

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. S420/1986

BETWEEN	NEVILLE SMITH	PLAINTIFF
AND	DONALD FITZ-RITSON	FIRST DEFENDANT
AND	JENNIFER MESSADO	SECOND DEFENDANT
AND	INTERNATIONAL INVESTMENTS LIMITED	THIRD DEFENDANT
AND	FIRST LIFE INSURANCE COMPANY LIMITED	FOURTH DEFENDANT
AND	APPROPRIATE TECHNOLOGY LIMITED	FIFTH DEFENDANT
AND	LIFE OF JAMAICA LIMITED	SIXTH DEFENDANT

SUMMONS FOR INTERLOCUTORY INJUNCTION

February 27, 1987

R.N.A. Henriques Q.C., Dennis Morrison and Miss Tracy Barnes instructed by Messrs Dun Cox and Orrett for the Plaintiff.

Hugh Small Q.C. and Arthur Hamilton instructed by Messrs Myers, Fletcher and Gordon, Manton and Hart for the fourth, fifth and sixth Defendants the Respondents herein.

WOLFE J.

The Plaintiff by a Writ of Summons dated the 27th day of October 1986 endorsed in the terms set out below sought the relief from the Defendants aforementioned.

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.

I shall now proceed to summarize the history of the transaction between the parties. By an Agreement for sale dated 9th June 1980 between the Plaintiff and the first named Defendant, the first named Defendant agreed to sell and the Plaintiff to purchase lands known as Chancery Hall in the parish of Saint Andrew, and comprised in Certificates of Title at Volume 1054 Folio 665 and Volume 666 Folio 49. The agreed purchase price was \$500,000.00 of which amount the Plaintiff had paid \$260,000.00 to the first named Defendant up to the time the action was commenced. The Plaintiff was given vacant possession of the lands the subject matter of the Agreement on the 31st day of March 1981 and has remained in possession since then.

The third named Defendant a limited liability company was registered as the primary mortgagee on the titles of the subject matter herein. From 1975 until 1985 the first and second

named Defendants were the only two shareholders and Directors of the third named Defendant Company.

The Plaintiff in October 1983 invited the fourth Defendant, First Life Insurance Company Ltd. to enter into a joint venture to develop the lands. The fourth named Defendant in turn introduced the fifth named Defendant, Appropriate Technology Ltd. as a part of the joint venture team. Negotiations ensued as to the joint venture scheme.

In March 1984 Worker's Savings and Loan Bank in a letter addressed to Jennifer Messado and Company indicated that they were willing to advance the sum of \$240,000.00 to complete the sale.

The response of Jennifer Messado and Company to the Workers Savings and Loan Bank makes interesting reading.

In September 1985 the third Defendant exercising its power of sale contained in Mortgage No. 204602 registered under title of the said lands sold the lands to the fifth Defendant for a consideration of \$1,220,000.00.

It is against this background that the Plaintiff prays the grant of an interlocutory injunction in the terms of the summons dated the 27th October 1986 and as recited at paragraph 4 of the Writ of Summons supra.

I do not propose to enter into a detailed analysis of the Affidavits because I fear that in so doing my views might have the effect of influencing the issues which are properly to be determined at the trial.

I shall therefore concentrate on the legal principles which are to be considered in deciding whether or not an interlocutory injunction ought to be granted.

In the celebrated case of American Cyanamid Company v. Ethicon Ltd. [1975] 1 A.E.R. p. 504. Lord Diplock delivering the opinion of the House of Lords laid down the following principles which were to be the rule and guide in the exercise of the discretionary power to grant an interlocutory

injunction.

1. The Court must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried.

The question therefore arises is there a serious question to be tried in the instant case. When one considers the status of the parties, the relationship which existed between the Plaintiff and the Defendants at different stages of the transaction and more so the relationship between the third named Defendant, the mortgagees who exercised the power of sale and the first Defendant, the allegation of fraud raises in my view a serious question for trial. The conduct of the Defendants require the serious investigation of the court.

2. The court should consider whether if the Plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the Defendants continuing to do what was sought to be enjoined between the time of the application and the time of trial. If damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the Plaintiff's claim appeared to be at that stage. If on the other hand, damages would not provide an adequate remedy for the Plaintiff in the event of his succeeding at the trial, the court should consider whether, on the contrary hypothesis that the Defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the Plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from

doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the Plaintiff would be in a financial position to pay them, there would be no reason on this ground to refuse an interlocutory injunction.

Bearing in mind the fact that the Plaintiff is a purchaser in possession if he succeeds on his claim I would be inclined to the view that in the particular circumstances of this case damages would not be adequate remedy. Applying the contrary hypothesis I am of the view that if the Defendants were to be successful they could be adequately compensated in damages under the Plaintiff's undertaking as to damages. I am further satisfied that the Plaintiff would be in a financial position to pay such damages. Assuming I am wrong then let me consider the third consideration as enunciated by Lord Diplock.

3. The balance of convenience: where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both the question of the balance of convenience arises. Where the factors are evenly balanced the court is advised to pursue the path of prudence and preserve the status quo. What is the status quo which ought to be protected herein? The nature of the claim suggests that it would be the status prior to the alleged "fraudulent transfer".

In my view the balance of convenience would favour the granting of the interlocutory injunction.

Mr. Small Q.C. for the fourth, fifth and sixth Respondents submitted that the allegation of conspiracy could not be supported where acts are done by two or more persons merely for the purpose of protecting their own interests. See Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch [1942] 1 A.E.R. 142.

The peculiar relationship of the first Defendant and the third Defendant in my view raises the question whether the exercise of the power of sale by the third Defendant was merely to protect their own interest or whether the first and second Defendants Directors of the third Defendant were acting together with the third Defendant to defeat a contract validly entered into in order to procure a better price.

For the aforesaid reasons I hold that the order prayed in the summons dated 27th day of October 1986 ought to be granted.

Order granted in terms of summons.