

IN THE SUPREME COURT OF BELIZE, A.D. 2011

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**

- | | |
|--|-------------------------|
| <ol style="list-style-type: none">1. Lincoln Cane Ventures, LLC2. Federic Speaker3. Glenn R. Hamilton4. Daniel Russell5. John Midlen6. Mark Brady7. Wendy Speaker8. Therese Brady9. Lee and Anita Albert Living Trust10. The Anderson Trust11. Janer Properties trust12. Daniel Baur13. Bradley Blanchat14. Kelly Blanchat15. Jon Bosch16. Michele Bowen17. David Calagno18. Vickie Causby19. Michael Coleman20. Tammi Coleman21. Jera Burns22. Jennifer Daly23. Michael Daly24. Jerry Dermody25. Kerry Dermody | <p>CLAIMANTS</p> |
|--|-------------------------|

- 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. **Floenco 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

2011

23rd November

21st December

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. This is a ruling on an interlocutory application for security for costs by the defendants in this claim which was brought by one hundred and fifty-four claimants for declarations that they have rights to timeshare

property in Belize valued, according to the statement of case, in excess of US 17 million dollars. The relevant Rules dealing with security for costs are Rules 24.2 and 3 of the Supreme Court (Civil Procedure) Rules 2005 (the Rules) which state as follows:

- “24.2 (1) A defendant in any proceedings may apply for an order requiring the claimant to give security for the defendant’s costs on the proceedings.
- (2) Where practicable, such an application must be made at a case management conference or pre-trial review.
- (3) An application for security for costs must be supported by evidence on affidavit.
- (4) The amount and nature of the security shall be such as the court thinks fit.

24.3. The court may make an order for security for costs under Rule 24.2 against a claimant only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order and that –

- (a) the claimant is ordinarily resident out of the jurisdiction; or
- (b)
- (c) the claimant –
- (i) failed to give his address in the claim form”

2. Case management has not yet been held; but I do not think, considering the overriding objective of the Rules, and the general

power of the Supreme Court to rectify matters where there has been a failure to comply with a Rule, that this court is precluded at this stage, from considering the application. Under Rule 24.3, the court has a discretion to make an order for security for costs, if satisfied having regard to all the circumstances of the case, it is just to do so. It appears that having first exercised the discretion under Rule 24.3 to make the order, the court is then given a further discretion under Rule 24.2 (4) with respect to the amount and nature of the security for costs. In the exercise of the discretion under Rule 24.3, the court ought to consider the merits of the claim, and whether any order for security for costs was likely to stifle a genuine claim. At this interlocutory stage, where the full facts of the case are not known, and that all that are available to the court with regard to the claim, are the claim, the statement of case and defence, the court is not in a position to give, as would be expected, a conclusive finding on the merits of the claim. Any expressions on the merit at this stage would be preliminary and subject to the evidence adduced at the trial. But at this stage, an examination of the case may be considered for the purpose of forming a view of its merits.

3. Briefly, the case at this stage is that the claimants purchased timeshare rights in property situate at Block 7 Parcel 8843 San Pedro Registration Section, owned by Sueno Del Mar Limited, a private liability company incorporated in Belize (the company). The company offered for sale timeshare rights to timeshare units on the property to the claimants, and agreements of sale were entered into between the claimants and the company. The value of the timeshare

rights purchased by the claimants in accordance with the agreement exceeded, according to the claimants, US\$17,000,000.

4. A different company Suena Del Mar Holdings (Sueno) incorporated under the laws of Nevis was in the business of taking loans to finance timeshare interests, including interests of the company. In September 2007 Sueno took mortgages from the first defendant in the sum of US four million dollars, and the company signed as guarantor. Apparently there were defaults in repaying the loan and the first defendant on 14th July, 2010 demanded payment of the outstanding balance on the loan, which demand was not complied with by the Sueno and the company. The company was put into receivership and the second defendant was appointed on 13th September, 2010 as receiver of the company. The claimants alleged that the second defendant as receiver intended to sell the property which would impact negatively on their timeshare rights and they would suffer loss as a result. The claimants also allege that they have personal assets in the nature of household items, fishing equipment and items of clothing on the property valued at over 1 million US dollars, according to the statement of claim. This is not consistent with an affidavit purportedly signed on behalf of the claimants by Mr. Cartwright that the value of the items and equipment was about US\$478,000.

5. The claimants also alleged that the first defendant had disallowed the claimants from exercising their timeshares rights to occupy the property. In basic terms, the claimants allege that under the

Timeshare Act 2007 No. 14 of 2007 (the Act) which came into force in March 2009, in no event shall the exercise of a power of sale or pursuit of any other right or remedy under a mortgage shall “extinguish or impair a purchaser’s timeshare rights in a timeshare unit.”: see section 17(1)(a) of the Act. A sale of the property, according to the claimants, would impair their timeshare rights and is contrary to the Act and therefore they brought the claim for declarations to protect their timeshare rights in the property.

6. For the defendants it was submitted that the timeshare rights were sold to a large majority of the claimants prior to the coming into force of the Act, and therefore the Act was not applicable. With respect to the remaining claimants’ timeshare rights sold after the commencement of the Act, they accepted in writing that when they purchased the rights “they were acquiring a revocable licence only and would not be acquiring any equity or interest in the Sueno Del Mar Limited,” to use the words of counsel for the defendants.
7. An application for security for costs should not be made the occasion for a detailed examination of the merits of the case. However, a claimant will not be required to provide security for costs where at the time of the application, the claim appears highly likely to succeed: *Al Koronky v. Time Life Entertainment Group Ltd.* 2006 EWCA Civ 1123. The most the court could say at this interlocutory stage is that there may be some merit in the claim. In the exercise of the discretion whether it is just to make the order under Rule 24.3, the court ought also to consider whether such an order would stifle a claim which may

be genuine. In order to make a decision on this, the court has to consider not only whether the claimants could provide the security for costs out of their own resources, but also whether it could also raise the amount of security. Since this is likely to be within the knowledge of the claimants, it is for them to satisfy the court that they would be prevented by an order for security for costs from continuing with the claim: see *Kerry Development Ltd. v. Tarmac Constructions 1995 3 AER 534 at page 540 per Gibson LJ*. A claimant who alleges that an order for security will stifle the claim must adduce satisfactory evidence that he does not have the means to provide security and that he cannot obtain appropriate assistance to do so from any third party such as a relative or friend who might reasonably be expected to provide such assistance if they could: see *Al Koronky v. Time Life Entertainment Group Ltd., 2005 EWHL 1688*.

8. For the purpose of discharging the burden of proving that an order will prevent or stifle the claim, only David Cartwright, for one of the claimants, Jaguar Resorts Limited, swore to an affidavit, purportedly authorized by the other claimants to do so, stated at paragraph 9 that “many of the claimants have used their life savings to acquire a timeshare right at Sueno and cannot deposit additional monies at this time.” Apart from Mr. Cartwright’s affidavit, none of the other claimants swore to any affidavits in this matter to show that they could not meet an order for security for costs or that such order would stifle the claim. Mr. Cartwright in paragraph 9 must have been stating what he was told by the other claimants. It must also be noted that in paragraph 9, Cartwright was referring to “many of the

claimants;” but how many claimants cannot deposit monies at this time, have not been disclosed in the evidence. According to Cartwright, many claimants cannot deposit additional monies at this time, but whether they could do so at some other time, or by the time the case comes to trial, is also not known.

9. Cartwright, purportedly speaking for all the claimants in his affidavit, produced emails purportedly sent to him by some claimants showing that they own property in Belize totalling about US\$478,000. The property described by Cartwright in his affidavit is really chattel comprising of household items, fishing equipment and items of clothing. The alleged property is not land or real estate. The property, according to Cartwright’s affidavit, is only in relation to 78 claimants, out of the 154 claimants named in the claim. There is no evidence of the kind of property, if any, owned by the other claimants. Moreover, Cartwright gives in his affidavit evidence of an approximate value of the chattels belonging to each of the 78 claimants; but not only absent from the evidence are any receipts or bills or expert evidence verifying the value of the chattels, but absent also from the evidence is evidence of the physical condition of the chattels, their saleability and present price. Moreover, the court would expect from a litigant, opposing an application for security for costs under Rule 24(3), evidence, which is absent in this case, of the financial circumstances of the litigant, including bank accounts, fixed assets, salaries, occupation, remunerations and liabilities, as was done in *Kuenyehia and others v. International Hospitals Group Ltd.*, 2007 EWCA 274. In this case before me, apart from the chattels

referred to by Mr. Cartwright, there is not much more the claimants have produced by way of evidence to prove that they have property to satisfy an order for costs, and to assist the court in deciding in their favour that an order for security would stifle the claim and therefore it would not be just to make such an order.

10. In the Caribbean, another circumstance which I think the Supreme Court ought to consider in exercising its discretion under Rule 24.3 is the supremacy of Caribbean Constitutions and the constitutional right of access to the court. An order for, or amount of, security for costs, may, depending on the facts and circumstances of the case, have the effect of taking away that constitutional right of the litigant of access to the court.
11. Once the decision was taken to file the claim with 154 claimants, then either the claimants should have produced evidence that they have duly authorized Cartwright to depose on their behalf, or each of them should have deposed affidavits showing that they do not have the financial resources to comply with an order for security for costs, and that such an order would in effect prevent them from continuing with their claims. They should have also, in my view, sworn to affidavits showing clear evidence of the condition and value of the chattels referred to above. The burden is on the claimants to prove, on a balance of probabilities, that an order for security for costs would stifle their claim and that it would not be just to make such an order. For the above reasons, I am not satisfied, on a balance of probabilities, that they have discharged this burden. From the evidence and the

above reasons, I am satisfied, having regard to all the circumstances of the case, that it is just to make an order for security of costs in this matter.

12. In addition to the requirement that the court must be satisfied that it is just to make the order, the court also has to be satisfied under Rule 24.3(a) that the claimants are ordinarily resident out of the jurisdiction of Belize. As pointed out by learned counsel for the defendants the claim form, statement of claim dated 7th April, 2011 and the amended statement of claim dated 6th May, 2011 state under the heading “Certificate of Truth” as follows: “The claimants are resident abroad in various states in the United States of America . . .” The second defendant has sworn to an affidavit dated 6th June, 2011 giving the addresses of 126 of the claimants in various states in the USA. Moreover, it was conceded by learned counsel for the claimants that they reside out of the jurisdiction. The burden is on the applicant/defendant to prove that the claimants are ordinarily resident out of the jurisdiction. The phrase “ordinarily resident” should perhaps be interpreted in accordance with its ordinary and natural meaning. It seems to me that a person is ordinarily resident out of a country or jurisdiction, if he habitually and normally resides lawfully elsewhere by choice and for a settled or permanent purpose. I think the evidence clearly shows that the claimants are ordinarily resident out of Belize in the USA, except the claimants Tammi and Michael Coleman who are resident in Belize.

13. In relation to Rule 24.3(c) the claimants have failed to give their addresses in the claim form as required by the Rule. After the names of the claimants on the claim form, there appears the phrase “All of the United States of America,” which I do not think would amount to addresses of the claimants because an address of a claimant, not only for purposes of the Rule but generally, ought to be more specific so that other persons including parties to the claim, would have specific information for purposes of contact by mail in relation to the claim. I am satisfied that Rule 24.3(c) has not been complied with by the claimants.

14. The next question is the amount and nature of the security for costs under Rule 24.2(4) of the Rules. The amount of the security awarded is in the discretion of the court and the amount shall be such as the court thinks fit having regard to all the circumstances of the case. The claimants in the statement of claim ask for reliefs in the nature of orders and declarations, including a declaration that the claimants timeshare agreements and timeshare rights be recognized and enforced. The total value of all the claimants and others timeshare rights in the property, which they want to enforce, amounts to US\$17,913,000,50 according to appendix 1 of the amended statement of claim. Thomas Tillett by affidavit dated 28th September, 2011 also stated that the cumulative value of the claimants claim is US\$17,913,000.1.

15. The defendants request prescribed costs under Rule 64.5. The court has to decide the value of claim for the purpose of determining the

amount of the prescribed costs: Rule 64.5(2). Where a defendant applies for such costs, the value of the claim is the amount claimed by the claimant in the claim form: Rule 64.5(2)(b)(i). If the claim is not for a monetary sum, as is this claim, the value of the claim is to be treated as a claim for \$50,000, unless the court makes an order under Rule 64(6)(1)(a): Rule 64.5 (2)(b)(iii). As mentioned above, the defendants showed that the cumulative value of the timeshare rights in the property is US\$17,913,000.01. The claimants in the amended claim form have given a value of the claim as US\$17,913,000.50. They have not denied the type of costs applied for by the defendants, though the claimants have opposed the payment of security for costs. I therefore rule that the value of the claim as stated by the claimants, is US\$17,913,000.50. Using this value of the claim, the amount of security for costs, using the principles of prescribed costs, would be in the amount of BZ\$5,268,156.39 as shown in the fourth affidavit for second defendant.

16. The amount of security for costs is in the discretion of the court talking into consideration the facts and circumstances of the case. The court ought to consider that security for costs “ought not to be illusory or oppressive nor too little nor too much” per Lindley LJ in *Dominion Brewery Ltd., v. Foster 1897 77 L.T. 507*. The court ought also to take into account the possibility of the case collapsing at the trial, the expenses in defending the claim, and the likelihood that such costs could prevent or stifle the continuation of the claim: see *Procon Ltd. V. Provincial Building Ltd., 1984 1 W.L.R. 559 at p 565*. This court also takes into consideration that the amount of prescribed costs

applied for by each defendant is not to be paid by any one claimant, but is to be divided among the 154 claimants depending on the value of their respective timeshare rights in the property. Affidavits by Thomas Tillett and the second defendant exhibit a scale of prescribed costs for each of the 154 claimants, giving their individual names and the value of their respective timeshare rights and the corresponding costs. This value of the individual timeshares rights of each claimant is consistent with appendix 1 attached to the claimants' amended statement of claim. Using the value of the individual claimant timeshare rights, and applying the scale of prescribed costs in accordance with appendix B in Rule 64.5, the defendants have given in the scale the prescribed costs payable by each individual claimant. In exercising the discretion to determine the amount of security for costs the court should take into consideration any evidence of the claimants impecuniosity, but the onus is upon the claimants to put proper and sufficient evidence before the court to this effect and should make full frank disclosure: see *MV York Motors v. Edwards* 1982 1 WLR 444. In this matter the claimants have failed to discharge this onus.

17. Each defendant has applied for security for costs in the amount above. The court has a discretion to award an amount as the court thinks fit. The court has to be satisfied, having regard to all the circumstance of the case, that it is just to make an order for the amount of security. I do not think it is just, having regard to all the circumstances, to order each claimant in column 1 in the schedule to pay the amount of costs in column 2, to each defendant. I therefore rule that each claimant in

column 1 shall pay in Belizean dollars the security for costs in column 2, for that claimant and that that payment shall be the security for costs in respect of both defendants in equal shares.

18. The court makes the following orders:

- (1) Each claimant mentioned in column 1 of the schedule below shall pay into court not later than 16th April, 2012 the security for costs mentioned for that claimant in column 2 of the said schedule, and that payment shall be the security for costs in respect of both defendants in equal shares.
- (2) The claim in this matter is stayed until 17th April, 2012.
- (3) Where any claimant fails to pay the security for costs in accordance with (1) above the claim with respect to that claimant is struck out as from 17th April, 2012.
- (4) This matter is fixed for Report on 20th April, 2012 at 9:00 a.m.

SCHEDULE

P.T.O.

Oswell Legall
JUDGE OF THE SUPREME COURT
21st December, 2012