ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

(CIVIL)

CLAIM NO ANUHCV2013/0002

BETWEEN:

PIERRE IMFELD

Claimant

AND

CARIBBEAN DEVELOPMENT (ANTIGUA) LIMITED

Defendant

Appearances:

Ms E. Ann Henry QC for the Claimant
Mr Andrew O'Kola for the Defendant

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2016: April 25
2017: March 1

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JUDGMENT

Introductory and brief background

[1] **LANNS, J. [Ag]:** In this case, the Claimant, Pierre Imfeld claims against the Defendant Caribbean Development (Antigua) Limited, reimbursement of all monies paid by the Claimant to the Defendant by way of community charges, in the amount of US$31,582.16, together with interest on the said sum, at the rate of 5 % in the amount of US$1,21.88. The Claimant also claims a declaration that the Defendant is not entitled to be paid any monies for monthly charges whatsoever. Further, the Claimant claims an injunction to prevent the Defendant from disconnecting the sewage service to the Claimant's Villa # 265. Finally, the Claimant asks for costs.

[2] The Claimant's case is that on the 21st December 1999, he entered into an agreement in writing for the purchase of certain lands forming part of Jolly Harbour residential development. Pursuant to the land purchase Agreement, the Claimant became the registered proprietor of the property registered as Registration Section South East; Block 55; 1186C; Parcel 384, on which was constructed a dwelling house known as Villa 265 (the Villa).

[3] The Claimant avers that by Clause A of the Agreement, he agreed to observe the covenants and stipulations set out in the First Schedule. According to the Claimant, the covenants in the First Schedule are recorded as Encumbrances on the Claimant's title to the subject land.

[4] The Claimant alleges that in breach of 'Clause A', of the First Schedule, the Defendant, from January 2000, purporting to be authorised by the 'said Clause', demanded payment of amounts varying from US174.90 to US 287.50 per month for community charges for the property. The Claimant asserts that by mistake, he made the payments so demanded until September 2011, when it was brought to his attention that the community charges demanded by the Defendant and paid by the Claimant were in excess of the amount prescribed under the Agreement.

[5] Upon making the discovery, the Claimant, by letters written to the Defendant dated 28th November 2011 and 23rd December 2011, sought clarification of the matter, but the Defendant never responded; whereupon, the Claimant ceased making any further payments.

[6] To date, the Defendant has failed or refused to reimburse the Claimant for the alleged overpayments made by him during the period January 2000 to September 2011.

[7] By email dated 9th August 2012, the Defendant issued a notice of disconnection of utility services which are part and parcel of the Agreement of Sale for which the Claimant paid the consideration under the Agreement for Sale .

[8] On the 27th March 2013, the Claimant instituted the present claim seeking the reliefs set out in paragraph 1 herein.

[9] The Defendant apparently filed a Defence and Counterclaim (which are not included in the Core Trial Bundle), but the court record shows that by order of the Court[1] dated 21st January 2016, the Defence and Counterclaim were struck out and it was ordered that for its failure to comply with case management orders, the Defendant not be permitted to call any witnesses at the trial.

[10] The matter eventually came up for trial on the 25th April 2016. Prior to the hearing of the evidence, counsel drew the court's attention to an application filed by the Defendant to set aside the order of the master striking out the defence and counterclaim The court denied the application on the ground that that order is best challenged on appeal, and even if I was wrong, if the court were to grant the order sought, it would be sanctioning the laxity of the Defendant and his repeated

[1] Glasgow M.

non-compliance with the case management orders of the court. Furthermore, the court was of the opinion, that based on its own order dated 16th February 2016, (which has not been set aside or appealed, or stayed) it would proceed with the trial. And it did.

[11] The Claimant's sole witness was Mr Imfeld, who gave one witness statement and was duly cross-examined thereon by learned counsel for the Defendant, Mr O'Kola.[2]

Issues

[12] The main issues for determination are

(1) whether the Claimant was bound, or had an obligation to pay community charges; and if so what amount/proportion was payable?

(2) whether the Claimant overpaid the Defendant for community charges to the sum of US$31,582.16, based on a mistake; and if so

(3) whether the sum is refundable

Was the Claimant obligated to pay community charges

[13] The answer to this question is to be found in Clause 5 (iii) of the Sales Agreement dated 10th February 1999:

"It is further expressly agreed and declared that:

1) ...

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**

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[2] It was agreed at trial that notwithstanding that the Defence had been struck out, the Defendant did not lose his right to cross-examine the Claimant and any other witness for the Claimant. But this right is limited in that the scope of cross-examination cannot be permitted to travel beyond limited object of pointing out falsity or weakness of the plaintiffs case, and in any case, it cannot be converted into presentation of defence theory. (See **Sheshrao Raibhan Ingale vs Shilpa Sheshrao Ingale; 2005 (2) Bom CR 667, 2005 (1) MhLj 188)**

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 share of the said costs as they become due, such charges to be annually audited.[3] (Bold added for emphasis).

[14] I glean from Clause 5 (iii) that Villa 265 was part of the Defendant's Development Project, and that the Claimant, being the owner of Villa 265, was obliged to contribute his share of maintaining the common facilities, and that Mr Imfeld, being a 'purchaser' and 'owner' agreed to pay in a timely fashion ', a sum' equivalent to his 'fair share" of the costs of maintaining the common facilities, 'as they become due', such charges to be 'annually audited'.

[15] At paragraph 6 of his Statement of Claim, the Claimant asserts that 'in breach of Clause A of the Sales Agreement, the Defendant purporting to be authorised by the said "Clause A' of the Sale Agreement, demanded payments of varying monthly amounts for community chares.

[16] In his witness statement, the Claimant stated that to his knowledge, the terms contained in the Sales Agreement and the Transfer of Land are the terms of the Agreement which were binding on the Defendant and the Claimant. Curiously, in paragraph 9 of the same witness statement, the Claimant admitted that he had not closely studied the terms of the agreement, and when he received the demand, he did not question its correctness. The Claimant, at paragraph 13 of his witness statement, made reference to owners (including him) paying the 'amounts due' plus surcharge. Then at paragraph 14, the Claimant stated that when he examined the Agreements he had entered into with the Defendant, he was satisfied that in fact, he had no obligation to pay the community charges which were being demanded by the Defendant.

[17] In the letter written to the Defendant dated 28th November 2011, delivered by email, (which form part of the evidence in the case) the Claimant stated in effect that upon reviewing the Purchase Agreement, he sees no basis for the charges which the Defendant has been levying to his account. The relevant paragraph is paragraph 3 of the letter: It states in part:

> "A review of the document [Purchase Agreement] reveals that there is no defined basis for certain charges which CDAL [the Defendant] has been levying to my account; I note from my records that these charges, which are labelled by CDAL as a "Community Charge" have been levied without basis. Throughout the years, I have apparently been invoiced for "Community Charges" in error."

[18] In his follow-up or second letter to the Defendant dated 23rd December 2011, the Claimant made the same complaint, and expressed the same concern as to the basis for the charges, and alleges that he had been invoiced for 'Community Charges' in error.

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[3] Significantly, there is no similar Clause or reference contained in the Transfer of Land Agreement, although the Claimant asserts that the Sales Agreement forms an integral part of the Transfer of Land Agreement dated 21st December 1999.

[19] During cross-examination, the Claimant stated that he accepts the terms of the Agreement dated 10th February 1999. In further cross-examination, the Claimant accepted that part of the Agreement required him to pay a fair share of maintaining the common facilities. He further stated that he read the contents of the Sales Agreement before he signed it, and he took special care of the paragraph which mentioned that an annual audit ought to be done. yet he stated in his witness statement that he had not closely studied the terms of the Sales Agreement

[20] In his written closing submissions, learned counsel for the Defendant points to Clause 5 (iii) of the Sales Agreement, and submits that Clause 5 places an obligation on owners to pay community charges.

Findings

[21] I find that the claimant's case on this issue as contained in his statement of claim, his witness statement , the letters dated 28th November and 23rd December 2011 and oral testimony are replete with inconsistencies and conflicts. Reference is made to a breach of Clause A of the Agreement. There is no Clause A in the Sales Agreement.[4] Clause 5 is the relevant Clause.

[22] I find that Clause 5 of the Sales Agreement places an obligation on the Claimant to contribute a sum of money towards the cost of maintaining the common facilities. This contribution towards the cost of maintaining the 'common facilities' is referred to by the Defendant as "Community Charges". I find that the Claimant, during cross examination has changed his stance on his obligation to pay community charges, (or fair share contribution for maintaining the common facilities) and accepted and acknowledged that the terms of the Sales Agreement, are all binding on him. I therefore answer the question as to whether the Claimant is obliged to pay community charges in the affirmative.

What amount or proportion was payable by the Claimant as community charges

[23] The Claimant asserts in his statement of claim that the demands made on him varied from US$ 174.90 per month to US$287.50 per month. He pleads that the amount of $31, 582.16 as set out on the spreadsheet produced by him was in excess of the amount prescribed under the Agreement. This is the same amount that is being claimed by the Claimant as reimbursement.

[24] Did the Claimant overpay the Claimant. The Claimant in paragraph 7 of his Statement of Claim identified and annexed a copy of a spreadsheet detailing the excess allegedly demanded by the Defendant and paid by the Claimant.

[25] At paragraph 8 of his witness statement, the Claimant stated that shortly after he acquired the property, he received a demand from the Defendant for payment of community charges in the sum of US$174.90. As I have said, he stated candidly that he had not closely studied the terms of the

[4] This is obviously an error, and it appears that the words intended were "marked A" instead of "Clause A"; it is observed that the Land Transfer Agreement annexed to the Statement of Claim is marked "A"

Agreement, and that when he received the demand, he did not question its correctness. During the period 2000 and 2011, he continued to pay the amounts demanded. By 2011, the demand increased to US$287.50 monthly. The Claimant stated that he began questioning the amount he was paying for community charges, because of the general decline in the overall state of the area, and upon examining closely the Agreement entered into with the Defendant, he came to the conclusion that he had no obligation to pay community charges being demanded by the Defendant

[26] In his witness statement, the Claimant emphasized that the Defendant never undertook an annual audit to make a determination as to what was the cost of maintaining the common facilities referred to in the Sales Agreement. Nor was he provided with any such audit or documentation to that effect. He further stated that the Defendant has not over the years provided any evidence of the cost of maintaining the common facilities. He states that he has no idea of the cost the Defendant truly has incurred and continues to incur in maintaining the common facilities, because the Defendant has never tried to establish what it spent; the Defendant has simply demanded a figure without seeking to justify it. During cross examination, the Claimant altered his stance on the audit by stating that he did in fact receive audited statements, but he did not receive proper audit statements in that the audit had only been done for three years. Asked whether he takes the position that he is/was not liable to make a fair share contribution of community charges, until he has received an audited statement, the Claimant answered, 'Yes', adding that that he should receive an annual auditor's report'.

[27] During cross-examination, the Claimant pointed out that the Agreement does not define 'fair share', so he does not agree that he is not paying his fair share. He pointed out that the amount to be paid is not properly defined.

[28] Counsel for the Defendant, in his written closing submissions, noted that the Claimant is not asking for the excess to be refunded, he is asking for everything he paid to be reimbursed suggesting that nothing was payable under the Agreement.

[29] As to the issue of the audit, counsel submits that the Claimant is wrong on the audit point which is to the effect that it was a condition precedent to the imposition of community charges that an audit be done annually before an assessment as to what is payable as a fair share of maintaining the common facilities. In this regard, counsel went on to present a discourse regarding the interpretation put upon Clause 5 by the Claimant. In the end, counsel took the view that Clause 5 does not actually say that the carrying out of the audit is a condition precedent to the liability or obligation of the Claimant to make contributions. As far as counsel was concerned, Clause 5 imposes an obligation on the Claimant to pay, and an obligation on the Defendant to audit, and neither is dependent on the other.

Findings

[30] It is not possible to state with any certainty what sum was payable by the Claimant as community charges. Clause 5 of the Sales Agreement does not define what is a fair share. Nor does it

disclose the process for setting the charges to each purchaser/owner. The calculation of the amount of fair share payable by the Claimant is not prescribed by the Agreement, nor was the Claimant told what costs were incurred in maintaining the common facilities'. In spite of these failures/anomalies, the Claimant, by his own admission paid the amounts invoiced for without question as to the manner of calculation, and without raising any objection whatsoever for 11 years without seeking clarification as to why he was being invoiced for 'community charges' as opposed to maintenance charges The Claimant, therefore by his course of conduct, agreed, and accepted the amount charged for community charges as reasonably and fairly calculated, and that he understood community charges to be the same thing as contribution towards maintenance of the common facilities. He therefore cannot be heard to say that he was overcharged in excess of US$31,582,16, being the total amount invoiced and paid for the period 2000 to 2011, when he himself paid the amounts charged knowing that there was no provision in the Agreement as to how the charges would be calculated. I consider that it is a fair inference that the Claimant accepted the amount charged to be his fair share for maintaining the common facilities.

[31] Interestingly, in the letters from the Claimant to Mrs Gayle Hechme, the General Manager of the Defendant, the Claimant sought to challenge the community charges based on lack of 'defined basis' and purported 'error'. There is no mention of excess payment or incorrect calculation.

[32] Significantly, the Claimant is claiming for the amount he paid for the period 2000 to 2011 when he stopped paying. Two questions arise from this. The first is whether the Claimant is statute barred from claiming for sums 'overpaid' for more than six years before the filing of the claim. The Claim was filed in 2013. The period of alleged excess/overpayment is 2000-2011 over 11 years. It must be remembered that the Claimant asserts that he made the payments by mistake. Where the claim is for money paid in error or under a mistake of law, time does not run until the mistake is, or could with reasonable diligence have been discovered. It does not apply to a mistake as to fact.[5] That said, there is no pleading before me on the statute of limitation for the sum claimed for refund dating back to 2000. And the issue was not canvassed. So I do not dwell on it..

[33] This leads to the next question, whether, even if the Claimant was not statute barred by virtue of lack of pleading, could the sum allegedly overpaid be refunded where the Claimant benefitted from community services, and did not object to the charges levied against his account?

Is the Claimant entitled to a refund of the sums paid for community charges

[34] The witness statement of the Claimant outlined services over which he had become increasingly concerned about and which were not supplied consistently. Mr Imfeld stated that the standard of maintenance of the common facilities was dropping, and certain parts of the area were looking run down.

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[5] City Properties Limited v New Era Finance limited [2016] JMCC Comm.1; Claim No 2013 CD 00166

[35] However, the Claimant admitted, during cross-examination that he or his property benefitted from services provided by the Defendant during the period for which he is claiming a refund, and he continues to get a benefit from the Defendant, even though he has not made any payments since 2011.

Findings

[36] I find, based on his own admission, that the Claimant and or his property derived some benefit from community services provided by the Defendant. I accept, the evidence of the Claimant that there was an overall decline in the standard of service, and certain areas were run down. Indeed he told the court that he stopped paying because of the overall state of the services provided. The question the court must ask is whether, having benefitted by way of community services provided by the Defendant, is it conscionable or just for the Claimant not to pay for such services. The answer must be 'no'.

[37] Accordingly, looking at the evidence in its totality, I find, on balance, that the admission of the Claimant that he and or his property benefitted from the services provided by the Defendant; the admission that he had an obligation under Clause 5 of the Sales Agreement to pay community charges; and the fact that no objections were raised about the charges levied, are sufficient for me to find that the Claimant is not entitled to be refunded the amount paid as community charges. In fact, I find that, in all the circumstances, it would be unjust to allow the Claimant to be repaid the sum of money he paid as his fair share for maintaining the common facilities, being referred to as community charge. I find that the Claimant is not entitled to be reimbursed the money already paid.

[38] All that being said, I find that the Defendant is not without blame. I have difficulty understanding why it dealt with the Claimant's request for clarification in such a shallow/ unprofessional manner It failed to respond to the letters written to it seeking clarification on the matter. One would have thought that the Defendant would want to justify the amount charged, and explain the reason for the various increases in charges. There is no formula for determining 'fair share'. The failure to provide annual audits reflects poorly upon the Defendant[6]. The eventual acknowledgement of the Claimant's letters threatening disconnection of certain essential services and the added interest, was in poor taste, and showed little or no regard for the very Sales Agreement which is binding upon both parties.

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[6] In as much as this failure was not expressly pleaded in the Statement of Claim; and in light of the fact that the Defence and counterclaim has been struck out, the Reply (which is not included in the Core Trial Bundle) cannot be taken into account. Further the Claimant has advanced no submissions on the issue, so in my view it will not be prudent to address in any detail the lack of, or failure to present an audit.

The Claim for a declaration

[39] As previously noted, the Claimant seeks a declaration that the Defendant is not entitled to be paid any monies for monthly community charges whatsoever. In the light of the terms of Clause 5 of the Sales Agreement, and in the light of the Claimant's acceptance during cross-examination that he is bound by the Agreement and is obliged to pay community charges, and that he has in fact benefitted from community services provided by the Defendant, I can see no reason to grant this declaration. It is open to the Claimant, if he has issues with the services provided, or if he has issues with the amount charged, to raise these issues with the Defendant and it is incumbent upon the Defendant to give cooperation to the Claimant by responding and to seek to address and resolve the issues and or objections raised in an amicable, professional and decent manner. Accordingly, the declaration is refused.

The claim for an injunction

[40] The Claimant claims an injunction to prevent the Defendant from disconnecting the sewage service to the Claimant's Villa 265. However, it is said that the disconnection threatened, never occurred. In this regard, I am not of the view that in a situation where the Defendant is not without fault, where he has failed to reply to the concerns of the Claimant in a timely fashion this was a proper stance to take. He who comes to equity must do equity; and he who comes to equity must come with clean hands. In the circumstances, I accede to the claim for an injunction. To disconnect the sewage, cannot be the correct answer given the negative impact it would have on the environment and the surrounding property owners, and given the fact that the Defendant failed and or refused to reply to the concerns of the Claimant in a timely fashion

Costs

[41] The general rule is that costs follow the event. However, the court has a discretion to allow a proportion of the costs to the successful party or to make the successful party pay the costs. (CPR 64.6). In this case, success has been divided; so I will order that the Claimant pays 75 % of the costs of this action in accordance with the prescribed scales under CPR 65.5.

Conclusion

[42] In the end, notwithstanding the fact that the Defense and Counterclaim have been struck out, the Claimant's case, when tested by cross-examination, has not been made out. The Defendant by way of cross examination, was able to point out falsities and or weakness of the Claimant's case.

Additionally, even on the basis of certain averments in the Statement of Claim, for example, the alleged lack of authority to charge a fee for community charges; the alleged breach of Clause A of the Sales Agreement; the allegation that the community charges were invoiced in error and paid by mistake, the various averments in his witness statement that were not pleaded in the statement of claim[7]; alterations of certain position averred in the witness statement during cross-examination, judgment cannot be entered for the Claimant.

[43] For the reasons stated above, I grant the following reliefs:

1. The Claimant's claim is dismissed in part. The Claimant is not entitled to be reimbursed the sum of US$31,582.16.

2. The claim for a declaration that the Defendant is not entitled to be paid any monies for monthly community charges whatsoever is dismissed.

3. The Defendant, whether by his agents, servants or otherwise, is prohibited from disconnecting the sewage service of the Claimant

4. The Claimant shall pay the Defendant half of its costs of the action, such costs to be determined in accordance with CPR 65 .5, Appendices B and C

5. The Defendant is entitled to post judgment interest at the rate of five per cent per annum from the date of delivery of a sealed copy of this judgment to the date of final payment.

[44] I m grateful for the assistance of all counsel concerned.

PEARLETTA E LANNS
HIGH COURT JUDGE [AG]

[7] Including the averment concerning the reasons why he started questioning the amount being paid for community charges