

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

COMMERCIAL DIVISION

CLAIM NO. SLUHCM2020/0028 formerly SLUHCM2018/0068

BETWEEN:

PIGEON ISLAND DEVELOPMENT COMPANY LIMITED

Claimant

And

- 1. THE LANDINGS UNIT PLAN NO. D2/2007**
- 2. LANDINGS COMMERCIAL ASSETS LTD formerly
LANDINGS RESORT MANAGEMENT COMPANY LIMITED**

Defendants

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini

High Court Judge

Appearances:

Mr Deale Lee of Counsel for the Claimant

Mr Peter Foster QC with Ms Renee St Rose, Ms Marie-Ange Symmonds and Mr Mikel

King of Counsel for the Defendants

2021: April 10
May 10 & 11
July 13

2022: March 30

JUDGMENT

[1] **ST ROSE-ALBERTINI, J. [Ag]:** The parties to this action are (i) the claimant, Pigeon Island Development Company Ltd ("PID") who claims to be the current developer of the

condominium development known as The Landings (“the development”), (ii) the first defendant The Landings Proprietors Unit Plan No. D2/2007 (“The Landings BC.”) which is the body corporate of the development, and (iii) the second defendant Landings Commercial Assets Ltd (“LCA”) which is a nominee of The Landings BC, created to hold certain property on its behalf.

- [2] They are engaged in a dispute over PID’s entitlement to appoint directors to the board of directors of The Landings B.C (“the Board”), which depends upon the meaning and effect to be given to a Memorandum of Understanding executed between the parties, a court order by consent, the Condominium Declaration, and the Condominium Bylaws.
- [3] PID claims to be entitled to appoint 4 directors to the Board and to a reduction of the Board size pursuant to the terms of the Memorandum of Understanding, in consideration for which it agreed to and did divest ownership of the commercial units of the development, in favour of LCA. Alternatively, PID claims that the right of appointment of directors is enshrined in the Condominium Bylaws, based on the current phase of the development.
- [4] The defendants contend that pursuant to the Condominium Bylaws coupled with a court order by consent, the directors are to be appointed by the owners of the residential and commercial units only. As PID is no longer the owner of the commercial units having donated these units to LCA under an Agreement for Donation and Deed of Donation, which together superseded the Memorandum of Understanding, PID is no longer entitled to appoint directors to the Board.

The Issues

- [5] The following issues arise for resolution:
 - 1. Is the current composition of the board of directors of The Landings BC ultra vires the Condominium Declaration and Condominium Bylaws and therefore unlawful?
 - 2. Is PID entitled to a declaration that the development is in Phase 2 and as such it is entitled to 5 seats on the Board of The Landings BC as the developer, pursuant to

clause 2 of the Condominium Bylaws?

3. Alternatively, is PID is entitled to a declaration that the development is in Phase 3 and as such entitled to 3 seats on the Board of The Landings BC, as the developer, pursuant to clause 2 of the Condominium Bylaws?
4. Is the Memorandum of Understanding legally binding and enforceable? If the answer is yes, did The Landings BC breach same and should specific performance be ordered?

PID's Case

[6] The Landings, which consists of residential and commercial units, common areas and other resort amenities was to be developed in 4 phases. On 4th April 2007, The Landing Limited ("TLL") as the original developer executed a Condominium Declaration in relation to Phase 1 which was registered on 2nd July 2007, thereby creating The Landings BC and establishing its Bylaws. TLL subsequently completed Phase 2 and the Condominium Declaration was duly amended in 2008 to incorporate this Phase. However, after commencing Phase 3, TLL encountered financial difficulty, and was unable to complete that phase. Nonetheless, on 24th November 2010, TLL further amended the Condominium Declaration to incorporate Phase 3 and announced its intention to begin Phase 4.

[7] In 2012 a group of unit owners representing the majority, filed Claim No. SLUHCV2012/0222 ("the 2012 claim") against The Landings BC, seeking to have a receiver appointed to manage the affairs of The Landings BC. The substantive claim was not adjudicated, as the parties entered into a consent order dated 27th March 2012 ("the Consent Order"), which was approved by the court. It states the following:-

"1. The Board of The Landings shall effective immediately consist of 11 board members in accordance with clause 2.2 of the byelaws "At completion of phase 4" which is 8 residential unit owners and 3 commercial unit owners."

[8] According to PID, the Consent Order had the effect of transferring control of the development from TLL to The Landings BC, which left the question of completion of the

development unresolved. The remainder of the development's land continued to be owned by TLL, which was unable to raise the financing necessary to complete the development. Further, having lost control of the development, TLL also lost the ability to use it as a source of funding. Consequently, TLL was placed in receivership by its main creditor.

- [9] To avoid the possibility of the assets of TLL being sold off piecemeal to entities whose interests did not coincide with that of The Landings BC, a group of 37 residential unit owners formed PID, to purchase TLL's assets and raise the funds to complete the development. The assets purchased were undeveloped lands, the commercial units and certain accounts receivable, at the price of US\$8.4 million. Additionally, PID raised US\$1.0 million to complete Phase 3. PID asserts that upon purchase it became the new developer but recognized that despite its obligation to complete the development, it had no say in the management of The Landings BC. As a result of its obligation to complete the development, it was necessary to be represented on the Board, thus it entered into a Memorandum of Understanding with The Landings BC on 18th November 2014 ("the MOU") to ensure its representation on the Board.
- [10] According to PID, clause 6 of the MOU states that it is legally binding on the parties. The parties agreed that PID would be entitled to appoint 4 directors to the Board, who would have the responsibility for all matters affecting construction of the development. It was also agreed that The Landings BC would take all necessary steps, including amending the Consent Order, to reduce the size of the Board from 11 to 7 directors. The consideration given by PID for the right to appoint directors to the Board, was:
- i. termination of the existing commercial lease between TLL and The Landings BC and grant of a new lease at a nominal rate;
 - ii. the waiver of accounts receivable owing from The Landings BC to PID; and
 - iii. transfer of the commercial units owned by PID to The Landings BC in the most tax efficient manner.
- [11] PID claims that it has complied fully with the terms of the MOU. In particular, by Deed of Donation executed on 28th November 2015 and registered in the Land Registry, it donated the commercial units to LCA as the nominee of The Landings BC, for which it also

obtained waiver of the stamp duty on transfer. PID says that the property donated was valued at US\$5,416,000.00 at the time of transfer. PID says that initially it was permitted to appoint 3 and then 4 directors to the Board as agreed under the MOU, however, at a meeting of the Board on 26th April 2018, by a majority vote, the Board passed a resolution purporting to remove the directors appointed by PID. Despite its requests, The Landings BC has failed to reinstate the directors and refused to take any action to reduce the size of the Board; and is therefore in breach of the terms of the MOU.

[12] PID further says that the Consent Order on which The Landings BC relies for composition of the Board violates the Condominium Act, the Condominium Declaration and the Bylaws, is therefore void for illegality and is unenforceable. In reality the development is at the end of Phase 2 with Phase 3 only partially completed, and the Consent Order has sought to establish the composition of the Board as at the end of Phase 4. It therefore conflicts with the actual phase of construction and the Condominium Declaration. Further bylaw 2.2 states that the composition of the Board is to be determined by the Phase of the development, bylaw 2.3 states the composition of the Board at each phase; and bylaw 2.4 provides that the number of directors shall not be changed until completion of Phase 4. Bylaw 14 provides that the Bylaws may be amended only by a special resolution, except for bylaws 2.2, 2.3, and 2.4 which can only be amended after the completion of Phase 4 of the development. Thus, the Consent Order disregards these provisions of the bylaws and breaches section 15(3) of the Condominium Act which provides that no amendment of the Bylaws shall have effect unless approved by a special resolution of the body corporate and registered in the Land Registry. No special resolution has been registered, approving a change to the composition of the Board.

[13] Further and in the alternative, PID contends that the Condominium Declaration and Bylaws continue to be the constitutional and governing documents of The Landings BC. Bylaw 2, which specifies the composition of the Board has not been amended and cannot be amended until the development is completed. The current Board is therefore unlawfully appointed as is not in conformity with bylaws 2.2 to 2.4, and section 15(1) of the Condominium Act, which determine the nomination and election of the Board. It is said that

the current Board consists of 8 residential unit owners and 3 commercial unit owners as at completion of Phase 4, despite the development being in Phase 3. Bylaw 2.3 provides that throughout the construction of Phase 3, the board is to be comprised as at completion of Phase 2, which is 4 residential unit owners, 2 commercial unit owners and 5 representatives of the developer. The Board currently has no representatives of PID as the developer and this contravenes the Bylaws. Alternatively, the current version of the Condominium Declaration provides that the development is at the completion of Phase 3, consequently the composition of the board is 5 directors appointed by the residential unit owners, 3 by the commercial unit owners and 3 representatives of the developer. PID is therefore entitled, at a minimum, to appoint 3 directors to the Board.

[14] PID asserts that refusal to permit its appointments to the Board has deprived it of rights and entitlements under the Act and Bylaws and continues to cause undue hardship. In the absence of such representation, The Landings BC has taken decisions that were not informed by PID's concerns or plans. Further, successful completion of the remainder of development requires PID to have a voice in the management of the resort. The new units to be constructed would form part of the operational condominium development, therefore any development partner or financier will want to ensure that PID has a say in the management of the resort, which would provide additional security for participation. Thus, lack of representation on the Board has made it impossible to attract a new development partner or financing to complete the development.

[15] PID also alleged that pursuant to the MOU and the Agreement for Donation it is entitled to continue to occupy a residential unit in the condominium development rent-free until completion of the development. The Landings BC is precluded from charging rent for the said unit, and in breach of that agreement it has charged rent from 1st April 2018 in the sum of \$2,100.00. It is convenient to mention here that in response to this allegation The Landings BC has stated in evidence that the charges were made in error. The matter has since been rectified and PID is no longer billed rental charges. PID accepted this to be the case, and that issue was put to rest.

- [16] PID therefore claims (i) specific performance of the MOU; (ii) a declaration that the current composition of the Board is ultra vires the Condominium Declaration and Bylaws and is unlawful; (iii) a declaration that the development is currently in Phase 2 and PID is entitled to 5 seats on the Board; alternatively, the development is currently in Phase 3 and PID is entitled to 3 seats on the Board, (iv) costs, and (v) such other relief as the Court deems fit.

The Defendants Case

- [17] The defendants pleaded that in March 2012, a group of 72 unit-owners filed the 2012 claim against The Landings BC for the appointment of an administrator to manage its affairs. That claim arose because (i) TLL had failed to complete Phase 4 of the development within a reasonable period, (ii) the development remained incomplete and construction had ceased, (iii) TLL continued to control the Board with the appointment of 7 seats as “*At completion of Phase 2*”, (iv) TLL undertook acts to the detriment of the unit owners by operating the development poorly, thereby causing the unit owners financial loss and hardship, and (v) TLL and The Landings BC had acted in breach of the Condominium Declaration.
- [18] At the first hearing of that claim, the court requested that the parties meet to seek resolution the matter. TLL, The Landings BC and the unit owners met and agreed to the terms of the Consent Order. TLL agreed to hand over control of the Board to the unit owners as “*At completion of Phase 4*” of clause 2.2 of the Bylaws, which states that the board shall consist of 11 members, being 8 residential unit owners and 3 commercial unit owners. The Consent Order has been acted upon and complied with by The Landings BC and all unit owners from 2012 to date and its effect is to immediately constitute the Board as “*At completion of Phase 4*”.
- [19] In December 2012, TLL was placed into receivership. At that time, Phase 3 was partially completed, and any successor in title to TLL would have had the right and obligation to complete construction of the development in accordance with the Condominium Declaration. A group of 37 unit-owners came together and formed a company called Owners Consortium Limited (OCL) to purchase the immovable property of TLL from the

receiver and to complete the development. OCL purchased the said property through its nominee PID in December 2014. At that time OCL was the sole shareholder in PID, but neither OCL nor PID purchased TLL or its obligations or liabilities, under the Condominium Declaration and TLL did not at any time assign its obligations, rights, and liabilities under the Condominium Declaration to PID. Only the immovable assets were purchased, and at the date of purchase the property was subject to the Condominium Declaration, the Bylaws, and the Consent Order.

[20] The defendants further aver that the Consent Order remained in full force and effect when the MOU was executed between The Landings BC and PID on 18th November 2014. The preamble to the MOU provides the basis on which it was entered into, the terms on which PID as the current developer would continue to complete the development, and The Landings BC would continue to operate the development as it was doing at the time. The MOU provided that:

- i. 3 directors of PID would be appointed to the Board to replace those of TLL, and a fourth director from PID;
- ii. The Landings BC would take steps to legally reduce the size of the Board from 11 to 7 members;
- iii. PID's directors would have written proxy to control all matters related specifically to the proposed construction of the development;
- iv. once the size of the Board is reduced, The Landings BC would be comprised of no less than 4 directors who have invested in PID; and
- v. the parties would enter into a long-term lease, of a minimum of 75 years, in respect of the commercial units at rent set at a nominal off-market rate.

[21] The defendants state that the MOU did not provide for transfer of the commercial units to The Landings BC or its nominee and rely on clauses 3 and 5 of the MOU, which provide for a lease and transfer of control of the commercial units and deny that the commercial units were transferred to The Landings BC pursuant to the terms of the MOU. The defendants further assert that the commercial units were donated by PID to The Landings BC pursuant to an Agreement for Donation dated 12th October 2015 and Deed of Donation executed on 28th October 2015, registered at the Land Registry on 24th February 2016 as

Instrument Number 641/2016. By virtue of the Deed of Donation, The Landings BC became the owner with absolute title to the commercial units, and the Agreement for Donation and Deed of Donation contain their own clauses and consideration for transfer of the commercial units.

[22] The defendants also say that The Landings BC has complied with the terms of the MOU so far as is legally possible. In November 2014, 3 directors of PID were appointed to the Board to replace TLL's directors. At that time, PID was the owner of the commercial units. Further, one of The Landings BC's directors resigned, and a fourth director was appointed from PID. The 4 PID directors who were Ken Jaffa, Wes Hall, John Rittenhouse and Peter Devaux handled all construction and development matters. In November 2014 there were 10 investors in PID on the Board. At the Annual General Meeting ("AGM") held in 2015, PID appointed 3 directors as owner of the commercial units, the residential owners elected 8 directors, and together there were 10 investors in PID on the Board. At the 2016 AGM similarly, PID appointed 3 directors as owner of the commercial units and the residential owners elected 8 directors. That Board consisted of 8 PID investors. At the 2017 AGM, PID sought to appoint 4 directors to the Board pursuant to the MOU. Members of The Landings BC objected to this, however, PID nominees were provisionally appointed. Subject to a legal opinion on the matter, the 4 directors provisionally appointed by PID at the 2017 AGM were removed from the Board in April 2018. At the October 2018 and October 2019 AGMs, only 3 investors of PID stood for election to the Board and therefore there were 3 investors of PID on each of those Boards. Thus, from 2014 to 2018 the Board consisted of more than 4 PID investors. The defendants contend that in any event clause 2(c) of the MOU, requiring the Board to comprise at least 4 directors who were investors in PID, does not take effect until such time as the size of the Board is legally reduced.

[23] The defendants contend that:

- i. The Consent Order provides for 8 residential unit owners and 3 commercial unit owners and no appointees from the developer;
- ii. The Condominium Act, the Bylaws and the Consent Order provide for appointments to the Board, and the MOU cannot be relied on to make board

appointments;

- iii. PID was the owner of commercial units from 2014-2015 and entitled to 3 seats on the Board during that period. The right to those 3 seats were lost on transfer of the commercial units to LCA;
- iv. The Agreement for Donation and the Deed of Donation superseded the MOU and its intentions as they were not contemplated by the MOU;
- v. LCA is the owner of the commercial units and is the only body entitled to appoint 3 seats to the Board;
- vi. The Landings BC has never refused to take action to reduce the size of the Board, which requires a change to the Bylaws by a 75% majority vote of the unit owners. Rather, PID indicated to The Landings BC that it did not wish to have the Board size reduced on three occasions. In the circumstances, PID has waived that right, as well as the right to bring a claim for specific performance in that regard.

[24] The defendants further say that the constitution of the Board is set by the Consent Order, which is in full force and effect, has not been varied or set aside, and remains binding on The Landings BC and the unit owners, which includes PID. The Consent Order does not conflict with the Condominium Declaration, or the actual Phase of development and has merely constituted the Board as '*At Completion Phase 4*', where the Board is made up of residential and commercial unit owners only. The Condominium Declaration was amended in 2016 to include Phase 3, where the development remains because of the failure of TLL to complete Phase 3. Since purchasing the immovable property in 2014, PID has likewise failed to complete Phase 3.

[25] The defendants aver that clause 2.4 of the Bylaws does not prohibit the constitution of the Board '*at completion of Phase 4*', and the Consent Order did not amend the Bylaws. Should it be found to have done so, it nonetheless remains in full force and effect. In compliance with the Consent Order, an Extra Ordinary General Meeting was held on 12th April 2012 by The Landings BC to constitute the Board pursuant to the Consent Order. The unit owners were given notice of the meeting and accordingly elected 8 residential unit owners as directors to the Board. The Consent Order was in the interest of all unit owners,

as TLL had relinquished control of the Board to all unit owners, and not just the 72 who filed the 2012 claim. The defendants and the unit owners have complied with the Consent Order from 27th March 2012 to date.

[26] It is said that PID was not a party to the 2012 claim and has no standing to challenge the Consent Order on the ground of illegality or at all. It remains lawful and does not conflict with the Condominium Declaration or the rights of unit owners. Further, PID is estopped from challenging the Consent Order as the immovable property of TLL was purchased subject to the Consent Order with full knowledge of its effect and it was complied with from 2014 until 2018. PID's sole request upon purchase of the immovable property was to petition the High Court to amend the Consent Order to reduce the number of directors of the Board. Thus, the current Board is lawful as the directors are elected in compliance with the Bylaws, the Condominium Act, and the Consent Order,.

[27] The defendants state that by a Deed of Transfer dated 21st November 2014 registered at the Land Registry on 8th December 2014 as Instrument No. 4757/14, PID purchased the undivided share of TLL in the common property of the development and the rights appertaining thereto and became the successor in title to the immovable property of TLL which formed part of the development. At the date of purchase, PID became a unit owner with the right to build out the units as provided in the Condominium Declaration. By Deed of Amendment of Condominium Declaration registered at the Land Registry on 12th July 2016 as Instrument Number D1/2006, PID was described as developer for the sole purpose of acknowledging that it was successor in title to the immovable property of TLL. The Deed of Amendment expressed the intention to not affect the unit entitlement of Phase 1, 2 and 3 unit-owners nor the descriptions, covenants, restrictions or bylaws and other general provisions given in the original Condominium Declaration. The defendants assert that PID is not the developer, and TLL remains the developer, having declared the existing Phases 1, 2 and 3. PID is simply a unit owner having purchased the rights held by TLL in the common property of development. Should PID be found to be the developer, it is only for Phase 4 of the development, which to date does not exist.

- [28] PID has always had its investors on the Board, and has controlled the Board. Despite this, it has only managed to complete the partially constructed C4 building and swimming pool and has not advanced Phase 3 of the development from 2014 to date. Construction has ceased for an inordinate period and there is no indication when it will resume. In April 2019, PID admitted that it did not have sufficient funds to complete the units of the C4 building or to construct further buildings.
- [29] The development is made up of 3 phases which comprise 141 unit-owners who have invested in excess of US\$100,000,000.00. PID does not have a greater interest in the development than the 141 unit-owners. It pays no contribution to The Landings BC for the expenses of the development, and all expenses are borne by the 141 unit-owners of the completed units. The Board currently represents the interest of all unit owners including PID and has not undertaken any act which adversely affects PID. Further, while OCL as the original shareholder of PID initially comprised 37 unit-owners, this is no longer the case. There are now only 13 unit-owners with shares in OCL, with the majority shareholder being one unit-owner named Parcel Holdings Limited, a company owned by Wesley Hall ("Mr. Hall"). Only Parcel Holdings Limited has the right to appoint directors to the Board of PID and the other 12 minority shareholders of PID have not endorsed these proceedings. The defendants have further invited PID to nominate two members to a Construction and Development Committee with the Chairman of the Board and two of PID's own investors who are directors on the Board, however, PID has declined.
- [30] The defendants claim that between 2018 and 2019 the development recorded its highest level of increase in rental pool distribution for unit owners, with an increase by 100% forecasted for 2020. Homeowners' dues decreased by 10% and is forecasted for a further decrease. The improved financial performance from 2017 to 2019 was due to the management of the resort under the Board made up of its unit owners. This is of extreme benefit to all unit-owners with completed units. PID has not been able to attract a development partner or financier since 2014, even when its investors held the majority seats on the Board and should not be allowed to benefit from its own inaction. The present circumstances mirror those under which the Consent Order was made in 2012 to constitute the Board '*at completion Phase 4*'.

- [31] On execution of the MOU, PID agreed and acknowledged that it was not entitled to five seats on the Board and was only entitled to seats assigned to the owner of the commercial units by virtue of the Consent Order. Further, PID at all times acknowledged and accepted that the Board is constituted as '*at completion Phase 4*' and is therefore estopped from now claiming otherwise. They ask that PID's claim be dismissed, with costs.

PID's Reply

- [32] PID states that, under the Condominium Declaration, 'developer' is specifically defined and given clearly identified functions and rights. By Deed of Amendment of the Condominium Declaration, registered in the Land Registry on 12th July 2016 as Instrument Number D1/2016, it was designated as developer with all the rights and entitlements of developer. PID denies that it is merely a unit owner and asserts that it succeeded to all the rights and entitlements of the developer including the right to be represented on the Board in its capacity of developer. The Agreement for Donation and Deed of Donation were entered into in fulfillment of the terms of the MOU, consequently they form part of it and are to be interpreted in tandem with it.
- [33] PID has said that TLL was not a party to the 2012 claim and rejects the defendants' assertion that the intention of the Consent Order was for the developer to permanently relinquish any entitlement to representation on the Board. PID maintains that a change to the Bylaws can only be achieved lawfully by complying with the amendment provisions of the Condominium Act and the Bylaws. Further holding an Extraordinary General Meeting to elect directors does not satisfy the provisions of the Bylaws or the Condominium Act, for amending the Bylaws. Composition of the Board as at Phase 4, when the development is actually in Phase 3, is itself a breach of the terms of the Condominium Declaration, the Bylaws and the Condominium Act.
- [34] PID says the MOU provided for its appointment of directors, and not their election at a general meeting. It has not waived its rights to reduce the Board size as alleged and intends to rely on the admission by The Landings BC that it has taken no steps to do so.

Similarly, PID alleges that it has not complied with the Consent Order and is not in any way estopped from challenging it, as it has never accepted the Consent Order to be binding on it, or its entitlements. PID denies that it agreed or acknowledged that it was not entitled to five seats on the Board and does not accept that it was only entitled to Board seats by virtue of being owner of commercial units. It continues to assert the right to be represented on the Board under the Condominium Declaration.

- [35] PID says it has never controlled the Board and has only appointed a maximum of 4 directors. The fact that directors who are investors in PID are serving on the Board does not make them PID's agents. Further the C4 building has been completed, contrary to what the defendants say, however it cannot proceed further with construction until this dispute is resolved. Additionally, The Landings BC has used and continues to use PID's land for commercial purposes without its consent and the revenue generated by the commercial activities have not been accounted for. The appointment of a Construction and Development Committee does not satisfy PID's entitlements under the Condominium Declaration, nor does not recognize that the developer has an interest in the general administration of the development until it is completed.

Issue 1: Is the current composition of the board of directors of The Landings BC ultra vires the Condominium Declaration and Condominium Bylaws and therefore unlawful?

The Consent Order

- [36] It is PID's position that the Consent Order, which currently forms the basis for composition of the Board is ultra vires the Condominium Act, Declaration and Bylaws and therefore void for illegality. It should not be enforced, and instead specific performance of the MOU should be ordered, or compliance with the provisions of the Condominium Act, Declaration and Bylaws.

[37] In written closing submissions Counsel for PID argued that as a creature of statute a condominium development can only exist and operate with the four corners of the statute under which it is created. In support Counsel relied on statements made in **Toronto Standard Condominium No. 1566 v The Owners of TSCC No. 1566**¹ a decision of the Ontario Supreme Court where that court noted four sources of provisions restricting owners and affecting units in a condominium, namely the Act, the declaration, the by-laws and the rules passed by the condominium board. The hierarchy is such that the Act is at the top, followed by the declaration, then the by-laws and finally the rules, and no provision in any given category can be inconsistent with a provision higher up in the chain. Counsel submits that in Saint Lucia the Condominium Act² establishes that it is the By-laws which determine the composition of the Board, and the manner in which directors are nominated and elected. In support section 15(3) of the Act provides that:

“(3) Bye-laws shall not be added to, amended or repealed except by special resolution and any such addition, amendment or repeal shall not come into operation unless and until lodged for record in the Register as an amendment of the relevant Declaration.”

[38] Section 4(2) of the Condominium Act similarly provides that no amendment to the Condominium Declaration is effective unless it is registered. As no amendments have been made to the By-laws they continue to remain in force and clause 2 thereof remains the lawful means for nominating and electing directors. The Consent Order operates as a *de facto* amendment to the By-laws as it purports to set the composition of the Board at the completion of Phase 4, when the facts clearly establish that the completion is at Phase 3, and by clause 2.3 that composition should be as at the completion of Phase 2. The effect of the Consent Order is to amend clauses 2.2 and 2.3 as the current composition of the Board does not match the physical phase of construction and offends the By-laws.

[39] Counsel for the defendants contend that the Consent Order is legally binding and must be complied with, unless and until it is set aside or varied. Counsel relied on the Privy Council decision in **Isaacs v Robertson**³ where that court said: “an order made by a court of

¹ 2017 ONSC 6542

² Cap 5.05 of the Revised Edition of the Laws of Saint Lucia

³ (1984) 1 AC 97

unlimited jurisdiction, such as the High Court of Saint Vincent, had to be obeyed by the person against whom it was made unless and until it had been set aside by the court.”

- [40] Counsel further submits that the Consent Order simply constitutes the Board at completion of Phase 4, and has in no way amended the Bylaws. It also does not offend clause 2.3, or the Declaration or the Act which prescribes the procedure for amending by-laws and the registration of such amendments. PID is unable to circumvent the Consent Order which is binding on The Landings BC and on all unit owners including PID, and every subsequent unit owner. It merely states that effective immediately the Board is to be constituted as if it was at Phase 4. Any variation of this order must involve the parties to the claim, on the grounds required to set aside or vary such order. TLL offered to hand over control of the Board to the unit owners to resolve the 2012 claim, and there was no amendment to the Bylaws, as the Board is still constituted in accordance with one of the stipulated Phases in the Bylaws.

Discussion

- [41] On this issue I agree that the position is as stated by Byron JA in **Alric C. Hillocks Agencies Ltd. v Saunders International Sales Corp**⁴, that it is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a court of competent jurisdiction to obey it, unless and until that order is discharged. More importantly, His Lordship expressly stated that this extends even to a case where the person affected by the order believes it to be irregular and that the decisive effect of this learning applies with equal force to consent orders.
- [42] I understand PID’s contention to be that the Consent Order ought not to have been approved, as it paved the way for composition of the Board in a manner which was contrary to the stipulation in the Bylaws, which ties composition to completed Phases. Thus, PID’s argument is that the Consent Order was wrongly granted, as it appears that the statutory provisions governing composition of the Board were not considered when the

⁴ Civil Appeal No. 9 of 1992 at pages 3-4.

order was approved. To this Counsel for the defendants says that TLL provided affidavit evidence in the 2012 claim agreeing to give control of the Board to the unit owners to resolve the impasse which existed at that time. In my view, even if it is the case the Consent Order was wrongly granted, I do not see how it could be said to be ultra vires the Act, Declaration or Bylaws.

[43] **Halsbury's Laws of England**⁵ explains the doctrine of ultra vires thus:

"349. Doctrine of ultra vires.

A power to do something extends only to that thing¹; so a purported exercise of the power that extends to a different thing is to that extent not an exercise of the power at all and in so far as it purports to depend on the power, it is void as being ultra vires². An administrative order or other act which is ultra vires, but not defective on its face, is voidable rather than void. It therefore subsists and has force unless and until quashed or otherwise set aside by a court possessing the necessary jurisdiction³. In practice the doctrine of ultra vires mainly arises in connection with the making of delegated legislation and is dealt with more fully in that connection⁴."

[44] **Stair Memorial Encyclopedia**⁶ explains the application of the doctrine as follows:

"18. Application of the ultra vires doctrine.

While the ultra vires doctrine in its broad sense applies to all public authorities, regardless of the types of power vested in them¹, an important application of the general doctrine is found in the doctrine of jurisdiction. This doctrine applies to tribunals, inferior courts and other bodies with power to take judicial decisions. If such a tribunal takes a decision that lies outside its jurisdiction, the decision may be described as ultra vires, incompetent or in excess of jurisdiction. While the terms 'vires', 'jurisdiction' and 'competence' are often interchangeable, some aspects of the control of jurisdiction require separate consideration. Another important application of the ultra vires doctrine arises where legislative powers are conferred by Parliament upon ministers of the Crown, government departments, local and other authorities. Delegated legislation has the force of law only when it conforms to the powers granted by statute.....

In its broadest sense, the ultra vires doctrine refers to the whole body of law relating to the grounds on which an action or decision of a public authority may be subject to judicial review, including defects of procedure and breach of natural justice. In a much narrower sense, the ultra vires doctrine refers to the rule that a

⁵ Halsbury's Laws of England/Statutes and Legislative Process (Volume 96 (2018))/2. Acts of the United Kingdom Parliament/(6) Operation of Acts/(ii) Functions of the Executive/C. Statutory Powers/349. Doctrine of ultra vires.

⁶ Stair Memorial Encyclopaedia/ADMINISTRATIVE LAW (Reissue)/3. JUDICIAL REVIEW OF ADMINISTRATIVE ACTION: THE GROUNDS OF CONTROL/(1) THE ULTRA VIRES RULE AND THE PRINCIPLE OF LEGALITY/18. Application of the ultra vires doctrine.

public authority acts ultra vires if it embarks on an activity or enterprise which ex facie is outside its legal capacity....

Although the ultra vires doctrine has lost much of its former importance within company law, it still applies to a wide range of unincorporated associations, clubs, trade unions and trusts, where it serves to reinforce the contractual rules of association, the trust deed or other constituent document of the body in question.”

[45] The High Court of Saint Lucia is a superior court of record. As can be seen from the above, the doctrine has no bearing on, or in relation to an order or decision of the High Court. There is no assertion that the court acted outside its jurisdiction or in excess of the powers conferred on it when the Consent Order was approved. If an order of the court does not accord with the statutory provisions governing a dispute, it simply means that it is wrongly granted, and the remedy provided to litigants in such a case is the right to appeal. In **Alric C Hillocks**, Byron JA stated that it is not open to anyone to disregard or disobey a court order because he/she is of the view that it is somehow irregular. The avenues are provided by law to challenge an order of the court and if they are not utilized, the order stands and must be complied with. No authority to support a contrary position has been provided by PID.

[46] I therefore conclude that the Consent Order is not ultra vires the Condominium Act, Declaration and Bylaws and is therefore valid.

Does the Consent Order bind PID?

[47] PID has argued that the Consent Order does not govern its activities, because of this Court's finding that it had no standing to challenge the order. The finding in question was made on PID's application to amend its statement of case to include the relief that the Consent Order be varied or set aside. The amendment was not permitted on the basis that a Consent Order can only be varied or set aside on grounds for varying or setting aside a contract such as mistake, misrepresentation and the like and would have to be brought by way of a fresh claim and not by way of relief in the instant claim. Additionally, PID was never a party to the proceedings in which the Consent Order was granted. For these reasons PID says that the Consent Order operates only between the unit owners and The

Landings BC who are the parties to the claim and cannot circumscribe its rights and entitlements under the MOU or the Condominium Declaration.

[48] In my view, whether PID is bound by the Consent Order would depend on whether it is an order *in rem* or *in personam* and binds all persons, or only the parties to the order. The definitions and effect of such orders are set out in **Halsbury's Laws of England**:

“1561. Importance of distinction between judgments in rem and judgments in personam or between parties.

A judgment in rem¹ (that is, a judgment of a court of competent jurisdiction determining the status of a person or thing or the disposition of a thing, as distinct from a particular interest in it of a party to the litigation) is conclusive of the facts or state of things actually decided or effected; and is conclusive against all persons, whether parties, privies² or strangers to the decision³. Other judgments which affect the interests of the parties rather than their status, often referred to as judgments in personam (or judgments between parties)⁴, have the effect that the parties to them, and their privies, are prevented from denying what the judgment itself establishes, and the grounds upon which it was founded⁵; but, save to prove their existence, date and consequences, such judgments are generally inadmissible for or against strangers⁶.

Thus the most important distinction between judgments in rem and judgments in personam is that, whereas the latter are binding only as between the parties to them and those who are privy to them, the judgment in rem of a court of competent jurisdiction is, as regards persons domiciled and property situated within the jurisdiction of the court pronouncing the judgment⁷, conclusive against all the world⁸ in whatever it settles as to the status of the persons or property⁹, or as to the right or title to the property, and as to whatever disposition it makes of the property itself, or of the proceeds of its sale¹⁰. In other words all persons, whether party to the proceedings or not, are estopped by a judgment in rem from averring that the status of persons or things, or the right or title to property, is other than the court has by such a judgment declared or made it to be.”⁷

“1597. Consent judgment in rem.

Although a judgment by consent may well create an estoppel between the parties¹, it is at least doubtful whether a judgment in rem obtained by consent of the parties² can ever be conclusive against persons who were not, and do not claim through, the parties to it, except so far as may be necessary to protect the title of a person who purchases the relevant property on the faith of the judgment.

⁷ Halsbury's Laws of England/Civil Procedure (Volume 11 (2020), paras 1–496; Volume 12 (2020), paras 497–1206; Volume 12A (2020), paras 1207–1740)/25. Finality of Judgments and of Litigation/(1) Finality of Judgments and Orders/(ii) Classification of Judgments/A. In General/1561. Importance of distinction between judgments in rem and judgments in personam or between parties.

It has been stipulated that a judgment by consent cannot effect res judicata so as to bind the public or absent parties³.⁸

[49] Applying the principles above to the instant case, the Consent Order is not an order in rem. It does not appear to determine the status of The Landings BC, any right or title to property, or any disposition of or in relation to The Landings BC. It determined the particular interest in the constitution of the Board for the parties to the 2012 claim, which were a group of unit owners and The Landings BC. Even if I am wrong, it appears that even a judgment which is in effect a judgment *in rem*, if obtained by consent, will not be considered as such for the purpose of binding a third party.

[50] However, the fact that it is an order *in personam* does not necessarily mean that it does not bind PID, which could be bound, if it is a privy of TLL. The following passage from **Halsbury's Laws of England** explains the concept of privies:

***“(ii) Parties Estopped by Judgment Determining Rights
1599. Parties and privies.***

*A judgment in personam or between parties¹ raises an estoppel only against the parties² to the proceedings in which it is given and **their privies³ (for example, those claiming or deriving title under them)⁴**. As against all other persons it does not prejudice the persons before the court⁵, and with certain exceptions⁶, although conclusive of the fact that the judgment was obtained and of its terms⁷, is not admissible evidence of the facts established by it⁸.*

Privies are of three classes:

- (1) privies in blood (for example, ancestor and heir)⁹;*
- (2) privies in law (for example, (formerly) tenant by the curtesy or in dower)¹⁰ and others that came in by act in law¹¹ (for example, testator and executor, intestate and administrator¹², bankrupt and trustee in bankruptcy¹³);*
- (3) **privies in estate or interest** (for example, testator and devisee¹⁴, vendor and purchaser¹⁵, landlord and tenant¹⁶, a husband and his wife claiming under his title and a wife and a husband claiming under hers¹⁷, successive incumbents of the same benefice¹⁸, assignor and assignee of a bond¹⁹, and the employee of a corporation defending a claim of trespass at the cost of his employers and justifying under their title and the corporation itself²⁰).*

...

It is not easy to detect from the authorities what amounts to a sufficient interest²². The question seems to be determined by an examination of the

⁸ Halsbury's Laws of England/Civil Procedure (Volume 11 (2020), paras 1–496; Volume 12 (2020), paras 497–1206; Volume 12A (2020), paras 1207–1740)/25. Finality of Judgments and of Litigation/(3) Parties Estopped by Judgment/(i) Parties Estopped by Judgment Determining Status/1597. Consent judgment in rem.

***factual identity of interests of the parties and the fairness of binding them by a decision in which they were not represented*²³.”⁹**

- [51] Although there is no singular test applicable to every circumstance, case law illustrates the relationship of privity and the considerations in determining whether such relationship exists¹⁰. This issue will turn on whether PID can be considered a privity of TLL.

Is PID the current developer and a privity of TLL?

- [52] PID claims that it is the current developer, being successor in title to TLL. The defendants claim that it is not, and is merely successor in title to the immovable property with the right to build out the remaining units as provided by the Condominium Declaration. I do not agree with the defendants. They cannot seek to say, on one hand, that PID is the successor in title of the immovable property with responsibility to complete the development and, on other hand, conveniently say that PID is not the developer because it did not purchase TLL itself, or that TLL did not assign its rights and liabilities to PID. The defendants’ pleadings and evidence is replete with references to PID as developer, and the fact that PID has responsibility to complete construction of the development is also acknowledged.
- [53] The Declaration was amended on 13th May 2016 by a Deed of Amendment of Condominium Declaration to recognize the Transfer of Land dated 21st November 2014 registered in the Land Registry as Instrument Number 4757/2014, by which PID “*purchased from The Landings Limited (in receivership) the Resort and in doing so became successor in title to The Landings Limited*”. The defendants say that the amendment to the Declaration did not intend to change unit entitlements of the unit owners of Phase 1, 2 and 3, nor the descriptions, covenants, restrictions or bylaws and other general provisions given in the original Declaration. In the absence of an express

⁹ Halsbury’s Laws of England/Civil Procedure (Volume 11 (2020), paras 1–496; Volume 12 (2020), paras 497–1206; Volume 12A (2020), paras 1207–1740)/25. Finality of Judgments and of Litigation/(3) Parties Estopped by Judgment/(ii) Parties Estopped by Judgment Determining Rights/1599. Parties and privies.

¹⁰ Skyparks Group plc v Marks and another [2001] EWCA Civ 319; Gleeson v J Wippell & Co Ltd [1977] 3 All ER 54; Doe d

Gaisford v Stone (1846) 3 CB 176, 15 LJCP 234

statement to the contrary, this would include the descriptions, covenants, restrictions and general provisions in favour of the developer, which the Declaration, as amended, identifies as PID. The developer in the Amended Declaration is defined as the legal and absolute owner of the Resort consisting of commercial and residential units and the Resort is defined as the immovable property described in the 1st schedule together with the buildings and improvements thereon including the rights attached thereto. The 1st Schedule identifies the parcel of land upon which the development is situate (which excludes units which have been completed and sold). It is clear therefore that PID is the successor in title to TLL, not only to the immovable property, but all the rights and liabilities attached thereto.

[54] It is further undisputed that PID was formed to purchase, and did purchase the undeveloped land, which has been declared by the Condominium Declaration to be land upon which the remainder of the development is to be built, in order to complete construction. The MOU upon which all parties rely declares this as its object in the preamble which states: *"the developer wishes in time to develop, extend, and complete certain areas of the property..."* It cannot now be denied that PID is the developer. PID is the developer for all intents and purposes.

[55] The question is whether PID's status as developer gives rise to sufficient identity of interest between TLL and PID such that PID is a privy of TLL. To my mind, there is sufficient identity of interest, to the extent that the relationship between them, is at a minimum that of vendor and purchaser of the immovable property, which is an accepted category of relationship that gives rise to privity. More so, as PID has succeeded to the title of TLL and its rights, liabilities, and interest in completing the development under the Declaration and Bylaws, it essentially stands in the identical position or in the shoes of TLL.

[56] I am also mindful that PID purchased the property and assumed this position subsequent to and with full knowledge of the Consent Order and its effect. The evidence is replete with discussions between The Landings BC and PID on ways to legally restore adequate representation of PID as developer, on the Board. In the circumstances, there is nothing that would make it unjust to conclude that PID is a privy of TLL and bound by the Consent

Order as TLL was. If I am wrong, I will go on to consider the MOU, which PID alleges is what is binding, was breached by the defendants, and it now seeks to enforce.

Issue 2 and 3

Issue 2: Is PID is entitled to a declaration that the development is in Phase 2 and as such it is entitled to 5 seats on the Board of The Landings BC as the developer, pursuant to clause 2 of the Condominium Bylaws?

Issue 3: Alternatively, is PID is entitled to a declaration that the development is in Phase 3 and as such entitled to 3 seats on the Board of The Landings BC, as the developer, pursuant to clause 2 of the Condominium Bylaws?

- [57] The parties, throughout their evidence, agree that the development is currently at Phase 3. That is not in dispute. It also appears that the development is at a standstill as PID has indicated that it will not continue with construction until the matter in dispute between the parties is resolved. Nonetheless, as I have already determined that the Consent order is valid and binding on PID, by virtue of it being a privy of TLL, it follows that PID is not entitled to 5 seats as at Phase 2, or 3 seats as at Phase 3.

Issue 4: Is the MOU legally enforceable? If the answer is yes, did The Landings BC breach same, and should specific performance be ordered?

- [58] Counsel for PID relied on the case of **Velox and Another v Helenair Corporation and Others**¹¹ to make the point that by virtue of Article 917A of the Civil Code¹² the doctrine of consideration in English law does not apply to this jurisdiction. Accordingly, the consideration for entering into a contract may be gratuitous (proviso (b) of article 917A) and such a contract, made for the purpose of enhancing the standing of one party to the contract, is enforceable by the other party. All that is required is an intention to be bound by the promises made. Clause 8 of the MOU says it is governed by the laws of Saint Lucia

¹¹ (1997) 55 WIR 179

¹² Cap 4.01 of the Revised Edition of the Laws of Saint Lucia

and at clause 6 it says it is legally binding. Thus, the parties expressly stated their intention to be bound by the undertakings given. Although it is said that cause is required for formation of the contract, there were specific undertakings by each of the parties and they agreed to be bound by their undertakings. Counsel says that none of the undertakings given were required to be in notarial form and none of the conditions which destroy consideration as stated apply. So it is clear that the MOU is enforceable as the parties intended to be bound and as such the elements of a binding contract were created.

[59] Counsel for the defendants initially took the position that there was simply no consideration in the MOU to give rise to a validly enforceable contract. However, Counsel subsequently agreed that the law, as it stands in this jurisdiction, does not require consideration in the English law sense and on that point she conceded that the parties' undertakings to each other and agreeing to be legally bound, gives rise to enforceability.

[60] As I understand it, the MOU is legally enforceable. At clause 6 it states: *"This Memorandum is, except where it is expressed otherwise, legally binding and each of the parties agree to take all such actions and do all such things as to put into effect the obligations contained herein"* which indicates the intention of the parties to enter into legal relations. Further, there was certainty of its terms and the parties willingly and on their own accord expressly stated that they would be bound by the undertakings given.

What was the agreement contained in the MOU and did The Landings BC breach the terms of the MOU?

[61] The agreement contained in the MOU is not as PID suggests and is more consonant with the defendants' position. It was executed after the Consent Order and PID would have been well aware of its terms and effect. It must therefore be taken that, at the time of execution both parties understood the Consent Order to be operative and that it governed composition of the Board.

[62] The MOU makes implicit reference to the Consent Order in the preamble, where it states that *"the BC wishes to continue operating the property as it is currently doing"*; and in

clause 2 where it states: *“the BC board, whose size has been set by the High Court of St. Lucia as being eleven (11) in number...”* PID’s recognition of the Consent Order is also implicit from its pleadings and evidence, where it states that the terms of the Consent Order, which exclude it from representation on the Board, is what necessitated the MOU. There are also explicit references throughout PID’s evidence, to the Consent Order governing composition of the Board. One such reference is the statement of Mr. Hall in a letter dated 1st July 2018 to The Landings BC that: *“at the time of completion of acquisition of the assets of the developer... the Board structure was governed by a Consent Order issued by the High Court in March 2012 which gave 8 director seats to residential unit representatives and 3 director seats to commercial unit representatives.”* PID cannot now say that it did not acknowledge the Consent Order as being in full effect and binding. On the contrary, it was because it accepted the Consent Order as binding, that the need arose, to execute the MOU.

- [63] The history behind the 2012 claim, which both parties agree on, and which is amply set out in their pleadings, is also relevant. To summarize, the Bylaws provide that the number of seats on the Board allocated to the developer is inversely proportionate to the phase of the development. Closer to completion, less representatives of the developer and more unit owners sit on the Board. That claim arose because TLL was unwilling or unable to progress and complete the development, it continued to retain control of the Board with the greater number of seats and was allegedly acting to the detriment of unit owners. The parties to that claim negotiated and obtained the Consent Order wherein TLL relinquished control of the Board to the unit owners, as if the development had been completed. It is some of these very unit owners, who then formed OCL, which incorporated PID to acquire the land and assets of TLL, to take over and complete construction of the development. It is in this context that the terms of the MOU must be considered. Was it the intention of Board (then constituted in accordance with the Consent Order) and PID, to simply revert to the pre-2012 state of affairs, giving PID as the new developer, control of the Board in the same manner as TLL, which they had fought to oust?

[64] The case of **Tamarind Cove Marina Development Limited v Sea Bridge (St. Kitts-Nevis) Inc**¹³ provides authority for the approach that the Court, in interpreting the parties' agreement, may adopt to ascertain their intention having regard to the prevailing context and circumstances at the time of execution:

*"[15] The first issue for consideration is the terminology of the covenant agreed to by the parties. Counsel for the claimant refers the court to the case of Arnold v. Britton and Others¹ where the Supreme Court of the United Kingdom noted that **in interpreting a contract the court must identify the intention of the parties. In doing so the court must consider "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean."** Whilst words contained within the contract must be assessed in light of their ordinary and natural meaning, the context and circumstances surrounding the contract must also be considered.*

[16] In the more recent case from our own Court of Appeal, Malmaison Properties LLC et al v Jeffrey Coyne et al², Thom JA stated that "[t]he court must seek to determine what was the contract according to the true intention of the parties. The parties' true intention can be gleaned from the contract read in its entirety, having regard to the background and circumstances of which the parties can be taken to have been aware at the time the contract was made." Her Ladyship goes on to note that "contractual documents should be interpreted against the "factual matrix" at the time the parties enter the contract." The applicable test therefore is to consider the natural and ordinary meaning of the words used whilst giving due regard to the background and circumstances under which the parties negotiated the contract. This would assist in determining the true intention of the parties..."

[65] Having carefully examined the MOU, I have formed the view that it sought to comply with the Consent Order. Its preamble specifically states the intention of parties thus: "And whereas the developer wishes in time to develop, extend and complete certain areas of the property **and the BC wishes to continue operating the property as it is currently doing.**" At that time, the Board was constituted under the terms of and in compliance with the Consent Order and comprised of the unit owners (residential and commercial) who had control of the operations and management of the development. It clearly expressed the intention to continue in this manner.

¹³ Claim No. NEVHCV2019/0034

Did the MOU grant PID the right to appoint 4 directors to the Board?

- [66] In contention is Clause 1 which provides that *“Upon completion of the Agreement for Sale, the BC Board will appoint three (3) directors of the developer [PID] to fill the seats on the Board of the BC currently reserved for TLL and/or the receiver.”* Clause 2(a), so far as relevant, similarly, mentions *“the developer being currently entitled to three (3) seats on the BC Board.”* The MOU does not specify the basis on which TLL (or PID in its place) was entitled to the 3 seats on the Board, however, the context provides some assistance. The ‘Agreement for Sale’ referred to, was the agreement between TLL and PID for the purchase of TLL’s immovable property in the development, which included the commercial units. Pursuant to the Consent Order, the commercial units carried the right to appoint 3 seats to the Board. At the time of the MOU, as the Board was constituted in accordance with the Consent Order. This meant that TLL had no seats on the Board as developer, but still had 3 seats as owner of the commercial units and was therefore entitled to 3 seats by virtue of being the owner of the commercial units. Upon completion of the sale the commercial units would have been transferred to PID, who would become entitled to appoint directors to these 3 seats, as owners of the commercial units.
- [67] One only needs to compare the provisions of the Bylaws with those of the Consent Order to confirm that the 3 seats ‘reserved for TLL and/or the receiver’ to which PID was ‘entitled’ under the MOU, were the seats allocated to the owner of the commercial units as opposed to seats as the developer. PID’s witnesses all state that the MOU allowed PID to appoint directors in its capacity as developer because it would of necessity, have to be represented on the Board in order to successfully complete construction of the development, which is consistent the Act, Declaration and Bylaws. They say it was on that basis that PID negotiated and agreed the right to appoint 4 directors. Kathleen Taylor, for example, states in her evidence that PID’s entitlement to appoint 3 directors was pursuant to clause 2 of the Bylaws ‘at completion of Phase 3’ which provides that the developer is to appoint 3 seats. If that were the case, at the time of executing the MOU, PID would, in fact, have been entitled to 3 seats as developer and 3 more as commercial unit owner, which would have given it the right to appoint 6 of the 11 seats on the Board.

[68] Clearly this is not what was intended, as the MOU expressly and repeatedly stated that the Board was to continue to operate as it was then, as the unit owners ‘see fit.’¹⁴ It would be inconsistent as the MOU expressly states that PID was ‘entitled’ to appoint 3 directors and would be afforded the right to appoint an additional director, giving it the right to appoint 4 seats in total. It is only under the Consent Order, as commercial unit owner, that PID would have been ‘entitled’ to appoint 3 directors to the Board.

[69] Clause 2 provides further support. It requires The Landings BC Board to “*use all reasonable endeavours to legally reduce... the size of the Board from 11 to 7 during the term of the proposed development activity.*” Clause 2(b), however, states that until such time, “*the remaining 7 BC Board members agree to provide the four directors of the developer... with written proxy to control all matters related specifically to the currently proposed construction and development project (and provided such matters do not materially adversely affect the operation of the Property as a resort).*” By this statement, the MOU clearly intended that PID would only have 4 directors on the Board and specifically provided for them to control matters related to construction of the development but not over the Board and the operation of The Landings BC generally. The MOU was carefully drafted to achieve the purpose as stated in its preamble. At the time of execution, The Landings BC was operating pursuant to the Consent Order and it sought, while maintaining the terms of the Consent Order, to grant PID a level of representation on the Board. It recognized PID’s entitlement, not as developer which then had no representation on the Board, but as owner of the commercial units. It then granted PID the right to appoint an additional director and proxy to those 4 directors to control matters related to construction only. Once PID transferred ownership of the commercial units under the Deed of Donation, it lost its entitlement to appoint the 3 directors which corresponded to ownership of those units. Thus, the Landings BC has not breached the MOU in refusing to allow PID to appoint 3 directors after the date of the Deed of Donation.

[70] However, I do not agree with the defendants that the MOU did not require the yearly appointment of the fourth additional director by PID, until construction was complete, and

¹⁴ MOU clause 5.

that the requirement was only for the first year. While it is not expressly stated, the intention of the parties appears to have been that this would continue from year to year. Clause 2 (b) sheds some light where it states, *“Until such time as it is possible to achieve the legal reduction of the BC board to 7 total members the remaining 7 BC board members agree to provide the four directors of the developer with written proxy to control all matters related specifically to the current proposed construction and development project.”* The preamble of clause 2 which is in general terms and not limited in time states that *“the BC Board... will then appoint a fourth director from the developer making a total of four (4) OC directors of the Developer board on the BC Board...”* It is clear that the four being appointed by PID was anticipated to continue from year to year at least for as many years as it took to reduce the Board size, all being equal and had PID retained ownership of the commercial units. PID having transferred the commercial units does not affect the agreement by the Board to allow it to appoint the additional director. Thus, the Landings B.C has not complied with the MOU, in that regard.

Did the MOU provide for the transfer of the commercial units to The Landings BC or its nominees?

[71] PID's witnesses all state that the obligation given by PID for the right to appoint 4 directors to the Board was termination of the existing commercial lease between TLL and The Landings B.C and entering into a new lease at a nominal rate; waiver of accounts receivable owing from The Landings BC; and transfer of the commercial units. In some instances, they refer to the transfer 'of control' of the commercial units to The Landings BC in a tax efficient manner. They say it was in fulfillment of this obligation that the parties entered into the Agreement for Donation and Deed of Donation and transferred the commercial units to The Landings BC without the latter having to pay stamp duties on transfer. Thus, PID fulfilled its obligations under the MOU.

[72] I note that the MOU does not speak to any obligation by PID for the right to appoint 4 directors to the Board. To the contrary, it speaks of PID's 'entitlement' to appoint 3 directors. In any event, it does not require, or even mention PID transferring the

commercial units to The Landings BC or its nominee, such that this could be considered an exchange for any benefit obtained. What PID agreed to do was to terminate the existing lease of the commercial property and enter into a new long-term lease of at least 75 years at a nominal rate. PID also agreed to *“transfer of control of the commercial spaces of the Property to the BC, on the understanding that the BC is permitted to be able to continue to operate the property as it sees fit.”*

[73] Transfer of ‘control’ and transfer of ‘ownership in the commercial units’ are starkly different concepts that carry different legal implications. The two are not the same as PID suggests. Agreement to grant a lease and transfer of ‘control’ of property does not contemplate a transfer of ownership, or a transfer of the property itself. If the intention was as PID suggests, to transfer ‘ownership’ then there could be no utility in agreeing in the MOU to grant The Landings BC a lease or transfer ‘of control.’ There would be no need for The Landings BC to take a lease of property it would own, and as owner have control of. Thus, it is pellucid that when the MOU was executed, it was not anticipated that PID would transfer ownership of the commercial units to The Landings BC. What seem to have been contemplated was that PID would continue to own the commercial units and be in a position to grant the new lease and control of the commercial spaces, as agreed. By virtue of being owner of the commercial units, it would continue to have the right to appoint 3 directors, in that capacity. The agreement as contained in the MOU did not contemplate change of ownership and the loss of the right by PID to appoint Board members.

[74] The evidence does not reveal what brought about this departure from the clear terms of the MOU. PID’s witness and director Mr. Hall exhibited an email circulated after the execution of the MOU from another director John Copeland (“Mr. Copeland”) dated 1st December 2014¹⁵, which confirms that at the time the MOU was executed it had neither been agreed nor contemplated that PID would transfer the commercial units to The Landings BC. The idea to do so came about after the signing of the MOU and not in consideration of the right or benefit to appoint 4 directors. It appears to have been done

¹⁵ See Exhibit “WJH 6”

with different considerations in mind, and the following excerpt from that email provides some insight:

"In discussions with Peter Foster this past week, ...

*Now that The Landings Owners Consortium (LOC) is set up, and has formed Pigeon Island Development (PID) to act [as] exclusive developer of the unbuil[t] residential land, Peter Foster believes that LOC can **convey the commercial spaces directly to the Body Corporate** without any transfer tax exposure or VAT. He is authoring a deed of transfer to [e]ffect the same, **noting that the "consideration" for the transfer is non-monetary and represents an exchange between the BC and LOC for the right to develop without unit entitlement being enforced on the developer.** Only in the unlikely event that such a transfer would be contested (which he does not envision) should the assets be leased from LOC to the BC."*

[75] I have examined the Agreement for Donation, and it makes no reference to the MOU and contains its own separate terms and conditions, which do not accord with those contained in the MOU. It cannot therefore be said that the Agreement for Donation, which was carried into effect by the Deed of Donation was undertaken in fulfillment of or pursuant to the MOU.

[76] I am therefore persuaded that PID was not entitled under the MOU to appoint 4 seats to the Board as developer, or that the consideration for any benefit obtained thereunder was transfer of the commercial units to The Landings BC or its nominee LCA. It was always entitled to appoint 3 directors in accordance with the Consent Order by virtue of being the commercial unit owner. Having transferred ownership of these units to LCA, it lost the right to appoint those 3 directors to the Board. It is LCA, as owner of the commercial units, who now has the right to appoint those 3 seats.

What was the agreement in relation to reduction of the Board size?

[77] PID contends that The Landings BC breached the MOU by failing to reduce the size of the Board from 11 to 7 directors. Mr. Hall states that it was an important part of the MOU that the Board size be reduced to make the management of The Landings more efficient. This,

he says, was constantly reiterated in emails exchanged between directors of PID and the Board. In support, he exhibited several of the emails exchanged.

- [78] I note in two emails, both sent on 28th August 2014, prior to execution of the MOU, Mr. Hall stated his position that the Board size should be reduced to 7, with 4 being the named OCL directors and unless this is agreed, the deal will not be completed, as he will withdraw his support for the OCL, request return of his funds, and seek compensation from the Board for any lost deposit. In other correspondence, subsequent to executing the MOU, he again raised the matter of the reduction of the Board size. In an email of 12th December 2014, less than one month after executing the MOU he states: *"You mentioned the Board size at 11 but that was the old size as we agreed the Board size would be reduced to 7 for exactly the reason you stated. This was the reason for the MOU. Has that not happened?"*
- [79] Phil Rider replied to this email giving the following explanation: *"My understanding is that the MOU commits to move towards a Board of 7 through the Courts. A Board of eight was elected at the AGM with a further 3 of you joining with the acquisition of the developer's assets making a current total of 11. As far as I am aware no application to the Courts have been made at this stage."* In reply, on the same day (12th December 2014) Mr. Hall responds: *"Guys we need to discuss this. We were clear that the Board would be reduced now and work through Courts. The recommendation that was agreed that directors would pass their votes to us. John Copeland pipe in here. This is the premise in which the MOU states and this is the premise in which I agreed to loan the funds and proceed. If this is not the case, we have a big problem!"*
- [80] Again, in an email three months later, dated 16th February 2015, Mr. Hall states *"... it was and has always been about reducing the Board size and effective management of the resort... without reduction of the Board there is no deal. I said this much to John and for some reason, people seem to not recalled this very hotly contested debate."* (sic.) Mr. Copeland responds as follows: *The language of the MOU is clear and unambiguous. It was drafted by Adam Gobat himself, a St. Lucian lawyer who is quite familiar with the process of petitioning the High Court of Saint Lucia. The Body Corporate Board of Directors does not in and of itself have the legal authority to change the numerical*

composition of the Board ... Until such time as the legal reduction of the Board is approved by the High Court, the standing BC Board members have agreed to provide a written proxy to the four Board members from the OC for acts related to the proposed construction and development project. The Body Corporate Board of Directors cannot compel the High Court of Saint Lucia to expedite its court calendar, however it has agreed to use reasonable endeavours to legally reduce the Board, including petitioning the High Court.

[81] The terms in the MOU relating to reduction of the Board size are clear and state the following:

*“2. The BC Board... **shall use all reasonable endeavours to legally reduce (including by petitioning the High Court) the total size of the BC Board to seven (7) during the term of the proposed development activity on the Property** and shall undertake to do the following:*

...

b. Until such time as it is possible to achieve the legal reduction of the BC board to seven (7) total members, the remaining seven BC board members agree to provide the four directors of the Developer, namely... with written proxy to control all matters related specifically to the currently proposed construction and development project (and provided such matters do not materially adversely affect the operation of the Property as a resort.)

...

d. It is not known how long it will take to achieve the legal reduction of total board seats however the goal is to expeditiously work towards this objective while offering the new developer directors discretion concerning construction and development activities.”

[82] The above terms and the email correspondence exchanged prior to and after executing the MOU provide a clear indication of what was agreed. It is that the Board would take steps to have the size reduced. It appears that this was understood from the language of the MOU and the responses to Mr. Hall's emails, that this process would take some time and was somewhat uncertain. Thus, no time limit was placed on this term and suitable provision was made by the parties for what would obtain in the interim. I observe that Mr. Hall himself appears to recognize this in another email dated 25th December 2014 to members of the Board, in which he admits as much. He states:

*“...A condition to the OC closing the deal was the reconstitution of the Board by reducing the size to 7. **However, as was discussed, we must get the High Court of Saint Lucia to approve this change. This will no doubt be a significant cost and is an uncertain process.** Our desire is not to put hardships*

on ourselves because we are all owners and our interests should be aligned. Accordingly, I'm proposing the following changes:

1) we keep the board as currently constituted and not proceed with the High Court approval;

2) form a 3 member committee of the Board with full authority delegated by the Board to this committee to oversee the management of The Landings. The size of the committee can be adjusted at the committee's discretion. A chairman will be appointed for this committee similar to any other board committees. The GM and FC will report directly to this committee. All resort operations will be handled by this committee working with the GM and FC ...

...

I am proposing that I chair this committee with Peter Devaux and John Copeland as members. I trust that this will be acceptable, and I would like us to move forward on this basis ASAP but prior the QBM...

Did The Landings BC breach the MOU, as the Board size has not been reduced, or did PID waive its right to have the Board size reduced?

[83] The defendants admit that The Landings BC has not taken steps to reduce the Board size, but state that it is because PID had communicated on 3 occasions that it did not wish to do so. The defendants submit that PID waived its right to the reduction and cannot claim that The Landings B.C breached the MOU, on account of this.

[84] In this regard, Mr. Roden' evidence is that the Board was willing to put reduction of the Board size to a vote of the unit owners, but PID indicated it did not wish to proceed at that time. In 2017 by an email dated 11th May 2017, Mr Hall enquired of the status of the reduction pursuant to the MOU and indicated that PID would like to enforce this right. Mr. Hall also stated that until then he would only attend and participate in meetings of LBC Holdings Inc, a subsidiary of The Landings BC, which according to the parties, was incorporated to deal with the issue of PID representation as developer, for completion of the development. In response, Mr. Roden says Kathleen Taylor as director of the Board, by email dated 14th May 2017 indicated that it was understood, at the time the MOU was executed, that there would be difficulty in reducing the Board, which would require a 75% majority vote of the unit owners and it was also not guaranteed that the High Court would reduce the Board size. This would take several years and would be expensive. It was for

this reason, the parties sought, in good faith, to achieve the same effect by forming LBC Holdings Inc with a 7-member board to undertake operations of the development.

- [85] Mr. Roden's evidence is that thereafter 4 directors were excluded from Board meetings and were not allowed to vote or participate. This led to 2 directors resigning and caused a stir among unit owners, as to PID's intentions. This was discussed at a meeting of LBC Holdings Inc on 7th July 2017, where the minutes reveal that Mr. Hall indicated to members that the reason for reduction of the Board size was to create a more productive Board, however, the members did not agree. Mr. Hall and the other directors of LBC Holdings Inc, including PID directors and investors ultimately agreed that it would be time consuming and costly to proceed with the formal reduction and agreed that the number of directors of LBC Holding should be increased from 7 to 11. This decision by the Board of LBC Holdings Inc was confirmed by an email dated 20th August 2017 from the Chairman of that Board meeting and one of PID's witnesses Mr. John Rittenhouse, to other Board members and in the minutes of The Landings BC AGM of 13th October 2017.

Mr. Roden says this position was again acknowledged and confirmed by Mr. Hall in an email dated 11th October 2017 as Chairman of OCL. He informed owners that PID had decided not to pursue the High Court change because it would be too costly, and instead had set up a separate corporation with a 7-member board to manage the affairs of development. Mr. Hall stated further that this was agreed by the Board, the MOU was then executed between The Landings BC and OCL Boards, and after the MOU was executed, PID made the investment to purchase the assets from the receiver. I note that this email is to the same effect as that of Kathleen Taylor mentioned above.

- [86] The doctrine of waiver is explained in **Halsbury's Laws of England** as follows:

"(iv) Waiver

378. Meaning of 'waiver'; validity of waiver.

'Waiver' is a vague term used in many senses¹... However, in contract it is most commonly used to describe the process whereby one party unequivocally¹¹, but without consideration¹², grants a concession or forbearance to the other party by not insisting upon the precise mode of performance provided for in the contract, whether before or after any breach of the term waived¹³. A waiver by estoppel or forbearance in this sense is to be

distinguished from a variation: a variation is supported by consideration and cannot be retracted unilaterally¹⁴; but **a waiver or forbearance is without consideration and may prima facie be retracted unilaterally**¹⁵.¹⁶

“380. Binding effect of waiver.

...

Nevertheless, where the concession lacks the support of consideration or a deed, **it may still have an effect as a waiver by estoppel or forbearance of the obligations under the contract⁵, provided that B's waiver is unequivocal⁶ and A has acted upon it⁷.** The effect is as follows. Normally, the party for whose benefit the waiver was made (A) cannot refuse to accept the performance as agreed to in the waiver⁸. Thus if a buyer (A) of goods requests the seller (B) to extend the time for acceptance A cannot, when the goods are delivered at the later date, refuse to accept them on the ground that they were not delivered in accordance with the strict terms of the contract⁹. On the other hand, if a seller (B) waives the buyer's (A's) obligation to accept delivery within a stipulated time, B may still require A to accept delivery within a reasonable time¹⁰.

If the party granting the concession (B) has led the other party to believe that he will accept performance at a later date than that originally provided for in the contract B will not be able to refuse that performance when tendered¹¹; but if time is of the essence¹² it will remain so as regards the new date¹³. However, if the time of forbearance is not specified in the waiver, B is entitled to impose a reasonable new time limit, which may become of the essence¹⁴; but, if the new time limit is unreasonable, it only takes effect on expiry of a reasonable time¹⁵. **If B has led the other party to believe that he will accept performance in a different manner from that provided for in the contract he will prima facie¹⁶ be entitled to reject the altered performance but he must then give that other party a reasonable time in which to comply with the strict terms of the contract¹⁷.**

Whilst a waiver normally has only a suspensory effect, it may have a permanent effect upon the parties' rights when the original performance becomes impossible¹⁸ or inequitable¹⁹.¹⁷

“381. Requirements of waiver.

Waiver may be express¹ or implied from conduct², but in either case it must amount to an unambiguous³ representation arising as the result of a positive and intentional act done by the party granting the concession with knowledge of all the material circumstances⁴. Furthermore, it seems that for

¹⁶ Halsbury's Laws of England/Contract (Volume 22 (2019))/8. Discharge of Contractual Promises/(5) Discharge by Subsequent Agreement/(iv) Waiver/378. Meaning of 'waiver'; validity of waiver.

¹⁷ Halsbury's Laws of England/Contract (Volume 22 (2019))/8. Discharge of Contractual Promises/(5) Discharge by Subsequent Agreement/(iv) Waiver/380. Binding effect of waiver.

a waiver to operate effectively the party to whom the concession is granted must act in reliance on the concession^{5...}"¹⁸

- [87] The case of **Panoutsos v Raymond Hadley Corporation of New York¹⁹** illustrates the operation of waiver of a contractual right, from which the following principle stated by Viscount Reading C.J. is instructive. He stated:

"It is open to a party to a contract to waive a condition in the contract which is inserted for his benefit. If the sellers chose to ship without the protection of a confirmed bankers' credit, they were entitled to do so, and the buyer performed his part of the contract by paying for the goods shipped, though there was no confirmed bankers' credit, inasmuch as that condition had been waived. If at a later stage the sellers wished to avail themselves of the condition precedent, in my opinion there was nothing in the facts to prevent them from demanding the performance of the condition, provided they gave reasonable notice to the buyer that they would not make a further shipment unless there was a confirmed bankers' credit. If they had done that and the buyer had then failed to comply with the condition, he would have been in default, and the sellers would have been entitled to cancel the contract without being liable to any claim by the buyer for damages."²⁰

- [88] Applying these principles to the facts here, Mr. Roden's evidence reveals conduct which amounts to waiver by PID of the right to have the Board size reduced, at least for a period of time. Mr. Hall's email of 20th October 2017 would have been the most recent occasion on which PID would have waived that right. His email spoke to PID's decision not to pursue the reduction due to expenses of cost and time. It further spoke to this decision having been made and agreed from before or at the time of execution of the MOU and highlighted that an alternative had been agreed and given effect, meaning the formation of the separate company LBC Holdings Inc. This is corroborated by PID's own witnesses Katheen Taylor in her email of 14th May 2017, and Mr. Hall's email of 25th December 2014, a few weeks after the MOU was signed.

- [89] In my opinion, these emails by Mr. Hall constitute repeated positive and intentional acts of making unambiguous representations of the concession to not insist on reduction of the

¹⁸ Halsbury's Laws of England/Contract (Volume 22 (2019))/8. Discharge of Contractual Promises/(5) Discharge by Subsequent Agreement/(iv) Waiver/381. Requirements of waiver.

¹⁹ [1916-17] All ER Rep 448

²⁰ At page 450

Board size, while also demonstrating knowledge of all the material circumstances. The Landings BC has said that it relied upon such representations, which has not been disproven. Therefore, PID would have effectively waived its right then, and cannot now say that The Landings BC breached the MOU.

[90] However, the matter does not end here. The question remains whether PID has unilaterally retracted the waiver as it is entitled to do, and has given notice of the retraction and a reasonable time within which to comply with the strict terms of the MOU. As already mentioned, it was acknowledged, accepted, and agreed by all concerned in various correspondence, that this obligation would take some time, as well as expense and was also uncertain.

[91] I have considered Mr. Hall's email of 11th May 2017 and it does not constitute retraction of the waiver, given that his subsequent email of 11th October 2017 amounts to an unequivocal representation that the obligation was being waived. I have also considered the correspondence that the parties exchanged after PID's directors were removed from the Board in April of 2018. It was initiated by a letter dated 12th June 2018 from Anne Copeland ("Ms. Copeland"). She referred to a commitment made by the Board at the 26th April 2018 meeting to hold the required Extra Ordinary General Meeting to have members determine whether the Board size should be reduced. She then expressed that upon receiving legal advice The Landings BC took the position that PID had waived its right to have the Board size reduced and therefore there was no legal obligation on the Board to proceed to obtain a special resolution approving same. She concluded by seeking the acceptance of PID to this position.

[92] Mr. Hall responded by letter of 25th June 2018 which, in my considered opinion, amounts to retraction of the waiver. *He stated: "In light of the foregoing, the Owners Consortium strongly disagrees with the position taken by the Body Corporate and states that the Body Corporate is and remains bound by the terms of the MOU... The Owners Consortium denies that it has relinquished its right to request a reduction in the size of the Board of the Body Corporate but is willing in the short term to continue to operate as part of an 11-member Board. Should the body corporate fail to honor its obligations under the MOU,*

within seven days of receipt of this letter, the Owners Consortium will have no alternative but to commence legal action...”

[93] In her letter in reply dated, 1st July 2018, Ms. Copeland acknowledges the obligation to reduce the Board size but maintained the position that PID had released The Landings BC from the said obligation and states, *“In any event, I am not sure that the size would make any difference to the OC at this time, as the OC is no longer the owner of the commercial units.”*

[94] Whilst this may be so, the obligation to have the Board size reduced remains a term of the MOU and it is the case that Mr. Hall by his letter of 25th June 2018 retracted the waiver. The Landings BC is therefore required to make all reasonable endeavors to reduce the Board size from 11 to 7 pursuant to the MOU, unless otherwise relieved of this obligation, by PID. However The Landings BC must be given a reasonable time within which to comply. The authorities clearly establish that reasonableness would depend on the circumstances of each case.

[95] Based on the foregoing, the MOU entitles PID to appoint only 1 director of the current 11 directors, under clause 2(a). Having given up its right to appoint 3 directors by virtue of transfer of ownership of the commercial units and The Landings BC is required to take the necessary steps to reduce the size of the Board to 7 within a reasonable time.

Conclusion

[96] The Consent Order cannot be and is not ultra vires the Condominium Act, Declaration and Bylaws and is therefore valid. It is binding on PID, as the successor in title to TLL and the current developer of The Landings, as there is sufficient privity of interest with TLL to make it just that PID should also be bound by the Consent Order. In any event, the MOU conforms with the Consent Order and gave PID the right to appoint 3 directors to the Board by virtue of being the owner of the commercial units. Having transferred the commercial units to LCA, it is no longer entitled to appoint 3 directors, but pursuant to the MOU, retains the right to appoint only 1 director. The transfer of ownership of the

commercial units to The Landings BC was not required or even contemplated by the MOU and was therefore not consideration for any benefit obtained under the MOU.

[97] From the date of execution of the MOU to 25th June 2018, the date of Mr. Hall's letter to Ms. Copeland, PID had waived its undisputed right to have the Board size reduced, having made unequivocal representations that it did not wish to do so. The Landings BC, relying upon such representations, did not breach the MOU in not having taken steps to reduce the Board size during this period. However, by the letter of 25th June 2018, the waiver was retracted and therefore The Landings BC is, from that date required to take steps to reduce the Board size. A reasonable period must be given to comply with this obligation.

Costs

[98] As the parties have each been successful on aspects of their respective statements of case, (PID in relation to specific performance of the MOU and the defendants in relation to the validity of the Consent Order), I will order that they each bear their own costs of these proceedings.

[99] I therefore make the following orders:

1. Specific performance of the MOU is hereby ordered in relation to clause 2 of the MOU for reduction of the size of the Board and clause 2(a) for PID's appointment of 1 director to the Board.
2. PID is not entitled to appoint 5 directors as at completion of Phase 2, or 3 directors as at completion of Phase 3 of the Bylaws, as the Consent Order is valid and binding.
3. The parties will each bear their own costs of these proceedings.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar