[2016] JMCC Comm 38

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2016CD00056

BETWEEN	**GORDON STEWART**	**CLAIMANT**
AND	**GOBLIN HILL HOTELS LIMITED**	**FIRST DEFENDANT**
AND	**MIES INVESTMENT LIMITED**	**SECOND DEFENDANT**
AND	**MARVIN GOODMAN**	**THIRD DEFENDANT**
AND	**ROSALEE GOODMAN**	**FOURTH DEFENDANT**

IN CHAMBERS

Emile Leiba and Courtney Bailey instructed by DunnCox for the claimant

Lord Anthony Gifford QC and Emily Shields instructed by Gifford, Thompson & Shields for the defendants

November 17, December 16 and 19, 2016

CIVIL PROCEDURE – APPLICATION FOR SUMMARY JUDGMENT – COURT CONTRIBUTING TO DELAY – ABSENCE OF REASONS FOR JUDGMENT – LITIGANTS CONTRIBUTING TO THE DELAY – EFFECT OF PREVIOUS JUDGMENT ON DOCUMENTS TO BE INTERPRETED IN THE PRESENT CASE

SYKES J

Fifteen years and counting

[1] Mr Stewart holds 908 A shares in Goblin Hill Hotel Limited ('GHHL'). He is also the holder of a 99-year lease in respect of villa number 6 at GHHL's property in Portland. Thus he is both a shareholder and a leaseholder which means, as will be seen below, he is liable to assessments under article 91 of the articles of association of GHHL and clause 5 (b) of the lease between Mr Stewart and GHHL. He is not to be assessed under both in any given year. It is open to GHHL to determine under which document they will exercise the power to levy assessments and/or special assessments.

[2] This case is one of several filed in the early 2000s against the defendants. The circumstances of all the cases are broadly very similar in that they turn, largely, on the interpretation of certain clauses found in the documents and certain articles in the articles of association. In each case there may specific factual differences such as (a) when they became leaseholder and/or shareholders; (b) whether they are just shareholders and not lease holders; and (c) whether they occupied the villa.

[3] The first of these matters to go through the courts all the way to the Judicial Committee of the Privy Council was **John Thompson and another v GHHL** CL T 005/2002 (unreported) (delivered November 6, 2006). The decision was reversed by the Court of Appeal (**GHHL v John Thompson** SCCA No 57/2007 (unreported) (delivered December 19, 2008)). The first instance decision was restored by the Privy Council (**Thompson v GHHL** [2011] 1 BCLC 587)

[4] In 2001 Mr Gordon Stewart filed this claim against the defendants. In 2016 it was transferred to the Commercial Court Division of the Supreme Court. After years of sporadic activity, Mr Stewart filed an application on September 7, 2016 seeking summary judgment against the GHHL on some aspects of the claim and against all the defendants on other parts of the claim. He also sought the striking

out of GHHL's defence to the claim as the alternative. All the defendants, in their application filed September 21, 2016, responded by seeking to have the entire claim struck out and in the alternative that summary judgment be entered for the defendants on some parts of the claim. There is also an application by Mr Stewart for enforcement of a request for information. After stating the core facts the court will examine the merits of the applications in the following order: (a) the disclosure application; (b) the summary judgment applications and (c) the striking out application.

[5] Mr Stewart has failed in his endeavour to enforce the request for information. The defendants have failed in their application for striking out the claim. The parties have had mixed results on their summary judgment applications.

The core facts

[6] What is about to be stated comes from the judgment of the Judicial Committee of the Privy Council. This court gratefully adopts and reproduces their Lordships' summary of the facts and will add additional details that are peculiar to this particular case so far as they are relevant to the applications made and the issues to be decided in those applications. The following narrative is taken directly from paragraphs 1 – 10 of their Lordships' advice:

> ***[1]*** *Goblin Hill Hotels Ltd (GHHL) is the registered proprietor of 111/2 acres of land known as Goblin Hill, in the Parish of Portland, Jamaica. The company was incorporated in 1969 for the purpose of the development of Goblin Hill in phases as vacation homes. The development was structured so as to achieve approved hotel enterprise status and thereby gain certain tax relief. For this reason, a Cayman Islands company called San San Investments Ltd (SSIL) was involved.*
>
> ***[2]*** *All the original purchasers of shares in GHHL were required to sign three documents. These included an 'agreement for the sale of options for the purchase of shares and grant of lease' between SSIL, GHHL and the purchaser which (i) recorded the undertaking by GHHL to construct 33 villa units and to operate them as a hotel;*

and (ii) granted the purchaser the option to purchase shares in GHHL and enter into a lease of a villa unit on the terms of the attached draft. By cl 4B of the draft lease, if the lease option was exercised by the purchaser, the lessee agreed to permit the leased villa to be operated by GHHL as a hotel, but only during the 'Incentive Period'. The incentive period was defined as the period ending on the 20th anniversary of the date specified for the commencement of the development as an 'approved hotel enterprise'. … the trial judge in these proceedings, found that this period ended in 1989.

[3] *There was no right in GHHL to raise assessments in respect of the cost of maintaining the villa units and the grounds on purchasers who exercised the option to buy shares and enter into leases during the incentive period. It was the expectation of the developers that these costs would be met from the hotel earnings and that, if there were any shortfall, this would be paid by the shareholders. By art 91(1) of the articles of association and cl 5 (b) of the draft lease, however, GHHL was entitled to raise assessments after the end of the incentive period.*

[4] *The authorised share capital of GHHL was $J54,000. This was divided into three classes of shares of $J1 each as follows: 30,600 A ordinary shares; 15,300 B ordinary shares and 8,100 C ordinary shares. The Class C shares represented 15% of the total authorised share capital. Article 4(1) provided that the Class A shares were to be held in blocks, so that each block was allocated to one of the villa units comprising the 70 apartment bedrooms in Phase 1 of the development. Shares numbered A1 to A19,976 related to 28 villa units comprising 44 apartment bedrooms and shares numbered A19,977 to A30,600 related to the villa units comprising the remaining 26 apartment bedrooms. Article 4(2) provided that the Class B shares were to be held in blocks so that each block was allocated to one of the villa units to be erected by GHHL in Phase 2 of the development. Class A and B shares entitled the holders to participate in the earnings of GHHL as from the date of the construction of the villa units relating to the shares. Article 4(3) provided that the Class C shares numbered C1 to C3,564 entitled their holders to participate in the earnings of the company as from the date of completion of the construction of the 28 villa units to which the Class A shares numbered A1 to A19,976*

were allocated; and the Class C shares numbered C3,565 to C8,100 entitled their holders to participate in the earnings of the company as from the respective dates of completion of the units to which the remaining Class A shares and the Class B shares were allocated. The purpose of the Class C shares (which were issued to the developers) was described by Rosalie Goodman at para 10 of her witness statement as being 'designed as an incentive to the developers to remain active and interested in the project after selling off the shares'.

[5] *Article 91 of the articles of association provided:*

91. (1) After the twentieth anniversary of the date specified for the commencement of Goblin Hill San San as an approved hotel enterprise under the Hotel (Incentives) Act, 1968 the Directors shall at the beginning of each financial year or as soon thereafter as possible estimate the total sum of money required for the maintenance of the Company and the cost of carrying on the operation and performing the obligations of the Company with regard to the villa units or apartments at Goblin Hill San San and the grounds used therewith for the ensuing year and in particular but without prejudice to the generality of the foregoing words the amount of all water rates taxes rates insurance premiums and other outgoings and the cost of repairs and replacements and the necessary expenses of upkeep maintenance operation and any fees payable under any management contract entered into by the Company and in addition any amount to create a reasonable reserve for the purposes aforesaid and such amount as will meet any deficit incurred in any previous year of operations and the said total sum of money shall be borne by each member in proportion to his shareholding in the Company and the proportion of the annual cost estimated as aforesaid payable by each member shall be called "an Assessment". Each member shall pay the amount of the Assessment so made on him to the person and at the times and places and in the manner appointed by the Directors. An Assessment shall be deemed to be made when a resolution authorising such Assessment is passed.

(2) The Directors may from time to time make such further assessments upon the members as the Directors may deem necessary to meet any additional or unforeseen expenses of

operating and/or maintaining the villa units or apartment and grounds as aforesaid and the said further sum of money shall be borne by each member in proportion to his shareholding in the Company and the proportion of the annual cost made as aforesaid payable by each member shall be called "a Special Assessment". Each member shall pay the amount of the Special Assessment so made on him to the person and at the times and places and in the manner appointed by the Directors. A Special Assessment shall be deemed to be made when a resolution authorising such Special Assessment is passed.' (Our emphasis.)

[6] *Article 12 provided that GHHL had a 'first and paramount lien' on all shares held by any member of the company for all debts of such a member.*

Article 13 gave the company the right to sell any shares in respect of which it had a lien.

[7] *The leases between GHHL and those purchasers who took leases of the villa units were for 99 years at an annual rent of J$1. By cl 2(a), the lessee covenanted to pay the amounts of assessments and any special assessments made 'on the days and times and in the manner from time to time directed'. By cl 4B (i) the lessee covenanted to permit the leased villa to be operated by GHHL as part of the hotel enterprise during the incentive period. By cl 5(b) it was agreed that--*

'(b) After the end of the Incentive Period as hereinbefore defined the Company shall at the beginning of each financial year thereafter or as soon thereafter as possible estimate the total sum of money required for the maintenance of the Villa Units as a first class resort hotel for the accommodation of transient guests and the cost of carrying on the operation and performing the obligations of the Company with regard to the Villa Units and the grounds thereof for the ensuing year and in particular but without prejudice to the generality of the foregoing words the amount of all water rates taxes rates insurance premiums and other outgoing and the cost of repairs and replacements and the necessary expenses of upkeep maintenance operation and any fees payable under any management contract entered into by the Company and in addition any amount to create a reasonable reserve for the purposes

aforesaid and such amounts as will meet any deficit incurred in any previous year of operation and the said total sum of money shall be borne by each lessee of a villa unit in proportion to his shareholding in the Company and the proportion of the annual cost estimated as aforesaid payable by each lessee shall be called "The Assessment".' (Our emphasis.)

[8] *By cl 5(c) of the lease it was agreed that, if GHHL declared that it required funds in addition to the estimated total in cl 5(b) for the continued operation and maintenance of the villa units and grounds, then the company should estimate the additional amounts required and 'this amount to be called 'the Special Assessment' shall be paid by each lessee of a villa unit in proportion to his shareholding in the Company'.*

[9] *Clause 5(d) provided inter alia that 'if any rental or assessment or special assessment or any part thereof shall be in arrear for more than sixty days' GHHL was entitled to forfeit the lease.*

[10] *By 1972 share options relating to 28 of the villa units had been sold and the Class A shares relating to those units and the Class C shares relating to those shares had been issued. Phase 2 of the development has never been built. The options for the unissued shares were due to expire in 1984. They were renewed until 1994. On 30 May 1994 all the unissued shares (including the unissued Class C shares) were issued to the developer directors and (in the case of Trans Atlantic Holdings) a company controlled by Antony Alberga, one of the developers. These shareholders did not enter into leases with the company. One of them, Mrs Goodman, explains at para 13 of her witness statement that by 1994--*

'political and social conditions did not support the continued development during this time and the three developers decided to purchase the balance of share options at the price at which they were valued in the accounts, which they would hold jointly and severally until they were in a position to complete the development and sell the shares.'

The problem

[7] The principals of GHHL established the hotel in such a manner that it should have a constant source of funding for its operations and maintaining the property. In funding its operations and maintenance of the property, there were two periods of time that were important. There was the incentive period and the post-incentive period. The incentive period ran from 1969 to 1989. During the incentive period the hope was that all the units would be built and GHHL would have been able to operate the property as a hotel assuming it qualified for the incentives under the relevant legislation. During the incentive period the revenues from the operation of the hotel were hoped to be sufficient to meet expenses. If there was a shortfall then the shareholders would make up the difference. In the post incentive period GHHL was entitled to raise assessments and special assessments by virtue of article 91 (1) of the articles of association and clause 5 (b) of the lease.

[8] The dispute between Mr Stewart and the defendants is in relation to assessments and special assessments levied against him in the post incentive period. Hence his claim naming the period 1989 to 2000 as the time in dispute. He is also challenging the booking charges and commissions imposed by GHHL.

[9] The **John Thompson** case resolved the legality of the assessment, special assessments and occupancy charges.

The issue

[10] The Board framed the issues before it at paragraph 15:

> ***[15]*** *The main issue that arises on the appeal is a comparatively narrow question of the true construction of art 91 of the articles of association and cl 5(b) of the lease. The question is whether (as the appellants contend and Sykes J held), the assessments were to be determined by reference to the whole of the issued shareholding of GHHL or (as the respondents contend and the Court of Appeal*

held) they were to be determined only by reference to the issued shareholdings of those who were also leaseholders.

[11] The Board authoritatively determined the meaning of article 91 of GHHL's articles of association and clause 5 (b) of the lease. The article and clause in the **John Thompson** case are identical in all respects to the article and clause in the present case and in that respect that interpretation is binding on this court and the parties to this case.

The interpretation

[12] The ruling of the Board was that both the article and the clause should be given their plain and ordinary meaning. The reasoning of the Board is found at paragraphs 16 and 17:

> ***[16]*** *Prima facie, the plain and ordinary meaning of the articles and the lease provides decisive support for the appellants' case. The respondent must confront two linguistic difficulties in relation to art 91(1). First, the article provides that the total sum of money assessed to be paid 'shall be borne by each member' (our emphasis). As a matter of ordinary language 'each member' means exactly what it says: each shareholder of each class of shares is liable to pay. Article 4 provides that there are three classes of shares. These include the Class C shares which, it is common ground, were not issued to leaseholder shareholders, but to the developers. The phrase 'each member' on the face of it, therefore, includes the Class C shareholders. Even if the articles made no provision for Class C shares, the phrase 'each member' must, as a matter of ordinary language, also include any shareholder to whom the Class A or B shares have been issued, but who have not become leaseholders. On the respondent's construction, the phrase 'each member' has to be construed as if it reads 'each member who has entered into a lease in respect of a villa unit'.*
>
> ***[17]*** *The second difficulty (which arises both in relation to art 91(1) of the articles and cl 5(b) of the lease) is that the amount assessed is to be borne by each member 'in proportion to his shareholding in the Company'. As a matter of plain and ordinary language, this must mean that the amount is to be borne in the proportion that a*

member's shareholding bears to the entire issued share capital of the company. If the respondent is right, 'in proportion to his shareholding in the Company' means 'in the proportion which his shareholding bears to the shares issued to those members who have entered into a lease in respect of a villa unit'.

[13] The consequence of this interpretation of the reinstatement of the Supreme Court judgment is that any assessment or special assessments made based on the interpretation that was held to be incorrect then those assessments are incorrect and should be set aside. Also any forfeiture of the lease and sale of shares based on the erroneous interpretation was unlawful.

[14] In the **John Thompson** case the assessments and special assessments ought to have been done using the entire 54,000 shares as the basis for the calculation and not any lesser number. Once the 54, 000 shares were not used as the divisor then the necessary result was that the assessment and special assessments were higher than they ought to have been and therefore were unlawfully imposed. The reasons for this in that was that all 54,000 shares were issued by the time the Thompson's became shareholders and leaseholders in GHHL.

[15] From what has been said to far a number of things are so plain as to be incapable of being subject to any rational argument to the contrary. First, GHHL are entitled in law to impose assessments and special assessments. Second, under article 91 (1) and clause 5 (b) of the lease, each shareholder and lessee who is a shareholder are subject to assessments and special assessments in proportion to their shareholdings. Third, one cannot be a leaseholder without being shareholder, but one can be a shareholder without being a leaseholder. Fourth, if one is a shareholder and not a leaseholder, the assessments and special assessments are imposed under article 91 (1). Fifth, if one is leaseholder one must necessarily be a shareholder and the assessment and special assessment may be done under either the lease or article 91 (1). Mathematically, whether the assessment or special assessment is done under the lease or article the proportion is in relation to one's shareholdings and that is why a leaseholder

must necessarily be a shareholder. Were it otherwise there would be a free-riding leaseholder who would benefit from the bounty of others without being subject to an assessment. Sixth, those subject to the assessment and special assessment are to pay on the dates, times and manner as directed. Seventh, those leaseholders who comply with the assessment and special assessment and not in breach of other obligations are in good standing.

[16] The years in dispute in this case are from 1989 to 2001. As stated in the Board's advice, all 54,000 shares were issued in 1994. This means that not all the shares were issued in 1989. The principle established by their Lordship's ruling is that it is the issued shares in any given year that is the divisor into the dividend (the assessment and/special assessment). This means that any assessment or special assessment raised against Mr Stewart must be done on the basis of the total number of shares issued in the years in question.

[17] The court now turns to the applications the first of which is the enforcement of the request for information.

The request for information

[18] Mr Stewart requested information from the defendants concerning a mortgage granted by GHHL to Mies Investment Limited ('Mies'). Mies is an investment company in which the principals are the Goodmans. GHHL is controlled by Goodmans. Mr Stewart's fear, as articulated by Mr Emile Leiba, is that the ownership structure of both companies creates the risk that the power of sale may be exercised by Mies in a manner that is to the detriment of Mr Stewart. This concern led to the request for information in which Mr Stewart wants to get information on the servicing of the debt. He wishes to know (a) the size of the debt broken down into principal and interest; (b) what payments have been made and (c) whether the mortgagor is in arrears of default.

[19] This is quite a bold application. It has no foundation in law or fact. Mr Leiba made the impossible submission that the special facts, namely, the same persons

controlling the mortgagor and mortgagee, ought to be sufficient to persuade the court to grant the order. What Mr Leiba's submission failed to do was to address the reply and rule 34.1 (1) of the Civil Procedure Rules ('CPR'). It is not that counsel did not attempt but the defendants' response was unanswerable in law and fact.

[20] Mr Leiba submitted that having that information was relevant to the issues for determination. Counsel referred to an injunction granted by the Court of Appeal much earlier in these proceedings. This court acknowledges that an injunction was granted all the way back in 2003. It is to be noted that injunction was granted well before the Board determined the meaning and application of the relevant clause in the lease and the relevant article in the articles of association. As an aside it is this court's strong view that the beneficiary of that injunction ought to have returned to the Court of Appeal and apprise that court of what has happened since then. Much has happened including an appeal the Privy Council where the authoritative interpretation of the article and clause relevant, in part, to this dispute was laid down. Thus we have the unfortunate situation where an injunction granted in a particular set of facts still remains in place when those facts have changed significantly.

[21] According to counsel the information sought is relevant to 'what step the mortgagee could take upon discharge of the injunction granted by the Court of Appeal.' It was also submitted that there would not be a great deal of prejudice if the information were provided. The court was urged to 'look at the entire circumstances,' that is to say, the pleadings and the nature of the case.

[22] Lord Gifford QC took the point that Mr Stewart has no right to the information and the information requested cannot assist the court in determining any issue in this case. Mr Stewart is seeking information about what has passed between GHHL, mortgagor, and Mies, mortgagee. There is no dispute between them.

[23] The CPR has something to say about this application. Rule 34.1 (1) states:

This Part contains rules enabling a party to obtain from any other party information about any matter which is in dispute in the proceedings.

[24] Rule 34.2 (2) and (3) state:

> *(2) An order may not be made under this rule unless it is necessary in order to dispose fairly of the claim or to save costs.*
>
> (3) *When considering whether to make an order the court must have regard to –*
>
> *(a) the likely benefit which will result if the information is given;*
>
> *(b) the likely cost of giving it;*
>
> *(c) and whether the financial resources of the party against whom the order is sought are likely to be sufficient to enable the party to comply with the order*

[25] These rules speak for themselves. There is no dispute concerning the mortgage. The order is not necessary to resolve any dispute between the parties and consequently there is no benefit which will result from the information requested.

[26] The court refuses the order on the ground that there is no dispute between Mr Stewart and the defendants concerning the mortgage.

The striking out application

[27] The defendants have applied for the claim to be struck out against them on the basis that it has been in court for fifteen years. Lord Gifford submitted that after fifteen years it is not right that the defendants should be asked to respond to a claim that old which depends upon figures and calculations from 1989 to 2001.

[28] From the defendants' stand point this is the history of the matter:

> (a) the claim was filed on July 26, 2001;

(b) a defence and counterclaim were filed by GHHL on October 25, 2001 and by the other defendants on October 26, 2001;

(c) the claimant applied for an injunction which was heard and determined by Reid J on July 17, 2003;

(d) the claimant appealed the decision of judge to the Court of Appeal on July 25, 2003;

(e) the Court of Appeal granted an injunction on terms;

(f) in January and December 2003, the claimant wrote to the Registrar of the Supreme Court requesting a case management conference date;

(g) GHHL also wrote the Registrar in July and December 2003 and May 2005 asking for a case management conference date;

(h) nothing happened until September 2014 when the claimant wrote again to the Registrar asking for a case management date;

(i) the claimant made several attempts to get the reasons for judgment of Reid J but without success.

[29] The defendants say that Mr Stewart did nothing between 2003 and 2014.

[30] Mr Stewart says that this narrative while accurate does not have the correct nuance. He says:

(a) that effort to get the appeal heard was stymied by the absence of reasons from Reid J;

(b) the appeal would need to be heard before the substantive action;

(c) there was communication with the Registrar of the Court of Appeal who told him that she had made the request for the reasons from the Registrar of the Supreme Court;

(d) despite follow up communication the reasons are still outstanding;

(e) the perfected order of Reid J was received in January 2005;

[31] While all this was going on the **John Thompson** case heard and determined in 2007; the appeal was heard and determined by the Court of Appeal in 2008; and finally to the Privy Council which heard and delivered judgment in 2011.

[32] In effect, Mr Stewart is saying that he was not inactive. The delay was occasioned by the inefficiencies in the court system manifested by his inability to secure a case management date; get the reasons for judgment by Reid J; the delay in perfecting the order of Reid J; and the still incomplete record of appeal in the Court of Appeal occasioned by the absence of reasons for judgment from Reid J.

[33] There is no doubt that Supreme Court contributed to the delay in hearing this matter. Both sides wrote to the court asking that a case management date be set. There was no response from the court. That fact is regrettable.

[34] Regarding the absence of reasons. That too is regrettable but not a bar to hearing the appeal. There have been innumerable interlocutory appeals which have been heard and determined by the Court of Appeal without reasons from the first instance court. That there should be reasons is not open to question but to say that an interlocutory appeal could not be heard because of the absence of reasons is not an acceptable reason because the procedural process provides a remedy for just that circumstance – the Court of Appeal hears the matter and exercises its own discretion as distinct from reviewing the reasons for the judge's decision. The court has examined the recital to the formal order of the hearing before Reid J and noted that six attorneys attended the hearing before Reid J. Surely not all of them were making submissions to the judge. From the names listed there were at least two Queen's Counsel, a very senior attorney, and three juniors. The court, until told otherwise, proceeds on the premise that notes were being made of the hearing by the juniors of the submissions made. Thus even if

the judge had simply delivered the outcome of the hearing without reasons, the parties could have agreed a note of what was said during hearing so that the Court of Appeal would have some understanding of the nature of the submissions. The evidence was presented on affidavit.

[35] In **TPL Limited v Thermo-Plastics (Jamaica) Limited** [2014] JMCA Civ 50 the Court of Appeal heard an appeal from the Supreme Court in which one of the grounds was that the learned judge (a) failed to give reasons for granting an interlocutory injunction and (b) made no findings of fact. At paragraph 52 Mangatal JA (Ag) stated:

> *In the instant case, regrettably, the learned trial judge gave neither oral nor written reasons for his decision. This application essentially constituted a rehearing of the application and this court had therefore itself to examine the issues and material that were before the learned judge in order to decide whether he acted exercised (sic) his discretion correctly.*

[36] Thus the very thing that Mr Stewart complains about has been dealt with by the court. **TPL** was not novel. It was simply applying a well-established solution to the no-reasons problem that may arise from first instance adjudications. The Court of Appeal itself, in essence, rehears the matters and makes its own decision regarding the grant the grant or refusal of the injunction.

[37] Even if there has been a trial where the notes of evidence are not available the Court of Appeal has endeavoured to do substantial justice by examining the material such as it is and render a decision. As recently as November 29, 2016, the Court of Appeal in **Kenneth Thomas v Irene Thomas** [2016] JMCA Civ 57 handed down judgment in a matter where the court was not provided with the official transcript of the notes of evidence. The parties agreed 'truncated notes of counsel which, although helpful, were incomplete.' There were no details of cross examination of the witnesses. Far from satisfactory and not to be taken as the norm but the point is even in those dire situations there is a solution. Thus the

court does not accept that the absence of reasons for judgment since 2003 is a good excuse for not prosecuting the appeal with vigour.

[38] Regarding the absence of a case management date, the court's response is that that too is not a good reason. Mr Leiba submitted that the CPR do not impose any duty on the litigant other than applying for a case management date under the transitional provisions of the CPR. The court's response is this: it is not unknown for litigants to apply for orders compelling the Registrar to act and such orders have been granted. This court has granted several. That was an option open to Mr Stewart.

[39] The point is that despite the lack of response from the Registrar of the Supreme Court the procedural rules provide a remedy and attorneys at law are expected to use the remedies available to negotiate the obstacles. If an order compelling the Registrar to act is necessary then so be it.

[40] If the attorney does not wish to go that route there is nothing preventing the attorney at law from filing a notice of application for court orders requesting specific case management orders. The procedural rules have provisions to manage circumstances where it is being alleged that the Registrar either has not acted or refuses to act. The litigant is not without a remedy. The non-exercise of these remedies cannot be relied on as a reason for not pushing forward with the matter. Thus the excuse advanced is really a non-excuse.

[41] The final point on this aspect of delay is this: by 2011, the Privy Council had delivered its advice on the proper interpretation of the very clause and article in dispute in this case. This meant that as a matter of law no other interpretation was permissible other than what their Lordships had decided. This means that Mr Stewart could have moved the process forward by doing the very thing that he is doing now: applying for summary judgment in light of the decision of the Board.

[42] This last point was recognised by Mr Leiba in paragraph 15 of his written submissions where he says that it was better to await the outcome of the **John**

Thompson case 'and then critically examine the position in the remaining case, as has been done by the claimant herein, and determine, what, if any issue, need to go forward.' With this the court agrees but there is no rational reason for that not to have been done within a matter of weeks of the Board's judgment. Five years to do this is simply unacceptable.

[43] Mr Leiba insinuated that the defendants have a counterclaim and are guilty of the same sin as Mr Stewart. The response to this is, as Salmon LJ said in **Fitzpatrick v Batger** [1967] 1 WLR 706, 710:

> *It is said in this case: the action ought not to be dismissed because the defendants might have taken out a summons to dismiss for want of prosecution much earlier than they in fact did. They no doubt, however, were relying on the maxim that it is wise to let sleeping dogs lie. They had good reason to suppose that a dog which had remained unconscious for such long periods as this one, if left alone, might well die a natural death at no expense to themselves: whereas if they were to take out a summons to dismiss the action, they would merely be waking the dog up for the purpose of killing it at great expense which they would have no chance of recovering. I am not surprised that they did not apply earlier, and I do not think that the plaintiff's advisers should be allowed to derive any advantage from that fact.*

[44] In an earlier judgment this court had attributed this to Lord Denning (**Maria Follett v Bournville Briscoe** Claim No F 076 of 1991 (unreported) (delivered May 16, 2006 at paragraph 11). That is incorrect. It was Salmon LJ who said these words. So the fact that the defendants may be guilty of the same sin is no justification for Mr Stewart's.

[45] What is obvious from the narrative is that there is sufficient blame to go around for everyone – the non-response of the Supreme Court to the various requests for a case management conference, the lack of reasons for judgment, the attorneys not utilising all the avenues available in the procedural world to push the case forward.

[46] Mr Leiba pointed out in his submission that Cooke JA in **Alcan Jamaica Company v Herbert Johnson and Idel Clarke** SCCA No 20 of 2003 (unreported) (delivered July 30, 2004) stated at page 15:

> *This review of the cases indicates that in the development of our jurisprudence in this area much emphasis has been placed on whether or not there is a substantial risk that a fair trial is not possible when there is inordinate and inexcusable delay.*

[47] Cooke JA expressed great optimism regarding the CPR when it was introduced. At page 16 his Lordship stated:

> *Since January 2003 the new Civil Procedure Rules 2002 have come into effect. One of the cardinal objectives is to prevent delay, through case management. Not long from now dismissals for want of prosecution may well be an anachronism – at least in its present guise.*

[48] It is not clear whether his Lordship's sanguinity was well placed but is fair to say there are not many written judgments these days dealing with striking out for reasons of delay.

[49] The question on this application is whether there is a substantial risk that a fair trial is not possible. Mr Leiba took the view that most of the cases cited by Lord Gifford were ones in which the claim was in negligence arising from motor vehicle collisions and therefore were not quite applicable to a case of this kind. [1] The argument was that motor-vehicle kind of cases depend on eye-witness recollection of events and the longer the time between event and trial the less reliable witness' memories were likely to be. In this court's view that is not a sufficient basis for the distinction. The issue is not the type of case but whether

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[1] **Maria Follet v Bourneville Briscoe** CL F076 of 1991 ((unreported) (delivered May 16, 2006) ; **Wood v H G Liquors and another** (1995) 48 WIR 240; **Alcan Jamaica Company and another v Idel Thompson Clarke** CL 420/1996 (unreported) (judgment delivered July 30, 2004);

there is evidence to suggest that a fair trial is not possible. The fact that it is motor vehicle case is not without more a reason to conclude that a fair trial not possible. It depends on the nature of the evidence and not the type of case. The true principle to be derived from the motor-vehicle type of cases is this: where the quality of the evidence available at trial is poor or very likely to be poor (and motor-vehicle cases may be an example in instances where they depend solely or substantially on witness' memories which generally degrade with time) then the longer the time between the event and application for striking out the easier it is for the court to draw the inference that a fair trial is no longer possible. However, in the modern age there may be CCTV footage or a cellular phone recording or even an admission by the defendant. In cases where this evidence is available a striking out on the basis that witness's memory is impaired or unreliable is less likely to succeed on the failing or failed memory basis. Some other reason would quite likely need to be present.

[50] The present case is one which turns significantly upon documents. This is not to say that because the evidence comes largely from documents then it necessarily follows that a fair trial is possible. It all comes down to the quality of the evidence. The availability of documents without more does not mean a fair trial is possible. There may be the need to have someone explain the content of the documents, their significance and put them in some context. What appears on the face of the document may not all that there is to know about it.

[51] In the present case the affidavit evidence comes from solely from Mrs Emily Shields. The Goodmans themselves have not indicated any difficulty in meeting the claim. No defendant has said that documents are no longer available, or persons to explain the documents, their content and the like, are not available to testify. The closest one comes to any difficulty is found in paragraph 11 of Mrs Shields' affidavit dated September 21, 2016 where she says:

> *The claim includes claims for damages for conspiracy to injure and breach of duty which are based on allegation of fact relating to the conduct of the defendants between 1989 and 2000. A trial of these*

claims would require evidence to be given and tested relating to the parties' actions during that time period and it would be difficult if not impossible for the parties to remember accurately what they did, so that a fair trial of the issues could not be held.

[52] This is a good intuitive proposition. It is intuitive as distinct from an actual assertion by the defendants because Mrs Shields said in paragraph 2 of the same affidavit states that:

> *I have read the various documents and correspondence relating to this case. Until recently the first defendant was represented by the firm of Watson & Watson. My evidence derives from a study of the files of that firm as well as from the files kept by my firm.*

[53] What this means is that counsel, having read both files and consulted the relevant authorities, developed syllogistic argument which quite likely went like this:

> *Some striking out applications succeed where a long time has elapsed since the claim was filed.*
>
> *All successful striking out applications occur where a long time has elapsed since the claim was filed.*
>
> *Since a long time has elapsed since this claim was filed therefore this application should succeed.*

[54] The defendants would need to bring this case within the class of those striking out applications that succeed. The evidence of Mrs Shield at paragraph 11 was designed to do just that. The evidence has not achieved that objective because the claim is not just about the conspiracy and breach of duty. It raises issues about (a) a mortgage granted by GHHL to Mies and (b) the accuracy of the calculations of the occupancy charges. Mr Stewart has trimmed his claim to more acceptable levels. He has abandoned the conspiracy to injure. He has also given up on the breach of duty claim as well as an order seeking the appointment of a receiver. So too Mr Stewart has sensibly abandoned the quest to prove that the mortgage was void. Having regard to the pleadings and the evidence necessary

to support them it was always going to be a Sissyphean task to try to prove them. This means that in respect of the striking out applications the application now relates to (a) occupancy charges, booking charges, commissions, and (b) whether the lease granted before the mortgage binds the mortgagee.

[55] The mortgage issue can be dealt with purely as a matter of law. The occupancy charges are a combination of fact and law. The occupancy charges issue should largely be about calculations which ought to be recorded somewhere. The booking charges and commission can be determined by an examination of the relevant documents. There is no evidence that records don't exist or the witnesses who may be able to speak to these records are unavailable or have failing memories. Regrettably, Mrs Shields' affidavit has not spoken to these matters and consequently, having regard to the context of this case, there is no evidence that a fair trial is no longer possible.

[56] The case is now in the Commercial Division of the Supreme Court and trial can be had within the next 12 months. This case will not be taking up a disproportionate share of the Commercial Division's resources. The case management powers of the court are sufficient to police the conduct of the parties in order to ensure that they meet the timetable set by the court. Naturally, the case management orders will set a tight but realistic timetable with appropriate sanctions. The court therefore declines to strike out the claim.

[57] Having declined to strike out the claim the court is not saying that the application was not a proper one. After 15 years any defendants would like to be rid of potential liability. The court now turns to the summary judgment applications.

Mr Stewart's and the defendants' applications for summary judgment

[58] In this section of the judgment the court will deal with two applications. Mr Stewart applied for summary judgment as modified by Mr Bailey's second affidavit and the submissions of Mr Leiba. The defendants applied for summary judgment as an alternative to their striking out application. The court will divide

the summary judgment application in three parts. The first is the mortgage issue; the second is the assessment and special assessment issue and finally the occupancy and booking charges as well as the commission charge.

[59] Before going further Mr Stewart's attorneys at law made some indications to the court that are now stated.

[60] According to Mr Bailey's second affidavit if summary judgment were granted in the terms sought then the only issue remaining would be in relation to the mortgage. Lord Gifford took the position that it is not necessary to hear and determine the matter in order to grant the remedy at paragraphs 42 (2) (d) and (e) because the decision of the Judicial Committee has decided the proper interpretation of the same clause and article in question and to that extent the defendants are bound to apply the decision of the Board to Mr Stewart.

[61] Mr Leiba indicated at the commencement of his submissions that Mr Stewart was no longer pursuing

(i) paragraph 42.1 (c) (claim for damages for conspiracy to injure);

(ii) paragraph 42.2 (g) (an injunction restraining defendants from serving notice or default under the lease);

(iii) paragraph 42.2 (h) (claim for damages for breach of duty); and

(iv) paragraph 42.2 (i) (order for the appointment of a receiver of GHHL).

[62] The injunction at paragraph 42.2 (g) was to prevent GHHL taking steps to forfeit the lease until the declarations sought were heard and determined. Mr Bailey said in his affidavit that if Mr Stewart were to receive summary judgment on paragraphs 42 (2) (d), (e) and (f) (ii) then the injunction at paragraph 42 (2) (g) would not be necessary.

[63] It is important to note that the defendants had sought summary judgment on the paragraphs 42.1 (c), 42 (2) (h) and 42 (2) (i) in their notice of application for court orders filed September 21, 2016. The defendants did not seek summary judgment on paragraph 42 (2) (g). The present position of Mr Stewart means that the court need not adjudicate on whether the defendants are entitled to summary judgment on those paragraphs that Mr Stewart is no longer pursuing.

[64] The legal standard for summary judgment is found in rule 15.2 of the CPR. It requires the court to decide whether the claimant or defendant has any real prospect of succeeding on or defending the claim or issue as the case may be. What is required is an assessment of the prospects of success on the claim, defence or the issue. It is not a trial. The judge does not make findings of fact. The criterion is not probability but a lack of reality. The must look into the future and decide that the outcome of the trial would be if it goes forward. In coming to its decision the court has regard for the present information available, what information may become available through discovery, the present state of the law, the availability of witnesses and the like. The pleadings may be well done and accurate but realistically, they cannot be proved. (**Three Rivers District Council and other v Governor and Company of the Bank of England** [2003] 2 AC 1).

[65] Sometimes the case being advanced is so implausible and the cogency of the evidence required in such a case is so great that it is not hard conclude that the case has not realistic prospect of succeeding (**Three Rivers** (Lord Millett)).

A. *The mortgage issue*

[66] Mr Stewart is seeking summary judgment in respect of the mortgage against all four defendants. These remedies are found at paragraph 42 (1) (a) and (b) of the amended statement of claim. The amended statement of claim was amended even further. There is no formal document yet setting out the new amendments. The further amendment was indicated via Mr Courtney Bailey's second affidavit

on behalf of Mr Stewart. This was supported by the written and oral submissions of Mr Leiba for and on behalf of Mr Stewart.

[67] The court will set out the paragraphs as they present stand in the amended statement of claim and use strike-throughs and bold to indicate the amendments that have been indicated by the affidavit and written submissions.

[68] According to Mr Bailey's second affidavit the remedies now sought in respect of the mortgage are:

> *Paragraph 42 (1) (a):*
>
> *A declaration that mortgages purportedly granted by the first defendant to the second defendant over lands registered at volume 1129 folio 450 and volume 1298 folio 746 and known as Goblin Hill Hotel and debenture granted by the first defendant to the second defendant over its fixed assets, including the said lands ~~are void, or alternatively, are void as against the plaintiff and other lessees of villas situated on the said land or in the further alternative~~, take effect only subject to the said leases.*
>
> *Paragraph 42 (1) (b)*
>
> *An injunction restraining the defendants and each of them by themselves, their servants, agents or otherwise ~~from taking any steps to enforce~~, ~~or to procure the enforcement of~~, ~~the said mortgage or debenture upon any default of the first defendant thereunder, or otherwise,~~ ~~or~~ transferring or disposing of the said mortgage and debenture to third parties except upon terms which preserve the priority of the plaintiff's lease over the said securities and in the case of the third and fourth defendants from using their voting or management power in the second defendant to achieve the said ~~enforcement or~~ transfer of the mortgage or debenture* ***except upon terms which preserve the priority of the plaintiff's lease over the said securities****.*

[69] As is immediately obvious the present position of Mr Stewart as represented by what is left after the strike-throughs and what was added by the words in bold is

a significant climb down from what was originally sought. A case of reduced ambitions.

[70] The idea behind paragraphs 42 (1) (a) and (b), with the most recent amendments, according to Mr Leiba, is that the Goodmans control GHHL, the mortgagor, and they also control Mies, the mortgagee. At any time, it is said the mortgagee may exercise its power of sale and should this happen it would be to the detriment of Mr Stewart.

[71] As the law presently stands, it is immediately clear why Mr Stewart reduced the scope of his ambitions in relation to the mortgage. The first point would be that he is not a party to those arrangements and he would be hard pressed to indicate the legal foundation for his proposition that he could get a relief declaring that a contractual arrangement between two parties can be declared void on the intervention of a third party who is not a party to that agreement. The second point is that the claim as framed is not a complaint under the Companies Act where a shareholder is suggesting that those in charge of the company have acted improvidently to the detriment of the company and himself (see section 212).

[72] In any event, the Registration of Titles Act ('RTA') has something to say about leases. The RTA emphasises the importance of the date of registration and not the date of creation of interests in land. It is the interest that is registered first that gets priority over other interests. Sections 55 to 74 deal with registration and its consequences. Section 58 states:

> *Every duplicate certificate of title shall be deemed and taken to be registered under this Act when the Registrar has marked thereon the volume and folium of the Register Book in which the certificate is entered; and every instrument purporting to affect land under the operation of this Act shall be deemed and taken to be registered at the time produced for registration, if the Registrar shall subsequently enter a memorandum thereof as hereinafter described in the Register Book upon the folium constituted by the existing certificate of title and also upon the duplicate; and the*

> *person named in any certificate of title or instrument so registered as the proprietor of, or having any estate or interest in or power over, the land therein described or identified, shall be deemed and taken to be the duly registered proprietor thereof, or as duly registered in respect of such estate interest or power;*
>
> *Provided that if, before entering the memorandum hereinbefore mentioned, the Registrar shall, for any reason, return the instrument to the person producing the same, the time of reproduction of the instrument for registration after the requirements of the Registrar have been complied with, shall be the time of production for registration.*

[73] Section 58 underscores the importance of registration. If an instrument is presented but has to be returned and on return it is accepted the effective date is not the date it was first presented but the date it was in fact registered after it was returned to the Registrar of Titles.

[74] Section 59 states:

> *Every instrument presented for registration may be in duplicate ..., and shall be registered in the order, and as from, the time at which the same is produced for that purpose; and instruments purporting to affect the same estate or interest shall, notwithstanding any actual or constructive notice, be entitled to priority as between themselves according to the time of registration, and not according to the date of the instrument. ...*

[75] This provision supports section 58. It confers priority as between instruments from the time of registration and not the date of the instrument. This makes perfect sense. The date on the document may not in fact be the date of its creation. Actual or constructive notice is utterly irrelevant when it comes to determining priority by registration of instrument. The impact of this is that if a mortgagee knows of a lease in existence between the mortgagor and the lessee before he took the mortgage, that knowledge is of no moment. If the mortgagee registers his mortgage before the lease then he gets priority. Actual notice does

not deprive the mortgagee of priority. If actual notice cannot do so then clearly constructive notice cannot do so either.

[76] It is important to appreciate how far reaching is this provision. The common law does not have a concept of notice. The doctrine of notice was developed by the courts of equity as a means of protecting beneficiaries of and holder of equitable interests. If a person has personal knowledge of something the clearly he has notice of it. However equity went further to say that if a person employs an agent to investigate a title to property on his behalf and the agent finds out some fact during the course of his investigation relevant to the transaction involving the title, then the person employing the agent is deemed to have notice. This is called imputed notice. If the person employing the agent ought, according to the standards of equity, to have known something whether personally or through his agent, equity treats the person employing the agent as if he actually knew it. This is constructive notice. Thus notice to the agent is notice to the principal. The law does not say that the principal knows or is deemed to know what the agent knows but rather that the principal cannot escape by employing an agent because if that were so all he would need to do is to employ an agent.

[77] It was this doctrine that the Torrens system sought to restrict. It makes sense because the whole point of the RTA was to create greater certainty and reduced costs of land transactions. The state has now stepped forward to say that it guarantees that what is registered is what is relevant.

[78] Hence section 71 states that except '*in cases of fraud no person contracting or dealing with, or taking or proposing to take a transfer from the proprietor of any registered land, lease, mortgage, or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration, money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge of*

any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.'

[79] Section 72 refers to any registered land, lease, mortgage or charge. Section 60 forbids the registration of any trust, express, implied or constructive but trusts may be declared and the instrument doing the same may be deposited with the Registrar who may protect the rights of any person with the beneficial interest in any way he deems advisable.

[80] Section 3 of the RTA has important definitions. 'Instrument' is defined.

> *Instrument shall include a conveyance, assignment, transfer, lease, mortgage, charge and also the creation of an easement;*
>
> *Proprietor shall mean the owner, solely, jointly or in common with any other person, whether in possession, remainder, reversion, expectancy or in tail, or otherwise, of land, or of a lease, mortgage or charge; ...*

[81] Section 94 of the Registration of Titles Act states:

> *Any freehold land under the operation of this Act may be leased for any term not being less than one year by the execution of a lease thereof in the form in the Sixth Schedule, and the registration of such lease under this Act; but no lease or any land subject to a mortgage or charge shall be valid or binding against the mortgagee or annuitant unless he shall have consented in writing to such lease prior to the same being registered.*

[82] It is clear then that what gives priority as between instruments under the RTA is registration and not the date of creation of the instrument or date of execution. As between the immediate parties to the instrument their rights are governed by the instrument subject to what the RTA may have to say.

[83] A lease as is obvious from the provisions cited once captured in an instrument is capable of being registered if it is greater than one year. If the lease was registered prior to the mortgage then the mortgage would be subject to the lease.

Where the lease is not registered then unless the mortgage specifically makes provision for any existing lease, then the mortgage is not subject to the lease.

[84] From what has been said about the doctrine of notice and its severe restriction under the RTA it follows that the submissions by Mr Leiba concerning Mr Stewart's open occupation of his villa and that the defendants knew of the lease are of no moment because it is registration that is vital not knowledge on the party of the mortgagees.

[85] There was even a direct appeal to equity. Section 59 has overridden any benefit that may have from equity or even the common law.

[86] Under the Torrens system, as captured in the RTA, because a mortgage does not operate as transfer of the land but rather imposes a charge upon the land, the mortgagor can still lease the land despite the mortgage. In order to prevent leases being granted by the mortgagor without the knowledge of the mortgagee the mortgage often times has provisions preventing the mortgagor from leasing or parting with possession or encumbering the land in any way without the written permission of the mortgagee.

[87] Mr Leiba submitted that section 94 of the RTA applies to a lease granted after the registration of the mortgage. Respectfully, the court cannot agree. Mr Leiba's submissions do not recognise that a lease may be granted, as in this case, before registration of the mortgage. Had it been registered there is no problem. If a lease is granted before the mortgage but the mortgage is registered first the mortgage takes priority. It is not the time when the lease is granted that is important but when registration occurs. If the mortgage is registered first, then clearly the lessee has to comply with section 94 regardless of when the lease was granted.

[88] The court has taken account of the written submission made on behalf of Mr Stewart. It was submitted that the court should examine the mortgage instrument to see whether Mies was given a charge over GHHL's property 'free of the

claimant's and other lessees unregistered leases.' The written submissions further informed the court that 'when [the] task of construction is undertaken in the context of the surrounding circumstances known to both parties to the charge … the mortgages were given subject to the unregistered leases of the claimant and other lessees. Clause 8 (j) and 3 (b) of the mortgage instrument, in particular point in favour of this conclusion.' There is no need for the court to undertake an exercise of this nature. The RTA provided the solution which was not utilised.

[89] The present predicament of Mr Stewart was not caused by any of the defendants. The lease was granted many years before the mortgage and there is no pleading or any affidavit evidence suggesting that the defendants prevented Mr Stewart from registering his 99 year lease.

[90] The written submissions make reference to the special circumstances of this case namely that the mortgagor and mortgagee are controlled by the Goodmans and if an injunction is not granted then all that would be necessary is for GHHL to stop servicing the mortgage and Mies could exercise its powers as a mortgagee thereby imperilling the lease holders such as Mr Stewart. This is a theoretical possibility which may only become reality if Mr Stewart does not bring himself on the right side of good standing. The mortgage instrument provides for preservation of the unregistered lease holder by the simple expedient of requiring them to be in good standing. All Mr Stewart needs to do is follow the terms of the lease and pay the assessments and other lawful charges raised against them in accordance with the decision of the Board and comply with the other terms of the lease and any other document that governs the relationship between the parties.

[91] The written submissions suggested that GHHL purported 'to give a mortgage to the second defendant free of the leases over the property.' This is not entirely accurate. The mortgage protects unregistered leases by making it a condition of such protection that the lessees must be in good standing. The protection afforded by the mortgage instrument to unregistered lease holders was not the result of any legal obligation on the mortgagor/mortgagee. The unregistered

leaseholders were being given greater protection by the mortgagor/mortgagee when the law did not require them to do so.

[92] The court was urged, via the written submissions, to utilise 'established principles, and peer through the corporate veil' of the mortgagor and the mortgagee 'and conclude that the granting and registration of a mortgage to the [Mies] without making it subject to the claimant's lease amounts to 'fraud' disentitling [Mies] from the protection of those sections of the [RTA].'

[93] The word 'fraud' was placed on quotation marks to suggest that actual dishonesty was not intended but nonetheless words have two types of meanings: the denotative (conventional dictionary meaning) and the connotative. Connotative meanings may hint at something because of the context that the denotative does not. The context here suggests that the conduct of the Goodmans has some affinity to the conduct of the Jamaican three-card man that popular figure who convinces members of the public to play the three-card game. He shows the patron a card and quickly manipulates the three card in the presence of the patron who is then required to identify the card that was shown to him. In order to participate the patron has to place a bet. If the patron identifies the correct card his money is doubled instantly. If not, the three-card man takes the whole. The success of the three-card man depends on nimble fingers and speed of manipulation of the card. He has not lied to you but someone one feels that something is not quite right.

[94] The negative connotation is not justified. At the risk of repetition had Mr Stewart registered his lease as he was entitled to do the problem he now has would not have arisen at all. This problem was self-inflicted. No one prevented him from registering the lease.

[95] The court needs to emphasise that in the **John Thompson** case it was plain that GHHL would rely heavily on the assessments and special assessments in the post incentive period to meet its obligations to keep the property at the standard of a first class resort. In those circumstances it really should not have come as a

surprise that GHHL may very well have had to borrow money to meets its own obligations if the leaseholder and/or shareholders did not pay their assessments in full and on time. The evidence in **John Thompson** showed that the problem had become so chronic that a sale of the property was contemplated. The problem of lessees not paying was mentioned in **John Thompson** yet some or all expected the benefit of the property maintained to the standard of a first class hotel. If lessees and shareholders did not pay the assessments, even for good reason, then how else but by borrowing would GHHL meets its contractual obligations to keep the property to the standard of a first class hotel?

[96] The articles and the lease contained no hidden material. It was there for all to see. The risks were present and manifest. No three-card man mentality was present in the documents. If parties contract in the face of the known risks then they live with the consequences of their choice. That is what freedom of contract means.

[97] The fact that the lease predated the mortgage cannot give it priority over the mortgage which was registered under the RTA. This stands in sharp contrast to the common law position as explained in **Universal Permanent Building Society v Cooke** [1952] Ch 95 where the mortgagor contracted to purchase a property. Before completion the mortgagor granted a weekly tenancy to her sister. When the lease was granted the mortgagor did not yet have the legal estate which meant that the lessee's tenancy rested on the insecure foundation of tenancy by estoppel. The estoppel would operate against the mortgagor. The mortgagor eventually received the legal estate by way of conveyance. The day following the conveyance of the legal estate to the mortgagor she granted a mortgage to the mortgagee. The mortgagor defaulted and the mortgagee now wanted to eject the tenant from the property. The issue that arose was whether the tenant had acquired an interest in the property that was good against the mortgagee. The trial judge granted the order for possession on the basis that the conveyance and the mortgage was one transaction. The trial judge took the view that the fact that conveyance was dated December 28 and the mortgage dated

the following day was still sufficient to make it one transaction and so the mortgagee could be granted an order for possession. The implication of the trial jduge's finding was that at no time did the mortgagor get the legal estate and thus the tenancy never progressed beyond a tenancy by estoppel which was only effective against the mortgagor and not the mortgagee. On appeal, the Court of Appeal felt able to conclude that it was two separate transactions with the result that the trial judge was reversed on the ground that for the brief moment in time between the conveyance to the mortgagor and the grant of the mortgage (December 28 and 29 of the same year) the mortgagor had an unencumbered legal estate out of which she could grant the lease. The effect of this scintilla temporis was that the mortgagor had a legal estate out of which she could properly grant a lease. The tenancy by estoppel which good only against the mortgagor now became a proper lease. Once it became a proper lease it bound the mortgagee. The fact that mortgage document prevented leasing without the mortgagee's consent coming as it did after completion and not being part of the same transaction did not prevent the tenancy arising.

[98] The Court of Appeal of England and Wales re-examined the matter in **First National Bank Plc v Thompson** [1996] Ch 231 albeit in a different factual context. The court affirmed the correctness of **Cooke**. However, in Jamaica, the RTA has replaced the common law in this regard and registration of leases greater than one year is necessary if it is to bind the mortgagee. In this case it is not what the mortgagee knows but what whether the lease was registered.

[99] There is simply no legal foundation to grant the declaration sought at paragraph 42 (1) (a) as framed. What Mr Leiba is asking the court to do is to provide the benefit of registration without the lessee complying with the law by registering the lease.

[100] In light of the court's decision on paragraph 42 (1) (a), there no possibility of Mr Stewart succeeding in securing an injunction under paragraph 42 (1) (b) as framed. It is asking for an injunction to prevent a mortgagee from lawfully

exercising any power of sale that may legitimately arise except on terms that the power is exercised subject to an unregistered lease. The RTA has told us how priority is secured. There is no other way.

[101] This court concludes that there is no real prospect of Mr Stewart succeeding at paragraphs 42 (1) (a) and (b) of the amended statement of claim in their present formulations.

[102] A word on the mortgage. Various references have been made to the clause in the mortgage that protects lessees in good standing. The relevant clause is clause 8.19 (g) which reads:

> *… as at the date hereof there are no leases or tenancy agreements registered against the certificate(s) of title to be the mortgaged premises save and except such as have been notified in item 7 of the schedule hereto and that from and after that date hereof, the mortgaged premises will not be the subject of any other lease registered under or by virtue of the Registration of Titles Act or any registered tenancy agreement whatsoever (save existing unregistered leases to shareholders of the mortgagor which are in good standing) without the prior consent of the mortgagee.*

[103] Here we see the mortgagor acknowledging the existence of unregistered leases. Mr Leiba submitted that the phrase the clause should be read without the words 'in good standing.' This is impossible if for no other reason that the court is not aware of any authority for a non-party to an agreement to seek to remove (rectify) the actual text of the contract. The mortgagee and mortgagor have agreed between themselves as to how they are going to treat with unregistered leases. That is a matter for them. Also the court has no authority to rewrite agreements for parties. The court is limited to interpretation of the document when that issue properly arises between the contracting parties. The court may rectify a document at the behest of one of the contracting parties. Neither circumstance has arisen in this case.

[104] It is necessary to refer to the defendants' summary judgment application which was their alternative position should the striking out application fail. The application by the defendants for the alternative remedy for summary judgment was filed on September 21, 2016 and amended on October 7, 2016. They asked for summary judgment in favour of themselves on paragraphs 42 (1) (a) and (b) in the statement of claim and the amended statement of claim.

[105] In light of Mr Bailey's affidavit Lord Gifford's response was to propose a declaration in the following terms:

> *A declaration that mortgages granted by the first defendant to the second defendant over lands registered at volume 1129 folio 450 and volume 1298 folio 746 and known as Goblin Hill Hotel and debenture granted by the first defendant to the second defendant over its fixed assets, including the said lands take effect subject to the* ***claimant's unregistered lease between himself and the lessor/mortgagor, if the claimant's lease is in good standing.*** (Emphasis added)

[106] The part in bold is to take account of Mr Stewart's unregistered lease by recognising that the mortgage instrument spoke directly to recognising unregistered leases that are in good standing.

[107] It is this court's view that the declaration proposed by Lord Gifford is the correct declaration and that declaration is granted. The court is of the view that the declaration granted in the terms proposed by Lord Gifford is sufficient protection for Mr Stewart provided he is in good standing. This means that declaration sought in paragraph 42 (1) (a) is granted as amended by Lord Gifford's proposed declaration.

[108] The defendants say that the injunction sought in paragraph 42 (1) (b) is unnecessary because there is no evidence that the defendants are 'transferring or disposing of the said mortgage and debenture to third parties.' The court agrees with this observation. Further Mr Stewart is also asking in paragraph 42 (1) (b) that the court interferes with the internal operation of Mies. As far as the

pleadings go it is not entirely clear what locus standi Mr Stewart has in relation to Mies that would enable him to secure an injunction restraining members and officers of that company for exercising their voting or management powers in the manner sought by Mr Stewart. This claim cannot achieve that result. This claim was not conceived as a company law action seeking redress for perceived misdeeds in the management of a company. There is no pleading that Mr Stewart falls within the class of person recognised by the Companies Act who would have locus standi to take action in respect of how a company is being managed (see section 213A of the Companies Act). The court therefore refuses to grant summary judgment in favour of Mr Stewart on paragraph 42 (1) (b).

B. *The assessments and special assessments*

[109] Mr Stewart is seeking summary judgment on paragraphs 42 (2) (d) (e) & (f) (ii) of the amended statement of claim. These paragraphs are set out now:

> *Paragraph 42 (2) (d) reads:*
>
> *A declaration that the sums charged to the plaintiff for maintenance and special assessments for each of the years 1989 to 2001 exceed the sums which could legitimately be charged under the lease between the plaintiff and the first defendant and under the articles of association of the first defendant, properly construed, and that the said assessments and special assessments are accordingly pro tanto unlawful, invalid and unenforceable.*
>
> *Paragraph 42 (2) (e) states:*
>
> *An order that the assessments for the years 1989 to 2001 be set aside and that the first defendant render assessments on proper bases, and in accordance with the lease and the articles of association properly construed and a further order that the first defendant repay to the plaintiff any sums paid by the plaintiff in excess of what was properly payable, plus interest at such commercial rate as the honourable court deems fit.*
>
> *Paragraph 42 (2) (f) (i) provides:*

A declaration that the so-called occupancy charges levied by the first defendant against the plaintiff in respect of the occupancy of the plaintiff's villa by the plaintiff or by others with his permission, are unlawful and arbitrary and not permitted by the terms of the plaintiff's lease of the said villa or the articles of association of the first defendant or otherwise and a further declaration that the debiting of the plaintiff's account with booking charges or commission payable to Goblin Hill Villa of San San Limited and/or the first defendant are or were wrongful.

Paragraph 42 (2) (f) (ii) seeks:

Further and/or in the alternative

(x) A declaration that the occupancy charges levied by the first defendant against the plaintiff in respect of the occupancy of the plaintiff's villa by the plaintiff or by others with his permission were incorrectly calculated, inordinate and excessive; and

(y) An order for an accounting by the first defendant in respect of the calculation of the said occupancy charges;

(z) An order that the first defendant repay to the plaintiff any sums paid by the plaintiff in excess of what was properly payable, plus interest at such commercial rate as the honourable court deems fit.

[110] The notice of application seeks an alternative order:

The first defendant's defence in relation to the claimant's claim to the reliefs claimed at paragraphs 42 (2) (d), (e) and (f) (ii) of the amended statement of claim be struck out.

[111] In respect of the primary order sought by Mr Stewart the ground is that the first defendant has no real prospect of successfully defending the claim in respect of remedies sought at paragraphs 42 (2) (d), (e) and (f) (ii) of the amended statement of claim having regard the Supreme Court's decision and the Privy Council's decision in **John Thompson**.

[112] Regarding the alternative application the ground is that the first defendant's defence discloses no reasonable grounds for defending the claim in light of the judgment Privy Council in **John Thompson**.

[113] The defendants' positon as articulated in the affidavit of Mrs Shields is that Mr Stewart is only entitled to the declaration at paragraph 42 (2) (e) and not paragraph 42 (2) (d).

[114] The court agrees with Lord Gifford to a limited extent. The Thompsons in **John Thompson** became shareholders at a time when all 54,000 shares were issued and that is why the assessments and special assessments in their case had to be done on the basis of 54,000 shares being issued. In the case of Mr Stewart, some of the years in dispute predate 1994, the year when all the shares were issues. In respect of these years the divisor is the number of issues shares for the years in question. Depending on the date of issue the number of shares for a given year may increase. From 1994 onwards it is the 54,000 shares that become the divisor because all shares were issued in 1994.

[115] Paragraph 42 (2) (d) as framed is too broad and there is the danger that it misses the basis of the **John Thompson** case. The Board never held that the assessments and special assessments were not permitted by the article and the lease. The assessments and special assessments were permitted and in that sense could be lawfully charged. The amounts arrived at were only unenforceable because of the wrong divisor was used.

[116] In paragraph 85 the Supreme Court found in **John Thompson**:

> *The claimants have failed to show that the estimated cost of operating and maintaining the villas and grounds for to (sic) the standard of (sic) first class resort hotel … were (sic) excessive.* ***What they have shown is that GHHL used the wrong divisor and so would end up with a higher quotient and to that extent and that extent alone the assessments and special assessments levied …were excessive and should be set aside****. (Emphasis added)*

[117] In respect of the assessments and special assessments the Supreme Court expressly found at paragraph 149:

> *The claimants are entitled to the declarations that the assessments and special assessments …were excessive. There is no evidence that the estimates required under the lease or the articles of association were excessive.* ***What made the assessment and special assessment excessive …is that GHHL did not use the entire 54,000 shares as the basis for the calculation of the individual share holders (sic) contribution****.* (Emphasis added)

[118] The Supreme Court held as a matter of law that the raising assessments and special assessments were lawful because the relevant documents when properly interpreted led to that conclusion. Once this conclusion was reached as a matter of law the remaining question was whether as a matter of fact the assessments and special assessments met the legal standard. The Supreme Court said the standard was not met. This interpretation of the clause and article was upheld by the Privy Council.

[119] From all this the court understands that the formula for arriving at the individual assessments for shareholder assessed under the articles is this:

> *Assessment/special assessment ÷ total number of issued shares for the year of assessment/special assessment = assessment/special assessment per share*

[120] The quotient arrived at is then multiplied by the number of shares the shareholder has and that number is the dollar figure to be paid by the shareholder since the article says that the assessments and special assessments are to be in proportion to the shareholders shares in GHHL.

[121] The court grants summary judgment in respect of paragraph 42 (2) (d). Also the court agrees with Lord Gifford that the word ‘maintenance’ in the first line of paragraph 42 (2) (d) should be removed and replaced with ‘assessment.’ Summary judgment on paragraph 42 (2) (e) is granted in favour of Mr Stewart having regard to the Privy Council’s decision. Counsel are to agree the wording

on these two paragraphs and the formulation must reflect the decision of the Board in **John Thompson**.

C. *The occupancy charges, booking charges and the commission*

[122] This leaves the question of the occupancy charges. As noted in the Supreme Court decision in **John Thompson** it is not the name that is important but whether the charges levied are justified by the articles and terms of the lease. Clause 5 (b) of the lease applies after the incentive period. In the **John Thompson** case the Supreme Court found that the incentive period ended in 1989 and thus clause 5 (b) applied from that time onward. Also in **John Thompson** the court found that clause 5 (b) of the lease imposed a requirement on GHHL to maintain the property at the standard of a first class resort hotel. The lease also required GHHL to estimate the cost of carrying the company's operation and performing the company's obligations regarding the villa units and the grounds (para 62 of judgment). The assessments to be made can only be for maintenance, upkeep and repairing the villas, the grounds and the property (para 62). It was also found as a matter of construction of the lease that the same interpretation applies to clause 5 (c) which addresses special assessments with the proviso that those special assessments are restricted to maintenance of the villas and the grounds.

[123] Article 91 (1) had virtually identical wording to that found in clause 5 (b) of the lease, that is to say, GHHL was required to 'estimate the total sum of money required for [a] maintenance of the company and the cost of carrying on the operation and [b] performing the obligations of the company with regard to the villa units or apartments ag Goblin Hill San San and the ground used therewith.' Under article 91 (2) the trial court also found that there was power to raise a special assessment for 'additional or unforeseen expenses of operating or maintaining the villa, or apartments or grounds.'

[124] It is clear that under clause 5 (b) and article 91 (1) the company is required to estimate the costs to carry out its obligations under the lease and article. Then

those assessments are collected from the shareholders and/or lease holders in accordance with the Privy Council's decision. The documents contemplated that there may well be shareholders who are not lease holders. Those who are shareholders and not lease holders would be assessed under the articles alone. Those who are lease holders and also shareholders are assessed under either the lease or the article but not both.

[125] The Supreme Court in **John Thompson** held as matter of construction of the documents (not analysis of evidence) that the occupancy charges were lawful (paragraph 86). Thus if it turns out that when the villas or apartments are occupied they cost more to maintain then clearly it would be legitimate for the estimate to be calculated to take account of any increased maintenance costs arising from occupation. The declaration sought states that the 'so-called occupancy charges' levied by GHHL were not permitted by the terms of the lease or the articles of association of GHHL. The court is of the view that the occupancy charges were permitted by the terms of the lease and the articles of association. It means that the court cannot grant the summary judgment sought that the occupancy charges are unlawful as requested by paragraph 42 (2) (f) (i) of the amended statement of claim.

[126] Paragraph 42 (2) (f) (i) is also asking for a declaration that the debiting of Mr Stewart's accounts with booking charges and commission payable to GHHL were and are wrongful. Presumably this means that it was not authorised by any of the documents executed by the parties. The court takes this view because paragraph 42 (f) (ii) seeks a declaration that the occupancy charges were incorrectly calculated, inordinate and excessive. It is unlikely that both mean the same thing. The first is questioning the legality of the occupancy charges while the second is questioning the accuracy of the occupancy charges calculation, assuming that they are lawful. Paragraph 42 (f) (ii) further seeks consequential orders. If Mr Stewart is successful in establishing that the calculations were not only flawed but should be less that what was actually charged then clearly GHHL would have to account for the sums levied under the heading of occupancy

charges. Interest at a commercial rate on those sums found to be due to Mr Stewart would be in order for those charges where such interest was pleaded.

[127] Something further must be said about the occupancy charges. This aspect of the assessment and special assessment may need to be calculated separately from those parts which can be arrived at by dividing the total assessment by the number of issue shares. The occupancy charges would only arise when the villas were occupied. If they are not occupied then it is difficult to see how such a charge could arise. However, even if the villas were never occupied there would still be the need to maintain them. The maintenance is needed simply because they exist and not because they are occupied.

[128] Regarding the quantification of occupancy charges, the court in **John Thompson** held that the occupancy charges were lawful provided that they were the result of the estimate that GHHL was to make under clause 5 (b) of the lease or article 91 of the memorandum of association. Thus the legal foundation to levy occupancy charges is not in doubt. What was left over from **John Thompson** was the calculation of the charges. Mr Stewart can therefore challenge the correctness of the calculation. Depending on the outcome then the consequential orders for an account and repayment at a commercial rate are legitimate orders to seek.

[129] The court has no calculations before it and so cannot determine whether the arithmetic of the occupancy charges is correct and so summary judgment cannot be granted on the premise that they were incorrectly calculated, inordinate or excessive. It follows that summary judgment cannot be granted for an accounting, repayment and interest on any sum found to have been overpaid or wrongly paid by Mr Stewart.

[130] The previous judgment in **John Thompson** did not deal with booking charges levied or commissions earned by GHHL. The court does not agree with Lord Gifford that the previous decision covers this aspect of the present claim. It means that this aspect of this claim can move forward to trial.

[131] In view of the court's decision that the quantification of the occupancy charges as well as both the legality and quantification of the booking charges and commission can go forward there is no necessity or even basis for granting the injunction sought at paragraph 42 (2) (g). There is no evidence that GHHL has served, about to serve or taking steps to serve notice of default under the lease or articles on the Mr Stewart. There is no evidence that any power of re-entry or forfeiture is about or has been exercised. Summary judgment under paragraph 42 (2) (g) is denied.

Summary

[132] A summary of the court's decision on the three applications is as follows:

(1) the claimant's application to enforce the request for information is denied;

(2) the defendants' application for striking out the entire claim is denied;

(3) the claimant's application for summary judgment on paragraphs 42 (2) (d) and (e) is granted but the actual wording of the declaration must reflect the decision of the Judicial Committee of the Privy Council in **John Thompson** that is to say that the divisor is the number of share issued for the year in question. It may be that depending on the date of the issue there may be different numbers of shares for any given year;

(4) the declaration sought in respect of the mortgage in paragraphs 42 (1) (a) and (b) of the amended statement of claim as further amended in terms of what was stated in Mr Courtney Bailey's affidavit is granted but in these terms:

> *A declaration that mortgages granted by the first defendant to the second defendant over lands registered at volume 1129 folio 450 and volume 1298 folio 746 and known as Goblin Hill Hotel and debenture granted by the first defendant to the second defendant over its fixed assets, including the said lands take effect subject to the* ***claimant's unregistered lease between himself and the***

lessor/mortgagor, if the claimant's lease is in good standing. *(Emphasis added)*

(5) the first defendant's application for summary judgment on paragraph 42 (2) (f) (i) is granted in relation to occupancy charges because occupancy charges are permitted by the terms of the lease and/or the articles of association. It is really a matter of the method of quantifying charges during the relevant years and not whether they were permitted. The occupancy charges are permitted by the terms of the lease and the articles of association. The remaining issue is whether those charges were accurately calculated. The calculation of the occupancy charges was not decided by the Supreme Court in **John Thompson**;

(6) the **John Thompson** case did not decide on the legality of the booking charges and commission and neither was the calculation of those charges determined. Since they book charges and commissions were not previously adjudicated upon whether in law or fact and therefore can go forward to trial;

(7) the injunction sought by the claimant in paragraph 42 (1) (b) is not granted because there is no need for it and could not be granted as presently framed. An injunction is not necessary having regard to the terms of the declaration approved in respect of the mortgage. Also the terms of the mortgage protects Mr Stewart if he is in good standing. There is therefore much to be done before GHHL can get to taking steps to forfeit the lease. GHHL must now raise the assessments in accordance with the Privy Council's decision which then must be paid by Mr Stewart;

Conclusion

[133] The only issues to be decided in this matter are:

(a) whether the amounts charges as occupancy charges were correctly calculated for the years 1989 – 2000;

(b) whether the booking charges and commission are permitted by the agreement between Mr Stewart and GHHL;

(c) whether the sums charges in respect of the booking charges and commissions were correctly calculated for the years 1989 – 2000.

[134] There may be consequential orders regarding refunds and interest on the excess should it be the case that Mr Stewart was either overcharged or that there was no legal basis for the booking charges and commission.

[135] For the purpose of the recording accurately the delivery of judgment in this matter the following is noted. It was intended that Friday, December 16, 2016 be regarded as the date of delivery of the written judgment but having regard to the corrections made, further submission made on Monday, December 19, 2016 as well as adjustments made in light of those submissions, the date of delivery of judgment of December 19, 2016.

[136] Counsel are to submit a draft order to give effect to these reasons for judgment. The court having heard submissions on costs will deliver its costs orders along with reasons in the next 50 days.