SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

Claim No SLUHCV 2004/0214

BETWEEN:

ESCAP DEVELOPMENT CORPORATION

Claimant

AND

ROSS BOWRING

Defendant

Appearances:

Mrs Mary Juliana Charles for Claimant
Mr. Gerard Williams for Defendant

……
2005: October 24
2006: June 26
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DECISION

Mason J

[1] The Claimant, Escap Development Corporation, a company duly incorporated under the Commercial Code of St. Lucia and continued under the Companies Act is making a claim

against the Defendant, Ross Bowring for the sum of $16,021.88 which the Claimant alleges is due and owing by the Defendant to the Claimant.

[2] The Defendant counterclaims for special damages in the sum of $15,817.98, general damages, interest and costs.

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[3] The Claimant is a development company which is involved in the business of, inter alia, selling real estate in a land development project known as Escap Development in the quarter of Micoud and covering some 180 acres of land.

[4] Under an act called the Special Development Areas Act (No. 2 of 1998) which was passed to "rectify the uneven development in St. Lucia by designating certain areas as special development areas, providing relief to persons carrying out specified activities in these areas and to persons providing such activities", the Claimant as a designated approved developer was granted certain concessions and exemptions by the Ministry of Finance.

[5] An approved developer is defined by the Act as any person approved by the Minister of Finance to carry out work in a special development area.

[6] A special development area is one specified in the First Schedule to the Act, and Escap Development, being in one of the prescribed areas was therefore designated a special development area.

[7] By Section 4 of the Act it is provided:

1) A person who wishes to be an approved developer may make an application to the Minister for the purpose.
2) The Minister may approve the application referred to in subsection (1), either unconditionally or subject to such conditions as he thinks fit.

3) The Minister may, in approving an application under subsection (2), grant further incentives under section 140 of the Income Tax Act 1989.
4) The approval of a person as an approved developer shall be published in the Official Gazette.

[8] And by Section 7:

An approved developer shall, during the development period be exempt from the payment of the taxes and duties specified in the Third Schedule.

[9] And under Section 2 (1) (interpretation section):

The development period means a period of not more than ten years, prescribed by the Minister.

[10] By letter dated 15th February 2006 the CEO of the Escap Development applied for and was granted certain concessions by letter dated 10th April 2006, by the Minister of Finance.

[11] These concessions were inclusive of

1) Designation of Escap Development (and its associated company) status as approved developer(s) in respect of certain activities;
2) 100% exemption from import duty, stamp duty and consumption tax or inputs for the construction of new buildings
3) 100% of waiver for corporate income tax

[12] These benefits were to:

1) endure for a development period of ten years;
2) apply to activities carried out in the Development area specified in the letter, and

3) be subject for the duration to verification by appropriate Government authorities

[13] By Deed of Sale executed on 22nd November 2001, the Defendant purchased two (2) parcels of land from the Claimant for the purpose of constructing a dwelling house. This Deed of Sale had appended to it three (3) Schedules detailing so called Master Deed Restrictions over the properties constructed or to be constructed within the Development.

[14] In accordance with the 2nd and 3rd Schedules to the Deed of Sale, the Defendant as owner of said property became a member of the Neighbourhood Association for which there was an annual membership fee.

[15] On 5th December 2001, the Claimant and the Defendant entered into an agreement, the intent of which was for the Defendant to benefit from the concessions which the Claimant enjoyed from the Government of St. Lucia namely, the importation of building materials free of customs duty and consumption tax.

[16] Under this agreement, the Defendant by Clause 1 assumed responsibility for the ordering of materials for the construction of his building.

[17] However, by clause 5 of said agreement all materials so ordered (in the case of those subject to duty and consumption tax) were to be consigned to the Claimant who would be responsible for clearing them from Customs and delivering them to a special area under the control of the Claimant. The Defendant would be responsible for payment of all costs associated with the delivering and storage of those materials.

[18] I think it necessary at this stage to quote clauses 6 to 8 in their entirety:

1) The Developer will select the local Import Agent that will be responsible for the clearance of the materials through the Customs and Excise Department of the Government of St. Lucia. The Owner must provide adequate documentation

for the importation of the materials that denotes clearly to the St. Lucia Customs Authorities that the Developer is the importer of the materials. The Owner will not hold the Developer responsible for the decision of the St. Lucia Customs Authorities as to the applicability or not of the concessions to the material the Owner ordered or caused to be ordered.

2) As instructed by the Developer, the Owner will pay or have paid to the Developer or his designated agent(s) the levies and fees of the Customs and Excise Department and all the other costs required to allow the materials to be imported and delivered to the area controlled by the Developer. The Owner also assumes the responsibility for any fees from the St. Lucia Port Authority and or from the Customs and Excise Department associated with any delay in the importation of such material.
3) For this service the Developer shall charge a fee of twenty five percent (25%) of the Duty and Consumption Tax Savings for such goods as declared on the importation Documents duly certified by the Customs & Excise Department of the Ministry of Finance. This sum is payable by the Owner to the Developer in full on importation.

Claimant's Case

[19] It is the Claimant's case that

1) the Defendant paid his membership fees in the Neighbourhood Association for the years2001 and 2002 but failed to pay for 2003;
2) by not paying membership fees, the Defendant was in breach of the Master Deed restrictions;
3) in accordance with the agreement of 5th December 2001, the Defendant paid for four (4) consignments of materials, but when the 5th consignment arrived he queried the payment of the service charge and objected to paying the fee as calculated by the Claimant, stopping payment on a cheque he had submitted before the Claimant could encash it

4) the Claimant has been denied the fee of 25% by the Defendant's refusal to adhere to the terms of the agreement in relation to six further consignments of goods by the Defendant by making his own arrangements for their importation, and
5) as a result of the foregoing, the Claimant has suffered loss and damage

Defendant's Case

[20] The Defendant in response to these assertions states his refusal to pay membership fees was based upon the realization that the Claimant was not conducting its affairs in accordance with the articles of the Schedule to the Deed of Sale governing the Neighbourhood Association and he therefore opted to withdraw as a member of the Association.

[21] The Defendant admits that it was on the 5th shipment that problems arose between himself and the Claimant with respect to the service charge and that he did in fact stop payment of the cheque.

[22] The Defendant's reason for refusal to pay the 25% fee on the other consignments was because the Claimant refused to sign off on any of his invoices and that in any event he had paid all of the costs relating to the clearing, transporting and storing of the goods as well as 100% of the duties and taxes levied on them.

[23] It is the Defendant's contention that after having read the Special Development Areas Act, he was of the view that the Claimant was not entitled to charge monies for the concessions granted by Parliament, because although the Act designated the Claimant as the approved developer, the Act was for the sole benefit of the land owners (see paragraph one of Defence).

[24] The Defendant is counterclaiming also for loss and damage in the sum of duty paid on these consignments

Evidence

[25] There was only one witness for each of the parties – the Manager of the Claimant Company and the Defendant himself.

[26] It must be recorded that each witness gave evidence with conviction with no suggestion of subterfuge or dissembling.

[27] Under cross examination the witness for the Claimant attributed that there was nothing in the agreement which stated that the annual membership formed part of the agreement; that the only reference to payment under the agreement was to be found in clause 8 which then entitled the Defendant to the concessions.

[28] The witness stated that the Claimant does not have brokers but rather "buys into this facility". In other words when the Claimant needed to transport material from the docks to a building site, they would hire someone to do it.

[29] The witness agreed that under clause 5 of the agreement, the Claimant would be responsible for clearing the goods and delivering them to the site. However "clearing" in this context did not mean clearing from Customs – that would be done by a broker because the Claimant did not do the physical clearing. The paperwork would be done by a broker chosen by the Defendant.

[30] With respect to the phrase "For this service" in clause 8 of the agreement, the witness indicated that the service which the Claimant delivered was the concession itself as well as the clearing of the paperwork from the broker. The service also indicated other paperwork, correspondence and telephone calls in connection with the Defendant's goods whether to the supplier and/or the Defendant himself.

[31] On suggestion from Counsel for the Defendant, the witness agreed that the only "thing" in the agreement defining the 'service" was delivery and clearing.

[32] The figure of 25% for the charge which was arrived at before the Defendant came on board was determined by the Directors of the Claimant Company.

[33] On the subject of meetings of the neighbourhood Association, the witness denied that over the past three (3) years that the Defendant had not been informed of any meetings, that she was unaware that the Defendant had not received any notice of the meetings which were held sometimes at her residence. These notices according to her were either hand delivered or mailed and on two occasions, on trying to deliver to the Defendant's residence, she was asked to deliver the notice elsewhere. She was also forbidden to go to the Defendant's residence.

[34] The Defendant for this part agreed under cross examination that he was a mandatory member of the Neighbourhood Association and could not resign or opt out of the Association. He admitted that membership carried with it certain financial obligations and that there was an outstanding invoice for 2003 which he had not paid.

[35] The Defendant admitted paying the 25% fee for the first four (4) consignment of material and receiving the duty free concessions.

[36] He knew that the Act (Special Development Areas Act) had been mentioned in the agreement which he signed but it was only a year after signing the agreement that he saw a copy of the Act.

[37] The Defendant then denied owing on the six consignments and stated that it was not he who stopped following the procedure whereby he did not enjoy the benefit of the

concessions. He was adamant that it was the Claimant who refused to sign off any new entries on his behalf, as a consequence of which he was forced to clear the consignments himself.

[38] He fiercely contended that having had to clear the consignment himself, pay 100% duty and taxes, he ought not to be liable for the 25% fees to the Claimant as he had not received any services to justify payment of the fee.

Issues

[39] The issues identified by the parties are as follows:

1) according to the Claimant that the preliminary and sole issue is whether the concessions as granted by the Act were the Claimant's or whether the Defendant was entitled as of right to them;
2) according to the Defendant - that the terms of the Agreement are based on illegality – fraudulent misinterpretation and Statutory illegality and so the contrast is unenforceable. It is unenforceable as against public policy. Paragraph 8 of the agreement is the focus of the Defendant's assertion of illegality and as a consequence that paragraph could be severed, while retaining the rest. But in the event that the entire contract found to be illegal, then any monies paid are recoverable.

Arguments

For the Claimant

[40] The Claimant is of the view that the only issue to be determined is to whom were the concessions granted under the Act.

[41] Claimant argues that the matter can be resolved by interpreting the Act in conjunction with the correspondence between the Claimant and the Minister of Finance.

[42] The contention is that reading the Act especially at section 7 (previously set out) in conjunction with the definition of "approved developer" (also set out), it is obvious that the concessions are the Claimant's. For the Defendant to benefit from it, this could only be done through the vehicle of the agreement.

[43] If clause 8 be excised from the agreement as suggested by the Defendant, then the Defendant would not be entitled to have his goods cleared free of duty. The Act does not confer any benefit on the Defendant.

[44] The clear wording of the agreement at clause 8 indicated that the Defendant was being charged a fee for services specified in clauses 5, 6 and 7.

[45] The quantification of the charge was merely tagged to the Customs duties. Thus the duties paid to the Customs Department, if wrongfully paid as alleged by the Defendant could only be reimbursed by the Department and not by the Claimant.

[46] In response to the Defendant's allegation of fraud, the Claimant posited that the Defendant did not indicate which of the Claimant's statements he alleged to be fraudulent, that in order to succeed with this contention, he ought to have specifically pleaded fraud and indeed have proved such fraud.

[47] Counsel submitted that the Claimant being a real estate developer with some 180 acres at his disposal had not revealed whether it was the company's intention to construct houses in the future and start its own development but in any event that was not an issue for the Defendant but rather an issue between Government and the Claimant.

<u>For the Defendant</u>

[48] It is the opinion of the Defendant that the tenet of the entire argument relied on by the Claimant suggested a fraudulent intent and motive, that the Defendant relied on the agreement believing it would be the only means of receiving the concessions.

[49] Counsel for the Defendant submits that the Claimant was aware of the Defendant's entitlement to the benefit under the payment of a service fee for which service the Claimant was never prepared to offer because there was no mechanism in place for the performance of the service to be performed by the Claimant.

[50] The Claimant therefore fraudulently misrepresented an obligation to perform a service integral to the contract which the Claimant had no intention of performing, nor did he in fact perform.

[51] The Defendant argues that it is apparent from the reading of the Act that Parliament intended the "person" engaged in the activities of development to receive the benefit of the concessions, that the Claimant having been designated an approved developer and having been granted the full benefit under section 7 of the Act, never engaged themselves in the construction of any houses and or other building as is contemplated by the Act.

[52] The Claimant's sole occupation was in selling land.

[53} According to the Defendant, there is no provision, whether express or implicit, in the Act, entitling the Claimant to charge a fee for the concessions designed for the benefit of the true developer, that is the Defendant, who having undertaken the role in every respect was entitled to receive the full benefit under the Act without having to pay for it.

[54] Counsel for the Defendant argues that it would be unconscionable that the Claimant should unjustly enrich itself by using an Act of Parliament which was intended for the benefit of a particular class of persons.

[55] In his submission that the agreement is against public policy, Counsel referred to the "public conscience test "enunciated by Hutchinson J in Thackwell V Barclays Bank PLC (1986) 1 AER 676 at 687 and quoted by Bernard J A Velox and Another V Helenair Corporation & Others (1993) 55 WIR 184 at 194.

[56] This test required "(involving) the court looking at the quality of the illegality relied on by the Defendant and all the surrounding circumstances without fine distinctions, and seeking to answer two questions, first, whether there had been illegality of which the court should take notice, and second whether in all the circumstances it would be an affront o the public conscience if by affording him the relief sought the court was seen to be indirectly assisting or encouraging the plaintiff in his criminal act'.

[57] Counsel considers that it is patently obvious that the Claimant intended to extract monies from the Defendant by having him to pay twice for services which the Claimant never provided, that this is illegal because the Claimant was profiting from his own wrong and it would therefore be an affront to the public conscience to assist the Claimant in upholding his contract.

[58] Counsel is seeking severance of the contract – to have paragraph 8 of the agreement excised on the ground that where a contract is partly lawful and partly unlawful, the court may cut out the illegal promise and enforce the lawful part only. Severance would not alter the nature of the contract, it would simply allow for the conferring of the benefit of the concession without the payment of a fee.

[59] Counsel posits that if the court were to hold that the contract was not severable and that the entire contract was illegal then the Defendant could recover monies paid under the illegal contract if he entered into the contract as a result of the Claimant's fraudulent misrepresentation.

[60} I should first of all wish to determine the issue raised by the Claimant and to state that I do not agree that it is the sole matter to be resolved.

[61] Despite the protestations of the Defendant, the wording of the Act is very clear.

[62] While it may be possible that the Defendant could be to all intents and purposes regarded as an "approved developer", he cannot in the present instance be regarded as the "person" for whom these specific concessions were granted, the ones contained in the letter of 10th April 2001.

[63] To fall into the category of approved developer and to be entitled to the concessions under the Act, one must first of all have been designated such, have applied to the Minister for approval to carry out work in a special development and have had the approval gazetted.

[64] There is no evidence that the Defendant at any time has been so designated, not having made the relevant application to the Minister for the designation which would lead to the granting of concessions.

[65] It is patently clear therefore that the benefits granted in this letter of 10th April 2001 from the Minister of Finance were for the specific benefit of the Claimant.

[66] I should even venture to add that the Act contemplated large tracts of land for development rather than the construction of a specific dwelling house by a single landowner. For this one needs only have regard to the Second Schedule to the Act pursuant to section 3, which identifies the specific types of activities e.g. residential complexes.

[67] While I can agree with Counsel for the Defendant that the intention of Parliament can be gleaned by reference to the long title of the Act, I cannot accept his submission that the Defendant by constructing a dwelling house was the "true developer" and was therefore entitled to receive the full benefit under the Act. (He never applied for it!)

[68] If as suggested we look to the long title of the Act, we could never come to that conclusion. The long title reads: An act to rectify the uneven development in St. Lucia by designating certain areas as special development area, providing relief to persons carrying out specified activities in these areas and to persons financing such activities. (emphasis mine).

[69] I do agree with Counsel for the Defendant that it was within the intention of Parliament that "persons" like the Claimant would undertake such activities as the construction of residential complexes, the reduced costs of which would redound to the benefit of the individual purchasers but as suggested by Counsel for the Claimant, it is presumptuous of us to say that the Claimant with 180 acres at its disposal did not intend to carry out this specified activity some time in the future.

[70] We cannot anticipate the future behaviour of the Claimant, who has a 10 year development period within which to act, by determining at this stage that the Claimant will not act in accordance with the intention of the Act.

[71] The court is therefore not prepared to pronounce on the future behaviour of the Claimant.

[72] The Defendant is seeking to have the agreement declared illegal and therefore unenforceable or the ground that the Claimant, being aware of the Defendant's entitlement to the benefit, was purporting to grant this benefit upon payment of a service fee , which service the Claimant was never prepared to offer or did in fact give.

[73] I believe that I have dealt with the question of the Defendant's entitlement to the benefit, but let me here reiterate that the benefit was not granted to the Defendant except to the extent that he could tap into it when passed to him by the Claimant – it was not his (the Defendant's) as of right.

[74] Upon the execution of the Deed of Sale on 22nd November2001, the Claimant signaled its intention through the 2nd schedule in the Master Deed Restrictions to have the purchasers

of land within its development benefit from the duty and consumption tax concession on materials for construction which had been granted to the Claimant. This is contained in the 2nd schedule of the Deed of Sale under the caption "Imposition of Deed Restrictions".

[75] This intention to benefit was cemented in an agreement executed on 5th December 2001 between the Claimant and the Defendant.

[76] The preamble to that agreement states "And whereas the Developer (Claimant) enjoys certain concessions from the Government of St. Lucia in the form of importation of building materials free of customs duty and consumption taxes and the intent herein is for the Owner (Defendant) to benefit from said concessions (emphasis mine).

[77] It is upon this intention to benefit the Defendant by passing on the concessions to him, that the Claimant purports to act: to offer certain services in exchange for a 25% of the amount which the Defendant would have had to pay if the concession benefit to the Claimant were not available.

[78] I see no illegality in this arrangement: the benefit is not the Defendant's as of right, he is being saved 75% of duty and consumption tax and is being asked to pay 25% as payment for the performance of certain services by the Claimant when the concessions are accessed.

[79] However having not been convinced as to the illegality of the agreement, the question now remains: whether the Claimant is entitled to claim the fee of 25% where, as the Defendant claims, no services were performed.

[80] I would answer in the affirmative. This is a prima facie reading of the situation because when clause 8 is considered, there is the undertaking by the Defendant to pay the25% fee in full over the importation of the materials.

[81] We need however to go back and look at the other terms of the agreement.

[82] The parties have agreed that the Defendant was entirely responsible for the construction of his house and for the ordering of the materials required for such construction. (Clause 1).

[83] But in order to access the concessions to which the Claimant is entitled and is offering the Defendant to tap into, there are duties which the Defendant must perform viz provide the Claimant "in a timely manner" the full address and contact information of the supplier(s) and the list of materials that he (the Defendant) intends to order and which the Defendant expects to be subject to the duty and consumption tax concessions awarded to the Claimant. (Clause 4). All such material ordered by the Defendant must be consigned to the Claimant. (Clause 5)

[84] The Claimant also has certain duties and responsibilities relative to the transaction viz to clear the materials from the Customs Authority and to deliver to and store them in an area under the control of the Claimant until they are required by the Defendant. (Clause 5). The costs associated with this (the delivery and storage) are the responsibility of the Defendant. (Clause 9).

[85] The Claimant is also responsible for selecting the local broker who would look after the clearance through the Customs, obviously under the supervision of or with input from the Claimant given the provision in clause 5 – "the Developer (Claimant) shall be responsible for the clearing of the same (the materials) from the Customs Authorities".

[86] All levies, fees and costs are to be paid by the Defendant (Clause 7)

[87] By clause 8, the Claimant charges "for this service" a fee which is equivalent to 25% of the 100% duty and consumption tax on goods which are subject to the concession and which have been so certified by the Customs & Excise Department of the Ministry of Finance.

[88] This 25% of fee is payable in full by the Defendant to the Claimant on importation of the materials.

[89] For goods which do not fall into this category that is goods which attract duty and consumption tax, there are different considerations and a different fee structure which is negotiated separately. We need not consider this aspect.

[90] What then is meant by "for this service?"

[91] Under cross examination, the witness for the Claimant states and I quote "for this service means the service that Escap delivers – the concession itself also the clearing of the paperwork for the broker. There is also paperwork, correspondence and telephone calls with respect to the Defendant's goods from the supplier to the Defendant. On most occasions we deal directly with them. I agree that in the agreement the only thing defining the service is delivering and clearing".

[92] It is clear then that the service involves a total of three (3) things:

(1) permitting the Defendant to access the duty free concession;
(2) Clearing of the materials from Customs in association with a local broker and
(3) Delivering the materials after they have been cleared to a storage area controlled by the Claimant.

[93] From a perusal of the agreement there appears to be nothing which mandates the Defendant to first secure the permission of the Claimant when ordering materials for the construction of his dwelling house except in the case where the Defendant wishes to benefit from the concessions granted to the Claimant. From clause 1of the agreement the Defendant assumes responsibility for the construction and for the ordering of materials for construction.

[94] It is only if he, in seeking to benefit from the concessions, gives the list of materials to the Claimant then consigns them to the Claimant that the fee becomes due and payable, that is when "for this service" begins to "kick in" but the circle of "for this service is not complete until the Claimant clears the material and delivers it to storage.

[95] Under cross examination, the witness for the Claimant when queried about the provisions under Clause 5 of the agreement states "I would agree that means that Escap would be responsible for clearing the goods and delivering them to the site. Clearing in this context does not mean clearing from Customs. Clearing is done by a broker and Escap. The paperwork would be done by a broker. The broker was chosen by the Defendant because the Defendant chose to change the broker. Escap does not do physical clearing".

[96] The Defendant's position with respect to the change in the broker was that he became unhappy with the delay and "substantial confusion" concerning the processing by the broker which resulted in him (the Defendant) incurring significant storage charges.

[97] It appeared that he changed the broker with the consent of the Claimant.

[98] When informed by the Claimant that they would no longer be providing services related to the importation of goods, the Defendant had, according to him, to find his own import agent and provide his own administration. The Claimant would simply sign the Declaration.

[99] This was neither challenged nor denied by the Claimant.

[100] It would appear then that it was the Claimant who first reneged on the agreement as per clause 6: :The Developer (Claimant) will select the local Import Agent that will be responsible for the clearance of the materials through the Customs and Excise Department……."

[101] I should wish also to state that whether the Claimant does the actual physical clearing or it is done by a broker provided by them, it is within my limited knowledge of customs procedure that the connotation of clearing is the process which culminates in the owner of goods being able to take actual physical possession of those goods after all Customs procedures have been concluded.

[102] From the evidence adduced with respect to the last six consignments, there was no service given by the Claimant.

[103] According to the witness for the Claimant in her witness statement in paragraph 15: "Since then, he has had other consignments delivered but he has not sought our assistance in clearing them, which he could only access upon payment of the requisite fee which he failed to pay".

[104] And again at paragraph 18: "Due to his prior conduct in stopping his cheque, we could not clear his goods free of duties without a prior payment for our services, which is provided for in our agreement with him. In fact he never even contacted us with respect to any further consignment and we do not know if the goods that were brought in are ones which would ordinarily attract the waiver of duties as per our agreement".

[105] It therefore stands to reason that if the Defendant does not choose to access those services and prefers instead to pay the 100% of duty and consumption tax then neither can the Claimant expect to claim nor the Defendant be obligated to pay the 25% fee.

[106] The claim of the Claimant is therefore dismissed with respect to the sum claimed in its Statement of Claim as amount due (25% of duty saving) on invoices dated 2nd May, 2002 through to 23rd May, 2003.

[107] The Counterclaim of the Defendant is also dismissed since it is based on the erroneous assumption that he was entitled to and qualified for a 100% waiver on the materials imported pursuant to the provisions of the Act.

[108] I do not believe that I need pronounce upon the question of membership of the Defendant in the Neighbourhood Association.

[109] The Defendant himself under cross examination accepted that on execution of the Deed of Sale and the Schedules that he became a mandatory member of that Association and was as a consequence liable for the payment of certain dues.

[110] I should wish however to make the following observations:
In accordance with the Third Schedule by paragraph E of the preamble which states "This Third Schedule is for the benefit of the Neighbourhood and establishes an owner association….." and by paragraph 1 under Article 1 which states, "Each owner shall become a member of the Association" and by Article VI paragraph 6.4" Each owner shall be a mandatory member of the Association ……." the Defendant is a member of the Neighbourhood Association.

[111] By Article X which deals with covenants for Maintenance Agreements, each owner covenants to pay certain Assessments for the upkeep of the Neighbourhood.

[112] If the Claimant does not adhere to the procedures for holding of meetings etc as is alleged by the Defendant that does not permit him to refuse payment of his dues.

[113] In addition having accepted that the three Schedules form part and parcel of the Deed of Sale, the Defendant having agreed that he has not paid his assessment for 2003, becomes liable for that sum.

[114] And the Court so finds.

The Order of he Court therefore is:

1) the claim of the Claimant is hereby dismissed except to the extent of the sum of $3,871.29 which represents the 2003 payment of the Defendant to the Neighbourhood Association
2) The Counterclaim of the Defendant is hereby dismissed
3) Interest on the said sum of $3,871.29 is payable at the rate of 6% per annum from the year 2003, the date on which the said sum was due until payment
4) Costs prescribed to the Claimant.

Sandra Mason Q. C.
HIGH COURT JUDGE