EASTERN CARIBBEAN SUPREME COURT
ANTIGUA & BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV 2012/0608

GINGER VILLA INCORPORATED

Claimant

and

CARIBBEAN DEVELOPMENTS (Antigua) LIMITED

Defendant

Before:
Ms. Agnes Actie — Master [Ag.]

Appearances:
Ms. C. Debra Burnette with Ms. Stacy Ann Osbourne - Saunders of counsel for the Claimant
Ms. Leslie- Ann Brissett George of counsel for Defendant

2014: January 13;
February 17 .

JUDGMENT

[1] **ACTIE, M. [AG.]:** By claim form with statement of claim filed on 10th September 2012, the claimant claims against the defendant the following:

(i.) the payment by the defendant in the amount of US$ 7,967.85;

(ii.) a declaration that the amount due to be paid under the agreement for monthly community charge for the property is US$145.00;

(iii.) interests on payment of the sum of US $ 7,967.85.

(iv.) costs and such other relief as the court may deem just and appropriate.

[2] The defendant filed an acknowledgment of service on 15th October 2012. By notice of application on the even date the defendant applied for a declaration that the court ought not to exercise its jurisdiction and to order a stay of the proceedings pursuant to CPR Part 9.7.

[3] The grounds of the application are stated as follows:

1. On 23rd February 2001, the claimant and defendant entered into an agreement whereby the defendant agreed to sell property to the claimant subject to the conditions and covenants detailed in the agreement.

2. Clause 35 of the agreement provides that any dispute arising between the parties to the agreement shall be referred to arbitration

3. That the matter has not been referred to arbitration in accordance with the terms of the agreement between the claimant and the defendant and the defendant is ready and willing to do all things necessary for the proper conduct of arbitration. The commencement of these proceedings is therefore in breach of the agreement made between the parties.

4. As more fully detailed in the accompanying affidavit.

[4] The claimant relying on the decision of Barrow JA in **Beach Properties Barbuda Limited v Lazurus Master Fund Ltd**[1] contends that the application is an abuse of process having regard to paragraph 4 of the application which states "*As more fully detailed in the accompanying affidavit* ". In **Beach Properties Barbuda Limited v Lazurus Master Fund Ltd** Barrow JA speaking on an application for an injunction, said at paragraphs 18 and 19 as follows:

> "(18) The application for the injunction followed the unfortunate practice of failing to state the grounds of the application. The prescribed form for making applications expressly requires the grounds to be stated in the form by providing a section beginning, "The grounds of the application are

[1]Territory of Virgin Islands HCVAP 2007/002 delivered on 17th September 2007

- ". The lawyers for the appellants thought it satisfactory to complete this section by inserting: "As set forth in the Affidavits [filed in support]."

(19) This is a completely unacceptable practice. It is an abuse of the process of the court that should attract condign consequences. One objective of requiring that the application must state its grounds is to focus the thinking of lawyers. By being required to identify the grounds for making an application, before making it, lawyers are required to consider the merits of the application. A lawyer who has difficulty in formulating grounds for making an application has reason for thinking that perhaps it is because there are no grounds. The requirement of stating grounds also serves to clarify for the judge and the opposing party the basis on which the applicant claims to be entitled to the order sought. When an application states no grounds, it raises the suspicion that the application may be groundless, not just in form, but also in substance. That suspicion is heightened in a case such as this in which the failure to state grounds was deliberate: the section of the form requiring grounds to be stated was not simply overlooked. By telling the court to find the grounds in the affidavits the drafter revealed a clear advertence to the requirement of stating the grounds of the application and a conscious decision not to comply with the requirement. But even if it had been a case of laziness and not obfuscation that would have been a difference only of degrees. Failure to state the grounds of an application because it is too much trouble for the lawyer to do so is still very much an abuse of process."

[5] Having reviewed the application I am of the opinion that the objection raised by the claimant as to the form of the application fails as the grounds for the application are clearly stated in paragraphs 1 to 3 of the application. The court in **Beach Properties Barbuda Limited v Lazurus Master Fund Ltd.** experienced much difficulty in dealing with the application as the grounds on which the application for an injunction was made were not clear stated. The grounds are clearly stated in this case as the applicant refers to the agreement made between the parties and the clause in the agreement which is alleged to have been breached by the claimant in filing the claim prior to arbitration. The affidavit referred to at paragraph 4 of the notice of application merely expounds on the grounds of the application. It is to be noted that both CPR Part 9.7 and the Practice Direction require an application disputing the court's jurisdiction to be supported by evidence on affidavit. The case at bar is clearly distinguishable from the situation in the **Beach Properties case.**

[6] The issue left to be determined is whether or not the court should exercise its jurisdiction pursuant to CPR Part 9.7.

[7] To put the issue into perspective it is necessary to give a short background of the facts which gave rise to the application before the court.

Background

[8] On 21st February 2001, the claimant and defendant executed an instrument of transfer of property subject to certain covenants as set out in the agreement. Clause 30 of the first schedule reads as follows:

> " (30) The transferee shall pay the monthly maintenance charge also known as the community charge, which charge is now levied by the Transferor and which charge is now fixed at one hundred fort five dollars ($145.00) United States Currency per month per villa and which is charged for and expended upon the services provided to and for the benefit of the above mentioned parcel; which services are limited to security, grounds maintenance, infrastructural maintenance, sewage, lighting and liability and risk insurance for common areas in the administration thereof."

[9] The claimant in the statement of claim avers that the defendant in breach of the said clause demanded payment of amounts in excess of US$145.00 per month for community charges for the property. The claimant further submits that by mistake increased payments were made until October 2011, when the claimant became aware that the community charges demanded by the defendant were in excess of the US $145.00 prescribed in the agreement. Upon discovery of the overpayment the claimant wrote to the defendant who failed to respond which resulted in the filing of the claim on 10th September 2012.

[10] The defendant in response contends that the commencement of these proceedings is in breach of the agreement between the parties since the dispute arising between the parties has not been referred to arbitration in accordance with clause 35 of the agreement. Clause 35 reads as follows:

> "If any difference or question shall arise between the parties hereto as to the construction of these presents or as to the amount to be paid at any

time by any party or as to any matter which any party wall hereby created, the same shall be referred to arbitration of some competent Architect named by the President for the time being of the Architects Association of Antigua and Barbuda by agreement of the parties who shall arbitrate such difference or question pursuant to the Antigua and Barbuda Arbitration Act and any amendment thereto."

Analysis

[11] The starting point is to determine whether the overpayment of the community charge and refund sought by the claimant is a dispute contemplated by clause 35 which necessitates the matter to be referred to Arbitration.

[12] In **Heyman and Another v Darwins Limited**[2] Lord Macmillan states:

> "...the first thing to be ascertained is the precise nature of the dispute which has arisen. The next question is whether the dispute is one which falls within the terms of the arbitration clause. Then sometimes the question is raised whether the arbitration clause is still effective or whether something has happened to render it no longer operative. Finally, the nature of the dispute being ascertained, it having been held to fall within the terms of the arbitration clause, and the clause having being found to be still effective, there remains for the court the question whether there is any sufficient reason why the matter in dispute should not be referred to arbitration."

[13] It is a requirement in a condominium/strata type development for provisions to be made for the payment of community charges for the maintenance of the common areas and the units. Clause 30 at the time of the execution of the agreement makes provision for the community maintenance charge "***now fixed***" (my emphasis) at One-Hundred & Forty Five dollars United States currency (US$145.00) per month. The use of the word "***now fixed***" suggests that the amount maybe varied in the future. The pleading at paragraph 7 of the statement of claim states that the defendant in breach of the said clause and purporting to be authorized by the said clause, demanded payment of amounts in excess of US$145.00 per month for community charges. Clearly an issue has arisen as to the amount being charged subsequent to the execution of the agreement. The

[2] [1947] AC 356, at page 370

claimant in a letter dated 14th November 2011 seeks clarification of the amount and disputes the purported increase.

[14] I am of the opinion that the arbitration clause in paragraph 35 of the agreement appears to be wide in scope to cover the dispute that has now arisen between the parties. It is obvious that the claimant is taking issue with the construction and intention of clause 30 in relation to the amount to be paid towards the community charges. The claimant is of the view that the defendant purporting to be authorized by clause 30 has increased the community charges to be paid for the property. The defendant further seeks a declaration to confirm that the monthly community charge due and payable is the amount as stipulated in the agreement. Those issues in my estimation go to the construction of the agreement contemplated by clause 35 of the agreement. Clause 35 is clear and unambiguous and states:

> "If any difference or question shall arise between the parties hereto as to the construction of these presents or as to the amount to be paid at any time by any party"....., the same shall be referred to arbitration of some competent Architect named by the President for the time being of the Architects Association of Antigua and Barbuda by agreement of the parties who shall arbitrate such difference or question pursuant to the Antigua and Barbuda Arbitration Act and any amendment thereto.

[15] The Honorable Chief Justice Rawlins in **Ocean Conversion Limited v The Attorney General of the Virgin Islands**[3] states:

> "[13] " ..... it is important to note the trite principle that whether the High Court stays a claim to permit the parties to proceed to arbitration is within the discretion of the judge. This is by virtue of statute and common law principle. Section 6(1) of the **Arbitration Act** provides that where an applicant relies on an arbitration clause in an agreement to obtain a stay, the court "may" grant the stay if the court is satisfied that there is sufficient reason why the matter should be referred to arbitration in accordance with the agreement. It follows, of course, that a court should not grant a stay if the matter in issue between the parties does not fall within the terms of the arbitration clause."

[3] Territory of the Virgin islands HCVAP 2007/030 delivered on 12th January 2008

[14] For the statutory contextual completeness, section 6(1) of the **Arbitration Act** states as follows:

> "6. (1) If any party to a domestic arbitration agreement, or any person claiming through or under him commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

[15] In its common law context, it is noteworthy that the courts have often stated that although there is a residual discretion not to grant a stay, in the ordinary case, where an applicant has complied with the relevant requirements, a court in exercising its discretion judicially has no option but to grant a stay to permit parties to proceed to arbitration. The court would therefore, be required to exercise its discretion in favour of granting a stay in order to cause the parties to abide by their agreement to resolve their disputes by the agreed alternative method."

[16] The overriding position is that contracting parties ought to be held to their bargain and if disputes fall within the scope of an arbitration clause then the court would uphold the parties' contract to arbitrate and refer the matter unless good reason is shown by the opposing party why it should not be so.

[17] Section 5 of the **Arbitration Act of Antigua & Barbuda**[45] makes provisions for a stay of proceedings where there is arbitration and read as follows:

> *"5.* (1) If any party to an arbitration agreement or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, before

[4] Laws of Antigua & Barbuda Cap 33

delivering any pleadings or taking any other steps in the apply to that court to stay the and that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant, was, at the time when the proceedings were commenced and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

[18] The defendant in its application of 15th October 2012 states that it is willing and ready to do all that is necessary for the proper conduct of arbitration to resolve this matter and the court has no reason to suggest otherwise.

Order

[19] Having regard to the evidence before the court, the provisions of the **Arbitration Act** and **CPR 2000** Part 9.7, it is hereby ordered and declared as follows:

(1) The court shall not exercise its jurisdiction in respect of the proceedings in the claim form and statement of claim filed on 10th September 2012 as the matter should first be referred to arbitration in accordance with clause 35 of the agreement entered into by the parties on 23rd February 2001.

(2) The claim form with statement of claim filed on 10th September 2012 is hereby stayed until the determination of the arbitration proceedings or until further order of the court.

(3) All further proceedings in this matter are stayed until the final determination of the arbitration or until further order of the court.

(4) The parties are directed to take all necessary steps to commence the arbitration with promptitude having regard to the time lapse since the impasse between the parties.

(5) Costs in the application to the defendant in the sum of $750.00.

Agnes Actie
Master [Ag.]