

Legal Update

In December 2022, the Grand Court issued an Order for Directions. (copy attached)

The Directions Hearing was preceded by a July 19, 2022 letter (copy attached) from KSG Law to Bedell Cristin addressing the issues of *Redactions* and *Books of Account*. The letter contains the following statements:

“In any event, it does not appear that this issue can be advanced in further correspondence unless and until your client identifies what specific documents exist that it refuses to disclose on the basis that they do not constitute “*books of account*” within the meaning of the By-laws.”

“In the absence of any particular redaction being proposed by your client, it is not accepted that any redactions are appropriate or required. It is clear that this issue cannot be resolved in a factual vacuum based purely on legal principles.”

When Bedell Cristin failed to respond to KSG Law with specificity for either *Redactions* or *Books of Account* issues, KSG Law filed for a Directions Hearing in Grand Court. The purpose of this filing was to force responses from ExCo so the case could move meaningfully forward. This Directions Hearing was held on December 1, 2022. Owners should be aware that ExCo responses to this court order may be deemed inadequate by the plaintiff and that could result in additional court activity.

This July 2022 KSG Law letter followed frustrations by the plaintiff and other owners in receiving meaningful Strata records in a timely manner despite ExCo claims in their November 2018 letter that “There is complete transparency with regards to VP governance.” (copy attached).

After the initial inquiry for Strata records, the plaintiff was informed by BCQS on September 18, 2019 that ExCo would “revert to you shortly”. It would take over 400 days before BCQS would send QuickBooks ledgers on October 30, 2020 while denying other requested records. The lengthy delay and subsequent review of the information raised concerns that the ledgers were incomplete and possibly modified. Requests for Strata banking records to verify the accuracy of the ledgers have been repeatedly denied. To date, other critical Strata records that were requested have also not been received.

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION**

CAUSE NO: 196 OF 2019

BETWEEN:

GLOBAL MARKETING ASSOCIATES LLC

PLAINTIFF

AND:

THE PROPRIETORS, STRATA PLAN NO. 44

DEFENDANT

ORDER FOR DIRECTIONS

Upon a Summons for Directions filed 15th of February 2021 coming on for hearing

AND UPON considering the hearing bundle and hearing Counsel for the Plaintiff and Defendant

IT IS HEREBY ORDERED that:

1. That the Consent Order filed May 2020 in this matter be varied as follows:
2. That the parties within 42 days agree a form of Consent Letter and Non-disclosure Agreement to permit compliance by the defendant of its obligations under the Data Protection Act in order to provide books of account to the plaintiff.
3. That within 7 days of such agreement as outlined at paragraph 2 the parties execute the NDA agreement and within a further 7 days the defendant does serve on the intended recipients the Consent Letter.
4. That the defendant within 21 days from the date of this order provides to the plaintiff a schedule setting out which of the following records it accepts fall within the defendants definition of books of account "Defendant's Books of Account" below;
 1. ExCo meeting minutes
 2. Accounting (including QuickBooks) records

This Order for Directions was filed by KSG Attorneys, Attorneys at law for the Plaintiff, whose address for service is 4th Floor, Harbour Centre, 42 North Church Street, George Town, Grand Cayman, PO Box 2255 GT, KY1 1107. GC 196 of 2019.

3. Bank statements for all strata accounts [with month end reconciliations]
 4. Individual owner statements
 5. Check payment details in check number order
 6. Deposit slip details in date order
 7. Owner identification of direct receipts
 8. A list of registered owners
 9. Details of outgoing wire payments
 10. All detailed invoices (including legal) for costs incurred by the strata
5. That within 56 days of the issuance of the Consent letter, the defendant do provide the plaintiff with the Defendants Books of Account under paragraph 4 of this Order for 5 years prior to the date of issue of proceedings with a narrative explanation of all categories of redactions applied to the Defendant's Books of Account, to the extent that the defendant has not already provided the same to the plaintiff.
6. That shall it be necessary:
- 6.1 The Plaintiff be granted leave to file and serve a further affidavit of James Keim no later than 28 days from the date of provision of the books of account at paragraph 5;
 - 6.2 That the Defendant be granted leave to file and serve an affidavit in response to the further affidavit of James Keim, to be filed 28 days after service upon the Defendant of that further affidavit of James Keim;
7. A CMC to be listed for the first available date no less than 14 days from the date set for service of the evidence at 6.2
8. Costs of this application be costs in the Cause.

DATED this day of December 2022
FILED this day of December 2022

THE HONOURABLE JUSTICE WALTERS

This Order for Directions was filed by KSG Attorneys, Attorneys at law for the Plaintiff, whose address for service is 4th Floor, Harbour Centre, 42 North Church Street, George Town, Grand Cayman, PO Box 2255 GT, KY1 1107. GC 196 of 2019.

JUDGE OF THE GRAND COURT

Approved as to form and content:



KSG
ATTORNEYS-AT-LAW FOR THE PLAINTIFF



BEDELL CRISTIN
ATTORNEYS-AT-LAW FOR THE DEFENDANT



Bedell Cristin
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Attention: Richard Parry

19 July 2022

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42 North Church Street
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KY1-1107
Cayman Islands

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Our Ref: 0441/18
Sent by: Email only

Dear Mr Parry,

**Re: GC 196 of 2019
Global Marketing Associates LLC v The Proprietors, Strata Plan
No 44**

We refer to your letter dated 7 June 2022. We adopt the defined terms used in our previous correspondence.

Redactions

Our client does not accept that redactions of any Personal Data are required here where either (a) the relevant proprietor will consent to the disclosure or (b) the disclosure falls under either of both of sections 2 and 6 of Schedule 2 to the DPA. We addressed this point in our 6 May 2022 letter, and the arguments made in your latest correspondence do not refute our position:

1. The extract from *Beachcomber* reproduced at [1.1] of your letter is incomplete and is not authority for the proposition that you appear to derive from it. Rather, Williams J at [52] of *Beachcomber* is dealing with whether disclosing the requested information to the plaintiff there constituted 'processing' of personal data. In any event, the plaintiff's concession that information could be provided with personal data redacted has no bearing on this case.
2. Similarly, the extract at [1.2] of your letter is not relevant here. Indeed, you note that the plaintiff in *Beachcomber* "accepted that documents should be redacted in order to protect personal identifiable information". In those circumstances, the judge's conclusions were not reached after full argument on the point and have limited applicability to this dispute.



3. While there is no dispute with the general proposition that disclosure permitted under sections 2 or 6 of Schedule 2 to the DPA would call for redactions based on the purpose of the processing:
 - 3.1. In the absence of any particular redaction being proposed by your client, it is not accepted that any redactions are appropriate or required. It is clear that this issue cannot be resolved in a factual vacuum based purely on legal principles. Unless and until a specific redaction is made by your client, this matter cannot be resolved in correspondence.
 - 3.2. It is inappropriate for your client to recharacterize for their own benefit our client's purpose, as you do at [1.5] of your letter. There is no reasonable basis for your client to question our client's good faith in setting out his purpose for requesting inspection of the books of account.
4. As to your argument at [1.6] of your letter, we repeat similar points made in our 6 May 2022 letter, nothing in *Beachcomber* or the specific strata bylaws at issue in that decision has any relevance to the construction of the term "*books of account*" as used in the By-laws.

Overall, your treatment of William J's judgment in *Beachcomber* as if his words were a statute is inapt and entirely the wrong approach. Our respective clients' rights and obligations under the By-laws and the DPA must be determined in the specific factual context of this case, including our client's purpose for seeking the disclosure and the proper construction of the By-laws. An appeal to the specific facts of the *Beachcomber* case does not advance that analysis.

Books of Account

We disagree that *Kayne v The Owners, Strata Plan LMS 2374*, 2007 BCSC 1610, has any meaningful relevance as a persuasive authority when interpreting the term "*books of account*" in the By-laws:

1. *Kayne* concerned the interpretation of section 35 of the *Strata Property Act* (British Columbia). The *Strata Titles Registration Act* (2013 Revision) (the **STRA**) does not contain a universally applicable statutory provision equivalent to section 35.
2. While section 3.11 of the By-laws contains language similar to section 22 of Schedule 1 of the STRA, and section 35 of the BC legislation, the By-laws as a contractual document must be interpreted in their own specific context in the usual way.



3. The need to interpret the By-laws in their own specific context is greater here where the proprietors have opted to amend and vary the default bylaws set out in Schedule 1 of the STRA.

In any event, it does not appear that this issue can be advanced in further correspondence unless and until your client identifies what specific documents exist that it refuses to disclose on the basis that they do not constitute "*books of account*" within the meaning of the By-laws.

As requested, we enclose a copy of *Inversiones Frieira SL v Colyzeo Investors II LP* [2012] 1 BCLC 469.

Costs

As we set out in our 6 May 2022 letter, there is nothing in the By-laws that would shift the costs of your complying with its own obligations under section 3.11.6 to the requesting proprietor. The relevance of your statement that the request is made under the By-laws rather than the DPA is not understood – it is precisely our point that the By-laws do not require our client to bear those costs directly. We note that you do not cite any section of the By-laws or any relevant legal principle for your assertion that "*there should rightly be reasonable costs imposed for such requests*". If the parties to the By-laws intended for there to be such an imposition, it would have been provided for in the By-laws. It is not.

All our client's rights remain reserved.

Yours faithfully

A handwritten signature in black ink, consisting of the letters 'KSG' in a stylized, cursive font.

KSG Attorneys at Law

Strata 44 – Villas Pappagallo

23 November 2018

Dear Owners,

Hope everyone is well. We look forward to seeing you in January!

Some owners have recently received a letter or have been approached by a fellow owner regarding VP management.

The following is a factual response to the outlined concerns:

- There are no issues of concern related to the VP property, its management, or the EC regarding transparency, conflict of interest, or honesty. The EC, members of which are elected by owners annually at each AGM, serve voluntarily, tirelessly, without payment but at great personal sacrifice in terms of time spent, in order to supervise management of the Strata and ensure the maintenance, upkeep and improvement of the property for the benefit of all owners and occupants.
- There is complete transparency with regards to VP governance. Every year the agenda and meeting notice and minutes of the previous AGM are issued well ahead of time. This package was circulated on 29 October 2018 in advance of the 2019 AGM. The Financial Statements, proposed budget for the upcoming year and details of any suggested major projects and the proposed funding of them will be distributed as early as possible prior to the AGM. Owners meet at the AGM in January to review minutes, discuss proposed projects, voice concerns and approve the upcoming year's budget. Owners who cannot attend are encouraged to send proxies to execute their vote. Any spending outside of the annual budget (e.g., special projects) is done only with owner approval. AGM minutes are distributed to owners. Budgets and financial information is on file with our Property Manager, Michael Baulk, and is open to all owners. Throughout the year our property manager and the EC are available to discuss any questions or concerns and will provide further copies on request of AGM minutes, financial statements, budgets, and insurance policies and cover notes.
- An owners' directory, which is voluntarily prepared and distributed by one owner, contains full contact details of all owners who have provided these details, as well as other relevant information. The latest version of this was circulated on 16 November 2018, and all owners are encouraged to update their information now or at the AGM.
- As part of the collaborative process, many ideas are presented at the AGM, but only motions approved by the owners are executed. For example, a 'property website' was discussed, but the owners did not want to proceed. Consequently, there is a website for short-term rentals that is open to any owner who has a DOT license. The website is 100% funded by the participating owners. Short-term rentals are completely separate from Strata management and funds.

- The By-Laws require the EC to issue Rules of Occupancy, which have been in existence for many years but are revised from time to time to take account of concerns raised and changing circumstance. The latest revision, to ensure that the Rules are consistent with the By-Laws, was undertaken following discussion of a number of ongoing issues at the 2017 AGM. At the 2018 AGM, owners were informed that the revision had been completed, and copies were distributed to owners shortly thereafter.
- Similarly, construction scheduling was discussed and agreed to at the 2018 AGM because it is to the benefit of all owners and residents. Restricting major renovations when the property is less occupied is common practice and common sense. After two full villa renovations on the property this year, this policy appears to be a good idea and working well.
- Likewise, parking lot replacement was discussed and tabled until the 2019 AGM, and a pool heater was discussed and tabled until the issue has been more thoroughly researched with regards to options and price. Since these items are outside the operating budget, they would need owner approval to proceed.
- Regarding the legal fees, communication from the 'concerned' owner was delivered through a lawyer, without any prior direct EC/management contact or discussion. As the letter was from a very experienced litigator known to the EC who raised very serious allegations, the EC had no option but to engage our own attorney to advise us on our rights and obligations. As a result, the VP lawyer was contacted as it is in our collective best interests to hand any legal request to our lawyers for professional advice and the appropriate response.
- The EC has been cooperative and must follow bylaw requirements when addressing legal issues.

We would encourage all owners to continue to follow the process of 'open communication' that has been in place and has worked successfully for several years now.

Please be assured that your EC and management team has worked countless hours to ensure the property and its finances are in great shape. The property appearance, financial health, strong community and collaborative spirit, reflect those efforts.

On another note, we have been working diligently on the parking lot quotations/options and will be sending you more information soon.

In the meantime, we appreciate your support and look forward to the upcoming year of working together to best enhance our property and its value.

Happy holidays and see you all at the AGM and Beach BBQ!

The EC