

**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**Common Law and Equity Side**

**2012/CLE/gen/FP/273**

**IN THE MATTER of a Conveyance dated the 30 th June, 2005 made between David Watt Duncan and Ellen Duncan of the one part and Michael Andrew Westenhofer of the other part and recorded in the Registry of Records in Volume 9308 at pages 314 to 324.**

**AND IN THE MATTER of certain provisions of the Law of Property and Conveyancing (Condominium) Act, Chap. 139 of the Statute Laws of The Bahamas.**

**AND IN THE MATTER of Section 21 of The Supreme Court Act, 1996, Chap. 53 of the Statute Laws of The Bahamas.**

**B E T W E E N**

**MICHAEL ANDREW WESTENHOEFER**

**Plaintiff**

**AND**

**CORAL BEACH MANAGEMENT COMPANY LIMITED**

**Defendant**

**BEFORE:** The Honourable Justice Petra M. Hanna-Adderley

**APPEARANCES:** Mr. Christopher Gouthro for the Plaintiff

Mr. Jacy Whittaker for the Defendant

**HEARING DATE:** June 3, 2020

**RULING**

**Application for Leave to Dispose of Action by way of Preliminary Point**

## Introduction

1. The Plaintiff by way of Summons filed on the 4<sup>th</sup> July, 2016 makes an application to the Court for leave to dispose of the action by way of determination of a preliminary point of law pursuant to Order 15, Rule 6 and Order 33, Rule 3 of the Rules of the Supreme Court ("RSC") or such Order as the court deems fit under the inherent jurisdiction of the Court. In particular, the preliminary point of law sought by the Plaintiff to be determined is whether the Defendant has unlawfully charged the Plaintiff to rent his condominium unit and whether such charge is an unjust enrichment or unfair restriction or burden against this right to dispose of his unit. The Applicant contends that the central issue of this case is the validity of Section 5.10 of the Amended Declaration dated 10 February, 1978 recorded in Volume 3063 at pages 344 to 3939 (hereinafter referred to as "Bye-laws" and or "Rules" and or "Amended Declaration").

## Background Facts

2. The Plaintiff commenced this action by way of Originating Summons filed on the 14<sup>th</sup> August, 2012. An Amended Statement of Claim was filed on the 17<sup>th</sup> October, 2012 and subsequently two Re-Amended Statement of Claims were filed on the 11<sup>th</sup> April, 2014 and the 10<sup>th</sup> September, 2015 ("the Re-Amended Statement of Claim"). The Plaintiff's claim as pleaded in the last Re-Amended Statement of Claim is for damages resulting unlawful or overcharged fees between the 14<sup>th</sup> July, 2007 to the 13<sup>th</sup> August, 2012 that were not provided for by a Declaration of Condominium dated the 31<sup>st</sup> December, 1968 and Amended Declaration. He also claims loss of rent following the disruption of power which he alleges was done by the Defendant sometime in July and August 2012.
3. The Defendant filed its Memorandum and Notice of Appearance on the 20<sup>th</sup> August, 2012 and filed its Defence in response to the Re-Amended Statement of Claim on the 8<sup>th</sup> October, 2015.
4. The parties both rely on their last filed pleadings for the purposes of the application before me.
5. It is worthwhile to note that both parties have made various applications such as applications for strike out, stay of proceedings, injunctive relief since the commencement of this action. However, to date this matter has yet to be set down for trial a circumstance I shall address shortly.
6. It is noted that the Plaintiff has withdrawn his claim relating to unjust enrichment and loss of rent as found in paragraphs 5 and 10 and all related paragraphs of the Re-Amended Statement of Claim. In particular:-

*"5. As from the 14<sup>th</sup> July, 2007 to the 13<sup>th</sup> August, 2012 the Plaintiff has been overcharged or unlawfully charged by the Defendant in the amount of \$3,678.75.*

*PARTICULARS OF UNLAWFUL OR OVER CHARGING*

*Plaintiff was overcharged contrary to Section 5.2 of the Condo Rules or otherwise unlawfully in the following amounts:*

- i)...*
- iii)...*
- iv)...*

v)...

10. On or about the first week of August, 2012 the Defendant caused the power to be turned off in the Plaintiff's Unit without any explanation or reason resulting in the Tenant vacating the Plaintiff's Unit and causing the Plaintiff to refund a portion of the rent paid by the Tenant Mr. & Mrs. Ken and Lynn Pearson in the amount of \$3,000 and requiring the Plaintiff to incur additional costs in flights and accommodations to attend to his unit.

11. As a result of the above actions the Plaintiff has suffered loss and damages.

*PARTICULARS OF LOSS AND DAMAGE*

2. Loss of rent in the amount of \$3,000

3. Damages from losing tenant to be assessed." and the same has been struck out.

## **Issue**

7. Essentially, the issue to be determined before me is whether the Plaintiff should be granted leave to dispose of the action by way of the determination of a preliminary point of law, in particular the validity of Section 5.10 of the said Amended Declaration and its compliance with the Law of Property and Conveyancing (Condominiums) Act ("the Act").
8. Counsel for both parties have submitted very full written submissions that deal with the instant application and the determination of the substantive matter however for the purposes of this ruling I will only refer to the submissions that are relevant to the application for leave before me.

## **The Law**

9. The Plaintiff's application is made pursuant to Order 33, Rule 3 of the RSC.

10. Order 33, Rule 3 states:-

"The Court may order any question or issue arising in a cause or matter, whether of fact, or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated."

## **Analysis and Discussion**

### **Leave for Disposal of Action by way of Preliminary Point of Law**

11. The Court has a discretionary power to order any question or issue arising in a cause or matter whether of fact or law or partly of fact and law to be tried before, at or after the trial of such cause or matter and give directions as to the manner in which the question or matter shall be stated.
12. Although the Court has a discretionary power, there are several cases that are instructive on how the Court should approach an application for leave for a determination of a preliminary point of law. In particular, the case which was referred to by Counsel for the Defendant, Mr. Whittaker **Tara Exploration and Development Company and Tara**

**Mines Limited, Plaintiffs v The Minister for Industry and Commerce, Defendant [1975] IR 242** provides guidance for the Court. In **Tara Exploration and Development Company and Tara Mines Limited (supra)** the Defendant in the action applied for a direction under Order 32, rule 4 (similar to our Order 33, Rule 3 of RSC) that certain questions of law be determined before any evidence was given in the action. The facts of the case briefly are, in exercise of his powers under Section 13 of the Minerals Development Act 1940, the defendant on the 1st April, 1971 gave to the plaintiffs an undertaking that he would grant to one or other of them a State mining lease on such terms and subject to such conditions and subsidiary agreements as the defendant might consider proper or desirable in the public interest. After negotiations lasting over three years, the position was that the defendant would not grant a State mining lease to the chosen company unless (*inter alia*) the latter agreed to pay to the State a certain rent and royalties, and agreed to the transfer to the State of 49% of the company's share capital or the payment to the State of a further sum to be equivalent to the income from such proportion of its share capital. The plaintiffs brought an action in the High Court in which they claimed a declaration that the defendant was not entitled to impose the said terms as a condition of the granting of a mining lease under the Act of 1940, and a declaration that the defendant was only empowered to grant such lease upon terms which were reasonable and customary in the mining industry. Before the trial the defendant applied under Order 34, r 2, to the Court for a ruling that certain questions of law should be determined as preliminary issues before any evidence was given in the action in relation to any matters of fact. These questions were (*inter alia*) whether the defendant's discretion in the matter had been limited or curtailed either by the provisions of the Act of 1940 or by the terms of the undertaking, and whether the Act empowered the defendant to impose on a mining company, as a condition of the grant of a mining lease, a requirement that part of the share capital of the company be vested in the State. At the hearing of the application it was held by Kenny J, in dismissing the application, that the proposed questions could not be answered without reference to the relevant facts (still undetermined) such as the nature of the negotiations that preceded the defendant's undertaking; and that the Court could not dispose of the issues in the action by answering the proposed questions at an interlocutory stage of the action. On appeal Higgins C.J. on page 256 of the ruling stated:

**"The infrequent use of this procedure may be explained by the restricted field in which it can operate. First of all, there must be a question of law which can be identified amongst the issues in the action. Further, this question of law must be such that it can be decided before any evidence is given. If special facts have to be proved, or if facts are in dispute, the rule does not apply. In addition, it must appear to the court to be convenient to try such question of law before any evidence is given. This will involve a consideration of the effect on other issues in the case and whether its resolution will reduce these significantly or shorten the hearing. Convenience in this respect must also be considered in the light of what appears fair, proper and just."**

The subsequent appeal was disallowed by the Court and it was determined that the procedure under Order 34, Rule 2 should not be applied where the answer to the suggested question of law is dependent upon facts that have not been ascertained.

## **Test to be Applied**

### **Question of Law Identified**

13. The basis of the Plaintiff's claim as found at paragraph 4 of the Re-Amended Statement of Claim is that "the Plaintiff has been charged various fees and other charges by the Defendant that the Defendant knows are not provided for by the Condo Rules or are contrary to the Condo Rules or otherwise contrary to law." The Plaintiff further alleges that from the 14<sup>th</sup> July, 2007 to the 13<sup>th</sup> August, 2012 he was overcharged or unlawfully charged by the Defendant in the amount of \$13,678.75. Additionally, at paragraph 6 of the Re-Amended Statement of Claim the Plaintiff also alleges that in June 2012 the Defendant began charging him 25% of the gross rental income of his unit on the basis of an old provision of prior bye-laws of Coral Beach whereby unit owners committed their units to the Defendant and the Defendant found guests or tenants and provided daily services and retained 25% of the rentals. He alleges that because the Defendant no longer provides such services, the Defendant is wrong in law and equity for "extracting" the 25% of gross private rental even if the old provision is still applicable.
14. The question of law the Plaintiff submits arises from the action of the Defendant (the "old provision") i.e. charging the 25% of the gross rental income which does not comply with the Act. He submits that particular provisions of the Act give the Condominium Association the power to raise funds and the "old provision" does not fall into any of those categories.
15. Although the Plaintiff in his Re-Amended Statement of Claim has levied numerous allegations against the Defendant, I accept that the sole issue to be determined is indeed whether the provision as found in the Amended Declaration complies with the provisions of the Act.
16. The Plaintiff in his Written Submissions submits that the central issue of the instant case is whether Section 5.10 of the Amended Declaration is valid.
17. Counsel for the Plaintiff, Mr. Christopher Gouthro submits that Section 5.10 of the Amended Declaration is ultra vires of Condominium Law for two reasons, firstly, Section 5.10 does not derive its authority from any of the provisions of the Condominium Law. He submits that the Condominium Law specifies only two ways that the Condominium Association can raise money, i.e. by Section 14(2)(c) raising money by levying contributions according to unit entitlement or by Section 14(2)(d) recovering from a unit owner money for repairs or work done to the unit of a unit owner. It is his submission that Section 5.10 of the Amended Declaration does not fall within either Section 14(2)(c) or (d) of the Condominium Law. Moreover, he further submits that there is no power given to Condominiums to raise funds against specific owners as opposed to all the owners and such power to raise money cannot be used to discriminate against one owner or a group of owners. Lastly, he submits that the threat of using rental and administration fees against a single owner operates as an arbitrary weapon and thus provides justification for striking such rental and administration fees from Declarations as being void in the interests

of the public generally. He relies on the cases of **Re Basmadjian and York Condominium Corp No. 52 of 1981; The Proprietors, Strata Plan No. 64 v Reef Village Estates Limited Civil Appeal No. 2 of 2015; Couture v TSCC No. 2187.**

18. Counsel for the Plaintiff further submits that the second reason Section 5.10 of the Amended Declaration is ultra vires is that the Condominium Law requires assessments and charges to be dollar amounts and that those amounts be apportioned by unit entitlement and not a 25% percentage assessment. Additionally, he submits that Section 5.10 of the Amended Declaration is ultra vires to the constitutional rights of owners as it purports to unjustly restrict the right of owners to dispose of their unit by lease.
19. Mr. Gouthro submits that the singular issue is whether the Act allows rental fees to be charged to a single owner therefore Section 5.10 of the Amended Declaration is void and all rental fees paid by the Plaintiff to the Defendant must be refunded.
20. Counsel for the Defendant, Mr. Jacy Whittaker in response to the Plaintiff's application submits that before considering such an application the Court must look at the Plaintiff's pleaded case. He submits that the Re-Amended Statement of Claim makes no mention of the issue of validity of the Declaration, the Bylaws or the Rules in relation to Section 5.10 of the said Declaration. Moreover, he further submits that the issue of whether or not there has been unjust enrichment by the Defendant is heavily fact based and not just a question of law.
21. Mr. Whittaker submits that the Plaintiff is not seeking a determination of a preliminary issue but is seeking summary judgment of his claim against the Defendant. It is his submission that the Court should guard itself against this type of abuse as this is not the purpose of Order 33 of the RSC. He relies on the case of **Tara Exploration and Development Company and Tara Mines Limited (supra)** in support of this submission. He further submits that the Court should be guided by the criteria as found in **Wrottesley v Revenue and Customs Commissioners [2015] UKUT 637 (TCC)** which include:- the matter should be approached on the basis that the power to deal with matters separately at a preliminary hearing should be exercised with caution and used sparingly; the power should only be exercised where there is a "full, distinct, knockout point" which will dispose of the case (i.e. an aspect of the case would mean a separate issue, rather than a point which is a step in the analysis in arriving at a conclusion on a single issue); the point must be succinct, it must be capable of being decided after a relatively short hearing without significant delay; regard should be had to whether there is any risk that the determination of the preliminary issue could hinder the Court in arriving at a just result at a subsequent hearing of the remainder of the case; an account should be taken for any potential for overall delay making allowance for the possibility of a separate appeal on the preliminary issues.  
**See- Goldman Sachs International v Revenue and Customs Commissioners [2009] UKUT 290 (TCC); Hargreaves v Revenue and Customs Commissioners [2016] EWCA Civ 174; Cork Plastics (Manufacturing) and others v Incos Compound UK Ltd and another [2008] IEHC 93**
22. He also relied on the case of **Radstock Co-Operative and Industrial Society Ltd. v Norton-Radstock U.D.C. [1968] 2 W.L.R.** as found in the commentary at **33/3/1/ on page 644 of the White Book, Volume 1** whereby it was determined that an "issue"

which involves dealing with the whole subject-matter of the action without any evidence is not a preliminary point and should not be ordered to be tried as such.

23. In the circumstances I do not find the Plaintiff's failure to specifically plead the specific provisions of the Amended Declaration in the Re-Amended Statement of Claim detrimental or fatal to the application before me. Moreover, neither the parties nor Counsel in their submissions have disputed that the parties are bound by the provisions of the Amended Declaration and subsequent governing documents relating to the Plaintiff's units and the Act.
24. Therefore, I accept that there is a singular question of law which has been identified amongst the issues in the action. Additionally, a determination that the provision is valid would result in the other allegations as pleaded in the Re-Amended Statement of Claim falling away.

### **Convenient to Try Question of Law Before Evidence Given**

25. Counsel for the Plaintiff submits that the preliminary point of law is a question purely on construction of the Act, i.e. whether the Act should be construed and interpreted so as to allow a rental fee that is a common expense to be charged to a single unit owner. It is his submission that this point of law will determine all the issues in this case. Further, he submits that this preliminary point does not require any discussion of facts and that there are no facts that could influence the decision of the Court on this point of law.
26. Counsel for the Defendant submits that the Act and governing documents have the same rules of construction and as such there is no need for other aids of interpretation and both the Act and the governing documents are to be read as a whole.
27. I accept both Counsel submissions on this point. I find that the issue before me deals solely with the interpretation of the Amended Declaration and its compliance with the Byelaws, Resolutions of the Defendant and the Act. Therefore, for the purposes of determining this preliminary point I find it would not be necessary for evidence to be given as such an interpretation is not a matter of fact-finding but a matter of construction.

### **Fair, Proper and Just**

28. Lastly, Counsel for the Plaintiff submits that such a determination at this point would avoid the lengthy time and costs of a trial in this matter. Moreover, he submits that the question before the Court is a legal question that has never been decided in the Bahamas.
29. Counsel for the Defendant however submits that the question/issue raised in this matter has already been determined in the case of **Hampton Ridge Condominium Association Limited v Terou Bannister et. al 2016/CLE/gen/0406**. Therefore, the preliminary point/issue is not unique to the Bahamas jurisprudence. However, it is noted that this authority would perhaps be more relevant to the substantive hearing should leave be granted.
30. The history of this matter has been long and protracted. This matter is not a recent matter as the Originating Summons was filed in 2012. In the usual course of litigation, such a matter should have either been dispensed with by now or should be reaching its conclusion. However, to date this matter has been wrought with numerous applications

to amend, parties seeking injunctive relief and other means which has delayed the final conclusion of this matter.

31. To my mind, the essential purpose of the determination of a preliminary point of law is to save time and costs.
32. Therefore, I must take into consideration the length of time and costs expended since the commencement of these proceedings. I accept Counsel for the Plaintiff's submission that a determination at this point would avoid the lengthy time and costs associated with a trial in this matter. As provided by Counsel for the Defendant, this issue is not a new issue and as such a resolution on this preliminary issue will significantly reduce the time associated with the hearing of this matter.

### **Conclusion**

33. It is for these reasons I grant the Plaintiff leave for the hearing of an application for the determination of a preliminary point of law.
34. In the circumstances costs are awarded in the cause.

This                      day of September 2020

Petra M. Hanna-Adderley  
Justice