



[2016] JMCC COMM36

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2016CD00354

BETWEEN	AZZURO COAST LIMITED	CLAIMANT
AND	DENNIS ATKINSON	1 <sup>ST</sup> DEFENDANT
AND	OCEAN SANDS RESORTS LIMITED	2 <sup>ND</sup> DEFENDANT
AND	BRANDON ATKINSON	3 <sup>RD</sup> DEFENDANT
AND	THE OCCUPANTS 14 JAMES AVENUE OCHO RIOS, SAINT ANN	4 <sup>TH</sup> DEFENDANT

IN CHAMBERS

Mr. Stuart Stimpson and Mr. Hadrian Christie instructed by Hart Muirhead Fatta for the Claimant.

Mr. Joseph Jarrett for the Defendants.

December 6 & 16, 2016

Injunction - Principles to be applied - balance of convenience - Applicant registered legal owner - person against whom injunction is sought is a second mortgagee with no current right to possession or occupation

LAING, K

The Application

[1] The Claimant by Notice of Application filed on 2 November 2016 seeks orders including *inter alia*:

*A mandatory injunction to restrain the defendants from continued trespass on all that parcel of land is (sic) all that part of The Point Estate, in Ocho Rios in the parish of Saint Ann known as 14 James avenue, in Saint Ann, comprised in Certificate of Title at Volume 1269 Folio 97 of the Register Book of Titles.*

- [2] This application was heard at the same time as an application for striking out in Claim No. 2016 CD 00358 and although the parties in each case are not there are a number of facts which are relevant to both proceedings. It was submitted by Mr Jarret for the Defendants that it was inappropriate for the Claimant herein to have filed a separate claim but this Court does not share his view.

### **The applicable law**

- [3] In determining the circumstances in which an interim injunction ought to be granted our Courts have consistently been guided by the principles laid down **American Cyanamid v. Ethicon [1975] 1 All ER 504** which have for convenience been reduced to 3 main considerations, which in summary are:

1. Is there a serious issue to be tried?
2. Would damages be an adequate remedy?
3. Does the balance of convenience favour the granting of an injunction?

### **Is there a serious issue to be tried?**

- [4] The Claimant asserts that since the 19<sup>th</sup> of July 2016, it acquired the parcel of land part of The Point Estate, at Ocho Rios in the parish of Saint Ann known as 14 James Avenue in Saint Ann, comprised in Certificate of Title at Volume 1269 Folio 97 of the Register Book of Titles (“the Property”) and it is the legal owner. The Claimant further asserts it has been unable to take possession of the Property and that the Defendants are trespassers and/or squatters with no legal or equitable right to the Property. The Claimant asserts that the 3<sup>rd</sup> Defendant is a mere mortgagee, and he was not the lawful owner of the property when he

entered upon it in 2008. It is in these circumstances that it is submitted that he and his cohort are in continued possession against the demands of the registered owner, the Claimant.

- [5] The issue is a narrow one and I find that there is clearly a serious issue to be tried in this case as to whether the Defendants are trespassers and whether the Claimant is entitled to the relief claimed against them.

**Would damages be an adequate remedy?**

- [6] The Claimant fears that the Defendants' trespass to the Property has led and/or will lead to the Property's deterioration and consequential damage because, from the observation of the Claimant's directors, the Property is in dire need of repair and maintenance and there is evidence of water damage in the ceilings on the 2<sup>nd</sup> floor and several rooms were unlocked and were dilapidated. The Claimant believes that this could damage the Property. The Claimant also asserts that there is a real risk that if the order is not granted the claimant will find itself in a position of default in regards to some of the financial obligations of its principals. In support of this assertion, the Claimant's highlighted that the purchase of the Property was funded partially by a loan of US\$100,000.00 secured by Melvina Bayley-Hay, a director of the Company and by the Company nearly depleting its capital reserves.

- [7] The Claimant asserts that without access to the Property it was unable to make a proper assessment of this investment and it is unable to secure the investment as its insurers insist on an inspection of the Property before it can receive peril insurance cover, and this inspection cannot be carried out with the defendants in occupation. The Claimant further asserts that because of the inability to utilize the Property for such an extended period of time, this has and will continue to have a negative impact on the Company's projections for revenue generation. It was anticipated that the revenues should have off-set the Claimant's director's bridge-

loan for the Company and that this could lead to irreparable reputational damage to her and could prejudice any further attempts to seek financing.

[8] In the circumstances, the Claimant maintains that damages are not an adequate remedy as it is unclear whether the defendant has the means to satisfy such an order having regard to his failure to honour the mortgage to Development Bank of Jamaica over the years and his admitted financial challenges at this time. Additionally, it will be difficult to assess the profit that Azzuro loses daily while it is unable to carry on its intended hotel operation at the location, there is also an un-assessable loss to the goodwill and reputation of the location as a tourist/local destination for vacationers, and even if these losses were measurable the Defendants would still be unable to compensate for the Claimant's losses.

[9] As the privy Council has re-iterated in **National Commercial Bank Jamaica Ltd v. Olint Corp Ltd (Jamaica) [2009] UKPC 16 (28 April 2009)**:

16. *At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in American Cyanamid Co v Ethicon Ltd [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.*
17. *In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irreparable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irreparable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the American Cyanamid case [1975] AC 396, 408:*

*“It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them.”*

18. *Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court’s opinion of the relative strength of the parties’ cases.*

[10] I find that there is considerable force in the submissions of the Claimant as to why damages are not an adequate remedy in this case. Notable is the absence of any cogent evidence to suggest that the Defendants or any of them will be able to satisfy a monetary judgment against them if the Claimant is successful on its claim which is a claim the relative strength of which weighs significantly in favour of the Claimant.

[11] Furthermore adopting this approach as suggested in **Olint** (*supra*), I am of the view that the course which will cause the least irremediable harm will be to grant the injunction in this case. Foremost in my mind is the fact that the Claimant is the registered owner of the Property. It acquired the Property as a result of DBJ exercising its powers of sale as mortgagee. The mortgage of DBJ ranks ahead of that of the 1<sup>st</sup> Defendant and the mortgage held by the 1<sup>st</sup> Defendant is expressly made subject to that held by DBJ. The particulars supporting the allegation of fraud as summarised in paragraph 23 of the defence, even if proved would be insufficient to support a finding of fraud as a matter of law, as it relates to the sale or the Claimant’s acquisition of a legal interest in the Property.

[12] The interest of the 1<sup>st</sup> Defendant is that of a second Mortgagee. The 1<sup>st</sup> Defendant complains that the sale of the Property by DBJ was conducted improperly and/or fraudulently. In the absence of fraud (which this Court finds unsustainable given the pleadings), the 1<sup>st</sup> Defendants remedy would be

confined to damages against DBJ by operation of section 106 of the **Registration of Titles Act** which provides as follows:

*“If such default in payment or in performance or observance of covenants continues or one month after the service of such notice for such other period as in such mortgage or charge is for that purpose fixed, the mortgagee or annuitant or his transferees may sell or concur with any other person in selling the mortgaged or charged land, or any part thereof, either subject to prior mortgages or charges or not, and either together or in lots, by public auction or by private contract, and either at one or several times, subject to such terms and conditions as the mortgagee or annuitant thinks fit, with power to vary any contract for sale, and to buy in at auction, or to vary or rescind any contract for sale, and to resell without being answerable for any loss occasioned thereby, with power to make such roads, streets and passages, and grant such easements of right of way or drainage over the same, as the circumstances of the case require and the mortgagee or annuitant thinks fit; and may make and sign such transfers and do such acts and things as are necessary for effectuating any such sale; and no purchaser shall be bound to see or inquire whether such default as aforesaid has been made or has happened, or has continued or whether such notice as aforesaid has been served, or otherwise into the propriety or regularity of any such sale. Where a transfer is made in professed exercise of the power of sale conferred by this Act, the title of the transferee shall not be impeachable on the ground that no cause has risen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised, but any person damnified by an authorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power. “*

[13] The Court wishes to expressly state that it recognizes the mandatory nature of the injunction sought but it is of the view that this does not affect the Court’s view of the correctness of its decision in granting the order sought. I am fortified in my view by the judgement in **Olint** in which their Lordships made the following observations which bear reproducing:

19. *There is however no reason to suppose that in stating these principles, Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases, the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other: see Lord Jauncey in R v Secretary of State for Transport, ex parte Factortame Ltd (No 2) [1991] 1 AC 603, 682-683. What is true is*

*that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than in cases in which a defendant is merely prevented from taking or continuing with some course of action: see Films Rover International Ltd v Cannon Film Sales Ltd [1987] 1 WLR 670, 680. But this is no more than a generalisation. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in Shepherd Homes Ltd v Sandham [1971] Ch 340, 351, “a high degree of assurance that at the trial it will appear that at the trial the injunction was rightly granted.”*

*For these reasons, arguments over whether the injunction should be classified as prohibitive or mandatory are barren: see the Films Rover case, ibid. What matters is what the practical consequences of the actual injunction are likely to be....*

**[14]** For the reasons outlined herein the court makes the following orders:

- 1. The Defendants are hereby restrained from continued trespass on all that parcel of land part of The Point Estate, in Ocho Rios in the parish of Saint Ann known as 14 James avenue, in Saint Ann, comprised in Certificate of Title at Volume 1269 Folio 97 of the Register Book of Titles (“the Property”).*
- 2. The Claimant’s officers, servants and/or agents are permitted to enter inspect the Property forthwith.*
- 3. Costs of this application to be costs in the Claim*