

BARBADOS

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

No. 1827 of 2012

BETWEEN

JAMES NORVILL

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] This is one in a series of applications against the Defendant for similar injunctive relief arising out of the non-performance of contracts of sale of condominiums on the Barbados West Coast. In this application James Norvill, a United Kingdom (UK) resident seeks an interim injunction: (1) to restrain the Defendant through its servants and/or agents from entering the premises known as Lot 5, Sandown, Fitts Village in the parish of St James; (2) to require the Defendant to return all keys, locks and security devices, and (3) to require the Defendant through its servants and/or agents to give peaceful and quiet enjoyment of the premises until the trial of the action.

BACKGROUND

[2] A.A.G. Investments Inc. (AAG) is a registered Barbadian company. Mr. Norvill resides in South Wales in the United Kingdom. On 14th February 2008, these two parties signed an agreement in which Mr. Norvill agreed to purchase the property Lot 5 Sandown from AAG for \$420,000.00 United States dollars. The agreement contained the following terms:

(a) that the Claimant should pay a deposit of US\$42, 000.00;

(b) that the date of completion of the said sale shall be 30 days after the Defendant has notified the Claimant in writing that the Chief Town Planner has issued his Certificate of Compliance certifying that the Lot may be sold or otherwise disposed of;

(c) that the Claimant shall subscribe and take up one share in the capital of common services at a subscription price of \$1.00 and

(d) that the Claimant should pay a monthly maintenance fee of \$350.00 for common services.

[3] Mr. Norvill duly paid AAG the deposit as agreed. He later paid, with the agreement of AAG, two further sums of US\$336,000.00 and US\$21,000.00. In February 2008 he took possession of the property with the agreement of the Defendant and paid all the costs under the contract. AAG has not now been able to produce the Certificate of Compliance and on 16th August 2012, AAG through its agent John Simm locked Mr. Norvill out of the property.

[4] On 25th October 2012, Mr. Norvill filed a claim form and a statement of claim seeking orders for: (1) injunctive relief; (2) that AAG convey the property to him within a reasonable time; (s) an account for all the sums received by AAG from any of AAG's tenants or guests in occupation of the premises or alternatively (4) the return of the sum of US\$399,000.00 with interest.

[5] This application for the interim injunction was filed on 12th November 2012. For completeness, it should be noted that the mortgagee of the premises, Republic Bank (Barbados) Limited (Republic Bank) applied to be added as a party to the proceedings on 29th November 2012, and that matter was heard and disposed of. Republic Bank also seeks possession of the property.

FACTS

[6] These facts are not disputed. It is the case for the Claimant that he has performed all he is required to do under the contract. He has deposed that he has advised the Defendant that he is ready to complete and the Defendant has refused to do so. Mr. Forde QC agrees that there is a serious issue to be tried. Namely, the breach of contract, the claim for specific performance and whether the contract has been frustrated or whether it can be completed at all.

[7] 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.

[8] The argument for the Defendant is made somewhat difficult by the fact that the director Mr. Simm has presented the case. On 7th November 2012 Mr. Simm filed a defence along with an affidavit on behalf of the Defendant. The defence, which the Claimant has made an application to strike out as it raises a number of serious procedural problems, rests on two planks. These are the same arguments he uses in this application. Firstly, he points out that further to the written contract it was agreed between himself and the Claimant through a series of e-mails exhibited in his affidavit of 7th November that Mr. Norvill should enter into occupation as a

licensee to avoid the difficulties of taking possession with the prospect of the Certificate of Compliance not ever becoming available. The e-mail from Mr. Norvill of the 25th May 2010 states as follows:

“Adrian, I am prepared to agree that you are now allowing me occupation of Sandown 5 on the basis of a licence/permission from AAG because the sale and purchase has not yet completed. However, I must be clear that I am still taking legal advice on my position and claims that I may have against both Floyd Phillips and/or AAG and for this reason, my agreeing to a licence is on the basis that I am reserving my legal rights against all parties...”

- [9] Mr. Simm is of the (erroneous) view that the Claimant is seeking possession based on the fact that he previously entered into possession and paid the maintenance and utility bills. In fact, to dispose of that point here and now, it is enough 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.
- [10] Secondly, Mr. Simm argues more sensibly 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, the crux of the substantive case.
- [11] It appears from the defence and Mr. Simm’s affidavit 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. This right of way, he argues, should have been provided for when Mr. Phillips (now counsel for the Claimant) acted as counsel for the vendors of the land on which the condominiums are built; but it was not. The Claimant has made no comment on this, undoubtedly he correctly considers its relevance to be minimal, but he does not deny the Defendant’s assertion that the sale of Lot 5, Sandown cannot be completed without this right of way.
- [12] In the circumstances, Mr. Simm argues that the purchase monies should not have been paid to AAG and that the Claimant should sue Mr. Phillips for negligence. He makes the point that he has requested from the Claimant’s attorneys-at-law an “advice” on how the defect in title can be cured but that they failed to provide the requested legal information despite indicating that they were aware of the solution.
- [13] He points 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 argues 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.
- [14] Two more points in relation to the Defendant’s case are of interest. Firstly, the Defendant says it cannot repay any money to the Claimant because it has used the funds in building the properties, which it now cannot sell. Secondly, the entire

property which has not yet been subdivided and of which this lot forms only a part has been mortgaged to Republic Bank which is seeking repayment of the loan or possession of the entire lot. That case, suit no. 1724 of 2012 is also to be heard by this Court. I mentioned Republic Bank's application to be joined as a party earlier.

- [15] The issue for the Court is this. 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? There is no doubt that there is a triable issue here. The determination of the matter rests on the relative strength of the respective cases; where does the balance of justice or convenience lie?

The Discretion to Grant Injunctive Relief

- [16] 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 *Toojays Limited v Westhaven Limited Civil Appeal No. 14 of 2008 Barbados Court of Appeal, Decision of 16 September 2011*) Burgess JA 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.”

- [17] With regard to the first question, as stated before there is no doubt that there is a serious issue to be tried. In the substantive claim, the Claimant is seeking possession, specific performance of the contract or repayment of the US\$399,000.00 he has paid the Defendant. The Defendant admits that it cannot complete the contract as it is unable to provide a Certificate of Completion due to the lack of a right of way. Mr. Simm’s position is that the failure to do so is not the Defendant’s 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 issue to be tried and the Court so finds.

The Balance of Justice

- [18] I turn now to the second question. The function of this Court in exercising its discretion to grant an interlocutory injunction 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”: per Lord Kerr LJ in *Cambridge Nutrition Ltd. v British Broadcasting Corporation* [1990] 3 All E.R. 523 at 535 quoted with approval in *Toojays (supra)* at paragraph [50]. To do so, the court “has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) ...”: per Lord Hoffman in *National Commercial Bank of Jamaica Ltd v Olin Corp’n Ltd* [2009] 1 WLR 1405 at 1409.
- [19] In order to hold that balance justly, I will turn first to the consideration of the adequacy of damages. As stated in *Toojays*, where a claim for an injunction in aid of specific performance arises, 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.
- [20] This is an unusual case. Generally, in 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”: *Toojays (supra)* at paragraph [66]. 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 such special circumstances no inquiry into the adequacy of damages is usually necessary.
- [21] In this 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.

[22] At this stage the Court cannot say whether the contract can be completed or not and the Defendant given final 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 all of the purchase price and cannot or will not complete.

[23] When these relative factors are balanced, the Court comes ineluctably to the 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 irreparable prejudice by the refusal of the injunction.

CONCLUSION

[24] 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.

[25] 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.

[26] Leave to appeal.

Jacqueline A R Cornelius
Judge of the High Court