, but:*

20 (d) *The owners are precluded from calling an EGM by virtue of*
21 *paragraph 2(1) without the consent of the Developer in his sole*
22 *discretion.*

23 Day to Day running of the Strata

24 (a) *The Strata is run by Executive Committee elected at AGM.*

25 (b) *At present the executive committee must consist of five (5) persons.*
26 *Whilst only two(2) of them are to be nominated by the Developer*
27 *leaving a possible majority of non-Developer owners on the*
28 *Committee, the developer is entitled to invoke his enhanced voting*



rights under paragraph 2(2) to vote in a majority Committee comprising persons under his control (it has done this).”

4 **THE LEGAL STATUS OF BY-LAWS**

5
6 34. Mr. Kennedy’s argument continues, that the question of whether by-laws are legislative
7 or of a private contract law nature is relevant to the Court’s consideration of the
8 enforceability of the amended by-laws.

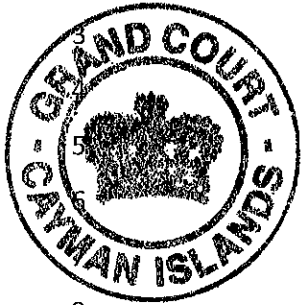
9
10 35. Reference was made to section 3 of *the Interpretation Law* where the definition of the
11 term “regulations” includes by-laws. Reference was also made to section 57(2) of *the*
12 *Interpretation Law*, which states that every Schedule to any Law shall be construed and
13 have effect as part of the Law. Further, sub-section 27(d) states that no regulation shall be
14 inconsistent with the provisions of any Law.

15
16 36. The term “autonomic legislation” was then brought into play, and reference was made to
17 the definition contained in *Stair Memorial Encyclopedia* as follows:

18
19 *“Many self-governing bodies corporate, standing outside the structure of*
20 *government, have the power, conferred upon them by Act or Parliament or*
21 *by royal charter, to lay down by-laws, regulations or the like. Norms*
22 *created by the exercise of such powers have been characterized as*
23 *‘autonomic’ or ‘autonomous’ legislation. Such norms often stand on the*
24 *borderline between legislation and contract.”*

25
26 37. Reference was made to the decision of the Judicial Committee of the Privy Council in
27 *Gatherer v Gomez (1992) 41 WIR 68*. Mr. Kennedy also referred to the New Zealand
28 case of *World Vision of New Zealand Trust Board v Seal [2004] 1 NZLR 673*.

29
30 38. It was Counsel’s further submission that the idea of a strata as a community democracy
31 has been adopted in the Cayman Islands, notably by Henderson J in his ruling in *Keim v*



1 *Proprietors Strata Corporation #275 Cause No. 95/2005*, unreported, where Henderson

2 J stated:

3 *"There can be no doubt that the underlying intent and philosophy of the*
4 *Law is that a strata corporation shall have a form of governance closely*
5 *analogous to that of a private corporation. The intent is that the units*
6 *holders will, by democratic process, elect those who govern the*
7 *corporation on their behalf."*

8
9 39. In *Owners No 3397 v Tate* [2007] NSWCA 207, the Australian Courts grappled with the
10 status of by-laws, i.e. whether they are to be considered delegated legislation, or
11 "statutory contract". McColl JA, sitting in the New South Wales Court of Appeal, at
12 paragraph [71] of the judgment, concluded that the following principles emerge on the
13 authorities:

- 14 1. By-laws are the "series of enactments" by which the proprietors in a
15 body corporate administer their affairs, they do not deal with
16 commercial rights, but the governance of the strata scheme;
- 17 2. By-laws have a public purpose which goes beyond their function of
18 facilitating the internal administration of a body corporate;
- 19 3. By-laws may be characterized as either delegated legislation or
20 statutory contracts;
- 21 4. Whichever be the appropriate characterization, exclusive by-laws
22 should be interpreted objectively by what they would convey to a
23 reasonable person;
- 24 5. In interpreting exclusive by-laws the Court should take into account
25 their constitutional function in the strata scheme regulating the rights
26 and liabilities of lot proprietors.
- 27 6. An exclusive-use by-law should be construed so that it is consistent
28 with its statutory context; a court may depart from such a construction
29 if departure from the statutory scheme is authorized by the governing
30 statute and the intention to do so appears plainly from the terms of the
31 by-law.



1 40. In respect of the argument as to whether the by-laws are delegated legislation or statutory
2 contracts, McColl JA concluded by saying at paragraph [72]:

3
4 *"the question of whether the by-laws constitute delegated legislation or a
statutory contract was not fully argued. As the foregoing discussion
reveals, the decision on their characterization may be a distinction
without a substantive difference from the interpretative perspective. It is
not appropriate to express a final view on these issues. It is sufficient to
say that on either approach the interpretation of Special By-law 21 had to
be approached on the basis which was consistent with the statutory
scheme and that caution had to be exercised in considering the
surrounding circumstances."*

10
11
12
13
14 41. In the House of Lord's decision in *Kruse v Johnson*[1898] 2 QB 91, see in particular,
15 pages 98-99, In respect of the by-laws made by public representative bodies, Lord
16 Russell stated:

17
18 *"If, for instance, they were found to be partial and unequal in their
19 operation as between different classes; if they were manifestly unjust; if
20 they disclosed bad faith; if they involved such oppressive or gratuitous
21 interference with the rights of those subject to them as could find no
22 justification in the minds of reasonable men, the Court might well say
23 "Parliament never intended to give authority to make such rules; they are
24 unreasonable and ultra vires."*

25
26 42. Mr. Kennedy submits that this formula amounts in essence to a test of reasonableness,
27 equivalent to the irrationality or Wednesbury principles applicable to judicial review, as
28 expounded in the well-known case of *Associated Provincial Picture Houses Ltd.v*
29 *Wednesbury Corporation* [1948] 1 KB 223.

1 43. It was further submitted that the delegated power to amend by-laws must not contradict,
2 be repugnant to, or inconsistent with its enabling legislation, including the original by-
3 laws. Thus, if it offends these principles then the delegated power is *ultra vires* and void.
4

5 44. Mr. Kennedy also had a suite of submissions aimed at the consideration of the by-laws as
6 contractual in nature, as opposed to having an administrative law element. He argued that
7 viewed in that way, the by-laws were also invalid.
8

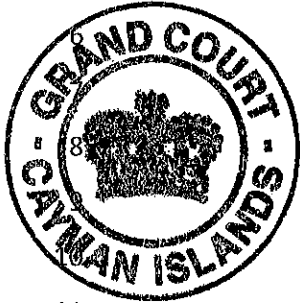
9 45. In that regard, the decision of the House of Lords in *British Equitable Insurance*
10 *Company v Bailey* [1906] A.C. 35, is useful. The case concerned the by-laws of an
11 insurance company. Lord Lindley, at page 42 stated:



13 "Of course, the power of altering by-laws, like other powers, must be
14 exercised bona fide, and having regard to the purposes for which they are
15 created, and to the rights of persons affected by them."

17 46. In *Citico Banking Corp NV v Pusser's Ltd* [2007] 2 BCLC 483, the Judicial Committee
18 of the Privy Council affirmed that the proper test in relation to the amendment of the
19 articles of association of a company is whether the alteration of the articles is passed in
20 good faith for the benefit of the company as a whole using the test of the reasonable man
21 coming to the same decision.
22

23 47. It is to be noted that sub-section 5(3) of *STRL (2013 Revision)*, which was also extant in
24 *the 1973 Law* provides that any enactment providing for the incorporation, regulation and
25 winding up of corporations shall not apply to corporations under *the STRL*. However, in
26 New South Wales, Australia, the courts have interpreted equivalent provisions as not
27 excluding the principles governing the manner in which shareholders have power to alter
28 the articles of association. In *Houghton v Immer* [1997] 44 NSWLR 46, a decision of the
29 Court of Appeal of New South Wales, it was held that the doctrine of fraud on a power
30 applied to bodies corporate formed under *the New South Wales Strata Act of 1973*.
31



1 48. At page 10 of the judgment, Handley JA indicated that compliance with the formal
2 requirements for the valid exercise of a power does not exclude the right to equitable
3 relief. Then, at page 11, the learned Judge of Appeal discussed the law as follows:
4

5 *"The power of a proprietor to vote at general meetings of the body*
corporate is not fiduciary and within limits it may be exercised by the
proprietor for his or her own benefit. Mr. McDougall also submitted that
the principles which restrain the exercise by shareholders of their power
to alter Articles of Association of limited liability companies are not
applicable because bodies corporate were not subject to the general
legislation affecting companies. See s. 54(2).
11

12 *This submission overlooks the fact that the doctrine of fraud on a power is*
13 *of general application, and was developed long before the earliest*
14 *legislation dealing with companies."*
15

16 49. Handley JA then went on to cite with approval Dixon J's explanation of the relevant
17 principles in *Peters' American Delicacy Company Ltd. v Heath & Ors* (1939) CLR 457,
18 and opined that these principles apply to bodies corporate formed under the *Strata Titles*
19 *Act* and to the powers of the proprietors exercisable at general meetings. Dixon J at page
20 511 of *Peters' American Delicacy* elucidated the issues as follows:
21

22 *"If no restraint were laid upon the power of altering articles of association,*
23 *it would be possible for a shareholder controlling the necessary voting*
24 *power so to mould the regulations of a company that its operations would*
25 *be conducted or its property used so that he would profit either in some*
26 *other capacity than that of memberor, if as member, in a special and*
27 *peculiar way inconsistent with conceptions of honesty, so widely held or*
28 *professed that departure from them is described, without further analysis,*
29 *as fraud...*

30 *The chief reason for denying an unlimited effect to widely express powers*
31 *such as that of altering a company's articles is the fear or knowledge that*



an apparently regular exercise of a power may in truth be but a means of securing some personal or particular gain, whether pecuniary or otherwise, which does not fairly arise out of the subjects dealt with by the power and is outside and even inconsistent with the contemplated objects of the power."

(My emphasis)

50. It is to be noted that the Plaintiffs also place reliance upon section 3 (2A) of *the STRL (2013 Revision)* in relation to the *ultra vires* argument. Indeed, Mr. Kennedy says that this sub-section is of critical importance. Although this section came into existence after the amendments to the by-laws, (it appeared for the first time in *the Strata Titles Registration (Amendment) Law, 2012*), in my view it would be relevant to an examination of the rights as they stood at the time of this application by the Plaintiffs. That section states as follows:

"Part II Strata Lots

Creation of strata lots

3. (2A) Upon registration of a strata plan, complete strata plan, phase strata plan and an amended strata plan-

(a) *the land described in such plan is divided into strata lots and common property, if any, in accordance with the plan; and*

(b) *the proprietors of each strata lot is entitled to all the rights and obligations of a proprietor including the right to vote as a member of the corporation established upon registration of the plan in accordance with section 5."*

(My emphasis)

51. Mr. Kennedy submits that the current strata by-laws offend against the underlying rationale of the scheme of *the Strata Titles Registration Law*, namely the creation of a democratically elected body enabling each owner to participate in the process, with a democratic, inclusive process enabling majority rule. The by-laws, the argument continues, specifically and deliberately remove the rights enshrined in section 3(2A) b) of *the STRL*.

1 52. It was further posited that the amendments are clearly partial and unequal in their
2 operation as between different classes of owner. On the one hand there is the Developer
3 as owner, who by virtue of the amended by-laws effectively controls every aspect of the
4 running of the Strata. Thus, the argument continues, two clear and distinct classes of
5 owner emerge, with the developer as Class A and the other owners as Class B.

6
7 53. The corollary to these arguments is that the power to amend the by-laws has been
8 exercised for a purpose, or with an intention, beyond the scope of the instrument creating
9 the power.

10
11 54. Mr. Kennedy contends that amendments to by-laws purporting to destroy voting rights
12 conferred by the enabling legislation have been found inconsistent with *the STRL* by
13 Henderson J in *Kiem v Global Group*. Counsel claims that the amended by-laws in that
14 case essentially imposed the same voting restrictions as are present in the instant case.
15 Reference was made to page 7 of the judgment, where Henderson J stated:

16
17 *"In my view, the ordinary and reasonable observer, having adhered to this*
18 *contract upon purchase of a unit, would have intended that the*
19 *developer's hold on the affairs of the corporation would last only for a*
20 *limited period. The intention must have been to comply with the spirit and*
21 *intention of the Law itself and to form an executive committee through*
22 *democratic processes, including the holding of general meetings. Any*
23 *construction of the articles which does not recognize that intent is not only*
24 *objectively unreasonable but antithetical to the goals of the Law itself."*

25
26 55. Reference was also made by the Plaintiff's Counsel to the New Zealand case of *Body*
27 *Corporate No. 199883 v. Clarke Family Associates Ltd.* [2004] 5 NZCPR 947. In that
28 case, Mr. Kennedy submits, there were similarly restrictive by-laws and Ronald Young J
29 found the by-laws to be *ultra vires* the enabling statute. That statute, *the Unit Titles Act*
30 *1972* contained the following provision:



1 “37(6). No rule or addition to or amendment or repeal of any rule shall
2 prohibit or restrict the devolution of units, or any transfer,
3 lease, mortgage, or other dealing therewith, or destroy or
4 modify any right implied or created by this Act.

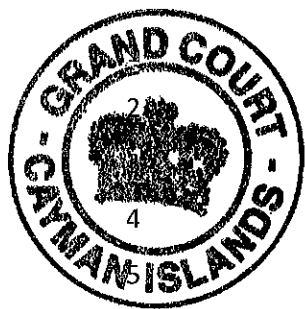
5 (Counsel’s emphasis)

6 56. The facts of that case are interesting, as is the content of the offending by-law. I take the
7 facts from the judgment of Young J, at paragraph 10. The body corporate applicant was
8 formed when the unit title plan for the units were deposited in March 2000. The
9 respondent was the developer and owned four units in the development. The second
10 applicants were all of the other owners of the 17 units in the development. Prior to the
11 deposit of the Unit Plan the Respondent amended the Rules set out in the Second and
12 Third Schedule of the Act.

13
14 57. In particular, by-law 35, which was found to be *ultra vires*, read as follows:



15 “35. That so long as Clarke Family Associates Limited shall be the
16 proprietor of any units or future development units set out on the units
17 plan the principal units of which are covered by the Body Corporate
18 hereunder, then in such cases the Body Corporate will not without the
19 consent of Clarke Family Associates Limited pass any resolution, form
20 any committee or use the common seal or sign any documents on behalf of
21 the Body Corporate without the express consent in writing of the Clarke
22 Family Associates Limited and further the Body Corporate will not do
23 anything that will hinder or interfere with the completion of all buildings
24 and appurtenances shown on any proposed Unit Title Development Plan
25 (existing or amended) and further the Body Corporate will do all things
26 necessary and incidental that are required of the Body Corporate,
27 including signing all necessary documents to assist Clarke Family
28 Associates Limited with and promote the completion of all buildings and
29 appurtenances shown on any proposed development Units Title
30 Development Plan (existing or amended) in respect of the completed
31



principal units over which the Body Corporate has jurisdiction and in particular, but without prejudice to the generality of the foregoing, the Body Corporate will do all things necessary and incidental that are required of the Body Corporate including signing all necessary documents to enable Clarke Family Associates Limited or any purchaser from Clarke Family Associates Limited to subdivide the commercial office area on Level Three of the Development into five separate principal units with each having its separate units title."

58. In finding the amending of voting rights *ultra vires*, Young J, at paragraph [34], stated as follows:

"[34]There are clearly two parts to R 35. The first part essentially gives the Clarke Family Associates Limited a right of veto over any action the body corporate proposes to take which requires any form of resolution. Any action to be taken by the body corporate must be consented to by the Clarke Family Associates Limited. This provision is in my view clearly *ultra vires* the Act. The respondent realistically accepted that. The first part of R. 35 is in breach of s 37(6) which prohibits the destruction or modification of rights expressed or implied by the Act. The Act provides for a variety of voting rights and entitlements... In certain situations unanimous resolutions are required, in others, majority of unit area applies. These provisions would be rendered nugatory by this veto right. The body corporate could effectively be prevented from doing anything by one unit holder's vote. I am satisfied therefore that the first part of R 35 clearly conflicts with s 37(6) and that that part of R 35 is ultra vires."

(My emphasis)

59. Mr. Kennedy submits that whilst no statutory equivalent to s 37(6) exists in Cayman, there is no need for such statutory provision. He suggests that indeed, ***Keim v Global Building Group*** so demonstrates. Further, it is submitted that section 3(2A) provides for the proprietor's right to vote as a member of the corporation. Therefore, that if the current



by-laws are permitted to subsist, this renders the rights enshrined in *the STRL* totally meaningless. It was therefore submitted that this is a clear case for judicial redress of the actions of the Developer by removing the offending by-laws to achieve consistency with the enabling legislation and the legislative intent.

6 **THE DEFENDANTS' SUBMISSIONS**

7
8 60. Mr. Dors, on behalf of the First Defendant, took a neutral position on this aspect of the
9 application.

10
11 61. TRL and CTL, in order to avoid duplication, presented the case in such a manner that
12 Counsel for CTL Mr. Robinson took the lead in arguing the *ultra vires* point, whilst
13 Counsel for TRL Mr. Huskisson took the lead in arguing the issue as to whether there is
14 cause to appoint an administrator. Both Counsel handed up comprehensive written
15 Skeleton Arguments.

16
17 62. It was submitted by CTL that By-law 2 of the Castaways' Cove By-Laws is not *ultra*
18 *vires the STRL* in any respect. Further, that By-law 2 is not prohibited by *the STRL*
19 whether at the time of the registration of the Castaways' Cove by-laws, or now. The By-
20 law is not inconsistent with any of the provisions of *the STRL* and nor does it fall outside
21 the scope of the powers of a strata corporation to create its own by-laws as defined by the
22 Statute. To the contrary, the procedure by which the Castaways' Cove by-laws were
23 created and later amended in 2003 is entirely consistent with the procedure prescribed by
24 *the STRL*.

25
26 63. Mr. Robinson submitted that *the STRL* is a comprehensive code of the law applicable to
27 strata corporations in the Cayman Islands. He submitted that, to the extent that this code
28 is deemed to be incomplete or inadequate, the proper procedure is for the Legislative
29 Assembly, not the Court to correct any such perceived deficiencies. Parties who have
30 acquired vested rights by virtue of the statutory regime created under *the STRL* should
31 not have those rights taken away or destroyed by retrospective legislation.



The argument continued that legislative action is the consistent means by which perceived deficiencies in strata titles legislation have been addressed in the jurisdiction from which *the STRL* was adopted. It is also the means of reform utilized in other jurisdictions which have also adopted similar legislation.

5

6 65. Counsel contends that except as expressly provided in *the STRL*, there is no restriction
7 against a developer of a strata development exercising its 100% voting control of the
8 strata corporation to amend the by-laws in Schedule One of *the STRL*, prior to the sale of
9 the Strata units.

10

11 66. It was further submitted that the principles upon which the Court may, in certain
12 circumstances, set aside a resolution of the majority shareholders of a company, or the
13 majority unit holders of a strata corporation, altering the articles of association or by-laws
14 to the detriment of the minority, do not apply in the current case.

15

16 **THE LEGISLATIVE INTENTION BEHIND *THE STRL* AND HISTORY OF *THE STRL***
17 **LEGISLATION**

18

19

20 67. It was Mr. Robinson's submission that the legislative history of the legislation, both
21 before and since the first enactment of *the STRL*, is a very good guide to discerning the
22 legislative intention with respect to the Statute generally, as well as with respect to the
23 specific provisions relevant to the question of whether By-law 2 is *ultra vires*.

24

25 68. *The 1973 Law* was based on *the Conveyancing (Strata Titles) Act, 1961* of New South
26 Wales, Australia ("*the 1961 NSW Act*"). It was further submitted that *the 1961 NSW Act*
27 was not simply the philosophical underpinning of *the 1973 Law*. That in fact, the entire
28 structure, concepts and content of *the 1961 Act* were adopted, with very little
29 modification, in *the 1973 Law*.

30

31 69. Among the provisions which were it is contended substantially adopted in *the 1973 Law*
32 were those having to do with the establishment and management of the body corporate



created by virtue of registration of a strata plan pursuant to the statute. A comparison of section 14 of *the 1961 NSW Act* with section 5 of *the 1973 Law* and section 13 of the *1961 NSW Act* with section 15 of *the 1973 Law* shows that the provisions were similar if not identical.

5

6 70. Mr. Robinson submits that the exclusion of the companies or similar legislation (section
7 14(2) of *the 1961 NSW Act* and section 5(3) of *the 1973 Law*) is a very clear indication
8 that the respective Statutes intended to constitute an exhaustive and comprehensive code
9 on matters regarding the establishment and governance of strata corporations. Reference
10 was made to a paper by Alice Christudason, *Subdivided buildings-developments in*
11 *Australia, Singapore and England, (1996)* International & Commercial Law Quarterly,
12 343. Ms Christudason in her analysis states:

13
14 *"While there are substantive as well as adjectival differences in the*
15 *provisions for strata schemes from these various jurisdictions, a common*
16 *thread may be discerned:*

- 17 (a) *all statutes are comprehensive codes;*
18 (b) *all determine the property interests of the owners; and*
19 (c) *all provide for an administrative framework for the*
20 *management of the property, for regulation of the conduct of*
21 *the owners, for the payment of the common expenses by the*
22 *owners, and for termination of the schemes."*

23
24 71. Counsel therefore argues that there is therefore no basis for any conclusion that the
25 framers of the legislation intended that strata proprietors should have any more protection
26 with respect to the by-laws than those embodied in the legislation. With respect to the by-
27 laws in Schedule One, it was submitted that the fundamental safeguard in *the 1973 Law*
28 is that those by-laws may only be amended or varied by unanimous resolution (section
29 15(2)), and the additional safeguards are as follows:

- 30
31 (1) the by-laws could not prohibit or restrict devolution or dealing with any
32 strata lot or destroy or modify any covenant (section 15(4));



- (2) the by-laws could not be secretly amended as they would have no effect until they are lodged with the Registrar of Lands (section 15(5)); and
- (3) every proprietor is entitled to inspect a copy of the by-laws on request (section 15(6)).

6 72. The restriction set out in sub-section 15(4) of *the 1973 Law* was considered by
7 Henderson J in *Foith v Proprietors Strata Plan No. 436* [2014 (1) CILR 335]. In that
8 case, Henderson J ruled that one of the by-laws of two of the strata corporations within
9 the Ritz-Carlton Grand Cayman Resort which restricted the proprietors in the leasing of
10 their units, contravened section 21(4) of *the STRL (2005 Revision)* (this was formerly
11 section 15(4) of *the 1973 Law*) in that it had the effect of restricting the proprietors in
12 dealing with their strata lot. The judgment went on appeal but that aspect of the judgment
13 was approved by the Court of Appeal.

14
15 73. Mr. Robinson submits that unlike in *Foith*, in the instant case the Plaintiffs have not been
16 able to identify any provision of *the STRL* which By-law 2 of the Castaways' Cove by-
17 laws contravenes.

18 19 **THE EXPRESSIO UNIUS PRINCIPLE OF CONTRUCTION OF STATUTES**

20 74. Reference was made to the well-known work of *Bennion on Statutory Interpretation - A*
21 *Code*, 6th Edition, sections 390-394. Section 394 states that where an Act contains
22 specific exceptions, it is presumed that these are the only exceptions intended. Applying
23 that principle to the legislation under consideration, it was submitted that by specifying
24 what may not be included in by-laws of a strata corporation, it must be presumed that
25 these are the only exceptions of the kind intended by the statute.

26 27 **ARGUMENT THAT THERE IS LIMITED APPLICATION OF THE COMPANY LAW** 28 **ANALOGY**

29
30 75. It was argued that there can be but limited application of the company law analogy to *the*
31 *STRL*.

1 **POST-1973 STRATA LEGISLATION REFORM OUTSIDE THE CAYMAN ISLANDS**

2
3 76. Mr. Robinson had a very interesting set of submissions under the above head. It was
4 posited that, by the time *the 1973 Law* came into effect in the Cayman Islands, the New
5 South Wales legislation had been undergoing a process of significant review and
6 modification to address some of the perceived weaknesses in the systems of government
7 permissible under *the 1961 Act*. These reforms were adopted in *the Strata Titles Act,*
8 *1973, ("the 1973 NSW Act")*.

9
10 77. This new NSW legislation addressed a number of matters, including placing certain
11 limitations on a developer during the period when the developer has full control of the
12 voting rights of the body corporate.

13
14 78. Mr. Robinson's extensive research reveals that, before *the 1961 NSW Act* was enacted, it
15 was identified and opined that *the 1961 NSW Act* would in terms permit the amendment
16 of the by-laws in Schedule One by the developer. Reference was made to an article by
17 A.F. Rath, in the [1960] Sydney Law Review, 11, '*Strata Titles in New South Wales*'.

18
19 79. Reference was also made to the debates in the New South Wales Legislative Assembly
20 during the second reading of the 1973 Strata Titles Bill. Further reference was made to
21 the *Western Australia Strata Titles Act, 1966*, which also appears to have been based
22 upon *the 1961 NSW Act*. I note the similarities between section 15 of that Act and *the*
23 *1973 Law*, now section 21 of *the STRL (2013 Revision)*. Counsel adverted to the Law
24 Reform Commission of Western Australia's Working Paper dated February 1977, on the
25 Review of The Strata Titles Act 1966-1970, where the issue was raised as follows:



"Another problem under the present Act is that during the period when the original proprietor (i.e. the person who owns the lots comprised in the strata plan at the time of the registration of the plan) is the proprietor of lots the sum of whose entitlements exceeds one-half of the aggregate unit entitlement, he can dictate the manner in which the scheme will be



administered. The reason is that while he retains this position he can outvote the remaining proprietors. In fact, while the original proprietor owns all the lots in the strata plan he can have a unanimous resolution passed and can, for example, have the by-laws contained in Part 1 of the Schedule amended."

(Counsel's emphasis)

80. What *the 1973 NSW Act* did was to introduce for the first time within the legislation a concept of the 'original proprietor', which the legislation defines to be the owner of the property at the time of registration of the strata scheme. It also heralded the concept of the 'initial period' which is defined to mean the period from the creation of the body corporate to the date when at least one third of the aggregate unit entitlement is owned by proprietors other than the original proprietor.

81. A number of limitations on the original proprietor during the initial period were enacted. Included amongst those are limitations on the power to amend, add to or repeal the by-laws, or the power to appoint a managing agent to hold office for a period beyond the initial period - section 66 of *the 1973 NSW Act*.

82. In addition, section 57(5) of *the 1973 NSW Act* brought in new rules, set out in Schedule 2, concerning the conduct of and voting at meetings of the body corporate, other than the first annual general meeting.

83. Mr. Robinson contends that these were all very significant changes made to the governance and management structure of strata corporations in New South Wales. He further argues that they give the clearest indication that those who enacted *the 1961 NSW Act* regarded it as a comprehensive code, and used the only effective means of modifying a statutory code, which he argues, is by further legislation.

84. Mr. Robinson candidly states that, had the reforms in *the 1973 NSW Act* been adopted in the Cayman Islands, By-law 2 of the Castaways' Cove by-laws could not have been properly adopted at the time when those by-laws were registered. However, he closes on



at this point, by stating that, with the scheme for management and control of Cayman Islands Strata Corporations being as set out in *the 1973 Law* there was nothing to prevent any developer from adopting such by-laws.

4

5 85. Counsel has also referred to proposed statutory changes to the Cayman Islands
6 Legislation. Reference was made to the 2011 Report of the Law Reform Commission,
7 and its further Report of October 2014, and a draft Strata Titles Bill, 2014. Among the
8 proposed restrictions on the nature and scope of by-laws, are restrictions, mainly to do
9 with discrimination, and health and safety - Clause 53. Further, there is also a new
10 provision proposed which would confer, for the first time, a power on the Court, on
11 application, to strike out a by-law that reduces the value of a strata lot or unfairly
12 discriminates against a proprietor - clause 54.

13

14 86. However, it is to be noted that although the Report of the Commission dated 4 April 2011
15 raised the issue of some developers having too much power under strata schemes (page
16 2), that developers often amend the statutory by-laws prior to selling, and that some by-
17 laws are draconian (pages 15 and 16), the Report and the Draft Bill do not appear to have
18 addressed this issue directly, and/or in any event, the Draft Bill does not go as far as *the*
19 *1973 NSW Act*; it does not seek to limit the powers of the strata corporation during the
20 period when the developer is in control of the corporation.

21

22 87. As regards the Plaintiffs' reliance upon the decision of Henderson J in the *Kiem* case, Mr.
23 Robinson submits that the reliance is misconceived for a number of reasons. One reason
24 he submits is that the question decided in *Kiem* was one of construction of article 14 of
25 the by-laws of Strata Corporation #275. It was also pointed out that Henderson J did not
26 set aside article 14; he construed that article in a manner such that, in his view, it would
27 be consistent with article 3.3. At page 7 of the judgment, Henderson J indicated that he
28 arrived at his construction of the by-law in order that that by-law would "*comport with*
29 *the intent of the Law and of the parties...*"

30



1 88. Mr. Robinson also submitted that Henderson J's imputation of the proprietors' intent
2 appears to be based on what he stated at page 3 of the judgment, as follows:

3
4 *"In the present case, the developer has followed what is, in the Cayman*
5 *Islands, a very common practice; it has provided in the bye-law that the*
6 *developer itself will remain in total control of the strata corporation and*
7 *its executive committee. Ordinarily, such provisions serve a purpose for a*
8 *limited time. During that period when the units have not all been sold, it*
9 *may be difficult or even impossible to form an executive committee from*
10 *the unit holders themselves. In addition, if the development is continuing,*
11 *it will likely be to everyone's benefit to have the developer control the*
12 *affairs of the corporation.*

13 *....The expectation is that as the development matures and reaches the*
14 *point where most of the units have been sold to third party purchasers,*
15 *there will be a general meeting, an election of an executive committee, and*
16 *an election of a chairman to assume the management power previously*
17 *exercised by the developer."*

18
19 89. It is Counsel's submission that there is no reference in the judgment to any specific
20 evidence on which the Judge relied to form his conclusions as to the existing practice.
21 Further, that there is no evidence referred to in the judgment as to the precise nature of
22 the development of the strata plan in **Kiem**.

23
24 90. By contrast, Mr. Robinson submits that in the instant case there is evidence that Mr.
25 Clappison and all the original purchasers purchased their units expressly subject to the
26 entrenched rights of TRL. Further, that Mr. Clappison's agreement for sale, dated 9 July
27 2004, expressly agreed to the amendment of the by-laws in the First and Second Schedule
28 of the Law and the adoption of the amended by-laws.

29
30 91. Clause 5(2) of the agreement for sale provides:



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"Immediately on registration of the Strata Plan the Vendor must cause the Body Corporate to amend the bye-laws in the First and Second Schedules to the Law so as to be kept in the form or substantially in the form of the bye-laws set out in the copy bye-laws kept in the office of the Vendor and initialed by the parties for the purpose of identification and forming part of this agreement. The Vendor is entitled prior to the adoption of the bye-laws to make such reasonable revisions to them as it sees fit and the Purchaser consents and will be deemed on completion to have consented to those amendments and to any such revisions."

92. Clause 6(6)(c) of the agreement provides:

"The Property is sold and the Purchaser will take title to it subject to the provisions of the Law in general and in particular the following matters consequent on the registration of the Strata Plan-

...

(d) The Bye-laws of the Body Corporate, which come into existence on or after registration of the Strata Plan, in the form referred to in clause 5(2)."

93. Mr. Robinson makes the point that any purchaser, including Mr. Clappison, who signed such an agreement must be taken as having no other intention other than they wished to be bound by the by-laws as amended.

94. The evidence provided in this case includes the evidence in Mr. Kel Thompson's affidavit that it is common practice for a strata development which is a part of a resort to appoint a manager to manage the operations as well as to confer enhanced rights to the developer in order to ensure consistency of operations. Some of the examples provided were of the Ritz Carlton, where under the management agreement the manager has been appointed for a term of 99 years. A copy of the amended by-laws of Strata Plan No. 502, which relate to Sherife's Garden was also produced, and which confers on the developer similar voting rights *"until the Developer is no longer the Proprietor of two strata lots or*



until the 31st day of July 2009, whichever is the last to occur...". A copy of the amended by-laws of Strata Plan No. 763 (Watercolours) was also produced, which confer on the developer control of the executive committee and "until the first anniversary of the completion of sale of the last Strata Lot...."

5

6 95. Mr. Robinson also made submissions in response to Mr. Kennedy's arguments based
7 upon the principles concerning fraud on the minority. It was Counsel's submission that,
8 even if the principle were applicable to the amendment of the by-laws in the present case,
9 the necessary basis for its application, as outlined in the authorities, is not satisfied.
10 Further, it was argued that the principle has no application to circumstances where the
11 resolution altering the articles (or, as in this case, the by-laws), was unanimous at the time
12 it was passed. The principle was, the argument continues, established to prevent the
13 exploitation of an existing minority, not those who, with the knowledge of the
14 amendment, acquire their interests subsequent to the amendment.
15 (my emphasis)

16 96. Counsel rounded out this aspect of the submission by saying that in every case cited by
17 the Plaintiffs in support of this argument, the resolution altering the articles was passed
18 by a majority. None involved an amendment by a unanimous vote which could not, by
19 definition, be oppressive to any other class, there being no other. It was submitted that the
20 Plaintiffs' reliance on this principle is therefore misconceived.

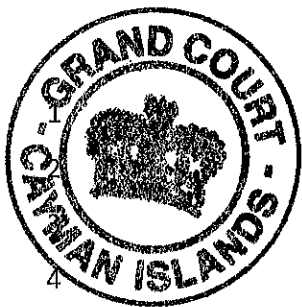
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22 THE APPLICATION FOR APPOINTMENT OF AN ADMINISTRATOR

23 97. The power to appoint an administrator is set out in section 9 of *the STRL (2013*
24 *Revision)*. It is to be noted that the section does not speak of removal of the Executive
25 Committee but that would seem to be a necessary implication. Sub-sections 9(1), (2) and
26 (3) provide as follows:

27 "Administration

28 9(1) Every corporation, or any person having an interest in a
29 strata lot may apply to the court for the appointment of an
30 administrator.



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5
6
(2) *The court may, in its discretion on cause shown, appoint an administrator for an indefinite period or for a fixed period on such terms and conditions as to remuneration or otherwise as it thinks fit. The remuneration and expenses of the administrator shall be an administrative expense within the meaning of this Law.*

7
8
9
(3) *The administrator shall, to the exclusion of the corporation, have the duties and powers of the corporation or such of those duties and powers as the court shall order.*

10
11
.....”

12 **THE PLAINTIFFS’ SUBMISSIONS**

13
14 98. In British Columbia, Canada, the term in the legislation, “*cause*”, was changed to “*best interests of the Strata*” by legislation enacted in 1998. These terms were considered by
15
16 Harvey J in *Lum et al v The Owners, Strata Plan VR519* [2001] BCSC 493, where, at
17 paragraph 11, he concluded that the following five factors, and additionally, the question
18 of the costs attendant on appointment of an administrator, were relevant to the issue:

- 19
20 a. *whether there has been established a demonstrated inability to manage the strata corporation;*
21
22 b. *whether there has been demonstrated substantial misconduct or mismanagement or both in relation to the affairs of the strata corporation;*
23
24 c. *whether the appointment of an administrator is necessary to bring order to the affairs of the strata corporation;*
25
26 d. *where there is a struggle within the strata corporation among competing groups such as to impede or prevent proper governance of the strata corporation, and*
27
28



e. where only the appointment of an administrator has any reasonable prospect of bringing to order the affairs of the strata corporation.

In addition, there is always to be considered the problem presented by the costs of involvement of an administrator."

99. Mr. Kennedy submits that these five factors discussed in *Lum* are a suitable basis for the consideration of the issue in the instant case. He further submitted that all of these factors are present. He argued that the evidence of Mr. Clappison demonstrated, in broad terms, the spiraling costs, lack of transparency with regard to the accounts, deep divisions within the Strata between the Developer and the majority of the other owners and an entirely dysfunctional management structure.

100. It is the Plaintiffs' position that, irrespective of the relief granted under the *ultra vires* issue, the Strata requires professional and independent management. Counsel submitted that relations between the parties are irretrievably strained, and are likely to remain so for some time. It was argued that a review of the spending of the Strata, both past and future is required, alongside an independent, professional agent versed in Strata Law and ownership disputes in order to resolve the issues extant between the parties.

101. Some of the matters raised by Mr. Clappison in his Affidavit evidence, are the following:

- a. Whether there have been specific or manifold instances of inappropriate or excessive billing of expenses to owners;
- b. Whether substantial misconduct or mismanagement, or both, in the affairs of the Corporation has been demonstrated;
- c. Conflicts of interest between the current Executive Committee, TRL as management agent for the Strata, and TRL as owner of the Reef Resort;
- d. Inappropriate marginalization of owners at AGM by both personally threatening behaviour and by vote manipulation.

1 102. In his March 2014 Affidavit, Mr. Clappison makes a number of allegations. Some of
2 them are dealt with at paragraphs 25, 31, 32, 37, 40 and 53 as follows:



5 ***"Costs to Strata Owners"***

6 25. *From the outset of the incorporation of the Strata the Strata has*
7 *been under the control of TRL. TRL has deemed it appropriate to*
8 *pool the expenses incurred in running the Reef Resort operations,*
9 *sales of timeshare units at the Reef Resort, a rental pool of units*
10 *from the Reef Resort, a rental pool of from the Strata as well as the*
11 *Strata itself. The two rental pools are under the control of TRL. As*
12 *a result TRL is allocating expenses five ways amongst these*
13 *various operating units.*

14
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16 ***Relationship and Shared Expenses with the Reef Resort, the Strata and the***
17 ***Rental Pool***

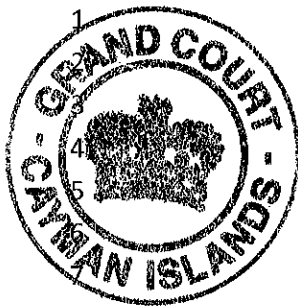
18 31. *As the Reef Resort is owned by TRL, TRL determined that some of*
19 *the expenses that are incurred by the Strata and the Reef Resort*
20 *should be pooled in an effort to save on common expenses.*
21 *Examples of such expenses are beach cleaning, front desk services,*
22 *reservations and concierge.*

23 32. *Through review of the Strata financial statements it is apparent to*
24 *me that TRL is not allocating expenses correctly and that*
25 *proprietors of units are paying a disproportionate amount of*
26 *money by way of Strata fees, these fees are being used to pay the*
27 *expenses of TRL which we believe are not properly attributable to*
28 *us but to TRL in their roles as either Owner of the Reef Resort or*
29 *as fees which should be paid by the Rental Pool owners only.*

30
31

32 ***37. Beach Cleaning***

33 37.1. *Affordable Maintenance was paid \$50,900 during the year and the*
total cost to the Strata of beach cleaning was \$43,447 when shared
with the Reef Resort.



37.2. *There is no evidence of competitive quotes being received for this service which would be common practice for most large single line items on a Strata income statement particularly where one contract exceeds \$50,000 in one year. The threshold for competitive quotes should be much lower given the overall budget of the Strata. Despite this any attempt by us to engage with TRL and Mr. Thompson at any level over issues of costs and accountability are simply met with evasiveness, disdain and eventual use of Article 2(2) of the bye-laws to push through budget approvals and increases in fees.*

.....

40 Maintenance

40.1 *The only maintenance costs that should be payable by the owners is for maintenance of the common property and the exterior of the Units on our common property. This cost does not include beach cleaning which is separately invoiced so the common property is only the car park, tennis court, the pool and cabana and the walkways. The total costs incurred as maintenance for the Strata are \$113,786.*

40.2 *These costs seem very inflated relative to what is actually necessary for the maintenance of the Strata.....*

Action by Owners

.....

53. *The manner in which owners are being treated at the AGM's is entirely unacceptable, including Kel Thompson personally threatened dissenting owners with physical violence and dismissing off-hand owner grievances. At the AGM's the increases in costs and the 2012 budget were put to the floor and the owners rejected the budget. As a result of the failure of motion to approve the budget Kel Thompson asked for a poll and invoked Article 2.2 of the bye-laws to override the majority and approve the Budget."*

1 **THE DEFENDANTS' SUBMISSIONS ON THE APPOINTMENT OF AN**
2 **ADMINISTRATOR**

3

4 103. Originally, Mr. Dors for the 1st Defendant had expressly adopted a neutral position. Of
5 the five members of the Executive Committee, three are affiliated with TRL and two
6 have provided letters of support to the Plaintiffs in this matter. Mr. Dors explained during
7 closing arguments that it was because of that conflict, that the Executive Committee of
8 the Strata Title had taken a neutral position.

9
10 104. However, at the end of the day, Mr. Dors submitted that "for cause shown" to be
11 satisfied, cause must be shown in the form of misconduct or mismanagement on the part
12 of the Executive Committee (Counsel's emphasis). He submitted that there is a
13 distinction to be drawn between examining the actions of TRL, to whom the Executive
14 Committee has delegated the management functions pursuant to the Management
15 Agreement, and examining the issue of whether the Executive Committee have
16 themselves provided any cause. Mr. Dors submitted that if the Plaintiffs succeed in
17 appointing BCQS, then that would not affect the Management Agreement, which TRL
18 would still have. Mr. Dors cautioned against the Court being asked to grant relief that
19 does not really deal with the mischief about which the Plaintiffs complain.

20

21 105. It is fair to say that this line of argument took Mr. Kennedy by surprise, since it did
22 deviate somewhat from the previously neutral stance maintained by the First Defendant
23 right up until the closing submissions. Mr. Kennedy countered that the Plaintiffs were
24 entitled to the relief sought and that the First Defendant ought not to be allowed to rely
25 upon technicalities to defeat the relief sought by the Plaintiffs.

26

27 **THE 2nd AND 3rd DEFENDANTS' SUBMISSIONS**

28 106. Mr. Huskisson in his written closing submissions helpfully summarized in paragraph 2,
29 the four broad bases upon which TRL and CTL say that there is no cause for the
30 appointment of an administrator:

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"a. Mr. Clappison does not have standing to bring this claim because he does not have an interest in one strata unit. Sea Grape... does have standing because it owns one unit, but since it can only be interested in matters arising since it became an owner that rules out all of the issues before the Court.

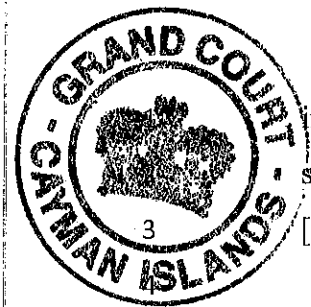
b. There is no evidence that a majority of owners wishes to stop being a part of a resort, which was a central part of Mr. Clappison's case until he gave evidence.

c. The authorities describe the jurisdiction to appoint an administrator as an extreme one. The shorthand applied in the authorities is "substantial misconduct, mismanagement or inability to manage the strata". Nothing in Mr. Clappison's complaints even gets close to this test.

d. The appointment of an administrator would present a number of practical difficulties, particularly with the operation of the resort day to day. TRL have a management contract in place. Some 80 staff manage the resort under its supervision. No attempt has been made to identify how an administrator would operate in practice".

STANDING

107. Under s.9 (1) of **the Strata Titles Registration Law (2013 Revision)**, any person having "an interest" in a strata lot has standing to apply for the appointment of an administrator. What amounts to "an interest" is not defined in **the STRL**, but, relying on **Foith v Strata Plan No. 436** [2014 (1) CILR 335], Mr. Huskisson submitted that the Court may look to **the Registered Land Law (2004 Revision)** for guidance where a term is not defined in **the STRL**. **The Registered Land Law** defines an "interest" in land as including absolute ownership of land. Counsel submits that whilst the word "includes" might leave some room for argument, it is clear that the draftsman did not have in mind fractional ownership. Counsel further submitted that this is logical in applications of this sort, as they carry serious consequences. It was sought to draw an analogy with the requirement



in a winding up application that a contributory should have a tangible interest in the relief sought. In that regard, reference was made to the oft-cited case of *In Greenhaven Motors* [1997] BCC 547.

108. According to Counsel, Mr. Clappison has attempted to clothe his complaints with some degree of legitimacy by falsely claiming that he has the support from a majority of members. It was argued that in his cross-examination, it became apparent that in fact Mr. Clappison was assuming that several owners who had not returned his questionnaire were supporting him, along with others who had not on the form provided by Mr. Clappison either indicated support or opposition.

RESORT ISSUES

109. Mr. Huskisson submitted that Mr. Clappison's evidence is that he should not be, and does not want, to be paying for a share in the cost of running a resort, and Counsel characterized this complaint as being a central complaint. However, Mr. Huskisson refers to his cross-examination of Mr. Clappison, and submits that it is significant that Mr. Clappison:

- (a) said the apportionment of resort costs was really only a "small part of the argument";
- (b) accepted that he purchased a unit in a "resort";
- (c) accepted the description of Castaways' as a sister resort of the Reef Resort;
- (d) accepted that he paid a premium on purchase for being part of a resort;
- (e) accepted that in principle it made sense for there to be costs sharing between the two parts of the resort.

110. It was Counsel's submission that it is completely standard for persons who buy a condominium, where the condominium falls within a development part of a resort, that there would be sharing of costs between the two parts of the resort. It was submitted that



even if Mr. Clappison does not use the shared amenities, their existence, maintenance and upkeep make his unit, and those of all owners not in the TRL rental pool, more attractive to short-term holiday renters, and confers a distinct benefit to Mr. Clappison and these owners.

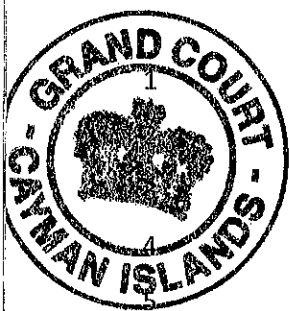
111. Mr. Huskisson referred to the basis of the management fee (charged as a percentage of costs), remaining a constant feature since the agreement was entered into in December 2003. In cross-examination, Mr. Clappison also conceded that the principle of sharing costs between the two parts of the resort had also accordingly been in place for some twelve years. Counsel went on to point out that some eighty people are employed in the combined resort.

112. Mr. Huskisson's follow up submission was that once the "*resort*" issue is taken out of the analysis, "*one is left with a somewhat elusive complaint of overspending*". It was submitted that the focus ought to be on identifying overspending that amounts to substantial misconduct.

THE SUBSTANTIAL MISCONDUCT TEST/AUTHORITIES

113. TRL in their written submissions indicated that they agree that the factors set out in the *Lum* decision cited by the Plaintiffs' Counsel, represents a reasonable reference point. Counsel pointed to paragraph [12] of *Lum* where it was accepted that the democratic government of the strata community should not be overridden by the Court except where "*absolutely necessary*". Reference was also made to paragraph [27] where the Judge found that the applicants had not "*established substantial misconduct, mismanagement or a demonstrated inability to manage the affairs on the part of the strata councils...*"

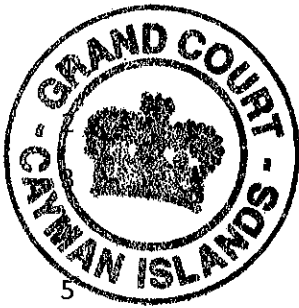
114. Whilst "*substantial misconduct*" is not defined as such, Counsel submits that it must amount to serious and deliberate unlawful behaviour, bordering on, if not actually amounting to fraud. Counsel indicates that the only reported case that the parties have been able to find in which the Grand Court has appointed an administrator is in *Kiem v*



Strata Corp 275. The note of the decision at [2007 CILR Note 19], regarding a decision of Levers J, (handling a different aspect of the same case earlier handled by Henderson J), confirms that the purpose of the appointment in this case was to investigate and resolve issues raised as a result of an inspection carried out by a firm of forensic accountants who had been appointed to inspect the defendant's books following allegations of fraudulent accounting practices by their management company.

115. Counsel referred to the fact that a similar jurisdiction to appoint an administrator exists in Australia. Reference was made to the decision in *Parker v The Owners of Timberside Villas –Strata Plan 27426* [2006] WASAT 254. This was a decision of the State Administrative Tribunal where the Tribunal described the remedy of appointing an administrator as “*an extreme remedy*” and a “*remedy of last resort*”. *Parker* is an interesting case, and shows how developed this area of the law is in Western Australia. In this case an application was made for the appointment of an administrator under section 102 of *the Western Australia Strata Titles Act 1985*. The application was related to other proceedings in which the applicant sought an order for the termination of the management agreement between the respondent strata council and a strata manager. The strata manager was a company related to the developer of the retirement village concerned. In the related proceedings, an order was made to shorten the term of the management agreement. The application for the appointment of an administrator was refused.

116. Reference was also made by Counsel to the Canadian case of *McGowan v Strata Plan NW1018* [2002] BCSC 673. At paragraphs 12 and 13 of their skeleton argument, Counsel for TRL discuss *McGowan* as a good example of the height of the bar that must be attained for the Plaintiffs to succeed. In *McGowan* the applicant raised a host of complaints including alleged double charging due through paying both salaries and management fees (paragraph 33) and retaining employees rather than using independent contractors (paragraph 34). These are, I agree with Mr. Huskisson, two of the Plaintiffs' principal complaints. Counsel submitted that the following passage neatly encapsulates what should be said of the complaints in the instant case. The complaints:-



5 "are not such as to demonstrate substantial misconduct or
6 mismanagement, nor do they reflect an inability to manage the
7 Corporation. The examples given are spread over nearly eight years of
8 Corporation management and in a context in which differences of opinion
9 have unfortunately become somewhat personal on both sides (paragraph
10 71).
11
12
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14 117. Counsel submitted that there has been no real attempt to identify substantial misconduct.
15 He suggests that the approach taken by Mr. Clappison has been to list out more or less
16 every item of expenditure in the hope that something will find favour with the Court.
17 Further, it was pointed out that there is no independent accounting evidence to assist the
18 Court, as there was in both *McGowan* and *Kiem*.
19
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22 118. It was further submitted that such independent evidence as there was (in the form of the
23 2009 audit and the 2010 review) point to there being no misconduct. When asked about
24 the fact that neither of the two independent accounting firms engaged to look at the books
25 of the strata, Mr. Clappison (who the Court notes is himself a Chartered Accountant and
26 Chartered Business Valuator and Financial Planner), indicated that it was not the job of
27 the auditor or reviewer to identify misconduct or to question the charges from TRL to the
28 Strata.
29
30
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119. Counsel then set out what TRL's position is in relation to the most significant (or as he
puts it, least trivial) allegations, as follows:

- a. **Audit.** TRL accepts that there has been difficulty in completing the audits post 2011. However, they say that the auditors have shown an understandable reluctance and signs of nervousness following the threat of, and the subsequent issue of court proceedings. In his evidence Mr. Thompson said that he wants the accounts to be audited. Counsel submits that there is no reason why the Executive Committee cannot be left to supervise the completion of the outstanding audits.



1 b. **Beach Cleaning.** Mr. Clappison complains that there is no evidence of
2 competitive quotes being received for the service which would be common
3 practice for most large single line items on a Strata income statement particularly
4 where one contract exceeds \$50,000 in one year. However, Mr. Thompson in his
5 evidence stated that over the past several years, TRL has tried a variety of
6 different options for beach cleaning. However, in its experience, the most efficient
7 and cost effective method is to employ their own staff to maintain the beach
8 cleaning. At present TRL has three full time staff members cleaning the beach
9 seven days a week.
10

11 Mr. Huskisson refers to this and other evidence, to say that this could not be
12 further from misconduct, mismanagement, or inability to manage. He submits that
13 the Plaintiffs are really complaining about being denied the opportunity to
14 micromanage the process themselves. Further, that Mr. Clappison as holder of a
15 one sixth share is not entitled to dictate how the beach should be cleaned.
16

17 c. **Double Counting.** At paragraph 34, and a second wrongly numbered paragraph
18 34, in his First affidavit, Mr. Clappison states as follows:
19

20 ***"Relationship and Shared Expenses with the Reef Resort, the Strata and***
21 ***the Rental Pool***

22 ***"34. Even before I comment on specifics I state that many of these costs***
23 ***should be covered by the management fee charged by TRL pursuant to***
24 ***clause 3.7 of the management agreement-15% of the total costs of***
25 ***administration of the Strata exclusive of insurance. This figure based on***
26 ***the 2012 accounts would allow TRL a fee of \$92,141 for management of***
27 ***the Strata alone.***

28

29 ***34. Furthermore the backdrop to these concerns is the lack of***
30 ***accountability of TRL in their apportionment of these expenses and the***
31 ***clear conflict of interest that exists. TRL are in effect on both sides of the***



[sic] every transaction, they control the Executive Committee of the Strata on behalf of the owners for a profit on the one hand and on the other they operate the Reef Resort Timeshare operation for profit. Furthermore any increase of costs apportioned to the Strata actually increases their management fee. The entire system lends itself to the encouragement to load expenses against the Strata which will be paid by owners and therefore increases the profits of TRL."

120. In response, in paragraphs 6 and 10a of his Second affidavit, Mr. Thompson says that Mr. Clappison is correct that some of the expenses incurred by TRL in managing the Resort are allocated to Castaways' under a pooling arrangement. However, Mr. Thompson also denies that TRL has inflated the annual expenses allocated to the Castaways' Strata. He states:

"6.... These expenses include the cost of operating the amenities which Castaways' enjoy. An example is the games room described above. Castaways' pay a percentage of these pooled expenses based on their usage of the amenity in question. An example of an expense that is predominantly allocated to the timeshare half of the Resort is housekeeping. Castaways' pays only 10% of these pooled costs, to reflect the relatively limited cost of supplying towels and bathroom supplies to Castaways' pool areas, restrooms, gyms and showers as well as occasional cleaning and maintenance of Castaways' common areas. However Mr. Clappison is incorrect if he seeks to allege that the costs of selling time share units or running rental pools is allocated to Castaways'. I expand on these issues further below, but stress that the allocation of pooled expenses to Castaways' is determined fairly and by reference to actual usage.

...

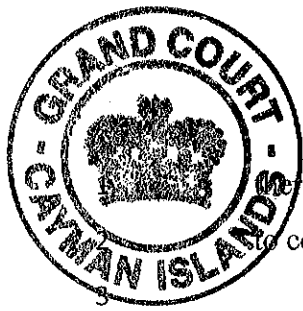
10. a. Mr. Clappison suggests the accounting function should fall within the 15% management fee charged by TRL. The 15% is charged against the



total expenses incurred (not including the largest item, insurance) and is structured in that way to ensure that TRL is fairly compensated for the level of work it undertakes. An alternative would be to charge a fixed fee, but in my view to charge a percentage of the expenses is a fairer reflection of the work involved. Mr. Clappison's suggestion of wrapping the expenses in a 15% fee is unworkable because there would be no expenses against which to apply the 15% fee. What he may really be saying (or wishing) is that TRL should be managing the Resort for nothing."

121. In evidence Mr. Thompson said that the management fee paid to TRL represents TRL's profit. Counsel submits that this is entirely consistent with clause 3.7 of the Management Agreement under which the management fee is charged at "*fifteen percent of all costs related to the operation of the Strata Corporation*". It was submitted TRL's proportionate costs for providing management services to the Strata are properly a part of the "*costs related to the operation*" of the Strata. Counsel stated that TRL passes on the costs associated with the running of the Resort to the users of the Resort and charges a management fee in addition. He submits that it would be unrealistic to require any commercial enterprise to limit its charges to the salaries of the staff engaged. Further, he argues that the evidence also establishes that an increase in the costs of the Strata confers no benefit on TRL whatsoever since TRL has to pay 29.2% of those costs.

122. There were a number of other issues raised by the Plaintiffs and responded to by Mr. Huskisson but I do not consider it necessary to go into those in any further detail. Mr. Huskisson raised a number of concerns which he argues are important practical considerations, and which point to the inappropriateness of appointing an administrator. He submitted that the starting point must be that the democratically elected Executive Committee directs the operation of the Strata. Further, that whilst day to day management has been delegated to TRL through its Management Agreement, (which has not been challenged in these proceedings), the Executive Committee retains its supervisory role. It is comprised of persons connected with and unconnected with TRL. Counsel submits that



There is no evidence before the Court that the Executive Committee is not fit and proper to continue in its role.

4 RESOLUTION OF THE ISSUES

5 THE *ULTRA VIRES* ISSUE

123. The approach to construction of a statutory provision is quite clear. The starting point is the ordinary and natural meaning of the language used. However, it has long been established that statutory provisions must be construed in their context, and the Court must have regard to the statutory purpose both of the Statute as a whole and the specific provisions in particular. See *Halsbury's Laws of England*, Volume 96 (2012)/5, paragraph 1081, "*Ascertaining the legislator's intention*", and *Bennion* Sections 201 and 202 "*Statement of the informed interpretation rule*" and "*The 'context' of an enactment*" cited by Mr. Kennedy.

124. I agree with the statement of Henderson J in *Kiem v The Proprietors Strata Corporation* #275 at page 3, that the underlying intent of *the STRL* is that the Strata Corporation is to be run upon democratic lines. I also agree with Mr. Kennedy's submission that the voting structure envisioned by and embodied in *the STRL* was designed to be a democratic, inclusive process, by and large enabling majority rule, and allowing the proprietors to make collective decisions.

125. Additionally, I find the views expressed by Heath J in the New Zealand case of *World Vision*, whilst discussing the principles underpinning the equivalent Strata Titles New Zealand legislation, equally applicable to *the STRL*. At page 682, paragraph 51, these principles were stated by Heath J to include:

" a) *The need to synthesize the conflicting views, needs and desires of proprietors who have differing interests, through the adoption of a democratic model. That model is designed to enable proprietors to make collective decisions (through the body corporate) about the use of common*



property and proposals to make structural changes or additions to the property likely to affect the use, enjoyment or value of units owned by other proprietors."

126. The ordinary meaning of the words used in section 15(2) and 15(3) of *the STRL* was that the by-laws set out in the First Schedule were to be in force until by-laws were made by the Corporation. Further, the by-laws in the First Schedule were not to be amended or varied except by unanimous resolution. However, the most common meaning of the term "unanimous" in ordinary non-legal language is not one that embraces the resolution or decision of one person. In ordinary language it is a concept that ordinarily connotes two or more persons being in accord, or being in complete agreement, or sharing the same views. *The 1973 Law* defines "*unanimous resolution*" to mean "*a resolution unanimously passed at a duly convened meeting of a corporation at which all persons entitled to exercise the power of voting conferred by or under this law are present personally or by proxy at the time of the motion.*" (My emphasis). On the other hand, it is accepted that upon registration of the strata plan the sub-divider, as owner of the whole parcel, is the sole member of the body corporate.

127. This issue is quite a complex one. It seems to me that there is a need to distinguish between the different aspects of the resolution procuring the amendment of the by-laws. Firstly, there is a need to distinguish the question of whether TRL, as the developer and 100% owner of the strata units, had the right to carry out the amendments separate and apart from the question whether, by their nature, the amendments are, *ultra vires*. In my view, under the version of *the STRL* as it then existed, indeed as it exists today, TRL as sole owner did technically have the right to vote for the amendments. However, the moment that proprietors other than TRL became proprietors of strata units, it seems to me that a situation was thereby created in which there was an inconsistency between the amended by-laws and the structure and Scheme of *the STRL*, in particular in relation to voting rights and the composition of the Executive Committee.

128. When a person becomes the owner or proprietor of a unit in a strata, they become a part of the body corporate, under the name "The proprietors, Strata Plan No. ____ (with the

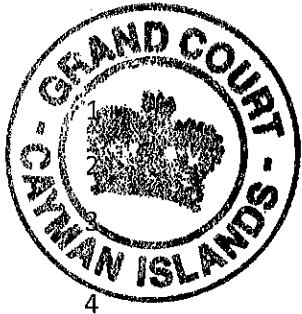
1 appropriate number of the strata plan inserted in the blank space).” Under *the 1973 Law*,
2 there were provisions in addition to those in section 15 that dealt with the resolutions
3 needed to deal with various matters. For example, by section 14(1) the proprietors could
4 by unanimous resolution direct their corporation to transfer or lease the common property
5 or any part thereof.
6

7 129. Under *the STRL (2013 Revision)*, there are provisions that speak to matters which can
8 only take place by way of super-majority resolutions, and importantly, there is the right
9 under section 3(2A) to vote as a member of a corporation. What defines the requirements
10 of democracy underlying the statutory scheme is crystalized when the Corporation
11 consists of more than one proprietor of the Strata units.
12

13 130. The academic Papers and the Discussions in the New South Wales Legislative Assembly
14 prior to the enactment of *the NSW 1973 Act*, relied upon by Mr. Robinson, do support
15 the submission that one of the areas of deficiency identified in relation to *the 1961 NSW*
16 *Act* was that the developer was able to alter any of the by-laws. However, there was no
17 decided case referred to in those Papers and Discussions in which an unsuccessful
18 challenge had been mounted by proprietors of a Strata in relation to amendments
19 procured by a Developer when he was the 100% owner of all the units, securing to
20 himself enhanced rights or rights of veto. In NSW Australia, the Legislature kept abreast
21 of the concerns and decided to do something about them in the form of amendments to
22 the Law. A legislative cure does not itself provide a reason why the present challenge to
23 By-Law 2 should fail. At page 5 of the work by A.F. Rath, the author does state the
24 following:
25



26 “One result of the body corporate structure is that on registration of the
27 strata plan the sub-divider, as owner of the whole parcel, is the sole
28 member of the body corporate. Thus he is at that stage in a position to
29 alter any of the by-laws. He cannot alter the units entitlement of lots
30 (Clause 18), or affect their free assignability (Clause 14(3)) but he can
31 vitally change the duties of proprietors and their rights in respect of



common property, and could confer special benefits on certain lots, and special burdens on other lots, by the adoption of a different or varied set of bye-laws."

131. Also, at page 16 of the discussion in the NSW Legislative Assembly, there was discussion of how the new provisions proposed in the *NSW 1973 Act* in relation to changing by-laws would introduce a number of safeguards to ensure that changes to the by-laws did not discriminate against individuals. Further, the new Bill provided that for so long as the original owner had lots having unit entitlements exceeding half the aggregate unit entitlement, the voting power of the original proprietor was so reduced as to ensure that he cannot outvote all other proprietors.

132. However, it does not follow from the fact that the NSW Legislature chose to make express provision by way of amendment to existing Law that there are not such rights to be found by a Court as existing on a contextual reading of the relevant legislation. It is of course ideal that the statutory rights and provisions should be formulated clearly and expressly in the interest of certainty and consistency and so as to prevent unnecessary litigation. However, that does not signify that a properly grounded legal challenge is bound to fail. The fact that there is no specific reference to case law where similar provisions have been held by a Court of Law not to allow for a challenge such as that mounted by the Plaintiffs in this case, is not without significance. It means that there are no binding or persuasive Court decisions cited for this Court to consider.

133. In *Bennion* at section 176 of the extensive extract provided by Mr. Kennedy, there is reference to the topic "Dynamic processing by the court (*stare decisis*)". Reference is made to the decision in *Corocraft Ltd v Pan American Airways Inc* [1968] 3 WLR 714 at 732, where Donaldson J stated:

"The duty of the Courts is to ascertain and give effect to the will of Parliament as expressed in its enactments. In the performance of this duty



the Judges do not act as computers into which are fed the statutes and the rules for the construction of statutes and from whom issue forth the mathematically correct answer. The interpretation of statutes is a craft as much as a science and the judges as craftsmen select and apply the appropriate rules as the tools of their trade. They are not legislators, but finishers, refiners and polishers of legislation which comes to them in a state requiring various degrees of further processing."

134. In my judgment, although there is no provision in *the STRL* such as that which constituted sub-section 37(6) of *the New Zealand Unit Titles Act of 1972*, in the *Clarke* case, (which states that "No rule or addition to or amendment or repeal of any rule shalldestroy or modify any right implied or created by this Act"), the Court is fully permitted, indeed, is bound to construe the by-laws in light of the whole Scheme of *the STRL* and that includes in particular, voting rights. Even without such provision the Courts implicitly have the power to strike down an amended by-law which is inconsistent with the statutory scheme, or destroys or waters down rights created under it.

135. I readily accept Mr. Robinson's point that a corporate entity that has articles of association which limit the voting rights of shares held by shareholders are not deemed invalid or *ultra vires* the company's legislation. He gave the example of closed-ended investment funds, whereby all the management shares of the company are held by the investment manager or his nominee, with the investors, who are the main stakeholders in the company, holding participating shares which confer no voting rights, or rights to participate in the company's management.

136. However, that is quite different from the situation that obtains in a Strata Corporation. The proprietors of the Strata lots in any strata plan form and become a body corporate. More importantly, they have, by virtue of *the STRL* voting rights and entitlements, express and implied, to vote as members of the corporation. They are entitled to have decisions reached upon various matters concerning themselves and their property rights in the manner provided for in *the STRL*. Further, section 3(2A) of *the STRL*, by referring

1 to "strata plan, complete strata plan, phase strata plan and amended strata plan" not
2 only recognizes voting rights; it also recognises that the category of persons becoming
3 proprietors and acquiring voting rights may change over time.

4
5 137. Thus, in my judgment, the following words of Young J in the *Clarke* case, at paragraph
6 [34] are equally true in the instant case:



7
8 "The Act provides for a variety of voting rights and entitlements..... In
9 certain situations, unanimous resolutions are required. In others, majority
10 of unit area applies. These provisions would be rendered nugatory by this
11 veto right. The body corporate could effectively be prevented from doing
12 anything by one unit-holder's vote."

13
14 138. It is plain that the Scheme of *the STRL* contemplates proprietors having voting rights,
15 that certain matters, such as, for example, to do with the common property could only
16 take place by unanimous resolution (under *the STRL (2013 Revision)* by super-majority
17 resolution). Other matters can take place by majority decision. The amendment at By-law
18 2(2) that allows TRL to be entitled on a poll to the same number of votes equal to all the
19 votes of others cast at the meeting plus two additional votes clearly interferes, renders
20 nugatory, or waters down, the voting rights and entitlements of other proprietors provided
21 for under *the STRL law*. In addition, the combined effect of Sub-clauses 2(1) and (3) is
22 that none of the other proprietors can ever call for a meeting to discuss anything outside
23 of the accounts. This is because under these amended by-laws annual general meetings
24 are to deal only with consideration of the accounts and only the developer can exercise its
25 discretion as to whether to call for an extraordinary general meeting. That seems to
26 penalize the other proprietors with no apparent justification.

27
28 139. The by-laws were not to be amended or varied except by unanimous resolution of the
29 body corporate (my emphasis). The by-laws set out in the First Schedule are therefore the
30 model, or default by-laws. Their content represents what was considered desirable,
31 reasonable and in keeping with the policy and Scheme of *the STRL*. Indeed, one of the



pillars of the management structure of the Strata Corporation is the entity known as an Executive Committee. The only provisions dealing with the Executive Committee appear in the First Schedule By-Laws, clauses 13-22 (inclusive).

140. I was initially drawn to the logic of Mr. Robinson's argument that the principles of, or analogous to fraud on the minority, were established to prevent the exploitation of an existing minority and the Plaintiffs were not at the time of the amendment an existing minority. However, this reasoning does not withstand closer analysis. This is because we are here considering a statutory scheme. A contextual reading of *the STRL* reveals that Parliament never intended *the STRL* to give authority to make rules such as those in By-law 2. In my view, they are unreasonable in the *Wednesbury* sense once there are owners other than the original owner, and are *ultra vires*. They are manifestly partial. There is no denying that an apparently regular exercise of a power has in fact been but a means of securing some personal or particular gain to the developer, whether pecuniary or otherwise, which does not fairly arise under the power to amend accorded by *the STRL* – see *Peter's American Delicacy*, referred to in paragraph 49 above.

141. I also do not agree that the doctrine of *expressio unius* applies here. This is because, although sub-section 15(4) of *the 1973 Law*, states that no by-law shall operate to prohibit or restrict the devolution of strata lots or any dealing therewith or to destroy or modify any easement implied or created by the Law, this is not the only basis upon which the Court's power to strike down a by-law as being *ultra vires* could arise. I am also of the view that the *expressio unius* principle does not apply because there may well be reasons for singling out devolution of strata lots or easements for special mention in sub-section 15(4), other than an intention to exclude other types of problems with by-laws – see *Bennion* Section 395. Indeed, the article by Rath (at page 320) states that the intention behind this type of provision "*is that no alteration of the by-laws shall be capable of changing the structure of strata titles as virtually equivalent to surface titles*". Further, like all canons of construction, the *expression unius* principle operates only where not outweighed by other interpretative factors – see *Bennion* Section 390.



Sub-section 27(d) of *the Interpretation Law* decrees that no regulation, and therefore no by-law, shall be inconsistent with the provisions of any Law. As stated in *Owners No.3397 v Tate at paragraph [72]*, by-laws have to be approached on a basis consistent with the Statutory Scheme under which they are authorized. Consistency has to do not only with express provisions, but also with the overall context and underlying aims of the legislation when construed as a whole.

143. In my judgment Clause 2 of the by-laws is just as repugnant to the Scheme of *the STRL* and as *ultra vires* as was the by-law in *Foith* considered by Henderson J. to be inconsistent with section 21(4) of *the STRL (2005 Revision)*.

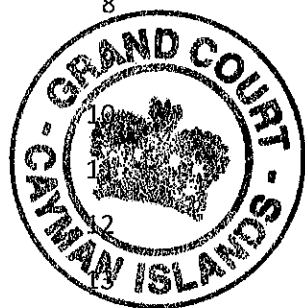
144. In the instant case, I am of the view that the Plaintiffs are entitled to the declaration sought in respect of By-Law 2 and that the By-laws of Castaways' Cove, the 1st Defendant must be modified by the existing Executive Committee, by deleting By-Law 2, and lodging the modified By-Laws with the Registrar of Lands forthwith.

145. It is also my considered view that the Legislature should examine the specific concerns raised in this case and the tensions that undoubtedly exist between the interests of developers and proprietors of strata units in a Strata development forming part of a resort. I would urge the Legislators to decide whether there is a need for appropriate amendment to the legislation. It would be a matter for the Legislature to decide whether amendment should be along the lines set out in *the 1973 NSW Law*, or in other legislation in the Commonwealth, or indeed in a unique form that fulfills the needs of the Cayman Islands and its people.

146. I note that in the instant case the Plaintiffs have not addressed their submissions to the status of the contractual arrangements which they entered into with TRL in the form of Agreements of Sale. There is no evidence as to whether TRL and Mr. Clappison initialed a copy of the by-laws as provided for in Clause 5(2) of the Agreement for Sale. In cross-examination, Mr. Clappison said that he never saw the by-laws and does not recall initialing them. However, the combination of Clauses 5(2) and 6(6) of the Agreement for

1 Sale may suggest that the purchasers were on notice about the amended by-laws, or
2 should have been. Henderson J held in *Foith* that the contractual terms in that case were
3 valid and raise separate and different considerations apart from the question of validity of
4 the by-laws themselves. There was held to be nothing in *the STRL* that prohibited a
5 party from contracting out of the provisions in section 21(4). At paragraph 18 Henderson
6 J stated:

7
8 *“ if there is a common thread to these decisions (and I am not sure there*
9 *is), it is to be found in the Court’s desire to protect a vulnerable group-*
10 *gold miners, borrowers, and liquidation creditors-from giving up*
11 *important rights because of pressure or simple ignorance. Purchasers of*
12 *strata lots are a different case. A strata lot owner is already protected*
13 *from prohibitions and restrictions on his right to lease which might be*
14 *imposed against his will by majority vote; s. 21(4) does that. There is no*
15 *compelling reason to extend the same protection to prospective*
16 *purchasers. Such purchasers have complete freedom to agree to*
17 *restrictions on leasing or to look elsewhere for a strata lot. There is no*
18 *question of public interest which prevents a purchaser from agreeing on*
19 *leasing restrictions even though the other owners could not impose such*
20 *restrictions upon him by majority rule.”*



21
22 147. The Court of Appeal (see paragraph 34 of the judgment, per Chadwick P) approved the
23 reasoning of Henderson J on this public policy point.

24
25
26 148. In summary therefore, I hold that By-Law 2 is invalid and should be struck down, Since
27 the matter has not been directly raised or argued before me, I will not go on to make
28 declarations as to the validity of the relevant Agreements for Sale.



APPOINTMENT OF AN ADMINISTRATOR

1 In my judgment the Plaintiffs do have standing to bring this application. In addition,
2 although Mr. Huskisson is quite right that not all of the owners who Mr. Clappison says
3 expressed support for these proceedings circled the choice of "approval" as opposed to
4 "dissent" which appeared on the relevant Form circulated by Mr. Clappison, I agree with
5 and accept Mr. Clappison's reasoning in his cross-examination that even though persons
6 may not have circled the choice "approval", it was reasonable to conclude that those who
7 sent the letters back to him were in agreement with the bringing of, and the issues raised
8 in this law suit. Those persons represented approximately 36 units. In my judgment, the
9 Plaintiffs have sufficient status and interest to maintain these proceedings and have
10 significant and substantial support from other proprietors. Section 9 of *the STRL* states
11 that anyone having "an interest" in a strata lot may apply to the Court for the appointment
12 of an administrator. I am of the view that the Plaintiffs have cleared that hurdle with ease.
13 The analogy of tangible interest in *Greenhaven Motors* is also not in any event on "all
14 fours" since appointment of an administrator is not of the same nature as a winding up
15 application.
16

17
18 150. It is obvious that there have been personal clashes between TRL, (in particular Mr. Kel
19 Thompson), Mr. Clappison, and other owners. It is also plain that the preparation of
20 accounts and accountability has been less than satisfactory. However, many of the
21 problems have come about, as the Minutes of Annual General Meetings reveal, because
22 TRL has on numerous occasions used By-law 2(2) to, amongst other matters, carry
23 resolutions and approve accounts when there is objection or disagreement by other
24 proprietors.
25

26 151. As Mr. Huskisson pointed out in his submissions, the remedy of appointing an
27 administrator is an extreme remedy. Further, as was argued, *McGowan* is a case in which
28 there were, complaints similar to those in the instant case, having to do with double
29 charging and the retaining of employees rather than independent contractors. In



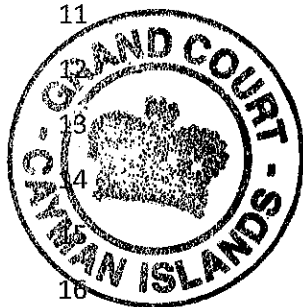
McGowan it was held that the circumstances did not reach the requisite standard. In my view the same obtains here.

4 152. Despite the numerous complaints, Mr. Clappison did acknowledge that the Strata is
5 maintained to a high standard. Further, it is clear, (and indeed, Mr. Clappison conceded
6 this), that the principle of sharing costs between the two parts of the resort has been in
7 place for some twelve years. The basic structure of the combined resort has accordingly
8 been in place for some twelve years, and some eighty people are employed in the
9 combined resort. The plaintiffs and the other proprietors supporting this claim were
10 aware when they were purchasing their interest in the units that they were buying into a
11 Strata development forming part of a Resort. They plainly derive benefits from that
12 arrangement and those circumstances. Additionally, in my view, many of the problems
13 being experienced by the proprietors will fall away once the by-laws are amended. I also
14 found some of the practical points raised by TRL validly raised. For example, how
15 would the administrator be expected to interact with TRL, where the lines of demarcation
16 of functions would fall, and what, if any, might be the effect on the Wyndham franchise.

17
18 153. I am not satisfied that:

- 19
20 (a) There has been a demonstrated inability of the Executive Committee to
21 manage the Strata;
22 (b) There has been substantial misconduct or mismanagement or both in the
23 affairs of the Strata;
24 (c) That the appointment is necessary to bring order to the affairs of the
25 Strata; or
26 (d) That the struggles between competing groups on the strata is such as to
27 impede or prevent proper governance of the Strata, particularly having
28 regard to the fact that I have ordered the offending By-law 2 to be
29 removed from the by-laws.
30

1 154. I note that in this case, there was no challenge brought in relation to the Management
2 Agreement with TRL. In any event, *the STRL* does not contain the type of wide powers
3 under which the Tribunal in the Western Australia case of *Parker v Strata Plan No.*
4 *27426* was able to shorten the term of a Management Agreement. However, I say nothing
5 about this definitively since there were no arguments addressed on this. I have ruled in
6 the Plaintiffs' favour on the substantive legal point argued on this application and have
7 declared By-law 2 *ultra vires*. Substituting for the phrase "shortening the term of the
8 management agreement", the phrase "declaring By-law 2 *ultra vires*", I echo the
9 reasoning of the Tribunal at paragraph 3 of the summary, where it is stated:-
10



11 " *The Tribunal concluded, for the same reasons set out in the other*
12 *proceedings, that an insufficient case was made out for the extreme*
13 *remedy of appointing an administrator, which the Tribunal considered*
14 *should be a remedy of last resort. In view of the order made in related*
15 *proceedings shortening the term of the management agreement, the*
16 *Tribunal concluded that there was no reason to believe that the members*
17 *of the strata council, with the benefit of the guidance provided by the*
18 *Tribunal's reasons for decision in those proceedings would not properly*
19 *discharge their obligations thereby obviating any present need for an*
20 *administrator.*"

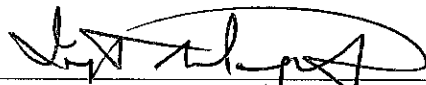
21 (my emphasis)

22 155. On balance, I am of the view that in all of the circumstances, there should be no need to
23 resort to this remedy at this time. However, an Annual General Meeting will have to be
24 held to decide upon the constitution of the Executive Committee. The present Executive
25 Committee must continue to serve until that can take place. In addition, it appears to me
26 that the Executive Committee should be required to ensure the production of audited
27 accounts for all outstanding years as soon as practicable and should forthwith make those
28 available to the proprietors of Castaways' Cove. There should be liberty to apply to the
29 Court in respect of these and other such matters.
30

1 156. In my judgment, the Plaintiffs have substantially succeeded. They succeeded on the main
2 issue of *ultra vires*, but not on the issue of appointing an administrator. However, these
3 are distinct and separate issues. My preliminary view is that the Plaintiffs should recover
4 costs from TRL and CTL on a reduced percentage basis – See *Seepersad v Persad* [2004]
5 UKPC 19, paragraph 24 where these costs principles are discussed. I am minded to order
6 70% costs to the Plaintiffs against the Second and Third Defendants to be taxed if not
7 agreed. If the parties are not in agreement with this Costs Order, they have liberty to
8 apply within 14 days of the date of delivery of this Judgment, seeking a different order.
9



16
17
18
19


THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT