[2013] JMCA Civ 26

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 21/2012

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**VINCENT GAYNAIR**	**1ST APPELLANT**
AND	**CHARLES ROSS**	**2ND APPELLANT**
AND	**NEVILLE HENRY**	**3RD APPELLANT**
AND	**NEGRIL BEACH CLUB LTD**	**1ST RESPONDENT**
AND	**NEGRIL INTERVAL OWNERSHIP CLUB**	**2ND RESPONDENT**
AND	**RAZ OFER**	**3RD RESPONDENT**
AND	**OFER HELFMAN**	**4TH RESPONDENT**
AND	**MARGARET CARSWELL**	**5TH RESPONDENT**
AND	**MICHAEL CAUSWELL**	**6TH RESPONDENT**
AND	**JULIAN EDWARDS**	**7TH RESPONDENT**

Ransford Braham QC and Jerome Spencer instructed by Patterson Mair Hamilton for the appellants

The respondents not appearing or represented

4, 6 June and 5 July 2013

HARRIS JA

[1] In this appeal, the appellants challenge a judgment of Simmons J (Ag) (as she then was), delivered on 16 November 2011. After hearing the appeal, we ordered as follows:

> "The appeal is allowed. The orders of the learned judge are set aside. It is declared that:
>
> 1. the purported emergency general meeting of the Proprietors of Strata Plan #88 held on 2 April 2011 was illegal, null and void;
>
> 2. the resolutions made at the purported general meeting of the Proprietors Strata Plan #88 held on 2 April 2011 are null and void;
>
> 3. the election of a purported executive committee at the general meeting of 2 April 2011 is null and void; and
>
> 4. costs of the appeal and in the court below are awarded to the appellants to be agreed or taxed."

We promised to put our reasons in writing. This we now do.

[2] Each appellant is the owner of a strata lot in Proprietors Strata Plan #88. The 2nd and 3rd appellants were among the elected members of the strata executive committee (the committee), they having been elected at an annual general meeting held on 21 February 2010. The respondents are also owners of strata lots. The 3rd respondent, Raz Ofer, is a director of the 1st and 2nd respondents, Negril Beach Club Ltd and Negril Interval Ownership Club respectively. On 9 February 2011, the 3rd respondent, who was an elected member of the committee, wrote to the committee requesting that an extraordinary general meeting be convened. The committee met but

the request for the meeting was declined for the reasons that the 1st and 2nd respondents were in arrears in respect of their contributions and that the annual general meeting was due soon, pending the receipt of the statements of accounts.

[3] On 2 April 2011, an extraordinary general meeting was held, the 3rd respondent having scheduled that meeting. Notices of the meeting were sent out by Mr Lindell Laing, the property manager who was instructed by the committee to cancel same. Despite this, a meeting was held. At that meeting, a committee was appointed. On that committee, the appellants and three other proprietors of the strata plan were replaced by Mr Ofer Helfman, the 4th respondent; Mrs Margaret Carswell, the 5th respondent; Mr Michael Causwell, the 6th respondent; and Mr Julian Edwards, the 7th respondent.

[4] The appellants, being dissatisfied with the state of affairs, by a fixed date claim form, amended and filed on 16 May 2011, brought proceedings against the respondents in which the following declarations were sought, that:

> "1. the purported emergency general meeting of The Proprietors Strata Plan #88 held on April 2, 2011 was contrary to the law, its by-laws and is therefore illegal, null and void;
>
> 2. any resolutions made at the purported general meeting of The Proprietors Strata Plan #88 held on April 2, 2011 are null and void;
>
> 3. the election of a purported executive committee at the meeting held on April 2, 2011 is null and void;
> …"

[5] On 15 July 2011, the claim came up for hearing before Simmons J. A preliminary point raised by the appellants as to whether the extraordinary general meeting held on 2 April 2011, was contrary to law or the strata's by-laws was heard by her. On 16 November 2011, she made the following decision:

> "i. The third defendant, Mr. Ofer was entitled to request that the EGM be convened;
>
> ii. The Notice of the EGM was issued by Mr. Laing;
>
> iii. The executive committee did not have the power to cancel the EGM;
>
> iv. The email sent by Mr. Ofer did not amount to a reissued Notice convening the EGM; and
>
> v. The number of persons which would have constituted a quorum at the EGM is to be determined by the reference to the number of them who were fully paid up in respect of the strata lots owned by them at the commencement of the meeting."

[6] The following grounds of appeal were filed:

> "(1) The Learned Judge erred in finding that a strata manager under the bye-laws for PSP#88 had the authority *ipso facto* to convene an Extraordinary General Meeting.
>
> (2) The Learned Judge erred in her assessment of the evidence and submissions made by the Appellants that the purported Extraordinary General Meeting had been properly convened in circumstances where it could only be [sic] have convened by the Executive Committee and the sworn evidence for both the Appellants and Defendants was that it was neither convened by or on the instructions of the Executive Committee.
>
> (3) Having made a finding that fourteen fully paid up members would have been needed to constitute a quorum for the purposes of the meeting purportedly held on April 2, 2011, the Learned Judge erred in not making a ruling that there was no quorum present."

Submissions

[7] The submissions of Mr Braham QC were prefaced on two issues. The first is whether the manager employed to the strata corporation was empowered to summon a meeting. The second is whether there was insufficient evidence before the learned judge to establish the absence of a quorum. We are firmly of the view that the determination of this appeal turns on these issues.

[8] In dealing with the first issue, Queen's Counsel submitted that the learned judge correctly found that it is the committee which has the power to convene an extraordinary general meeting even in circumstances where the proprietors of 25% of the units request same and although the 3rd respondent and his companies were indebted to the corporation, this did not disentitle them to demand the convening of the meeting. However, he argued, the learned judge erred, in that, she misconstrued the by-laws and misapplied the evidence when she held that the manager of the corporation had the authority to call the meeting, and that the meeting was properly convened. She, he contended, failed to distinguish between the right and the authority to determine the holding of an extraordinary general meeting and the issuing of the notice.

[9] In buttressing his submissions, he placed reliance on the case of ***In re State of Wyoming Syndicate*** [1901] 2 Ch 431. He submitted that, in that case, the requisite number of the members of the company submitted a requisition for the convening of a meeting in accordance with the Articles of Association. Although the directors had the

authority to call a meeting, if they failed to do so, the members of the company may have done so. The secretary summoned the meeting without the directors' authorization. Wright J at page 436 concluded as follows:

> "In my judgment it is clear in law that the meeting could not have been properly summoned on the day on which it was summoned except by the directors. It could not be summoned by the requisitionists because the twenty-one days limited by s.13 of the Act of 1900 had not expired. I need not decide whether requisitionists can, after the expiration of the twenty-one days mentioned in the section, call a meeting by notices signed by the secretary. But before that period had expired only the directors could call the meeting, and the secretary could not, without their authority, summon a meeting."

[10] Queen's Counsel made reference to ***Smith v Paringa Mines Limited***; ***Paringa Mines Limited v Blair***; ***Paringa Mines Limited v Boyle*** (1906) 2 Ch 193, on which the learned judge relied in order to support a finding that the property manager of the strata corporation had the power to send the notice convening the meeting. He distinguished that case on the basis that in ***Smith v Paringa Mines Limited***, the matter turned on the issuing of a notice postponing the meeting after the notice convening the meeting had been properly issued. In the instant case, Queen's Counsel argued, the meeting had not been duly convened as there was no basis for doing so. Further, in this case, he argued, unlike the position in ***Smith v Paringa Mines Limited***, the requisitionists were not authorized to call the meeting without the authority of the strata commission.

[11] Referring to the notice of 17 March 2011, cancelling the meeting of 2 April 2011 and averments in an affidavit of the 1st appellant of 4 May 2011, that a decision had

been made by the committee refusing the 3rd respondent's request for a meeting, and a response from the 3rd respondent in an affidavit of 17 May 2011, clearly, Queen's Counsel argued, the 3rd respondent understood that a meeting had not been called by the committee. He further submitted that the purported extraordinary general meeting, having not been convened by the strata's committee, the designated body under the by-laws, or on its behalf, was null and void.

[12] In addressing the issue of the quorum, Mr Braham argued that, there being 28 owners of units, one half of those persons would comprise a quorum and therefore 14 would be eligible to vote, provided that, in keeping with section 30 of the first schedule, their contributions had been duly paid. The learned judge, he contended, found that 14 fully paid up members had to be present to form a quorum on 2 April 2011, but concluded that she did not have sufficient information to make a finding as to a quorum, despite ample evidence that the contributions of only 11 of the 14 members present were fully paid up.

Analysis

[13] It will be useful to make reference to such areas of the law as are relevant to the appeal. Section 9 of the Registration (Strata Titles) Act (the Act) 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 a resolution passed by at least seventy-five percent of the proprietors;

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

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

[14] Section 2 of the First Schedule reads:

"**2**. The corporation shall –
(a) control, manage and administer the common property for the benefit of all proprietors;

(b) … (f)"

[15] Section 3 of the First Schedule states:

"**3**. The corporation may-

(a) … (e)

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

[16] Section 7 the First Schedule reads:

"**7.** The corporation may whenever it thinks fit and shall upon a requisition in writing made by proprietors entitled to twenty-five *per centum* of the total unit entitlement of the strata lots convene an extraordinary general meeting."

[17] Section 10 of the First Schedule provides:

"**10.** Save as is in these by-laws otherwise provided, no business shall be transacted at any general meeting unless a quorum of persons entitled to vote is present at the time when the meeting proceeds to business. One-half of the persons entitled to vote present in person or by proxy shall constitute a quorum."

[18] Section 13 of the First Schedule states:

"**13**. There shall be an executive committee of the corporation which shall, subject to any restriction imposed or direction given at a general meeting, exercise the powers and perform the duties of the corporation."

[19] Section 14 of the First Schedule provides that the committee shall be elected at the first general meeting of the corporation and thereafter at each annual general meeting.

[20] Section 21 of the First Schedule states:

"**21.** The executive committee may-

(a) employ for an [sic] on behalf of the corporation such agents and servants as it thinks fit in connection with the control, management and administration of the common property and the exercise and performance of the powers and duties of the corporation;

(b) subject to any restriction imposed or direction given at a general meeting, delegate to one or more of its members such of [sic] its powers and duties as it thinks fit, and may at any time revoke such delegation."

[21] Section 27 of the First Schedule provides that the proprietors shall have one vote which corresponds with the unit entitlement to their respective strata lots.

[22] Section 30 of the First Schedule provides that no proprietor is entitled to vote unless all contributions are fully paid.

[23] The learned judge concluded that the property manager was entitled to issue the notice convening the meeting and such notice was valid. The critical question arising from this conclusion is whether the validity of the issuance of the notice by the property manager is good in law.

[24] As can be readily observed, section 9 of the Act clearly shows that the management, control, administration, use and enjoyment of the strata lots and its common property are governed by the by-laws. Section 2 (a) of the First Schedule to the Act imposes on the corporation a duty to manage, control and administer the common property for all proprietors' benefit. Section 3 (f) of the First Schedule gives a discretion to the corporation in relation to such things as are necessary for the control, management and administration of the common property. Section 7 of the by-laws permits the holding of an extraordinary general meeting upon the request of a proprietor holding 25% of unit entitlement of the strata lots but even then, the holding of a meeting by the 25% is subject to the making of a written requisition to the corporation. These powers conferred on the committee are extensive. It is the committee which is entitled to exercise the corporation's powers and perform the corporation's functions, save and except in circumstances where it is constrained by any restrictions or instructions issued at a general meeting. It is the committee which is empowered to call meetings or give permission to do so. Accordingly, the committee

may accede to or deny a request from 25% of the proprietors for the calling of a meeting, depending on the circumstances.

[25] Section 21 of the First Schedule speaks to the committee delegating functions to persons. However, the appointment of a person by the committee in the form of a property manager does not mean that that person can carry out the functions of the committee without its authorization. It is the corporation, through its committee, which is clothed with a right to call a meeting, or issue notifications for a meeting, or grant permission to the 25% of the proprietors to do so.

[26] As shown in ***In re State of Wyoming Syndicate***, cited by Mr Braham, the unauthorized issuance of a notice, convening a meeting of members of a corporation, makes any resolution passed at that meeting void. In that case, the English Court of Appeal gave consideration to the question of a notice convening a meeting at which a resolution was passed. The act of the company secretary, in sending out notices for the meeting without the permission of the directors, invalidated the resolution.

[27] Although Mr Laing, the property manager, had scheduled a meeting for 2 April 2011, on 2 March 2011, the committee held a meeting, following which, on the committee's instruction, the following notice was sent by him to the proprietors of the strata plan:

> "Dear Owners,
>
> At the Executive Committee meeting on 2 March 2011 with the Strata [sic] Lawyer Mr. Green and Mr. Ofer's [sic] Lawyer Ms. Long, as a result of the meeting I was informed by the Executive

> Committee, that in regards to the large amount of maintenance fees owed by Mariner's Negril Beach Club for over (3) months as per their requested [sic] there will be no Extra-Ordinary general meeting on the 2 April 2011; Instead as soon as the final Audited Report is ready the date for the Annual General Meeting will be set by the Executive Committee…"

The meeting was held as the 3rd respondent wrongly proceeded to place a notice in the newspaper, scheduling a meeting for 2nd April 2011 and sent email messages to some of the proprietors informing them of the date.

[28] The learned judge found that there was no apparent challenge to the property manager sending out the notice convening the meeting. At paragraph [34] of her judgment she said:

> "[34] The effect of the issue of the notice of the EGM dated the 17th February 2011 must now be considered. As was stated previously, there appears to be no dispute that Mr. Laing had the authority to issue notices in respect of meetings. By-law 13 makes it clear that the corporation which is comprised of all proprietors acts through its executive committee. The committee in exercise of its powers under by-law 21 employed Mr. Laing as its Property Manager."

[29] She went on to state at paragraph [36]:

> "[36] Mr. Laing's authority to issue the notice has not been challenged and there is no dispute regarding the origin of the notice which was sent by email. I therefore find that the notice of the EGM was issued by Mr. Laing. It is my view nothing turns on who caused the notice to be published in the newspaper."

After dealing with the question as to whether the committee could have cancelled the meeting, at paragraph [39], she said:

> "[39] In this matter, the notice was issued by Mr. Laing who was authorized to do so and was served within the required time frame. The by-laws of the strata speak to the convening of meetings and not to their cancellation. This is not unlike the situation in ***Smith v Paringa Mines Limited***."

[30] Even if there were no challenge to the dissemination of the notice convening the meeting this does not mean that such notice had been validly sent. The critical issue is whether the property manager was authorized to send it. It was incumbent on the learned judge to have carried out a proper examination of the requisite by-laws as well as the evidence before her in order to ascertain whether Mr Laing could have legitimately sent the notice.

[31] As previously indicated, the by-laws bestow on the committee the right to govern the common property of the strata plan. There was evidence that the extraordinary general meeting had not been convened by the strata committee or on its behalf. The 1st appellant, in paragraphs 13, 14, 15 and 16 of his affidavit of 4 May 2011, speaks to the circumstances surrounding the committee's refusal to call the meeting. He states:

> "13 In a letter dated February 9th, 2011 Mr. Ofer demanded that an Emergency General Meeting ("EGM") be called.
>
> 14. The Executive Committee met on 2nd March 2011 and considered the request for an EGM. The Executive Committee decided that because of the arrearages of Negril Beach Club Ltd., Mr. Ofer would not be entitled to vote at such EGM.
>
> 15. Furthermore, the Strata's annual general meeting (AGM) was due and was to be called as soon as the audited accounts were available.

16. For the foregoing reasons the Executive Committee decided that no EGM should be held."

[32] The 3rd respondent, in paragraph 19 of his affidavit sworn on 17 May 2011, confirms the strata committee's refusal to call a meeting. The paragraph reads:

> "19. In relation to paragraphs 13, 14, 15 and 16 of the Gaynair Affidavit, I say that it is correct that by way of a letter dated February 2011, I requested the last EC to call an EGM. However, the then EC refused to call the EGM, and I do verily believe they did so because they well knew that the vast majority of owners in the Strata were keen to remove some members and replace them, so that a new EC may deal with matters such as the curious activities of Mr. Gaynair and Mr. Ross. Indeed, the reasons Mr. Gaynair has given for the old EC not calling the EGM I requested are entirely baseless. First, as it regards the outstanding maintenance charges, the by-laws do not prevent a proprietor in arrears from requesting an EGM. I made that request on behalf of NBC and NlOC pursuant to paragraph 7 of the Strata's by-laws which provide that '**The corporation may whenever it thinks fit and shall upon a requisition in writing made by proprietors entitled to twenty five *per centum* of the total unit entitlement of the strata lots convene an extraordinary general meeting**.' NBC and NlOC has a unit entitlement of 130 of the total 225 in the Strata. Secondly, the audited accounts have long been available."

[33] The minutes of the meeting of 2 March 2011, disclose that, at that meeting, Mr Laing informed the chairman that he had sent out a notice for a meeting to be convened on 2 April 2011. The chairman's response to him was that the notice was sent without the committee's approval and therefore sent prematurely. As earlier indicated, an authentic notification of the meeting's cancellation was circulated to the proprietors. The foregoing obviously demonstrates that the committee had not

contemplated the holding of a meeting on 2 April 2011 and the 3rd respondent would have been aware that a meeting would not have been held.

[34] It is abundantly clear that the conferment of the authority on the committee to call an extraordinary general meeting is an exclusive right enjoyed by the committee, which could only be assigned where it grants approval to the proprietors of 25% of the strata units to convene such meeting. Further, it is plain that the committee did not give instructions to the property manager that it would be holding a meeting on 2 April 2011. Therefore, Mr Laing could only have issued the notice, on the instruction of the committee, or where, at an annual general meeting, he had been instructed so to do. Having not been commissioned by the committee to issue the notice he clearly acted without authority, thus rendering the notice sent by him convening the meeting invalid. The meeting of 2 April 2011, is therefore null and void.

[35] We will now turn our attention to the matter of the quorum on the day of the meeting. The learned judge refrained from making a determination as to whether a quorum was in place. She found that she was unable to make a ruling as to a quorum due to "the absence of the relevant information". She said at paragraphs [47], [48] and [50] of her judgment:

> "[47] By-law 30 makes it clear in the absence of a quorum of persons entitled to vote no business is to be done. This in effect means that no decisions can be validly taken at such a meeting. It is to be noted that the determination as to whether there is in fact such a quorum is to be made at the time when the meeting proceeds. Therefore, a proprietor in order to be

> counted may settle his account at any time before the commencement of the meeting.
>
> [48] In this matter twenty-eight (28) proprietors comprise the strata. If they were all paid up at the date of the EGM, fourteen (14) of them would constitute a quorum of persons entitled to vote. In order to determine whether or not there was such a quorum on the 2nd April 2011 it must therefore be ascertained how many of them were fully paid up.
>
> [50] Unfortunately, the court has not been provided with sufficient information pertaining to the status of the accounts in respective [sic] of the twenty-eight proprietors of the strata."

[36] Contrary to the learned judge's finding in paragraph [50] above, there was sufficient evidence on which she could have arrived at a conclusion as to a quorum. The strata property consists of 28 units of which each proprietor would be entitled to one vote. By virtue of section 30 of the First Schedule, the owners whose subscriptions were not fully settled were precluded from voting. Section 10 of the First Schedule specifies a quorum to be one half of the proprietors owning units. There being 28 units, a quorum would comprise 14 owners. Under section 30, only fully paid up members are eligible to vote. The foregoing was acknowledged by the learned judge. However, she omitted to take into account the fact that the minutes of the meeting of 2 April 2011, show that only 11 of the 28 members had fully met their obligations by the payment of their dues. Further, an affidavit of Mr Laing, sworn on 25 May 2011 shows that the 1st and 2nd respondents, who were represented at the meeting by Mr Ofer Helfman on behalf of their director Mr Raz Ofer, had not fully paid up their contributions. In such circumstances, the meeting, as constituted, proceeded without the required minimum number of members. This being so, there would not have been

a quorum from which votes could have been legitimately taken. As a consequence, the purported election of an executive committee was invalid for want of quorum and the resolutions passed are null and void.

[37] The foregoing are our reasons for allowing the appeal.