

IN THE GRAND COURT OF THE CAYMAN ISLANDS

176

CAUSE NO: of 2009

BETWEEN:

- 1) THE PROPRIETORS, STRATA PLAN NO. 238
- 2) ANTHONY W DESIO AS TRUSTEE
- 3) COLGAI LTD
- 4) ROGER & BETTY LOU HENDRICKSON
- 5) SUN SAND LTD
- 6) INT'L E-TRADE EQUITIES (04) LTD
- 7) MTOROSHANGA LTD



AND:

- 1) CONCH POINTE BEACH RESORT LTD
- 2) BURNLEY FOSTER
- 3) MARY FOSTER



PLAINTIFFS

DEFENDANTS

WRIT OF SUMMONS

TO THE DEFENDANTS:

Conch Pointe Beach Resort Ltd International Corporation Services Ltd PO Box 472 GT Harbour Place 2 nd Floor North Wing 103 South Church Street George Town Grand Cayman Cayman Islands	Burnley and Mary Foster PO Box 472 Grand Cayman KY1-1106, Cayman Islands
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THIS WRIT OF SUMMONS has been issued against you by the above-named Defendant in respect of the claim set out on the next page.

Within 14 days after the service of this Writ on you, counting the day of service, you must either satisfy the claim or return to the Court Office, P.O. Box 495G, George Town, Grand Cayman, the

accompanying Acknowledgment of Service stating therein whether you intend to contest these proceedings.

If you fail to satisfy the claim or to return the Acknowledgment within the time stated, or if you return the Acknowledgment without stating therein an intention to contest the proceedings, the Plaintiff may proceed with the action and judgment may be entered against you forthwith without further notice.

Issued this 9th day of April 2009.

NOTE - This Writ may not be served later than 4 calendar months (or, if leave is required to effect service out of the jurisdiction, 6 months) beginning with the date of issue unless renewed by order of the Court.

IMPORTANT

Directions for Acknowledgment of Service are given with the accompanying form.

STATEMENT OF CLAIM

The Development

1. The Defendant is the registered proprietor of West Bay North West Block 3D Parcel 155 (the "**Land**") and the developer of the Phased Strata Plan known as "Strata Plan 238" over the Land which has been registered pursuant to section 17 of the Strata Titles Registration Law (2005 Revision) (the "**Law**"). The Defendant became the registered proprietor of the Land on 12 June 1996. (The Defendant will be referred to as the "**Developer**").
2. The First Plaintiff is the Strata Corporation incorporated pursuant to section 5 of the Law (The First Plaintiff will be referred to as the "**Strata Corporation**").
3. There are four registered phases for Strata Plan 238.

Phases One, Two and Three

4. Phases One, Two and Three consist of units H1 to H9 as shown on Strata Plan 238.
5. Phases One, Two and Three were completed by the Developer between 12 March 1998 and 30 September 1999.
6. Units H1 to H8 in phases One and Two were purchased by the Second to Seventh Plaintiffs (together the "**Owners**") as set out below. Unit H9 remains owned by the Developer.
7. The Second Plaintiff is the registered proprietor of Lot 3D 155H1 ("**Unit H1**"). The Second Plaintiff became the registered proprietor on 22 April 1998.
8. The Third Plaintiff is the registered proprietor of Lot 3D 155H2 ("**Unit H2**"). The Third Plaintiff became the registered proprietor on 14 October 1999.
9. The Fourth Plaintiffs are the registered proprietors of Lot 3D 155H3 ("**Unit H3**"). The Fourth Plaintiffs became the registered proprietors on 23 April 1998.
10. The Fifth Plaintiff is the registered proprietor of Lots 3D 155H4, 3D 155H6 and 3D 155H7 ("**Units H4, H6 and H7**"). The Fifth Plaintiff became the registered proprietor of the said lots on 14 October 1998, 15 May 2002 and 15 June 1999 respectively.

11. The Sixth Plaintiff is the registered proprietor of Lot 3D 155H5 (“Unit H5”). The Sixth Plaintiff became the registered proprietor on 13 December 2004.
12. The Seventh Plaintiff is the registered proprietor of Lot 3D 155H8 (“Unit H8”). The Seventh Plaintiff became the registered proprietor on 18 April 2008.
13. The Developer is the registered proprietor of Lot 3D 155H9 (“Unit H9”). The Developer became the registered proprietor on 12 June 1996. Unit H9 is subject to a charge registered to the Second and Third Defendants. The Second and Third Defendants are the beneficial owners of the Developer and are in effective control of the Developer.

Phase Four

14. Phase Four of Strata Plan 238 consists of approximately nine small units and development of it has not yet commenced by the Developer.
15. The Law does not require the Land which includes that part which is designated as common property on Strata Plan 238 (the “Common Property”) to be transferred to the Strata Corporation until after Phase Four has been completed. This results in it remaining owned by the Developer until that time.
16. The Developer has no intention of commencing and/or completing Phase Four in the near future or at all.

Particulars

- a. Phase One was completed in 1998 and phase three was completed in September 1999. It has therefore been in excess of eleven years since Phase One was completed and in excess of nine years since Phase Three was completed.
 - b. The Developer has advised by letter from his attorneys dated 10 March 2009 that:

“You should be aware that our client intends to complete the development of phase 4 in due course, however, in light of the present worldwide market turmoil it is of the opinion that until the current world wide depression resolves itself that building units which were designated for phase 4 would not be in the best interest of anyone”.
 - c. The present worldwide market turmoil is an excuse since this condition has only been in effect very recently and the Developer failed to commence and/or complete Phase Four whilst the world wide economy, including demand for housing, was strong despite attempts by the Owners to have the Developer commence development of Phase Four.
17. If the Developer does not complete Phase Four, then the Common Property will remain owned by the Developer indefinitely.

Contract

18. When the Owners initially purchased their respective units they each entered into an oral agreement with the Developer.
19. The terms of the said oral agreement were inter alia that in consideration of their purchase the Developer would complete Phase Four within a reasonable period of time and transfer the Land and the Common Property to the Strata.
20. In breach of the terms of the said contract, the Developer failed to complete Phase Four and failed to transfer the Common Property to the Strata. Particulars are set out in paragraph 16 above.
21. As a result of the said breaches of contract, the Owners have suffered loss and damage.

Particulars

- a. Loss of value of their Units; and
- b. Inability to sell their Units;

Proprietary Estoppel

22. Further and/or in the alternative, the Plaintiffs claim as follows:
23. At all material times the Developer represented to the Owners and the Strata and/or created and encouraged an expectation that the Strata, on behalf of the Owners would have a proprietary interest in the Land and/or Common Property in accordance with the Strata Plan 238.

Particulars

- a. The Owners and the Strata were provided with a brochure prepared by the Developer entitled "Conch Pointe Beach Resort" (the "**Brochure**").
- b. The Brochure included a copy of the plan of the Land showing the Common Property which includes inter alia a tennis court, security gate, guard house, water fountain, septic system, sports pavilion and footpaths and landscaping;
- c. Strata Plan 238 clearly shows that part of the Land designated as Common Property;
- d. The title to each of the Units owned by the Owners states under the heading Appurtenances "*the benefits as listed in the By-Laws and any amendments thereof*";

- e. The relevant portions of the By-Laws are as follows:
- i. "Common Property" is defined as *"means so much of the land and buildings comprised in the Strata Plan as is not comprised in any Strata Lot"*
 - ii. Section 3(1) provides: *"The Corporation must: – control, manage and administer the Common Property for the benefit of all Proprietors to the intent that the Development is kept up and maintained in a first class private residential condominium development"*
 - iii. Section 38 provides: *"In addition to any easements prescribed or implied under the Law or any rule of common law or equity, a Proprietor has the benefit of the following rights:-*
 - (1) the right in common with all other Proprietors and all others having the like right to use for the purposes only of coming to and going from the Development all parts of the Common Property which afford access to them; and*
 - (2) the right in common with all other Proprietors and their servants, agents, licensees, invitees, tenants and visitors to use the gardens, swimming pool, beach, tennis courts, pleasure grounds, roads, drives, paths and forecourts forming part of the Common Property; and*
 - (3) the sole right for himself or those expressly authorised by him to park a motor vehicle on the parking space or spaces designated for his use by the Executive Committee.*
- f. Section 13 of the Law states that *"The common property shall be held by the members as proprietors in common in shares proportionate to their unit entitlement of their respective strata lots"*.
- g. The Developer orally represented that Phase 4 would be completed in a timely fashion and that it would build a manager's unit so that the Strata could employ a professional property manager.
24. In consequence of paragraph 23 above, the Owners and the Strata had an expectation and/or belief that the Common Property would be transferred to the Strata within a reasonable period of time.
25. The Owners and the Strata relied upon that expectation and have acted to their detriment.

Particulars

- a. The Owners paid a price for their Unit which was calculated by reference to the inclusion of their proportionate share of the Common Property;
 - b. The Owners would not have purchased their respective units if they knew that they would not have received their proportionate share in the Common Property in accordance with Strata Plan 238 within a reasonable period of time;
 - c. The Owners have paid fees to the Strata to cover maintenance of the Common Property even though it is still owned by the Developer;
 - d. The Strata has paid maintenance fees in order to maintain the Common Property even though it is still owned by the Developer.
 - e. The Strata has incurred costs in relation to the Common Property after Hurricane Ivan in September 2004 including but not limited to planting additional palm trees and painting the wall surrounding the front of the Common Property.
26. At all material times the Developer was aware that the Owners and the Strata relied upon that expectation and have acted to their detriment.

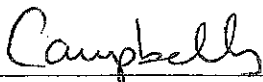
Particulars

- a. As set out in paragraph 13 above, at all material times the Developer was the registered proprietor of Unit H9 and up until 28 February 2006 was in control of the Strata;
 - b. The Developer was aware of all of the representations in set out in paragraph 23 above;
 - c. The Developer was aware that the Owners relied upon the said representations when purchasing their respective units.
27. As set out in paragraph 16 above the Developer has failed to and has no intention to complete Phase Four.
28. In the circumstances it is unconscionable for the Developer to continue to be the registered proprietor of the Land and therefore the Common Property and/or to not complete Phase Four so that the Land can be transferred to the Strata.

AND THE PLAINTIFF CLAIMS:

1. An order for specific performance of the contract set out in paragraphs 18 to 21 above;

2. Further and in the alternative, an order that the First, Second and Third Defendants consent to an amendment of Strata Plan 238 to remove Phase Four from the plan;
3. Further and in the alternative an order that the First Defendant take all action necessary to obtain the consent of the Second and Third Defendants to remove Phase Four from the plan including, if necessary to pay out the charges so that they can be removed from the registers;
4. Alternatively, an order that a receiver be appointed to the First Defendant for the purpose of taking all action necessary for the removal of the said charges over Unit H9 and/or to obtain the consent of the Second and Third Defendants to the removal of Phase Four from Strata Plan 238;
5. Upon provision of the necessary consents required in accordance with the Law, an order that the First Defendant forthwith cause the Land to be transferred to the Strata;
6. Further and in the alternative, orders that the First Defendant completes Phase Four forthwith but no later than 18 months from the date of the order and then transfer the Land to the Strata upon completion.
7. Further and in the alternative, damages for breach of contract and/or equitable damages against the First Defendant.
8. Costs; and
9. Such further and/or other relief.



CAMPBELLS
Attorneys-at-Law for the Plaintiffs

THIS WRIT OF SUMMONS AND STATEMENT OF CLAIM is issued by Campbells, Attorneys-at-Law for and on behalf of the Plaintiff, whose address for service is 4th Floor, Scotiabank Building, George Town, Grand Cayman (Ref: MC/lc/13345).

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BETWEEN:

- 1) **THE PROPRIETORS, STRATA PLAN NO. 238**
- 2) **ANTHONY W DESIO AS TRUSTEE**
- 3) **COLGAI LTD**
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- 5) **SUN SAND LTD**
- 6) **INT'L E-TRADE EQUITIES (04) LTD**
- 7) **MTOROSHANGA LTD**

PLAINTIFFS

AND:

- 1) **CONCH POINTE BEACH RESORT LTD**
- 2) **BURNLEY FOSTER**
- 3) **MARY FOSTER**

DEFENDANTS

**ACKNOWLEDGEMENT OF SERVICE
OF WRIT OF SUMMONS**

If you intend to instruct an Attorney to act for you, give him this form IMMEDIATELY.

Important: Read the accompanying directions and notes for guidance carefully before completing this form. If any information required is omitted or given wrongly, ***THIS FORM MAY HAVE TO BE RETURNED.***

Delay may result in judgment being entered against a Defendant whereby he may have to pay the costs of applying to set it aside.

1. State the name of the Defendant by whom or on whose behalf the service of this Writ is being acknowledged.

2. State whether the Defendant intends to contest the proceedings (tick the appropriate box)

Yes

No

3. If the claim against the Defendant is for a debt or liquidated demand, AND he does not intend to contest the proceedings, state if the Defendant intends to apply for a stay of execution against any judgment entered by the Plaintiff (tick box).

Yes

Service of the Writ is acknowledged accordingly

(Signed).....

[Attorney] for

[Defendant in person]

Address for service:

Please complete overleaf

Notes on address for service

Attorney: Where the Defendant is represented by an Attorney, state the Attorney's place of business in the Cayman Islands. A Defendant may not act by a foreign Attorney.

Defendant in person: Where the Defendant is acting in person, he must give his post office number and the physical address of his residence or, if he does not reside in the Cayman Islands he must give an address in Grand Cayman where communications for him should be sent. In the case of a limited company, "residence" means its registered office.

Indorsement by Plaintiff's Attorney (or by Plaintiff if suing in person) of his name, address and reference, if any in the box below:

Campbells 4 th Floor Scotia Centre PO Box 884 GT Grand Cayman KY1-1103 Ref: MPC/13345
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Indorsement by Defendant's Attorney (or by Defendant if suing in person) of his name, address and reference, if any in the box below:

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