

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 1241 of 2016

BETWEEN

DR. MARTIN KLAUS BUDER

FIRST

APPLICANT/CLAIMANT

DR. ASTRID BEATE ANGELA PFENNING

SECOND

APPLICANT/CLAIMANT

AND

NORMA ALBERTHA COX

RESPONDENT/DEFENDANT

Before The Honourable Madam Justice Pamela Beckles, Judge of the High Court

**2017: February 14
September 8**

Appearances:

Mr. Lalu Hanuman, Attorney-at-Law on behalf of the Applicants/Claimants

Mr. Elliott D. Mottley, Q.C. in association with Mr. Stewart Mottley and Ms. Ava Marisa Lee, Attorneys-at-Law on behalf of the Respondent/Defendant

DECISION

Introduction

[1] By way of a fixed date claim form dated and filed September 14, 2016, Dr. Martin Klaus Buder and Dr. Astrid Beate Angela Pfenning ("the First

and Second Applicant/Claimant” respectively) instituted a claim against Norma Alberta Cox (“the Respondent/Defendant”) seeking the following relief:

- “1. Specific Performance by the Defendant of her written contract or agreement of the 23rd day of June, 2016 to allow the Claimants to purchase the property known as “The Palms” for \$500.000.00 Barbadian dollars.
2. Such damages for the breach of contract and or agreement as the Honourable Court deems fit, and or damages for breach of contract and or agreement in lieu of or in addition to an Order for Specific Performance.
3. Further or other relief.
4. Costs.”

[2] The First and Second Applicant/Claimant at the same time also filed an exparte application under a certificate of urgency for injunctive relief.

[3] This application was heard on the 22nd September, 2016 by **Justice Cecil McCarthy, Q.C.**, who made the following Orders:

- “1. That the Defendant be restrained until further order from entering into any further or any sale agreement or agreements whatsoever from parting with possession or otherwise disposing of the property known as “The Palms” located in Woodside, also known as Woodside Gardens, off Bay Street, in the parish of St. Michael, in this Island of Barbados.
2. That the Defendant shall ensure that the property mentioned in paragraph one above is maintained in a good state of repair pending the hearing of this matter at trial.

3. That the Claimants shall serve this Order along with certified copies of the court documents that were filed on the 14th day of September, 2016 in this matter, on the Respondent/Defendant's Attorney-at-Law, Mr. Azaz K. Juman of Clarion House, No. 51 Blue Water Road, Rockley, in the parish of Christ Church, in this Island of Barbados within seven (7) days hereof.
4. That the Defendant be at liberty to apply to have this order varied or discharged on seven (7) days' notice to the Claimants.
5. Costs to be in the cause.
6. That the matter is adjourned until the 20th day of October, 2016."

[4] This was then followed by a Notice of Application accompanied by supporting affidavits filed on October 18, 2016 and subsequent Amended Notice of Application filed on November 14, 2016 by the Defendant seeking an Order that:

- (i) The Order of the **Honourable Mr. Justice Cecil McCarthy, Q.C.**, Acting Judge of the High Court restraining the Defendant from entering into any further or any sale agreement or agreements whatsoever for parting with possession with or otherwise disposing of the property known as "The Palms" located in Woodside, also known as Woodside Gardens, off Bay Street, in the parish of St. Michael, in this Island ("the injunction") be discharged;
- (ii) The Claimants be ordered to pay an appropriate sum into court to solidify the undertaking to abide with any order as to costs or damages caused by the granting of or subsequent extension of the injunctive relief.
- (iii) The Order of the **Honourable Mr. Justice Cecil McCarthy, Q.C.**, Acting Judge of the High

Court directing the Claimants to serve the Order dated 22nd September, 2016 along with certified copies of the court documents that were filed on the 14th day of September, 2016 in this matter, on the Defendant's Attorney-at-Law, Mr. Azaz K. Juman of Clarion House, No. 51 Blue Water Road, Rockley, in the parish of Christ Church, in this Island of Barbados within seven (7) days from the date of that Order be set aside;

- (iv) The Claimants' statement of case be struck out pursuant to Rule 26.3 of the Supreme Court (Civil Procedure) Rules, 2008 ("the CPR") for failure to comply with a rule and/or under the inherent jurisdiction of the court as an abuse of process; and
- (v) The Claimants pay the costs of the Application."

Factual Background

- [5] The Applicants/Claimants entered into negotiations with the Respondent/Defendant for the purchase of a property situate off Bay Street, St. Michael.
- [6] The parties sought to negotiate the precise terms and conditions of the agreement for sale/contract through the exchange of correspondence including letters, numerous emails and the exchanging of a number of draft agreements.
- [7] The agreement for sale/contract was not signed and neither was any deposit paid.

The Documentary Evidence

[8] The court is of the view that it is necessary to set out some of the documentary evidence exchanged between the parties.

1. *Letter dated 23 June, 2016 to Dr. Martin Buder and Dr. Ashtrid Pferring from Rosanne Trotman.*

“...Dear. Dr. Buder and Dr. Pfenning,

**Re: Sale of Property at The Palms, Woodside Gardens,
Bay Street, St. Michael**

We confirm that Ms. Norman Albertha Cox of 9385 SW 77th Ave, 3036 Miami, Florida 33156, U.S.A., had agreed to sell you her property at The Palms, Woodside Gardens, Bay Street, St. Michael for the sum of five hundred thousand dollars (BBD \$500,000.00).

Would you kindly inform your Attorney-at-Law, that the vendor’s Attorney-at-Law is Mr. Azaz K. Juman, “Clarion House”, #51 Blue Water Road, Rockley, Christ Church, Barbados in order that he may arrange for your deposit and signature of the agreement to purchase.

Should you require any further information please do not hesitate to contact us.

Yours faithfully,

Roseanne Trotman
Director

c.c: Mr. Lalu Hanuman”

2. *Letter dated June 28th, 2016 addressed SUBJECT TO FORMAL CONTRACT to Mr. Lalu Hanuman from Azaz Khan Juman, Attorney-at-Law...*

“Thank you for your confirmation of representation of the Purchasers, Martin Klaus Buder and Astrid Beate Angela Pfenning.

Accordingly, I am pleased to enclose the following:

1. Copies of items listed on the attached schedule of instruments on title; and
2. Draft Agreement for sale for your perusal and approval.

I have also sent an editable electronic copy of the Agreement for Sale to you in the event that you find it satisfactory for your clients' signatures or wish to amend it directly in order to assist in the possibility of expediting this transaction. Should the signed agreement contain any changes please forward copy of our draft with changes noted for our reference..."

3. *Draft Agreement for sale sent to Applicants/Claimants' Attorney-at-Law on 28th June, 2016 considered a standard agreement for sale.*
4. *Applicants/Claimants' Amended agreement which was submitted to Mr. Azaz K. Juman on 3 July, 2016 with the following inserted among other things:*

"12. When the property becomes vacant, the purchasers shall have the right to have a qualified civil engineer or similar professional, inspect the property to ensure that the said property is in a fit state, especially given the forthcoming presence of a summer camp for a large number of young teenagers in the said property, and if it turns out that the said property is not in a fit state, then the purchasers will have a right to renegotiate this agreement, and in the event of disagreement, to rescind it."

5. *Email sent Wednesday, 13 July, 2016, 13:24 hours from OneWorld Law Firm to Mr. Lalu Hanuman indicating which terms of the Applicants/Claimants' Amended agreement were accepted and which were rejected. In particular as it relates to paragraph 12 it stated:*

"This paragraph is not acceptable. Paragraph 11 already requires that on completion the property be in the state in which it was on the date of the agreement fair wear and tear excepted, as is standard legal practice in Barbados. We will be advising our client that your request to make

the agreement conditional upon structural survey is inordinate and contrary to standard practice and that any survey that your clients may require must be done prior to exchange, with our client's permission and within a reasonable period to be stipulated by our client."

6. *Email sent Wednesday, 13 July, 2016, 19:15 hours from Lalu Hanuman to OneWorld Law Firm.*

"...4. My client's concern is that currently there is a summer camp on at the premises for young teenagers who may well damage the property/foundations by jumping about etc.

5. Please refer to the above #4. In the circumstances I will advise my clients to await the ending of the summer camp, then to have a structural survey carried out and then to sign the Agreement. It is not "fair wear and tear" to have hundreds of teenagers canvorting through the premises for nine weeks. This is a residential property, not a dance hall."

7. *Edited version of the Applicants/Claimants' Amended Agreement submitted to the Respondent/Defendant's attorney on 27th July, 2016 striking out the clauses which were not accepted by the Defendant; as well as a proposed Engrossed Agreement, both of which did not include paragraph 12.*

8. *Email sent Friday, 29th July, 2016 at 09:50:39 hours from Lalu Hanuman to Azaz:*

"2. ...My clients have now arranged for their German money to be on stand-by.

5. Based on the below, my clients have now retained a professional to do the inspection asap. Please advise if this can be done either today or over the weekend...

You have not mentioned a completion date – shall we say mid-November 2016 to allow for all the paperwork to be done?"

9. *Email sent Monday, 15 August 2016, 10:23 hours from OneWorld Law Firm to Lalu Hanuman:*

“Dear Lalu

I trust all is well.

I regret to advise that my client has instructed that they do not agree to the terms proposed by your clients as further elaborated in your below email and will not be proceeding with the sale to your clients at this time.

It is my understanding that Ms. Rosanne Trotman advised your clients of this on Thursday July 28, 2016.

Sincerely,

Azaz K. Juman
Attorney-at-Law”

The Respondent/Defendant’s Contention

- [9] It is the Respondent/Defendant’s contention in seeking to have the injunction granted on 22nd September, 2016 discharged, that if the Applicants/Claimants had provided the court with all of the above-mentioned correspondence, thereby making full and frank disclosure of all material, factual and legal matters, their application for injunctive relief would not have been granted. They contend that from the correspondence the court would have seen that there was a fundamental disagreement with respect to the terms of the alleged contract, such that the parties never agreed on the terms of the sale; also that there was never any payment of a deposit and neither was any agreement for sale executed in respect of the transaction.

The Applicants/Claimants' Contention

- [10] The Applicants/Claimants' position is that they entered into a written contract and or agreement with the Respondent/Defendant on the 23 June, 2016 to purchase a property at a purchase price of \$500,000.00 Barbados currency. In full reliance on the said written contract and or agreement they sold property in Germany to generate funds for the purchase of the property and entered into various other legal undertakings including a mortgage and costs.
- [11] They further contend that the Respondent/Defendant has now increased the sale price to the said property and that as a result of this breach the injunction should remain in place and that they should be allowed to purchase the property for the purchase price agreed upon.

Issue(s)

- [12] The main issue in this case at present is whether the injunction which was obtained on 22nd September, 2016 should be discharged for failure by the Applicants/Claimants to make full and frank disclosure of all material facts to the court hearing the application.
- [13] However before determining that issue it would seem that the court would have to look into the matter of whether there was a valid, binding and concluded contract between the parties because if it can be shown that no

contract was concluded, then it may be argued that there was no basis for granting the interim injunction.

The Law

- [14] It is recognized that when relief for specific performance is sought for an agreement, damages are almost never considered an adequate remedy. It is also recognized as stated, in 24 Halsbury's Laws of England (4th Edn), para 920 that 'pending proceedings for specific performance, the High Court will grant an injunction to restrain a vendor from dealing with property if there is a clear and undisputed contract.'
- [15] A clear and undisputed contract can only exist where certain elements are present, namely, offer, acceptance, consideration, intention to create legal relations, completeness and certainty – see Chitty on Contracts, 32rd Edn, Sweet & Maxwell 2015 Vol. 1 at 2 – 001.
- [16] Therefore in order to be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing further to be settled by negotiation between the parties. For it is well settled that an agreement to negotiate in good faith is not enforceable and an agreement which requires further negotiation and agreement on essential matters is not enforceable as such contracts are too uncertain to have binding force.

- [17] So that the first requirement for the formation of a contract is that the parties should have reached agreement. Generally speaking, agreement is reached when an offer made by one of the parties is accepted by the other. However an agreement may lack contractual force on the ground of want of consideration. Also when parties carry on negotiations, it may be hard to say exactly when an offer has been made and accepted because as the negotiation progress, each party may make concessions or new demands and the parties may in the end disagree as to whether they had ever agreed at all.
- [18] In deciding whether the parties have reached agreement the court must look at all of the correspondence exchanged between the parties and decide whether, on its true construction, the parties had agreed to the same terms and this is normally done by applying the objective test.
- [19] In some cases after parties have reached agreement, it may be that the offer and acceptance are set out in formal documents the purpose of which may be merely to record the agreed terms or where it is stipulated that an agreement is to be embodied in a formal contract it may be that the agreement is regarded by the parties as incomplete, or as not intended to be legally binding, until the terms of the formal document are agreed and the document is duly executed in accordance with the terms of the preliminary agreement. This is generally the position where “solicitors are involved on

both sides, formal written agreements are to be produced and arrangements are made for their execution”. The normal inference will then be that “the parties are not bound unless and until both of them sign the agreement”. *Cheveny Consulting Ltd. v. Whitehead Mann Ltd.* [2006] EWCA Civ 1303; [2007] 1 All E.R. (Comm.) 124 at [45] per **Sir Andrew Morritt C.**

[20] Usually agreements for the sale of land by private treaty are made “subject to contract”. In those cases such agreements are normally regarded as incomplete until the terms of a formal contract have been settled and approved by the parties. In *Winn v. Bull* (1877) 7 Ch. D. 29 at 32, the defendant agreed to take a lease of a house for a specified time at a stated rent “subject to the preparation and approval of a formal contract.” It was held that there was no enforceable contract and Jessel, M.R. said, “It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared.”

[21] In determining whether or not to grant or to discharge an interlocutory injunction, the approach of the court in this jurisdiction, has been to accept the principles handed down by **Lord Diplock** in *American Cyanamid Co. v. Ethicon* [1975] A.C. 396; [1975] 1 All E.R. 504 as establishing the guidelines to be applied.

- [22] In the decision of *Toojays Ltd. v. Westhaven Limited*, Civil Appeal No. 14 of 2008 **Burgess, JA** confirmed that the approach is one which has two stages, that is, the trial judge before whom the application is made has to consider the first question, namely whether there is a serious issue to be tried as opposed to a claim which is frivolous or vexatious.
- [23] The second stage of inquiry as contemplated by **Burgess, JA** is the inquiry into the balance of justice – where does the balance of justice lie in determining whether or not to grant the injunction. One of the factors which have to be considered is whether or not the Applicants/Claimants can be compensated in damages, in other words the court has to determine whether damages would be adequate.
- [24] If the court finds that damages would not be an adequate remedy, then an injunction should be granted regardless of the strength of the Applicants/Claimants’ case at the time of the application.
- [25] If however damages would be an adequate remedy and the Respondent/Defendant would be in a financial position to pay them then “no interlocutory injunction should normally be granted, however strong the Plaintiff’s case appeared to be at that stage” – **Lord Diplock** in *American Cyanamid*.
- [26] Another consideration which this court must consider in determining whether or not the injunction should be discharged is which party would be

subjected to the greater risk of injustice. In order to ascertain this due consideration must be given to the relative strength of the parties' cases.

Conclusion and Disposal

- [27] In reviewing all the documentary evidence before the court including the letters, emails and draft agreements, it is the opinion of the court that the evidence which the Applicants/Claimants have placed before it is not of the required quality or kind to satisfy the court that there is a serious issue to be tried. There was an offer and acceptance but negotiations were still taking place with an essential term with respect to the structural survey still to be determined. The content and language of the correspondence from the Applicants/Claimants' Attorney-at-Law was such as would cause tremendous discomfort and uncertainty with respect to the intention of his clients.
- [28] In the absence of any consideration or signing of any of the draft agreements, why would the Defendant remove the property from the market. They did not and subsequently came into contact with a third party who was willing to not only purchase the property "as is" but offered twenty thousand dollars (\$20,000.00) above the original purchase price.
- [29] The court in determining where the balance of justice lies and in weighing the relative strength of the parties' case, must be careful not to conduct a

mini-trial and to be ever mindful of the words of **Lord Diplock** in

American Cyanamid Co. v. Ethicon Ltd. [1975] 1 All E.R. 504 at 510:

“It is no part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to 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 considerations. The court does not believe that there are any conflicts of evidence with regard to the facts in this matter or any difficult questions of law.”

- [30] It is true that Counsel for the Applicants/Claimants neglected to put before the court some critical pieces of correspondence in applying for the interim injunction, however it is doubtful whether at that interlocutory stage of litigation the court would have reached a different decision – it is usually the general approach of the court to grant the injunction in such circumstances until the matter is dealt with inter partes.
- [31] Both parties then came before the court on the 10th February, 2017 where the Defendant applied to have the said injunction discharged and this issue was argued strenuously by both sides, thereby providing the court with additional information.
- [32] After reviewing all of the information above, including the pleadings, submissions, evidence and applicable law the court is of the view that the balance of justice in this case lies in favour of discharging the injunction granted by **McCarthy, J** on 22nd September, 2016.

PAMELA A. BECKLES
Judge of the High Court