

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION

2021/CLE/gen/01318

IN THE MATTER of the Law of Property and Conveyancing (Condominium) Act, Chapter 139, Statute Law of the Commonwealth of The Bahamas **(the Act)**. **IN THE MATTER** of the Declaration of Condominium dated the 31st day of August A.D. 1998 made under the Act, recorded in Volume 7610 at pages 485 to 524 **(the Declaration)** establishing “Bimini Sands Phase II Condominium Association”, situate on the Island of Bimini **(the Condominium)**. **IN THE MATTER** of Units 12F of the Condominium **(the Unit)**. **IN THE MATTER** of a purported Notice of Charge perfected against the Unit by the 1st Defendant and Recorded in Volume 13517 Pages 696 to 700, respectively **(the Purported Charge)**

BETWEEN

STEVEN M. CHESS
KAREN CHESS

Plaintiffs

-AND-

BIMINI SANDS PHASE II CONDOMINIUM ASSOCIATION

1st Defendant

-AND-

BIMINI SANDS HOA PHASE 2 INC.

2nd Defendant

Before: The Honourable Madam Senior Justice Indra H. Charles

Appearances: Mr. Kahlil Parker KC with Ms. Roberta Quant of Cedric L. Parker & Co. for the Plaintiffs
Mr. Raynard Rigby KC with Ms. Asha Lewis of Baycourt Chambers for the 1st Defendant
The 2nd Defendant has not entered an appearance

Hearing Dates: 21 July 2022, 4 August 2022 (on written submissions)

Practice and Procedure - Interrogatories – RSC 1978 Order 26 Rules 1 and 2 - Whether the interrogatories relate to matters in question – Whether the interrogatories are necessary for disposing fairly the issues between the parties –Section 17 of the Law of Property and Conveyancing (Condominium) Act, 2006 – Duty of body corporate to maintain accounts and records

The Plaintiffs are the owners of a Unit in a Condominium Complex in Bimini. They commenced this action against the Defendants after the 1st Defendant imposed a charge of \$33,350.33 as of 2 November 2021 (“the Purported Charge”) over the Plaintiffs’ Unit as a result of arrears of maintenance fees and threatened to sell the Unit. The Plaintiffs dispute the validity of the charge placed over the Unit and seek a plethora of relief including an injunction to prohibit the Defendants from selling or otherwise interfering with their Unit and declarations to the effect that the Defendants are not entitled to the Purported Charge. They contend that the Defendants’ operation and management was contrary to the Conveyancing and Law of Property (Condominium) Act, 2006 (“the Act”) and the Condominium Declaration (“the Declaration”). To be succinct, the Plaintiffs have raised substantial concerns about the legality of the 2nd Defendant’s purported operation of a Bahamian condominium from Florida and have disputed its ability to levy contributions from the Plaintiffs. They therefore seek leave to serve interrogatories on the Association in accordance with RSC Order 26.

The 1st Defendant contends that it has not acted contrary to the Act or the Declaration. With respect to the Plaintiffs’ request for interrogatories, in its submissions dated 21 July 2022, the 1st Defendant provided answers to the Plaintiffs’ request but the Plaintiffs say they have not been provided with all of the interrogatories requested.

HELD: Ordering the 1st Defendant to answer the proposed interrogatories (as identified in the Ruling) on affidavit by 15 November 2022

1. The 1st Defendant’s argument that it is empowered to delegate management of the Condominium through an American company and to an American bank account is premature. That is related to the management of the Condominium which is the overarching substantive issue between the parties namely whether the Defendants are operating unlawfully so that the sums they claim are either not owing or are not owing to the accounts they assert. However, the question in the present application, is whether the answers sought by the Plaintiffs are related to the matters in question and are necessary for the disposal fairly of the issues.
2. The account particulars and the operational mandate would confirm to whom the Plaintiffs’ money is being paid and the persons entitled to operate the said account(s) on the 1st Defendant’s behalf, ensuring that the Plaintiffs are in fact paying the proper entity and that those operating the accounts are duly authorized to do so.
3. Whether the absence of the 1st Defendant’s bank account is unsatisfactory or not is not in question. Further, there being some agreement between the Association and the American company demonstrates some privity.

4. In my judgment, the 1st Defendant maintaining or not maintaining the records of expenditure, receipts, audits and budget documents does not directly affect the question of whether the Purported Charge is owing and the more apposite question is whether the 1st Defendant is permitted to delegate the management of the Condominium to the American company that has demanded payment of arrears from the Plaintiffs. Of direct relevance is the Statement of Account particularizing the arrears owed by the Plaintiffs, which the 1st Defendant has provided the Plaintiffs with. However, that is for determination of the substantive matter and not this application. The production of the said documents would confirm whether the 1st Defendant has been operating in accordance with the Declaration, at least in respect of that obligation to keep records.
5. By the 1st Defendant's response as to its relationship with the American company that demanded payment of the arrears from the Plaintiffs and its lack of access to a Bahamian account, it has already made clear its reason for collecting the maintenance fees by that account. Further, the overarching issue between the parties is whether that delegation is permissible. In determining that substantive issue at trial, the parties will make arguments as to whether the 1st Defendant is permitted to operate using the account in Florida, USA.

RULING

Charles Snr. J:

Introduction

- [1] By Summons filed on 13 January 2022, the Plaintiffs ("the Chesses") applied for leave to serve twelve (12) interrogatories on the 1st Defendant ("the Association") relating to the Association's operation and management of their Unit in a Condominium Complex in the Island of Bimini and requiring answers on affidavit within fourteen (14) days or any period stated by the Court pursuant to Order 26 Rules 1 and 2 of the Rules of the Supreme Court 1978 ("RSC").
- [2] In its written submissions dated 21 July 2022, the Association responded to some but not all of the interrogatories. The Chesses, in their submissions in reply, rejected the adequacy of some of the Association's responses.

Some salient facts

- [3] The Chesses are the owners of a unit in a Condominium Complex ("the Unit") by virtue of their Conveyance dated 1 November 2000.
- [4] The Unit and Condominium are governed by a Declaration of Condominium of Bimini Sands Condominium – Phase II dated 31 August 1998 ("the Declaration").

- [5] The Association is the body corporate established by Clause 13 of the Declaration for the purpose of enabling the Unit Owners to manage and operate the Condominium.
- [6] The 2nd Defendant (“Bimini Sands HOA”) is an American not-for-profit corporation incorporated in Florida for the purpose of operating as a Home Owners’ Association. Bimini Sands HOA is not a party to the Declaration.
- [7] By the terms of the Declaration, each owner of a Unit has, by virtue of his ownership, membership in the Association and is empowered with voting rights.
- [8] By letter dated 27 August 2021, the attorneys for the Association wrote the Chesses, advising them that a lien was placed on their Unit as a result of arrears in maintenance charges in the amount of BSD\$33,350.33 as of 2 November 2021 (“the Purported Charge”). The Association’s attorneys demanded payment of the Purported Charge failing which the Unit would be advertised for sale.
- [9] By letter dated 8 September 2021, the attorneys for the Chesses wrote the Association’s Counsel, stating that they had been recently retained and requested that the Unit not be advertised for sale while they reviewed the file.
- [10] There were back and forth correspondence between the attorneys. Subsequently, the Chesses’ attorneys requested a current statement of their clients’ arrears as alleged by the Defendants. The attorneys for the Association provided the Chesses’ attorneys with a ‘homeowner ledger’ issued by Bimini Sands which showed the Purported Charge.
- [11] To be succinct, the Chesses are contending that while, on the face of it, they may be owing the Purported Charge, they are only obliged to pay it to the Association by the provisions of the Declaration and the Law of Property and Conveyancing (Condominium) Act, 2006 (“the Act”). They alleged that Bimini Sands HOA, an American corporation is a stranger to the Declaration and it has no lawful right or authority to operate the Condominium or to levy, demand, and/or receive funds

with respect to the operation and management of the Condominium established in Bimini, The Bahamas.

[12] The Chesses also alleged that the Homeowner Ledger issued by Bimini Sands HOA does not reflect the Value Added Tax (“VAT”) that would be payable with respect to “the maintenance charges” lawfully levied with respect to a condominium in The Bahamas nor does it display a Tax Identification Number (TIN) as is lawfully required by such a demand with respect to “maintenance charges” lawfully levied with respect to a condominium in The Bahamas.

[13] In short, the Chesses have raised substantial concerns about the legality of Bimini Sands HOA’s purported operation of a Bahamian condominium from Florida and has disputed its ability to levy contributions from the Chesses and to collect funds directed to US accounts with respect to a Bahamian Condominium which is *ultra vires* the Declaration and the Act. The Chesses also dispute the legality of Ms. Sandra Mayer and I & S Management Inc.’s (“I & S”) purported management of the Condominium which is an American Company operating from Fort Lauderdale, Florida, USA. They therefore seek leave to serve interrogatories on the Association. Bimini Sands HOA, although properly served by email, has not entered an appearance.

The applicable legal principles

[14] The Court’s jurisdiction to make an order for discovery of interrogatories is set out in RSC Order 26 which provides:

“1. (1) A party to any cause or matter may apply to the Court for an order —

(a) giving him leave to serve on any other party interrogatories relating to any matter in question between the applicant and that other party in the cause or matter; and

(b) requiring that other party to answer the interrogatories on affidavit within such period as may be specified in the order.

(2) A copy of the proposed interrogatories must be served with the summons, or the notice under Order 25, rule 7, by which the application for such leave is made.

(3) On the hearing of an application under this rule, the Court shall give leave as to such only of the interrogatories as it considers necessary either for disposing fairly of the cause or matter or for saving costs; and in deciding whether to give leave the Court shall take into account any offer made by the party to be interrogated to give particulars or to make admissions or to produce documents relating to any matter in question.

(4)” [Emphasis added]

[15] In **Laina Limited and another v Ansbacher (Bahamas) Limited** [2021] 1 BHS J. No. 6 Winder J (as he then was) addressed the ambit of the Court’s jurisdiction at para 14 of the Ruling:

“In relation to interrogatories, the English Court of Appeal had earlier stated, in the case of *Attorney General v Gaskill (1882)*, *20 Ch. D 519*, per *Cotton LJ*, at p.528:

The Judicature Act enables everyone as of right to interrogate his opponent, putting by Order XXXI., rule 2, certain checks on the exhibiting useless interrogatories. It enables a person who is called upon to answer interrogatories to defend himself from answering in a way in which he could not have done in former days, but the right to discovery remains the same, that is to say, a party has a right to interrogate with a view to obtaining an admission from his opponent of everything which is material and relevant to the issue raised on the pleadings. It was said in argument that it is not discovery where the Plaintiff himself already knows the fact, but that is a mere play on the word “discovery.” Discovery is not limited to giving the Plaintiff a knowledge of that which he does not already know, but includes the getting an admission of anything which he has to prove on any issue which is raised between him and the Defendant. To say that the pleadings have raised the issues, and that therefore the interrogatories should not be allowed is an entire fallacy. **The object of the pleadings is to ascertain what the issues are, the object of interrogatories is not to learn what the issues are, but to see whether the party who interrogates cannot obtain an admission from his opponent which will make the burden of proof easier than it otherwise would have been.** As regards the interrogatories relative to the right of way they clearly are proper interrogatories. The object is to get from the Defendant in this case an admission of that which no doubt he denied by his defence, but not on oath, viz. a fact supposed to be within his knowledge that there is a right of way, and an

admission of it by him must obviously save an enormous amount of expense at the trial.”

The Originating Summons

[16] By Originating Summons filed on 4 November 2021 supported by the affidavits of Shelly Beadle filed on 4 and 5 November 2021, the Chesses dispute the Purported Charge. They seek a plethora of relief including an injunction prohibiting the Defendants from selling or otherwise interfering with their Unit and Declarations to the effect of the Defendants being disentitled to the sums. They also seek an order requiring Bimini Sands HOA to produce to the Court and to them an audited account of its operations and management from 1 November 2000 to date under section 17 of the Act. They contend that the Purported Charge is not effective for several reasons including:

- i. It was issued in breach of section 21 (2) of the Act by reason that it was not issued under seal of the Association and it failed to state the date on which the purported amount due became payable;
- ii. The Association failed to levy contributions and/or common expenses from the Chesses with respect to the Unit pursuant to and/or in accordance with the Declaration or the Act;
- iii. Bimini Sands HOA's purported operation and/or management of the Condominium and demands and contributions and/or common expenses levied from the Chesses and Unit Owners in the condo is ultra vires the Act and the Declaration.
- iv. The purported contributions and/or common expenses levied by Bimini Sands HOA is ultra vires the Act and the Declaration.

[17] The Association relied on the affidavit of Tricia Johnson filed on 30 November 2021.

[18] On 5 November 2021, at an *inter partes* hearing and upon agreement by the parties, the Court granted an injunction to prohibit the sale of the Unit. In the

meanwhile, the Chesses have paid BSD\$33,350.33 into Counsel for the Association's account.

The interrogatories sought by the Plaintiffs

[19] The Chesses sought the following twelve (12) interrogatories from the Association:

- i. Kindly provide the account particulars and operational mandate, with respect to the Association's bank account(s).
- ii. Kindly confirm whether the Association is duly registered pursuant to and in accordance with the VAT Act and if not, why not?
- iii. Kindly provide the Association's Certificate of Registration pursuant to and in accordance with the VAT Act.
- iv. Kindly provide the Association's TIN Number, VAT Certificate and/or TIN Certificate.
- v. Kindly provide the Association's VAT returns for the period 2017 to date filed pursuant to and in accordance with the Value Added Tax Act.
- vi. Kindly confirm whether the Association has secured approval from the Central Bank of The Bahamas to operate accounts in Florida, USA, or otherwise outside of the jurisdiction, and if it is the Association's position that it does not require such permission, why not?
- vii. Kindly provide a copy of I & S's Business License pursuant to and in accordance with section 3 of the Business Licence Act, 2010.
- viii. Kindly confirm whether there is an agreement in place between the Association and I & S, and if so, kindly provide a copy of the same.
- ix. Kindly provide copies of the accounts and records maintained by the Association with respect to the receipts and expenditures arising from its operation of the Condominium for the period 2017 to date in accordance with the Declaration.

- x. Kindly provide copies of the Association's audited accounts for the period 2017 to date prepared and rendered in accordance with section 17 (2) of the Act, which provides that: "*Annual Accounts duly audited by a qualified auditor shall be rendered by the body corporate to all unit owners at least once in every year*", and Clause 16 (d) of the Declaration.
- xi. Kindly provide the Associations' budget adopted by its Board for the period 1st October 2017 to date, and any amendments thereto, pursuant to and in accordance with Clause 18 of the Declaration.
- xii. Kindly confirm the statutory basis or otherwise in the Declaration for the Association's purported "*late fees*" billed to the Chesses and purportedly charged against the Unit.

[20] The interrogatories sought by the Chesses may be subsumed under the following broad sub-heads:

- i. Questions relating to I & S' relation to the Association;
- ii. Request for accounts and records maintained by the Association;
- iii. Questions relating to VAT;
- iv. Question relating to Central Bank's approval and;
- v. Question relating to late fees.

[21] Learned Counsel Mr. Parker KC, who appeared as Counsel for the Chesses, submitted that the overarching claim against the Defendants is that due to the Association's failure to operate in compliance with the Act and the Declaration, it is not entitled to demand payment of any outstanding sums. Details as to the existence and particulars of the Defendants' operation of its accounts are related to the matter in question, namely, whether they are operating contrary to the law such that the sums they contend are due are not in fact owing.

Questions relating to I & S' relationship to the Association

- [22] Mr. Parker KC submitted that the request for the production of account particulars and the operational mandate would confirm to whom the Chesses' money is being paid and the persons entitled to operate the account(s) on the Association's behalf, ensuring that the Chesses are in fact paying the proper entity and that those operating the accounts are duly authorized to do so. According to Mr. Parker KC, the question related to the relevance of I & S is important. As the Chesses have received demands for payment from I & S purportedly on behalf of Bimini Sands HOA, despite it being a stranger to the Condominium Complex, there is a real question as to whether I & S is the proper party to receive outstanding sums. In the Affidavit of Shelly Beadle, she stated that although the Association's name is ostensibly on the charge, the Chesses are being asked to make payments to Bimini Sands HOA, which is an American company. Further, the Chesses received a draft motion to "*revise insurance coverage to include coverage for the US based operations*" with respect to Bimini Sands Condo Association I-XV, a reference to several other American companies including Bimini Sands HOA and Bimini Sands HOA 1-15 Inc, another American entity, all strangers to the Declaration and the Act.
- [23] Mr. Rigby KC, appearing as Counsel for the Association, submitted that the overarching test for the Court is to assess the materiality and relevance of the interrogatories in the context of the mischief of the action. He next submitted that the Originating Summons in substance seeks a determination of the lawfulness of the Notice of Charge on the Unit owed by the Chesses. He argued that the majority of the interrogatories are questions posed and are asking for discovery of documents.
- [24] The submissions of Mr. Rigby KC relate not to the relevance (or lack thereof) of the interrogatories but to the substantive issue. In an effort to justify the payment of the arrears to an American account and therefore the operation of the Condominium more generally, Mr. Rigby KC argued that the Association is empowered to delegate management.

[25] This argument is, however, premature. Mr. Rigby KC's justification of the management of the Condominium is related to the overarching substantive issue between the parties of whether the Defendants are operating unlawfully so that the sums they claim are not owing or are not owing to the accounts they assert. However, the question in the application is whether the answers sought by the Chesses are related to the matters in question and are required for the disposal of the issues.

[26] I agree with Mr. Parker KC that the account particulars and operational mandate as well as confirmation of the existence and proof of an agreement between the Association and I & S are related to the matters in question and are required for the disposal of the issues. The Chesses are questioning whether I & S is associated with the Association and whether the Association is entitled to delegate the management to a foreign company. In order to determine this, the account particulars and operational mandate and existence of agreement are required to determine the relation of I & S to the matter. In order to determine whether I & S is entitled to receive funds on behalf of the Association, its relation to the matter must be established which can only be proved by the Association disclosing I & S' relationship to it. As Mr. Parker KC correctly stated, the account particulars and the operational mandate would confirm to whom the Chesses' money is being paid and the persons entitled to operate the said account(s) on behalf of the Association, ensuring that the Chesses are in fact paying the proper entity and that those operating the accounts are duly authorized to do so.

[27] The Association provided details on the bank account:

“The First Defendant’s bank account was closed due to the closure at RBC Bimini branch. The plans to open an account at Bank of Bahamas branch in Bimini but it requires travel to facilitate opening.

The First Defendant has access to an account at Chase bank in the USA, which the Plaintiffs are aware of and its account details.

The First Defendant has access to an account at the Bank of the Bahamas at the Bimini branch, in care of the account of Bimini Cove Resort & Marina Ltd.

The Account No. Is 1350005365.

For further clarity, Bimini Cove Resort & Marina Ltd. Is the developer and property manager of the Bimini Sands phases properties with responsibility for inter alia security, landscaping and maintenance of the pools.”

[28] In response, Mr. Parker KC submitted that the absence of an account is unsatisfactory. The agreement between Bimini Sands HOA and I & S is exhibited to the Affidavit of Tricia Cargill-Johnson filed on 30 November 2021. Whether the absence of an account is unsatisfactory or not is not in question. Further, there being some agreement between the Association and I & S would demonstrate some privity.

Request for accounts and records maintained by the Association

[29] Mr. Parker KC submitted that the ninth, tenth and eleventh interrogatories which request the accounts and records maintained by the Association with respect to receipts and expenditures arising from its operation of the Condominium from 2017 to date, the audited accounts for the said period and the budget for the period of 1 October 2017 to date are directly related to the substance of the sums that the Association claims are due. In support, he referred to Clause 16(d) of the Declaration which provides that the accounts, records and vouchers authorising any payments shall be available for inspection by any Unit Owner at all reasonable times. He also relied on Clause 18 of the Declaration which requires the Board of Association to adopt a budget and an estimate of Common Expenses for the Condominium before 1 October of each year to be delivered to each Unit Owner on or before the 31 October next following. As such, says Mr. Parker KC, the Association ought to be ready and willing to provide the information sought.

[30] It is irrefutable that the Chesses, as Unit Owners, are entitled to accounts and records related to the Condominium’s management and a budget. Their substantive claim is that the Defendants have failed to manage the Condominium in accordance with the Declaration. As stated, the Declaration requires that the said documents be available for inspection by Unit Owners. It follows that the production of these documents would determine whether the Defendants have

been compliant with the record keeping aspect of their operational duty under the Declaration.

- [31] In my judgment, the Association maintaining or not maintaining the said documents does not directly affect the question of whether the Purported Charge is owing and the more particular question of whether the Association is permitted to delegate the management of the Condominium to I & S. Of direct relevance is the Statement of Account particularizing the arrears owed by the Chesses, which the Association has provided the Chesses with. However, that is for determination of the overarching substantive matter and not this application. The production of the accounts and records would confirm whether the Association has been operating in accordance with the Declaration, at least in respect of that obligation to keep records.
- [32] In its submissions, the Association stated that the financial statements for 2017 to 2021 are within the Chesses' possession in that they were provided to them on previous occasions. According to the Association, they were sent to their Counsel by e-mail dated 22 February 2022. If that is so, then the ninth interrogatory is unnecessary. Otherwise, the Association ought to send the financial statements which are requested.
- [33] With respect to the audited accounts, the Association asserted that they are no longer required to provide same as a resolution was passed by the Board of Directors for accounts not to be audited due to the cost. The eleventh interrogatory is a request for the budget from the periods of 1 October 2017 to present. The Association responded, stating that the budget in any given year is less than \$100,000. However, giving an estimate of the budget does not satisfy the obligation of the Association to provide a written budget in accordance with Clause 18 of the Declaration. The Association is therefore required to produce the budget. In the event that the Association is unable to do so, it should provide the resolution passed by the Board of Directors and state whether the Chesses were previously advised of this resolution and the date on which it was passed.

Questions relating to VAT

[34] By its submissions, the Association stated that it is not registered pursuant to the VAT Act because its revenue is less than \$100,000 in any given year which exempts it from the requirement to register. If that is true, this interrogatory is therefore unnecessary. The third, fourth and fifth interrogatories on further VAT information will fall away as a result of the Association's exemption under the VAT Act.

Question relating to approval of Central Bank to operate in the USA

[35] The Chesses' sixth interrogatory is whether the Association has secured approval from the Central Bank of The Bahamas to operate accounts in Florida, USA or otherwise outside of the jurisdiction and, if it is the Association's position that it does not require such permission, why not. The answer given by the Association is that no approval to operate in the USA was sought from the Central Bank because none was required.

[36] Although the Association's response is laconic in that it does not answer why no approval was required, the answer is, in my judgment, sufficient. By its response as to its relationship with I & S and its lack of access to a Bahamian account, the Association has already made clear its reason for collecting the money by that account. Further, the overarching issue between the parties is whether that delegation is permissible. In determining that substantive issue at trial, the parties will make arguments as to whether the Association is permitted to operate using the account in Florida, USA. As such, the sixth interrogatory is unnecessary at this stage.

[37] This also applies to the seventh interrogatory which requests the business license for I & S.

Question relating to late fees

[38] The Chesses' twelfth interrogatory asks the statutory basis or otherwise for the late fees billed to them. In its submissions, the Association stated that the interest was charged pursuant to Clause 8(b) of the Association's byelaws and Clause 15 (e)

of the Declaration. In their reply submissions, the Chesses argued that the Association's response is unsatisfactory because it refers to "interest" instead of "late fees". That submission is untenable as the difference in terms is merely a difference in language but they mean one and the same thing.

Conclusion

[39] For all the reasons stated, I will grant leave to the Chesses to serve the Association with the proposed interrogatories as identified above, the answers to which the Association should provide to the Chesses by 15 November 2022.

[40] Costs will be costs in the cause.

Dated this 17th day of October 2022

**Indra H. Charles
Senior Justice**