

COMMONWEALTH OF THE BAHAMAS

2012/FP/CLE/GEN/00200

IN THE SUPREME COURT

Common Law and Equity Division

BETWEEN

DARIEO COX

JACQUELINE COX

ELLESIA GIBSON

DWIGHT COX

SAMUEL BASDEN

PEGGY BASDEN

ULANDER RUSSELL-THOMPSON

Plaintiffs

AND

EDEL WEISS CHALET CONDOMINUM ASSOCIATION

Defendant

APPEARANCES: Ms. Constance McDonald KC on behalf of the Plaintiffs

Mr. Osman Johnson on behalf of the Defendant

HEARING DATE: 16<sup>TH</sup> December 2022

**COMMITTAL PROCEEDINGS, ENFORCEMENT OF AN INJUNCTION ORDER, FAILURE TO COMPLY WITH RULES OF THE SUPREME COURT SPECIFICALLY ORDER 52**

**DECISION**

**FORBES J**

**BACKGROUND**

1. This action arises out of what the Plaintiffs allege were breaches of the Declaration of Condominium and the provisions of the Law of Property and Conveyancing (Condominium) Act (“the Act”) by the Defendant, Edelweiss Chalet Condominium Association. The Plaintiffs also allege that the Defendant caused liens against their respective units and subsequently sold the same without lawful authority to do so and as a result failed to act lawfully within the provisions of the Act. The pleadings as filed in this action are provided below:-
  - a. The Plaintiffs filed a Specially Indorsed Writ on the 5<sup>th</sup> June 2012;
  - b. The Plaintiffs filed an Ex- Parte Summons and Affidavit on 27<sup>th</sup> September 2012 seeking substituted service and an order was granted by the Court giving leave for the substituted service;
  - c. The Defendant entered its Memorandum and Notice of Appearances on the 20<sup>th</sup> November 2012;
  - d. The Defendant subsequently filed its Defence and Counterclaim on the 5<sup>th</sup> December, 2012 along with a Summons seeking security for costs. It is noted that the application for security for costs remains outstanding having been adjourned multiple times;
  - e. The Defendant also filed on the 5<sup>th</sup> December 2012 another Summons pursuant to Order 18 Rule 19 to strike out however this application remains outstanding having been adjourned multiple times;

- f. The Plaintiffs filed their Reply and their Defence to Counterclaim on the 2<sup>nd</sup> January 2013;
  - g. The Defendant filed its Reply to the Defence and Counterclaim on the 2<sup>nd</sup> January, 2013;
  - h. The Defendant filed another Summons on the 12<sup>th</sup> March, 2014 seeking Security for Cost and another Summons on the 2<sup>nd</sup> April 2014 seeking to Strike out the Plaintiffs claim. These Summonses have yet to be heard and remain outstanding having been adjourned multiple times.
2. The Plaintiffs by an Amended Ex-Parte Summons filed the 15<sup>th</sup> May, 2015 sought an Order from the Court that the Defendant whether by itself or by its agent or otherwise be restrained by injunction until judgment in this action or further order from selling, interfering with, disposing of or advertising for sale United 2, 3, 6, 7 and 8 Edelweiss Chalets Condominiums, and an Order setting aside the Indenture of Conveyance made between the Defendant and Anthony Harvey of Units 7 and 8. The parties appeared before then Justice Estelle Gray Evans on the 23<sup>rd</sup> July, 2015 and it was ordered that leave be granted to the Plaintiffs to re-amend its Amended Ex-Parte Summons filed the 15<sup>th</sup> May, 2015; that the Defendant, whether by itself, or its servant or agent, or whether by anyone claiming through the Defendant in connection with units 2, 3, 4, 6, 7 and 8 situated at Edelweiss Chalet Condominium be restrained from interfering with the quiet enjoyment of the Plaintiffs of the aforementioned units until the determination of the action or further Order of the Court and that the cost occasioned by the amendment be paid by the Plaintiffs to be taxed if not agreed. The said Order was filed on the 30<sup>th</sup> July, 2015. The Court notes a similar Order bearing the same was filed by the Plaintiffs containing a Penal Notice. The Defendant subsequently filed a Summons on the 23<sup>rd</sup> June 2016 seeking to have the Injunction set aside pursuant to Order 32 Rule 6 of RSC and an Affidavit in support of this Summons was filed on the 1<sup>st</sup> July 2016. This application was likewise adjourned and has never been heard substantially. Additionally, on the 6<sup>th</sup> April 2016 a Directions Order was given by the Court and the parties commenced preparing the matter for Trial.
3. A Notice of Motion on behalf of the Plaintiffs was filed on the 23<sup>rd</sup> November, 2021 seeking to have the named Defendants Anthony John Harvey and Barbara Gloria Teleri Dawn Harvey committed for failing or refusing to comply with the Order of the Court dated 23<sup>rd</sup> July 2015. The Affidavit of Darieo Cox, the 1<sup>st</sup>



Plaintiff in this action was filed on the 19<sup>th</sup> November, 2021 in support of the Plaintiffs application for committal. Subsequently, a Notice of Intention to Proceed on behalf of the Plaintiffs was filed on the 3<sup>rd</sup> December, 2021.

## LAW

4. The Plaintiffs, in particular the 1<sup>st</sup> Plaintiff seeks to have who he alleges as the Directors of the Defendant committed to Her Majesty's Fox Hill Prison for their contempt in failing and refusing to comply with the Injunction Order.
5. The provisions of Order 52 of the Rules of the Supreme Court ("the RSC") govern the procedure parties must follow when making an application for committal.
6. Order 52 of the RSC states:-
  - "1. (1) The power of the Supreme Court to punish for contempt of court may be exercised by an order of committal.
  - (2) Where contempt of court —
    - (a) is committed in connection with —
      - (i) any proceedings before the Supreme Court; or
      - (ii) criminal proceedings, except where the contempt is committed in the face of the court or consists of disobedience to an order of the court or a breach of an undertaking to the court; or
    - (b) is committed otherwise than in connection with any proceedings, then, subject to paragraph (4), an order of committal may be made by the Supreme Court.

...

**2. (1) No application to the Supreme Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.**

**(2) An application for such leave must be made ex-parte to the Supreme Court, and must be supported by a statement setting out the name and description of the applicant. The name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.**

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8...**(Court's emphasis)**"

## SUBMISSIONS

7. The parties provided the Court their respective Skeleton Arguments. The gravamen of the Plaintiffs' submissions is that it is within the power of the court of equity to punish any person who knowingly assists a person bound by an order or decree to disobey its terms. Ms. Constance McDonald, KC has submitted that after service of the injunction the Defendant conveyed the units (the subject matter of the injunction) to Strathclyde International Limited; that if the Defendant was aggrieved by the injunction it should have been advised to appeal or have it set aside and that in the Affidavit of Anthony St. John Harvey he has admitted his contempt.
8. Mr. Osman Johnson, on behalf of the Defendant by way of his Preliminary Objection filed on the 16<sup>th</sup> December, 2022 and his written submissions asserted that the Plaintiffs are not properly before the Court as they have not received an Order granting leave for an application to seek committal prior to the filing and fixture of their Notice of Motion.

## ISSUES

9. The Court must therefore consider whether the Plaintiffs Notice of Motion is properly before the Court in compliance with Order 52 of the RSC.

## DISCUSSION

10. The law is very clear as to the process before obtaining a committal order as a result of actions that amount to contempt of court. In accordance with Order 52, Rule 2(1) of the RSC leave has to be granted before an application for committal is made. The Plaintiffs have not provided to this Court any evidence of an Order being made by this Court or any other Court granting them leave to file their Notice of Motion. Moreover, as submitted by Mr. Johnson and after a review of the Court file, no Order granting leave to apply for committal has been made by this Court or any other Court.
11. Therefore, having considered the submissions before it and the documents filed on behalf of the parties in this action, the Court is of the view that the Plaintiffs

Notice of Motion in the absence of an Order granting leave to commence committal proceedings is premature and subsequently the Plaintiffs application is hereby dismissed.

## COSTS

12. On the issue of costs, the award of costs are always within the discretion of the Court. Therefore, the Court does not find any reason to depart from the general rule that costs usually follow the event and award the costs of this application to be paid by the Plaintiffs to the Defendant to be taxed if not agreed.

Dated the 3<sup>rd</sup> of February 2023



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Mr. Justice Andrew Forbes