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STATE OF HAWAI'I

NO. 25473

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

BERT DOHMEN-RAMIREZ, as Trustee of the Bert Dohmen-Ramirez Revocable Trust, Plaintiff-Appellant, v.
JAY FREIS, Defendant-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 91-3388)

MEMORANDUM OPINION
(By: Watanabe, Acting C.J., Nakamura and Fujise, JJ.)

Plaintiff-Appellant Bert Dohmen-Ramirez, as Trustee of the Bert Dohmen-Ramirez Revocable Trust (Dohmen), appeals from the Final Judgment entered on October 24, 2002 by the Circuit Court of the First Circuit.[1]

I.

Dohmen and Defendant-Appellee Jay Freis (Freis) are adjoining lot owners in the Maunalua Beach Subdivision (Maunalua Beach) on O'ahu.

Ward and Beatrice Brown (the Browns) were the predecessor owners of Freis's property. In or about 1950, the Browns sought permission from Kamehameha Schools, which owned the fee interest in the property at the time, to tear down an old garage and replace it with a new building consisting of a two-car garage, "a storeroom, a laundry, a combination living and

[1] The Honorable Virginia Lea Crandall (Judge Crandall) presided.

bedroom, bath and kitchenette [garage/apartment]."[2] The Browns represented to Kamehameha Schools that Mrs. Brown's parents would live in the new structure and that it would not be used as a rental unit. Kamehameha Schools allowed this construction and use of the garage/apartment:

> Please be advised that the Trustees are willing to permit Mrs. Brown to raze the present garage and to erect in its same location the outbuilding referred to above . . . on the understanding that this outbuilding will not at any time be used as a rental unit but will be used by members of her immediate family only and that the Lessee will notify our office of any change in occupancy during the term of the lease.

The Browns built the new structure and Mrs. Brown's parents resided there until their deaths.[3] However, in or about 1960, the Browns began renting the garage/apartment to non-family tenants. In all but one occasion, these tenants were single individuals. Kamehameha Schools inspected the Browns' property and issued another lease to the Browns in 1966, which again contained the above-mentioned restrictions. There is no evidence

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[2] Ward and Beatrice Brown's lease from Kamehameha Schools contained the following provisions:

> That he will use or allow to be used the premises hereby demised solely for residential purposes; and will not, at any time during said term, erect, place or maintain or permit or suffer to be erected, placed or maintained upon said premises more than one dwelling (exclusive of outbuildings) which dwelling shall have cost and be fairly worth not less than Four Thousand Five Hundred Dollars ($4500.00); and that the Lessors shall be the sole judges of the worth of any such dwelling, and as to what constitutes a dwelling and an outbuilding[.]
>
> That he will not permit or suffer any building or structure to be erected or placed on the land hereby demised for use as a tenement house, rooming house or apartment house (the Lessors to be the sole judges as to what shall constitute a tenement house, rooming house or apartment house), nor use any building or structure on the land hereby demised as a tenement house, rooming house or apartment house, or for or in connection with the carrying on of any business or trade whatsoever[.]

[3] Mrs. Brown's father died in 1951 and her mother died in 1957.

that the Browns ever informed Kamehameha Schools that they had begun renting the garage/apartment to non-family members. The Browns continued this practice until 1989, when they sold the property, in fee simple, to Freis.

Meanwhile, in 1988, the Hawaii Kai Homeowners, Ltd. and the Portlock Community Association (PCA) helped negotiate the lease to fee conversion from Kamehameha Schools to the individual lessees of Maunalua Beach. The Declaration of Protective Provisions[4] (DPP), which is the subject of the present controversy, was drafted and filed with the Bureau of Conveyances, binding those who purchased the fee interest to

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[4] The 1988 Declaration of Protective Provisions (DPP) contained the following statement of the reasons and purpose behind the document:

> WHEREAS, Declarant is desirous of maintaining the residential character of the Residential Area and of providing for the preservation of the values and amenities of said area and to preserve the area as an attractive residential district for the advantage of the residents of the district and the community at large, and to this end, Declarant desires to subject the Residential Lots to the declarations hereinafter set forth, each and all of which is and are for the benefit of the Residential Lots within the Residential Area and each owner and lessee of such lots.

The provision at issue in this case reads:

> ARTICLE II
> Restrictions
>
> Section 1. Use. All Residential Lots shall be occupied and used only for residential purposes and only one (1) single-family dwelling (exclusive of outbuildings) shall be erected, placed, maintained or allowed on a Residential Lot. No building or structure on a Residential Lot shall be used as a tenement house, rooming house or apartment house or for or in connection with the carrying on of any business or trade whatsoever. No building shall exceed two (2) stories in height.

(Emphasis added.)

their properties. The DPP also contained enforcement and waiver provisions pertaining to these covenants.[5]

After purchasing the property in 1989, Freis began improvements and enlargement of the garage/apartment, for which the proper permits from the City and County of Honolulu were obtained. Shortly thereafter, Dohmen expressed objections to Freis's construction activities and what appeared to be his multiple tenant rental plan for the property.

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[5] The DPP enforcement and waiver provisions read:

ARTICLE III

General Provisions

> Section 2. Enforcement. [Kamehameha Schools], owners, and the lessees of Declarant or owners under valid and existing leases of Residential Lots within the Residential Area for a term of five (5) years or longer, shall each have the right, but not the responsibility, to enforce any or all of the limitations, restrictions, covenants and conditions imposed by this Declaration by any proceeding at law or in equity against any person or persons violating or attempting to violate any such limitation, restriction, covenant or condition, and any judgment for any such violation may require all costs and expenses of such enforcement action, including a reasonable attorney's fee, to be paid by the person who the court finds in violation of any such limitation, restriction, covenant, or condition . . . .
>
> Section 3. No Waiver. No failure to enforce the provisions of any limitation, restriction, covenant or condition of this Declaration shall constitute a waiver of any right by [Kamehameha Schools], owner, or lessee of Declarant or owner, to enforce any provisions of this Declaration in another case against or with respect to the same owner or lessee.

The restrictions contained in the DPP were limitations on the fee interest being transferred, as reflected in the following language:

> The limitations, restrictions, covenants and conditions contained herein, as they now are or hereafter become effective as above provided, shall run with the Residential Lots, and shall be binding upon all parties having or acquiring any right, title or interest in and to any of the Residential Lots within the Residential Area, and their respective personal representatives, heirs, successors and assigns, and shall inure to the benefit of [Kamehameha Schools] and each owner and lessee thereof as herein set forth.

Freis was often out of state. He resided in the upstairs portion of the garage/apartment from one to six months out of the year and, starting in or about 1990, rented out the main dwelling to various tenants. During a five-and-a-half month period in 1990, at the request of the president of the PCA, Freis also rented out a downstairs portion of the garage/apartment to an unrelated person. At the time, Freis occupied the upstairs portion of the garage/apartment and rented out the main dwelling to another tenant. While most of the time there were three persons living on the Freis property, at no time were there more than five residents.

Dohmen filed the complaint in the instant case on October 9, 1991, seeking to have Freis enjoined from renting out his property and to have the garage/apartment torn down. In 1995, Judge Steven M. Nakashima granted in part and denied in part Dohmen's "Second Motion for Summary Judgment," ruling that the garage/apartment would be allowed to stand, but that Freis was enjoined from living on the property if he was also renting other parts of it to non-family members. Freis timely appealed in Supreme Court Number 20476.

By memorandum opinion dated May 28, 1998, the Intermediate Court of Appeals (ICA) 1) vacated the September 7, 1995 order partially granting Dohmen's Second Motion for Summary Judgment and the order awarding attorneys fees and 2)

remanded the case "for proceedings consistent with [its] decision." In brief, we held,

> We believe that summary judgment was prematurely granted by the court because it is not clear whether the court considered Freis's "grandfather" argument, genuine issues of material fact existed regarding Freis's affirmative defenses of abandonment and acquiescence, and the defense of "unclean hands" must be decided by the court. Accordingly, we do not reach the other issues raised by Freis on his appeal and by [Dohmen] on his cross-appeal, and we remand the case.

A jury-waived trial before Judge Virginia Lea Crandall was held on this matter in 2000-2001. On June 14, 2002, Judge Crandall found in favor of Freis and filed the "Court's Findings of Fact, Conclusions of Law, and Order." Freis subsequently moved for attorneys fees and costs, and his motion was heard and granted on September 23, 2002.

On October 24, 2002, Final Judgment in this matter was entered. Dohmen timely filed a Notice of Appeal on November 14, 2002.

II.

Dohmen raises five points of error on appeal. He alleges that Judge Crandall erred 1) in disregarding prior rulings and conducting a trial de novo because the ICA remanded only for consideration of four defenses that the previous judge had failed to address; 2) by misinterpreting the terms "outbuilding" and "single-family" in the DPP; 3) by finding that the building restriction of the DPP had been abandoned; 4) by finding that Dohmen had acquiesced to the use restriction

violations of the DPP; and 5) by awarding Freis attorneys fees in this case.

The Trial Court Did Not Err By Holding a Trial De Novo on Remand.

The trial court must strictly comply with the mandate of the appellate court. State v. Lincoln, 72 Haw. 480, 485, 825 P.2d 64, 68 (1992). It is for the trial court on remand to interpret the appellate court's mandate in light of the entire opinion and give effect to the letter and intent of the mandate. Mid-Pacific Dress Mfg. Co. v. Cadinha, 36 Haw. 732, 739-40 (1944). It is the appellate court's task on appeal to determine whether the trial court properly followed the appellate court's previous directive.

Here, the concluding paragraph of the ICA's opinion instructed: "Accordingly, the September 7, 1995 order granting in part Dohmen-Ramirez's May 4, 1995 summary judgment motion and the corresponding February 3, 1997 amended final judgment are vacated. The case is remanded to the court for proceedings consistent with this opinion."

Dohmen argues on appeal that the mandate was limited to consideration of "four matters which the prior court failed to address." However, a fair reading of the ICA's decision yields the conclusion that it is not so limited.

First, the court went on to state that some of the parties' exhibits were not properly certified as required by

Hawai'i Rules of Civil Procedure (HRCP) Rule 56(e), noting, "on this ground alone we could remand.[6] . . . [O]n remand we instruct the court to order the parties to bring their summary judgment evidence into compliance with HRCP Rule 56(e)." (Footnote supplied.) Second, it is clear that the ICA did not rule on the correctness of Judge Nakashima's interpretation of the DPP. Third, the court found genuine issues of material fact with regard to Freis's abandonment and acquiescence defenses which necessitated a trial, at least as to those issues. The court also directed that the trial court determine the effect of the DPP use restriction, which in turn, would bear on whether Dohmen violated the restriction and Freis's "unclean hands" defense. Finally, the court specifically reserved ruling on "the other issues raised by Freis on his appeal and by Dohmen-Ramirez on his cross-appeal," and remanded the case. Given all the matters left undecided, the direction that the matter remanded for "proceedings consistent with this opinion" could not fairly be read as a limitation on the trial court's authority.[7]

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[6] The Intermediate Court of Appeals (ICA) nevertheless relied on these exhibits in its opinion as the parties had not objected to the lack of certification and relied on some of them in their appellate briefs.

[7] Moreover, Bert Dohmen-Ramirez (Dohmen) did virtually nothing to relieve the trial court of the need to hold an evidentiary hearing in this case. He did not move for summary judgment on remand nor did he bring the exhibits submitted in support of his previous motion for summary judgment in compliance with Hawai'i Rules of Civil Procedure (HRCP) Rule 56(e), despite the ICA's clear directive in its opinion to do so. We note that Dohmen's counsel acknowledged, at the *de novo* trial Dohmen now claims was error, that whether this failure meant the trial court was not bound by the previous court's findings was "an excellent question."

(continued...)

The Trial Court Was Correct In Denying Dohmen's Requested Relief.

Dohmen's next three points on appeal challenge the circuit court's reasoning in ruling that Freis was not in violation of the DPP.

However, it is undisputed that, when Freis purchased the property in question from the Browns, "the improvements on it were (i) the main house and (ii) the garage/apartment outbuilding as built by the Browns under their 1950 agreement with [Kamehameha Schools]." At argument, Dohmen agreed that the garage/apartment built by the Browns and the use to which it was put, including rental, was permitted under the terms of the DPP. Thus, the questions become whether Freis's renovation substantially changed the nature of the garage/apartment and whether Freis's use of his property after the garage/apartment renovation materially exceeded the scope of the Browns' prior use.

Freis's renovations to the garage/apartment did increase the "useable square footage by 500 square feet, at a cost of approximately $100,000, through the addition of a lanai

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[7](...continued)
In any event, it appears that Dohmen offered 82 exhibits at the trial *de novo*, duplicating a few that had also been submitted in support of his earlier motion for summary judgment before Judge Nakashima. All of Dohmen's exhibits were received into evidence by Judge Crandall.

More importantly, despite Dohmen's claim that Judge Crandall "disregard[ed] prior findings and conclusions made by a judge with concurrent jurisdiction," she adopted many, if not all, of Judge Nakashima's findings and Dohmen does not, in this appeal, challenge any of Judge Crandall's findings of fact.

and a deck above the lanai." Half of the garage and the two storage closets on the first floor were turned into recreation, utility and bath rooms. The utility room, according to the plans submitted into evidence, consists of built-in shelves and a dresser as well as a clothes washer and dryer. Significantly, no other appliances, and no sink are included in the plans for the utility room. The bathroom and kitchenette on the second floor were remodeled. A fence was built between the garage/apartment and the main house. Thus, the garage/apartment remains as a structure that would accommodate one, but not two households.

Based on this record, we cannot say that the circuit court's finding that "[t]he renovation is not substantial in terms of expansion and size as to require removal of the second dwelling from the original ambit of approval by Kamehameha Schools" is clearly erroneous. We also conclude that Freis's use of his property after the garage/apartment renovation did not materially exceed the scope of the Browns' prior use. The Browns had rented the garage/apartment to non-family members while living in the main dwelling. Freis rents out the main dwelling and lives in the garage/apartment from one to six months per year. Other than a five and a half month period in 1990, Freis has not rented any portion of the garage/apartment to others. Freis conceded at oral argument that renting a portion of the garage/apartment while he lived there would violate the DPP, and he denied having multiple-tenant rental plans for his property.

Therefore, this court concludes the circuit court did not err in finding Freis was not in violation of the building and use restrictions.[8]

The Circuit Court Erred in Awarding Attorney's Fees.

Dohmen also challenges the award of attorney's fees[9] to Freis. We agree the award was in error but for reasons other than those advanced by Dohmen in his briefs.[10]

The award of attorney's fees is reviewed under the abuse of discretion standard, TSA Int'l Ltd. v. Shimizu Corp., 92 Hawai'i 243, 253, 990 P.2d 713, 723 (1999), and "[t]he trial court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Lepere v. United Public Workers Local 646, 77 Hawai'i 471, 473, 887 P.2d 1029, 1031 (1995) (internal quotation marks and brackets omitted). "An award of attorney's fees must be based on statute, agreement, stipulation or precedent." DeMund v. Lum, 5 Haw. App. 336, 345, 690 P.2d 1316, 1322 (1984) (internal citations omitted).

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[8] It is thus unnecessary to reach the issues of whether the defenses of abandonment and acquiescence applied.

[9] Dohmen does not contest the award of costs.

[10] Dohmen argues (1) this suit was not between parties to a contract within the meaning of Hawaii Revised Statutes (HRS) § 607-14 (1993), (2) even if the original parties to the DPP had the right to reciprocal attorney's fees under HRS § 607-14, Freis did not establish that this reciprocal benefit ran with the land, (3) Freis is not the prevailing party in this litigation, and (4) even if the lower court had authority to award fees, it did not have authority to award fees incurred in the prior appeal.

Freis based his motion for attorney's fees on Hawaii Revised Statutes (HRS) § 607-14 (1993).[11] Section 607-14, HRS, provides:

> In all the courts, in all actions in the nature of assumpsit and in all actions on a promissory note or other contract in writing that provides for an attorney's fee, there shall be taxed as attorneys' fees, to be paid by the losing party and to be included in the sum for which execution may issue, a fee that the court determines to be reasonable. . . . The court shall then tax attorneys' fees, which the court determines to be reasonable, to be paid by the losing party; provided that this amount shall not exceed twenty-five per cent of the judgment.

(Emphasis supplied.) Dohmen's Complaint alleged violations of the DPP's building and use restrictions and prayed for injunctive relief, attorneys fees and costs and "such other and further relief as the court deems just and equitable." There was no prayer for damages as a result of the alleged breach of these covenants.

"[A]ssumpsit is a common law form of action for the recovery of damages for non-performance of a contract." Smothers v. Remander, 2 Haw. App. 400, 404-05, 633 P.2d 556, 561 (1981). See also, DeMund v. Lum, 5 Haw. App. 336, 345 n.10, 690 P.2d 1316, 1323 n.10 (1984) ("this action is not in the nature of assumpsit, but is simply for an injunction"). Thus, as framed, Dohmen's lawsuit was "not in the nature of assumpsit" and Freis cannot avail himself of HRS § 607-14 as authority for his attorneys' fees award.

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[11] Freis also cited to HRCP Rule 11, which provides for sanctions, including the award of attorneys' fees, for certain misrepresentations to the court. The Circuit Court did not specify the basis for its attorneys' fees award. However, as Freis did not allege misconduct in either his motion or supporting memorandum and the court found none, we presume the award was based solely on HRS § 607-14.

Nor can the provisions of the DPP, standing alone, provide the necessary authority for the award of attorneys' fees. The DPP contains the following enforcement provision:

> [Kamehameha Schools], owners, and the lessees of [Kamehameha Schools] or owners under valid and existing leases of Residential Lots within the Residential area for a term of five (5) years or longer, shall each have the right, but not the responsibility, to enforce any or all of the limitations, restrictions, covenants and conditions imposed by this Declaration by any proceeding at law or in equity against any person or persons violating or attempting to violate any such limitation, restriction, covenant or condition, and any judgment for any such violation may require all costs and expenses of such enforcement action, including a reasonable attorney's fee, to be paid by the person who the court finds in violation of any such limitation, restriction, covenant or condition. . . .

(Emphasis supplied.) Here, Dohmen was not found "in violation" of the DPP and the plain language of this provision does not authorize the taxing of fees against him.

As there is no authority to support the attorneys' fee award, we must reverse that part of the judgment entered below.

III.

The October 24, 2002 Final Judgment is affirmed in part and reversed in part. The award of attorney's fees is reversed. In all other respects, the Final Judgment is affirmed.

DATED: Honolulu, Hawai'i, October 14, 2005.

James J. Bickerton
(William W. Saunders, Jr., on the briefs; Bickerton Saunders & Dang) for Plaintiff-Appellant.

David J. Gierlach
(Michael Jay Green with him on the briefs) for Defendant-Appellee.

Corinne K A Watanabe
Acting Chief Judge

Craig H. Nakamura
Associate Judge

Associate Judge