[2023] JMCA Civ 46

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE D FRASER JA

SUPREME COURT CIVIL APPEAL NO COA2022CV00123

BETWEEN	**MONICA MONIQUE WALKER**	**1ST APPELLANT**
AND	**PROPRIETORS STRATA PLAN NO. 42**	**2ND APPELLANT**
AND	**HEATHER NASRALLA MCKAY**	**1ST RESPONDENT**
AND	**WAYNE NASRALLA**	**2ND RESPONDENT**
AND	**EDITH REARDON**	**3RD RESPONDENT**
AND	**GRACE DONALDSON SHAW**	**4TH RESPONDENT**

Written submissions filed by Naylor & Mullings for the appellants

Written submissions filed by Hart Muirhead Fatta for the respondents

6 October 2023

Civil Procedure – Proper parties to claim concerning strata property – Capacity of strata corporation to sue and be sued – Whether strata corporation has capacity to sue persons other than registered proprietors of the strata in nuisance – Registration (Strata) Titles Act ss. 4, 5, 9 and 14, and First Schedule

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

MCDONALD-BISHOP JA

[1] This is a procedural appeal brought in the names of Monica Monique Walker ('Ms Walker') and Proprietors Strata Plan No. 42 ('the Corporation') (collectively, 'the appellants') from an order made by a judge of the Supreme Court sitting in chambers on 28 November 2022. The learned judge refused the appellants' application for an interim injunction.

[2] By way of a further amended notice of application filed on 25 August 2022, the appellants sought the injunction to restrain the respondents, Heather Nasralla McKay (1st respondent), Wayne Nasralla (2nd respondent), Edith Reardon (3rd respondent) and Grace Donaldson Shaw (4th respondent), from dealing with land known as 9 Haining Road, Kingston 5 in the parish of Saint Andrew ('the respondents' property'). The 3rd and 4th respondents did not participate in the proceedings before the learned judge and are, therefore, not parties to the appeal.

[3] It is also important to note from the outset that although Ms Walker is named as an appellant, the aspect of the learned judge's orders that is challenged relates to her findings and orders regarding the Corporation. For this reason, the focus of this judgment will be on the aspects of the learned judge's decision that relate only to the Corporation.

The background

[4] Ms Walker is the owner/occupier of a strata lot in Strata Plan 42 located at 11 Haining Road, Kingston 5 in the parish of Saint Andrew ('the complex'). The Corporation is described in the appellants' statement of case as "a legal body corporate established to represent the collective interests of the proprietors of the [complex] and to manage the common areas of the [complex]".

[5] The 1st and 2nd respondents are lessees and the 3rd and 4th respondents are the lessors and registered proprietors of the respondents' property.

[6] The appellants applied for the interim injunction to prevent the respondents from dealing with their property "in a manner that contravenes" restrictive covenant number one ('the restrictive covenant') endorsed on the certificate of title for the respondents' property. The restrictive covenant stipulates that the respondents' property shall be used for residential purposes only. The appellants' complaint is that the property is being used as business premises and in a manner that contravenes the restrictive covenant. They listed several acts that they say contravene the restrictive covenant and affect their quiet enjoyment of their property. The appellants also contend that the actions of the respondents have resulted in property damage and in breaches of their constitutional rights to respect for and protection of private and family life.

[7] The claim that underlies the application for injunctive relief was filed with the original notice of application for interim injunction on 17 February 2013. In outline, the appellants seek these remedies (albeit not in the exact order as set out in the claim form):

a. A declaration that the respondents are in breach of the restrictive covenant;

b. A declaration that the respondents and/or their agents by their actions have interfered with the appellants' quiet enjoyment of their land;

c. A declaration that the respondents and/or their agents have breached the appellants' constitutional rights to privacy contrary to section 13(3)(j) of the Charter of Fundamental Rights and Freedoms by the installation of security cameras on the respondents' property that are so positioned to record the private residences at the complex;

d. An injunction to restrain the respondents from contravening the restrictive covenant by the granting of orders for:

1. the removal/repositioning of the security cameras on the respondents' land;

2. mandating the respondents to maintain all trees on their property at regular intervals and attend to the fruits on the trees before they rot on the appellants' land; and

3. the removal and/or destruction of the wooden structure affixed to the boundary wall between the respondents' property and the complex; and

e. Damages for breach of the restrictive covenant, nuisance, damage caused to the complex and the appellants' property rights.

[8] In support of the application for injunctive relief, the appellants relied on affidavit evidence, which sought to establish that the 1st and 2nd respondents, as occupiers of the respondents' property, did several acts on the property, including playing loud music; using loud speakers and other amplification devices; hosting large gatherings; and carrying out construction, which caused loud noise in contravention of the Noise Abatement Act and Regulations. The appellants allege that the 1st and 2nd respondents also improperly dispose of waste on their property, by burning it against the common boundary wall with the complex, and failed to maintain trees on their property, which caused damage to the boundary wall and common areas of the complex. The appellants also deposed that the respondents have installed security cameras on their property, which are positioned to record the private homes of the proprietors and the common areas of the complex, thereby infringing the appellants' constitutional right to respect for and protection of private and family life. All these activities, the appellants say, are in breach of the restrictive covenant and create a nuisance, which have "hampered" them in the use and enjoyment of their property, damaged the boundary wall and common areas and caused depreciation to the value of their property, among other things.

[9] In the premises, the interim injunction was sought to restrain the respondents from carrying out those activities and for them to take steps to desist from these activities or remedy the damage caused by them.

The 1st and 2nd respondents' preliminary objection

[10] At the hearing of the application for the injunction, the 1st and 2nd respondents, through their counsel, raised preliminary points in objection before the learned judge regarding several matters relative to the appellants' legal standing. In so far as is relevant to the Corporation, counsel contended that there is no evidence that the Corporation, being a body corporate, had the requisite authority to bring the claim against the 1st and 2nd respondents and, by extension, the application for interim injunctive relief.

The appellants' response

[11] The appellants' response to the objections touching and concerning the Corporation was as follows (para. 5 of the learned judge's written note of the oral decision):

> a. The Corporation has the authority to bring the claim. It is tasked with protecting and managing the complex and, therefore, if there is an interference with the property or the rights of its proprietors/occupiers, it must have the capacity to bring a claim.
> b. The minutes of the Corporation, exhibited by Ms Walker, show that the Corporation's executive committee has the authority to carry out the operations of the Corporation. In doing so, the executive committee is carrying out the role of the Corporation to protect and manage the common property of the complex.

The learned judge's decision

[12] After considering the objections and response concerning the Corporation, the learned judge refused to grant the interim injunction. She made orders in these terms relative to the Corporation as detailed in para. 16 of the written note of her oral decision:

> "c) The [Corporation] has no standing to bring the substantive claim or to pursue the Further Amended Notice of Application filed on August 25, 2022, in the absence of express provision in the Bylaws of the strata plan permitting it to bring a claim in nuisance against a person not a registered proprietor under the strata plan and not subject to the Registration of Strata Titles Act and the Bylaws for the strata plan.
>
> d) The Further Amended Notice of Application filed on August 25, 2022, is hereby amended… to remove the [Corporation] as a party thereto."

[13] In summary, the learned judge's reasons for this aspect of her decision are as follows (paras. 9 and 10 of the written note of the oral decision):

> (i) The Corporation's powers are to be found in section 4(2) and the First Schedule of the Registration (Strata Titles) Act ('the Act') and the by-laws. Its duties are outlined in section 5 of the Act.
>
> (ii) The Corporation can bring a lawsuit pursuant to its powers and duties under the Act and by-laws to manage and administer the strata property and in order to ensure compliance by the registered proprietors with the by-laws and the Act. However, its duties and powers are circumscribed by the Act and the by-laws. Therefore, it is not accepted that without an express provision in the by-laws to that effect, the Corporation can bring a claim in nuisance against persons who are not proprietors of the strata plan and not subject to the Act and the by-laws.

(iii) No evidence was given of any express provision in the by-laws which gives the Corporation the power to bring such a claim. No such power can be found by necessary implication in any statutory provision or by-laws.

(iv) Accordingly, the Corporation had no standing to bring the claim and, by extension, the further amended notice of application.

The appeal

[14] The appellants have challenged order 16. c) of the learned judge's decision on four grounds of appeal. The grounds of appeal have been encapsulated in these two primary grounds:

(a) The learned judge erred in holding that the Corporation had no capacity to bring the claim or the notice of application for court orders as its powers are limited to suing and being sued by only proprietors of the strata pursuant to section 4(2) of the Act.

(b) The learned judge erred in holding that for the Corporation to sue and be sued by third parties, there must be an express provision to that effect in the by-laws.

[15] The order being sought from this court is that order 16. c) be set aside with costs to the appellants.

[16] It is noted that the Corporation has omitted to refer to order 16. d) of the learned judge's decision where she ordered that its name be removed as a party to the application. This seems to be an oversight as any order setting aside order 16. c) would impact the order of the learned judge removing the Corporation as a party to the claim and application ('the removal order'). Therefore, in the interests of justice, this court would have to also set aside the removal order if it found that the learned judge erred in

her conclusion that the Corporation had no legal standing to bring the claim and application.

The submissions

a. The Corporation's

[17] The Corporation contends that the ruling of the learned judge constitutes a misinterpretation of section 4(2) of the Act and fails to consider the law as it relates to the legal standing of parties in property damage and nuisance claims. It contends that on a reading of section 4(2) of the Act and section 28 of the Interpretation Act, there is no limitation or restriction on its power to initiate claims against third parties. Section 4(2) of the Act is clear and unambiguous that the body corporate can sue all others in its corporate name as there is no statutory limitation on the power.

[18] The learned judge erroneously limited the powers of section 4(2) of the Act and found that the Corporation could not bring a claim against the respondents as third parties. Section 4(2) does not provide an express limitation on the Corporation's ability to sue persons who are not proprietors in the strata ('non-owners'). Additionally, the by-laws of the Corporation cannot limit the powers without expressly stating such a limitation.

[19] Counsel for the Corporation submitted further that the claim concerns property damage done to common areas of the complex by the operation of the business on the respondents' property. This aspect of the claim relates to the failure of the 1st and 2nd respondents to maintain trees on their property and attend to fruits that rot on the common area of the complex damaging it. The claim also relates to a structure affixed to the boundary wall, which has caused damage to the wall. The learned judge failed to consider that the question of the legal standing of the Corporation is related to the reliefs sought for nuisance and damage to the complex. The learned judge failed to address the question of the property damage in her reasoning.

[20] According to counsel for the appellants, the striking out of the claim of the Corporation is a "wholesale disentitlement" of the Corporation from pursuing relief against third parties, without an express provision in the by-laws to this effect, despite the fact that the affected areas include common areas. In removing the Corporation as a party to the claim and notice of application, the learned judge failed to consider section 5(1)(f) of the Act and the effect of the property damage on the obligations of the Corporation.

[21] The appellants contend that it is evident on the face of the claim that the Corporation requires redress from the court for the damage. If there is interference (such as in this case) by a non-owner with the Corporation carrying out its functions, then the Corporation must have the legal capacity to sue the interfering non-owner. The canons of statutory interpretation provide the implication that such an imposition of duty must be coupled with the power to execute the duty as well as to sue and be sued in respect of the carrying out of that duty. The learned judge's narrow interpretation of this section and the by-laws creates uncertainty and absurdity.

b. <u>The 1st and 2nd respondents' submissions</u>

[22] Counsel for the 1st and 2nd respondents submitted that no resolution had been produced authorising the institution of the proceedings nor has any provision of the by-laws been identified which is capable of creating such a power. They highlighted that a named owner of a strata lot in the complex has deposed that he has no objection to the activities on the respondents' property and he has not agreed to the initiation of the proceedings in the name of the Corporation.

[23] Furthermore, counsel contended that the learned judge's finding that the Corporation is incapable of bringing a claim in nuisance is "grounded in the very nature of nuisance", which is that the person seeking to bring the claim must have a proprietary interest in land or in exclusive possession of the land in question to bring the claim in nuisance. There is no suggestion that the Corporation has a proprietary interest in the land or that it is in exclusive possession of the land. Accordingly, it does not have the right to sue in private nuisance. It is a corporate entity, separate and distinct from its

members with the goal of effective management of the various freehold interests and associated by-laws under it. In support of their arguments, counsel relied on cases such as **Hunter v Canary Wharf** [1997] AC 655; **Foster v Warblington Urban District Council** [1906] 1 K.B. 648; and **The Proprietor Strata Plan No. 305 v Greater Works International** [2015] JMCC Comm 6 at para. 72.

The ambit of the appeal

[24] Before discussing the issues raised for resolution on the appeal, I am impelled to dispose of an important aspect of the 1st and 2nd respondents' submissions. It is noted that they have raised issues not ventilated in the court below and which were not relied on by the learned judge in coming to her decision. More specifically, there is nothing to indicate that the learned judge was called upon to consider the issue regarding the existence of a proprietary interest or exclusive possession of the complex in the Corporation. In their original submissions, counsel for the 1st and 2nd respondents stated that the objection concerning the Corporation was "…the absence of any power conferred on the Corporation to bring such a claim" and alternatively, "the absence of any resolution of the Corporation permitting it to bring such a claim and further, in light of the express statements of some owners of the complex that they do not support the claim".

[25] The written note of the learned judge's oral decision also does not reflect any issue regarding the Corporation's incapacity to sue in nuisance because it had no proprietary interest in or exclusive possession of the complex. The learned judge stated at para 4(e) of the written note of her oral decision that the objection regarding the Corporation was, in summary, "that there is no evidence that the Corporation has the requisite authority to bring the claim". The Corporation's recorded response also does not point to any such issue having been raised and ventilated. Therefore, there is nothing which shows a consideration of the point now raised in the supplementary submissions of the 1st and 2nd respondents. I accept the Corporation's submissions that this particular issue concerning the lack of authority to sue, due to the absence of a proprietary interest and exclusive possession, is raised for the first time in the appeal.

[26] Furthermore, and, in any event, the learned judge did not make her order adverse to the Corporation on the basis of the Corporation's capacity to bring a claim for nuisance due to absence of proprietary interest, exclusive possession or a resolution. Her decision rested on the provisions of the Act and the by-laws. Therefore, counsel is implicitly (and belatedly too) asking the court to affirm the learned judge's decision on matters not considered by her and, indeed, not raised in the proceedings before her.

[27] I would not sanction this approach of counsel in the light of rule 2.3 of the Court of Appeal Rules, 2002 ('the CAR') and the overriding objective. Rule 2.3(3) provides that a respondent who wishes the court to affirm the decision of the court below on grounds other than those relied on by that court must file a counter-notice in form A3 setting out such grounds. Rules 2.3(4) and (5) of the CAR then state that the counter-notice must be filed within 14 days of the service of the notice of appeal and the party filing it must serve it on all other parties in the proceedings below who may be directly affected by the appeal. The 1st and 2nd respondents have not complied with the rules of court for their submissions to be considered regarding the capacity of the Corporation to sue in nuisance due to absence of proprietary interest, exclusive possession and a resolution. Therefore, this aspect of the 1st and 2nd respondents' submissions is not taken into account in the determination of the appeal.

[28] The issues for determination will now be addressed.

Whether the Corporation had no capacity to bring the claim or the notice of application for court orders as its powers are limited by the Registration (Strata Titles) Act to suing and being sued by only proprietors under the strata plan

[29] Sections 4(1) and (2) of the Act provides:

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

> (2) The corporation shall have perpetual succession and a common seal and be capable of suing and being sued in its name."

[30] The learned judge correctly stated that the Corporation, upon registration, became a body corporate with the capability to sue and be sued in its own name. Beyond that, section 4(2) is silent as to the matters in which it may sue or be sued or who may be parties to a lawsuit involving the Corporation. However, the learned judge's view is that despite the legal personality conferred on the Corporation, its powers, including its right to sue third parties, are circumscribed by the Act itself, by virtue of section 4(2), section 5 and the First Schedule.

[31] In my view, section 4(2) of the Act is not supportive of the position taken by the learned judge. There is nothing to suggest, from a literal reading of the subsection, standing alone, that there is any restriction on the legal capacity of the Corporation to sue and be sued. The Act has not made the capacity to sue and be sued subject to any other provision. However, the Act must be read and construed as a whole to determine whether there is any limitation on the legal capacity of the Corporation to sue or be sued. This brings into focus section 5, which sets out the duties and powers of the Corporation.

[32] Close scrutiny of section 5 shows a non-exhaustive list of powers and duties. According to section 5(1), "the duties of the corporation shall include" (in summary): to effect insurance of the building against certain risks; to effect other insurance as required by law; to pay the premiums for any insurance effected by it; to apply insurance money received by it for rebuilding and reinstatement of the building; to comply with notices or orders of a competent authority requiring repairs or work to be done on the property; and to keep the common area properly in a state of good and serviceable repair and properly maintained. Some of these duties are subject to the unanimous resolution of the proprietors.

[33] By virtue of section 5(2), "the powers of the corporation include" (in summary): to institute court proceedings against proprietors to recover any money expended by it

for repairs or work done by it or at its direction in complying with the directives or orders of a competent authority; to enter any lot to effect repairs or to carry out work required to be done by any competent authority; and to exercise the power of sale in respect of any strata lot.

[34] One thing is clear is that the preceding subsections do not reveal any express limitation on the legal capacity of the Corporation to sue or be sued conferred by section 4(2). The subsections make no reference to all the circumstances under which legal proceedings may be instituted by the Corporation, but it is clear from some of the powers conferred by section 5 of the Act that the Corporation could well engage third parties in assisting it to carry out its duties and functions. For instance, as can be seen above, one of its duties is to keep the common area in a state of good and serviceable repair and properly maintained (section 5(1)(f)). There are similar duties and powers given to the Corporation in the First Schedule of the Act, which involve, among other things, carrying out repairs to the strata lots and the common area. It also has the right to engage third parties in the execution of its power of sale and the initiation of court action for the recovery of debt owed by proprietors.

[35] The Corporation's entitlement to engage third parties to carry out its functions and duties carries with it the possibility of the Corporation being sued by such persons or the Corporation having to sue them relating to the services rendered. This could possibly arise, for example, from contractual arrangements with those parties, giving rise to a claim for breach of contract or, indeed, from negligence resulting in damage to property, giving rise to a claim in tort. The Corporation's power to sue and be sued may be regarded as an incident of, or natural corollary to, its powers and duties.

[36] It is interesting to note also that section 4(2) of the Act is identical to section 14(4) of the Conveyancing (Strata Titles Act) 1961 of New South Wales, which was the first piece of legislation of its kind dealing with strata titles. It has been noted that the Conveyancing (Strata Titles Act) 1961 of New South Wales had no precedent and "can fairly be labelled 'Made in Australia'" (see A F Rath, P J Grimes and J E Moore, Strata

Titles A Handbook Comprising Annotations and Practice Notes on the Conveyancing (Strata Titles) Act, 1961 With Regulations and Forms, page xi).

[37] In section 14(4) of the Conveyancing (Strata Titles Act) 1961, it was stated that the body corporate can sue and be sued, which is in almost identical wording to section 4(2) of our Act. It then went on to state at section 14(5):

> "14. (5) The body corporate may –
>
> **(a) sue and be sued on any contract made by it;**
>
> **(b) sue for and in respect of any damage or injury to the common property caused by any person, whether a proprietor or not;**
>
> (c) be sued in respect of any matter connected with the parcel for which the proprietors are jointly liable." (Emphasis added).

[38] For some unexplained reason, our legislators, having adopted the provision giving the body corporate legal personality, omitted to indicate the circumstances in which the power to sue may be exercised as in the case of the New South Wales statute. Therefore, it has been left open for our courts to interpret the section to give effect to the intention of Parliament.

[39] Applying the canons and rules of statutory interpretation, it cannot reasonably be said that on a reading of sections 4(2) and 5 together, Parliament intended to circumscribe the circumstances under which the corporate body may sue, to only matters pertaining to and involving the Corporation and proprietors *inter se*. If that were the intention of Parliament, one would have expected it to be expressly stated because it would be a curtailment on the right to sue.

[40] Further, a reading of the provisions of sections 4(2) and 5 of the Act, within the context of the statute as a whole, does not point to anything that can be taken to impliedly forbid the Corporation from suing third parties. In light of the scheme of the New South Wales statute evidenced by the provisions quoted above, and the similar provision in our

statute that renders the Corporation capable of suing and being sued, it does seem safe to conclude that the Corporation would have the same powers to sue in the circumstances expressly stated in section 14(5) of the Conveyancing (Strata Titles Act) 1961 of New South Wales. Therefore, in the light of those provisions of the New South Wales statute, I would hold that the Corporation is empowered under our statute to sue third parties in relation to matters that are incidental to the carrying out of its duties and the exercise of its powers as the body corporate consisting of all the proprietors. More specifically, the corporation is empowered to sue "**for and in respect of any damage or injury to the common property caused by any person, whether a proprietor or not**" (Emphasis added). Ultimately, the ability of the Corporation to sue a third party, which is under consideration in this case, must depend on the circumstances or context in which the dispute between the third party and the Corporation arises.

[41] In considering this point, one could consider, by way of illustration, an incident involving a motor vehicle colliding into the boundary wall of the complex, which abuts the roadway, damaging it. Would it be that the Corporation would have no recourse to seek redress from the third-party driver of the motor car for damage to the wall, even though the wall is its responsibility? It is difficult to accept that the law would deny the Corporation the right to seek legal redress relating to the wall on the basis that the driver of the motor car is not a proprietor of the complex. It would be an absurdity to hold that it falls on each proprietor to sue the third-party driver and not the Corporation even though the Corporation is comprised of all the proprietors.

[42] In my view, if a third party acted in a manner that negligently or otherwise unlawfully caused damage to the common area, the Corporation must have the legal right to seek redress for the damage caused. It falls within its duty to do all things necessary to keep the common area in good and serviceable repair. In other words, the wrong done by the third party affects the Corporation's control, management or administration of the common area, which is its responsibility. I would, therefore, hold that once the action to be taken is reasonably connected to the Corporations' statutory duties and powers, there

is nothing in sections 4(2) or 5 that could restrict its right to sue only to proprietors of the complex.

[43] Accordingly, having considered the provisions of the New South Wales statute mentioned above, regarding the legal capacity of a corporation within a similar statutory framework, and as a matter of common sense, it does appear that the learned judge, in restricting the Corporations right to sue only to proprietors of the complex would have given an unduly restrictive and, indeed, crippling, meaning to sections 4(2) and 5 of the Act. Indeed, if the right to sue is restricted to only proprietors, then the right to be sued would also be similarly restricted. I refuse to accept that that was the intention of Parliament because it must have been within its contemplation and expectation that third parties would, at least, be required to provide goods and services to the Corporation and, therefore, could be affected by any acts or omissions of the Corporation regarding the areas and matters under its control.

[44] I conclude that there is merit in the Corporations' complaint that the learned judge misconstrued sections 4(2) and 5 of the Act as it relates to the capability of the Corporation to sue non-owners. This conclusion now takes me to the second issue for consideration.

Whether the First Schedule of the Act and the by-laws restrict the Corporation's right to sue only proprietors

[45] The learned judge opined that because the duties of the Corporation are circumscribed by the Act and by-laws, she could not accept, without an express provision in the by-laws, that the appellants could bring an action in nuisance against persons who are not proprietors. She further noted that no evidence was given of any express provision in the by-laws, which gives the Corporation power to bring such a claim.

[46] Section 9(1) of the Act states:

> "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."

[47] Section 9(2) sets out what the by-laws should include, and reference is made to the First and Second Schedules of the Act.

[48] Section 9(3) provides:

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

[49] The learned judge specifically highlighted the First Schedule in coming to her conclusion that the Corporation's right to sue non-owners for nuisance is not expressly provided. The learned judge also went further to state that no evidence was given "of any express provision in the [by-laws]" for the complex, which gives the Corporation the power to bring the claim. In my view, however, the power of the Corporation to bring a claim is already conferred by statute and that right is not made subject to section 9, which provides for the creation of by-laws. Therefore, there would be no further need for the by-laws to deal with the question of the right of the Corporation to sue or be sued. The Act stipulates what the by-laws are designed to do and there is nothing to suggest that the by-laws affect the general right of the Corporation to sue and be sued conferred by section 4(2) of the Act. Counsel for the appellants have submitted that section 4(2) is wide enough to clothe the Corporation with the requisite power to bring the claim against the respondents as third parties. I cannot disagree with that submission.

[50] In the First Schedule, it is provided among the statutory by-laws that the Corporation shall "(a) control, manage and administer the common property for the benefit of all proprietors" and may "(f) do all things reasonably necessary for the enforcement of the by-laws and the control, management and administration of the common property". Additionally, the by-laws of the complex produced in evidence, through Ms Walker, expressly make these same provisions noted above, among others.

[51] The by-laws are described as covenants between the Corporation and the proprietors and the proprietors among themselves *inter se* (section 8 of the Act). The Corporation has responsibilities to the proprietors, which would necessitate its engagement with third parties to provide goods and services in order to carry out the functions it is obliged to execute. It means then that for the Corporation to observe and perform all provisions of the by-laws (including the two highlighted above), bringing a lawsuit against third parties may reasonably be considered necessary for enforcing the by-laws and for the control, management or administration of the common area. The power to sue persons other than proprietors of the complex is a necessary implication. The same would hold true regarding the capacity to be sued arising from section 4(2) of the Act.

[52] The provisions of the First Schedule of the Act considered by the learned judge and the by-laws of the complex provided by Ms Walker, seem wide enough to encompass the right of the Corporation to take legal action, if reasonably necessary, to fulfil its covenants under the by-laws and to carry out its duties regarding the control, management and administration of the property that falls within its purview.

[53] I would conclude that there is nothing in the by-laws or the First Schedule that restricts or ousts the statutory right of the Corporation to sue third parties or its liability to be sued by third parties. Therefore, the learned judge erred in her conclusion that because there is no evidence that the by-laws expressly confer on the Corporation the power to sue third parties in nuisance, it cannot be a party to the claim or the application for injunction.

[54] Furthermore, and connected to the foregoing reasoning, the learned judge erred on another basis. It is observed that the learned judge confined her reasoning to the claim in nuisance. However, the correctness of this order is now questionable in light of the fact that the Corporation had not only brought a claim in nuisance but also, in substance, for property damage to areas under the control, management and administration of the Corporation, allegedly resulting from the acts or omissions of the

1st and 2nd respondents. The areas damaged would clearly fall within the purview of the Corporation. Again, it would be absurd and inconvenient for each proprietor to bring a claim for the property damage alleged to be done to the common area, when the common area falls under the authority of the body corporate comprising all the proprietors.

[55] Therefore, I would conclude that the right of the Corporation to sue third parties for damage to the common area is not precluded by the First Schedule of the Act or the by-laws. Therefore, the learned judge fell into error by failing to have regard to the claim for property damage and the right of the Corporation under substantive law to seek redress against the 1st and 2nd respondents for the alleged damage to the complex.

Conclusion

[56] In all the circumstances, it seems fair to conclude that the Corporation's complaint that the learned judge was wrong to focus only on the claim for nuisance is not without merit. In my view, the learned judge erred in failing to appreciate that the Corporation's claim did not only sound in nuisance but in other causes of action. Therefore, the crucial question that the learned judge ought to have resolved on the notice of application did not concern the Corporation's legal capacity to bring the claim or to seek injunctive relief but rather whether, on the evidence presented and the law governing the grant of interim injunctions, it was entitled to the relief sought. The application, so far as it was brought by the Corporation, should not have been terminated at that preliminary stage for the reasons advanced by the learned judge.

[57] On the foregoing reasoning, it does appear reasonable to hold that the learned judge erred in her conclusion that the Corporation had no legal standing to bring the claim, and by extension, the application for interim injunction on the sole basis that it was precluded from doing so by the Act and was not expressly authorised to do so by the by-laws. In all the circumstances, the Corporation was a proper party to the claim and the notice of application for interim injunction. It was for the learned judge to determine whether it was entitled to the interim relief being sought, having regard to the applicable substantive law governing the relevant causes of action.

[58] The order removing the Corporation as a party to the application on the basis the learned judge did was erroneous. The Corporation should succeed on the appeal.

[59] Accordingly, the appeal should be allowed, and the order of the learned judge that the Corporation had no legal standing to bring the claim and the notice of application for injunctive relief should be set aside.

[60] The Corporation should remain as a party to the claim and be restored as a party to the notice of application for the proceedings to be considered on their merits.

[61] I would grant the costs of the appeal to the Corporation against the 1st and 2nd respondents to be agreed or taxed.

FOSTER-PUSEY JA

[62] I have read, in draft, the judgment of McDonald-Bishop JA. I agree with her reasoning and conclusion, and there is nothing I can usefully add.

D FRASER JA

[63] I, too, have read the draft judgment of McDonald-Bishop JA. I agree with her reasoning and conclusion and have nothing to add.

MCDONALD-BISHOP JA

ORDER

1. Order 16. c) made in the Supreme Court on 28 November 2022, that the Corporation had no legal standing to bring the substantive claim or to pursue the further amended notice of application filed on 25 August 2022, is set aside.

2. Order 16. d) made in the Supreme Court on 28 November 2022, that the further amended notice of application filed on 25 August 2022 is hereby amended to remove the Corporation as a party thereto, is set aside.

3. The Corporation shall be restored as a party to the substantive claim and the further amended notice of application filed on 25 August 2022 for consideration of the proceedings on their merits.

4. Costs of the appeal to the Corporation against the 1st and 2nd respondents to be agreed or taxed.