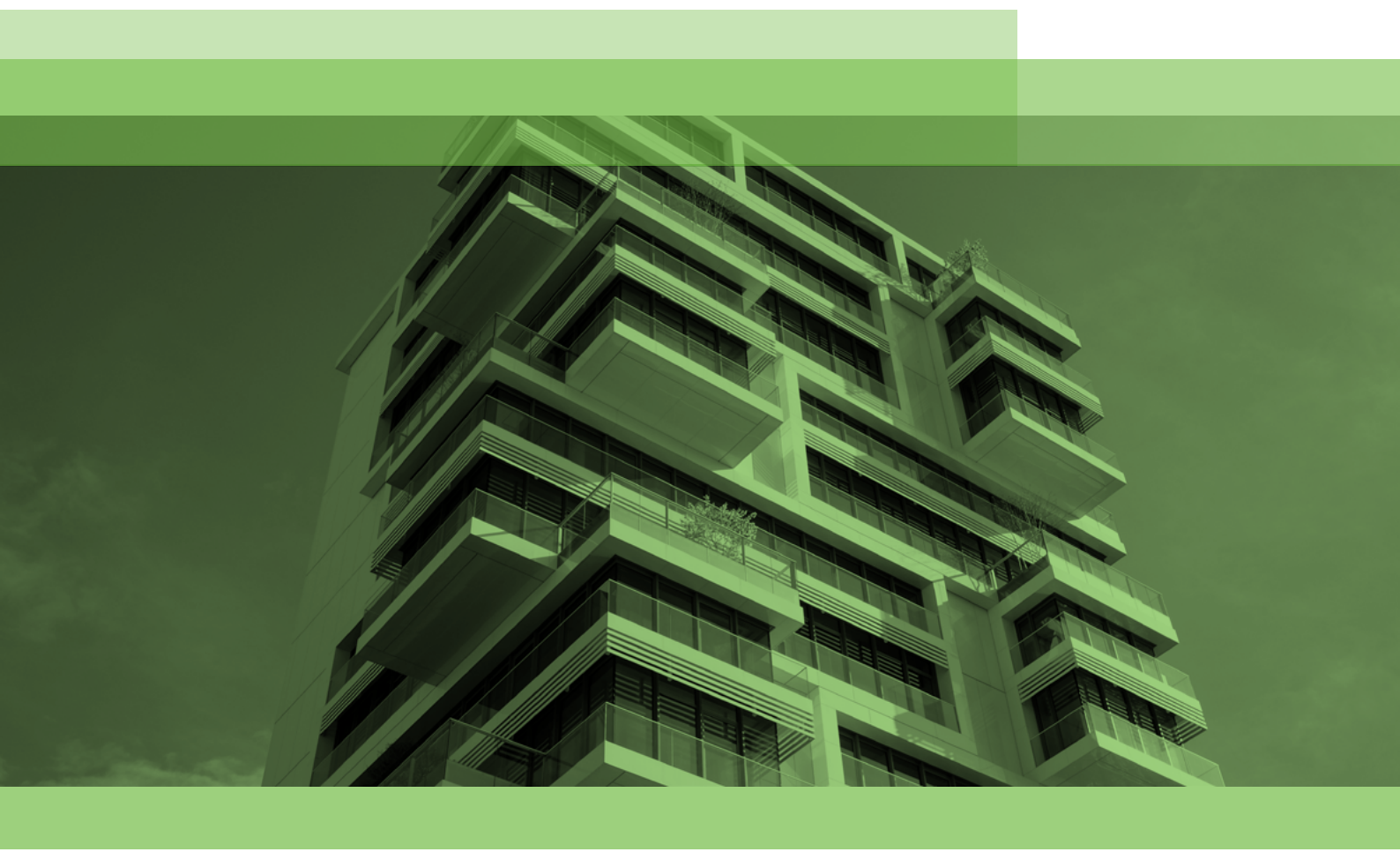


# Saxe v Pleasant Ways Body Corporate

Community Scheme Ombud Service - Adjudication Order

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**Case Number:** CSOS 106/WC/17  
**Adjudicator:** Kamlesh Ker  
**Date:** 13 July 2017  
**Applicant:** Gayle Saxe  
**Respondent:** Pleasant Ways Body Corporate



## **PARTIES**

The Applicant is the registered owner of Units 309, 310 and 406 in the Building situated at 275 Beach Road, Sea Point, Cape Town, in the Western Cape.

The Respondent is the Body Corporate of Pleasant Ways, a body corporate as contemplated in section 2 of the Sectional Titles Scheme Management Act No. 8 of 2011 and which is hereinafter referred to as the Body Corporate. The Body Corporate is represented by the chairperson of the Trustees of the Body Corporate, Grant Richardson.

The hearing was part heard on 23 June, 2017 and on 6 July, 2017 and was concluded on 11 July, 2017.

## **BACKGROUND AND NATURE OF THE ISSUES**

This is an application for dispute resolution in terms of Section 38 of the Community Schemes Ombud Services Act No. 9 of 2011, hereinafter referred to as the CSOS Act, which application was lodged with the Western Cape Provincial Ombud Service office.

The Applicant conducts a short term letting, self-catering business at the Units owned by her, namely Units 309,310 and 406, much like the Airbnb type of accommodation for holiday makers. Units 309 and 310 were one-bedroomed apartments and Unit 406 was a two- bedroomed apartment. After the re-configuration of the units by the Applicant, Units 309 and 310 now have two bedrooms each and Unit 406 has three bedrooms. The Body Corporate rules allow occupancy of two persons per bedroom. As a result of the additional rooms added through re- configuration of the space, the Applicant is of the view that she may now let the premises out to four persons in each of the two-bedroomed apartments and six persons in the three- bedroomed apartment and she sought an order from CSOS to confirm this. The Body Corporate argued differently and the arguments and evidence will be summarized below.

Furthermore, the Body Corporate imposed fines amounting to a total of R27,000 on the Applicant for overcrowding.

The Applicant raised objections regarding the alleged unfair

procedure followed prior to the allocation of rental parking bays. She also required her parking bay to be correctly marked as it was not in line with the extent of her exclusive use parking bay as registered at the Cape Town Deeds Office. The latter problem has now been rectified so I will not add that part of the dispute to the list of issues to be decided.

An additional issue was tabled by the Applicant at the Adjudication on the first day of the hearing relating to a Resolution tabled at the Special General Meeting held on 6 June, 2016. The Applicant claimed that the issue was urgent as the Managing Agent for the Body Corporate, namely Sandak- Lewin Trust, had called another Special General Meeting to vote on the same Resolution which had not succeeded at the meeting on the 6th of June 2017, and the Notice to the owners called for the meeting to be held on 24 July, 2017. The motion called for short term letting to have a minimum rental period of three months at a time. I allowed this issue to be added to the list of Issues due to the urgency of the matter.

The Respondent also added another issue relating to an additional Levy which he believed the Body Corporate ought to be entitled to charge owners who had increased the number of bedrooms in their units, due to the increased wear and tear, electricity and water consumption occasioned by the additional occupancy numbers. The current levies are assessed on the Participation Quota (PQ) of the units only, not on the occupancy numbers. I allowed this issue to be added as the outcome of this hearing might impact on the number of occupants who occupy the units, and the increased costs to the owners at large. I however stressed that I would only make a finding in principle and provide guidelines, if I find that the occupancy has indeed been legitimately increased and will not determine an actual amount as this is the task of the Body Corporate and its Managing Agent.

## **SUMMARY OF ISSUES TO BE DECIDED AND PRAYERS FOR RELIEF**

**[1]** Whether the Applicant should be allowed to let her units out to the maximum number of occupants permitted per bedroom in terms of the new configuration of her units. This prayer for relief is in terms of Section 39(3)(d) of the CSOS Act.

**[2]** Whether the Applicant made herself guilty of overcrowding in terms of the Scheme Governance Provisions, and if so, whether due process had been followed when the fines were imposed. This prayer for relief is in terms of section 39(3)(d).

**[3]** Whether the rental parking bays were fairly allocated. This prayer for relief is in terms of Section 39(7)(b).

**[4]** Whether the proposed Special General Meeting called for on the 24 July, 2017 should be allowed to proceed on that date or a subsequent date. This prayer for relief is in terms of Section 39(4) (c).

**[5]** Whether an additional levy ought to be charged for units which have increased the number of bedrooms in their units but are still paying a levy based on the current Participation Quota based on the number of square meters per unit and not on the number of bedrooms per unit, and if so, what criteria are to be applied and the effective date from which this will be imposed. This prayer for relief is in terms of Section 39(1) (c).

## **SURVEY OF EVIDENCE AND ARGUMENTS**

### **APPLICANT'S VERSION**

The Applicant testified on her own behalf and called various witnesses. She also submitted documentary evidence. The evidence is summarized below:

#### **GALE SAXE:**

**[1]** With regard to the occupancy, she submitted Certificates of Occupancy from the City of Cape Town's Development Management Director, to the effect that each of her apartments, namely 309, 310 and 406 at Pleasant Ways had been completed on 16 February, 2017 in terms of an approved building plan for the internal alterations of each of her units.

**[2]** During the past two years, the supervisor at the Building, one John van Vledder, has been harassing her short term tenants over occupancy issues.

**[3]** She believed that the supervisor, John Vledder, has influenced the Chairperson of the Body Corporate, Grant Richardson, who believes that she is in breach of the Rules.

**[4]** She believed that the old occupancy rules should not apply to her newly renovated units and that each unit should be revised to two persons per bedroom for the increased number of bedrooms.

**[5]** Two former Chairpersons of the Body Corporate, namely Mark Elleyne and Lennart Uller, told her that Council recognition of the revised number of bedrooms after renovations was sufficient for raising occupancy numbers.

**[6]** With regard to the fines, she believed that they were unreasonable and that due process had not been followed before the fines had been imposed. The Body Corporate has imposed a fine of R500 per person per day for each day of overcrowding.

**[7]** With regard to the parking bays, she conceded that the boundaries of her parking bay have been marked correctly since the dispute was referred to CSOS.

**[8]** However, as far as the rental bays are concerned, she claimed that the available bays for rental have been unfairly allocated by the Trustees of the Body Corporate and by Grant Richardson in particular as he had placed a notice on a small notice board in the entrance hall of the building, and gave owners a fixed amount of time to contact the Trustees to be able to participate in a draw for parking bays. However, for those owners who do not live in the building, this method is unfair. She believes that all owners ought to have been notified by registered mail or email of any information pertaining to the building which could affect them. By the time she found out, the bays had already been allocated. She did not refer to any rule which required that notice be served in that way.

**[9]** She had made her desire for a parking bay very clear when she was second to the highest bidder for a parking bay that was auctioned by the Body Corporate some time ago. She owns only one parking bay.

**[10]** With regard to the Special General Meeting, where the proposed three- month minimum tenancy period did not pass, she argued that the proposed re-vote was inappropriate and discriminated against owners who rent their units for periods less than three months. She challenged the witness, Carl Smit, from Sandak- Lewin Trust, when he testified about the reasons for the re-vote and I will deal with the reasons for her challenge when I deal with Carl Smit's evidence.

**[11]** She testified at length about Grant Richardson's attempts to influence the owners against short-term letting.

**[12]** Under **cross-examination**, and with regard to **occupancy**, Grant Richardson submitted a letter from Lennart Uller, a former Chairman of the Body Corporate, the one prior to Mark Elley, in which he refuted Gale Saxe's testimony to the effect that he had agreed to an increased occupancy for her units.

**[13]** In the letter Lennart Uller states that he had provisionally allowed Mrs Saxe to have more people in her apartments until the next General Meeting (SGM or AGM), and was told that she needed to apply to the General Meeting to take a decision to change the number of occupants allowed in the apartments owned by her since the reconfiguration. He had however made it clear that anything of this kind could only be considered once the plans for her apartments had been approved by the City Council.

**[14]** Lennart Uller had further stated in his letter that he had been very forthcoming prior to this, to the extent that he had taken Mrs Saxe's plans to the City Council for a pre- approval meeting with an official at the City Council. The official gave guidance on the drawings on what needed to be changed or done before the City Council would approve the alterations proposed by Mrs Saxe.

**[15]** Thereafter he returned the drawings to Mrs Saxe, and told her what she needed to do to amend the plans and informed her that such amended plans would then need to be considered by the Trustees of the Body Corporate for possible approval. Once such approval had been

granted by the Trustees, she could submit the altered plans to City Council for their approval.

**[16]** Once City Council had approved the altered plans, she could apply to the general meeting to change the occupancy.

**[17]** He went on to add that it goes without saying that his provisional permission could not extend beyond, at most, the next Annual General Meeting. By that time, she will have had enough time to make the alterations and have the new plans submitted to the Trustees for approval and then she would also have had enough time to take them to the City Council for approval.

**[18]** He added that there could be no misunderstanding about the conditions upon which he granted the provisional approval, and that any other argument by Mrs Saxe is a misrepresentation of what he said. He stated that it was not for him to decide, it was for the General Meeting to decide.

**[19]** These conditions were not followed by his successor (Mark Elley), so he suggested that this be done now.

**[20]** With regard to **the fines**, he, Grant Richardson, disputed Ms Saxe's version and I will deal with his version when I deal with his testimony.

**[21]** With regard to the parking bays for rental, he also disputed her version and I will deal with his version when I deal with his testimony.

**[22]** With regard to the Special General Meeting, I will deal with her objections when I deal with Carl Smit's evidence on this matter.

The applicant testified at length and her evidence is on record. I do not wish to record same here and will only deal with the most contentious issues raised. I also wish to add that Ms Saxe repeated herself constantly and interjected when other people spoke, hurling insults and attacking the Chairman of the Body Corporate, Grant Richardson repeatedly despite several requests from me to refrain from doing so. She personalized issues and displayed a tendency

to exaggerate. The record will reflect that she jumped from one issue to the next in a chaotic haphazard fashion and I constantly tried in vain to bring her back to order when she jumped from one issue to the next and introduced irrelevant evidence. It was difficult to manage her emotional outbursts and the duration of the hearings were protracted unduly due to Ms Saxe's conduct at the hearing.

### MARK ELLEYNE:

**[1]** He is the former Chairman of the Pleasant Ways Body Corporate, from December 2015 after Lennert Uller, and was not voted in at the last AGM on 12 August, 2016. He gave evidence regarding what he believed to be an irregular manner in which he had been "ousted" in August 2016 but I will not summarise this here as he has not contested the election of the new Chairman, Grant Richardson, after that meeting and he is not attempting to contest it at this hearing. He also conceded that he had been remiss in submitting his name as Trustee prior to that meeting. He added that the Body Corporate did not call another meeting to rectify the irregularities like they were doing now with the recalling the Special General Meeting. He cited examples of blank proxies which had been signed by owners in favour of John the supervisor, but conceded that although there were different handwritings, it was not illegal, merely unethical. He further cited examples of votes being counted by the show of hands instead of by ballot.

**[2]** Prior to his Chairmanship, a number of apartments had been renovated.

**[3]** Under the previous Chairman, occupancy of the renovated apartments had not been officially changed where bedrooms had been added or removed.

**[4]** The rules were suspended until an assessment can be made which is consistent with the City's by-laws.

**[5]** He therefore engaged the services of an expert to survey all the units and evaluate all the apartments. There had also been a debate about whether one of Mrs Saxe's flats had met the City Council's requirements.

**[6]** Before he could receive the final result of the survey, he lost his position as Chairman.

**[7]** In principle, all properly renovated units could have their occupancy raised based on a two person per room occupancy.

**[8]** There was a lot of bad blood between the supervisor, John, and Mrs Saxe. He influenced other owners to believe that Mrs Saxe was breaching the rules.

**[9]** With regard to the parking, the owners voted to widen the driveway to create two extra parking bays. The proceeds of the sale of the bays would be used to make capital improvements in the building.

**[10]** When he was re-called by Mrs Saxe as a witness on 6 July, 2017, he testified regarding the Special General Meeting held on 24 May 2017.

**[11]** He felt that the meeting had been relatively well organized. Attendees signed in, were given voting slips, the Managing Agent, Mark Spires put the information on the completed voting slips into a computer, announced that 51 owners were present, explained that 75% of the voters needed to vote in favour of the motion for it to succeed, then stated that the motion had succeeded whereupon he, Mark Elleyne said that 14 had voted against the motion, which leaves 73% in favour of the motion. When this was pointed out, Mark Spires corrected himself and declared that the motion had not succeeded. It was very close and the meeting ended.

**[12]** Grant Richardson sat at the head table and chaired the meeting.

**[13]** He was surprised when he received the email from the Managing Agent, saying that the voting had been irregular and that it had to be conducted again at a Special General Meeting to be held on 24 July, 2017. In the past meetings were not recalled even though procedures were irregular.

**[14]** He believed that the meeting had been re-called because the Body Corporate were not happy with the outcome of the first meeting and that the reasons given for the recall were of a technical nature.

**[15]** There was no prior consultation with the owners, something which he had done when he was Chairman. He conceded that there was no rule which required prior



consultation but believed that it was good practice to do so.

**[16]** Under **cross-examination**, he confirmed that Mrs Saxe had been a Trustee and needed to abide by the conduct rules, but added that Trustees are not always aware of the rules.

**[17]** With regard to the measuring of the rooms, he had faith in the Company, IMPT, which he had hired to survey the building, as that Contractor, namely Angelo, had done painting and renovation work and he was chosen because of his knowledge of Sectional Title Buildings.

**[18]** He conceded to many questions regarding the AGM when he was not re-elected but as this is not an issue, I will not deal with it here. I have recorded only to compare the defects in that meeting with those at the Special General Meeting which is being recalled due to irregularities.

**[19]** With regard to the email from Lennert Uller dated 23 January, 2017 which also referenced his earlier email dated 19 November, 2016, he was not aware of it, but his understanding was that the enforcement of the occupancy rule had been suspended.

#### ZAYDEE EBRAHIM MOTALIEB:

**[1]** She owns an apartment in Pleasant Ways which she purchased in 1993 and has been letting the apartment on a short-term basis since December 2016.

**[2]** She is a widow and is dependent upon the rental income.

**[3]** She was not consulted about the proposed motion at the first SGM and when she received the Notice, she told Grant that she was devastated.

**[4]** She corroborated Mark Elleyne's version of how the voting proceeded on the 6th June, 2017 so I will not repeat it here.

**[5]** She was not aware of any security issues or complaints around short term letting.

#### RESPONDENT'S VERSION

##### GRANT RICHARDSON:

He submitted extensive documentary evidence and testified as follows:

**[1]** He is the Chairperson of the Trustees of the Pleasant Ways Body Corporate.

**[2]** Gayle Saxe has been blaming him for everything yet she has been overcrowding for three years.

**[3]** With regard to **occupancy**, the previous Chairperson, Lennart Uller, had during his tenure told Ms Saxe to apply to the City Council to have her plans approved so she has known for a long time but only produced the Occupancy certificates in February 2017.

**[4]** She has been advertising for short term letting based on two and three bedroom occupancy respectively, and has been allowing 4 people to occupy units 309 and 310, and six people to occupy unit 406 and despite his request to her to change the advert to reflect the correct occupancy, she continued to advertise the incorrect occupancy and refused to change the advertisement.

**[5]** He then went through a lengthy email dated 19 May 2017 which was sent by her and her husband, Maon Saxe to the owners of the apartments at Pleasant Ways, in which they misled the owners regarding the true state of affairs and in which they personalized the issues, blaming him for their troubles.

**[6]** He disputed most of the contents of the email and presented his version.

**[7]** In the interests of brevity, I will not go into the details but only record the aspects which relate to the issues at hand.

**[8]** With regard to the **parking**, the Body Corporate is in the process of creating three additional parking bays inside the property which will be sold as Exclusive Use bays.

**[9]** There are two bays on the roadside earmarked for Contractors, but which they, the Contractors do not use

at night. He therefore deemed it in the interests of the residents to use these bays from 5pm to 8am rather than leave them empty at night.

**[10]** He suggested to Mark Spires, from Sandak- Lewin Trust, that he avoid allocating the bays to owners who are in arrears, as the rental for the bays will simply add to the arrear amounts owing by them.

**[11]** He placed a Notice in the Concierge opposite the lifts on the ground floor, in which he invited applications to submit their names for a lucky draw. The security guard drew the names from the slips in the box, randomly.

**[12]** There is no requirement that Notices should be emailed or sent by registered mail to advertise two temporary rental parking bays.

**[13]** No lease was entered into with any of the renters of the bays and the rental of the bays are of a temporary nature, which can be terminated at 24 hours' notice. These rented bays will be terminated as soon as the wall has been built.

**[14]** With regard to the three bays being created inside the property, one of the bays has been allocated to the tenant of the person who bought the bay and has paid her deposit of R150,000 but she has not yet taken transfer due to delays with the appointment of the land surveyor. The building is being repainted and the scaffolding is occupying some of the parking space.

**[15]** There are four owners of bays, two inside and two outside.

**[16]** Gayle Saxe complained about the allocation of the bays in an email she sent to all the owners, and as a result the conflict spiraled out of control.

**[17]** With regard to the two internal bays, the leases expire at the end of the year, and there is no lease for the outside bays.

**[18]** Gayle complained that Mrs Franco was allocated a bay yet she owns a garage. Mrs Franco is disabled and needs a bay close to the building. The person from Flat 506 who won the lucky draw gave permission to Mrs Franco to use his bay when he is away. This is also a temporary

arrangement. When the bays are ready for sale, they will be auctioned. The other bays are on a long term lease.

**[19]** He could have left the bays allocated to the Contractors empty at night, but these are often used illegally by hotel residents from the hotel next door despite signs that illegally parked vehicles will be clamped and fined R250-00.

**[20]** With regard to the occupancy fines, the conduct rules allow for fines to be issued.

**[21]** The procedure followed is to warn a person at a meeting with the Trustees that they are in breach and a fine is issued only if the breach continues. The fines start at R350 per occupancy breach, and then are increased to R500-00 per occupancy, not per person and not per day.

**[22]** Mrs Saxe has been a Trustee and was aware of the process.

**[23]** She nonetheless allowed overcrowding of her apartments for years.

**[24]** The fines were imposed on all her flats over a period from 1 May, 2016 up to 8 January, 2017. There were 37 fines during this period, which adds up to R18, 500.

**[25]** He was approached by Mr Maon Saxe, Gayle's husband, who told him that they had taken bookings in advance and had already booked the apartments based on the higher occupancy levels. They had submitted their plans to the City Council but had not yet had occupancy certificates from the City Council.

**[26]** After consulting the other Trustees, he sent an email to Mr Saxe in which he granted a 30 day period with effect from 11 January, 2017 to submit Occupancy Certificates from the City Council confirming the new occupancy levels.

**[27]** As the certificates were not forthcoming after the 30-day period had expired, he wrote to them on 11 February, 2017, advising that neither the Trustees, nor the managing agent had received any correspondence from the City Council. He advised them that any breach of the occupancy limits carried a fine which will be enforced with effect from 12 February, 2017.

**[28]** During the period 12 February, 2017 to 26 May, 2017, another 18 fines were imposed.

**[29]** The certificates of occupancy furnished by Ms Saxe were signed on 20 February, 2017 and stated that the alterations had been completed on 16 February, 2017.

**[30]** He furnished a handwritten spreadsheet detailing the fines before the grace period of 30 days and after that period had expired.

**[31]** The breaches had been going on for a few years but the fines were only imposed with effect from 16 May, 2016.

**[32]** The information is derived from the forms which all incoming occupants are required to fill in when taking occupation of an apartment at Pleasant Ways, whether it is a short term or long term tenant. The Supervisor John manages this process.

**[33]** At the hearing on 6 July, 2017, he indicated that he was of the view that the fines were excessive to expect Ms Saxe to pay, and undertook to speak to the Trustees to ascertain whether they were amenable to waiving or reducing the fines.

**[34]** At the hearing which continued on 11 July, 2017, he conveyed the agreement reached with the majority of the Trustees that 80 per cent of the fines be suspended for a period of one year from 11 July, 2017 and if there are no breaches during this period, the 80 per cent will be waived. If there are transgressions, the fines will become due and payable immediately.

**[35]** He therefore requested that the Ombuds office make an order for the payment of 20 per cent of the fines with immediate effect, and the 80 per cent on the basis proposed by the Trustees.

**[36]** With regard to the additional levies on short term letting, he explained that the levy paid by owners is currently based on the Participation Quota (PQ) of each unit and not on the number of occupants. The PQ is based on the number of square meters of each Section. Mrs Saxe's alterations has not resulted in an increase in the number of square meters of any of the three Sections owned by her.

**[37]** The PQ of Mrs Saxe's units has not increased as a result of the alterations and increased bedrooms. The Body Corporate will therefore need to impose an increase in the levy occasioned by the increase in the number of occupants in those sections which have increased the number of bedrooms in their apartments. There are two other affected owners and they have agreed to pay a certain amount. At the CSOS Conciliation, Mr Maon Saxe had agreed in principle that an additional amount should be levied.

**[38]** He also requested that the Ombud's office assess an amount for an additional levy to be imposed by the Body Corporate on all sections which have increased the number of bedrooms, due to the additional resources used by the increased number of occupants. These resources comprise electricity used in common areas, wear and tear of common property, carpets and lifts, increased maintenance and repairs etc. The Body Corporate includes water consumption in the levy account as there are no individual water meters. The extra water consumed by the additional occupants is paid for by the Body Corporate. An additional levy needs to be imposed for extra water consumption.

**[39]** With regard to the occupancy, he produced a copy of the Environment Health By-law 2003, as amended, issued by the City of Cape Town.

**[40]** In terms of this by-law, overcrowding is defined as "occupancy of habitable rooms (being all rooms in a dwelling excluding kitchens, bathrooms and sanitary conveniences) for sleeping purposes where such occupation exceeds 1 adult person per four square meters and/or one child under the age of 10 years of age per two square meters.

**[41]** Based on this, apartments 309 and 310 which now have second bedrooms which are 6,4 square meters each need to be reviewed. The second bedrooms could only allow one adult and one child under the age of ten years in each of the bedroom since they were 6,4 square meters and since they were less than 8 square meters, two adults could not be allowed. The maximum occupancy for 309 and 310 would therefore be three adults and one child, and not four adults.



**[42]** This took Mrs Saxe by surprise and I indicated that I would allow her time to consult an attorney or get further information to enable her to respond to the Environmental Health By-law, and she indicated that she would need to get legal advice and needed a few days for this purpose. As the day was almost over, the matter was adjourned to 11 July 2017.

**[43]** When the hearing resumed on 11 July 2017, Mrs Saxe produced an undated letter from Ms Verity Carstens, Senior Environmental Health Practitioner at the City of Cape Town, which Ms Carstens signed on behalf of the Director of City Health.

**[44]** The letter will be dealt with under the cross-examination of Grant Richardson below.

**[45]** Under cross-examination, the contents of the letter of Verity Carstens was put to Grant Richardson who conceded that the Environmental Health By-Law 2003 did not apply but he took issue with certain other matters. I therefore deemed it necessary to speak to Ms Carstens to clear up the questions raised by him. For the sake of convenience, I will not deal with Ms Carstens as a separate witness but will deal with her evidence and cross-examination here.

**[46]** MS VERITY CARSTENS confirmed the contents of her letter and explained via speaker telephone as follows: (1) Mrs Saxe's apartments are situated on a property that is classified as H3 (an occupancy consisting of two or more dwelling units on a single site). (2) In terms of SANS 10400 Part A, two persons are permitted per bedroom. SANS 10400 Part C requires habitable rooms which includes bedrooms to have a minimum size of 6 square meters.

**[47]** She further confirmed that the plans for flats 309 and 310 have been approved to be in compliance with the National Building Regulations and Standards Act.

**[48]** Part 4 (Trades) of the City of Cape Town's Environmental Health By-law does not apply to a property with H3 occupancy (apartment complex). In terms of the said By- Law, the definition of an accommodation establishment excludes this: "Does not include any premises which provides lodging with one or more meals per day and has fewer than five beds available for occupation." In a subsequent letter dated 11 July,

2017 and sent on 12 July, 2017, she added "or which provides no meals and has fewer than three rooms that are let or intended for letting." (It is common cause that the two affected apartments have two bedrooms.). In her subsequent letter she also stated that she is not in a position to comment on whether consent is required to operate airBnb at the property and suggested that the Body Corporate enforce its Scheme Rules and liaise with the City of Cape Town's Land Use Department regarding usage permitted on the erf. In her covering letter sent on 12 July, 2017, she stated that she has since confirmed with the Town Planning Department that the zoning for the erf is GR5 and that the category does make provision for self-catering/guesthouse and that no additional consent is required from the City Council as long as it is in accordance with Body Corporate Rules. She provided the contact details of the zoning department where the owner or Body Corporate could obtain a zoning clearance certificate. The letter was sent to the parties and to me.

**[49]** I invited comments from Mrs Saxe and Grant Richardson. Grant Richardson pointed out the confusion regarding the consent. He pointed out that he had received conflicting information regarding the need for consent and explained his reasons at length. I do not propose to take his concerns any further for reasons explained more fully below. Suffice to say that it is clear that Mrs Saxe has tried to comply by obtaining the Occupancy Clearance Certificates, albeit that there was a considerable delay in obtaining same. The Body Corporate can take the matter further with the City Council for future reference. For the purposes of my task, I do not need to know the outcome of the apparently conflicting views or opinions on whether consent is required for the land usage as an airBnb establishment or for self- catering accommodation. Mrs Saxe indicated that she was happy to apply for consent should this be necessary.

### CARL SMIT:

**[1]** He is the Managing Director at Sandak-Lewin Trust, the Managing agent of the Pleasant Ways Body Corporate.

**[2]** The Special General Meeting on 24 May, 2017 was not managed properly by one of his staff members, Mark Spires.

**[3]** He received complaints from two owners about a

number of irregularities and as the Managing Director he thought it best to recall the meeting at the expense of Sandak- Lewin Trust to protect the reputation of the Trust.

**[4]** He therefore addressed a letter to the owners, requesting them to attend another Special General Meeting on 24 July, 2017.

**[5]** One of the owners, Mrs van der Westhuizen, had complained that she was confused about the meeting. People were not clear about what they were voting for and the managing agent, Mark Spires added to the confusion when he initially incorrectly announced that the motion had passed.

**[6]** The motion read as follows: **"CONDUCT RULE 17. Letting of Units**

An owner letting his unit, or any portion thereof, is obliged to adhere to the following:

17.1.1 No letting of any unit or portion thereof, shall be allowed for a period of less than three months.

17.1.2 No form of "time-sharing" or any similar arrangement or scheme may be concluded in respect of a section.

17.1.3 No sub-letting is permitted.

17.2 Any owner in breach of this rule shall, notwithstanding anything to the contrary contained in the existing rules of the body corporate, be liable for a fine of R750-00 per day."

**[7]** The voting was also defective as some voting slips were missing.

**[8]** The Chairperson had proxies for the owners of 201 and 107 but no voting slips are on record for these two votes.

**[9]** There were no voting slips for 110, 111 and 311 yet they were present and they did not abstain. They will not be testifying. Mark Spires should have correlated 51 voters with 51 voting slips. Counting should not have commenced until they had received all the voting slips. No abstentions were recorded to account for the missing voting slips.

**[10]** The proxy for Mrs Saxe just said Saxe without distinguishing between Mr and Mrs Saxe. Mr Saxe signed as owner, but the flat is owned by Mrs Saxe. All of the three units are owned by Mrs Saxe but Mr Saxe voted for one of her three units.

**[11]** The Trustees felt that they should rather call another Special General Meeting but he felt that Sandak-Lewin Trust should recall the meeting and bear the cost as the reputation of the Sandak Lewin Trust is at stake.

**[12]** The law is silent on whether another meeting can be called for the same motion but there is nothing to preclude the Trustees from calling another Special General Meeting.

**[13]** Under cross-examination, it was put to him that the owner of 311 had moved overseas. He stated that he was not aware of this so he will withdraw that as an irregularity.

**[14]** It was put to him that Mr and Mrs Saxe were not aware that all the flats were registered in her name. They were under the impression that one of the flats was registered in Mr Saxe's name. They accepted the records from the Deeds office which was presented at the hearing. It was put to him that even if the one vote for Mr Saxe was disregarded, the outcome would still have been the same in that the motion would not have succeeded. It was further put to him that a proxy can be held by a non-owner and he did not dispute this.

**[15]** He did not ask the owners of 110 and 111 whether they signed the register and they did not complain.

**[16]** It was put to him that the issues he raised were minor and of a technical nature.

**[17]** Further that it is the responsibility of the owner or his proxy to ensure that his vote is recorded.

#### **EVALUATION OF INFORMATION AND EVIDENCE OBTAINED OCCUPANCY**

**[1]** Much of the confusion regarding the occupancy status was cleared up by Verity Carsten's evidence and letters and I will deal with that below.

**[2]** What is clear is that Mrs Saxe was aware that her sections, after the reconfiguration to fit in an extra bedroom into each of her apartments, needed to be approved by the City Council before the Body Corporate would be in a position to change the occupancy.

**[3]** The letter from Lennart Uller makes it very clear that he explained the procedure to her and even went out of his way to assist her to ascertain the City Council's requirements before the plans would be approved. This goes back as far as 2015.

**[4]** She nonetheless persisted in exceeding the occupancy levels of each of her three flats.

**[5]** She finally succeeded in getting Certificates of occupancy on 16 February, 2017.

**[6]** A lot of noise was made around Grant Richardson's attitude towards Mrs Saxe and vice versa. I do not wish to go into that. The issue is whether the flats are compliant, and if so, when they became compliant.

**[7]** Much was made of the Environmental Health By-law of 2003 in relation to overcrowding. After I called Verity Carstens and questioned her about her letter, Grant Richardson conceded that that By-law did not apply to the flats in question.

**[8]** The issue of whether the City Council needs to consent to the departure of the usage of the flats for short term letting of self-catering apartments was cleared up by her, but Grant Richardson has taken issue with that as he has had conflicting opinions.

**[9]** For the purposes of determining the occupancy levels, I have sufficient information at my disposal to make this decision.

**[10]** The Body Corporate is free to continue its enquiry into whether consent needs to be applied for.

**[11]** Mrs Saxe has indicated that she is willing to apply for consent but it would now appear that this is not necessary.

**[12]** Mrs Saxe has now done whatever has been requested of her by the Body Corporate. She was not aware of any

further procedures or consents needed and the Body Corporate has not requested her to comply with any further procedures.

**[13]** The issue of consent for the departure from usage for self-catering accommodation only came up during the questioning of Verity Carstens, who initially stated in her verbal evidence on 11 July, 2017 and in her letter dated 11 July, 2017 that she was not sure whether this was necessary. However, in her covering email to all parties on 12 July, 2017, to which she attached her letter dated 11 July, 2017, she advised that she had since checked with the Town Planning Department and that that department had confirmed that the zoning of the property is GR5 and that the category has made provision for self-catering/guesthouses, so no additional consent is required. She added that should a zoning clearance certificate be required, the owner and Body Corporate may apply for same, and she provided the address where the application can be made.

**[14]** It is in the interests of Mrs Saxe to make such application and provide the certificate to the Body Corporate and she has indicated her willingness to do so.

**[15]** The issue of short term letting for the airBnb type of scenario has become complex and there seems to be uncertainty even by City Council officials. It would be unfair to expect Mrs Saxe to comply with something that the authorities are themselves unclear of.

**[16]** The position is as follows: Flats 309 and 310 have two bedrooms each, each of which is more than 6 square meters. Flat 406 has three bedrooms, each of which is more than 6 square meters.

**[17]** The permitted occupancy is therefore as follows: Flat 309, maximum of four persons, adults or children under the age of 10 years. Flat 310, maximum of four persons, adults or children under 10 years of age. Flat 406, maximum of six persons.

**[18]** This is with effect from 16 February, 2017 when the occupancy certificates were issued.

#### FINES:

**[1]** Mrs Saxe was well aware that she was in breach of the

rules on occupancy.

**[2]** She was a trustee and as such she was aware of the procedure.

**[3]** The purpose of consulting the owner was to make her aware that she was in breach of the rules.

**[4]** Mr Lennart Uller assisted her as far back as 2015 to comply with the City | Council requirements to enable her to increase the occupancy of her flats in terms of the Body Corporate Rules.

**[5]** She cannot claim that she has not been consulted. The fact that she was aware is sufficient.

**[6]** She nonetheless continued to breach the rules and continued to advertise for occupancy exceeding the permitted levels.

**[7]** The Body Corporate has provided clear and undisputed evidence of the number of violations prior to the period when Grant Richardson and the Trustees granted her a 30-day grace period over the festive season from 8 January, 2017 until 11 February, 2017.

**[8]** The total number of fines for the period from 1 May, 2016 to 8 January, 2017 amounts to 37 fines at R500 each. Mrs Saxe is liable for payment of all these fines.

**[9]** The fines imposed after 16 February, 2017 are not valid as Mrs Saxe had complied with the Body Corporate's requirements on 16 February, 2017.

**[10]** For the period from 12 February, 2017 when the grace period ended until 16 February, 2017, one fine was imposed and this is valid. Flat 310 was in breach on 15 February, 2017.

**[11]** The total number of valid fines is 38 at R500 each and not 55 as the remaining fines were imposed after Mrs Saxe had complied.

**[12]** The sum of R19,000 is therefore owed by Mrs Saxe in respect of fines.

**[13]** The Trustees of the Body Corporate have agreed to suspend 80 per cent of the fines for a year and will waive

the said 80 per cent of the fines if she does not make herself guilty of any transgressions during the period of one year.

**[14]** The one year period will be with effect from the date of this order.

**[15]** Mrs Saxe must therefore pay 20 per cent of the fines which is due and payable with immediate effect, on the date of receipt of this order by her, to the Body Corporate. I calculate this to be the sum of R3,800-00.

#### **RECALL OF SPECIAL GENERAL MEETING**

**[1]** It is to be noted that Carl Smit agreed to send out notices to postpone the Special General Meeting indefinitely as the outcome of this hearing might not be available in time for the meeting.

**[2]** On the issue of the Saxe vote, it would have made no difference to the outcome of the vote whether Mr or Mrs Saxe voted for that particular apartment as either one of them would naturally have voted against the motion. This irregularity is therefore not significant.

**[3]** Carl did not call the owners of 110 and 111 to testify at the hearing and did not offer compelling reasons why they could not testify. His evidence in this regard is therefore hearsay and cannot be regarded as an irregularity.

**[4]** He conceded that he did not know that the owner of 311 had emigrated and withdrew that from the list of irregularities.

**[5]** With regard to the voting slips for the proxies held by Grant Richardson which were not found, I find it strange that Grant, who was present and chairing the meeting, did not ensure that the two voting slips were recorded. He has been instrumental in calling for the vote at a Special General Meeting and has been very actively involved in resisting short-term letting. One would have expected him to have been extra diligent to ensure that the voting slips which he held as proxy would be counted. There was a considerable delay when the votes were counted. The count was so close. Surely he had enough time to rectify the situation. The existence of the proxies were within his sole knowledge and he must take responsibility for his oversight, if indeed it was an oversight.

**[6]** Carl did not call Mrs van der Westhuizen to corroborate his evidence that she had said that she was confused about what the vote was, nor did he provide reasons why she could not testify.

**[7]** The issues raised by Carl Smit do appear to be of a technical nature.

**[8]** Mark Elley testified that there were many irregularities at other meetings in the past, notably the AGM where he was not voted in, but nothing had been done about that.

**[9]** It would appear that the vote, although flawed, had complied substantially with the procedure for voting.

**[10]** If meetings were to be recalled every time a minor irregularity is found, there would be no end to the number of meetings recalled.

**[11]** I therefore find that the Special General Meeting need not be re-called.

#### **PARKING:**

**[1]** Grant Richardson testified that the rental parking bays were allocated on a temporary basis and that Mrs Saxe is free to bid in the auction when the newly created parking bays are ready to be auctioned.

**[2]** Mrs Saxe has taken issue with the manner in which he advertised the rental parking bays as he placed the advert in the foyer and did not email it to everyone. She has not provided evidence of any rule which states that the notice should be emailed to all owners or sent by registered post.

**[3]** Grant made a reasonable attempt to notify residents. He argued that the fact that Mrs Saxe does not reside in the building is her problem. Mrs Saxe ought to check the Notice Boards. I agree with this argument.

**[4]** Given the temporary nature of the rental parking bay allocation, and the fact that no leases have been entered into, and that 24 hours' notice can be given to vacate the bays, it would be unduly disruptive to re-do the lucky draw.

**[5]** The manner in which the lucky draw was done was

random and did not favour anyone in particular. There were only two bays for which some 130 owners would have had to compete. The chances of Mrs Saxe or any other participant drawing a lucky number are very slim.

**[6]** As these rental bays are of a very temporary nature, no permanent prejudice has been suffered.

**[7]** Grant Richardson has provided plausible reasons why he did it in the manner which he did. He has complied sufficiently with a transparent process and has displayed the Notice at a place which is frequented by most residents.

**[8]** I find no reason to order that the parking bays be re-advertised or re-allocated.

#### **ADDITIONAL LEVIES FOR APARTMENTS WHICH HAVE INCREASED THEIR OCCUPANCY BY INCREASING THE NUMBER OF BEDROOMS OR PERMITTED SLEEPING ROOMS WITHOUT INCREASING THE SIZE OF THEIR SECTIONS:**

**[1]** At the outset, I indicated to Grant Richardson that his application was not part of the dispute before me and that it is not the function of a CSOS adjudicator to determine levies. I however indicated that since I was seized of the matter, I was willing to look at principles to guide the parties to try to seek consensus on a fair amount.

**[2]** The levies are currently based on the Participation Quota of each unit and not on the number of occupants in a unit.

**[3]** It follows that any owner who increases the number of occupants without a corresponding increase in levies is unduly benefitting from a smaller PQ size-of- apartment based levy at the expense of other owners.

**[4]** Mr Maon Saxe had evidently agreed in principle to contribute towards an increased levy.

**[5]** An amount was proposed by Grant Richardson who testified that the amount was accepted by the other two affected owners.

**[6]** Mrs Saxe was not happy with the amount. The reason she advanced was that it would substantially increase her expenses. She did not however give a criteria based



reason for her objection. She did not take up Grant's request that she make a counter proposal.

**[7]** The extra expenses are based on extra electricity, wear and tear and lift usage occasioned by the increased occupants.

**[8]** Mrs Saxe argued that her apartments are not always occupied. This argument is rejected as the same applies to all apartments, as some owners use their apartments as holiday homes, others use it more than others. Some have the maximum number of occupants and others have only one or two. The only fair, tried and tested basis is the PQ. Since this will not work where the PQ basis is size based and not room based, another method based on expenses needs to be established for apartments with increased bedrooms and corresponding increased permitted occupancy.

**[9]** Mr Richardson asked CSOS to make a determination. I am of the view that it is not in the jurisdiction of CSOS to determine levies as this is a complex calculation which is the task of the Body Corporate and its Managing Agents. If however a levy is imposed which is deemed to be unfair or discriminatory, the aggrieved person could approach CSOS and needs to provide plausible reasons for the objection, not simply that it would increase the owner's expenses.

**[10]** Mrs Saxe has benefitted for many years from exceeding the maximum occupancy and has earned extra income as a result. It is only fair that she pay a reasonable amount for past and future benefits.

**[11]** Water usage in particular has become a very serious concern in the Western Cape and the cost of water has increased and is expected to increase in the future. The sections do not have individual water meters to measure consumption so the consumption is charged on a PQ basis.

**[12]** I therefore wish to issue the following guidelines to the parties:

**[13]** That all fair wear and tear expenses, electricity and other common property usage be assessed by the Body Corporate.

**[14]** That the PQ of the average two and three bedroom levies of those sections which have not been re-configured, be used as a yardstick for determining a basis for levies to modified apartments which have increased their bedrooms and occupancy as a result of re-configuration.

**[15]** That water usage be estimated per person for the maximum occupancy allowed in the unit and not in terms of the PQ. That consideration be given to the financial feasibility of installing separate water meters not only to owners of increased occupancy sections but to owners of all sections due to the water costs and restrictions in the Western Cape.

**[16]** That the effective date of such levies should be the date on which Mrs Saxe breached the occupancy numbers as per both of the spreadsheets provided at the hearings by Grant Richardson. I draw this distinction between fines and consumption because the levies are based on consumption and wear and tear and not on compliance with occupancy.

**[17]** That the parties attempt to reach consensus based on objectively justifiable costs.

**[18]** That the parties engage in good faith and in a mature manner and not be unduly obstructive and difficult, vexatious or frivolous. In this regard I refer to my comments above about the manner in which Mrs Saxe conducted herself during this adjudication at the end of my summary of her evidence, after item 22 above and that she will be well advised to take note of my displeasure at the way in which she conducted herself at the hearing. I also wish to draw the attention of the parties generally to the provisions in the CSOS Act which could render a party who is unduly difficult liable to an adverse costs order against him/her.

**[19]** That a referral for conciliation be made if a dispute should arise only after exhausting all options to resolve the dispute internally and amicably.

**[20]** Grant Richardson expressed the wish that Mr Saxe rather than Mrs Saxe be the person who negotiates on her behalf and I agree that this will be helpful provided that Mrs Saxe agrees to authorize Mr Saxe to negotiate on her behalf.

The Adjudicator is empowered to investigate, adjudicate and issue adjudication order in terms of sections 50, 51 53, 54 and 55 of the Community Schemes Ombud The CSOS Act enables residents of community schemes including sectional titles schemes and Home Owners Associations to take their disputes to a statutory dispute resolution service instead of a private arbitrator or the courts.

### ORDER

For the reasons given under my Evaluation of the Evidence and Information above, the following order is made:

**[1]** Insofar as **occupancy** is concerned, the permitted occupancy is as follows:

- (a) In respect of Flat 309, a maximum of four persons of any age.
- (b) In respect of Flat 310, a maximum of four persons of any age.
- (c) In respect of Flat 406, a maximum of six persons of any age.

**[2]** Insofar as the **finances** are concerned,:

- (a) Mrs Saxe is liable to pay fines in the sum of R19,000 and not R27,500-00.
- (b) Mrs Saxe is ordered to pay the sum of R3,800-00 on account of the fines to the Pleasant Ways Body Corporate immediately upon receipt by her of this order.
- (b) Payment of the remaining 80 per cent of the fines amounting to the sum of R15,200-00 is suspended for a period of one year from the date of this order. Should Mrs Saxe make herself guilty of any breach of Body Corporate Rules, this suspended amount of the fines in the sum of R15,200-00 will become due and payable immediately upon proof of commission of such breach.

**[3]** The vote taken at the **Special General Meeting** dated 24 May, 2017 complied sufficiently with the voting requirement and the Special General Meeting which has been **recalled** by Sandak-Lewin Trust to be held on 24 July, 2017 or such later date as may have been envisaged

for the recall must not proceed. This does not preclude the Body Corporate from calling for another Motion to be tabled if there is no reason in Law or in the Rules of the Body Corporate to table the Motion again at some later date.

**[4]** The temporary rental **parking bays** were allocated in a reasonable manner and need not be re-allocated.

**[5]**(a) The Body Corporate may impose additional levies on those apartments which have increased their occupancy through re-configuration of the number of bedrooms or permitted sleeping rooms without increasing the size of their apartments.

(b) The parties hereto or their duly authorized Representatives must attempt to reach consensus on a fair additional levy to be charged to Sections 309, 310 and 406 on account of the increased occupancy of the said units. In this regard, the guidelines stated under **"Additional levies to be imposed on apartments which have increased their occupancy through re-configuration of the number of bedrooms or permitted sleeping areas without increasing the size of their sections"** above may be followed.

(c) Should the parties fail to reach consensus, the Body Corporate may impose an additional levy which it deems fair based on existing rules and procedures. Should Mrs Saxe be aggrieved by the levy imposed, she must attempt to resolve the matter internally in terms of the Body Corporate Rules and Dispute Resolution Processes. Should such attempts fail, she may approach CSOS for Conciliation.

(d) The effective date of the additional levies to be imposed is from 1 May, 2016 onwards, which is the date of the first fine imposed on Mrs Saxe, that being the date of her first breach and the date from which she is deemed to have begun to enjoy the benefits of increased occupancy.