IN THE COURT OF APPEAL OF THE TURKS AND CAICOS ISLANDS

CIVIL APPEALS 5/2022 & No: 7/2022
[FROM ACTION NO CL174/2019]

BETWEEN: **CL AP 05/2022**

THE PROPRIETORS, STRATA PLAN No. 67
Appellant (Original Defendant)

and

HMC HOLDINGS LTD
Respondent (Original Plaintiff)

AND

BETWEEN: **CL AP 07/2022**

HMC HOLDINGS LTD.
Appellant (Original Plaintiff)

and

THE PROPRIETORS, STRATA PLAN NO. 67
Respondent (Original Defendant)

CORAM: **THE HON MR JUSTICE K. NEVILLE ADDERLEY, JA, PRESIDENT(Ag.)**
THE HON MR JUSTICE STANLEY JOHN, JA
THE HON MR JUSTICE SIR IAN WINDER, JA

APPEARANCES: **MR CONRAD GRIFFITHS KC OF GRIFFITHS & PARTNERS FOR THE APPELLANT IN CL AP 05/2022 AND THE RESPONDENT IN CL AP 07/2022**
MR ARIEL MISICK KC OF MISICK & STANBROOK AND DEBORAH JOHN-WOODRUFFE WITH HIM FOR THE APPELLANT IN CL AP 07/2022

HEARING DATE: **23rd AND 24TH JANUARY, 2023**

DELIVERY DATE: **24th March 2023**

JUDGMENT

ADDERLEY, JA

1. This appeal arose out of a decision of Simons J ("the Judge") given on 22nd April, 2022, after a 3-day trial and a comprehensive judgment which gave relief for damages caused by the breach of duty by The Proprietors, Strata Plan No. 67 ("the Strata Corporation") known as the Regency Grand Resort ("the Regent Grand"). The breach was in failing to repair the flat roof of one of their buildings following Hurricane Irma which resulted in damage to the interior of the Appellant's unit from water ingress over a sustained period up to and after the time of trial.

2. There was a separate claim by the unit owner for reimbursement for the cost of the replacement of external windows which The Strata Corporation replaced and billed to the unit owner, but the unit owner was of the view that the windows were common property, which ought to have been replaced at the expense of the Strata Corporation.

The Parties

3. HMC Holdings Ltd. ("HMC") is a Turks and Caicos Islands ("TCI") company and the registered proprietor of the strata lot comprised in parcel No. 60905/206/K51 ("the Property"), located on the 6th floor of the condominium hotel known as the Regent Grand.

4. The Strata Corporation located at Parcel 60905/206 is the statutory body for the Regent Grand established under section 4 of the Strata Titles Ordinance CAP 9.04 ("**STO**"). The **STO** provides for the creation of strata lots, which are owned by

individual proprietors and common property owned by the Strata Corporation on behalf of the proprietors.

5. The Strata Corporation is responsible for the maintenance, repair and management of common property, which includes, among other areas, the roofs of the buildings. It is governed by its by-laws which, under section 20 of the **STO**, bind The Strata Corporation and all proprietors of strata lots. It is, therefore, empowered by the **STO** and its by-laws to impose assessments on proprietors to defray the costs and expenses of discharging its duties and powers, including the repairing and maintenance duties. The legal framework under the **STO** is similar to what, under some other jurisdictions, are called condominiums.

The Regent Grand

6. The Regent Grand is a hotel/condominium resort development located in Grace Bay, Providenciales**.** It consists of four buildings, A, B, C and D and is constructed on Parcel 60905/206. The construction of these buildings was completed in 2007. Building A consists of 53 residential units. The Property known as Unit 603, which is the subject matter of this action, is located directly beneath Unit 702 and adjacent immediately to the WEST of Unit 602 on the sixth floor of the seven-floor Building A.

7. The proprietors acquired their property primarily for investment to earn rental income. Many of the proprietors in the Regent Grand rented their units as short-term holiday rentals. Some of them rented them using independent management companies and others rented without going through the agency of a management company.

8. By resolution duly passed on 6 June 2021 at the Annual General Meeting of The Strata Corporation the by-laws were amended to empower The Strata Corporation to appoint a Designated Rental Manager ("**DRM**") with power to undertake a wide variety of

services with the exclusive right to provide management of residential strata lots for short term holiday rental use.

9. The operation of any rental, trade or business at the Regent Grand in relation to any short-term holiday rentals, other than through the **DRM** upon the terms and conditions prescribed by Executive Committee, was prohibited. "Short-term holiday rental" was defined to mean any rental on which tax is imposed under the Hotel, Restaurant and Tourism (Taxation) Ordinance 2019 and any Ordinance amending or replacing that Ordinance.

10. On 22 April 2018 at the Strata Corporation's AGM, White Sands on Grace Bay Ltd. was appointed the **DRM**. On 27th July, 2018, the Executive Council of the Strata Corporation promulgated the Direct Renting Practices Rules, which imposed penalties on owners who rented their units outside the **DRM**. In the case of units of 5 bedrooms or more, which applies to the instant case, the penalty was US$550.00 per day for each day so rented.

THE CLAIM AND COUNTERCLAIM

11. By the proceedings below commencing on 4th December, 2019, HMC asserted two causes of action:

    (1) breach of statutory duty by the Strata Corporation, in neglecting to repair the flat roof of Building A, which resulted in damage to the interior of the Property from water ingress over a sustained period from 2017, following Hurricane Irma.

    (2) restitution by way of reimbursement for the cost of replacing window damaged by the hurricane, which the Plaintiff claims was common

property and so ought to have been replaced by The Strata Corporation at its own expense.

12. The Strata Corporation initially denied breach of duty but later admitted liability, and at trial contested only the heads and quantum of damages. On the second claim, The Strata Corporation denied that the windows were common property and asserted that HMC was estopped from denying that they were not part of the Property.

13. The Strata Corporation counterclaimed for rectification of the strata plan if it was found that the windows were common property.

THE APPEALS

14. There are two appeals before the court. The first appeal is Civil Appeal 5/2022 by the Strata Corporation, the Defendant in the Original Action and Plaintiff by Counterclaim. In this appeal, The Strata Corporation appeals against the decisions of the judge whereby he:

(a) ordered an assessment of damages instead of fixing the amount in damages to be awarded to HMC, the Respondent and the Plaintiff in the Original Action. The Strata Corporation claims that the maximum amount to which HMC was entitled was US$50,000.00 which, according to its by-laws, was the maximum amount The Strata Corporation could pay a unit owner without a resolution of their Executive Committee.

(b) awarded damages for loss of amenity to be assessed.

(c) awarded pre-judgment interest.

(d) awarded costs to HMC, except for those heads of loss relating to loss of rental income, the claim for injunctive relief and the claim for restitution of replacement costs of external windows.

15. The second appeal is Civil Appeal 7/2022 by HMC against the decisions of the Judge refusing:

(a) to award damages for loss of rental income because such claim ran afoul of the illegality principle.

(b) to order the reimbursement costs of windows (US$46,131.75), which were paid by The Strata Corporation but billed to HMC, which HMC claimed to be common property and the responsibility of The Strata Corporation.

THE FACTS

Water ingression and failure to repair

16. The judge helpfully summarized the evidence and I repeat his narrative here: Mrs. Monique King and her husband Robert King are the beneficial owners of HMC; and Mrs. King gave evidence on its behalf. In her witness statement she gave details of the time (over a year) and money (over $1 million) spent on home improvement works at the Property which were completed in early 2013. The Property was then placed on the short-term rental market, which was the primary purpose of its purchase.

17. She related that over the years HMC developed a loyal customer base of returnee visitors and between 2014 to 2021 produced net annual averaged rent

of $147,307.00 net of taxes, fees, penalties (after their implementation in July 2018), and other levies annually. Income was zero in 2020.

18. The damages that HMC claims arose from the Corporation's failure to repair the roof, and while those repairs were being carried out, it was unable to rent the Property and receive any rental income. Also due to the considerable damage caused by water ingression the consequent cost of repairs was high.

19. Unit 702 also sits directly above the Property. Kim Seabrook (along with her husband) is the beneficial owner of Regent Penthouse Ltd. which is the registered proprietor of Unit 702. Mrs. Seabrook is also a member of the Executive Committee of the Corporation and gave evidence on its behalf. She said that at least some of the water ingress into the Property came from a defective planter on the outside rear terrace of their unit.

20. The Judge noted that the water from the roof was continuing during his site visit on the first day of the trial.

FINDINGS OF THE JUDGE

21. The Judge accepted the evidence of Mrs. Seabrook regarding water ingress via the planter.

22. The Judge found that there could be only two possible sources of water ingress into the Property, namely the flat roof that partially covers the Property, and/or Unit 702 which is on the seventh floor, directly above it. This was challenged by the Respondent. He showed the Court pictures which he claimed evidenced water damage on the opposite side of the room in a dining room area.

23. The Judge reasoned that based upon the evidence of Mrs. King, on the experts' comments regarding the unpredictability of water flow within concealed spaces, on the drawings that were produced at the trial, and from the Court's own visit to the Property and its surroundings, it seemed reasonable to conclude:

a. given the relative size and location of the planter *vis-a-vis* the flat roof; and

b. given that the problem of water ingress continued even after the planter had been repaired; and

c. given that the locations of water ingress into the Property and the damage caused extends beyond the entry hallway that is directly beneath the planter,

that most of the water ingress would have come via the flat roof, which is common property for which the Corporation is responsible and in respect of which it admits breach of duty to repair. With these considerations in mind, the Judge found the Corporation liable for 90% of the repair costs claimed by HMC in respect of the damage sustained by the Property from water ingress. The Judge ruled that such damages were to be assessed, if not agreed between the parties.

THE SEVEN ISSUES

24. Counsel helpfully submitted to us seven agreed issues for the Court's determination. They could be categorized as follows: the Sources of the Leak

Issue; the Assessment Issue; the Amenity Issue; the Interest Issue; the Illegality Issue; the Windows Issue; and the Costs Issue.

25. I will now discuss the seven issues *seriatim*.

ISSUE 1: THE SOURCES OF THE LEAK ISSUE:
WHETHER THE JUDGE WAS WRONG TO HOLD THAT THE LEVEL OF DAMAGES CAUSED BY THE WATER INGRESS FROM THE FLAT ROOFS AND THEREFORE ATTRIBUTED TO THE STRATA CORPORATION EQUATED TO 90% OF THE DAMAGE SUFFERED BY HMC.

26. The Judge concluded at paragraph 8 of his judgment:

> "*With these considerations in mind, the Court finds the Corporation liable for 90% of the repair costs claimed by HMC in respect of the damage sustained by the Property from water ingress; such damages are to be assessed if not agreed between the parties*."

27. Counsel for HMC points to the Judge's site visit and the detailed reasons for reaching that decision. The Respondent argued that the Judge did not mention the evidence that emerged from the photographs which he put in evidence showing that some water damage was done by HMC's leaking terrace window, which was in the living room on the opposite (Western) side of the room. This plan of the room was shown to the Court and he also pointed out what he said was termite infestation caused by the leak.

28. It is very difficult on the evidence shown to the Court for a court to reach the conclusion that no reasonable Judge could conclude, as the Judge did in light of a site visit by him, from which he made observations supported by detailed reasons. The fact that he did not mention what appeared in the photograph shown to us does not mean that he did not consider it. The authorities have repeatedly

warned appellate courts to exercise care in overturning findings of fact of a Judge at first instance. One such recent authority is **Kwok v Yao [2022] UKPC 52** where Dame Geraldine Andrews (with whom Lord Briggs, Lord Kitchen, Lady Rose and Lord Richards agreed) repeated the time-honoured admonition at paragraph 40:

> ‘‘40: An appellate court should not interfere with a Judge’s findings of primary fact unless they are “plainly wrong”, which in this context connotes that either there was no evidence to support the finding, or the finding was based on a misunderstanding of the evidence, or the finding was one that no reasonable judge could have reached (or, as it is sometimes put, “outside the bounds within which reasonable disagreement is possible”).”

29. Furthermore, if the Court were to reject the 90/10 split, on what basis, except an arbitrary one, could the Court replace the percentages, not having had the advantage of a site visit like the Judge?

30. None of the justifications for an appellate Court overturning a judge’s decision can be applied here. For the above reasons the court accepts the finding of fact made by the Judge in this case with the result that the Respondent’s Notice in respect of issue 1 is dismissed.

ISSUE 2: THE ASSESSMENT ISSUE:
WHETHER THE JUDGE WAS WRONG TO DEFER ASSESSMENT OF THE SUM RECOVERABLE BY HMC AS DAMAGES, AND IF SO, WHETHER THE COURT OF APPEAL SHOULD NOW FIX THAT SUM IN AN AMOUNT NOT EXCEEDING US$50,000.00

31. The HMC states that the Judge was wrong to delay assessment of damages. The Strata Corporation argues that the Judge did not in fact delay assessment and, by the wording of his judgment, allowed an assessment to be made. At paragraph 85.3 of the Judgment the Judge stated:

> "85.3 I grant the claim for damages for breach of the duty to repair, negligence and nuisance by the Corporation. This claim was conceded by the Corporation, and I find it proved. Recovery shall encompass all items listed under "Particulars of Special Damages" at paragraph 11 of the Amended Statement of Claim except items (b) Loss of rental income, and (d) Cost of replacement windows. These I have disallowed on principle following full argument and for the reasons given. HMC is also awarded its loss of amenity claim to be assessed if the parties are unable to agree. This is allowed under the Further or other Relief prayer since it is pleaded but not specifically prayed."

32. We agree with the Strata Corporation that the form of this Order allows an assessment to be made.

33. In the Amended Statement of Claim the following particulars of Special damages were set out:

$25,000.00	- Loss of rental income between 17 and 29 June 2019
$49,285.86	- Cost of permanent repairs
$46,131.75	- Cost of replacement windows

34. Subtracting the items disallowed by the Judge, namely loss of rental income ($25,000) and cost of replacement windows ($49 285.86); left $89,576.77. 90% of that sum, as ordered by the Judge, is $74,313.93. Before us The Strata Corporation drew attention to the Schedule of Damages available at trial and argued that other amounts, which they say were not special damages occasioned by the leaking roof, ought to have been deducted. However, there is no indication that this was accepted by the Judge.

35. Based on the adjustments above indicated by the Judge we order the payment by The Strata Corporation to HMC of $74,313.93 in special damages.

ISSUE 3: THE AMENITY ISSUE:

WHETHER THE JUDGE WAS WRONG TO HOLD THAT HMC WAS ENTITLED TO A SUM IN RESPECT OF DAMAGES FOR LOSS OF AMENITY

36. The judge held at [47] of his judgment that paragraph 11(g) of the Amended Statement of Claim was a sufficient plea for loss of amenity by HMC and sufficient to support the claim for relief in paragraph 12(3) which claimed "damages for breach of duty, negligence, and nuisance". In reviewing the pleading in paragraph 11(g) it is, in fact, on behalf of the Kings as follows:

> "**11(g)**: The beneficial owners of the Plaintiff have since 2001 stayed at the Property during the thanksgiving and Christmas holidays annually. During their stays during those periods in 2019, as a result of the poor state and condition of the Property **the beneficial owners** suffered significant loss of amenity, including but not limited to, continuous inconvenience and severe diminishment of their comfort and enjoyment of the Property. (Emphasis added)

37. The judge stated at paragraph 46 of his judgment that:

> *''*Clearly an inanimate entity such as HMC cannot suffer a loss of essentially animate sentiments**.**"

38. Yet he awarded the claim for the loss of Amenity to HMC as suffered by the Kings as "the *alter ego* of HMC" and concluded:

> "…the loss of amenity is to be imputed to the Kings and I hold that it is, in principle, recoverable*. ''*

39. On HMC's claim for loss of amenity The Strata Corporation argued that companies cannot suffer a loss of amenity which is part of non-pecuniary loss including "pain and suffering and loss of amenity" as defined in McGregor on Damages 21st ED at chapter 5 referred to by Lord Judge LJ at [48] of **Simmons v Castle** [2013] 1 All ER.

40. Also, he argued, to attribute loss of amenity to the Kings, who are the beneficial owners of HMC, is an impermissible attempt to pierce the corporate veil contrary

to the principle reiterated by **Prest v Petrodel** [2013] UKSC 34' He said the Judge misconstrued **Prest** when he made the following obviously incorrect statement at paragraph 45:

> ''I do not believe that **Prest** offers Mr. Griffiths QC the support he needs to sustain his argument, except in the round-about and indirect sense that the corporate veil was pierced at the instance of a wife prosecuting ancillary relief proceedings against a devious husband.'' (Underline added)

Mr. Griffiths KC pointed out that in **Prest** the corporate veil was not in fact pierced and that the wife received benefits, not by virtue of the corporate veil being pierced, but based on the finding that the properties were being held as nominee for the husband. In fact, he observed that **Prest** severely narrowed the grounds on which the corporate veil could be pierced.

41. HMC nevertheless argued that loss of amenity in the case of a company was an interference with a property right and the loss of amenity was represented by actual rent for the periods when the Property would have been rented but was not, because of the lack of repair due to the water damage, or the notional market rent for the periods during which the Property would have been rented but for the fact that the property was in a state of disrepair.

42. He relied by analogy on cases relating to claims by lessees from lessors for loss of comfort, inconvenience and distress resulting from failure to repair premises and argued that those experiences by the Kings, as beneficial owners of HMC, were only symptoms of the loss of amenity as a property right which HMC could claim. He relied on Briggs LJ's statement in **Moorjani v Durban Estate Limited [2015] EWCA Civ 1252** where he said at [32]:

"Distress and inconvenience caused by disrepair are not free-standing heads of claim, but are symptomatic of interference with the lessee's enjoyment of that asset. If the lessor's breach of covenant has the effect of depriving the lessee of that enjoyment, wholly or partially, for a significant period, a notional judgment of the resulting reduction in rental value is likely to be the most appropriate starting point for assessment of damages. Generally, this reduction will not be capable of precise estimation; as Morritt LJ said in *Wallace,* it will be a matter for the judgment for the court, rather than the expert valuation evidence."

43. The above passage was approved by the Court of Appeal in **Khan v Mahmood [2022] EWCA Civ 791 at [55].**

44. Reference was also made to **Earle v Chamalamboos [2006] EWCA Civ 1090; per** Carnwath **at [31], Wallace v Manchester City Council [1998] 30 HLR 111, per** *Morritt LJ* at [at 42].

45. ***Moorjani*** was relied on by HMC for the proposition that:

(a) loss of amenity derived from the impairment of the amenity of its proprietary interest, and

(b) that loss can be measured by loss of rental income.

He noted that the Judge at paragraph 11 of the judgement accepted the evidence of Mrs. King as to rents received, which averaged US$147,307.00 annually on a net basis between 2014 and 2021.

46. All of the authorities cited by the Appellants, including **Moorjani,** applied to lessees who were natural persons. In our judgment, the Judge was right when he stated at paragraph 46 of his judgment that an inanimate entity, such as HMC, cannot suffer a loss of essentially animate sentiments. In this case, the Kings are

not the owners or lessees of the Property in relation to The Strata Corporation. HMC is. So while HMC is entitled to make a claim for loss of rent or notional rent, in our judgment it is could not make a claim for loss of amenity.

47. In the court below Mr. Misick had argued that the loss of capital value of the premises could be used to value the loss of amenity, however, he graciously conceded in his skeleton arguments before us that "HMC now accepts that, on the authority of ***Earle v Chamalamboos***, capital value is not an appropriate yardstick because of the temporary nature of the loss, disapproving of ***Callabar*** in this respect".

48. Accepting Mr. Misick's KC submissions, the Judge was therefore led into error in making the following ruling at [49] of his judgment:

> *''*49. I note however that at paragraph 26 of his written submissions, Mr. Misick offers that HMC intends to obtain expert evidence to enable the Court to assess HMC's loss of amenity by reference to the damage to the capital value of the Property by reason of its being in a state of disrepair. Unless both counsel agree otherwise, it would therefore be the Court's intention to defer the assessment of damages for loss of amenity until such expert evidence has been produced, received, and considered and the Court can hear the submissions of both parties as to its import.*''*

49. Furthermore, even if HMC could claim loss of amenity, according to **Moorjani** an appraisal would have been a matter for a judge at trial without the need for an expert valuation. Therefore, the proper course would have been for the judge to have appraised the value of the loss of amenity at the trial. This, the judge obviously did not do.

50. The judge also misconstrued **Prest** and did not apply the fundamental principle in **Salomon v Salomon** [1896] **UKHL 1** that a company and its beneficial owner have separate juristic personalities. The concept of "*alter ego*" relied on by the judge is normally in the context of agency or of "the directing mind" of the company which was not raised in this case.

51. Accordingly, in my judgment HMC could not claim loss of amenity and even if it could, on the authorities provided, the correct procedure for assessment was not applied.

ISSUE 4: THE INTEREST ISSUE:
WHETHER THE JUDGE MISDIRECTED HIMSELF IN AWARDING INTEREST TO HMC

52. The Judge made the following order at paragraph 85.6 of the judgment:

> *''*I allow interest pursuant to the Civil Procedure Ordinance on the damages for breach of duty, negligence, and nuisance that I have awarded HMC against the Corporation."

53. He did not give a reason for awarding interest in that form. The judgment did not address what the rate should be, for what period, or fix an amount on which interest should be paid. Mr. Griffiths KC argued that simply to award 'interest' without more demonstrates an error in making any such award.

54. He further argued that no interest, except the statutory interest, should have been allowed because pre-judgment interest had not been pleaded. Order 18 rule 8(4) of the TCI Civil Rules 2000 mandates pleading as follows:

> "(4) A party must plead specifically any claim for interest however it arises, and all facts relied upon in support of the claim."

55. Instead of pleading s19(2) all HMC pleaded in the prayer for relief in the amended Statement of Claim was:

"(4) Interest in equity or pursuant to the Civil Procedure Ordinance."

56. Mr. Griffiths KC drew attention to Section 19(2) of the Civil Procedure Ordinance ("CPO") which gives the court jurisdiction to award such interest. It provides:

> "(2) Subject to rules of court, in proceedings before the Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the Court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and—
>
> *(a)* in the case of any sum paid before judgment, the date of the payment; and
>
> *(b)* in the case of the sum for which judgment is given, the date of the judgment.

57. Section 19(2) of the CPO is verbatim section 37A of The Senior Courts Act 1961 of England. Both are stated to be subject to rules of Court.

58. The commentary in the English White Book states that the pleading should be both in the body of the Statement of Claim as well as in the prayer. However, Mr. Misick KC pointed out that in **McDonalds Hamburgers Ltd v Burger King (UK) Ltd** [1987] the pleading was considered by the English Court of Appeal to comply with the rule even though it was pleaded only in the prayer. However, it is noted that in **McDonalds** the claim for interest was specifically pleaded by reference to the equivalent of section s 19(2) of the CPO as follows:

"for the payment of all sums found due with interest thereon pursuant to section 35A of the Supreme Court Act 1981".

59. According to The White Book the rules have been interpreted to mean that if the claim for interest is being made under s35A (the equivalent of our s19(2) of the CPO the pleading should specifically so state and it is not sufficient to state the claim as being under the statute (as was done in this case).

60. Mr. Misick KC agreed with Mr. Griffiths KC that a claim for interest must be specifically pleaded but stated that although section 19(2) of the CPO is not expressed in the claim for relief, it is the only provision under which pre-judgment interest may be awarded under the CPO.

61. He applied for leave to re-amend his Amended Statement of Claim to add a reference to Rule 19(2) to which Mr. Griffiths KC objected because no formal application to amend having been made he was prejudiced because there was no draft pleading on which to make submissions, in particular there was no pleading of facts to show what quantum (if any) of loss HMC suffered by not having the rent during the time the unit was not available for rental.

62. While the court has a discretion to grant leave to amend at any time, no evidence was put before the court on which it could properly exercise its discretion to do so and therefore, I disallowed the amendment.

63. For the reasons discussed above I allow the appeal in relation to The Interest Issue.

ISSUE 5: THE ILLEGALITY ISSUE:
WHETHER THE JUDGE WAS RIGHT IN HOLDING THAT HMC WAS PRECLUDED FROM RECOVERING LOSS OF RENTAL INCOME BECAUSE OF THE ILLEGALITY PRINCIPLE

64. HMC challenged the Judge's decision to deny it rental income as a head of loss, because of his finding that HMC engaged in illegality by renting the Property without using the **DRM** contrary to a by-law which was duly passed and notified to it in July 2018.

65. The illegality defence operates to deny a Plaintiff a claim, which would otherwise be established if the claim did not involve the Plaintiff's own illegal conduct.

66. There was a fundamental difference between Mr. Misick KC and Mr. Griffiths KC on the interpretation of the illegality principle.

67. According to Mr. Misick, except for torts involving dishonesty or corruption, breaches of civil law such as breach of contract, or the commission of a tort does not constitute illegality in this context. He relied on passages from the judgment of *Lord Sumption* in **Les Laboratories [2014] UKSC 55***:*

> *"25. The ex turpi causa principle is concerned with claims founded on acts which are contrary to the public law of the state and engage the public interest. The paradigm case is, as I have said, a criminal act. In addition, it is concerned with a limited category of acts which, while not necessarily criminal, can conveniently be described as "quasi-criminal" because they engage the public interest in the same way. Leaving aside the rather special case of contracts prohibited by law, which can give rise to no enforceable rights, this additional category of non-criminal acts giving rise to the defence includes cases of dishonesty or corruption, which have always been regarded as engaging the public interest even in the context of purely civil disputes; some anomalous categories of misconduct, such as prostitution, which without itself being criminal are contrary to public policy and involve criminal liability on the part of secondary parties; and the infringement of statutory rules enacted for the*

protection of the public interest and attracting civil sanctions of a penal character, such as the competition law considered by Flaux J in Safeway Stores Ltd v Twigger [2010] Bus LR 974."…

"28 Apart from these decisions, the researches of counsel have uncovered no cases in the long and much-litigated history of the illegality defence, in which it has been applied to acts which are neither criminal nor quasi-criminal but merely tortious or in breach of contract. In my opinion the question what constitutes "turpitude" for the purpose of the defence depends on the legal character of the acts relied on. It means criminal acts, and what I have called quasi-criminal acts. This is because only acts in these categories engage the public interest which is the foundation of the illegality defence. Torts (other than those of which dishonesty is an essential element), breaches of contract, statutory and other civil wrongs, offend against interests which are essentially private, not public. There is no reason in such a case for the law to withhold its ordinary remedies. The public interest is sufficiently served by the availability of a system of corrective justice to regulate their consequences as between the parties affected."

68. In **Patel v Mirza** [2016] 2016 UKSC 42 Lord Toulson expressed his view of the law at [99] :

"***"***Looking behind the maxims, there are two broad discernible policy reasons for the common law doctrine of illegality as a defence to a civil claim. One is that a person should not be allowed to profit from his own wrongdoing. The other, linked consideration is that the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand*."*

And at paragraph 108, he said:

> *"*The broad principle is not in doubt that the public interest requires that the civil courts should not undermine the effectiveness of the criminal law.*"*

69. At 231 Lord Sumption stated:

> "In practice the illegality principle has almost invariably been raised as a defence to a civil claim based on a breach of the criminal law. In **Les Laboratoires Servier v Apotex Inc** [2015] 1 All ER 671, [2015] AC 430 this court held that with immaterial exceptions the defence is available only in such cases…*"*

70. Mr. Griffiths KC interpreted the authorities in a different way. He submitted that the essential feature of the illegality doctrine was highlighted in **Patel v Mirza** [2016] UKSC 42 by Lord Toulson at [120] who said:

> *Summary and disposal*
>
> 120. The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather

by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate." (underline added)

71. He also relied on recent cases where The United Kingdom Supreme Court further considered this issue in **Stoffel & Co v Grondona** *[2020] UKSC 42 and* **Henderson v Dorset Healthcare University NHS Foundation Trust** *[2020] UKSC 43.* Lord Lloyd-Jones said in Stoffel at [26] and [44]:

> "26. …The essential question is whether to allow the claim would damage the integrity of the legal system….
>
> *PROFITING FROM ONE'S OWN WRONGDOING…*
>
> [44] For one branch of the law to enable a person to profit from behaviour which another branch of the law treats as criminal **or otherwise unlawful** would tend to produce inconsistency and disharmony in the law and so cause damage to the integrity of the legal system." *(Emphasis added)*

72. Mr. Griffiths KC submitted that HMC was in constant breach of the Strata Corporation's by-laws which prohibited unit owners from renting their units except through the **DRM**. He submitted that breach of those by-laws was the kind of behaviour at which the illegality principle was aimed because the bye laws were statutory instruments breach of which was against public policy identified by the judge.

73. To support his position Mr. Griffiths KC referred to the local cases of **O'Connor - v- The Proprietors, Strata Plan No 51** [2017] UKPC 45, ("**the Pinnacle Case**"), and **Dodds v The Proprietors, Strata Plan No. 27** CL 70/2017 which upheld the

principle that of Strata developments can if they wish require rentals to be conducted only through a single **DRM** And, he said by-laws are statutory instruments deriving as they are from the STO.

74. Mr. Misick KC contended that the by-laws were not statutory instruments. He relied on case law and section 25(e) and s26(1) of the Interpretation Ordinance. Among other things a statutory instrument must be published in the gazette to take effect and there was no evidence that this had been done.

75. With regard Lord Toulson's reference in **Patel** to **"**criminal or otherwise" unlawful he submitted that Lord Toulson reference to "otherwise" was to other breaches which engage the State or matters in the public interest namely public law matters not private law issues, as in this case.

76. Mr. Misick KC then analysed what he considered to be the errors of the judge which included: he elided the cause of action with one of the heads of loss claims, incorrectly read the statement of *Lord Sumption's* speech in ***Les Laboratories*** at [28] as conferring on the judge the power to be flexible in determining what constitutes illegality for the purpose of the defence, misconstrued the meaning of the public interest in the context of the illegality defence, and wrongly characterized the renting of the Property in breach of the Designated Manager as being dishonest when It was simply a breach of contract, since it was done in the open and The Strata Corporation collected all of its penalty fees.

77. In any event, for a civil claim to qualify as an exception to the requirement that acts must be criminal or quasi criminal, the civil claim must have as one of its essential elements, dishonesty or corruption: per Lord Sumption in ***Les Laboratories*** at [28]. The allegation against HMC is not that it committed any tort,

much less, one of dishonesty or corruption. At most, it was a breach of contract. The Strata Corporation was entitled to seek injunctive relief under the civil (not criminal) jurisdiction of the court to prohibit HMC from renting the Property. Instead, it waived this right, and instead imposed penalty payments which it collected. Indeed, the Strata Corporation's Quarterly Update published on 13 April 2020 included a draft Income Statement revealing it had received US$166,585 in penalty payments in the year 2018-2019 from HMC.

78. The Court agrees with the analysis by Mr. Misick KC as set out above. It would appear that the judge fell into error in interpreting the reference to public policy and public interest as they were used in the context of illegality, concluding that it related to economic policy in the public interest when it related to legal policy that affected the public as in public law. Lord Sumption had said this in ***Les Laboratories***:

> "[23] The paradigm case of an illegal act engaging the defence is a criminal offence. So much so, that much modern judicial analysis deals with the question as if nothing else was relevant. Yet in his famous statement of the principle in **Holman v Johnson** Lord Mansfield spoke not only of criminal acts but of "immoral or illegal" ones. What did he mean by this? I think that what he meant is clear from the characteristics of the rule as he described it, and as judges have always applied it. He meant acts which engage the interests of the state or, as we would put it today, the public interest. The illegality defence, where it arises, arises in the public interest, irrespective of the interests or rights of the parties. It is because the public has its own interest in conduct giving rise to the illegality defence that the judge may be bound to take the point of his own motion, contrary to the ordinary principle in adversarial litigation.

79. We agree with Mr. Misick KC that Lord Toulson's reference to "or otherwise "in the above passage from **Patel** was a reference to public law as opposed to private law, not a reference to acts which may or may not have a criminal element. While it is perhaps understandable that the judge would take judicial notice of the dependence of the TCI economy on an orderly system of strata rentals to support the touristic economy TCI, in my judgment, the judge misinterpreted the authorities' reference to public interest.

80. In paragraph 86 the judge had disallowed the claim for rental income after the coming into force of the DRM byelaws as follows:

> **"...**except items (b) Loss of rental income".

81. He had already allowed recovery of loss of rent prior to the DRM bylaw. In paragraph 30 the Judge states:

> **"**Proportionality is achieved in the circumstances by limiting recovery, as I have done, to any period prior to the introduction of the DRM by-law".

82. After the by-law came into force loss of rent was caught by the illegality defence. With the illegality issue hereby dismissed, the Appellant is now entitled to recover loss of rent both before and after the **DRM**.

83. However, no additional evidence of the quantum of lost rental prior to the passage of the DRM by-laws which come into effect on 27th July, 2018, was drawn to the Court's attention and so the figure of $25,000 is taken to include loss both before and after the by-law.

84. For all of the above reasons we allow the appeal in relation to the Illegality Issue, and find that damages for loss of rent ought not to have been disallowed. Accordingly, we restore the order for payment of that item of special damages in the sum of $25,000.

ISSUE 6: THE WINDOWS ISSUE.:
WHETHER THE JUDGE WAS RIGHT TO FIND THAT THE WINDOWS WERE PART OF THE PROPERTY

85. The Judge devoted over 30% of the judgment (33 out of 91paragraphs) to this issue.

86. He concluded that the replaced windows were a part of the Property and not the common property. His conclusion is set out at paragraph 82:

> *"*82: I, therefore, accept the expert evidence called on behalf of the Corporation and I hold that the boundary between the Property (of which HMC is the registered proprietor) and common property (which the Corporation is duty bound to repair and maintain) is "the exterior line of the external walls and terraces" to quote Mr. Hutchings. So, for the purposes of section 7(3) of the STO, the common boundary between the Property and common property, is "otherwise specified" in Strata Plan No. 67. According to that specification as indicated here, the windows that were replaced by HMC were within the boundaries of HMC's property and the costs of doing so were properly for HMC's account. HMC's claim in restitution must therefore fail. I so hold.

87. HMC appeals that decision.

88. Mr. Misick KC relied on the literal wording of section 7(3) of the **STO** set out earlier. It provides:

> "7(3) The common boundary between any two strata lots or between a strata lot and common property shall, **unless otherwise specified in the relevant strata plan**, be the centre line of the floor, wall or ceiling between such strata lots or strata lot and the common property, as the case may be." [emphasis added]

89. He said there was nothing written on the plan to specify that the common boundary was other than the centre line of the floor wall or ceiling between the lot and the common property and that expert evidence was not admissible because it was a question of law for the court to determine whether or not the plan "otherwise specified".

90. He relied on a number of cases including **Opus Ferries Limited and Others v Fullers Bay of Islands Limited (New Zealand)** [2003] UKPC 19 to distinguish the approach that should be taken to public documents as opposed to private documents. In that case Lord Hope made the point as referred to by Lord Reid in **Slough Estates Ltd v Slough Borough Council** [1971]AC that members of the public are entitled to rely on a public document, and ought not to be subject to the risk of its apparent meaning being altered by the introduction of extrinsic evidence to which they did not have available.

91. He also relied on **Mostyn House Estate Management Company Ltd v Youde and others** [2022] EWCA Civ 929 to support the contention that a publically registered document is addressed to anyone who wishes to inspect it and they should be able to conclude that the documents contain "all material terms".

92. He cited **Niagara River Coalition v Niagara-on-The-Lake (Town) 2010 ONCA 173**, where the Court of Appeal of Ontario held that expert evidence from the former town planner, who was responsible for drafting the plan, was not

admissible in evidence in considering the proper interpretation of a public plan. The court held that interpretation is a question of law which must be determined on the basis of the documents that comprise such plans.

93. He therefore submitted that the expert evidence of Mr. Hayward and Mr. Hutchings who prepared the architectural plans and the strata plan respectively were not admissible as to the interpretation of the strata plan.

94. Mr. Griffiths KC submitted that a reading of the Strata Plan plainly shows at critical points a deviation ('jog') on the wall even to the naked eye. This deviation, he says establishes the outside edge of the exterior wall as the common boundary between the Property and the common area. He contended that reading a plan prepared by a surveyor is a matter where a surveyor or other expert can aid the interpretation of the plan.

95. He summarized the expert evidence on the Strata Plan which shows that:

a. Unit 603 has an exact measured square footage of 5,658 that is shown on the Schedule of Unit Entitlement registered with the Strata Plan and filed with the Register of lands as SP:67 on 27 September 2007. It is a precise figure, not an approximate figure. It reflects the stated size of the Unit on HMC's instrument of transfer on purchase. It is in the public record and the Register of Lands certified on 19 October 2011 that it is true copy of the instrument on record at the Land Registry. The correct square footage of the unit of 5,658 square can only be calculated if the boundary is treated as the outside edge of the exterior wall.

b. Unit 603 shares an interior common boundary wall with Unit 602. The centre line of that wall is therefore the common internal boundary in that instance, which is what the Strata Plan depicts; and

c. the boundary line then 'jogs' outward at either end of the common boundary wall between Unit 602 and Unit 603, where the

exterior walls begin visibly shows that the boundary line 'moves' to the outer edge of the exterior wall. This is visible on the Strata Plan itself.

96. He pointed out that the evidence also showed that The Strata Plan is drawn to scale (at scale of 1:1250) in accordance with the STO (see Schedule 1 Form 1) in accordance with section 7(1)(c)(ii) of the STO, the Strata Plan defines the boundaries of each strata lot and the Strata Plan also complied with the Strata Titles Regulations (the "**STO Regulations**"). In other words, it is an architectural plan.

97. Mr Griffiths KC further contended that the words "*unless otherwise specified in the relevant strata plan*" in section 7(3) means that if a strata plan shows or specifies the boundary to be other than the centre line, then the boundary is as shown or as specified. '*Specified*' used here, he contends, simply means to identify and is not constrained or limited only to written words.

98. Mr. Griffiths KC argued that had it been a requirement of the STO that the position of the boundary had to be identified by words (i.e. in writing) if other than the centre line, then section 7(3) would have required an added reference to "*specified **in writing***" ('writing' being expressly referred to in Regulation 4(g)). Section 7(3) does not refer to a requirement of 'writing' and so there is no basis to suggest that a narrative description of a boundary on the Plan is required.

ISSUE 6 DISCUSSION

99. The cases relied on by Mr. Misick KC dealt with interpreting written text on plans to which the rules of construction could be applied. This case is concerned with an objective interpretation of the architectural plan itself. In **Niagara River** the issue was whether the Jet Goat business could fit within the "Conservation"

designation under the Plan. It could not if the word "Conservation" included parks. Mr. John Perry who drafted the plan was allowed to give his subjective evidence that the word "Conservation" was meant to recognise parks and public opens spaces under the Plan. Winkler CJO delivering the judgment for the panel agreed with the appellant that the evidence was inadmissible.

100. This case is clearly distinguishable from **Niagara River.** Here, the Court is not being asked to interpret words or text within a written document or contract to determine what was the intention of the parties. It is being asked to determine objectively what, if anything, the "jog" on the architectural plan specifies for the purpose of applying section 7(3). Hence, the line of cases dealing with statutory construction such as **Investors Compensation Scheme v West Bromwich Building Society** [1988] 1 All ER and others do not apply. in relation to interpreting the architectural Plan. The judge was entitled to ask himself what was the meaning of the 'jog' on the Strata Plan, was it specifying anything? In ascertaining that meaning, he was entitled to rely on extrinsic evidence including the experts as well as the surrounding circumstances.

101. Furthermore, all of the information relevant to interpreting what is specified on the plan is contained in public documents. They are all registered with the Registrar of Land Surveys as they are by law mandated to be. Any member of the public can view the plans and determine what was specified on the Strata plan. There was no danger of running afoul of the observation of Lords Hope and Reid in **Opus Ferries** and **Slough Estates** referred to earlier.

102. The judge accepted the expert evidence of Mr. Simon Hutchins of SWA Architects who was the Project Architect for the development. He was the person who

instructed/oversaw the measurement of areas of the units to determine saleable square footage. He prepared two reports and gave viva voce evidence upon which he was cross examined.

103. Included in the evidence which he gave was the following definitive statement:

> "As an architect reading the plan it shows the boundary of a unit taken along the external walls, jogging to the centerline of the party wall. It is because of the jog and the fact that we know the boundary of the party wall is along its' (sic) centre line we can deduce that the boundary to the rest of the unit is taken along the exterior line of the external walls and terraces."

104. The Judge noted that the expert also confirmed that each unit was an exact Gross square footage and the measurement of units was measured to the outside face of the exterior unit walls to the outside edge of the balconies and to the centerline of any shared wall with another unit.

105. The Judge also referred to the evidence of another expert Mr. Patrick Hayward, a qualified surveyor and practitioner in The Turks and Caicos Islands for over 20 years. He gave evidence that he overlayed the digital strata plan over Mr. Hutchings' design drawings and from that it is clear that the outside face of the wall was taken as the boundary between the Property and the common property to equal 5,658 square feet.

106. Mr. Hayward stated that he also observed a jog or deflection on the strata plan where the common walls end and the exterior walls begin, and that the only reason for a boundary to have a jog in these locations is that the unit's boundary is changing from the centerline to the exterior wall.

107. As Mr Hayward explained this is how the Strata Plan had been read since registration in 2007 and is probably why all proprietors (including HMC) paid for their replacement windows at the relevant time.

108. At paragraph 81 of his judgment the judge expressed that he had no doubt that both men gave "objective unbiased opinions", and went on to give his decision in paragraph 82.

109. HMC called no evidence to say what was specified on the Strata Plan. None of its lay witnesses addressed this issue. HMC offered no conflicting evidential explanation for this "jog". Therefore, the only evidence available to the judge on this issue was from Mr. Griffiths KC's witnesses. The Judge accepted that evidence. Indeed, apart from the argument that the expert evidence was not admissible, for which we gave our reasons for rejecting, no evidence has been brought to our attention on which we can conclude that the Judge's decision is one which no reasonable judge could have made.

110. For all the above reasons, in our judgment the judge was right. We therefore dismiss the appeal on The Windows Issue.

ISSUE 7: THE COSTS ISSUE:
WHETHER THE JUDGE MISDIRECTED HIMSELF IN NOT AWARDING COSTS TO THE STRATA CORPORATION ON ALL THE LIVE ISSUES AT TRIAL UPON WHICH IT SUCCEEDED

111. In reviewing the Judge's order as to costs we find that he exercised his undoubted discretion using the right principles from *Re Elgindata (No. 2)* 1992 1 W.L.R. 1207 and including **Straker v. Tudor Rose** [2007] EWCA Civ 365 and **Pigot v. The Environmental Agency** [2020] EWCA 1444 (Ch) with the exception of the Windows Issue which was in fact a separate cause of action from The Sources of

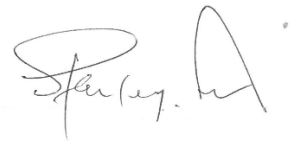
the Leak Issue. Costs in that cause of action ought to have been for the Strata Corporation as a main cause of action not just an issue in the main cause using the principles in **Elgindata.**

112. I shall adjust the judge's costs order to reflect the new disposals. The Strata Corporation is entitled to its costs on the Windows Issue as a discrete cause of action. Of the other agreed issues The Illegality Issue won by HMC, and The Amenity Issue won by The Strata Corporation required the largest outlay of judicial and counsel resources. The Sources of the Leak Issue won by HMC, The Assessment Issue won by The Strata Corporation and The Interest Issue won by The Strata Corporation, required less allocation of judicial and counsel's resources. The costs in The Amenity Issue and The Illegality Issue should offset each other. This would leave the balance of the costs in relation to The Sources of the Leak Issue, and The Interest Issue. On balance the costs should therefore be that of the Strata Corporation. For the above reasons we exercise our discretion to award 75% of the Costs to the Strata Corporation.

113. HMC shall pay the Strata Corporation's costs hereby ordered such costs to be taxed if not agreed.

Adderley JA, President (Ag.)

I agree



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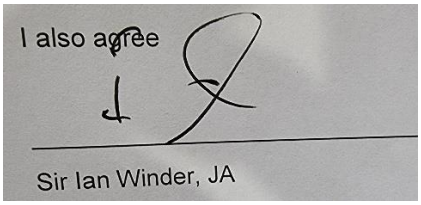
John, JA

I also agree



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Sir Ian Winder, JA