

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
C.I.C.A. (Civil) CACV009/2016
G413/2013

BEFORE

The Hon Sir George Newman, Justice of Appeal
The Hon Sir Richard Field, Justice of Appeal
The Hon Dennis Morrison, Justice of Appeal

Between:

Thompson Resorts Limited
Castaways' Timeshare Ltd

Appellants

And

Carl Clappison
Sea Grape Escape Ltd
Proprietors Strata Plan #381

Respondents

Appearances: Mr Michael Barnes, QC and Hector Robinson instructed by Mourant Ozannes appeared for the Third Defendant/Appellant, Castaways' Timeshare Limited. Mr Ian Huskisson and Ms Charmaine Richter instructed by Travers Thorp Alberga on behalf of the Second Defendant/Appellant, Thompson Resorts Limited. Mr James Kennedy and Mr Laurence Aiolfi instructed by Samson & McGrath of behalf of the Plaintiffs/Respondents, Carl Clappison and Sea Grape Escape Limited.

(Hearing: 24 August 2016
Judgment: 4 November 2016)

JUDGMENT ON COSTS
Released 19 January 2017

1. The proceedings the subject of this appeal were commenced by originating summons issued by Carl Clappison and another (the plaintiffs), each acting in their capacity as proprietors of condos and as members of the strata corporation incorporated under the Strata Titles Law designated as Strata Plan no 381. All the members of the strata corporation had an interest in the subject matter of the proceedings and they were properly joined in their representative capacity as Proprietors Strata Plan no 381. Had any of them wished they could have applied to be joined as additional plaintiffs. Equally had any of them wished they could have given notice of an intention to defend the application. Only two strata proprietors gave notice of their interest in being added to the proceedings as defendants, namely Thompson

Resorts Limited (TRL) and Castaways Timeshare LTD (CTL). They were joined pursuant to an order of the Chief Justice dated 8 September 2014. The application to be joined included an application for each to be separately represented. As to this the Chief Justice reserved the question of costs to the trial judge but whilst the trial judge made no criticism of the joinder of both TRL and CTL she did not specifically consider the issue. It is now said by the plaintiffs, being the unsuccessful appellants to this court, that it was neither necessary nor reasonable for TRL and CTL to be separately represented by different firms of lawyers.

2. CTL is a wholly owned subsidiary of TRL. Kel Thompson a director of TRL swore an affidavit dated 4 March 2014 in support of TRL's application to be joined. As of 2012 Kel Thompson was the sole director of CTL but the affidavit in support of CTL's application was sworn by Cindy Abrahams as Secretary of CTL. As of December 2009 she was also the Secretary of TRL.
3. TRL made its application on the basis that "...as owner of almost one third of Castaways[the condos] and as "manager" under "a management agreement made between The Strata corporation and TRL and by virtue of its rights under by-law 2, its rights would be severely affected if the application was successful".
4. CTL made its application to be joined on the basis that it owned four condos and as a result had a direct interest in the management of the resort. It may have done but its interest was no different from the interest TRL had as an owner and because it was not the manager its interest was less acute. Its ownership of the four condos dated back to March 2010 when the condos were transferred to it by TRL in the course of an inter company transaction.
5. By paragraph 4 of its submissions to this court TRL and CTL maintain that, whilst the companies are under common ownership, they, "...intervened in very different capacities. TRL manages the resort. Its involvement was limited to defending the application to appoint an administrator...CTL intervened in its capacity as owner of a number of units in the resort".
6. This Court is unable to accept the suggested distinction as having any bearing on the reality of the position. More than that the distinction is contradicted by the terms of Mr Thompson's affidavit summarized in paragraph 3 above. CTL's ownership of four condos, it being a wholly owned subsidiary of TRL, added nothing to the substantial ownership interests of TRL. TRL had far more at stake than its interest in resisting the application to appoint an administrator. Further as both an owner and as the manager was qualified and able to present all the relevant facts and defend all the interests affected by the plaintiff's application.

7. At the trial the witness called for the defendants was Kel Thompson. CTL did not call a witness. The Court accepts the submission that the interests of TRL and CTL were identical. It was not necessary for separate firms of lawyers to be instructed. It follows that the successful appellants should recover one set of costs here and in the court below. Both Plaintiffs to be jointly and severally liable for those costs.

8. By paragraph 8 of TRL's and CTL's submissions it is submitted that there should be a separate order for costs in favour of the Strata Corporation originally joined as the sole defendant. It is suggested that unless such an order is made the Strata "...will have to pass its costs on to TRL,CTL and other proprietors who played no part in the dispute". But there is no evidence that the Strata Corporation incurred any costs. There is no basis to conclude that any members of the Strata other than TRL and CTL incurred costs. The Strata Corporation did not incur any costs and played no part in the action in its corporate capacity. TRL and CTL acted in their own joint interests and did not purport to represent the interests of all the members or the corporation. There shall be no separate order in favour of the Strata.

Nor should any attempt be made under the by-laws to seek contributions from the members who played no part in the proceedings.