

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

ANUHCV2013/0002

BETWEEN:

PIERRE IMFELD

Claimant

and

CARIBBEAN DEVELOPMENTS (ANTIGUA) LIMITED

Defendant

Before:

Kimberly Cenac-Phulgence

Master [Ag.]

On written submissions:

Ms. E. Ann Henry for the Claimant

Mrs. Fidela Corbin-Lincoln for the Defendant

2013: November 6, December 6;
2014: February 27.

Preliminary Issue-Whether the Court should exercise its case management powers pursuant to CPR 26.1(2)(e)-Whether there should be a separate trial of preliminary issues ordered

JUDGMENT

[1] **CENAC-PHULGENCE, M [AG.]**: On 22nd May 2013, the claimant as part of case management filed an application supported by affidavit for certain questions to be dealt with as preliminary issues pursuant to rule 26.1(2)(e) of the **Civil Procedure Rules 2000** ("CPR 2000"). The Court on the 8th October 2013 when the matter came up for hearing gave directions that submissions be filed and exchanged by

the parties within 14 days, i.e by the 23rd October 2013. On 6th November 2013 when the matter again came up for hearing, the claimant made an application for an extension of time to file its submissions and was granted until 8th November 2013 to so do. Thereafter, the parties were to rely on their submissions and a decision would be made pursuant to the written submissions. In analysing the submissions which had been filed by the parties as at 8th November 2013 for the purpose of writing the decision, it became clear to me that the parties had filed submissions on two different aspects, the defendant on whether the questions should be decided as preliminary issues and the claimant in answer to the questions. At the hearing on 6th December 2013, it became even clearer that there was no consensus on what the subject matter of the submissions ordered to be filed on 8th October 2013 were to be. There was no order in relation to the application of 22nd May 2013 on the record and so I therefore made an order for the claimant to file submissions in relation to the application of 22nd May 2013 or to indicate whether he would stand by the submissions previously filed. I therefore now consider the application of 22nd May 2013.

Background

- [2] On 2nd January 2013, the claimant filed a claim in which it sought inter alia reimbursement of monies paid to the defendant by way of community charges and a declaration that the defendant is not entitled to be paid any monies for monthly community charges whatsoever. The claimant avers that he entered into an agreement in writing which he refers to as the Land Purchase Agreement on 21st December 1999, for the purchase of certain lands ("the Property"). The claimant further avers that in breach of the covenants and stipulations contained in the First Schedule to the Land Purchase Agreement, the defendant purporting to be authorized by the said covenants demanded payment of amounts per month for community charges for the Property. The claimant says that by mistake, the payments demanded were paid by him until September 2011 when he became

aware that the community charges demanded by the defendant were in excess of the amounts prescribed under the Land Purchase Agreement.

[3] The defendant filed its defence on 12th February 2013. It is the defendant's position that in addition to the 21st December 1999 Agreement, there was a Sale Agreement dated 10th February 2013 and that the terms and conditions as between the parties are contained in these two documents. The defendant denies that the amounts required to be paid by the claimant were required to be paid in breach of the clause in the First Schedule to the Land Purchase Agreement. The amounts were required to be paid pursuant to the terms of the Sale Agreement, more specifically Clause 5(iii), entered into by the claimant in February 1999 which they say is binding on the claimant.

[4] Clause 5(iii) which is the relevant part of the Sale Agreement states:

"It is further expressly agreed and declared that:

i) ...

ii) ...

iii) The Property is part of a development which will comprise on completion approximately 500 houses together with 200 parcels of land on which residential buildings will be constructed commercial buildings leisure facilities and common areas, and that each owner for the time being of a house or other residential building or other property, *and each owner or tenant shall be obliged to contribute their fair share of maintaining the common facilities and that to that end the Purchaser hereby agrees in further consideration hereof to pay in a timely fashion a sum equivalent to his fair share of the said costs as they become due such charges to be annually audited.*" (my emphasis)

[5] I pause here to note that mention of the Sale Agreement was made by the defendant and was not referenced by the claimant in their claim form although its existence was acknowledged and agreed by the claimant in his reply. The reference in paragraph 4 above is not found in the Land Purchase Agreement of 21st December 1999.

[6] The defendant also filed a counterclaim on 12th February 2013 in which it claims inter alia (a) the unpaid community charges, (b) a declaration that it is entitled to charge the claimant a sum in respect of community charges pursuant to the agreements between them specifically the agreement dated 10th February 1999 (the Sale Agreement), (c) alternatively, a declaration that the course of dealing between the parties since January 2000 evidences an agreement between the parties for the provision of services by the defendant and the payment for same by the claimant and that the claimant is therefore estopped from denying the said agreement and (d) further in the alternative, a declaration that in the absence of an agreement between the parties, the defendant having provided the services and the claimant having taken the benefit of same, the defendant is entitled to receive from the claimant on a quantum meruit basis the reasonable cost of the services.

[7] In the counterclaim the defendant at paragraph 6 avers that it was a specific term of the agreement for sale between the defendant and the claimant that the claimant's property was part of the defendant's development and that each owner was obliged to contribute their share of maintaining the common facilities and that the purchaser being the claimant agreed to pay in a timely fashion a sum equivalent to his fair share of the said costs as they become due such charges to be annually audited.

[8] The claimant filed a reply and defence to counterclaim on 4th April 2013 wherein he acknowledged executing an agreement for sale on 10th February 1999 (referred to above as "the Sales Agreement" and referred to as the Purchase Agreement by the claimant) and also that the clause referred to by the defendant was an accurate reproduction of clause 5 of the Sale Agreement and reflects the essential part of the Agreement. At paragraph 5 of the reply and defence to counterclaim, the claimant avers that:

"...there has been no audited assessment by the Defendant communicated to him or at all of his "fair share of maintaining the common facilities" as referred to in the Purchase Agreement or incurred by the Defendant at all. It is further the contention of the Claimant that *it is a*

condition precedent for the imposition of community charges by the Defendant that the assessment be done annually and that it be audited."
(my emphasis)

- [9] The claimant further avers that there have either been no annual audited assessment of the claimant's "fair share of maintaining the common facilities" as is required by the Purchase Agreement (Sale Agreement) or, if such an assessment has been done that the same has never been communicated to the claimant, and as such is not binding on him.
- [10] On 24th April 2013, the defendant filed a reply to defence and counterclaim in which it denies that it is a condition precedent to the enforceability of the charges that they be audited. The defendant denies that it never provided documentation to show that the amount payable by the claimant was his fair share of the cost of maintaining the common facilities.

The Preliminary Application

- [11] The claimant on 22nd May 2013 filed a notice of application for an order that the following questions be dealt with a preliminary issues pursuant to Part 26.1(2)(e) of CPR 2000 namely:
- Whether pursuant to the Sale Agreement made on 10th February 1999 between the claimant and the defendant, it is a condition precedent for the imposition of community charges by the defendant that:
- (i) there be an annual audit to determine the fair share of maintaining the common facilities which would represent the amount to be paid by the claimant; and
 - (ii) that the audit be presented to the claimant.
- [12] The grounds of the application are inter alia that (i) one of the overriding objectives of the CPR 2000 is that the Court deal with matters in a manner so as to save judicial time and litigation costs and (ii) the disposal of the questions will narrow

the issues between the parties. The application is supported by an affidavit of Nicole Nesbitt filed on 22nd May 2013. In the affidavit, the claimant accepts that the Sale Agreement was inadvertently not referred to by him in his claim and that he accepts the said Agreement as being an Agreement between him and the defendant and as being binding on him.

[13] At paragraphs 10 and 11 of the said affidavit, the claimant repeats his contentions that the annual audit of the costs for providing the common facilities is a condition precedent to the imposition of the community charges and that until the audit is conducted and presented to the claimant there is no basis on which the defendant can impose and demand that the claimant pay the community charges.

[14] On 16th July 2013, the defendant filed an affidavit in response of Veneren McKenzie to the application in which objection was made to the application for the grant of an order for the determination of the questions raised as preliminary issues on the ground that the claimant has disclosed no fact, circumstances or reason that may permit the court to conclude that there are special grounds for holding a separate trial on the issues and that this case is not a suitable one for the exercise of the court's discretion in favour of the claimant.

[15] The parties were to file submissions on the application and the defendant filed its submissions on 24th October 2013 and the claimant on 20th December 2013 which are the submissions which will be considered in this decision.

The Claimant's Submissions

[16] The claimant submits that based on the plain language of the Sale Agreement, the obligations to pay the community charge is imposed by clause 5 of that agreement executed on 10th February 1999. The claimant further submits that it is an essential requirement that the assessment as to what is his "fair share" of the costs incurred by the defendant in maintaining the common property is required to be audited annually. I do not think that this is in dispute at all.

[17] The claimant submits that as a matter of law, before the defendant may impose the charges, he must meet the requirements of clause 5 of the Sale Agreement and that it is in that context that the application as to whether the preliminary questions should be dealt with is being made. The claimant says that the questions raise only points of law and that disposition of them will assist in saving judicial time and resources through active case management.

[18] The claimant submits further that the discretion of the court to exercise its case management powers by engaging in determining the preliminary questions would be an appropriate exercise of discretion in this case and asks the court to order that the questions referred to in the application be dealt with as preliminary issues pursuant to Part 26.1(2)(e).

The Defendant's Submissions

[19] The defendant submits that there are four issues arising for determination on this claim and identifies these as follows:

- (1) whether the agreement of 10th February 1999 (Sale Agreement) is binding on the claimant-This the defendant says has been conceded by the claimant who has accepted that the Agreement is binding on him;
- (2) Did the claimant have notice of the assessments that were made by the defendant as the claimant's fair share?
- (3) Was it a condition precedent that the assessments were required to be audited and served on the claimant?
- (4) What is the specific amount due to the defendant?

[20] The defendant submits that whether the claimant had notice of the assessment for 2007 and whether it was indeed served on the claimant as he asserts in his reply

to defence to counterclaim and also what is the amount due to the defendant are both questions of fact to be decided on the evidence of the parties adduced at trial.

- [21] In relation to issue (3), the defendant submits that this issue is to be determined upon (a) an interpretation of the specific words of the agreement signed by the claimant on 10th February 1999 and (b) upon consideration of the intention of the parties. The defendant submits that to the extent that this question requires an interpretation of the words in the agreement, it is a question of law and to the extent that it requires consideration of the intention of the parties, it is a question of fact. This issue therefore involves a question of mixed law and fact.
- [22] The defendant further submits that the court should exercise its discretion under CPR 26.1(2)(e) to order a separate trial of issues only after careful consideration of the circumstances including the risks. The defendant refers to the case of **Craig Reeves v Platinum Trading Management Limited**¹ in support of this submission. The defendant submits that the instant case is a simple case of debt owed by the claimant to the defendant, based on the terms of an agreement which the claimant concedes is binding on him. The case, the defendant contends involves issues of fact or issues of mixed law and fact, which are not exceptional or extraordinary.
- [23] The defendant again contends that neither the claimant's grounds for the application nor the affidavit in support thereof disclose facts, circumstances or reasons which would permit the court to conclude that there are special grounds for holding a separate trial. The defendant contends that this case is not a suitable one for an order to be made for the trial of separate issues under CPR 26.1(2)(e) and that the application ought to be dismissed by the court.

¹ HCVAP2008/004, St. Christopher and Nevis (delivered 30th May 2008).

The Law and Principles

- [24] The court has an express power to try issues separately as a preliminary issue. This power is part of the court's case management powers under Rule 26.1(2)(e) of CPR 2000 which states that the court may "direct a trial of separate issues". In the case of **Craig Reeves**, it was held that there are three types of orders that can be made: for a trial of a preliminary issue on a point of law; for a trial of a preliminary issues or questions of fact and for the separate trial of issues of liability and quantum. The court also held that to order a separate trial of a question or issue was an extraordinary and exceptional course which should only be made on special grounds.
- [25] Barrow JA at paragraph 16 of **Craig Reeves** said of the application for the trial of a preliminary issue that "that is a procedure that the court employs when costs and time can be saved if decisive issues can be tried before the main trial." He continues at paragraph 17-
- "Wasting rather than saving time, complicating rather than simplifying issues, and engaging in mini-trials with no true justification for doing so, are among the risks that require careful consideration before a court decides to order the trial of a preliminary issue."
- [26] The dicta of Lord Roskill in **Allen v Gulf Oil Refining Ltd.**² was referred to in **Craig Reeves**. In **Allen**, Lord Roskill said:
- " ...The preliminary point procedure can in certain classes of case be invoked to achieve the desirable aim both of economy and simplicity. But the cases in which such invocation is desirable are few. Sometimes a single issue of law can be isolated from the other issues in a particular case whether of fact or of law, and its decision may be finally determinative of the case as a whole. Sometimes the facts can be agreed and the sole issue is one of law. But the present is not a case in which this procedure ought ever to have been adopted ..."

² [1981] AC 1001 at 1021-1023.

[27] Barrow JA stated at paragraph 18 of **Craig Reeves**

“It will be seen from the speech of Lord Roskill that the trial of preliminary issues will usually be a point of law, which can be isolated from any factual dispute, or may be made separately triable because facts are agreed.”

[28] It is very clear from the case of **Craig Reeves** and the dicta of Lord Roskill that the court needs to exercise caution when deciding whether to exercise its case management powers and grant a trial of a preliminary issue. The claimant in this case says that the issue to be decided can be easily decided as a matter of law by examining the Clause 5 of the Sale Agreement.

Conclusion and Analysis

[29] As stated above, the decision to order the trial of a preliminary issue should be exercised with caution. I agree with the submissions of the defendant that the questions which the claimant want answered as preliminary issues involve issues of mixed law and fact and would therefore require embarking on a mini-trial to determine such questions. This question cannot be answered simply on submissions from the parties as the intention of the parties and the background to the Agreement are important factors which the Court must have regard to in coming to a conclusion on the issues as raised.

[30] I am not persuaded by the submissions of the claimant that the trial of these preliminary issues will save costs and time. In fact, I believe that it may actually protract what may be a relatively simple matter. The issues raised by the claimant for trial as preliminary issues are in my opinion substantive matters which ought more properly to be dealt with at the trial of the matter. Dealing with these issues at this juncture to my mind serves no useful purpose as it will not bring the matter to a conclusion. Dealing with these issues will require the parties to file submissions on the preliminary issues and that a hearing take place to determine the issues.

- [31] The claimant's own submission as to how Clause 5(iii) of the Sale Agreement ought to be interpreted itself shows that this is not a fit case for the Court to make an order for the trial of the preliminary issues applied for. The claimant asserts what he thinks ought to be interpretation of the words in Clause 5(iii) and in essence asks the Court to also interpret the clause to the effect that if the auditing is not undertaken, the charge may not be imposed. The answers to the preliminary question whether it is a condition precedent that the charges must be audited in order to be charged to the claimant is not one which can be gleaned simply by looking at the words in Clause 5(iii). And so I agree with the submissions of the defendant that the answer to the first issue, whether it is a condition precedent for the imposition of community charges that there be an annual audit and that that audit be presented to the claimant must involve more than just a question of law. It must also involve questions of fact. If this is the case, I agree with the defendant that this is not a suitable case for the deciding of a preliminary issue.
- [32] In a case where the interpretation of a clause in an agreement is so central to the matter of the claim, it would not be wise in my opinion to fetter the hands of a trial judge by deciding on such substantive issues. It ought to be that the judge can properly rule on these issues as part of the trial. To determine the issues identified prior to trial would not save any costs and may well protract the matter.
- [33] I therefore find that this is not a case in which an order should be made for the trial of the preliminary issues identified, namely, whether pursuant to the Sale Agreement made the 10th February 1999 between the claimant and the defendant, it is a condition precedent for the imposition of community charges by the defendant that (i) there be an annual audit to determine the fair share of maintaining the common facilities which would represent the amount to be paid by the claimant and (ii) that the Audit be presented to the claimant.

[34] The Order is as follows:

1. The application of the claimant filed on 22nd May 2013 for an Order that the following questions be dealt with as preliminary issues namely, whether pursuant to the Sale Agreement made the 10th February 1999 between the claimant and the defendant, it is a condition precedent for the imposition of community charges by the defendant that (i) there be an annual audit to determine the fair share of maintaining the common facilities which would represent the amount to be paid by the claimant and (ii) that the Audit be presented to the claimant is dismissed.
2. Costs to the defendant in the sum of \$750.00.
3. The matter is adjourned to the Master for case management directions.



Kimberly Cenac-Phulgence
Mon Feb 24 2014 11:02:36

Kimberly Cenac-Phulgence
Master [Ag]