



[2020] JMSC Civ 263

REASONS FOR JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015 HCV03867

IN THE MATTER of all that parcel of land being part of Lot numbered A THIRTY ONE on the plan of part of TORBAY, RECLAIMED LANDS AND BOGUE ISLAND now called MONTEGO FREEPORT in the parish of SAINT JAMES being the Strata Lot numbered NINE on the Strata Plan numbered Four Hundred and Forty and Sixty One Undivided 1/100,000th shares of the common property therein and being all of the land comprised in the Certificate of Title registered at Volume 1229 Folio 675, of the Register Book of Titles in the name of Maco Management Inc.

BETWEEN	MACO MANAGEMENT INC.	CLAIMANT
		1ST DEFENDANT
AND	THE PROPRIETOR'S STRATA PLAN 440	
AND	THE STRATA APPEALS TRIBUNAL	2ND DEFENDANT

IN OPEN COURT

Mrs. Denise Kitson, K.C. and Ms. Khian Lamey instructed by Grant, Stewart, Phillips & Co., Attorneys-at-law for the Claimant

Mr. Seyon Hason instructed by Seyon T. Hanson & Co., Attorneys-at-law for the 1st Defendant

**Ms. Carla Thomas, Ms. D. Powell and Mr. Christopher Henry, Attorneys-at-law
for the 2nd Defendant**

Heard: October 26 and 27, 2016 and November 27, 2020

Judicial Review - Whether Strata Corporation in Breach of National Water Commission Act and Office of Utilities Regulation Act - Whether Issuance of Certificate of Power of Sale Properly Exercised - Whether Appeal to Tribunal was within Legislative Timeframe - Whether Decision of Strata Appeals Tribunal Amendable to Judicial Review-Irrational and/or Unreasonable.

GRAHAM-ALLEN, J

[1] This matter came on for hearing on October 26 and 27 2016 and November 27, 2020. At the conclusion of the reception of evidence and the closing submissions by both counsels, I disposed of the matter in it's entirety and delivered a decision in an oral judgment on the November 27, 2020. I sincerely apologize to the parties for the delay and now give my reasons for judgment. My orders are as follows:

- (1) An Order of Certiorari to quash the order and or finding of the Strata Appeals Tribunal that Proprietors Strata Plan 440 ("PSP 440") was not supply or distributing water on or within the premises of PSP 440 to the proprietors and or occupants of PSP 440, contrary to the National Water Commission Act and the Office of Utilities Regulation Act.
- (2) An Order of Certiorari to quash the order and or finding [of] [t]he Strata Appeals Tribunal that it was within the power of Proprietor Strata Plan 440 to amend its By-laws, without informing all the registered proprietors of the strata lots of the Extraordinary General Meeting of PSP 440 purportedly held, at which time the By-laws were amended, such instrument of amendment dated 9th November 2011 being lodged at the National Land Agency (Office of Titles).
- (3) An Order of Certiorari to quash the order and or finding of the Strata Appeals Tribunal that it was within the power of PSP 440 to amend its By-laws to raise money to offset the increase of the imposition of usage and sewerage charges by the NWC and that PSP 440 could "levy"

these charges against the proprietors in accordance with section 5(2)(b) of the Act.

- (4) An Order of Certiorari to quash the order and or finding of the Strata Appeals Tribunal that the payment of water rates by (sic) the NWC was an obligation imposed on PSP 440, for which PSP 440 is empowered to levy a charge on each proprietor of each strata lot in proportion to their unit entitlement.
- (5) An Order of Certiorari to quash the order and or finding of the Strata Appeals Tribunal that the Commission of Strata Corporation had correctly and validly issued a Certificate Pursuant to Exercise of Powers of Sale in respect of Strata Lot numbered 9 to Proprietor Strata Plan 440 registered at Volume 1229 Folio 675 of the Register Book of Titles in the name of Maco Management Inc. ("Maco Management").
- (6) A Declaration that Proprietors Strata Plan 440 unlawfully supplies water for private consumption to the proprietors of PSP 440 without the requisite licence issued pursuant to sections 4 and 4A of the Offices of the Utilities Regulation Act and contrary to section 26 of the National Water Commission Act.
- (7) A Declaration that Maco Management Incorporated is not indebted to PSP 440 for sums claimed by PSP 440 for usage and sewerage charges of NWC and included in the "maintenance charges" in relation to Strata Lot numbered 9 to Proprietor Strata Plan 440 registered at Volume 1229 Folio 675 of the Register Book of Tiles in the name of Maco Management Inc.
- (8) A Declaration that PSP 440 must account to Maco Management Incorporated for all the sums paid by it to PSP 440 after September 2010, in excess of maintenance charges that were properly due and in particular, those attributed to the increased cost of water and sewerage.

- (9) A Declaration that the amendment of its By-laws by PSP 440 without notifying all the registered proprietors of the strata lots, including Maco Management Incorporated, of the Extraordinary General Meeting which was convened for the purpose of amending the By-laws was unlawful and contrary to the rules of natural justice.
- 10) A Declaration that the amendment of the By-laws of PSP 440 which purportedly authorized the PSP 440 to collect charges for water supply from proprietors and to disconnect the water supply of each proprietor for non-payment of the charges is unlawful and accordingly is void.
- 11) A Declaration that the Certificate Pursuant to Exercise of Powers of Sale issued by the Commission of Strata Corporations in respect of Strata Lot numbered 9 to Proprietor Strata Plan 440 registered at Volume 1229 Folio 675 of the Register Book of Titles in the name of Maco Management Incorporated is null and void.
- 12) A Declaration that Maco Management Incorporated lodged its appeal of the decision of the Commission of Strata Corporations to the Strata Appeals Tribunal within the statutory timeframe as mandated in section 5(6), 5A(1) and 5A(2)(c) of [the] Registration (Strata Titles) Act.
- 13) Costs to the Claimant to be taxed if not agreed.
- 14) Reasons to be provided at a later date.

[2] By way of a fixed date claim form,¹ the claimant seeks the following relief:

- 1)** *An Order of Certiorari to quash the order and or finding of the Strata Appeals Tribunal that Proprietor Strata Plan 440 (also hereinafter referred to as "PSP 440") was not supplying or distributing water on or within the premises of PSP 440 to the proprietors and or occupants of*

¹Filed on August 4, 2015

PSP 440, contrary to the National Water Commission Act and the Office of the Utilities Regulation Act.

- 2)** *An Order of Certiorari to quash the order and or finding of the Strata Appeals Tribunal (also hereinafter referred to as “ the SAT”) that it was within the power of PSP 440 to amend its By-laws, without informing all the registered proprietors of the strata lots of the Extraordinary General Meeting of PSP 440 purportedly held, at which time the By-laws were amended, such instrument of amendment dated 9th November 2011 being lodged at the National Land Agency (Office of Titles).*
- 3)** *An Order of Certiorari to quash the order and or finding of the Strata Appeals Tribunal that it was within the power of PSP 440 to amend its By-laws to raise money to offset the increase of the imposition of usage and sewerage charges by the NWC and that PSP 440 could “levy” these charges against the proprietors in accordance with section 5(2) (b) of the Act.*
- 4)** *An Order of Certiorari to quash the order and or finding of the Strata Appeals Tribunal that the payment of water rates by (sic) the NWC was an obligation imposed on PSP 440, for which PSP 440 is empowered to levy a charge on each proprietor of each strata lot in proportion to their unit entitlement.*
- 5)** *An Order of Certiorari to quash the order and or finding of the Strata Appeals Tribunal that the Commission of Strata Corporation had correctly and validly issued a Certificate Pursuant to Exercise of Powers of Sale in respect of Strata Lot numbered 9 to Proprietor Strata Plan 440 registered at Volume 1229 Folio 675 of the Register Book of Titles in the name of Maco Management Inc.*
- 6)** *A declaration that Proprietors Strata Plan 440 unlawfully supplies water for private consumption to the proprietors of PSP 440 without the requisite licence issued pursuant to sections 4 and 4A of the Office of*

Utilities Regulation Act and contrary to section 26 of the National Water Commission Act.

- 7) *A declaration that Maco Management Incorporated is not indebted to PSP 440 for sums claimed by PSP 440 for usage and sewerage charges of NWC and included in the "maintenance charges" in relation to Strata Lot numbered 9 to Proprietor Strata Plan 440 registered at Volume 1229 Folio 675 of the Register Book of Titles in the name of Maco Management Inc.*
- 8) *A declaration that PSP 440 must account to Maco Management Incorporated for all sums paid by it to PSP 440 after September 2010, in excess of maintenance charges that were properly due and in particular, those attributed to the increased cost of water and sewerage.*
- 9) *A declaration that the amendment of its by-laws by PSP 440 without notifying all the registered proprietors of strata lots, including Maco Management Incorporated, of the Extraordinary General Meeting which was convened for the purpose of amending the by-laws was unlawful and contrary to the rules of natural justice.*
- 10) *A declaration that the amendment of the by-laws of PSP 440 which purportedly authorized the PSP 440 to collect charges for water supply from proprietors and to disconnect the water supply of each proprietor for non-payment of the charges is unlawful and accordingly is void.*
- 11) *A declaration that the Certificate pursuant to Exercise of Powers of Sale issued by the Commission of Strata Corporations in respect of Strata Lot numbered 9 to Proprietor Strata Plan 440 registered at Volume 1229 Folio 675 of the Register Book of Titles in the name of Maco Management Incorporated is null and void.*
- 12) *A declaration that Maco Management Incorporated lodged its appeal of the decision of the Commission of Strata Corporations to the Strata*

Appeals Tribunal within the statutory timeframe as mandated in section 5(6), 5A(1) and 5 A (2) (c) of the Registration (Strata Titles) Act.

13) *Any further relief, directions and or Orders as this Honourable Court deems just in the circumstances of the case.*

14) *Costs to the Claimant.*

[3] The second defendants, the Strata Appeals Tribunal (“the SAT”), heard the appeal of the claimant on July 16, 2014, August 15 and October 10, 2014. The SAT found that the appeal filed by the claimant was out of time and that PSP 440 was not in the business of supplying or distributing water and further that PSP 440 had the power to raise funds by levy in the manner in did under section 5(2)(b) of the NWC Act. The tribunal accordingly rendered the following orders:

“1) Appeal dismissed;

2) Costs of the appeal to be the Respondent’s, such costs to be be agreed and if not agreed, to be taxed before the registrar of the Supreme Court of Jamaica.”

BACKGROUND

[4] The claimant, became the registered proprietor, of the Strata Lot numbered 9 on Strata Plan 440 and 61 undivided 1/10,000th shares of the common property on April 12, 2013 and comprised in the Certificate of Titles registered at Volume 1229 Folio 675 of the Register Book of Titles.

[5] Prior to this, Mr. Gordon Brown (the claimant’s representative and also a Director of the company) had been the purchaser in possession since on or about November 2006.

[6] PSP 440, in exercise of its duties under the Registration (Strata Titles) Act, provided inter alia, that amenities and services to the respective strata proprietors be payable by way of a single charge levied against each strata lot as maintenance fees.

[7] In July 2010, in a meeting convened of Strata Proprietors, proprietors were informed of a new sewerage charge from the National Water Commission (hereinafter "the NWC") . A decision was taken at the meeting to contact the NWC with a view to facilitating individual meters so that each proprietor could pay his own rates to the NWC and an increase in the maintenance sum was imposed in the interim. This decision was communicated to all strata proprietors by way of a Memorandum dated September 9, 2010 from the Executive Committee of PSP 440. The effect of the sewerage was that, there was a drastic increase in the NWC bill charged to the strata.

[8] Mr. Brown, the claimant's representative, objected to the increase in maintenance and wrote to the Executive Committee of PSP 440 by later dated September 20, 2010 indicating that it would be impossible to accede to the increase in maintenance charges given the nature and infrequency of occupancy by the claimant and its licensees.

[9] At a subsequent Annual General Meeting of PSP 440 on March 5, 2011, a decision was taken that separate meters would not be pursued and water and sewerage charges would remain part of maintenance. However, by vote taken, a decision was made, that the increased cost of maintenance, sewerage and water rates would be charged to all strata proprietors.

[10] By letters dated July 19, 2011 and August 15, 2011, the Executive Committee of PSP 440 wrote to the claimant's representative and requested outstanding payment for maintenance fees outlined as follows:

"

1. *Maintenance Fees: JA\$66,238.00*

2. *Insurance Cess: US\$994.00*

3. *Front Wall Cess: JA\$45,810.00*

"

[11] The claimant's representative remitted via cheque the outstanding maintenance, insurance payment and the cess imposed for the construction of the front wall and fence. However, there was an objection to the portion of

maintenance which represented an increase in the NWC's charges for sewerage and water.

[12] Following a series of written correspondences, between the parties regarding the disputed and outstanding sums, including written notices demanding payment of all outstanding sums, PSP 440 applied to the Commission of Strata Corporations (hereinafter "the CSC") for a Certificate Pursuant to Exercise of Powers of Sale under s.5(c)(4) of the Registration (Strata Titles) Act, in or around January 2013 in respect of strata lot numbered 9.

[13] The CSC then wrote to the claimant, advising of the receipt of the application for powers of sale, options for payment if the debt was acknowledged and the right of appeal if the sum was disputed.

[14] By instrument dated February 19, 2013 and issued on March 11, 2013, the CSC issued its Certificate Pursuant to Exercise of Powers of Sale on the basis that PSP 440 had exhausted all means of obtaining payments owing to the CSC and notifying the proprietor of the proposed sale of the said strata lot.

[15] On July 23, 2013, the claimant lodged an appeal to the Strata Appeals Tribunal (hereinafter "the SAT") against the decision of the CSC, on the grounds that:

"

(1) Maco is not indebted to the PSP 440 in the sum claimed by PSP 440 in respect of Strata Lot numbered 9.

(2) The amendment of the By Laws of PSP 440 authorising its purported right to force proprietors to pay stated charges for the supply of water and for sewerage and to disconnect for non-payment of the charges is void and in breach of the law.

(3) Maco is not obliged to pay any sums to the Defendant on account of water or sewerage services purportedly supplied to it or its predecessor

in title since the date of the passage of the Office of Utilities Regulation Act.

(4) The charge certificate issued by the Commission of Strata Corporations to PSP 440 in respect of the said strata lot was wrongly issued.

(5) Maco also relies upon facts and grounds set out in the affidavit of Gordon Brown attached to (the) Notice of Appeal. ”

[16] At the conclusion of the hearing the appeal, the SAT, gave a decision in favour of PSP 440 as outlined above, for which the claimant seeks judicial review.

THE ISSUES

[17] (i) Whether PSP 440 was is in breached of the National Water Commission Act and Office of Utilities Regulation Act?

ii) Whether the CSC's issuance of a certificate for exercise of power of sale of Strata Lot 9 was in contravention of the Registration (Strata Titles) Act?

iii) Whether the Appeal lodged by Maco Inc was within the time limit of the Registration (Strata Titles) Act?

iv) Whether the Decision of Strata Appeals Tribunal's is Irrational and/or Unreasonable?

THE EVIDENCE

The Affidavit of Gordon P. Brown

[18] The claimant by way of the affidavit in support² of fixed date claim form, deponed by Mr. Gordon Brown (Director of the company and representative of the claimant), stated he has been the purchaser in possession of the strata lot, numbered 9 since on or about November 2006 and has maintained exclusive

² Filed August 4, 2015

possession since then. Mr. Gordon stated, that the claimant, became the registered proprietors of an estate in fee simple of all that parcel of land being the Strata Lot numbered nine together with sixty-one undivided ten-thousandths of the common property therein of the Strata Plan No. 440 being all that parcel of land registered at Volume 1229 Folios 675, of the Register Book of Titles ("Strata Lot 9") on April 12, 2013. The certified copy of the duplicate certificate of title is marked GPB 6.

[19] Mr. Brown stated that the executive committee of the Strata Corporation by a memorandum dated September 9, 2010, informed all strata lot proprietors that there would be a dramatic increase in the operating costs of the corporation due to the implementation by NWC of sewerage charges for services supplied. This memorandum is marked GPB 7. The memorandum made reference to an Extraordinary General Meeting of the Strata Corporation held on Thursday, July 20, 2010 and further outlined that the decision taken by the majority of members present, that each strata proprietor should apply to the NWC for separate supply of water and sewerage services and have a meter assigned to each strata lot instead of the alternative of increasing maintenance fees. Said memorandum stipulated that a cess would be imposed to cover the cost of installation of water pipes to each strata lot, by the Strata Corporation.

[20] Mr. Brown stated that he wrote a letter dated September 20, 2010, addressed to Ms. Angela Davis, Property Manager, replying to the executive committee and in which he explained that the monthly maintenance of each proprietor should be reduced by a fair measure, on the basis that proprietors would pay only for the water actually supplied to the pools and for watering of the lawns and maintenance of the common areas. This letter is marked GPB 8. He further stated that he suggested that a method for the calculation of the reduction of maintenance fees, based on the average cost of the total water bill to the Strata Corporation for a 3 month period immediately prior to the implementation of the sewerage charge and with a fair adjustment for water to the common areas of the strata plan.

[21] He stated he received a memorandum dated September 22, 2010, marked GPB 9, which was sent by the executive committee, informing all strata lot proprietors that there would be an implementation of a special increase in maintenance fees as an interim measure until individual meters were installed. This

was stated in said memorandum, to be due to the serious impact of the cost of sewerage on the Corporation's cash flow. Mr. Brown stated that he wrote to the executive committee, in response and indicated that it would be impossible to accede to such an increase given the nature and infrequency of occupancy by the claimant and its licensees at strata lot 9. It was further requested, that the executive committee provide financial analysis to justify the charges imposed. That letter, dated September 30, 2010, is marked GPB 11.

[22] Mr. Brown stated in his affidavit, that at the subsequent Annual General Meeting, held on March 5, 2011, the matter of the increased cost facing the Strata Corporation was considered. A copy of the minutes marked GPB 12, outlined at page three of the Annual General Meeting's report that:

"After a lengthy discussion re: the pros and cons of this issue it was decided that we keep water as part of Maintenance as the best way forward in the interest of the complex. Ms. Williams suggested a vote be taken whether to keep the present system. The vote was taken as follows - do we individualize water meters or continue with the existing system as our 'safety net' to collect. Twenty-Four including thirteen proxies were in favour; eight against and two declined. Mr. Dear insisted that individual sub-meters should still be installed to monitor each person's usage..."

[23] He stated that two letters were received from the executive committee, dated July 19, 2011 and August 15, 2011, in which the executive committee brought to the claimant's attention maintenance fees outstanding and further requested payment for the outstanding amounts. These letters are marked GPB 13 and GPB 14, respectively. The letter marked GPB 13 outlines the outstanding amounts to be *"Maintenance Fees JA\$66,238.00, Insurance Cess US\$994.00 and Front Wall Cess JA\$45,810.00."* The letter marked GPB 14, outlines *"that your water supply will be disconnected effective August 22, 2011 for the non-payment of Insurance cess. The total amount outstanding is Nine Hundred and Ninety Four (US\$994.00) US Dollars."*

[24] Mr. Brown stated that he sent a response by letter dated August 17, 2011, to the executive committee and enclosed cheques for the outstanding maintenance, insurance payment and the cess imposed for the construction of the front wall and

fence. In addition, Mr. Brown stated that it was further outlined, in said letter which is marked GPB 15, of the claimant's objection to the collection by the executive committee, for services which the PSP 440 did not have license for sale/resale and which was perpetrated under the threat of disconnection. He further stated that the strata lot was unoccupied as at 2011, due to the fact that the claimant, had commenced extensive renovation works.

[25] He stated that prior to the renovation works, he lived alone in the strata lot but since November 2013, resided there with his wife. He further stated that the water consumption which is being charged to the claimant by the Strata Corporation, is the same as that charged to a couple with 2 children and a housekeeper who occupy a similar unit on the Strata Plan.

[26] The claimant again made payments of the undisputed maintenance due and Mr. Brown, wrote a letter dated October 26, 2011 marked GPB 17, in which he expressed willingness to meet, 'Maco Management's fair obligations for reasonable and legitimate expenses incurred by the Strata Corporation', by way of having the complex and each strata lot, separately metered in accordance with the law.

[27] The executive committee responded in their letter, dated December 6, 2011 and which is marked GPB 18, that guidance and advice of the CSC would be sought in the dispute between both parties pursuant to the Registration (Strata Titles) Act. Mr. Brown further stated that a letter dated May 3, 2012 was sent by the executive committee requesting payment for the period beginning August 2011 up to that time. It is further stated that, payment was sent enclosed in a letter dated June 13, 2012 for the period November 2011 to June 2012.

[28] The CSC sent a letter to the claimant dated October 23, 2012, marked GBP 21, enquiring into the dispute between the claimant and PSP 440 and requesting that both parties attend a hearing scheduled for November 13, 2010 at 10:00am. Mr. Brown stated, that this letter was only received on November 5, 2012, a mere 8 days before the scheduled hearing. He wrote to the CSC indicating his unavailability and indicated that, he, the claimant's representative would be unavailable until around December 5, 2011 and stated that he attached copies of correspondences between Maco Management and the executive committee of PSP 440. He further requested

that a representative of the Offices of the Utilities Regulation (“the OUR”) and the NWC be in attendance. This letter is marked GBP 22.

[29] Mr. Brown states that, Maco Management, received no further comment on the correspondences sent to the CSC nor any indication as to whether the representatives of the OUR and the NWC would be allowed to attend the meeting. A letter was received from the CSC, that the meeting between the parties would be adjourned until December 6, 2012. He stated that during a telephone call, the unavailability of the claimant’s counsel for the scheduled meeting was communicated to the CSC but that afterwards nothing further was communicated by the CSC.

[30] He stated that written notices addressed to the former proprietors of strata lot 9, Steve Lyn, Suzanne Lyn and Mavis Lyn (who owned strata lot 9, prior to Mr. Brown’s ownership), dated December 17, 2012 demanded payment of outstanding maintenance sums within 30 thirty days, were sent by executive chair of PSP 440, Karen Ffrench. He stated that the notices were affixed to the door of the property but which were not seen until several weeks later. Said notices are marked GBP 24. He stated that a letter sent from the CSC dated January 24, 2013, also addressed to the former registered proprietors, indicated that an application of powers of sale was received in respect of sums claimed by PSP 440. Said letter required that the former registered proprietors make payments of at least 50% of the disputed sums by February 18, 2013. The sums claimed is outlined in the amount of “\$267,734.00 for outstanding maintenance charges as at December 1, 2012 and further US\$994.00 for outstanding insurance for as at period April 1, 2012.” This letter is marked GBP 25.

[31] The CSC issued to PSP 440, by instrument dated February 19, 2013 and issued on March 11, 2013, a Certificate Pursuant to Exercise of Powers of Sale. This was on the basis that PSP 440, had exhausted all means of obtaining payments owing to the Corporation and notifying the proprietor of the prosed sale of strata lot 9. This is also stated was affixed to the door of the strata lot. The Certificates are marked GBP 26.

[32] Mr. Brown stated he received a letter dated March 26, 2013, from PSP 440, on April 19, 2013, to which was attached a copy of the Certificate of Power of Sale

obtained by PSP 440. This letter is marked GBP 27. During this time, on April 12, 2013, the claimant, Maco Management became the registered proprietor of the strata lot. Mr. Brown stated that in his affidavit, that all further communications were ceased with PSP 440 and the CSC due to the conduct of each, as they regarded the claimant as lacking legal standing for the purposes of the resolving the dispute.

[33] Mr. Brown stated that he instructed his Attorneys-at-law to forward to PSP 440, the full balance of maintenance sums levied by PSP 440 from 2010 up to the ending of April 2013. This was sent via manager's cheque and/or drafts by letter dated April 23, 2013 in the amount of \$192,393.00 and US\$1,988.00 for maintenance and insurance cess respectively. This letter is marked GBP 28. Mr. Brown stated that, the property manager, refused to accept payment on April 29, 2013 from the bearer for the claimant's Attorneys-at-law and as a result the payments were instead sent by registered mail. Mr. Brown stated he later received letter dated June 4, 2013, from first defendant's attorneys which returned these cheques/drafts sent for payment for sums owed and which outlined that the payments tendered would not settle the account claimed by PSP 440. This letter is marked GBP 37. Mr. Brown stated that no statement of account was submitted on behalf of PSP 440 to support what amounts were said to be outstanding.

[34] He stated as a result of the aforementioned, he conducted searches at the National Land Agency's Office of Titles and discovered the instrument dated July 9, 2011, in which PSP 440 amended the By-Laws of the Strata Corporation, which gave it, inter alia, the right to enter into agreements with the strata proprietors from time to time to provide services and amenities to their strata lots. They purportedly also had the right to withhold such services in the event of non-payment for same and for outstanding maintenance payments or any other breach of the Corporation's By-Laws.

[35] Mr. Brown stated that he conferred with Mr. Steve Lyn and neither he nor any of the other registered proprietors received any notice of an Extraordinary General Meeting by PSP 440 to consider the amendments to its By-Laws in 2011 and so were not in attendance at the meeting. He stated that he became aware of a Daily Observer newspaper advertisement dated May 10, 2013, in which the OUR notified the public that the provision of water or sewerage services by an organization or

person who was not in possession of a licence from the Minister with Portfolio responsibility was prohibited pursuant to Section 4A of the OUR Act and warned of enforcement action in the event of breaches of the OUR Act. The said newspaper tear sheet is marked GBP 30.

[36] He stated that written enquiries were made to the OUR by letter dated May 13, 2013, regarding whether PSP 440 possessed a licence for the provision of sewerage or water services or was the provision of same. This letter marked GBP 31. He stated that, the response from Ambassador Peter Black, Secretary of the OUR, dated May 14, 2013, was that there was no record of PSP 440, having been issued with a licence to provide water or sewerage services and that PSP 440 had no legal authority to enter into such agreement with any Strata Proprietor with respect to the provision of water or sewerage services. This latter is marked GBP 32.

[37] Mr. Brown stated in his affidavit, that against this background, he wrote to the CSC by letter dated May 20, 2013 and marked GBP 33, requesting to know what was their advice or opinion on the matter, in light of the publication by the OUR and also the fact that PSP 440 had no license. He stated that PSP 440, wrote a letter dated May 27, 2013, that it would elevate the matter to its legal committee on June 4, 2013. This letter is marked GBP 34. No further response was received from the CSC until December 3, 2013, when the Attorneys-at-law for the claimant, received two letters. The first letter dated June 12, 2013 and marked GPB 35, was written by the CSC to the OUR and the second letter dated July 18, 2013 and marked GPB 36, was a response from the OUR. Mr. Brown stated that given that the matter was not resolved, an appeal was subsequently filed with the SAT.

The Affidavit of Kevin Williams

[38] As part of the case on behalf of Maco Management, an affidavit was deponed by Kevin A. Williams, Vice President of Legal Affairs at the NWC, was filed. This affidavit is marked GBP 38. Mr. Williams in his affidavit stated that in his capacity as Vice President, he is the principal Legal Officer of the NWC and inter alia, the keeper of records of all legal agreements entered into by and between the NWC and any parties. He further stated that, parties wishing to sell, supply or

distribute or sub-distribute water processed or supplied by the NWC are required to enter into an agreement with the NWC.

[39] In respect of strata corporations, Mr. Williams stated that water supplied by the NWC through a single water main to the strata corporation, are governed by sections 26 and/or section 27 of the NWC Act. The consent of the NWC is required and further pursuant to section 4 of the OUR Act, the strata corporation would be required to obtain a licence from the OUR to supply water and to be engaged in sewerage services. Mr. Williams outlined that supplying water to the proprietors on its premises, was contrary to section 26 and 27 of the NWC Act and is a criminal offence.

[40] Mr. Williams stated that there were no records of an agreement between the NWC and PSP 440 for the provision of the supply of water. Therefore, under section 26 of the NWC Act, PSP 440, cannot legally distribute water without the expressed permission of the NWC. This information was conveyed to the claimant's Attorneys-at-law, via email dated December 18, 2013 in response to their query on the matter of PSP 440 possessing a licence.

The Affidavit of Karen Ffrench

[41] The claimant has also included as part of its case, the affidavit of Karen Ffrench³, and marked GPB 39. In her affidavit, Ms. Ffrench stated that the by-laws of PSP 440 were amended at its Annual General Meeting, held on March 8, 2008. A copy of the minutes were also exhibited. The decision was also taken that proprietors who were frequently late with their maintenance contributions payments, would be liable to have their water supply to their strata lots disconnected. In the minutes, there are no record of the particular resolution passed.

[42] She stated that PSP 440, had sought and obtained the advice of the Commissioner on Strata Corporations on the matter of the inclusion of a contribution to water and sewerage rates as part of maintenance contributions. That advice, contained in a letter from the CSC dated November 23, 2011, she stated was to

³ Deponed on August 20, 2013

effect that there was nothing illegal or irregular in including those items as part of maintenance.

The Affidavit of Angela Davis-Walker

[43] In her affidavit⁴, Mrs. Angela Davis-Walker, Property Manager of the executive committee of PSP 440, in response to the Affidavit of Mr. Gordon Brown in support of Fixed Date Claim Form, sought to address the issue of whether PSP 440 was required to obtain a license from the OUR.

[44] Mrs. Davis-Walker, prior to 2010, sewerage was never charged to PSP 440 and when the charge was implemented by the NWC, that PSP 440 was in continuous communication with the entity, regarding adjustments to reflect sewerage charges to its bill on a monthly basis. She stated that in or about early 2014, representatives of the NWC, visited the Bay Pointe Property and indicated they were on a drive to change all water meters in the Montego Freeport area from analog to metric. They requested an interview, to which she stated that she took part and after answering questions, the new meter was installed on or about June 6, 2014 and the subsequent bill for July 2014, showed an increased of over 100% of the previous bill.

[45] She stated that it was based on this increase, that PSP 440 contacted the NWC regarding the high cost and it was suggested that there may have been a problem with the new meter installed. She stated that the NWC responded by letter dated August 28, 2015, which is marked ADW-1 and which indicated that following an assessment, a final decision would be communicated within 30 days from the date of letter.

[46] Mrs. Davis-Walker, stated that checks on the meter and the pipes by NWC representatives and the conclusion was communicated by letter dated September 26, 2014 from the NWC, that there was nothing wrong with the meter or its

⁴ Filed on June 30, 2016

calibration. This letter is marked ADW-2. She further stated that the NWC was asked to assist in resolving the matter by checking for leaks. The Leak Detection team from NWC determined that the inlet valves were found defective and apart from a few bathroom leaks, the complex had no leaks. The findings of which were sent by the NWC via letter dated December 15, 2015, which is marked ADW-3.

[47] On or about November 10, 2015, PSP 440 wrote to the NWC requesting a rate change based on the fact that PSP 440 was being charged at commercial rate rather than a condominium rate. She stated that the NWC replied by requesting the Certificate of Registration with the Commission of Strata Corporation and same was submitted which lead to a grant of the rate change. Said letters from NWC dated November 19, 2015 and January 13, 2016, respectively are marked ADW-4.

[48] Mrs. Davis-Walker stated, that at no point during the communications with NWC, was PSP 440 ever requested to produce or obtain a license by the NWC or that they were acting in breach of the NWC Act or the OUR Act. She further stated that the NWC, has continued uninterrupted supply to the property through the bulk meter.

CLAIMANT'S SUBMISSIONS

[49] Counsel for the claimant, submitted that PSP 440, was in breach of section 26 of the NWC Act, in the manner of the provision of water utilities as there was no statutory exception permitting a Strata Corporation to provide utility services to a strata lot without a licence or without seeking permission from the relevant authorities, namely the NWC or the OUR.

[50] Charges being levied under section 5(2)(b) must be referable to charges relating to the common property only, and so, the first defendant cannot purport to levy any charge on unit entitlement, based on expenses relative to parts of a strata plan that do not form part of the common property. Therefore, to the extent that the first defendant sought to increase maintenance to cover water and sewerage consumed within each individual unit, it is not a contribution pursuant section 5(2). The statute is clear as to what can be recovered from the proprietor under section 5(2).

[51] Further, these charges were levied after the holding of an Extraordinary General Meeting of the first defendant where the decision was taken, by majority of members to amend the By-Laws of the Corporation, giving the right to the Corporation, inter alia, to enter into agreements with proprietors from time to time to provide services and amenities to their strata lot. In addition, an interim increase in maintenance fees was imposed upon the proprietors to offset the NWC charges and the right to withhold such services in the event of non-payment.

[52] The claimant submitted that at no time, were the former registered proprietors or the claimant, made aware of the Extraordinary General Meeting convened by PSP 440 to consider the amendments which resulted in the registration of the instrument at the National Land Agency's Office of Titles on 9th November 2011. This purported amendment to the By-laws, in the context where PSP 440 lacks a licence, is null, void, of no effect and is unenforceable.

[53] It is submitted that **South Devon Water Board v Gibson** [1955] 2 QB supports the claimant's position that, it is the first defendant, who is the customer of the NWC and who receives water from the NWC through a bulk meter and supplies water to the claimant and other strata lot proprietors, through its network of pipes in the common property over which the first defendant exercises absolute control. The defendant owns and maintains exclusively the network of pipes traversing the common property leading to each strata lot and not the NWC. Further, the absence of NWC sub-meters to individual strata lot proprietors of PSP 440 means that there is no creation of a supply by NWC directly to the individual proprietors.

[54] In the **South Devon Water** case, the inhabitants of a village could freely collect water at public standpipes. The board vested with authority by an order, installed a network of pipes to carry that water to proprietors and sought to levy a water rate charge. The defendant objected and the court was asked to determine whether the board could levy the charge. The court held that the delivery of water to the inhabitants' premises through pipes and mains provided by the board, was a "**supplying**" of water within the meaning of section 46 of the Third Schedule of the Water Act, 1945 and the board was therefore entitled to charge a water rate in respect of that supply. It was further stated by the court that the right of the

inhabitants to free water under section 64 of the Public Health Act, 1875 was limited to taking and carrying away free water from the public standpipes.

[55] It is submitted that the difference with the **South Devon** and the instant case is that the Board was authorized. The first defendant in this case has not been so authorized by the relevant authorities and is therefore not entitled to charge for the service so provided. The issue is one of fact and it is clear that the first defendant was engaged in the activity of supplying and distributing water within the meaning of the Act. The first defendant has no share in the individual strata lot of which the claimant is the registered proprietor. Each unit owner has a share in the common area. Therefore, it is submitted that even if the first defendant can contract with the NWC on behalf of the unit owners, it is only in respect of water that is used in the common property. Consequently, when the first defendant transmits water from the NWC pipeline to property of each individual strata owner, in which the first defendant has no legal or other interest, it is supplying water to the unit owners.

[56] The failure by the first defendant to obtain the licence of the NWC and OUR to supply water is fatal to its asserted right to payment from the Claimant and renders it and its officers liable to the criminal sanction set out in section 28 of the NWC Act. Accordingly, it was submitted that it would be impossible for the claimant to accede to such an increase in maintenance charges given the nature and infrequent occupancy by the claimant and its licensees of the strata lot. Further, that since the first defendant is in breach of the NWC Act as they are not in possession of a license to charge for water at all, the first defendant should therefore not be permitted to continue such a high-handed, arbitrary and unlawful stance. Counsel relies on the case of **South Wales Electricity Plc v Director General of Electricity Supply** [1999] EWHC Ch 200⁵.

[57] In that case, the electricity company also operated as the water supplier and sought a declaration that running an electricity and water prepayment scheme was within the claimant's statutory powers. It was held that the electricity company did not have the power to issue coin operated meters which were capable of metering and

⁵ (22nd October, 1999)

charging for both electricity and water supply since the words allowing the company to install such meters were quite restrictive. The company having only been licensed to recover electricity rates was acting in breach of its license, although convenient to customers.

[58] It is also submitted that the defendant had no authority to levy the increased sum on the claimant as it was not authorised to do so and the claimant has not agreed to same. Accordingly, the first defendant was not entitled to a Certificate for Sale of the claimant's unit when the claimant had then paid all that was due and it was the first defendant which refused to retain same.

[59] Counsel for the claimant contends in respect of the second defendant that the findings of the SAT are unreasonable, irrational and illogical since the tribunal misconstrued section 26 of the NWC Act in not finding that the first defendant was supplying water and sewerage services within the premises to the claimant within the meaning of the Act. It is submitted that, the implications of the decision of the second defendant satisfies the unreasonableness test set out in **Re Duffy** [2007] UKHL 4. Counsel further advances, in respect of the unreasonableness of the second defendant's decision, the case of **HMB Holdings Ltd v Cabinet of Antigua & Barbuda** [2007] UKPC 37, that the decision is irrational.

[60] The tribunal in deciding the appeal, treated the language defining each of the offences conjunctively instead of disjunctively. In doing so, the SAT took the view that section 26 is to be read solely to cover the act of taking water from premises and not, as it ought, the supply of water within the premises, thereby ascribing to section 26, a meaning which can only be achieved by importing words into the section and thus contorting the clear and unambiguous meaning of the words used. By this interpretation, section 26 could only apply to persons who take water from the [strata's] premises (and sell or supply it) outside.

[61] Further, that judicial review is sought of the decision of the second defendant who are empowered by section 15A of the Registration (Strata Titles) Act to hear appeals from aggrieved persons by decision of the Corporation and being a statutory body (a public authority) is amendable to judicial review.

[62] It is submitted that no reasonable tribunal who properly directed itself would have arrived at the conclusion of the second defendant. It is further submitted that the second defendant incorrectly interpreted and applied the statutory provisions of both the NWC Act and the **Registration** (Strata Titles) Act. Counsel relies on the case of **Douglas Campbell v The Strata Appeals Tribunal and PSP No. 3 (Carib Ocho Rios)** [2015] JMSC Civ 46, on the basis that their appeal was filed within the prescribed time and that the second defendant was clearly wrong in ruling that the appeal was out of time.

[63] In the **Campbell**⁶ case, the claimant was the owner of one apartment and the beneficial owner of two other apartments within the strata. After falling into arrears in respect of maintenance fees, he was issued with a delinquency notice, which specifically outlined the sums outstanding to be settled and the possibility of an application to the CSC for power of sale in respect of the apartments. The CSC later issued certificates of sale pursuant to section 5C(4) for the apartments on the basis it was satisfied that the corporation exhausted all means of obtaining payments of the amounts owed and that the claimant was notified of the proposed sale. The claimant then lodged an appeal to the Tribunal under section 15A (2)(b) of the RSTA against the amount of contribution levied by the corporation, which was dismissed by the Tribunal on the basis that the appeal was out of time. The claimant then sought judicial review of the decision of the tribunal. Laing J determined that:

"[22] ...Section 15A is therefore a comprehensive appeals section which provides for appeals from decisions of a strata corporation as well as the Commission and is noticeably devoid of any time limit or deadline for appeals to be brought.

[64] His Lordship further continued:

[27] I find that the Tribunal erred in the construction it applied to the Act and in applying the 3 month time limit to the Claimant's appeal, no such deadline being applicable (for the reasons outlined in this judgment). The Claimant's appeal having been brought within a reasonable time (considering his

⁶ [2015] JMSC Civ 46

explanation for the delay) was entitled to and deserved to have his appeal considered on its merits.”

[65] It is submitted that the facts in the instant case, mirror those in the Campbell case, with the exception that the claimant was in constant dialogue with the first defendant. During such dialogue, the address used for communication with the claimant was at 30-34 Market Street, White Sands Beach P.O., Montego Bay, St. James but the first defendant failed to serve the claimant with a copy of the notice at that address and whom the defendant is aware is the agent of the registered proprietor of record for the purposes of section 5A(2) of the RSTA. Counsel further relies on the case of **Douglas Campbell v The Strata Appeals Tribunal [2016] JMCA App 15**, where it is asserted that Justice Hillary Philips JA, approved the dicta of Laing J.

[66] It is submitted that, the claimant did not become aware of the Certificate until the 19th April 2013 and it was at that time that his duty to act within a reasonable time arose. The claimant lodged an appeal with the Strata Appeals Tribunal on 23rd July 2013, **three (3) months** after becoming aware that a Certificate had been issued and only after all efforts to tender the payments stipulated by section 5A (2)(e) of the RSTA had failed. It is therefore submitted, that having so acted the Claimant acted within a reasonable time as prior to that the claimant was awaiting to hear from the first defendant in respect of a meeting of the parties.

[67] Accordingly, the first defendant ought not to have been enabled by the second defendant to enforce the collection of any sums disguised as maintenance contribution for services it was not licensed to provide.

FIRST DEFENDANT’S SUBMISSIONS

[68] It is submitted that, in so far as PSP 440 accessed water through a bulk meter, it was not in the business of supplying or distributing water, and was neither in breach of the NWC Act or the OUR Act and did not need a license as the claimant contends and is based on a pedantic interpretation of the respective legislations.

Counsel also relies on the case of **South Devon Water Board v Gibson**⁷ and advanced that this Honourable court finds that, the correct interpretation pursuant to section 4(2)(a) of the NWC Act is that, the first defendant's occupants are multiple consumers to which the water is sold in bulk by a bulk meter for which the strata is then billed based on usage.

[69] It is further submitted, that the case of **South Wales Electricity Plc v Director General of Electricity Supply**⁸, being relied upon by the claimant, is distinguished from the instant case, in that the first defendant was not acting outside of the scope of its powers, was not supplying water, was not in breach any licensing requirements as it is not a utility provider, but is rather a customer of water supplied by the NWC through a bulk meter, pursuant to its powers under section 5(2) (a) and (b). Therefore, the first defendant would not require a license, whereas the South Wales case dealt specifically with a utility provider in the form of the local authority.

[70] Counsel for the first defendant, submitted that the claimant's Fixed Date Claim Form and Affidavit in Support, clearly establish that the appeal lodged by the claimant, was an appeal against the decision of the Commission of Strata Corporations to issue a Certificate Pursuant to the Exercise of Powers of Sale. It submitted that in the case of **Strata Appeals Tribunal v Douglas Campbell [2016]** JMCA App 15, the dictum of Phillips JA at paragraphs [50], [51] and [52], is clear that 30 day time limit is applicable to the applicant's appeal of the Commission's decision to issue the Certificate of Sale. Phillips JA outlined:

"[50] In this case, in my opinion, for the purposes of the resolution of the competing issues in the application, it is only necessary to examine section 15A of the Act. It seems clear to me that this section established the Tribunal for the purpose of hearing appeals. It is also pellucid, as found by the learned judge and endorsed by counsel for the respondent in submissions in the application before us, that any person aggrieved by the decision of the corporation, being a proprietor of the strata lot, or by a decision of the

⁷[1955] 2 Q.B. 448

⁸ [1999] EWHC Ch 200

Commission, may appeal to the Tribunal, in the prescribed manner, having paid the prescribed fee. So, on the basis of those clear words, in this case, the respondent, being a proprietor of a strata lot could appeal to the Tribunal, if aggrieved by a decision of the corporation or by a decision of the Commission. There is also no mention of any time limit in that provision, and so on the face of it, it would appear that the respondent would not be restricted to appealing within a 30 day limit but could appeal within a reasonable time.

[51] The question would therefore be whether in the circumstances of this case, it was reasonable to conclude without more, that the respondent's appeal was out of time. The judge found that it was not, and he also gave consideration to the delay and whether the appeal was filed within a reasonable time and he found that it was. It may therefore appear that the Tribunal erred in this regard in which case there would not be a real prospect of success on appeal on this point.

[52] However, there were other issues raised in respect of the interpretation to be accorded to other provisions in the statute, which would, it was argued, impact on the position taken above, with particular regard to whether the decision being appealed must relate to the certificate issued by the Commission and not to the assessment of the contribution being levied by the corporation, in which case the appeal ought to have been filed within 30 days from the issuance of the certificate which the respondent had not done. Whether any of those arguments can succeed will be based on how sections 3B and 5A of the Act are to be construed, and particularly whether section 15A can be overridden by those provisions or whether it can stand alone and be construed as such. That decision will be determinative of the appeal. In my view, there seems little chance of section 15A being interpreted in any way other than I have already indicated and that was therefore one of the bases upon which I thought that the application for stay should be refused."

[71] The appeal in the instant case, it is submitted, was outside of the statutory time limits of thirty (30) days as provided by the Registration (Strata Titles) Act. Counsel submitted further, the claimant, unlike the claimant in the **Campbell** case,

was well aware of the decisions of the corporation and took no steps within a reasonable time to challenge the said decisions before the Tribunal and only took steps to challenge the Certificate of Sale using the historical decisions as 'ground of appeal'. In the alternative view, should this Honourable Court find that the decisions which were challenged by the claimant in his appeal, were decisions of the corporations which ought to be challenged in a reasonable time applying the reasoning of Laing J. The evidence in this regard, contradicts a finding that the claimant challenged the said decisions within a reasonable time. This is on the basis that the challenge was in July 2013, well in excess of two years of the 2010 decisions and in excess of one year of the 2011 decisions.

SECOND DEFENDANT'S SUBMISSIONS

[72] Counsel for the second defendant submitted that under section 4(1) of the RSTA a strata corporation is a body corporate comprising the proprietors of all strata lots which comes into existence on registration of the strata plan. Thus, clothing strata lot proprietors with collective legal personality. Further, the NWC supplies water to the premises through the corporation which is a legal entity which represents the proprietors.

[73] It is therefore submitted that the individual owners or occupiers of the strata lot are to be regarded as owners or persons in possession of the whole or part of the premises supplied with water by the Commission within the meaning of section 26 of the National Water Commission Act. Therefore, there is no supply by PSP 440 to individual proprietors. Further, the tribunal found that the matter of whether an offence was committed by PSP 440 under the NWC Act was a matter for the court. Counsel relies on the test in **Attorney General of Belize and Others v Belize Telecom Limited and Another** [2009] UKPC 10 as applied in **Jamaica Public Service Co Ltd v Meadows and Another** [2015] JMCA Civ 1, to support that the mischief which Parliament intended to address extends to arrangements such as strata developments.

[74] In that case, the appeal concerned the decision of **Sykes J**, who ruled that the license granted to the Jamaica Public Service Company, though valid, the terms of the license which granted the company exclusive rights to transmit electricity was not

valid. The learned judge ruled that the Minister of Government with responsibility for Mining and Energy was authorised to issue a licence to a single operator to supply electricity to consumers across the entire island. However, the Minister was in error when he designated that the licence as being exclusive. In the consolidated appeal brought by the Jamaica Public Service, the company asserted that the learned judge misinterpreted the relevant legislations.

[75] Brooks JA outlined at paragraph 56 in respect of the applicable test :

*“The Privy Council in **Attorney General of Belize and Others v Belize Telecom Ltd and Another** [2009] UKPC 10; [2009] 2 All ER 1127 (referred to in **Thompson v Goblin Hill**) gave guidance as to the approach that the court should take where a document is silent. Their Lordships opined that the court was not authorised to introduce terms that would make the document more fair or reasonable. The aim of the court, the Board said, is to discover what the document actually means.*

Lord Hoffmann, delivering the opinion of the Board, said at paragraph 16:

*“...The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER at 114-115, [1998] 1 WLR 896, 912-913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.”*

[76] Further, payments of water rates to the NWC is an obligation on the corporation and that there was only one metre and the corporation has the responsibility to pay the bill. It was submitted that there was no basis on which the Tribunal could have applied any other meaning to the word “**obligation**” under the Act. Therefore, payment of such rates is an obligation of the corporation within the meaning of section 5(2)(a) and contributions accordingly may be levied on the proprietors in accordance with section 5(2)(b).

[77] It is submitted that in respect of the Order for Sale, that the claimant submitted no evidence to the Tribunal at the time of hearing of the appeal of any defect in the proceedings leading up to the grant of the Order of Sale or lack of due process or any factor that the Tribunal could reasonably consider that would render the grant of the Order of Sale on its face irregular or improper.

[78] Counsel for the second defendant, conceded that the Tribunal erred in its finding that the 30 day time limit stipulated in section 3 of the RSTA applied to the appeal filed by the claimant based on the decision in **Douglas Campbell**⁹. However, it is submitted that this error would not operate to vitiate its decision as the Tribunal went on to consider the substantive grounds raised in the appeal.

[79] It was submitted that in order for a remedy to be granted on the basis of irrationality or *Wednesbury* unreasonableness, the claimant must establish that the decision was so perverse that no reasonable body, properly directing itself to the law to be applied could have reached such a decision per **Halsbury’s Laws England**¹⁰. The claimant has not established this and that the SAT’s decision was one in which a reasonable tribunal could have arrived at based on the law and evidence before it.

THE LAW

The National Water Commission Act 1963 (hereinafter “the NWC Act”)

[80] The material section of the act are as follows:

⁹[2015] JMSC Civ 46

¹⁰ Volume 61 (2010) at paragraph 617

Section 26:

“Any owner of person in possession of the whole or any part of any premises supplied with water by the Commission who sells or supplies to any person or permits any person to take any such water from the premises, except in accordance with a licence from the Commission, shall be guilty of an offence.”

The Office of the Utilities Regulation Act 1995 (hereinafter “the OUR Act”)

[81] The material section of the act are as follows:

Section 4A:

“No organization of body of person shall provide a prescribed utility service without first being issued with a licence granted by the Minister to provide such service.”

[82] The Registration (Strata Titles) Act (hereinafter “the RSTA”)

The material section of the act are as follows:

Section 3B:

“(1) The functions of the Commission shall be to-

- a) monitor, regulate and supervise corporations incorporated by section 4;*
- b) keep or cause to be kept a register of such corporations to be known as “The Register of Strata Corporations”*
- c) facilitate the resolution of disputes, in particular, those between a corporation and a proprietor arising from any matter to which this Act relates;*
- d) consider complaints from proprietors that the amount of contribution levied under section 5(2)(b), is unreasonable or inequitable;*
- e) enforce the by-laws; and*

f) perform such other functions as may be conferred upon it by or under this Act, or as the Minister may by order prescribe”

[83] Section 5A of The RSTA allows a strata corporation to exercise powers of sale in respect of a strata lot for which the owner has failed, neglected or refused to pay maintenance for a period exceeding 30 days:

“5A. (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 purpose 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) that if the outstanding contribution and interest accrued thereon are not paid within the period specified under paragraph (c) or make suitable arrangements to pay that amount, the corporation may sell the strata lot by public auction or by private treaty in accordance with section 5C(4);

(e) that the proprietor, if aggrieved by the amount of contribution stated in the notice, may lodge an appeal if he has paid at least fifty percent of the amount owing or such other amount as may be agreed with the corporation.”

[84] Section 5 (2) (b) and (e) outlines the powers of the corporation and provides as follows:

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

(a)...

(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)...

(d)...

(e) to exercise a power of sale in respect of a strata lot in accordance with the provisions of this Act.”

[85] Section 15A addresses appeals and provides for the establishment of the Strata Appeals Tribunal. It provides as follows:

“15A. (1) There is hereby established for the purposes of hearing appeals, a body to be known as the Strata Appeals Tribunal, and the provisions of the Fourth Schedule shall have effect with regard to the constitution and operation of the Tribunal and otherwise in relation thereto.

(2) Any person aggrieved by a decision of-

a) the corporation, in the case of the aggrieved person being a proprietor of a strata lot; or

b) the commission, may appeal to the Tribunal in the prescribed manner, upon payment of any prescribed fee.

(3) Before determining an appeal, the Tribunal shall give the parties the opportunity to be heard by the Tribunal.

(4) The Tribunal may, on appeal under subsection (2)-

a) *allow the appeal and set aside or vary the decision of the corporation or the Commission, as the case may be; or*

b) *dismiss the appeal and confirm the decision of the corporation of the Commission, as the case may be.*

(5) *The amount in respect of which the Tribunal may order payment under subsection (6) of section 5A, shall not exceed the amount in respect of which a Resident Magistrate's Court has jurisdiction in actions arising from contract.*

(6) *Where an order of the Tribunal is made pursuant to subsection (6) of section 5A, the Tribunal shall forthwith cause the order to be lodged with the Clerk of Courts for the parish in which the land comprising the strata lot to which the order relates is situated."*

[86] Section 9 of the RSTA outlines the provisions for By-laws in respect of strata corporations. Specifically, in respect of amendment of the By-laws, section 9(2)(a) (prior to the 2009 amendment) provides:

"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;"

[87] In **Douglas Campbell v The Strata Appeals Tribunal and PSP No 73 (Carib Ocho Rios)** [2015] JMSC Civ 46, Laing J states in respect of appeals lodged to the tribunal at paragraph [23] and [24] that:

"[23] The sections of the Act which address the right of appeal and which may properly be considered to be appeal gateway sections are sections 3B, 5A and 15A. It is clear that the Act does not establish a rigid, tiered system of appeals and whether intentionally or not, there is an overlap in these gateway

sections to the extent that section 15A provides a right of appeal already conferred by section 3B and 5A.

[24] *It is my opinion and finding that it is a decision pursuant to section 3B to which the thirty-day limit imposed by 3B (6) specifically applies and that it applies exclusively to appeals pursuant to that section. Had the draftsman intended the thirty-day deadline to apply to all appeals this could have been easily stated in section 15A. The Court is not prepared to construe the Act in such a manner as to impose the application of such a provision to all appeals made to the Tribunal.*”

[88] At paragraph 26¹¹, he further stated:

“In absence of any expressed time limits imposed on appeals under sections 5A and 15A the Claimant was entitled to bring its application within a reasonable time. I find that the Claimant did bring his appeal within a reasonable time given the Court’s acceptance of his explanation for the delay as contained in his affidavit, which was that he did not become aware of the Corporations assessment and delinquency notices dated 23 March 2011 until sometime in January 2012.”

[89] The grounds for judicial as explained by Lord Diplock in **Council of Civil Service Unions v Minister of the Civil Services** [1985] AC 374 outlines three heads in relation to decision making powers, namely illegality, irrationality and procedural impropriety:

“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 justifiable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

¹¹ JMSC Civ 46

By 'irrationality' I mean that can now be succinctly referred to as - Wednesbury unreasonableness (Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1984] 1 KB 233). 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...

I have described the third head as - procedural impropriety rather than failure to observe 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 that 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."¹²

DISCUSSION

THE PROVISION OF WATER UTILITIES

[90]

CERTIFICATE OF POWER OF SALE

THE APPEAL TO THE STRATA APPEALS TRIBUNAL

DISPOSITION

¹² [1985] AC 374, 410 F-H