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Judgment of September 9, 2009  
Interlocutory proceedings No. 2379 of 2009.

## **COURT OF FIRST INSTANCE OF ARUBA**

### JUDGMENT

in the **INTERLOCUTORY PROCEEDINGS** between:

#### **ALLAN COHEN,**

living in the United States of America, electing domicile at the offices of his attorney,  
PLAINTIFF, also to be named Cohen hereinafter,  
attorney: the lawyer *mr.* D.G. Kock

versus

the cooperative association

#### **MARRIOTT VACATION CLUB INTERNATIONAL OF ARUBA, doing business as Aruba Ocean Club,**

having its seat in Aruba,  
DEFENDANT, also to be named AOC hereinafter,  
attorneys: the lawyers *mr.* M.G.M. Schwengle and *mr.* A.A.D.A. Carlo

### **1. THE PROCEEDINGS**

The course of the proceedings appears from:

- the petition filed with the office of the Clerk of the Court on July 21, 2009;
- the record of the Clerk of the Court of the hearing in the session of August 17, 2009;
- the Replication and Rejoinder filed on August 25 and 28, 2009, respectively.

Judgment was set for this day.

### **2. FACTS**

2.1 The AOC is a cooperative association of timeshare owners in the timeshare resort in Aruba that is operated under the flag and care of Marriott (Vacation Club International).

2.2 Plaintiff is a member of the AOC as timeshare owner. Plaintiff also was a member of the Board until recently, including 6 years as president. In the most recent Board elections during the General Meeting of Members of March 2009, plaintiff was not reelected.

2.3 The AOC has approximately 9,000 members. They all have the right to vote. Marriott also has shares and consequently the right to vote in the association. The General Meeting of Members is

the highest body within the association. This Meeting of Members convenes at any rate each year. A member can authorize another member to vote on his behalf.

2.4 The register of members is open for inspection by every member (Article 27.2 of the Articles of Association of the association). This register of members was produced by AOC in these proceedings as an Exhibit, containing the names and addresses of all members. For all members, the address: 99 L.G. Smith Blvd. in Aruba, address of the AOC, is stated.

### **3. CLAIM AND POSITIONS OF PARTIES**

3.1 Plaintiff requests the Court to order defendant by judgment, enforceable by anticipation, to give plaintiff a list of all members of the association with the addresses and e-mail addresses belonging thereto, used by defendant to reach these members, and this on pain of forfeiture of a penalty of Afl. 10,000.- per day defendant would fail to comply with the decision to be given in this case, costs to be determined by the Court.

3.2 Plaintiff substantiated his claim with the allegation that he, as a member of the AOC, is entitled to the addresses of the other members. Only in this manner can the association function in such a way that it does not only serve Marriott's interests. Plaintiff was president of the AOC, but was voted out of the Board when he had criticism regarding Marriott. This was also possible because the AOC and Marriott have and use the addresses of the members, *inter alia* to obtain proxies to vote. Also for these proceedings Marriott or the AOC used the addresses and e-mail addresses of the members again. Plaintiff believes that the AOC has a claim on Marriott. He wants to consult the other members on this point.

3.3 Defendant adopts the position that an urgent interest is missing. There are no urgent matters pending. He can already communicate with the other members through the website arubaoceanclub.com, and the promise has already been made to present plaintiff's request to the next General Meeting of Members. Furthermore, only 13% of the members have expressed themselves in favor of releasing information. Given the above, plaintiff also has a limited interest in award of the claim, whereas the interest of the AOC in case of rejection is considerable. The AOC does not have the e-mail addresses of the members.

### **4. CONSIDERATIONS**

4.1 The Judge in interlocutory proceedings is of the opinion that plaintiff does not have an urgent interest in his claim. The urgency would have been given based on established case law, according to plaintiff, in which an urgent interest is found in a request to terminate an unlawful situation or a systematic infringement of a right. Plaintiff also refers to the judgment of this Court of November 5, 2008 (LJN: BG8460). The Judge does not follow plaintiff on this point and considers the following for this purpose, even apart from the question whether the outcome of proceedings on the merits cannot be awaited as well.

4.2 The urgency has to be evaluated in accordance with the concrete circumstances of the case. Plaintiff claims – briefly stated – the (e-mail) addresses of the other members in order to be able to inform them of and possibly to consult them on a possible claim of the AOC on Marriott. The AOC alleges that this request does not have to be made until in the Annual General Meeting of Members. The Judge holds that the starting point has to be that conflicts within an association have to be settled first by means of the possibilities given by the Articles of Association of the association. In this case, plaintiff contests the refusal of the Board of the association to give him the actual addresses of the members. The General Meeting of Members as the highest body within the association can express itself on aforementioned decision on plaintiff's request. No facts or

circumstances have been alleged that cause that the General Meeting of Members, which the Judge assumes will be held in March 2010, based on the Articles of Association and the meeting held most recently, cannot be awaited.

4.3 However, when reviewing the urgency, the question whether it is appropriate to await the General Meeting of Members also has to be considered. For plaintiff's allegation is that this meeting is dominated by Marriott and that he actually needs the addresses to change this (and consequently also the composition of the Board). However, this argument is not sufficiently important with the establishment that the point will be put on the agenda, which means that this can be taken note of by the members in the announcement of the meeting. Based on what has been alleged by the AOC, the Judge also proceeds on the assumption that plaintiff is free to (further) explain his position on the website freely accessible to the members and to consult the members on the "TUG message board" belonging to the website. Finally, it was also considered in the opinion that the AOC, when announcing the next Annual General Meeting of Members, will refer to this site as a location where one can find an explanation of the agenda point initiated by plaintiff and possibly of other agenda points. So it cannot be held that awaiting the General Meeting of Members has to be deemed inappropriate.

4.4 Reference to the judgment of this Court of November 5, 2008 to substantiate the urgency does not hold either. As appears from legal ground 5.5 of that judgment, the urgency for that counterclaim consisted of the circumstance that only with the addresses of the members of this association a General Meeting of Members could be convened against the will of the Board of that association. The actual situation the urgency was based on consequently cannot be compared to the facts in this case.

4.5 Plaintiff will be declared non-suited in his claim. Plaintiff will also be ordered to pay the costs of this dispute as the unsuccessful party, estimated on the side of defendant at Afl. 1,500.- in respect of the attorney's fee.

## **5. THE DECISION**

The Judge in this Court, adjudicating in interlocutory proceedings:

5.1 declares plaintiff non-suited in his claim;

5.2 orders plaintiff to pay the costs of these proceedings, on the side of defendant estimated at Afl. 1,500.- in respect of the attorney's fee.

This judgment was given by *mr.* J. Recourt, Judge in this Court, and was pronounced in the public session on Wednesday, September 9, 2009 in the presence of the Clerk of the Court.

[was signed]