[2022] JMSC Civ. 40

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU 2022 CV 00213

BETWEEN	**LOYAL HAYLETT**	**APPLICANT**
AND	**STRATA APPEALS TRIBUNAL**	**FIRST RESPONDENT**
AND	**PROPRIETORS STRATA PLAN NO. 401**	**SECOND RESPONDENT**

IN CHAMBERS- VIA ZOOM

Miss Jacqueline Cummings instructed by Cummings Archer and Co for the applicant

Mr. Garth McBean instructed by Garth McBean and Co for the first respondent

Mr. Lemar Neale instructed by Nealex for the second respondent

Heard: March 10, and April 1, 2022.

Application for leave to apply for Judicial Review - Test for granting leave - Whether application prompt - Whether threshold met.

PETTIGREW-COLLINS J.

BACKGROUND

[1] The applicant describes himself as a businessman who resides in the parish of St. James. He was also the proprietor of unit B22 at Sand Castles, Ocho Rios in the parish of St. Ann, which is part of Proprietor Strata Plan 401. He has since sold his interest in the unit.

[2] The first defendant is a tribunal established under the Registration of Strata Titles Act to hear appeals of aggrieved persons against decisions of the Commission

of Strata Corporation (the Commission). The second respondent is a strata corporation incorporated under the Registration of Strata Titles Act and is the complex known as Sand Castles, located at Main Street, Ocho Rios in the parish of St. Ann.

[3] The genesis of this application is the decision of the strata corporation to impose a cess on all proprietors of the strata in order to fund certain projects which it has not been disputed, involved the improvement, repair and upkeep of common areas. Controversy surrounds whether the decision was taken at an Annual General Meeting (AGM) of the proprietors held on the 8th of December 2018 and whether there was a quorum present at the meeting when the decision was allegedly taken.

THE APPLICATION

[4] This application before the court is for leave to apply for judicial review. The Notice of Application was filed on the 25th of January 2022. There is no question that the application was filed out of time, therefore the applicant has also sought an extension of time for making the application.

[5] The applicant filed an Affidavit of Urgency in Support of the Notice of Application for Leave to Apply for Judicial Review. He exhibited to that affidavit, his proposed Fixed Date Claim Form (FDCF) as well as an affidavit in support of that Fixed Date Claim Form. I shall refer to this affidavit as the proposed affidavit. He states that it is on the proposed FDCF and proposed affidavit that he relies to ground the application. I will address this manner of treating with the application in due course, as it is also a source of complaint by the respondents.

[6] The orders sought in the application are:

1. That the time for making this application for leave to apply for judicial review be extended to the date hereof.

2. The applicant be granted leave to apply for judicial review and to file a Fixed Date Claim Form seeking the following remedies:

   (a) An application for leave for judicial review of the decision of the first defendant made on the 15th of October 2021 for the following orders:

i. A declaration that the first defendant acted ultra vires and/or illegally and/or unlawfully and/or irrationally in dismissing the appeal of the claimant in their decision made on the 15th of October 2021.

ii. An order of certiorari to quash the decision of the first defendant made on 15th of October 2021.

iii. A declaration that on the proper interpretation of Section 5A(2)(b) of the Registration of Strata Titles Act and Clause 36 of the by-laws of the second defendant it does not provide for interest to be charged for capital expenditure imposed on the proprietors in the form of a one-time payment or cess.

iv. A declaration that the Executive Committee of the second defendant on 8th of December 2019, and thereafter, had no locus standi to impose a cess upon its proprietors as their election was ruled to be null and void and of no effect by the Strata Commission in a ruling dated October 28, 2021 and the said cess was unlawfully imposed on the proprietors and the claimants.

[7] In addition to the above orders, the applicant also sought an interim injunction to restrain the strata corporation from enforcing the collection of the cess until the determination of the matter.

[8] The grounds of the application were also set out. The grounds relied on are based on the provisions of Rule 56.3(1), 56.6(2) and 56.10. Further, that the applicant is directly impacted by the decision of the first respondent and that there is no time limit for bringing the application.

[9] Written submissions were filed by all parties and same were supplemented by oral submissions. I shall not reproduce the submissions in full but will make reference to them where I find it necessary to do so.

THE ISSUES

[10] The two main issues are whether an extension of time should be granted for the applicant to make his application for leave and whether the applicant has an

arguable ground for judicial review with a realistic prospect of success. In dealing with the second issue, I shall examine each proposed ground in deciding whether the applicant has an arguable case.

THE LAW

[11] Rule 56.2 of the Civil Procedure Rules (CPR) provides that:

> 1. *An application for judicial review may be made by any person, group or body which has sufficient interest in the subject matter of the application.*
>
> 2. *This includes:*
>
> *(a) Any person who has been adversely affected by the decision which is the subject of the application.*

[12] Rule 56.3(1) provides that a person wishing to apply for judicial review must first obtain leave. Rule 56.6(1) directs that an application for leave to apply for judicial review must be made promptly and in any event, must be made within three (3) months from the date when the grounds for the application first arose. This court is empowered to extend time to apply for leave for judicial review if good reason is shown for doing so, based on rule 56.6(2).

[13] Sub-rules (3), (4) and (5) of rule 56 provide as follows:

> *(3) Where leave is sought to apply for an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date on which grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceedings.*
>
> *(4) paragraphs (1) to (3) are without prejudice to any time limits imposed by any enactment.*
>
> *(5) When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to –*
>
> *(a) cause substantial hardship to or substantially prejudice the rights of any person;*
>
> *(b) be detrimental to good administration.*

[14] The case of **Council of Civil Service Unions (CCSU) v Minister of State for the Civil Service** [1985] AC 374, HL, is often relied on in examining the bases on which judicial review may be sought. Lord Diplock enumerated the rationale. These are illegality, irrationality and procedural impropriety. At page 410, he said:

> *By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute by those persons, the judges, by whom the judicial power of the state is exercisable.*
>
> *By 'irrationality' I mean what can now be succinctly referred to as 'Wednesbury' unreasonableness Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it*
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> *I have described the third head as 'procedural impropriety' rather than a failure to observe the basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules which are expressly laid down in the legislative instrument by which its jurisdiction is conferred even where such failure does not involve any denial of natural justice.*

[15] In relation to the concept of lawfulness, Halsbury's Laws of England, Volume 61A, (2018) paragraph 11, provides an explanation:

> *"The courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully. Such a body will not act lawfully if it acts ultra vires or outside the limits of its jurisdiction. The term 'jurisdiction' has been used by the courts in different senses. A body will lack jurisdiction in the narrow sense if it has no power to adjudicate upon the dispute, or to make the kind of decision or order, in question; it will lack jurisdiction in the wide sense if, having power to adjudicate upon the dispute, it abuses its power, acts in a matter which is procedurally irregular, or, in a Wednesbury sense, unreasonable, or commits any other error of law. In certain exceptional cases, the distinction between errors of law which go to jurisdiction in the narrow sense and other errors of law remain important.*

A body which acts without jurisdiction in the narrow or wide sense may also be described as acting outside its powers or ultra vires. If a body arrives at a decision which is within its jurisdiction in the narrow sense, and does not commit any of the errors which go to jurisdiction in the wide sense, the court will not quash its decision on an application for judicial review, even if it considers the decision to be wrong."

[16] The primary role of the court at the leave stage, is to ensure that actions which are frivolous and vexatious do not go forward, so that leave is not granted where an action is without any arguable ground, having a realistic prospect of success. The case of **Sharma v Brown-Antoine and Others** (2006) 69 WIR 379, a decision of the Judicial Committee of the Privy Council sets out the test for granting leave to apply for judicial review. Lords Bingham and Walker expounded at page 387 of the judgment:

"The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy… Arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in R (on the application of N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ. 1605, [2006] QB 468, at para 62 in a passage applicable mutatis mutandis to arguability:

…the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a Court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.

*It is not enough that a case is potentially arguable; an applicant cannot plead potential arguability to justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the Court may strengthen**; Matalulu v The Director of Public Prosecutions** [2003] 4 LRC 712 at 733.*

[17] In **Shirley Tyndall O.J. et al v Hon. Justice Boyd Carey (Ret'd) et al**, unreported case bearing claim number 2010 HCV 00474, Mangatal J. in explaining the concept of 'arguable ground with a realistic prospect of success', had the following to say:

> *"It is to be noted that an arguable ground with a realistic prospect of success is not the same thing as an arguable ground with a good prospect of success. The ground must not be fanciful or frivolous. A ground with a real prospect of success is not the same thing as a ground with a real likelihood of success. The Court is not required to go into the matter in great depth though it must ensure that there are grounds and evidence that exhibit this real prospect of success."*

[18] In the English Court of Appeal case of **R (on the application of Wasif) v Secretary of State for Home Department,** [2016] 1 WLR 2793, Underhill LJ on the notion of arguability said:

> *"In our view the key to the conundrum is to recognize that the conventional criterion for the grant of permission does not always in practice set quite as low a threshold as the language of arguability or realistic prospect of success might suggest. There are indeed cases in which the judge considering an application for permission to apply for judicial review can see no rational basis on which the claim could succeed: these are in our view the cases referred to in the Grace case as "bound to fail" (or Hopeless). In such cases permission is of course refused. But there are also cases in which the claimant or applicant…has identified a rational argument in support of his claim but where the judge is confident that even taking the case at its highest, it is wrong. In such a case, it is in our view right to refuse permission."*

[19] The court should always consider the question of the availability and suitability of alternative remedies. The respondents concede that in this instance, the applicant has no alternative remedy.

THE FORMAT OF THE APPLICATION

[20] Mr. McBean on behalf of the first respondent argued that the applicant has gone about his application in a manner that is unacceptable. He made the observation that the applicant has laid out much of the evidence on which he relies to ground this application in his proposed affidavit. The bulk of the documents on which the applicant relies are exhibited to the proposed affidavit. Such practice is irregular but I am of the view that that is a matter of form rather than substance. I consider for these purposes that the affidavit exhibited to the affidavit in support of the application, forms a part of his affidavit. I will confess that I find this manner of making the application odd but I do not take the view that his application should fail from the inception on the basis of this minor irregularity. It is observed further, that although the applicant said that he is relying on the proposed FDCF to ground his

application, the grounds set out in that document are the precise grounds stated in the Notice of Application. It is sufficient for the applicant to note that if leave were to be granted, he would be required to filed his Fixed Date Claim Form and affidavit in support pursuant to the grant of leave.

WHETHER THE APPLICANT SHOULD BE GRANTED AN EXTENSION OF TIME TO MAKE THE APPLICATION

[21] The applicant is seeking an order of certiorari in relation to the decision of the Appeals Tribunal which was made on the 15th of October 2021. The deadline of three (3) months expired on or about the 15th of January 2022. At the hearing of the application, the applicant's attorney-at-law contended that he is only 10 days late and she adverted to the fact that extensions have been granted in instances where applicants have been late by months and even years. She cited the case of **Constable Pedro Burton v The Commissioner of Police** [2014] JMSC Civ. 187 where the applicant was 31 months out of time.

[22] The respondents contend that the extension should not be granted. Mr. Neale observed that the circumstances of **Pedro Burton** are entirely distinguishable because in that case, the applicant had been pursuing the alternative remedies available to him and he had pursued those remedies promptly. Also, it was after he had exhausted those remedies that he sought leave. Further, it was the pursuit of his alternative remedy which had delayed his application for judicial review. Counsel pointed out that that fact was the major consideration for the court in deciding to grant the extension of time.

[23] The applicant's reasons for being late in filing the application were stated in paragraphs 8 to 11 of his affidavit filed in support of the application. I now set out those reasons in full.

> 8. There is no specific time limit for me to make the application herein but if the court holds there is then out of an abundance of caution I am asking this court to extend the time within which I can make this application as it have (sic) been three month (sic) since the decision I am reviewing was made.

9. The reason for the delay in filing my application here was due to a misunderstanding on my part. I was sent some documents by my Attorneys at Law to sign since November 21 and I did not notice these documents in my email.

10. I thereafter went overseas and while I was waiting on my attorney to tell me the court date, I was not aware that my Attorney were (sic) actually waiting on me to sign and send back the documents to me. It was not until I was contacted again in January 2022 by my attorney that they pointed me to the fact that they are waiting on me to print and sign and send back to them the documents that I realized there was a delay.

11. It was not intentional on my part, and I know that this delay would not prejudice the Defendants and it is not inordinate.

[24] The applicant submitted that there would be no prejudice to any of the parties if the extension were to be granted. Mr. Neale counters that assertion by observing that the second respondent has acted to its detriment.

[25] The court accepted in **Pedro Burton** that the pursuit of alternative remedy was a good reason to advance for the delay in making the application and one that should be given favourable consideration. The applicant in the instant case was not pursuing an alternative remedy.

[26] As Mr. Neale pointed out, the court must consider if notwithstanding the delay, there are good reasons why the application should be allowed to proceed. In **Pedro Burton,** Dunbar-Green J. (Ag) expressed as follows at paragraph 24 of her judgment:

> *"The import of Rule 56 is that it is not so much a question of whether there are good reasons for the delay as good reasons to extend time (see **R (Young) v Oxford City Council** (EWCA) Civ 240) albeit the existence of unexplained delay could be decisive in an exercise of discretion whether to grant leave for extension of time (**see R v Secretary of State exp. Furneau** [1994] 2 All ER 652, 658."*

[27] Dunbar-Green J. went on to say that in **R v Secretary of State for Trade and Industry Exp. Greenpeace** 200 Env. LR 221, 261-264 it was said that good reason

for extending time may include the fact that there is no prejudice to third party rights, no detriment to good administration and if there is a public interest requirement, then the application should proceed.

[28] It is my view that the applicant has not proffered a good reason for his delay. To say that he was only ten (10) days late in filing his application is to entirely ignore the requirement to act promptly. The three months is to be regarded as an absolute deadline. It is generally the case that if the application is made within the three (3) months' period, it will not be regarded as late. The matters that he advanced are indicative of a lack of seriousness in pursuing his application and a failure to have any regard whatsoever for the fact that he was required to act with alacrity. Indeed, he stated that there was no time limit to make the application, which is suggestive of a lack of knowledge which in any event, is not a good excuse. Miss Cummings has asked the court to understand the evidence that there is no time limit in the context of a time frame set by the Registration of Strata Titles Act, the statute governing his claim before the Commission and the Appeals Tribunal.

[29] Mr. Neale advanced that it cannot be said in this instance that there is no prejudice to third parties. He directed the court's attention to paragraph 29 of the affidavit of Trevor Bernard, where he stated that over 80% of the proprietors of the units have paid the cess levied, and the sums paid by them have been used towards renovation and refurbishing and other capital expenditure within the Strata. This evidence Mr. Neale says is demonstrative of the prejudice to the second respondent. It may be garnered however that the sums would have been utilized long before Mr. Haylett would have been able to file this application since the matter was not concluded before the Appeals Tribunal until the 15th of October 2021 and so there is no causal relationship between the delay and any such prejudice.

[30] Mr. Haylett so far does not stand on very good grounds for the grant of an extension of time. I will now proceed to examine whether any of the grounds relied on by the applicant are arguable with a realistic prospect of success. If he has an arguable ground, that is a factor to be taken into consideration in deciding if an extension of time should be granted.

WHETHER THE APPLICANT HAS AN ARGUABLE GROUND WITH A REALISTIC PROSPECT OF SUCCESS

1. T**HE FIRST DEFENDANT ACTED ULTRA VIRES AND/OR ILLEGALLY AND/OR UNLAWFULLY AND/OR IRRATIONALLY IN DISMISSING THE APPEAL OF THE APPLICANT IN THEIR DECISION MADE ON THE 15TH OF OCTOBER 2021.**

[31] In order to adequately address this ground, it is necessary to examine how the Appeals Tribunal dealt with various areas of complaint placed before it regarding the decision of the Commission. It is also necessary to examine how the Appeals Tribunal dealt with the complaint that the facilitator at the Commission Miss Tricia Harris failed to have regard to an email which according to the applicant, contained an admission from the chairman of the strata corporation that there was no quorum at the AGM at the time of the passing of the budget. There are also matters concerning the Appeal Tribunal's decision not to admit certain items that were being presented as fresh evidence during the course of the hearing and the treatment of the affidavit evidence of Miss Tricia Harris. I will firstly address the matters which arose during the course of the hearing.

Fresh evidence

[32] Where it is alleged that there is a failure to consider relevant evidence, in the context of an application for leave to apply for judicial review, such an allegation brings into focus the admonition in **Wednesbury** that a decision maker must call his own attention to the matters which he is bound to consider. In this instance, what was said to be relevant evidence was being put forward for the first time during the hearing of an appeal before a quasi-judicial tribunal. The question is whether the Appeals Tribunal acted unreasonably in refusing to admit what was said to be relevant evidence and fettered its own discretion by constraining itself to accepting only fresh evidence that was admissible by virtue of principles by which a court of appeal is required to abide.

[33] Miss Cummings submitted that the Appeals Tribunal was not bound by rules of evidence and there was no basis for placing reliance on the case of **Ladd v Marshall** [1954] EWCA Civ. 1. She said that by doing so, the Appeals Tribunal

ignored its own rules. In essence she is saying that the Appeals Tribunal fettered its own discretion.

[34] Mr. McBean submitted that Rule 13.3 of the relevant rules of the Appeals Tribunal required that new evidence be disclosed. Implicit in that requirement he says, is the right of the opposing party to object to that evidence. One clear basis for the objection he said, was that the test in **Ladd v Marshall** was not met. He accepted as Miss Cummings pointed out, that the Appeals Tribunal is not bound by strict rules of evidence. Mr. Neale adopted Mr. McBean's submissions.

[35] In the case of **Harold Brady v The General Legal Council** [2021] JMCA Civ App 27, McDonald Bishop JA reiterated the applicability of the principles in **Ladd v Marshall** in this jurisdiction at paragraphs 38 to 41 of her judgment:

> *"This court has endorsed and applied those principles in many decisions, such as* ***Rose Hall Development Limited v Minkah Mudada Hananot*** *[2010] JMCA App 26 and* ***Russell Holdings Limited v L&W Enterprises Inc and Another*** *[2016] JMCA Civ 39, which the parties in these proceedings have cited. The principles extrapolated from* ***Ladd v Marshall*** *cases ('the* ***Ladd v Marshall*** *principles') establish that the court will only exercise its discretion to receive fresh evidence where:*
>
> > *1. the evidence the applicant seeks to adduce was not available and could not have been obtained with reasonable due diligence at the trial;*
> >
> > *2. the evidence is such that, if given, it would probably have had an important influence on the outcome of the particular case, though it need not be decisive; and*
> >
> > *3. although the evidence itself need not be incontrovertible, it must be such as is presumably to be believed or apparently credible.*
>
> *[39]* ***Ladd v Marshall****, therefore, laid down the rule that where there had been a trial or a hearing on the merits, the decision should only be reversed by reference to new evidence if it can be shown that the conditions it has stipulated are satisfied.*
>
> *[40]* ***Ladd v Marshall*** *remains good law in Jamaica and is usually the starting point in considering fresh evidence applications in civil proceedings, even though there is authority to suggest that the court is not bound in a straightjacket to apply these principles. The primary consideration, it is held, is that justice is done (see* ***Rose Hall Development Limited****). It should be noted, however, that although the CPR does not make express provision for fresh evidence applications, it is accepted that the* ***Ladd v Marshall*** *principles are not in conflict with the*

overriding objective of the CPR (see ***Darrion Brown v The Attorney General of Jamaica and Others*** *[2013] JMCA App 17). Therefore, the* ***Ladd v Marshall*** *principles are consonant with the interests of justice in considering fresh evidence applications in civil cases. This is so, although civil appeals to this court are by way of rehearing. Indeed, the application of the principles of law relevant to the reception of fresh evidence in civil proceedings has been established in this court with no distinction drawn between appeal by way of rehearing or appeal by way of review.*

[41] It is considered necessary to note further that disciplinary proceedings are classified as quasi-criminal, having regard to the standard of proof required to be met for liability to be established. Even though this is so, the court has applied the ***Ladd v Marshall*** *principles as adopted in* ***Rose Hall Development Limited*** *to fresh evidence applications in such proceedings (see* ***Dwight Reece v General Legal Council*** *(Ex parte Loleta Henry) [2021] JMCA Misc 1). But it should be noted that even if it could be argued that because disciplinary proceedings are quasi-criminal and so principles applicable to criminal law should apply, the position would be the same. This is so because there are statutory provisions and established principles at common law that treat with the admissibility of fresh evidence on appeal in criminal cases.*

[36] The Appeals Tribunal is governed by rules contained in the fourth schedule of the Act. It is able to regulate its own proceedings based on the provisions of rule 6(4). It is clear from the extract from **Harold Brady** that the rule may be applied in quasi-judicial proceedings such as the proceedings before the Strata Appeals Tribunal. I will now examine the circumstances surrounding the refusal to admit the specific documents.

(a) The affidavits

[37] Regarding the complaint that the Appeals Tribunal failed to admit fresh evidence in the form of affidavits from three (3) proprietors, Mr. Haylett's evidence in his proposed affidavit is that he obtained statements from three (3) proprietors who were in attendance at the AGM on December 8, 2018. The evidence of each he said, was to the effect that there was no quorum at the meeting when the vote was taken. He exhibited those affidavits.

[38] Mr. McBean submitted that in keeping with the test in **Ladd v Marshall**, the Appeals Tribunal properly determined that the affidavits did not qualify as fresh evidence since it is not disputed that the affiants were present at the AGM and so their affidavits could easily have been obtained for the purposes of the hearing

before the Commission. Mr. Neale made similar submissions and also submitted that the evidence contained in the three affidavits merely corroborated what the applicant had said, that is, that there was no quorum. It was his further submission that the evidence was not credible.

[39] There is no reason given by the Appeals Tribunal as to why the fresh evidence was rejected. It appears from the submissions of the parties however, that the matter was comprehensively addressed by them before the Tribunal. What is clear of the potential evidence contained in all three affidavits is that it did not on the face of it meet the three limbs of the test in **Ladd v Marshall** which must be met cumulatively. The information contained in the affidavits was not new to the Appeals Tribunal. The affiants were making the same assertion that Mr. Haylett had been making. All the information meant in essence, is that three additional persons who were said to be present at the meeting and who could have given affidavits if they wished to when the matter was before the Commission, were also saying that a quorum was not present when the budget was passed. The Appeals Tribunal had before it the basis on which the Commission had come to its conclusion. Although the Appeals Tribunal was not bound to, it was certainly within its remit to determine if the principle in **Ladd v Marshall** was to be applied in determining the admissibility of the three affidavits.

(b) The letter from the Commission

[40] On the matter of fresh evidence, there was also a complaint that the Appeals Tribunal refused to allow a letter outlining a subsequent decision of the Strata Commission that made the elections of the existing committee null and void. The argument following from this was that if the election was null and void, the committee had no authority to act and so any decision made by the committee was also null and void.

[41] The letter relied on was in the circumstances fresh evidence to the extent that it was not available and could not have been obtained with reasonable due diligence. A perusal of the letter impels me to the view that it would not have overcome the second limb of the test.

[42] This letter is dated October 28, 2020 and was exhibited to Mr. Haylett's affidavit as LH 14. It was not particularly clear to me from Mr. Haylett's evidence what meeting was being referred to. That letter outlined that it was brought to the attention of the Commission by one Mrs. Nathani that the Extraordinary General (EGM) of March 3, 2018 was not valid because it had not commenced on time. The contents of this letter will be dealt with elsewhere in this judgment.

[43] Suffice it to say at this point that this letter cannot be taken to convey that the Commission had ruled that the election of the committee was void and more importantly, decisions taken by the committee were null and void, consequently, it could not be said that the Appeals Tribunal was wrong in ruling that the letter while it constituted fresh evidence, was irrelevant to the proceedings. Even if the letter had not been considered in the context of fresh evidence, and consequently as a document that could be excluded on account of the principle in **Ladd v Marshall**, another basis on which the Appeals Tribunal could properly have excluded it, was lack of relevance.

[44] It cannot in my view be said that the Appeals Tribunal acted unreasonably in failing to admit the affidavits or the letter from the Commission.

The treatment of the affidavit evidence of Miss Tricia Harris – the facilitator

[45] The applicant is disgruntled because of the repeated reference to Miss Harris' evidence before the Appeals Tribunal as uncontroverted. The applicant's evidence is that the hearing of the appeal before the Appeals Tribunal was scheduled for May 1, 2020 but because of the pandemic, it was postponed indefinitely. At some point the matter was back before the Appeals Tribunal and a case management conference was scheduled for January 30, 2020. At that hearing Miss Harris was directed to file and serve her affidavit on or before February 20, 2020. This was not done until October 6, 2020. It was the applicant's evidence that the hearing of the appeal was set for December 18, 2020. The hearing commenced on January 15, 2021 and was part heard and adjourned more than once. It was concluded July 2, 2021 and a ruling reserved until October 2021.

[46] In the ordinary course of things, instead of by affidavit, Miss Harris' findings could have been submitted in the form of a report. The applicant did not complain

that he was denied the opportunity to file an affidavit in response. He claims that the attorney who represented the strata corporation before the Appeals Tribunal objected to all the other evidence that his attorney sought to bring before the Appeals Tribunal to counter what Miss Harris said in her affidavit.

[47] The evidence and the circumstances in totality make it apparent that the only evidence the applicant could be referring to as that which the attorneys took objection to, was that contained in the following documents: the affidavit of the three individuals, the email from the chairman in response to the email from the Turners and the letter from the Commission. I have so concluded because those are the documents the Appeals Tribunal refused to allow. None of those documents could properly have been used to counter anything Miss Harris had to say. In her affidavit, she set out the basis for her findings and how she arrived at those findings, having regard to the documents and the evidence she said she considered. She was not giving evidence in support of one side or the other. The Appeals Tribunal was entitled to treat Miss Harris' affidavit evidence as it did. This complaint regarding the treatment of her affidavit was not specifically set out as a ground but would have impacted the decision as a whole. This complaint cannot provide the applicant with an arguable case with a realistic prospect of success.

The applicant's complaints before the Commission

[48] It is at this point necessary to set out the grounds of complaint raised by the applicant when he sought the intervention of the Commission. This court does not have the benefit of the submissions that were made to the Commission by the applicant but it seems fair to say based on the observation of the Appeals Tribunal and the absence of complaint from his attorney-at-law, that some of the complaints were not argued before the Commission. The grounds were as follows:

1. Presenting a budget at the AGM meeting held in 2018 which was not approved by the majority of present owners and at the time there was no quorum.

2. That the budget that was presented did not include expenditure already made before the AGM meeting for which the cess is retroactively being imposed.

3. Illegally adding the cess amounts to the maintenance and charging interest for non-payment. The addition and charging of interest on the cess is also unconscionable and burdensome and it is expected that the Stata owners will pay all of the above monies in three months.

4. Failing to give adequate notice of the imposition of the two cess amounts as notice of the first cess amount was given in March 2019 with thirty days to pay that cess and the second cess within another 30 days, thus payment is to be made in one calendar year.

5. Failing to present at the AGM meeting held in 2018 a budget that reflected income and expenditure statements as per Clause 23(c) of the Stata by-laws.

6. Failing to make books of account available for inspection at all reasonable times of the application of a proprietor as per Clause 23(d) of the Stata by-laws.

The Appeal Tribunal's treatment of the findings of the Commission

[49] I do not propose to address all of the grounds raised in the appeal before the Tribunal but only those in relation to which the applicant has voiced dissatisfaction with the outcome, as garnered from his affidavit evidence and the submission of his attorney at law. Those matters include: the validity of the resolution by which the capital budget was said to have been passed, the alleged error on the part of the facilitator based on her alleged disregard and refusal to allow into evidence an email from the Chairman in response to that from the Turners, the complaint that the budget that was presented did not include expenditure already made before the AGM for which the cess was retroactively being imposed and other complaints regarding the budget.

1. Whether resolution to adopt capital budget was properly passed

[50] Ground 1 to 1 (c) of the appeal concern the absence of a quorum, and the impact on the validity of the passing of the budget. It also concerned the use of the audio recording and the failure to admit the email from Mr Bernard in response to the

email from the Turners. The findings of the Commission were captured under the heading “presenting a budget at the AGM meeting held in 2018 which was not approved by the majority of present owners and at the time there was no quorum”

[51] The applicant states in this regard that there was no quorum present at AGM held on the 18th of December 2018 when the capital budget of 50.3 million dollars was passed. He contends on this basis that the cess was improperly levied and the Appeals Tribunal therefore improperly upheld the decision of the Commission of Strata Corporation that there was a quorum present. The Commission found that based on the provisions of the relevant legislation and the by-laws, the conditions that could have invalidated the proceedings of the meeting were: improper notice, insufficient notice or the lack of quorum at the time the meeting proceeded to business. The Commission said that based on its assessment of the records of the strata corporation, the meeting was properly convened and a quorum was present at the time that the meeting commenced.

[52] The Commission noted that from the audio recording of the annual general meeting (as provided to the Commission by the strata corporation) while there was a prolonged uproar prior to the consideration of the capital budget, the meeting was not adjourned at that time. Further, there was no adjournment prior to the tabling of the resolution on the capital budget or prior to the vote to adopt the capital budget.

[53] It was also said that it noted from the audio recording that there was no objection raised from the proprietors present during the vote on the capital budget that there was a lack of a quorum at that time. Further, that the vote was stated to have been carried with noted abstentions.

[54] The applicant’s argument is that the Commission was wrong in using an inaudible recording as proof of the presence of a quorum. It was also contended that there was no evidence before the Commission to show that the proprietors voted on how financing for the capital budget would be obtained. Further, that there was no evidence as to how many persons voted for or abstained from voting on the motion. Generally, there are complaints having to do with the details of the voting process.

[55] In treating with the complaint that the budget was not properly passed because of the want of a quorum at the meeting and the Commission’s findings on

the matter, the Appeals Tribunal examined how the Commission arrived at its conclusion that there was indeed a quorum when the meeting commenced. The Appeals Tribunal in determining that the Commission had not erred in relying on the audio recording presented by the Executive Committee of the strata corporation, took into consideration a number of factors. In the report setting out its decision, it enumerated some of those factors.

(a) the Appellant made no objection to the audio recording being used;

(b) It was not denied that the Appellant directed the 1st Respondent (the Commission) to the relevant parts of the audio recording and identified his voice on the recording.

(c) The uncontroverted evidence of the 1st Respondent that the audio recording was rewound and fast-forwarded to retrieve the relevant excerpts in the presence of the Appellant and his Attorney-at-Law and neither of them objected to its authenticity.

(d) The uncontroverted evidence of the 1st Respondent that the appellant was heard on the audio recording initiating discussions and asking questions in relation to the Treasurer's Report to the General Meeting- the evidence is that the appellant's voice was heard and identified…

(e) The reliance placed by the applicant on the audio recording at the hearing to explain an argument that occurred at the meeting.

[56] Having noted those factors, the Appeals Tribunal concluded that it could not find any reason to disturb the Commission's findings that there was a quorum when the meeting commenced. It is important to note Miss Harris' evidence on this point. It was not her position that a quorum had been present when the resolution was passed, but rather that Mr. Haylett had not proven that a quorum was not present then. She held the view that the onus was on Mr. Haylett to prove that there was not a quorum present at the relevant time. It cannot be said that she was wrong in taking this view. It was the applicant who made the assertion so he was required to prove it on a balance of probabilities.

[57] The Appeals Tribunal also considered that Miss Harris' evidence was that she did not receive any application from Mr. Haylett's attorney-at-Law for the full audio recording. It is to be noted that it was also a complaint of Mr. Haylett before the Commission that the facilitator erred when she denied the complainant and his attorney-at-law's request to hear the purported audio recording in its entirety with the facilitator so that the complainant could verify its accuracy and confirm whether the recording had omissions, additions and/or alterations of the discussion that took place at the AGM. This assertion by him meant that there was a dispute as to what transpired before the Commission. The matter could not have been resolved before the Appeals Tribunal merely by way of submissions. There is no indication before this court that the applicant made any attempt to place evidence before the Appeals Tribunal to properly deal with what was a finding of fact to be made as to whether he or Miss Harris was being truthful in that regard. As indicated elsewhere, on this basis, the Appeals Tribunal was entitled to treat Miss Harris' evidence as uncontroverted and so her evidence in this regard would be treated no differently. It is also noteworthy that the Appeals Tribunal formed the view as indicated in its findings, that Counsel for the appellant (the applicant) did not pursue that point in earnest.

[58] Complaints such as that it was not known how many persons were for or against the motion or who abstained or who had proposed or seconded it, or that there was an absence of the exact wording of the motion were of no significance since the by- laws did not require that such information be provided. By-law 25 provides that at a general meeting, a resolution may be taken by a show of hands and a poll is not necessary. Further, that a declaration by the chairman that a resolution has been carried by a show of hands is sufficient where no poll is demanded. It is true that the minutes do not reveal that the proprietors voted on how the capital budget was to be raised. My perusal of the by-laws did not reveal any stipulation therein to the effect that proprietors were required to vote on the matter.

[59] The finding of the Commission that there was a quorum is a finding of fact. The basis on which findings of facts may be disturbed have been set out in case law. In **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ. 7 the law relating to how a judge's findings of facts should be treated was extensively set out as follows:

It has been stated by this court, in numerous cases, that it will not lightly disturb findings of fact made at first instance by the tribunal charged with that responsibility. Their Lordships in the Privy Council, in ***Industrial Chemical Co (Ja) Ltd v Ellis*** *(1986) 23 JLR 35, an appeal from a decision of this court, approved of that approach. The Board ruled that it is only in cases where the findings of the tribunal are not supported by the evidence, or it is clear that the tribunal did not make use of the benefit of having seen and heard the witnesses, that the appellate court would disturb those findings. Their Lordships re-emphasised that principle in their decision in* ***Beacon Insurance Company Limited v Maharaj Bookstore Limited*** *[2014] UKPC 21. The Board stated, in part, at paragraph 12: ".*

It has often been said that the appeal court must be satisfied that the judge at first instance has gone "plainly wrong". See, for example, Lord Macmillan in ***Thomas v Thomas*** *[[1947] AC 484] at p 491 and Lord Hope of Craighead in* ***Thomson v Kvaerner Govan Ltd*** *2004 SC (HL) 1, paras 16-19. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts****: Piggott Brothers & Co Ltd v Jackson*** *[1992] ICR 85, Lord Donaldson at p 92. Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence:* ***Choo KokBeng v Choo Kok Hoe*** *[1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169." (Emphasis supplied)*

[8] A comprehensive review of the various principles involved in this court's assessment of findings of fact, was made in two separate decisions of this court, which were handed down on 3 November 2005. The cases are ***Clarence Royes v Carlton Campbell and Another*** *SCCA No 133/2002 and* ***Eurtis Morrison v Erald Wiggan and Another*** *SCCA No 56/2000. [9] In the former case, Morrison JA set out the principles that should guide an appellate court in considering findings of fact by the court at first instance. The other members of the panel agreed with the principles which he set out at paragraph 9 of his judgment:*

"...The authorities seem to establish the following principles:

> *1. The approach which an appellate court must adopt when dealing with an appeal where the issues involved findings of fact based on the oral evidence of witnesses is not in doubt. The appeal court cannot interfere unless it can come to the clear conclusion that the first instance judge was "plainly wrong". - See* ***Watt v Thomas*** *(supra),* ***Industrial Chemical Company (Jamaica) Limited*** *(supra);* ***Clifton Carnegie v Ivy Foster*** *SCCA No. 133/98 delivered December 20, 1999 among others.*

2. In Chin v Chin [Privy Council Appeal No. 61/1999 delivered 12 February 2001] para. 14 their Lordships advised that an appellate court, in exercising its function of review, can 'within well recognized parameters, correct factual findings made below. But, where the necessary factual findings have not been made below and the material on which to make these findings is absent, an appellate court ought not, except perhaps with the consent of the parties, itself embark on the fact finding exercise. It should remit the case for a rehearing below.'

3. In an appeal where the issues involve findings of primary facts based mainly on documentary evidence the trial judge will have little if any advantage over the appellate court. Accordingly, the Court of Appeal, which has the power to draw any inference of fact it considers to be justified, may more readily interfere with the finding of the trial judge- See Rule 1. 16(4)

4. Where the issues on appeal involve findings of primary facts based partly on the view the trial judge formed of the oral evidence and partly on an analysis of documents, the approach of the appellate court will depend upon the extent to which the trial judge has an advantage over the appellate court. The greater the advantage of the trial judge the more reluctant the appellate court should be to interfere.

5. Where the trial judge's acceptance of the evidence of A over the contrasted evidence of B is due to inferences from other conclusions reached by the judge rather than from an unfavourable view of B's veracity, an appellate court may examine the grounds of these other conclusions and the inferences drawn from them. If the appellate court is convinced that these inferences are erroneous and that the rejection of B's evidence was due to an error, it may interfere with the trial judge's decision – See Viscount Simon's speech in Watt v Thomas (supra)."

[10] In the latter case, K Harrison JA, with whom the rest of the panel agreed, set out, at page 15, the following guiding principles:

"The principles derived from the [previously decided cases on the point of findings of fact] can therefore be summarized as follows: (a) Where the sole question is one of credibility of the witnesses, an appellate court will only interfere with the judge's findings of fact where the judge has misdirected himself or herself or if the conclusion arrived at by the learned judge is plainly wrong. (b) On the other hand, where the question does not concern one of credibility but rather the proper inferences that ought to have been drawn from the evidence, the appellate court may review that evidence and make the necessary inferences which the trial judge failed to make."

[60] Having regard to the law as outlined, the question arises as to whether there is any basis for the Appeals Tribunal to have disturbed the Commission's findings of

fact. The submission of the applicant's attorney-at-law before the Appeals Tribunal was that the quorum is one half of the persons present at a general meeting who are entitled to vote. This she said was so, based on the provisions of section 10 of the Registration of Strata Titles Act. The respondents pointed out that this was changed based on an amendment to the by-laws. This amendment was made on the 22nd of January 2001, changing the quorum to one quarter of the persons present and entitled to vote. By virtue of section 9 (2) (a) and (b) of the Act the strata corporation is permitted to amend or vary the by-law. The applicant has not argued that the by-laws were not properly amended. It would be reasonable to say that his position that a quorum was not present could perhaps also have been informed by his mistaken view as to what number of persons constituted a quorum.

[61] The position in terms of the basis on which findings of fact should be disturbed is no different in a court setting from proceedings before an administrative tribunal. The functions of the Appeals Tribunal are akin to those of an appellate court. The Appeals Tribunal was required to treat with the Commission's findings of fact in the same manner that an appellate court would be required to. There was nothing on the evidence to suggest that the Commission for example drew the wrong inference from facts found or that it made findings of fact that could not be made on the evidence presented. The Appeals Tribunal was entitled to rely on, and apply normal principles of law during its deliberations. It cannot be said that the Appeals Tribunal was in error on account of having done so.

[62] Further, there appears to be no basis for any argument that irrelevant matters were considered or there was a failure to consider relevant matters in arriving at the decision made on this issue. The Appeals Tribunal in applying legal principles, on the face of it correctly applied them and there is no basis for saying that it was in error.

2. The facilitator erred when she disregarded and disallowed an email from the Chairman in response to that from the Turners

[63] The Appeals Tribunal addressed the complaint that the facilitator erred when she disregarded and disallowed an email that was sent to all owners by the chairman of the AGM in response to an email that was sent to all owners by Nancy and Walter

Turner that clearly evidences that a quorum did not exist at the time the budget was tabled and a resolution sought to adopt same. The Appeals Tribunal determined that there was no merit in that complaint. The information contained in the email from the applicant's perspective, was relevant to the question of whether there was a quorum present at the meeting.

[64] Mr. Haylett's evidence regarding the email is contained in paragraphs 12 and 13 of his proposed affidavit. He said there that one of the proprietors sent an email to the executive committee on June 24, 2019, questioning the legality of the votes at the AGM and requested the recording. He said that in an email in response, Mr Bernard admitted that many persons left the meeting and that the quorum was lost at some point. The emails were exhibited to his affidavit. A reading of the email from Mr Bernard could not properly be construed to mean that he was saying the quorum was lost before the vote was taken. The Commission was entitled to disallow the email on the basis that its contents were irrelevant. The Appeals Tribunal was a fortiori entitled to come to the finding that it did. In any event, Ms Harris' evidence regarding the email was that she had not disregarded it but had regard to its contents.

3. The budget that was presented did not include expenditure already made before the AGM meeting for which the cess is retroactively being imposed.

[65] In arguing before the Appeals Tribunal, the applicant complained that the Commission failed to look into the complaint that certain items placed in the capital budget had already been paid for or were unnecessary. These included resurfacing of the pool deck, the surveillance system, reroofing of gazebo and roofing of a commercial shop by a proprietor and charging the cost to the other proprietors.

[66] The applicant said at paragraph 40 of his affidavit that neither the Commission nor the Appeals Tribunal realized that his complaint was that the cess imposed on the proprietors included expenditure already made by the strata corporation and hence there was no need to spend that money again or ask the proprietors to pay for same as it was already paid from the regular monthly maintenance fees.

[67] There was no ruling with regard to this matter and the Appeals Tribunal noted that no mention was made of that issue because that matter "was not properly before

the Commission". Counsel Miss Cummings made no reference to this issue in her submissions before this court. This court is not privy to the submissions that were made before the Commission and in the absence of submissions from counsel on the matter during the hearing before this court, this court is obliged to consider that counsel must have been aware and accepted that that issue, as the Appeals Tribunal found, was not argued before the Commission.

[68] Notwithstanding the above observations, it was noted that there is a statement in the minutes of the AGM to the effect that some projects had already been started but that they had not yet been paid for.

4. Other complaints regarding the budget

[69] A ground of complaint before the Appeals Tribunal was that the facilitator disregarded the complaint that the cess was not an agenda item for the AGM. Another was that the facilitator disregarded the applicant's submission that the draft budget that was circulated in the treasurer's report hours before the AGM was defective in that it did not mention the proposed cess or outline the calculations and there was no proper income and expenditure statement as required by by-law 23(c) that was presented at the AGM. Therefore, the complainant could not assess whether the budget was credible. There was also the complaint that the budget that was circulated did not include a capital budget. The grounds of complaint were encapsulated in grounds 2 and 5 before the Appeals Tribunal.

[70] The ruling in this regard was that the Commission noted a copy of the 2018/19 operating and capital budgets which the corporation presented as tabled at the AGM and that it noted income and expenditure items in the budget. The facilitator's statement as to her finding in this regard was terse. In examining this ground, the Appeals Tribunal did not only have regard to what Miss Harris said in her affidavit, but stated that it also examined the Commission's audit report on the strata, a copy of the treasurer's report and copies of the draft income and expenditure statement for the relevant period. The Appeals Tribunal also pointed out that the treasurer's report indicates that it was circulated to the owners at 12.27 on December 8, 2018 and that to that report, was attached the draft capital budget for 2018/2019.

[71] There was consequently material on which the Commission could have found that a capital budget was not omitted and for the Appeals Tribunal to have found that the Commission did not disregard evidence that there was no capital budget.

[72] This is not an arguable ground with any reasonable prospect of success because there is no basis on which a court of judicial review can say that the Commission or the Appeals Tribunal did not carry out its respective functions properly. This was a finding of fact that the facilitator was entitled to make and the Appeals Tribunal was also entitled to uphold that finding.

[73] I have chosen not to give detailed consideration to the aspect of the decision by the Appeals Tribunal having to do with the complaint that the budget did not include expenditure already made before the AGM for which the cess was retroactively being imposed as well as the other complaints having to do with the budget because Miss Cummings did not present any arguments before me in relation to these matters. The applicant however raised these matters in his affidavit and in the interest of completeness, I addressed them.

2. A DECLARATION THAT ON THE PROPER INTERPRETATION OF SECTION 5A(2)(b) OF THE REGISTRATION OF STRATA TITLES ACT AND CLAUSE 36 OF THE BY-LAWS OF THE SECOND DEFENDANT IT DOES NOT PROVIDE FOR INTEREST TO BE CHARGED FOR CAPITAL EXPENDITURE IMPOSED ON THE PROPRIETORS IN THE FORM OF A ONE-TIME PAYMENT OR CESS.

[74] This proposed ground requires consideration of whether the strata corporation had jurisdiction in the wider sense. Although it was also argued that the acts of the strata committee were null and void because it had no jurisdiction to act at all, this ground is predicated on the argument that even if the committee did have the jurisdiction to act, it acted illegally in that it misunderstood and wrongly applied the relevant provisions dealing with the payment of interest. The decision of the strata was that interest was payable on outstanding sums due, to include late payment of the cess applied to finance capital projects.

[75] Part of the argument presented before the Appeals Tribunal regarding the charging of interest was that the strata corporation had never before applied interest to the account of the proprietors since its incorporation. The applicant did not directly

raise any question of having a legitimate expectation that such situation would continue and therefore this court sees no need to address any such matter. It was not being contended however, that the rules did not permit for interest to be added.

[76] It was also the applicant's submission before the Appeals Tribunal that the section of the by-laws quoted by the strata corporation (by-law 36) addressed instalments due, thus a cess imposed is not an instalment as contemplated by the by-law, but rather referred to the regular monthly maintenance payment.

[77] The complaint was also that the strata corporation illegally added the cess amounts to the maintenance and charged interest for non-payment and that the charging of interest on the cess was unconscionable and burdensome and that it was in essence, unreasonable to expect the owners to pay all of the above monies within a three months' period.

[78] Before the Commission, by-law 36 was examined and it was determined that instalments of administrative expenses that were outstanding to the corporation for any period in excess of thirty days; whether those expenses are rates, outgoings or assessments were all subject to interest as specified in the corporation's by-laws and that the by-law stated that the instalments 'shall bear interest' and as a consequence, the executive committee was obligated to levy interest charges in respect of arrears.

[79] Section 5(2) and (3) of the Registration of Strata Titles Act provide as follows:

> *(2) The powers of the corporation include the follow- -*
>
> *(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;*
>
> *(3) Subject to the provisions of subsection (4) any contribution levied pursuant to subsection (2) shall be due and payable on the passing of a resolution to that effect and in accordance with the terms of such resolution, and may be recovered as a debt by the corporation in an*

action in any court of competent jurisdiction from the proprietor entitled at the time when such resolution was passed and from the proprietor entitled at the time when such action was instituted, both jointly and severally.

[80] Section 5A (1) and (2) of the Act provide as follows:

> *(1) Where for a period exceeding thirty days, a proprietor fails, neglects or refuses to pay to the corporation, all or any part of the contribution levied pursuant to section 5(2)(b), the corporation shall act in the manner specified in subsection (2).*
>
> *(2) For the purposes of subsection (1), the corporation shall notify in writing the proprietor concerned and his agent, if any, and the mortgagee of the strata lot, if any*
>
> > *(a) of the outstanding amount of the contribution owing by the proprietor and the period for which the contribution is owed, outlined in a related statement of accounts;*
> >
> > *(b) of the amount of interest accruing on the contribution and the period for which interest is payable, outlined in a related statement of accounts;*
> >
> > *(c) that the proprietor is required, within thirty days from the date of the service of the notice, to pay the outstanding contribution and the amount of interest, if any, accruing thereon;*
> >
> > *(d)…*
> >
> > (e)…

[81] By virtue of by-law 1(b), a proprietor is required to pay "all rates, taxes, charges, outgoings and assessments that may be payable in respect of his strata lot".

[82] By-law 36 provides as follows:

> *The executive committee shall not later than one month after the first general meeting of proprietors determine the amount to be raised for administrative expense for the control, management and administration of the common property and the discharge of the obligation of the Corporation. The amount so determined shall be apportioned between the various proprietors in the same proportions as the unit entitlement of each lot contained in the Strata Plan and the proportion so determined in respect of each proprietor shall be paid by annual quarterly monthly or weekly instalments as determined by the*

Executive Committee. Each proprietor shall pay to the Corporation the amount of each instalment due from time to time not later than 7 days from the due date as notified by the executive committee notwithstanding any difference or dispute which may have arisen between the proprietor and the executive committee. Any instalment due from a proprietor which 30 days or more in arrears shall bear interest at the rate of 4% per annum above the prime lending rate at the Corporation's bank which becomes effective on the due date being the first of each month and which interest shall be paid by the proprietor together with the payment of the instalment due.

[83] In his affidavit filed on the 10th of March 2022, the applicant asserted that the $50.2 billion cess is not an administrative expense but capital expense. On behalf of the first respondent, Mr. McBean submitted that there is nothing in by-law 36 which restricts the meaning of the word instalment as used in that by-law to the items referred to in by-law 1(b). None of the parties to the application has addressed in any comprehensive way in submissions, the question of whether the sums levied for capital expenses fall within expenses for the administration, management and control of the strata corporation.

[84] Regarding the cess, Miss Harris addressed her mind to the relevant provisions of the by-laws dealing with payment of administrative expenses and determined that whether the expenses are rates, outgoings or assessments they are all subject to interest. Based on the provisions of by-law 36, it is not stipulated how sums for administrative expenses should be raised. It was open to the strata management committee to determine the amount to be raised and also how it was to be paid as long as the sums were properly apportioned among the proprietors based on unit entitlement. She seemed to have formed the view that the sums in question were assessments. The term 'assessments' is not defined in the act but is clearly a reference to sums adjudged to be paid in respect of the individual strata lot based on by-law 1 and has no bearing to payments touching and concerning the common areas.

[85] In relation to the matter of interest, by law 36 initially provides that any instalment due from a proprietor which is 30 days or more in arrears, shall bear interest at the rate of 20 % per annum. In paragraph 41 of his proposed affidavit, the applicant deposed that his attorney-at-law provided proof that the rate of interest for the strata corporation was reduced from 20% to 4% above the prime lending rate of

the corporation bank yet the first respondent ruled that the interest rate was 20% per annum on late payments. An amendment to the by-laws changed the applicable rate of interest as indicated by the applicant. The strata Committee was wrong in imposing a different rate. If a body acts within its jurisdiction but makes a decision that is wrong, that decision may not necessarily be subject to judicial review. The rate of interest charged is not a part of the substantive ground of complaint and could not in my view properly have formed a basis for judicial review since it was within the limits of the jurisdiction of the strata corporation to charge interest, albeit, at a different rate from that which was imposed.

[86] The sums referred to in sections 5(2), (3) and 5A of the Act as well as by-law 36 must be funds for the purposes of administrative expenses sufficient in the opinion of the corporation for the control, management and administration of the common property, and consequently, any instalment due must be a reference to instalments due in respect of such charges.

[87] In section 5A(2)(b), reference to contribution levied pursuant to 5A(2)(a), is clearly a reference to contributions for the purposes of administrative expenses for the control management and administration of the common property. Section 5A(1) pertains to when a proprietor fails to pay contribution levied pursuant to section 5A (2)(b). In such instance, the corporation must notify the proprietor in writing of the outstanding amount and of the interest accruing on the contribution. I am of the view that having regard to the meaning ascribed to the words control management and administration, sums levied for capital expenditure, in a context where no provision is made elsewhere in the statute for the levying of funds for capital expenditure, must properly be considered as contributions so that it attracts interest if paid outside of the period stipulated for payment.

[88] By virtue of by-law 36, the executive committee is tasked with the responsibility to determine the amount to be raised for administrative expense for the control, management and administration of the common property **and the discharge of the obligation of the Corporation.** Whatever sum that the committee determines is to be paid, is apportioned between the various proprietors in the same proportions as the unit entitlement of each strata lot and the proportion determined in respect of each lot is to be paid whether by annual, quarterly, monthly or weekly instalments as

determined by the executive Committee. Each proprietor is required to pay to the Strata Corporation the amount of each instalment due. It is in the by-laws that the terminology instalment is introduced. Payment by instalments denote periodic payment of a sum in equal parts. In this instance, the Committee stipulated that it was to be a one-time payment.

[89] The word control in the context must mean 'to supervise the running of', management necessarily means 'supervising of something/someone' and administration speaks to control or governance. These words in the context must be given a purposive meaning. It is observed that nowhere else in the Act or by-laws is provision made for raising sums for capital expenses in connection with the common areas. The legislation was in relatively recent years amended because it was recognized that there was an urgent and overwhelming need for proper administration of strata corporations. It must have been envisaged that sums for the management, control and administration of the common areas cover expenditure to be made for the purposes of the repair, upkeep and maintenance of the buildings that form part of the common area, which is the responsibility of the strata corporation. **The expenditure described as capital expenditure by the applicant are clearly expenditure towards such** repair, upkeep and maintenance of the buildings.

[90] By law 36 gives further clarity to the purpose for which the monies are to be used. It introduced the phrase **"and the discharge of the obligation of the Corporation." It is unquestionable that the obligation of the strata corporation includes the repair, maintenance and general upkeep of the common areas, whether such repair, maintenance and upkeep are major or minor. The applicant has failed to demonstrate that the strata corporation acted illegally in applying interest to the sums levied for capital expenditure and consequently that the Tribunal erred in refusing to disturb the findings of the Strata Commission regarding the corporation's actions.**

3. DECLARATION THAT THE EXECUTIVE COMMITTEE OF THE SECOND DEFENDANT ON 8, 2019, AND THEREAFTER HAD NO LOCUS STANDI TO IMPOSE A CESS UPON ITS PROPRIETORS AS THEIR ELECTION WAS RULED TO BE NULL DECEMBER AND VOID AND OF NO EFFECT BY THE STRATA COMMISSION IN A RULING DATED OCTOBER 28, 2021 AND THE SAID CESS WAS UNLAWFULLY IMPOSED ON THE PROPRIETORS AND THE APPLICANT.

[91] This ground also raises a question of jurisdiction, but in the narrow sense. It broaches the question of whether the strata corporation acted unlawfully in the sense that it lacked jurisdiction in the narrow sense, that it had no power to make decisions at all in relation to the strata and in particular, no jurisdiction to impose the cess because the body was never properly constituted.

[92] The applicant in this order, made reference to the letter dated October 2021 and the relevant date as to the conduct of the executive committee as December 8, 2019. The letter is in fact dated October 28, 2020 and the date of the AGM in question was December 8, 2018. I assume he was mistaken in referring to the dates and take it that he meant to have referred to the dates as shown by the documents. In the applicant's affidavit filed on the 25th of January 2022 in support of the application, he stated at paragraph 18 that the Appeals Tribunal refused to allow a letter outlining a subsequent decision of the Commission that made the election of the existing executive committee of the strata corporation null and void. This he said, meant that the decision to impose the cess taken by that committee was also null and void.

[93] This letter was in some measure addressed when dealing with the alleged failure to admit it as fresh evidence. I now examine in full the contents of that letter. The first portion of that letter addressed an Extraordinary General Meeting held on August 1, 2020 and is therefore of no relevance to the present proceedings.

[94] The letter addresses an EGM held on March 3, 2018. Mr. McBean indicated during submissions that it was at this meeting that the executive was elected. I have not been able to find any evidence to that effect. The letter outlined that it was brought to the Commission's attention that the EGM was not valid because it did not start on time. The notice of the meeting it was said, indicated that the meeting should start at 11:00 am but it commenced at 12:32 pm. It was therefore outside of the one-hour limit within which the meeting should have commenced. The Commission

stated that that matter had been brought to its attention more than two years later and the executive committee would have already acted upon their decision(s) and would have been given in this case ostensible authority to act.

[95] The next paragraph of the letter deals with the tenure of the executive committee. The letter stated that the Commission had been advised that a decision was taken at previous general meeting sometime in 2014 for the tenure of the executive committee to be 2 years. The Commission noted that that decision had the effect of varying the by-laws and therefore merely passing a resolution was not enough to give effect to the decision. It was further stated that the resolution passed must be recorded at the Office of Titles in order to vary the by-laws in accordance with section 9 of the Registration of Strata Titles Act. It was further stated that until that was done, the tenure of the executive was one year. It was therefore determined that the current executive was out of time and could no longer act on behalf of the strata corporation.

[96] Assuming the executive was elected at the March 2018 meeting, the Commission determined that as at the date of its letter (October 28, 2020) the committee could no longer act on behalf of the strata corporation. The date of the letter was long after the fact of the AGM at which the decision to impose the cess was taken. If it is correct that that executive committee was elected at the March 2018 meeting, then that decision of the Commission was irrelevant to the status of the executive committee as at the date of the AGM in question. It is therefore incorrect to say that the Commission ruled that the election of the committee was null and void.

[97] In the case of London **Clydeside Estates Ltd v Aberdeen District Council** [1980] 1 WLR 182, Lord Hailsham LC at 189F- 190C said:

> *"When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of noncompliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events. It may be that what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the chain of events. It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another. At one end of this*

spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences upon himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of his own. At the other end of the spectrum the defect in procedure may be so nugatory or trivial that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint.'and 'though language like 'mandatory,' 'directory,' 'void,' 'voidable,' 'nullity' and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition. As I have said, the case does not really arise here, since we are in the presence of total non-compliance with a requirement which I have held to be mandatory. Nevertheless, I do not wish to be understood in the field of administrative law and in the domain where the courts apply a supervisory jurisdiction over the acts of subordinate authority purporting to exercise statutory powers, to encourage the use of rigid legal classifications. The jurisdiction is inherently discretionary and the court is frequently in the presence of differences of degree which merge almost imperceptibly into differences of kind."

[98] There is a basis for a successful argument that even if there were irregularities surrounding the election of the executive committee, one would have to consider that the committee had been in place and had been making decisions on behalf of the strata corporation and that no one had taken issue with the validity of the committee and its actions. This position is supported by the case of **Ellen Williams v Strata Appeals Tribunal et al** [2020] JMSC Civ. 132 where the principles extracted from **London Clydeside Estates Ltd v Aberdeen District Council** were applied. There is also a good argument to be made that the irregularity in the scheme of things was minor and so the defect could be said to be nugatory in the scheme of things and did not have the effect of rendering the election void and consequently could not mean that the decisions of the committee were null and void. This proposed ground cannot be considered to be an arguable ground with a realistic prospect of success.

THE APPLICATION FOR AN INJUNCTION

[99] Batts J in the case of **Lauriston Stewart v Sonada Limited et al** [2020] JMCC Comm 27 very succinctly stated the considerations to bear in mind when

deciding if an interim injunction should be granted. I adopt his formulation. At paragraph 5 he said:

> *I am not to determine factual issues or to conduct a mini-trial. Whether or not an injunction is to be granted, until the trial of this action, will depend on: firstly, the Claimant establishing that there is a serious issue to be tried. Secondly if this is established the court must be satisfied, on one hand, that damages will not be an adequate remedy for the Claimant if the injunction is refused, and he ultimately succeeds at a trial. The court must also be satisfied on the other hand that if the injunction is granted at this stage, but the Defendant ultimately succeeds at trial, the Defendant will be adequately compensated by an award of damages under the Claimant's undertaking as to damages. In considering the respective adequacy of damages the ability, of each party to pay such damages, is relevant. Thirdly, if the question, as to the respective adequacy of damages is evenly balanced the court must go on to consider factors relevant to the overall justice of the case (or the balance of convenience). These factors include all the circumstances of the case and may be many and varied. They include in some situations, the relative strength of each parties' respective case and therefore the likely ultimate result after trial. The authorities, supportive of the above stated test for the grant of interlocutory injunctive relief, are:* ***American Cyanamid Co v Ethicon Ltd*** *[1975] 1 AER 504 and* ***National Commercial Bank Jamaica Ltd. v Olint Corp Ltd.*** *Privy Council Appeal No. 61 of 2008, [2009] 5 LRC 370.*

[100] Even if this court were to equate a serious question to be tried with an arguable ground for judicial having a reasonable prospect of success, and conclude that there is an arguable ground, the applicant would still have to show that damages would not be an adequate remedy if ultimately he were to be successful in establishing that the strata corporation had no authority to impose the cess and that he is therefore entitled to be paid the sum being held in escrow.

[101] As Mr. Neale submitted on behalf of the second respondent, this is an instance where damages would clearly be an adequate remedy. The applicant's only interest in the matter now is his money being held in escrow and would be paid over to him in the event he should succeed in his claim for an order of certiorari quashing the decision of the Appeals Tribunal.

[102] He has no proprietary interest in the strata corporation as he disclosed that he has since sold his strata lot. The second respondent has given its cross

undertaking as to damages and has by evidence demonstrated how it would satisfy that undertaking.

[103] The injunction sought, it is observed, was to restrain the strata corporation from enforcing the collection of the cess until the determination of the matter. The sums belonging to other proprietors have evidently been collected and from all indications utilized. Mr. Haylett's has also expressed concern on behalf of persons who remain proprietors of the strata corporation. The obvious is that those persons are not parties to the proceedings.

[104] Miss Cummings sought to clarify in the end that the applicant's interim remedy would be a stay of proceedings rather than an injunction. This submission was not particularly clear to me as there are no proceedings to be stayed.

[105] In any event, I have determined that Mr. Haylett does not have an arguable ground for judicial review with a realistic prospect of success, hence the point is moot. He is not entitled to a grant of an interim injunction or any interim remedy at all.

[106] In light of my reasoning, the application for extension of time and for leave to apply for judicial review is refused. There will be no order as to costs.

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Pettigrew-Collins, A.
Puisne Judge