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24/10/2007

1 IN CHAMBERS  
2 IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 95 OF 2005

6 BETWEEN:

7 JAMES AND DIANNE KEIM

8 Plaintiffs

10 AND:

11 THE PROPRIETORS OF STRATA CORPORATION #275

12 Defendant

14 BEFORE: The Honourable Madam Justice Levers

16 Appearance:

17 Mr. Mac Imrie and Mr. Crispian Lynch of Maples and Calder for the

18 Plaintiffs

19 Mr. Hector Robinson of Mourant du Feu & Jeune for the Defendant

21 Date of hearing: 19<sup>th</sup> October 2007



24 JUDGMENT



26 Levers, J.

29 I have before me two applications by way of Summons. The first one has  
30 been dealt with by consent order and in that the Plaintiffs claimed that the  
31 Defendant should pay the costs of the proceedings, such costs to be taxed if  
32 not agreed; and that the Plaintiffs should have leave to discontinue these  
33 proceedings. Both parties have agreed and a consent order has been filed.

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The second Summons is the Defendant's and asks for the following relief:

- (1) The appointment of Russell Smith of Chris Johnson Associates Limited by Order of the Honourable Court dated 10<sup>th</sup> May 2006, as Administrator of Strata Corporation #275 be discharged;
- (2) The fees and expenses of the Administrator in the sum of US\$131,659.85 in respect of the appointment be approved by this Honourable Court;
- (3) There be such further directions or orders as this Honourable Court deems appropriate; and
- (4) There be no order as to Costs.

Mr. Imrie submits that the Plaintiffs would have agreed to the relief as framed in paragraphs 1 and 2. However, the Defendant has very recently amended its position and now seeks a substantial costs order against the Plaintiffs. The evidence in support of the Summons by the Defendant is the Administrator's Report.

1 Mr. Robinson on behalf of the Defendant has conceded that the details of the  
2 relief sought have been served on the Plaintiffs attorney by way of  
3 correspondence and that the Defendant relies on paragraph 3 of the  
4 Summons and Section 9 (6) of the Strata Titles Registration Law (2005  
5 Revision) for an order that the Plaintiffs pay the Administrator's  
6 remuneration and expenses, including the legal expenses incurred by the  
7 administrator consequent upon his appointment. The issue which therefore  
8 remains alive in this matter is:

9

10 (1) As to by whom and to what extent the  
11 Administrator's remuneration and expenses are  
12 payable; and

13 (2) The issue as to the costs of the Defendant's  
14 present application.  
15

16 Mr. Imrie however, takes another point and that is, he submits that I have no  
17 jurisdiction to award costs against the Plaintiffs under the Strata Titles  
18 Registration Law (2005 Revision). He submits that in the event that he is  
19 wrong on this, costs should not be awarded against his client as:

20

21 (a) There is no evidence in support of the Defendant's positions; and

- 1           (3)    A declaration that the formal demand notice dated 10  
2                    February 2005 from the Defendant to the Plaintiffs for the  
3                    sum of US\$4,488.36 is invalid.
  
- 4           (4)    An injunction restraining the Defendant from taking any  
5                    steps to enforce the said formal demand notice pursuant to  
6                    Article 6.1(c), 3.11(iv) or any other Article of the By-  
7                    Laws.
  
- 8           (5)    Declarations as to the interpretation, meaning and effects  
9                    of Article 2.1(0) of the By-Laws.
  
- 10          (6)    A declaration that the Defendant is in breach of Article 2.1  
11                   (0) of the By-Laws.
  
- 12          (7)    Declarations as to the interpretation, meaning and effects  
13                    of Articles 3.1, 3.2, 3.3, 3.4 and 14 of the By-Laws.
  
- 14          (8)    Declarations as to the duties and obligations owed to the  
15                    Plaintiffs by any Executive Committee appointed pursuant  
16                    to Article 14 of the By-Laws.
  
- 17          (9)    Such further or other relief, damages, orders, declarations  
18                    or injunctions as the Court deems fit and just.
  
- 19          (10)   Costs.

20

21           A Defence was filed on behalf of the Defendant and several interlocutory  
22           applications ensued. It would be fair to say that the Plaintiff was mostly  
23           successful in the various applications which resulted, of course, in the  
24           Consent Order for Costs of US\$50,000 filed today. The several  
25           concerns that the Plaintiffs had sought relief for, both in the Writ of

1 Summons and in the interlocutory applications were mainly to do with  
2 the contents of the Articles and also the behaviour of the Executive  
3 Committee. The Articles were in fact amended by the Court on 22nd  
4 December 2005.

5

6 Pursuant to an order of the Court on 11<sup>th</sup> October 2005, the Plaintiffs  
7 appointed Kroll (Cayman) Limited to inspect the accounts books and  
8 records of the Defendant. There was an extraordinary general meeting  
9 held on the 5<sup>th</sup> January 2006 to appoint a new Executive Committee. The  
10 Plaintiffs renewed their application for the appointment of an  
11 Administrator in March 2006, proposing that the duties of the  
12 Administrator would include:

- 13 (1) implementing the effect of the Order dated 22<sup>nd</sup>  
14 December 2005, clarifying the meaning and effect of the  
15 By-Laws, especially Article 14, and the duties of the  
16 members of the Executive Committee;
- 17 (2) holding a fair election for the appointment of a new  
18 executive committee;
- 19 (3) responding to and resolving the outstanding issues in this  
20 action which have been significantly reduced as a result  
21 of the rulings made to date; and
- 22 (4) responding to and resolving the issues raised in the letter  
23 written by Maples and Calder to Woodward Terry & Co

1                   dated 15<sup>th</sup> November 2005, which sets out the issues  
2                   raised following the inspections by Kroll.

3  
4                   It would appear on the facts before me that the Plaintiffs were still  
5                   concerned in March 2006 about implementing the effects of the order;  
6                   amending Article 14 and that those issues were still alive and unresolved.

7  
8                   For purposes of this application, the contents of Article 14 matters not,  
9                   save and except to say that it was still a live issue when the Plaintiffs  
10                  asked the Court to appoint the Administrator. Article 14 vested controls  
11                  in the developer and dealt with appointment of the Executive Committee.  
12                  Further hurricane assessments and insurance matters were also still alive  
13                  and the holding of “fair” elections was still of major concern to the  
14                  Plaintiffs. It would not be surprising to find that the holding of a “fair”  
15                  election would be imperative to the Plaintiffs as it would deal with his  
16                  entire future in his dwelling house.

1 Mr. Robinson has submitted that the Executive Committee that was in  
2 place endeavoured to accommodate the Plaintiffs' wishes. His  
3 submission as to this contained in paragraph 24 is as follows:

4 "Notwithstanding these proposals, the Plaintiffs  
5 pressed on with their application for the  
6 appointment of an administrator. At the hearing  
7 on 10<sup>th</sup> May 2006 the position was taken on behalf  
8 of the Defendant not to oppose the application if to  
9 do so would have meant a protracted hearing  
10 which would have resulted in significant additional  
11 legal costs. The application was based on a  
12 number of factual allegations the determination of  
13 which would have been difficult and would have  
14 taken significant time for resolution. When it  
15 became clear that the Plaintiffs were not prepared  
16 to withdraw the application, the Order was allowed  
17 to be made substantially unopposed."

18

19 On 10<sup>th</sup> May 2006, Mr. Russell Smith was duly appointed as Administrator  
20 on the terms set out in the Order of the Court. The Order of the Court  
21 appointed the Administrator giving him the following responsibilities to:

22

23 3.1 proceed to ensure the completion of the audited financial  
24 accounts as at 30 September 2005, and interim management  
25 accounts up to the date of his appointment;

26 3.2 take possession and control of the books, records and other  
27 documents pertaining to the affairs of the strata;

1           3.3 investigate and if thought fit resolve the issues raised in the letter  
2           written by Maples and Calder to Woodward Terry & company  
3           dated 15 November 2005;

4           3.4 monitor and supervise the activities of GBG pursuant to the  
5           management agreement between Ocean Pointe Villas and GBG;

6           3.5 proceed to convene an annual general meeting as soon as  
7           reasonably practicable, including a new election of executive  
8           committee members.

9

10   The preamble to the order says that upon hearing counsel for the Plaintiffs  
11   and counsel for the Defendant and upon reading the affidavits and the  
12   exhibits in the Court file having been read, the following order was being  
13   made. Having been appointed, the Administrator undertook his duties as an  
14   officer of the Court. Unfortunately, the learned Judge did not address the  
15   question of his fees. But when it came to costs, he made an order reserving  
16   the costs. The factual situation as outlined by both counsel is that the Judge  
17   gave a strong indication that the appointment was going to be made. They  
18   went outside and having discussed the matter, Mr. Robinson was not willing  
19   to consent to costs. Therefore, in order to resolve the matter quickly, the  
20   order was drawn up in the manner it was.

21

1 **The Defendant's Position**

2 The Defendant's position succinctly put, is this; that under the Strata Titles  
3 Registration Law (2007 Revision), the Court has jurisdiction to make an  
4 order for costs in its discretion and that that discretion is extremely wide.

5

6 Mr. Robinson submits on behalf of the Defendant that this appointment of an  
7 Administrator, although it is an appointment by a judge of an official of the  
8 Court, was not justified and that most of the grievances had already been  
9 addressed when he was appointed. That although Mr. Russell as  
10 Administrator supervised a new election and a new executive committee has  
11 been appointed and that committee after consultation with the owners have  
12 authorized the payment of Mr. Russell's fees, the Court still has jurisdiction  
13 to include Mr. Russell's fees in the order for costs. He further submits that  
14 these administration fees should be paid by the Plaintiffs. He concedes that  
15 Mr. Russell's expenses do not include legal fees, but says that that does not  
16 preclude the Court from exercising its discretion and punishing the Plaintiffs  
17 by ordering them to pay these fees, as the appointment of the Administrator  
18 was totally unnecessary and unjustified. He submits that he is not estopped  
19 because of the prior resolution of the Strata to pay the fees.

1

2 His position is that it is not fatal to his case that the Defendant did not take  
3 steps to strike out the action, but submitted to the jurisdiction instead. In his  
4 own words, he concedes that the application and appointment went more or  
5 less unopposed. He does stress, however, that it was because the judge's  
6 indications were so strong that the appointment was going to be made, that  
7 the Defendant decided not to fight it. The Defendant submits that there is no  
8 difference between costs and legal fees which could also include costs and  
9 Administrator's fees.

10

11 Finally, he submits that valiant efforts were made to settle and that the  
12 conduct of the parties will show that the Plaintiffs were not willing to settle.  
13 He says, although Article 14 deals with the relationship of the parties and the  
14 governance of the strata, the matter could have been resolved without the  
15 appointment of an Administrator. He urges the Court to hold that the  
16 appointment was not justified considering the extent of the state of affairs at  
17 Ocean Pointe Villas at the time of the appointment.

18

1 **The Plaintiffs' Position**

2 The Plaintiffs' position on the law is that the Court has no jurisdiction to  
3 hear this matter and that the Strata Titles Registration Law (2005 Revision)  
4 does not give the Court jurisdiction to hear this matter. But, that if that is  
5 wrong then the appointment was totally justified. The following points are  
6 made by Mr. Imrie on behalf of the Plaintiff:

7 (1) there is no evidence to support the Defendant's proposition that  
8 the Administrator's appointment was unjustified;

9 (2) that the Court cannot use the Administrator's report which was  
10 after the event to criticize the appointment at the time;

11 (3) that the Court appointed an officer of the Court and that it was  
12 not the Plaintiffs who appointed the officer. That the court felt  
13 justified in appointing an officer of the Court;

14 (4) that there were still substantial matters that had not been  
15 resolved and were of concern to the Plaintiffs;

16 (5) that even if the report is used as evidence, which it should not  
17 be, even if it is, the report supports the Plaintiffs' position that  
18 at that time Ocean Pointe Villas was in disarray and needed the  
19 appointment of an Administrator;

1 (6) that it was not the Plaintiffs alone that complained. That the  
2 Plaintiffs were supported both in Court and outside Court by  
3 several proprietors who had concerns;

4 (7) that the evidence revealed that the developer was paying  
5 personal expenses out of the Strata's money and was not  
6 repaying them immediately but only over a period of time  
7 which made for bad accounting practices. That it took even the  
8 Administrator one year to call an election; and

9 (8) that the report was 96 pages long and expressed several  
10 concerns.

11

12 Those are some of the most important points he makes on the question of  
13 the appointment being necessary and justified.

14

15 On the question of jurisdiction, of course he relies on the law and says  
16 that the Court cannot vary a mandatory requirement to pay the  
17 Administrator's costs (paragraphs 9(2) of the Strata Titles Registration  
18 Law (2005 Revision). He says that the Defendant is estopped from  
19 making this application because there is a special resolution to pay the  
20 administrative costs voted on by all the owners and no one objected to it

1 despite Mr. Robinson and the new Executive Committee being present  
2 and therefore they are estopped from making this application.

3

4 Generally, however, he draws the Court's attention to the fact that there  
5 is no evidence to support this application from any of the owners. There  
6 is no evidence that the owners know that this present application is going  
7 to be made. There is no evidence that any member of the Executive  
8 Committee wishes to make this application. The owners, he submits  
9 should be put on notice as they may be open to claims against them if the  
10 Court rules against the Plaintiff (as they may be joined). He urges the  
11 Court to say that it is simply not good enough to say that Mr. Robinson  
12 has been instructed especially in circumstances where the summons filed  
13 and open to inspection does not reflect the nature of the application being  
14 presently made. Finally, and equally importantly, he makes the point  
15 that the Administrator commends the Plaintiffs for their full cooperation.  
16 If there is an allegation of fraud or theft that has been made, it was not  
17 made by the Plaintiffs. The Administrator's report which I shall quote  
18 later in this judgment it is urged, is supportive of the Plaintiffs' claim and  
19 therefore the Plaintiffs should not have to pay for the delay and

1 hampering by other owners. Mr. Imrie draws my attention to the fact that  
2 the Administrator himself does not say that his appointment was  
3 unnecessary.

4

5 **The Law**

6 An award for costs is entirely at the discretion of the Court. In making it  
7 the Court is required to have regards to all the circumstances and in  
8 particular to the following matters:

- 9 (1) the extent to which the parties followed, any applicable  
10 precaution protocol;
- 11 (2) the extent to which it was reasonable for the parties to raise,  
12 pursue or contest each of the allegations or issues;
- 13 (3) the manner in which the parties pursued or defended the  
14 action, a particular allegation or issues;
- 15 (4) whether the successful party exaggerated the value of the  
16 claim
- 17 (5) whether a party was only partly successful; and
- 18 (6) any payment into Court or offer to settle.

19

20 Those are the principles that are to be applied in a normal litigation.

21 However, the costs of an Administrator are governed by the Strata Titles

1 Registration Law (2005 Revision). Mr. Robinson submits that as costs  
2 follow the event or the actions of the parties are such that costs should be  
3 awarded against them, the discretion is the Court's under the Law. Section 9  
4 of the Strata Titles Registration Law (2005 Revision) reads:

5

6 “(1) Every corporation or any person having an interest in a  
7 strata lot may apply to the court for appointment of an  
8 Administrator.

9 (2) The court may, in its discretion on cause shown, appoint an  
10 Administrator for an indefinite period or for a fixed period on  
11 such terms and conditions as to remuneration or otherwise as it  
12 thinks fit. The remuneration and expenses of the Administrator  
13 shall be an administrative expense within the meaning of the  
14 Law.

15 (3) The Administrator shall, to the exclusion of the corporation,  
16 have the duties and powers of the corporation or such of those  
17 duties and powers as the court shall order.

18 (4) The Administrator may delegate any of the powers vested in  
19 him under subsection (3).

20 (5) The court may, in its discretion on the application of the  
21 Administrator or any person referred to in subsection (1),  
22 remove or replace the Administrator.

23 (6) On any application made under this section, the court may  
24 make such order for the payment of costs as it thinks fit.”

25

1 For purposes of this application section 9 subsections (2) and (6) are the  
2 relevant ones. As will be seen from section 9 subsection (2), the  
3 remuneration and expenses of the Administrator are to be treated as an  
4 administrative expense within the meaning of this law. That is mandatory as  
5 the word “shall” is used. Unfortunately, the definition section nor does this  
6 law define what administrative expenses are. However, it must be clear that  
7 the administrative expenses are those that are incurred during the course of  
8 the Administrator conducting and overseeing the affairs of the corporation.  
9 The submission that has been made and which has caused the matter to be a  
10 live issue in this application is the meaning of subsection (2) read in  
11 conjunction with subsection (6) which reads:

12  
13 “On any application made under this section, the  
14 court may make such order for the payment of  
15 costs as it thinks fit.”

16  
17 It is being submitted that that section is so wide that the Court can exercise  
18 its discretion in varying the mandatory directive under section (2).

19

1 I must ask myself, what are the applications that can be made under section  
2 9. Application can be made under section 9(1), under section 9(4) and under  
3 section 9(5). It cannot be said that an application can be made under section  
4 9, subsection (2). That section vests the Court with the power to appoint an  
5 Administrator for a period of time on an application made under 9(1) and  
6 gives the Court a directive as to how the expenses of the Administrator's  
7 shall (mandatory) be handled.

8

9 I do not therefore find that under section 9(6) this would come within the  
10 words "on any application". I agree with Mr. Imrie that the words "on any  
11 application" must mean an application under this section and not the  
12 administrative expenses as well.

13

14 I must now look at section 24 of the Judicature Law which provides:

15 (1) Subject to the provisions of this or any other Law and to rules of  
16 court, the costs of and incidental to all civil proceedings in –

17 (a) the Court of Appeal; and

18 (b) the Grand Court,

19 Shall be in the discretion of the relevant court.

1 (2) Without prejudice to any general power to make rules of court,  
2 such rules may make provisions for regulating matters relating to  
3 the costs of those proceedings including, in particular, the  
4 entitlement to costs, the taxation of costs, the powers of taxing  
5 officers and the powers of judges to review decisions of taxing  
6 officers.

7 (3) The court shall have full power to determine by whom and to what  
8 extent the costs are to be paid.”

9

10 It is worthy of mention that the power of the Court is wide but it is subject to  
11 the provisions of this or any other law and rules of court. The costs of and  
12 incidental to all civil proceedings in the Court of Appeal and the Grand  
13 Court shall be in the discretion of the relevant court. It is my view,  
14 therefore, that I am governed by the Strata Titles Registration Law (2005  
15 Revision) and that I do not have the jurisdiction to award costs against the  
16 Plaintiffs under section 9 (6).

17

18 Even if I were wrong as to this, I am of the view that the Administrator’s  
19 appointment was justified and indeed the very report that has been relied  
20 upon by Mr. Robinson is supportive of this conclusion.

21

1 An administrative expenses incurred by him in relation to the administration  
2 is payable whether or not incurred within the context of legal proceedings  
3 and therefore as an officer of the Court, he acts for the benefit of the  
4 corporation. The corporation being made up not only of the Executive  
5 Committee but all the owners and in that context it must be trite that once  
6 the Court appoints its own official to administer a strata, the person applying  
7 for the appointment cannot be penalized because the opposition says it  
8 wasn't justified. The Court felt it was justified and if that court ruling was  
9 wrong, it would be my opinion that advice should have been given to appeal,  
10 vary or set aside the order.

11

12 It is clear from well established authority that the terms of the regime for an  
13 Administrator, for Liquidator, for a Trustee are all paid out, not by  
14 individuals who ask for the appointment or asked for the removal, but from  
15 the estate itself. Several cases have been relied on but they must be read in  
16 the context of their governing statutes and are of little help in this  
17 jurisdiction. I believe that the submission as to an unjustifiable appointment  
18 can easily be resolved in the Court's mind by the very evidence Mr.  
19 Robinson relies on.

1

2 The Administrator in his second affidavit at paragraph 12 said:

3 “In relation to paragraph 3, I agree that during the  
4 course of the administration I received reports  
5 from proprietors other than the Plaintiffs raising  
6 concerns which I considered necessary to  
7 investigate. It became evident to me soon after  
8 my appointment that it was not the case that the  
9 Keims were alone in their dissatisfaction and  
10 mistrust of Mr. Alliger and the Management  
11 Company. A number of Proprietors had issues of  
12 complaint. The regular submissions of fresh  
13 allegations by a number of Proprietors increased  
14 the costs of the Administration and had a material  
15 affect upon the depth, direction and focus of  
16 investigations.”

17

18 At paragraph 19 of his second affidavit, he says:

19 “It was clear from the Maples and Calder letter,  
20 and meetings and conversations I had with a  
21 number of Proprietors other than the Keims, that a  
22 full investigation into the accuracy and  
23 completeness of the accounts was of paramount  
24 importance to many Proprietors and that  
25 explanations should be furnished to them regarding  
26 specific issues including, but not limited to  
27 allegations of fraud and theft on the part of the  
28 Management Company and Mr. Alliger etc...”

29

1 And finally, I quote from the last paragraph of the Administrator's Report to  
2 this Court:

3 "With regards to the primary investigations,  
4 concerning the financial position of the Strata,  
5 Management accounting practices and allegations  
6 of fraud, such exercise has been a costly and time-  
7 consuming process but one which, in the opinion  
8 of the Administrator, was necessary in order to  
9 reach this present position and to bring greater  
10 knowledge to the Owners."

11

12 The evidence is clear that the Administrator was justifiably appointed. I  
13 therefore dismiss the application made in this Court orally by Mr. Robinson.  
14 His Summons however, asks for the discharge of Russell Smith of Chris  
15 Johnson Associates Limited. By virtue of the Order made by the Honorable  
16 Justice Henderson appointing the Administrator in May 2007, he is  
17 automatically discharged because he was appointed only until a new  
18 Executive Committee, elected under his supervision, was appointed. And I  
19 therefore do not feel I need to make an order for the relief requested in  
20 paragraph 1 of the Summons of the Defendant. Paragraph 2 of that  
21 summons asks for the approval of the Administrator's fees which this Court  
22 approves, as has been approved by the owners of the Strata and it is to be  
23 paid by the corporation.

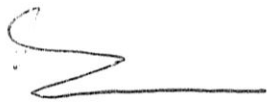
1

2 The question of costs of this application is reserved, if the parties wish to  
3 submit written submission on it, they may do so or be heard orally.

4

5 Dated this 24<sup>th</sup> of October 2007

6



7

Judge of the Grand Court

