

BARBADOS

[Unreported]

Suit No: CV 1197 of 2007

IN THE HIGH COURT OF JUSTICE

CIVIL DIVISION

BETWEEN

CHRISTOPHER KENNETH MATTHEW COYLE

CLARENCE BERESFORD GILKES

JUDITH-ANN GILKES

LISA ESMAY COYLE

DIANN SHIRLEY BLADES - PLAINTIFFS

AND

JAMES DOHERTY - DEFENDANT

**Before The Honourable Madam Justice Maureen Crane-Scott, Q.C.,
Judge of the High Court(ag)**

2007: September 19; October 4

Mr. Bryan Weekes for the Plaintiffs

Mr. Leslie Haynes, Q.C for the Defendant

DECISION

- [1] **Crane-Scott J:** This is an urgent application by the Defendant James Doherty brought by Summons filed on July 25, 2007 for the discharge of an interim injunction granted by Chandler J on July 9, 2007 in which it was ordered, *inter alia*, that:

“1.1 The Intended Defendant his, employees, agents, or assigns are prohibited from entering into any lease arrangement or sale agreement with any party or in any way dealing with the property of the Intended Defendant known as Unit 6 Freshwater Condominiums situate at Fresh Water Bay, Black Rock, in the parish of Saint Michael in this Island so as to part possession with the same until further order of the Court.”

- [2] The Summons for discharge of the injunction is supported by an affidavit (“the Haynes affidavit”) sworn on July 20, 2007 by Leslie Francis Haynes, Q.C. on behalf of the Defendant and filed herein on July 25, 2007. The Haynes affidavit seeks to lay the legal basis for the Defendant’s contention that an Agreement for sale and purchase entered into between the Defendant and the Plaintiffs in or around the month of April 2007 for the sale to the Purchasers of Unit 6 of the Fresh Water Bay Condominiums (“Unit 6”) had been frustrated in consequence of the Defendant’s failure to obtain the approval to the sale of the body corporate of the Fresh Water Bay

Condominiums pursuant to Bye-Law 8(f) of the Freshwater Bay Condominium Declaration and Bye-laws.

[3] Bye-Law 8(f) of the Freshwater Bay Condominium Declaration and Bye-laws provides as follows:

“8. A unit owner shall:-

(a);

(f) not sell agree to sell or otherwise dispose of his unit except by way of testamentary disposition except the person to whom the unit owner desires to sell or dispose of the unit to is first approved by a majority of the body corporate which consent shall not be unreasonably withheld in the case of a responsible and respectable person of adequate financial means;”

The Factual Background:

[4] The background to the current impasse between the parties appears not to be in dispute and is set out in the affidavit of Christopher Kenneth Matthew Coyle (“the Coyle affidavit”) filed in the proceedings on July 3, 2007. The facts are contained in several documents exhibited with the Coyle affidavit and (having regard to paragraphs 2, 3 and 4 of the Haynes affidavit) are admitted by the Defendant.

[5] The documents evidencing the facts are for convenience identified below:

“P 1” Undated 2007 Agreement for Sale & Purchase of Unit 6 between the Plaintiffs and the Defendant;

- “P 2” Letter dated June 21, 2007 (Clyde Turney to Malcolm Deane) advising the Plaintiffs that the Agreement was at an end due to the refusal by a majority of the Freshwater Bay Condominium owners/ Body Corporate to approve the sale;
- “P 3” The Condominium Declaration and Bye-Laws for the Fresh Water Bay Condominium made the 8th day of January, 1997 pursuant to the Condominium Act, Chapter 224A of the Laws of Barbados and recorded with the Registrar of Titles;
- “P 4” Letter dated June 26, 2007 (Malcolm Deane to Clyde Turney) in response to the letter at “P 2” informing the Defendant of the Plaintiffs intention to proceed with the sale and purchase unless provided with valid reasons for the refusal by the majority of the owners for their refusal to consent to the sale and purchase and requesting a meeting with the Condominium owners/ Body Corporate;
- “P 5” Letter dated June 27, 2007 (Clyde Turney to Malcolm Deane) in response to the letter at “P 4” advising that the approval of the Condominium Body Corporate had not been given and that the contract of sale had been frustrated and further that the Defendant is under no obligation to take any proceedings for declaration or otherwise;
- “P 6” Letter dated June 27, 2007 (Malcolm Deane to Clyde Turney) in response to the letter at “P 5”

indicating, *inter alia*, that the Plaintiffs were not requiring the Defendant to obtain a declaration but merely requesting the Vendor to notify the Condominium owners/ Body Corporate that their refusal does not comply with the Bye-laws and that unless they can give reasonable grounds for their refusal as required, the Defendant would proceed with the sale. The letter also advised that the Plaintiffs would resist the Defendant's declared intention to sell the condominium to someone else;

"P 7" Letter dated June 28, 2007 (Clyde Turney to Malcolm Deane) in response to the letter at "P 6" restating the Defendant's previous position that the contract had been frustrated and reiterating the Defendant's inability to convey the property to the Plaintiffs given the circumstances;

"P 8" E-mail dated May 11, 2007 authored by Patricia Greaves, one of the Unit owners and addressed to an Amanda Evelyn expressing certain concerns and reservations regarding the prospective purchasers and the use to which Unit 6 would be put and requesting clarification on certain points.

The Defendant's Submissions in support of the application to discharge the interim injunction:

[6] At the hearing of the Defendant's application to discharge the interim injunction, Counsel for the Defendant, Mr. Leslie Haynes,

Q.C. made a number of submissions in support of the Defendant's contention that the injunction should be discharged.

- [7] Mr. Haynes' initial submission was that the interlocutory injunction granted by Chandler J had been granted in aid of the principal relief sought in the Writ of Summons, namely, in aid of an order for specific performance. He contended that if it can be shown that the Plaintiffs would at the trial ultimately not obtain an order for specific performance, then the interlocutory injunction should be discharged since it was issued in aid of specific performance.
- [8] He cited the case of *Lumley v. Ravenscroft [1895] Q.B. 683* in which it was held that an interlocutory injunction, being ancillary only to the relief which a Court may make at the trial, ought only to be granted where a case for specific performance can be made out and that accordingly, a Plaintiff is not entitled to an injunction unless he can make out a case for specific performance.
- [9] Counsel's submission finds support in the following passage from Sir Edward Fry's text "*A Treatise on the Specific Performance of Contracts*" at page 540,
- "If, however, on interlocutory application for an injunction, it appears that the case is one in which it would be wrong to grant specific performance at the trial, it follows that it would be wrong to grant the injunction."*
- [10] Mr. Haynes then made a twofold submission as to the reasons why specific performance would not be granted in this particular case. Firstly, he submitted that a Court would not order specific performance where to do so would result in the Defendant

becoming liable for breach of a contract or covenant with another person. Secondly, Mr. Haynes submitted that a Court will not compel a Vendor, and in this case, the Defendant, to embark on speculative litigation in order to assist the Plaintiffs in obtaining the consent which they seek. In such circumstances, he submitted, a Court would not order specific performance.

- [11] In support of his first submission, Mr. Haynes cited the case of *Willmott v. Barber [1880] Ch. 96* as authority for the proposition that a Court will not compel a Defendant specifically to perform an agreement when the result would be to compel him to commit a breach of a prior agreement with another person. Additional support for his submission was found in *Halsbury's Laws of England, 4th Edition, Volume 16* and the case of *Warmington and anor v. Miller [1973] Q.B. 877*.
- [12] **Warmington's Case** was also cited as authority to rebut the Plaintiffs' assertion in paragraph 11 of the Coyle affidavit that the Agreement signed in April 2007 was a legally enforceable document which vested in the Plaintiffs an equitable interest in Unit 6. Mr. Haynes submitted that what gives rise to an equitable interest is where it can be established that there is an agreement to be performed which is capable of being specifically enforced.
- [13] Mr. Haynes' second submission was that a Court will not compel a Vendor, and in this case, the Defendant, to embark on speculative litigation in order to assist the Plaintiffs in obtaining the consent of a third party, namely, the majority of the Condominium owners/Body Corporate to the sale.

[14] Authority for the above submission was found in an extract from *Halsbury's Laws of England, 4th Edition, Volume 42* and the case of *Wroth and anor v. Tyler [1973] 1 All ER 897* which both support the proposition that a Vendor will not usually be required to embark on difficult or uncertain litigation in order to secure any requisite consent.

[15] In particular, Mr. Haynes highlighted the following dictum of Megarry J in *Wroth v. Tyler* (cited above):

“ A vendor must do his best to obtain any necessary consent to the sale; if he has sold with vacant possession he must, if necessary, take proceedings to obtain possession from any person in possession who has no right to be there or whose right is determinable by the vendor, at all events if the vendor's right to possession is reasonably clear; but I do not think that the vendor will usually be required to embark on difficult or uncertain litigation in order to secure any requisite consent or obtain vacant possession. Where the outcome of any litigation depends on disputed facts, difficult questions of law or the exercise of a discretionary jurisdiction, then I think the court would be slow to make a decree of specific performance against the vendor which would require him to undertake such litigation...No doubt the line between simple and difficult cases will sometimes be hard to draw; and it may be that specific performance will readily be decreed only where it is plain that the requisite consent is obtainable without difficulty.”

[16] Before completing his submissions, Mr. Haynes identified certain other difficulties which, in his view, would preclude the Plaintiffs

from obtaining a decree of specific performance in the present case. According to him, the Plaintiffs are not party to any covenant between the Vendor and the Condominium Body Corporate and therefore cannot properly bring an action for a declaration as to the illegality or otherwise of a covenant to which they are not a party.

[17] Further, Mr. Haynes pointed out that the Plaintiffs' allegation that the Condominium Body Corporate unreasonably withheld its permission cannot be sustained in the absence of evidence as to the grounds on which consent to the sale was refused by the majority of the Condominium Body Corporate.

[18] Mr. Haynes argued that even the e-mail dated May 11, 2007 authored by Patricia Greaves, one of the Unit owners and addressed to Amanda Evelyn "P8" exhibited to the Coyle affidavit is subject to interpretation. He pointed out that according to the Coyle affidavit, the Plaintiffs are of the view that the reason why permission was not granted was that the Plaintiffs are Barbadian citizens. However, he submits, when one examines the email it can equally be argued that the reason why the owners of Unit 5 were not in a position to give their consent to the sale was that they were harbouring concerns that their "quiet little oasis" could be over-run with noise.

[19] Counsel also placed reliance on the following passage at paragraph §999 of Sir Edward Fry's text "*A Treatise on the Specific Performance of Contracts*" at page 466:

" as the consent of a third party is, or may be, a thing impossible to procure, a Defendant who has entered into a contract to the performance of which such consent is necessary,

will not, in case such consent cannot be procured, be decreed to obtain it, and thus perform an impossibility.”

[20] Finally, Mr. Haynes submitted that in view of the difficulties outlined, specific performance would not be granted to the Plaintiffs and that the injunction should therefore be discharged.

The Plaintiffs’ Submissions in favour of keeping the interim injunction in place:

[21] At the outset, Counsel for the Plaintiffs, Mr. Bryan Weekes indicated that he had absolutely no difficulty with any of the submissions which Counsel for the Defendant Mr. Haynes had made with respect to the law of specific performance.

[22] Mr. Weekes, however, strenuously disagreed with Mr. Haynes’ contention that specific performance would not issue when a Judge ultimately comes to hear the substantive arguments in this case. Mr. Weekes submitted that at the trial the Court would be required to hear other arguments on principles of law involving illegality, public policy and the severance of void or illegal provisions contained in an otherwise perfectly enforceable contract.

[23] Mr. Weekes stated that it was the Plaintiffs’ case that, at the end of the day, specific performance would be granted and that there were very strong arguments for the grant of specific performance in this case.

[24] He pointed out that in the Statement of Claim, the Plaintiffs had alleged that Bye-Law 8 (f) is *ultra vires* the ***Condominium Act, Cap. 224A*** of the Laws of Barbados. He submitted that if a Court were to hear arguments in relation to the legality of Bye-Law 8(f) and to declare it to have been *ultra vires* the ***Condominium Act,***

the Court would be asked to examine whether Bye-Law 8(f) was capable of being severed from the Agreement for Sale in a manner which would leave intact an otherwise perfectly good and enforceable agreement between the Plaintiffs and the Defendant for the sale and purchase of Unit 6.

- [25] Mr. Weekes pointed out that when the matter was heard before Chandler J in July, 2007, the Plaintiffs had asked for the Court's assistance in granting an interim injunction to maintain the *status quo* between the parties until a Court hears the full arguments. He explained that the usual guidelines set out in the leading case of *American Cyanamid Co v. Ethicon Ltd [1975] A.C. 396* for determining whether or not to grant interim injunctive relief had been fully argued before *Chandler J* who had granted the interim injunction to maintain the *status quo* between the parties pending trial of the substantive action.
- [26] Mr. Weekes submitted that, given the peculiar nature of the case and the potentially illegal nature of Bye-Law 8 (f) *vis-à-vis* section 15 of the *Condominium Act Cap. 224A*, it would be dangerous to lift the injunction at this stage and urged me to leave the *status quo* in place pending trial of the substantive action.
- [27] Mr. Weekes indicated that the Plaintiffs were vigorously pursuing the case through the Courts and had on August 15, 2007 already filed a Summons pursuant to O. 81 of the *Rules of the Supreme Court* together with a further affidavit of Christopher Coyle seeking certain relief, orders and directions. He accordingly submitted that in the interests of justice, the injunction should be

permitted to remain in place pending trial of the various issues in the case.

[28] Mr. Weekes stressed that the current case was not a straightforward situation having regard to the issues which had been raised by the Plaintiffs as to whether Bye-Law 8(f) was lawful, and if declared to be unlawful, whether Bye-Law 8(f) could be severed from the Agreement for Sale in such a manner to permit the agreement between the parties to proceed to completion.

1) Mr. Weekes referred to section 15 of the *Condominium Act, Cap. 224A* which deals with the contents of Bye-Laws and the types of matters which Bye-Laws could, subject to the Act, lawfully provide for. He noted that there was nothing in section 15 of the Act which expressly authorized the making of a Bye-Law which would in effect operate as a fetter on the fee simple held by individual Unit owners. Given the specific wording of section 15, the imposition of such a fetter in a Bye-Law, would, he argued, be *ultra vires* the *Condominium Act* and contrary to public policy.

[29] Mr. Weekes cited paragraphs 17:185, 17:187 and 17:189 of *Chitty on Contracts, 28th Edition* which relate to the circumstances in which a Court could be requested to sever the illegal portions of the Agreement for Sale. According to Mr. Weekes, in severing Bye-Law 8(f), the Court would firstly, not be making a new contract for the parties and secondly, the Court would be urged to do so because such severance would be in accordance with public policy.

[30] According to Mr. Weekes, once Bye-Law 8(f) is severed, what would be left would be an agreement which can be specifically enforced.

Mr. Haynes' response:

[31] In response, Mr. Haynes pointed out that the Plaintiffs had a major difficulty to overcome which was that the Plaintiffs were not at this stage, parties to the covenant with the Condominium Body Corporate and furthermore, that the Condominium Body Corporate was at the present time not a party to the action.

[32] In his rebuttal to Mr. Weekes' submission that Bye-Law 8(f) constituted an unlawful fetter on fee simple ownership and contrary to public policy, Mr. Haynes observed that by agreement, persons fetter their rights to alienate their property all the time. He pointed out for example, that the right of a shareholder to transfer his shares in a private company is frequently subject to the restrictions imposed by the articles on a member's freedom to transfer his shares.

[33] Mr. Weekes intervened to point out that while the articles of a company might impose a fetter or restriction on the right of a shareholder to transfer his shares, such a fetter related to personal property, whereas the present case relates to an unlawful fetter contained in Bye-Law 8(f) on the right of a condominium owner to alienate the fee simple held by him in real property.

The applicable law:

[34] Having read the Coyle and Haynes affidavits and heard the submissions of Counsel on both sides, I turn now to a consideration of the applicable law and, in particular, the manner

in which the Court is required to exercise its discretion as to whether the injunction granted herein by Chandler J on July 9, 2007 should remain in place until trial of the issues or be discharged.

[35] It is not disputed that the Court has a discretion at any stage of the proceedings to grant a prohibitory injunction such as was granted in this case by *Chandler J* on July 9, 2007. Indeed, sections 44 and 45 of the *Supreme Court of Judicature Act, Cap. 117A* provide as follows:

“44. The High Court may at any stage of the proceedings

(a).....

(b) grant a mandatory or other injunction;

(c)

where it appears to the Court to be just or convenient to do so for the purposes of the proceedings before it; and, if the case is one of urgency, the Court may grant a mandatory or other injunction before the commencement of the proceedings.”

“45. (1) Any.....injunction under section 44 may be made either unconditionally or on such terms and conditions as the Court thinks just, including, if an injunction is granted before the commencement of the proceedings, a condition requiring proceedings to be commenced.”

[36] The Order of July 9, 2007 granting the injunction in these proceedings, was made *ex parte* upon a certificate of urgency prior to the commencement of the proceedings. It contained the usual

stipulation to the effect that the intended Defendant or anyone notified of the Order could apply to the Court at any time to vary or discharge the Order or so much of it as affects that person.

[37] The Summons filed on July 25, 2007 by the Defendant seeking the discharge of the injunction granted *ex parte* on July 9, 2007, effectively places the issue of the necessity for the interlocutory injunction in the current proceedings back before the High Court for review.

[38] The House of Lords decision in *American Cyanamid Co v. Ethicon Ltd*, (cited above) now some three decades old, remains the leading authority on the approach of the courts to interlocutory injunctions *inter partes* for prohibitory injunctions. More specifically, the guidelines laid down by Lord Diplock in the case are regarded as the principal source of law on the subject.

(i) Is there a serious question to be tried?

[39] As a first step, under the Diplock guidelines, the Plaintiffs must satisfy the Court that there is “**a serious question to be tried**” [at 407G]. Put another way, the injunction should be discharged at this stage if the Plaintiffs cannot show that they have “**any real prospect of succeeding in [their] claim for a permanent injunction at the trial**” [at 408A]. It also appears from the guidelines that at the interlocutory stage, “**it is no part of the court’s function.....to try to resolve conflicts of evidence on affidavit as to the facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration**” [at 407H].

- [40] As outlined in the text between paragraphs [6] to [20] above, Counsel for the Defendant, Mr. Haynes centered his arguments in favour of the discharge of the injunction on the simple premise that the interim injunction in this case could only have been made in aid of the order for specific performance which the Plaintiffs have claimed.
- [41] Arguing from that premise, Mr. Haynes submitted that as the Defendant had been unable to obtain the consent of the majority of the Condominium Body Corporate as required by Bye-Law 8(f), the Agreement for sale of Unit 6 had been frustrated in consequence of which specific performance would not issue to the Plaintiffs. That being the case, Mr. Haynes was of the view that the rationale for the interim injunction could not be sustained and the injunction should therefore be discharged.
- [42] Having listened to the submissions of Counsel for the Plaintiffs Mr. Weekes, and taken note also of the various types of relief claimed for in the Writ of Summons herein, the Court is satisfied that the legal issues raised in these proceedings involve questions which go far beyond the simple question as to whether specific performance of the contract **in its present form** will issue.
- [43] In the light also of the Coyle and Haynes affidavits filed on behalf of both parties to the proceedings, it is clear that the Plaintiffs' case raises serious questions of law which in effect challenge the very existence and legal basis of Bye-Law 8(f) on which the Defendant has relied to treat the contract as having been frustrated.
- [44] The Court is also satisfied that this is not a straightforward case of specific performance and frustration of contract and that the Court

which ultimately hears the substantive application will also be called upon to determine whether the fetter contained in Bye-Law 8(f) of the Condominium Declaration on the right of the Defendant to dispose of his unit without the prior consent of a majority of the other unit owners is a matter which lawfully falls within the scope and contemplation of section 15 of the *Condominium Act, Cap. 224A*.

[45] The Court is also satisfied that aspects of the Plaintiffs' case raise important issues of public policy which the Judge who ultimately hears the substantive case would be required to consider and determine. These issues **are in addition to** the obvious issues of frustration, breach of contract, severance of illegal terms and specific performance which were identified and discussed during the submissions of Counsel.

[46] In the light of the Diplock guidelines in the *American Cyanamid Case*, it is not part of the Court's function at this stage of the proceedings to resolve these difficult questions of law, all of which call for detailed argument and careful consideration.

[47] I accordingly find that the Plaintiffs in this case have reached the required threshold under the first limb of the Diplock guidelines in that they have satisfied the Court that there are serious questions to be tried which cannot be resolved at this interlocutory stage.

(ii) Are damages an adequate remedy?

[48] That finding having been made, the Court is, in accordance with the Diplock guidelines in the *American Cyanamid Case*, required to go on to consider whether (assuming that the Plaintiffs were to succeed at the trial in obtaining a declaration as to the illegality of

Bye-Law 8(f) and in having it severed from the Agreement for Sale thereby establishing their right to an order for specific performance) the Plaintiffs would be adequately compensated by an award of damages for the loss they would have sustained had the injunction not been issued.

[49] During his submissions, Counsel for the Defendant, Mr. Haynes suggested that since specific performance would not issue at the trial the Plaintiffs might have a remedy in damages. Mr. Haynes, however, did not expand any further on the issue of damages as, in his view, this did not arise on the application.

[50] Not surprisingly, Counsel for the Plaintiffs submitted that damages would not provide an adequate remedy to the Plaintiffs in this case. He stressed that the Plaintiffs have always been and are still desirous of purchasing Unit 6 in the Freshwater Bay Condominium complex and have at all times been ready and willing to complete the purchase of Unit 6 and to perform their own outstanding obligations under the Agreement for Sale.

[51] Mr. Weekes drew the Court's attention to the undertaking in damages contained in the Order of July 9, 2007, which the Plaintiffs have given to the Court to compensate the Defendant for any damage which the Defendant might suffer as a result of the injunctive relief granted in the case. Damages, he submitted, would adequately compensate the Defendant for any damage which he might suffer as a result of the grant of the injunction.

[52] Having regard to the contents of the letter dated June 27, 2007 (Malcolm Deane to Clyde Turney) annexed as "P6" to the Coyle affidavit, in which the Plaintiffs are said to have obtained

information that the Defendant had started the process of selling the condominium to someone else, it is clear to the Court that if the injunction were to be discharged at this stage of the proceedings, there would be nothing whatsoever to prevent the Defendant from carrying out his stated intention of selling Unit 6 to someone else.

- [53] Paying due regard to the second limb of the Diplock guidelines and taking all the circumstances into account, the Court is satisfied that an award of damages in this case would not adequately compensate the Plaintiffs for the loss which they would suffer if the injunction were to be discharged prior to the trial of the substantive issues. Indeed, if the injunction were to be discharged at this stage, then the Plaintiffs would not only have lost the opportunity to purchase the property, but more importantly, would lose the opportunity to argue the serious issues of law upon which their case for specific performance is said to be founded.

(iii) The balance of convenience:

- [54] Mr. Weekes submitted that the ‘balance of convenience’ favours the retention of the interim injunction in this case and that the Plaintiffs are the only parties who would be prejudiced if the injunction is discharged. However, it appears that under the Diplock guidelines in the *American Cyanamid Case*, a Court need only go on to consider the balance of convenience “*where there is a doubt as to the adequacy of the respective remedies in damages available to either party or to both*” [at 408E]. Accordingly, as no doubt has arisen as to the adequacy of damages in respect of either party to these proceedings, the Court makes no finding in relation to ‘the balance of convenience’ in this matter.

Disposal:

[55] As the Court is satisfied: (a) that there are serious questions to be tried which cannot be resolved at this interlocutory stage; and (b) that damages would not provide an adequate remedy to the Plaintiffs in this case; and further (c) that the Plaintiffs' undertaking in damages which is currently in place in these proceedings will provide an adequate remedy to the Defendant, the application for the discharge of the injunction is refused. Costs of the application will be costs in the cause.

**Maureen Crane-Scott,
Judge of the High Court(ag)**