

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No 627 of 2014

**LUNAR CAPITAL LIMITED
AJMAL KHAN**

**1ST CLAIMANT
2ND CLAIMANT**

-AND-

LUCIEN RÉMILLARD

DEFENDANT

Before the Honourable Mr. Justice William J. Chandler, Judge of the High Court

**2014: April 16 and 17;
2015: March 13**

Mr. Barry L.V. Gale Q.C., in association with Mrs. Laura F. Harvey-Read for the Claimants

Mr. Dale D. Marshall Q.C., Mr. Andrew Thornhill and Mr. Khamaal Collymore of Messrs George Walton Payne & Co. for the Defendant

DECISION

[1] On 17 April 2014, having accepted the usual undertaking in damages in respect of loss to the Defendant or third parties, I issued a mandatory injunction in this matter in the following terms:

- (i) The Defendant, whether acting himself or by his servants or agents, do permit the Claimant free and unobstructed entry into the property

together with all of its amenities known as “Cove Spring House” situate at the Garden in the parish of Saint James in this Island (hereinafter referred to as “the Property”) so as to have full use and enjoyment of the Property by 1.00 p.m. 19th April 2014 to 27th April, 2014.

(ii) The Defendant is restrained by himself, his servants or agents or otherwise or in any other way from interfering with the Claimant’s use and enjoyment of the Property in any manner whatsoever between 1.00 p.m. 19th April 2014 and 27th April, 2014.

(iii) Question of costs reserved.

[2] I promised to give my reasons and do so now.

BACKGROUND

[3] The claimants in this matter were the owners of a luxury villa called ‘Cove Spring House’ situate at ‘The Garden’ St. James and located on the West Coast of Barbados. In the latter part of 2013, the parties entered into an Agreement for Sale for the property and it was agreed that the second claimant would continue to have access to the Property on listed dates that were agreed. This action commenced as a result of the defendant’s unwillingness to grant the second claimant access on the agreed dates.

- [4] In 2002, Lunar Capital Ltd purchased all the shares in a company known as ‘Suncity’; the company that owned Cove Spring House. The second claimant was the sole and ultimate beneficiary of all the shares in Lunar Capital Ltd and as such acquired sole beneficial ownership of the Property. By Offer to Purchase the defendant sought to acquire all of the shares in Suncity for the sum of USD \$41,250,000.00. The offer was to purchase not just the Property itself but all the moveable rights and assets located therein including furniture and accessories but with the exception of the second claimant’s personal effects.
- [5] Clause 6.2 of the Offer to Purchase contained, *inter alia*, the following provision:
- ‘...the purchaser consents that the vendor may have the use or benefit of the property for a period of three (3) weeks per year, rent free, during five (5) years following closing. The period of such lease shall be agreed between the parties on an annual basis...’
- [6] A formal share purchase agreement dated 14th November 2013 was drawn up with Mr. Khan as Guarantor and pursuant to clause 6.2 of the Offer to Purchase, it was agreed that the claimants would have the right to occupy the premises rent free on dates that were specified in a schedule to the Share Purchase Agreement (clause 8 and schedule 9). As was contained in the

Offer to Purchase, a list of Mr. Khan's personal effects was included at schedule 7 of the Agreement. The schedule was in the following terms:

ITEM	DESCRIPTION
Wine, Liquor	All, being approximately 544 bottles of red/white wine and champagne; Two wine coolers for refrigeration of wines; Approximate equivalent of 42 bottles liquor comprising part/full
Clothing	Various clothing in owner's closet
Automobile	2006 Mercedes Benz ML350 SUV
Piano	Large Piano, actually belonging to Arshad Khan
Terry O'Neil Photo Collection	All being approximately 16-18 framed signed b/w photographs

[7] On 8th November 2013, Mr. Khan's agent, Stephen Parker removed the following items from the property (listing is USD)

- (a) One small antique boat - \$25,000.00
- (b) 2 large black consoles - \$10,000 each
- (c) One large chest - \$2,000.00
- (d) 21 bath mats - \$60.00 each
- (e) 36 bath towels - \$110.00 each
- (f) 19 bath sheets - \$100.00 each
- (g) 49 hand towels - \$75.00 each
- (h) 31 robes - \$150.00 each
- (i) 31 wash cloths - \$50.00 each
- (j) 3 boxes of candles - \$300.00 each

TOTAL - \$64,895.00

[8] The defendant's agent, Andre Marier, made a report to the Royal Barbados Police Force. In the ensuing period the defendant advised that the dates as

specified in the Schedule would not now be kept and correspondence between the parties' Attorneys both here and in Canada began.

THE APPLICATION

- [9] The claimants' application is one for specific performance of the obligations imposed under clause 6.2 of the Offer to Purchase and under clause 8 and schedule 9 of the Share Purchase Agreement under Vendor's use of Property Post Closing. The claimants seek additionally an injunction restraining the defendant (his servants, agents or otherwise) from breaching clause 6.2 of the Offer to Purchase and clause 8 and schedule 9 of the Share Purchase Agreement and/or from interfering with the claimant's use and enjoyment of the property.

The Injunctive Proceedings

- [10] By Notice of Application dated 15th April 2004, the claimants made an urgent application for interim injunctive orders (1) to permit them free and unobstructed access to the property from 17th April 2014 until 27th April 2014 inclusive; (2) restraining the defendant his servants and agents from interfering with the claimant's use and enjoyment of the property between 17th April 2014 and 27th April 2014 inclusive; and (3) such other relief as the court considered just and appropriate. As stated earlier at paragraph [1], on 17th April 2014, this court, accepting an undertaking in damages from the

claimants, granted the orders sought by the claimant for interim relief save that the time period specified was from 13:00hrs on 19th April 2014 to 27th April 2014.

[11] The affidavits in this matter whether filed either for or against the interim application, set out the entirety of the evidence and are germane to my determination.

Affidavit of Stephen Parker

[12] Mr. Parker provided the claimants with property management services and was the claimants' agent in Barbados. He deposed that the reason why the claimant had purchased the property was because it was one of a kind and unique on the Island. He states that the property is unique in a number of different ways as set out below:

- a. The property has 10 en-suite bedrooms
- b. The property is on the water with its own secluded beach
- c. The property is on the West Coast, the 'Gold Coast'.
- d. The property has its own private cinema and gym
- e. The property was fully air-conditioned; and
- f. The property was fully staffed by a manager, an assistant manager, a chef, a cook, kitchen assistant, 4 Butlers, 5 Housekeepers; 2 landscape artists and 2 security guards at night.

[13] Mr. Parker deposed further that the second claimant and he were last in the property between 12th and 15th November 2013. He stated that during the visit, Mr. Khan gave him various gifts which he considered to be his

personal effects. These gifts included 2 pieces of furniture (one from his mother and the other from another gentleman), candles (which he purchased from Bali), candle holder and some robes amongst other things. The Assistant Manager at the time organized a truck to transport these items to his house and this was done with Mr. Khan and various members of staff in house at the time. Mr. Parker stated that Mr. Khan then removed his other personal items from the Property including his wines, 2 wine fridges, liquor, clothing, car and a sculpture of a boat which was a gift. Mr. Khan, however, left pictures in the Property and it was understood that they would be collected subsequently.

- [14] After the sale, the defendant's agent, Andre Marier informed him that things were missing from the Property. Mr. Parker stated that he responded to Mr. Marier indicating that items were given to him by Mr. Khan. He did not want to create problems for Mr. Khan so he arranged to return the two pieces of furniture. When the truck was on route to return the furniture, the property manager was told by the defendant to cancel the truck and Mr. Parker said that he was informed not to return the 2 pieces of furniture. Mr. Khan's piano, he stated, was collected on or about 27th December 2013, but the Terry O'Neil Photos were still in the Property.

[15] Mr. Parker stated further that in an effort to resolve the matter, it was agreed that USD \$7,000.00 would be paid to the defendant in consideration of the disputed items. Mr. Khan had paid staff salaries owed by the defendant for 2-3 weeks and after netting off the monies owed, USD\$1,236.16 (BBD\$2,474.72) was then due and owing to the defendant. Mr. Marier then informed him that the monies owed could not be set off and stated further that the dates for Mr. Khan's stay at the Property could not be held due to the nature of the unsolved issues. The defendant's lawyers subsequently confirmed the dates via e-mail and queried the dates for Mr. Khan's stay in July to August (2014).

[16] Mr. Parker stated that on 10th March 2014, the cheque for BBD\$2,472.72 was sent to the defendant's banker but was returned on 13th March 2014. Mr. Marier stated that they were no longer accepting any payment and criminal charges had been filed. He was subsequently informed that Mr. Khan's name was not on the schedule of guests for the April period anymore. He e-mailed Mr. Marier on 9th April 2014 seeking confirmation that Mr. Khan would have use of the Property in April as agreed and pointing out that in particular that Mr. Khan would be entertaining HRH The Duke of York during the period.

[17] He stated that the defendant's lawyers then responded by e-mail stating that the defendant was now unwilling to have Mr. Khan stay at the Property because of the missing items incident. The e-mail stated that had it not been for the incident the defendant would have fulfilled his side of the agreement and he considered that Mr. Khan had fundamentally breached the agreement.

Affidavit of Ajmal Khan

[18] Mr. Khan's affidavit largely confirmed the version of events as deposed to by Mr. Parker. Mr. Khan did state however in his prayer for a mandatory injunction that there were other comparable and/or suitable properties in Barbados of the same calibre and standard.

Affidavit of Andre Marier

[19] Mr. Marier stated that he is the defendant's agent and that in such capacity, he negotiated the purchase of the Property (known as Cove Spring House). He stated that there was a clear agreement as to what items would be considered the personal property of Mr. Khan and as such capable of being removed by him. He stated that because of the unlawful removal of the items, which constituted an act of total dishonesty, the defendant was unwilling to allow Mr. Khan to occupy the villa. The conduct of Mr. Khan and his agent was not only a breach of the agreement but unlawful, dishonest and unprincipled.

[20] Mr. Marier agreed that neither the Offer to Purchase or the Share Purchase Agreement included a specific inventory but he stated that the schedule entitled 'Ajmal Khan Personal Item' was signed and agreed by both parties. The items, he stated, which were removed should not have been removed; the removal was wholly improper and a breach of contract. The only items which Mr. Khan was permitted to remove were the items as agreed.

The case for the Claimant

[21] Mr. Gale submitted that both the Offer to Purchase agreement clearly established the right of the Claimant to occupy the Property on the dates specified in the schedule of the share purchase agreement. The contracts had been freely entered into by the parties. Two items of furniture were taken from the Property along with robes, candles and candle sticks prior to completion.

[22] The Claimant took the boat which he considered to be his personal effect since it was a fiftieth birthday gift from Mr. Dermott Desmond, the owner of Sandy Lane. The other items he gave to Mr. Parker as gifts. After completion, complaint was made about the removal of the items and the claimant offered to return the furniture and arranged for their return. This process was stopped by the Defendant. Thereafter, negotiations ensued for compensation and the figure of 7000.00 US dollars was agreed (the

compromise agreement). On closing the Defendant did not have a checking account to pay the staff and the Claimant paid the wage bills on his behalf of about 5,800.00 US dollars which was set off against the 7000.00 USD leaving a balance of 1200.00US. A cheque for 2,400.00 BDS dollars (presumably the BDS equivalent of \$1,200.00 USD) was tendered to Victoria Bank which is owned by the Defendant. The cheque was sent back the next day. An email was received from Mr. Marier stating that the Defendant was not accepting any payment and that criminal charges had been deposited (laid).

[23] Counsel opined that this was a breach of the compromise agreement. He further urged that there could be no fundament breach of contract by the Claimant by removing the items when there was an agreement for compensation and set off in respect of these items. If there was a breach, which was not admitted, it was cured by the compromise agreement. Counsel also referred to the email of Mr. Gagnon (SP7) in which Mr. Gagnon wrote that there was no problem with the April 17 to 27 stay, stated that the Defendant wanted to know the exact dates in April that the Claimant wished to stay and the suggestion that the parties could have an open dialogue. The email was dated February 2014 and the guests who were

staying in the house had been booked in after that date. Thereafter, the Defendant had a change of heart and reneged on the agreement.

[24] Counsel referred to an email (SP10) from Mr. Parker to Mr. Marier dated 9 April, 2014 in which he advised that His Royal Highness (HRH) the Duke of York would be the Claimant's guest. There was no answer and thereafter, Mr. Gagnon on the 9th April, 2014 wrote that after careful consideration, the Defendant was unwilling to have the Claimant stay at the house. Mr. Gale submitted that the Defendant was in flagrant breach of his contractual obligations in respect of the Claimant's occupancy of the house. Having had knowledge of the Claimant's rights and his intention to exercise those rights, since November of 2013 and with knowledge that court proceedings had been filed, the Defendant rented the Property to someone else. The court should have regard to the fact that the Defendant had thereby attempted to "steal a March" and had acted high handedly (**Spry "Equitable Remedies" 7th Ed 2007, Lawbook Co Australia (Spry)**).

[25] Counsel submitted that the Property was unique in terms of its location and amenities. He submitted that the mandatory injunction had a similar effect as an order of specific performance (**Spry**). The Claimant had a contractual license to occupy the Property which was in the nature of a proprietary right.

[26] The Claimant was willing to give an undertaking in damages. If there was any hardship to the Defendant it was of his own making. He also submitted that if, as the Defendant claimed, there were comparable properties the Defendant could move the 13 new guests into one of those properties. The court should exercise its discretion in favour of the Claimant since the Defendant's chances of success were remote. The court should act with caution, however, the balance of justice demanded that the injunction be granted. He relied upon **American Cyanamid Co v Ethicon Ltd [1975] AC 396, [1975] 1 All ER 504, [1975] 2 WLR 316, HL. (American Cyanamid) and Toojays Limited v Westhaven Limited, Civil Appeal No. 14 of 2008 (unreported) (Toojays).**

The Defendant's submissions

[27] Mr. Marshall urged the court to disabuse itself in relation to the alleged visit of the Duke of York. The Claimant was in no position to prove that the Duke was actually visiting Barbados. He referred to the agreement for sale and share purchase agreement and submitted that there was a warranty on the part of the vendor in paragraph 4.1.3.

[28] The furniture and equipment were part of the Property which was sold and the personal items had been agreed. The schedule of the share purchase agreement listed the assets of the company on the date of completion and

schedule 7 contained the personal items of the Claimant. Therefore, the Claimant could only remove those items that he was contractually allowed to. The removal of any other items constituted theft. Whether or not the boat was a gift to him was irrelevant, it was not one of the items listed as his personal items. The Claimant, he alleged had taken 31 bath robes, 31 wash cloths and three boxes of candles, 21 bathmats and bath towels among other things. No distinction could be made between grand theft and small theft.

[29] Counsel also submitted that the alleged agreement for compensation did not cure the breach of contract. Counsel submitted also that SP8 an email sent 24th February 2014 from John Fraser to Charles Gagnon was a request for confirmation that the USD \$7000.00 dollars was in satisfaction of all outstanding matters relating to the contents of the Property and was really a question. There was no evidence of any response to Mr. Gagnon's email which spoke of the USD \$7000.00 in respect to the furniture. There was therefore, no true agreement or any resolution of the breach of contract. There was no question of the Defendant stealing a march on the Claimant. The Property was a rental property and the contract of sale included bookings to which the Property was already subject. To grant a mandatory injunction would not be to maintain the *status quo*. The Claimant was not in occupation of the Property and the grant of a mandatory injunction would

have the effect as granting specific performance without proceeding to trial. Such injunctions are less readily given than prohibitory injunctions. The court must ask itself whether there was a high degree of assurance that specific performance would be granted at trial.

[30] The court should also look at the effect of the proposed order on third parties. The proposed order would create hardship on the 13 innocent persons who had been booked into the property as guests. The Claimant, counsel submitted, had brought this situation upon himself. To permit someone to stay in one's house require trust and confidence which did not exist here, since things were taken wrongfully (**Shell U.K. LTD v Lostock Garage Ltd [1976] 1 WLR 1187**).

[31] The court should consider the maxim of equity that he who comes to equity must come with clean hands and deny the relief sought.

[32] In reply Mr. Gale submitted that the court should look at the relevant strength of the Claimant's case and sought to distinguish the authorities cited by the Defendant's counsel.

Discussion

[33] The parties agree that the relevant law is to be found in **Toojays** which analysed the decision in **American Cyanamid**. **Toojays** established that, in order to succeed in a claim for interlocutory injunction, the Claimant must

prove (1) that he has a strong arguable case against the Defendant and (2) that the balance of convenient favours the grant. He must prove that damages are not an adequate remedy.

[34] The court has had regard to all of the evidence presented in the affidavits and to the agreement for sale and the share purchase agreement. It is clear that the parties were in negotiation for settlement of the outstanding issues in relation to, inter alia, the items which were removed from the property. Of crucial importance was the email of 18 February 2014 in which the Defendant's counsel Mr. Gagnon stated "There is no problem with the April 17-27 stay. Mr. Remillard would like to know the exact dates that Ajmal would like to stay at Cove Spring during July and August as he wants to make some plans for these two months. He also has a rental request for July 28-Aug 4 ... They could have an open dialogue and iron out any outstanding issues."

[35] Of equal importance is the Defendant's change of heart when his counsel wrote in an email dated 9th April 2014 to Mr. Parker that the Defendant after careful consideration was unwilling to have the Claimant stay at the property. Mr. Gagnon also wrote "But for this incident, he would have fulfilled his side of the agreement but considers that the actions of Mr. Khan constituted a fundamental breach of the agreement." It is not the court's

function, at this interlocutory stage of proceeding to resolve the outstanding issues of breach of contract between the parties. The Defendant's submission on this issue would require me so to do. Whether or not there has been a breach of contract fundamental or otherwise is to be resolved at the full hearing of this matter. I am guided by the decision in **Toojays**. Having regard to the affidavit evidence and the correspondence between the parties acting through their respective counsel, I am of the opinion that the Claimant has a strong arguable case in breach of contract against the Defendant applying the first limb of the **Toojays** principles.

[36] It was submitted on the Defendant's behalf that to maintain the status quo ante would be to maintain the situation where the 13 guests were booked into the Property. I am of the opinion that the status quo is related to the contractual arrangements between the parties whereby the Claimant is entitled to occupy the Property for the periods stated in the agreement. The Defendant was well aware that the Claimant intended to insist on his right to occupy the Property on the stated dates and, after negotiations ensued, agreed to his stay. No mention was made that other guests had been booked into the Property.

[37] Mr. Marshall submitted that the Claimant had not acted equitably by taking items contractually belonging to the Defendant. Having regard to the

affidavit evidence, I cannot conclude that the Claimant stole the items which he took from the Property. The Court would have to hear these parties give their evidence in chief and under cross examination to make such a finding. An allegation of theft requires proof of an intention permanently to deprive the owner thereof or the *animus furandi* which affidavit evidence does not allow me to draw a conclusion thereon.

[38] In respect of the question whether or not the balance of justice favours the grant of the mandatory injunction, the court cannot ignore the allegation that **HRH**, the Duke of York, is to be guest of the Claimant at the Property. This must be balanced against the impact of any proposed order on the 13 innocent persons who are presently staying at the Property. The court cannot ignore the immense damage that could be done to the international reputation of Barbados if HRH the Duke of York, was to visit Barbados and no suitable accommodation and security arrangements put in place for his stay. This matter has implications beyond the private contractual arrangement of these parties. In balancing the respective interest of all sides, I am of the opinion and hold that damages would not be an adequate remedy in these circumstances and that the balance of justice favours the grant of the mandatory injunction. It must be noted that in this regard, the court asked

for and received email evidence from Mr. Parker via his mobile telephone, that Buckingham Palace had confirmed the prince's visit.

[39] The Court expresses its appreciation to all counsel for the excellence of their arguments, research and the authorities handed up to the Court at very short notice.

William J. Chandler
High Court Judge