Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. ERC 248 OF 1990

BETWEEN	CLAUDE BROWN	1st Plaintiff
	BURLETT BROWN	2nd Plaintiff
A N D	VAYDEN McMORRIS	DEFENDANT

Norman Wright and Mrs. Maureen Moncrieffe instructed by Moncrieffe, Pantry Betton-Small and Company for Plaintiffs.

Michael Hylton Q.C. and Miss Debbie Fraser instructed by Myers, Fletcher & Gordon for Defendants.

Heard: November 27, 1997 and February 4, 1998.

JUDGMENT

HARRIS, J.

This is an application under a summons issued by the plaintiffs on the 3rd October, 1997 in which they seek the following order:

> 'That there be an inquiry whether the plaintiffs have sustained damages by reason of the injunction dated the 26th April 1993 which the defendant ought to pay according to his undertaking as to damages contained in the said order.'

The plaintiffs and defendant are registered proprietors of adjoining lots of land which form part of a subdivision in Forest Hills, St. Andrew. Lot 12 registered at Volume 585 Folio 91 in the Register Book of Titles is owned by plaintiffs and lot 12A registered at Volume 585 Folio 90 is owned by the defendant. These lots are subject to restrictive covenants.

On the 26th November, 1990 the plaintiffs made an application by way of an Originating Summons for the modification of one of the restrictive covenants endorsed on the certificate of title which reads:-

"There shall be no subdivision of the land."

On 8th March 1991 they obtained an order of modification of the covenant, granting subdivision of their land into two lots. They commenced construction of a second dwelling in or about April 1992 as they had also obtained building approval from the relevant authority. On 22nd October 1992 the order of the court of 8th March 1991 was set aside due to an error in service of the notice of the proposed modification and the defendant was granted leave to file objection. After filing his objection the defendant sought and obtained an interlocutory injunction restraining the plaintiff from continuing the construction of the building until trial. The summons was dismissed by an order of the 29th July 1994. An appeal which followed that order was allowed on the 20th December 1995.

In deciding whether an inquiry as to damages ought to be ordered, two principal questions emerge. The first is whether the injunction had been wrongly granted. The second is whether there has been such delay on the part of the plaintiffs which ought to preclude them from proceeding to an inquiry if it is found that the injunction should not have been granted.

The issue as to whether the injunction had been wrongly granted will first be addressed. A court will not make an order for an inquiry for damages pursuant to an undertaking on the grant of an injunction unless the plaintiff fails on the merits. It must be shown that the injunction ought not to have been granted.

In support of the foregoing proposition Cotton LJ, in **Griffith v Blake 1884 27 Ch 474, at p. 474** stated:-

> **".... the rule is, that whenever the undertaking is given, and the plaintiff ultimately fails on the merits, an inquiry as to damages will be granted unless there are special circumstances to the contrary."**

In **Newby v Harrison 1861 3 De G.F and J at page 290 Turner L J** declared:-

> **"The true principle appears to me to be this, that a party who gives an undertaking of this nature puts himself under the power of the court, not merely in the suit but absolutely; that the undertaking that he will be liable for any damages which the opposite party may have sustained, in case the court shall ultimately be of the opinion that the order ought not to have been made."**

Then in **Ushers Brewery v King and Company 1972 21 Ch. 148 at page 154 Plowman J.** observed:-

> **"It is my judgment established by the authorities that an inquiry as to damages will not be ordered in these cases until either the plaintiff has failed on the merits at the trial or it is established before trial that the injunction ought not to have been granted in the first instance."**

In the case under consideration the plaintiff averred that between the period of the granting of the injunction and the adjudication of the action by the Court of Appeal they had sustained loss and damage arising from the escalation in interest rates and construction costs. An undertaking as to damages will be of no protection to the plaintiffs unless it is shown that the defendant did not have a right to an injunction. Mr. Wright urged that the test to be applied ought to be whether the injunction was necessary. The authorities have clearly established that the test must be whether at the date of the injunction the defendant was entitled to the order.

Was the defendant entitled to an injunctive order? The covenants endorsed on the certificates of title of the plaintiffs and defendant had been properly imposed and are binding on all parties within the subdivision. The defendant is entitled

to the benefit of the covenants and is therefore clothed with the authority to challenge any user of the plaintiffs' land which is not in conformity with the terms of the restrictions on the title. The plaintiffs had commenced the construction of a building in contravention of the restrictive user and such an act would have been an infringement of the defendant's rights.

The fact that an Order had been obtained from the court in March 1991 approving the modification of the covenant and that the plaintiffs had begun erection of a dwelling house before the order setting aside that order of March 1991, does not avail the plaintiff. The Order of March 1991 was made as a result of the failure of the plaintiffs to effect service on the defendant in order to bring to his attention the application for the proposed modification of the covenant.

At the time of the granting of the injunction the covenant was still valid and enforceable and since the defendant had a right to enforce the restrictive use of the covenant, he could have properly sought and obtained an injunction restraining any violation of the covenant.

In allowing the appeal, the court of appeal modified the covenant. That court did not decree that the defendant did not have a right to have made his objection. The effect of the order would be to grant permission to the plaintiffs to subdivide the land although subdivision had been prohited by the covenant, which , does not implicitly declare that the defendant was not entitled to object to modification or to obtain an injunction. He had a right to the injunctive order. It follows therefore that the injunction had not been improperly granted and the plaintiffs are precluded from enforcing the undertaking given by the defendant.

In the event that I am wrong, it will be necessary for me to consider the question relating to the time within which the application for inquiry as to damages should be made. The time frame within which such application should be made is of importance. Where the injunction is dissolved, the application may be made then, or at the time of trial. It may also be made after trial but if it is made then, it should be done **expeditiously**. If it is not made within a reasonable time after trial it may be refused.

In **Smith v Day 21 Ch. 421** at page **430 Cotton L.J,** in dealing with the subject of relevant time for making the application, declared:-

> **"It is certainly desirable that the application should be made either at the time when the injunction is dissolved or at the hearing of the cause. No rule, however, has been laid down that it must be made at one or other of those times, and I do not say that the court ought to lay down any express limit as to time, still I think that a long delay might of itself be fatal to the application."**

In **Smith v Day (supra)** a perpetual injunction was granted in November 1880 as to access of air. In June 1881 the Court of Appeal dismissed the action. Notice of Motion for an inquiry as to damages was presented by the defendant in February 1882. This was refused by the trial judge. It was held that an inquiry as to damages ought not to be granted and that even if the defendant sustained some damage by granting of the injunction the court is not bound to grant an inquiry of damages if damage is trivial, remote or if there is delay in the making of the application.

The present case is one in which the injunction was granted on 24th April 1994. The appeal was allowed in July 1995. Application for enquiry as to damages was made on 3rd October 1997, which is two years and 3 months after the

determination of the matter by the court of appeal. The authorities dictate that the application should be made within a reasonable time. Two years and three months cannot be regarded a reasonable time. The delay in presenting the application is inordinate. No reasons have been proferred for the delay which could move the court to find that the applicants ought to be allowed to proceed. There are no special circumstances by virtue of which the court could find otherwise.

The summons is dismissed with costs to the defendant.