

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division

2015/CLE/gen/1650

BETWEEN

TREASURER OF THE COMMONWEALTH OF THE BAHAMAS

Plaintiff

AND

IMAGINE NATION COMPANY INC.

Defendant

Before Hon. Mr Justice Ian R. Winder

Appearances: Christopher Jenkins with Chizelle Cargill for the Plaintiff
Gail Lockhart-Charles for the Defendant

10 and 23 May 2019

RULING

WINDER, J

This is an application by the Plaintiff (the Treasurer) for summary judgment.

1. The Treasurer brings this claim by Statement of Claim seeking the collection of outstanding real property tax in the amount of \$2,031,790 and penalties with respect to two properties owned by the Defendant. The two properties (the Properties) are Rudder Cut Cay and Lansing Cay both situated in the Exuma Cays, and were acquired by the Defendant on 13 July 2006. The Treasurer says that the real property taxes remain unpaid from 2007.
2. The Defence (as amended) avers that the Properties were acquired by the Defendant at the same time it purchased another cay, Musha Cay. The Defendant says that Musha Cay and the Properties were acquired together for the purpose of operating them together as one Hotel Resort.
3. The Defendant's case is that it understood that the Government would grant the entire resort concessions and exceptions pursuant to the Hotels Encouragement Act (the HEA). In particular, at paragraphs 8, 9, 10, 11, 12 and 13 of the Amended Defence it is stated:
 8. In reliance upon the said understanding, the Defendant engaged in extensive discussions with the Government as to the investment and the extensive refurbishment, development and re-branding of the resort, including the addition of major new facilities to create this world class luxury resort.
 9. Shortly after the Defendant purchased the said properties, the Defendant was advised by Government authorities that if it wished to include Rudder Cut Cay within the resort, extensive modifications would have to be undertaken, including the removal of many tons of waste and dangerous toxic debris, including chemicals, abandoned and corroded machinery and vehicles, and dilapidated, dangerous and uninhabitable buildings and other structures.
 10. The Defendant agreed to undertake the considerable task of cleaning up Rudder Cut Cay and making it safe with the understanding that it would be eligible for the said concessions and exemptions as a part of the hotel resort. With that understanding, the Defendant cleared away and safely disposed of all of the

hazardous debris, structures, and vehicles on Rudder Cut and made it habitable and usable for guests.

11. Additionally, the Government was excited by the idea of packaging and promoting the islands as a single resort and sought the Defendant's permission to make use of the name "the Islands of Copperfield Bay," the concept of the islands as a single resort, and proprietary photographs of the islands created by the Defendant in advertising materials that promote tourism in The Bahamas.
 12. The Defendant's beneficial owner consented and also donated his name, his brand and his time to promoting The Bahamas via the Ministry of Tourism's "Behold" Campaign, a Superbowl campaign and numerous print campaigns and media appearances.
 13. Since the purchase of the properties, the Defendant has invested in excess of \$20 million in upgrades. The Bahamas is the beneficiary of a constant stream of favourable publicity in the international media as a result of the spectacular resort that the Defendant has created.
4. When acquired, Musha Cay had been the beneficiary of real property tax exemptions under the HEA which had been obtained by its former owners. The Properties were not subject to any such exemptions under its former owners. Subsequent to the commencement of this action, the Government of The Bahamas and the Defendant entered into an amended agreement (the Agreement) under the HEA on 26 February 2016. The Agreement purported to extend exemptions from real property taxes with respect to the Properties.
5. The Treasurer's case, as reflected in the Reply, is that the terms of the Agreement did not provide that the outstanding taxes and surcharges already incurred and owed have been extinguished. Further, they say, there is no reference to retroactive application of the real property taxes incurred prior to 24th February 2016.
6. The Treasurer has applied by Summons dated 3rd April 2017 for summary judgment pursuant to Order 14 rule 1 of the Rules of the Supreme Court, which provides:

Where in an action to which this rule applies a statement of claim has been served on a defendant and the defendant has entered an appearance in the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against the defendant.

7. To succeed on an application for summary judgment the Treasurer must demonstrate, inter alia, that the Defendant has no defence to a claim included in the Writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed. The purpose of Order 14 is to enable a plaintiff to obtain summary judgment without a trial, if he can prove his claim clearly and if the Defendant is unable to set up a bona fide defence or raise an issue against the claim, which ought to be tried.
8. The Treasurer says that there is no defence to the claim and relies on the following exchange of correspondence:

By letter dated 23 July 2009, the Ministry of Finance advised Imagine Nation that:

“... according to our records, Musha Cay and Big Lansing Cay have both been purchased by Imagine Nation Inc. However, they have not been declared to our office for tax purposes.

You are therefore requested to forward a copy of the conveyance documents for both properties to our office as a matter of priority, to regularize their status on our property tax role.

Further, it is noted that Imagination Inc., has a \$803,704 outstanding property tax bill, delineated as follows:

- Little Lansing Cay \$32,010.00
- Big Lansing Cay \$129,844.00
- Rudder cut Cay \$641,850.00

In the absence of a response to our letter dated 15th June, 2008 requesting an up to date appraisal of Rudder Cut Cay and Little Lansing Cay, in accordance with section 12(3) of the Revised 2000. Real property Tax Act, you are request to settle your outstanding account, pending a decision to your objection.”

By letter dated 12 October 2010, Richard Lightbourne of McKinney Bancroft & Hughes, who was then the attorney advising Imagine Nation, advised the Ministry of Finance letter as follows:

"We have reviewed the matter fully with our clients and would advise that it is their belief that the Government had agreed to exempt the properties from real property taxes in that it was accepted that the properties comprised what is referred to as the Islands of Copperfield Bay and they were all entitled to the benefits under the Heads of Agreement relating to Musha Cay.

We are proposing to have a meeting with the relevant authorities and the Ministry of Tourism in an effort to have the matter clarified. Our clients are anxious to resolve the apparent misunderstanding and are hopeful that a meeting can be arranged in the near future so that we can put the issue behind us."

By letter dated 12 October 2010 Mrs. Rosemary Pintard-Bowe on behalf of the Acting Controller of Inland Revenue, advised Mr. Lightbourne as follows:

"I am also to advise that the National Economic Council NEC 5 (07) 5, did not agree for the Imagine Nation Company Inc. to be granted exemption from real property tax for Rudder Cut Cay, Little Lansing Cay and Big Lansing cay, the latter of which still has not been declared for property tax purposes. Also, these properties were not part of the Hotels Encouragement Act agreement dated 9th September, 1996.

In light of the foregoing, I wish to once again request the declaration of Imagine Nation Inc. holding on Big Lansing cay, and the settlement of your client's outstanding real property taxes as a matter of priority.

Further, in order to decrease the protracted delay in communication, it is requested that you deal directly with this office, as we have direct responsibility for oversight of all matters related to land in Exuma and its Cays, and wish to have this matter amicably and expeditiously concluded."

By letter dated 23 January 2017 Mr. Creswell Sturup, the Permanent Secretary of the Office of The Prime Minister formally advised Counsel for Imagine Nation as follows:

"We have been advised that the Treasurer of the Commonwealth of The Bahamas has commenced Supreme Court proceedings by way of Writ of Summons filed on 15 October 2015, against Imagine Nation Company to recover outstanding real property

taxes and surcharges owed by the company in respect of Rudder Cut Cay and Little Lansing Cay ("the Properties"), in the amount of \$1,935,275 and \$96,515, respectively.

In February 2016, two new agreements were entered into between the Government of The Bahamas and Imagine Nation, namely the Amending Agreement under the Hotels Encouragement Act Agreement dated 24th February 2016 ("the Amending Agreement") and the Hotels Encouragement Act Agreement dated 24th February 2016 ("the 2016 HEA Agreement")...

We understand that on 17th May 2016 you filed an Amended Defense in this matter and in that document Imagine Nation maintains that it is exempt from the payment of any real property taxes in respect of Rudder Cut Cay and Little Lansing Cay from the date of the 1996 HEA Agreement, on the following basis:

1. the 1996 HEA Agreement provides that Musha Cay Resort be granted real property tax exemptions pursuant to Clause 6 and 7 of the Agreement;
2. the Amending Agreement reflects Imagine Nation as the new owner of Musha Cay Resort and adds Rudder Cut Cay and Little Lansing Cay to the properties which form a part of Musha Cay Resort; and
3. the 2016 HEA Agreement extends the real property tax exemption under the 1996 HEA Agreement to Rudder Cut Cay and Little Lansing Cay for a further period of 20 years.

From the above you appear to suggest that taxes previously assessed on the Rudder Cut Cay and Little Lansing Cay properties are invalid and that the real property tax exemption now granted to these cays through the Amending Agreement and 2016 HEA should be applied retroactively. From a view of Real Property Tax Department's records we note the following:

1. Imagine Nation Inc. purchased the following properties:
 - a. Musha Cay
 - b. Rudder Cut Cay
 - c. Little Lansing Cay
 - d. Big Lansing Cay;
2. By a 1996 HEA Musha Cay was granted exemption from real property tax from the date the hotel opened its doors and taxes were assessed accordingly;

3. By NEC 5(07)5, the National Economic Council did not agree for Imagine Nation Company Inc. to be granted exemption from real property tax for Rudder Cut Cay and Little Lansing Cay as they were not part of the 1996 HEA. This decision was communicated by a letter dated October 12, 2010 from the Real Property Tax Department to McKinney Bancroft & Hughes who was acting for the Company at that time, a copy of this letter is attached for your perusal;
4. Taxes assessed for the period prior to 2007 have been settled and the outstanding balances represent taxes due from 2007;
5. In February 2016, the Amending Agreement and the 2016 HEA Agreement added Rudder Cut Cay and Little Lansing Cay to the Musha Cay Resort.

For the avoidance of doubt I wish to advise that:

- Pursuant to the NEC 5(07)5, the National Economic Council did not agree for Imagine Nation Company Inc. to be granted exemption from real property tax for Rudder Cut Cay and Little Lansing Cay;
- Pursuant to the Amending Agreement and the 2016 HEA Agreement, Rudder Cut Cay and Little Lansing Cay were added to the Musha Cay Resort and were granted exemptions from real property tax from 24th February, 2016.

As a result, the real property taxes remain due and outstanding on Rudder Cut Cay, Little Lansing Cay and Big Lansing Cay up to 23rd February, 2016."

9. The Affidavit of Nakita Isaacs, filed on behalf of the defendant, provides:

...

6. The issue was ventilated again in correspondence between the Government of The Bahamas and the Defendant in 2015 and in 2016, when it was finally resolved. A copy of the letter from Gail Lockhart Charles & Co. to the Bahamas Investment Authority dated 30th October, 2015 is at pages NDI 1-4. This letter outlined to the Bahamas Investment Authority the history of the Defendant's acquisition of the properties and the Defendant's understanding of the Real Property Tax position, as explained in the 21 June, 2010 letter from McKinney Bancroft and Hughes. By letter dated 13 January, 2016 from the Bahamas Investment Authority to Gail

Lockhart Charles & Co., at pages NDI 5-20 the Bahamas Investment Authority advised that the issue might be resolved by entering into an Amending Agreement. Paragraph 2 of the said letter stated as follows:

"The issue regarding the real property tax exemption of Rudder Cut Cay and Little Lansing Cay may be resolved by entering into and Amending Agreement which would add both Cays to the Principal Agreement as they were purchased by the former owners for resort expansion. I have enclosed a sample of an Amending Agreement for our guidance."

7. It is clear that the Amending Agreement, when considered in the context of the correspondence between the Defendant and the Bahamas Investment Authority immediately preceding it, was intended to vary the Principal Agreement in order to resolve the issue of the real property tax arrears.
10. Whilst the claim of the Treasurer, on an examination of the evidence, appears formidable it is not undefendable in the circumstance of this case. Notwithstanding the National Economic Council have determined that the exemptions ought not to be applied retroactively to 2007, the Defendant's claim is cast a bit more widely. The Defendant's case is that representations were made by the executive, specifically the then Prime Minister, that the exemptions would be extended on certain terms which it says has been fulfilled.
11. The evidence in the Defendant's case appear to consist considerably in oral communications between Mr Copperfield, the principal of the Defendant and members of the executive. Whilst the direct evidence is principally oral in nature, the Defendant also relies on certain circumstantial evidence. In particular, they rely on (1) the evidence showing that they have honored the conditions they say were placed upon it by the Executives; and (2) the Permit to purchase the property, granted to the Defendant contained the following endorsement:

TO: Imagine Nation Company Inc.

Permission is hereby granted you to acquire/hold the following property to wit:-

RUDDER CUT CAY, ONE OF THE EXUMA CAYS, EXUMA, THE BAHAMAS

For use as:-

TO BE USED FOR FURTHER EXPANSION OF THE MUSHA CAY
DEVELOPMENT

The undisputed evidence was that the Musha Cay Development had been extended the relevant real property exemptions under the Hotels Encouragement Act. Whilst this may not be direct evidence, this fact only affects the quality of the defence not its existence. Whether at a trial the Court finds that the evidence comes up to proof is also a different matter.

12. In the circumstances therefore, whilst I think the road ahead for the Defendant is a hard one, I am not prepared to conclude that there is no defence to the claim. In the circumstances the application for summary judgment is dismissed with costs to be paid to the Defendant to be taxed if not agreed.

Dated the 19th day of December 2019



Ian R. Winder

Justice