IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ST. CHRISTOPHER AND NEVIS

NEVIS CIRCUIT

CIVIL CLAIM NO. NEVHCV2012/0027

BETWEEN:

JOHN KORESKO **CLAIMANTS**

AND

NELSON SPRING HOME OWNERS ASSOCIATION
NELSON SPRING HOME OWNERS ASSOCIATION COMPANY LIMITED
EUGENE CRANFORD
BEACH FROMT CONDOMINIUM HOLDINGS LIMITED **DEFENDANTS**

Appearances:

Mr. MacClure Taylor for the claimant

Ms. Kurlyn Merchant and Mrs. Lenora Walwyn for 1st 2nd and 3rd defendants

Mr. Vincent Byron for the 4th defendant

2012 March 29

JUDGMENT

[1] **REDHEAD J. (Ag)** On 7th March 2012 the applicant filed a claim seeking against the respondents the following:

(i) A declaration that the first Annual Meeting of certain unit owners of Nelson Spring Condominium held on 13 January 2009, and actions taken in connection therewith, were void and of no legal effect.

(ii) A declaration that the appointment of the Board of Directors of the first defendant at a meeting held on 1st March 2012 and any action taken in connection therewith were null, void and of no effect.

(iii) Damages for breach of agreement of purchase and sale between the claimant and the defendants dated 9th June 2008. Specifically breach of clause 29 0of the Agreement.

(iv) Specific performance of clause 24 of the said Agreement.

(v) An injunction restraining [the] defendants or their affiliates and employees from trespassing on the units and common elements of Nelson Spring Condominium.

(vi) An injunction to eject the trespassers who are illegally in use of the property which was designated "common property" in the Declaration of Condominium.

(vii) An order declaring void modifications to the Declaration of Condominium; including without limitation, changes to the common property made after the initiation sales of the condominium units.

(viii) An order declaring void any agreement with respect to the Yachtsman Grille and any person, entity or venture associated with its proprietor Greg Slagon ; and an injunction of such persons, entity or ventures from continuing their uses.

(ix) An order for an accounting with respect to any uses of the common property by Yachtsman Grille, or any other person, entity or venture and an accounting of all amounts received or disbursed on account of persons purporting to act in the role of fiduciaries of the statutory condominium association.

(x) An injunction restraining the defendants or their servants from retaining the units owned by the claimant to with units A,B,C and D in Block 5 and units A and B in Block 6 or from

(xi) An order vesting the claimant with the authority of the Successor to the Declarant, with authority to act as an initial sole Director and exclusive authority with the power of a Receiver to conduct or wind up the affairs of the Statutory Condominium Corporation.

(xii) An injunction restraining defendants from taking any action with respect to the governance of the Nelson Spring Condominium and Homeowners Association until the conclusion of the matters at Bar, alternatively as a matter of equity and public policy, ordering the defendants jointly and severally to forthwith return to the claimant the sum of $3,042,000.00 plus interest, cost of suit and expenses of litigation.

[2] The applicant filed an affidavit in support of his application. In his affidavit the applicant swore that on 2nd April 2007, he entered into an agreement with the fourth respondent to purchase the Unit A of Block 3 of Nelsons Spring Condominium for a price of US$605,000.00. In association thereto, the parties also signed an individualized Declaration of Covenants, Conditions and Restrictions that also excepted only two lots of land.

[3] By Agreement of purchase and sale dated 9th June 2008 between the Developer and himself, it was agreed to the purchase of an additional 6 condominium units namely units 5A, 5B, 5C, 5D, 6A and 6B at a price of US$600,000.00 per unit.

[4] The Applicant contends that pursuant to the said agreement, Article 23 of the Condominium Act, and Article XII and XIII of the Declaration of Condominium, his share of the common property and voting interests would be based on relative shares of 3 units of 3 bedrooms each (Unit 3A and Block 6), and 4 units of 2 bedrooms (Block 5) to with 5.357 per cent x 3 = 16.071 and 3.571 percent x 4 = 14.284 equal total ownership and voting percentage 30.355.

[5] The applicant in his affidavit swore that as a material inducement he entered into an agreement and the Developer agreed to name him as the first chairman of the

Board of the Homeowners Association, the corporation that by law is formed to oversee the management of the condominium and its common elements.

[6] At the time of the Agreement there was no board in place, so that on entering [into] the Agreement he was of the opinion that he would be the founding Director of the Board and was in Clause no. 29 of the contract [which] provides :-

> "Upon execution of this Agreement, Vendor shall appoint Purchasers as Chairman of the Board of the Association, and Vendor shall take such other measures required by the Declaration and the Association to turn over control of the condominium to unit owners."

[7] The applicant swore that as a further material inducement and consideration for him to enter into the Agreement, the third respondent agreed to sell him lots A2 and A3 on the Fern Hill Development, Nevis, a project developed by the fourth respondent, and that he would have the authority to act for the Association until further actions were taken by him to fulfill other requirements of the Condominium Act, because the defendants had also agreed to turn over control of the condominium upon execution of the agreement.

[8] The claimant swore in his affidavit that he has no adequate remedy in law for having been deprived of his fairly negotiated right to direct the affairs of the condominium as the first appointed initial and sole Director and Chairman and Successor to the Declarant.

[9] The second and third respondents expressly, impliedly represented to other legal or equitable owners of units that such Annual General Meeting was a legitimate exercise of powers under the Condominium Act, when it is not and cannot be because the pre-existing covenants of the fourth respondent (Declarant of the Condominium) and the applicant.

[10] The applicant in his affidavit swore that the conduct of Annual General Meeting and the consequential election of Directors will be in contravention of and in breach of the contractual arrangement that the applicant has with the Declarant of the Condominium Project, the fourth respondent.

[11] The second respondent is not the Association of Homeowners contemplated by the Condominium Act, but rather is a sham and fraud on the respondent and others.

[12] On information and belief, the first, second and third respondents do not have assets in the Federation sufficient to satisfy a judgment for money equivalent to the millions of dollars the applicant has at stake in this matter.

[13] He, having been denied his right in the Homeowners Association and subjected to trespass against his 30.355 percent interest in the common property of Nelson spring Condominium by actions of the respondents, suffer continuing and substantial irreparable harm.

[14] The fourth respondent having sold all units in the Nelson Spring Condominium, and having obtained amounts in excess of any sum to which they are entitled, suffer no detriment from the status quo of an injunction.

[15] The first respondent does not appear to be operating by virtue of the actions of the second and third respondents and therefore cannot suffer any detriment from the injunction requested herein.

[16] At various times after the sales of the units, the fourth respondent has caused to be filed in the public records of Nevis various "amendments" to the Declaration of Condominium, to [with]

(a) After the contract of sale of Unit 3A and payment received, an area around the pool area, adjacent to the building known as Block 8, was eliminated from common property.

(b) After the contract of sale of Unit 3B which was prior to Unit 3A, certain other properties was removed from the definition of common property or removed from the condominium altogether and such modification is the subject of another action pending in this Honourable Court.

[17] Mr. Koresko swore that on information and belief, the fourth respondent or others, including the former owner of a unit in Block 8, permitted Greg Slagon and others to come unto common property around the pool and adjacent to Block 8 described above, and operate a commercial venture known as Yachtsman Grille, and engage in rentals of Polaris vehicles and watercrafts on common property, and such unauthorized and illegal use has continued unabated for many months.

[18] Neither the Statutory Condominium Corporation, nor any legal or beneficial owner of any unit (other than persons who have been in league with the fourth respondent) has received compensation for the modifications to the Condominium Declaration, the unauthorized uses or any other gains, profits, or advantages which the respondents or others have obtained for themselves as a result of their unauthorized activities.

[19] On information and belief, the failure or unwillingness of the respondents to prevent both modification of the Declaration, to prevent the numerous and continuing trespasses on common properties and to prevent interruption of essential services, demonstrated the refusal of the respondents to act consistently with their fiduciary duties and moral responsibilities.

[20] As further evidence of the breakdown of governance, on information and belief, the following persons have resigned from any purported Board of Directors to have been formed in violation of his contracts. Lady Joy Bourne, Mr. Mark Williams, Mr.

Justin Dickie, Dr. Adrian Turner; and such persons have left Mr. Cranford and his agent Jan Grell-Hull in positions of illegitimate authority.

[21] Finally, the applicant alleges that the failures and actions of the respondents set forth in this application illustrate the complete breakdown of the ability of the statutory condominium association to secure orderly governance of the property consistent with the intentions of the Condominium Act and the agreements of sale executed by the applicant and other unit owners.

[22] The above is the evidence I have distilled from the lengthy affidavit evidence of the applicant in support of his application to restrain the respondents from the governance of the Nelson Spring Condominium. The gravement of the applicant's complaint which forms the basis of his application is that in 2008 he and the fourth respondent entered into a contract whereby the applicant spent $3,600,000.00 by way of the purchase of Blocks 5 and 6 of the condominium units on the applicant's understanding that he will be appointed by the fourth defendant as the first Chairman of the Board of Directors of the Condominium Corporation.

[23] The applicant argues that in breach of the expressed provision, which was a condition precedent to the performance of the agreement on his behalf, the Developer failed or refused to appoint him as Director as provided for in the agreement.

[24] Learned counsel for the applicant in his skeleton arguments contended that as a material inducement for the applicant to enter enter into the Agreement with the Developer, it was agreed that the applicant will be named as the first Chairman of the Board of the Homeowners Association, the corporation that by law is formed to oversee the management of the condominium and its common elements.

[25] Mr. Taylor in his submissions contended that at the time of the Agreement there was no Board of Directors in place, so that on entering the Agreement the

applicant was of the opinion that he would be the sole director of the first board with all the authority connected therewith, and was in no way dissuaded from forming this belief and obtaining that understanding.

[26] I make the observation that the applicant has failed to prove any agreement between him and the Developer, the fourth named respondent. He has exhibited no agreement. In fact, learned counsel for the applicant has referred to Clause 29 of the contract of 2008 which provides inter alia:

> "Upon execution of this Agreement, Vendor shall appoint **Purchasers** as Chairman of the Board of the Association, and Vendor shall take such other measures required by the Declaration and the Association to turn over control of the condominium to unit owners."

[27] If the applicant is relying on that provision as support for his contention that there was an agreement between him and the Developer that he will be appointed as the first Chairman of the Association, I am of the considered view that that provision does not support the applicant's contention. The provision does not specifically refer to the applicant but rather uses the words "shall appoint purchasers".

[28] In the main, the submissions on behalf of the applicant have regurgitated the affidavit of the applicant. Mr. Taylor in his submissions contended that the conduct of the Annual General Meeting and the consequential election of the Directors are in contravention and in breach of the contractual arrangement and intentional disregard of the seminal documents of the condominium, that if allowed to stand will cause damage to the applicant that may not be recoverable in damages.

[29] The applicant's stake in the condominium project is larger than that of any other person by a factor of at least two, and his standing to bring this application as the duly appointed Successor to the Developer is beyond dispute.

[30] Finally, Learned Counsel for the Applicant contended that this matter involves the operation of common property and individual units designated in the Declaration of Condominium, and as such real estate is unique in the world, and any action of an illegitimate board of directors has a negative effect on it and the individual units of the condominium, there is no adequate remedy at law.

[31] The Applicant brought this action pursuant to sections 35 and 37 of the Condominium Act[1] (the Act). S.35 comes under the heading **TERMINATION BY ORDER OF THE HIGH COURT.**

S.35(1) "A Corporation, any owner or any person having an incumbrance against a unit and common interest may apply to the High Court for an order terminating the government of the property under the provision of this Act."

S.37(1) "Where a duty imposed by this Act, the declaration or the bye-laws is not performed, the corporation, any owner or any person having an incumbrance against a unit and common interest may apply to the High Court for an order directing the performance of the duty."

S.37(2) "The High Court may, by order, direct performance of the duty and may include in the order any provisions that the court considers appropriate in the circumstances."

S.37(3) "The lessee of a unit shall be subject to the duties imposed by this Act, the declaration and the bye-laws, on an owner except those duties respecting common expenses, and this section shall apply in the same manner as to the owner, and where the lessee is in contravention of an order under this section the court may terminate the lease."

[1] **St. Christopher and Nevis Condominium Act Cap 10.03**

[32] Ms. Merchant in her skeleton arguments submitted that S.35 does not permit the granting of the relief which the applicant is seeking i.e. for the respondents to be restrained from conducting any action with respect to the governance of the corporation. The learned counsel contended that if this section is applicable the entire corporation will cease and as such there can be no appointment of any other person to conduct its affairs. Ms. Merchant on behalf of the first, second and third respondents submitted that the applicant has no standing to apply to the court for the orders sought.

[33] Section 13 (1) of the Act states:

> "The registration of the Declaration and Description shall create a Corporation without share capital whose members are the owners from time to time of the condominium units."

[34] Ms. Merchant argued that to be a member of the corporation the individual must be an owner of a condominium unit. This argument, to my mind, is so obvious that it does not need to be stated.

[35] Learned counsel Ms. Merchant referred to S.2(1) of the Act which describes "owner" as the owner of a freehold estate or estates in a unit and common interest, but does not include a mortgagee unless in possession.

[36] Section 4(1) of this Act provides:

> "Only land under the operation of the title by Registration Act may be governed by the provisions of this Act and where the land and the interest appurtenant to the land description are not entirely under the title by Registration Act the description shall not be registered."
>
> 4(2) "Upon the registration of a declaration and description the land and the interests appurtenant to the land described in the description shall be governed by this Act."

4(3) "Upon the provisions of subsection (2) of this section being complied with there shall be endorsed on each certificate of title that relate to a condominium unit and a condominium property respectively, a statement that the provisions of the Act shall apply to the land to which each of the certificates relates."

[37] Section 8(1) of the Act states:

"Units and common interests shall, for the purposes, including the purposes of property tax, constitute real property and may be inherited or devised by will and subject to the provisions of this Act, the declaration and bye laws, each owner shall be entitled to exclusive ownership and use of his or her unit.

8(2) "A title to a unit comprised in a condominium property shall consist of a certificate of title, which shall be in such form as may be prescribed by regulations."

[38] Ms. Merchant submitted that when read in its entirety, the Act seems to suggest that the reference to owner in the Act, in fact refers to the owner holding a registered title which by section 4(3) ought to be with a statement that the provision of the Act applies to the said land.

[39] Having regard to the clear and unambiguous provisions referred to above, there cannot, in my view, be any serious challenge to this submission. In fact, in my view, it was in the contemplation of the Vendor that the applicant should have obtained a Certificate of Title to the unit but the applicant refused or neglected to obtain such a certificate.

[40] In the Beach Front Condominium Holding Limited - Agreement of Purchase and Sale Nelson Spring Condominium paragraph 4 of the Agreement states as follows:

"Closing shall take place at the Chambers of Theodore L. Hobson and Associates Springate South, Government Road, Charlestown Nevis. Upon the closing of title and the receipt by the Vendor of the final instalment by wire transfer, bank draft or certified cheque, payable to the Vendor shall deliver to the purchaser a memorandum of transfer to be executed by the Vendor in registrable form to enable the purchasers to obtain a memorandum Certificate of Title to the unit..."

[41] Mr. Taylor argued that an agreement for sale is an equitable right and therefore he is asking the court to exercise its equitable jurisdiction.

[42] Ms. Merchant in her skeleton submissions argued that the applicant is asking the court to invoke its equitable jurisdiction by finding that the applicant has an equitable interest in condominium property, the applicant must be prepared to not only now do what is right and fair but also show that his past records in relation to this issue are clear. In short, if the applicant has not come to equity with clean hands he ought to be precluded from any equitable interest **Tinsley v Milligan**[2].

[43] Learned counsel referred to paragraph 12 of Jeanette Grell-Hull's affidavit:

"Despite the claimant's claim that he is the owner of several units, the claimant has refused to make any payments to the Association for contributions towards the common expenses and contributions as mandated in the Declaration by all unit owners."

[44] There has been no affidavit evidence to contradict the evidence of Ms. Jeanette Grell-Hull and therefore I consider this evidence uncontroverted. I shall therefore refuse to exercise any equitable jurisdiction in favour of the applicant.

[45] I have decided that the applicant has no locus standi in that he is not a registered owner of any unit, and that I shall not exercise the equitable jurisdiction of the

[2] **[1996] All ER 65**

court. These are matters sufficient to dispose of the application. However, just in case I am wrong on these issues, I go on to consider the other issues.

[46] Ms. Merchant in her skeleton submissions argued that the first, second and third respondents are not parties to the alleged contract between the fourth respondent and the applicant. In support of her argument Ms. Merchant referred to paragraphs 9 and 10 of the applicant's affidavit. He swore:

> Paragraph 9 "On 2nd April 2007 I entered into an agreement with the fourth respondent to purchase from it the Unit A of Block 3 of Nelson Spring Condominium for a price of US$605,000.00. In association thereto the parties also signed an individualized Declaration of Covenants Conditions Conditions (Sic) and Restrictions that also excepted two lots."
>
> Paragraph 10 "By an agreement of purchase and sale dated 9th June 2008 between the Developer and myself it was agreed to purchase an additional 6 condominium units namely 5A 5 5C 5D 6A and 6B at a price of US$600,000.00 per unit."
>
> Paragraph 13 "As a material inducement I entered into an agreement and the Developer agreed to name me as the first Chairman of the Board of Homeowners Association, the corporation that by law is formed to oversee the management of the condominium and its common elements."

[47] There is no evidence that the first, second and third respondents in any way are contractually linked or obligated in any way to the applicant.

[48] Learned counsel Ms. Merchant referred to **Chitty on Contracts**[3]. Paragraph 18-003 states:

> "...the common law doctrine of Privity of Contracts means that a contract cannot (as a general rule) confer rights or obligations arising under it on any person except the parties to it."

[3] 29th Edition

[49] I agree with the submission of learned counsel that the first, second and third respondents are not parties to the agreement, and that the court cannot impose any obligations arising under the agreement.

[50] In support of his Application, the Applicant prayed in aid Clause 29 of the alleged contract.

> "Upon execution of this Agreement, Vendor shall appoint Purchasers as Chairman of the Board of the Association, and Vendor shall take such other measures required by the Declaration and the Association to turn over control of the condominium to unit owners."

[51] I have commented on this provision above. However, Ms. Merchant in her skeleton submissions argued that this provision conflicts with Section 13(1) of the Condominium Act which stipulates:

> "The registration of a declaration and description shall create a corporation without share capital whose members shall be the owners from time to time."

[52] Learned counsel, Ms. Merchant contended that the declaration creating the said association repeats this provision in Article 1 Section 1 and defines owners as referring to registered owners in Section 3 of said Article of the Declaration. Ms. Merchant submitted that the applicant cannot be a member of the Association if he does not satisfy the requirements of being an owner. She argued that a mere agreement to appoint the applicant as Chairman without satisfying the requirement that he is a unit member cannot suffice.

[53] Further, Learned Counsel argued that the Act makes no provision for a person who is not an owner to be a member of the Association. The alleged Agreement is contrary to the statute and therefore the agreement cannot be enforced. I agree. (See also Section 15). Ms. Merchant submitted that the applicant cannot apply to this honourable court for an injunction to restrain the directors of the corporation from conducting duties statutorily imposed.

[54] Section 15 of the Act mandates:

> "The affairs of the corporation shall be managed by a board of directors consisting of three persons or such greater number as the declaration or bye-laws may provide, elected by members of the corporation."

[55] Finally, Ms. Merchant argued that the applicant is seeking an injunction under Part 17 of the Rules[4]. Rule 17.4(2) provides as follows:

> "Unless the court otherwise directs, a party applying for an interim order under this rule must undertake to abide by any order as to damages caused by the granting or extension of the order."

[56] The undertaking to abide by any order as to damages, unless the court otherwise directs is, in my view, mandatory. Ms. Merchant contended that the applicant's application and affidavit have failed to state that the applicant will abide by such undertaking.

[57] The second relief which the applicant seeks is that the applicant be granted immediate authority as Successor to the Declarant consistent with the contract with the fourth respondent, with the authority to act or any person or temporary Receiver of the Statutory Condominium Corporation for the purpose of investigating, conducting and if necessary winding up its affairs.

[58] Ms. Merchant pointed out that S.22 of the Act deals with the issue of winding up but does not address the appointment of a receiver. The applicant has failed to point out which law he is coming under.

[59] I have ruled that the applicant is not entitled under the contract with the fourth respondent to the order he seeks. I need to consider the issue of winding up which becomes a moot point.

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[4] **Civil Procedure Rules 2000**

[60] In an affidavit filed by Mr. Deon Daniel, the Managing Director of the fourth respondent swore that that the fourth respondent is not concerned in the governance of the Nelson Spring Condominium Homeowners Association and therefore the first relief prayed for by the applicant is hypothetical and otiose. The fourth respondent is not a member of the Board of Directors of the Homeowners Association.

[61] Mr. Byron submitted that the relief prayed for in grounds 1 and 2 of the application is a final order and not an interim order against the fourth respondent. Mr. Byron also argued that the relief prayed for also seeks relief against a third party without notice to that third party. Mr. Byron contended that the relief sought by the applicant seeks to enjoin the Homeowners Association from doing what the statute permits it to do. He argued that the statute is very clear in this regard.

[62] Mr. Byron also argued that the applicant's application is for an injunction and at the same time for the appointment of a Receiver. That the application for an injunction cannot embrace an application to appoint a receiver. I agree.

[63] One of the main complaints of the applicant is the operation of the Yachtsman Grille on what the applicant terms common property. Mr. Byron in this regard pointed to Clauses 8 and 9 of the Agreement for sale. Clause 8 stipulates in part:

> "The common property of the condominium will ultimately be managed, operated and maintained by Nelson Spring Condominium Homeowners Association (the Association) for the benefit of all owners of units in accordance with and subject to the Declaration and the bye-laws of the Association."

[64] More importantly, Clause 9 states:

> "The Purchasers acknowledge that the portions of land not sold by the Vendor among others the exercise or fitness facilities, snack bar/restaurant and offices spaces are not common property, but that the purchasers do

have a right to their use and related facilities by way of a registered easement as set forth in the Declaration and contractually by way of this provision which shall survive conveyance."

[65] Clause 9 is quite clear in my opinion. The common property is exempt from the units and the owners of units only have a right to the use of snack bar/restaurant such as Yachtsman Grille. This, in my opinion, cannot be an illegal use of common property as alleged by the applicant.

[66] In light of the foregoing, the application of the applicant is hereby dismissed.

[67] Costs to the respondents on a Prescribed Costs basis.

A.J. Redhead

High Court Judge