[2011] JMCA Civ 24

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 68/2009

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA

BETWEEN	**EUGENIE CHIN LYN**	**1ST APPELLANT**
AND	**SYLVIA CHIN**	**2ND APPELLANT**
AND	**KEVIN DEHANEY**	**3RD APPELLANT**
AND	**LUDLOW REYNOLDS**	**RESPONDENT**

Bert Samuels instructed by Knight, Junor & Samuels for the appellants

Ronald Paris and Chumu Paris instructed by Paris & Company for the respondent

16, 17 July 2009 and 29 July 2011

PANTON P

[1] I have read the reasons for judgment of my brother Dukharan JA and agree with his reasoning and conclusion. I have nothing to add.

MORRISON JA

[2] I too agree with the reasoning and conclusion of Dukharan JA and have nothing to add.

DUKHARAN JA

[3] This is an appeal against the decision of Cole-Smith J made on 1 June 2009, discharging an ex parte injunction granted by her on 15 September 2008 in favour of the appellants. She refused to grant new injunctions in terms of the discharged injunctions pending the hearing of this appeal. On 16 and 17 July 2009, we heard submissions from the appellants and the respondent when we dismissed the appeal and refused the injunctions sought. We promised then to put our reasons in writing and this we now do.

[4] The chronology of events in this case commenced in May 2008 when the 1st appellant (hereinafter called E.C.L) and the respondent began negotiations for the sale of a property at 24 Dudley Kassim Drive in Montego Bay, St James. The parties agreed on a price of $30,000,000.00. Between 10 May and 8 June 2008, E.C.L. made four payments totalling US$100,000.00 to the respondent. There is no evidence, in writing, of any agreement between the parties as to the terms of the sale. The parties instead began negotiations to enter into a lease with an option to purchase. Sometime in July 2008 the respondent allowed E.C.L. to store goods on the premises. E.C.L. indicated to the respondent that she wanted her sister and her son's name added to the lease and complained that the draft lease did not include an option to purchase. An engrossed

lease incorporating the amendment requested by E.C.L. was made and executed on 13 August 2008 before a Justice of the Peace. The following day the respondent gave the engrossed lease to E.C.L. for execution by her son and sister. Before that the respondent gave E.C.L. letters to the Jamaica Public Service Company Ltd and the National Water Commission to reconnect utilities to the premises in the name of E.C.L. The keys to the premises were also given to E.C.L. On 1 September 2008, E.C.L. paid US$4,000.00 into the respondent's bank account.

[5] The respondent went abroad and on 5 September 2008 E.C.L. gave the respondent a copy of the engrossed lease which was not signed by her or her son but with various notations on the document. On 6 September 2008, the respondent instructed his attorney to terminate the lease. On 14 September 2008, the respondent returned to Jamaica and took back possession of the premises by replacing padlocks, which were put on by E.C.L. On 15 September 2008, the appellants obtained an ex parte injunction after commencing these proceedings.

[6] It is against this background that on 1 June 2009, Cole-Smith J refused and discharged the continuation of the injunction and found that, although there are serious and complicated issues to be tried, damages would be an adequate remedy.

[7] The appellants filed four grounds of appeal. However, only two were pursued. They are as follows:

> "(a) The learned judge erred as a matter of fact and/or law and/or wrongly exercised her discretion in

refusing to grant the applications for the injunction such as to amount to a miscarriage of justice.

(b) The learned trial judge erred as a matter of fact and law in finding that damages are an adequate remedy in relation to an alleged breach of contract for the sale of land."

[8] The orders sought are as follows:

"a. An order setting aside the learned Judge's Order.

b. Orders that:

1. An Injunction restraining the Respondent whether by himself or acting through his servants/agents or otherwise from re-taking possession or otherwise interfering with the quiet possession of the Appellants in respect of premises located at Dudley Cassin [sic] Drive, Montego Bay in the parish of Saint James currently occupied by the Appellants.

2. An Injunction restraining the Respondent whether by himself or acting through his servants and/or agents from taking any steps to bar or otherwise prevent the Appellants and their servants or agents from entering the premises located at Dudley Cassin [sic] Drive, Montego Bay in the parish of Saint James and/or from carrying on their business operations at the said premises.

3. An Injunction to restrain the Respondent whether by himself or acting through his servants and/or agents or otherwise from taking any step calculated to:

a. Interfere with and/or disrupt the Appellants' business operations at the said premises in any way whatsoever

b. Interfere with and restrict the Appellant's lawful use and occupation of the premises.

c. Deprive the Appellants, their servants, agents, workers and other invitees from having access to the premises.

d. Deprive the Appellants of their right to utilize the premises as contemplated by the lease agreement entered into between the parties.

4. An injunction restraining the Respondent whether by himself or through his servant and/or agents from selling, transferring or otherwise disposing or attempting to sell, transfer or otherwise dispose of his interest in the said property at Dudley Cassin [sic] Drive Montego Bay in the parish of Saint James.

5. Costs of this application be Costs in the Appeal.

6. Such Further and/or other relief as this Honourable Court deems fit."

Submissions

[9] Mr Samuels for the appellants, in his skeletal arguments, submitted that although the learned judge correctly found that there were serious and complicated issues to be tried, she erred when she found that damages would be an adequate remedy. Counsel cited **American Cyanamid Company v Ethicon Limited** [1975] 2 WLR 316, to support his argument that, even if an award of damages would be an adequate compensation, there was no undertaking as to damages on the part of the respondent. There was no evidence before the court that should the appellants succeed at trial, the

damages she would have suffered could be paid by the respondent. He further submitted that E.C.L. has demonstrated by her affidavit that she and the other appellants are able to honour any undertaking in damages if such an award was given to the respondent. If damages would be an adequate remedy, and since the appellants after giving an undertaking are in a financial position to pay, there would be no reason upon this ground to refuse an interlocutory injunction. Counsel further submitted that grave hardship and oppression would befall the appellants while the respondent would suffer no loss as he has retained the deposit of US$100,000.00 and continues to collect US$4,000 monthly for rental/mortgage. The balance of convenience therefore rests in the appellants' favour due to the undue hardship that would occur. A remedy in damages, counsel further submitted, would result in an unfair outcome, in that, the appellants have already incurred expenses in the improvement of the property and payments already made would be lost.

[10] Counsel for the appellants further submitted that there could be no dispute as to whether a lease exists based on the acts of part performance, confirmation of a lease and an option for future purchase as evidenced by the memorandum in writing. Counsel cited the case of **Rossiter and Others v Miller** (1878) 3 AC 1124, where it was held that if, on the construction of correspondence which has taken place between the parties to a contract for the sale of land, all the particulars essential for the finality and completeness of the contract, with reference to the premises, parties, price, etcetera are found in section 4 of the Statute of Frauds and the mere fact that the parties have stipulated that there shall afterwards be prepared a formal agreement

embodying the terms agreed on is immaterial and does not affect the matter. Counsel further submitted that the respondent is estopped from denying that the appellant is a purchaser in possession and a lessee and that there is an agreement for a lease with an option to purchase in the future.

[11] Counsel in sum, submitted that damages would not be an adequate remedy and would create a grave injustice, in light of the appellants' hardship and that the balance of convenience rests in the appellants' favour and withholding an injunction would more likely produce an unjust result.

[12] Counsel for the respondent, Mr Ronald Parris, submitted that the facts do not support the appellants' argument that the parties concluded a binding agreement for sale, evidenced in writing and capable of being specifically performed. The facts do not support the appellants' argument that they are purchasers in possession of the respondent's premises. Counsel further submitted that the appellants were put in possession by the respondent upon his receipt of the written lease agreement signed by the 1st appellant, subject to it being signed thereafter by the other two appellants. Counsel argued that the other two appellants did not sign the lease, but by written notations indicated disagreement with fundamental terms already agreed upon by the respondent, thereby showing an intention not to be bound by the terms of the lease signed by him. Counsel in summary, submitted that this court should uphold the decision of Cole-Smith J discharging the ex parte interim injunction and refusing to grant new injunctions, and it is not necessary for the court to even consider the balance

of convenience or the balance of the risk of injustice. Even if this court thinks otherwise, then the balance favours the refusal of injunctive relief, as damages would be an adequate remedy, he contended.

The Issues

[13] The main issue to be determined is whether or not the appellants have a real prospect of success for a permanent injunction at the trial of this claim. Is there a triable issue? In **American Cyanamid v Ethicon Limited,** Lord Diplock said at page 323:

> "So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

This approach was followed in the case of **Ninemia Maritime Corporation v Trave** [1983] 1 WLR 1412 when Kerr LJ said at page 1417:

> "A good arguable case is no doubt the minimum which the plaintiff must show in order to cross what the judge rightly described as the 'threshold' for the exercise of the jurisdiction. But at the end of the day the court must consider the evidence as a whole in deciding whether or not to exercise this statutory jurisdiction."

[14] Is there evidence to support the fact that the parties concluded a binding agreement for sale which is evidenced in writing and capable of being specifically performed? It is quite clear from the facts that in May 2008, E.C.L. and the respondent

commenced negotiations for the sale of the property for a price of $30,000,000.00. There is evidence of payments totalling US$100,000.00 towards the intended purchase of the property but no evidence in writing of any agreement between the parties of the terms and conditions of the sale. It is admitted in the affidavit of E.C.L. at paragraph [6] [c], that she was unable to complete the sale in a short period but that she and the respondent would enter into a lease agreement, whereby she would enter into possession of the premises as a lessee and purchaser for a period of six years, but subsequently amended to three years. It is also gleaned from the affidavit at paragraph [7] that she advised the respondent that the 2nd and 3rd appellants would be parties to the sale and lease agreement and requested that the agreements include the other appellants. There is evidence, and admitted in paragraph [9] of E.C.L.'s affidavit, that the respondent caused a lease agreement to be prepared which was executed by E.C.L. and the respondent and forwarded to the 2nd and 3rd appellants in Canada for their execution. A copy of this lease agreement (exhibited) reveals that neither the 2nd nor 3rd appellant has signed it.

[15] The respondent stated in his affidavit that having gone to Canada, he collected the lease on 5 September 2008 from the 2nd appellant where he observed a number of annotations, amendments and jottings on the document which he had not known about nor agreed to.

[16] It is clear that the facts do not support the contention that the parties concluded a binding agreement as there is nothing evidenced in writing to suggest that the

appellants are purchasers in possession of the property. There is nothing to suggest that the appellants are also lessees in possession, pursuant to a valid and binding lease agreement entered into by the parties. The engrossed lease (as exhibited) shows no indication that the 2nd and 3rd appellants are signatories. The lease agreement was signed by E.C.L. but subject to it also being signed by the other two appellants.

[17] In view of the foregoing, we found that the learned judge was correct when she refused to grant the injunction sought. As stated, we dismissed the appeal and refused the injunctions with costs to the respondent to be taxed, if not agreed.