

COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCivApp. No. 75 of 2022

B E T W E E N

WALLACE I. ROLLE

KRYSTAL D. ROLLE

Appellants

AND

THE TOWN COURT MANAGEMENT COMPANY

Respondent

BEFORE: **The Honourable Mr. Justice Isaacs, JA**
The Honourable Madam Justice Crane-Scott, JA
The Honourable Mr. Justice Jones, JA

APPEARANCES: **Ms. Krystal Rolle, KC, with Ms. Kendrea Demeritte, Counsel for the**
Appellants
Mr. Kahlil Parker, KC, with Ms. Roberta Quant, Counsel for the
Respondent

DATES: **15 November 2022, 9 March 2023**

Civil Appeal – Sections 14(2) (e) and (g), 14(3) of the Law of Property and Conveyancing (Condominium) Act – Breach of Contract – Breach of Duty - Judge's Finding of Fact - Whether the judge failed to have regard to the legal issues raised - Was the judge in error in failing to grant interest on damages awarded where the claim was part of the case

The appellants purchased Unit No. 5 at Town Court Condominiums. Town Court Ltd and Real Estate International acted together as managers of the condominium complex. The appellants claimed damages against the respondent for breach of contract and breach of duty for failure to maintain the condominium development as required by law. The judge ruled on declarations sought by the claimants/appellants and ordered damages to the claimants/appellants. The appellant's now appeal the decision on eight grounds which this court summarised into three issues "a) Was the judge's finding of "clerical and/or typographical errors" in the respondent's documents unreasonable and unsupported by evidence. b) Did the judge, in refusing the appellant's declarations, give consideration to the factual issues without regard to the legal

issues raised in the trial. c) Was the judge in error in failing to grant interest on damages awarded to the appellant where the appellant made this claim as part of his case.”

Held: appeal dismissed, judgment in the court below affirmed; costs to the respondent to be taxed if not agreed.

As to whether the judge’s finding of “clerical and/or typographical errors” in the respondent's documents was unreasonable and unsupported by evidence, the court found that the judge, having considered the facts and evidence, and having heard the witnesses at trial, could reasonably arrive at the conclusion which he did.

The appellant's complaint that the judge failed to give consideration to the legal issues raised are essentially a challenge the judge's findings of facts. The judge concluded that the Act and Declaration gave the respondent the power to appoint an agent to manage the day-to-day affairs of the condominium on its behalf. Having found that the names of one party in the Declaration to be a typographical mistake the court cannot say that this interpretation of the documents before the judge was one which was not open to him and that he has erred, in fact or in law.

The appellants made no claim for interest of a specific rate or for a specific period only for us to "**award such interest as the Court deemed just**". Second, it is trite law that the award of interest is discretionary and the fact that the judge did not award interest not claimed is not an error of the judge. Here, the fact that the judge did not award interest as a separate category, does not prevent the appellants from claiming interest at the statutory rate from judgment.

Volpi v Volpi [2002] EWCA Civ 464; applied

J U D G M E N T

Judgment delivered by the Honourable Mr. Justice Jones, JA:

Introduction

1. This is an appeal against the decision of Winder J, (as he then was) in the Supreme Court delivered on April 8, 2022, when he ruled on Declarations sought regarding the proper management of the condominium complex known as Town Court Condominiums. He refused all five Declarations sought by Wallace I. Rolle and Krystal D. Rolle ("the appellants"). Winder J, also made orders for Town Court Management Company ("the Respondent") to prepare a proper accounting of charges and to make payment to the appellants. Finally, he ordered damages in the amount of twenty five thousand, nine hundred, forty six dollars and twenty two cents (\$25,946.22) to the appellants.
2. In 2002, the appellants purchased Unit No. 5 at Town Court Condominiums. The developer ("Town Court Ltd"), and Real Estate International ("REI") (a management company) acted together as managers of the condominium complex. The appellants claimed damages against the respondent for breach of contract and breach of duty under the Declaration of Condominium dated the 8 October, 1979 and Section 14(1)(b) of the

Law of Property and Conveyancing (Condominium) Act 1965 for failure to maintain the condominium development as required by law.

Grounds of Appeal

3. The appellants filed a Notice of Appeal on May 20, 2022 with eight grounds of appeal.

- a) **The Learned Judge refused the Declarations based solely on facts' without giving any or any proper consideration to the various legal issues attendant to the proper determination of the Declaratory relief that was sought by the Appellants.**
- b) **The Learned Judge in refusing the Declarations, in directing the "proper accounting", in ordering payment in accordance therewith and by holding inter alia that, "REI was engaged to provide services on behalf of the Defendant" and that "REI was clearly the agent of the Defendant and empowered to manage the day to day operations of the condominium complex on behalf of the Defendant..." erred in law by failing to give any or any proper consideration to Section 15(4)(6) of the Condominium Byelaws which provides that "The Board may appoint persons who are – unit – owners (whether or not members of the Board) to hold such offices and to perform such functions as the Board may from time to time determine" [Emphasis Added] AND the acceptance and concession on cross examination of the Respondent's witness, Mr. Terrance Fountain that REI was not a unit owner of the Town Court Condominium.**
- c) **The Learned Judge in refusing the Declarations, in directing the "proper accounting", in ordering payment in accordance therewith and by holding inter alia that, "REI was engaged to provide services on behalf of the Defendant" and that "REI was clearly the agent of the Defendant and empowered to manage the day to day operations of the condominium complex on behalf of the Defendant..." erred in law by failing to give any or any proper consideration to the following relevant legal questions, despite the same having been raised and relied upon by the Appellants, namely:-**
 - i. **Whether the duties, powers and obligations vested in the Respondent by the Declaration of Condominium and by the enabling statute, namely the Law of Property and Conveyancing (Condominium) Act 1965 ("The Act") are delegable duties, powers and obligations having regard inter alia to the Act and the Interpretation and General Clauses Act.**
 - ii. **Whether Clause 17 of the Declaration of Condominium which provided, "The Management Company shall also have the power to delegate all or any of its powers and duties to any company firm or person of its choice" is ultra vires the Act and therefore invalid.**
 - iii. **Whether the "contributions" and/or "common area expenses" payable by unit owners by virtue of the Declaration of Condominium and/or under the Act can**

properly include fees payable to a third party exercising the statutory powers, duties and obligations of the body corporate having regard inter alia to the fact, which was noted by the Learned Judge in his Judgment,” that both of the Respondent’s witnesses confirmed that the charges levied against the Appellants during the Challenged Period included the fees paid to REI.

- iv. iv. The efficacy and/or validity of the acts done by REI during the Challenged Period consequent upon a determination of the legal questions raised in Paragraph 3(i) through 3 (iii).
- d) The Learned Judge in refusing the Declarations, in directing the “proper accounting”, in ordering payment in accordance therewith and by holding that, “The Defendant is a body corporate and must out of necessity act through the auspices of others” erred in law by failing to give any or any proper consideration to Section 15(4) of the said Bye Laws which confirmed that “The powers and duties of the body corporate shall, subject to any restriction imposed or direction given at a general meeting, be exercised and performed by the Board of the body corporate.”
- e) The Learned Judge in refusing the Declarations, in directing the “proper accounting” and in ordering payment in accordance therewith erred in law by failing to give any or any proper consideration to any of the authorities cited and relied upon by the Appellants including *Maillis v. Town Court Ltd*, *Seaport Construction Co. v. Residential Resort Developments Ltd. (In Liquidation)*, *Roberts v. Albacore Developments Ltd*’ and *Cannes Resort (Freeport Ltd) v Gaudet*’, the consideration of which were relevant to the proper determination of the Declarations and the Respondents’ Counterclaim relative to the Challenged Period.
- f) The Learned Judge’s acceptance of the Respondent’s case of “Clerical and/or Typographical Errors” was plainly wrong and such finding was wholly unsupported by the evidence as a whole, impermissible on the evidence as a whole and one which no reasonable judge could have reached on the evidence.
- g) The Learned Judge, having granted the Appellants damages in the total amount of \$25,946.22 erred in law by failing to consider and determine the Appellants’ pleaded claim for interest on such damages thereby leaving such pleaded claim wholly undetermined.
- h) Having regard to all of the circumstances of the case, no Judge properly directing himself on the law and the evidence would have refused the Declarations, directed the “proper accounting” as aforesaid, directed the Appellants to make payment to the Respondent on the basis of such “proper accounting”, accepted the Respondent’s case of “Clerical and/or Typographical Errors” and fail to consider and determine the Appellants’ claim for interest on its damages.”

Issues

4. We conveniently summarise these grounds into three discrete issues. First, we deal with the issue relating to the complaint about the judge's finding of fact, and then with a complaint about the judge's failure to have regard to the legal issues raised. Finally, we discuss the complaint about the judge's failure to award interest on damages given to the appellant. The issues are as follows:-
 - a) Was the judge's finding of "clerical and/or typographical errors" in the respondent's documents unreasonable and unsupported by evidence.
 - b) Did the judge, in refusing the appellant's declarations, give consideration to the factual issues without regard to the legal issues raised in the trial.
 - c) Was the judge in error in failing to grant interest on damages awarded to the appellant where the appellant made this claim as part of his case.

Analysis

Issue One: Was the judge's finding of "clerical and/or typographical errors" in the respondent's documents unreasonable and unsupported by evidence?

5. One issue raised by the appellants is that of fact. The Appellants contend that the judge's acceptance of the respondent's case of "Clerical and/or Typographical Errors" was plainly wrong and that such a finding was wholly unsupported by the evidence and one which no reasonable judge could have reached on the evidence. The judge heard evidence about an agreement between the parties in which the owners appointed REI as their management agent, with the responsibility for managing the Town Court Condominiums.
6. Terrance Fountain gave evidence. The witness statement contained his evidence in chief which the judge referred to in paragraph 6 of his judgment.

"1. I am a Unit owner in the Defendant's Condominium and am duly authorized to make this Witness Statement on the Defendant's behalf. The Defendant is the management company of the Condominium, established by its Declaration of Condominium.

2. The overwhelming majority of Unit owners in the Condominium pay their contributions as have been levied by the Defendant over the years, in the same manner as the contributions claimed by the Defendant with respect to Unit A-5 have been, and they continue to pay their said contributions. Even where Unit owners have fallen into arrears, none have adopted the position taken by the Plaintiffs herein, suggesting that someone other than the Defendant was purporting to levy or collect contributions with respect to the Condominium, which has never been, and is not, the case.

3. I myself, in my capacity as then Chairman of the Defendant's Board, executed the Agreement between the Defendant and Real Estate International (Bahamas) Company Limited, dated the 15" day of May A.D. 1996, ... While I accept that the said

Agreement refers to a “Town Court Condominium Association”, I can confirm that, despite this clerical error, it was in fact the Defendant, as the Body Corporate of the Condominium, who determined to and duly engaged Real Estate International (Bahamas) Company Limited. I can confirm that it was the Defendant's Board's decision to engage Real Estate International (Bahamas) Company Limited to assist the Defendant in carrying out its functions.

4. Any reference in statements issued on behalf of the Defendant during the currency of the said Agreement to being “in account with” Town Court Limited, was due to a clerical error. Town Court Limited was neither party to the Defendant's Agreement with Real Estate International (Bahamas) Company Limited nor was it otherwise involved in any way in the operation or management of the Condominium. The statements issued to Unit owners during the currency of the said Agreement were issued on the Defendant's behalf and overwhelming majority of were duly paid to the Defendant by the ‘Unit Owners, none of whom, aside from the Plaintiffs, ever suggested that they thought the said statements were being issued by someone other than the Defendant or that they would not pay the amounts claimed pursuant thereto because of any such concerns. At all material times the Plaintiffs couched their refusal to pay the arrears due and payable to the Defendant with respect to Unit A-5 as a purported protest concerning alleged issues regarding the maintenance of the Common Areas at the Condominium. [Emphasis ours]

7. Another witness who gave evidence was Lisa Hall. Paragraph 8 of the judge's judgment is:

"4. The significant majority of owners in the Condominium, myself included, pay their contributions as have been levied over the years. The Plaintiffs are the only owners who have taken the position that somehow an entity other than the Defendant was seeking to unlawfully extract funds from them, apparently for purposes other than operation and maintenance of the Condominium. That was not the case. By engaging Real Estate International (Bahamas) Company Limited and in attempting to collect the outstanding sums due to the Defendant the subject of the Counterclaim herein, the Defendant's Board was at all material times, and to the date hereof, merely seeking to ensure the effective and efficient management of the Condominium for the benefit of all Unit Owners.

5. The Defendant determined to engage Real Estate International (Bahamas) Company Limited to carry out

management services on behalf of the Unit Owners at the Condominium, which services they duly provided. During the course of their engagement by the Defendant, Unit Owners, myself and the Plaintiffs included, were duly billed by Real Estate International (Bahamas) Company Limited with respect to our common expenses and the significant majority of Unit Owners fulfilled our obligations as owners by paying the said contributions to the Defendant due with respect to our units in the Condominium.

6. While Statement formerly issued by Real Estate International (Bahamas) Company Limited to Unit Owners may have, due to a clerical error, made reference to being “in account with” Town Court Limited, as the Management Agreement itself demonstrated there was no involvement by Town Court Limited, the Declarant, in the operation or management of the Condominium and Real Estate International (Bahamas) Company Limited had no contractual relationship with Town Court Limited with respect thereto. [Emphasis ours]”

8. The evidence from the cross-examination from Ms. Hall’s was:

"Mrs. Rolle QC: Now, this clerical error that you speak of, when was it determined by you, that this clerical error existed? When was that determined or ascertained?"

Ms. Hall: Specifically to REI?

Mrs. Rolle QC: There's more than one clerical error that you're contemplating?

Ms. Hall: No. What I'm saying is that I did not come on the board until November 2010.

Mrs. Rolle QC: Right so the clerical error that your contemp—

Ms. Hall: And at that time Town Court had assumed self-management. I think they had discontinued their relationship with REI, prior to my coming on the board.

Mrs. Rolle QC: Okay. Here's the question I'm asking. In paragraph 6. you make reference to a clerical error. The question that I'm asking you, when, if ever, was this clerical error ascertained.

Ms. Hall: 2011: when we actually met with a lawyer, I think, 2011. 2010, when we actually was advised by a lawyer, I'm referring to the declaration of condominium to say what our true name was.

Mrs. Rolle QC: So in 2011 the clerical error was discovered after

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Ms. Hall: That I was aware of it. I can only speak for myself.

Mrs. Rolle QC: Understood. Understood. I'm not trying to trick you. I'm just trying to understand your position. So the follow up question to that is this, after you took legal advice and you discovered the clerical error in 2011, was it corrected.

Ms. Hall: Yes. We corrected certain things on the statement to make sure that it says Town Court Management Company. Because as I said, until that point we weren't -- I wasn't personally aware of the Declaration of Condominium. "

9. A key finding by the judge was his determination of the identity of the parties to the agreement. Here is what the judge said at paragraphs 12 and 13 of his judgment.

“One of the key issues of fact for determination in this action is the efficacy of the agreement dated 15 May, 1996 made between parties named as the Town Court Condominium Association and REI. The contracting party is expressly referred to as ‘the Owners’ of the Town Court Condominiums and Real Estate International (Bahamas) Company Limited. Under the agreement the owners appointed REI as their management agent with the responsibility for managing the Town Court Condominiums. The Defendant’s case is that this was clearly a clerical error and the true contracting parties, as accepted by them were the Defendant and REI. I accept the Defendant’s contention. (emphasis ours)”

10. Then at paragraph 14 he said:

“Whilst I accept Rolle as a truthful witness, the only witness in any position to speak to what transpired at the condominium complex in 1996 was Fountain, who gave evidence on behalf of the Defendant. Rolle could not speak to events concerning the entry into the management agreement or the conduct of the parties under the agreement prior to his purchase of the Unit. I found Fountain to be a truthful and credible witness.”

11. The respondent's case before the judge, which was accepted by him, is that this was a clerical error and the true contracting parties, as accepted by them were themselves and REI. In **Volpi v Volpi [2002] EWCA Civ 464**, at para [2] - [3], the UK Court of Appeal summarised the approach of an appellate court to the findings of fact of the judge at first instance. The court said.

“2. The appeal is therefore on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:

i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

ii) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

12. The determination of this issue required a finding of fact by the judge. For the appellants to succeed on this issue, it is necessary for them to establish that the finding of fact by the judge was unreasonable. We accept that the judge, having considered the facts and evidence, and having heard the witnesses at trial, could reasonably arrive at the conclusion which he did. The appellants having failed to show the finding to be unreasonable and unsupported must fail on this issue.

Issue Two: Did the judge, in refusing the appellant's declarations, give consideration to the factual issues without regard to the legal issues raised in the trial?

13. In his judgment, the judge summarised the appellant's issues as.

- a) **i. Whether Town Court Limited did in fact carry out management functions of the Body Corporate?**
- b) **ii. If so up to what date were all such functions finally relinquished by Town Court Limited?**

- c) **iii. Assuming that the powers of the Body Corporate could as a matter of law be delegated (which is denied) was it the Body Corporate who appointed Real Estate International (REI)?**
 - d) **vi. Whether the fees of REI were in fact included in the sums levied against the unit owners as Contributions?**
 - e) **v. Whether there was plumbing damage which the Body Corporate was liable to repair and did the Body Corporate undertake such repairs?**
14. Counsel for the appellant contended the judge refused the declarations sought without giving consideration to the legal issues raised by them in the trial and in submissions. They argue that REI nor Town Court Ltd were unit owners, yet the respondent, by an agreement, appointed them to carry out management functions in the condominium. Second, the agreement between the respondent, REI and Town Court Ltd was worthless. Their engagement to manage the condominium, they argue, is incompatible with the statute and byelaws, and unenforceable. Third, they say the efficacy of the agreement is a question of law and not fact, as described by the judge.
15. We take the view that the judge determined that the issues raised mixed questions of law and fact which were to be determined in this case. Where the judge has to resolve mixed questions of law and fact, the judge should first make his findings of fact to enable him to apply the applicable law. Here, the judge found as a fact that the Respondent was the party that appointed REI as its management agent, giving them the responsibility for managing the Town Court Condominiums. He also concluded that REI in demanding contributions and receiving payments from the owners did so in the name and under the authority of the respondent.
16. In coming to this conclusion, the judge examined Section 14 (2) (e) and (g) of the Law of Property and Conveyancing (Condominium) Act (the Act), which provides that the powers of the Respondent include:-
- "The power "to employ such staff as may be deemed necessary to carry out its duties" ...; and**
- The power "to exercise any other powers as may be conferred upon the body corporate by the Declaration or the byelaws"."**
17. Also, Clause 17 of the Declaration of the Town Court Condominium (the Declaration) which provides.
- "The Management Company shall also have power to delegate all or any of its powers and duties to any company, firm or person of its choice."**
18. Section 14 (3) of the Act provides that.
- "All agreements, decisions and determinations lawfully made by the body corporate in accordance with this Act, the relevant Declaration and the byelaws shall be deemed to be binding on all unit owners."**

19. From these provisions, the judge also concluded that the Act and Declaration gave the respondent the power to appoint an agent to manage the day-to-day affairs of the condominium on its behalf. Having found that the names of one party in the Declaration to be a typographical mistake, we cannot say that this interpretation of the documents before him was one which was not open to him and that the judge has erred, in fact or in law. The appellant's complaint that the judge failed to give consideration to the legal issues raised are essentially a challenge the judge's findings of facts. We have already determined that the appellant has not shown the findings of fact of the judge to be unreasonable given the evidence before him. This ground of appeal must also fail.

Issue Three: Was the judge in error in failing to grant interest on damages awarded to the appellant where the appellant made this claim as part of his case?

20. The appellants contend although the judge granted them damages in the amount of \$25,946.22 he failed to consider their claim for interest, leaving that claim undetermined. They have now requested that we grant them interest on the judgment amount at 5% from the Writ of Summons to judgment.
21. We observe the appellants made no claim for interest of a specific rate or for a specific period only for us to "**award such interest as the Court deemed just**". Second, it is trite law that the award of interest is discretionary and the fact that the judge did not award interest not claimed is not an error of the judge. Here, the fact that the judge did not award interest as a separate category, does not prevent the appellants from claiming interest at the statutory rate from judgment. See **White Book 1985 O.42 r1**. This ground has no merit and fails.

Disposition

22. For all the reasons set out above we refuse the appellants appeal and affirm the judgment of the judge in the court below with costs to the respondent to be agreed or taxed.

The Honourable Mr. Justice Jones, JA

The Honourable Mr. Justice Isaacs, JA

The Honourable Madam Justice Crane-Scott, JA