COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION
2017/CLE/gen/00967

BETWEEN

DONALD URGO AND ASSOCIATES LLC

First Plaintiff

AND

UH NASSAU LIMITED

Second Plaintiff

AND

SUNSET EQUITIES LIMITED

Defendant

Before: **The Hon. Madam Justice G. Diane Stewart**

Appearances: **Ms. Margaret Gonsalves-Sabola for the Plaintiffs**
Mrs. Gail Lockhart-Charles KC and Ms. Lisa Esfakis for the Defendant

Ruling Date: **24th March, 2023**

RULING

1. By Summons filed 1st March 2021, the Defendant sought an Order pursuant to Order 33 rule 3 and/or Order 31A of the Rules of the Supreme Court and/or the inherent jurisdiction of that Court for seeking leave to have the preliminary determination of several of the issues between the parties namely: -

    1. Whether the Plaintiffs were required by Bahamian law to be in possession of permits and approvals to lawfully act as Manager of the Hotel?

    2. If so, whether the Plaintiffs or either of them were at any time in possession of the relevant permits and approvals to lawfully act as Manager of the Hotel?' and

    3. If not, whether the Plaintiffs' claim for damages or payment for any activities that were conducted illegally should be dismissed on the grounds of illegality or ex tupria causa.

2. The First Plaintiff and the Defendant were parties to a Management Agreement a Franchise Agreement and a Management Company Acknowledgement Agreement all dated 17th December 2015, whereby the First Plaintiff alleges that it or its nominee would, *inter alia*, act as Manager of the Marriot Courtyard Hotel ("the Courtyard") upon certain terms. The Courtyard is owned by the Defendant. The Plaintiffs claim that the Defendant breached the agreement by, *inter alia*, failing to perform certain obligations and by failing to reimburse them for their management work done and monies

expended. As a consequence, the Plaintiffs initiated the present action.

3. The Defendant now contends that any actions by the Plaintiff were conducted illegally and as such any alleged contractual entitlement for compensation or remuneration in relation to the act should be deemed to be void and unenforceable. Central to the analysis of the relevant legal issues was the question of whether the Plaintiffs were in possession of the necessary permits to lawfully conduct the activities that they were contracted to perform and if not, could a claim for compensation for activities illegally performed be sustained. The determination of this point would place the Court in a position to dispose of most, if not all, of the issues before the Court.

4. Order 31A of the Rules of the Supreme Court ("RSC") outlines the Court's power under case management. By Order 31A r. 1(d) and 1(1) the Court could decide the order in which matters were to be resolved and could give directions to ensure that the trial of the case proceeded quickly and efficiently. The rules state: -

> **"1. The Court shall deal with cases actively by managing cases, which may include —**
>
> **(a) .....;**
> **(b) .....;**
> **(c) .....;**
> **(d) deciding the order in which issues are to be resolved"**

5. Neuberger J in **Steele v Steele [2001] C.P. Rep. 106** set out the criteria to consider in determining whether to exercise the discretion to order a trial of preliminary issues: -

> **"The determination of a preliminary issue can be a very satisfactory way of cheaply and quickly disposing of a case or part of a case."**

The Defendant relied on these criteria in support of its application to obtain leave to have the preliminary issues decided. The Defendant set out the criteria and made its submissions in support thereof: -

> "i. "**Whether the determination of the preliminary issue will dispose of the whole case or at least one aspect of the case" –** *The preliminary issue in the instant case was what steps the Plaintiffs were required to undertake to put themselves in a position to lawfully perform the contract and if they failed to take the steps, a claim for activities illegally performed could be entertained.*;
>
> ii. '**Whether the determination of the preliminary issue could significantly cut down the cost and the time involved in pre-trial preparation and in connection with the trial itself**' – *If the preliminary issue was determined in favour of the Defendant at an early stage there would be an enormous cost benefit.*
>
> iii. **"If the preliminary issue is an issue of law, the amount of effort involved in identifying the relevant facts for the purpose of the preliminary issue" –** *The preliminary points are entirely discrete. They do not need to be heard with any of the other factual or legal issues in the case. Where facts need to be identified in order to determine the point, they were limited to uncontroversial evidence regarding identification of the relevant statutes requiring licensing or*

permissions and the production by the Plaintiff and any permission obtained pursuant thereto. A significant investigative effort on the part of the Court would not be required;

iv. **"If the preliminary issue is an issue of law, whether it can be determined on agreed facts**" – *The main fact involved of the permission existing or not was not in dispute.*

v. **"Whether, and if so, to what extent, the value of a preliminary issue is diminished where the facts are not agreed"** – *The key facts, namely the agreements, speak for themselves as did the provisions of the relevant statutes requiring permits and licensing and even if they were not, the value of the preliminary issue would not be diminished*;

vi. **"Whether the determination of the preliminary issue may unreasonably fetter either the parties or the court in achieving a just result"** – *It was inconceivable that the determination of the proposed preliminary issue could unreasonably fetter either the parties or the Court in achieving a just result*;

vii. **"The risk that an order will increase the costs or delay the trial"** – *Even if the Defendant was wrong in its contentions, resolution of the issue at a preliminary hearing would not add any cost or inconvenience to the parties or to the court. The issue has to be determined at some stage and neither the evidence nor the legal submissions required for its resolution overlap with any other issue or fell naturally to be considered alongside the evidence or submissions on any other issue*;

viii. **"The extent to which the determination of the preliminary issue may be irrelevant. The more likely it is that the issue will have to be determined by the court, the more appropriate it is to have it determined as a preliminary issue"** – *The Preliminary Point issues are highly relevant to these proceedings and will have to be determined by the Court at some stage*;

ix. **"The risk that the determination may lose its effect by subsequent amendments to the pleadings so as to avoid the consequence of the preliminary determination."** – *It would simply not be possible for any of the parties to amend its case so as to circumvent the consequences of the Court's early determination of the identified points.*;

x. **"Whether it is just and right to order the determination of the preliminary issue"** – *It was just and right to order the determination of the proposed preliminary issue. If the trial judge were to take the view that the Defendant's contention is a good one then in that eventuality, the trial judge would still have to consider all the evidence and submissions on the other issues, even though the relief sought in the Plaintiff's Statement of Claim action fell to be dismissed on these grounds. That would be wasteful of valuable court time as well as cost to the parties. The potential saving of cost and court time make this a case in which preliminary determination is highly desirable.*

6. The criteria in **Steele v Steele** were also relied on with approval by Hepburn J in **Tyrone Morris One Hundred and Sixty-One Others and Paradise Enterprise Ltd**

2014/COM/gen/00471 and Winder J in **The Ontario Securities Commission v Wayne Lawrence Pushka and Bonnieblue 2015/CLE/gen/1979.**

7. The Plaintiffs highlight that no evidence was sworn by the Defendant in support of its application. They submit that the application was misconceived and oppose the making of an Order that the preliminary issues be tried before the trial of the action. Notwithstanding the Defendant's failure to put any evidence before the Court in support of their application, the Plaintiffs rely on the viva voce evidence of the Defendant's President Ron Hershco ("Mr. Hershco") from a December 2019 transcript.

8. By Mr. Hershco's own admission, the Defendant was indebted to the Plaintiffs under the Management Agreement between the parties. It received services from third parties which were paid for by the First Plaintiff i.e. the hiring of William Hartman as the interim general manager and other benefits under the Management Agreement such as the operation of the Marriott system.

9. Under cross-examination, Mr. Hershco testified that the Hotel involved in the dispute was the only asset owned by the Defendant anywhere and that there were no bank accounts in its name in The Bahamas. All revenue received in relation to the operation of the Hotel was deposited into a bank account in the name of Beachfront Equities Limited ("Beachfront") which was wholly owned by him.

10. Mr. Hershco admitted that the only bank account which was in any way connected to the Defendant, the Hotel or its operations was a bank account in the name of Beachfront which was under his sole control and that any monies in the account would not be available to satisfy any judgment against the Defendant.

11. Accordingly, the issue for determination should be: -

    - Whether there is a valid and binding contract between the Plaintiffs and the Defendant?
    - Whether the Plaintiffs separately or collectively have performed their obligations under the Management Agreement?
    - If so, whether compensation is due to the Plaintiffs under the terms of the Contract?
    - Alternatively, whether the Plaintiffs are entitled to be compensated on a
    - 'quantum meruit basis, and
    - If compensation is due, what is the quantum of the compensation that is due to the Plaintiffs.

12. The issues that the Defendant seeks to have determined were deceptively simplistic but would require the Court to determine all questions of liability between the parties without hearing any evidence and under the guise of a trial of the so-called preliminary issues. The real issues could not be conveniently compartmentalized and simplified.

13. Preliminary issues which involve dealing with the whole subject matter of the action without any evidence are not preliminary issues and should not be ordered to be tried as such;- **Radstock Co-operative and Industrial Society Limited v Norton-Radstock UDC [1068] Ch. 605.**

14. The Plaintiffs also rely on **Lexi Holdings PLC v Pannone & Partners [2009] EWHC 3507 (Ch)** where Justice Briggs stated:-

"In the balance against ordering a preliminary issue are, as it seems to me, the following factors. Firstly this is very clearly not a case in which the preliminary issue could possibly proceed by way of agreed facts. In the light of the bare majority decision of the House of Lords in the Stone & Rolls case, it seems to me that the question whether any particular case is likely to fall within the ex turpi causa principle is inherently likely to be fact –intensive. Further, it is quite apparent to me, from having the benefit of seeing this issue pleaded out between the parties pursuant to a direction which I gave earlier this year, that there are likely to be numerous disputes of fact which will need to be sorted out, both by disclosure of documents and by calling and cross-examination of witnesses. Furthermore, I should add that the absence of any agreement about the facts is said, in the McLoughlin **case at least, to be a factor against the ordering of a preliminary issue.**

15. They further rely on **McLoughlin v Grovers (a firm) (2001) AER D335** where Justice David Steel stated:-

"61. I also agree that this appeal must be allowed. This outcome is attributed in large part to the parties' failure to use the procedure for determining preliminary issues properly.

62. The claimants' pleaded case was highly fact sensitive, being both unusual and contentious. Yet no attempt seems to have been made to establish the factual premise for the issue of the law on which the judge was invited to rule. In addition the parties then presented the judge with a joint view of the legal issues which was misconceived. An additional complication was the degree of the confusion as to the scope of the oral evidence and the need or otherwise for cross-examination on matters pertaining to foreseeability as opposed to limitation. One outcome was the almost inevitable dispute between counsel as to the relevant scope of the claimant's case.

63. As Lord Scarman observed in *Tilling v Whiteman [1980]* AC 1 at p. 25: "Preliminary points of law are too often treacherous short cuts."

16. The issues in question call for the Court to make a determination as to whether the Plaintiffs have acted unlawfully. If the Court acceded to the Defendant's application it would mean that it would have done so without permitting the Plaintiffs to lead any evidence in their defence.

17. **Order 33 rule 3 of the Rules of the Supreme Court ("RSC")** provides: -

> "**3.** 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."

18. The English Court of Appeal and House of Lords warned against the risks of delay and increased costs resulting from the trial of preliminary issues, particularly in complex cases. In **Rossett Marketing Ltd & Anor v Diamond Sofa Company Ltd [2012] EWCA Civ 1021** Lord Neuberger described preliminary issues as offering a siren song to the parties. The Plaintiffs also cited the criterion set out in Steele v Steele, the decision of David Steel J in McLoughlin v Jones [2001] EWCA Civ 1743 and the guidance of Briggs J in Lexi Holdings Plc v Pannone & Partners [2009] EWHC 3507 (Ch) who stated: -

"questions of case management, questions of cost, delay and the use of the parties' and the court's resources must come first and foremost in the consideration whether any particular issue should be dealt with as a preliminary issue."

19. The Plaintiffs asked the Court to consider the following when determining the Defendant's application: -
    - The First Plaintiff, in good faith and in reliance on the Management Agreement, provided services to the Defendant which the latter accepted;
    - The Defendant did not reimburse any monies which were advanced by the First Plaintiff on its behalf nor did it pay for any of the services it received;
    - Even if the Plaintiffs needed various licenses and permits, which was not admitted, to carry out their contractual obligations, the Defendant could not rely on any perceived omission on the part of the Plaintiffs to evade its contractual obligation to pay for services rendered and disbursements made on its behalf as equity will not permit the provisions of a statute (or even several statutes) to be used to bring about an injustice;
    - The Defendant submitted under cross-examination that it owes the Plaintiffs;
    - Winder J (as he then was) in his judgment dated 15th May 2018 observed that the Defendant had enjoyed all the benefits of the Management Agreement between December 2015 and July 2017 in circumstances where "nothing had ever been paid to the Plaintiffs";
    - The trial of the issues would necessarily involve the Court in making a determination on liability in the action in all respects;
    - The Defendant is asking the Court to declare that the Plaintiffs acted unlawfully without allowing them to lead any evidence in their defence.

DECISION

20. The Defendant seeks the discretion of the Court to dispose of the action by granting leave to have a determination made of a preliminary issue on what it considers to be a pre-emptive issue of the main issues between the parties. It essentially argues that they could not be liable for anything done or not done under the Management Agreement because the Plaintiffs did not have the requisite authority or licences to operate in the first place.

21. Even though they moved the Court by Order 33 rule 3 in addition to Order 31A and the inherent jurisdiction of the Court, their submissions before the Court were only based on Order 31A which discusses the Case Management Powers of the Court which I accept provides the Court with an unfettered discretion.

22. Notably however, judges in previously decided cases have found that Order 33 rule 3 and Order 31A go hand in hand and have confirmed that reliance should be placed on the factors set out by Neuberger J in Steele v Steele.

23. Winder J (as he then was) in **The Ontario Securities Commission v Pushka and another [2018] 1 BHS J. No. 94** made such a finding: -

> **"7 Order 33 rule 3 of the Rules of the Supreme Court provides:**
> **"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.

Additionally, Order 31A of the Rules of the Supreme Court Order 31A imposes upon the court the duty to *"deal with cases actively by managing cases, which may include ... (b) identifying the issues in the case at an early stage ... [and] (d) deciding the order in which issues are to be resolved".*

8 *Hepburn J.* in the Supreme Court case of *Tyrone Morris One Hundred and Sixty-One Others and Paradise Enterprises Ltd* 2014/COM/gen/00471 relying on the decision in *Steel v. Steele (2001) CP Rep 106* enumerated the considerations to be taken into account by a court in determining not to exercise its discretion to order a trial of preliminary issue(s)."

24. By its Re-Amended Defence and Re-Amended Counterclaim filed 31st May 2021, the Defendant asserts that the First Plaintiff misrepresented that it was qualified to carry out the contractual duties required of the Manager under the Management Agreement and in breach of the conditions precedent of the Management Agreement failed to obtain the necessary permits and licenses for the Manager to lawfully operate the hotel (the "Defence").

25. By its Particulars at paragraph 9 the Defendant alleged: -

> **"9 b) Contrary to the express representation as to qualifications cited above, the First Plaintiff had no business license, no bank account and none of the approvals from the Bahamas Investment Authority or Bahamas Department of Immigration or the Central Bank as required to lawfully operate, direct and supervise the Hotel. As such the First Plaintiff was not qualified to operate direct and supervise the Hotel as it represented and held itself out to the Defendant to be.**
> **c) Clause 4.01C of the Agreement provides: Permits and Licenses. Manager shall maintain the various permits and licenses required to be held in its name that are necessary to enable Manager to operate the Hotel in accordance with the terms of this Agreement and the License Agreement**
> **d) In breach of the requirement of Clause 4.01C the First Plaintiff neither had nor obtained the requisite permits and licenses necessary to enable it to operate the Hotel in accordance with the terms of the Agreement."**

26. The Defendant's claim as against the Plaintiff was essentially that the First Plaintiff operated illegally and pleaded the same as required by the Rules of the Supreme Court. The Plaintiffs claim is that they were acting within the scope of the Management Agreement and were not inter alia paid for services rendered.

27. The **Supreme Court Practice 1976,** better known as The White Book discusses the Effect of Order 33 rule 3.

> **".....This Rule should be read with O. 18, r. 11, supra (raising a point of law on the pleading) and with r. 4(2), infra (trial) of preliminary issues). Under this Rule the Court has the power to try a preliminary question of law on the outset. Such question may have been raised on the pleadings.....There are disadvantages in ordering the trial of a preliminary point of law on assumed facts (see per Lord Wilberforce and per Lord Pearson in Att.-Gen v Nissan [1969] 2 W.L.R. 926; [1969] 1 ALL E.R. 629, H.L.).....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 (Radstock Co-operative and Industrial Society Ltd.**

v. Norton-Radstock U.D.C. [1968] Ch. 605; [1968] 2 W.L.R. 1214, C.A.).

28. The Defendant, while not obligated to by the Rules, has not filed any evidence in support of their assertion. In its Defence it does not state the specific approvals that may have been required and there is nothing before the Court to confirm that the Plaintiffs did not obtain any approvals if they were in fact required to obtain them. If as the Defendant says the preliminary point would address the whole subject-matter of the action, there would have to be evidence before the court in support of their application. There are no agreed facts before the court on these issues. Further in the absence of evidence of the Plaintiffs, the court is unable to determine whether the resolution of the proposed preliminary issue would in fact be dispositive of the action.

29. I am fully aware of the admonition in **Tilly v Whiteman (1980)** AC 1 as referred to above. Further I am of the view that the hearing of these preliminary issues cannot proceed on agreed facts. As stated in Lexi Holdings v PLC that **"where any case is likely to fall within the ex turpi causa principle it is inherently likely to be fact-intensive."** The Defendant is alleging illegality arise out of the Plaintiffs failure to obtain the necessary licences and hence the inability of the Plaintiffs to perform the contract or claim any relief thereunder. It will be fact sensitive and not conducive to the hearing of a preliminary issue in the absence of the evidence from both sides.

30. I am therefore not satisfied that in the present circumstances, this is the appropriate case for the grant of leave to have a preliminary issue heard. The Defendants summons is hereby dismissed.

31. I apologize to the parties for the delay in producing this ruling, however the submissions as made both in writing and orally were considered.

32. The Defendant shall pay to the Plaintiffs their costs for the action to be taxed if not agreed

Dated this 24th day of March 2023

Hon. Madam Justice G. Diane Stewart