IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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HAWAIIAN ASSOCIATION OF SEVENTH-DAY ADVENTISTS
A Hawaiʻi Non-Profit Corporation,
Respondent/Plaintiff-Appellant-Cross-Appellee,

vs.

STACEY T.J. WONG, As Trustee of the Eric A Knudsen Trust,
Petitioner/Defendant-Appellee-Cross-Appellant.

SCWC-28592

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 28592; CIV. NO. 03-1-0026)

June 28, 2013

RECKTENWALD, C.J., NAKAYAMA, AND MCKENNA, JJ.;
WITH POLLACK, J., DISSENTING SEPARATELY,
WITH WHOM ACOBA, J., JOINS

OPINION OF THE COURT BY MCKENNA, J.

I. Introduction

Hawaiian Association of Seventh-Day Adventists, a Hawaiʻi non-profit corporation ("SDA"), filed suit seeking, among other things, a declaration that its rental of cabins to the public is permissible under its lease agreement with the Eric A.

Knudsen Trust ("Lease"). Stacey T.J. Wong, as trustee of the Eric A. Knudsen Trust ("Wong"), counterclaimed for termination of the Lease and other remedies. The circuit court, inter alia, granted summary judgment in favor of Wong on SDA's claim regarding cabin rentals, but granted summary judgment in favor of SDA on Wong's claims for termination and equitable relief. The Intermediate Court of Appeals ("ICA") vacated summary judgment as to the issue of cabin rentals, opining that such use of the Property is permissible under the terms of the Lease, and remanded the case for further proceedings.

We conclude that the ICA correctly vacated the court's judgment in favor of Wong on SDA's claim regarding cabin rentals (Count I of the Complaint), but for the wrong reasons. Contrary to the parties' stipulation and the ICA's conclusion, we hold that Paragraph 16 of the Lease, which delineates permissible uses of the Property, is ambiguous. If, on remand, the fact-finder determines that Paragraph 16 prohibits the use of cabins by the general public, Wong may be entitled to damages for breach of contract and/or disgorgement of profits. The ICA therefore also erred in affirming summary judgment in favor of SDA on Wong's claims for breach of contract and unjust enrichment (Counts II and III of the Counterclaim). We conclude that the ICA correctly vacated the circuit court's order awarding attorneys' fees and

costs to Wong; we also, however, vacate the ICA's order awarding costs on appeal to SDA because a prevailing party has yet to be determined. Except for Wong's claim for termination of the Lease (Count I of the Counterclaim), on which the ICA properly affirmed summary judgment, we therefore vacate the ICA's Judgment on Appeal and remand this case for further proceedings consistent with this opinion.

II. Background

A. Factual Background

The subject 200-acre parcel of land ("Property") is part of a 940-acre parcel located in Koloa, Kauaʻi, originally owned by the Augustus F. Knudsen Trust and the Eric A. Knudsen Trust (collectively, "the Trusts"). In 1949, the Trusts leased the Property to Valdemar L'Orange Knudsen who, in turn, assigned the lease to Kahili Mountain Park, Inc. ("KMPI"), a company owned by several beneficiaries of the Trusts. KMPI subsequently constructed campgrounds and facilities, including cabins that it rented to the general public as vacation residences. This area became known as Kahili Mountain Park ("the Park").

Beginning in 1982, KMPI negotiated to sell its capital stock and its leasehold interest in the Park to SDA, which planned to construct a school on part of the Property. SDA

closed its acquisition of KMPI's outstanding stock in 1984, at which point the 1949 lease was assigned to SDA, KMPI was dissolved, and a new lease was negotiated with the Trusts.

On December 31, 1984, SDA and the Trusts executed a new sixty-year lease, effective January 1, 1985. Paragraph 16 of the subject Lease delineates allowable uses of the Property as follows:

> 16. Use of Demised Premises. The demised premises shall be used only for educational, recreation (including vacation residence for members and staff of Lessee's school and church), agricultural, health care and humanitarian uses. No dwellings shall be constructed or used on the demised premises except for faculty, administrative staff, students and employees. If Lessee ceases to use the demised premises for the above purposes, Lessor shall have the right to terminate this Lease.

Paragraph 26 of the Lease is a nonwaiver clause, which gives SDA an thirty-day window to remedy any alleged breach:

> 26. Nonwaiver. Acceptance of rent by Lessor or its agent shall not be deemed to be a waiver by Lessor of any breach by the Lessee of any term, covenant or condition of this Lease herein contained, nor of Lessor's right to declare and enforce a forfeiture for any such breach, and that the failure of Lessor to insist upon strict performance of any of the terms, covenants or conditions of this Lease, or to exercise any option herein conferred in any one or more instances shall not be construed as a waiver or relinquishment for the future of any such terms, covenants, conditions or options, but the same shall be and remain in full force and effect; PROVIDED, HOWEVER, that before any forfeiture shall be enforced, Lessor shall give written notice to Lessee of the breach constituting the ground of forfeiture, and Lessee shall have thirty (30) days from the date of such notice within which to remedy or cure such breach, and if such breach shall be so cured or remedied, then such breach shall be waived and no forfeiture shall be enforced for such breach . . . .

SDA's principal objective in leasing the Property was to develop and operate a kindergarten through twelfth-grade

school ("School"). After obtaining the necessary permits, SDA developed the Property, opened its new School, and constructed houses for faculty and staff. In addition, SDA continued KMPI's practice of renting cabins to the public, used the rental income to support the School, and constructed additional cabins pursuant to permits previously obtained by KMPI.[1]

Between 1984 and 2000, the Trusts were aware of SDA's continued vacation rentals to the public. There was no communication from the Trusts that these rentals might violate the Lease. By late 2000, however, three major changes occurred: Valdemar L'Orange Knudsen, who had been a strong supporter of the School, died; the Augustus F. Knudsen Trust terminated and the Eric A. Knudsen Trust ("EAK Trust") acquired a hundred-percent fee interest in the Property; and the trustee for EAK Trust changed from First Hawaiian Bank to Wong.

In an April 4, 2001 letter to SDA, Wong asserted that "the Adventists are in material default of the Kahili Adventist School/Mountain Park lease with respect to the Permitted Uses provision." Wong did not explain how SDA had violated the Lease or ask SDA to cease its practice of renting cabins to the public. He warned, however, that he could pursue several legal remedies

[1] SDA constructed a total of 17 additional cabins, in addition to the 25 cabins that were in existence when KMPI sold its leasehold interest. Of these 42 structures, approximately 31 were available for vacation rental prior to March 2002, when SDA ceased its rentals.

against SDA including termination of the Lease, eviction from the Property, and a suit for monetary damages and legal fees. Wong stated that he supported SDA's vision of enhancing the property, and he hoped that they could work together to achieve this mission, fulfill the Property's potential, and satisfy the past breach. Using SDA's financial statements from June 1984 to January 2000, Wong calculated that SDA owed $642,551.33 in unpaid rent, based on a rate of ten percent of gross revenues from SDA's cabin rentals. Wong proposed that SDA prepare a detailed five-year business plan for expanding the Park, enter into a new lease that would permit commercial use of the Property, and pay EAK Trust ten percent of gross non-School related revenues.

SDA retained a consultant to prepare a five-year business plan and evaluate Wong's proposal for expansion; however, it refused to make retroactive payment of percentage rents. Wong rejected SDA's business plan and characterized its failure to tender payment as "evidence of bad faith." In a letter dated March 6, 2002, Wong demanded that SDA cease "all commercial vacation rental operations" and pay "an amount equal to ten percent (10%) of the gross revenues received by [SDA] from the commencement of the commercial vacation rental operations in 1985 until the date such operations cease pursuant to this demand," plus a ten percent interest rate and general excise tax.

On March 13, 2002, SDA notified Wong that it would

cease renting cabins to the public in order to avoid termination of the Lease. SDA maintained, however, that rental of the cabins to the public was a permitted recreational use. It also noted that ceasing rentals would cause significant monetary losses and could result in SDA closing its School. SDA immediately ceased booking reservations for cabins but, pursuant to an agreement with Wong, continued to honor reservations that had been made before March 6, 2002.

B. Circuit Court Proceedings

On March 10, 2003, SDA filed a Complaint in the Circuit Court for the Fifth Circuit ("circuit court"),[2] seeking a declaratory judgment that its operation of the Park, including commercial uses of the Property and rental of cabins to the public as vacation residences, was permitted under the Lease ("Count I of the Complaint"). SDA also alleged that the Lease had been orally amended to permit continued rental of the cabins ("Count II of the Complaint"); that Wong's allegations of breach were barred by waiver and estoppel based on the Trusts' knowledge of these rental activities ("Count III of the Complaint"); and that Wong should be enjoined from threatening to terminate the Lease and interfering with the cabins rentals, since these

[2] The Honorable Kathleen N.A. Watanabe presided.

actions would seriously and irreparably damage SDA ("Count IV" of the Complaint"). In addition, SDA sought damages for Wong's wrongful demand that SDA halt its vacation rentals to the public ("Count VI of the Complaint"). The Complaint did not contain a Count V.

On April 1, 2003, Wong filed an Answer and Counterclaim, seeking termination of the Lease on the ground that SDA had violated its terms by conducting prohibited commercial operations on the Property ("Count I of the Counterclaim"). In addition, Wong claimed an entitlement to damages based on SDA's breach of contract, its failure to comply with the conditions for use, and its refusal to pay rent for its commercial operations ("Count II of the Counterclaim"). He also claimed that SDA had been unjustly enriched by its commercial operations on the Property, and sought disgorgement of the profits therefrom ("Count III of the Counterclaim"). Finally, he alleged that SDA was obligated to defend and indemnify Wong for any loss or damage in connection with the Lease ("Count IV of the Counterclaim").

The parties each filed multiple motions for partial summary judgment.[3] With respect to Count I of the Complaint

[3] The parties filed a total of nine summary judgment motions: (1) [SDA's] Motion for Partial Summary Judgment on Count I of the Complaint (Cabin Rentals), filed July 28, 2005; (2) [SDA's] Motion for Partial Summary Judgment on Counts II and III of the Counterclaim (Percentage Rents), filed August 10, 2005; (3) [SDA's] Motion for Partial Summary Judgment on Count I of the Counterclaim (Termination), filed August 10, 2005; (4) [SDA's] Motion for Partial Summary Judgment on Counts I, II and IV of the Counterclaim (Failure

(continued . . .)

(cabin rentals), the parties stipulated that the Lease is unambiguous, parol evidence is inappropriate, and the court's interpretation should be limited to the four corners of the agreement.

Wong argued that Paragraph 16 clearly prohibits use of the Property by anyone other than faculty, administrative staff, students, and employees. While maintaining that the Lease is unambiguous, Wong cited letters and committee reports from School representatives in support of his position that Paragraph 16 never contemplated rental of cabins to the public. He also submitted deposition testimony from individuals who had been involved in discussions regarding SDA's use of the Property before the Lease was finalized.

SDA, on the other hand, argued that permissible uses of the Property include educational, agricultural, humanitarian, recreational, or health care, and the Lease does not prohibit use of the Property by the public for any of these permitted purposes. It maintained that the parenthetical reference to "vacation residence" provides an example of recreational use,

(. . . continued)
to Exhaust Administrative Remedies), filed August 25, 2005; (5) [SDA's] Motion for Partial Summary Judgment on Count IV of the Counterclaim (Indemnity), filed August 25, 2005; (6) [Wong's] Motion for Summary Judgment with Respect to Count I of the Complaint, filed, August 17, 2005; (7) [Wong's] Motion for Summary Judgment with Respect to Counts II, III, IV, and VI of the Complaint, filed August 17, 2005; (8) [Wong's] Motion for Summary Judgment Based Upon [SDA's] Violation of the Lease, filed August 17, 2005; and (9) [Wong's] Motion for Partial Summary Judgment with Respect to Count VI of the Complaint, filed August 24, 2005.

while the subsequent reference to "dwellings" is a limitation only as to those individuals who could permanently reside on the Property. SDA argued that Wong improperly cited opinion evidence from individuals who were neither involved in drafting the Lease nor qualified to make legal conclusions regarding interpretation of its terms. It contended that, if parol evidence were considered, communications pertaining to the negotiation and execution of the Lease expressly contemplated expansion of the existing cabin rental operations to generate income for the School.

With respect to Count I of the Counterclaim (termination), Wong acknowledged that the law disfavors forfeitures and that the Lease provides SDA thirty days to cure any violation. Relying on Food Pantry v. Waikiki Business Plaza, 58 Haw. 606, 575 P.2d 869 (1978),[4] and Aickin v. Ocean View

[4] In Food Pantry, lessee sought a declaratory judgment regarding its assignment and subleasing of the premises without prior written consent from lessor, and lessor sought termination of the lease based on breach of a non-assignment provision. 58 Haw. at 608, 575 P.2d at 873. The trial court concluded that lessee had materially breached the lease, and lessor was entitled to damages based upon the fair market rental for the premises; the court, however, refused to terminate the lease as long as lessee cancelled the assignments and subleases or, alternatively, paid a higher rental for the remainder of the term. Id. at 613, 575 P.2d at 875.

On appeal, we held that the trial court was empowered to grant equitable relief to relieve a party from forfeiture and the court had not abused its discretion in refusing to terminate the lease. 58 Haw. at 613-14, 575 P.2d at 875-76 ("Equity does not favor forfeitures, and where no injustice would thereby be visited upon the injured party, equity will award him compensation rather than decree a forfeiture against the offending party.").

Investments Co., 84 Hawaiʻi 447, 935 P.2d 992 (1997),[5] however, he argued that the court should exercise its powers in equity to terminate the Lease as a result of SDA's willful violations. In opposition, SDA contended that termination was inappropriate under paragraph 26 of the Lease where, upon receiving written notice from Wong, SDA timely cured any alleged violation by ceasing its rental of cabins to the public.

With respect to Counts II and III of the Counterclaim (breach of contract and unjust enrichment), Wong argued that SDA violated the Lease by impermissibly renting cabins to the public and he was therefore entitled to a remedy for such breach, either in the form of reimbursement of revenues or disgorgement of profits. SDA argued, inter alia, that relief for an alleged breach was limited to the express terms of the Lease (i.e., notice and opportunity to cure, followed by termination); that a

[5] In Aickin, tenants who failed to timely renew a commercial lease, sought declaratory judgment restraining lessor from terminating the lease. 84 Hawaiʻi at 449-51, 935 P.2d at 994-96. After conducting a bench trial, the circuit court concluded that tenants had materially breached the lease by failing to timely exercise an option to extend, and lessor was entitled to possession of the premises. Id. at 451-52, 935 P.2d at 996-97.

This court held that tenants were entitled to equitable relief if they could show: (1) their conduct was not intentional, willful, or grossly negligent; (2) lessor did not rely to its detriment on the failure to give notice; (3) strict enforcement of the notice provision would result in unconscionable hardship to tenants; and (4) the delay in giving notice was not unreasonably long within the context of the lease itself. 84 Hawaiʻi at 455-56, 935 P.2d at 1000-01. We noted that the lease had not yet expired when tenants gave notice of their intent to renew, the four-month delay was not unreasonably long in the context of a ten-year lease, and the failure to timely exercise the option was an oversight; on this basis, we concluded that the circuit court had abused its discretion by refusing to apply equitable principles and extend the lease. Id. at 455, 935 P.2d at 1000.

claim for percentage rents assumes the parties would have agreed to such a clause at the time the Lease was signed; that the Lease contained no provision for monetary damages; and that Wong did not suffer any damages from the alleged breach.

After a hearing, the circuit court issued orders granting summary judgment in favor of Wong on Counts I through IV of the Complaint (cabin rentals, oral amendment, estoppel, and injunctive relief), and granting summary judgment in favor of SDA on Count VI of the Complaint (damages)[6] and Counts I through IV of the Counterclaim (termination, breach of contract, unjust enrichment, and indemnification). The court did not elaborate on the grounds for its decision, and SDA filed motions for clarification and reconsideration. At a hearing on these motions, the court explained that it had found no ambiguity in the Lease and, therefore, had not considered parol evidence in making its decision. It then denied both motions.

Wong then filed a motion for costs and attorneys' fees. SDA argued that Wong was not entitled to fees and costs because it had prevailed on two of the four main issues before the court: termination of the Lease and retroactive payment of percentage rents. The circuit court concluded that Wong was entitled to

[6] SDA had not moved for summary judgment on this count, and this ruling appears to contradict the court's ruling in favor of Wong on Count I of the Complaint (vacation rentals). It appears that the circuit court recognized this contradiction by later dismissing Count VI in its Amended Final Judgment. See n.7, infra, and accompanying text.

reasonable attorneys' fees and costs because he had prevailed on the disputed main issue in the Complaint (i.e., cabin rentals). It therefore awarded Wong $60,270.00 in fees and $27,206.90 in costs.

On May 21, 2007, the court entered its Amended Final Judgment, disposing of all claims against the parties as follows: granting summary judgment in favor of Wong on Counts I through IV of the Complaint (cabin rentals, oral amendment, estoppel, and injunctive relief); granting summary judgment in favor of SDA on Counts I through IV of the Counterclaim (termination, breach of contract, unjust enrichment, and indemnification); dismissing Count VI of the Complaint (damages);[7] awarding reasonable attorneys' fees and costs to Wong; and dismissing all claims and counterclaims not specifically identified therein.

C. The ICA Opinion

SDA appealed the court's judgment granting summary judgment in favor of Wong on Count I of the Complaint (cabin rentals), arguing, among other things, that rental of cabins to the public is a permissible recreational use, and that the Lease does not otherwise prohibit SDA from engaging in commercial

[7] As the ICA notes, it is unclear why the court dismissed Count VI of the Complaint (damages), even though it had earlier granted summary judgment in favor of SDA, and there was no subsequent stipulation by the parties or decision by the court. SDA, however, did not appeal this count.

activities on the Property.[8]

Wong cross-appealed the court's judgment granting summary judgment in favor of SDA on Counts I, II, and III of the Counterclaim (termination, breach of contract, and unjust enrichment), arguing that he was entitled to terminate the Lease because SDA's rental of cabins to the public was a persistent and willful material breach, and that he was entitled to monetary damages as compensation for SDA's improper use of the Property.

In a Memorandum Opinion dated April 16, 2012, the ICA concluded that the Lease does not prohibit SDA from renting cabins to the public as vacation residences. The ICA opined that "[t]he first sentence of Paragraph 16 does not authorize or exclude use of the Property by [SDA] or any particular class of individuals" and "nothing in the text suggests that [SDA] is prohibited from collecting revenue from the permissible use of the Property." While acknowledging that the second sentence of Paragraph 16 limits the use of "dwellings" to faculty, staff, students and employees of SDA, it concluded that this restriction does not apply to use of the Property for "vacation residence," which is an expressly permitted recreational use. The ICA concluded, however, that although it was undisputed that at least some of the cabins were being used as vacation residences rather

[8] Although the court also granted summary judgment in favor of Wong on Counts II, III and IV of the Complaint (oral amendment, estoppel, and injunctive relief), SDA did not appeal these portions of the court's judgment.

than permanent dwellings, the record contained very little about what the cabins looked like, how they were used, and who used them. Accordingly, the ICA concluded that it could not grant summary judgment in favor of SDA, and remanded the case to the circuit court for further proceedings on this issue.

The ICA affirmed the circuit court's decision as to the remaining counts of the Complaint and Counterclaim. It concluded, inter alia, that termination of the Lease was not warranted because SDA had cured any alleged breach by ceasing cabin rentals to the public within thirty days of receiving written notice from Wong, and that Wong was not entitled to monetary damages because the circuit court had erred in concluding that SDA's cabin rentals were prohibited by the Lease. Finally, the ICA vacated the order awarding attorneys' fees and costs to Wong because, in remanding the case to the circuit court, a prevailing party had yet to be determined.

SDA then filed a motion for attorneys' fees and costs. On June 8, 2012, the ICA issued an order denying SDA's request for attorneys' fees and granting its request for costs in the reduced amount of $16,377.92. It concluded that SDA was not entitled to attorneys' fees because a prevailing party had yet to be determined, but an award of costs was appropriate because SDA had prevailed on appeal.

D. Questions on Certiorari

Wong raises the following questions on certiorari:

> A. Whether the ICA gravely erred in vacating the Circuit Court's grant of summary judgment in favor of Wong on Count I of [SDA's] Complaint seeking a declaratory judgment that "continued operation of 'Kahili Mountain Park' and vacation rental of the cabins . . . is permitted by the terms of the lease."
>
> B. Whether the ICA gravely erred in affirming the Circuit Court's grant of summary judgment in favor of SDA on Count I of Wong's Counterclaim for termination of the lease on the ground that [SDA] willfully violated Paragraph 16 of the lease by renting cabins to the general public.
>
> C. Whether the ICA gravely erred in affirming the Circuit Court's grant of summary judgment in favor of SDA on Counts II and III of Wong's Counterclaim seeking damages for breach of contract and unjust enrichment, respectively.
>
> D. Whether the ICA gravely erred by vacating the Circuit Court's Order Granting Fees and Costs and paragraph 4 of the Amended Final Judgment awarding Wong attorneys' fees and costs.

III. Standard of Review

A motion for summary judgment is reviewed de novo, viewing the evidence in the light most favorable to the non-moving party, under the same standard applied by the trial court. State v. Tradewinds Elec. Serv. & Contracting, 80 Hawaiʻi 218, 222, 908 P.2d 1204, 1208 (1995); Foytick v. Chandler, 88 Hawaiʻi 307, 313-14, 966 P.2d 619, 625-26 (1998). See also Hawaiʻi Rules of Civil Procedure Rule 56.

"Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Pacific Int'l Serv. Corp. v. Hurip, 76 Hawaiʻi 209, 213, 873 P.2d 88, 92 (1994) (citation omitted). "A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." Guajardo v. AIG Hawaiʻi Ins. Co., 118 Hawaiʻi 196, 201, 187 P.3d 580, 585 (2008) (citation omitted).

IV. Discussion

A. Count I of SDA's Complaint (Cabin Rentals)

SDA and Wong both maintain that Paragraph 16 of the Lease is unambiguous and enforceable.[9] They disagree, however, on the effect of Paragraph 16's parenthetical reference to "vacation residence" and the subsequent restriction on "dwellings." Wong contends that SDA's rental of cabins to the public violates the terms of the Lease because it constitutes use of a dwelling by someone other than faculty, administrative staff, students, and employees. SDA, on the other hand, argues

[9] Wong nevertheless offers certain extrinsic evidence "to explain and reinforce the unambiguous use provision in Lease." SDA argues, however, that Wong's reliance on select pieces of inadmissible parol evidence is misleading where the Lease is unambiguous and the proffered evidence does not accurately reflect the intent of the parties at the time the Lease was executed.

that the use of cabins as vacation residences by the public is expressly permitted as a recreational use and is distinguishable from the use of permanent dwellings.

1. Principles of Contractual Interpretation

"[T]he construction and legal effect to be given a contract is a question of law freely reviewable by an appellate court." Brown v. KFC National Mgmt. Co., 82 Hawaiʻi 226, 239, 921 P.2d 146, 159 (1996) (citations and internal quotation marks omitted). "The determination whether a contract is ambiguous is likewise a question of law that is freely reviewable on appeal." Id. (citations omitted).

Contract terms are interpreted according to their plain, ordinary, and accepted sense in common speech. Cho Mark Oriental Food v. K&K Intern., 73 Haw. 509, 520, 836 P.2d 1057, 1064 (1992). The court's objective is "to ascertain and effectuate the intention of the parties as manifested by the contract in its entirety." Brown, 82 Hawaiʻi at 240, 921 P.2d at 160 (citation and internal quotation marks omitted).

A contract is ambiguous when its terms are reasonably susceptible to more than one meaning. Airgo v. Horizon Cargo Transp., 66 Haw. 590, 594, 670 P.2d 1277, 1280 (1983). As a general rule, the court will look no further than the four corners of the contract to determine whether an ambiguity exists.

State Farm Fire & Cas. Co. v. Pac. Rent-All, 90 Hawaiʻi 315, 324, 978 P.2d 753, 762 (1999) (noting that the parties' disagreement as to the meaning of a contract does not render it ambiguous). The parol evidence rule "precludes the use of extrinsic evidence to vary or contradict the terms of an unambiguous and integrated contract." Pancakes of Hawaiʻi v. Pomare Props. Corp., 85 Hawaiʻi 300, 310, 944 P.2d 97, 107 (App. 1997) (citation omitted). This rule, however, is subject to exceptions that permit the court to consider extrinsic evidence when the writing in question is ambiguous or incomplete. Id. Where there is any doubt or controversy as to the meaning of the language, the court is permitted to consider parol evidence to explain the intent of the parties and the circumstances under which the agreement was executed. Hokama v. Relinc Corp., 57 Haw. 470, 476, 559 P.2d 279, 283 (1977). The court may admit parol evidence to explain an ambiguity, whether latent or patent:

> In determining whether or not an ambiguity exists in a document, under the parol evidence rule, the test lies not necessarily in the presence of particular ambiguous words or phrases but rather in the purport of the document itself, whether or not particular words or phrases in themselves be uncertain or doubtful in meaning. In other words, a document may still be ambiguous although it contains no words or phrases ambiguous in themselves. The ambiguity in the document may arise solely from the unusual use therein of otherwise unambiguous words or phrases. An ambiguity may arise from words plain in themselves but uncertain when applied to the subject matter of the instrument. In short, such an ambiguity arises from the use of such words of doubtful or uncertain meaning or application.

Hokama, 57 Haw. at 474-75, 559 P.2d at 282 (citations omitted) (emphasis added).

2. Paragraph 16's Use Provisions Are Ambiguous

As pointed out earlier, the parties stipulated that the Lease is unambiguous. We note, however, that the parties' stipulation as to a question of law is not binding on the court, and does not relieve us from the obligation to review questions of law de novo. Chung Mi Ahn v. Liberty Mut. Fire Ins. Co., 126 Hawaiʻi 1, 10, 265 P.3d 470, 479 (2011) (citations omitted).

The main issue before this court is whether Paragraph 16 of the Lease prohibits SDA's practice of renting cabins, as vacation residences, to members of the public not affiliated with the Church or School. Paragraph 16 provides:

> 16. Use of Demised Premises. The demised premises shall be used only for educational, recreation (including vacation residence for members and staff of Lessee's school and church), agricultural, health care and humanitarian uses. No dwellings shall be constructed or used on the demised premises except for faculty, administrative staff, students and employees. If Lessee ceases to use the demised premises for the above purposes, Lessor shall have the right to terminate this Lease.

Paragraph 16 begins by enumerating five permissible uses of the Property. The first sentence states: "The demised premises shall be used only for educational, recreation (including vacation residence for members and staff of Lessee's school and church), agricultural, health care and humanitarian uses." Focusing on the parenthetical phrase in this sentence, the ICA construed the word "including" as a term of enlargement,

and concluded that the reference to vacation residence was intended as an example of permissible recreational use rather than a limitation thereof. In doing so, the ICA relied upon Lealaimatafao v. Woodward-Clyde Consultants, 75 Haw. 544, 556-57, 867 P.2d 226, 224 (1994).

In Lealaimatafao, this court addressed the scope of the wrongful death statute, which provided damages for "pecuniary injury and loss of love and affection, including . . . loss of parental care, training guidance, or education, suffered as a result of the death of the person by . . . any person wholly or partly dependent upon the deceased person." 75 Haw. at 550-51, 867 P.2d at 223-24 (emphasis added). Citing a definition from Black's Law Dictionary 763 (6th ed. 1990), this court focused on the term "including" and explained:

> The term, "including" expresses "an enlargement and has the meaning of and or in addition to, or merely specifies a particular thing already included within the general words theretofore used." By using the term "including," the legislature intended the enumerated claims to be exemplary of the type of claims which may be brought for the loss of love and affection. The term "including" in no way implies exclusivity. Thus it is irrelevant whether Appellants are entitled to any of the enumerated claims inasmuch as they have a general claim for the loss of love and affection.

75 Haw. at 556, 867 P.2d at 226 (brackets omitted).

Lealaimatafao involved statutory interpretation, not contractual interpretation. More importantly, in Lealaimatafao, this court relied upon only one of several definitions of the term "including." According to the definition from Black's Law

Dictionary, however, "including" can construed to express limitation as well as expansion, and interpretation of that term depends upon context. Black's Law Dictionary 763 (6th ed. 1990) ("'Including' within statute is interpreted as a word of enlargement or of illustrative application as well as a word of limitation."). Thus, with respect to the first sentence of Paragraph 16, the parenthetical reference could indicate a limitation on how vacation residences may be used for recreational purposes by a particular category of persons.

In addition, while Lealaimatafao involved statutory construction, "expressio unius est exclusio alterius" is a fundamental canon of contractual interpretation. See Edwin W. Patterson, The Interpretation and Construction of Contracts, 64 COLUM. L. REV. 833, 853-55 (1964). Under this principle, the express mention of a particular provision may imply the exclusion of that which is not included. Tsunoda v. Young Sun Kow, 23 Haw. 660, 665 (Haw. Terr. 1917) ("A reservation or exception may be implied from the language of the lease, although not expressly mentioned, where the language used shows such intent." (Citations omitted.)).[10] If the parties had intended to identify vacation residence as an example of recreational use, they could

[10] In Tsunoda, this court applied the rule "expressio unius est exclusio alterius" and held that, where a lease contemplated the use of water for irrigation of lands and lessee's domestic purposes, the parties intended to except any surplus water from operation of the lease. 23 Haw. at 665.

have done so without referring to a particular category of persons entitled to use those vacation residences.[11] It is therefore unclear whether the parenthetical phrase states a limitation on who may use the Property as vacation residences, and the sentence is particularly ambiguous when read in context.

The following sentence of Paragraph 16 states: "No dwellings shall be constructed or used on the demised premises except for faculty, administrative staff, students and employees." The ICA acknowledged that the term "dwellings" was ambiguous insofar as it could refer broadly to a structure in which people live (as Wong contends) or, more specifically, to a place of primary or permanent residence (as SDA contends). It concluded, however, that the term was unambiguous within the context of the Lease.

Contract terms are interpreted according to their plain, ordinary, and accepted sense in common speech. Cho Mark Oriental Food, 73 Haw. at 520, 836 P.2d at 1064. Where terms are undefined, the court may resort to legal or other well-accepted dictionaries to determine their ordinary meaning. Sierra Club v. Hawaiʻi Tourism Auth., 100 Hawaiʻi 242, 253, 59 P.3d 877, 888 (2002). The ICA noted that because vacation residence was a permissible recreational use of the Property, it would be

[11] Reading the parenthetical as the dissent does, without explaining the import of this language, renders the reference "to members and staff of Lessee's school and church" superfluous.

unnatural to read the subsequent restriction as a limitation thereof, and "dwellings" must therefore be construed to mean "primary, non-recreational residences" rather than temporary or short-term vacation residences.

This analysis begs the question of whether a vacation residence constitutes a type of dwelling which, absent the parenthetical phrase, would be restricted to faculty, administrative staff, students, and employees. Given this ambiguity in the term "dwellings," it is possible that Paragraph 16's restriction on the construction and use of "dwellings" states the general rule, while the parenthetical reference to "vacation residence" provides a limited exception thereto. Under this interpretation, Paragraph 16 could reasonably be construed to allow members and staff of SDA's School and Church—including those who might not be permitted to use dwellings—to use the Property for short-term vacation residence, but to prohibit such use by the general public.

The dissent suggests that interpreting "dwellings" to encompass "vacation residence" would be illogical and inconsistent. Dissent at 17-24. We respectfully disagree, because the parenthetical phrase in the first sentence entitles a broader subset of individuals to use the property for "vacation residence" (i.e. members and staff of SDA's school and church) than those permitted to use "dwellings" (i.e., faculty,

administrative staff, students, and employees). Further, recognizing this ambiguity in the language of Paragraph 16 does not frustrate otherwise permissible uses of the Property, because any such limitation would apply only to the use of "dwellings," which are defined broadly as any structure in which a person lives, a residence, or an abode. Black's Law Dictionary 582 (9th ed. 2009) (defining "dwelling-house").

Thus, the terms of Paragraph 16 are reasonably susceptible to more than one interpretation, there are genuine issues of material fact regarding the intent of the drafters, and summary judgment is therefore inappropriate. Although the ICA correctly vacated summary judgment in favor of Wong and remanded the case for further proceedings on the issue of cabin rentals, it did so for the wrong reason.[12] We vacate the ICA's judgment as to Count I of the Complaint (cabin rentals), and remand the case to the circuit court for a determination of whether the Lease permits SDA to use cabins as vacation residences for the general public. In making this determination, the fact-finder may consider additional evidence, including parol evidence, regarding the intent of the parties at the time of drafting.

[12] The ICA explained that there were disputed issues of material fact as to whether cabins were used by SDA solely for the purpose of vacation rentals. Insofar as Wong contended that SDA rented cabins to the public for both long-term and short-term use, the ICA concluded that SDA had failed to present sufficient facts to dispose of this claim on summary judgment.

3. The Lease Does Not Prohibit Commercial Activities

Although our analysis of Paragraph 16 effectively disposes of Wong's questions on certiorari, we address several additional arguments to provide guidance on remand.

Wong claims that the Lease prohibits SDA from engaging in commercial uses of the Property, including renting vacation residences to the public, because the five uses enumerated in Paragraph 16 are all "non-commercial." This argument, however, lacks merit. A use that is educational, agricultural, recreational or related to health care is not, by design, non-commercial. A permissible recreational use does not cease to be recreational simply because SDA charges a fee.[13]

Furthermore, neither Paragraph 16 nor the remainder of the Lease expressly or implicitly prohibits SDA from conducting commercial activities on the Property. If the parties had intended to include such a prohibition, they could have easily done so. Based on the plain language of the Lease, we conclude that SDA is not prohibited from collecting revenue from otherwise permissible uses of the Property.

[13] As the ICA correctly explained: "Paragraph 16 plainly permits [SDA] to use the Property to run a school, farm, or medical clinic. Whether [SDA] charges students a tuition, sells the harvest, or charges patients fees for the provision of medical treatment is merely derivative of and incidental to these uses."

B. Count I of Wong's Counterclaim (Termination)

Because the fact-finder could determine, on remand, that Paragraph 16 of the Lease prohibits the use of cabins by the general public, we must address whether Wong's purported claim for termination of the Lease was effective.

Wong contends that he was entitled to terminate the Lease due to SDA's "intentional, willful, or grossly negligent" breach in renting cabins to the public. SDA, however, argues that the Lease cannot be terminated because it timely cured any alleged violations within thirty days of receiving written notice from Wong.

Absent ambiguity, contract terms must be interpreted according to their plain meaning. Cho Mark Oriental Food, 73 Haw. at 520, 836 P.2d at 1064. Under the terms of the Lease, Wong possesses a right to terminate if SDA ceases to use the Property for a permissible purpose. The right to terminate, however, is subject to Paragraph 26, which provides SDA thirty days within receipt of written notice to remedy any alleged breach. It is undisputed that Wong first demanded SDA cease its practice of renting cabins to the public in a letter dated March 6, 2002.[14] SDA informed Wong that it would cease its vacation

[14] There is some evidence that the Trusts were aware of SDA's practice of renting cabins to the public between 1984 and 2000. Prior to Wong's March 6, 2002 letter, however, there was no communication from the Trusts that these rentals violated the terms of the Lease.

rental operations on March 13, 2002. Under these circumstances, SDA timely cured the alleged breach within the required time frame and Wong was not entitled to terminate the Lease.

Wong's reliance on Food Pantry, 58 Haw. at 613-14, 575 P.2d at 875-76, and Aickin, 84 Hawaiʻi at 455-56, 935 P.2d at 1000-01, is misplaced. Those cases recognized a policy against forfeiture, despite lessors entitlement to terminate under the express terms of a lease. As we explained in Food Pantry, "[e]quity does not favor forfeitures, and where no injustice would thereby be visited upon the injured party, equity will award him compensation rather than decree a forfeiture against the offending party." 58 Haw. at 614, 575 P.2d at 876. In this case, the express terms of the lease do not permit Wong to terminate where SDA timely remedies an alleged breach within thirty days of receiving written notice.

Thus, even if the fact-finder determines that SDA's vacation rentals violated the Lease, Wong was not entitled to termination. We therefore affirm the ICA's judgment in favor of SDA on Count I of the Counterclaim.

C. Counts II and III of Wong's Counterclaim (Breach of Contract and Unjust Enrichment)

If, on remand, the fact-finder concludes that Paragraph 16 of the Lease prohibits the use of cabins by the general

public, it will also have to address Wong's claim that he is entitled to an award of monetary damages for breach of contract or disgorgement of profits from SDA's rental operations.

SDA maintains that Wong is not entitled to damages because the Lease does not contain a penalty provision, the court cannot rewrite the terms of the Lease to require payment of percentage rents, and it did not profit from its rental operations because those funds were used to support the School. SDA also argues that unjust enrichment is inappropriate as a quasi-contract claim where there is a valid, enforceable contract between the parties.

The ICA concluded that Wong could not seek damages or disgorgement by virtue of the fact that he was not entitled to termination of the Lease. A claim for breach of contract or unjust enrichment, however, is distinct from a claim for termination of the Lease.

A claim for breach of contract allows a party to recover just compensation for any loss or damage that is the natural and proximate consequence of an opposing party's breach. Amfac v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 128, 839 P.2d 10, 32 (1992). A claim for unjust enrichment permits a party to seek restitution for benefits improperly conferred on an opposing party as a result of a wrongful act. Porter v. Hu, 116 Hawaiʻi 42, 55, 169 P.3d 994, 1007 (App. 2007) (citing Durette v. Aloha

Plastic Recycling, 105 Hawaiʻi 490, 100 P.3d 60 (2004)). In deciding whether a party is entitled to restitution, the court is guided by its objective to prevent injustice. Small v. Badenhop, 67 Haw. 626, 636, 701 P.2d 647, 654 (1985) ("One who receives a benefit is of course enriched, and he would be unjustly enriched if its retention would be unjust." (Citation omitted.)).

If the fact-finder concludes that SDA violated the Lease by renting cabins to the public, Wong may be entitled to an award of monetary damages for breach of contract and/or equitable relief in the form of disgorgement of profits from SDA's rental operations.[15] Accordingly, we vacate the ICA's judgment in favor of SDA on Counts II and III of the Counterclaim, and remand the case for further proceedings on these claims.

D. Attorneys' Fees and Costs

In light of our decision that Paragraph 16 is ambiguous, we conclude that neither party has prevailed on appeal. Therefore, the ICA did not err in vacating the circuit court's order awarding attorneys' fees and costs to Wong. Because SDA has not prevailed on appeal, however, we vacate the ICA's order awarding costs to SDA. See Hawaiʻi Rules of

[15] It is unclear why the circuit court granted summary judgment in favor of SDA on Counts II and III of the Counterclaim, while granting summary judgment in favor of Wong on Count I of the Complaint.

Appellate Procedure Rule 39(a) ("[I]f a judgment is affirmed in part and reversed in part, or is vacated, or a petition granted in part and denied in part, the costs shall be allowed only as ordered by the appellate court.")

V. Conclusion

We conclude that the ICA correctly vacated summary judgment in favor of Wong on Count I of the Complaint (cabin rentals), but for the wrong reasons. The ICA also correctly affirmed summary judgment in favor of SDA on Count I of the Counterclaim (termination). However, in light of our decision to remand the case on the permissibility of cabin rentals, we conclude that the ICA erred in affirming summary judgment in favor of SDA on Counts II and III of the Counterclaim (breach of contract and unjust enrichment).

Finally, we conclude that the ICA correctly vacated the circuit court's order awarding attorneys' fees and costs to Wong. We also vacate the ICA's order awarding costs on appeal to SDA because a prevailing party has yet to be determined.

We therefore affirm in part and vacate in part the ICA's judgment on appeal, and remand this case to the circuit court for further proceedings consistent with this opinion.

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