COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2020/CLE/gen/00211

BETWEEN

MICHAEL STANDING

First Plaintiff

and

MARIA STANDING

Second Plaintiff

AND

BAKERS BAY MARINA LIMITED

First Defendant

AND

BAKERS BAY CLUB LIMITED

Second Defendant

AND

PASSERINE AT ABACO LIMITED

Third Defendant

Before: The Honourable Madam Justice Tara Cooper Burnside (Ag)

Appearances: Alfred Sears QC and Moreno Hamilton with him for the Plaintiffs

Robert Adams and Edward Marshall II for the Defendants

Hearing Date: 19 January 2021

Civil Practice – Summons to Strike-out Statement of Claim – Order 18 Rule 19(1)(a)(b) and (d) of the Rules of the Supreme Court – frivolous, vexatious and/or abuse of the process of the Court

RULING

[1] This is an application by the Defendants by a Summons filed on 18 March 2020 for the following relief:

(i) An Order pursuant to Order 18 Rule 19(1)(a)(b) and (d) of the Rules of the Supreme Court striking out the Plaintiffs' Statement of Claim on the ground that the Defendants were at all material times agents of Mr Kip Taylor and therefore, are not proper parties to the subject action;

(ii) Further and or alternatively, an Order pursuant to Order 18 Rule 19(1)(b) and (b) of the Rules of the Supreme Court striking out the Plaintiffs' Statement of Claim as against the Second and Third Defendants on the ground that the claims set out therein as against the Second and Third Defendants are bound to fail.

Background

[2] This action was commenced by the Plaintiffs against the Defendants on 12 February 2020 by a specially indorsed Writ of Summons. A summary of the Plaintiffs' claim follows.

[3] In or about 16 August 2019, the Plaintiffs acquired:

(i) membership in Baker's Bay Marina Club (the "**Marina Club**") pursuant to a Baker's Bay Marina Club Membership Agreement for Yacht Slip Membership (the "**Marina Membership Agreement**") entered into between the Plaintiffs and the First Defendant; and

(ii) Membership in Baker's Bay Golf & Ocean Club (the "**Golf Club**") pursuant to the provisions of a Bakers Bay Golf and Ocean Club Membership Purchase Agreement (the "**Golf Membership Agreement**") entered into between the Plaintiffs and the Second and Third Defendants.

For ease of reference, I refer to both the Golf Membership Agreement and Marina Membership Agreement as the "**Agreements**".

[4] The cost of the Golf Club membership was $250,000.00, which sum is defined in the Golf Membership Agreement as the "**membership contribution**". The cost of the Marina membership was $2,250,000.00, which sum is defined in the Marina Club Membership as the "**membership deposit**".

[5] Shortly after execution of the Agreements by the Plaintiffs, the Plaintiffs paid the cost of the membership contribution in full. In addition, they paid the sum of $500,000.00 towards the membership deposit, leaving a balance of $1,750,000.00 to be paid for the Marina membership.

[6] On 1 September 2019, approximately two weeks after the Plaintiffs acquired the memberships, Hurricane Dorian struck the island of Abaco, causing great damage to the island. The Golf Club and the Marina Club were among the properties that were damaged by the hurricane. The damage was so severe that the clubs had to be closed to facilitate repairs.

[7] By the Statement of Claim indorsed on their Writ the Plaintiffs seek (i) rescission of the Agreements, (ii) repayment of the sums paid under the Agreements and (ii) damages for breach of contract and conversion.

Order 18, rule 19(1)

[8] Under Order 18, rule 19(1) the Court may "at any stage" of the proceedings order to be struck out any pleading or the indorsement of any writ on the ground that it discloses no reasonable cause of action. Order 18, rule 19, insofar as it is relevant, states as follows:

> "**19.(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –**
>
> **(a) it discloses no reasonable cause of action or defence, as the case may be; or**
> **(b) it is scandalous, frivolous or vexatious; or**
> **(c) …**
> **(d) it is otherwise an abuse of the process of the court,**
>
> **and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.**
>
> **(2) No evidence shall be admissible on an application under paragraph 1(a).**"

[9] The principles which apply on an application to strike out are well established:

(i) The object of the rule is to stop cases which ought not to be launched, which are obviously frivolous or vexatious or obviously unsustainable: ***Duchy Lancaster v London and North Western Railway Company*** [1892] 3 Ch 274, T***he Private Trust Corporation Limited v Vohra and others*** [2009] 2 BJS J No. 21.

(ii) The jurisdiction is draconian and should be exercised cautiously and only in clear and exceptional cases; for once it is exercised, the party affected is deprived of a hearing of his case on the merits: ***Anderson-Thomas v Batnagar and another*** [2018] 1 BHS J. No. 191.

(iii) A statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable and there is no need to go to trial: ***Nagle v Feilden*** [1966] 2 Q.B. 633, ***Hamby Limited v Hermitage Estates Limited and others*** [2009] 3 BHS J No. 109.

(iv) An application under Order 18, rule 19(1)(a), i.e. on the basis that the pleading or indorsement fails to disclose a reasonable cause of action, is only appropriate when, on the face of the pleading complained of, it is clear that the facts stated do not give rise to a triable issue or defence. No evidence is permitted to be adduced and it is not permissible for the Court to anticipate the defence(s) which the defendant may plead and be able to prove at the trial, nor anything which the plaintiff may plead in reply. The Court must make a determination based on the four corners of the pleading alone and the primary question to be determined is whether, assuming the allegations are true, a cause of action with some chance of success is disclosed when only the allegations are considered. So long as this question may be answered in the affirmative, a strike out order will not be justified. This is so, even if the case is highly improbable, difficult to believe or not strong: ***Drummond-Jackson v British Medical Association*** [1970] 1 All ER 1094, ***Lawrance v Lord Norreys*** [1890] 15 AC 210.

(v) Abuse of process concerns a misuse of procedure in a way which, although not inconsistent with the literal application of the Court's procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people. The circumstances in which abuse of process can arise are wide and varied and depend on the facts of the particular case: Per Lord Diplock in ***Hunter v CC of The West Midlands Police*** [1982] AC 529, 536.

(vi) The strike out power of the Court is a summary jurisdiction which was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way: per Dankwerts LJ in ***Wenlock v Moloney*** [1965] 2 All ER 871, 874.

The basis of the application

[10] The Defendants' first ground of complaint is that they are not proper parties to the action because at all material times they were acting as agents of Mr Kip Taylor ("**Mr Taylor**"). They contend that as a result of such relationship, the Statement of Claim discloses no reasonable cause of action against them, is frivolous or vexatious and/or an abuse of the process of the Court.

Principles relating to the law of agency

[11] Relevant principals relating to the law of agency are set forth at paragraphs 159 and 160 in Halsbury's Laws of England, Volume 1 (2017), which test was referred to the Court by Mr Adams on behalf of the Defendants. Those paragraphs state:

"**159. Identity of principal disclosed.**

Where an agent in making a contract discloses both the existence and the name of a principal on whose behalf he purports to make it, the agent is not, as a general rule, liable on the contract to the other contracting party, whether he had in fact authority to make it or not; but a personal liability may be imposed upon him by the express terms of the contract, by the ordinary course of business, or by usage, and he will be liable for breach of warranty of authority in cases where he had no authority.

Further, the agent is personally liable on the contract if it is shown that he is the real principal, or that the principal named by him is non-existent or incapable of making the contract in question, or is not the real principal although there might be another principal in existence. The agent is also liable if he holds him-self out as agent for a named person, but is in fact agent for an unnamed person.

160. Documents executed or signed in agent's name.

An agent who executes a deed in his own name is personally liable upon it, whether he discloses the name and existence of his principal or not.

In respect of bills of exchange, cheques and promissory notes signed by an agent on his principal's behalf, the agent is not liable unless he signs his own name, in which case he is personally liable even though he adds to his signature words describing him as an agent, unless he makes it perfectly clear that he is signing only on his principal's behalf. He is not liable upon any acceptance in his own name, unless the bill was in fact drawn upon him, in which case he is liable although he purports to accept merely as agent.

In the case of any other written contract signed by the agent in his own name, but purporting to be made on behalf of a named principal, the agent will not be personally

liable, unless from the terms of the contract it appears that such was the intention of the parties..."

Order 18, rule 19(1)(a) - Does the Statement of Claim disclose a reasonable cause of action?

[12] As indicated in paragraph 9(iv) above, an application under Order 18, rule 19(1)(a) is appropriate only when, on the face of the pleading complained of, it is clear that facts stated do not give rise to a triable issue or defence. No affidavit evidence is admissible and so long as a valid cause of action or defence has been raised, a strike out order will not be warranted, even if the case is not strong.

[13] The Defendant filed evidence in an effort to demonstrate that they negotiated and entered into the Agreements as agents of Mr Taylor. However such evidence is inadmissible for the purposes of an application to strike out a pleading under Order 18, rule 19(1)(a) and the Court must make a determination based on the contents of the pleading alone

[14] Having reviewed the Statement of Claim in the present case, it is not apparent to me that the Defendants were engaging with the Plaintiffs in an agency capacity such that their claims against the Defendants are bound to fail. In my view, the pleading gives rise to triable issues and evidences *ex facie* causes of action against the Defendants with some chance of success. It would not be appropriate for the Court to strike out the Statement of Claim under Order 18 rule 19(1)(a) in the circumstances.

Order 18, rule 19(1)(b) and (d) - Is the Statement of Claim frivolous, vexatious or an abuse of the process of the Court?

[15] While no evidence is permitted to be adduced for the purposes of an application under Order 18, rule 19(1)(a), affidavit evidence is admissible upon an application made under Order 18, rule 19(1)(b) or (d). I will therefore consider the evidence presented by the Defendants to determine whether the Statement of Claim is frivolous, vexatious or an abuse of the process of the Court and/or bound to fail.

Evidence

[16] The Defendants' evidence of the alleged agency is contained in the affidavit of Rodman F. Deleveaux filed on 19 March 2020 (the "**Deleveaux Affidavit**").

[17] The Deleveaux Affidavit states:

> "3. In August 2019, the First Plaintiff and Craig Klinger, acting as agent for the Defendants, were engaged in written and oral discussions in connection with the Plaintiffs' purchase of a Baker's Bay Golf & Ocean ("the Club") marina and golf

membership from an existing member of the Club namely, Kip Taylor. There is now produced and shown to me and marked Exhibit "RFD.1" copies of the WhatsApp messages exchanged between the First Plaintiff and Craig Klinger regarding the purchase of the said memberships over the period between 10 August 2019 and 18 August 2019.

4. According to the WhatsApp messages as aforesaid and an email message from Craig Klinger to Connie Concetto dated 11 August 2019 on which both the First Plaintiff and Kip Taylor were copied, it was communicated that the Plaintiffs had agreed to purchase (i) a golf membership from Kip Taylor's Harbour Cottage #1 for the sum of $250,000.00 and (ii) Kip Taylor's 100 foot boat slip located at B-19 for the sum of $2,250,000.00 with a $500,000.00 non-refundable due prior to or upon execution of the sales agreement for the same with the balance of the purchase price to be paid by the Plaintiff's on or before 31 October 2019. There is now produced and shown to me and marked Exhibit "RDF.2" a copy of the said email message dated 11 August 2019.

5. As a result, on 16 August 2019, the Plaintiffs executed a Baker's Bay Golf & Ocean Club Membership Purchase Agreement with the Second and Third Defendants, as agents for Kip Taylor, for the purchase of Kip Taylors Harbour Cottage #1 golf membership at Baker's Bay Golf & Ocean Club for the sum of $250,000.00 ("the Golf Membership Agreement"). There is now produced and shown to me and marked Exhibit "RDF.3" a copy of the said Baker's Bay Golf & Ocean Club Membership Purchase agreement made between the Plaintiffs and the Second and Third Defendants.

6. Also 16 August 2019, the Plaintiffs executed a Baker's Bay Marina Club Membership Agreement for Yacht Slip Membership with the First Defendant, as agent for Kip Taylor, for the purchase of Kip Taylors 100 foot boat slip located at B-19 for the sum of $ 2,250,000.00 with a $500,000.00 non-refundable deposit ("the Marina Membership Agreement"). There is now produced and shown to me marked Exhibit "RDF.4" a copy of the said Baker's Bay Marina Club Membership Agreement for Yacht Slip Membership made between the Plaintiffs and the First Defendant.

7. On 19 August 2019, the First Plaintiff requests confirmation from Connie Concetto that the Plaintiffs wire transfer to the Defendants in the amount of $750,000.00 was received which was provided to the First Plaintiff by Connie Concetto on 20August 2019.

8. The Defendants have been advised by their attorneys and verily believe the Plaintiff's Action as against them is one that ought to be struck out on the grounds that the Defendants at all material times were acting in their capacity as agents for Kip Taylor in the subject transactions."

[18] It also exhibits, among other things (i) WhatsApp messages (the "**WhatsApp Exchange**") exchanged between the First Plaintiff ("**Mr Standing**") and Craig Klinger ("**Mr Klinger**"), the marketing and sales director at Baker's Bay and (ii) an email (the "**Email**") from Mr Klinger to Connie Concetto on which Mr Taylor and the Plaintiffs were copied.

[19] The substantive parts of the WhatsApp Exchange and Email are set out below.

WhatsApp Exchange

"Mr Klinger: The seller of the 100' slip is firm at $2.25mm. Membership would be additional $250k.

Mr Standing: I think it will be better for us. Could you put in an offer. Thanks.

Mr Klinger: For which slip? 80'er or the 100'er?

Mr Standing: 100. More private…

Mr Klinger: Please outline you[r] payment schedule, he will not take less than $2.25 mm. Others have tried and he just will not go lower than that…

Okay, Kip agreed to your terms, $2.25mm for the slip with $500,000 (non-refundable) paid this coming week/upon signing the slip purchase agreement and then the additional $1.75mm will be paid towards the end of October, but not later than Oct 31st, 2019. Club membership to be an additional $250k to join (one time fee/80% equity) Good?

Mr Standing: Good".

Email

"Morning, Connie

Please meet Mike Standing. We have come to terms with Mike to purchase Kip's 100' slip B-19. Mike is going to pay for the slip with $500,000 (non-refundable) paid this coming week/upon signing the slip purchase agreement and then the additional $1.75 mm will be paid towards the end of October, but not later than October 31st.

> Club membership initiation to be an additional $250k with Mike purchasing the club membership from Kip's Harbour Cottage #1…"

[20] Mr Standing, the First Plaintiff, swore an affidavit in response to the Deleveaux Affidavit. In summary, he states as follows:

(i) The Plaintiffs were informed by a representative of Baker's Bay that (i) they could not buy memberships directly from an existing member and (ii) they could only buy memberships from Baker's Bay directly;

(ii) The Plaintiffs were informed that (i) the right to use a slip or a pier structure could not be conveyed to them under Bahamian law and (ii) they were required to buy memberships and access rights through the clubs owned and controlled by Baker's Bay in order to do so;

(iii) They understood from Mr Klinger that a slip for their vessel would need to be available before they could receive membership in the Golf Club and Marina Club and believed that slip B19, which was previously assigned to Mr Taylor would be assigned to them in his place;

(iv) When they were negotiating the Agreements, Mr Klinger explained that the sale of the Golf membership and the Marina membership was between the Plaintiffs and "Bakers Bay" because Bakers Bay was building a house for Mr Taylor, and Mr Taylor was indebted to Baker's Bay;

(v) On or about 26 May 2020, the Plaintiffs received a "Notice of Membership Suspension" from the Second Defendant which stated, "Baker's Bay Club Limited ("Club") is providing this notice to you…for failing to pay any amount owed to the Club in a proper and timely manner…..As a reminder, the Club (i) has a lien and other rights against each membership for any unpaid dues, fees, charges or assessments, etc. …and (ii) reserves all right and remedies under the Bylaws to collect on the above stated delinquency including rights of termination/expulsion"

(vi) As recently as October 2020, the Plaintiffs received a reminder from the Second Defendant with respect to unpaid membership fees.

[21] On behalf of the Defendants, Mr Adams contends that the Plaintiffs' case as pleaded in the Statement of Claim is "plainly unsustainable as a matter of fact and/or law". According to him, the uncontested facts demonstrate that the Defendants were merely acting as agents for Mr Taylor and they were not selling the licence for Slip B-19 or the Golf Membership themselves.

[22] In his submissions, Mr Adams relies heavily on the WhatsApp Exchange, the Email and the fact that the sums paid by the Plaintiffs were ultimately payable to Mr Taylor. He submits that the Plaintiffs knew and understood that the transactions were between them and ultimately Mr Taylor.

[23] On behalf of the Plaintiffs, Mr Sears QC contends that the overwhelming evidence discloses that the Plaintiffs' communications and agreements were with the Defendants and the Defendants' representatives. Further, up to the present date the Defendants continue to invoice the Plaintiffs and thereby represent that the arrangements in connection with the Golf membership and yacht slip licence are with Baker's Bay and not Mr Taylor. He also argues that the Defendants had a vested financial interest in the transactions with the Plaintiffs and the written terms of the contract make it clear that the Defendants were the principals in the transactions.

[24] Mr Sears QC relies on the Canadian case of ***Saskatchewan Wheat Pool v Leon Walchuk*** [2004] SKQB 193, which adopted with approval the well-known principle that, as an exception to the general rule, an agent acting for a disclosed principle may be liable on a contract if the parties expressly intend or it may be inferred from the circumstances that liability should fall on the agent.

[25] Assuming for the sake of argument that consideration of the WhatsApp Exchange and Email does not offend the parole evidence rule, the agency arguments advanced by Mr Adams are compelling. It certainly *appears* from the WhatsApp Exchange and the Email that Mr Klinger was acting on Mr Taylor's behalf in the "*sale of Mr Taylor's 100' slip B-19*". Mr Klinger's statements to Mr Standing that "*the seller of the 100' slip is firm at $2.25mm*" and "*Kip agreed to your terms*" undoubtedly suggest this to be the case. The same holds true for Mr Klinger's statement in the Email that "*Club membership initiation to be an additional $250k with Mike purchasing the club membership from Kip's Harbour Cottage #1…*". Nonetheless, when one reviews the provisions of each of the Agreements, the agency relationship alleged is not clear.

[26] First, it is readily apparent that neither of the Agreements indicates on its face that the First Defendant, in the case of the Marina Membership Agreement or the Second and Third Defendants, in the case of the Golf Membership Agreement are acting as agent for a third party. Also apparent is that each of the Defendants executed the Agreements in their own names and without any qualification whatsoever.

[27] Second, with respect to the Marina Membership Agreement, even though that agreement refers to "Slip B-19", the *subject* of the agreement is membership in the Marina Club. In this regard, the Marina Membership Agreement states:

"**II. PURCHASE OF MEMBERSHIP**

The undersigned ***hereby acquires membership*** in Baker's Bay Marina Club in the category indicated below from Baker's Bay Marina Limited, a Bahamian company doing business as Baker's Bay Marina Club (the "Club").

Slip B-19

	MEMBERSHIP CATEGORY	MEMBERSHIP DEPOSIT	AMOUNT PAID WITH AGREEMENT	VAT. TAX	AMOUNT OWED
✓	Yacht Slip Membership	$2,250,000.00	$500,000.OO	$*	$1,750,000

VAT may be due as determined by Government." (my emphasis)

[28] Third, both Agreements provide terms which set out the rights and liabilities of the Plaintiffs as "member" vis-à-vis the Defendants, respectively. This suggests that Defendants are parties to the Agreements in their own right, i.e. as principals, so as to be able to enforce the provisions against the Plaintiffs. For example, the Marina Membership Agreement provides:

> "[The Plaintiffs] hereby acknowledge that [we are] required to pay to the Club the membership dues, and applicable fees and charges together with any sales tax, or other tax that may be due with respect to the payment of dues, fees or charges.
> …
> [The Plaintiffs] hereby acknowledge that the use of the Club Facilities and any privilege or service incident to membership is undertaken with knowledge of risk of possible injury. [The Plaintiffs] hereby accept any and all risk of injury to [ourselves, our] guests and [our] family sustained while using the Club Facilities or while involved in any event or activity incident to membership in Baker's Bay Marina Club. [The Plaintiffs] agree to release and indemnify the Club, the lessor under the lease of the Club Facilities, any manager of the Club Facilities, their affiliates, their successors and assigns and their respective directors, officers, partners, members of any limited liability company, shareholders, employees, representatives and agents in accordance with the provisions of the Rules and Regulations."

[29] Similarly, the Golf Membership Agreement states:

> "[The Plaintiffs] hereby agree to pay to the Club the membership contribution and the membership dues, fees and charges, including any applicable sales tax or other taxes for the category of membership selected. The current amount of dues for each membership category is

> described on a separate Schedule of Dues, Fees and Charges, and is subject to Change.
> …
> [The Plaintiffs] specifically grant the Club a security interest in any amount which it may owe under the Membership Documents to secure all amounts owed by me to the Club, including filing fees and reasonable attorneys' fees incurred by the Club incident to the collection of such amounts.
> …
> [The Plaintiffs] hereby acknowledge that the use of the Club Facilities and any privilege on or service incident to membership is undertaken with the Knowledge of possible risk of injury. [The Plaintiffs] hereby accept any and all risk of injury to [themselves, their] guests or family sustained while using the Club Facilities…In accepting the risk of injury, [the Plaintiffs] understand that [they are] relieving the Club, Passerine at Abaco Limited, a company duly organized under the laws of the Commonwealth of The Bahamas (the "Company") their affiliates, successors and assigns…from any an[d] all loss, cost, claims, injury, damages…incurred by [the Plaintiffs, their] guests or family resulting from or arising out of any conduct or event connected with membership in the Club and use of any of the Club Facilities."

[30] In my view, such provisions are not congruent with the idea that the First Defendant, in respect of the Marina Membership Agreement and the Second and Third Defendants, in respect of the Golf Membership Agreement, are parties to the Agreements as mere agents.

[31] In addition to the foregoing, each of the Agreements incorporates a Membership Plan, the terms of which expressly provide that membership in the Marina Club and Golf Club cannot be transferred or sold by any member to a third party. In this regard, the Plan Membership incorporated into the Marina Membership Agreement states (at pages 9-10):

> "A Yacht Slip Member may resign his or her membership and arrange for the Club to reissue the membership…Should a member desire to resign from Baker's Bay Marina Club, the member shall be required to give written notice to the Club. Resignation of a member is irrevocable, unless otherwise determined by the Club. A member may not transfer or sell his or her membership to any person or entity. All memberships must be reissued by the Club."

[32] Similarly, the Membership Plan incorporated into the Golf Membership Agreement provides (at page 9):

> "A Member may transfer his or her membership only to the Club by resigning the membership and arranging for the Club to reissue the membership. Should a member desire to resign from the Club, the member shall be required to give written notice to the Club. Resignation of a member is irrevocable, unless otherwise determined by the Club."

[33] Those provisions indicate that memberships may not be "transferred" by a member to a third party; they may only be "issued". Further, such issuance must be done by the relevant Club. This scenario seems inconsistent with the position that the transaction was one of sale and purchase between Mr Taylor and the Plaintiffs.

[34] Furthermore, each of the Agreements provides that in the event of resignation of the membership and reissuance of the membership by the Club to a new member, the former member will be entitled to a refund equal to the membership deposit or the membership contribution, as the case may be. In the Marina Membership Agreement, the provision is as follows:

> "Upon resignation of the membership and reissuance of the membership by the Club to a new member, in accordance with the "Transfer of Membership" provision of the Baker's Bay Marina Club Membership Plan (as amended from time to time, the "Membership Plan"), the undersigned member will receive a refund equal to eighty percent (80%) of the membership deposit established for the membership in accordance with the terms and conditions of the Membership Plan. The refund will be made within 30 days after reissuance of the resigned membership.
>
> The obligation to make the refund provided for above shall be subject to set-off for all amounts due under the Membership Plan and Rules and Regulations which remain unpaid upon the making thereof. The membership deposit may be prepaid in whole or in part at any time without penalty or premium."

[35] When the provisions of the Agreements are considered, the following seems to be the case: (i) the Marina Club is the only person capable of issuing Marina Club memberships, (ii) the Golf Club is the only person capable of issuing Golf Club memberships and (iii) transfers of those memberships by a member to a third party is not permitted. Additionally, where a member resigns his membership and that membership is subsequently reissued, he will be entitled to receive a "refund" from the relevant Club in an amount equal to 80% of the membership deposit or membership contribution then charged for that membership. A number of steps are involved but it is not clear to me that when the Defendants reissue a membership, they do so in the capacity of agent. The position is even less clear given that the resigning member is entitled to a "refund" as opposed to simply the sale proceeds.

[36] In all the circumstances, I do not think it is clear in the present case that the Defendants were at all material times acting as agents for Mr Taylor.

Order 18 Rule 19(1)(b) and (d) – Is the Plaintiffs' Statement of Claim bound to fail?

[37] The second ground of complaint in the Defendants' Summons is that the Statement of Claim as it relates to the Second and Third Defendants is bound to fail. In their submissions, however, Mr Adams and Mr Sears QC both argued the point as it relates to all of the Defendants.

[38] In their Statement of Claim, the Plaintiffs seek rescission of the Agreements on the basis that they were frustrated. They also seek repayment of the sum of $750,000.00, representing $500,000.00 towards the membership deposit payable under the Marina Membership Agreement and the membership contribution payable under the Golf Membership Agreement $250,000.00.

Frustration

[39] Mr Adams contends that the doctrine of frustration does not apply to the Agreements and therefore the Plaintiffs' claim for repayment is unsustainable. To support his submission, he refers the Court to the authority of ***Edwin Commercial Corporation and another v Tsavliris Russ (World Salvage and Towage) Ltd, The Sea Angel*** [2007] EWCA Civ 547 where Rix LJ stated:

> "[111] In my judgment, the application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances. Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as "the contemplation of the parties", the application of the doctrine can often be a difficult one. In such circumstances, the test of "radically different" is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as

provided for and contemplated and its performance in the new circumstances.

[112] What the "radically different" test, however, does not in itself tell us is that the doctrine is one of justice, as has been repeatedly affirmed on the highest authority. Ultimately the application of the test cannot safely be performed without the consequences of the decision, one way or the other, being measured against the demands of justice. Part of that calculation is the consideration that the frustration of a contract may well mean that the contractual allocation of risk is reversed. A time charter is a good example. Under such a charter, the risk of delay, subject to express provision for the cessation of hire under an off-hire clause, is absolutely on the charterer. If, however, a charter is frustrated by delay, then the risk of delay is wholly reversed: the delay now falls on the owner. If the provisions of a contract in their literal sense are to make way for the absolving effect of frustration, then that must, in my judgment, be in the interests of justice and not against those interests. Since the purpose of the doctrine is to do justice, then its application cannot be divorced from considerations of justice. Those considerations are among the most important of the factors which a tribunal has to bear in mind."

[40] Mr Adams therefore submits that the application of the doctrine of frustration requires a multifactorial approach whereby the terms of the particular contract must be considered, including the knowledge, expectations and assumptions of the parties. He says that in the present case, the Plaintiffs' enjoyment of their memberships was temporarily interrupted by reason of a hurricane and that would have been within the ordinary contemplation of the parties when the Agreements were made, given the frequency with which hurricanes and tropical storms affect this region.

[41] Mr Adams also referred the Court to the affidavit of Livingston Marshall, a Senior Officer of Baker's Bay, which was sworn on 9 November 2020 on behalf of the Defendants. In that affidavit Mr Marshall states:

> "Currently, there are approximately 1,639 full time construction employees at the Club completing the repairs necessary for its reopening and I can confirm that the Club will be reopened to its members on 21 December 2020 after which all existing Club members, including the 1st and 2nd Plaintiffs, will be able to access the majority of its facilities."

[42] On this basis, Mr Adams argues that once the facilities are repaired the Plaintiffs will be able to enjoy all of the rights and privileges conferred upon them by the Agreements. He also contends that the mere incidence of a temporary disruption or delay in the Plaintiffs'

use of their memberships by reason of hurricane, without more, is insufficient to trigger application of the doctrine of frustration to bring either of the Agreements to an end.

[43] I agree with Mr Adams that the doctrine of frustration requires a multifactorial approach. The Agreements must be construed in light of the facts existing at the time they were made to determine whether the ultimate situation is or is not within the scope of the contract so construed. Whether or not the delay is such as to bring about frustration must be determined by taking into account all evidence of what has occurred and what is likely thereafter to occur. It is often a question of degree and in my view, the Plaintiffs should be permitted to call their witnesses and lead their evidence to prove their case. On the face of it, the Plaintiff may well face difficulties in proving frustration but that is not a sufficient reason to order that the claim should be struck out.

[44] In his final submission, Mr Adams makes an argument in the alternative. He says that the Plaintiffs pleaded case is bound to fail in any event because even if the Court does not accept that the Defendants acted as agents, the Plaintiffs have pleaded their case in contract and the evidence before the Court indicates that there is no binding contract between the parties. In this regard, Mr Adams refers the Court to the provisions of the Agreements which expressly state that they will not be binding on the Defendants until "**the acceptance below is signed**"; and neither of the Agreements before the Court is signed.

[45] In response, Mr Sears argues that it is clear from paragraph 18 of the Statement of Claim and the relief prayed, that a claim for money had and received is pleaded. They state:

> "18. In the premises, **the Defendants have converted** the Plaintiffs' golf fee of Two Hundred and Fifty Thousand Dollars ($250,000.00) and Yacht Slip Membership fee of Five Hundred Thousand Dollars ($500,000.00) to their own use.
>
> …
>
> AND THE PLAINTIFF claims as against the Defendants:-
>
> I. Rescission of the said contracts;
>
> II. Repayment of the said sum of Seven Hundred and Fifty Thousand Dollars (US$750,000.00) paid by the Plaintiffs to the Defendants for the Baker's Bay Golf Club Membership and Marina Slip Membership in the Baker's Bay Marina which the Defendants **have received** to the use of the Plaintiff." (my emphasis)
>
> …"

[46] It is well established that a claim for money had and received may arise where the defendant has received money or property convertible into money of the claimant under such circumstances that he is obliged by the ties of natural justice and equity to refund it.

The action is now viewed as a restitutionary claim based on "unjust enrichment" and there are numerous situations in which the claim may be made.

[47] Although the basis of the claim could have been made clearer by particulars, or pleas in the alternative, I am satisfied that, in addition to their claims in contract, the Plaintiffs are seeking relief in restitution. Additionally, to the extent that the Plaintiffs' pleaded claim for money had and received may be defective, I agree with Mr Sears QC that any such defect may be cured by amendment and this Court should not exercise its power to strike out.

[48] For the reasons set forth above, I do not consider that this is a clear case where the Plaintiffs' action is bound to fail. The Defendants' application is therefore dismissed with costs to the Plaintiffs, taxed if not agreed.

DATED this 18th day of May 2021

TARA COOPER BURNSIDE
JUSTICE (AG)