COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2020/CLE/gen/00592

BETWEEN

GATHINA INT'L. LIMITED

Plaintiff

AND

REPLAY DESTINATIONS (BAHAMAS) LTD.

Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: **Kevin Moree with Andrew Smith for the Plaintiff**

Raynard Rigby QC for the Defendant

12 March 2021

DECISION

WINDER, J

This is my decision on the application of the plaintiff (Gathina) for summary judgment as against the defendant (Replay).

Background

1. Replay is the owner of condominium unit #909 in the One Ocean Condominiums on Paradise Island ("the Unit'), which it has agreed to sell to Gathina. Following the execution of the agreement for sale (the 'Agreement') between the parties on 20 January 2017, issues arose, inter alia, as to the calculation of the actual square footage of Replay's Penthouse unit.

2. This action was begun by specially endorsed Writ of Summons on 26 June 2020. The Statement of Claim endorsed thereon provides:

> 3. The Defendant is the owner of Unit 909, One Ocean Condominium, Paradise Island, The Bahamas ("the Unit") and marketed it for sale as having a total area of 6,212 square feet.
> 4. The actual total area of the Unit is approximately 6,419 square feet and, in any event, in excess of 6,000 square feet.
> 5. The One Ocean Declaration of Condominium dated 11 May, 2005 and recorded in the Registry of Record Volume 9234 at pages 1-140, as amended, ("the Declaration of Condominium") states that the total area of the Unit is 4,801 square feet and that it has a unit entitlement of 2.06. The Declaration of Condominium along with the amendments thereto will be relied on for their full terms and effects.
> 6. The Plaintiff agreed to purchase the entirety of the Unit as it actually exists and the Defendant agreed to sell the entirety of the Unit as it actually exists.
> 7. The Plaintiff and the Defendant agreed a purchase price for the Unit on the basis that it was approximately 6,212 square feet.
> 8. By an Agreement for Sale dated 20 January, 2017 entered into between the Plaintiff and the Defendant ("the Agreement for Sale"), the Defendant agreed, inter alia, to convey, as beneficial owner, to the Plaintiff good fee simple title to the Unit…
> 9. On or about 20 January, 2017, the Plaintiff and the Defendant executed an Addendum to the Agreement for Sale ("the Addendum").
>
> …

12. By paragraph three (3) of clause nine (9) in the Agreement for Sale ("Paragraph 3), the Plaintiff and the Defendant i) acknowledged that the approval from the One Ocean Property Owners' Association Limited ("the Association") was required with respect to the proposed improvements to the Unit, including structural modification of the roof and balcony elements ("the Requisite Approval") and ii) agreed that in the event the Requisite Approval was not forthcoming, the Agreement for Sale shall terminate and the Plaintiff would be entitled to a refund of all monies paid to the Defendant up to the date of termination.
14. The transfer of common property by the Association to the Defendant required the consent of all the unit owners in the One Ocean Condominium.

...

18. The Requisite Approval has never been granted by the Association and as such the Plaintiff was entitled to terminate the Agreement for Sale pursuant to Paragraph 3.
19. Alternatively, if the Association did purport to grant the Requisite Approval, such approval was not proper and/or binding because it never obtained unanimous consent of all the One Ocean Condominium unit owners. As such, the Plaintiff was entitled to terminate the Agreement for Sale pursuant to Paragraph 3.

...

22. On 7 April, 2020, Lennox Paton, on behalf of the Plaintiff, issued another termination notice in almost identical terms to the 5 March Termination Notice and demanding, inter alia, the refund of Payments by 5:00pm on 10 April, 2020 ("the 7 April Termination Notice"). The 7 April Termination Notice will be relied upon for its full terms and effects.
23. Further or alternatively, the Defendant does not have good fee simple title to the total actual area of the Unit and therefore cannot convey the same to the Plaintiff as agreed. As the Unit is detailed in the Declaration of Condominium as being 4,801 square feet the Defendant only has good fee simple title to that portion of the Unit (the other portion being common property). The actual size of the Unit is 6,419 square feet meaning that the Defendant cannot convey good fee simple title to approximately 25% of the actual area of the Unit. In the circumstances, the Plaintiff was entitled to and did terminate or rescind the Agreement for Sale and the Plaintiff is entitled to a refund of the Payments.
24. Further or alternatively, the Agreement for Sale was entered into by the mutual mistake of the Plaintiff and the Defendant in that they both erroneously believed that the Defendant owned the entirety of the Unit as it actually exists, the Plaintiff, as it was entitled to do, rescinded the Agreement for Sale and is entitled to a refund of the Payments.
25. Further or alternatively, the Declaration of Condominium is void because its contents are materially inaccurate... the Unit as it actually exists and the unit entitlement for every unit in the One Ocean Condominium is incorrect. As a result, the Unit does not exist, the Agreement for Sale is rescinded and the Plaintiff is entitled to a refund of the Payments.

3. By Summons dated 26 August 2020, Gathina seeks the following:

1. a declaration that the Plaintiff was entitled to and did terminate the Agreement for Sale dated the 20th January, A.D., 2017 ("the Agreement for Sale") pursuant to paragraph (3) of clause (9) of the Agreement for Sale as referenced in paragraphs 12, 18, and 22 of the Writ and Statement of Claim filed herein on the 26th June, A.D., 2020 ("the Statement of Claim").
2. the sum of US$1,104,970.00 being the total amount to be refunded by the Defendant to the Plaintiff pursuant to paragraph (3) of clause (9) of the Agreement for Sale as referenced in paragraphs 10,11,12,18,22 and 26 of the Statement of Claim.

...

4. Gathina seeks summary judgment pursuant to Order 14, rule 1 and Order 75, rule 1 of the Rules of the Supreme Court (RSC) against Replay. Order 14, rule 1(1) RSC provides:

> "Where in an action to which this rule applies a statement of claim has been served on a defendant and that 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 had 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."

Order 75, rule 1(1) RSC provides:

> 1(1) In any action begun by writ indorsed with a claim –
>
> (a) for specific performance of an agreement (whether in writing or not) for the sale, purchase or exchange of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages; or
> (b) for rescission of such an agreement; or
> (c) for the forfeiture or return of any deposit made under such an agreement,
>
> the plaintiff may, on the ground that the defendant has no defence to the action, apply to the Court for judgment."

5. In its Defence, filed on 12 August 2020, Replay says inter alia, the following:

...

4. Paragraph 5 of the Statement of Claim is admitted. The Defendant avers that the Declaration of Condominium and its amendment refer to the Unit size and

the corresponding entitlement as "approximations". The Defendant also contends that the aforesaid Declaration of Condominium and the amendment accord with the relevant provisions of the Law of Property and Conveyancing (Condominium) Act and were at all material times valid and binding on the Plaintiff (as purchaser).

...

6. The Defendant contends that the parties bargained to sell and purchase the Unit as described in the Agreement for Sale dated 20th January, 2017 and more particularly clause 1 thereof. The Defendant will rely at the trial on the terms of the said Agreement for Sale for their true effect and weight.

...

8. Paragraph 8 of the Statement of Claim is admitted. The Defendant avers that post the execution of the Agreement for Sale the Plaintiff requested and the Defendant agreed to carry out upgrades to the Unit at a cost of $176,807.00, thereby increasing the purchase price.

...

10. Paragraph 12 of the Statement of Claim is admitted. The Defendant contends that on or about 9th December, 2016 the Association agreed to the improvement works as set out in clause 9 of the Agreement for Sale and therefore events had overtaken the terms of the Agreement for Sale. The Defendant shall rely at the trial on the Resolution dated 9th December, 2016 of the Association.

11. The Defendant further contends that on a true construction of clause 9 of the Agreement for Sale the terms thereof were intended and did relate to the common area improvements which were being carried out at the Condominium complex at the material time of the execution of the said Agreement for Sale and the Addendum, which improvement works related to the roof and balconies.

...

13. Paragraphs (*sic*)13 of the Statement of Claim is denied and the Plaintiff is put to strict proof thereof. The Defendant contends that the improvement works referenced in clause 9 of the Agreement for Sale did not include any construction of the Unit or any Unit renovations and was limited to construction works in the common property, namely the roof and elevators.

14. The Defendant further contends that the requisite approval and the corresponding improvements to the common property of the Condominium complex did not involve and necessitate any change, alteration or modification to the boundaries of the Unit and that the said Unit's square footage was not expanded, extended or increased by any works carried out to the said complex's common property improvement works.

15. The Defendant further avers that at all material times there was no lawful basis or requirement for any transfer of the common property from the Association to the Defendant as alleged or at all and the Plaintiff is put to strict proof thereof.

...

20. The Defendant further avers that any issue relating to unit entitlement does not require an amendment of the Declaration as alleged or at all. The measurement errors surrounding the unit entitlements did not (and do not) offend the Act (and/or the terms of the said Declaration of Condominium).

...

37. As to paragraph 26 of the Statement of Claim, the Defendant admits that it has not refunded the deposit to the Plaintiff and contends that the Plaintiff is not lawfully entitled to the said deposit occasioned by the terms of the said Notice of Default of 14th April, 2020 and occasioned by the Plaintiff's breach of the said Agreement for Sale by failing to complete the said purchase.
38. In the premises, the Defendant contends that the Plaintiff is not entitled to the refund of any funds paid under the Agreement for Sale and that in the prevailing circumstances the Plaintiff suffered no legally maintainable or actionable loss or damages.
...

6. Gathina's Summons was supported by the affidavits of Guido Craveri filed on 7 September 2020 and Knijah Knowles filed on 1 February 2021. Replay opposed the application and relied on the evidence contained in the affidavit of Michael Sneyd filed on 21 January 2021 and the affidavit of Shade Munroe filed on 4 February 2021.

7. Clauses 9(2) and (3) of the Agreement provides:

2 The Association has previously voted in favour of the construction of certain Common Area Improvements and a loan (the 'Loan') provided by the Seller to the Association in order to finance those Common Area Improvements, which Loan will be repaid through dues and/or assessments of the Association against the units in the Condominium. Payment of all dues and/or assessments against the Unit, including those for the Loan, shall be the responsibility of Purchaser after Closing."

3 Purchaser further acknowledges that improvements related to the Unit including structural modification of roof and balcony elements is subject to approval by the Association. In the event that approval by the Association is not forthcoming this Agreement shall terminate and Purchaser shall be entitled to the return of the Deposit together with any monies paid to Seller up to date of termination.

8. Gathina's case is summarized at paragraph 14 of its submissions:

[Gathina]'s case is that Paragraph 3, taken in its documentary, factual and commercial context, requires a separate approval from the Association with respect to proposed improvements to the Unit (as opposed to common area improvements) and is a valid and binding term of the Agreement for Sale. The requisite approval was not obtained and therefore [Gathina] was entitled to and did terminate the Agreement for Sale pursuant to Paragraph 3. Consequently, [Gathina] is entitled to a refund of the Payment along with interest from the date of termination.

9. Contrary to Gathina's contentions, Replay maintains that the necessary approval was obtained at the One Ocean Home Owners Association Annual General Meeting held on 9 December 2016. Gathina relies on the decision of Gray-Evans J (as she then was) in the case of ***T.G. Investments LLC v New Hope Holding Limited et al (2009) 4 BHS No. 11.*** At paragraph 51 of the decision, Gray-Evans J says:

> 51 I am mindful of the principles by which I am to be guided in dealing with summary judgment applications under Order 14, namely that:
> (1)The purpose of Order 14 is to enable a plaintiff whose application is properly constituted to obtain summary judgment without 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. *(Notes 14/3-4/5 1997 White Book - Roberts v Plant [1895] 1 QB 597 C.A.).*
> (2)Leave to defend must be given unless it is clear that there is no real and substantial question to be tried or that there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment (*Jones v. Stone).*
> (3)Order 14 proceedings should not be allowed to become a means for obtaining, in effect, an immediate trial of the action, which will be the case if the court lends itself to determining points of law or construction that may take hours or even days and the citation of many authorities before the court is in a position to arrive at a final decision. *Home and Overseas Insurance Co. Ltd. V Mentor Insurance Co. (UK) Ltd. (in liquidation)*
> (4)Order 14 was not intended to shut out a defendant who could show that there was a triable issue applicable to the claim as a whole from laying his defence before the court or to make him liable in such case to be put on terms. Thus in an action on bills of exchange where the defendant sets up the plea that they were given as part of a series of Stock Exchange transactions and asked for an account, it was held to be a clear defence, and entitled the defendant to leave to defend. *(Jacobs v Booth's Distillery Co.)*
> (5)By Order 14 rule 3, the Court has the option of (i) giving judgment for the plaintiff for part or all of the claim; (ii) dismissing the application; or (iii) giving leave to a defendant to defend if it is satisfied that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part a claim.
> (6)That where an issue of law is raised by either party on a summary judgment application, the Court has the following options:
>
> 1. If a plaintiff's case or the defendant's defence is based solely on a point of law and the court can see at once that the point is misconceived, summary judgment may be given;
> 2. If at first sight the point appears to be arguable but with relatively short argument can be shown to be plainly unsustainable, summary judgment may be given; or

3 If the point of law relied upon by either party raises difficult questions of law which call for detailed argument and mature consideration, summary judgment is inappropriate. *Home and Overseas Insurance Co. Ltd v. Mentor Insurance Co (UK) Ltd.*

(7)Finally, where there is a triable issue, though it may appear that the defence is not likely to succeed, the defendant should not be shut out from laying his defence before the court either by having judgment entered against him or by being put under terms to pay money into court as a condition of obtaining leave to defend. *(Jacobs v Booth's Distillery Co.)*

10. Gathina says that there is provision in the Agreement for its termination. They rely on the case of ***Arnold v Britton and others [2015] UKSC 36*** to undergird their contention that the commercial contract between the parties should be interpreted according to the natural meaning of the language therein. Gathina maintains that the approval that was agreed at the AGM was for improvements to the common area only and not to the unit itself. They reiterate that the approvals required under paragraph 3 were not given by the One Ocean HOA. It is submitted that paragraph 3 of the Agreement is its own 'standalone termination clause'.

11. Gathina says that Replay has no good and arguable defence to its summary judgment application. Further, there is no issue to be tried here. In the event that this Court determines that there is a triable issue(s) between the parties Gathina requests an order for a payment into court for the full judgment amount.

12. Replay opposes this application for summary judgment and relies on the affidavit of Michael Sneyd filed on 21 January 2021 and that of Shade Munroe filed on 4 February which included the second affidavit of Sneyd in support. The Court's jurisdiction pursuant to Orders 14 RSC to grant summary judgment is not disputed. However, Replay suggests that the Orders 14 and 75 RSC cannot be sought together but one must be sought in the alternative. They point to Gathina's Writ of Summons which seeks rescission and the return of the deposit which they say fall under the remit of Order 75 RSC.

13. Replay relies on the case of ***Chromik v Ansbacher (Bahamas) Limited and others; UBS Trustees (Bahamas) Ltd – [2018] 1 BHS J. No. 34*** a decision of Charles J wherein the test for summary judgment was explored:

43 In Swain v Hillman and another [2001] 1 All ER 91 at 92, Lord Woolf MR said that "the words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success". At page 95b, Lord Woolf MR went on to say that summary judgment applications have to be kept to their proper role. They are not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. Further, summary judgment hearings should not be mini-trials. They are simply to enable the Court to dispose of cases where there no real prospect of success.

...

46 Therefore, the Court should be cautious since it is a serious step to give summary judgment. Nonetheless, a plaintiff is entitled to summary judgment if the defendant does not have a good or viable defence to his claim. This is also in keeping with the overriding objective of Order 31A to deal with cases justly by saving unnecessary expense and ensuring timely and expeditious disposal of cases. It is also part of the Court's active case management role to ascertain the issues at an early stage and to decide what issues need full investigation at trial and to dispose summarily of the others.

[Emphasis added]

18. The case ***Marrakech Ltd v Cartwright [2000] BHS J. No. 117*** is also relied on by Replay to address the Order 75 application. Replay says that a person of full age and understanding who signs a legal document, barring a plea and finding of non est factum, must accept that the document belongs to him. They say that Gathina cannot now plead that the Agreement was void ab initio.

19. Unsurprisingly, Replay does not agree with the interpretation taken by Gathina of Clause 9 of the agreement. They rely on the affidavit of Michael Sneyd to show that there are triable issues here. Some of those issues, they say, are:

(a) The interpretation of clause 9, paragraph 3 of the Agreement for Sale;

...

(c) The interpretation of clause 12(f) in the Agreement for Sale on the unit entitlement;

...

(e) The legal effect of the approval of the AGM prior to the execution of the Agreement for Sale and that fact in the context of clause 9;

(f) Whether the Plaintiff's termination notice was effective and their legal consequences; and
(h) The effect of clause 5 of the Agreement occasioned by the failure of the Plaintiff to complete the sale.

20. Replay accepts that it is within my purview to construe the Agreement with reference to clause 9, however, they submit that evidence and cross examination of witnesses will be required to expand on the matters discussed at the HOA's AGM of December 2016 and the decisions taken at that meeting. After all, they say, the issue in dispute is whether the HOA approved the roof modification or, as Gathina suggests, the decision of the HOA related to unit entitlement. Unit entitlement was not a part of the agenda at that meeting, submits Replay. Clause 12 of the Agreement is of import, says Replay, as by it Gathina agrees to be bound by the Declaration of Condominium.

21. Additionally, submits Replay, clauses 9 paragraph 3 and 12(f) of the Agreement are standalone clauses and were never intended to be cross-referenced. The Agreement captures the parties' intentions and should be construed as such. Reliance is placed on the decision in ***Marley v Rawlings and another [2014]1 All ER 807***, where UK Supreme Court stated, at paragraph 19:

> When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant word, (a) in light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions.

22. Replay also relies on the well-known case of ***Rainy Sky SA & Ors. v Kookmin Bank [2012] 1 All ER 1137*** and the approach to be taken by the courts in the construction of contracts. They say that in order for the court to apply the correct approach to the interpretation of a commercial contract, "all of the relevant surrounding circumstances" are to be taken into account. They say that a trial is therefore required where the evidence of the parties can be examined. Replay also argues that Clause 29 of the Agreement, as "no oral modification clause" requires Gathina to put in writing all oral representations that

it seeks to rely upon. Reliance is placed on the decision of ***MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2019] AC 119.***

Analysis & Disposition

23. The Supreme Court Practice (2016) at paragraphs 24.2.5 provides an instructive discussion of the considerations to be taken into account when a court considers a summary judgment

> ...
>
> If the applicant for summary judgment adduces credible evidence in support of their application, the respondent becomes subject to an evidential burden of proving some real prospect of success or some other reason for a trial. The standard of proof required is not high. It suffices mainly to rebut the applicant's statement of belief. The language of ... ("no real prospect...") indicates that, in determining the question, the court must apply a negative test. The respondent's case must carry some degree of conviction: the court is not required to accept without analysis everything said by a party in his statements before the court (ED&F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472. In evaluating the prospects of success of the claim or defence judges are not required to abandon their critical faculties (Calland v Financial Conduct Authority [2015] EWCA Civ 192 at [29]). ...Therefore, the Court hearing a [summary judgment] application should be wary of trying issues of fact on evidence where the facts are apparently credible and are to be set against the facts being advanced by the other side. Choosing between them is a function of the trial judge, not the judge on an interim application, unless there is some inherent improbability in what is being asserted or some extraneous evidence which would contradict it (Fashion Gossip Ltd v Esprit Telecoms UK Ltd July 27, 2000, unrep., CA; cf. Day v RAC Motoring Services Ltd [1999] 1 ALL E.R. 1007, PER Ward L.J. at 1013 propounding the adoption of a negative test on applications to set aside default judgments). When deciding whether the respondent has some real prospect of success the court should not apply the standard which would be applicable at the trial, namely the balance of probabilities on the evidence presented; on an application for summary judgment the court should also consider the evidence that could reasonably be expected to be available at trial (Royal Brompton Hospital NHS Trust v Hammond (No. 5), [2001] EWCA Civ 550, CA).

24. In the Court of Appeal case of ***Mark Oscar Gibson Sr. v The Bank of The Bahamas Ltd SCCiv App No. 43 of 2020***, Evans JA, writing for the Court, stated the following relative to summary judgment applications in this jurisdiction:

13. The test which is applicable is well known and was most recently applied by Charles J in the case of Higgs Construction Company v Patrick Devon Roberts and Shenique Esther Rena Roberts 2017/CLE/gen/00801 (unreported) where she observed as follows:

> [26] Under O. 14 r 5, the test to be applied by the Court is whether there is any "triable issue or question" or whether "for some other reason there ought to be a trial". If a plaintiff's application is properly constituted and there is no triable issue or question nor any other reason why there ought to be a trial the Court may give summary judgment for the plaintiff.
>
> [27] It is a well-established principle of law that the Court ought to be cautious since it is a serious step to give summary judgment. Nonetheless, a plaintiff is entitled to summary judgment if the defendant does not have a good or viable defence to his claim. This is also in keeping with the overriding objective of Order 31A to deal with cases justly by saving unnecessary expense and ensuring timely and expeditious disposal of cases. It is also part of the Court's active case management role to ascertain the issues at an early stage and to decide what issues need full investigation at trial and to dispose summarily of the others."

14. In AerCap Ireland Ltd and others v Hainan Airlines Holding Co. Ltd [2020] EWHC 2025 (Comm) Cockerill J observed that:

> "13. The law governing applications for summary judgment is not contentious. In summary:
>
> a) The test for summary judgment is that (i) the party against whom the application is made has no real prospect of success on the claim or issue in question, and (ii) there is no other compelling reason why the claim or issue should be disposed of at trial: CPR 24.2.
>
> b) A real prospect of success means a 'realistic' as opposed to a 'fanciful' prospect of success": Swain v Hillman [1999] EWCA Civ 3053.
>
> c) At the same time, a 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable".

25. In the English Court of Appeal case of ***Home and Overseas Insurance Co. Ltd v Mentor Insurance Co. (U.K.) Ltd (In Liquidation) [1990] 1 WLR 153, 158*** Parker LJ stated that "the purpose of summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim."

26. There are substantial questions of fact presented that ought to be afforded consideration at a trial (***Saw v Hakim (1889) 5 T.L.R. 72***). In all the circumstances, I could not accept the submissions of Counsel for Gathina that there is no-triable issue in this matter and that summary judgment should be given in all the circumstances. Replay's

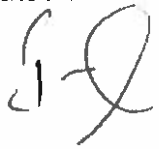
defence to this action is more than fanciful or imaginary and better than merely arguable (***ED&F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472***).

27. I accept the submissions of Replay that evidence and cross examination of witnesses will be required to expand on the matters discussed at the HOA's AGM of December 2016 and the decisions taken at that meeting. I am therefore satisfied that the matter is one in which there should be a trial and evidence adduced.

28. Gathina's application for summary judgment and its request for payment into court is denied.

29. Replay shall have its reasonable costs such to be taxed in default of agreement.

Dated this 4th day of February, 2022



Ian R. Winder

Justice