IN THE HIGH COURT OF BELIZE, A.D. 2023

CLAIM No. 433 of 2021

BETWEEN

TARPON COVE ESTATE OWNERS ASSOCIATION LIMITED	**CLAIMANT**
AND	
LATAYNA SCOTT ALDANA	**DEFENDANT**

DECISION OF THE HONOURABLE MADAM JUSTICE PATRICIA FARNESE

HEARING DATE:

December 12, 2022

APPEARANCES:

Mrs. Kia Marie Diaz-Tillett, Counsel for the Claimant

Mrs. Robertha Magnus-Usher, Counsel for the Defendant

DECISION ON APPLICATION TO STRIKE OUT THE CLAIM

Introduction:

[1] Tarpon Cove Estate Owners Association Limited (Tarpon Cove HOA) has initiated a Claim seeking declarations that they are successors in title to restrictive covenants that are purported to be held by DP Developments Company Limited (DP Development). As successors, Tarpon Cove HOA claim that they are entitled to collect Home Owners Association (HOA) fees

from Ms. Aldana as required by the restrictive covenants. Ms. Aldana owns two properties within the Tarpon Cove Development. Tarpon Cove HOA is seeking HOA fees from February 2013 to the present.

[2] Ms. Aldana owns two parcels (the Properties) in the Tarpon Cove Development. The Land Registrar Report lists that each parcel is subject to a restrictive covenant that predates the issuance of the Land Certificates to Ms. Aldana. Titles to the Properties, however, were transferred to Ms. Aldana in 2010. When Ms. Aldana transferred the Properties, she agreed to be bound by the terms of that restrictive covenant, which include agreements to pay various maintenance assessments to DP Development.

[3] Presuming this agreement is a valid restrictive covenant, the beneficiary of the restrictive covenant, known in law as the dominant tenement, is DP Development. DP Development is the corporate entity that developed and sold the parcels that form Tarpon Cove. In 2012, after a sufficient number of parcels in the development had been purchased, DP Development transferred two parcels that contain the common areas within the Tarpon Cove Development to the Tarpon Cove HOA. Tarpon Cove HOA asserts that they "inherited" the benefits of the restrictive covenant with the 2013 transfer.

[4] Ms. Aldana relies on *CPR Rule 8.1(5) (c)* and *(d)* in her Application to Strike out the Claim and argues that Tarpon Cove HOA was required to initiate the proceedings as a Fixed Date Claim and not an originating summons. *CPR Rule 8.1(5) (c)* and *(d)* provides:

> (5) Form 2 (fixed a claim form) must be use –
>
> ...
>
> (c) whenever its use is required by a Rule or practice direction; and
>
> (d) where by any enactment proceedings are required to be commenced by originating summons or motion.

[5] Relying on the old Civil Procedure Rules, she argues that the essence of the claim is the proper interpretation of the agreement purporting to create a restrictive covenant. She relies on

commentary about the nature of originating summons to argue that the matter should proceed by Fixed Date Claim. She argues that the Fixed Date Claim were introduced to replace originating summons and, therefore, matters that would have been commenced as originating summons must now be brought as Fixed Date Claims. The authorities she provides to support this argument have little persuasive value as they predate the enactment of the current CPR rules.

[6] Even if I were to accept that Fixed Date Claims were intended to act like originating summons as Ms. Aldana asserts, the Court is bound by the current language in the CPR. *Rule 8.1(4)* specifies that claims must be initiated using Form 1 unless *Rule 8.1(5)* applies. While *Rule 8.1(5) (c)* speaks to commencing by way of Fixed Date Claim whenever required by a "Rule," the old Civil Procedure Rules were replaced by the current CPR. The old rules are largely irrelevant to determining how to commence a claim. *Rule 8.1(5)(d)* requires a Fixed Date Claim Form to be used if an "enactment" requires proceedings be commenced by originating summons or motion. Only legislation and regulations contain "enactments." I have not been provided with any legislative or regulatory provision that requires disputes in contract or property rights to be commenced by originating summons or motion.

[7] Contrary to Ms. Aldana's assertions, Tarpon Cove HOA has not acted improperly and are not abusing the process by commencing as they have. If anything, Ms. Aldana's Application verges on being frivolous and vexatious as the Application has no basis in law. In addition, the submissions made on her behalf improperly raised matters not set out in the Application, including matters related to a withdrawn Application for Default Judgment and the Court's orders related to mediation. The overuse of the Application to Strike Out as a litigation strategy in this jurisdiction consumes too many Court resources. The Court has repeatedly given the direction that the Court's power to strike out a claim is to be used sparingly and only in the clearest of cases. Counsel, as Officers of the Court, have a role to play in ensuring that matters are dealt with expeditiously by not filing applications with little prospect of success.

[8] The Application to Strike Out is dismissed. Tarpon Cove HOA did not err by initiating the claim as they have. Costs of $1,500.00 are awarded to be paid by Ms. Aldana to the Tarpon Cove HOA.

[9] Before concluding, I wish to remind the Parties that a restrictive covenant is a property interest. If the disputed agreement is found to be a valid restrictive covenant, the rules of property and not contract govern.

Dated February 10, 2023

Patricia Farnese
Justice of the Supreme Court of Belize