

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCv2018/0265

BETWEEN:

STANHOPE SHEPERD LTD

CLAIMANT/COUNTER DEFENDANT

AND

CARIBBEAN DEVELOPMENTS (ANTIGUA) LIMITED

DEFENDANT/COUNTER CLAIMANT

Appearances:

Mr. Septimus Rhudd for the Claimant

Mr. Hugh Marshall for the Defendant

2022: June 27

2023: October 27th

JUDGMENT

- [1] **Drysdale, J.:** This matter concerns a Counter Claim for monies due under a contract for the payment of certain sums of monies for the construction of apartments. Initially a Claim Form was filed on 25th June 2018 in which relief for amongst other things being the reimbursement of the sum of \$31,050.00 together with an order for the connection of utilities to certain buildings was sought. The matter proceeded in its usual form. However, on the date of trial the parties indicated that this claim had been resolved and the focus now was on addressing the issues raised in the Counter Claim. Hence this decision will only relate to and resolve the issues emanating from the Counter Claim.
- [2] A Counter Claim was filed on 9th April, 2019. In it the Counter Claimant asserted that it was entitled to certain sums pursuant to the terms of an agreement dated 19th April, 2011, entered into between the parties. Accordingly, the Counter Claimant sought recovery of the following:

1. The sum of US\$184,500.00 representing monies due under the contract dated 19th April 2011.
2. The sum of US\$24,000.00 representing unpaid community charges for the period December 2018 to March 2019 and continuing at the monthly rate of US\$250.00 per unit.
3. Damages to be assessed in respect of unpaid community charges at the monthly rate of US\$0.50 upon each square foot over 1,000 per unit for the period December 2018 until judgment.
4. Interest.
5. Cost
6. Any further relief

[3] To understand the genesis of this matter it is necessary to recite the relevant background.

Relevant Background

- [4] The Counter Claimant is a company that has the responsibility for providing services to the property owners and residents of the Jolly Harbour community. These services include the provision of security, gardening, and utilities. The Counter Defendant is an Antiguan registered company, engaged in amongst other things property ownership, property development and property management. The Counter Defendant is principally involved in the ownership, development and management of "high-end" residential properties situated in the Jolly Harbour area geared towards a high-net-worth clientele. These residential properties are comprised of units situated within the Jolly Harbour area and designated as "Harbour Island".
- [5] On 19th April 2011, the parties entered into a written agreement, whereby the Counter Defendant was granted permission to develop Harbour Island. The agreement detailed the development that the Counter Defendant was permitted to carry out and the payments that would be made if the Counter Defendant developed "an apartment scheme". The agreement further provided that if the Counter Defendant built "villas" then no such payments would be made to the Counter Claimant.

- [6] The Counter Claimant alleges that the Counter Defendant breached the terms of the agreement by failing to pay the sum of US\$5,000.00 for the first 25 apartments built and US\$8,500.00 thereafter for additional apartments which were built. The Counter Claimant contends that the Counter Defendant has built a total of 40 apartments.
- [7] The Counter Claimant also contends that despite the delivery of several units to end users to include ten (10) transfers to third parties, the Claimant has not paid the initial payments of US\$5, 00.00 nor the sums of US\$250.00 per month for the first 1000 square feet of internal space of the unit.
- [8] It is also the Counter Claimant's position that in addition to the payments that were to be advanced to them after the construction of apartments, further payments were to be advanced by the Counter Defendant. That is, upon transfer of a unit to a third party, each occupier was to pay to the Counter Claimant as community charge the sum of US\$250.00 per month for the first 1,000 square feet of internal space of each unit and thereafter US\$0.05 per square foot per unit over the first 1,000.00 square feet of internal space per unit.
- [9] The Counter Claimant asserts that the Counter Defendant has not advanced the monies due for community charges in accordance with the agreement even though the Counter Defendant has sold not less than 14 units being 1a, 1c, 1d, 2a, 2b, 2c, 2d, 3a, 3c, 3d, 4c, 7e, 8e and 9h. The Counter Claimant also maintains, that in addition to these units that have been sold, the Counter Defendant has delivered to third parties an additional 18 units which are currently occupied. It is therefore the Counter Claimant's position that each of the units should pay community charges as agreed.
- [10] The central basis of the Counter Defendant's Defence to the Counterclaim is its contention that it has built villas rather than apartments and thus it is under no contractual or legal obligation to pay the sum of US\$5,000.00 or US\$8,500.00 for each unit built.
- [11] The Counter Defendant asserts further that the payments for community charges are not applicable to the units constructed by it and maintains that this claim by the Counter Claimant is based on a mis categorisation of the units to justify the application of these fees.
- [12] The court will now turn to the evidence presented by the parties.

- [13] Before I do so however it should be pointed out that the current principals of the Claimant and the Defendant were not the original signatories to the 19th April 2011 agreement but inherited the existing state of affairs when they each took over their respective roles. As a result, neither of the said principals are intimately familiar with the circumstances leading to the preparation, and eventual execution, of the agreement.

Evidence

Witness for the Counter Claimant - Wilhelm Berends

- [14] The sole witness for the Counter Claimant was Mr. Wilhelm Berends whose witness statement was filed on 2nd February 2021.¹ The witness is the Director of the Counter Claimant. He deposed that the Counter Claimant manages the development of Jolly Harbour and serves as a Management Company for Jolly Harbour's over eight hundred (800) property owners.
- [15] His evidence is that on 19th April 2011 the parties signed an agreement. The Agreement permitted the Counter Defendant to develop a portion of Jolly Harbour known as Harbour Island. He says that the Agreement superseded general covenants in respect of the lands, in that, the same allowed the construction of more than one building per parcel.
- [16] The Harbour Islands lands were transferred to the Counter Defendant by Transfer of Land, which was signed on 20th October 2011 and stamped by the Land Registry on 18th November 2011.
- [17] He says that the Agreement of 19th April 2011 notes that in consideration of the Counter Claimant permitting the Counter Defendant to construct an apartment scheme, a payment of US\$5,000.00 would be advanced to the Counter Claimant for each apartment built, up to the first twenty-five (25) apartments. Thereafter, in accordance with the Agreement, for every apartment unit built after the construction of the first twenty-five (25) apartments, a payment of US\$8,500.00 per apartment built would be advanced to the Counter Claimant. This one-off payment would become due upon completion. He says that it was always understood as between the parties that upon delivery of a unit to a third party, the Counter Defendant would report the same to the Counter Claimant. This would allow the Counter Claimant to be aware of when the one-off payments and monthly payments became due.
- [18] The Agreement of 19th April 2011 also notes that upon delivery to a third party the respective unit would pay to the Counter Claimant its fair share contribution

¹ Page 79 of Bundle II (Part A)

to the community charge based on the sum of US\$250.00 per month for the first one thousand (1,000) square feet of internal space. Further, the Agreement notes that internal space beyond one thousand (1,000) square feet, will incur a rate of US\$0.05 per square foot per month as community charges. A portion of the Counter Defendant's Harbour Island units have been sold, whilst another portion is being used as rental property. As such these rental properties consume community service covered in the community charge and should be considered as delivered and subject to payment of monthly charges.

- [19] Mr. Berends says that to date the Counter Defendant has constructed and delivered to third parties over thirty-two (32) units. Each of the Counter Defendant's Harbour Island buildings may be divided into what may be described as larger and smaller buildings. The larger buildings are divided into two (2) floors, with five (5) separate units; four (4) smaller units on the second floor and one (1) large unit on the ground floor. The smaller buildings are divided into two (2) floors, with four (4) separate units; two (2) units on the second floor and two (2) units on the ground floor. He says that these larger and smaller buildings make up the Counter Claimant's Harbour Island Development which are comprised of separate units and that they are apartments.
- [20] He further states that at the time of the 2011 Agreement, it was always the understanding as between the parties that the dwellings which would be comprised in each of the Counter Claimant's condominium development building units would be categorised as apartments. This position was continually noted in the condominium development and site plans presented by the Counter Defendant².
- [21] Mr. Berends says that the Counter Defendant has constructed and delivered to third parties over thirty-two (32) units which are all apartments.
- [22] He also says that in breach of the Agreement, the Counter Defendant upon the delivery of units to third parties has not advanced the fees due for the first twenty-five (25) units built, and the fees due for units constructed after the first twenty-five (25) units built.
- [23] Mr. Berends also says that around the last quarter of 2020, the Counter Defendant began to advance to the Counter Claimant sums due for community

² The Counter Defendant prepared and presented a condominium plan for the Harbour Island Lands for the Land Registry of Antigua and Barbuda. This Plan was stamped by the Land Registry on 16th December 2016.

charges per the 2011 Agreement. However, the arrears as it relates to outstanding community charges have not been fully liquidated.

- [24] At the trial Mr. Berends accepted that the agreement did not contain a definition of “apartments” or “villas” and agreed that, based on the expressed terms of the document, the Counter Defendant was permitted to develop Harbour Island subject to the approval of the Development Control Authority (“the DCA”) and C.D.A.L Planning Committee. He accepted that, if neither DCA nor C.D.A.L gave approval, the project could not have proceeded.
- [25] The Witness was shown a letter, dated 10th September 2015, from the DCA. He conceded that the letter from the DCA had granted permission to the Counter Defendant to proceed with the construction of its Harbour Island project pursuant to applications that had been made by the Counter Defendant. Those applications related to the Counter Defendant’s intention to construct “Multi-Villa Units”.
- [26] It was pointed out to the Witness that the said applications had been stamped and approved by the Counter Claimant. He admitted that he had been a part of the Planning Committee in 2015 when that approval had been given. He testified further that he was aware that C.D.A.L had given planning approval for the Harbour Island project. He recalled having seen the letter from DCA confirming the approval of the Counter Defendant’s application.
- [27] Mr. Berends’ attention was then drawn to the Environmental Impact Statement (“EIS”), dated August 2015 which was prepared by Ivor Jackson & Associates. He conceded that he was aware of Mr. Ivor Jackson and, when asked about his knowledge of Mr. Jackson's expertise and experience in preparing Environmental Impact Reports, he indicated that he knew Mr. Jackson as someone doing this line of work. The Witness's attention was then draw to Section 1.3.2 of the EIS captioned “Project Description”. He was specifically directed to the subheading “(a) Villa complexes”. There, it was pointed out to him that the description contained in that section all specifically referred to “villa complexes” being constructed. No mention was made of any “apartment complexes”. He conceded that was what the EIS contained.
- [28] Mr. Berends’ attention was then drawn to Paragraph 9 of his Witness Statement. It was pointed out to him that, in his Witness Statement, he adopted the language used by Ivor Jackson in the EIS (sub-heading (a) Villa complexes) in his (Mr. Jackson's) description of the buildings as villas but he, Mr. Berend, had then decided instead to categorise the units as “apartments”. When pressed on

this, he testified that, *“based on his information, [he] made the decision to classify them as apartments”*.

[29] The Witness was asked whether he had ever written to the Counter Defendant to have the units formally designated as “apartments”. He responded in the negative. He conceded that, apart from him personally classifying the units as “apartments”, he had taken no steps to have the units so officially designated. He admitted that he had not provided any documents, during the trial, to show any official designation of the units as “apartments”. According to Mr. Berends, the designation was based solely on his interpretation of the Agreement and his belief that this was what the parties had intended when the agreement was made in 2011. He further conceded that he did not have any specialised skills or expertise that would enable him to so designate or categorise the units as “apartments”.

[30] It was put to the witness that his personal decision to categorise the units as “apartments” was done with a view to the Counter Claimant deriving a financial benefit from the constructions. In his response, Mr Berends accepted that, based on the terms of the agreement, if the Counter Defendant built “villas”, then the payments claimed by the Counter Claimant would not become payable. Those payments, he conceded, would only become payable if “apartments” were built.

Witness for the Counter Defendant - Fitzmaurice Christian

[31] The Counter Defendant called one witness, namely, Mr. Fitzmaurice Christian who filed a witness statement on the 11th January, 2021³. Mr. Christian is the Vice President of the Counter Defendant company.

[32] He says that the properties, managed by the Counter Defendant, are part of the Government's Citizenship by Investment Programme and are intended to attract high net worth investors as clients. He also says that Counter Claimant is known to him, and that it is responsible for providing services to the Jolly Harbour community to include the provision of security, gardening, and utilities.

[33] He states that the Counter Claimant's overall managerial responsibility for the Jolly Harbour area also covers the properties owned and managed by the Counter Defendant and that to the best of his knowledge, the Managing Director and person in charge of the day-to-day management and operations of the Counter Claimant is Mr. Wilhelm Berends. He says that Mr. Berends is the

³ Page 76 of Bundle II (Part A)

person with whom he would interact concerning the business of the Counter Defendant.

[34] Mr. Christians says that prior to his becoming a part of, and employed by, the Counter Defendant, the parties entered into an agreement on 19th April 2011. That agreement covered, among other things, payment by the Counter Defendant during the development of the Harbour Island area and the payment of service charges in respect of the units to be developed by the Counter Defendant. Over the following years, the parties subsequently entered into a series of oral agreements intended to add to and expand upon that earlier written agreement. Mr. Christian says that the parties have acted upon those oral agreements and understandings.

[35] He states that in the present legal action, the Counter Claimant has asserted that the Counter Defendant is indebted to the Defendant in respect of charges applicable to the units built by the Claimant. The agreement of 19th April 2011 however, speaks only to the payment of charges on apartments built by the Counter Defendant. The agreement expressly exempts the payment of charges in respect of villas. Mr. Christian asserts that contrary to the assertions of the Counter Claimant, the Counter Defendant is maintaining that it has built “villas” and not “apartments” so that the charges which the Counter Claimant has sought to impose on the Counter Defendant are not applicable.

[36] He says that by a letter, dated 10th September 2015, received from the Development Control Authority, the Counter Defendant’s properties were properly described as “villas”. This reinforces the Counter Defendant’s position that the units built by the Counter Defendant are to be designated as “villas” and thereby exempt from the charges that the Counter Claimant is seeking to impose.

[37] During cross-examination, focus was directed, principally at the community charges to which the Counter Claimant claimed to be entitled. Mr. Christian in response took exception to how those community charges had been calculated by the Counter Claimant as most of the units did not exceed the stipulated 1000 square feet. The witness did not dispute those properties had been transferred and that community charges, plus ABST (Antigua and Barbuda Sales Tax) became due on those transfers.

[38] He maintained that the agreement allowed for the payment of \$75.00 for units constructed but not sold. He testified further that, his understanding of the payment of \$250.00 was that it became payable only when any of the units had

been transferred to third parties. He reiterated that the Counter Defendant had always complied with that understanding. Mr. Christian also indicated that the Counter Defendant was willing to pay community charges in accordance with the agreement.

Issues for Determination

[39] Having read the parties pleadings and heard the evidence at trial this court has determined that the issues to be resolved are as follows:

- a. Are the units which the Counter Defendant has constructed “apartments” or “villas”?
- b. Is the Counter Claimant entitled to the reimbursement of the sums outlined in its Counterclaim?

Analysis and Law

Issue 1 – Are the units which the Counter Defendant constructed apartments or villas?

[40] The crux of this case hinges on a crucial determination of whether the constructed buildings are either villas or apartments. This is because the classification bears significant implications for various legal and practical aspects surrounding the properties in question. Ultimately the correct classification of the buildings as villas or apartments will serve as the linchpin for establishing whether the Counter Claimant has met the necessary foundation to establish an entitlement to compensation as claimed.

[41] As previously indicated the parties entered into an agreement in writing on 19th April 2011. The relevant part of the agreement stipulates as follows:

‘The Stanhope Shepherd Ltd may develop Harbour Island subject to DCA and CDAL Planning Committee approval (not to be unreasonably withheld) on the following basis:

DEVELOPMENT

A combination of 3 (Three) story buildings (maximum 70 %) and 2 (Two) story buildings (30 %) are allowed in the centre of the Island. For the waterfront and inside lots not more than 5 (five) households per lot are allowed.

In consideration of CDAL allowing Stanhope Shepherd LTD to do an apartment scheme then the following would apply:

- For the first 25 apartments a payment would be made of USD\$5,000 to C.D.A.L per apartment built.
- All other apartments a payment would be made of USD\$8,500.00 to C.D.A.L per apartment built.

These payments would be paid out of the net sale proceeds at the time the respective unit is delivered to a third party purchaser.

Should villas be built then no such payments will be made to CDAL.'

[42] The maxim qui assertit probare debet translated means he who asserts must prove and is a fundamental principle of law. Simply put, this means that a party making a claim must substantiate it with evidence. It therefore places the onus on the Counter Claimant to provide a convincing and credible case demonstrating the truth of the validity of its position that the units constructed are apartments and are subject to the payment of certain fees.

[43] In attempting to resolve this issue the Court is immediately confronted with the inadequacy of the agreement in clarifying this issue as the agreement does not present clear and defined terms regarding the classification of "apartment" or "villa". It goes without saying that lacking specific definition can lead to ambiguity and impact the enforceability of the agreement.

[44] The lack of clarity in definition therefore necessitates careful consideration of all the evidence. Ordinarily the court would attempt to determine the intention of the parties at time of execution of the agreement. However, no witness in these proceedings was present at this pivotal time. In the absence of witnesses during this critical juncture the Court will place significant emphasis on the available evidence and documentation presented.

[45] The Counter Defendant highlights that 2011 agreement specified the requirement for both the DCA and CDAL's approval for the project's development. It posits that from this it is clear that both entities were part of the approval process. Further that before the Court is an approval letter from the DCA for it to construct multi-unit villas. The Counter Defendant further argues that that approval was only granted after receipt from CDAL's Planning Committee. Further among the persons copied was William Berends the witness for the Counter Claimant. That Mr. Berends was copied in his capacity as Technical Manager and that in that capacity he would have been poised to raise

any objections to the classification of the units as multi villas as opposed to multi apartment units.

[46] The Counter Defendant also relied heavily on an EIS which describes the project as a development of 56 villas complexes on 56 separate land parcels. Later in that document the author described with more particularity the villa complexes as being separated into phases with each villa complex comprising of two floors with five separate units, 4 smaller units on the second floor and one large unit on the ground floor. That document also throughout the same referred to the units as villas. The Counter Defendant argues therefore that it is inconceivable that in these circumstances that the applications would have related to apartment complexes and not villas. Further this EIS was submitted to the DCA and seemingly founded a basis for the grant of the Counter Defendant's applications which were titled in the approval letter as multi villa units.

[47] The Counter Claimant argues that the Counter Defendant's development is categorised as a condominium development having been registered pursuant to the Registration of Condominium Titles Act. Pursuant to section 2 of that act a condominium is defined as interest in real property, where there is a collective interest in a part of the real property coupled with a separate interest in partitioned but attached areas. The Counter Claimant further asserts that the units which have been constructed accord with the architectural and planner's definition of apartments. The Counter Claimant concludes that therefore these units are apartments and that the Counter Defendant should advance fees to it incongruence with the agreement.

[48] The starting point seems to be with the definition of what constitutes a condominium. According to section 2 of the Act a condominium is defined as follows:

'an estate in fee simple for life or for a term of years, as the case may be, in real property consisting of an undivided interest in common in a portion of a parcel of real property together with a separate interest in space in a residential, industrial or commercial building on such real property (such as an apartment, office or store) and may in addition include a separate interest in other portions of such real property.'

[49] Whist the above definition does seem to refer to an apartment as being capable of being defined as a condominium this is not a fait accompli. Whether an apartment can be described as such depends on various factors and legal definitions. It is not an automatic classification.

[50] A condominium is a distinctive form of ownership which allows individuals to possess an undivided interest in a segment of the real property. Such owners also interest in specific common areas within the property allowing for shared ownership whilst still enjoying individual property rights within their own space. An apartment as defined by Oxford's Dictionary is 'a set of rooms for living in that are part of a larger building and are usually all on one floor.' In contrast tenants have no ownership rights in the units they occupy. This distinction prohibits a tenant from the sale of the unit, a right which is conferred on a condominium holder. Additionally, whilst condominium owners are responsible for the maintenance of their units and are further subject to the payment of a Home Owners Association fee which is typically utilised to maintain the common areas, the landlord of an apartment is responsible for such repairs and maintenance. Whilst this is not meant to be an exhaustive list of the differences between the two, it highlights that the classification of a building as one or the other is not solely based on its construction or how it is referred to in a definition.

[51] I agree with counsel Rhudd's submission that the categorising of the development by the DCA holds significant weight in whether the project was a multi-unit villa or multi-unit apartment. The DCA plays a significant role in development. The DCA is the statutory body mandated by law to oversee and give necessary approval for planning and development projects in the Antigua and Barbuda. In fact, the preamble to the Physical Planning Act states:

'An Act to make provision for the orderly and progressive development of land and to preserve and improve the amenities thereof; for the grant of permission to develop land and for other powers of control over the use of the land; for the regulation of the construction of buildings and other related matters; to confer additional powers in respect of the acquisition and development of land for planning; and for purposes connected with the matters aforesaid.'

(emphasis mine)

[52] These powers are in fact exclusive to the DCA who is also vested with wide ranging powers of enforcement where there has been a breach of its statutory function. The DCA therefore serves a crucial role in ensuring that development aligns with planning, safety and community interests. Thus, if the DCA has approved the classification of the buildings as multi-unit villas it suggests that they have reviewed the application in accordance with their regulations and criteria. The production of the EIS is indicative of this. It is clear that the DCA made a determination after a thorough consideration and assessment of the application, classifying the units as multi villas based on their evaluation of the project.

- [53] Further the DCA's assessment was not done independent of any involvement of any party, but also included the concurrence of the Counter Claimant. Mr. Berens admits that he was aware that the Counter Claimant had given its approval for the development and more importantly that he had seen the approval letter from the DCA classifying the units as villas. I agree with counsel Rhudd that notice having been given to the Counter Claimant of the type of units to be constructed that if the development deviated from the agreed terms and DCA approval it would have been expected that the Counter claimant would have raised those concerns.
- [54] The Counter Claimants failure to take action to reclassify or to classify these units as apartments despite the significant financial impact is an important point to consider parties are generally expected to take steps to protect their interest and rights especially when they are aware of potential financial implications. Instead, the Counter Claimant did not raise any concerns or objections whilst the development proceeded without interruption. It was only when the Counter Defendant raised certain issues which initially formed part of the now discontinued claim that the matter of whether the units were apartments or villas arose. The Counter Claimant's failure to challenge the classification and the witness's admission that the determination that the units were deemed to be apartments were done only by it without the engagement or involvement of any other party is concerning and bordering on being high handed and unfair. Clearly the Counter Claimant cannot change the terms and conditions of an agreement unilaterally. Any modifications would require mutual consent particularly where it relates to an issue which was previously not clarified in the agreement.
- [55] Further when one party produces a written contract and fails to adequately define or clarify certain terms this will be construed against that party. This is often referred to as the doctrine of contra proferentem meaning that any ambiguity or lack of certainty in the contract may be interpreted to the disadvantage of the party responsible for drafting it. The case of **Canada Steamship Lines Ltd. v The King**⁴ refers.
- [56] The counter claimant has not presented sufficient evidence to demonstrate that it has met the threshold for reclassifying the units and the associated entitlement specific fees that come with such reclassification. Furthermore, the Counter Claimant by failing to challenge the classification of the units and the apparent lack of objection and contradictory behavior cannot take a contradictory position to unfairly benefit from their own prior actions or inaction. The principle of estoppel is designed to prevent such unfairness and particularly in

⁴ [1952] AC 192

circumstances where the Counter Claimant's behavior has influenced the expectations and actions of the Counter Defendant.

Issue 2 – Is the Counter Claimant entitled to the reimbursement of the sums outlined in its Counterclaim?

[57] This is a short point given the previous finding of the Court that the Counter Claimant failed to meet the threshold for the units to be designated as apartments and considering that the agreement states that fees are contingent upon this designation it follows that units designated as villas do not incur financial obligations. Since there is no established breach of the agreement the Counter Claimant cannot be awarded damages which it claims.

[58] Considering all the circumstances I find that the Counter Claimant has not met the threshold for reclassifying the units as apartments therefore the Counter Claimant is not entitled to the sums claimed in its pleaded case.

Order

[59] It is hereby ordered as follows:

- a. The counterclaim is dismissed.
- b. The Counter Claimant shall pay the Counter Defendant prescribed costs.
- c. Interest.

JAN DRYSDLE

HIGH COURT JUDGE

BY THE COURT

REGISTRAR