

NO. 26837

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

ASSOCIATION OF APARTMENT OWNERS OF 1251 HEULU, a Hawaii nonprofit corporation, Plaintiff-Appellant, v. THOMAS D.M. CHUNG and JANICE H.S. TSUCHITORI, Co-Initial Trustees of the Thomas D.M. Chung Trust under an unrecorded revocable trust agreement dated February 29, 1996, and AMERICAN SAVINGS BANK, F.S.B., a federal savings bank, Defendants-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(Civ. No. 04-1-0020)

SUMMARY DISPOSITION ORDER

(By: Recktenwald, C.J., Foley and Fujise, JJ.)

Plaintiff-Appellant Association of Apartment Owners of 1251 Heulu (AOAO) appeals from the September 17, 2004 Final Judgment of the Circuit Court of the First Circuit (circuit court)<sup>1</sup> in favor Defendants-Appellees Thomas D.M. Chung (Chung) and Janice H.S. Tsuchitori, Co-Initial Trustees of the Thomas D.M. Chung Trust under an unrecorded revocable trust agreement dated February 29, 1996 (Trustees), and American Savings Bank, F.S.B., a federal savings bank.<sup>2</sup> In this case, AOAO sought to partition the 1.3671% undivided interest in land appurtenant to Apartment 902 in the condominium building located at 1251 Heulu Street in Honolulu (1251 Heulu).

After a careful review of the issues raised, arguments advanced, law relied upon, and the record in the instant case, we dispose of AOAO's appeal as follows:

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<sup>1</sup> The Honorable Victoria S. Marks presided.

<sup>2</sup> Defendant-Appellee American Savings Bank, F.S.B., a federal savings bank, was the holder of Plaintiff-Appellant Association of Apartment Owners of 1251 Heulu's mortgage on Apartment 902. American Savings Bank filed no motions or responsive pleadings, made no appearances, and otherwise took no part in the proceedings.

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1. The circuit court did not err when it "ignored" the testimony of AOA's experts. "Expert opinion testimony of attorneys on legal questions, other than that as to the law of another jurisdiction, is . . . generally excluded." Create 21 Chuo, Inc. v. Southwest Slopes, Inc., 81 Hawai'i 512, 522 n.4, 918 P.2d 1168, 1178 n.4 (App. 1996). The affidavits and reports of AOA's attorney-experts amounted to an opinion on a question of law -- whether AOA and Trustees were co-tenants by virtue of the Declaration and by operation of law. Since such determinations are "exclusively within the province of the court[,]" the circuit court did not err by not relying on the affidavits and reports by AOA's experts. Id.

2. The circuit court properly concluded that "the language of the [Declaration of Horizontal Property Regime of 1251 Heulu (Declaration) and the Condominium Conveyance Document (CCD)] are not ambiguous; and that is a question of law for the Court to determine." Generally, "the construction and legal effect to be given a contract is a question of law." Hanagami v. China Airlines, Ltd., 67 Haw. 357, 364, 688 P.2d 1139, 1144 (1984). There is no room for interpretation "[w]hen the terms of a contract are definite and unambiguous" and the court may only "apply the rules of construction and interpretation in an effort to ascertain the intention of the parties to the contract" when the language of the contract leaves "some doubt as to the meaning and intention" of the parties. Id. at 364, 688 P.2d at 1144-45. AOA acknowledges that the term "demised land" refers to the land underlying 1251 Heulu. The terms contained in the Declaration and CCD are unambiguous and clearly state that AOA is not entitled to partition.

3. The Declaration and the CCD prohibited AOA's partition action. The Declaration states that common elements, including the land, "shall remain undivided, and no right shall exist to partition or divide any part thereof[.]" Similarly, the CCD states that "[n]either Master Lessor, nor Sublessor nor Lessee will institute or maintain any action to subdivide or

partition the demised land during the term of this sublease." AOA, a successor signatory to the Declaration and CCD, is (1) the Master Lessor as successor to M & H Limited, (2) the Sublessor as the successor to GO Finance's leasehold interest and (3) the Lessee as the owner of Apartment 902. AOA's argument that the partition prohibition applies only to the common elements and not to the fee simple interest in the land appurtenant to an individual unit is contrary to the plain language of the Declaration and the CCD. Here, AOA has waived its right to partition by express contract. See Hemni Apartments Inc. v. Sawyer, 3 Haw. App. 555, 562, 655 P.2d 881, 887 (1982). Thus, it is unnecessary to reach AOA's claim that the Declaration created a co-tenancy in all of the land underlying 1251 Heulu.

4. The circuit court properly awarded the Trustees attorneys' fees and costs pursuant to Hawaii Revised Statutes § 607-14 (Supp. 2006), the contract documented in the CCD, and the Master Lease with Chung. Under the CCD, AOA, as the Lessee, must pay on demand, "all costs and expenses including reasonable attorney's fees" incurred by the Trustees as Lessor, in enforcing any covenants of the CCD in connection with any litigation commenced by AOA. The Master Lease assigned to GO Finance by Chung also contains a similar provision providing for recovery of costs and expenses including reasonable attorneys' fees incurred by the prevailing party. Despite AOA's argument on appeal that its status as a Lessee is not relevant to the proceedings, AOA's claim for partition of the undivided 1.3671% interest in the land appurtenant to Apartment 902 stems from its status as the owner of Apartment 902 under the CCD and as a Lessee under the Master Lease with Chung. AOA breached the terms of the Declaration and the CCD when it commenced this prohibited partition action against the Trustees. Thus, the circuit court did not abuse its

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discretion when it awarded attorneys' fees and costs pursuant to the terms of the CCD and the Master Lease with Chung.

Therefore,

IT IS HEREBY ORDERED that the September 17, 2004 Final Judgment of the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, October 18, 2007.

On the briefs:

Robert Bruce Graham, Jr. and  
Aaron M. Shumway  
(Ashford & Wriston),  
for Plaintiff-Appellant.



Chief Judge

Philip J. Leas,  
Gino L. Gabrio, and  
Stacey Kawasaki Djou  
(Cades Schutte) and  
Sidney K. Ayabe  
(Ayabe Chong Nishimoto Sia &  
Nakamura),  
for Defendants-Appellees.



Associate Judge



Associate Judge