



[2023] JMCC Comm 44

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. SU2023CD00446

BETWEEN	AIRPORT BEACH HOTEL LTD	1st CLAIMANT
AND	RALPH SCOTT	2ND CLAIMANT
AND	MARLENE WHITTINGHAM	3RD CLAIMANT
AND	COURTNEY HAMILTON	1st DEFENDANT
AND	TIFFANY HAMILTON	2ND DEFENDANT

Miss Abigail Henry instructed by Naylor & Mullings for the claimants

Mr Andrew Graham instructed Bishop & Partners for the defendants

Heard September 26, 2023, and October 6, 2023

Interpartes hearing of interim injunction - whether there is a serious issue to be tried - whether damages would be an adequate remedy- effect of material non-disclosure by the applicant.

IN CHAMBERS

CORAM: JARRETT, J

Introduction

[1] This is my decision in respect of an amended ex parte notice of application filed by the claimants on September 14, 2023, by which the following orders are sought :

- a) “An injunction to restrain the Defendants whether by themselves or their servants and/or agents or otherwise from selling, mortgaging, pledging, assigning constructing or dealing in any way howsoever with the property known as all that parcel of land part of Palm Beach in the parish of St. James of 3435.3515 square meters and being all the land comprised in Certificate of Titles registered at Volume 1512 folio 224 in the Register Book of Titles (hereinafter referred to as ‘the subject property’)
- b) An injunction to restrain the Defendants, until the trial of this matter or further Order in the meantime, from evicting the Claimant from the subject property.
- c) An order to preserve the state of all that parcel of land part of Palm Beach in the parish of St James of 3435.3515 square meters and being all that land comprised in Certificate of Title registered at Volume 1512 folio 224 in the Register Book of Titles of the subject property (sic) until the trial of this matter or further order of the Court.
- d) The Claimant gives the usual undertaking as to damages.
- e) Costs of this application to the Claimant/Applicant
- f) Such further and/or other relief as this Honourable Court deems fit.”

Interim injunctions having been granted by Barnaby J on August 28, 2023 and extended by Wint -Blair J on September 14, 2023 , what came before me was the further consideration of the application at an *interpartes* hearing .

The substantive claim

[2] A substantive claim by way of amended claim form and amended particulars of claim, was filed on September 8, 2023. In the amended claim the claimants seek the following relief: -

- 1) "A Declaration that a valid and binding agreement exists between the Claimant and the Defendants in respect of the Agreement for Sale entered into on the 24th day of August 2022 and the Lease /Purchase Agreement dated June 21, 2021.
- 2) An order for Specific Performance of the Agreement for Sale dated August 24, 2022, and the Lease /Purchase Agreement dated June 1, 2023 for all that parcel of land part of Palm Beach in the parish of Saint Janes of 3435.5315 Square Meters and being the lands comprised in Certificate of Title registered at Volume 1512 Folio 224 in the Register Book of Titles (hereinafter referred to as the (sic) "the subject property") .
- 3) In the alternative to (2), Damages in lieu of specific performance and /or for breach of contract.
- 4) In the alternative to (2), Damages for Loss of Opportunity and/or Bargain.
- 5) In the alternative to (2) Special damages in the sum of Ten Million Dollars (\$10,000,000.00).
- 6) Interest thereon.
- 7) An injunction to restrain the Defendants whether by themselves or their servants and/or agents or otherwise from

selling, mortgaging, pledging, assigning, constructing or dealing in any way howsoever with the subject property.

8) An injunction to restrain the Defendants whether by themselves or their servants and/or agents or otherwise from entering or trespassing upon the subject property or in any way disturbing the Claimant's possession of the land.

9) Costs and Attorneys Costs

10) Such further and/or other relief as this Honourable Court deems fit."

Factual background

[3] The 1st claimant is a limited liability company which operates a hotel. The 2nd and 3rd claimants are its managing directors. The 1st defendant is an attorney-at-law, and the 2nd defendant is his daughter. The 1st claimant practises law out of the chambers Hamilton & Hamilton, Attorneys-at-law. By a Lease dated June 21, 2021, the 2nd and 3rd claimants leased property part of Palm Beach in the parish of Saint James, measuring 3435.5315 square meters and being the lands comprised in Certificate of Title registered at Volume 1512 Folio 224 in the Register Book of Titles ("the property") from Hamilton and Hamilton, Attorneys-at-law. The registered proprietors for the property are the 1st and 2nd defendants. The lease was for an initial period of two years, with an option to purchase the property within the first year of the lease and a right of first refusal should the option not be exercised. The lease contained a provision for the abatement of rent for a period of time to facilitate the "build out" of the property by the 2nd and 3rd claimants.

[4] A purchase and sale agreement dated August 24, 2022, was entered into between the 1st claimant and the 1st and 2nd defendants for the purchase of the property. The purchase price was stated to be US \$1,300,000.00 with a deposit of US \$100,000.00 on signing. There is a dispute as to when this agreement was signed.

The claimants contend that the 1st claimant did not receive a signed agreement from the 1st and 2nd defendants until about March 2023, while the defendants say that the agreement was signed by both sides on August 24, 2022, the date of the Agreement. The purchase and sale agreement exhibited to the affidavit of the 2nd and 3rd claimants, does not reflect stamp duty as having been paid.

[5] On March 25, 2023, the 1st defendant sent to the 1st claimant a text message in which he said this: -

“Hi Mas Andy I felt compelled to bring to your attention the passage of Extended time and still no mortgage commitment. While I did not share my obligation time line with you it is now critical that we proceed to close title within the next 90 days. It is untroubled that I have been more than generous in giving you all this time to secure funding but its now affecting my own financial commitments
It is unarguable”

Following on that text, three cheques representing the deposit were sent to the 1st defendant by letter dated May 19, 2023, from the claimants’ attorneys-at-law.

[6] By letter dated May 24, 2023, the 1st defendant returned the cheques indicating, inter alia, that the property has been sold. The text of that letter is important, and so I reproduce it in full below: -

May 24, 2023
Naylor & Mullings
Attorneys-at-law
34-36 Old Hope Road
Kingston 5
Attention: Ms Gillian Mullings,

Re: Proposed Purchase of land part of Palm Beach in the parish of Saint James registered at Volume 1512 Folio 224

Dear Ms Mullings,

We are in receipt of a letter with enclosures of cheques to our firm totalling US \$100,000.00 without any frame of reference. Accordingly these cheques are being returned to you forthwith.

If you are referring to the property your clients occupy, that property has been sold. A Proper Notice under their Lease Agreement was given to them on May 15 pursuant to Paragraph 3 (1) of that Lease.

Please note that your clients had over a year to secure financing through both First Global Bank, National Commercial Bank and other private lenders, Menard Clarke and Patrick Davis , all of which proved for naught in that they were unsuccessful in all their attempts.

We continue to wish them well as Tenants and the Security Deposit we have for them will be returned when they vacate the premises.

Incidentally, I hope they shared with you a reduction in rent we gave to them which will now terminate, so that the original rent will go into effect immediately and will continue until they vacate the premises.

Very truly yours,

HAMILTON & HAMILTON

PER: Courtney Hamilton

- [7] The claimants say that \$10,000,000.00 was spent by the 1st claimant renovating and reconstructing the property. The 1st claimant lodged a caveat on the certificate of title in respect of the property on the basis of having an equitable and legal interest in it. In the statutory declaration given by the 2nd and 3rd claimants in support of the caveat, on behalf of the 1st claimant, they state that the deposit of US \$100,000.00, was paid upon the signing of the purchase and sale agreement. The 2nd and 3rd claimants did not disclose that the deposit paid by the 1st claimant

was rejected and returned by the 1st and 2nd defendants. In the aftermath of the Registrar of Titles warning the caveat, the substantive claim was filed.

The submissions

- [8] Miss Henry, counsel for the claimants argued that there is a serious issue to be tried, as the text message from the 1st defendant gave the 1st claimant 90 days to complete, at a time when he was aware that no deposit had in fact been paid. Furthermore, the sale of the property to a third party was done prior to the expiration of that 90-day period. She argued further that damages would not be an adequate remedy as the 2nd and 3rd claimants invested their savings into the property, the property is of great sentimental value to them, they sold property they owned to assist with the renovation and improvements, a fact well known to the 1st defendant as he was the attorney-at-law with carriage of sale of that transaction. According to her, the balance of convenience favours granting the injunction as the defendants will suffer the least irremediable harm should it result at trial that the injunction ought not to have been granted.
- [9] Reliance was placed on section 49 of the Stamp Duty Act to argue that the court has the power to remedy the absence of stamp duty on the purchase and sale agreement by making the appropriate orders that the payment be made.
- [10] Mr Graham, counsel for the defendants opposed the extension of the injunctions on the following bases: -
- a) There is no serious issue to be tried as there was no valid agreement for the sale of the property, since no consideration was paid by the 1st claimant.
 - b) The purchase and sale agreement is not stamped, and by virtue of section 36 of the Stamp Duty Act, it cannot be admitted into evidence as valid or effectual in these proceedings.
 - c) Section 46 of the Stamp Duty is inapplicable as it is this interlocutory hearing that is of relevance.

- d) There has been material non-disclosure by the claimants in that they failed to disclose before Barnaby J that the deposit had been rejected by the defendants.
- e) There has also been material non-disclosure by the claimants in that in their statutory declaration to support a caveat which they lodged on the certificate of title for the property, they declared that the deposit on the sale had been paid at the time of signing and that contradicts their own evidence before this court.
- f) Damages would not be an adequate remedy for the 1st defendant should it be determined at trial that the injunction ought not to have been granted, because the 1st defendant has medical bills to contend with in respect of a hip replacement he underwent in the United States of America; he is 77 years old and has closed his legal practice and would face financial ruin should the sale of the property to a third party not be allowed to be completed.
- g) Damages are an adequate remedy for the 1st claimant as the claimants have said that the 1st claimant's losses amount to \$10,000,000.00 in costs to improve the property.
- h) The balance of convenience is in the defendants' favour.

Is there a serious issue to be tried.

[11] It is settled that the starting point in applications for interim injunctions, is whether there is a serious issue to be tried and that this relates to whether the applicant has a real prospect of succeeding at obtaining a permanent injunction at trial. (**American Cyanamid Co v Ethicon Ltd [1975] 1 AER 504**). I fully agree with Mr Graham's written submissions that the 1st claimant was not a party to the Lease and therefore cannot rely on the option to purchase and the right of first refusal in the Lease, to ground any relief under the purchase and sale agreement. However, it is my view, and Mr Graham agrees, that the purchase and sale agreement as drafted and executed, can stand on its own without any regard to the option to purchase in the Lease.

[12] I however disagree with Mr Graham's submission that there can be no valid contract between the 1st and 2nd defendants and the 1st claimant because no consideration was paid. The consideration under the purchase and sale agreement was the purchase price of US \$1,300,000.00. The purchase and sale agreement is an executory agreement. Completion was to be approximately 90 days from the date of the agreement on payment in full of the balance purchase price and costs of transfer payable by the purchaser and/or its nominees in exchange for the duplicate certificate of title endorsed in favour of the purchaser. The deposit of US \$100,000.00 is not the consideration. It is the earnest to bind the contract and is a general pre-estimate of the damage the vendors would suffer should the 1st claimant not complete. (See generally, **Dojap Investments Limited v Workers Trust and Merchant Bank, unreported Supreme Court Civil Appeal, decided February 11, 1991**).

[13] Although the deposit was rejected, the evidence is that on March 25, 2023, the 1st defendant gave the 1st claimant 90- days within which to complete. This extension of the date for completion was done with full knowledge that the deposit had not yet been paid. This 90-day period, on Mr Graham's calculations would have expired around June 24, 2023. But the evidence is that at the time of the 1st defendant's letter dated May 24, 2023, the property had already been sold. This raises, in my view, the serious question whether the 1st defendant was entitled in the circumstances to sell the property to a third party in light of the extended time he had given to the 1st claimant to complete. In justifying the actions of the 1st defendant, Mr Graham took me to special condition 5 of the purchase and sale agreement which provides that the agreement is subject to the purchasers obtaining a legal mortgage from a reputable financial institution and that a written letter of undertaking must be submitted to the attorneys-at-law with carriage of sale, (Hamilton & Hamilton), within 60 days of the agreement. If this is not done, according to the special condition, the vendors are entitled to cancel the agreement. But the difficulty with this submission is that ignores the 1st defendant's text message of March 25, 2023, in which he extends the completion date by 90

days. It is therefore my view that whether the 1st defendant was entitled in the circumstances to sell the property to a third party and the corollary question whether there exists a valid agreement between the 1st claimant and the defendants for the sale and purchase of the property, are serious issues to be tried.

- [14] Section 36 of the Stamp Duty Act prevents an unstamped purchase and sale agreement from being admitted in evidence as valid or effectual in any court for the enforcement of it. At this interlocutory stage however, the claimants are not asking that the agreement be enforced.

Whether damages would be an adequate remedy

- [15] Having determined that there is a serious issue to be tried, I now turn to consider whether, if the 1st claimant succeeds at trial in obtaining the permanent injunctions sought, it would be adequately compensated in damages for any loss suffered, if the interlocutory injunctions are refused. The 2nd and 3rd claimants in affidavit evidence filed on behalf of the 1st claimant say that the 1st claimant acted to its detriment and has incurred costs of \$10,000,000.00 in the renovation and reconstruction of the property. The 2nd and 3rd claimants also say that they sold their house at Ryne Park Village and put the funds (presumably from that sale) into the property. They say further that the 1st defendant was aware that they had intended to finance the 1st claimant's transactions and improvement to the property using the equity in their home. In paragraph 21 of their affidavit filed on August 24, 2023, they also say that they fear that they will lose their investment if the defendants sell the property before the determination of the claim. This is their evidence at paragraph 22 of that affidavit: -

"22. Further we have built our business there and the hard work which we have put in to bringing the place to its current state has created great sentimental value for use (sic). Particularly as we have invested all our earnings and liquated assets to ensure the prosperity of this investment into our hotel business. Further the subject property is of a special nature and

particularly conducive to our business. In such circumstances damages would not be an adequate remedy”

- [16] The authorities indicate that there is a presumption (albeit rebuttable) that damages will not be an adequate remedy where the subject, the issue of the injunctive relief, is real property. In **Tewani Limited v Kes Development Co. Ltd and ARC Systems Limited (unreported) Claim No. 2008 HCV 2729**, Brooks J (as he then was), considered whether damages would provide an adequate remedy for the claimant if it were to succeed at trial but was denied an interim injunction. The learned judge said this:

“The significance of the subject matter being real property, raises a presumption that damages are not an adequate remedy, and no enquiry is ever made in that regard. The reason behind that principle is that each parcel of land is said to be “unique” and said to have “a peculiar and special value” Hardwicke, L.C. in *Buxton v Lister & Cooper* (1794) 3 Atkins Reports 383 said at page 384:

Brooks JA (as he then was), however also recognised in **Lookahead Investors Limited v Mid Island Feeds(2008) Limited & Others [2012]JMCA App11**, that the presumption is rebuttable and that each case must truly turn on its own facts.

- [17] As an alternative to specific performance, the claimants in their amended claim form and amended particulars of claim, plead that the 1st claimant seeks to recover special damages in the sum of \$10,000,000.00, representing the cost of the improvements the 1st claimant is alleged to have made to the property. As observed earlier, this cost to the 1st claimant is also alleged in the affidavit evidence of the 2nd and 3rd claimants. In the amended claim, the 1st claimant also claims damages for loss of opportunity and /or bargain. The evidence and the averments in the amended claim undoubtedly suggest to me that damages would indeed be an adequate remedy for the 1st claimant, the purchaser under the purchase and

sale agreement. Furthermore, the evidence of the sentimental attachment to the property, is that of the 2nd and 3rd claimants, and not that of the 1st claimant, a corporate entity. The pleadings and the evidence plainly suggest to me, that for the 1st claimant, the purchase was a commercial transaction. There is nothing in the pleadings or in the evidence to support the 2nd and 3rd claimant's allegation that the property is of such a special value to the 1st claimant that monetary compensation by way of damages would be inadequate. I therefore find, based on the evidence as well as on the pleadings, that damages would be an adequate remedy for the 1st claimant.

[18] The 1st defendant has exhibited a copy of the agreement for sale which he and the 2nd defendant have concluded with a third party. The evidence is that the sale price negotiated is US \$1,300,000.00. Although the 1st defendant has said that he has medical bills to cover, and that he intends to close his law practice in December 2023, I am satisfied and therefore find, that given the sale price for the property, the defendants would be able to pay the 1st claimant's damages should the 1st claimant succeed at trial. In the result, the extension of the interim injunctions must therefore be refused.

Non -disclosure

[19] I am obliged to make the observation that even if I had found that damages would not have been an adequate remedy and that the balance of convenience was in favour of extending the interim injunctions, I would not have extended them due to the material non -disclosure of the claimants.

[20] In the *exparte* application which was before Barnaby J, the claimants failed to disclose that the deposit of US \$100,000.00 was rejected and returned by the 1st defendant, and consequently, the 1st claimant did not have an equitable interest in the property on the basis of having paid a deposit. In fact, the very statutory declaration which the claimants lodged in support of the caveat at the office of the Registrar of Titles gives the distinct impression that the 1st claimant's equitable

interest in the property arose from having paid the deposit and that this deposit was paid on the signing of the purchase and sale agreement. It is settled law that an interim injunction like all other ex parte interlocutory orders is liable to be set aside for material non-disclosure. It is also settled law that where an ex parte interim injunction has expired, a court will likely refuse to extend it because of a material non-disclosure. [See for example **Jamaica Teachers Association v Marlon Francis, Margaret Angela Creary, Althea Marie Ennis and City Lights Imports Limited {2015 JMSC Civ 92}**]

[21] I am of the view that the non-disclosure in this case was indeed material. The clear premise of the claimants' case at the ex parte stage was that the 1st claimant had an equitable interest in the property having paid the agreed deposit, yet the defendants had refused to complete the sale and had instead offered to sell to a third party. There is no evidence from the claimants explaining why the disclosure was not made. No evidence for example, that the non-disclosure was made innocently in that the return of the deposit was not known to them or that they did not perceive its relevance.

Conclusion

[22] In the circumstances, I make the following orders:

- a) The orders sought in the amended ex parte notice of application for court orders filed on September 14, 2023 , are refused.
- b) Costs to the defendants to be agreed or taxed.

A Jarrett
Puisne Judge