In The Supreme Court of Bermuda

CIVIL JURISDICTION

2021: No. 152

IN THE MATTER OF a Lease dated the 17th day of December 1992 made between Shelly Hall Properties Limited (as the Landlord), Shelly Hall Company Limited (as the Company) and Geraldine Patricia Rodrigues (as the Tenant).

AND IN THE MATTER OF an Assignment of lease dated the 28th day of February 2007 made between Melanie Nicole Dowie (as the Assignor), Shelly Hall Properties Limited (as the Landlord) and Elmore Antoine Warren and Nicole Julia Warren (as the Assignees).

AND IN THE MATTER OF the Judgment of Acting Magistrate R. Barritt dated the 10th day of April 2019 as confirmed by the Order of Magistrate T. Chin dated the 19th day of February 2020.

AND IN THE MATTER OF the Mortgage dated 28 February 2007 between the Bank of N.T. Butterfield & Son Limited (as Mortgagee) and Nicole Julia Warren and Elmore Antoine Warren (as Mortgagors).

AND IN THE MATTER OF the Landlord Tenant Act 1974 and the Inherent Jurisdiction of the Supreme Court of Bermuda.

BETWEEN:

SHELLY HALL PROPERTIES LIMITED

Plaintiff

and

(1) NICOLE JULIA WARREN

(2) ELMORE ANTOINE WARREN

Defendants

RULING

"Condominium association", Tenants' breach of lease, Judgment in Magistrates Court, Application in Supreme Court for possession of property pursuant to tenants' breach, Tenants' application for stay of possession for landlord's breach of arbitration clause in agreement, whether steps taken by tenants in the Magistrates Court proceedings cause waiver of tenants' right to arbitration

Date of Hearing: **12 December 2022**
Date of Ruling: **28 December 2022**

Appearances: **Richard Horseman, Wakefield Quin, for Plaintiff**

Vaughan Caines, Forensica Legal, for Defendants

RULING of Mussenden J

Introduction

1. The Plaintiff caused a Specially Indorsed Writ of Summons to be issued dated 25 May 2021. The Plaintiff is the Landlord under a lease dated 17 December 1992 (the "**1992 Anchor Lease**") and Assignment of Lease dated 28 February 2007 (the "**2007 Assignment Lease**", together the "**Leases**") between the Plaintiff and Defendants in respect of the property known as Unit 67, 1 Shelly Hall Drive, Hamilton Parish (the "**Property**"). In short it is a condominium property where the Plaintiff is the landlord (the "**Landlord**") and the Defendants who own the Property are the tenants (the "**Warrens**").

2. The Landlord issued proceedings on 30 April 2018 in the Magistrates Court against the Warrens for unpaid maintenance fees (the "**Maintenance Fees**") and was awarded judgment by Acting Magistrate Barritt on 10 April 2019 in the sum of $13,359.16 (the "**Judgment**"). The Defendants unsuccessfully sought to set aside the Judgment which was subsequently confirmed by an Order of the Magistrates' Court on 19 February 2020.

3. As a result of the Judgment in the Magistrates Court, the Landlord seeks, in the Supreme Court, summary judgment possession of the Property and an order that the Leases may be

enforced by sale of the Property (the "**Possession Application**"). The Landlord's application is supported by the First Affidavit of Andrew Simpson, a director of the Landlord, sworn 14 January 2022 ("**Simpson 1**").

4. By a Summons dated 3 November 2021 the Warrens seek a stay of the Possession Application (the "**Stay Application**") pending the outcome of an arbitration hearing, pursuant to Clause 5(c) of the Anchor Lease (the "**Arbitration Clause**") and section 7 of the Arbitration Act 1986 (the "**Act**"). The application is supported by Mr. Warren's affidavits ("**Warren 1**" and "**Warren 2**"). The Arbitration Clause states:

   "If any disputes or questions whatsoever shall arise between the parties hereto the matter in difference shall be submitted to a single arbitrator to be agreed upon between the parties and such submission shall be considered a reference to arbitration within the meaning of the Arbitration Act 1984 or any Act for the time being in force amending or replacing the said Act and the decision of such arbitrator shall be final and binding upon the parties hereto."

Background

Background according to the Landlord

5. Simpson 1 sets out that the Warrens failed to pay Maintenance Fees and thus on 30 April 2018 the Landlord commenced proceedings in the Magistrates' Court by way of Ordinary Summons. The Warrens then filed a Defence and Counterclaim dated 19 November 2018. In turn the Landlord filed a Reply to the Defence and Counterclaim. The Warrens never raised the issue of the Arbitration Clause. On 10 April 2019, at the trial of the matter in the Magistrates' Court, the Landlord did not provide the executed Anchor Lease but provided a draft Anchor Lease to the Magistrate Court. Simpson 1 sets out that the Magistrate relied upon the 2007 Assignment Lease. The Warrens did not appear at that hearing on 10 April 2019 and the Judgment was granted upon the Magistrate hearing the evidence of Ms. Cox for the Landlord.

6. Simpson 1 sets out that the Warrens filed an application to set aside the Judgment. Attorney Eugene Johnson came on the record for the Warrens when in due course he filed various documents including a Skeleton Argument dated 25 October 2019 (the "**Skeleton Argument**"). The Skeleton Argument raised the issue of the Arbitration Clause and it also continued to advance the Counterclaim. Further, the Skeleton Argument set out that the Claim and Counterclaim should be remitted to the Supreme Court for determination pursuant to section 15 of the Magistrates' Court Act 1948 as the issues in the Counterclaim could only be heard in the Supreme Court. On 9 October 2022, the Warrens attended the hearing for the set-aside application but Mr. Johnston did not. At a rescheduled hearing on 19 February 2020, both the Warrens and Mr. Johnston failed to appear. The Magistrates' Court affirmed the Judgment and made a comment that the proper remedy against the Judgment would not be an application to set-aside the Judgment as evidence was heard for the Landlord, but instead the proper remedy was by way of an appeal.

7. The Landlord issued these proceedings in the Supreme Court and eventually was granted leave to adduce the Anchor Lease into evidence, which was obtained later on from the bank that had provided a mortgage to the Warrens (the "**Mortgagee Bank**"). The Warrens were encouraged to seek legal advice and in due course Mr. Caines came on the record for the Warrens. Simpson 1 took issue with various assertions in Warren 1 and then set out further detail about the issues between the Landlord and the Warrens which generally included the issue of non-payment of the Maintenance Fees upon which the Landlord relies to appropriately manage the entire development at Shelly Hall. Simpson 1 set out that it was counterintuitive for the Warrens to withhold the Maintenance Fees and then simultaneously allege that the Landlord had failed to maintain their property including providing potable water. Further, there was a proper protocol in place to hear complaints justly.

Background according to the Warrens

8. Warren 2 set out that there were a number of legal documents in respect of the Property as follows:
    a. The 1992 Anchor Lease containing the Arbitration Clause;
    b. The Lease dated 28 June 2002 (the "**2002 Lease**"); and

c. The 2007 Assignment Lease – which was presented to the Court.

9. Warren 2 set out that the Warrens had experienced various issues at the Property that the Landlord had an obligation to resolve. In reply to being served with the Ordinary Summons in the Magistrates' Court, Mr. Warren himself completed various parts of the Ordinary Summons and filed the Counterclaim for $6,100 which was for the cost of water the Warrens had to purchase having routinely woken up without a proper water supply at the Property. At the point of filing the Counterclaim, the Warrens did not have an attorney.

10. After appearing at the Magistrates' Court, Mr. Warren met with Mr. Simpson in an unsuccessful attempt to resolve the issues. Thereafter, Mr. Warren appeared in the Magistrates Court, his wife Mrs. Warren never appearing there. He missed the hearing date of 10 April 2019 when Judgment was granted as he was off island and had travel difficulties. He applied to set-aside the Judgment. The Warrens retained Mr. Johnson and there were various appearances before different Magistrates and Acting Magistrates when adjournments took place in the Magistrates' Court. Eventually there was a hearing when due to the early days of the Covid-19 pandemic and other confusion about hearing dates Mr. Johnson and the Warrens did not attend. At some point the Mortgagee Bank contacted the Warrens and apparently gave its support to the Landlord to take possession of the Property from the Warrens. It is not in dispute that the Warrens have a mortgage and that they have always been consistent with their mortgage payments for the Property which is of significant value. For clarity, (i) the Warrens are not delinquent on their mortgage payments; and (ii) it is the Maintenance Fees that the Warrens refuse to pay due to issues at the Property.

11. Warren 2 set out that in the Magistrates' Court the Landlord relied on various clauses from the Anchor Lease but omitted any reference to the Arbitration Clause. Thus, if this Clause had been put before the Magistrate then the matter would have gone to arbitration. However, Mr. Warren states that the Warrens were litigants in person and completely ignorant of the legal procedure. Thus, it was for the attorneys representing the Landlord to inform the Court of all the obligations of the parties, in particular the Arbitration Clause. Moreover, in the Defence to the Counterclaim, the Landlord made reference to various

clauses of the 2007 Assignment Lease but failed to exhibit the other two relevant preceding leases which would have shown that arbitration was mandated should issues arise between the parties.

12. In the present hearing in Court, Mr. Caines submitted that Mr. Johnston had disappeared from the Warrens' case once he filed the Skeleton Argument. Thereafter the Warrens were unsuccessful in their attempts to reach Mr. Johnston to proceed with their case.

The Law

13. Section 7 of the Arbitration Act 1986 states as follows:

"Staying court proceedings where there is submission to arbitration

7 If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains ready and willing to do all things necessary to the roper conduct of the arbitration, may make an order staying the proceedings."

14. In the case of *Penncorp Life Insurance Company v Mirza et al* [2016] MBQB 233 (Canada) the parties had agreed an arbitration clause in their agreement. The plaintiff commenced proceedings and the defendant filed a defence and counterclaim. Neither party raised the arbitration clause. The judgment stated as follows:

"15 ... The arbitration clause was not pleaded or raised. Even after its defence and counterclaim was filed, the defendants insisted that the plaintiff provide an affidavit of documents. The defendants have, by engaging in this litigation, required the plaintiff to take significant steps, including the filing of a lengthy reply to request for

particulars, the filing of a reply and defence to counterclaim and the preparation of a voluminous affidavit of documents and document discovery.

17 The circumstances here are similar to that in Bouchan v Slipacoff (2009), 94 O.R. (3d) 741 (S.C.J.), where a statement of defence and counterclaim was filed, particulars were provided by the defendants and the plaintiffs provided an affidavit of documents before the defendants file d a motion for a stay. The court was of the view that if the defendants had a right to arbitration, they abandoned such right when they took steps within the action and waived their right to insist on arbitration.

18 Similarly, in Sal (in Trust) v Jack Aaron & Co. (2009), 60 B.L.R. (4th) 157 (Ont. S.C.J.), the defendants filed a defence and counterclaim before filing their motion for a stay eight months after being served with the statement of claim. The court held that aside from whether the defendants attorned to the jurisdiction, they waived their rights to arbitration. By electing to assert their rights in the litigation by a counterclaim, rather than relying on the arbitration clause, they were estopped by their conduct in requesting a stay."

15. In *Krebs v Meritus Trust Company Limited* [2018] Bda LR 91 at paras 52 – 66 – Attride-Stirling AJ, in a strike-out application, when considering whether a defendant had taken a step in the proceedings stated:

"52. If I am wrong on the existence of an arbitration clause issue, and there was a valid clause, the court would have to decide the next question, whether the defendant is debarred from now relying on the arbitration clause because he has taken a step in the action. I have considered this question below.

53. Both parties relied upon Eagle Star Ins Co Ltd v Yuval Ins Co Ltd [1978] 1 Lloyds LR 357, where a very strong Court of Appeal; led by Lord Denning MR opined that an application to strike out a statement of claim, on the facts of that case, was not taking a step in the action, such as to preclude a party from applying to stay proceedings in favour of an arbitration clause.

60. In the case at bar, the defendant's application to strike out is not limited to pointing out technical problems (eg failing to disclose a cause of action, which is done without evidence). They attack the claim on the merits, using copious evidence. Further, the nature of certain of their attacks amount to a step in the action.

65. So it seems that the correct legal position is that generally speaking, an application to strike out on technical grounds, including where a Statement of Claim clearly discloses no cause of action on its face, will not be a step in the action (see Eagle Star), but an application to strike out where the court is invited to consider evidence and make a decision on the merits, is to be considered taking a step in the action.

66. In the present case, for the reasons set out above, the defendants did take a step in the action. In the premises they have waived their right to arbitrate. Their application for a stay, for this reason also, would be denied."

16. In *Buchanan v Lawrence* [2012] Bda LR 47 paras 4 – 6 Kawaley CJ stated:

"5. ... The essence of the dispute is whether or not the subject matter of the present civil action is caught by the arbitration clause. Mr. Dunch for the Plaintiff argues that it is plainly not. He relies in part on the Affidavit of the Defendant which seems to suggest that he views the claim as being against him personally. Mr. Ouwehand for the Defendant submits, in reliance on several authorities, that the proper approach for the Court to adopt under article 8 of the Model Law[1] is to grant a stay where there is a prima facie case that the relevant dispute is caught by the arbitration clause.

6. I agree that this is the applicable test. It is clear that the UNCITRAL Model Law imposes a very strong policy in favour of arbitration. I was referred to Robert Merkin's

---

[1] *Article 8 provides:*
"(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court."

'Arbitration Law' (Informa Press: London, 2011). At page 8-22 footnote 12, there is a list of various jurisdictions (including Model law jurisdictions) and the following statement appears:

> *"This principle has been applied in numerous cases, eg. Kaiser v. Krauss [2003] 122 ACWS (3d) 981 (stay granted where it was not clear whether the parties were bound by the arbitration clause in their capacities as individuals); Instrumenttitehdas Kytola Oy v. Esko Industries Ltd [2003] BSSC 722 (dispute as to whether dispute fell within arbitration clausestay granted as answer not clear)..."*"

17. In the Privy Council case of *Anzen Ltd & Others v Hermes One Ltd (British Virgin Islands)* [2016] UKPC 1, at para 13, 33 – 35 the Court stated:

> *"12. Arbitration clauses commonly provide that unresolved disputes "should" or "shall" be submitted to arbitration. The silent concomitant of such clauses is that neither party will seek any relief in respect of such disputes in any other forum: AES UST-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC [2013] UKSC 35; [2013] 1 WLR 1889, para 1; ...*
>
> "
>
> *However, even the words "should" or "shall" cannot be taken entirely literally. There is no obligation to commence arbitration, if a party decides to do nothing. But the words "should" and "shall" do make clear that it is a breach of contract to litigate.*
>
> *13. As with any issue of construction, the language and context of the particular agreement must ultimately be decisive. But clauses depriving a party of the right to litigate should be expected to be clearly worded - even though the commercial community's evident preference for arbitration in many spheres makes any such presumption a less persuasive factor nowadays than it was once. The consequence of the appellants' case would, at least in theory, be that the respondent's commencement of litigation was a breach of contract, for which the appellants proving loss could without more claim damages - though the prevalence of clauses providing that arbitration "shall" take place and the infrequency of claims for their breach may again*

reduce the weight of this factor. The fact remains that there is an obvious linguistic difference between a promise that disputes shall be submitted to arbitration and a provision, agreed by both parties, that "any party may submit the dispute to binding arbitration". This clear contrast and the evident risk that the word "may" may be understood by parties to mean that litigation is open, unless and until arbitration is elected, are, in the Board's view, important pointers away from analysis I.

34. ... The hallmark of arbitration is consent. In Bremer Vulkan Schiffbau und Maschinenefabrik v South India Shipping Corp Ltd [1981] AC 909, the House of Lords drew a significant distinction between litigation and arbitration. Parties to an agreement to arbitrate are, it held, under mutual obligations to one another to cooperate in the pursuit of the arbitration. Section 40(1) of the current English Arbitration Act 1996 makes the duty express, by providing that: "The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings". Of course this duty postulates that arbitral proceedings are already on foot.

35. ... It enables a party wishing for a dispute to be arbitrated, either to commence arbitration itself, or to insist on arbitration, before or after the other party commences litigation, without itself actually having to commence arbitration if it does not wish to. It comes close in effect to analysis I, save that, unless and until one party insists on arbitration, there is no promise by the other party not to litigate."

Analysis of the Applications

18. In my view, the Landlord's Possession Application should not be granted and the Warrens' Stay Application should be granted in part for several reasons. First, it is clear on the documentary evidence that in the Magistrates' Court proceedings, the Warrens' breaches of the clauses of the 2007 Assignment Lease, that is, failing to pay the Maintenance Fees were put before the Magistrate. It was on this basis that the Magistrate granted judgment against the Warrens.

19. However, it is also clear, that in the absence of the Warrens at the hearing, the Landlord did not put the Arbitration Clause of the 1992 Anchor Lease containing before the Magistrate. Had the Landlord done so, then it is likely that the Magistrate would have given effect to the mandatory Arbitration Clause by refusing to grant judgment or inviting submissions from the Warrens on the point. I rely on the principle set out in *Anzen Ltd & Others v Hermes One Ltd (British Virgin Islands)* that by such mandatory language neither party would have sought relief in any other forum. Further, in applying the principle set out in *Buchanan v Lawrence*, it is clear that the disputes between the parties are caught by the Arbitration Clause. In my view, this matter went off the proper track from the very start and did not get back onto a proper track.

20. Second, Mr. Horseman argues that by the Warrens filing a Defence and Counterclaim that they had taken steps in the litigation thus waiving their right to arbitration. I accept that the Warrens whilst litigants in person complied with the instructions on the Ordinary Summons, that is, filing a Defence and the Counterclaim. Also, I accept that Mr. Warren was following the procedure of the Court whenever he attended the Court as a litigant in person. Mr. Horseman also argues that the Warrens took a step in the litigation when their counsel Mr. Johnston filed a Skeleton Argument pressing on with the Counterclaim and requesting the matter be sent to the Supreme Court for determination of the Claim and Counterclaim.

21. However, the Skeleton Argument also challenged the Landlord's decision to litigate when there was the Arbitration Clause to be engaged. In my view, I am inclined out of fairness to the Warrens as litigants in person not to consider their compliance with the Ordinary Summons as taking a step in the proceedings. In respect of Mr. Johnston's Skeleton Argument, in my view, the arguments contained in it were of technical nature including that it directly challenged the decision to litigate rather than arbitrate. If I followed the Canadian case of *Penncorp Life Insurance Company v Mirza et al* and the cases cited therein, I would be compelled to consider these actions as amounting to taking a step in the proceedings and thus the right to arbitration was waived. However, in applying the

principles set out in *Krebs v Meritus Trust Company Limited*, I am of the view that the nature of the Skeleton Argument, that is, it was of a technical nature, should not be considered as taking a step in the action. To that point, then a stay should be granted of the Possession Application.

22. Third, the Warrens' Stay Application seeks an order of the Court to stay the Possession Application pending the outcome of an Arbitration Proceedings. The Court is not in a position simply to grant that order as there is still in place the Judgment of the Magistrates' Court in favour of the Landlord that the Warrens have breached the 2007 Assignment Lease. Thus, it is likely that for the Warrens, the first step to take is to challenge the Judgment by way of the appeal process, which starts in the Magistrates Court. If the Warrens are successful in an appeal against the Judgment then their next step is likely to commence arbitration proceedings. Practically speaking, the Warrens may or may not get to arbitration proceedings. In my view, the proper order on the Stay Application is for the Possession Application to be stayed pending the determination of an appeal against the judgment and any arbitration proceedings.

23. Fourth, I have considered the Landlord's submissions that the Warrens have not paid their Maintenance Fees since the dispute first arose in 2015. The Mortgagee Bank has made some payments to the Landlord on their behalf. In the meantime they have lived at the Property and they have benefitted from the overall maintenance of the property as paid for solely by the payment of maintenance fees by all the other tenants of the Landlord.

24. In my view, I agree with the Landlord that this is not a fair position. I accept that the Warrens have a dispute over various matters and the payment of the Maintenance Fees that wish to take to arbitration. Thus, as I have not heard any evidence that the Warrens are challenging absolutely all the maintenance services, it follows for me that the Warrens are not challenging the full amount of the Maintenance Fees that they are obliged to pay as they are still living at the property and receiving benefits of maintenance. To that point, as a condition of granting a stay, the Warrens should pay some Maintenance Fees pending an appeal and an arbitration, the amount being approximately in the range of 50% as they dispute some services and do not dispute other services. Also, the Warrens should have

recognized that the outcome of any arbitration could go either way and as such should have been prepared to pay all outstanding Maintenance Fees if that was so determined at arbitration. Thus, it seems that they should have paid the disputed Maintenance Fees into an escrow account or otherwise reserved them in some way.

25. In fairness to the Landlord and the Warrens, in my view, the Warrens should be required to pay the amounts as set out below as a condition of the grant of the Stay Application (the "**Stay Maintenance Fee Payment Conditions**"). For clarity, I have not made any determination of liability of the disputes about the maintenance services or the Maintenance Fees as those are matters for arbitration.
    a. The Warrens to pay to the Landlord (or Mortgagee Bank whichever is appropriate) 50% of the Judgment sum of $13,359.16 dated 10 April 2019;
    b. The Warrens to pay to the Landlord (or Mortgagee Bank whichever is appropriate) 50% of the further delinquent Maintenance Fees of $29,971.91 incurred as of 15 September 2021.
    c. The above sums in (a) and (b) to be paid by 31 January 2023.
    d. The Warrens to pay 50% of the monthly maintenance fees going forward starting on the relevant due date after 1 January 2023 until determination of any arbitration proceedings.
    e. The above sums subject to be adjusted by any final arbitration award.

26. Fifth, this matter has been in the Court process for some time. In my view, it should be expedited without delay by the Warrens and cooperation by the Landlords. I make the following orders:
    a. The Warrens must commence the appeal process in the Magistrates' Court within 14 days of the date of this Ruling.
    b. The Warrens, if successful on appeal, must commence the arbitration proceedings within 14 days of the appeal judgment and must abide by section 39(1) of the Arbitration Act 1986, that is, the implied term that is the duty of the claimant to exercise due diligence in the prosecution of his claim.

c. In respect of any appeal proceedings and arbitration proceedings, I draw attention to the need for expedition of proceedings to the Magistrate, the Judge who will hear the appeal and any arbitrator.

Conclusion

27. For the reasons above:

a. I stay the Landlord's Possession Application pending any successful appeal and determination of any arbitration proceedings. If the Warrens' appeal and/or the arbitration proceedings are unsuccessful for them then this matter can be restored before me for further determination of the Possession Application.

b. I grant the Warrens' Stay Application subject to the Stay Maintenance Fee Payment Conditions set out above. I grant liberty to apply by letter, to be filed within 14 days of the date of this Ruling, only in respect of the Stay Maintenance Fee Payment Conditions: (i) an application to vary the "50%"; and (ii) an application to vary the payment date of 31 January 2023.

c. Any appeal by the Warrens in the Magistrates' Court must commence within 14 days of the date of this Ruling.

d. The Warrens, if successful on appeal, must commence any arbitration proceedings within 14 days of the date of the appeal judgment.

e. All proceedings should be advanced without delay.

28. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall be reserved until the determination of any appeal and arbitration proceedings and/or further steps in the Possession Application.

Dated 28 December 2022

HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT