IN THE SUPREME COURT OF BELIZE, A.D. 2012

CLAIM NO. 213 of 2011

IN THE MATTER of Section 17(1)(a) of the Time Share Act, Laws of Belize

AND

IN THE MATTER of the recognition and enforcement of rights of timeshare members

1. **Lincoln Cane Ventures, LLC** **CLAIMANTS**
2. **Federic Speaker**
3. **Glenn R. Hamilton**
4. **Daniel Russell**
5. **John Midlen**
6. **Mark Brady**
7. **Wendy Speaker**
8. **Therese Brady**
9. **Lee and Anita Albert Living Trust**
10. **The Anderson Trust**
11. **Janer Properties trust**
12. **Daniel Baur**
13. **Bradley Blanchat**
14. **Kelly Blanchat**
15. **Jon Bosch**
16. **Michele Bowen**
17. **David Calagno**
18. **Vickie Causby**
19. **Michael Coleman**
20. **Tammi Coleman**
21. **Jera Burns**
22. **Jennifer Daly**
23. **Michael Daly**
24. **Jerry Dermody**
25. **Kerry Dermody**

26. **Jeff Wertz**
27. **Bryan L. Dodd Revocable Trust**
28. **Andy Donlon**
29. **Susan Donlon**
30. **Bradford Eneix**
31. **Diane Eneix**
32. **Robert Fenske**
33. **Susan Fenske**
34. **Brian Fletcher**
35. **Kim Fletcher**
36. **Gloria Franklin**
37. **Larry Casey**
38. **William Hamblin**
39. **Madeline Hamblin**
40. **David Hensley**
41. **Alan Hertz**
42. **Taffi Hertz**
43. **Paul Hogue**
44. **Shellie Hogue**
45. **Mary Louise Howatt**
46. **Pat Jackson**
47. **Rolly Jackson**
48. **Sandra Jenkins**
49. **Stephen Jenkins**
50. **John R. Jiura**
51. **Jim Kenyon**
52. **Candace Kenyon**
53. **Karen Konze**
54. **Gillard Kosina**
55. **Lee Kosina**
56. **David Lafferty**
57. **Paula Lafferty**
58. **Brenda Lammers**
59. **Legacy Properties International Limited**
60. **Mario Leboeuf**
61. **John Patrick Lester**
62. **Marilyn Lewis**
63. **John Lewis**
64. **Barbara Little**
65. **Robert Little**

66. **Maloney Realty Trust**
67. **Christine Marsh**
68. **Stephen Marsh**
69. **Cheryl McDonald**
70. **Mark McDonald**
71. **Hogue and Merkeley LLC**
72. **Terrence J Mick Revocable Living Trust**
73. **Princess Maggs Inc.**
74. **Paul Holdings LLC**
75. **Aretha Mitchell**
76. **Arlen Mitchell**
77. **G. Dawn Murdoch**
78. **Robert Vandermeulen**
79. **Bart Palmer**
80. **Suzanne Palmer**
81. **Java 7 Ltd.**
82. **Joshua Richen**
83. **Travis Richen**
84. **Eric Ronse**
85. **Tina Ronse**
86. **Carol Russell**
87. **Jary See-Gilbreath**
88. **Dana Shay**
89. **Mike Simms**
90. **Janie Simms**
91. **Michelle Fox**
92. **Andrew Fox**
93. **Sullivan Trust**
94. **Michael Svoboda**
95. **Sally Svoboda**
96. **Mountain View Ranch LLC**
97. **Turner Family Trust**
98. **Gaines Berry**
99. **Brenda Dils**
100. **James Dils**
101. **Bradley J. Esty Revocable Trust**
102. **O.C. Haley**
103. **Timothy Hood**
104. **Wendy Hood**
105. **Kathy Johnston**

106. **Steven Johnston**
107. **Lisa Kampfer**
108. **Martin Kampfer**
109. **Duane L. King**
110. **Phil Myers**
111. **Ann Myers**
112. **Eugene Rakow**
113. **Barbara Rakow**
114. **Cheryl Randel**
115. **Vernon Randel**
116. **Karen Slade**
117. **Thomas Slade**
118. **Kevin Solloway**
119. **Amy Swartz**
120. **Arnold Swartz**
121. **Sueno Del Mar 2bfm LLC**
122. **Jaguar Resorts LLC**
123. **Beth Harris**
124. **Rhonda Meyer**
125. **Justin Hertz**
126. **Heather Hertz**
127. **Jerry Buckley**
128. **Muriel Buckley**
129. **Elizabeth Calago**
130. **Flroenco Pili Choo**
131. **Tres Gringo Construction LLC**
132. **Sue Hensley**
133. **Paul F. Hogue Living Trust**
134. **Shellie Hogue Living Trust**
135. **Roger Hogue**
136. **Sandi Jiura**
137. **Lee Frankenbeger**
138. **Laura Frankenbeger**
139. **Mike Mizuik**
140. **Gary Sherman**
141. **Belva Cardiff**
142. **Daubert Pension Plan and Trust**
143. **Steven Maeda**
144. **Julie Maeda**
145. **Charles Lindsay**

146. Patricia Lindsay
147. John D. Turley
148. Lucinda L. Turley
149. Perry Family Trust
150. Florin Pindic Blaj
151. Steven Fabor
152. Suzanne Fabor
153. Eva Monaghan
154. George Monaghan

AND

BRITISH CARIBBEAN BANK INTERNATIONAL LIMITED 1st DEFENDANT
MARK HULSE (IN HIS CAPACITY AS RECEIVER OF SUENO DEL MAR LIMITED 2ND DEFENDANT

Hearings
2012
16th May
19th June
27th June

Mr. Michael C.E. Young SC and Mrs. Deshawn Arzu-Torres for all the claimants.
Mrs. Ashanti Arthurs-Martin for the first defendant.
Mrs. Magali Marin-Young for the second defendant.

LEGALL J.

RULING

1. In the above matter, this court after a hearing, gave a written decision dated 21st December, 2011 that the one hundred and fifty-four

claimants must give security for costs in the amount stated in the decision in respect of each claimant. The claimant filed an appeal against the decision, and then made an application to the court for a ruling whether leave is required for the appeal to the Court of Appeal against an order made for security for costs, and if such leave is required, an order granting such leave; and also for a stay of the decision until the appeal is heard and concluded. The claimants had already filed a notice of appeal, prior to the filing of the application for leave to appeal. On 16th May, 2012, the court gave an oral ruling refusing the application for leave to appeal and a stay of execution. These are the reasons for that ruling.

2. An appeal shall be to the Court of Appeal in any matter from any order of the Supreme Court or judge thereof where such order is final and is not, among other things, an order as to costs: see section 14(1) of the Court of Appeal Act Chapter 90. The order the court made in the decision dated 21st December, 2011 mentioned above, amounts, in my view, to an order as to costs. I therefore rule that leave is required before filing an appeal against a decision on security for costs.

3. The claimants say that if leave is required, as I ruled above, then leave should be granted because the court prima facie made an error when it ordered security for costs, and that the appeal raises a question of importance upon which further argument is required, and an appeal would be to the public advantage. A prima facie error was made, firstly because, according to the claimants, the court heard the application for security for costs prior to the case management in this

matter, even though Rule 24.2 of the Supreme Court (Civil Procedure) Rules 2005 mandates that the application "must be made at case management conference or pre-trial review." The court, according to the claimants, failed to comply with Rule 24.(2) and therefore erred when it heard the application prior to the case management. Counsel for the claimants not only took part in the hearing of the application, but made no objection to hearing the application prior to case management. But a failure to comply with a Rule, in this case Rule 24(2) "does not invalidate any step taken in the proceedings, unless the court so orders: see Rule 26.9(2). I see nothing to exclude this rule, where the failure is on the part of the parties, and as alleged, the court. It is of interest to note that the "attainment of true justice is over the highway of realities and not through the alley of technicalities and that courts exist to do justice between litigants …… in a judicial system that proceeds with speed and efficiency": see ***Watson v. Fernandes, Caribbean Court of Justice Appeal No. CV2 of 2006***. The overriding objective of the Rules to hear matters expeditiously must also be considered. I therefore do not see a prospect of success on appeal in relation to this ground.

4. The claimants further urge that this court made a significant error when it awarded security for costs on the basis that the value of the claim was US$17,913,000.50 when there was no such value in the claim, which is really for declarations and damages in general. Some of the declarations claimed by the claimants in the claim and statement of case are:

"1. A declaration that the timeshare agreements and the attendant timeshare rights of the claimants are legally binding agreements;
2. A declaration that the timeshare agreements and attendant timeshare rights of the claimants be recognized, and enforced by the first and second defendants pursuant to section 17(1)(a) of the Timeshare Act in the operation and/or sale of the property and the exercise of any power and right of sale;
3. A declaration that the timeshare agreements and the attendant timeshare rights of the claimants be recognized, and enforced by and against any subsequent purchaser of the property or other transferee of any interest therein;
7. Damages."

5. In paragraph 1 of the statement of case, the claimants plead that at "all material times the claimants were purchasers and or owners of timeshare rights pursuant to the respective timeshare membership agreements executed between the claimants and Sueño De Mar Limited (as specified in Appendix 1) in a fractional interest membership club known as "Sueño del Mar" located at the property." The property was then described as land situate 13 miles north of San Pedro Town, being Block 7 Parcel 8843, San Pedro Registration section containing 9.6 acres, together with all buildings and erections thereon. Sueño offered for sale to the claimants timeshare rights in timeshare units on the property, and timeshare agreements were accordingly entered into by all the claimants purchasing the timeshare rights in the property. Clause 4 of the statement of claim states that

"the collective value of the timeshare rights purchased pursuant to the said agreements exceeds US $17 million." The claimants, to prove this value, exhibit an appendix to the statement of claim showing an amount of US$17,913,000.50.

6. The claimants, as shown above, request in the statement of claim, declarations to enforce their timeshare rights which they claim exceed US$17,000,000. The claimants argue that all they are seeking in the claim are declarations for possession and occupation of the property and that "this is not a case where the sum of US$17,913,00.50 is being claimed from the defendants." As mentioned above, the claimants are seeking to enforce their timeshare rights, which is valued at that amount by the claimants. I agree with the submissions of learned counsel for the defendants that the claim by all the claimants as stated by the claimants in the claim is to enforce their timeshare rights which are valued by the claimants at over US$17,000,000. I agree that this is the value of the claim.

7. The claimants further submit that the amount of security for costs awarded is unreasonable in all the circumstances of the case. Instead of bringing a representative action, the option was taken by learned counsel for the claimants to have 154 claimants. This may result in having to call each claimant to prove that each is entitled to the declaration sought which could involve a long trial depending on the case of each claimant, which could in turn, result in the defendants having to cross-examine and put up a defence in relation to each claimant. Further, according to the orders made by the court in the

decision, a single claimant may pay the costs in relation to him or her, as, for instance, claimant No. 61 John Patrick Lester in the sum of $12,702.88, and the case will proceed in relation to him; and if he is successful in the court process, I cannot see the defendants not accepting the decision of the court in relation to the other claimants whose cases raise generally the same legal issues, even though there are or might be differences in the details of each claimant. On the basis of the above, I am not satisfied that the orders as to costs are unreasonable. Another option opened to the claimants, and perhaps should have been accepted, was to bring a representative action under Rule 21, drafted differently from the present statement of claim, claiming a right to occupy or possess the timeshare property, without any stated value of the property.

8. Several well known authorities establish the principles to be applied by the court when considering an application for leave to appeal. "Leave to appeal will be granted if the court is of the view that the appeal has a realistic prospect of succeeding." See ***Addari v. Addari No. 21 of 2005 C.A. Virgin Islands, unreported, per Rawlins JA at page 5***. Other principles are (1) where there is a prima facie case that an error has been made; (2) where the question is one of general principle decided the first time; and (3) where the question is one of importance upon which further argument and a decision of the Court of Appeal would be to the public advantage: see ***Belize Telemedia v. Belize Telecom Ltd. No. 23 of 2008 Court of Appeal Belize (unreported) per Carey JA at page 3 & 4, quoting Sosa J, as his***

Lordship then was in Wang v. Atlantic Insurance Co. Ltd. Supreme Court Belize 21st July 1998 unreported.

9. The court has a discretion whether or not to grant leave to appeal, and the applicant for leave to appeal has the burden to show prima facie that an error has been made. For instance, such an error would include, where the judge in the exercise of his discretion, "made a mistake in law, disregarded principle, misapprehended the facts, took into account irrelevant material, ignored relevant material or failed to exercise his discretion": see ***Addari v. Addari above at page 5***.

10. The burden is on the applicant for leave to appeal to satisfy anyone of the principles or categories mentioned in ***Belize Telemedia Limited v. Belize Telecoms and Wang v. Atlantic Insurance Co. Ltd.*** above. As shown above, the applicants have failed to prove errors on the part of the judge so as to satisfy the first category of ***Wang***. As to the second category, general principles applicable to the granting or refusing security for costs have been adumbrated in several decisions, some of which have been quoted in the decision above dated 21st December, 2011 in this matter; and certainly do not amount to a general principle to be decided for the first time.

11. The applicant also hinged the application for leave to appeal on the third category of ***Wang***, that the appeal raises a question of importance upon which a decision of the Court of Appeal would be to the public advantage. It may be argued with some justification that all matters before the Court of Appeal are of importance, but I am not

satisfied, and the burden is on the applicant that a decision on the case management point or on the value of the claim or on the reasonableness of the orders of 11th December, 2011, considered above, most of which were considered previously by the court would be to the public advantage.

12. It seems that the satisfaction of one or other of the categories of ***Wang***, would be enough to grant leave to appeal in this case. But I am not satisfied, that the applicant has established any of the categories in ***Wang***. I therefore refuse leave to appeal.

13. The applicant also applied for a stay of further proceedings and execution of the decision of this court dated 21st December, 2011 until the appeal is heard and determined. It has already been noted that the claimants filed a notice of appeal before the application for leave to appeal. The issues for the court on an application for a stay pending appeal are whether the appeal has some prospect of success, and whether the applicant for a stay has shown that without a stay he will be ruined. An applicant who proves the above has legitimate ground for the granting of a stay pending appeal. The appeal, in my view, for the reasons above, does not have a prospect of success.

14. In support of the application for a stay, an affidavit dated 11th April, 2012 sworn by Mrs. Arzu-Torres, attorney-at-law for the claimants was filed. Mrs. Arzu-Torres swore that she was informed by David Cartwright, who is one of the claimants, and verily believe, that they the claimants, do not have the capacity to pay, nor are they able to

raise the finances to pay the costs ordered by the court; that they have used their life savings to purchase the timeshare rights; and that if the stay is not granted irreparable harm would befall the claimants. There is no evidence from the claimants themselves that without a stay they will be ruined; and Mrs. Arzu-Torres affidavit above falls short of proving that the claimants would be ruined if a stay is refused. Learned counsel for the defendants brought to the attention of the court ***Marie Makhoul v. Cicely Foster HCVAP 2009/014*** decided in the Court of appeal of Antigua where the court said:

> "Unfortunately, the bald assertions by Ms. Makhoul that she will be personally and financially ruined, without establishing a factual basis for the assertion is most unhelpful in the exercise of a discretion to grant a stay and in assessing fairly where the justice of the case lies. The burden is on her, as the applicant for the stay, to satisfy the court in this regard, the respondent having a judgment on the merits in her favour. This she has failed to do.

15. The claimants, relying on ***Hammond Suddard Solicitors v. Agrichem International Holdings 2002 ECWA Civ 335***, followed in ***Marie Makhoul*** above, further submit that the principle of ruination, and prospect of success are not the sole factors to be considered in deciding whether to grant a stay. The court should balance the risks of injustice to one or both parties. The court in ***Hammond Suddard*** puts it this way:

> "…Whether the court should exercise its discretion to grant a stay will depend on all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay."

16. The court in ***Hammond Suddard*** also stated that the evidence in support of the stay needed to be full, frank and clear. I think the court in considering whether to grant a stay ought to identify evidence, if any, of ruination and prospect of success and then ask itself, taking all the evidence and circumstances into account, the question: Is there a risk of injustice to grant or to refuse a stay? The problem with the application before me is that there is no clear and frank evidence of ruination or other such serious problems and therefore it is impossible to conclude that a refusal of the stay would be an injustice to the claimants. As already pointed out above, costs are ordered in relation to each claimant in varying amounts as low as BZ$10,000 in one case. Any of the claimants is authorized to pay his respective costs; and proceed with the substantive claim in relation to him, and after all the court processes, if he is successful, I do not think the defendants would wish to the defend all the other claims which involve the same legal issues as the successful first claim. The reverse is also true. If the first claimant is not successful; the other claimants are not likely to proceed. This is further reason for thinking that the orders in the decision are not unjust or unreasonable.

17. After making the oral ruling in this matter, an application was made subsequently for costs by the defendants. At a hearing for such costs

the claimants did not contest liability for costs and informed the court that they were not challenging the amount of costs applied for by the defendants. But the claimants have applied orally to the court for a stay of the order for costs, as there is an appeal of the above ruling and an application for leave to appeal. As there is no evidence to support the application for a stay, the application for a stay was refused. On the basis of the position above of the claimants as to liability and the amount of costs, the court awarded the amount of costs applied for by the defendants in respect of the above ruling.

18. I therefore make the following orders:

(1) Leave of the Supreme Court is required before filing an appeal against a decision on security for costs.

(2) The applications for leave to appeal and for a stay of execution and further proceedings are refused.

(3) The claimants shall pay costs to the No. 1 defendant in the sum of $19,181.25, and to the No. 2 defendant in the sum of $33,075.00.

Oswell Legall
JUDGE OF THE SUPREME COURT
27th June, 2012