

IN THE SUPREME COURT OF BELIZE A.D. 2020

CLAIM NO. 119 of 2020

BETWEEN

(BOC-708 INC.

1st CLAIMANT

(BOC-104 INC.

2nd CLAIMANT

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(AND

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(PROPRIETORS OF STRATA PLAN 54

1st DEFENDANT

(PROPRIETORS OF STRATA PLAN 42

2nd DEFENDANT

(TARIQUE CHOUDHARY

3rd DEFENDANT

(PAUL COPE

4th DEFENDANT

(DEBBIE NICHOLS

5th DEFENDANT

(MARK ELPHICKE

6th DEFENDANT

(SIMON RICHARDS

7th DEFENDANT

(SUE KAMARA

8th DEFENDANT

(MARIUS VISAMANTAS

9th DEFENDANT

(LAURENCE HAGAN

10th DEFENDANT

(NICK ENGLISH

11th DEFENDANT

BEFORE the Honourable Madam Justice Sonya Young

Hearing and Decision:

17th December, 2020

Appearances:

Mr. Andrew Marshalleck SC with Mr. Estevan Perera and Ms. Payal Ghanwani,
Counsel for Claimants/ Respondents.

Ms. Priscilla Banner, Counsel for Defendants/ Applicants.

KEYWORDS: Property Law - Strata - Civil Procedure - Strike Out Claim - Abuse of Process _ Discloses no Reasonable Grounds - Declarations are Advisory Only - No Fiduciary Duty - No Lis Pendens - Amendment Necessary

JUDGMENT

1. This is an application to strike out a Claim and in the alternative, for the extension of time in which to file a Defence. Briefly, the Claim reveals that the 1st Claimant is a proprietor in Strata plan number 54 and therefore has a share in the 1st Defendant. The 2nd Claimant is a proprietor in Strata plan number 42 and has a share in the 2nd Defendant. The remaining Defendants are present and/or past members of either the 1st or 2nd Defendant's Executive Committee. Both Strata plans include residences and common property which house a pool, restaurant, bar and dive shop.

2. The Claimants plead that since October 2018 the Defendants, under the name of the Umaya Resort and Adventures, have been continuously conducting a resort business selling accommodations and the like, using the condominiums and facilities contained within the mentioned Strata plans. They have also been earning revenue and incurring debt (of unknown proportion) separate and distinct from their members as a limited liability company could do. All this was being done with neither the consent or knowledge of all members of the 1st and 2nd Defendants.

3. The Claimants then seek declarations that as strata corporations, existing by virtue of the Strata Titles Registration Act, the 1st and 2nd Defendants do not enjoy limited liability like a company incorporated under the Companies Act so the members are liable for all debts properly incurred; they do not have

legal capacity to conduct business, promote a company, raise capital by loans or investment for and on their own behalf, or sell any of the common property, consequently any and all such acts undertaken are ultra vires and void and the executive committee of the Defendants who engage in ultra vires acts are personally liable for debts incurred in pursuing such activities.

4. They also ask for an injunction to restrain the Defendants from engaging in these ultra vires acts. Additionally, they seek declarations that they are entitled to certain requested information, that the 3rd through 11th Defendants are in breach of their fiduciary duty in not providing said information and should, therefore, be ordered to provide same. Finally, they seek costs.
5. The Defendants make their application on the grounds that 1. The first three (3) declarations sought consist of questions of pure law seeking advisory opinions and granting such declarations would serve no useful purpose. 2. The Claimants are not entitled to the information requested and are owed no fiduciary duty. 3. There is no lis between the Claimants and the Defendants in this Claim. 4. The Claim is an abuse of process and discloses no reasonable grounds for its existence.
6. The Claimants strenuously object to the application stating that real issues do exist between the parties so that the Claim is not an abuse of process. The declaratory relief sought is of practical importance to members of the 1st and 2nd Defendants and the Court has a recognised discretion it could exercise.
7. Ground 1. Abuse of Process: Advisory Opinions or Opinions on the Interpretation of the Strata Act. There is no doubt that the Court cannot grant

declaratory relief in respect of abstract or hypothetical questions. Counsel for the Claimants submits that the first *“three declarations seek to determine issues between the parties and are the building blocks for the grant of the permanent injunction preventing the Defendants from continuing to engage in the activities complained of to the detriment of the Claimants and for placing liability for past wrongful action where they rest as a matter of law. As such they are not advisory but are manifestly very useful for the parties.”* I agree with Counsel for the Applicants that the declarations sought in 1 and 2 (i, ii, iii, iv) are in fact in the nature of advisory opinion or declarations on legal issues. They really make no finding against the said Defendants whatsoever and the Court cannot grant the declaratory relief as prayed.

8. If, however, the Court is able to find that the Defendants have engaged and continue to engage in specific ultra vires acts, it may then make a declaration to that effect as well as a declaration as to liability (personal or otherwise) and consequently grant an injunction if it finds this to be necessary. The issue as to whether or not ultra vires acts have been committed is one which can only be determined through consideration of the evidence and findings of fact. Those findings may include the specific nature of the 1st and 2nd Defendant and the extent of the powers conferred on the Executive Committee in relation to any actions they may have been proven to have taken. But there is no need to make declarations to this effect since it will serve no useful purpose.
9. The Court is also not able to make a pure law declaration as sought in declaration 3. The judgment must be confined to the actual dispute between the parties and a consideration of the particular facts.

10. The Claimants find some significance in the Defendants' failure to deny the conduct of the resort business, promoting a company, raising capital or selling land which forms part of the common property. For this Court, such a denial is better suited for a Defence. In any event in a striking out application it is assumed that the facts alleged by the Respondent are true.

Permanent Injunction:

11. The Applicant submits that the injunction is stated to be claimed against all Defendants while in fact it ought really only to be made against the 1st and 2nd. This calls for an amendment and nothing more.

Information Request:

12. In the first place, there is to my mind a problem with the pleaded case. It relies on a document which, although attached to the Claim Form, forms no part of it. Its attachment indicates only that the Claimant considers it necessary to his case. Hence **Rule 8.7(3)** speaks to "identify or annex" any such document. The Claimants' allegation that the disclosure of certain requested information is part of a fiduciary duty owed them but which was breached by the 3rd through 11th Defendants needs specificity. **Rule 8.7 (1)** mandates a statement of all the facts on which the Claimant relies. The actual contents of the letter have therefore only been referred to and not pleaded.
13. The Court also agrees with Counsel for the Defendants that the specific fiduciary duty which is claimed to have been breached has not even been

particularized. Paragraph 33 of the Claimants' submission makes this particular Claim much clearer than the Claim itself.

14. I remind Counsel on both sides that a strike out application is not a mini trial. Whether the executive committee members owe any fiduciary obligations to the Claimants is a matter better suited for trial particularly since it appears that it may be one of some novelty in Belize. Be that as it may, the Defendants must know quite clearly what allegations they must meet.

Reasonable grounds for bringing the Claim:

15. Striking out is draconian and must be done in only the most plain and obvious of cases. This is not one of those cases. This Court believes that there is an actual dispute between the parties which will have direct and significant impact on the Claimants who as proprietors and members are generally exposed to liability for the actions of the Defendants. They ought to know what the legal consequences would be and to injunct any continuation of any illegal behaviour proven. The Court agrees with Counsel for the Claimant that this is certainly possible prior to the liabilities being called upon. The Court also agrees with Counsel for the Claimant that this Claim is a developing area of the law in Belize so there is even more reluctance to strike out.

Determination:

16. While this Court can find no reason to bar the Claimants from its doors at this time, the claim begs amendment. The Court is prepared to grant the Claimants one month from today's date in which to amend, file and serve.

Time will then run in accordance with the Rules. Costs to the Applicants in the sum of \$5,000.00.as they have seen only partial success.

SONYA YOUNG
SUPREME COURT JUDGE