Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 100/93

| BETWEEN | OSMOND HEMANS | FIRST PLAINTIFF |
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| AND | THELMA HEMANS | SECOND PLAINTIFF |
| AND | ST. ANDREW DEVELOPERS | DEFENDANT |

Mr. Christopher Samuda instructed by Piper and Samuda for Plaintiffs

Miss D. Fraser instructed by Myers, Fletcher and Gordon for Defendant.

Heard: May 25, June 7, 1993

Reasons for Judgment

HARRISON J. (Ag.)

The plaintiffs, in these proceedings sought an order to restrain the Registrar of Titles by herself her servants and or agents or otherwise however until the trial of the action from registering any transfer and/or transfer numbered 744339 in respect of lands comprised in Certificate of Title registered at Volume 1223 Folio 655 of the Register Book of Titles in the names of Richard Michael Jureidini and H. Elizabeth Jureidini or any other person(s) or otherwise dealing with the said land.

On the 7th June, I dismissed the application on the summons for interlocutory injunction and promised to put my reasons in writing. I now fulfill this promise.

The action out of which the application arises is a claim by the plaintiffs against the defendant for:

"1. Specific Performance of an Agreement for Sale between the plaintiffs and the defendant for all that parcel of land being lot numbered 158 on the plan part of Chancery Hall being the land comprised in Certificate of Title registered at Volume 1223 Folio 655 of the Register Book of Titles.

2. Alternatively, rescission of the said agreement and the return of the stipulated purchase price paid by the plaintiffs to the defendant with interest thereon from such date and at such rate as this Honourable Court sees fit.

3. Alternatively, damages for fraudulent misrepresentation made orally by the defendant through its servant and/or agent Collin Lyons respecting the completion and approval of the infrastructure and obtainment of the title of the said parcel of land with interest thereon.

4. An injunction restraining the defendant and the Registrar of Titles their servants and/or agents from transferring or dealing with the aforesaid land until the trial of this action.

5. A declaration that the sum of One Hundred and Eleven Thousand Four Hundred and Eighteen Dollars ($111,418.00) claimed by the defendant for escalation costs under the said agreement for sale is not payable under the same or alternatively for an account of what was/is payable thereunder.

6. Further or alternatively, damages for breach of contract.

7. Such further and other reliefs as this Honourable Court sees fit.

8. Interest and Costs".

The Affidavit evidence on behalf of the plaintiffs state that pursuant to the terms of the agreement the first plaintiff made payment of the purchase price of $150,000.00 by five instalments of $30,000.00 each and was assured by Collin Lyons, an authorised sales representative of the defendant company, that all infrastructures in relation to the lot were in place. He was further assured that there would be no difficulty obtaining title.

It was further contended that in making the final payment in July, 1990 the said Collin Lyons informed the first plaintiff that title would be issued within a period of three months. He made several visits to the office of the defendant company but was unable to receive title and the delay remained un-explained.

The first plaintiff further stated that the second plaintiff and himself had complied fully with the terms of payment of the stipulated purchase price. He received sometime in April, 1991 a letter from the defendant's Attorneys indicating that they should pay escalation costs pursuant to the agreement. These costs were strongly disputed.

As a result of a notice the plaintiffs received from the Registrar of Titles regarding an intended registration of a transfer of the said lot to the Jureidinis, they lodged a caveat against the Certificate of Title.

Section 49(h) of the Judicature (Supreme Court) Act provides the legal basis for the grant of an Injunction and states as follows:

> "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that such order should be made."

The governing principles applicable to a grant of an interlocutory injunction have been stated by Lord Diplock in the case of American Cyanamid v. Ethicon [1975] A.C. 396 at p. 406 as follows:

> "The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his rights for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The Court must weigh one need against another and determine where the balance of convenience lies."

At page 407 Lord Diplock continued:

> "It is not part of the Court's function at this stage of the litigation to try and resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations."

> "... So unless the material available to the Court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

It is against this background that I must consider the applicant's submissions.

In summary Mr. Samuda submitted:

a) That the only outstanding monetary issue between the parties were the escalation costs which was being contested by the plaintiffs.

b) That the purchase price was still in the defendant's hands.

c) That there was no response in the defendant's Affidavit in opposition to the allegation of misrepresentation made by its servant and/or agent Collin Lyons.

d) That there was no response to the allegation of fraud on the part of the defendant in withholding title to the lot.

e) That since there was no reference in the defendant's Affidavit that it was unaware of a caveat lodged by the plaintiffs against the title, the defendant ought to have known that it would have entered into a contract with the Jureidinis, fully well knowing of the caveat; that they still had the purchase price in hand and that the plaintiffs were disputing their legal entitlement to pay the escalation costs.

f) That since there was a clear and undisputed contract between the parties and there was no doubt as to the legal rights of the parties, an interlocutory injunction should be granted. He sought reliance on Spiller v. Spiller E.R. 974, Hadley v. The London Bank of Scotland Ltd. E.R. 562 and Halsbury's Laws of England Vo. 4 para. 1008.

Miss Fraser quite forcibly submitted that the plaintiff's application should be refused for the following reasons:

a) The plaintiffs failed to disclose all the material facts of the matter in their application for an ex-parte interim injunction.

b) The plaintiffs delayed unreasonably for an injunction.

On the issue of failure to disclose material facts I find Spry's The Principles of Equitable Remedies Third Edition at pages 476-477 useful. The principle is stated as follows:

> "Where application is made ex-parte, the obligation of the plaintiff is not merely not to mislead the Court by expressly or impliedly making representations that are untrue, as is otherwise ordinarily the case in an inter partes proceeding, but in addition he is under the duty of disclosing to the Court all matters within his knowledge which are material to the proceedings at hand and which tend in favour of an absent party. A matter is regarded as material for these purposes either if it is relevant to the existence of a power to grant an injunction or if it is one of those circumstances that the Court takes into account in exercising its discretion. Furthermore, the better view is that it does not have to be shown that the undisclosed matter in question would, if established, have been decisive, for one reason or another, against the party who has not made a proper disclosure. It is sufficient that it is relevant and of such a nature that it might foreseeably have been regarded by the Court as of weight; and so for example, it has been said to be appropriate to enquire whether there has been "any mis-statement or omission of any important facts. Occasional dicta that suggest that the defendants must be able to show that if there had been a proper disclosure no injunction would have issued must probably be regarded as incorrect, especially since it is often difficult or indeed impossible to determine retrospectively whether a particular discretionary consideration would have been decisive."

Also of relevance is the decision of King v. The General Commissioners for the purposes of the Income Tax Acts for the District of Kensington ex-parte Princess Edmond De Polignac [1917] K.B. 486 where Viscount Reading C.J. stated the rule at page 495 thus:

> "Where an ex-parte application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the Affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the

> result of this examination and hearing is to leave no doubt that the Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit."

Mr. Samuda submitted that the plaintiffs were not guilty of non-disclosure of material facts and that there was nothing in the plaintiff's Affidavit which could be construed as misleading the Court as to pertinent facts or otherwise.

Osmond Hemans, at paragraph 9 of his Affidavit dated March, 19, 1993 states:

> "9. ...I received no communication whatsoever from the defendant company and/or its Attorneys-at-Law, Myers, Fletcher and Gordon, respecting the reason for the delay in completing the matter and the issue of title notwithstanding the fact that the second plaintiff and myself had complied fully with the terms of payment of the stipulated purchase price and all the infrastructures were in place."

At paragraph 10 he continues:

> "That in late April, 1991 I received in the post a letter from the said Attorneys-at-Law for the defendant company together with an Escalation Certificate from Quantity Surveyors indicating that the second plaintiff and myself should pay escalation costs pursuant to the Agreement the extent and calculations of which I disputed and still dispute in view of the un-explained delays by the defendant company and its agents in completing the matter."

The defendant on the other hand, in an Affidavit sworn to by Dayton Wood, its Managing Director, stated inter alia:

> "3. On April 3, 1991 our Attorneys, Myers, Fletcher and Gordon, sent by registered mail a letter to Mr. and Mrs. Hemans indicating to them that the sum of $127,867.50 was due from them and that they were required to execute the Instrument of Transfer and to pay the said sum ..."

Now, the letter sent in April was exhibited with the affidavit. Upon perusing this letter, it is observed that not only the sum representing escalation costs were required to be paid. The plaintiffs were also required to pay half stamp duty, half registration fee on Transfer, half Transfer fee, Attorneys fee on agreement, half cost title and electricity supply fee.

The Affidavit of Dayton Wood continued:

"4. Our Attorneys had no response to the said letter and on September 5, 1991 another letter was sent by registered mail by our Attorneys to Mr. and Mrs. Hemans. We instructed our Attorneys to write to the Hemans and request that the balance purchase monies with interest be paid by the end of September 1991, or the Agreement would be treated as rescinded.

5. On October 7, 1991, the Attorneys for Mr. and Mrs. Hemans wrote to our Attorney requesting a copy of the said Agreement so as to ascertain if their client was obliged to pay interest on the balance purchase price. Their [illegible]s also asked that we do not do anything prejudicial to their clients interest without discussing the matter with them ...

6. Our Attorneys supplied the copy of the Agreement .....

7. On November 28, 1991 our Attorneys by registered mail and acting on our instructions served Notice on Mr. and Mrs. Hemans that the contract was rescinded and that the sum of $15,000.00 of the money paid by them was forfeited. The sum represented 10% of the purchase price and the balance was refunded to them ..."

The question to be answered is whether these facts which have been dislcosed in the Affidavit evidence of Dayton Wood are so relevant and of such a nature that it might forseeably have been regarded by the Court as of weight.

Quite apart from escalation costs, there were other costs and fees to be paid by the plaintiffs. Non payment of these costs would certainly result in further delays in having title to the property transferred.

Then, there is also the rescission of the contract to consider.

Was the plaintiff's affidavit candid and did it state the facts fairly when he stated that both his wife and himself had complied fully with the terms of payment of the stipulated purchase price? I am aware that I am not dealing with an application to discharge the ex-parte injunction and neither is this a court of trial.

I have carefully examined the facts as they are and as they have been stated in the applicants affidavit and it is my considered view that the non-disclosure of the facts stated above which I hold are material, is fatal to this application before me.

I now turn to the question whether damages is an adequate remedy.

Mr. Samuda submitted that the loss of the property which would result from the refusal of an injunction would constitute irreparable damage to the plaintiffs. In these circumstances he submitted that damages could not therefore compensate the plaintiffs for the bargain lost.

The principles to be applied regarding damages are set out in Halsbury's Laws (3rd Edition) at para 739. It is stated thus:

> "It is the very first principle of injunction law that prima facie the Court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the Court interferes by way of injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds; first, that the injury is irreparable, and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired; and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject-matter in question..."

For the plaintiffs, it was submitted that damages could not compensate them having regard to their respective occupations, that is, civil servant and farmer and that their salaries and income would be outstripped by inflation. Furthermore, it was submitted that with the spiralling inflation in real estate and the devaluation of the local currency, damages could not compensate them for the bargain lost.

In my judgment, I hold that damages would be an adequate remedy. Furthermore, Dayton Wood, has deposed that Chancery Hall Estate is comprised of two phases. Phase 2 will be available for sale with a sub-division of some 69 lots. There was no evidence before me that the plaintiffs had any form of attachment to the lot in any special way.

Assuming that I am wrong in arriving at the views expressed above let me examine the balance of convenience.

Where does it lie, with the plaintiffs or the defendant? What kind of harm is likely to arise? In considering the balance of convenience I should first consider whether if the plaintiffs succeed at the trial, they would be adequately compensated by damages for any loss caused by the refusal to grant the injunction. As I have already indicated, this is a case where damages are clearly adequate to cover the plaintiffs loss. The defendant company is in the business of real estate and would in my view be in a financial position to pay them.

On the other hand, I should also consider the nature of the damage which the defendant would suffer if the injunction were granted. The evidence has revealed that a third party is involved. From all appearances, this is an innocent third party who has now entered into a contract to purchase the said lot of land and the full purchase price has been paid by them. The affidavit evidence of the defendant shows where notice of the rescission of the contract was sent by post to the plaintiffs on November 28, 1991. However, on November 29, 1991, the plaintiffs had lodged a caveat against the title. Mr. Samuda has argued that in the ordinary course of business the Registrar of Titles would have notified the defendant of this caveat and in light of this the company ought not to have entered into a contract with the Jureidinis. The fact of the matter is that there is no evidence before me which suggests or imputes knowledge on the part of the defendant so far as this caveat is concerned. For their part, the defendant company, who are treating the contract as being rescinded and not having received any further communication from the plaintiffs for over a period of one year, entered into the agreement for sale on December 8, 1992 with the Jureidinis.

In my judgment, the balance of convenience is clearly in favour of the defendant company in refusing this injunction.

But there is another side of the coin which must be examined. It was submitted that the plaintiffs duty was to have come to Court without delay and that the delay in bringing this application was unreasonable.

The evidence revealed that one year had passed since the plaintiffs had lodged their caveat. They had done nothing during the interim, but were suddenly aroused to action, it would appear, when they received a Notice dated 8th March, 1993 from the Registrar of Titles informing them that an application was made by the defendant to transfer the lot to the Jureidinis. Having realised their predicament, a Writ of Summons seeking the relief of specific performance amongst other reliefs, was filed on their behalf on March 19, 1993.

How then at such a belated stage could a Court aid the applicants for a grant of interlocutory injunction? "Vigilantibus non dormicubus, jura subveniunt": equity aids the vigilant and not the indolent. In the words of Lord Camden L.C. In Smith v. Clay 27 E.R. 419, "A Court of Equity has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this Court into activity, but conscience, good faith and diligence; where these are wanting the Court is passive and does nothing."

The plaintiffs therefore, in my judgment, must be content if at all for any relief, for a remedy in damages.

It was for these reasons that I held that the order prayed for in the Summons for Interlocutory Injunction dated 25th March, 1993 should be refused.