



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

3  
4 CAUSE NO. 365 of 2006

5  
6 BETWEEN:

7 ANTHONY TRAVERS

8 Plaintiff

9 AND:

10 THE PROPRIETORS, STRATA PLAN CORPORATION #104  
11 (a Corporation)

12 Defendant

13  
14 BEFORE: The Honourable Madam Justice Levers

15 Appearances:

16 Mr. Mac Imrie of Maples & Calder for the plaintiff

17 Mr. Diarmad Murray of Walker for the defendant

18  
19 Date of hearing: 18<sup>th</sup> May 2007

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JUDGMENT

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21  
22 Levers, J.

23  
24 There are two applications before this Court. One is a Summons for  
25 Directions filed by the Plaintiff dated 19<sup>th</sup> February 2007 and the other is  
26 a Summons filed by the Defendant dated 3<sup>rd</sup> April 2007.

27

1 In view of the nature of the relief sought by the Defendant, it was  
2 decided to hear the Summons filed on the 3<sup>rd</sup> April 2007, first. The  
3 Summons asks for the following relief: (Defendant's Summons)

- 4
- 5 (1) That pursuant to Order 28, rule 8 of the Grand Court Rules  
6 these proceedings be continued as if this action had been  
7 commenced by Writ of Summons;
- 8 (2) That the Plaintiff be at liberty within 28 days to serve a  
9 Statement of Claim;
- 10 (3) That the Defendant be at liberty within 28 days to serve a  
11 defence and that the Plaintiff be at liberty within 14 days  
12 thereafter to serve a reply; and
- 13 (4) That the costs of and occasioned by this application be  
14 paid to the Defendant by the Plaintiff.

15

16 The simple reason for hearing the Defendant's Summons first was in  
17 the event that this Court ruled that the matter proceed by way of Writ  
18 of Summons, the directions given would be of a different character to  
19 that given in the Originating Summons process.

20

21 **Background**

1 The Plaintiff commenced this action on 7<sup>th</sup> September 2005 by way of  
2 Originating Summons which has subsequently been amended. The  
3 action is clearly one that can be begun by way of Originating  
4 Summons (see Order 5, rule 4 (1) of the Grand Court Rules, 1995). It  
5 is also understood that it is not an usual way of commencing  
6 proceedings in matters where there is a substantial dispute of fact.

7  
8 The Supreme Court Practice (1999) Vol 1, at 7/7/2 gives several  
9 examples of when the commencement of action by originating  
10 summons is appropriate. In describing the appropriate form to be  
11 used it is said, "*it is used for applications for relief under the inherent*  
12 *jurisdiction of the Court when no other form is prescribed, for example*  
13 *declarations as to construction of documents, and questions of law,*  
14 *administration of estates, kin enquiries, and mortgage actions under*  
15 *Order 88.*"

16  
17 The Defendant's position is that this case comes under the category  
18 of one which involves a substantial dispute of fact. It is to do with the  
19 damage caused to two units in an apartment building in Grand

1 Cayman, known as The Cayman Club, which was damaged  
2 significantly in the 2004 Hurricane Ivan.

3  
4 The Defendant apparently received insurance proceeds as a result of  
5 an insurance claim for damage caused by hurricane Ivan. The  
6 Plaintiff petitioned the Court seeking a declaration as to whether the  
7 basis of an assessment and/or damage to each of the units prepared  
8 by BCQS, is accurate, as each of the registered proprietors, including  
9 the Plaintiff were given a credit from part of the insurance proceeds  
10 for the cost of refurbishing their units.

11  
12 The Plaintiff disputes the basis of and the amount of the insurance  
13 distribution made to him. He also claims to be entitled to information  
14 relating to the apportionment of the insurance proceeds and the  
15 Defendant's assessment of the cost of repairs to The Cayman Club.

16  
17 Mr. Murray on behalf of the Defendant submits:

18  
19 (1) That the Defendant will seek to lead both factual and expert  
20 evidence on each of the issues, the Plaintiff disputes;

1 (2) That there will be several affidavits because a determination  
2 of whether the Plaintiff is entitled to the accounts sought will  
3 require an assessment by the Court as to whether the Plaintiff  
4 is so entitled to the accounts on the facts;

5 (3) The Court will be required to determine a factual dispute in  
6 relation to:

7 (i) the assessment of damages undertaken by  
8 the Defendant's third party agents; and

9 (ii) the assessment of whether the methodology  
10 used by the defendant in determining the  
11 credit for the cost of refurbishing their units  
12 allocated to each of the registered  
13 proprietors, including the Plaintiff, was  
14 correct.

15 (4) And finally, he submits that the prejudice to the Defendant if  
16 the proceedings were to continue by Originating Summons  
17 would be as set out in the affidavit of Kevin Doyle, extremely  
18 harmful and that the Defendant would be denied the benefit of  
19 discovery. In other words, that the Plaintiff is likely to hold  
20 documents relevant to the extent of damage to the units  
21 owned by him as the Plaintiff retained his own contractors to  
22 reinstate those units.

23  
24 The Amended Originating Summons seeks the following relief:

25 (Plaintiff's Summons)

1  
2 By this Originating Summons, which is issued on the  
3 application of Anthony Travers of Unit 5, the Cayman Club,  
4 West Bay Road, Grand Cayman, the Plaintiff claims against  
5 the Defendant in respect of point 1 below and seeks the  
6 determination of the Court on points 2, 3 and 4 below,  
7 namely:

8  
9 (1) An order that the Defendant by its Executive Committee  
10 do produce to the Plaintiff:

11  
12 (a) An account of the manner in which the  
13 insurance proceeds received in respect of  
14 the damage caused by Hurricane Ivan  
15 have been or are to be allocated or  
16 apportioned to each owner of a  
17 condominium at The Cayman Club.

18  
19 (b) An account of the manner in which the  
20 assessment for the costs of repairs have  
21 been calculated by the Defendant's agents  
22 and claimed from each owner of a  
23 condominium at The Cayman Club.

24  
25 (2) A declaration as to the correct and appropriate amount due to  
26 be paid by the Plaintiff to the Defendant in respect of the

1 assessments made by the Executive Committee of The  
2 Cayman Club.

3  
4 (3)A declaration that the Plaintiff is not bound to complete the  
5 "Release and Discharge" circulated by the attorneys-at-law for  
6 the Defendant as a condition precedent to the Plaintiff's  
7 entitlement to receive the appropriate proportion of his  
8 insurance proceeds.

9  
10 (4)A declaration that, pending the resolution by the Court or the  
11 parties of the issues in points 1, 2 and 3 above, the Plaintiff is  
12 entitled to participate in and vote at any general meeting  
13 notwithstanding that all contributions in respect of his strata lot  
14 may not have been duly paid.

15  
16 (5)Such other orders, declarations or directions as the Court  
17 deems just or expedient.

18  
19 (6)An order that the Plaintiff's costs of and incidental to this  
20 proceeding be paid by the Defendant.

21  
22 If the Defendant does not acknowledge service, such  
23 judgment may be given or order made against or in relation  
24 to him as the Court may think just and expedient.

25

1 Mr. Murray makes these submissions against the background that he  
2 has not filed any affidavit evidence and the arguments advanced to  
3 date have not been advanced by any expert or witness on oath. In  
4 addition he has not requested any further information from Mr. Imrie.

5  
6 His submissions are based on the premise that should he put in any  
7 evidence, the Court will likely come to the conclusion that his  
8 objections would succeed. The Court is clearly at a disadvantage  
9 when an argument is based against this background. Had affidavit  
10 evidence been filed it would have been most useful.

11  
12 Mr. Imrie for the Plaintiff submits to the Court that there are two  
13 issues to be resolved by this case:

14  
15 (1)What is the proper assessment of damage to the  
16 Plaintiff's apartment? and

17 (2)Has the Strata committee adopted the correct  
18 method of apportioning the insurance proceeds  
19 and the cost of repairing damage between the  
20 owners?

21

1 All other points in the Amended Originating Summons, he submits are  
2 ancillary to these main points.

3

4 The first relief sought in the Originating Summons is an order for  
5 accounting.

6

7 On the present state of the evidence before the Court, it cannot be said  
8 that this will result in a substantial dispute of fact. It surely would be a  
9 question of construction of the by laws of the strata corporation to  
10 determine whether this Plaintiff is entitled to an accounting and the  
11 question of the manner in which the assessment was made would also  
12 be a question for the Court to determine based on the documents before  
13 it.

14

15 The second relief is a declaration as to the correct and appropriate  
16 amount due to be paid by the Plaintiff to the Defendant. This would be a  
17 simple matter to resolve, once the evidence is before the Court on (1)  
18 and (2) above. The Plaintiff is not asking for a specific quantum of  
19 damages; the Plaintiff is asking the Court to determine what is correct  
20 and appropriate in view of the manner in which the accounting is done. I

1 cannot see that this could be a question of a substantial dispute of fact  
2 in the sense of complexity. It may be a mathematically tedious question.

3

4 The third relief is a declaration that the Plaintiff is not bound to complete  
5 the "Release and discharge" that has been circulated by the Defendant.

6 This would be a matter of construction of the Strata by laws, but in any  
7 event I am informed that this has been resolved.

8

9 A declaration is also sought that pending the resolution by the Court or  
10 the parties of the issues in points 1, 2 and 3 above, the Plaintiff is  
11 entitled to participate and vote in any general meetings. I am told, as a  
12 result of the Plaintiff not paying the Strata Corporation's fees and the  
13 Defendant refusing a cheque for \$278,000, this declaration was  
14 requested. Apparently this matter too has been resolved.

15

16 So, it would appear that of the relief sought, two matters were matters of  
17 construction and have been resolved and the others are the ones that  
18 Mr. Murray is submitting should be proceeded with by way of a Writ of  
19 Summons.

20

1 In an Originating Summons the Plaintiff and the Defendant can cross-  
2 examine each others witnesses if they so require and the methodology  
3 and quantum of assessment and distribution can be addressed by way  
4 of affidavits. However, if the Defendant puts in substantial evidence  
5 which will require the Court to go into disputes of fact, then the Court  
6 can review the Defendant's application on the evidence before this  
7 Court. However at present it cannot say that this matter will involve a  
8 substantial dispute of fact.

9

10 All the cases that have been referred to in this case are relevant and  
11 useful if the Court were convinced that there is a substantial dispute of  
12 fact. I am not so convinced. I therefore dismiss the Defendant's  
13 Summons.

14

15 Mr. Murray submits that if the Court was not to hold in his favour then  
16 the Defendant would not be contesting the order sought by the Plaintiff,  
17 except that he wishes more time to file affidavits than the 28 days given  
18 in the Summons. There has been sufficient delay already. I therefore  
19 rule that:

1 (1)The Plaintiff will be granted leave to file and serve the  
2 affidavits of Anthony Travers, Richard Douglas and  
3 Christopher Phillips;

4 (2)The Defendant do file its affidavits in reply to the Plaintiff's  
5 evidence within 28 days from the date of this order, such  
6 affidavit to include evidence of the matters specified in  
7 paragraphs 1(a) and 1(b) of the Amended Originating  
8 Summons dated 7<sup>th</sup> September 2006;

9 (3)The Plaintiff do file any affidavits in reply to the Defendant's  
10 evidence within a further 21 days thereafter;

11 (4)The parties do have leave to simultaneously exchange one  
12 expert's report on the issue of the cost of repairing the  
13 damage to the Plaintiff's unit 21 days after the date the  
14 Plaintiff's reply evidence is filed;

15 (5)Within 14 days after service of the Plaintiff's reply evidence  
16 or (if applicable) the exchange of expert reports, the Plaintiff  
17 do serve on the Defendant points of claim to be decided at  
18 the hearing of this action;

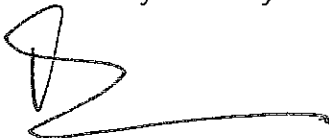
19 (6)Within 14 days after service of the points of claim, the  
20 Defendant do serve on the Plaintiff its points of defence;

21 (7) The matter be re-listed for a pretrial directions hearing, to be  
22 listed on the first available date before any judge within  
23 seven days after service of the Defendant's points of  
24 defence;

1 (8) The cost of and incidental to this application be costs in the  
2 Cause.

3  
4 I should add that rules and procedures are designed to ensure that the  
5 Court was free to adopt the procedure best calculated to enable a just  
6 and fully informed decision to be reached. On the evidence before the  
7 Court, in the exercise of my case management powers, I can decide the  
8 procedure to be adopted, and what should be subject to cross-  
9 examination at the hearing. It is my belief that based on the evidence as  
10 it presently stands, a just and fully informed decision can be reached if  
11 this matter goes to trial/hearing as presently commenced by way of  
12 Originating Summons.

13  
14 Dated this 29<sup>th</sup> day of May 2007

15 

16 Judge of the Grand Court

