

BARBADOS

**IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
Civil Division**

No.1824 of 2012

BETWEEN

JOHN JAMES FABBEY

CLAIMANT

AND

A.A.G. INVESTMENTS INC.

DEFENDANT

Before The Hon. Madam Justice Jacqueline A. R. Cornelius, Judge of the High Court

2013: June 27

July 26

August 20

Mr. Roger Forde Q.C. and Floyd Phillips for the Claimant

Mr. Adrian Simm, Director of the Defendant appears.

DECISION

INTRODUCTION

- [1] In this application filed 12 November 2012, the Claimant seeks injunctive relief against the Defendant arising out of the non-performance of a contract for the sale of a condominium on the Barbados West Coast. More particularly, the Claimant applies to the Court for an interim order that: (1) he be entitled to take possession of the premises known as Lot 10, Sandown, Fitts Village in the parish of St. James; (2) the Defendant through its Directors/Officers/Agents be restrained from entering or further renting the said property and (3) the Defendant provide an account for all rents received for the rental of property from 19 December. This case involves the identical point of law dealt with in *James Norvill v A.A.G. Investments Inc. No. 1827 of 2012 (unreported decision of 20 August, 2013)*. The facts are slightly different.

BACKGROUND

- [2] The Claimant, John James Fabbey, is a United Kingdom (UK) resident. A.A.G. Investments Inc. (AAG) is a registered Barbadian company. By an Agreement dated 11 April 2008 the Defendant agreed to sell to the Claimant the property situate at Lot 10, Sandown, Fitts Village in the parish of St. James for the sum of US\$500,000.00. In pursuance of the said Agreement the Claimant paid to the Defendant the deposit in the sum of US\$50,000.00.
- [3] The Claimant deposed at paragraph 4 of his Affidavit filed 25 October 2012 that the said Agreement was amended on or around 27 July 2008. The Claimant further deposed that he and the Defendant, acting through its agent and one of its directors Mr. Simm, agreed that he would purchase an additional piece of land to be added on the said property for the sum of £15,000.00 and the parties agreed at the same time to revise the purchase money from US\$500,000.00 to £250,000.00. According to the Claimant, the amended Agreement provided that if the Certificate of Compliance was not issued by the Chief Town Planner prior to the payment of the balance of the purchase money he would be allowed to take possession of the premises on the payment of the further sum of US\$350,000.00 and final balance of US\$50,000.00.
- [4] The Claimant made the agreed payments of £200,000.00 plus the deposit \$50,000.00 representing 90% of the purchase price; however, no Certificate of Compliance has been issued by the Chief Town Planner with respect to the said property.
- [5] On 25 October 2012 the Claimant filed a claim form together with a statement of claim in which he pleaded the following: (1) that the Defendant in breach of the Agreement has refused to deliver up possession of the premises but has retained possession, rented the premises and retained the rents and profits and refused to allow the Claimant possession; (2) the Defendant has neglected or refused to provide the Claimant with (a) a good and marketable title and (b) a Certificate of Compliance certifying that the said property may be sold and (3) that he has suffered and continues to suffer loss of damage including the use of enjoyment of the said property.
- [6] The Claimant also sought orders *inter alia* that: (1) the Defendant deliver up possession to the Claimant of the said property; (2) the Defendant convey the fee simple in the property to the Claimant within a reasonable time or alternatively the Defendant repay to the Claimant all monies paid to the Defendant with interest from the dates of payment; and (3) the Defendant account to the Claimant for all sums received by the Defendant from any tenants or guests in occupation of the said property.
- [7] On 7 November 2012 Mr. Simm filed a defence and affidavit on behalf of the Defendant. In the defence, he accepted that the Claimant moved into the property having made part payment of the purchase price and that the basis of the Claimant's occupation was under a licence/permission from AAG in order to

avoid the difficulties of taking possession with the prospect of the Certificate of Compliance not ever becoming available. Put simply, the Claimant is a mere licensee.

- [8] On 29 November 2012 the mortgagee of the property Republic Bank (Barbados) Limited (by virtue of a Legal Mortgage made 6 November 2007 between the Defendant and the Mortgagee) applied to be added as a party to the proceedings and that matter was heard and disposed of. The mortgagee also seeks possession of the property.

ISSUE

- [9] The issue to be determined in this application is whether the Court in its inherent jurisdiction should exercise its discretion in granting to the Claimant the injunctive relief which he seeks. Put differently, should a court, in these circumstances, grant an injunction which effectively puts a Claimant into possession of a property where the title is in issue and there is no indication at this stage that the title can be perfected?

SUBMISSIONS

- [10] It is the case for the Claimant that he has performed all he is required to do under the Agreements for the sale of the property. He is ready and willing to complete the purchase of the property but the Defendant is unwilling and has refused to do so. Mr. Forde QC submitted that there is a serious issue to be tried, that of the breach of contract. In short, whether the contract has been frustrated or whether it can be completed at all and therefore capable of specific performance. Further, he argues that the balance of convenience falls heavily on the side of the Claimant, who should not therefore be denied his injunction, and that this is not a case in which damages would be adequate.
- [11] Mr. Simm is of the (erroneous) view that the Claimant is seeking possession based on the fact that he previously entered into possession of the property. However, it is sufficient to say that that any claim for possession cannot now, and does not rest on that agreement, but on the nature of the contract itself.
- [12] Mr. Simm further argued that the injunction should not be granted because either, the contract is *void ab initio*, or it has been frustrated by the Claimant. This is what the Court can distill from the somewhat tortuous and confused pleadings filed by the Defendant to be the crux of the substantive case. It appears from his affidavit and the Defence that the failure of the Defendant to obtain the Certificate of Compliance has arisen because it has been unable to obtain a right of way necessary to satisfy the relevant Town and Country Planning regulations. Consequently, the sale of Lot 10, Sandown cannot be completed without this right of way. In this jurisdiction the Certificate of Compliance from the Chief Town Planner is necessary to give effect to the sale of property as it certifies that a lot may be sold or disposed of.
- [13] He pointed out that an injunction allowing the Claimant possession would effectively require him to trespass on the land over which the right of way has not

been granted, since there is every indication that such permission will not now be granted. In the circumstances, he argued the injunction should not be granted because if in fact the contract cannot be performed, damages will not just be an adequate remedy, but the only remedy.

THE LAW

[14] Section 44 (b) of the *Supreme Court of Judicature Act Cap 117A* confers upon this court the discretion to “grant a mandatory or other injunction”. In this jurisdiction it has been established that the case of *American Cyanamid Co. v Ethicon Ltd* [1975] A.C. 396 sets out the guidelines to be applied in determining whether or not to grant an injunction. In the recent Barbadian case of *Toojays Limited v Westhaven Limited Civil Appeal No. 14 of 2008 (Court of Appeal, Decision of 16 September 2011)* Burgess JA was of the view at paragraph [42] that, “the *American Cyanamid* guidelines must be taken to have established a two-stage inquiry. The first involves a consideration of whether there is a serious case to be tried and at the second stage the balance of justice (convenience) is the governing consideration. There, he succinctly stated as follows:

“[79] ... First, there is no doubt that the principles laid down by Lord Diplock in the *American Cyanamid* establish the guidelines to be applied by our Courts in determining whether or not to grant or discharge an interlocutory injunction. Second, in applying these guidelines, Courts must consider two questions. These questions are, whether there is a serious case to be tried and, if the answer to that question is in the affirmative, then the further question becomes whether the balance of justice lies in favour of granting or refusing the interlocutory relief.

[80] Third, because equity follows the law and the law regards justice as being best achieved by an award of damages, the Court must consider as a significant factor in assessing the balance of justice the question whether if the plaintiff succeeds he would be adequately compensated by damages for loss sustained between application and trial. If the plaintiff can be so compensated in damages the defendant should not be restrained by an interlocutory injunction except in exceptional circumstances.

[81] Fourth, case law has established that proceedings involving the grant or discharge of an interlocutory injunction in aid of an application for specific performance constitute an exceptional circumstance. Consequently, the question of whether damages would be an adequate remedy

in such cases is not to be treated as a question separate and apart from the second question where does the balance of justice lie.”

The Discretion to Grant Injunctive Relief

- [15] With regard to the first question, do the facts in the present matter disclose a serious issue to be tried? In the substantive claim, the Claimant is seeking possession and specific performance of the contract. The Defendant admits that it cannot complete the contract as it is unable to provide a Certificate of Compliance due to the lack of a right of way. The Defendant’s position is that the failure to do so is not its fault and that the contract is either *void ab initio* or has been frustrated, and the only remedy available to the Claimant is damages. Both parties agree that there is a serious case to be tried and the Court so finds.

The Balance of Justice

- [16] Having determined that there is a serious case to be tried, I now turn to the second question of whether the justice lies in favour of granting or refusing the injunction. In *Toojays (supra)*, the Court at paragraph [50] cited with approval the dictum of Kerr LJ in *Cambridge Nutrition Ltd. v British Broadcasting Corporation* [1990] 3 All E.R. 523 at 535: “The function of the court in relation to the grant or refusal of interlocutory injunctions is to hold the balance as justly as possible in situations where the substantial issues between the parties can only be resolved by a trial”. The Court found that task to be complex by nature and observed, as was noted by Lord Hoffman in *National Commercial Bank of Jamaica Ltd v Olint Corp’n Ltd* [2009] 1 W.L.R. 1405 at 1409 that, “... the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irreparable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be”.
- [17] In order to hold that balance justly, I will turn first to the consideration of the adequacy of damages. As was stated in *Toojays*, in proceedings, such as the present one, involving the grant of an injunction in aid of an application for specific performance, the question of whether damages would be an adequate remedy is not to be treated as a question separate and apart from the question of where does the balance of convenience lie.
- [18] Generally, in cases where a party applies to the Court for an injunction in aid for an application for specific performance, the Court is concerned with “the preservation of the interests of the parties in as just a manner as is possible pending the final determination of their rights”: the Court in *Toojays* at paragraph [66] citing Spry. Thus, an injunction requested will almost certainly be granted to prevent a vendor from dealing with the property if there is a clear and undisputed contract. In cases where no special circumstances exist, no inquiry into the adequacy of damages is usually necessary.

[19] In the instant case, the Claimant is seeking possession of the property, to be more precise, for the Defendant to be prohibited from denying him possession until the trial of the issue in which he seeks to enforce the contract. The Defendant says it cannot complete the contract through no fault of its own. There is no affidavit evidence from the Claimant to contradict the assertion of the Defendant that the contract cannot be completed because of any fault of the Defendant. That is clearly a matter for trial, if the pleadings are allowed to stand in the state they are in.

[20] At this stage the Court is not in a position to say whether the contract for the sale of the property can be completed or not and the Claimant be given possession. What the Court can say is that if the injunction is granted and the contract cannot be completed as the Defendant contends, the Claimant will have to give up possession and be restricted to an award of damages. There is no evidence or argument from the Claimant at this stage as to how this contract is to be completed in the absence of the Certificate of Compliance, which would indicate that specific performance is possible. It has not been denied that without the right of way the access to the property involves a trespass over land which does not belong to the Defendant as vendor and that the Claimant seeks to be put into possession of property to which title possibly can never be granted to him. This seems an untenable situation to create. Equally untenable is the fact that the Defendant has received a significant amount (90%) of the purchase price and cannot or will not complete.

[21] When these relative factors are balanced, as in the case of *James Norvill v A.A.G Investments Inc.*, the Court comes to the same conclusion that in these circumstances, it would be just for the Claimant to be confined to his damages for the breach of the contract of sale between the application for the injunction and the trial. If the Claimant succeeds at trial and his application for specific performance is granted, he will be adequately compensated in damages for the loss he would have sustained as a result of the Defendant's denying him possession between the time of the application and the time of trial. According to the evidence, the Claimant will suffer no irremediable prejudice by the refusal of the injunction.

CONCLUSION

[22] I consider that the balance of justice lies in favour of refusing the injunction and maintaining the status quo until trial of the issue. I add that I would have had no difficulty granting the injunction if there had been evidence that the title could be perfected.

[23] I make an order for a speedy trial and further order that the matter be set down before me for case management within 28 days. I will hear arguments as to costs.

Jacqueline A R Cornelius
Judge of the High Court