CA: Contract/LAND Specific performance / damages/injunction Interlocutory injunction which on motion by trial judge - On appeal from Order whether triable issue / whether damages sufficient remedy / balance of convenience. Held Trial judge discretion properly exercised - Appeal dismissed.

JAMAICA

REMEDIES

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL #22/87

COR: The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Downer, J.A. (Ag.)

BETWEEN	FIRST LIFE INSURANCE CO. LTD.	4th DEFENDANT/APPELLANT
A N D	APPROPRIATE TECHNOLOGY LTD.	5th DEFENDANT/APPELLANT
A N D	LIFE OF JAMAICA LTD.	6th DEFENDANT/APPELLANT
A N D	NEVILLE SMITH	PLAINTIFF/RESPONDENT

Hugh Small, Q.C., Stephen Shelton & Arthur Hamilton for appellants

R.N.A. Henriques, Q.C., & Dennis Morrison for respondent

27th, 28th April & 14th May, 1987

CAREY, J.A.:

We dismissed this appeal with costs to the respondent on 28th April, but promised to reduce our reasons to writing. This is in fulfilment of that promise. By his writ dated 27th October, 1986, the respondent (the plaintiff) claimed as follows:

> "1. The Plaintiff's claim is against the First named Defendant for:-
>
> a) Specific performance of an Agreement in writing made on June 9, 1980 whereby the Defendant agreed to sell to the Plaintiff all the parcels of land known as Chancery Hall and Forrest Hills registered at Volume 1054 Folio 665 and Volume 479 Folio 4 and Volume 666 Folio 49 of the Register Book of Titles for the sum of $500,000.00.
>
> b) Further and/or alternatively damages for breach of contract in addition to or in lieu of specific performance.

"c) An injunction to restrain the first named defendant from dissipating or disposing of his assets or any of them until trial of the action herein.

2. The Plaintiff's claim is against the Defendants for an Order to have a transfer registered on November 6, 1985 from the first named defendant to the fifth named defendant set aside on the grounds of fraud.

3. The plaintiff's claim is against the second, third, fourth, fifth and sixth named defendants for damages for conspiracy to procure a breach of contract and for damages for wrongfully procuring the same.

4. An injunction to restrain the fourth, fifth and sixth named defendants by their directors, officers, servants and/or agents or affiliates from selling, transferring or in any other way disposing of or incumbering those parcels of land known as Chancery Hall Plantation and Forrest Hills registered at Volume 1054 Folio 665, Volume 479 Folio 4 and Volume 666 Folio 49 until the trial of the action."

On the 27th February last, Wolfe J., by an order of that date, granted an interlocutory injunction in terms of paragraph 4 of the endorsement on the writ, to the plaintiff. This appeal is taken against that order by the fourth, fifth and sixth defendants, on a number of familiar grounds, viz., there was no triable issue between the parties (grounds 1 and 2), damages would be an adequate remedy (ground 3) the balance of convenience lay in favour of the appellants (grounds 4, 5 & 6).

As to the first two grounds, Mr. Small who initially sought to support them, was constrained to acknowledge the futility of that course. Paragraphs 2 and 3 in the endorsement ex facie raised serious allegations of fraud against the appellants. The affidavit of the respondent filed in support of the application for injunction amplified that position. It is not, in my view, necessary to detail the contents of that affidavit, but a summary of the allegations, which the appellants in their affidavits in rebuttal, did deny, should suffice so as to enable an intelligent appreciation of the issues which arise on the appeal.

Some time in 1980, the respondent (the plaintiff) entered into an agreement with the 1st defendant Donald Fitz-Ritson to purchase a number of parcels of land known as Chancery Hall Plantation and Forrest Hills for

$500,000.00. Provision was made in that agreement for the payment of a deposit of $15,000.00 and for other payments by a date certain which, together with the deposit, represented approximately one half of the total purchase price. The plaintiff duly paid, in total, $260,000.00 prior to that date. The 1st defendant never took any steps to complete the sale although the plaintiff expressed himself as being ready, willing and able to complete payment, and indeed Fitz-Ritson purported to sell and transfer the parcels he had agreed to sell to the respondent to the 5th defendant (2nd appellant) under a power of sale purportedly exercised by the 3rd defendant (the mortgagors of the property), the alter ego of the 1st and 2nd defendants. Prior to that purported sale and transfer, the respondent had been in negotiation with the fourth and fifth defendants with respect to a joint venture to develop the said lands. The 6th defendant (the 3rd appellant) through its attorney-at-law was aware of the agreement for sale between the plaintiff and first defendant and the joint venture discussions. The affidavit discloses that the 2nd, 3rd, 4th, 5th and 6th defendants being well aware of the circumstances set out, conspired together to induce the 1st defendant to breach the agreement. Thereafter the sale to the 5th defendant was contrived, and the transfer made. The 4th and 6th defendants (the 1st and 3rd appellants) advanced the sum of $1.2M by way of a loan to enable the sale to take place.

There was another fact which, although it formed no part of the plaintiff's affidavit, emerged, when the documentary evidence was examined, and for this I am greatly indebted to the meticulous attention to detail of my brother Campbell J.A. The effect of this material was to show that there might really have been no proper exercise of the power of sale by the mortgagors. Although a company called International Investments Limited is incorporated and registered, of which it is alleged the first and second defendants are the principal share-holders and directors, that company is not endorsed on the registered title as mortgagors. That registration which

was carried out by the first and second defendants, was done in the name of International Investment Company Limited, a non-existent company. And as to the latter fact, this was confirmed to us by Mr. Small.

The concession of Mr. Small shows that he appreciated, perhaps belatedly, that the material provided by the plaintiff in his affidavit, need not amount to a prima facie case. What the law requiries is that there should be a serious issue to be tried, in the sense that it should not be frivolous or vexatious. Lord Diplock in American Cyanamid v. Ethicon [1975] 1 All E.R. 504 at p. 510 made this clear when he observed:

> "The use of such expressions as 'a probability', 'a prima facie case', or 'a strong prima facie case' in the context of the exercise of a discretionary power to grant an interiocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried."

I can now pass to consider the argument that the learned judge erred when he concluded that damages would not be an adequate remedy. It was suggested that even if, in the result the plaintiff succeeded in his action, damages would be adequate compensation. Mr. Henriques, who appeared for the plaintiff, pointed out that the case involved an agreement for the sale of land in which fraud was being alleged. Specific performance was the plaintiff's suit, not damages, which could not therefore be an adequate remedy. I have no difficulty in accepting that contention of Mr. Henriques as being correct. In the circumstances of the present case, although the plaintiff's claim also sounded in damages, that was but a part, and indeed, not the principal remedy being sought. Moreover, even if it could be said that there was some uncertainty as to whether damages provided adequate compensation, or the question was evenly balanced, there was another fact which the judge was bound to go on to consider, viz., how was the status quo to be preserved --

> "Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo."

per Lord Diplock in American Cyanamid v. Ethicon (supra) at page 511.

With respect to the preservation of the status quo, there was evidence that the plaintiff was in possession of the land, the subject matter of the sale agreement, under an express term of the agreement and he had not been dispossessed. Further, although there was evidence that some plots had been sold to other parties, there was no evidence that the plots had been transferred to these purchasers. The question of third parties' rights being affected is a relevant factor in determining whether or not an injunction should be granted. For if the balance of hardship favours third parties, then the defendant would be entitled to succeed. In the present appeal, the third parties to whom sales had been made, had not yet obtained a legal interest in the plots purchased. The hardship to them would accordingly be less than that likely to be suffered by the plaintiff. If the plaintiff succeeds they would be no worse off than they are at present. They can have no better title than the 5th defendant (the 2nd appellant), their vendor. The status quo would obviously be preserved, if no other sales were permitted rather than to allow sales to other persons to take place. The grant of the injunction would place further sales on hold and achieve the object of the granting of the injunction, but a refusal could not. It is plain, therefore, that the learned judge could not be faulted in the exercise of his discretion to grant the interlocutory injunction.

I, therefore, conclude that none of the grounds argued before us, disclosed any basis whatever for our interference. For those reasons I concurred in holding that the appeal should be dismissed with costs to the respondent.

CAMPBELL J.A.

The appellants were by order of Wolfe J. made on 27th February, 1987 restrained from selling, transferring or in any other way disposing of or incumbering parcels of land known as "Chancery Hall Plantation" (hereafter called the property) pending the trial of a suit commenced by Writ issued by the respondent on 27th October, 1986.

The suit was commenced by the respondent against Donald Fitz-Ritson, Jennifer Messado, International Investments Limited, First Life Insurance Company Limited, Appropriate Technology Limited and Life of Jamaica as 1st, 2nd, 3rd, 4th, 5th, and 6th defendants respectively.

The Writ inter alia claimed specific performance of a contract of sale dated June 9, 1980 executed between the 1st defendant and the respondent covering the property, an order against all the defendants that registered transfer of the property dated November 6, 1985 from the 1st defendant to the 5th defendant be set aside on the ground of fraud and an injunction against the 4th, 5th and 6th defendants restraining them from selling or otherwise transferring or incumbering the property until the trial of the suit.

Before the learned trial judge at the hearing of the Summons for the Interlocutory Injunction were affidavits by the respondent and by the 2nd defendant on behalf of herself, her father the 1st defendant, and the 3rd defendant of which she is a director. There were also affidavits by or on behalf of the 4th and 5th defendants who are two of the appellants herein.

The affidavit evidence together with the exhibits disclosed indisputably that the respondent and the 1st defendant had entered into a contract of sale of the property on June 9, 1980. The material terms of this contract were that the respondent was to pay $250,000.00 in manner as therein stated by 30th June, 1981 and the balance of $250,000.00 on completion date namely 31st March, 1982. He was to be put in possession of the property on 31st March, 1981. The 1st defendant was to execute

agreements by June 1981 with persons who had previously paid deposits towards the purchase of lots in the property for the refund to them by the 1st defendant of their deposits, the 1st defendant was also responsible for discharging incumbrances on the property other than incumbrances in the form of "conditions of approval" of the Kingston and Saint Andrew Corporation on the Subdivision Plan of "Chancery Hall Heights" affixed to the contract of sale. The respondent duly paid a total sum of $260,000.00 and was let into possession on 31st March, 1981. The affidavit further disclosed that from about October, 1983 the respondent was in negotiations with the first two appellants with a view to a joint venture with them for the development of the property. During the currency of these negotiations the respondent with the knowledge of the 2nd defendant obtained a commitment in March 1984, for an advance to him by the Workers Bank of Jamaica in the sum of $240,000.00 being the balance of the purchase price, to complete the sale.

On the 6th day of November, 1985 the estate and interest of the 1st defendant in the property was transferred to the 4th defendant/ appellant by the 3rd defendant purportedly under powers of sale contained in mortgage transfer No. 204602 not in the name of the 3rd defendant, but rather in the name of the "International Investment Company Limited." This mortgage was purportedly executedon 14th November, 1974 and registered some ten months later.

Before us, Mr. Small correctly submitted that in the absence of the written judgment of Wolfe J. which was short and in any case, as stated by him, raised no point of law, we could properly determine from the affidavits and documents before the court, whether the learned judge had correctly applied the accepted principles stated inter alia in American Cyanamid Co. v. Ethicon Ltd (1975) 1 All E.R. 504 in making the order for interlocutory injunction.

The affidavit evidence in my view clearly showed triable issues in that firstly the respondent was impliedly alleging that there was fraud in the manner of the transfer of the property to the 5th defendant/appellant

and the latter was a party to the fraud. The first two appellants denied they were parties to any conspiracy from which fraud could be inferred or that they were parties to any conspiracy whatsoever. Secondly, the respondent was impliedly alleging that the purported transfer by the 3rd defendant under powers of sale as a mortgagee of the estate and interest of the 1st defendant to the 5th defendant/appellant was a contrivance to conceal the fact that to the knowledge of the 5th defendant/appellant it was in reality the 1st defendant who was effecting the transfer to the said 5th defendant/appellant so to overreached the interest of the respondent because the 3rd defendant was in reality the alter ego of the 1st defendant. These allegations were denied by the first two appellants as well as by the first three defendants who relied on the affidavit sworn to by the 2nd defendant for herself and as agent for the 1st and 3rd defendant.

There was in addition, the observation made by us that prima facie there was no exercise of the powers of sale because the 3rd defendant was not the registered mortgagee, and the registered mortgagee was a non-existent person, because there was no incorporated company having that name.

In the light of the above matters, Mr. Small properly stated that he would not proceed further with his submission that the interlocutory injunction ought not to have been granted based on the ground that the affidavits with supporting documents did not disclose triable issues.

Mr. Small however, submitted that even if the evidence before the learned judge did disclose triable issues he ought not to have ordered the interlocutory injunction because the balance of convenience weighed in favour of the appellants. This was so, he said, because firstly the respondent was merely a purchaser in possession without a registered interest. Secondly, since his contract of sale could not be completed without a discharge of the mortgage in favour of the 3rd defendant, a court would not order specific performance in favour of the respondent but

would rather leave him to his remedy for breach of contract against the 1st defendant. On the other hand, he submitted, the 5th defendant was the registered owner. The 5th defendant was prima facie entitled to the protection of the Registration of Titles Act. Thirdly, the status quo which ought to have been considered by the learned judge in applying the balance of convenience principle was that existing immediately preceding the issue of the writ. Thus considered, it was the status of the 5th defendant/appellant as a registered owner which was relevant and ought to have been preserved pending trial. Fourthly, the property being commercial in nature intended by the respondent to be developed for sale, damages would in any case be an adequate remedy.

To the contrary Mr. Henriques submitted that having regard to the claim of the respondent and the reliefs sought it was manifest that he was asking the court, if fraud was established, to set aside the transfer to the 5th defendant/appellant and thereafter to grant him the relief of specific performance. The uses of land even in the case of commercial land are diverse and the respondent had contended in his affidavit that he would suffer irreparable damage if the appellants were to continue disposing of the property in the manner disclosed by him in his aforesaid affidavit. This averment was not controverted.

In my view the status quo which the learned trial judge properly should consider and which he correctly considered was that which existed immediately before the impugned transfer on 6th November, 1985. It is this transfer which is alleged to be vitiated by fraud, which fraud if proved, would void the transfer. For the court to have considered the status quo as that existing immediately prior to the issue of the writ and in consequence conclude that it is that status quo which ought to be preserved pending trial and thus refuse the order, would enable the appellants to continue their dispositions of the property to bona fide purchasers thus complicating the situation should the respondent ultimately succeed in establishing fraud. The endorsement on the writ revealed that the respondent while claiming specific performance against his vendor was in addition, and to provide a basis for this relief, seeking an order setting

aside the transfer by his vendor to the 5th defendant/appellant on the ground of fraud, and pending the determination of this latter claim, he seeks the interlocutory order against the aforesaid 5th defendant/appellant. The grant of the order ensured that the respondent's indisputable rights which existed prior to the transfer to the 5th defendant/appellant are not irretrievably lost by the conduct of the 5th defendant/appellant pending the trial. On the other hand the rights of the 5th defendant/appellant, if vindicated at the trial would merely have been suspended and any loss suffered consequent on this suspension would be a matter of damages under the respondent's undertaking. The balance of convenience was thus clearly in favour of the respondent. The submission by Mr. Small that damages in any case would be an adequate remedy overlooks the fact that fraud is involved. In my opinion it is inconceivable that a court of equity, except perhaps in exceptional circumstances, difficult to envisage, would confirm a fraudulent transfer between a vendor and a subsequent purchaser whether directly or through some fraudulent device, thereby relegating a prior purchaser to his remedy of damages against his vendor. In any case a triable issue raised by the respondent in this case is that there is a fraudulent transfer involving the 1st defendant, the 3rd defendant as the alter ego of the 1st defendant and the 5th defendant/appellant. Accordingly, whether on other grounds the court would, notwithstanding its setting aside the transfer to the 5th defendant/appellant as fraudulent, refuse the respondent specific performance on the ground that damages is an adequate remedy, was not the relevant issue before the learned trial judge. The interlocutory injunction sought was not against the vendor but rather against an allegedly fraudulent subsequent purchaser against whom the question of damages versus specific performances does not arise. The issue was whether a purchaser under an alleged fraudulent transfer should as against a previous undisputed bona fide purchaser, be restrained from exercising rights under his purchase pending trial.

In my view the learned trial judge properly exercised his discretion in conformity with established principles in granting the order of interlocutory injunction.

It is for the above reasons that I concurred in the order made on April 28, 1987 dismissing the appeal.

DOWNER J.A. (AG.)

I agree with the reasons given by Carey & Campbell JJ.A. for dismissing the appeal.