

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO.E.53 OF 1995

BETWEEN	PEARL SMITH	PLAINTIFF
AND	CONRAD GRAHAM	1ST DEFENDANT
AND	LOIS GRAHAM	2ND DEFENDANT

Mr. Michael Hylton Q.C. & Miss Nicole A. Lambert for Defendant/Applicants instructed by Myers, Fletcher & Gordon.

Mr. Patrick Foster & Miss Lisa Samuels instructed by Clinton Hart & Company for Plaintiff/Respondent.

Heard: November 17, 1995, April 26, 1996
& June 19, 1996.

LANGRIN, J.

The defendants seek an inquiry to ascertain what damages they have suffered by reason of an interim injunction which was granted on the 15th February 1995 and dissolved on the 8th March, 1995 in which the plaintiff gave the usual undertaking as to damages.

By a writ of Summons dated 15th February, 1995 the plaintiff instituted civil proceedings against the defendants claiming a declaration that she was the lawful owner by adverse possession of part of land registered at Volume 1254 Folio 837 of the Register Book of Titles and situated at the rear of the premises known as 21 Sunset Avenue, Kingston 8 in the parish of St. Andrew. Also an injunction was sought to restrain the defendants from selling or disposing or otherwise dealing with the said land. The defendants are the registered proprietors of the said land.

The plaintiff by way of an exparte summons on the 15th February, 1995 applied to the Court for an Interim Injunction to restrain the defendants from entering, crossing, selling, disposing or otherwise dealing with their said land.

Upon the plaintiff giving the usual undertaking as to damages the Court granted a ten day injunction to the plaintiff on the 15th day of February, 1995 which was further extended by consent of the parties from the 25th February, 1995 for a further 14 days. However, on the 8th March, 1995 the plaintiff filed a Notice of Discontinuance

Prior to obtaining the injunction the plaintiff knew that the defendants intended to develop their land by building houses on it

and it is common ground that work had already started on the project.

The defendants obeyed the Court orders by stopping all work on the project and demobilising their workers.

The evidence adduced by the defendants state that they have suffered losses as a consequence of the injunction because there has been a significant increase in the cost of their project by reason of additional interest which they have had to pay to their bankers during the period they were unable to proceed with the development. The delay has resulted in the time originally scheduled for completion of the development being extended. Because the additional cost cannot be passed on to the eventual purchasers of units in the development compensation in respect of losses are being sought.

Mr. Howard Graham the Operations Manager of Citizens Bank gave evidence in respect of the loan which was used to develop the property. A sum of \$1,413,169.00 came from the defendants' personal fund. The bank made a loan of \$8,311,153.50 to Home Builders Development Company Limited, a company of which the defendants are the sole directors and shareholders. The loan was guaranteed by the defendants and secured by a mortgage over the defendants' said land.

Under cross-examination, Mr. Graham testified that \$1.6M came from their own personal resources. The sum of \$8.3M was used to purchase the land while the \$1.6M was used from their own resources to execute the project.

It is because they had to demobilise and then remobilise the work staff why the project was delayed for a period of 3½ months.

Where an interlocutory injunction has been granted on the usual undertaking as to damages if it is afterwards established that the plaintiff is not entitled to an injunction an inquiry as to damages may be directed. The governing purpose of damages is to put the party whose rights have been violated in the same position so far as money can do so, as if his rights had been observed. Damages to be recoverable must be reasonably foreseeable to result from the wrongful act. What is reasonably foreseeable depends on the knowledge of the parties or at all events the knowledge of the party who commits the wrongful act. See Hadley v. Baxendale (1854) 9 Ex.341 and Victoria Laundry Limited v. Newman (1949) 1 All ER 997.

It cannot be gainsaid that a developer of a housing project would have to utilize bank financing and would be paying interest. In Keating's

Building Contracts 4th edition the learned author at page 132 had this to say:

"Ordinarily where completion is delayed the contractor suffers a loss arising from the diminution of his income from the job and hence the turnover of his business but he continues to incur expenditure, usually called "overheads" which he cannot materially reduce or, in respect of the site, can only reduce, if at all, to a limited extent."

Mr. Patrick Foster, Learned Counsel for the plaintiff submitted with much force that the defendants are not entitled to recover damages for losses sustained because the injunction only prevented them from doing acts which if they had done would be in violation of the law.

The defendants had secured outline building approval dated February 28, 1995 addressed to their construction company which is stated as follows:

"I am directed to inform you that the Council's Building and Town Planning Committee of the Kingston and St. Andrew Corporation at its meeting held on 15th February, 1995 approved of your application to erect Six (6) single storeys, Three (3) bedroom single family dwellings on the abovementioned property, in accordance with the plans submitted and on the following conditions:-

1. That the applicant complies with all relevant conditions of the Proposed Subdivision when approved;
2. That detailed Building plans are submitted for consideration and approval before any construction work commences;
3. That Outline Building approval be granted for Two (2) years only.

One set of the plans is retained for our files.

Yours faithfully,

Town Clerk."

Mr. Graham testified that despite the date of the abovementioned letter granting the approval he was aware that the said approval would be granted at the Town Planning Committee's meeting held on February, 15, 1995 and had therefore taken preparatory steps to commence the infrastructure on the land. He had mobilised his work

force which consisted in the main of casual and independent workers and had placed a tractor on the land to commence clearing the land. In response to the question whether he could not have continued the development on the remainder of the land he said that the building approval was in respect of the whole land and further that the subject property in this case formed an integral part of the proposed development of his property. He did not continue with works on the remainder of the land as such work would only result in increased costs to the project as a whole.

It is the contention of Mr. Hylton Q.C. that no construction of building had started on February 15, 1995 and the subdivision approval had not precluded the construction of roadways and infrastructure. Further, the injunction restrained the defendants from "selling, disposing of or otherwise dealing with the said parcel of land".

It was submitted by Mr. Foster that the defendants could not on the 15th February, 1995 accept deposits because in so doing there would be a contravention of Sec. 26(1)(c) of the Real Estate (Dealers and Developers) Act since all the conditions of the proposed subdivision had not been finalized. It is my view and I so find that even apart from accepting deposits it cannot be denied that the delay caused by the injunction would result in damages suffered by the defendants. I do not find any merit in the submission.

Another point raised by Mr. Foster was that the bank loans disbursed to Home Owners Development Limited was not a loan to the applicants who were only contingently liable as guarantors if they were called upon to pay. Additionally, the scope of the undertaking as to damages given by the plaintiff did not relate to third parties such as the defendants.

The defendants were the sole shareholders of the company which was responsible for the construction.

It is a well established principle that although a company has a separate legal personality from its members or shareholders the Courts in certain circumstances will treat them as the same for many purposes. In Halsbury Laws of England 4th Edition, para.90 it is stated as follows:

"Notwithstanding the effect of a company's incorporation, in some cases that Court will pierce the Corporate veil in order

to enable it to do justice by treating a particular company for the purpose of the litigation before it as identical with the person or 'persons' who control that Company. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company or the nature of the persons who control it is a relevant feature."

Having regard to the circumstances of this case the Court will disregard the fact that the loan by the bank was disbursed to a private limited company, for to treat the company as a separate legal entity whose loss was not the personal loss of the defendants would be a denial of justice.

It is a general principle that a person who has been injured by the acts of another party must take reasonable steps to mitigate his loss and cannot recover for losses which he could have avoided but has failed through unreasonable inaction or action to avoid. The person who has suffered the loss therefore does not have to take any step which a reasonable and prudent man would not take in the course of his business.

Mr. Hylton Q.C. argues that the defendants having stopped the work on the project from February 15, 1995, had to relocate and re-engage the services of casual and independent workers after the suit was discontinued on March 8, 1995. It is said that the work on the project did not resume until June 1995. In light of the fact that the initial work was confined to construction of roadways and infrastructure coupled with the availability of casual labour it is the Court's view that the recommencement of work on the project should not exceed one month from the date of discontinuance of the suit. The defendants are therefore entitled to be compensated for a total loss of interest of 51 days, which include the injunction period of 21 days.

The damages will be assessed as follows:

Bank Loan

Interest at \$11,249.94 per day from	
15/2/95 to 22/2/95 (7 days)	\$78,749.58

Interest at \$10,278.94 per day from	
22/2/95 to April 7, 1995 (44 days)	\$452,273.36

Loan From Personal Funds

Interest at 42% on \$1,413,169.05

from the 15/2/95 to the 14/4/95 .

(51 days) at \$1626.11 per day.

82,931.61

Total -

\$613,954.55

There will be costs for the defendants to be agreed or taxed.