IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

MATTER# 2013: NO. 57

BETWEEN:

PATRICK BEAN

Plaintiff

- and -

LLEWELLYN PENISTON

Defendant

JUDGMENT

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1. This matter comes before me on the trial of the Plaintiff's claim against the Defendant for arrears of rent in the amount of $64,070 and on the Defendant's counterclaim for $820,000 in respect of funds advanced for the construction of the Plaintiffs's condominium development.

Procedural History

2. The Plaintiff commenced these proceedings by Specially Endorsed Writ, dated 9 March 2013. The Plaintiff pleaded that he entered into an oral agreement to lease No. 5 Long Bay Gardens[1], Sandys to the Defendant for $4,040 per month and that the Defendant failed to pay rent from November 2011 to February 3013.

3. On 1 April 2013 the Plaintiff obtained Judgment in Default of Appearance. It transpired that the Defendant had filed a Defence and Counterclaim within the time limited for filing an Appearance but he had not filed an Appearance. The Defendant applied to set aside the Default Judgment and the Plaintiff applied to strike out the Defendant's Defence and Counterclaim.

4. On 7 March 2014 the Chief Justice made a Ruling on the Defendant's application to set aside the Default Judgment and on the Plaintiff's application to strike out the Defendant's Defence and Counterclaim. Not surprisingly, the Chief Justice set aside the Default Judgment. The fact that the Defendant filed a Defence and Counterclaim, albeit without first filing an Appearance, clearly evidences his intention to defend the claim. The primary focus of the Chief Justice's Ruling was whether the Defendant's Defence should be struck out.

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[1] The property is referred to in some documents as "Darrell Gardens" or "Dariel Gardens"

5. The Defendant's Defence and Counterclaim, dated 23 March 2013, denied that the Plaintiff was owner of No. 5 Long Bay Gardens. The Counterclaim avered that:

   "it was always agreed with the Plaintiff, that in lieu of the legal services and expenses arising from services provided by the Defendant to the Plaintiff, including significant contributions toward the construction of the Plaintiff's Unit by the Defendant, that all such costs would be deferred and further, the Defendant would assist the Plaintiff to reduce his loan obligations with his Bank."

6. The Defendant's Defence and Counterclaim made a bare denial of the Plaintiff's title to No. 5 Long Bay Gardens. The Defendant, however, filed affidavits in advance of the strike out hearing that put forward a theory that his son was the legal owner of No. 5 Long Bay Gardens and that he occupied the property under a lease granted by his son.

7. The Chief Justice held that the Defendant's claim that his son was the owner of No. 5 Long Bay Gardens was totally without substance and would be struck out. The Chief Justice's Order, dated 7 March 2014, states:

   "the Plaintiff is the legal and/or ultimate beneficial owner No. 5 Darrell Gardens ... for the avoidance of doubt [this finding] *is binding on the parties and not subject to re-litigation either before this Court or in the Magistrates' Court*[2]*."*

8. The Defendant refused to accept the binding nature of the Chief Justice's Order in respect of the ownership of No. 5 Long Bay Gardens. The Defendant repeatedly attempted to reopen the ownership issue in the hearings before me by way of submission and cross-examination. The Defendant contended that the Chief Justice's Order on the ownership issue was obtained by fraud and perjury. I made clear to the Defendant at the outset that I was not going to go behind the Chief Justice's clear order and reopen the ownership issue. The Defendant was not to be deterred and he doggedly returned to the ownership issue taking up much of the time of the three-day hearing.

9. The Chief Justice Ruling found that the Defendant "*has an arguable defence on the face of the pleadings, bearing in mind that the Plaintiff's claim is based on an oral contact."* The Chief Justice said that the Counterclaim before him *"was in substance an elaboration of the Defence."*

10. On 2 September 2014 Defendant filed an Amended Defence and Counterclaim. There is no indication on the Court's file that he had leave to do so. Be that as it may, the Plaintiff filed a Reply and Defence to the Amended Defence Counterclaim and matters proceeded before me on the basis that the Amended Defence and Counterclaim was properly before the Court. In addition to the Amended Defence

[2] P obtained a Possession Order of 5 Long Bay Gardens from D in Magistrates Court on 29 April 2014.

and Counterclaim, the Defendant filed three bundles of documents in support of his case.

11. The defence in the Amended Defence and Counterclaim repeats the bare denial of the oral rental agreement and avers to matters going to the ownership issue which I have ruled was not to be considered by me given the Chief Justice's Order of 7 March 2014.

12. The counterclaim in the Amended Defence and Counterclaim raises a different case than pleaded in the Unamended Counterclaim as described above or in the Defendant's affidavit evidence filed in response to the strike out application. The Amended Counterclaim avers that there was an agreement whereby the Plaintiff would give the Defendant credit towards the purchase price of No. 5 Long Bay Gardens in respect of development costs funded by the Defendant and the provision of legal services by the Defendant. The prayer to the Amended Counterclaim seeks $820,000 in respect of:

    "*Damages for the construction costs, provisions of all materials, labour, loans, and cash advances provided to the Plaintiff by the Defendant for Units 4,5 & 6 of the Development and to all other common interests to the estate Development."*

13. The hearing took place on three separate days. On day 1 it came to the attention of the Court that the photocopy of a cheque that was put to the Plaintiff in cross-examination had an annotation on it that was not on the photocopy in the bundle the Defendant provided to the Plaintiff. On day 2 the Defendant gave evidence by reference to documents in his bundle which comprised mostly bank withdrawal slips which bore annotations which the Defendant said were contemporaneous. I noticed from the Court bundle which comprised mostly original documents that a number of annotations were in different coloured ink and style. This would not be apparent to the Plaintiff who had black and white photocopies. When I first noticed this I raised the annotation issue with the parties. When another questionable annotation arose, the Plaintiff asked to have sight of the Court's bundle which he was granted. After an initial review the Plaintiff asked for an adjournment for a more detailed review of the Court's bundle. The Plaintiff, also, sought leave to produce rebuttal evidence arising from the questionable annotations. The Defendant did not object provided he had a right to reply and I so ordered. The Plaintiff produced a witness statement and a bundle of documents dealing with the annotation issue. The Defendant refused to collect the Plaintiff's witness statement or bundle of documents and would not look at documents in the bundle in cross-examination on day 3, the final day of the trial. I have more to say on the annotation issue below.

The Evidence

14. The Plaintiff gave evidence which was largely consistent with his Affidavit, dated 12th November 2015, which was sworn in respect of the strike out application. Essentially, the Plaintiff said that he and Mr Wayne Ball purchased a property at Portland Close in Sandys in 2000 with a view to carrying out a condominium development. At some point in the project there was a falling out between the Plaintiff and Mr Ball. The Plaintiff reached a settlement with Mr Ball and carried on the development on his own.

15. Funds were borrowed from Capital G Bank for the development. Six units were built on the site. Four of the units were sold between July 2003 and January 2005. Two units remain unsold. The proceeds of sale were used to repay Capital G Bank and fund further development costs. It was the Plaintiff's plan to build the units in stages and use the proceeds of sale from the first built and borrowed funds to build subsequent units.

16. At the relevant time the Plaintiff was a barrister and attorney practicing as Penniston & Associates. Although it was not in evidence, it is a matter of record that the Plaintiff was subsequently disbarred. The Plaintiff had professional dealings with the Defendant prior to the Long Bay Gardens development and engaged him as attorney for the Long Bay Gardens development.

17. The Plaintiff said in his evidence in chief that during the building of units 1 and 2 at Long Bay Gardens he paid the Defendant for his professional services such as drawing up documents. At the time when the Plaintiff was turning his attention to building unit 3 he and Mr Ball had a meeting with the Defendant on board the boat the Corinthian. At that meeting the Plaintiff and Mr Ball agreed to sell unit 5 Long Bay Gardens to the Defendant's son for $600,000. The asking price for No 5 Long Bay Gardens was, at the time, $675,000. The Plaintiff and Mr Ball agreed to the $75,000 reduction because the Defendant had agreed not to charge further legal fees in respect of the Long Bay Gardens development or other matters. The Plaintiff and Mr Ball entered into a Coldwell Banker sales agreement, dated 22 April 2004, with the Defendant's son for the grant of a 999 year lease of unit 5 Long Bay Gardens at a price of $600,000. As I said earlier, I am not going to reopen the ownership issue. Based upon the Chief Justice's Ruling of 7 March 2014, it is safe to say that there was no completion of the sales agreement.

18. The Plaintiff borrowed a further $450,000 from Capital G Bank near the start of construction of unit 5 Long Bay Gardens. The Defendant moved in to unit 5 Long Bay Gardens in 2006. The Defendant wanted to customize certain interior fixtures and amenities at his own expense which the Plaintiff allowed. The Plaintiff said that he reached an agreement with the Defendant that he could move in provided he paid $4,040 rent per month to cover the Plaintiff's obligations to Capital G Bank. The Plaintiff said he needed the rent to keep his head above water financially. Earlier, the Plaintiff had kept Capital G Bank at bay by having his brother in law

Mr Vickers grant a charge over his property to secure the Plaintiff's indebtedness to the bank. The Plaintiff was concerned no to put his brother in law's property at risk.

19. The Plaintiff claimed that the Defendant paid the rent as agreed up to November 2011 although there were some missed payments which were made up. Between November 2011 and February 2013 when these proceedings were commenced the Plaintiff says the Defendant promised to pay the arrears of rent and never denied the obligation to do so.

20. The Defendant denied there was ever an agreement to pay the Plaintiff rent in respect of his occupation of Long Bay Gardens or that he ever paid rent. He relied on the fact that the Plaintiff had no documentary evidence to substantiate his claim for unpaid rent.

21. As to the Defendant's Counterclaim the Plaintiff said in his evidence that starting with the development of unit 3 Long Bay Gardens, the Defendant managed the finances of the construction project. It is clear from the documents before the Court that the Defendant negotiated/communicated with Capital G Bank in respect of the development finances. He approved and made payments in respect of the costs of the construction. The key issue on the Defendant's Counterclaim is whether, as the Defendant claims, the funds used in the development of units 4, 5 and 6 were his funds or whether as the Plaintiff contends all of the construction costs came from Capital G funding (which he was liable to repay) and the proceeds of sale of the completed units. The Plaintiff did concede that the Defendant made some personal loans to him in respect of the development but these were all repaid out of the purchase price of completed units or the drawdown of borrowed funds.

22. The Defendant supported his Counterclaim by producing a substantial number withdrawal slips from Capital G Bank and construction vendor receipts. Two of the withdrawal slips totaling $18,500 were from the Defendant's personal account. The balance of the withdrawal slips were from Penniston and Associates' client trust account. The withdrawal slips contained a manuscript annotation of what the withdrawal was for e.g. wages or payment of a supplier. Many of the withdrawal slips were signed by the Plaintiff and the Defendant put them to him in cross examination seeking a concession that the Defendant had paid for the costs of the development at Long Bay Gardens. The Plaintiff stood his ground and maintained that the funding came from Capital G Bank loans, proceeds of sale and to minor extent loans from the Defendant which had been repaid.

23. A substantial number of the withdrawal slips and construction vouchers contained what appeared to be added annotations other than the brief description of the purpose of the withdrawal. The added annotations which are often in different coloured ink to the original annotation all seek to show that withdrawal or payment was made on account of the purchase No. 5 Long Bay Gardens. For instance the withdrawal slip from Penniston & Associates' client trust account, dated 11

December 2003[3], is annotated "cash advance/credit # 5 ac". The withdrawal slip from Penniston & Associates' client trust account, dated 4 December 2003[4], says in print "*check: payee Patrick Bean*" the manuscript annotation says "*cash advance credit toward unit # 5*". I note that on 4 December 2003 the Defendant's son had not entered into the sales agreement to buy unit 5 Long Bay Gardens.

24. Another unusual instance of annotations relates to Penniston & Associates fee notes and overdue notices to the Plaintiff appearing at pages 118 – 123 of Bundle 1. The fee notes have a manuscript annotation "*credit # 5 LBG*" and two have the additional annotation "*hold on file*." The Defendant's case in part was that he would not charge for his legal services.

25. The Defendant put a customer copy of a Capital G bank cheque, dated 13 November 2003[5], made payable to Patrick Bean to the Plaintiff in cross-examination. The Defendant asked the Plaintiff to confirm his signature on the cheque which he did. I asked the Plaintiff about the manuscript annotation on the customer copy of the cheque which read "*Salary up to and including 22/11/03 credit unit # 5*". The Plaintiff responded "*this is the first time I seen this writing I would not have given him credit on payroll for unit 5*". The Plaintiff said in evidence that he did not believe that the construction of No 5 Long Bay Gardens had begun at that time.

26. The Plaintiff's rebuttal witness statement, dated 28 July 2015, dealing with the added annotations contends that the added annotations were not contemporaneous, as the Defendant claims, and were not on the documents presented to the Plaintiff at the time. The Plaintiff's rebuttal witness statement refers to and exhibits 127 Capital G Bank withdrawal slips covering roughly the period covered by the withdrawal slips exhibited to the Defendant's Bundle 1. The withdrawal slips in the Rebuttal Bundle were provided by the Defendant in the course of the development in response to concerns raised by Mr Ball in respect the Defendant's conduct in managing the project's finances. Few of the withdrawal slips in the Rebuttal Bundle have annotations. Such annotations as they do have consist of only a brief description of the purpose of the withdrawal such as salaries or building supplies and do not purport to be on account of the purchase of No 5 Long Bay Gardens.

27. In addition the Rebuttal Bundle exhibits a number of letters from Penniston and Associates to Capital G Bank directing the bank as to the drawdown of loan funds[6]. These letters detail how the funds were to be applied. Some of the letters to Capital G Bank show that the Defendant instructed the loan drawdowns to be used to repay personal loans from Penniston and Associates. For instance the letter from

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[3] D's Bundle 1 page 12

[4] D's Bundle 1 page 19

[5] D's Bundle 1 page 13

[6] Rebuttal Bundle pages 39 - 80

Penniston & Associates to Capital G Bank, dated 4 July 2004[7], drew down loan funds for, *inter alia*, "*Total clawback due to Penniston & Associates $22,791.23*". In cross-examination when confronted with his own letters to Capital G Bank, the Defendant accepted that he had received some repayment of loans that he made to the Plaintiff in connection with the development but he maintained there were substantial sums he had loaned or otherwise advanced to the Plaintiff in connection with the development of Long Bay Gardens which had not been repaid. The Defendant had previously contended that had not been repaid at all in respect of his loans and advances.

28. In addition the letters from Penniston & Associates to Capital G Bank show that drawdowns of P's loans were used to pay for builders' salaries and construction materials.

29. The Defendant maintained throughout his evidence that added annotations were contemporaneous. In cross-examination the Defendant denied the allegation that the additional annotations were made in preparation for this case. The Defendant did not have an explanation as to why some withdrawal slips were annotated in different coloured inks save that his pen may have run out of ink.

30. There is one other issue that arose during the course of the evidence and that relates to the deposit paid pursuant to the sales agreement, dated 22 April 2004, for the Defendant's son to purchase unit No. 5 Long Bay Gardens. The deposit was for $32,600. The Defendant put a letter to the Plaintiff in cross-examination which was from the Plaintiff to Caldwell Banker, dated 4 June 2007, which stated:

    "*I confirm that Lew Penniston will not be in a position to purchase the above property, as the Bank are now Mortgagees in possession, from the Writ if possession attached. In this regard, you can release the deposit to Mr Penniston as we discussed*."

    The Plaintiff responded to questioning in cross-examination that the Defendant had prepared the letter to Caldwell Banker and that he had signed it.

31. Coldwell Banker returned the deposit by cheque payable to Charjal Trust in the amount of $34,118.40 with accrued interest. The role of the Charjal Trust is not clear but it appears to be a trust linked to the Defendant.

32. The Defendant put a photocopy of a cheque to the Plaintiff in cross examination, dated 8 June 2007, drawn on his client trust account in the amount of $34,000 made payable to the Plaintiff. The Plaintiff acknowledged that he had received the cheque and represented the return of the deposit. The photocopy of the cheque shown to the Plaintiff had written on it in the memo line "Re # 5 & 6 for #5". The words "for #5" appeared in the photocopies in the Defendant's and the Court's

[7] Rebuttal Bundle page 75

bundle. The Defendant admitted that he wrote the words "for #5" on the cheque but he denied he did so in respect of this case. He offered no explanation as to how the words "for #5" appeared in the Defendant's photocopy and the Court's photocopy but not in the photocopy the Defendant provided to the Plaintiff.

33. Neither party offered an explanation, or at least a coherent explanation, as to why the Plaintiff received funds representing the return of the deposit.

Analysis and Findings

34. I will deal first with the Plaintiff's claim for arrears of rent. There is no contemporaneous writing on this issue so it falls to be determined on credibility based in part on the circumstances of the parties at the relevant time.

35. The Plaintiff allowed the Defendant into occupation of No. 5 Long Bay Gardens in about 2006 after its construction had been substantially completed. At that time the Plaintiff had a monthly obligation to Capital G Bank of $4,040 which he could not meet without receiving income from No 5 Long Bay Gardens. It would have been remarkable if the Plaintiff allowed the Defendant to occupy No 5 Long Bay Gardens for an indefinite period rent free. To do so would have meant that Capital G Bank would likely enforce its security over Mr Vickers' property which was situation which the Plaintiff wished to avoid. The Plaintiff clearly need the rental income and could not have reasonably forgone the rental income even if he wished to do so.

36. I accept the Plaintiff's evidence when he said "*as long as the Defendant paid his $4,040 everything was fine with capital G and did not threaten my brother in law's property in Sandys*". It would have been incredible if the Plaintiff would have allowed the Defendant to occupy No 5 Long Bay Gardens from 2006 to 2013 without an agreement to pay rent albeit an oral one. I find that the Plaintiff did not fabricate the oral agreement with the Defendant to pay $4,040 per month rent when he commenced proceedings in this Court to recover rental arrears and in proceedings in Magistrates' Court to gain possession on No 5 Long Bay Gardens.

37. In the circumstances I find in favour of the Plaintiff in respect of his claim against the Defendant to recover $60,040 in respect of arrears of rent for No 5 Long Bay Gardens.

38. I now turn to the Defendant's Counterclaim which is for $820,000 advanced and or loaned to the Plaintiff in the construction of units 4, 5 and 6 Long Bay Gardens.

39. The gravamen of the Defendant's Counterclaim is that he entered into an agreement with the Plaintiff that he would fund the construction of units 4, 5 and 6 Long Bay Gardens and in return the Plaintiff would credit the funding toward the Defendant's son's purchase of No 5 Long Bay Gardens. The Defendant sought to make good his Counterclaim by producing a large number of Capital G Bank withdrawal slips

and some invoices to show that he financed the construction of units 4, 5 and 6 Long Bay Gardens. I am reasonably sure that the withdrawal slips and invoices are in respect of the construction costs of Long Bay Gardens. The Defendant possessed the withdrawal slips and building invoices because the Plaintiff entrusted the financial management of the Long Bay Gardens development to the Defendant. The documents the Defendant relied upon were received by him as financial manager of the project and were stored in his attic.

40. I refer above to the additional annotation issue in respect of the documents in the Defendant's Bundle 1. The additional annotations, many of which are in different coloured ink from the original, seek to show that the payments made by the Defendants were to be credited toward the cost of the Defendant's son's purchase of No 5 Long Bay Gardens. I am satisfied that the additional annotations were not contemporaneous and were not on the documents when they were shown/signed by the Plaintiff. As noted above when the Plaintiff was referred to one annotated document, he responded "*this is the first time I seen this writing I would not have given him credit on payroll for unit 5*". I find that additional annotations were made by the Defendant in respect of this litigation. As such the documents in the Defendant's Bundle 1 do not provide any contemporaneous proof that the payments evidenced by the documents in that bundle were paid by the Defendant from his own funds on account of the purchase of No 5 Long Bay Gardens.

41. I find that the payments evidenced by the documents in the Defendant's Bundle 1 came from Capital G Bank funding, proceeds of sale of Long Bay Garden units or loans from the Defendant which were repaid as the Plaintiff stated in his evidence. It is inherently unbelievable that the Defendant would have paid/loaned $820,000 toward the development of Long Bay Gardens and said nothing about it until a late stage in these proceedings. I asked the Defendant whether he kept an account of the funds he had personally spent on developing Long Bay Gardens. He said no and that he relies on the random withdrawal slips and receipts before the Court. I find this strange because in the Penniston & Associates letters dealing with repayment of the Defendant's personal loans from the Capital G Bank drawdowns, the Defendant calculated his loan repayment to the penny. The Defendant did not raise the payment of $820,000 in respect of development costs in his initial Defence nor in the three Affidavits he filed in opposition to the Plaintiff's strike out Application nor was it mentioned, I am told, in the hearing of the strike out Application. No correspondence has been produced to show that the Defendant communicated with the Plaintiff regarding the loan or its repayment. The first time the Defendant contends he is owed $820,000 by the Plaintiff is in his Amended Defence and Counterclaim, dated 2 September 2014. In this regard, I, also, note that the sales agreement for the Defendant's son to purchase No 5 Long Bay Gardens, which appears to be a real estate agency standard document, makes no mention of the purchase price being paid by the Defendant making/advancing construction costs. The sales agreement did, however, provide that the agreement was subject to the purchaser obtaining financing.

42. In concluding that the Defendant did not provide the $820,000 funding for the Long Bay Garden development as claimed I place some reliance on the fact that the virtually all of the payments were made from Penniston & Associates client trust accounts. Rule 3 (3) of the Barristers (Accounts And Records) Rules 1976 provides that an attorney or his firm should not place his own funds or his firm's funds in a client trust account.

43. Accordingly, I dismiss the Defendant's Counterclaim save as below.

44. The Defendant did pay $34,000 to the Plaintiff in respect of the return of the deposit on the sales agreement for No 5 Long Bay Gardens. As I say above there was no explanation of this transaction but I believe it safe to conclude that it was not a gift. In the absence of any explanation as to the reason for the payment or any obvious consideration for the payment I find that it was in the nature of an advance and that the Plaintiff is liable to repay the Defendant $34,000.

Conclusion

45. The Plaintiff's claim against the Defendant succeeds in the amount sought, $64,070.

46. The Defendant's Counterclaim against the Plaintiff succeeds in the amount of $34,000.

47. I will hear the parties as to costs.

Dated this day of 2015

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John Riihiluoma
Assistant Justice