

IN THE SUPREME COURT OF BELIZE A.D. 2020

CLAIM NO. 119 of 2020

BETWEEN

(BOC-708 INC.

1st CLAIMANT

(BOC-104 INC.

2nd CLAIMANT

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(AND

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(PROPRIETORS OF STRATA PLAN 54

1st DEFENDANT

(PROPRIETORS OF STRATA PLAN 42

2nd DEFENDANT

(TARIQUE CHOUDHARY

3rd DEFENDANT

(PAUL COPE

4th DEFENDANT

(DEBBIE NICHOLS

5th DEFENDANT

(MARK ELPHICKE

6th DEFENDANT

(SIMON RICHARDS

7th DEFENDANT

(SUE KAMARA

8th DEFENDANT

(MARIUS VISAMANTAS

9th DEFENDANT

(LAURENCE HAGAN

10th DEFENDANT

(NICK ENGLISH

11th DEFENDANT

BEFORE the Honourable Madam Justice Sonya Young

Decision:

February 24, 2023

Appearances:

Ms. Payal Ghanwani Counsel for the Claimants.

Ms. Priscilla Banner Counsel for the Defendants.

JUDGMENT

1. Humbly, I dare say, this matter primarily concerns well intentioned misunderstandings. The action is brought by two registered proprietors of strata lots against their strata corporations and executive committee members (old and new). The first Claimant owns property within Strata Plan no. 54 and so holds a share in the first Defendant. The second Claimant owns property within Strata Plan no. 42 and accordingly holds a share in the second Defendant. The remaining Defendants are the elected members of the old and/or new Executive Committees of the first and/or second Defendants.

2. The common property of both Strata Plans no. 54 and 42 are treated (for the most part and for our purposes) like a single property and houses a pool, restaurant, bar, spa and dive shop. Prior to the 19th of October 2018 the business of renting the units contained within Strata Plans no. 42 and 54 as well as operating the business of the restaurant, bar, spa and dive shop was conducted by CMB Management Ltd (CMB).

3. By what the main witness for the Claimants (Mr. Poston) refers to as a “*hostile takeover*” followed by a court order, CMB was expelled from the premises with the assets turned over to the first and second Defendants. There was no order as to ownership of those assets.

4. The Claimants say that since then the first and second Defendants simply assumed control of those businesses. The third through the eleventh Defendants have been engaging in the conduct of resort business, earning revenue and incurring liability like a limited liability company which they are not.

5. Some of the Defendants have also purported to authorize the formation of a new company to undertake the resort business for and on behalf of the Defendants. Some of the Defendants have even, by resolution, purported to sell land and property held in the name of the first and second Defendants. Since the powers of the first and second Defendants are confined to those provided in the Strata Act these acts are all ultra vires and cannot be ratified.

6. The Claimants say further that in breach of their fiduciary duty and statutory obligations the original executive committee members failed to provide certain information to the Claimants as requested. While some of the information was later received from the new Executive Committee, they too failed in the fulfillment of their statutory obligation to provide the minutes of all meetings as requested.

7. The Claimants, therefore, seek a number of consequential declarations and orders, an injunction and costs.

8. The Defendants say unreservedly that the Claim is not only vexatious but also without merit. They agree that the resort business was first being operated by CMB until the Supreme Court of Belize ruled that CMB was not the beneficial owner of the resort business and had no legal or equitable right to possess, occupy or operate the amenities free from interference from the Corporations.

9. The Corporations then assumed control of the common property, but it did not take over the management of the amenities. Rather, out of necessity STEM LLC was appointed as the rental and property manager to avoid any interruption in the resort business. Subsequently, a company made up of some proprietors (including some

members) was incorporated to manage the rental of units as well as the common property and conduct business there in.

10. The Corporations deny ever earning revenue or incurring liability. They allege that there was a resolution passed at an annual general meeting to get funding to defend the original claim, but no loans were ever received. Those minutes were sent to all the members including the Claimants. A loan was received by the resort business for the benefit of all unit owners so that the business could survive. But all fees paid by proprietors were used only to upkeep, develop and maintain the common properties and meet insurance premiums, never to repay that loan.

11. There was no sale or intended sale of common property. There had been a resolution voted upon by members at an annual general meeting which had been mis-described but was subsequently corrected. That corrected resolution showed that the vote had been taken to seek legal advice regarding the procedure for sale of the common property. Therefore, targeting the Defendants in this way now must be intended to harass.

12. The Corporations also deny promoting or authorizing the formation of or owning or controlling any company. Rather, it is the individual proprietors who have done this, and all proprietors are at liberty to join the company if they so desire. This entity is, however, not authorized to conduct any business on behalf of the Corporation.

13. The Defendants admit their full awareness of the duties of a Corporation under the Act but deny any breach of any statutory or fiduciary duty as alleged. As soon as the executive realised that the request for information was coming from proprietors all information which they were statutorily required to disclose was provided.

14. They ask that the Claim be dismissed in its entirety with costs.

The Issues:

1. Whether since October of 2018 the first and second Defendants have been:
 - A. Engaging in the resort business of renting the 60 units located within Strata Plans no. 42 and 54 to guests for profit.
 - B. Engaging in the promotion of a company incorporated under the Companies Act of Belize for the purpose of conducting such resort business of renting the 60 units located within Strata Plans no. 42 and 54 for and on its behalf.
 - C. Operating the restaurant, bar, spa and/or dive shop for profit? If yes, whether the operating of a restaurant, bar, spa and/or dive shop constitutes resort business? Whether the First and Second Defendants have any statutory or other powers to conduct such activities or business?
 - D. Raising capital by way of loans, or promoting investments in any such Chapter 250 company, for the purpose of conducting any such business for and on its behalf and/or on behalf of its owners?
 - E. Selling any land forming common property standing in the name of any of the First and/or Second Defendants?

2. Whether any such acts above were conducted by resolution of the proprietors or by the members of the Executive Committee in their individual capacities?

3. Whether any such acts were ultra vires and done by the individual members, does this render the individual defendants personally responsible for any consequences or losses flowing therefrom.

4. If any such acts were unlawful and conducted by the Strata Corporations, whether an executive Committee member is personally liable for debts incurred by and in the names of the Strata Corporations?

5. Whether any of the Third through Eleventh Defendants have individually or to the exclusion of the Strata Corporations, incurred debts on behalf of the Strata Corporations for which they are personally liable?

6. Whether the Defendants have complied with their statutory obligations to provide information to the Claimants?

7. Whether the Claimants, as owners, are entitled to be provided with any or all of the information requested from the Defendants in their letter dated the 13th day of September 2019, as referred to in (p) above?

8. Whether the Third through Eleventh Defendants have breached their fiduciary duty to the Claimants, as owners by not providing them with any or all the information requested in their letter dated the 13th day of September 2019?

9. Whether the First Time EC Members may be liable personally for any acts done prior to their appointment as EC members?

10. There are three additional issues not agreed by the parties but which the Defendants wish to have determined. They will be listed and dealt with below.

Whether since October of 2018 the first and second Defendants have been:

A. engaging in the resort business of renting the 60 units located within Strata Plans no. 42 and 54 to guests for profit.

11. All parties agree that, by their very nature, this as well as the four following issues demand a consideration of the mountain of evidence now before the Court and a finding of fact.

12. The Court began its consideration with the history of these two strata developments as outlined in part by the witnesses on both sides which it found very telling.

13. The developments had witnessed receivership and various management companies. They had been embroiled in prolonged litigation with one management company CMB which went all the way to the Court of Appeal. The ultimate beneficial owner of CMB, Mr. William Poston, is also the ultimate beneficial owner of the two Claimants in this matter.

14. The result of that litigation was that possession of the common property of both developments was taken from CMB as they were found not to have had any beneficial interest in the developments located on the common properties or any legal or equitable right to possession or to conduct business there. They were also found not to be the beneficial owners of the resort business being operated from the common properties and known as the Belize Ocean Club.

15. Consequential orders were subsequently made which resulted in all the records and assets in CMB's possession relating to the Belize Ocean Club (including unit

bookings) having to be handed over to the first and second Defendants. There was noticeably no order made which gave ownership of the businesses or any of the businesses being conducted in the common property to the first and second Defendants.

16. After all this the strata corporations began a process of self-determination. They held their first general meeting ever, voted in their first executive committees and started the process of understanding their powers and carrying out their duties.

17. The Court is of the view that the EC members had come from a place where, as proprietors, they felt they had no control or authority over the common property in particular. They now became so concerned about once again losing control or authority that they were determined to be fully engaged in every aspect of whatever business was being conducted on the common property. The Court will bear this in mind as it considers the evidence before it.

18. Now I hesitate, even refuse to refer to the rental of units and all the businesses being conducted on the common property as the resort business as an important distinction must be made between the two. The businesses which will be discussed in Issue 3 operate out of the common property which is owned by all the proprietors in common but the units which are rented are individually owned by each proprietor.

19. Since there is no restraint on any individual renting their own unit, each unit owner is free to contract as they wish. On the other hand, while owners can use common property as allowed by law, by laws or rules, it is the strata corporation which exclusively controls the common property. So, the use and occupation of the

common areas by anyone other than the proprietors and guests is not a decision which an individual proprietor could make alone.

20. The Court next considered that the members of the EC are, by virtue of their presence on those committees, all proprietors. They are volunteer unit owners elected by a majority of owners. They are not directors of a company who may have been selected for specialist knowledge or expertise. They would also inevitably have a personal interest in ensuring that their investment (property rental) is successful. This may easily have caused any over exuberance or over involvement which the members of the Committees displayed.

21. It would also explain why they, as members of the EC and members of the rental pool, wanted to have access to the budget and accounting for the rental of the units which seemed to have been merged with the businesses being carried on on the common property, perhaps simply because it was being conducted by the same management company. It also explains a lot of what the EC members, as members of the rental pool, had to say in the Owner's Update.

22. For what it's worth, this Court did not find the Owner's Updates to be any formal document issued by the Strata Corporations for the promulgation of Corporation or EC information only. The June 2019 edition gives information following an informal meeting of owners. That is certainly not Corporation or EC business. But because there was not always a clear distinction being made between what was actual corporation business and what was individual proprietor business, the Court understands why there may have been some confusion caused to the Claimants.

23. So while I find that the members of the EC no doubt carried on, spoke and even wrote as if the rental business belonged to the Corporations, I cannot find that the business actually did or that either the first or second Defendants were engaged in the business of renting units for profit. The EC members' behavior, however, does make it quite understandable how the Claimants could have become concerned thereby prompting clarification of certain actions through the request for information (a matter which the Court will deal with momentarily).

24. The only matter that gave me pause was the financial statements. Because the rentals were being conducted by each individual unit owner through their contracted agent this Court could not reconcile why the Corporation was issued with any information relating to those rentals and why they were promulgating them.

25. Nonetheless, more compelling is the clear agreements made between individual proprietors and the various rental companies throughout most of the period under consideration. The remaining period where there were no such agreements in place has been sufficiently explained. The covid pandemic caused a cessation of all business.

26. On the other hand there are no such agreements made between the Strata Corporations and the rental agent for any rental of units. The fact is that very soon after the 19th of October order had been made, Stem was positioned to carry on the rental business and only those who signed on had their units rented. If the Corporations had any intention of carrying on the rental business, why was Stem so positioned and why so quickly?

27. I cannot agree with the Claimants that Stem received all of its directives from the old EC because Stem, like the other rental agents worked under those detailed contracts signed by each proprietor who wanted to be a part of the rental pool. If Stem or any other agent allowed themselves to be swayed by persons other than with whom they had contracted, that is a matter for them. Regarding the manner in which the rental agents conducted the rental of units, that is a matter better reserved for the parties to those individual contracts.

28. For all these reasons the Court will answer the first issue in the negative.

Whether since October of 2018 the first and second Defendants have been:

B. engaging in the promotion of a company incorporated under the Companies Act of Belize for the purpose of conducting such resort business of renting the 60 units located within Strata Plans no. 42 and 54 for and on its behalf:

29. The first and second Defendants deny this allegation entirely and submit that the evidence simply does not support it. The Claimants, however, stress that the concept of the “New Company” was the brainchild of the Old EC and evidence of this is to be found in the Owner’s updates particularly that of June 2019 and September 2019.

30. The update of June 2019 specifically speaks to what transpired at an informal meeting of owners. It states: *“A new owner-owned company will be established and authorized or licensed by the PSC to run the resort operations. Owners will have the flexibility to opt in or out of the resort activities. Courtenay Coye have (sic) been instructed to start the process of setting up the new company. We are waiting on confirmation of what documents are required for all owners wanting to become members of the new company.”*

31. The September issue is far more detailed, and the Court finds it necessary to include the entire relevant section:

NEW COMPANY

“As you know from our update sent in June when we informed owners that we were planning on setting up a new owner-owned company. This new company (NEWCO) will be appointed under licence by the PSCs to be its property management company which will be able to delegate the resort business on behalf of the PSCs under licence. This company will have authority to retain professionals to assist in the management of the property and resort and as such the long-term contract with STEM will ultimately be with this new company. The process of setting up NEWCO has already started; all owners are invited to become members of this new company.”

What is important to understand is that:

- *After careful deliberations with our legal counsel, it was determined that the most legally and operationally appropriate option to run the resort operation is to set up NEWCO. Such a separate business (for profit) company is a traditional solution, used also by other similarly structured resorts in Belize.*
- *NEWCO will be “owned” (through membership) exclusively by proprietors of PSCs 42 and 54. No external parties will be members. Hence all control of the resort operations will stay with the proprietors. To draw a parallel with the past, NEWCO will largely serve the same function as BOC Ltd and Muy-Ono did before – but without giving away any part of control of the resorts to outside parties.*
- *Differently from PSCs, NEWCO will be able to earn profits from all aspects of the business and share them among its members.*
- *The principles for unit rental, profit sharing, owner stays etc., which the ECs proposed earlier this year will be applied by NEWCO towards all owners who sign a Rental Management Agreement (RMA) with it.*
- *NEWCO will be the “operational arm” of the PSCs, responsible for running the resort operation, including hiring of a Property Management company (currently STEM). In effect proprietors will task themselves as members of NEWCO with running the resort business and overall property management.*

- *PSCs will delegate to NEWCO all property management responsibilities which PSCs are tasked with by law – key among them being maintenance of the common grounds and making sure the property on the development is insured. Effectively this would mean that PSCs will relegate themselves to (i) signing a contract with NEWCO, (ii) overseeing the agreed deliverables by NEWCO, (iii) determining, collecting, and allocating HOA fees, and (iv) any other ad-hoc business of PSCs which may not be transferable to NEWCO. The latter includes some important aspects, e.g., disposal of PSCs' property.*
- *As far as relationship with NEWCO is concerned, there will likely be three types of proprietors:*
 - *Full members of NEWCO who will participate in its decision making and profit sharing,*
 - *Non-members who will nevertheless sign an RMA for their units and will receive income based on an agreed formula (but not full profit sharing), and*
 - *Proprietors who will neither be members of NEWCO nor will sign the RMA, e.g. those who may decide to use their units exclusively for their own use. The latter category will only pay the HOA fee to PSCs and utility charges and any assessment (if requested) for their unit, to be determined by the PSCs.*

Owners who become Members will then be able to benefit from receiving net profit distributions from non-room generating departments. To become a Member, owners are required to send the following documents.

- 1. Notarized Copy of Passport;*
- 2. Bank Reference Letter with whom the relevant person has had a banking relationship with for at least 2 years (SAMPLE ATTACHED);*
- 3. Professional Reference Letter with whom the relevant person has had a professional relationship with for at least 2 years (SAMPLE ATTACHED);*
- 4. Copy of utility bill as proof of residence;*
- 5. Due Diligence Authorization Form (provided).*

To make it easier, we suggest that US-based owners send their documents to Marius, and for those in Europe to send to Paul. Please contact them to obtain their addresses. We would ask that all owners start collecting the documents required and send them through to Marius and Paul as soon as possible.

All operating licences will be transferred to this NEWCO including the STEM agreement.

32. Then under the heading ACCOUNTING it reads:

“Until the NEWCO structure and audit has been completed, the ECs feel that no distributions of rentals income to owners should take place until after the end of this current financial year as that would be the first full financial year of operation. ... It therefore means that no distributions will be made for the period up to end of March 2019, as these have been allocated towards owners HOA fee commitments.”

33. An email followed from the ninth Defendant dated the 28th of December, 2019. It contained what was called Umayya Structure and Terms December 2019. The Court accepts that Umayya, NEWCO or MGMT CO are all synonymous.

34. What is alarming about that document is that it speaks not only to the proposed company but also what the Corporations are expected to do. For example, *“paragraph 5 - PSCs will sign a single management agreement with MGMT CO. The latter will provide to the PSCs common area maintenance services and PSC financial management services. MGMT CO will be licensed by the PSCs to manage all common area properties of the PSCs. PSCs will compensate MGMT CO (using revenues from the HOA fees) for the services provided.”*

35. Paragraphs 9 to 14 discuss the financial structure of PSCs and Umayya resort. Stating even what HOA fees shall be. Paragraph 16 - *“Financial statements of the PSCs and Umayya resort will be managed by MGMT CO..... Financial statements of Umayya resort will*

be audited annually by external auditors, selected by unit owners in General Meetings for the PSCs and by members of MGMT CO for MGMT CO.

36. While the initial discussion concerning the NEWCO was done in an informal meeting, the words are clear, and they resound. NEWCO will be the operational arm of the PSCs to which the PCSs will delegate all property management responsibilities. By the admission of Mr. Choudhury, discussions on the formation of the company spilled over into general meetings. It is not simply a coincidence that the members of the PSCs were the ones who were pursuing the incorporation of this new company. No single owner or ordinary group of owners would be able to make the statements such as have been found in the above excerpts.

37. This Court finds that the subsequent incorporation of Amaya Ltd was the direct result of the Corporations, through their ECs, engaging in the promotion of a company incorporated under the Companies Act. Even with the above initial considerations, on which I began to explore the evidence in this matter, I can draw no other conclusion.

38. This allegation is answered positively and is not to be confused with any finding of ownership of the company.

**Whether since October of 2018 the first and second Defendants have been:
C. Operating the restaurant, bar, spa and/or dive shop for profit? If yes, whether the operating of a restaurant, bar, spa and/or dive shop constitutes resort business? Whether the First and Second Defendants have any statutory or other powers to conduct such activities or business?**

39. The Claimants point to the Owners Updates, particularly those of April 2019 and November 2019 and say that they are an admission that the ECs were using the HOA fees to purchase groceries for the restaurant and to buy a boat for the dive shop business and they were also actively monitoring the transactions of these businesses and participating in their operations. They also ask the court to consider the audited financials which were prepared on instructions provided to them by members of the EC.

40. They urged the Court to reject the notion that that the businesses were being operated by Stem and to find instead that Stem was simply an agent of the EC members. Further, that the Corporation had no power to conduct for profit business as a limited liability company could.

41. The Corporations deny operating these businesses. But they maintain that even if they were, they did have the legal capacity to manage their common properties for the enjoyment of the unit owners and provide amenities existing on the common properties for the benefit of their proprietors.

42. The Court having considered the evidence finds the following most compelling: Firstly, there were businesses being operated from the common properties. In order to operate from the common property, the owners or operators of the business must have been granted some legal right to possess the premises for a particular period of time. This had to have been done by the proprietors through the Corporations. This is because no single unit owner owns the entire common property. Pursuant to section 13(1) of the Act (*t*) *the common property shall be held by the members as proprietors in common in shares proportionate to the unit entitlement of their respective strata lots*

43. So while a single unit owner could grant a licence to guests to use and enjoy the common property, they certainly could not individually grant a licence or lease to any person or entity to use the common property for some commercial purpose.

44. There is sound reasoning to this. If for example the business involved the use of common property such as the communal pool for swimming lessons, then that could be seen as materially affecting the rights of other residents to enjoy the facilities. In fact, when common property is used by only one or some strata owners for business there is an opportunity cost to all other strata owners who lose the use of that common property. This is why using the common property in this way usually requires that most or all of the strata owners approve it since they are really giving up rights and benefits. There are also the associated maintenance costs which must be shared by all owners.

45. But back to the matter at hand, at best there is evidence that Stem had been appointed property manager and manager of any resort operations (Mr. Vismantas' witness statement paragraph 20) or manager of both the common property and the resort business (Mr. Vismantas' witness statement paragraph 26). As well as that *"The Strata Corporations appointed Ayam Limited to manage the common property and empowered it to manage the resort business and proprietors' rentals from the common property office. Ayam has hired Belize Collections to manage the resort business of "Umaya." Importantly, the Strata Corporations do not manage any rental or resort business."* (Mr. Vismantas' witness statement parag 33).

46. In fact the witnesses for the Defendants all seemed to state that Stem was appointed manager of the common property and the resort business. In the April issue the ECs referred to STEM as a hotel management company. There was never

any indication that Stem had been granted a any legal right to possession of or to conduct its business on the common property. Stem was merely managing these businesses. There is a distinction which must be made clear between property (including common property) management and the conduct of a business on that property for which some permission must be granted by the proprietors.

47. The agreement between the Strata Corporations and Amaya Ltd was produced. Noticeably, none was ever produced for Stem. That agreement revealed that in exchange for the services of property management and administration to be provided to the Corporation and on the payment of a \$1.00 licensing fee, Amaya is allowed to *“utilize and occupy during the Term, the Common Properties including the management building, the lobby, the restaurant and bards, the dive shop, the spa, the gym, all auxiliary buildings and staff quarters and to carry out its resort, restaurant, tour, guest services or other businesses therefrom in order to discharge its obligations to the proprietors that elect to participate in a hotel operation by placing their Strata Lots in the Rental Pool.”*

48. The Court must show restraint in commenting on this arrangement as this is not in issue before the Court. The expectation is that the contents of this judgment will be borne in mind.

49. So while the Defendants produced quite a bit of evidence, it was not until Amaya Ltd was incorporated that a licensing agreement was produced. No resolution from the Corporations was produced either granting a licence or lease to Stem to conduct business on the Common Property. This is very telling.

50. The Court, therefore, finds that the ECs had not entered into any other licensing or leasing arrangements prior. The management companies were all merely

managing the business; they did not own the business. They paid nothing to use the common property and maintenance costs were offloaded on to the strata corporation.

51. In relation to the Corporations, the Court finds that Stem was a property manager and as such is expected to work with the Council as its agent. Section 21 of the first schedule of the Act empowers the Executive Committee to:

(a) employ, for and on behalf of the Corporation, such agents and servants as it thinks fit in connection with the control, management and administration of the common property and the exercise and performance of the powers and duties of the Corporation.

52. A property manager can do no more than the corporation could lawfully delegate. And the council continues to be responsible for the decision making, providing guidance and ensuring that the laws and bylaws are complied with because it is bound to exercise the powers and perform the duties of the corporation (Section 13 of the Act). So, if Stem was in fact conducting business it must have been doing so either in its own regard or as an agent of the Corporations.

53. Secondly, a strata corporation is empowered to provide amenities to its members. This is done through individual agreements with each member. Section 3(e) of Schedule 1 of the Act:

The Corporation may-

(e) make an agreement with the proprietor or occupier of any strata lot for the provision of amenities or services by it to such strata lot or to the proprietor or occupier thereof;”

54. In the Jamaican case of **Proprietors Strata Plan No.7 v The Commissioner of General Consumption Tax Appeal No 1 of 1997, In the Revenue Court dated 30th July 1999** presented by the Defendants, the court considered the parameters of

a strata corporation's power to establish a fund for administrative expenses as laid out in Section 5(2) (a) of the Jamaican Strata Titles Act. It found that such a fund was to be established for administrative expenses of the corporation only, so only those which relate either to control etc. of the common property and fulfillment of the duty to insure the building.

55. Fees charged for telephone services provided to the proprietors by the corporation did not fall within Section 5(2) (a). However, by a section, similar to Belize's above, in the statutory bylaws, amenities could be provided by a corporation to a strata lot owner or occupier. The Court felt that the provision of telephone services was contemplated by the Act, as was the rental of common property (pursuant to a separate section of the Act itself) so both those activities were deemed lawful.

56. Even accepting this finding, there was no evidence that the first or second Defendants had entered into any agreements with owners or occupiers for the provision of amenities such as a dive shop, restaurant or bar. While some of the Defendants were eager to show their rental agreements with their personal rental agent, not a single one offered any evidence of any agreement made with either of the Corporations to provide the amenities operating out of the common property. The Strata Corporations themselves produced no such agreements. It is clear to me that these amenities were not provided pursuant to the By-laws.

57. Moreover, this Court, with respect, cannot accept that somehow the power to provide an amenity translates into the strata corporation being allowed to conduct profit making businesses. To my mind the way in which the amenity is provided must fall within all that the corporation is allowed to do according to the Act itself.

The bylaws cannot contravene the Act. They simply cannot confer powers on the strata corporation that are contradictory with the Act.

58. The Strata Corporation may rent or lease part of the common property to a business which could then provide the proprietor(s) required amenity if that amenity is to be some part of a profit-making business endeavor. A corporation cannot simply go into business for itself. It does not have the legal capacity to do this. If it was allowed to conduct business the Act certainly would have included this as one of its powers.

59. According to the Act the strata corporation is solely present to deal with any developing problems and underlying issues in the strata scheme among a few other tasks. The very structure of a strata requires a neutral body to hold the common property and to do this in trust for the owners of all the units. As such, the strata corporation also performs this role. It has the power to control, manage and administer the common property for the benefit of all proprietors. They must also do all things necessary for the enforcement of the by-laws. But nowhere in the Act does it allow a strata corporation the power to engage in any for profit business or to be a profit-based business.

60. Because they have no obligations or duties to conduct this type of business they cannot delegate such a power to anyone else and certainly not to the property management company.

61. What was repeated throughout from the Defendants was that those businesses were managed and operated sometimes by the same entities which managed the

common property and the unit rentals and sometimes by separate entities. But there was never any indication of who in fact owned the businesses.

62. This Court finds that since October 2018 the first and second Defendants were operating the restaurant, bar, spa and/or dive shop for profit and they had no statutory or other power to conduct such activities or business.

**Whether since October of 2018 the first and second Defendants have been:
D: Raising capital by way of loans, or promoting investments in any such
Chapter 250 company, for the purpose of conducting any such business for
and on its behalf and/or on behalf of its owners?**

63. There is no doubt that there was money being used to fund or support the businesses operating from the common areas. The Defendants all say it was through loans made originally to STEM. But STEM, on parting ways, did not take this loan with it as it eventually appeared on the balance sheet of Ayamu Ltd. after being removed from the original Audited Financials for the Belize Ocean Club for the period ending March 31st, 2019.

64. The Claimant urged that the only real link between all these entities is the First and Second Defendants. These two defendants impress that the loan amount was placed into a bank account solely for the business. The evidence from the Defendants reveals that money belonging to the first and second Defendant were also deposited into this account at one point (out of necessity). This argument therefore has little to no weight.

65. The Court finds it imperative to speak briefly about the bank account of a strata corporation. In order for a strata corporation to be managed properly it must have a bank account dedicated to the strata's maintenance funds. Those funds are all contributed by the unit owners for the welfare of their common property and must only be used for maintenance problems and insurance costs. The corporation must be able to properly account for how these funds are spent. The corporation is not allowed to use those funds for their own purposes. They certainly cannot use them to undertake business for profit.

66. Mr. Choudhury and Mr. Tabahi (the lenders) both insisted that the funds were lent to the resort business operated by STEM. It is significant that they do not say - owned by STEM. It is quite significant that when STEM was removed that debt did not leave with STEM. This indicates that for all intents and purposes the debt was not STEM's.

67. Since a business is not a legal entity and cannot enter into agreements or incur debt then the precise entity with whom this agreement must have been made cannot be the resort business. The resort business does not exist as a legal entity it is merely an activity.

68. What is also striking is that the lenders now purport to formalize the written loan agreement with an entity which did not exist at the time the funds were lent. If that entity wishes to accept that responsibility that is a matter for it, but it does not change the fact that that entity could not have been the one with whom any agreement had been originally made, nor could it have been the resort business.

69. However, embedded in that acceptance is an acknowledgement that the debt was never Stem's. With the Court's finding above that it was the Strata Corporations which had been operating those businesses within the common area then it must follow that the loan had been made to the Corporations for the conduct of those businesses.

70. The Court finds in the positive regarding this allegation.

**Whether since October of 2018 the first and second Defendants have been:
E: Selling any land forming common property standing in the name of any of the First and/or Second Defendants?**

71. The Claimant admitted that there had been none. There is no issue here.

**Whether any such acts above were conducted by resolution of the proprietors or by the members of the Executive Committee in their individual capacities?
Whether any such acts was ultra vires and done by the individual members does this render the individual defendants personally responsible for any consequences or losses flowing therefrom?**

72. This Court agrees with the Claimant that there is no resolution which could authorize, approve or ratify any decision of the executive committees to engage in acts which are ultra vires the legal capacity of a strata corporation. The Court also agrees that the powers and duties of a strata corporation are defined and limited by the Strata Titles Registration Act. As a creature of statute, the Strata Corporation is bound by the powers defined in that statute and cannot go beyond the remit of what is conferred.

73. The Defendants say there is no issue here as all of the issues above should be answered in the negative and should not arise for determination.

74. The Court says that a Strata Corporation does not enjoy any of the attributes conferred on companies incorporated under the companies act. There is no winding up of a strata corporation and it is these provisions which limit liability of members of companies. The proprietors do not have this protection as it has been expressly precluded by the Act.

75. The Claimant refers to Section 6(1) and (2) which outlines the duties powers of a strata corporation as follows:

- (a) to insure and keep insured the building to the replacement value thereof against fire, earthquake, hurricane and such other risks as may be prescribed, unless the proprietors by unanimous resolution otherwise determine;*
- (b) to effect such insurance as it may be required by law to effect;*
- (c) to insure against such risks other than those referred to elsewhere in this subsection as the proprietors may from time to time by unanimous resolution determine;*
- (d) subject to the provisions of subsections (2) and (3) of section 17 and to such conditions as may be prescribed, to apply insurance moneys received by it in respect of damage to the building in rebuilding and reinstating the building so far as it may be lawful to do so;*
- (e) to pay premiums on any policies of insurance effected by it;*
- (f) to keep in a state of good and serviceable repair and properly maintain the common property;*
- (g) to comply with notices or orders by any competent public or local authority requiring repairs to, or work to be done in respect of, the parcel;*
- (h) to comply with any reasonable request for the names and addresses of the members of the Executive Committee.*

(2) The powers of a Corporation shall include the following-

(a) to establish a fund for administrative expenses sufficient in the opinion of such Corporation for the control, management and administration of the common property, for the payment of any premiums of insurance and for the discharge of any of its other obligations;

(b) to determine from time to time the amounts to be raised for the fund referred to in paragraph (a) and to raise amounts so determined by levying contributions on the proprietors in proportion to the unit entitlement of their respective lots;

(c) to recover from any proprietor, by an action for debt in any court of competent jurisdiction, any sum of money expended by the Corporation for repairs to or work done by it or at its direction in complying with any notice or order by a competent public or local authority in respect of that portion of the building which constitutes or includes the strata lot of that proprietor;

to enter any strata lot and effect repairs or carry out work pursuant to its duty under paragraph (g) of subsection (1).

76. The Claimant also recognizes that there are other provisions in the Act which speak to other powers for eg. transferring or leasing the common property through unanimous resolution of the proprietors. (Section 14(1)).

77. Section 13 of the first Schedule to the Act provides that:

There shall be an Executive Committee of every Corporation which shall, subject to any restriction imposed or direction given at a general meeting, exercise the powers and perform the duties of the Corporation.

78. Section 15(1) of the first Schedule continues:

Subject to the provisions of this Act, the control, management, administration, use and enjoyment of the strata lots and the common property contained in every registered strata plan shall be regulated by by-laws.

The by-laws shall include-

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

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

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

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

(5) No amendment or variation of any by-law shall have effect until the relevant Corporation has lodged with the Registrar a notification thereof in such form as may be prescribed and until the Registrar notifies the Corporation that he has made reference thereto on the relevant registered strata plan.

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

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

79. The Court also finds that the Act does not allow a strata corporation to promote a company, enter into for profit business or raise loans for the purpose of conducting any such business. It may raise loans to perform its duties or exercise its powers.

80. The corporation raises funds by levying contributions against all lot owners. The amount that each lot owner must contribute is calculated according to the 'lot entitlement' accompanying the strata plan. If for example there is a recalcitrant lot owner who refuses to pay, the corporation is expected to meet this shortfall until more serious action could be taken against the lot owner (see section 99(3)).

81. In those circumstances a loan could lawfully be raised. However, conduct of a for profit business has already been found to be outside those parameters. Taking a loan for this purpose cannot be ratified by the proprietors. Whether or not there are resolutions is of no importance. These acts have all been proven to be ultra vires the legal capacity of a strata corporation.

If any such acts were unlawful and conducted by the Strata Corporations, whether an executive Committee member is personally liable for debts incurred by and in the names of the Strata Corporations?

Whether any of the Third through Eleventh Defendants have individually or to the exclusion of the Strata Corporations, incurred debts on behalf of the Strata Corporations for which they are personally liable?

82. The primary function of the executive committee is to ensure that the corporation is managed as required under the Act and to administer the by-laws. As a member of an Executive Committee, each individual member assumes personal liability for any action or decision taken outside its authority. This means that all decisions made by an Executive Committee that are not sanctioned by the Act become the personal responsibility of each member of the Executive Committee.

83. Any debts incurred by and in the name of the Strata Corporations whether through the businesses conducted on the common property, the promotion of the company under the Companies Act or the raising of a loan for the businesses conducted on the common property cannot be debts attributable to the Corporations but to the Executive Committee members themselves who incurred the debts purportedly in the name of the Corporations.

84. The Court will accordingly make the declaration that only liabilities properly incurred by the Defendants in the name of the First and Second Defendants as strata corporations existing under and by virtue of the Strata Titles Registration Act of Belize are liabilities of the members of the corporations in proportion to their respective unit entitlement.

Whether the Defendants have complied with their statutory obligations to provide information to the Claimants?

Whether the Claimants, as owners, are entitled to be provided with any or all of the information requested from the Defendants in their letter dated the 13th day of September 2019, as referred to in (p) above?

Whether the Third through Eleventh Defendants have breached their fiduciary duty to the Claimants, as owners by not providing them with any or all the information requested in their letter dated the 13th day of September 2019?

85. The Claimants submit that while it is not explicitly stated in the Act, the executive committee has an implied fiduciary duty to act in the best interest of the members of the corporation. This duty encompasses a duty of disclosure which requires the Executive Committee members to act with complete candor by disclosing all the facts and circumstances relevant to their decisions. They cite the inequality in the relationship, one akin to a trustee with its beneficiary. The discretion exercised by the committee could affect the legal and/or practical position of the beneficiary.

86. The Defendants say that when the first letter requesting the information was received from the Claimants there was no evidence that the Claimants were

proprietors of either the First or the Second Defendant. There was nothing which supported this assertion attached to the letter either.

87. The Court finds that the Old ECs did not fail in their duty to disclose information sought by the Claimants. The persons from whom the Claimants purchased were under a duty to notify the Corporation forthwith upon any change of ownership with their strata lots - bylaw 1(f) of the First Schedule of the Act.

88. There is no indication that this was ever done. It was, therefore, incumbent on the Claimants to ensure that this had been done or to fill the gap by **formally** giving this information themselves. A letter stating simply, I am a registered proprietor or director of a registered proprietor falls far short of what is acceptable to relay this information and to have it accepted and acted upon.

89. There is no need for the strata executive to extend itself to ascertain whether or not an entity or a person is in fact a proprietor. That simply goes too far for a group of volunteers. The law recognised this and so placed the onus elsewhere.

90. For completeness, the court states that the evidence that another proprietor Mr. Eady, who is no party to this claim, likewise did not receive any response to similar queries does not change the fact that the Claimants had proven no ownership. Equally so, whether or not the Old ECs had another reason for omitting to answer the Claimants before actual proof of ownership carries no sway whatsoever.

91. The Court accepts that it was not until 4th October, 2020 that the Claimants provided the requisite proof of ownership and it was then that any duty to disclose arose. There is an obvious reason for the process. The committee is aware of how to

treat with the individual and the individual is certain of what is required of the committee and may then do what is necessary to enforce those requirements. The duty to disclose, therefore, cannot be found to be breached even before it in fact arose.

92. What this Court is willing to offer by way of guidance is that when an executive committee receives the informal indication of ownership it may efficiently offer its own limited guidance by highlighting the section of the Act which requires the formal notification of transfer and request proof of the transfer as well. This keeps good neighbors which is of the utmost importance in a strata corporation. On the part of the committee, it is also a show of professionalism and interest in the well-being of proprietors or potential proprietors.

93. So what of the New EC who provided limited information? The Claimants sought the following information:

Strata Corporation Accounts:

- Proper books of accounts for all monies received and spent by the First and Second Defendant for the fiscal year 2018 and for the first quarter of 2019;
- An accounting of the source of funds used to pay for Strata Corporation Expenses for fiscal year 2018 and the first quarter of 2019;
- A schedule of the collection of maintenance fees by strata lots for the fiscal year 2018 and for the first quarter of 2019;
- An explanation of how and into what bank accounts the Strata Corporations are collecting monthly maintenance fees from owners;
- An indication of who has signing authority in these accounts;

Strata Corporation Budgets:

- The budgets for both Strata Corporations for the 2019 fiscal year;
- An explanation of the monthly maintenance and any other fees due on each strata lot;
- An explanation on how utilities are monitored and charged to each strata lot;
- Details of amounts paid to third parties for the management of the properties and amounts collected from third parties for the use of common properties;

Capital Expenditures:

- An explanation of why the capital expenditures provided with the owners update goes beyond maintenance and upkeep of common property;
- A detailed breakdown of the proposed capital expenditures by building and line item;
- An explanation of the source of funds proposed for each expenditure by building and line item;
- An explanation of the interest of the Strata Corporations in funding the line items listed as “operating equipment”, “website”, “Fyah cooking”, “IT Equipment”, “dive center”, and treadmill;

Insurance

- A copy of the policies that insure the condominium buildings and common properties against fire, earthquake, hurricane and such other risks;
- A rationale for the calculation of the replacement value of the building (And furnishing if covered);
- A copy of the policy that insures the Corporation against liability;
- Proof that the policy premiums have been paid and that the policies are in force;

Funding Agreement:

- An executed copy of the agreement;
- All written correspondence with the negotiation of this agreement;
- A full accounting of any funds that have been borrowed under the terms of this agreement;
- A full accounting of the sources and uses of any funds that have been borrowed by the Strata Corporation regardless of agreement along with the terms of those transactions;
- Clarification that the Strata Corporations have not borrowed funds for any purpose for which it is not statutorily authorized, nor has it encumbered common property without the authorization of all members;
- An explanation of how Tarique Choudhury avoids conflict in his role as a member of both executive committees and as principal beneficiary of the funding agreement.

Property Management:

- A copy of the contract that has been executed to provide property management services to the corporations;
- A list of the key employees of the company providing property management services;
- An explanation and accounting of the expenses paid to the property manager by that Strat Corporations for keeping the common property in a state of good and serviceable repair;
- An explanation and accounting of the source of funds used by the property manager in the execution of its duties;

Trading Company to run resort activities:

- An explanation of the current legal structure of the operation of the resort business;

- An explanation of how the Strata Corporations have the authority to grant such a license to run resort activities;
- An explanation of the role of the EC in establishing such a business;
- An explanation of the financial liability for an owner that opts in to the business;
- An explanation of how an owner that opts out will be compensated for the sure of common properties;
- An explanation of the envisioned relationship between the Strata Corporations and the new resort business entity;

Boat Purchase:

- An explanation of who the, we is that owns the boat;
- An explanation of how much the boat cost and how it was paid for;
- An explanation of why a Strata Corporation would need to own a boat to fulfill its statutory obligations to maintain and insure the common properties;

Show Unit:

- An accounting of how much was spent to create the show unit;
- An explanation of the source of funds used to create the show unit;
- An explanation of why one owner's unit was revamped and what role the executive committees played in the decision to make the investment;
- The identification of the unit number that was revamped;

Executive Committee Meetings:

- Copies of the minutes of any audio recordings that exist of all executive committee meetings, conference calls, negotiations and deliberations from September 2017 to date of letter;
- Date of last Annual General Meeting of the Corporations;

- Date of next scheduled Annual General Meeting of the Corporations; and
- Status of creating and adopting bylaws to govern the Corporations.

94. On the 4th of November 2020 the Committees responded by providing a copy of the balance sheets for both corporations and the current insurance policies. This they purported to do in accordance with the Act and indicated that that was the extent of the obligations imposed. They also invited the Claimants to attend the general meetings so that any lingering questions could be answered.

95. A few days later additional invoices for payment of insurance invoices were sent to the Claimants. The cover letter also sought clarification about any regulations which imposed an additional obligation to provide what the claimants had requested.

96. The Claimants say their proxy attended that meeting. Although their proxy made some of their previous queries, these remained unanswered.

97. Along with the obligation to appropriately budget for the scheme, in accordance with by-law 22 the strata corporation also has a responsibility to maintain proper records, including financial records, and minutes of meetings. The books of account are to be made available for inspection and upon written requests the insurance policies and receipts for last premiums paid must also be made available.

98. The Claimants rightly reminded the Court of the duty of a trustee as codified in the Trusts Act Cap 202 which reads:

“28.-(1) A trustee shall so far as is reasonable and within a reasonable time of receiving a request in writing to that effect, provide full and accurate information as to the state and amount of the trust property and the conduct of the trust administration to—

*(d) subject to the terms of the trust, any beneficiary of the trust who is of full age and capacity;
.....”*

99. In their capacity as trustees, the executive committee of the corporation is to make decisions in the best interest of all the owners. The spending of the corporation is controlled legislatively by the principle that the executive committee must administer the assets properly and for the benefit of the lot owners generally. Taken together, the committee is obligated to provide material which is full and true regarding decision making and spending. It is this candor to which Senior Counsel for the Claimants refer.

100. The Court has considered the requests made by the Claimants and can find no reason why the New executive committees would refuse to supply what was being sought as outlined at paragraph 95 above save the issue of conflict of interest relating to Tarique Chodury. That is better suited to another process. They could have taken whatever time they needed to organize a proper response. But as proprietors the Claimants have every right to know what expenses were being incurred, how the maintenance funds were being spent and why decisions of a particular kind were being made.

101. The New executive committees' failure to respond to all those enquiries constituted a breach of the Committees' fiduciary duty.

102. Again, by way of guidance only the Court finds it imperative to explain that members of an executive committee owe obligations to the owners' corporation which may exceed their own expectations. So as ordinary lay persons they must,

nonetheless, exercise considerable care in accepting their appointment. However, even more care should be exercised in performing their functions once appointed.

Whether the First Time EC Members may be liable personally for any acts done prior to their appointment as EC members?

103. The simple answer is no. They are responsible only for acts done or continued after they were appointed.

The Defendants' Issues:

104. The Defendants raised three issues which were not agreed to by the Claimant:

Whether providing some of the information requested in the letter dated the 13th day of September 2019 after the filing of the instant claim amounts to a partial admission of the claim?

If so, whether the Claimants are entitled to cost in respect to that portion of the claim up to the 4th day of November 2020 when some of the requested documents were provided?

105. The Court's earlier finding concerning the Old ECs has taken any wind from these sails. There need be no discussion here.

Whether an injunction or other direction may be granted as against a Defendant who is no longer an EC member or proprietor?

106. The Court does not act in vain. In any event the Court finds its declarations to be sufficient to deter or restrain the strata corporations and their executive committee

members present and future from any further ultra vires acts of the kind found in this matter, making an injunction against any of them wholly unnecessary.

Costs:

107. The Claimant is the most successful of the parties, but certain parts of his claim failed. The court will award him 75% of his costs against the first and second Defendants only. In the existing circumstances it is difficult, if not unfair, to make a cost order against the strata executive committee members whether past or present as they have always seemed well intentioned if misguided. They are volunteers receiving no payment for their services. The Court simply cannot hold them to the same standard as a director of a company.

Disposition:

108. It is hereby declared that:

1. All actions of the First and Second Defendants to promote a company incorporated under the Companies Act of Belize for the purpose of conducting for profit business on the common property of Strata Plans no. 54 and 42 for and on its behalf; raising capital by way of loans for the purpose of conducting any such business for and on its behalf and operating the restaurant, bar, spa and dive shop situated on the said common property for profit are ultra vires the legal capacities of the First and Second Defendants as strata corporations existing under and by virtue of the Strata Titles Registration Act of Belize and are unlawful.
2. Only liabilities properly incurred by the Defendants in the name of the First and Second Defendants as strata corporations existing under and by virtue of

the Strata Titles Registration Act of Belize are liabilities of the members of the corporations in proportion to their respective unit entitlement.

3. The Claimants, as owners, are entitled to the information being sought from the Executive Committee of the First and Second Defendants in their letter dated the 13th day of September, 2019 and stated at paragraph 95 of this judgment, save for the issue of conflict of interest.
4. The New Executive Committees of the First and Second Defendants have breached their fiduciary duty to the Claimants as owners, by failing and or refusing to provide them with the information requested in their letter dated the 13th September, 2019.

It is hereby ordered that:

5. The New Executive Committees of the First and Second Defendants must within one month of the date of this judgment herein provide the Claimants with the information requested in their letter dated the 13th of September, 2019.
6. Costs to the Claimant against the First and Second Defendants to be assessed if not agreed.

**SONYA YOUNG
JUSTICE OF THE HIGH COURT**