IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 358 of 2013

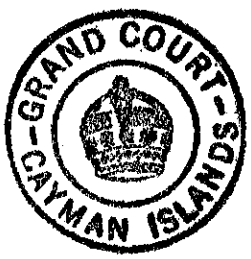
BETWEEN

SCOT FOITH et al.

Plaintiffs

And

The PROPRIETORS, STRATA PLAN 436 et al.



Defendants

Mr. K. Farrow, QC for the Plaintiffs

Mr. C. Young & Ms. C. Kish for the 1st to 3rd Defendants

Mr. N. Meeson, QC & Ms. H. Brooks for the 4th Defendant

Henderson, J.

April 9, 2014

JUDGMENT

1. When the plaintiffs purchased strata lots in The Residences at the Ritz Carlton they became subject to bye-laws (I follow the relatively uncommon spelling taken from the statute itself) and contractual terms restricting what would otherwise have been their

unfettered right to rent out their premises. In this action they seek to set aside those restrictions on the ground that the bye-laws violate section 21(4) of the *Strata Titles Registration Law (2005 Revision)* ("the Strata Law").

2. By consent, I have added the 4th Defendant as a party. A possible argument that the plaintiffs are estopped by their conduct (in signing the contracts) from seeking this relief now has been abandoned.

Facts

3. The plaintiffs are owners of strata lots in the North Tower, South Tower and Deckhouses at the Ritz Carlton; as a result, they are bound by the bye-laws of strata plans 436, 437 and 550 respectively. Each set of bye-laws contains provisions which are essentially identical (in clause 9 of the North and South Tower Bye-laws and in clause 8 of the Deckhouse Bye-laws) restricting rentals by owners. An owner wishing to rent out his unit must do so through the "Manager" "... on such terms as determined by the Manager or the Executive Committee from time to time acting reasonably ...". The Manager is entitled to a management fee on rentals which has been described in argument as "up to 30% of the gross rent". The unit owner must also pay a security deposit to the Manager (or strata corporation) to cover possible damage by a tenant and becomes liable to the corporation if the deposit proves insufficient. The security

deposit bears no interest; 10% of the deposit is taken as an administration fee prior to its return.

4. The standard-form contract of purchase and sale for units in the North and South Towers contain restrictions (in clause 10 of the Purchase Schedule and clause 2 of the Covenants Schedule) on renting which are, for present purposes, to the same effect. Purchasers of units in the Deckhouses are not bound by any such contractual obligation.

5. The plaintiffs say that the bye-law and contractual provisions are in violation of the Strata Law, which provides:

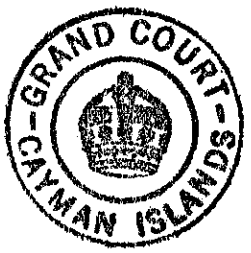
> *PART VI – Management And Administration*
>
> *21(1) Subject to this Law, the control, management, administration, use and enjoyment of the strata lots and the common property contained in every registered strata plan shall be regulated by bye-laws.*
>
> ...
>
> *(4) No bye-law shall operate to prohibit or restrict the devolution of strata lots or any dealing therewith or to destroy or modify any easement implied or created by this Law.* [underlining added]

Issues

6. The issues are:

    1) Are clause 9 (except clause 9.9) of the North and South Tower By-Laws and clause 8 (except clause 8.9) of the Deckhouses By-Laws invalid?

2) Are the plaintiffs bound by clause 10 of the Purchase Schedule and clause 2 of the Covenants Schedule in any event?



(1) Are the By-Law Provisions Invalid?

7. Counsel have advised that they are unaware of any judicial decision which construes section 21(4) of the Strata Law.

8. The prohibition contained in section 21 applies to three types of conveyance: a devolution, an easement, and "any dealing" with a strata lot. Those terms are not defined in the Strata Law. In the absence of definitions there, it is appropriate to refer to the *Registered Land Law (2004 Revision)* (the "RLL") for guidance as the two laws are intended to operate in harmony. Strata plans are registered under the RLL (see section 3 of the Strata Law) and there are a number of references to the RLL found in the provisions of the Strata Law. Section 3(2) of the Strata Law provides:

> *When a strata plan has been so registered, any strata lot included therein may devolve or be dealt with in the same manner and form as land under the operation of the* [RLL].

Section 3 of the RLL provides:

> *Except as otherwise provided in this Law, no other law and no practice or procedure relating to land shall apply to land registered under this Law so far as it is inconsistent with this Law.*

Thus, it is a reasonable inference that terms given a particular meaning in the RLL shall, in general, carry the same meaning in the Strata Law. The necessary close cooperation between the two laws and the paramountcy claimed by section 3 of the RLL compel this conclusion.

9. An easement is defined in section 2 of the RLL as

> *a right attached to a parcel of land which allows the proprietor of the parcel either to use the land of another in a particular manner or to restrict its use to a particular extent, but does not include a profit.*

Devolution is not defined in the RLL. The *Oxford Companion to Law*, 1980 defines devolution as

> *transmission of an interest in property from one person to another by operation of law, e.g. on death or bankruptcy.*

Obviously, a lease is neither an easement nor a devolution. Is it a "dealing" with a strata lot in the sense conveyed by section 21(4)?

10. The word "dealings" appears in the title to Part IV of the Strata Law ("Registration and Dealings") and in section 10(c)(ii) which contains a prohibition on "dealings with" the parcel to which the strata plan attaches immediately upon filing of the plan. The intent of this section is to prohibit all dealings, including leases. The expectation that a word will be accorded a uniform and consistent meaning throughout a given statute would suggest that section 21(4) does have application to leases.

11. The word "dealing" is defined in section 2 of the RLL as including a "disposition and transmission". A "transmission" is defined in the RLL as

> *The passing of land, a lease or a charge from one person to another by operation of law on death or insolvency or otherwise howsoever, and includes the compulsory acquisition of land under any written law.* (RLL, section 2)

Thus, devolution is equivalent to transmission, although the latter may also include compulsory acquisition by process of law. A "disposition" is

> *any act inter vivos by a proprietor whereby his rights in or over his land, lease or charge are affected, but does not include an agreement to transfer, lease or charge".* (RLL, section 2)

A lease is not a transmission but is it a disposition? Part V of the RLL, entitled "Dispositions", contains extensive provisions about leases in sections 44 to 63 inclusive. Part VIII of the RLL, "Restraints on Disposition", contains further provisions (in sections 124 to 131) applicable to leases. These two headings are what Bennion (in *Bennion On Statutory Interpretation*, 5th edition, at section 251) calls unamendable descriptive components of a statute. The view expressed occasionally in the past that they may not be used as aids to interpretation is erroneous: Bennion, *op. cit.*, section 255.

12. I conclude from these observations that the Legislative Assembly intended its use of the word "disposition" in the RLL to include leases. A "disposition" is also a "dealing" with land by virtue of section 2 of the RLL and, as a result, dealing with an interest in land includes leasing it as far as the RLL is concerned. The Strata Law uses the word in the same sense, as the Legislative Assembly intended.

13. The provision in section 21(4) of the Strata Law which prohibits the enactment of a bye-law restricting any dealing with a strata lot appears in PART VI which bears the title "Management and Administration". Section 21(1) of the Strata Law contemplates that the "control, management, administration, use and enjoyment" of a strata lot will be regulated through bye-laws. I accept that a restriction on leasing could be viewed as a component of a regulatory scheme for the control, use and enjoyment of the strata lot. On balance, though, I am satisfied that the textual analysis provided above dictates how the statute is to be construed: a bye-law may not prohibit or restrict a strata lot owner's right to rent or lease his unit. Consequently, clause 9 (except clause 9.9) of the North and South Tower By-Laws and clause 8 (except clause 8.9) of the Deckhouses By-Laws are invalid.

2) Are the Plaintiffs Bound by the Contract in Any Event?

14. The North and South Tower owners are bound by contractual provisions which mirror the bye-laws which have been set aside. There is nothing in the Strata Law itself which attempts to prohibit a party from contracting out of the restrictions in section 21(4). The plaintiffs say these contractual provisions are void for reasons of public policy as they represent an attempt to contract out of a statutory protection for purchasers of strata lots. The public policy principle is explained in *Kok Hoong v. Leong Cheong Kweng Mines,*

Ltd. [1964] 1 All ER 300 (PC), where the Privy Council said this in relation to a moneylending ordinance:

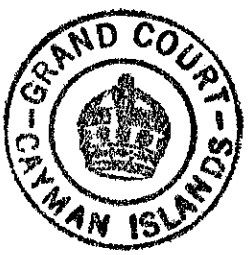
> *General social policy does from time to time require the denial of legal validity to certain transactions by certain persons. This may be for their own protection, as in the case of the infant or other category of person enjoying what is to some extent a protected status, or for the protection of others who may come to be engaged in dealings with them, as, for instance, the creditors of a bankrupt. In all such cases there is no room for the application of another general and familiar principle of the law that a man may, if he wishes, disclaim a statutory provision enacted for his benefit, for what is for a man's benefit and what is for his protection are not synonymous terms. Nor is it open to the court to give its sanction to departures from any law that reflects such a policy, even though the party concerned has himself behaved in such a way as would otherwise tie his hands. See Re Stapleford Colliery Co., Barrow's Case, per Bacon, V. C.*

15. Other examples have been cited. In *Lake View & Star, Ltd. v. Cominelli* [1937] 2 All ER 285 (PC), the lessees of a gold mine attempted to agree with their tributers in a manner which the court found to be in violation of a mining statute. The provision in question was plainly intended to protect the tributers by guaranteeing them a specified minimum share of the profit on the gold. The Privy Council held that the attempt to circumvent the legislation by agreement was contrary to public policy.

16. The decision in *Hoare v. Adam Smith (London), Ltd.* [1938] 4 All ER 283 (KB) involved a contract between a moneylender and a borrower that failed to state accurately the actual amount of the loan, in violation of legislation for the regulation of moneylending. The contract was found to be unenforceable as a result. The provision in question was a "plain disclosure" requirement designed to protect borrowers.

17. *British Eagle International Airlines Ltd. v. Compagnie Nationale Air France* [1975] 2 All ER 390 (HL) involved an insolvency in which the creditors had in effect agreed to a regime for the distribution of the liquidation estate that contravened the rule (for the payment of unsecured debts *pari passu*) mandated by the *Companies Act 1948*. The House of Lords held (with two of the five law lords dissenting) that the contractual arrangement was against public policy and could not be enforced.

18. If there is a common theme to these decisions (and I am not sure there is), it is to be found in the court's desire to protect the members of a vulnerable group – gold miners, borrowers, and liquidation creditors – from giving up important rights because of pressure or simple ignorance. Purchasers of strata lots are a different case. A strata lot *owner* is already protected from prohibitions and restrictions on his right to lease which might be imposed against his will by majority vote; section 21(4) does that. There is no compelling reason to extend the same protection to prospective purchasers. Such purchasers have complete freedom to agree to restrictions on leasing or to look elsewhere for a strata lot. There is no question of public interest which prevents a purchaser from agreeing on leasing restrictions even though the other owners could not impose such restrictions upon him by majority vote.



19. As a consequence, I find that clause 10 of the Purchase Schedule and clause 2 of the Covenants Schedule are valid and enforceable contractual provisions. The parties may speak to costs if they are unable to agree.

Henderson, J.

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