

*Judgment Both*

IN THE REVENUE COURT

APPEAL NO. 1 OF 1997

BETWEEN PROPRIETORS STRATA PLAN NO. 7 APPELLANT

A N D THE COMMISSIONER OF GENERAL CONSUMPTION TAX RESPONDENT

Mrs. Angella Hudson Phillips, Q.C. and Dr. Adolph Edwards for the Appellant.

Mrs. Barbara Lee and Mr. Frank Williams for the Respondent.

Heard on the 3rd & 4th days of November 1997 and the 30th day of July 1999.

**COURTENAY ORR J**

This appeal finds its genesis in two decisions of the Commissioner of General Consumption Tax (the Respondent): Firstly, his decision made on the 22nd day of January 1997, confirming an assessment raised in the sum of \$323,806.19, against the appellant, together with penalty and interest, and secondly, a Notice of Demand in the sum of \$742,211.05 dated the 13th day of January 1997, and comprised of the above mentioned sum of \$323,806.19, plus compound interest and penalty on that sum.

**THE BACKGROUND**

The following facts were admitted or proved:

- (a) The Appellant is a corporation registered under the Registration

(Strata Titles) Act (the Strata Titles Act) by the proprietors of all of the strata lots of Strata Plan No. 7 at Turtle Beach in the parish of St Ann.

- (b) Such of the services rendered by the Appellant pursuant to the powers and duties specified in the Strata Titles Act are exempt from the payment of General Consumption Tax (GCT) in accordance with the provisions of Item 16 of Part II of the Third Schedule of the GCT Act.
- (c) During the years 1994 and 1995, the Appellant provided telephone services to the unit holders (the proprietors) of the Strata Corporation through a PBX telephone system and charged them, in addition to the charges and GCT thereon made by Telecommunications of Jamaica, (TOJ) a service charge equal to 100% of the cost of the calls.

The appellant charged no GCT for the provision of this service;

- (d) The Appellant continued during the years 1994 and 1995, to rent Turtle Resorts Ltd. the agent of the unit owners (the proprietors) space in the Common Property for the provision of the service of a reception desk, reservations office and change

rooms for their staff. The appellant also let a part of the Common Property to Triple Star Caterers for the provision of the service of a coffee shop/lounge for the use of the proprietors and their guests; the appellant charged no GCT on the rent charged the tenants for the use of the aforementioned space in the Common Property;

- (e) At the introduction of the GCT regime, the appellant did not consider itself to be a person carrying on a taxable activity who was required to apply to be registered under the GCT Act. The appellant therefore did not apply for registration and the respondent of his own volition and without requiring the appellant by notice in writing to make an application for registration, registered the appellant as a taxpayer for the purposes of the said Act and sent a Certificate of Registration bearing number 44750, to it by post, in or about the month of May 1994.
- (f) Thereafter the appellant made monthly returns to the respondent for the period January 1994 to April 1995 inclusive, returning

income for telephone services provided by Telecommunication of Jamaica through the system to the proprietors and setting off against the sum due to the respondent, the tax paid by it on local purchases, services and expenses incurred by it. This "setoff" resulted in what the appellant regarded as a credit of \$316,527 in favour of the appellant, as at the 31st March 1995;

- (g) The respondent thereupon advised the appellant that it should have filed its returns on a bi-monthly basis and further advised it that it was not entitled to the input tax claimed, in the light of its tax exempt status as the provider of services rendered by a Strata plan Corporation;
- (h) The appellant therefore revised its returns for the period January 1994 to October 1995, inclusive and thereafter made returns on a bi-monthly basis, claiming credit to go forward arising out of claims for tax paid in the sum of \$37,054 as at the 1st December 1995;
- (i) The respondent thereupon audited the returns of the appellant.
- (j) Based on this audit, which was conducted between March and April of 1996, the respondent came to the conclusion that in addition to the services provided by the appellant under the duties and powers conferred upon it as a corporation under the Strata Titles Act, which services are exempt from tax the appellant had made taxable supplies by way of the following activities as noted above;

- (i) a 100% service charge imposed on telephone calls;
  - (ii) rental of space for office and utility operations; and
  - (iii) rental of space within the common property and operated as a coffee shop.
- (k) The respondent took the view that the appellant's returns were incorrect under Section 38 (1)(b) of the GCT Act; and the respondent was not satisfied with the basis on which the appellant's returns were prepared. Accordingly, the respondent proceeded, (under Section 38(2)(a) of the GCT Act), to make an assessment of the amount that he thought the appellant ought to have stated on the return; and in accordance with subsection (2)(b), he stated the general basis on which the said assessment was made-

By Notice of Assessment dated the 29th day of July 1996, he assessed the appellant to an additional amount of GCT in the sum of \$323,806.19 for the period January 1994 to December 1995, inclusive.

- (l) In the assessment the following adjustments were made to the appellant's returns:

PERIOD ENDED	GCT PER RETURN	GCT AS CORRECTED	DEFICIENCY
Jan - Feb 1994	403.00	14,289.58	13,886.58
Mar - Apr	2,259.00	16,206.15	13,947.15
May - June	(49,247.16)	11,698.02	60,945.18
July - Aug	(51,591.14)	80.82	51,671.96
Sept - Oct	650.00	14,772.59	14,122.59
Nov - Dec	(26,579.42)	17,289.44	43,868.86
Jany - Feb 1995	4,089.77	8,929.86	4,840.09
Mar - Apr	608.00	13,371.24	10,763.24
May - June	(8,256.00)	20,268.07	28,524.00
July - Aug	4,820.00	42,335.35	37,515.35
Sept - Oct	4,759.00	25,087.88	20,328.88
Nov - Dec	(12,480.00)	10,912.24	23,392.24
<b>TOTAL</b>	<b>(130,564.95)</b>	<b>193,241.24</b>	<b>323,806.19</b>

- (m) Because the Respondent had not served the Explanation of Adjustments on the appellant together with the Notice of Assessment, which Explanation would have allowed the appellant to submit an appropriate Notice of objection, the respondent agreed to accept from the appellant a late Notice of Objection, which latter Notice the appellant submitted to the respondent by letter dated the 24th day of October 1996, through its agent Messrs. Price Waterhouse;
- (n) The appellant objected to the aforesaid assessment, by letter dated October 24, 1996, contending that the services which the respondent

identified as constituting taxable supply are services performed in pursuance of its duties and powers under the Strata Titles Act; and as such, are exempt for GCT purposes.

The appellant also requested in its said letter of objection, that its registration as a registered taxpayer be canceled, in the light of Section 29(1) of the GCT Act.

- (o) Before making a decision in respect of the appellant's said objection, the respondent served on the appellant the notice of Demand dated the 13th day of January 1977 and delivered to the appellant in January 1997. The said Demand was for payment of \$746,211.05, being the amount raised on assessment, together with all accruals in respect thereof, up to the date of said notice, plus a balance outstanding for April 1996:

Penalty under Section 54(2) of the GCT Act for the period January 1994 to December 1994	\$ 87,275.04
and for the period March 1995 to December 1995	12,113.48
Surcharge under Section 54(2A)	2,742.11
Penalty under Section 54(3)	17,939.68
Interest under Section 54(4)	<u>355,710.44</u>
<b>Sub-Total</b>	<b>\$475,762.75</b>
Balance outstanding for April 1996	<u>100.73</u>
	\$475,863.48
Less net credit per returns	<u>- 53,458.62</u>
	422,404.86
Audit assessment	<u>323,806.19</u>
Amount per Demand Notice	<u><u>\$746,211.05</u></u>

- (p) Thereafter the respondent considered the matters raised by the appellant in its letter of objection and issued his Decision by letter dated January 27, 1997, confirming the assessment raised and refusing to cancel the appellant's registration as a registered taxpayer.

### THE STATUTORY FRAMEWORK

The statutory provisions relevant to this case are the General Consumption Tax Act, the General Consumption Tax Regulations, the Registration (Strata Titles) Act and of course the Revenue Court Rules.

### THE PROVISIONS UNDER THE GENERAL CONSUMPTION TAX ACT

Section 3(1) provides for the imposition of General Consumption Tax. It reads in part, so far as is relevant to this case, as follows:

“3(1) Subject to the provisions of this Act, there shall be imposed from and after the 22nd day of October, 1991, a tax to be known as General Consumption Tax -

(a) In the supply in Jamaica of goods and services by a registered taxpayer in the course or furtherance of a taxable activity carried on by that taxpayer .....

(b) .....  
..... by reference to the value of those goods and services.”

Section 2(1) defines the term “taxable activity” thus, (in part):

“taxable activity” means any activity, being an activity carried on in the form of a business, trade, profession, vocation, association or club, which is carried on continuously or regularly by any person whether or not



for a pecuniary profit, and involves or is intended to involve, in whole or in part, the supply of goods and services (including services imported into Jamaica) to any other person for a consideration, but does not include:-

- (a) .....
- (b) .....
- (c) any activity specified in the third schedule.”

Taxable supply is in the same section described as :

“any supply of goods and services on which tax is imposed pursuant to this Act.”

Section 25 reinforces the exemption mentioned above under the definition of taxable activity at “c” above. It provides as follows:

“The goods and services specified in the Third Schedule shall be exempt from the payment of tax under this Act.”

The Third Schedule outlines those goods and services which are exempt from tax. Part I of the Third Schedule deals with exempt goods, and Part II with exempt services. Item 16 of Part II lists among exempt services:

“Services rendered by a corporation as defined in the Registration (Strata Titles) Act in pursuance of the powers and duties specified in that Act.”

Section 2(1) provides:

“Services means the matters specified in the Fourth Schedule”.

The Fourth Schedule is headed:

**“TAXABLE SUPPLIES WHICH CONSTITUTE  
THE PROVISION OF SERVICES.”**

It then specifies as set out below:

“The following shall be regarded as the provision of services:

(a) .....

(b) .....

(c) .....

(d) the supply, other than the sale of real property of anything for a consideration which is not a supply of goods.”

(e) .....

Before it was amended by Act 10 of 1995 in March of that year paragraph

(d) above did not have the words “other than the sale of real property.

Prior to that, services was defined as:

“anything which is not goods but does not include real property, money, securities or choose in action.”

Section 29 (1) provides:

“29(1) A person who supplies goods and services specified in the Third Schedule shall be exempt from being registered under this Act in respect of those goods and services.”

Section 18(b) reads:

“For the purposes of this Act, anything which is not a supply of goods but is done for a consideration is a supply of services.”

**THE RELEVANT PROVISIONS OF THE REGISTRATION  
(STRATA TITLES) ACT**

Section 4 (1) makes provisions for the establishment of corporations under this Act. It states:

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

(2) .....

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

Section 9 of the Strata Titles Act provides inter alia, that:

“9. (1) 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.**

(2) 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 the corporation in that behalf the by-laws 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 proposes in relation to the parcel and the strata lots and common property therein.” (emphasis added)

Paragraph 2 of the First Schedule to the Strata Titles Act provides, inter alia,

that:

“2. The corporation shall -

- (a) control, manage and administer the COMMON property for the benefit of all proprietors;
- (b) Keep in a state of good and serviceable repair and properly maintain the fixtures and fittings (including elevators) used in connection with the common property;
- (c) where practicable establish and maintain suitable lawns and gardens on the common property;
- (d) maintain and repair (including renewal where reasonably necessary) pipes, wires, cables and ducts for the time being existing in the parcel and capable of being used in connection with the enjoyment of more than one strata lot or common property;”

Paragraph 3 of the said First Schedule provides, inter alia, that -

“3. The corporation may -

- (a) purchase, hire or otherwise acquire personal property for use by proprietors in connection with their enjoyment of the COMMON PROPERTY;
- (b) borrow moneys required by it in the performance of its duties or the exercise of its powers;
- (c) secure the repayment of moneys borrowed by it, and the payment of interest thereon, by negotiable instrument, or mortgage of unpaid contribution (whether levied or not), or mortgage of any property vested in it, or by combination of those means;
- (d) invest as it may determine any moneys in the fund for administrative expenses;
- (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; (emphasis added)**
- (f) **do all things reasonably necessary for the enforcement of the by-laws and the control,**

**management and administration of the common property.” (emphasis added)**

Section 5 of the Strata Titles Act provides, inter alia, in respect of the duties and powers of a corporation to which the Act refers, that-

“5. (1) The **duties** of the corporation **shall include** the following -

- (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 by unanimous resolution determine;
- (d) subject to the provisions of section 14 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 the corporation **include** the following -

- (a) to establish a fund for administrative expenses sufficient in the opinion of the 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 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;
  - (d) to enter any strata lot and effect repairs or carry out work pursuant to its duty under paragraph (g) of subsection (1).

As regards the executive of the corporation, paragraph 21(a) of the First Schedule contains the following provision:

21. The executive committee may-

“(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;”

Section 2 of the Registration Strata Titles Act defines “common property” thus:

“Common property” means, in relation to any strata plan, so much of the land to which such plan relates as is for the time being not included in any strata lot contained in such plan.”

“Strata Lot” is also defined in these terms:

“‘Strata Lot’ means a portion of land comprised in a strata plan and shown in that plan as a strata lot.”

Section 11 - (1) states:

“The proprietors may by unanimous resolution direct the corporation to transfer or lease the common property or any part thereof.”

### **THE INTERPRETATION ACT**

Section 3 provides that:

“In this Act and in all Acts, regulations and other instruments of a public character relating to the Island ..... Unless there is something in the subject or context inconsistent with such construction or unless it is therein otherwise provided - .....  
“person” includes any corporation, either aggregate or sole and any club, society association or other body, of one or more persons; .....

Similarly Section 4 (b) states .....

“Words in the singular include the plural and words in the plural include the singular.”

### **THE GROUNDS OF APPEAL**

The appellant submitted seven grounds of appeal as follows:

(i) The appellant is mandated by the provisions of the Registration (Strata Titles) Act and in particular the First Schedule thereto, to control manage and administer the common property for the benefit of all proprietors and with respect thereto, to perform the matters set out in sub-paragraphs (b), (c) and (d) of paragraph 2 of the First Schedule to the said Act. The appellant is also empowered to make an agreement with the proprietor or occupier thereof; as well as to do all things reasonably necessary for the enforcement of the by-laws and the control, management and administration of the common property, in accordance with the provisions of sub-paragraphs (e) and (f) of paragraph 3 of the said First Schedule.

(ii) Item 16 of Part II of the Third Schedule to the GCT Act exempts from the payment of tax under that Act, services rendered by a corporation as defined in the Registration (Strata Titles) Act in pursuance of the powers and duties specified in that Act.

(iii) The Appellant therefore contends that, in providing telephone services, through the operation of the telephone PBX system on a twenty-four hour basis to the strata lot owners, it is providing a service pursuant to the aforementioned provisions of sub-paragraph (e) of paragraph 3 of the said First Schedule, which services are exempt from tax pursuant to the aforementioned item 16 of Part II of the Third Schedule.

(iv) The appellant further contends that in carrying out the duties and providing the services set out in paragraph 3(c) hereof, it is acting pursuant to its duties and powers prescribed by the provisions of paragraphs 2 (a) to (d) and 3(e) and (f) of the



aforementioned First Schedule of the Registration (Strata Titles) Act in providing services which are exempt from tax by the aforementioned item 16.

(v) The appellant contends that by reason of the matters set out at paragraphs (i) to (iv) hereof and Section 29(1) of the GCT Act, it is exempt from registration as a "registered tax payer," and that the respondent's registration of it as such, should be Pursuant to Section 31 of the said Act.

(vi) The notice of Demand (referred to in paragraph o "background"), reveals that the respondent has imposed interest upon the interest and penalty charged in respect of its additional tax computed for each month of the period January 1994 to December 1995 and to March 1996 to April 1996, contrary to the provisions of the GCT Act as they existed during the relevant period. The appellant therefore contends that if, which is not admitted, the appellant is not providing services which are exempt from GCT, the compound interest reflected in the Notice of Demand, should be discharged.

(vii) The appellant further contends that if, which is not admitted, the aforementioned services provided by it pursuant to its powers and duties under the Registration (Strata Titles) Act are not exempt from the payment of GCT, the penalties reflected in the aforementioned Notice of Demand have been illegally imposed because the preconditions for the imposition of such penalties under Section 54 of the GCT Act, as it existed both prior to and after March 1995, have not been satisfied. the said penalties ought therefore, to be discharged.

### **THE RESPONDENT'S STATEMENT OF CASE**

The respondent in paragraph 3 of his Statement of Case made one concession to the case of the appellant. It reads in part:

“The respondent concedes that it did, without the authority the GCT Act or the consent of the appellant, charge compound interest on the additional tax which became due and payable as a result of the assessment raised.”

But the respondent traversed every material contention of the appellant to which he had not agreed, and gave the following reasons for doing so:

(i) imposing a 100% service charge on the cost of telephone calls made through PBX telephone system which the appellant operates for the benefit of the proprietors of Proprietors Strata Plan No. 7 is not a service contemplated under sub-paragraphs (b), (c) or (d) of paragraph 3 of the First Schedule to the Strata Titles Act.

(ii) the authority given to the Appellant under sub-paragraph (e) of paragraph 3 of the said First Schedule, to make an agreement... for the provision of amenities or services by it to any strata lot... does not preclude making agreements for the provisions of services which may constitute taxable activities under the GCT Act.

(iii) The imposition of a service charge as aforesaid is not a thing, *“reasonably necessary for the enforcement of the relevant by-laws and the control, management and administration of the common property”* contemplated under sub-paragraph (f), paragraph 3 of the First Schedule of the Strata Titles Act.

(iv) The rental of space to Turtle Resorts Limited or to any other entity for the office and/or utility purposes, or for any other purpose amounts to a taxable activity under the GCT Act. It is not a service which is *“reasonably necessary for the enforcement of the by-laws and the control, management and administration of the*

*common property*" under the aforesaid paragraph 3 (f) of the Schedule; nor is it one of the activities contemplated by paragraph 2 of the said First Schedule.

(v) The rental of space to Triple Star Caterers or to any other entity for the purpose of operating a coffee shop amounts to a taxable activity under the GCT Act. It is not a service which is "*reasonably necessary for the enforcement of the by-laws and the control, management and administration of the common property*" under the aforesaid paragraph 3(f) of the said First Schedule of the Strata Titles Act.

(vi) Section 29(1) of the GCT Act exempts from being registered "*A person who supplies goods and services*" only. The relevant item in the Third Schedule is item 16, and to the extent that the appellant also supplies services other than those referred to in item 16, it is liable to be registered in respect of those other services, which fall outside of the pales of the exemption.

### **THE APPELLANT'S REPLY**

In its reply the appellant said inter alia, that the respondent is not entitled to the third item of relief sought, namely a confirmation of the validity of the Notice of Demand, in light of the concession that he, the respondent, had acted without the authority of the Act or the consent of the appellant when he charged compound interest on the additional tax raised in the further assessment.

### **THE ISSUES**

After the filing of the reply, there were just three issues which fell to be decided:

- (1) Whether the appellant was engaged in taxable activities when

- (a) it imposed a 100% service charge on telephone calls;
- (b) it rented space for an office and utility operations, that is a reception desk, reservations office and change room for their staff;
- (c) it rented space for the operation of a coffee shop, lounge for the unit owners (proprietors) and their guests.

(2) Whether by virtue of Section 29(1) of the Act, the appellant is entitled to an exemption from being registered under the Act in respect of the activities noted in the first issue (supra); if so, the registration of the appellant should be cancelled.

(3) The validity of the Notice of Demand having regard to the fact that it was served on the appellant before the time for appealing against the assessment to this Court, had expired.

#### A Further Concession by the Respondent

During her oral submissions Mrs. Lee for the respondent conceded that the Notice of Demand was irregular and should be discharged. This was a change from the earlier position adopted in her written submissions.

Then she argued that:

“the appellant has suffered no damage thereby. No right of the appellant has been diminished in any way. The provisions of Section 40 of the Act (the right to appeal to this Court) are being all allowed to have full effect and meaning despite the precipitous service of a demand notice.”

I accepted her concession, and regard it as being in line with the most recent authorities on the subject. Hence only the first two issues remain.

With the matter of the Notice of Demand no longer a bone of contention, the appeal revolves around the question of whether or not certain services provided by

the Appellant are rendered pursuant to the powers and duties specified in the Strata Titles Act. If they are, they are exempt from GCT, if not they were taxable, and the appellant would be registrable. The services in question are: the provision by the appellant corporation of a PBX telephone service for its proprietors; the renting to the agent of the proprietors of Common Property for the provision of a reception desk, a reservations office and change rooms for staff, and the renting of a part of the Common Property for the provision, of a coffee shop/lounge for the use of the proprietors. The appellant contends that they are not taxable, the respondent insists that they are.

The solution of this problem posed by these issues requires an interpretation of sections of the Strata Titles Act and the General Consumption Tax Act (The GCT Act).

## **THE SUBMISSIONS ON BEHALF OF THE PARTIES**

### **FOR THE APPELLANT**

Mrs. Hudson-Phillips argued that the cumulative effect of various provisions in the General Consumption Tax Act, (The GCT Act) and schedules and the Strata Titles Act and Schedule thereto, render the activities, the subject matter of this dispute exempt from GCT.

She developed her arguments in this way:

The appellant is mandated by the provisions of the Registration (Strata Titles) Act and in particular the First Schedule thereto, to control, manage and administer the common property for the benefit of all proprietors and with respect thereto, to perform the matters set out in sub-paragraphs (b), (c) and (d) of paragraph 2 of the First Schedule to the said Act. The

appellant is also empowered to 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; as well as to do all things reasonably necessary for the enforcement of the by-laws and the control, management and administration of the common property, in accordance with the provisions of sub-paragraphs (e) and (f) of paragraph 3 of the said First Schedule. (emphasis supplied)

Item 16 of Part II of the Third Schedule of the GCT Act exempts from the payment of tax under that Act, services rendered by the corporation as defined in the Registration (Strata Titles) Act in pursuance of the powers and duties specified in that Act.

The appellant, in providing telephone services through the operation of the telephone PBX system on a twenty-four hour basis to the strata lot owners is providing a service pursuant to the aforementioned provisions of sub-paragraph (e) of paragraph 3 of the said First Schedule, of the Strata Titles Act which services are exempt from tax pursuant to the aforementioned item 16 of part II of the Third Schedule of the GCT Act.

The appellant in carrying out the duties and providing the services set out in paragraph 3(c) of its Notice of Appeal, (namely, rental of space for reception desk etc. and also for a coffee shop and lounge) is acting pursuant to its duties and powers prescribed by the provisions of paragraph 2(a) to (d) and 3(e) and (f) of the aforementioned First Schedule of the Registration (Strata Titles) Act and is providing services which are exempt from tax by the aforementioned item 16.

So far as the provision of telephone service to the entire strata complex is concerned, the appellant submits that in a situation as exists at the complex where the strata units are not owner occupied but are rented through a rental pool to tourists or other holiday makers on a short term basis, it is reasonable for the proprietors not to have TOJ install direct and separate "straight lines" in each strata unit, but to have the corporation provide, with their agreement, telephone services to the strata units through a PBX system.

That since it has the staff who operates the system on a twenty-four hour basis, it is reasonable that it should make a charge to the individual unit owners for such amenities and services.

These services are therefore reasonably necessary and provided by agreement with the individual properties and therefore the charges for them are exempt from GCT.

With respect to the provision of the amenities and services of a coffee shop/lounge, reception desk, reservations office and change rooms for staff, by the provision of rented space in the Common Property, it is reasonably necessary for the management, administration and control of the Common Property to have such amenities provided not by itself, but by persons who are answerable to the corporation and who are qualified to manage such amenities and services, and to charge a rental for such portion of the Common property used by the managers of such amenities and services.

It would be detrimental in all the circumstances if guests had to make their own arrangement for meals.

Similarly, it would be unreasonable and untidy to expect each individual proprietor to make arrangements to receive his short-term guests and provide change

rooms for his staff. To sum up, therefore, in imposing the aforementioned rental charges the appellant is acting pursuant to the powers given to it by paragraphs 2(a) and 3(f) of the aforementioned First Schedule. The appellant further submits that as long as it is so acting, it is exempted from imposing GCT charges on the rent charged.

#### FOR THE RESPONDENT

A careful reading of Section 29(1) of the GCT Act reveals that a person may be exempt from being registered in respect of some goods and services on which no tax is chargeable and yet be registrable on other goods and services.

By virtue of Item 16 of Part II of the Third Schedule of the GCT Act to ascertain which services rendered by the corporation would be exempt from GCT one must look at the duties and powers set out in Section 5 of the Registration (Strata Titles) Act (supra). For it is services rendered in pursuance of those duties and powers that are exempt. The duties which are particularly relevant, are maintaining the common property - Section 5(1)(f): establishing a fund for administrative expenses for the control management etc. of the common property; and for payment of insurance and the discharge of its other obligations 5(2)(a): determining the amounts to be raised for the fund and buying contributions from properties: Section 5(2)(b) (supra).

Section 9(1) of the Registration (Strata Titles) Act provides that the control, management etc. of the strata lots and the common property shall be controlled by by-laws. The appellant's by-laws have in the main incorporated the provisions of Sections 5 and 9 of the Registration (Strata Titles) Act, and the First Schedule thereto.

The three activities of the appellant which are the subject of this appeal must pass the test of being reasonably necessary for the enforcement of the by-laws and



the control management and administration of the common property. Support for this proposition is found in paragraph 2(f) of the First Schedule to the Registration (Strata Titles) Act. (supra)

“Common property” refers to land so a PBX system cannot satisfy the requirements of paragraph 2 (f) (supra) as being reasonably necessary for the use etc. of the common property.

Paragraph 3(e) which empowers the corporation to -

“make any 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;”

precludes agreements to provide services that amount to taxable activities.

It is conceded that a PBX system is necessary but the 100% service charge is not.

As regards the second and third activities - the leasing of parts of the common area, only two provisions are relevant - paragraphs 2(a) and 3(f) of the First Schedule of the Registration (Strata Titles) Act. (supra)

Paragraph 2(a) reads:

“The Corporation shall -

(a) control, manage and administer the common property for the benefit of all proprietors.”

and paragraph 3(f) enacts:

“The Corporation may -

.....

(f) do all things reasonably necessary for the enforcement of the by-laws and the control, management and administration of the common property.”

The commercial renting/leasing of the common property is not contemplated under the Registration (Strata Titles) Act as a means by which the common property is to be controlled, managed and administered. It is an activity outside the corporation powers and duties and therefore not exempt.

The addition of the word reasonably to the word necessary is meaningless. Hence none of the activities in question satisfy the test of being necessary, that is indispensable, needful requisite or essential.

The Registration (Strata Titles) Act makes sufficient provision for the corporation to raise funds, without resorting to charging for the activities the subject of this appeal.

### **THE COURT'S ANALYSIS AND CONCLUSION**

May a taxpayer be Registrable as regards some goods and services and exempt from Registration regarding others?

Mrs. Lee is quite correct in saying that "a person may be exempt from being registered under the GCT Act in respect of some goods and services on which tax is chargeable, and be perfectly registrable in respect of other goods and services which tax would be properly chargeable. This is clearly implied by regulation 14(3) of the GCT Regulations. It reads:

"Subject to paragraphs (4) and (5), where a registered taxpayer makes taxable supplies and exempt supplies, he shall be entitled to claim a credit ...." (emphasis supplied)

Moreover, Section 29(1) of the GCT Act deals with exemption from registration, and enacts:-

"A person who supplies goods and services specified in the Third Schedule shall be exempt from being registered under the Act in respect of those goods and services." (emphasis added)

To my mind these words admit of only one interpretation, that as given by Mrs. Lee above.

But whilst it is true that in the case of Carlton Lodge Club v Customs and Excise Commissioners [1974] 3 All ER 798, the court found that drinks served to members of the club were subject to tax it is not correct to say that it did so "although the activities of the club generally were not." The issue in that case was whether there was a supply. The appellants had argued there was none as there was no sale. The court agreed that there was no sale but held that all that was required for the tax to be chargeable was that there should be a supply in the course of a business carried on by him (the taxpayer/appellant); and that there was such a supply as it had been conceded that it was essentially a drinking club (p 799 line g.).

The scheme of the GCT Act contemplates exempt goods and services.

Thus for example the First Schedule Part 1 is headed "Taxable Supplies" and deals with various types of motor vehicles; Part II is headed "Items which are Zero-Rated" (emphasis mine). Even where Part II of the First Schedule speaks of the Governor General, and Diplomatic Organizations the reference is to articles for the use of such persons.

Now what will exempt a supply of goods and/or services by the appellants in the instant case, is if such a supply is made in pursuance of the powers and duties specified in the Registration (Strata Titles) Act.

Mrs. Hudson Phillips submitted that if the activities in question are not in pursuance of the powers and duties specified in that Act, they are ultra vires, illegal and must be stopped. That is quite true, but that would not exempt them from tax. In England, the sale of stolen cars has been held to be subject to Value Added Tax - Customs and Excise Commissioners v RJR Oliver [1980] 1 All ER 353. In the course of its ruling the court held that the fact that the dealer who sold the cars had no legal title did not alter the fact that he supplied them. On the other hand in

Hudson (t/a 21st Century Demolition and Plant Hire) Tolley's Tax Cases 1997 No. 31, 519, the Manchester Tribunal held that there was no right to claim tax paid (input tax) in respect of acquisitions of stolen goods.

Must all services performed by the appellants satisfy the test of being "Reasonably Necessary" in order to be exempt?

I do not agree as suggested by Mrs. Lee that paragraph 3(f) of the First Schedule of the (Strata Titles) Act (supra) must be applied to all activities of the appellant so that if any one is not reasonably necessary for the enforcement of the by-laws and the control, management and administration of the common property, it is not exempt. I hold that each sub-paragraph must be read disjunctively, there being no suggestion on a reading of the Act that they should be read conjunctively and paragraph 3(e) used. Sub-paragraphs (a), (b), (c) and (d) (supra) deal with specific matters. Paragraph (e) is of a general nature. There is no reason to hold that which is of a general nature should modify the earlier paragraphs as was done in the cases of *Dixon v BBC [1979] 2 All ER 112*, and *Cooper v Motor Insurers Bureau [1985] QB 575*. Hence the following principle is to be applied: Generalis clausula non porrigitur ad ea quae antea specialiter sunt comprehensa - A general clause does not extend to things previously dealt with by special provision.

How must the Phrase "Reasonably necessary" Be interpreted?

Mrs. Lee adopted a dictum of Wynn-Parry J in *Re Naylor Benzon Mining Company Ltd. [1950] 1 All ER 518 at 513 (a)*: He said:

"The words 'reasonably necessary', used as a phrase in which the adverb is designed to qualify the adjective, are meaningless. A thing is either necessary or it is not necessary.... As it stands, the phrase to me is a contradiction in terms."

She argued that none of the activities in question satisfies the definition of the Oxford English Dictionary 1961 Reprint of being indispensable, requisite, needful, or "that cannot be done without."

The phrase reasonably necessary has been used in statutes on many occasions. It was used in the Trustee Act 1893 (c 53) S.17.3 (now Section 23 of the Trustee Act 1925) and was interpreted in *Wyman v Paterson* [1900] AC 271, and in *Re Sheppard* [1911] 1 Ch 50.

In *Re Stanford* [1910] 1 Ch 440, Buckley J was required to interpret this phrase in Schedule 3 to the Settled Land Act 1925, in which it spoke of "Additions to or alterations in, buildings reasonably necessary or proper to enable the same to be let." He held that those words did not mean something that is absolutely necessary, but means "what a reasonable and prudent owner would do if he were absolutely entitled to the property."

In *Re Chemists Federation Agreement (No. 2)* [1958] 1 WLR 848 it was held that in deciding whether a restriction is "reasonable necessary" within Section 21(1)(a) of the Restrictive Trade Practices Act 1956, the court must consider whether a reasonable employer who is concerned to protect the public against injury would enforce this restriction if he could.

Further in *Coleen Properties Ltd. v Minister of Housing and Local Government and another* [1971] 1 All ER 1049, the English Court of Appeal (Lord Denning MR Sachs and Buckley LJJ) did not find the phrase objectionable or meaningless and proceeded to overturn the decision of Lylle J, in which he affirmed the decision of the minister that the acquisition of certain property was reasonably necessary for the satisfactory development or use of a 'cleared area.'

Significantly, the court held that the question of whether the acquisition was reasonably necessary was a question of fact. Lord Denning expressed himself thus at page 1053c:

“But the question of what is ‘reasonably necessary’ is not planning policy. It is an inference of fact.”  
(emphasis mine)

And Sachs LJ put it this way at page 1054c:

“The question before him was not, to my mind, one of policy. It was in essence a question of fact that had to be established as a condition precedent to the exercise of the powers to take away the subject’s property.”

For convenience I again set out the terms of paragraph 3(f) of the First Schedule to the Registration (Strata Titles) Act. It reads:

“3 the corporation may -

(a) ....

(f) do all things reasonably necessary for the enforcement of the by-laws and the control, management and administration of the common property.”

I reject the strictures of Wynn-Parry J, that the phrase “reasonably necessary” is meaningless, and hold that in paragraph 3(f) (supra) it means all that a prudent corporation would do in order to enforce the by-laws and for the control, management and administration of the common property.

#### The Interpretation of Item 16 of Part II of the Third Schedule of the GCT Act

As noted above a number of sections of the GCT Act provided for exemptions from taxation under the Act. Thus Section 2 of the GCT Act excludes from the definition of the “taxable activity” any activity specified in the Third Schedule, while Section 25 of the GCT Act states that -

“The goods and services specified in the Third Schedule should be exempt from the payment of tax under this Act.”

Section 29(1) enacts:

A person who supplies goods and services specified in the third Schedule shall be exempt from being registered under the Act in respect of such goods and services.”

In the instant case these provisions become crucial because as we have seen item 16 of Part II of the Third Schedule (which is headed -

“Goods and Services Exempt from Tax”) reads:-

”Services rendered by a corporation as defined in the Registration (Strata Titles) Act in pursuance of the powers and duties specified in the Act.” (emphasis mine)

The question arises whether the words “powers and duties” should be interpreted disjunctively or conjunctively. Both counsel have according to the tenor of their submissions implied that the words should be used disjunctively. I agree. The following authorities support this position - namely that item 16 above should be read as if the last phrase read “in pursuance of the powers or duties specified the Act.” Moreover I go further and hold that the item must be interpreted as if it read “in pursuance of any of the powers or duties specified in the Act.”

The following cases support this view.

*Golden HorseShoe Estates Company Ltd. v The Crown.* [1911] AC 480

The headnote reads as follows:

Under the Western Australia Dividend Duties Act, 1902 (2 Edw. 7 No. 32 Sections 5 and 6, companies which like the appellants carry on their business in Western Australia exclusively are not bound to pay duties in respect of any portion of their profits save that which they devote to the payment of dividends declared.

Section 13 enacts that the company may deduct from the dividends and return for its own use the sums payable for duties imposed thereon; and Section 15 enacts that 'when a dividend is distributed before the duty payable in respect thereof is deducted and paid, the duty shall be a debt due by the person receiving the dividend to His Majesty':-

Held, that to make sense of Section 15 the words 'deducted and paid' must be read as 'deducted or paid' and that then the section would bear the reasonable and just meaning that where the duties have been paid by the company, and also though not paid they have been deducted by the company from the dividends declared, the shareholders are not to be liable as debtors to the Crown in respect of them"(emphasis added)

*Attorney General for New Zealand v Brown and OTHERS [1917] AC*

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The headnote is set out hereunder:

"A testator domiciled in New Zealand provided by his will that a fund should be held in trust for such 'charitable benevolent religious and educational institutions societies associations and objects' as his trustees should select. In an investment clause the will referred to 'any... institution commercial municipal religious charitable educational or otherwise,;-

Held, that the gift must be construed as though the word 'and' were 'or' and that having regard to the investment clause, it could not be read as though the word 'charitable' governed each of the three following words, that the gift accordingly failed for uncertainty a gift to 'benevolent objects' whether



made in England or New Zealand not being a good charitable gift.”

Lord Buckmaster who gave the judgment of the court said at page 397:

“...it is in their Lordships’ opinion, impossible to use the word ‘and’ as a link intended to join all the words together and make a gift available only for such institutions or objects as satisfied each one of the conditions represented by each of the separate words.”

See also the case of *Stainland Industrial Corn and Provision Society vs Stainland Urban Council* [1906] AC 233.

I therefore hold that to use the words ‘powers and duties’ conjunctively, would be to render it impossible for any corporation to reap the benefit of the statutory exemption. This means therefore that it is sufficient if an activity is in pursuance of either a power or a duty enacted in the Registration (Strata Titles) Act for the corporation so acting to be exempt from general consumption tax in respect of that service or activity.

**What are the Powers and Duties to which item 16 refers**

Section 5 (1) of the Registration (Strata Titles) Act expressly states that the duties of the corporation shall include the matters listed in paragraphs a - h inclusive of that sub-section. Similarly section 5(2) of that Act expressly indicates that the matters enumerated in paragraphs (a) to (d) thereof are among the powers of the corporation. But there are other provisions which enact more duties and powers by implication.

Section 11(1) of that Act provides that

The proprietors may by unanimous resolution direct the corporation to transfer or lease the common property or any part thereof.” (emphasis added)

This gives the corporation a **power** to lease if the condition stated in the section is satisfied.

Paragraph 2 of the First Schedule of the Registration (Strata Titles) Act, also imposes duties on the corporation. It states that “The Corporation shall ...” and then lists four duties in paragraphs (a), (b), (c) and (d).

Similarly Paragraph 3 of the same schedule grants five powers in paragraphs (a) to (f) inclusive. There it uses the language - “The Corporation may....”.

The result of these enactments therefore is that if the activities of the corporation fall within any of these provisions, then subject to any modifications contained elsewhere in that statute or the General Consumption Tax Act or the Interpretation Act, the activities are exempt from GCT.

**Are the Activities in Question Exempt from GCT?**

The service charge of 100% on telephone calls through the PBX system.

Mrs. Hudson-Phillips had argued that this service charge was exempt in that it fell within the power granted in paragraph 3(e) of the First Schedule to the Strata Titles Act. As noted earlier that paragraph enacts that:

“3-The corporation may -

(a) .....

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

Mrs. Lee submitted that this service charge could escape being taxed if it was reasonably necessary for the enforcement of the by-laws and the control, management and administration of the common property, that is if it was covered by paragraph 3(f) of the First Schedule to the Strata Titles Act. In her oral submissions, she conceded that the PBX system was necessary but denied that the 100% service charge was also necessary. I have already rejected the argument that any of the activities in question are necessarily governed by this provision.

Mrs. Lee further submitted that a PBX system not being land could not constitute a part of the common property, hence the service charge attaching to that system could not be necessary for the management of the common property. This argument is based on the premise that paragraph 3(f) (supra) applies to this activity, but that argument has been discredited therefore this limb of her submission also fails.

I shall now suspend further consideration of this activity by itself so that I may at one stroke deal with a submission which Mrs. Lee made regarding the other two activities, but which in my opinion ought to be considered in connexion with the

service charge regarding calls made through the PBX system. Those other activities are: -

The renting of a part of the common area to an agent of the unit owners,, space for a reception desk, reservations office and change room for their staff.

The letting of a part of the common area for the provision of a coffee shop/lounge for the unit owners and their guests.

Miss Lee submitted that the appellant had exceeded its powers in the manner in which it realized the sums from the leasing of portions of the common property, and therefore these activities are not exempt from tax. Pivotal to this position she argued are sections 5(2) (a) and 5 (2) (b). The former gives the corporation power to: -

“establish a fund for administrative expenses sufficient in the opinion of the corporation for the control management and administration of the common property, for the payment of premiums of insurance and for the discharge of any of its other obligations.”

The latter empowers the corporation

“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.”

(Emphasis added).

Her argument went like this:

“The Act has made specific provision for the control, management and administration of the common property. a fund is to be established and the amounts must be raised by levying contributions as aforesaid. The commercial renting/leasing of the common property is not contemplated under the Strata Titles Act as a means by which the common property is to be controlled, managed and administered. This activity, being an activity outside the powers and Duties contemplated by the Strata Titles Act, cannot benefit from the exemption provided under section 29(1), of the General Consumption Tax Act. It does not amount to service rendered by a corporation in pursuance of the powers and duties specified in the Strata Titles Act. Tax is therefore properly chargeable in respect of amounts resulting from the said activity.” (emphasis added).

Mrs. Lee did not expressly refer to any linguistic canon but I understood her to be applying the maxim expressio unius est exclusio alterus – “to express one thing is impliedly to exclude another.” This principle is applied where a statutory provision might have covered a number of matters but in fact only deals with some of them. Hence unless those mentioned are to be regarded merely as examples or mentioned ex abundanti cautela, or for some other sufficient reason, those not mentioned are treated as excluded from the proposition. But like all canons of construction this principle is to be applied only where it is not outweighed by other interpretive factors.

The reasoning behind this principle is that the motive for the draftsman to mention some only of possible items or methods of doing something, must be the intention that they were the ones to be considered, and thus the others are excluded. In Cross: Statutory Interpretation (2<sup>nd</sup> Edition 1987 pp 138 – 139) the learned author offers this explanation:

**“... it is doubtful whether the maxim does any more than draw attention to a fairly obvious linguistic point viz. that in many contexts the mention of some matters warrants an inference that other cognate matters were intentionally excluded.”**

Mrs. Lee’s argument therefore amounts to this, that here the Act sets out specific remedies or procedures for the raising of money by the corporation and

therefore it must be presumed that others which might have been applicable are by implication excluded.

The case of Felix v Shiva [1938] QB 82, proves an example of the working of this principle. By section 103 of the County Courts Act 1959, the general principles of High Court practice were applied to the County Court. But section 20 of that Act specifically empowered the making of county court rules enabling the court to order a party to make interim payments. It was submitted that as no such county court rule had been made, the corresponding High Court rule for interim payment could be used having regard to the provisions of section 103.

It was held that Rules under Section 20 were the only method available, and in their absence Section 103 could not be applied. Everleigh L.J. said at pp 90-91:

**“If a power is given by statute, and that statute lays down the way in which that power is to be brought into existence, it must be brought into existence by that, method and none other.”**

One must look once more at the corporation's power to raise funds as contained in sub-sections 5(2) (a) and (b) which I again set out for easy reference.

They are as follows: -

“(2) the powers of the corporation include the following-

- a. to establish a fund for administrative expenses sufficient in the opinion of the 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;”

The solution to the problem of whether the activities in question are exempt  
and therefore whether the registration of the appellant should be cancelled as prayed  
depends upon the answers to four questions.

Firstly, for what purposes may the fund described in section 5(2) (a) be  
established?

The statute clearly states, “for administrative expenses” and obviously refers  
to such expenses of the corporation. The section goes on to state that the fund  
should be sufficient for two named purposes. The first is drawn from the primary  
duty imposed in paragraph 2(a) of the First Schedule to the Strata Titles Act (control



etc. of the common property). The second reflects the duty to insure the building (in particular) as stated in Section 5(1) of that Act.

But the last sentence of section 5(2) (a) requires that the fund should be sufficient "for the discharge of any of its other obligations." Having regard to the context and in particular the first sentence of section 5(2)(a) the words "any of its other obligations" cannot be interpreted to include matters other than "administrative expenses."

Secondly: How should amounts for the fund be obtained? The answer in section 5(2) (b) (supra) is "by levying contributions on the proprietors in proportion to the unit entitlement of their respective lots.

Thirdly: How do the purpose and source of the fund relate to the activities in question?

"Unit entitlement" is defined in section 2 of the Strata Titles Act. It means: in relation to strata lot the number specified in accordance paragraph (h) of subsection (1) of section 7.

Section 7 – (1) provides:

"Every Strata plan shall

(a) .....

(h) have endorsed upon it a schedule specifying in whole

numbers the unit entitlement of each strata lot and a number equal to the aggregate unit entitlement of all the strata lots.”

The method used by the Appellant to charge for the use of the PBX telephone system – a service charge equal to 100% of the cost of the calls can hardly be said to satisfy those criteria laid down in Section 5(2)(b) (supra). Similarly the renting of portions of the common property would also fail to meet those criteria. The three activities in question therefore are not done in pursuance of the powers conferred by Section 5(2) of the Strata Titles Act.

Fourthly, can the activities be said to be done in pursuance of any other powers or duties under the Strata Titles Act?

Mrs. Hudson-Phillips submits that the provision of the PBX telephone service and the service charge are in pursuance of 3(e) of the first schedule of the Strata Titles Act which provided that:

“3 – The corporation may –

(a) .....

(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;”

She argues that the singular includes the plural and therefore the corporation has made an agreement to supply the PBX telephone service to each proprietor, and that the service charge is exempt as it is a logical concomitant of such service, there being the necessity to pay the staff to operate the system. I agree.

I now turn to the rental of portions of the common area to two entities- Firstly to Turtle Resorts Ltd. the agent of the proprietors, for a reception desk, reservations office and change room for their staff; secondly to Triple Star Caterers space for a coffee shop/lounge.

Mrs. Hudson Phillips submits that these two activities are in pursuance of paragraph 2(a) and 3(f) of the First Schedule to the Strata Titles Act. They read as follows:

“2 – The corporation shall –

(a) control, manage and administer the common property for the benefit of all proprietors;

and

“3 - (a) .....

(f) do all things necessary for the enforcement of the by-laws and the control, management and administration of the common property.”

She also points out that by sub-paragraph 21(a) of the said First Schedule (supra), the corporation is empowered to employ agents to discharge its duties and

powers. Further by section 11 the corporation may lease or transfer the common property, and by section 12 may create easements over it.

I agree with Mrs. Lee that the fact that the appellant did not charge its tenants GCT on the rent is irrelevant. If the rent is taxable the appellant will be required to pay the tax nonetheless.

It has already been noted that the appellant has a power to let the common property – Section 11(1). In the absence of evidence to the contrary one must presume that the authority to do so was granted by an appropriate resolution. But does the appellant have the power to charge rental? A lease is defined in Curzon's dictionary of law thus:

“lease – a term of years .....

Generally involves the grant of exclusive possession

(qv) for a term at a rent” (emphasis mine)

When the legislature passed the (Strata Titles) Act, it must have been aware that to lease usually involves the charging of rent and by not expressly prohibiting this, when it enacted section 11(1) (supra) it impliedly granted the appellant and all such corporations the power to let the common property at a rent. Therefore this is an activity within the powers of the corporation and in pursuance of such a power, and is exempt for this reason. But there is another.

I wish to make a further observation, which affects all three activities.

There is a rule at common law that a statutory power by implication carries with it all incidental powers necessary for its operation. This rule was clearly stated in Attorney General v Great Eastern Railway Co. (1880) 5 App. Cas 473 Lord

Blackburn put it this way at p. 481:

**“... those things which are incident to and may reasonably and properly be done under the main purpose (of a statute), though they may not be literally within it, would not be prohibited.”**

Lord Selbourne LC said at p. 478

**“Whatever may fairly be regarded as incidental to, or consequential upon those things which the legislature has authorized, ought not, (unless expressly prohibited) to be held by judicial construction, to be ultra vires.”**

This rule was considered in R V. Richmond-upon-Thames London Borough Council, ex. p. McCarthy & Stone (Development) Ltd. [1990] 2 All ER 852 in the English Court of Appeal. The question for consideration was the legality of the practice of charging by a local authority, for pre-application planning consultations. The further issues and decision are summarized are thus in [1990] All ER Review p 353-4:

**“It is a common practice for developers who are minded to submit proposals for development or re-development to seek the informal views of the officers of the planning authority concerned as to the likely acceptability of their suggestions. The process is a useful one, both to the developer and**

**the local planning authority – but, there being no free lunches a cost is involved. The Court of Appeal has confirmed in this case that a charge (in this case a flat fee of 25.) may lawfully be made for such consultations under the Local Government Act 1972. The legislature had specifically conferred upon local planning authorities neither the duty nor the power to give such pre-application advice, but a charge could be made because such pre-application consultation was ‘calculated to facilitate, or was conducive or incidental to’ the local planning authority’s exercise of its planning functions.” (emphasis mine)**

It must also be remembered that so important and so strong is this rule, that, it is for example the basis for the well-known rule that, except where the contrary intention appears, the exercise of a statutory power cannot in itself amount to a nuisance.

I hold therefore that the activities in question are exempt from GCT. In the case of the charge for the PBX system it is exempt because it is pursuant of the power given in paragraph 3(e) of the First Schedule of the Strata Titles Act – making an agreement for the supply of services.

As regards the renting of portions of the common property, both rentals are exempt from tax in pursuance of the power under section 11(1) of the Strata Titles Act.

In the result the appeal is allowed, the decision of the respondent made on the 27<sup>th</sup> day of January 1997 and the Notice of Demand dated 13<sup>th</sup> January 1997 are hereby set aside. The registration of the Appellant under the GCT Act is cancelled.

The appellant shall have its costs to be taxed if not agreed.

Before parting with this matter I wish to record my profound apologies to all concerned for the delay in delivering this judgment. It is entirely due to the fact that in December 1997, I became ill and had to be hospitalized abroad; then again last year I also became ill.

Finally, I wish to thank counsel for their very helpful submissions.