CICA 15/2014

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT
FINANCIAL SERVICES DIVISION
(Justice Henderson)
(Cause No 358 of 2013)

BEFORE

The Rt Hon Sir John Chadwick, President
The Hon Elliott Mottley, Justice of Appeal
The Hon Sir George Newman, Justice of Appeal

BETWEEN

(1) SCOT FOITH
(2) PAULA FOITH
(3) MARSHA LTD

Plaintiffs/Appellants

-and-

(1) THE PROPRIETORS, STRATA PLAN 436
(2) THE PROPRIETORS, STRATA PLAN 437
(3) THE PROPRIETORS, STRATA PLAN 550

Defendants

(4) RC CAYMAN PROPERTY HOLDINGS LTD
(5) RC CAYMAN HOTEL HOLDINGS LTD

Defendants/ Respondents to Appeal

Mr. Kenneth Farrow QC of HSM Chambers for the Appellants, Scot Foith, Paula Foith and Marsha Ltd
Mr. Peter McMaster QC with **Mr. Robert Linley** of Appleby (Cayman) Ltd for the Respondents to the Appeal, RC Cayman Property Holdings Ltd and RC Cayman Hotel Holdings Ltd

Hearing: 27 April 2015
Judgment : 6 May 2015

JUDGMENT

Sir John Chadwick, President:

1. This is an appeal from part of an order made by Justice Henderson and filed on 10 June 2014 in proceedings brought by Scot Foith, his wife, Paula Foith, and Marsha Ltd against the Proprietors, Strata Plan 436, the Proprietors, Strata Plan 437 and the Proprietors, Strata Plan 550 (together "the Strata Plan Proprietors) and RC Cayman Property Holdings Ltd and RC Cayman Hotel Holdings Ltd (together "the RC

Cayman Holdings companies") in respect of dealings affecting (or said to affect) strata lots in the buildings known as the South Tower and the North Tower at The Residences at the Ritz Carlton.

The underlying facts

2. Mr and Mrs Foith are the proprietors of a condominium known as Residence 104 in the South Tower: Marsha Ltd is the proprietor of a condominium known as Residence 501 in the North Tower. Those two condominiums are registered as strata lots under the Registered Land Law (2004 Revision) pursuant to the provisions of the Strata Titles Registration Law (2005 Revision). They are included, respectively, in strata plans 437 and 436. As proprietors of those strata lots, Mr and Mrs Foith and Marsha Ltd are, respectively, members of the bodies corporate known as "The Proprietors, Strata Plan No.437" and "The Proprietors, Strata Plan No. 436" constituted under Part III of the Strata Titles Registration Law; and are subject to the bye-laws made, respectively, by those bodies corporate.

3. There is no material difference, for the purposes of this appeal, between the bye-laws made by The Proprietors, Strata Plan No. 437 and the bye-laws made by The Proprietors, Strata Plan No. 436. Each set of bye-laws contained, at By-Law 9 (*sic*) ("Residential Condos"), restrictions on the dealings or dispositions by the proprietor of the condominium. In particular, paragraph 9.1 of By-Law 9 was in these terms:

   > "A Proprietor shall not rent, lease, licence or part with possession of his residential Condo unless he does so through the Manager or its designee exclusively, on such terms as are determined by the Manager or the Executive Committee from time to time acting reasonably, subject at all time to these by-laws".

   In that context "the Manager" meant Cesar Hotelco (Cayman) Ltd or its nominee, successor, assignee or any designee thereof, retained by the Proprietors of the Strata Plan (the "Corporation") to provide management and administration services. The "Executive Committee" meant the executive committee of the Corporation.

4. Mr and Mrs Foith purchased Residence 104 from Condoco Grand Cayman Resort Ltd pursuant to an Agreement for Purchase and Sale dated 31 July 2004. The agreement contained a Schedule of Conditions: clause 10 in the schedule, headed "Restriction on Rental of Condominiums" was in these terms:

   > "<u>10 Restriction of Rental of Condominium</u>

(a) The Purchaser hereby acknowledges that the Condominium is subject to the Restriction and agrees that in the event that the Purchaser desires to rent the Condominium or any part thereof from time to time it may only do so in accordance with the provisions of this clause 10 and then only through the Vendor or its agent exclusively. Rentals for periods of 30 days or less are not permitted. Rentals for periods of more than 30 days shall be managed exclusively by the Vendor or its designee. For all purposes relative to this clause 10 (but subject at all time to the Strata Law and to the By-Laws), the Vendor or its designee shall be permitted to have the exclusive control of and discretion to direct, manage and supervise all rentals of the Condominium or of any part thereof. The provisions of this clause 10 shall survive the completion of this Agreement and shall be included in the By-Laws and the Restriction. Subject to the provisions of sections 132 and 134 of the Registered Land Law, the Restriction shall be deemed binding upon and run with the Condominium as land. The Vendor may require the Purchaser to deliver at the completion of this Agreement such further documentation relating to the Restriction as the Vendor may deem necessary to ensure that the Restriction shall be enforceable against the Purchaser and (to the fullest extent legally permissible) also against the Purchaser's successors and assigns.

(b) Clause 10(a) of this Agreement shall survive the completion of this Agreement."

"Restriction" is defined in clause 1(y) of the Purchase and Sale Agreement. It means:

> " . . . a restriction on dealings to be entered in accordance with section 132 of the Registered Land Law on the land register respecting the Property, the Condominium and/or other parcels of land and/or strata lots respecting the development and/or the Resort and expressed to endure for a period equal to the term of the Crown Lease, whereby all rentals of the Condominium are required to be managed on behalf of the registered proprietor thereof and the Strata Corporation exclusively by the Vendor or its designee on terms more particularly set forth in Clause 10 of this Agreement and whereby any transferee of the title to the Condominium shall be deemed to acknowledge and accept, and be bound by, the terms of such restriction."

Clause 4 ("Title") provided, at paragraph (e), that:

> "4(e) The Condominium is sold and the Purchaser shall take title thereto and possession thereof subject to the provisions of the registered Land Law and of the Strata Law in general and in particular (concerning which the Purchaser is hereby deemed to have satisfied himself as to all of the following matters) subject to:
>
> (i) The Strata Plan, and the By-Laws subject to such amendments thereto as the Vendor shall in its absolute discretion deem necessary or think fit in order to ensure the operation of the Resort, including the Development, as a first class resort."

In that context, the "Development" means the residential condominium development to be known as "The Residences at the Ritz-Carlton Grand Cayman Resort" (for so

long as such development is being managed by The Ritz Carlton Hotel Company of the Cayman Islands Ltd or any of its affiliates) to be constructed on the Property"; and the "Resort" means the Development, together with the hotel and Resort Amenities to be constructed on the Resort Property and to be known as the Ritz-Carlton Grand Cayman Resort.

5. The sale of Residence 104 to Mr and Mrs Foith was completed by a Transfer of Lease dated 3 April 2006. The schedule of covenants which formed part of that Transfer contained the following introductory paragraph:

> "The transferee with intent and so as to bind the title to the above numbered Parcel into whosoever hands that such title shall come and to benefit and protect the estate of the Transferor or any part thereof in the residential development for the time being known as "The Residences at the Ritz-Carlton Grand Cayman Resort" in Grand Cayman, Cayman islands (the 'Development') for good and valuable consideration (the receipt and sufficiency whereof is hereby acknowledged) hereby covenants with the Transferor and its successors in title to all or any parts of the Development that the Transferee, his executors, administrators successors, assigns and any other person or entity with an interest in the Development will at all times hereafter be bound by, observe and perform the following stipulations, restrictions and covenants:"

The schedule also contained, as covenant 2(ii):

> "2(ii) Subject at all time to the Strata Titles Registration Law (1996 Revision) and the by-laws of the Proprietors, Strata Plan No 437, each as may be amended from time to time, Manager and its designees and their respective successors and assignees shall have the exclusive control of and discretion to direct, manage and supervise all rentals of each Residential Unit."

6. On 28 November 2005, an entry was made in Section C - the incumbrances section – of the Land Register for Residence 104 in respect of restrictive agreements in the bye-laws of The Proprietors, Strata Plan 437. On 10 July 2006, the date of completion of the sale to Mr and Mrs Foith, a further entry was made in Section C of that title in respect of the restrictive covenants in the Transfer document. No entry was made in respect of the restrictive agreement, or the Restriction, in the Purchase and Sale Agreement dated 31 July 2004.

7. Marsha Ltd purchased Residence 501 from Condoco Properties Ltd pursuant to an Agreement for Purchase and Sale dated 21 May 2008. That agreement was in terms which were the same (or not materially different from) those in the Agreement for Purchase and Sale of Residence 104 dated 31 July 2004; in particular, it contained the

same covenant as to Restriction on Rental of Condominium. That sale was completed by a Transfer of Lease dated 1 July 2008. Again, the Transfer was in terms which were the same (or not materially different from) those in the Transfer in respect of Residence 104 dated 3 April 2006; save that the terms of covenant 2(ii) in the earlier transfer were in covenant 3(ii) in the later transfer.

8. On 23 November 2005, an entry was made in the incumbrances section of the Land Register entries for Residence 501 (wrongly referred as residence 510) in respect of restrictive agreements in the bye-laws of The Proprietors, Strata Plan 436. On 20 April 2010, following completion of the sale to Marsha Ltd, a further entry was made in Section C of that Title in respect of the restrictive covenants in the Transfer document. No entry was made in respect of the restrictive agreement, or the Restriction, in the Purchase and Sale Agreement dated 12 May 2008.

9. The benefit of the covenants in the two Purchase and Sale Agreements were transferred to RC Cayman Hotel Holdings Ltd in circumstances described in paragraphs 14 to 20 of the affidavit sworn by James Glasgow, a director of RC Cayman Property Holdings Ltd on 20 December 2013. At paragraph 17 of that affidavit, Mr Glasgow referred to a Deed of Transfer and Assignment dated 31 October 2012 (the "Omnibus Assignment"). At paragraphs 18 and 19 he said this (so far as material):

> "18 . . . Pursuant to the Omnibus Assignment, RC Cayman Hotel [Holdings Ltd] became the owner of all the assets of the Ryan Entities that had not otherwise been specifically assigned, including their rights as 'Developer' and 'Manager' under the Strata By-Laws for Stratas . . . 436, 437 . . . and 550; and (ii) their rights and obligations under the Sale and Purchase Agreements (*sic*)."
>
> 19 Thereafter RC Cayman Hotel assigned its rights as 'Developer' under the Strata By-Laws for Stratas 436 [and] 437 . . . to RC Cayman Property [Holdings Ltd]. . . ."

In that context the "Ryan Entities" includes Condoco Grand Cayman Resort Ltd and Condoco Properties Limited, the vendors under, respectively, the Purchase and Sale Agreement dated 31 July 2004 and the Purchase and Sale Agreement dated 12 May 2008: paragraph 14 of Mr Glasgow's affidavit.

10. Mr Glasgow did not, in terms, refer in his affidavit to the transfer of the benefit of the covenants in the schedules to the two Transfers, dated 3 April 2006 and 1 July 2008. But he exhibited to that affidavit a copy of the Omnibus Assignment of 31 October

2012. That deed is made between RC Cayman Holdings LLC "in the exercise of its powers of sale in respect of the assets and business of Condoco Grand Cayman Resort Ltd . . . and Condoco Properties Limited (the 'Assignors')" and RC Cayman Hotel Holdings Ltd ("the Incoming Party"). Clause 1 of the deed ("Transfer and Assignment") is in these terms (so far as material):

> "To the extent that the Assignors have not by way of any other deed, document or agreement already transferred, novated or assigned the Asset to the Incoming Party, the Assignors hereby transfer and assign to the Incoming Party, all of the Assignors' right, title and interest in and to the Assets. For the avoidance of any doubt, this transfer and assignment shall include, but shall not be limited to, all book debts and receivables of the Assignors, all rights of the Assignors as 'Developer' (and otherwise) under the By-Laws of . . . The Proprietors-Strata Plan 436 (The Residences at the Ritz-Carlton Grand Cayman Resort (North Tower)), [and] The Proprietors-Strata Plan 437 (The Residences at the Ritz-Carlton Grand Cayman Resort (South Tower)), . . ."

The "Assets" means "all of the assets of the Assignors"; recital (C) to the deed. I am content to assume, for the purposes of this appeal (but without deciding), that - as seems to be common ground - in so far as the benefit of the covenants in the two Transfers were not assigned to RC Cayman Hotel Holdings Ltd in some earlier document, the Omnibus Assignment did have the effect of transferring the benefit of those covenants to RC Cayman Hotel Holdings Ltd.

11. By originating summons issued on 16 July 2014 the plaintiffs, Mr and Mrs Foith and Marsha Limited, sought declarations (i) that clause 9 (other than sub-clause 9.9) of the By-Laws of Strata Plans 436 and 437 were null and void, on the ground that they contravened section 21(4) of the Strata Titles Registration Law (2005 Revision) ("the Law"); (ii) that clauses 9 and 10 of the schedules to the Purchase and Sale Agreements of 31 July 2004 and 12 May 2008 were null and void on the ground that they contravened the public policy reflected in section 21(4) of the Law; and (iii) that clauses 3 and 4 (*sic*) of the schedules to the Transfers of 3 April 2006 and 1 July 2008 were null and void on the ground that they, also, contravened the public policy reflected in section 21(4) of the Law.

12. Section 21 of the Strata Titles Registration Law (2005 revision) was in these terms (so far as material):

> "21(1) Subject to this Law, the control, management, administration, use and enjoyment of the strata lots and the common property contained in every registered strata plan shall be regulated by bye-laws.

(2) The bye-laws shall include:

(a) the bye-laws set forth in the First Schedule, which shall not be amended or varied except with unanimous resolution;

(b) the bye-laws set forth in the Second Schedule, which may be amended or varied by the Corporation.

(3) Until bye–laws are made by a corporation in that behalf, the bye-laws set forth in the First and Second Schedules shall, as and from the registration of a strata plan, be in force for all purposes in relation to the relevant parcel and the strata lots and common property therein.

(4) No bye-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 this Law.

. . .

(7) Bye-laws for the time being in force shall bind every corporation and the proprietors to the same extent as if such bye-laws had respectively been signed and sealed by such corporation and each proprietor and contained covenants on the part of such corporation with each proprietor and on the part of each proprietor with every other proprietor and with such corporation to observe and perform all the bye-laws."

"Corporation", for the purposes of the Law, means, in relation to any registered strata plan, a body incorporated by section 5: that is to say, it means the body corporate known as The Proprietors, Strata Plan No 436, (or other number as the case may be).

13. The originating summons came before Justice Henderson for hearing early last year. By an Order made on 9 April 2014, but not filed until 10 July 2014, the judge made the declaration sought in respect of the By-laws of Strata Plans 436 and 437; and directed that the Strata Plan Proprietors amend the respective By-Laws by deleting clauses 9 (other than sub-clauses 9.9) and lodge the amended By-Laws with the Registrar of Lands. But he did not make the declarations sought in relation to the covenants in the Purchase and Sale Agreements and in the Transfers. Rather, he confirmed that clause 10 in the schedule of covenants annexed to the Purchase and Sale Agreement and clause 2 in the covenants contained in the Transfer in respect of Unit 104 of the South Tower were valid and effective and binding on Mr. and Mrs. Foith; and that clause 10 in the schedule of covenants annexed to the Purchase and Sale Agreement and clause 2 (*sic*) in the covenants contained in the Transfer in respect of Unit 510 (*sic*) of the North Tower were valid and effective and binding on Marsha Ltd.

14. There is no appeal by the Strata Plan Proprietors from the judge's order in respect of the Bye-Laws. They have taken no further part in these proceedings; save, I assume, in relation to the assessment or agreement of the costs which they were ordered to pay to the plaintiffs. The plaintiffs appeal from so much of the order of 10 July 2014 as relates to the covenants contained in the Purchase and Sale Agreements and the Transfers.

The judge's reasons

15. After setting out the facts and identifying the issues which were for determination, the judge addressed, first, the question whether the provisions of the Bye-Laws were valid. After analyzing the statutory schemes in the Registered Land Law and the Strata Law – which, as he said, were intended to operate in harmony – he concluded that the word "dealing" in section 21(4) of the Strata Law was intended to include "leasing". Accordingly, "a bye-law may not prohibit or restrict a strata lot owner's right to rent or lease his unit"; and clauses 9 in the byelaws applicable to the North and South Towers (except sub-clause 9.9; which restricted "use" rather than leasing) were invalid.

16. The judge then turned to address the question: "Are the Plaintiffs bound by the Contract in any event?". He pointed out that there was nothing in the Strata Law itself which attempted to prohibit a party from contracting out of the restrictions in section 21(4). He referred to the submission advanced on behalf of the plaintiffs: that the contractual provisions were void for reasons of public policy as they represented an attempt to contract out of a statutory protection for purchasers of strata lots. He reminded himself of the observations of the Privy Council in *Kook Hoong v Leong Cheong Kweng Mines Ltd* 1963] UKPC 36; [1964] AC 993; [1964] 1 All ER 300:

> "General social policy does from time to time require the denial of legal validity to certain transactions by certain persons. This may be for their protection, as in the case of the infant or other category of person enjoying what is to some extent a protected status, or for the protection of others who may come to be engaged in dealings with them, as, for instance, the creditors of a bankrupt. In all such cases there is no room for the application of another general and familiar principle of law that a man may, if he wishes, disclaim a statutory provision enacted for his benefit, for what is for a man's benefit and what is for his protection are not synonymous terms. Nor is it open to the court to give its sanction to departures from any law that reflects such a policy, even though the party has himself behaved in such a way as would otherwise tie his

> hands. See *Stapleford Colliery Co, Barrow's Case* 14 ChD 432, 449, per Bacon V.C*"*

And he referred, also, to the decisions in *Lake View & Star Ltd v Caminelli* [1937] 2 All ER 285, *Hoare v Adam Smith (London) Ltd* [1938] 4 All ER 283 and *British Eagle International Airlines Ltd v Compagnie Nationale Air France* [1975] 2 All ER 390. He then said this:

> "If there is a common theme to these decisions (and I am not sure that there is), it is to be found in the court's desire to protect the members of a vulnerable group – gold miners, borrowers and liquidation creditors – from giving up important rights because of pressure or simple ignorance. Purchasers of strata lots are a different case. A strata lot owner is already protected from prohibitions and restrictions on his right to lease which might be imposed against his will by majority vote; section 21(4) does that. There is no compelling reason to extend the same protection to prospective purchasers. Such purchasers have complete freedom to agree to restrictions on leasing or to look elsewhere for a strata lot. There is no question of public interest which prevents a purchaser from agreeing on leasing restrictions even though the other owners could not impose such restrictions upon him by majority vote."

Accordingly, the judge held that clause 10 of the schedule to the Purchase and Sale Agreements and clause 2 (or 3, in the case of unit 501) of the covenants in the schedule to the Transfers were valid and enforceable contractual provisions.

The new points sought to be raised on the appeal

17. The appellants gave Notice of Appeal dated 17 July 2104; and served a Memorandum of Grounds of Appeal shortly thereafter, on or about 5 August 2014. By Amended Notice of Motion dated 10 March 2015 the appellants sought leave to amend the Originating Summons, the Notice of Appeal and the Memorandum of Grounds of Appeal. The amendments are intended to raise two new points: (i) that the restrictions in the schedules to the Purchase and Sale Agreements are not binding on the plaintiffs for want of registration ("the registration point"); and (ii) that, as a matter of construction, the covenants in (a) the schedules to the Purchase and Sale Agreements and (b) the schedules to the Transfers do not restrict the plaintiffs from letting their respective units, whether by themselves or through agents of their choice, and, subject to the by-laws, upon such terms as they thought fit. It is said, correctly in my view, that each of those new points is a pure point of law; not dependent on any factual material which might have been advanced in response to it at the hearing before the judge (if it had been taken at or before that hearing).

18. The approach to be taken in this Court on an application to raise on appeal points which were not taken in the court below was explained in *Demirel v TMSF* (CICA (Application) No 6 of 2009; unreported, 9 September 2009). After referring to the decision of the Court of Appeal of England and Wales in *Pittalis v Grant* [1989] 1 WLR 605, the Court said this:

> ". . . we should ask ourselves, first. whether (i) TMSF has had opportunity enough to meet the new points that Mr Demirel now seeks to take or (ii) has acted to its detriment on the faith of the omission to raise those points at the proper time; second, whether if the new points were taken, Mr Demirel would have any real prospect of succeeding on those points; and, third, if so, whether the risk of injustice in denying Mr Demirel that prospect of success outweighs the risk of injustice to TMSF in denying it the finality to which it is entitled, having succeeded on the points which were argued in the court below and are now abandoned".

I should make it clear that the risk of injustice to the respondents in the present case (in denying them the finality to which they are entitled) is much reduced in the circumstances that the points advanced in the court below in support of the plaintiff's submissions on public policy have not been abandoned: they are pursued in this Court.

19. Approaching the application to amend on that basis, we indicated that we would allow the amendments *de bene esse* in order to hear the arguments on the new points which the appellants seek to raise. It follows that there are three issues for consideration on this appeal: (i) the registration point; (ii) the construction point and (iii) the public policy point. I will address those points in turn.

The registration point

20. Section 93 of the Registered Land Law (2004 Revision) is in Division 5 ("Easements, Restrictive Agreements, Profits and Licences") of Part V ("Dispositions"). The section is in these terms (so far as material):

> 93(1) Where an instrument, other than a lease or charge, contains an agreement (hereinafter referred to as a restrictive agreement) by one proprietor restricting the building on or the use or other enjoyment of his land for the benefit of the proprietor of other land, and is presented to the Registrar, the Registrar shall note the restrictive agreement in the incumbrances section of the register of the land or lease burdened by the restrictive agreement, either by entering particulars of the agreement or by referring to the instrument containing the agreement, and shall file the instrument.

> (2) Unless it is noted in the register a restrictive agreement is not binding on the proprietor of the land or lease burdened by it or on anybody acquiring the land or lease."

21. For the purposes of section 93(1) of the Registered Land Law, "proprietor" takes its meaning from section 2 of that Law: it means "the person registered under this Law as the owner of land or a lease or a charge". At the dates when the Purchase and Sale Agreements in respect of Residences 104 and 501 were made (i) Mr and Mrs Foith were not registered as the owners of Residence 104 or of the lease under which title to that property was held and (ii) Marsha Ltd was not registered as the owner of Residence 501 or of the lease under which title to that property was held. It follows that, at the dates when the Purchase and Sale Agreements were made, they were not then "restrictive agreements" within the meaning of section 93(1): they were not "restrictive agreements" because they were not agreements by which one proprietor restricted the user or other enjoyment of his land – that is to say, land of which he was the proprietor – for the benefit of the proprietor of other land. The Purchase and Sale Agreements could not have been noted in the incumbrances section of the register relating to Residence 104 or Residence 501 (as the case might be) at the dates when they were respectively made.

22. Following completion of each Purchase and Sale Agreement, Mr and Mrs Foith became – by registration on 10 July 2006 - the persons registered as the owners of the lease under which title to Residence 104 was held; and Marsha Ltd became – by registration on 20 April 2010 - the person registered as the owner of the lease under which title to Residence 501 was held. From those dates, Mr and Mrs Foith (in respect of Residence 104) and Marsha Ltd (in respect of Residence 501) were "proprietors" for the purposes of section 93(1) of the Law; and, as it seems to me, the Purchase and Sale Agreements became "restrictive agreements" for the purposes of that section. It would, in my view, have been open to either Mr and Mrs Foith or Condoco Grand Cayman Resort Ltd to present the Purchase and Sale Agreement dated 31 July 2004 to the Registrar for registration – that is to say, to be noted in the incumbrances section of the register relating to Residence 104 – at any time on or after 10 July 2006; and it would have been open to either Marsha Ltd or Condoco Properties Limited to present the Purchase and Sale Agreement dated 12 May 2008 to the Registrar for noting in the incumbrances section of the register relating to Residence 501.

23. Neither of the Purchase and Sale Agreements was noted in the relevant register (or at all). The effect of non-registration, as it seems to me, is that (i) from 10 July 2006, the provisions in the Agreement dated 31 July 2004 which seek to restrict user or other enjoyment of Residence 104 have not been binding on Mr and Mrs Foith; and (ii) from 1 July 2008, the provisions in the Agreement dated 12 May 2008 which seek to restrict user or other enjoyment of Residence 501 have not been binding on Marsha Ltd.

24. The failure to present the Purchase and Sale Agreements for registration, following completion of those agreements was not, I think, an oversight on the part of the Vendors: the terms of the schedules make it clear that it was not in contemplation that those agreements would be registered as "restrictive agreements" under section 93(1) of the Law. I have referred, earlier in this judgment, to the definition of "Restriction" in the Purchase and Sale Agreements:

> "'Restriction' means a restriction on dealings to be entered in accordance with section 132 of the Registered Land Law on the land register respecting the Property, the Condominium and other parcels of land and/or strata lots respecting the Development and/or the Resort . . ."

It is clear that the intention was that the covenants were to be protected by registration of a Restriction under section 132, not by registration of a restrictive agreement under section 93(1). Clause 10 reflects this intention:

> "The Purchaser hereby acknowledges that the Condominium is subject to the Restriction . . . The provisions of this clause 10 shall survive the completion of this Agreement and shall be included in the By Laws and the Restriction. Subject to the provisions of sections 132 and 134 of the Registered Land Law, the restriction shall be deemed binding upon and run with the Condominium as land."

25. Section 132 of the Registered Land Law is found in Division 3 ("Restrictions") of Part VIII ("Restraints on Disposition"). The section is in these terms (so far as material):

> "132(1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, after directing such inquiries to be made and notices to be served and hearing such persons as he thinks fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.
>
> (2) . . .

> (3) The Registrar shall order a restriction to be entered in any case where it appears to him that the power of the proprietor to deal with the land, lease or charge is restricted."

A restriction is, as section 132 of the Law makes clear, an order made by the Registrar. It should be entered in the proprietorship section of the register: section 9(2)(b) of the Law.

26. Clause 2(iii) in the schedule of covenants in the Transfer dated 3 April 2006 was in these terms:

> "2(iii) The Transferee and his executors, administrators, successors, assigns and any other person or entity with an interest in the Parcel will at all times allow and shall not object to the Transferor making application to the Registrar of Lands pursuant to sections 132-134 inclusive of the Registered Land Law (2004 Revision), as amended from time to time, to register a restriction against the title to the Parcel in accordance with the covenants contained in this Schedule and the Transferee consents to the registration of a restriction on dealings being title to the Parcel prohibiting any dealings or dispositions which are inconsistent with the terms of these restrictions and covenants."

Clause 4 in the schedule of covenants in the Transfer dated 1 July 2008 was in the same terms (so far as material).

27. It does not appear from the material before this Court whether Condoco Grand Cayman Resort Ltd or Condoco Properties Ltd (as the case might be) did apply to the Registrar for restrictions to be entered against the titles to Residences 104 or 501; or whether the Registrar made orders constituting such restrictions pursuant to section 132 of the Law. What is clear is that the Registrar did not enter restrictions ordered under section 132 in the proprietorship section of those titles. But the Registrar did note the restrictive covenants contained in the Transfers dated 10 July 2006 and 1 July 2008 in the incumbrances section of those titles. It seems to me reasonably clear that the Registrar took the view (quite properly) that the appropriate manner in which to deal with whatever applications were made to him in relation to the restrictive covenants contained in those Transfers was to treat them as applications for the Transfer to be noted as "restrictive agreements" pursuant to section 93(1) of the Law. Be that as it may, the effect of what he did has been that the Transfers were noted in the incumbrances section of the titles to Residences 104 and 501; and, as it seems to me, they must be treated as having been registered as restrictive agreements within section 93(1). In those circumstances, as the appellants accept, section 93(2) of the

law does not have the effect that the covenants contained in the Transfers are not binding on Mr and Mrs Foith or on Marsha Ltd (as the case may be).

28. It follows that I conclude that the appellants are entitled to succeed on their registration point. The restrictions in clauses 10 of the Purchase and Sale Agreements are not binding on the appellants.

The construction point

29. It follows, also, that it is unnecessary to address the construction point in the context of the restrictions in the Purchase and Sale Agreements. But it is necessary to do in the context of the restrictions in the Transfers. As I have said, those are contained in clause 2(ii) of the Transfer dated 3 April 2006 and clause 3(ii) of the Transfer dated 1 July 2008. The two clauses are in the same terms, save for the reference to the relevant Strata Plan. I have set out those terms earlier in this judgment; but, for convenience, I will do so again:

> "Subject at all time to the Strata Titles Registration Law (1996 Revision) and the by-laws of the Proprietors, Strata Plan No 437 [or 436, as the case may be], each as may be amended from time to time, Manager and its designees and their respective successors and assignees shall have the exclusive control of and discretion to direct, manage and supervise all rentals of each Residential Unit."

The appellants submit that "stripped of unnecessary verbiage" that provision is to be read as:

> "Subject at all times to the Strata Law, the Developer has exclusive control over rentals."

30. The appellants contend, correctly in my view, that some meaning must be given to the words "Subject at all times to the Strata Law". In their written submissions, dated 10 March 2015, it is said:

> ". . . In a 'subject to A then B' type of clause, one would expect to find some nexus between A and B. If there is no such nexus, the Court is entitled to ask the question: why mention A at all? The additional words 'at all times' militates against treating the reference to A as mere surplusage. In the present context, B is relatively narrow dealing with letting restrictions. There are many provisions in the Strata Law which have nothing to do with letting restrictions. The only possible candidate is section 21(4) which, as Henderson J determined, invalidates by-laws which prohibit or restrict inter alia, lettings. It will be said that section 21(4) deals only with by-laws and not contractual provisions generally. That approach avoids any conflict between A and B but

> at the expense of depriving A of any function, that is, the absence of any nexus between A and B."

On that basis, it is submitted that the Court is entitled to and should, conclude that the purpose of the words "subject at all times to the Strata Law" was to put the Developer in the same position as the StrataPlan Corporation, no more nor less. It is said that the thinking behind including those words may be expressed in this way: "Well, we [the Developer] don't know whether these by-laws are enforceable but one thing's certain, we [the Developer] cannot enforce them. So let's put similar terms in our contracts. If the by-laws are enforceable, we can enforce them too; if not, we will be no worse off than we are now".

31. In substance, therefore, the Court is asked to construe the two clauses as if they read: "Manager and its designees . . . shall have the exclusive control of and discretion to direct, manage and supervise all rentals of each Residential Unit; Provided that the Manager and its designees . . . shall not have such exclusive control and discretion if a provision in the by-laws in those terms would be invalid by reason of section 21(4) – or any provision – of the Strata Law".

32. In my view there is no basis on which the Court can properly construe the two clauses in that manner. It is clear that the opening words "Subject at all time to the Strata Titles Registration Law (1996 Revision) and the by-laws of the Proprietors, Strata Plan No 437, each as may be amended from time to time" are intended to qualify (and, in some circumstances, to restrict) the exclusive control of and discretion to direct, manage and supervise all rentals of each Residential Unit which is conferred on the Manager and its designees. The clauses must be read in the sense: "Manager and its designees . . . shall have the exclusive control of and discretion to direct, manage and supervise all rentals of each Residential Unit; Provided that the Manager and its designees . . . shall exercise such exclusive control and discretion subject to the provisions of the Strata Law and the by-laws, each as amended from time to time". The relevant questions, therefore, are (i) whether there is any provision in the Strata Law (as amended from time to time) which prevents the Manager from exercising exclusive control of and discretion to direct, manage and supervise all rentals of a Residential Unit; and (ii) whether there is any by-law (as amended from time to time); and read in conjunction with the Strata Law (as amended from time to time) which prevents the Manager from exercising exclusive control of and discretion to direct,

manage and supervise all rentals of a Residential Unit. The answer to both those questions, at the time when they fell to be addressed, was "No". As Justice Henderson explained, the effect of section 21(4) of the Law was to prevent a comparable provision in the by-laws from having such effect; but that simply leaves the parties in the position that their contractual bargain has to be construed on the basis that there is no comparable provision in the by-laws; not on the basis that there is a provision in the by-laws which prevents the exclusive control of rentals being conferred on the Manager *dehors* the by-laws.

33. It follows that I conclude that the appellants fail on their construction point.

The public policy point

34. In my view the judge was correct to reach the conclusion that he did for the reasons that he gave. He was correct to hold that the relevant public policy underlying section 21(4) of the Strata Law was to protect a proprietor from restrictions on his right to lease his unit to which he had not agreed; but which (absent section 21(4) of the Law) might be imposed upon him by bye-laws which were made, or varied, by the Strata Plan Corporation following a majority vote of the proprietors as a whole. There was no public policy reason to prevent a proprietor from agreeing to accept restrictions on his right to lease his unit if he took the view, at the time, that it was in his interest to do so. As the judge pointed out ". . . purchasers have complete freedom to agree to restrictions on leasing or to look elsewhere for a strata lot".

Conclusion

35. I would give the appellants the leave sought to make the amendments to their originating summons, notice of appeal and memorandum of grounds of appeal so as to raise the two new points which have been argued. I would allow this appeal to the extent of setting aside the words "clause 10 of the purchase schedule and" where they appear in declarations (ii) and (iii) of the order of 10 July 2014. I would vary declaration (iii) by substituting "clause 3" for "clause 2". In all other respects I would dismiss the appeal.

Mottley JA I agree.

Newman JA I also agree.