Action No. CL 38

IN THE SUPREME COURT OF
THE TURKS AND CAICOS

BETWEEN:

1. CG MANAGEMENT
(Suing as assignee of all rights, interests and claims under rental and management which the 2" to 7th Plaintiffs and others and the Defendants are
2. CARIBBEAN ORANGE LTD.
3. CORAL SANDS LTD.
4. CAICOS ISLE PROPERTIES LTD.
5. BAREFOOT TRADING PARTNERS LTD.
7. BAGLEY
(the 2nd to 7th Plaintiffs suing on their own behalf and on behalf of all condominium owners Gardens who have entered into management and rental agreements with the

Plaintiffs

-and-

1. THE SEAGATE MANAGEMENT COMPANY LTD.
2. RAHUL LAKHANI

Defendant

AND

THE SEAGATE MANAGEMENT COMPANY

Plaintiff

-and-

1. CG MANAGEMENT LTD.
2. CAICOS ISLE PROPERTIES LTD.
3. BAREFOOT TRADING PARTNERS LTD.
4. CARIBBEAN ORANGE LTD.
5. 1712 HOLDING LTD.
6. CORAL SANDS LTD.
7. MARIAN INTERNATIONAL LTD.
8. LA COSTA PROPERTIES LTD.
9. CAMELOT LTD.
10. CORAL PALMS LTD.
11. SPORTZ R US LTD.

Defendant

(By

BEFORE THE CHIEF JUSTICE, THE HON. MRS. JUSTICE RAMSAY-HALE
Mr. Ariel Misick QC and with him, Ms. Deborah John-Woodruffe for the Plaintiffs and the Counterclai
Mr. Stephen Wilson QC for the Defendants and the Plaintiff by Counterclaim
Heard on 6 February 2018

RULING

Introduction

1. Coral Gardens is a condominium development comprising 31 units ("the Resort"). The majority of these units were placed in rental pools operated by divers management companies, including the rt Defendant, The Seagate Management Company Ltd ("Seagate"). Seagate entered into separate resort rental and management agreements ("RMAs") in or about 2014, with the 2' to 7th Plaintiffs and the Represented Parties ("the Proprietors") in this action, to rent those units which were placed in a rental pool.

2. Under the RMAs, which are each in the same terms, Seagate managed the rental properties and was paid a management fee of between 30% and 35% of the net proceeds of the rental income, and accounted to the Proprietors for the balance.

3, Some guests who stayed at the Resort paid an advance reservation deposit and paid the balance on check in or at the end of their stay. Others did not pay an advance reservation deposit but paid the full amount on check in or at the end of their stay.

4. The Proprietors terminated the RMAs effective 30 September 2016. During the period between the notice of termination and the effective date thereof, Seagate continued to accept reservations for the Proprietors' units which were fulfilled after the 30 September termination date. In some instances, advance rental deposits were paid which Seagate has retained. In other instances, monies for reservations made before termination ("Advance Reservations") were paid at check in and have been retained by

5. A dispute has arisen between the parties as to who is entitled to the advance reservation deposits which had been paid to Seagate by guests who made bookings before 30 September 2016 for stays that took place *after* the RMAs were terminated. As the question of who is entitled to the advance reservation deposits turns largely on a proper construction of the RMAs, the parties agreed that this question, and certain consequential questions, would be tried as a preliminary issue under 0. 14A and/or 0.

The Preliminary

6. The preliminary issues before the Court for

(1) Whether, on a true construction of the RMAs, the Proprietors became entitled to the rental deposits as paid by guests to Seagate ("Advance Rental Deposits") upon the advance reservations to which the said payments relate being fulfilled?

(2) If the answer to (1) is no, whether the Plaintiffs are liable to pay to Seagate the rental receipts in respect of advance reservations fulfilled in their respective units, less the Advance Rental Deposit received by Seagate?

(3) If the answer to (2) is no, whether Seagate is entitled to a management fee and reimbursement of other expenses and if so, at what rate are those fees to be

The RMAs

7. The following provisions of the RMAs are relevant to the issues to be tried as preliminary issues:

2.0 DUTIES OF

2.1 Manager is hereby retained exclusively for the purpose of arranging rentals and management of the Unit on the terms and conditions herein set forth [...].

2.2. It shall be the Manager's responsibility to advertise and promote the Units. Manager shall establish and advertise mutually agree (sic) upon rates and rental policies pursuant to which Manager will offer the Unit for rental which, in Manager's judgment, will optimize the rental potential of the Unit [...]

2.8 (a) Manager shall account for, and (upon request of Owner) disburse any rents due to 15' day of the month following the end of each calendar quarter of business [...] From the rents collected, the Manager shall first deduct the Manager's Fee (as herein defined) and any other expense chargeable to Owner such as, by way of illustration but not by way of limitation, past due debts, utility charges if any, and any strata or other fees and charges relating to the Unit or payable under this Agreement before any rental income is paid to Owner. If the rental income is not sufficient to pay all of Owner's charges, Owner shall pay the balance of any such outstanding charges as

3.0 FEES &

3,1 As compensation for the services to be rendered hereunder, the Manager shall receive a fee to be determined as follows:

Non-VRBO/Homeaway/Owner Originated rentals: For any non-VRBO/Homeaway/Owner originated rentals, as compensation for its services hereunder the Manager shall withhold thirty five per cent (35%) from monthly rental receipts of the adjusted net unit rental for such *non*-VRBO/Homeaway/Owner rentals.

VRBO/Homeaway/Owner Originated rentals: For all *new,* current or former VRBO/Homeaway/Originated rentals which meet or exceed 75 percent of the 2014 published "rack rates", as compensation for its services hereunder, the Manager percent (30%) from rental receipts of the adjusted net unit rental for such VRBO/Homeaway/Owner rentals or return VRBO/Homeaway/Owner originated guest

The adjusted net unit rental is defined as the gross amount of rental income less taxes, government charges, discounts, credit card charges, government taxes and service charges, and commissions paid to third parties for reservation bookings. The annual published "rack rates" shall be approved in writing by both the manager and by a majority of owners' in rental management program, or the published rack rate shall alternately be approved by the manager and the Executive Committee, providing the Executive Committee has received written approval by the majority of

To the extent Manager received a fee greater than the fee that would be paid under this agreement for the period December 15, 2014, through the date of this agreement, Manager shall refund to Owner the excess fee received within 30 days.

4.0 ADVANCE DEPOSITS/OTHER AUTHORISED

4.1 Manager shall place all advance rental deposits and earned rental income in a separate interest-bearing escrow account until disbursal, and any interest earned thereon shall accrue to the Managers account.

8.3 CANCELLATION &

a) In the event of a cancellation prior to (30) days before the date of the reservation arrival the guest shall receive their full deposit back, less the associated credit card

b) In the event of a cancellation within (30) days of the reservation arrival date the guest will forfeit 50% of the entire booking amount which will be held for and applied to a new reservation to be made within 12 months of the original booking date.

c) If the guest fails to rebook within 12 months of the original booking date their 50% deposit will be forfeited. In the event of guest forfeiture, the Management Company shall be entitled to retain the respective 30% or 35% of the forfeited amount and the owner shall be credited with the balance of either 70% or 65% of the forfeited amount.

1-

18.0 ACCOUNTING

18.1 Manager agrees to maintain separate accounting records of all rentals and expenses associated with Owner's unit, shall provide the owners with such accounts on a quarterly basis, and make such records available for inspection by Owner upon

18.2 Manager agrees to maintain any excess funds held for owner(s) □parate "collective" bank account designated for that sole purpose, which shall be adjusted at the end of each calendar quarter. Upon written request, Owner shall have access to all of the Owner's funds in the escrow account. Any interest earned on deposits held shall be to

18.3 Management Company agrees to maintain a separate books of account (but not necessarily a separate bank account) for all rental advance deposits and/or payments received in relation to the Owner's unit rentals. Such books of account shall be available for review by Owner and the books of account for all unit's rental deposits shall be available for review by an Owner's committee or upon the request

1.0 DEFINITION, TERMS AND

1.4 If this Agreement is terminated for any reason, including the Owner selling the Unit during the term hereof, or mortgage default proceedings are pending with respect to the Unit, any advance reservation(s) of the Unit shall become the property of Manager and may be placed in other available unit(s). Manager will use its best efforts relocate any party with such reservation to like accommodation(s) if requested to do so. If, however, comparable accommodation is not available, Owner agrees to honor said reservation(s), or indemnify and hold Manager harmless from all expenses, costs and damages incurred by Manager or guests as a result of refusal or

The Law

8. The principles of construction of commercial agreements are settled. In *Rainy Sky v Kookmin Bank* [2011] UKSC 50 Lord Clarke, giving the judgment on behalf of the Court, noted that the authorities,

"14. ...show that the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. As Lord Hoffmann made clear in the first of the principles he summarised in the Investors Compensation Scheme case [1998] 1 WLR 896 at 912H, the relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

9. His Lordship also noted that the parties' subjective intentions were irrelevant and that the mere fact that a term in the contract appears to be particularly unfavourable to one party or the other was not a matter to be considered. Citing Lord Hoffman's judgment in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, he observed that such a term may have been agreed in exchange for some concession made elsewhere in the transaction or the party affected by the term may simply have made a bad bargain.

10. His Lordship also observed that,

"21. The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understo d the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.

"[...]

"23. Where the parties have used unambiguous language, the court must apply it."

11. In *Arnold v Britton* [2016]1 All ER 1, Lord Neuberger identified several factors relevant to the construction of the lease before that Court which included the following:

"17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in Chartbrook, paras 16-26] should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the *eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered* by *the provision when agreeing the wording of that provision.*

"18. Secondly, when it comes to considering the centrally relevant words to be interpreted ...the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it

"19. The third point ... is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made.

"20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight...

"21. The fifth When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties...

"22. Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention

12. Some critics of Lord Neuberger's approach suggest that he adopted a literal approach to construction which was inconsistent with the approach adopted by the Court in *Rainy Sky.* This seeming conflict was addressed by Lord Hodge in *Wood v Capita Insurance Services* [2017] UKSC 24 who usefully synthesized the judgments, stating at para 10 that,

"The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning."

The Construction Issue

13. Although the parties have agreed that the preliminary issue is who is entitled to the advance rental deposits, it is clear from the arguments advanced that the real issue is whether the Proprietors are entitled to the whole of the income arising from the reservation as the reservations were fulfilled in their units or whether Seagate is entitled to the whole, on the ground that the Advance Reservations were their property or whether the parties' entitlement should be

adjusted as provided for under the provisions of the now terminated RMAs or on basis.

14. Mr. Misick submits that the Proprietors' contention, that they are entitled to the which are being held by Seagate as the guests stayed in their Units, is consistent with the purpose of the RMAs and the relationship of the parties and is not contradicted by any other provisions of the RMAs. He notes that the RMAs make no provision for payment to Seagate in respect of the Advance Reservations. Further, Seagate's contractual obligation to provide services and to be paid for those services terminated

15. In advancing Seagate's proposition that it is entitled to all the revenues arising from the Reservations, Mr. Wilson relies on the provision in clause 1.4 that, on termination, the Advance Reservations "*shall become the property*" which he submits makes it clear that Seagate is entitled to the income arising from those reservations even though paid after termination. He contends that it was clearly contemplated by the parties that, in the event of a termination, Seagate would continue to act as Manager until the termination became effective. In the circumstances where Seagate would continue to incur all the costs and expense associated with obtaining the reservations, it made commercial good sense to stipulate that any reservations made during that period - and inferentially, the income therefrom - were the property of Seagate, and not the Proprietor who had terminated the agreement, to ensure that Seagate was

16. Mr. Wilson submits further that this interpretation of clause 1.4, as entitling receipts in full, accords with commercial commonsense, since Seagate was bound under the RMAs to continue to do all things in respect of the Units during the termination period and would have had no incentive so to do if it were not to be paid for work done. The fact that under the RMAs Seagate was also obliged to provide cleaning, concierge services and other services - which it did not provide to the guests who held the reservations in question - did not mean that Seagate was not entitled to

17. In the alternative, Seagate contends that it is entitled to its fees at 30% or 35% of the net rentals as provided for under the RMAs. In support of its alternative case, Mr. Wilson relies on the fact that the RMAs provided for rental income earned in respect of each reservation to be paid to the Proprietors in arrears, *after* all reservations were fulfilled and net of all expenses and of all fees due and owing to Seagate in respect thereof. It was only when the revenues were adjusted by Seagate in line with the terms of the

18. Mr. Wilson also relies on Clauses 8.3(b) and (c), which provide that Seagate is entitled in respect of any deposits which are forfeit, as demonstrating that Seagate is entitled to receive a fee in respect of all bookings, whether cancelled or not.

19. Mr. Misick submits in response that Seagate's entitlement be paid fees under clause 8.3 arises where a reservation is cancelled and not otherwise.

20. With respect to Seagate's construction of clause 1.4, Mr. Misick submits that the clause have the meaning for which Seagate contends and that the provision, that any Advance Reservation is the property of Seagate, did not mean that the *Advance Deposits* were also the property of Seagate. What Clause 1.4 does, he submits, is give

Advance Reservations and to be indemnified by the Proprietor if the Proprietor refuses to make its Unit available and Seagate becomes liable in costs and damages as a result. In the absence of Clause 1.4, Mr. Misick contends that the Advance Reservations - and the income arising therefrom - would, *prima facie*, belong to the Proprietors as

21. Mr. Misick submits further, that there is nothing in the language of Clause **1.4** to Seagate was to benefit from the payment of management fees on the Advance Reservations: the revenues earned from the Advance Reservations were earned after termination of the RMAs and at the earliest when the guests checked in by which time the RMAs had been terminated and Seagate's contractual entitlement to management

Discussion and

22. In my view, the provision in clause 8 that Seagate be paid its 30% or 35% fee of the reservation deposit where the reservation had been cancelled and no on-site services have been provided, is the key to resolving the issue at hand. It makes it clear that Seagate is entitled to its fee once a reservation is made and that its entitlement to be paid does not depend upon on-site services being provided.

23. This interpretation of Seagate's entitlement to be paid makes commercial good sense considers its primary duty as set out in clause 2 which is to arrange rentals and manage the Units. Managing the condominium rentals includes the advertising and marketing of the property, setting rental rates to ensure the property is competitively priced, providing front office staff to answer booking inquiries, managing the reservations and ensuring adequate upkeep of units among other things.

24. Obtaining bookings and maximizing returns for each unit are Seagate's primary majority of their work is done on the front end, to secure reservations. While Seagate does provide services to the guests while on Island, that is incidental to their primary objective of filling rooms.

25. When Seagate's duties as rental manager are understood in this way the provision in that the Advance Reservations become the property of the rental management company on termination of the agreement - is readily understood, as the reservations represent the culmination of Seagate's efforts, the fruit of its labour,

26. The agreement thus provides for Seagate to be entitled to place those guests wherever and it would be entitled to its fee in respect of the reservations whether they are fulfilled.

27. In my view, their right to be paid does not arise at the end of the guests' stay. I do not Misick's proposition that by the time the revenues were earned in respect of the Advance Reservations, the agreement was terminated and Seagate had no contractual right to be paid in respect of them. While monies due from guests in respect of their reservations are paid *after* check in, Seagate's right to be paid its fee arose when it secured the Advance Reservation. In this respect, I think Mr. Wilson's analogy between a rental management agent and a real estate agent is apt. In the same way that the

introduces the purchaser to the seller and is entitled to be paid when the sale is concluded - even if concluded after the listing agreement is terminated- Seagate was entitled to its fee even if the reservation was fulfilled after the contract for services was terminated, the relevant services for which it was to be remunerated having been

28. I do not think it is possible to go as far as Mr. Wilson does and say that, because the Reservations are the property of Seagate, it is entitled to all the income arising from them. The provision in clause 1.4 is intended, in my view, to ensure that Seagate is paid for the work it has done to obtain the Advance Reservations, prior to termination of the RMAs. It seems to me that the only way for Proprietors to avoid Seagate's fees would be to request that guests not be placed in their Units as provided for in clause 1.4. Of course, if they did so they would run the risk of incurring greater costs as they were required by the RMAs to indemnify Seagate for any loss and damage Seagate incurred if

29. Based on the foregoing analysis, the answer to the first question is "no", the Proprietors are entitled to the Advance Rental Deposits. The answer to the second question is "no". The answer to the third question is that the Proprietors are liable to pay Seagate its accordance with the RMAs with respect to the reservations in

DATED 17 JULY 2018

CHIEF JUSTICE