

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

COMMERCIAL DIVISION

CLAIM NO. SLUHCM2019/ 0091

BETWEEN:

BANK OF SAINT LUCIA LIMITED

Petitioner

And

**OCEAN PATH (ST. LUCIA) INC.
[In Liquidation]**

Respondent

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini

High Court Judge

Appearances:

Ms Cleopatra McDonald and Ms Diana Thomas for the Petitioner

Ms Kristian Henry, for the Liquidator

Ms Renee T. St Rose with Ms Marie-Ange Symmonds, for The Landings Proprietors Unit Plan No. D2/2007 as Interested Creditor/ Appearer

2021: July 14
August 3, 5, 16

DECISION IN CHAMBERS

- [1] **ST ROSE-ALBERTINI, J. [Ag]:** By order dated 3rd March 2020 the respondent company Ocean Path (St Lucia) Inc was placed in compulsory liquidation, on a petition filed by the Bank of Saint Lucia Limited (“the petitioner”). Mr Leslie Prosper, Attorney-at-Law of Gordon, Gordon & Co. was appointed liquidator. Before the Court is an application filed by the liquidator on 22nd June 2021, for various declarations and orders.

Background

- [2] On 3rd February 2021 the liquidator filed an application for approval of the sale of the sole asset of the respondent namely Condominium Unit H3-21 or apartment 721 registered in the Land Registry as Block 1257B Parcel No.182/v/117 (“the Unit”). By order dated 4th March 2021 the Court approved a sale to Eaton Jn Baptiste or his nominee (“the purchaser”) for US\$395,000.00 or XCD\$1,066,500.00.
- [3] The Unit forms part of The Landings Condominium Development, and The Landings Proprietors Unit Plan No.D2/2007 (“the appearer”) is the body corporate or Homeowners Association charged with responsibility for maintenance and upkeep of the development and its common areas. Under the Condominium Declaration¹ the appearer is authorised to levy a contribution, to defray communal expenses incurred in operating the development. Under the Condominium Act² (“the Act”) the contribution is payable by each unit owner. Unpaid contributions plus interest constitutes a privilege against the unit, from the date on which it becomes payable. To take effect among creditors, notice of the privilege must be lodged for record in the Condominium Land Register.
- [4] On 29th October 2012 the appearer caused a Notice of Charge bearing Instrument No. 5036/2012 (“the Charge”) to be recorded on the land register for the Unit, giving notice that the unit owner has failed to pay contributions levied on the Unit. The Charge covered unpaid contributions in the sum US\$12,936.78 or XCD\$35,147.84 as of 11th July 2012 plus interest at 10% per annum.

¹ No. D2/2007 as Amended by D5/2008 at section 15

² Cap 5:05 of the Revised Edition of the Laws of Saint Lucia

[5] On 23rd April 2021, the liquidator filed an application for approval of the scheme of ranking of creditors, to facilitate the distribution of payments from the proceeds of sale. The appearer participated in these proceedings and agreed that the Charge ranked after the petitioner's claim, the latter being a secured creditor, whose hypothec was registered earlier in time. It was also agreed and accepted, that contributions levied from 3rd March 2020 (the date of the winding up order), until disposal of the Unit, would be paid by the liquidator as part of the liquidation cost and expense. That is because the Unit formed part of the assets which came into the custody of the liquidator and would remain under his control until disposal.

[6] Consequently, by order dated 31st May 2021, the Court approved the ranking of creditors in accordance with the relevant provisions of law, and made the following orders:-

"1. The order of priority of payments among the Respondent company's various creditors will be as follows;

- (i) The Liquidator's fees as approved by the Court;*
- (ii) The Liquidator's various expenses which will consist of legal, accounting, auditing and realtor expenses, the contributions levied by The Landings Proprietors Unit Plan No. 2/2007 for the period that the liquidator was in possession of the unit and miscellaneous expenses which are all to be determined;*
- (iii) The Petitioner's Hypothecary Obligation registered in the Land Registry on 4th March 2010 as Instrument Number 964/2010; and*
- (iv) The Landings Proprietors Unit Plan No. 2/2007 privilege charge registered in the Land Registry on 29th October 2012 as Instrument Number 5036/2012.*

2. The liquidator shall abide by the order of priority of payments referred to in paragraph 1 above."

[7] The liquidator has indicated that the proceeds of sale are insufficient to fully discharge the claims of the petitioner which stood at XCD\$2,180,729.95 as of 30th April 2021. Thereafter no funds will be left to cover contributions recorded under the Charge.

[8] Thus, the Liquidator seeks an order from the Court directing the Registrar of Lands to cancel the Charge, to facilitate conveyance of the Unit to the purchaser, free and clear of encumbrances. Additionally, the liquidator seeks declarations that (i) as liquidator, he is not liable to the appearer for any unpaid contributions, as grantor under subsection 20 (1) of the Act, and (ii) that the purchaser is not liable for any unpaid contributions as grantee, under the same section.

The Issues

[9] The issues for the Courts consideration are:

1. Is the Liquidator liable for unpaid contributions, as grantor, under section 20 of the Act?
2. Is the purchaser liable for unpaid contributions, as grantee, under section 20 of the Act?
3. Should the Charge be cancelled to facilitate sale of the Unit to the purchaser?

The Law

[10] The applicable provisions of law are found at sections 18, 19, 20, 21 and 34 of the Act, some of which are reproduced below:-

“18. Recovery of contributions

(1) A contribution levied by the body corporate on any unit owner shall be due and payable by the unit owner 7 clear days after the service of a notice in writing of the levying of such contribution.

(2) Any contribution which has not been paid by a unit owner upon its becoming due may be recovered as a debt by the body corporate in civil proceedings before a competent court and any such proceedings shall be maintainable without prejudice to the rights conferred upon the body corporate by section 21.

(3)

“20. Joint and several liability of grantor or grantee for unpaid contributions

(1) Upon the execution of any contract for the disposal of a unit the grantee shall be jointly and severally liable with the grantor for all unpaid

contributions due by the latter to the body corporate up to the date of the contract without prejudice to the grantee's right to recover from the grantor any amounts paid by the grantee therefor.

(2) For the purposes of this section the body corporate shall on the application of any unit owner or any person authorised in writing by him or her certify—

(a) the amount of any contribution which on the date of such certificate is due and payable by such unit owner;

(b) the time within which such contribution is payable;

(c) the extent (if any) to which any such contribution has been paid by the unit owner, and any such certificate is conclusive in favour of such person.

21. Charge on the unit

(1) Subject to subsection (2) **an unpaid contribution due from the owner of a unit together with interest** thereon at such rate as may be prescribed by the bye-laws **shall constitute a privilege upon such unit with effect from the date on which such contribution becomes payable.**

(2) **The privilege on a unit under subsection (1) shall produce no effect among creditors until a notice in writing under the common seal of the body corporate is lodged for record in the Register stating—**

(a) the name of the body corporate and the address of the property;

(b) the volume and page of the record of the relevant declaration;

(c) the name of the owner of the unit and the unit designation; and

(d) the amount due and the date on which it was payable.

(3) **A privilege under subsection (1) shall continue in force until—**

(a) **all sums secured thereby with interest thereon are fully paid; or**

(b) **the expiration of 6 years from the date on which the contribution was levied or the last payment (if any) on account of such contribution was made, whichever first occurs.**

(4) Upon payment of all sums secured by a privilege under subsection (1) together with interest thereon the unit owner is entitled on demand made to the body corporate to a certificate under its common seal that the amount due has been paid and on lodging such certificate for record in the Register and the payment of such fee as the Minister may prescribe by order such privilege shall thereupon be satisfied.

(5) **The body corporate shall have the same remedies for the purpose of enforcing the privilege created by subsection (1) as privileges under the Civil Code.**

34. Application of Civil Code, Code of Civil Procedure and other enactments

The provisions of the Civil Code, the Code of Civil Procedure and any other statute relating to undivided ownership, partition, servitudes and privileges shall apply to this Act save in so far as the Act expressly differs. [Emphasis added]

- [11] Regarding cancellation of charges articles 2028, 2029 and 2030 of the Civil Code³ (“the Code”) stipulate as follows:

“2028. The registration of real rights, or the renewal thereof, may be cancelled with the consent of the parties, or in virtue of a judgment from which there is no appeal, or which has become final.

[.....]

2029. If the cancelling be not consented to, it may be demanded from the proper court by the debtor or other holder, by any subsequent hypothecary creditor, by a surety, or by any party interested, together with whatever damages may be due.

2030. The cancelling is ordered when the registration or the renewal has been effected without right or irregularly, or upon a void or informal title, or when the right registered has been annulled, rescinded, or extinguished by prescription or otherwise. [Emphasis added]

Issue 1 : Is the Liquidator liable for unpaid contributions, as grantor, under section 20 of the Act?

- [12] In summary Learned Counsel for the appearer Ms St Rose submits that the term “grantor” is not defined in the Act and extends to a liquidator undertaking a sale in liquidation proceedings. She relied on the meaning of the term “grantor” in **Blacks Law Dictionary** as “the person by whom a grant is made. A transferor of property” further confirmed in **Chambers Concise Dictionary** as “the person by whom a grant or conveyance is made”. Counsel contends that the contributions are not extinguished and remain due, regardless of what happens to the Charge in relation to its ranking in the liquidation proceedings. The argument is premised on section 20 of the Act which Counsel claims is clear in its mandate that upon the execution of any contract for the disposal of a unit, the contributions remain payable.

³ Cap 4.01 of the Revised Edition of the Laws of Saint Lucia

- [13] Counsel submits that the section cannot be interpreted to exclude a sale by the liquidator, because once a contract for disposal is executed the grantor, which is the person disposing of the unit, becomes jointly and severally liable with the grantee or purchaser, for all the contributions still due. Counsel further submits that if the term grantor referred only to the respondent in a voluntary sale the legislation would have said so. In the absence of any such restriction grantor means anyone disposing of the Unit and that includes the liquidator, who then becomes liable for all unpaid contributions up to the date of disposal of the unit.
- [14] Ms St Rose further says that beneficial ownership of the proceeds of sale is immaterial to this issue because the section clearly says whoever is responsible for disposing is liable for all the unpaid contributions, along with the purchaser. It is Counsel's contention that in undertaking the sale of the Unit the liquidator steps into the shoes of the respondent having taken custody and control of this asset pursuant to section 404 of the Companies Act⁴. Therefore, as the person who will convey the Unit to the purchaser, the liquidator becomes the grantor who is jointly and severally liable for payment, under section 20.
- [15] In response Learned Counsel for the liquidator, Ms Henry, argued that the liquidator is not the grantor in the sense used in section 20 because he is not self-interested. Additionally, he is an officer of the court acting under a winding up order, having regard to the exercise and control of the powers of a liquidator under section 407 of the Companies Act. Counsel says that the liquidator sought the Court's directions for approval of the sale, under section 407(3) of the Companies Act and is also bound by the scheme of ranking approved by the Court. If the appearer's position is adopted, it would result in an inversion of the well-established provisions of law concerning ranking of creditors and would be unfair to the creditors who lawfully rank ahead of the appearer.
- [16] Learned Counsel for the petitioner Ms McDonald submits that the absence of a definition of grantor does not preclude a finding that the liquidator acts only as agent of the respondent and is not the owner of the unit. Counsel contends that subsection 20(1) contemplates a voluntary sale by a unit owner as grantor and not by a liquidator. "*Unit*

⁴ Cap. 13.01 of the Revised Edition of the Laws of Saint Lucia

owner” is defined in the Act as a person entitled to the unit, whether by virtue of absolute ownership, usufruct, or lease, and that definition does not include a liquidator. Counsel referred the Court to **Re Southern Pacific Personal Loans Ltd; Smith and another v Information Commissioner**⁵ and **Ayerst (Inspector of Taxes) v C & K (Construction) Ltd**⁶ to make the point that the status of a liquidator as agent of the company is settled and there can be no claim against the liquidator personally or otherwise. A liquidator is no more personally liable for contracts which he makes on behalf of the respondent, than directors would be for the contracts they make on behalf of a company. Thus, title to the Unit remains vested in the respondent, notwithstanding its liquidation. By taking control of the property and dealing with it, the liquidator is acting as agent, replacing the control formerly exercised by the board.

[17] Counsel submits further that in **Ayerst** it was said that the commencement of liquidation brings into effect a scheme as regards the company and its property which is fundamentally different from that which existed prior to liquidation. It is that the beneficial ownership of the assets of the company is suspended pending the implementation of a statutory scheme among creditors. Consequently, in exercising his powers and fulfilling his duties in respect of the Unit, the liquidator does so as agent of the respondent, but for the benefit of creditors and not for the benefit of the respondent. The company remains a legal person distinct from its shareholders, and the liquidator and the duty of the liquidator is to realize the assets to be distributed among creditors, with any surplus to shareholders.

[18] In concluding this point Ms McDonald submits that the appearer is not permitted to rely on any rights which existed prior to the wind-up order, or the order determining the scheme of ranking, as this would be detrimental to the beneficial ownership in the property, which is reserved for creditors. If the appearer’s position is adopted it would give the appearer a priority over all other privilege creditors, to which it is not entitled. Section 20 merely protects the appearer to ensure that unpaid contributions are not withheld by the grantor in a voluntary sale, where the company is directly entitled to the proceeds. This is unlike a

⁵ [2014] 1 All ER 98

⁶ [1975] 2 All ER 537

liquidation, where the money is that of the creditors to be distributed in accordance with the scheme approved by the court.

Analysis

- [19] A good starting for this discussion is found in **Halsbury's Laws of England**⁷ where the status of a liquidator is described as follows:

".....the liquidator in a winding up by the court is an officer of the court, at any rate for some purposes. He is the governing body of the company and also the receiver and manager of its assets, and he fills the character of an accountant to make up the books and accounts so as to ascertain each contributory's or member's share of liability and of any surplus. In receiving calls, the liquidator receives them as trustee.

Since, in a winding up, the company's assets must be collected and applied in discharge of its liabilities, its property is in the nature of trust property, affected with an obligation to be dealt with by the liquidator in a particular way; and this trust is constituted for the benefit of all the creditors. The liquidator is not, however, a trustee, in the strict sense of being a trustee, for each creditor or contributory of the company."

- [20] Section 404 of the Companies Act provides that when a winding-up order is made, a liquidator takes into his or her custody or control, all the property and things in action to which the company is or appears to be entitled. Section 405 goes on to say that:

*"Where a company is being wound up by the court, **the court may on the application of the liquidator by order direct that all or any part of the property of whatsoever description belonging to the company or held by trustees on its behalf shall vest in the liquidator by his or her official name, and thereupon the property to which the order relates shall vest accordingly,** and the liquidator may, after giving such indemnity, if any, as the court may direct, bring or defend in his or her official name any action or other legal proceeding which relates to that property or which it is necessary to bring or defend for the purpose of effectually winding-up the company and recovering its assets."*[Emphasis added]

- [21] These matters are amplified in **Bailey & Groves: Corporate Insolvency - Law & Practice**⁸ which state:-

⁷ Volume 16 (2017) at para 476

⁸ Chapter 22 at paragraph 22.1

“The making of a winding-up order divests the company the subject of the order of the beneficial ownership of its assets, and subjects them to a statutory trust for their distribution in accordance with the statutory rules for such distribution. It is one of the main duties of a liquidator in a compulsory liquidation to ensure that the assets of the company are got in, realised and distributed first to the company's creditors and if there is any surplus to the persons statutorily entitled to it. The assets include not only the assets which the company owns at the commencement of the liquidation but also those which the company acquires during the liquidation.

The company remains a separate legal personality notwithstanding liquidation, and remains the legal owner of its property which it holds on trust for its creditors in accordance with the provisions of IA 1986. This is in contrast to the position in bankruptcy where the bankrupt's estate vests in the trustee in bankruptcy immediately on his appointment taking effect. In a winding up the liquidator takes into his custody or has under his control 'all the property and things in action to which the company is or appears to be entitled. It is open to a liquidator to apply to the court for an order directing that all or any part of the company's property is to vest in the liquidator, although it will rarely be necessary for such an order to be made. An order vesting the company's assets in its liquidator is more likely to be made where there are cross-border considerations.’[Emphasis added]

[22] It is the case that in a compulsory liquidation the winding up order interposes the liquidator's authority over that of the directors of the board and the company becomes subject to the reasonable decisions of the liquidator, in undertaking his duties. In addition to the responsibilities outlined at paragraph 19 above the liquidator is to ensure that: (i) the company is removed from all its legal relationships; (ii) all contracts are completed, transferred, or otherwise brought to an end; (iii) the company ceases to carry on business except so far as may be necessary for the beneficial winding up; (iv) liabilities must be paid as far as possible; and (v) legal disputes must be settled.⁹

[23] In this case the liquidator could have applied under section 405 of the Companies Act to have the Unit vested in him. Understandably, there was no reason to do so, and no such application was made. However, it is generally accepted that even where a court order vests property in a liquidator, it is only in his official capacity, and he is not liable personally to the burdens or liabilities that come with it.¹⁰

⁹ Applications to Wind Up Companies by Dereck French; Second Edition, at para 1.1.6, page 15

¹⁰ Halsbury's Laws of England (Volume 16 (2017) at para 485

- [24] The legal principles outlined at paragraph 21 above demonstrate that there is a clear distinction between the office of liquidator, and the respondent as grantor for the purposes of section 20, where ownership of the Unit has not been vested in the liquidator. Although the respondent has ceased to have custody and control of its assets, that does not equate to a transfer of legal ownership, such that the liquidator assumes the role of grantor. I agree that the respondent remains a separate legal entity, despite the liquidation, and remains legal owner of the Unit, albeit held in trust for its creditors.
- [25] Typically, legal, and beneficial ownership in property vests in one and the same person or entity. In liquidation the company is divested of beneficial ownership in its property once the winding up is made. It is clear from the authorities cited that such separation does not change or affect legal ownership. Thus, the respondent remains the legal owner of the Unit, until it is sold, and the proceeds become available for the benefit of creditors and others who may be entitled.
- [26] Applying these principles to the facts of this case there can be no doubt that the liquidator is not the grantor for the purposes of section 20 of the Act, but rather the agent who acts for the respondent as grantor. He is merely taking the steps required to cause the respondent to part with ownership of its property in administering the liquidation. Even if the respondent is divested of beneficial ownership, this does not affect legal ownership for the purposes of the sale. It is still a sale in which the respondent as legal owner is the grantor, acting through the liquidator as its agent.
- [27] The contributions recorded under the Charge would warrant consideration in the liquidation. They would ordinarily be paid by the liquidator in accordance with the approved scheme of ranking, provided that the funds are sufficient to do so. Contributions levied after registration of the Charge, in this case, would not feature in the liquidation and would have no effect among creditors, because they have not been lodged for record in the register, as required by subsection 21(2) of the Act.

[28] For these reasons it is my considered opinion that sale of the Unit is not removed from the scope of section 20 of the Act, however it cannot be said that the liquidator is liable as grantor under that section, for all unpaid contributions.

Issue 2: Is the purchaser liable as grantee, for unpaid contributions, under section 20 of the Act?

[29] On this issue Counsel for the liquidator submits that it is only where a grantor as unit owner undertakes a voluntary sale and has disregarded or attempts to evade the liability that the grantee becomes jointly and severally liable for contributions owed. The liquidator sought the Court's approval for ranking the claims received and made inquiry of the appearer, who was notified and participated in the proceedings for approval of the ranking. The liquidator's actions do not equate to that of a person who made no inquiries or disregarded the rights of the appearer in relation to unpaid contributions. It is not a case of evading payment of contributions, but rather the liquidator is constrained by the scheme of ranking and the limited funds available for distribution. Thus, the appearer is precluded from relying on subsection 20(1) to subvert the mandatory provisions of law, which would render the approved ranking useless. The appearer is now subjected to the order directing the rank of creditors and is unable to displace it, to cause an innocent purchaser to be subjected to the condition in subsection 20(1).

[30] Ms Henry argued that it is unlikely that Parliament would have intended that the appearer or the general body of homeowners subsidize the liability of delinquent homeowners. However, by subsection 18 (2) and subsection 21(5) of the Act, Parliament sought to ameliorate this undesirable consequence by preserving for the appearer (i) the right to recover unpaid contributions as a debt in civil proceedings before a competent court and (ii) all the rights of enforcement of a privilege, as set out in the Code. These rights of enforcement were not exercised by the appearer, and it is unfair to now seek to usurp or bypass the scheme of ranking by utilizing subsection 20(1).

- [31] Counsel submits that as the proceed of sale are insufficient to satisfy the Charge, on account of its ranking, it must be extinguished and discharged against the respondent and as such it would be unenforceable against the purchaser. Counsel says article 1966(1) of the Civil Code supports this position as a privilege becomes extinct if the property which is subject to the privilege ceases to be an object of commerce.
- [32] Counsel for the petitioner argued that the contributions recorded under the Charge have expired by effluxion of time pursuant to section 21(3)(c) of the Act and are therefore unenforceable against the purchaser as grantee. Concerning the contributions which arose after registration of the Charge, Counsel stated that in a liquidation the grantee or purchaser is not concerned with the debts of the company which arose prior to the winding up order. On making such order the company is no longer entitled to the proceeds of sale as beneficial owner of the property, as it would be in ordinary circumstances.
- [33] In response Counsel for the appearer submits that under section 20 the joint and several liability of a grantor and grantee is in relation to all outstanding contributions at the date of the sale and is the responsibility of both parties. She relied on the definition of grantee in **Blacks Law Dictionary** as “*one to whom a grant is made*” as confirmed in **Chambers Concise Dictionary** as “*a person to whom a grant gift or conveyance is made*”. Counsel agreed that in the liquidation it is the contributions recorded under the Charge which qualify for payment. Nonetheless, that the appearer is entitled to all contributions due, on disposal of the unit. The purchaser to whom the unit will be conveyed is the grantee who is jointly and severally liable for these contributions.
- [34] Ms St Rose contends that the ability of the appearer to recover unpaid contributions from a grantee who is the purchaser does not in any way undermine or detract from the statutory provisions for ranking of creditors, neither does section 20 invert nor affect the approved scheme of ranking. It simply means that if the liquidator is unable to settle from the proceeds of sale, then the purchaser as grantee will be jointly and severally liable for contributions and become liable to pay all unpaid contributions. The appearer accepted that the petitioner’s hypothec ranked in priority to the Charge but has never accepted that

the contributions are discharged or displaced. Thus, unpaid contributions remain due and owing and the section directs that the purchaser as grantee is liable.

[35] Counsel explained that contributions include garbage collection, pest control, insurance, maintenance, electricity, water, service charge and all other charges so incurred in the normal course of property management. Such dues are apportioned amongst unit owners. Consequently, should one unit owner fail to pay, the unpaid amount is collected from the remaining unit owners because it is undesirable for the appearer to incur debt. It would mean that electricity, water, insurance, and other expenses would be disconnected or terminated, and creditors would seek to levy claims against the appearer. Section 20 exists as a safety net, which automatically imposes liability on the purchaser as grantee, to ensure that any unpaid contributions due by the previous owner are settled for redistribution among the unit owners. The purpose is to ensure equity and the overall success of the development.

[36] Counsel submits further that the expenses paid by the appearer on the respondent's behalf includes insurance and maintenance, which protects the Unit which is mortgaged to the petitioner. This redounds to the benefit of the petitioner as creditor of the respondent. The petitioner would be gaining an unfair advantage, having had the benefit of the insurance and maintenance of the unit over the years, which preserved its security. Thus, the obligations to repay the contributions should not be casually dismissed.

[37] Counsel maintains that it would be incumbent upon the liquidator, purporting to sell the property free and clear of all encumbrances, to ascertain the amount of unpaid contributions, and to notify the purchaser of this liability, having decided that unpaid contributions cannot be settled from the proceeds of sale. Moreover, subsection 20(2) permits a purchaser or his agent to ascertain whether there are any outstanding contributions owed to the appearer, which attach to the unit he intends to purchase. This provision exists for the purchaser's own protection. Should the purchaser fail to inquire or cause the grantor to settle the debt, then the purchaser becomes liable for same.

[38] Counsel stated that the appearer has not deliberately or negligently failed to avail itself to the remedies available under the Act or the Code, rather it has utilized them by the registration of the Charge and has interpreted section 20(1) to apportion liability towards the purchaser as grantee. Counsel further stated that in some jurisdictions there are separate provisions for the treatment of contributions in a voluntary sale as opposed to a foreclosure sale. However, in this jurisdiction the contributions are payable upon the disposal of the Unit on any contract, and there is no such distinction as to the nature of the sale. In that regard examples of similar statutes were provided to assist the Court.

Analysis

[39] Section 18 of the Act authorizes the appearer to levy contributions towards the operational expenses for communal aspects of the condominium. Section 19 makes a unit owner responsible for payment of such contributions. Subsection 20(1) makes a grantee jointly and severally liable with the grantor, for contributions owed. The term “*severally*” connotes that a grantee may be pursued separately to recover unpaid contributions. The subsection also gives a grantee the right to recover any sums paid from the grantor.

[40] In the absence of a definition for grantor or grantee in the Act, the words are to be given their plain and ordinary meaning. This was provided in the dictionary meanings put forward by Counsel for the appearer. Subsection 20(1) expressly states that liability attaches to grantor and grantee “***on the execution of any contract for the disposal of a unit***”. The language presents no ambiguity and leaves no room for conjecture. It means then, that Parliament did not intend to limit the scope of the section to a voluntary sale by a unit owner. In my opinion, it is intended to cover all forms of sale or disposal, irrespective of how it is undertaken, and that includes a liquidation sale.

[41] It is usually the case that in a liquidation when funds are insufficient to pay all debts, those which remain unpaid are declared extinguished or discharged as against the company to allow a liquidator to continue the process of dissolving the company. The discharged debt is reckoned a loss to a creditor since there is no other avenue for recovery. However, in

the case of a condominium subsection 20(1) specifically provides that contributions may be recovered jointly and severally from a grantee.

- [42] The appearer can no longer institute proceedings against the respondent as grantor because liquidation is ongoing. It means therefore that the only remaining option is to recover the contributions from the purchaser as grantee. In such a case the liquidator is authorised as the agent of the respondent who is still the unit owner, to make the necessary inquiry under subsection 20(2) of the Act, to ascertain the amount of any contributions due and the extent to which any of these contributions have been paid by the unit owner. This should be followed by disclosure to intended purchasers when soliciting bids, so that purchasers are aware of the liability and the implications of section 20 if the contributions cannot be paid in the liquidation.
- [43] I have perused the relevant sections of the Condominium Acts provided by Counsel for the appearer and Counsel for the liquidator, from the jurisdictions of Delaware¹¹, Maryland¹², Wisconsin¹³, the British Virgin Islands¹⁴, and the Bahamas¹⁵. They all contain identical provisions to section 20 and more so subsection 20(1) of the Act. In the British Virgin Islands and the Bahamas, the provision applies to any conveyance of a unit. In Delaware, Maryland, and Wisconsin it applies to a voluntary sale or conveyance.
- [44] The Delaware Act contains separate provisions for an execution sale by the sheriff. The sheriff is mandated to pay assessments of which he has notice, from the proceeds of sale. The purchaser at such sale and the unit involved are not liable for any unpaid assessments which arose prior to the sale. However, any assessments which were not paid by the sheriff and cannot be collected from a former unit owner may be reassessed as a common expense and redistributed to all unit owners, including the purchaser. In Delaware and Wisconsin, a purchaser is not liable for any assessment not disclosed in a statement provided by the homeowners' association, and any such uncollected assessment may be reassessed as a common expense and redistributed to all unit

¹¹ Sections 2236 - 2237 of Title 25

¹² Section 11-110 of Title 11, Maryland Condominium Act

¹³ Chapter 703.165 of the Condominium Ownership Act, Wisconsin Annotated Statutes

¹⁴ Condominium Ordinance of the British Virgin Islands – Cap 219

¹⁵ Law of Property and Conveyancing (Condominium) Act of the Bahamas – Cap 136

owners, including the purchaser. In Wisconsin the unit conveyed will not be subject to a lien for any assessments not registered within 2 years of the date that such assessment was made.

[45] Counsel for the petitioner says that these variations provide guidance on how the Court should treat the unpaid contributions, to avoid recovery against the purchaser. I note that the Act makes no such distinction and Parliament has not legislated for such outcome in a liquidation sale. It is trite that in such circumstance the effect of these provisions cannot be read into section 20, and the Court is constrained by the dictates of the Act, which is that a grantee is jointly and severally liable for the unpaid contributions on any contract for disposal of the Unit.

[46] The section means what it says and creates no conflict in the law relation to the ranking of creditors. In each case the Court will rank all creditors in accordance with the law. It is only contributions recorded under a Notice of Charge which will fall to be considered in a liquidation. Contributions which are not registered are of no effect among creditors and are not considered in a liquidation. Therefore, prospective purchasers must be placed on notice of the effect of the section.

[47] The parties have not provided any authority and I have found none, which says that if the contributions are not recoverable from the respondent as grantor, or in the liquidation as in this case, that they are automatically discharged against the purchaser as grantee. In fact, section 20 suggests the contrary, when it says that the contributions are recoverable jointly and severally from the grantee, on any contract for disposal of the unit. Thus, any undertaking given to convey the Unit free and clear of encumbrances, would have to be qualified by a statement in relation to section 20.

[48] Counsel for the liquidator referred the Court to dicta of Gonsalves-Sabola J, as he then was, in **Triple Ecstasy Limited v Bayview Village Management Ltd**¹⁶. The case examined various sections of the Bahamas Condominium Act in relation to the question

¹⁶ Supreme Court Bahamas – Equity Side No. 27 of 1989, delivered on 20th January 1989

whether the charge created by that Act was legal or equitable, and whether the body corporate was mandated to proceed by way of lawsuit to recover unpaid contributions. In concluding that the section created a legal charge the judge opined that the Bahamas Act created two situations by which a contribution would be cleared, otherwise it continued in effect and was enforceable by suit or by the power of sale as a mortgagee would under the Conveyancing and Law Property Act. It was for the body corporate to decide as a matter of convenience, which method of enforcement it wished to adopt.

[49] It that regard Gonsalves-Sabola J stated that enforcement by lawsuit¹⁷ was less draconian than recovery by way of sale¹⁸ under the Conveyancing and Law Property Act. He opined that the latter was more suitable for bad cases such as the inveterate defaulter whose non-payment threatened the proper operation or existence of the condominium. These statements were not made in relation subsection 20(1) of the Bahamas Act which deals with the “*joint and several liability of grantor or grantee*” and is the equivalent of subsection 20(1) of this Act. In fact, this section was not considered at all. The court went on to say that if the choice was between a narrower construction which would bring the purpose of the legislation to futility and a bolder construction which would bring about an effective result, then the latter should be accepted. Ultimately, the choice to be made when construing the section must be consistent with the smooth working of the system that the statute is regulating.¹⁹

[50] In my view the law must be applied as intended. There is no confusion or uncertainty in what the Act seeks to achieve, which is to institute a system of shared contribution for the communal expenses of the condominium. It provides several options for recovery of contributions from unit owners and purchasers. It seeks to protect the rights of unit owners against breach by delinquent owners and to ensure that service providers do not come knocking on the door of the appearer, as creditors. I do not think it can be said that the system, as legislated, results in unfairness or absurdity, or affects the mandatory provisions for ranking of creditors in a liquidation sale.

¹⁷ Section 18(3) of the Bahamas Condominium Act

¹⁸ Section 21(4) of the Bahamas Condominium Act

¹⁹ Supra note 11 at paragraphs 11 – 14 of the judgment

- [51] While I understand the liquidator's concern that prospective offers in a liquidation sale may be impacted by the application of section 20, it is simply the commercial reality which exists in relation to the sale of a condominium, under any circumstances, which has been in effect for well over four decades. The purchaser cannot be said to be a purchaser without notice, as the Charge registered by the Appearer is notice to the world. Additionally, every purchaser has a responsibility to undertake due diligence inquiries into the nature of the property being purchased.
- [52] Subsection 20(2) allows a purchaser with written authorization from the unit owner, to make the relevant inquiries of the appearer. The section goes on to state that a certificate issued by the appearer, containing the particulars of contributions due, is conclusive in favour of the person to whom it is issued. That provision is somewhat akin to the provision in the Wisconsin Act which provides that a grantee will not be held liable for any assessment which is not disclosed in the statement provided by the homeowners' association. Sale of the Unit is subject to the dictates of the Act, with the result that if the grantor is unable to settle, as in this case, then the grantee who is within reach may be pursued.
- [53] It is true that the Act affords the appearer several options for recovering contributions. The Court may not speculate on why other options were not pursued. Recovery of contributions from a grantee is simply an option afforded by the statute, which can be utilized contemporaneously upon the sale of a unit.
- [54] I therefore conclude that the appears is not precluded from pursuing the purchaser or his nominee, whichever becomes the new unit owner, for unpaid contributions which have not expired under section 21(3) of the Act.

Issue 3 : Should the Charge be cancelled to facilitate sale of the Unit to the purchaser?

- [55] Counsel for the liquidator submits that the appearer accepted that the liquidator was bound to act in accordance with the approved ranking. As there are insufficient funds to pay the contributions recorded under the Charge, it has become entirely unenforceable against the

respondent. It must be discharged, with no debt remaining due to the appearer. As the appearer has failed to pursue the methods of recovery permitted against the respondent prior to liquidation it should not be permitted to stymie the liquidation proceedings.

[56] Counsel for the petitioner submits that the contributions recorded under the Charge have expired by virtue of subsection 21(3) of the Act because six years have elapsed from the latest date recorded, which is 11th July 2012. The expiry date would be 11th July 2018, which it is earlier in time to 21st February 2021 (the date of last payment on account), and six years have not elapsed from that date. In the alternative, Counsel submits that as the funds are insufficient to pay the appearer's claim, it must be deemed unenforceable against the respondent and discharged for the purpose of concluding the sale to the purchaser, to give effect to the approved scheme of ranking.

[57] Counsel for the appearer countered by stating that the contributions are not extinguished and remain due and payable. Sporadic payments were made every year from 2013 to 2021, and it is the last payment on account which is important in calculating the six-year period for the purposes of section 21(3). Although the appearer accepted that the petitioner's hypothec ranked in priority to the Charge it has never accepted that the debt is discharged or displaced and has not consented to cancellation without payment.

[58] Additionally, Counsel submits that there is no issue of irregularity or any circumstance to void the Charge under Article 2030 of the Code, therefore there is no lawful basis for cancellation. Further the appearer has not 'deliberately' or 'negligently' failed to avail itself to the remedies available under the Act or the Code, rather it has utilized them by the registration of its privilege under the Charge and has interpreted subsection 20(1) to apportion liability towards the new purchaser.

Analysis

[59] By order dated 31st May 2021, the Court ranked the payment of claims for distribution from the proceeds of the sale (see paragraph 5 above). The appearer's Charge ranked after the petitioner's hypothec by virtue of article 2011 of the Code, which states that if the right is

subject to registration, it ranks according to the date of registration. The hypothec was registered in 2010 and the Notice of Charge in 2012, thus the former outranked the latter, having been registered first in time. This outcome is also consonant with section 41 of the Land Registration Act²⁰.

- [60] The liquidator has advised that upon payment of liquidator's fees, the cost and expenses of the liquidation and the debt of the petitioner bank, there will be no funds left to pay the appearer's claim under the Charge. I have already determined that contributions levied after 11th July 2012 up until 2nd March 2020 have no effect among creditors as a Notice of Charge was not lodged to register these contributions, pursuant to subsection 21(2) of the Act. Thus, these sums cannot be claimed in the liquidation proceedings.
- [61] I have perused the statements produced by the appearer as Exhibits BM2 and BM4. Collectively they capture sums levied by the Appearer on the Unit and payments made by the respondent from 2010 to 2021. Exhibit BM4 shows payments between January 2010 to December 2016 totaling US\$44,805.56. Exhibit BM2 does not reflect any payments in 2017 and 2018, but from 2019 to 2021 the sum of US\$78,709.07 was paid. The appearer gave the balance due as of 27th April 2021 as US\$43,035.51 which is the closing balance shown in Exhibit BM2.
- [62] The appearer did not provide a comprehensive analysis of the allocation of payments to contributions due, which would have clearly indicated whether contributions recorded under the Charge have been fully paid. Section 20(2)(c) empowers the liquidator to obtain a statement from the appearer which specifies the extent to which contributions levied have been paid by the unit owner. This necessitates the allocation of payments over the years to the contributions levied and could have facilitated removal of the Charge under section 12²¹ of the Land Registration Act, without the necessity for a court order.

²⁰ Cap 5:01 of the Revised Edition of the Laws of Saint Lucia

²¹ 12. Cancellation of obsolete entries: The Registrar may cancel any entry in the register which he or she is satisfied has ceased to be of any effect.

[63] Applying the most widely accepted best practice in accounting or financial reporting standards, that payments should be allocated to the contributions levied earlier in time, it is clear from the appearer's exhibits that the sums paid to date far exceed the amount registered under the Charge, which stood at US\$12,936.78 in July 2012. This sum would have been fully paid by the end of 2016, notwithstanding that contributions and interest continued to accrue after the Charge was registered. Further, payments made between 2019 to 2021 would have effectively wiped out any interest which would have accrued on the contributions recorded under the Charge. Thus, the outstanding contributions plus interest of US\$43,035.51 as of 27th July 2021 can only be in relation to contributions levied after 11th July 2012 which are not registered and cannot be claimed in the liquidation

[64] Based on the foregoing I am satisfied that the contributions recorded under the Charge did not expire and have been fully paid. The Charge is therefore extinguished by virtue of subsection 21(3) (a) of the Act and no longer has any effect in the liquidation. As the appearer has not consented to the cancellation, the Court is empowered to cancel same in accordance with article 2030 of the Code. This will allow the sale of the Unit to be completed to the bring the liquidation to conclusion, so that the respondent may be dissolved and struck off the Register of Companies.

Conclusion

[65] Based on the foregoing, I make the following orders:-

1. It is hereby declared that the liquidator is not the grantor for the purposes of section 20 of the Act and is not liable to The Landings Proprietors Unit Plan D2/2007 for unpaid contributions.
2. It is hereby declared that The Landings Proprietors Unit Plan D2/2007 is not precluded from pursuing the purchaser as grantee, for contributions which remain unpaid and have not expired by virtue of section 21(3) of the Act.
3. The Notice of Charge registered as Instrument No. 5036/2012 is discharged against the respondent and the Registrar of Lands is hereby directed to cancel the said Charge from the Land Register for Block 1257B Parcel No. 182/v/117.

4. There is no order for costs.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar