IN THE KWAZULU-NATAL HIGH COURT : DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO.: 19/2002

In the matter between:

FLEXI HOLIDAY CLUB	First Plaintiff/Respondent
TRAFALGAR HOLIDAY RESORTS	Second Plaintiff/Respondent
TRAFALGAR HOLIDAY RESORTS (PROPRIETARY) LIMITED	Third Plaintiff/Respondent
STAR VACATON CLUB	Fourth Plaintiff/Respondent

and

LA LUCIA SANDS SHAREBLOCK LIMITED	Defendant

JUDGMENT

VAN PER REYDEN J:

The plaintiffs instituted action against the defendant for delivery of certain shares, alternatively payment of the value of those shares, and in a further alternative, the payment of damages, interest and costs.

In paragraph 4 (bis) of its amended plea the defendant challenged the *locus standi* of the first, second and fourth plaintiffs in the following terms:-

"(a) In amplification of the denials in respect of the allegations pleaded in paragraphs 1, 2 and 4 the Defendant pleads as follows:

(i) The First, Second and Fourth Plaintiffs are associations formed subsequent to 31 December, 1989.

(ii) These associations carry on business which has as their objective the acquisition of gain.

(iii) The Plaintiffs are not registered companies.

(iv) In the premises and by virtue of the provisions of section 31 of the Companies Act 61 of 1973 these Plaintiffs at all relevant times did not have *locus standi.*

(b) In the alternative to (a) above, the Defendant pleads that:

(i) The First, Second and Third Plaintiffs consist of more that one person.

(ii) The Plaintiffs are not companies or otherwise have corporate personality as envisaged by Section 30 of the Companies Act 61 of 1973.

(iii) In the premises, the Plaintiffs at all relevant times did not have *"locus standi."*

On 28 August 2006 under Rule 33 (4) of the Uniform of Court Hugo J ordered the separate determination by way of a dedicated trial of the *locus standi in judicio* of the First, Second and Fourth Plaintiffs in the following terms:

"1 That the question of the *locus standi in judicio* of the First, Second and Fourth [Respondents] be determined separately and be disposed of *ante omnia* having regard to the provisions of sections 30 and 31 of the Companies Act 61 of 1973;

2. That with regard to the application of the provisions of section 30 and 31 of the Companies Act, the following specific issues be determined: at the time of their formation as clubs or associations or at any material time thereafter:

2.1. whether the First, Second and Fourth [Respondents] consisted or consist of more than 20 persons;
2.2. whether the First, Second and Fourth [Respondents] had or have as purpose the carrying on of business that has for its object the acquisition of gain by the said clubs or associations or by the individual members thereof;
2.3. whether the First, Second and Fourth- [Respondents] were registered in terms of the Companies Act 61 of 1973;
2.4. whether the First, Second and Fourth [Respondents] were formed in pursuance of some other law;
2.5. whether the First, Second and Fourth [Respondents] were formed in pursuance of Letters Patent or Royal Charter before 31 May 1962;
2.6. whether the First, Second and Fourth [Respondents] exist solely of persons who are members of a designated profession as contemplated in section 30 of the Companies Act;
2.7. whether the First, Second and Fourth [Respondents] have any legal existence and consequently have *locus standi in judicio* to pursue the main action;
2.8. whether the First, Second and Fourth [Respondents] have any members recognised by law as such; and accordingly
2.9. whether the First, Second and Fourth [Respondents] have any members with *locus standi in judicio* to pursue the main action.

3. That all further proceedings in the main action be stayed until the question of the *locus standi in judicio* of the First, Second and Fourth [Respondents] has been determined and disposed of by way of a trial hearing;

4. That paragraph 3 is to be read subject to existing orders of this division.

5. That costs are reserved."

The dedicated trial was duly held on 26 to 28 November 2008. Argument was postponed to Friday, 15 May 2009.

After argument on 15 May 2009 the Plaintiffs were granted leave to re-open their case in order to deal with an additional issue raised by the Defendant and defined as follows:

> "That in addition to and separate from the application of sections 30 and 31 of the Companies Act, the separate and distinct existence of the First, Second and Fourth Plaintiffs shall also be determined."

The case was adjourned to 7 December 2009 on which date Mr A.N. Ridl, the Plaintiffs witness, was recalled to respond to the additional issue. The case was thereafter adjourned for written argument to be filed, judgment having been reserved. Respondent's Supplementary Heads of Argument dated 9 December 2009 was filed shortly thereafter. Plaintiffs' Full Heads of Argument in which the additional issue was dealt with were filed on 16 June 2010.

PLAINTIFFS' COUNSEL'S ARGUMENT

Before considering Mr Vahed's argument on section 30 and 31 of the Companies Act it is convenient to incorporate the full text of the two sections in this judgment.

> "30. Prohibition of associations or partnerships exceeding twenty members, and exemption.-
>
> (1)—No company, association, syndicate or partnership consisting of more than twenty persons shall be permitted or formed in the Republic for the purpose of carrying on any business that has for its object the acquisition of gain by the company, association, syndicate or partnership, or by the individual members thereof, unless it is registered as a company under this Act or is formed in pursuance of some other law or was before the thirty-first day of May, 1962, formed in pursuance of Letters Patent or Royal Charter.
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> (2) The provisions of subsection (1) shall not apply with reference to the formation by persons qualified to carry on any organized professions which are designated by the Minister by notice in the Gazette, of any association, syndicate or partnership for the purpose of carrying on such professions and/or any combinations of such professions.
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> 31. Unregistered associations carrying on business for gain not to be corporate bodies.- No association of persons formed after the thirty-first day of December, 1939, for the purpose of carrying on any business that has for its object the acquisition of gain by the association or by the individual members thereof, shall be a body corporate, unless it is registered as a company under this Act or is formed in pursuance of some other law or was before the thirty-first day of May. 1962, formed in pursuance of Letters Patent or Royal Charter."

Mr Vahed's point of departure was Olivier JA's dictum in *Director: Mineral Development, Gauteng Region, & Ano v Save the Vaal Environment & Ors.* 1999 (2) SA 709 (SCA) at para [8]:

> "The prohibition contained in s 30(1) should be kept within its proper bounds. The underlying purpose of the prohibition in our country, as in England, is to prevent mischief arising from trading undertakings being carried out by large fluctuating bodies so that persons dealing with them do not know with whom they are contracting..."

Mr Vahed argued that there is no indication whatsoever that that scenario obtains in the present case. Against that backdrop he submitted that the test can be formulated as follows: *Were the clubs formed, and do they carry on any trading undertaking that has for its object the acquisition of gain by the clubs or by the individual members thereof?* In other words: *Are the clubs carrying on a trading undertaking such that what is being done by the clubs is what ordinary persons would describe as the carrying on of a business for gain?*

He argued that that formulation of the test takes into account the introduction of the concept of the "critical purpose" in sections 30 and 31 by **Nienaber JA** in *Mitchell's Plain Town Centre Merchants Association v McLeod & Ano* 1996 (4) SA 59 (A) at 166A where Nienaber JA synthesised the two sections as follows: "

> (1) if the membership of the association exceeds 20, the association must be registered as a company if it is formed for the critical purpose, failing which it will have no *locus standi in judicio;* if its membership is less than 20, it is not illegal if it is formed for the critical purpose and is to operate as, say, a partnership;
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> (2) whatever its membership, if the association is formed for the critical purpose it must be registered as a company in order to enjoy corporate personality; if it is not formed for the critical purpose it may yet enjoy corporate personality if it possesses the characteristics of a *universitas,* ie if it is to operate as an unincorporated voluntary association."

Mr Vahed in dealing with the evidence of Ridl, the ciubs' principal witness, submitted that an examination of his evidence in fine detail is not necessary for the purposes of his argument. In his Heads of Argument he submitted that the essence of Ridl's cross-examination, confined to his cross-examination, was as follows: "The concept of a club was not something Ridl and Lamont "dreamed up" but was a natural evolution that occurred in the timesharing industry globally and in South Africa. The Club Leisure Group was formed in 1994, long after the clubs, particularly Flexi Club, had been established and was not established to form a club to escape the provisions of sections 30 and 31 of the Act. The fundamental concept of a club was to avoid the individual members being exposed to risk. The club does not make a gain or profit. He said this repeatedly. Flexi Club is not a central cog in the business wheel of the Club Leisure Group The holding company, Club Leisure Holdings (Pty) Ltd owns the entire group, save for one company. That group structure excludes the clubs and, where applicable, their wholly owned subsidiary companies. The clubs contract with the group to market, manage and administer their affairs. In other words, the group act as the secretaries and other administrative personnel of the clubs. The group's expertise covers the sale of timesharing interests to the general public, the development of timeshare resorts, schemes etc. and the management of timeshare clubs, resorts and schemes."

Mr Vahed sketched the interaction amongst those entities and Flexi Club as follows: "The club stands apart and separate from the group. It owns the timesharing interests which allow its members to access holidays. The developer develops new timeshare resorts or acquires timeshare interests in existing timeshare resorts, today almost exclusively in the form of weeks represented by shares in shareblock companies. The developer exchanges these weeks, i.e. the shares in the shareblock companies coupled with their associated use agreements, for points in Flexi Club. Thus the club becomes the owner of the shares and the developer owns points in the club. The developer contracts with sales company to sell those points to the general public. In acquiring those points, a member of the public applies to become a member

of the club. The member pays the club a subscription charge which is directly linked to what the club is obliged to pay the shareblock companies. The subscription charges are paid to the club's wholly owned subsidiary which in turn pays that same amount over to the group's management company which is contracted to administer and manage the club.

Mr Vahed submitted that there cannot be any suggestion that Ridl's evidence falls to be rejected on any basis. He dealt briefly with the expert evidence of the plaintiffs' expert accountant, Mr Davis and the defendant's expert accountant, Mr Faris. He submitted that ultimately, Faris only queried two aspects of the club's activities. The first related to the so-called increase in wealth in the club's assets and the other related to the interest free loan of R127 million between the club and its wholly owned subsidiary. He argued that Faris' opinion on the increase in wealth concerns the revaluation exercise when the timeshare interests owned by the club, essentially the shares in shareblock companies, are revalued on an annual basis to account for inflation and to treat like for like. He regarded that increase as a gain.

He submitted that as to the interest free loan of R127 million Davis testified that it would make no sense for a wholly owned subsidiary to receive interest from its parent and then give it back as dividends.

With regard to the additional issue i.e. Do the Clubs have *locus standi* ordinarily? Mr Vahed submitted that: " Ridl's evidence during both sessions in the witness box was abundantly clear. He referred to the constitutions of each of the clubs and to the relevant founding provisions. The clubs enjoy a separate existence and the terms of their respective constitutions are unambiguous. Each of them meets the test of perpetual succession and is capable of owning property apart from its membership. What is important, is not whether the clubs actually owned physical property, i.e. in the case of the second and fourth plaintiff, but whether, in terms of

their constitutions, they are capable of owning property. On 7 December 2009, when Ridl testified on these aspects, his cross-examination was perfunctory. His evidence as to the founding of each of the clubs and the adoption of their respective constitutions was not and could not be gainsaid. His testimony as to the existence of the clubs, their constitutions, and consequently, their ordinary *locus standi,* must be accepted,"

Dealing with the increase in wealth Mr Vahed submitted that this issue and therefore, in Faris's eyes a gain, is in reality a red herring. Firstly, Faris accepts that the clubs' assets have been fairly and correctly valued. The problem that Mr Dickson, on behalf of the Defendant points to when cross-examining Ridl and when leading Faris on this aspect is encapsulated in Faris' expert opinion that the annual revaluation exercise represents an increase in wealth and therefore a gain. The conclusion that it is a gain is an assumption that that so-called gain is what sections 30 and 31 are envisaging when they employ the same term. Mr Vahed submitted that that cannot be viewed in isolation as Faris and the defendant seek to do. The first question that must be asked in this regard is whether the clubs exist for the purpose of accumulating or acquiring that so-called gain on the annual revaluation exercise? The perceived problem is resolved by examining the alternative. If an individual, a non-member, did not own points in the clubs but instead owned a share in the shareblock company, that share increases in value annually due to inflation etc in exactly the same way. Is that a gain in the sense contemplated by the sections? What then is the difference when that share is held by the club and the very same increase in value takes place? Does that exercise then become a peculiar object or achievement of the club? The answer, lies in the understanding that if a non-member stood to achieve the same increase in value, i.e. the so-called "gain" in substantially the same way it simply cannot be contended that that increase in value accrues to him *qua* member and that the club was therefore formed or exists for that "gain" by its members *qua* members.

Mr Vahed argued that the issue can be viewed from the perspective of the members intention.

He submitted that Revenue cases are particularly instructive and referred to *Commissioner South African Revenue Services v Wyner* 2004 (4) SCA 311 p. 316 par 7 and 8 where Southwood AJA is reported to have stated the following:

> "[7] Although there is no single all-embracing test of universal application for determining whether a particular receipt is one of a revenue or capital nature, it is well established that if the receipt is "a gain made by an operation of business in carrying out a scheme of profit-making", then it is revenue derived from capital productively employed and must be income' - *Overseas Trust Corporation Ltd v Commissioner of Inland Revenue* 1926 AD 444 at 453; *Commissioner for Inland Revenue v Pick 'n Pay Employee Share Purchase Trust* 1992 (4) SA 39 (A) at 56H - 57G and the cases there cited. This means that receipts or accruals will bear the imprint of revenue if they are not fortuitous, but were designedly sought for and worked for - *Commissioner for Inland Revenue v Pick 'n Pay Employee Share Purchase Trust (supra* at 57F - G).
>
> [8] Two factors which are always of great importance in deciding whether the proceeds of the sale of property are of a revenue or capital nature are the intention with which the taxpayer acquired the property and the circumstances in which the property was sold -*Malan v Kommissaris van Binnelandse Inkomste* 1983 (3) SA 1 (A) at 10B; Berea *Park Avenue Properties (Pty) Ltd v Commissioner for Inland Revenue* 1995 (2) SA411 (A) 413J -414A."

Mr Vahed submitted that the evidence in this matter is clear. The intention in acquiring points in the clubs is to access holiday destinations. That much is unchallenged. He argued that to regard the annual revaluation exercise as representing "gain" in the sense contained in the sections of the Act is without merit. It would be a clear exercise in placing form over substance, something which Ridl was unsuccessfully accused of.

As regards the loan of R127 Million Mr Vahed submitted that Davis' categorisation of the loan is the only acceptable and plausible treatment that can be given to it. The trustees of the Flexi Club and the directors of its wholly owned subsidiary, Flexi Club Management Services (Pty) Ltd are one and the same. The controlling minds are the same. To call this accommodation an arms length transaction is simply untenable. The proof of the pudding appears on the consolidated balance sheet when the so-called problem disappears.

Mr Vahed submitted that the acid test as to whether a gain is generated is the evaluation of the financial statements as testified to by the experts. He argued that it is abundantly clear that apart from the two aspects discussed above, Faris was unable to suggest that a gain had in fact been generated. In the absence of clear proof of a gain, can it be said that the critical purpose had failed? He submitted that the question can only be answered in the clubs' favour.

With regard to the suggestion that the Plaintiffs' conduct amounted to simulated transactions Mr Vahed argued that it was repeatedly, during his cross-examination, suggested to Ridl, a few times directly, but often subtly, that the clubs and the group have so arranged their affairs to avoid being hit by sections 30 and 31 of the Act. Ridl has maintained that this was not the case.

Mr Vahed argued, even if that were the case, and if the defendant maintains that the scheme as they put it is a simulated transaction or a series of simulated transactions, that there is nothing untoward in that. He referred to Scott JA's dicta in *Michau v Maize Board* 2003(6) 459 SCA at p. 463 - 464 par 4:

> "It has long since been established in cases such as *Zandberg v Van Zyl* 1910 AD 302, *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530, *Commissioner of Customs and Excise v Randies, Brothers & Hudson Ltd* 1941 AD 369 and more recently affirmed in *Erf 3183/1 Ladysmith (Pty) Ltd and Another y Commissioner of Inland Revenue* 1996 (3) SA 942 (A) that parties are free to arrange their affairs so as to remain outside the provisions of a particular statute. Merely because those provisions would not have been avoided had the parties structured their transaction in a different and perhaps more convenient way does not render the transaction objectionable. What they may not do is conceal the true nature of their transaction or, in the words of Innes JA in *Zandberg's* case *supra* at 309, 'call it by a name, or give it a shape, intended not to express but to disguise its true nature'. In such event a court will strip off its ostensible form and give effect to what the transaction really is. But, while the principle is easy enough to state in the abstract, its application in practice may sometimes give rise to considerable difficulty. Each case will depend upon its own facts. A Court will seek to ascertain the true intention of the parties from all the relevant circumstances, including the manner in which the contract is implemented. The onus is upon the party who alleges that the transaction is simulated."

Mr Vahed argued that in this regard the defendant bears the onus to prove that the transaction or transactions are simulated ones and that onus has not been discharged with regard to the legislative sanctions of clubs in property time sharing. Mr Vahed referred to section 1 of the Property Time Sharing Control Act 75 of 1983 where "club in relation to a property time sharing scheme means any club or association of persons in respect of which a right to membership or a right of participation in activities or functions may be sold to a member of the general public...".

Having specifically sanctioned the concept of a club he argued that it is inconceivable that the

legislature would have done so in circumstances where what was being sanctioned was immediately something that offended sections 30 and 31 of the Companies Act.

The only *modus operandi* that a club could therefore adopt is the one described in detail in evidence by Ridl. It is one that complies fully with the Property Time-Sharing Control Act, 75 of 1983.

In conclusion Mr Vahed argued that against a conspectus of the evidence as a whole the considerable success of the Club Leisure Group must be ignored. Either the clubs offend sections 30 and/or 31 or they do not. In this regard he referred to Hlope JP's dictum that "[t]he focal point remains whether the club was formed [or operates] for the purpose of carrying on any business that has at its object the acquisition of gain by the association or by the individual members thereof... " in *Huey Extreme Club v McDonald t/a Sport Helicopters* 2005(1) SA 285 (C) at paragraph [20]. He argued that the example of the wine club mentioned in *Huey Extreme Club* is instructive and is applicable in the present case. The clubs are no more than what they say they are, an association existing for the acquisition of holiday properties for the use and enjoyment of its members.

Finally he submitted that the separated issue falls to be resolved in the plaintiffs' favour with costs, such costs to include those reserved on previous occasions.

DEFENDANTS COUNSEL'S ARGUMENT

Mr Dickson favoured me with voluminous but well researched Main and Supplementary Heads of Argument running into 67 pages. For obvious reasons only those sections of his argument which, in my judgment, are relevant are incorporated in this judgment as succinctly as possible.

As an introduction to his argument Mr Dickson presented a summary of the Plaintiffs case as he saw it: The three Plaintiff Clubs are holiday clubs within a very successful and lucrative business operation called the Club Leisure Group. The clubs hold themselves out to be associations not for gain, capable of owning their own property, of suing and of being sued in their own names, of having perpetual succession, and of being common law bodies corporate. As such each club claims to be an *universitas personarurn.* The clubs have written constitutions, which, they claim are definitive of their status as corporate entities from the time of their formation, or, from the time of the last amendment to their constitutions. Evidence was lead, ex *abundant! cautela,* in an attempt to establish that the clubs are *bona fide universitates personarurn* in that 'no gain is generated by the associations . . . either for itself or for each association's respective members'. This evidence is designed to persuade this Court that the clubs do not violate the provisions of sections 30 and 31 of the Companies Act 61 of 1973. The managing director of Club Leisure Group, Mr Ridl, sought to explain the operations of the Group, the relationship of the clubs to the Group as a whole, and the legislative imperative to use common law bodies corporate to achieve a legal business model that did not conflict with the Companies Act 61 of 1973, the Share Blocks Control Act 59 of 1980 and the Property Time-Sharing Control Act 75 of 1983.

Mr Dickson argued that the case for the clubs is essentially threefold. They contend that success with any single argument is sufficient to establish their locus standi in judicio. **Firstly,** one must have regard ***only*** *to* the interpretation of the clubs' constitutions, which exercise must be performed without recourse to extrinsic evidence: and/or, **Secondly,** having regard to the testimony of Mr Ridl and the clubs' expert witness Mr Davis, the clubs are not formed for the purpose of carrying on any business that has for its object the acquisition of gain by the club or by the individual members of the club. In any event, according to Mr Ridl's evidence, the clubs have no gain whatsoever, the profits being consolidated up in the Group and not in the clubs *per* se: and/or, **Thirdly,** the existence of the clubs in the Club Leisure Group is ex

necessitate since no registered company could be established under the strictures of the Share Blocks Control Act. The clubs maintain that they are *bona fide* common law bodies corporate *(universitates personarum),* that they do not violate the provisions of sections 30 and 31 of the Companies Act, and that in any event, their existence is valid ex *necessitate,* there being no other suitable statutory provision to provide a legal haven for their existence. In the premises, the clubs maintain that they have the necessary *locus standi in judicio* to be accepted as litigants.

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In developing his argument Mr Dickson submitted that there are two essential issues to be determined. Both issues also entail consideration of an important ancillary dispute as to who bears the *onus* to prove or disprove the standing of the clubs. The essential issues are **firstly** the proper interpretation to be applied in this matter to sections 30 and 31 of the Companies Act 61 of 1973 and **secondly** the application of the core provisions of sections 30 and 31 to the proven facts. The proper interpretation of sections 30 and 31 will depend on this Court's determination of the meaning of the words 'permitted' and 'formed' in section 30 (1). He argued that the distinction between the words is profound especially since the word 'permitted' does not appear in section 31 of the Companies Act. He pointed out that the Plaintiffs' reliance on the judgment of Nienaber JA in **Mitchell's Plain Town Centre Merchants Association v McLeod and Another** *(supra)* is misconceived. Their reliance amounts to an impermissible and untenable attempt to revive the law that obtained at the time of the decision in **Shaw v Simmons,** (1883) 12 Q.B.D. 116 and throughout the era of the Companies Act 46 of 1926 until the promulgation on 1 January 1974 of the Companies Act 61 of 1973 which changed the law definitively. The application of the core provisions of sections 30 and 31 will depend on this Court's determination of the meaning of the phrase "for the purpose of carrying on any business that has for its object the acquisition of gain by the ... association.....or by the individual members", with particular emphasis on the concept and meaning of the word 'gain', and of course, on the findings of fact which this Court ultimately will make.

The most important ancillary dispute relates to the burden of proof. On whom lies the *onus* to prove or disprove the *locus standi in judicio* of the clubs? He argued that the question of *locus standi* under consideration here does not relate to the test of 'a direct and substantial interest'. Obviously an association whose very existence in law is at issue has a 'direct and substantial interest' in being heard by the Court which is about to make that most fateful determination. Nor is it necessary to consider the duty to begin: at the pre-trial conference the Plaintiffs accepted the duty to begin and duly did so at the trial,

Mr Dickson argued that the issue relating to the *onus* concerns three distinct, but interrelated, questions: Firstly, leaving aside for the moment a consideration of sections 30 and 31 of the Companies Act, do the clubs pass muster under the common law to be accepted as common law bodies corporate? Secondly, must the clubs' existence as *universitates personarurn* be determined only by considering their constitutions without regard to extrinsic evidence, or are there circumstances which permit one to examine the activities of the association? Thirdly, if the clubs hypothetical^ pass muster under the common law, what then is the affect of sections 30 and 31 of the Companies Act on their existence?

He argued that these are questions of an *'onus* in its true and original sense', *per* Corbett JA (as he was then) in **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd** 1977 (3) SA 534 (A) at 548 A-C. He submit that even when the issue of standing is approached on the basis of the common law or the statutory law, the *onus* in respect of all three questions remains a full *onus* to be discharged by the clubs. Mr Dickson also placed reliance on **Mars Incorporated v Candy World (Pty) Ltd** 1991 (1) SA 567 (A) where Nestadt JA referring to the **South Cape** case *(supra)* said at 575 H-I that:

> "In accordance with the general rule that it is for the party instituting proceedings to

allege and prove that he has *locus standi,* the *onus* of establishing that issue rests upon the applicant. It is an *onus* in the true sense; the overall *onus."*

Mr Dickson submitted that, even if one assumes that the clubs, *qua* associations, are acting in the interests of their members, the clubs still have to prove that they are validly constituted. In that regard the clubs have to prove not only that they are *bona fide* common law bodies corporate but also that they do not fall foul of sections 30 and 31 of the Companies Act.

As to the question whether the clubs' claim to be *universitates personarurn:* pass muster Mr Dickson submitted that at first blush it appears that the constitutions of Flexi Club and Club Trafalgar have the necessary wording to satisfy the characteristics of 'perpetual succession' and of 'being capable of owning property apart from their members'. However the constitution of Star Vacation Club does not claim the necessary characteristics of perpetual succession and corporate identity apart from its members. So it fails at the first hurdle. In the circumstances of this matter, the *locus standi in judicio* of both Club Trafalgar and Star Vacation may be moot. Mr. Ridl conceded in his evidence that these clubs did not own the shares they claimed in the Defendant and that they should not be Plaintiffs in the case. Nonetheless, Club Trafalgar shares with Flexi Club an array of well worded clauses in their constitutions each claiming the characteristics of an *universitas personarurn.* Clause 2 in the Flexi Club constitution (and clause 5 in the Club Trafalgar constitution) reads as follows:

"LEGAL NATURE OF THE CLUB

> The Club is an association not for gain, capable of owning its own property and of suing and being sued in its own name and having perpetual succession, and is therefore a common law body corporate."

Clause 5 in the Club Trafalga's Constitution reads as follows:

5. " **<u>NATURE OF CLUB AND ITS PROFITS</u>**

5.1. The Club is a corporate body under the common law of the Republic of South Africa

known as a universitas personarurn.

5.1.1. The Club has perpetual succession. Thus the Club:

5.1.1.1. continues as an entity notwithstanding changes in and of its membership;

5.1.1.2. holds its assets distinct from its Members; and

5.1.1.3. no Member has any right, title, claim or interest to the assets of the Club by reason of his membership;

5.1.2. The Club, and not its Members, is responsible for the payment of its debts; and

5.1.3. The Club does not have the object of carrying on any business that has for its object the acquisition of gain for itself or its Members.

5.2. The Club is not permitted to distribute any of its gains or profits to its Members of any person.

5.3. The Club is required to utilize its funds solely for investment or for the object for which it has been established.

5.4. The activities of the Club are to be wholly or mainly directed to the furtherance of its sole or principal object.

5.5. The Companies Act, No. 61 of 1973 of the Republic of South Africa, shall not apply in relation to the Club.

5.6. The Club is responsible for the enforcement of the Conduct Rules, and the control, administration and management of the Club for the benefit of Members."

Mr Dickson's argument on whether this Court should consider the Club's constitutions without regard to evidence has become academic because of Ridl's evidence and Mr Dickson's concession in his Heads of Argument "that not only are the constitutions in question ambiguous but the very money making activities in which the clubs participate and the members benefit, not merely by way of cheaper holidays, but also by way of recruitment fees, all clamour for an investigation into the "activities' of the clubs." The table thus has been set for the reception of the extrinsic evidence.

Mr Dickson attacked the constitutions of Flexi Club and Star Vacation Club on the basis that they bore no date of commencement or amendment. He however conceded that Ridl's

evidence established that the constitutions of Flexi Club and

Club Trafalgar were amended in 2000 and 1995 respectively. He argued that all three constitutions contain elements that demonstrate the acquisition of gain both for the clubs, their members and, in particular, their founding members.

Mr Dickson addressed the scope and ambit of sections 30 and 31 of the Companies Act 61 of 1973 in three main contexts: the meaning of the words 'permitted' and 'formed' ('toegelaat' and 'opgerig'); the scope of sections 30 and 31; and the application of the sections to the facts of this case. Section 30 of the Companies Act deals with the 'prohibition of associations or partnerships exceeding twenty members, and exemption'. Stripped of superfluous words such as 'company, syndicate and partnership' and subsection (2), the salient aspect of subsection (1) reads: "No ... association ... consisting of more than twenty persons shall be permitted or formed in the Republic for the purpose of carrying on any business that has for its object the acquisition of gain by the ...

association.....or by the individual members thereof, unless it is registered as a

company under this Act, or is formed in pursuance of some other law or was before the thirty-first day of May, 1962, formed in pursuance of Letters Patent or Royal Charter." The complete text of the Afrikaans 'artikel 30(1)' reads as follows: "Geen maatskappy, vereniging, sindikaat of vennootskap bestaande uit meer as twintig persone word in die Republiek toegelaat of opgerig met die doel om sake te doen wat die maak van wins deur die maatskappy, vereniging, sindikaat of vennootskap, of deur die individuele lede daarvan, as oogmerk het nie, tensy dit geregistreer word as 'n maatskappy kragtens hierdie Wet of opgerig word ingevolge 'n ander wet of voor die een-en-dertigste dag van Mei 1962, opgerig is ingevolge 'n Patentbrief of Koninklike Oktrooi."

Section 31 deals with 'Unregistered associations carrying on business for gain not to be corporate bodies'. 'No association of persons formed after the thirty-first day of December,

1939, for the purpose of carrying on any business that has for its object the acquisition of gain by the association or by the individual members thereof, shall be a body corporate, unless it is registered as a company under this Act or is formed in pursuance of some other law or was before the thirty-first day of May, 1962, formed in pursuance of Letters Patent or Royal Charter.'

Mr Dickson submitted that Section 31 does not replicate the provisions of section 30(1), it complements them. The key differences are the omissions of the word 'permitted' and the threshold of twenty members. He argued that the proper interpretation of section 30 (1) of the Companies Act, 1973, must commence with an assessment of its precursor in the 1926 Act - section 4. This submission is made on the basis of the minority dissenting judgment of Galgut AJA (as he was then) in **S** v **Mpetha** 1985 (3) SA 702 (A). At page 719 B Galgut AJA summed up the purpose of legislative amendments thus, 'the reason for the change is to remove a mischief which existed in a pre-existing statute'. Mr Dickson argued that the underlying principle concerning amendments to statutes derives from legislative amendments to the common law. There too the issue is 'to remove a mischief. He referred to the remarks of Van den Heever JA in **Hleka v Johannesburg City Council** 1949 (1) SA 842 (A) at pages 852 - 853:

> "To arrive at the real meaning we have according to Lord Coke ... to consider, (1) what was the law before the measure was passed; (2) what was the mischief or defect for which the law had not provided; (3) what remedy the Legislator had appointed; and (4) the reason of the remedy."

I do not propose to deal at length with Mr Dickson's .argument dealing with section 4 of the Companies Act 1926. It is common cause that this section does not contain the word permitted. The salient text of this section reads as follows:

"Prohibition of trading associations or partnerships exceeding twenty members

From and after the commencement of this Act no company, *association,* syndicate, or partnership *consisting of more than 20 persons* ***shall be formed*** in the Republic for the purpose of carrying on any business that has for its object the acquisition of gain by the company, association, syndicate, or partnership, or by the individual members thereof, unless it is registered as a company under this Act, (Our italics.)

Mr Dickson submitted that the only South African case touching on the essential difference between section 4 of the 1926 Act and section 30 of the 1973 Act is **Suid-westelike Transvaalse Landbou-kooperasie Bpk v Phambili African**

Traders Association 1976 (3) SA 687 (TK). At page 688 G-H, Wienand J quotes Henochsberg, Companies Act, 3rd edition, page 58 where the learned author states that: "In **Shaw v Simmons,** (1883) 12 Q.B.D. 116, it was held that an association was not newly 'formed' every time that there was a change in its membership, and it may thus be said that an association of 20 members or less when it was formed does not become 'formed' illegally, when its membership exceeds 20. The introduction of the word 'permitted', however, renders such an argument of no avail here,

Mr Dickson referred to *Henochsberg on the Companies Act* 5th Ed, vol I at 49 looseleaf issue 23 under 'General Note' where the authdr reiterates his opinion with regard to **Shaw v Simmons.**

He also referred to Blackman ef *al* Commentary on the Companies Act, vol 1 (revision service 3) at 3-15, where Professor Blackman, commenting on the Bhambili case stated the following:

> "The word 'permitted' in s 30(1) has been included in order to clarify that an association that is not formed for the purpose of gain, but subsequent to formation pursues gain, is in contravention of the prohibition in s 30. It also caters for the situation where the association is formed with twenty or less members but whose members subsequently exceed twenty. Section 30 is likewise contravened. Once the number of twenty is exceeded the association is illegal and a nullity and it remains so even if subsequently the number drops below twenty."

Mr Dickson argued that by excluding cognizance and recognition of the word 'permitted' in section 30 the argument which obtained during the **Shaw v Simmons** era is revived.

Dealing with the question which associations would fall into the category of voluntary association governed by section 30 and 31 of the Companies Act Mr Dickson referred to the following dicta of Nienaber JA in **Mitchell's Plain Town Centre Merchants Association** *(supra)* at pages 169 I to 170 B :

> "It is always helpful to look at the mischief at which the sections are aimed. The underlying purpose of the sections, based on English precedent, has been described in the leading case, *Smith v Anderson* (1880) 15 Ch D 247 (CA) at 273 *per* James LJ as
>
> > 'to prevent the mischief arising from large trading undertakings being carried on by large fluctuating bodies, so that persons dealing with them did not know whom they were contracting, and so might be put to great difficulty and expense, which was the public mischief to be repressed'
>
> The key word is 'trading'. It is the clue to the meaning of 'gain'. Gain' in the context in which it appears in ss 30(1) and 31 means a commercial or material benefit or advantage, not necessarily a pecuniary profit, in contradistinction to the kind of benefit or result which a charitable, benevolent, humanitarian, philanthropic, literary, scientific, political, cultural, religious, social, recreational or sporting organisation, for instance, seeks to achieve. The sections are concerned with commercial enterprises and 'gain' must be given a corresponding meaning ... . It is not a question.of law, it is a matter of fact."

Mr Dickson highlighted the fact that earlier in his judgment at page 167 J to 168 A, Nienaber JA had quoted Simonds J in **Armour v Liverpool Corporation**

[1939] Ch 422 at 437 with approval to wit: 'Neither business nor gain is a word susceptible of precise or scientific definition. The test appears to me to be whether that which is being done is what ordinary persons would describe as the carrying on of business for gain ...'.

Commenting on the dictum of Davis J at page 168 J in **South African Flour Millers' Mutual Association** v **Rutowitz Flour Mills Ltd** 1938 CPD 1991 that: 'if the acquisition of gain is merely a subsidiary and unsubstantial part of the activities of the association, then the latter cannot be said to be an association that has as its object the acquisition of gain' Nienaber JA says, 'what the *dictum,* I imagine, seeks to emphasise is that an object so insignificant as to be trivial in the context of the rightful function of the association, for example when a charitable association or sporting club is permitted by its constitution to charge a casual fee for tea, must not be allowed to distort the true picture. It remains, in the end, a matter of degree'

Concluding this leg of his argument Mr Dickson submitted that in substance, the test for whether an association is carrying on business that has for its object the acquisition of gain by the association or its members is threefold: **firstly,** it is a matter of fact, not law; **secondly,** it is a matter of degree, which must not be negligible; and, **finally,** would ordinary persons describe what is being done as the carrying on of business for gain?

Mr Dickson also highlighted facts, which in his view are common cause. These facts are: The name Club Leisure Group has two distinct meanings. The first is the generic name of the group in its entirety. The second is Club Leisure Group (Pty) Ltd, a private company owned by Club Leisure Holdings (Pty) Ltd. The latter company is ostensibly a holding company and is itself owned by Messrs Ridl and Lamont 'via two trusts', that is 'two trusts 50/50'. The holding company. Club Leisure Holdings (Pty) Ltd, does not generate income. The income is generated lower down in Club Leisure Group' according to Mr. Ridl. For the sake of convenience Mr Dickson referred to a schedule marked **Annexure "B"** annexed hereto which depicts diagrammatically the essential evidence given by Mr. Ridl about the functioning of the

group. Club Leisure Group (Pty) Ltd owns a developer company called Vacation Properties (Pty) Ltd and a sales company called Club Leisure Sales (Pty) Ltd. The sales company sells points for profit. The developer company introduces timeshare weeks to the clubs, in exchange for points. There is a management company called Club Leisure Management (Pty) Ltd, which is owned by Club Leisure Group (Pty) Ltd as to 50.01% and RCI as to 49.99%. Club Leisure Management (Pty) Ltd has one subsidiary company called First Resorts Management (Pty) Ltd. They act as managing agents for the clubs. Club Leisure Management (Pty) Ltd also has a division which runs the holiday clubs providing all of their staff and administrative structure. Although 'the income is generated lower down in Club Leisure Group', all profits in the group are consolidated up. In 2007 the pre-tax profit of the Club Leisure Group was sixty million rand - effectively thirty million rand each for the trusts of Messrs

Ridl and Lamont. Flexi Club has two subsidiary companies. They are Flexi Club Management Services (Pty) Ltd, which deals with subscriptions from members, and Club Management Holdings (Pty) Ltd, which deals with bonded properties. There are no bonded properties at present: the company has not been in operation for about 10 years and has not traded for about five years: it is dormant. Mr. Ridl agreed in cross-examination that there is a 'connection' between Flexi Club and Club Leisure Management (Pty) Ltd, the company jointly owned by RCI and Club Leisure Group. Club Leisure Management (Pty) Ltd is the managing agent of Flexi Club. It was appointed as managing agent by Flexi Club Management Services (Pty) Ltd, the subsidiary of Flexi Club. Exhibit "A" the Plaintiffs' bundle - which was 'not challenged in any respect' - indicates that Club Leisure Holdings (Pty) Ltd was appointed as the management company from 1 January 2000 for a period of ten years. Yet Club Leisure Holdings (Pty) Ltd is supposed to be the holding company, just under the trusts of Ridl and Lamont, that does not 'generate income'. Flexi Holiday Club, through its activities *via* its two subsidiaries, admittedly one being dormant, contributes approximately fifteen to twenty percent of the group's profit. Conservatively at 15%, that is nine million rand for the year 2007. Optimistically at 20%, that is twelve million rand for 2007. Flexi Club also contributes more to the group than Club Trafalgar and Star Vacation Club. But viewed from the perspective of Club Leisure Management (Pty)

Ltd, Mr. Ridl testified that 'maybe 10 or 12 million rand of that is made out of the clubs, the rest is made out of the management of the clubs, the rest is made out of other entities'. Significantly Mr. Ridl referred to the money coming from the clubs *via* Club Leisure Management (Pty) Ltd as 'our share'. Club Leisure Management (Pty) Ltd is owned in almost equal proportions by Club Leisure Group (Pty) Ltd and RCI. Indeed, later in cross-examination, Mr. Ridl said 'call it 50/50 for the sake of the argument'. 'Our share' of the amount coming from the clubs is 'about 10 or 12 million rand'. But the full share coming from the clubs into Club Leisure Management (Pty) Ltd is effectively double that amount, that is 20 to 24 million rand. Mr Dickson indicated that the schedule, Annexure "B", depicts this income flow up the right hand side of the chart. The estimate by Mr. Ridl for 2007 is remarkably accurate. It is borne out by the Financial Statements for the year ending 31 December 2007 of Flexi Holiday Club, Exhibit "F" at page 17 of the Report and page 20 of Volume 4, the surplus after taxation is R 29,212 million. The difference between the figures in the Financial Statements and Mr. Ridl's estimate the gap of R 9 down to 5,2 million is explained in an answer to the question 'What percentage of the business of the Club Leisure Group (Proprietary) Limited, with its total of 60 million, ... is generated by the Flexi Club?' Mr Ridl replied that without the interest the percentage would be about '20 to 25% maybe'

On the evidence led Mr Dickson questions the true nature of Flexi Holiday Club, i.e. whether it is a *bona fide* club, product, or central cog in a money making machine or is it an elaborate sham, scam, or chimera in the judicial context or is it a genuine *bona fide* and legal club? As a general proposition Mr Dickson submitted that there are at least three defining features of all *bona fide* voluntary associations, corporate or unincorporate, which one would expect and call 'normal' or 'usual'. **Firstly,** there is an active membership: **secondly,** an active board of directors or trustees who promote the interests of the association and its members: and **thirdly,** a secretariat at a fixed and discernible location that helps to coordinate the activities of the board and the members. Some associations are single purpose organisations without legal

personality. Others have environmental, charitable, benevolent, humanitarian, philanthropic, literary, scientific, political, cultural, religious, social, recreational or sporting concerns, purposes and objectives and legal personality, see **Transnet Ltd t/a Metrorail v Rail Commuters Action Group** 2003 (6) SA 349 (SCA); **Director: Mineral Development, Gauteng Region v Save the Vaal Environment** 1999 (2) SA 709 (SCA), **Huey Extreme Club v McDonald t/a Sport Helicopters** 2005 (1) SA 485 (C), and **Christian Education SA v Minister of Education** 2000 (4) SA 757 (CC). , '

Mr Dickson argued that, measured objectively, against what is ascribed as 'normal' and 'usual', Flexi Club is unique. No one is employed by the club: it has no 'staff manning an office': it is run out of the Club Leisure Group's offices at 1 Crompton Street, Pinetown: but, if anyone goes to the group's headquarters and asks to speak to someone from Flexi Club, 'there would be a deafening silence'. Flexi Club is an empty shell with members.

Mr Dickson dealt with Mr. Ridl's denial under cross examination, that Flexi Club was 'an empty shell with nobody working for it'. In fact, throughout his evidence, consistently and regularly, Mr. Ridl insisted that 'you must look at Flexi Club as one of our products, it's product that we sell', that 'if Flexi Club went, we would replace it with another product' and 'If we didn't have Flexi Club there are other products we sell '. The theme that Flexi Club is a product arises early in Mr. Ridl's testimony. He explained that the TISA (Timeshare Institute of Southern Africa) regulations did not allow the clubs 'to sell this product as an investment'. Furthermore, Club Leisure Sales has 'sales offices all around the country selling various products' and 'timeshare is an elitist product'. The clearest expression of the theme that Flexi Holiday Club, like the other clubs, is a product is Mr. Ridl's statement that: we're a little bit like the SA Breweries of the timeshare business and the different clubs are our different products'. Asked whether Flexi Holiday Club was an essential cog in the business of Club Leisure Group, Mr. Ridl replied: "Yes, it's one of our main products. It's like Castle, I mean look at what happened to the Breweries, they lost Amstel. They didn't-collapse. They went to replace it with other

beers, they took a knock. Mr. Ridl conceded Flexi Holiday Club is, at least, a 'modest' cog. He added: "If we lost Flexi Club yes, we would take a knock, but we certainly wouldn't collapse. We would carry on our business. We would make a little bit of less profit, maybe in the first or second year while we had to replace it, but it certainly - Club Leisure Group, put it this way, if Flexi Club was withdrawn from the market or whatever from tomorrow, our business wouldn't collapse."

Mr Dickson argued that Flexi Holiday Club is certainly an important 'product' within the Club Leisure Group, sufficiently central to the group's profit making pretensions that its replacement would cause some loss of profit for possibly two years. He submitted that Flexi Holiday Club is not merely a shell but an elaborate sham, designed to be the core central cog in Club Leisure Group's money making machine.

Mr Dickson expressed his surprise that neither Mr. Ridl nor Mr. Davis would concede during cross-examination the obvious and manifest increase in wealth for Flexi Holiday Club. Their reasoning is based on the argument that the adjustment in the valuations is required by virtue of inflation and that, despite the adjustments to inflation, members 'always get the same value'. Mr Dickson argued that there are three main concerns about the probity of the inflation based argument. **First,** there is no evidence as to the inflation rates to disabuse one's mind from the inherent arbitrariness of the trustees' guesswork in this regard. Second, the adjustments may have the effect of preventing members 'from getting better value than [they] had before', but that does not address the essential issue of gain to the club. Sections 30 and 31 of the Companies Act proscribe gain not merely in the hands of members but also in the hands of the associations or clubs. Third, the value increase due to inflation and the value increase due to increased property values are taken into account.

Mr Dickson argued that the user charge/refurbishment reserves likewise represent an increase

in wealth for Flexi Holiday Club. In particular, the extent to which user charges and refurbishment reserves are not expended leaves a residue in the club which becomes an increase in its wealth and finally, there is a very important additional increase in wealth to Flexi Holiday Club. It is the interest free aspect of the R 127 million debt Flexi Club owes to its subsidiary, Flexi Club Management Services (Pty) Ltd. It is not known when this loan began. It appears first in **Exhibit B2:** page 22, for the year 1999 at R2,8 million. By the year 2000 it was in excess of R7 million, in 2001 over R13 million, and then in 2002 and 2003 at lower amounts. See **Exhibit A:** page 27, cf page 54, and cf page 72. Mr Dickson argued that Mr Ridl's concession in cross-examination that the R 127 million debt/loan is not at 'arm's length' is an indication of how closely aligned Flexi Holiday Club and its subsidiary really are. In fact, one of the most compelling problems of the entire Club Leisure Group structure is the fluidity and interchangeability of companies, clubs and other entities.

He argued that the very complexity of the Club Leisure Group, manifestly more complex than the thumbnail sketch Mr. Ridl explained, evokes the warning underpinning the origin of sections 30 and 31 of the Companies Act in **Smith v Anderson** (1880) 15 Ch D 247 (CA) at page 273 *per* James LJ, to wit:

> 'to prevent the mischief arising from large trading undertakings being carried on by large fluctuating bodies, so that persons dealing with them did not know whom they were contracting, and so might be put to great difficulty and expense, which was the public mischief to be repressed'.

Mr Dickson also dealt with the windfall awaiting members upon the dissolution of Flexi Holiday Club. He argued that when Flexi Holiday Club is 'terminated' for whatever reason under the provisions of clause 16 of its constitution, 'the net assets if any remaining after payment of all debts and costs of winding up shall be distributed to the members in proportion to their paid up holiday points'. If, as Mr. Faris mused, on the valuation of Flexi Club's property by the trustees, and accepted by their auditors, the Financial Statements are 'genuine', then on dissolution (termination) of the club each of the 66 000 current members would receive approximately R

42 000.00. Paradoxically, Mr. Ridl denied the above calculation on the basis of offloading into the market, saying members would be lucky to get R1.00 a point instead of the recorded value based on approximately R10.00 a point. The excessive difference in paper value and practical value adds grist to the mill with regard to the sham that Flexi Holiday Club's points system is when regarded from a club member's point of view. As regards the points from the perspective of the club itself, and its founding members, he argued that there is no doubt that the life blood of the entire Club Leisure Group is the sale of points for use by members of the clubs. But by sleight of hand a huge tranche of the money from the sale of points is gathered into Club Leisure Group (Pty) Ltd without having to go *via* the shared company, Club Leisure Management (Pty) Ltd.

A starting point to reveal the nature of Flexi Holiday Club and Club Leisure Group is to consider the evidence of Mr. Ridl in conjunction with Annexure "B", the diagram of the group. At the top are the trusts of Messrs Ridl and Lamont, who, at the bottom, are also the founders and trustees of Flexi Holiday Club. This much is clear. However he argued that not all is clear, contradictions abound. Mr. Ridl attempted a deception concerning the identity of the owner of the points in relation to a Flexi Holiday Club member called Bakker spelt 'Baca' in the record. The passages are in Volume 2 starting from page 161, line 12 to page 165, line 13. In summary, Mr. Ridl maintained that the owner of the points was Vacation Properties (Pty) Ltd and not Flexi Holiday Club, despite all the documents in Exhibit B2 at pages 366 to 372 indicating the contrary. Mr. Ridl was asked in particular to comment on the documents at pages 370 and 368. His attention was drawn to the text of clause 1 on page 370, to wit: 'these points remain the property of the club until paid for', Mr. Ridl stated that the full document was not in the papers. He explained he would get a document which sets out the 'complete procedure'. He had one 'in chambers'. He promised to bring it the following day 'in the morning'. When eventually the document was produced, the attempted deception is plain. It

can be seen in the Conversion Agreement: it is not Vacation Properties (Pty) Ltd who performs the special transaction called a 'trade-in': it is Flexi Holiday Club itself. See the Conversion Agreement, **Exhibit J:** at page 63, Volume 4. It is in the context of the above contradiction that the entirety of Mr. Ridl's initially plain and straight forward evidence on the selling of points needs to be tested. The essential question is whether the convoluted and tortuous route to get the points out of the clubs and sold to new members is not just a sham.

Mr Dickson presented the following summary of the evidence concerning the points based on by Mr. Ridl's testimony. Club Leisure Group (Pty) Ltd owns Vacation Properties (Pty) Ltd. Vacation Properties (Pty) Ltd is the developer. It has the 'sole and exclusive right" to introduce the timeshare weeks or properties into the clubs. The developer makes the 'bulk of the profit' for Club Leisure Group: approximately R 40 million out of R 60 million made. He argued that two immediate questions arise: **first,** how does the developer get paid for introducing the timeshare weeks and properties into the clubs? Second, how does the developer acquire the weeks and properties in the first place?

He submitted that Mr. Ridl's evidence on how the developer is paid and who receives payment is often contradictory and incomplete. Mr Dickson presented the following synopsis. As regards payment to the developer he submitted that the developer 'receives points in exchange' for the timeshare weeks and properties from the clubs. In other words the clubs'pay or barter for the properties in points, not money. The developer takes the points and 'sells' the points 'through' another subsidiary of Club Leisure Group (Pty) Ltd, called Club Leisure Sales (Pty) Ltd. Whether the developer sells the points to the 'sales arm' to be on-sold to get club members, or whether the developer employs the sales arm as an independent contractor on a commission or similar basis is not clear from the evidence. Club Leisure Sales (Pty) Ltd then sells the points for cash to get new members for the clubs. At page 157 of the record, Mr Ridl explained the position thus:

> "Just so I can explain again so you just get it quite clearly. What happens is Vacation Properties will transfer a week of timeshare into the club, say it's worth 10 000 points. The club will then give Vacation Properties 10 000 points. Vacation Properties doesn't own that week anymore, it owns 10 000 points. That goes and sells that to Mr Joe Public, that 10 000 points to Joe Public. He pays a deposit and the balance he owes to Vacation Properties. It's got nothing to do with - and costs relating to getting that member and what have you has got nothing to do with the club, it's to do with the sales division and we normally do it through a sales company and they are paid the 50% marketing cost to pay for all these free weekends and free tea-sets and free whatever else you get."

After all its expenses and running costs are paid, Club Leisure Sales (Pty) Ltd contributes to the profits of Club Leisure Group (Pty) Ltd approximately R 6 million out of R 60 million made, that is 10%. Bearing in mind that the developer makes the 'bulk of the profit' for Club Leisure Group, that is, approximately R 40 million out of the R 60 million made, an amount of money more than R 40 million should be passed from the sales arm back to the developer. The reason the amount passed back from Club Leisure Sales (Pty) Ltd to Vacation Properties (Pty) Ltd should be more than R 40 million is to allow Vacation Properties to obtain timeshare weeks and properties leaving sufficient margin for the R 40 million annual profit that is, for the year 2007. But if the money is passed back, why is Vacation Properties (Pty) Ltd paying millions of rand in VAT? It is not supposed to be the seller of the points. Surely Club Leisure Sales (Pty) Ltd should be liable for the VAT on the sale of the points?

He submitted that two notable matters arise from the evidence summarised. **First,** why is there such confusion in the evidence as between the role of the developer and that of the sales arm? Are these companies genuine or simply a method to circulate money to disguise the fact that the real and substantive transactions are those of Flexi Holiday Club? Second, if Vacation Properties transfers a week of timeshare into Flexi Holiday Club, worth perhaps 10 000 points and the club reciprocates by giving Vacation Properties 10 000 points in exchange, and thereupon Vacation Properties relinquishes ownership of that week, then Flexi Holiday Club becomes the owner of the week. However, if the real market value of the points is not the actual value, as seems to be the evidence of Mr. Ridl concerning termination of the club, then Flexi Holiday Club makes an automatic gain to the extent of the difference between the points'

market value and their actual value. In this regard Mr Dickson referred to Mr Faris' evidence on the points frankly stating that: "I have a problem in understanding certain of the aspects of the operations of the club. I read in the 2003 financial statements net sales of points. I'm not clear whether the club is selling points or Vacation Properties is selling points. What is clear to me is that if Vacation Properties is selling points, it is paying VAT on those points, it is making a profit and if the club is doing the same thing, then it's also trading. Now, I'm not alleging that it's trading. All that I'm saying'is I'm confused, I don't know who is selling."

Mr Dickson submitted that upon receipt into the record of **Exhibit J:** the Conversion Agreement, a considerable amount of the confusion was clarified. With regard to trade-ins it is Flexi Holiday Club which purchases the timeshare from the (new) club member and pays the club member (seller) in points direct. So what should one make of the evidence by Mr. Ridl that Vacation Properties, *qua* developer, sells the points *via* Club Leisure Sales, the sales arm? At best for Mr. Ridl Mr Dickson submitted that the very complexity of Club Leisure Group has confused him too. Mr Dickson referred to the unexplained contradiction in the introductory pages of the financial statements disseminated at the calling of Flexi Holiday Club's annual general meetings. The 2004 documents read that the club's **Property Buying Company** is **Club Management Holdings (Pty) Ltd.** That is the subsidiary of Flexi Holiday Club. But in the 2007 documents the club's **Property Buying Company** is **Vacation Properties (Pty) Ltd.** See page 3 of Flexi Club's Annual Report 2007 at Volume 4, page 6.

As to how the developer acquires the timeshare weeks and properties Mr Dickson submitted that apart from the attempt to explain trade-ins, there is no direct evidence of how the 'developer', Vacation Properties (Pty) Ltd, actually purchases or 'acquires' properties for the clubs. The trade-in example of Mrs Bakker indicates that Vacation Properties does not do the trade-ins. He submitted that despite his manifest passion for his product, Mr. Ridl did not take this Court into his confidence. Perhaps it was never possible to do so when one considers the constitution of Flexi Holiday Club. There are three clauses in the

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release funds that is the subscriptions to make sure the property portfolio is 'sufficient' for members. All the above demonstrates that the original design of the cdnstitution was to allow Flexi Holiday Club to procure its own property portfolio from its own membership subscriptions. The idea of having 'property purchasing companies' to disguise these transactions seems only to have germinated in the late 1990's and to have evolved since, no doubt to meet the exigencies of this case, which began in February 2002.

In addressing sham transactions involving Flexi Holiday Club Mr Dickson submitted that the clubs are an elaborate sham. The constitutions have been drawn so well, with such meticulous attention to detail, that paradoxically that very detail discloses the truer business purpose underlying the existence of the clubs.

As an example he submitted that it is common cause that both Messrs Ridl and Lamont are the 'founders' and trustees of Flexi Holiday Club. Despite his prevarication when questioned as to the influence of their positions as trustees, and the fact that both of them are directors of the Flexi Club's subsidiaries, Mr. Ridl did not elaborate on the question concerning clause 8 v. of the Flexi Club constitution. The influence of the founding members, both of whom are trustees, is entrenched beyond any conceivable danger from the sum total of all the members of Flexi Holiday Club. Indeed, the method of entrenchment of the trustees' hegemony is so skilfully disguised and so excessively and unusually powerful that it can only be regarded as intrinsically inimical to the interests of any *bona fide* (and naive) club members, to such an extent that one must perforce conclude that the club is a sham *in toto.*

Clause 8 deals with the powers of the trustees. The preamble and clause 8 v. read as follows:

> "The powers of the trustees include the following:
>
> v. To exercise the votes of any members who are not present in person or by proxy at any meeting."

Flexi Holiday Club has more than 66 000 members, *per* Mr. Ridl. If all members attended any club meeting Kingsmead would not do, but perhaps King's Park might. So how many club members actually attend the Annual General Meetings or send in proxies? From the latest Annual Report 2007, **Exhibit** F: page 9 Volume 4 at page 12 it appears that 32 people attended the AGM on 30 May

2007 and that there were 13 proxies. Present at the meeting were, *inter alia,* Messrs Ridl and Lamont, duly re-elected trustees for the 'ensuing year'. The gap between the trustees' control and the members' control of their own club is so far that it proves there was never an intent to set up a club. Flexi Holiday Club is not a club, it is a sham designed to enrich the beneficiaries of the Club Leisure Group.

The general principle on which Mr Dickson relied in -this regard has been formulated by Scott JA in **Mackay** v **Fey NO and Another** 2006 (3) SA 182 (SCA) at page 194H-I:

> "[26] It has long been recognised that, where parties to a transaction for whatever reason attempt to conceal its true nature by giving it some form different from what they really intend, a court called upon to give effect to the transaction will do so in accordance with its substance, not its form. See generally **Erf 3183/1** Ladysmith (Pty) Ltd v **Commissioner for** Inland Revenue 1996 (3) SA 942 (A) at 952C - 953A and the cases therein cited. It is important to emphasise that a transaction which is disguised in this way is essentially a dishonest transaction; the object of the disguise, which is common to the parties, is to deceive the outside world. Before a court will hold a transaction to be simulated or dishonest in this sense it must therefore be satisfied that there is some unexpressed or tacit understanding between the parties to the agreement which has been deliberately concealed. See **Commissioner of Customs** and **Excise** v Randies, **Brothers** and **Hudson** Ltd 1941 AD 369 at 395-6."

On the question whether Flexi Holiday Club members make money and whether there is anything good for a person to be a member of these clubs, apart from cheaper holidays? Mr Dickson argued that the most important gain members can make by virtue of their Flexi Holiday Club membership is R 500 per new member recruited. This aspect of multi-level

marketing is not negligible, Consider the growth in membership. From the Annual Report, 2007 **Exhibit F:** at page 7 (volume 4: page 10) it appears that since 2006, when the recruitment fee may have been announced, membership has grown by some 4000 plus members. On 12 July 2006 the Club Leisure Group made an announcement in the press concerning their new cooperation agreement with the Organisation for Timeshare in Europe to the effect that their turnover was in excess of R 900 million. So the group certainly had, and has, the means to pay recruitment fees, despite Mr. Ridl palming the blame off onto the sales companies. The press announcement is on page 274 of **Exhibit B2.**

Finally, with regard to members getting cheaper holidays by virtue of their membership, Mr Dickson submitted that is axiomatic that such savings be considered 'gains' acquired by the members. In this regard he referred to the remarks of DW Butler in the chapter on **Time-Sharing** in *The Laws of South Africa,* Volume 27, First Reissue at paragraph **476 Club method,** fn 15 to wit:

> "It is nevertheless arguable that members of a time-sharing club do acquire a material benefit in the form of reduced holiday expenditure compared to equivalent hotel accommodation and in certain circumstances the prospect of a profit on resale. Cf Pienaar 1984 *De Rebus* 70 71,1986 *Journal of Judicial Science* 1 12 for the view that the club's constitution must forbid the members from selling their membership rights or time-shares at a profit to avoid the abovementioned prohibitions."

Mr Dickson concluded this leg of his argument with the submission that, the recognition that a member gains by having cheaper holidays appears in the evidence of Mr. Ridl at page 158 of volume 2. Mr. Ridl refers to it as 'financial logic'.

On the issue of abuse of control in Club Leisure Group. Mr Dickson submitted that Messrs Ridl and Lamont are the prime beneficiaries of the Club Leisure Group. They are the *tons et origo* of Flexi Holiday Club. It is their empire.

Mr Dickson referred to Robinson v Randfontein Estates Gold Mining Co Ltd

1921 AD 168 at pages 196 to 197:

> "The courts have remarked "upon the anomalous and undesirable position which arises in the working of the group system". Involving as it does "the management and direction of the policy and affairs of the various companies by some controlling authority through nominee directors", the system "is peculiarly liable to abuse". . "Unless the board is moulded to the will of the controlling authority the system cannot work. An independent set of directors would be fatal. Hence the temptation to deprive the nominees of all discretion until. . . they are completely under the thumb of the controlling authority and it is practically impossible for them to exercise an independent judgment. There may be something to be said for that position from the point of view of administrative efficiency. But it carries its own danger."

In conclusion Mr Dickson submitted that there are two main considerations with regard to an assessment of sections 30 and 31 concerning Flexi Holiday Club. Firstly, Flexi Club seems only to be a name or a product. It has no personnel who run the club. As such it could never be or fall within the ambit of the description in the Mitchell's Plain case at page 170, to wit, 'a charitable.

benevolent, humanitarian, philanthropic, literary, scientific, political, cultural, religious, social, recreational or sporting organisation'. Secondly, it seems that the better description of Flexi Holiday Club is not that of a club at all. It is a conduit through which flows nigh ten million rand a year into a mega group.

He submitted that ordinary people would describe what is being done in the Club Leisure Group as the carrying on of business that has for its object the acquisition of gain, in respect of which Flexi Club and the other clubs play a considerable role.

The argument by the clubs - to the effect that because the profits are consolidated up in the group, and no profits are retained by the clubs, the clubs are not acquiring gain - is incorrect.

In this regard the expert opinion of Mr Faris, which was unchallenged in all material respects, is the key. Gain, in the long run, must mean an increase in wealth. From the financial statements of Flexi Holiday Club, when compared over the period of 2001, 2002 and 2003 to 2007, the increase in wealth on the club's own version is staggering.

In his Supplementary Heads of Argument Mr Dickson dealt with the additional issue raised during the trial namely that in addition to and separate from the application of sections 30 and 31 of the Companies Act, the separate and distinct existence of the First, Second and Fourth Plaintiffs shall also be determined.

He argued that 3 cardinal features emerge from the evidence and a reading of the constitution of Flexi Holiday Club **First,** the clubs, especially Flexi Club, are schizophrenic. They have characteristics that derive partly from the traditional *universitas personarum* and mainly from the law on trusts, especially *business trusts.* **Second,** the clubs are designed to avoid any type of formal registration required by the Companies Act the issue in the November 2008 trial or the Trust Property Control Act 57 of 1988 the new perspective introduced by the clubs in December 2009. **Third,** in light of the new evidence, it appears that Flexi Holiday Club is closer to a disguised business trust, albeit not registered in terms of the Trust Property Control Act, while Star Vacation Club is an unincorporated association. Only Trafalgar seems to have a constitution which complies with some of the formalities required of an *universitas personarum* Yet the latter two clubs should not be litigants in the first place.

Mr Dickson dealt with the origin and characteristics of voluntary association under the common law and these of business trusts under the common law and as regulated by Act 57 of 1988.

As regards an incorporated voluntary association he submitted that it can be an *universitas personarum* under the common law or an association established by statute, The essential origin of all voluntary associations, incorporated and unincorporated, derives from the following principles which these associations have in common. Firstly, "a voluntary association *is a legal relationship which arises from an agreement among three or more persons to achieve a common object, primarily other than the making and division of profits."* Secondly, a voluntary association is 'a contract *sui generis* which does not fall within any of the well-defined classes of contract known to our law'. Thirdly, voluntary associations 'are for the most part bodies of persons who have combined to further some common end or interest, which is of a social, sporting, political, scientific, religious, artistic, or humanitarian in character, or otherwise stands apart from private gain and material advantage'. Fourthly, a voluntary association *qua universitas personarurn* must be distinguished from a trust. Fifthly, 'it is not necessary that an association should be created by statute or registered in terms of a statute to possess the attributes of a juristic person', per Hiemstra *3* in *Ex Parte* **Johannesburg Congregation of the Apostolic Church** 1968 (3) SA 377 (W).

The essential characteristics of an *universitas* are 'perpetual succession' and 'the capacity of acquiring rights and incurring obligations independently of its members, most importantly the capacity to own property. The essential characteristics are often fleshed out in more detail in our case law simply to assist the process of making the determination whether an association has all the characteristics necessary to be accepted as an *universitas.* In this regard he submitted that the following principles may be usefully adopted in its determination. Perpetual succession means at least three things: The organisation continues to exist and maintains its identity despite changes in its membership; Likewise with regard to changes in its governing body; and, The organisation can sue and be sued in its own name without having to be cited by way of a trustee or other official in the organisation,

He submitted that the capacity to acquire rights and incur duties must include all the usual powers to enter into contracts generally and especially to hold and use bank accounts. These powers are found in the constitution or charter of the organisation. In order to determine whether a voluntary association is an *universitas* it is necessary first to look at its constitution. If the constitution of an association makes it clear that such association has the characteristics of a *universitas,* then that would be decisive of the issue. If it is not possible so to determine by reference to the constitution, either from its express terms or by way of implication, regard must be had to the nature of and objects of the association. Furthermore, it would only be in those instances where the constitution is not clear that one could have regard to the activities of an association in order to determine whether those activities are such as to constitute the association a *universitas.* Despite the claim to being an *universitas,* the Flexi constitution is far from clear. It is more in the nature of a disguised business trust. In addition to the principles listed above to assess the probity of the constitution of a voluntary association.

He submitted that the following practical aspects flow from the method of assessing the nature, object and activities of an association The rights and powers of a voluntary association are limited by the terms of its charter or constitution. The constitution defines whether an association is or is not a *universitas* and confines its activities to what is expressly or impliedly contained therein. As regards trusts Mr Dickson submitted the constitution of Flexi Holiday Club falls squarely into a business trust. It is common cause that it is not registered in terms of Act 57 of 1988. Ridl accepted this. There are indications in the constitutions that show that a business trust was contemplated for example, Clause 7(c) of Flexi Club at page 1 of Exhibit Bl, as contemplated in Section 6(2)(b) of the Trust Property Control Act 57 of 1988.

In concluding his argument Mr Dickson pointed out that Ridl was challenged on the omnipotent power of the trustees that arises from their power to direct the affairs of the Club without any effective dissent. This he denied despite the powers of trustees implicit in Clause 8 v. complete

control of proxies at meetings : Clause 8 generally Clause 14 generally and specifically, Clause 14 c (calling of special general meeting by an ordinary member - an impossibility and Clause 14 f, read with Clause 14 1). The power of the trustees is overweening which is inimical to voluntary associations generally. Although Ridl stated that a member could resign, it is clear from his earlier evidence that this is not something readily accepted by Flexi Club. This also puts it apart from a genuine association.

Consideration of Counsels' Argument

In order to do justice to Counsels' argument I incorporated the bulk of it as concisely as possible. This approach assisted me to come to grips with the various legal issues raised in argument. Mr Vahed's argument is refreshingly concise, to the point and persuasive. However the well researched and at times tantalizing issues raised by Mr Dickson restored the equilibrium and caused me a certain degree of agony in my search for the answer to the dispute.

I do not propose to repeat all the authorities referred to by counsel. For the purpose of this judgment only those issues that will contribute to the resolution of the dispute will be considered, namely: 1. Is Flexi Holiday Club a sham designed to enrich the beneficiaries of the Club Leisure Group? *2.* Has Flexi Holiday •club been formed "for the purpose of carrying on any business that has for its object the acquisition of gain"? 3. Do the Plaintiffs have *locus standi in judicio* to pursue the main action. Resolution of these issues will do away with the remainder of the issues defined in Hugo J's order granted on 28 August 2006

I will consider Mr Dickson's argument first. The gist of his argument, as I understand it, is that

Flexi Holiday Club, (First Plaintiff), is "an elaborate sham, designed to be the central cog in Club Leisure Group's money making machine". At first blush and having regard to the excessive income Messrs Ridl and Lamont received from their Time Share business there seemed to be merit in this argument. I have no doubt that any level headed person and probably a high percentage of time share owners would fine it inequitable that Ridl and Lamont receive an annual income running into millions of Rand, whereas the time share owners numbering 66,000 are faced with monthly levies, administration fees and a deduction of 50% from the price paid towards time share points, as a commission which, through the structure of fringe companies controlled by Ridl and Lamont, ends up in their pockets. However the fact that the beneficiaries of the Club Leisure Group are enriched does not *ipso fucto* prove that Flexi Holiday club is a sham. The fact that the bulk of the 66,000 time share owners can for all practical purposes not attend the Annual General meeting, with Ridl and Lamont having the power entrenched in the Flexi Club Constitution "(to) exercise the votes of any members who are not present in person or by proxy at any meeting" is however a disturbing fact. The only conclusion to be drawn from this is that once a person has bought into the time share industry he or she is for all practical purposes trapped in the system. One would .have thought that two entrepreneurs with the massive income generated by their Time Share Industry, would have considered creating some stabilization fund to subsidize the levies and administration fees due by the members of the clubs.

At this stage I reiterate that **I** at no stage owned time share points and have no interest in this industry. This fact was disclosed to the legal teams at the commencement of the trial. From the outset **I** had an aversion in the time share industry for various reasons and more specifically because it is not an investment in property with prospects of any growth. One is burdened with a variety of extra expenses for the duration of ones membership and in order to make use of ones so called benefit compelled to spend the so called "holiday" bought in resorts controlled by the Time Share industry. These views are however my personal subjective views and being

very conscience of my aversion towards the Time Share industry I have cautioned myself to approach this dispute as objectively as possible.

Stripped from all emotion and possible prejudice the objective, and hopefully, correct approach is to consider this dispute against the provisions of the Property Time Sharing Control Act No 75 of 1983. (the Act). This Act regulates "the alienations of time sharing interests pursuant to property time-sharing schemes;" and provides "for matters connected therewith". Some of these "connected matters" are dealt with in the Regulations under the Act.

At this stage it is convenient to refer to Mr Vahed's argument at the foot of page 11 and page 12 of this judgment. Mr Vahed in response to the suggestion that the Plaintiffs Clubs' conduct amounted to simulated transactions to avoid the provisions of sections 30 and 31 of the Companies Act, referred to Ridl's denial that this was the case. He also referred to section 1 of the Act where a club in relation to a property time sharing scheme is defined as "any club or association of persons in respect of which a right to membership or a right of participation in activities or functions may be sold to a member of the general public". His submission in this regard was that "having specifically sanctioned the concept of a club ... it is inconceivable that the legislature would have done so in circumstances where what was sanctioned was ... something that offended section 30 and 31 of the Companies Act and that the *modus operandi* adopted in the formation and running of the clubs complies fully with the Act.

In order to decide whether there is merit in Mr Vahed's submission a closer scrutiny of the Act and the Regulations is required.

The definition of a "club" has been referred to *(supra).*

A property time - sharing scheme is defined as:

> "(a) any scheme, arrangement or undertaking in terms of which timesharing interests are offered for alienation or are alienated and the utilization of such interests is regulated and controlled, whether such scheme, arrangement or undertaking is operated pursuant to a share block scheme, any scheme under which time-sharing interests connected with rights to membership of or participation in any club are granted, any time-sharing development scheme based on the alienation of undivided shares in a unit as defined in section 1 of the Sectional Titles Act, 1971 (Act No. 66 of 1971), or otherwise; or
> (b) any scheme, arrangement or undertaking declared a property timesharing scheme by the Minister by notice in the *gazette* for the purposes of this Act, in terms of which interests in the use or occupation of immovable property, or any portion or part thereof, defined in the notice, are sold or leased;"

The following definitions contained in the Regulations are relevant:

> "developer" means a person whose business is the creation or the selling of time-sharing interest in his own property time-sharing scheme and includes an agent of such person;

> "managing agent" means the person engaged by a developer or a management association, to manage a property time-sharing scheme pursuant to a written management agreement;

> "management association" means an association consisting of representatives of a developer and purchasers of time-sharing interests, as provided for in regulation 7;"

Regulation 6 deals with the managing agent and reads as follows:

6. Managing agent.-

> (a) A developer of a property time-sharing scheme shall, prior to the sale of any time-sharing interest in respect of that scheme, appoint a managing agent and shall enter into a management agreement with such managing agent, in which contract the relevant management fee shall be specified.
>
> (b) 51 per cent or more of the persons having interests in time modules in relation to a particular property time-sharing scheme, may terminate the services of a managing agent if it has so been decided by a simple majority vote of those present or by proxy at a special meeting of which adequate notice has been given.

(c) The management association shall on the request of any purchaser or registered mortgagee, in respect of a time-sharing interest, at all reasonable times, make available for inspection to such purchaser or mortgagee, or any person authorized in writing by such purchaser or mortgagee, an updated record of the names and addresses of all the other purchasers of time-sharing interests in that property time-sharing scheme.

Regulation 7 provides for the establishment of a management association and reads as follows:

7. Establishment of management association. - With effect from the date on which any person other than the developer acquires a time-sharing interest in a particular property time-sharing scheme, there shall be deemed to be established for the property time-sharing scheme, a management association of which the developer and such person are members, and every person who thereafter acquires a time-sharing interest in that property time-sharing scheme.

The duties and powers of a management association are set out in regulations 8 and 9:

8. **(I)** In the event of the following matters not being attended to by any other person, it shall be the duty of the management association-

(a) to insure the building relating to the property timesharing scheme and keep it insured to its replacement value against fire;
(b) to insure against such other risks as the members may by special resolution determine;
(c) forthwith to apply any insurance money received by it in respect of damage to the building, in rebuilding and reinstating the building in so far as this may be effected;
(d) to pay the premiums on any policy of insurance effected by it;
(e) to maintain the common property as well as all accommodation and to keep it in a state of good and serviceable repair;
(f) to comply with any notice or order by any competent authority requiring any repairs to or work in respect of the relevant land or building;
(g) to ensure compliance with any laws relating to the common property or to any improvement on land comprised in the common property;
(h) control, manage and administer the common property for the benefit of all owners;
(i) keep in a state of good and serviceable repair and
properly maintain the plant, machinery, fixtures and fittings, including elevators, used in connection with the common property;
(j) subject to the rights of the local authority, maintain and repair, including renewal where reasonably necessary, pipes, wires, cables and ducts existing on the land and capable of being used in connection with the enjoyment of more than one accommodation or of the common property;
(k) on the written request of any purchaser or registered mortgagee, in respect of a time-sharing interest to produce to such purchaser or mortgagee, orany person authorized in writing by such purchaser or mortgagee, the policy or policies of insurance effected by the management association and the receipt or receipts for the last premium or premiums in respect thereof.

(2) The management association shall, for the purpose of effecting any insurance under sub-regulation **(I)** (a), be deemed to have an insurable interest in the placement value of the

building and shall, for the purpose of effecting any other insurance under that subsection, be deemed to have an insurable interest in the subject-matter of such insurance.

9. **(I)** The management association shall have the power-

(a) to establish for administrative expenses a levy fund sufficient in the opinion of the management association for the repair, upkeep, control, management and administration of the property time-sharing scheme and the building or buildings relating thereto, for the payment of rates and taxes, for the supply of electric current, gas, water, fuel and sanitary and other services to the building and land and any premiums of insurance, and for the discharge of any duty or other obligation of the management association;

(b) to require the purchasers whenever necessary, to make contributions to such fund for the purposes of satisfying any claims against the management association;

(c) to determine from time to time the amounts to be raised for the purposes aforesaid;

(d) to raise the amount so determined by levying contributions on the purchasers in proportion to the time modules purchased by such purchasers;

(e) to open and operate a current account and a savings account with a banking institution or a building society;

(f) to appoint employees as it may deem fit;

(g) to purchase, hire or otherwise acquire movable property for purposes of the operation of the property time-sharing scheme;

(h) where practicable, to establish and maintain suitable lawns and gardens and playing facilities for children on the common property;

(i) to borrow moneys required by it in the performance of its duties or the exercise of its powers;

(j) to secure the repayment of moneys borrowed by it and the payment of interest thereon, by negotiable instrument or the hypothecation of unpaid contributions whether levied or not, or by mortgaging any property vested in it;

(k) to invest any moneys of the fund referred to in paragraph (a);

(l) to enter into an agreement with the local authority or any person or body for the supply to the building and the land of electric current, gas, water, fuel and sanitary and other services;

(m) to enter into an agreement with any purchaser of a time-sharing interest for the provision of amenities or services by it to the accommodation relating to such timesharing interest or to the purchaser or occupier thereof;

(n) to do ail things reasonably necessary for the enforcement of the rules and the control, management and administration of the common property;

(o) to deny to any purchaser the use of any accommodation within the property time-sharing scheme or any other part thereof, during the period in which such purchaser is

in arrear in the payment of any moneys due from such purchaser to the management association;

(p) to appoint an executive committee of the management association, which, subject to the directions of the management association, shall exercise all the powers' and perform all the functions conferred upon it by the management association;

(q) to prohibit the transfer of any time-sharing interest unless all moneys due to the management association in respect of the time-sharing interest concerned have been paid or provision has been made to the satisfaction of the said management association for the payment thereof.

(2) Any contributions levied under any provision of Sub-regulation (I) shall be due and payable on the passing of a resolution to that effect by the management association and may be recovered by the management association by action in any court, including any magistrate's court, of competent jurisdiction, from persons who are purchasers at the time such resolution is passed .

(3) The management association shall, on the application of a purchaser or any person authorised by such purchaser, certify in writing-

(a) the amount determined as the contribution of that purchaser;

(b) the manner in which such contribution is payable;

(c) the extent to which such contribution has been paid by that purchaser; and

(d) the amount of any rate paid by the management association and not recovered by it.

(4) The management association shall have the right to assign to the managing agent any of its rights and obligations in terms of these regulations.

(5) The management association shall have at least one general meeting per annum.

(6) The management association shall determine the procedure to be followed at meetings thereof and all matters at any meeting of the management association shall be determined by simple majority vote of those present In person or by proxy.

It is clear that the Act and the Regulations provide an elaborate framework within which a club has to function. Annexure A hereto, the diagram setting out the structure of Lamont and Ridl's Time Share Business, relied upon by Mr Dickson in argument, identifies the companies who are the legal persona acting as

In this regard Mr Dickson highlighted numerous aspects which according to him demonstrated the object of acquisition of gain. He has emphasized the fact that the revaluation and adjustment of members points as a result of inflation and R500-00 payment to a member by introducing a new member, and the members acceptance by the club is proof of the

acquisition of gain by the club and its members.

Here again I find no merit in this argument if one has regard to Nienaber JA's synthesis of sections 30 and 31 of the Companies Act in Mitchell's Plain Town Centre Merchant's Association *{supra)* referred to at page 5 and 26 in this judgment where he dealt with the critical purpose of an association and the test to be applied to determine the meaning of business and gain. I am not persuaded that Flexi Holiday Club has been formed for the critical purpose of the acquisition of gain. It is clear from the evidence that the fringe companies who acted as developer, seller and managing agents are the companies who had as object the acquisition of gain, which they acquired by performing functions provided for in the Act.

Having reached this conclusion I am of the view that the additional issue introduced by the Defendant is a red herring. One may conclude that the introduction of this issue stemmed from concern that the Defendant's reliance on sections 30 and 31 of the Companies Act was questionable.

In any case I am satisfied that the constitutions, of Flexi Holiday Club and Club Trafalgar reflect the required characteristics of perpetual succession, corporate identity and the capability of owning property apart from their members. I am furthermore satisfied that the Plaintiffs possess the characteristics of a *universitas* and that they operate as unincorporated voluntary associations.

INTERIM ORDER GRANTED

Having reached this conclusion it follows that the relevant separated issues fall to be resolved in the Plaintiffs' favour and are so resolved.

COSTS ISSUE AND ORDER TO BE GRANTED

By reason of Mr Dickson's proposal, in his Heads of Argument, to hand up a draft order for this court's consideration and in view of Mr Vahed's submission that any costs award in the Plaintiffs' favour should include those reserved on previous occasions the parties are invited to submit an appropriate draft order, failing which a date should be arranged with the Registrar for the parties to address me on the terms of the order and the question of reserved costs.

VAN PER REYDEN J

DATE OF HEARING AND DEFENDANTS FULL HEADS OF ARGUMENT

FILED: 7 AND 9 DECEMBER 2009

PLAINTIFF'S FULL HEADS OF ARGUMENT FILED: 17/6/2010

DATE OF DELIVERY: 7 DECEMBER 2010

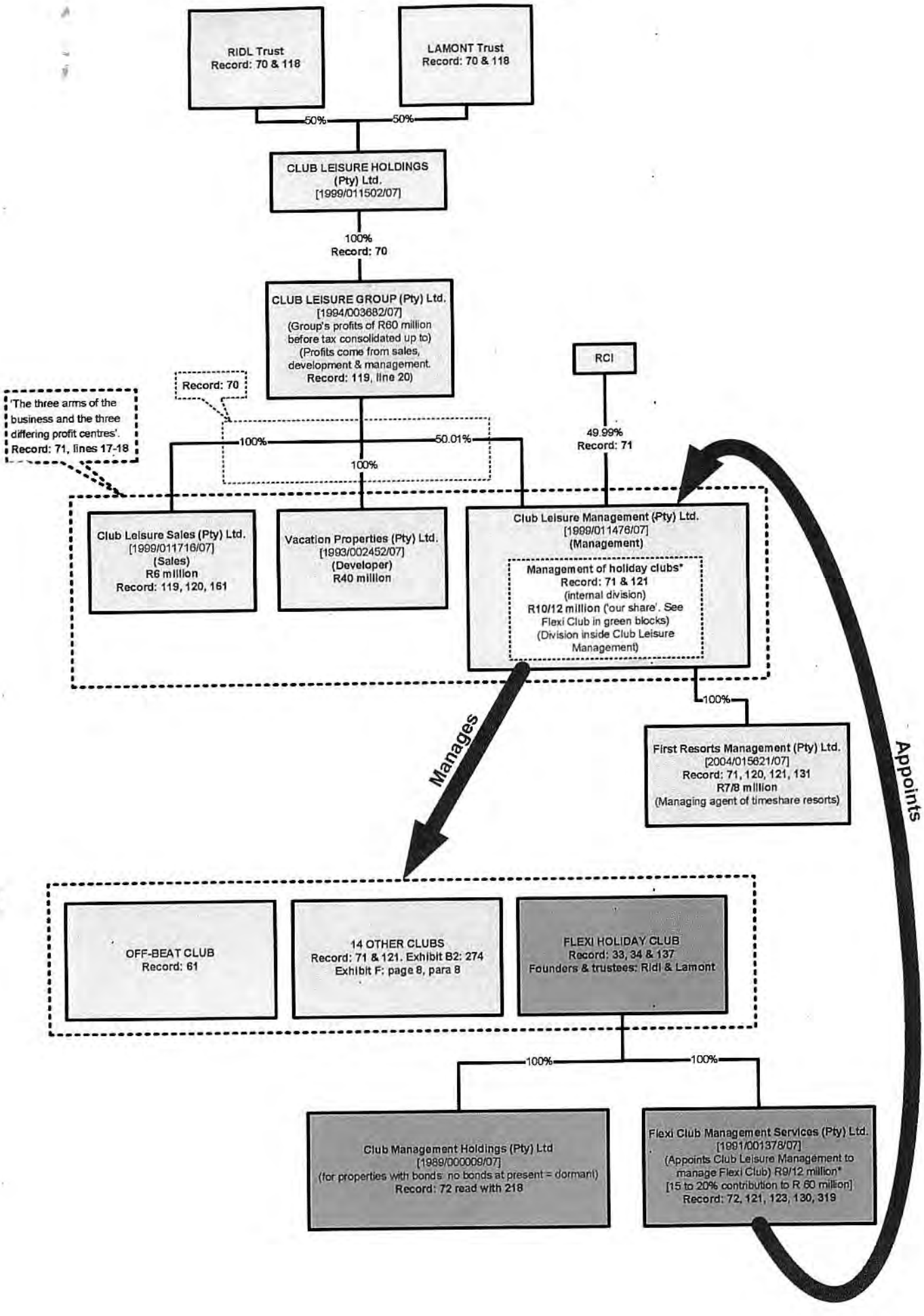
COUNSEL FOR PLAINTIFFS: ADV. R A K VAHED SC

ATTORNEYS FOR PLAINTIFFS: HORNBY, SMYLY GLAVOVIC INC
(Tel. 031-266-7751)

COUNSEL FOR DEFENDANT: ADV. A J DICKSON SC WITH
ADV. N TEE
ATTORNEYS FOR DEFENDANT: ATTORNEY GRUNDLINGH

ANNEXURE “A”

ANNEXURE "A"


RIDL Trust
Record: 70 & 118
LAMONT Trust
Record: 70 & 118
50%
50%
CLUB LEISURE HOLDINGS (Pty) Ltd.
[1999/011502/07]
100%
Record: 70
CLUB LEISURE GROUP (Pty) Ltd.
[1994/003682/07]
(Group's profits of R60 million before tax consolidated up to)
(Profits come from sales, development & management.
Record: 119, line 20)
RCI
49.99%
Record: 71
Record: 70
'The three arms of the business and the three differing profit centres'.
Record: 71, lines 17-18
100%
50.01%
100%
Club Leisure Sales (Pty) Ltd.
[1999/011716/07]
(Sales)
R6 million
Record: 119, 120, 161
Vacation Properties (Pty) Ltd.
[1993/002452/07]
(Developer)
R40 million
Club Leisure Management (Pty) Ltd.
[1999/011476/07]
(Management)
Management of holiday clubs*
Record: 71 & 121
(internal division)
R10/12 million ('our share'. See Flexi Club in green blocks)
(Division inside Club Leisure Management)
100%
First Resorts Management (Pty) Ltd.
[2004/015621/07]
Record: 71, 120, 121, 131
R7/8 million
(Managing agent of timeshare resorts)
Manages
Appoints
OFF-BEAT CLUB
Record: 61
14 OTHER CLUBS
Record: 71 & 121. Exhibit B2: 274
Exhibit F: page 8, para 8
FLEXI HOLIDAY CLUB
Record: 33, 34 & 137
Founders & trustees: Ridl & Lamont
100%
100%
Club Management Holdings (Pty) Ltd
[1989/000009/07]
(for properties with bonds: no bonds at present = dormant)
Record: 72 read with 218
Flexi Club Management Services (Pty) Ltd.
[1991/001378/07]
(Appoints Club Leisure Management to manage Flexi Club) R9/12 million*
[15 to 20% contribution to R 60 million]
Record: 72, 121, 123, 130, 319