[2020] JMCC Comm 27

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2020CD00296

BETWEEN	**LAURISTON STEWART**	**CLAIMANT**
AND	**SONADA LIMITED**	**1ST DEFENDANT**
	JENNIFER MESSADO	**2ND DEFENDANT**
	GEOFFREY MESSADO	**3RD DEFENDANT**
AND	**NATIONAL PROPERTY AND GENERAL INSURANCE BROKERS LIMITED**	**1ST INTERESTED PARTY**
	CAMNEL FARMS LIMITED	**2ND INTERESTED PARTY**

Injunction – Money loaned to 1st Defendant – Caveat lodged against property – Property already subject of sale to Interested Party – Whether sale to be restrained – Whether serious question to be tried- Balance of convenience-Promissory notes unstamped-Whether admissible in evidence - Observations on the practice of attaching exhibits to affidavits by schedule.

Jerome Spencer for Claimant

Lemar Neale instructed by Nealex for the 1st, 2nd and 3rd Defendants.

Jody-Ann Gaffe instructed by Vaccianna & Whittingham for the 1st and 2nd Interested Parties

Heard: 1st & 18th September, 2020

IN CHAMBERS by Zoom.

BATTS J

[1] On the first morning of this hearing objection was taken, to the fifth affidavit of Lauriston Stewart, because it was filed and served that morning. The affidavit was however responding to one filed, and served by the Interested Parties, on the 27th August 2020. I ruled the affidavit should stand. The Defendants and the Interested Parties elected, notwithstanding this ruling, to proceed with the matter. Neither sought an adjournment to take instructions.

[2] There was a second preliminary objection. This related to the reliance on unstamped promissory notes. Mr. Spencer in reply submitted that, as he was not seeking on this occasion to enforce the promissory notes, Section 36 of the Stamp Duty Act was not offended. He, alternatively, offered his undertaking to stamp the notes if the court so required. I agree with Mr. Spencer. Section 36 reads.

> *" No instrument, not duly stamped according to law, shall be admitted in evidence as valid or effectual in any court or proceeding* ***for the enforcement thereof****."*
> (highlight added*)*

The Claimant is utilising the documents as evidence of an equitable charge on certain land. He references a few words in the promissory note, and the surrounding facts and circumstances of its execution, as evidence that he at all material times had a caveatable interest in the land. This is a means of securing, not enforcing, the debt. No doubt at trial, when they seek recovery of the debt, either by a judgment on the promissory note or an order for sale of charged property or both, the promissory note will have to be stamped. I did not therefore call on Mr. Spencer to give his undertaking which, had I held otherwise, I would have been prepared to accept.

[3] This is the inter partes hearing of an application for an injunction. On the 27th July 2020 the Claimant obtained, on ex parte application, an interim Order restraining the Defendants from transferring land registered at Volume 1419 Folio 539 (which in this judgment I will call the Holburn Road Property). By Order made on the 21st August 2020 the court granted two interested parties a right of audience at the inter partes hearing. On that date also the injunctive order, made ex parte, was varied to say that it was the 1st Defendant which was restrained from transferring *"its undivided 1/5th share"* of the Holborn Road property. The court also made orders for the filing of skeleton submissions and fixed the 1st September as the date for the inter partes hearing.

[4] The Claimant, the Defendants and the Interested Parties all filed submissions in writing. They were, by agreement, each allotted 45 minutes to make oral submissions before me. Their efforts are appreciated and certainly shortened, what might otherwise have been, a lengthy hearing. Several affidavits have also been filed. I will list them so there can be no doubt as to that which is before me in this application. The affidavit of Lauriston Stewart filed on the 24th July 2020; second affidavit of Lauriston Stewart filed 27th July 2020; affidavit of Geoffrey Messado filed on the 21st August 2020; affidavit of Peter Thomas filed on the 21st August 2020; third affidavit of Lauriston Stewart filed on the 27th August 2020; affidavit of Avis Pamela Whittingham filed on the 27th August 2020; fourth affidavit of Lauriston Stewart filed on the 28th August 2020; fifth affidavit of Lauriston Stewart filed on the 1st September 2020. There are several exhibits attached to various affidavits. It is regrettable that the parties chose to append the exhibits by schedule. I have had occasion to comment adversely on this practice. It makes identification of the particular exhibit difficult unless the affidavit is paginated and, the various documents, appropriately indexed to the respective page.

[5] I have read the submissions and some of the authorities cited. I have read all the affidavits and considered each exhibit. I bear in mind that, at this interlocutory

stage, I am not to determine factual issues or to conduct a mini-trial. Whether or not an injunction is to be granted, until the trial of this action, will depend on: firstly, the Claimant establishing that there is a serious issue to be tried. Secondly if this is established the court must be satisfied, on one hand, that damages will not be an adequate remedy for the Claimant if the injunction is refused, and he ultimately succeeds at a trial. The court must also be satisfied on the other hand that if the injunction is granted at this stage, but the Defendant ultimately succeeds at trial, the Defendant will be adequately compensated by an award of damages under the Claimant's undertaking as to damages. In considering the respective adequacy of damages the ability, of each party to pay such damages, is relevant. Thirdly, if the question, as to the respective adequacy of damages is evenly balanced the court must go on to consider factors relevant to the overall justice of the case (or the balance of convenience). These factors include all the circumstances of the case and may be many and varied. They include in some situations, the relative strength of each parties' respective case and therefore the likely ultimate result after trial. The authorities, supportive of the above stated test for the grant of interlocutory injunctive relief, are: ***American Cyanamid Co v Ethicon Ltd [1975] 1 AER 504*** *and* ***National Commercial Bank Jamaica Ltd. v Olint Corp Ltd. Privy Council Appeal No. 61 of 2008, [2009] 5 LRC 370.***

[6] The Defendant and the Interested Parties assert that the ex parte order ought to be discharged because the Claimant failed to make full and frank disclosure and that the application for its extension ought to be refused. The duty of a party, to make full disclosure on an ex parte application, is well established, see for example: ***Venus Investments Limited v Wayne Ann Holdings Limited [2015] JMCC Comm 9 u*****nreported judgment of Sykes J (as he then was) dated 2nd June 2015** with which Morrison JA agreed in ***Venus Investments Ltd. v Wayne Ann Holdings Limited SCCA No. 109/2015*** **judgment 18 June 2015.** I have perused the material placed before the court at the ex parte application and in particular the affidavit from the Claimant filed on the 27th July 2020. The affidavit

exhibit letters which reference the Interested Parties and their claim. Those letters are discussed in paragraph 8 of the affidavit. There was I think sufficient disclosure in that respect.

[7] The Defendants complain that the Claimant failed to disclose charges, against his property, which undermine his ability to honour any undertaking as to damages. It is true that he did not disclose, at the ex parte stage, a charge for $24 million on property valued at $58 million. They also complain about the Claimant's failure to serve proceedings although they had been in correspondence with lawyers for the Defendants and the Interested Parties many months before. I hold that in both respects there has been a breach of the requirements. The ability to honour an undertaking as to damages is of critical concern to the court. The charge on the property proffered is not insignificant. Parties who approach the court, for ex parte interlocutory relief, should serve the process if at all possible. In this case the Defendants and Interested Parties had addresses which were known to the Claimant. No satisfactory explanation for the failure to serve was proffered. I therefore vacate the ex parte order made on the 27th July 2020.

[8] I am satisfied also, having considered the evidence and the law, that this application for injunctive relief must be refused. The Claimant has no arguable case and no prospect of success at trial. My reasons will be stated, as concisely as I can, given the rather complex nature of the factual matrix. This I will now recount.

[9] The Claimant had been a client of the 2nd Defendant, an attorney at law, for in excess of thirty years. He stated, understandably, that he placed trust and confidence in her. The 2nd and 3rd Defendants owned and controlled the 1st Defendant. The 1st Defendant company owned a 1/5th share of the Holborn Road property. In or about the month of January 2018 the Claimant loaned to the 2nd Defendant a total of US$65,000. The loans were secured by undertakings in writing

issued to the Claimant by the 2nd Defendant (exhibits LS 6 and 7 to the second affidavit of the Claimant filed on the 27th July 2020).

[10] The loans were also secured, and/or evidenced in writing by, two promissory notes (exhibit LS 1 to the second affidavit of the Claimant filed on the 27th July 2020). One is dated 10th January 2018 (for US$50,000) and the other is dated the 25th January 2018 (for US$15,000). Each, save for the amount borrowed, was identically worded as follows:

> "*We, Sonado Limited, a company duly incorporated under the Laws of Jamaica and having its registered office at No. 10 Holborn Road, Kingston 10 in the parish of Saint Andrew, DO HEREBY PROMISE to pay to LAURISTON STEWART AND/OR TANIQUE STEWART of No. 1 Spring Park Drive, Kingston 8 in the parish of St. Andrew the sum of Fifty Thousand United States Dollars (US$50,000.00).*
>
> *IT IS FURTHER UNDERSTOOD AND AGREED that SONADO LIMITED will pay interest on the principal sum of FIFTY THOUSAND STATES (sic) DOLLARS (US $50,000.00) at SEVEN AND ONE HALF PERCENT (7.5%) per month for two (2) months payable every thirty (30) (sic) until the date of repayment, being the said sum of THREE THOUSAND SEEN (sic) HUNDRED AND FIFTY UNITED STATES DOLLARS (US43,750.00) and to be repaid in full to the said LAURISTAN STEWART AND/ OR TANIQUE STEWART on or before the 10th day of March 2018 together with all costs and interest herein from the proceeds of Sale of Sonado Limited's one-fifth share and interest in property situated at No. 10 Holborn Road comprised in Certificate of Title registered at volume 1419 Folio 539 of the Registrar Book of Titles.*
>
> *AND IT IS FURTHER UNDERSTOOD AND AGREED that GEOFFREY MESSADO AND JENNIFER MESSADO DO HEREBY GUARANTEE this loan indebtedness and the repayment of the said sum of FIFTY THOUSAND UNITED*

> *STATES DOLLARS (US50,000.00) on or before the 10th March 2018 in accordance with the aforesaid terms and conditions herein."*

[11] The Claimant contends, which the Defendants dispute, that the words "*and to be repaid in full … from the proceeds of sale of Sonado Limited's one-fifth share and interest in property…*" suffice to create a charge on the Holborn Road property. The Claimant's assertion is buttressed by the fact that, on or about the 15th May 2018, he lodged a caveat against the Holborn Road property. No objection at that time was made to, or steps taken to remove, the caveat. Paragraphs 5 and 6 of the Claimant's declaration in support of caveat states:

> *"5. I am aware that the material property was put up for sale under Agreement for Sale dated the 21st day of November 2016 with Carriage of Sale entrusted to Jennifer Messado and Co. No sums have been paid to me by the said Attorneys-at-Law and I have not received any indication from them as to if and when I may expect the payment from them. A copy of the Agreement for Sale is hereby attached.*
>
> *6. Given the failure to pay the sum owing to me, I am lodging this caveat to protect my interest herein."*

[12] The Defendants, and the Interested Parties, argue that the words in the promissory note are inadequate to create an interest in land. At most, they say, it is an interest in the proceeds of a sale which is stipulated for. I do not think I should resolve that question at this interlocutory stage. It seems to me whether a caveatable interest was created will turn on the intention of the parties. This will be determined by the words of the contract. However, the surrounding circumstances, and the context in which words are used, may determine meaning and hence intent.

Therefore, the determination of the meaning is a matter of mixed fact and law for determination at trial.

[13] However, even assuming that the promissory notes were sufficient to give the Claimant an interest in the Holborn Road property, the Claimant will have no prospect of enforcing his claim to that interest. The agreement for sale, attached to the Claimant's declaration in support of his caveat, is dated the 21st November 2016 (exhibit LS 3 to the second affidavit of the Claimant filed on 27th July2020). It is expressed to be between the 1st Defendant (vendor) and the 1st Interested Party or nominee (purchaser). The subject matter of the sale is the 1st Defendant's 1/5th share of the Holborn Road property. The purchase price is US$155,0000.00. The fact that the agreement is attached, to the application for a caveat, suffices to demonstrate the futility of the claim in respect of Holborn Road. This is because it demonstrates the Claimant's actual knowledge of the Interested Parties' competing equity. The Claimant is saying that, as against the Defendants, it acquired an equitable interest in the Holborn Road property. The promissory note created a charge, they say, with respect to the money loaned. The Interested Parties contend that they too have an equitable interest in the same Holborn Road property. Their claim is based on an agreement to purchase. Although the Holborn Road property is registered land neither the Claimant nor the Interested Parties registered their alleged interest. The Claimant did, as we have seen, lodge a caveat. He however did so after having knowledge of the Interested Parties' prior interest.

[14] It is clear, on the evidence, that the Claimant knew, at the time the caveat was lodged, that the Interested Parties had agreed to purchase the Holborn Road property. Insofar as we are considering unregistered equitable interests the answer to the questions, which is first in time and who had knowledge of which, will be decisive. It is manifest that the Claimant was aware of the Interested Parties' interest which was also first in time. Therefore, his interest would be subject to the

Interested Parties'. Even assuming, without deciding, that the words in the promissory notes are capable of creating a chargeable interest, the Claimant's interest is in equity subject to that of the Interested Parties'. This is not to say the Claimant is without a remedy. His claim against the Defendants for a debt will continue to exist.

[15] The hopeless nature of the Claimant's assertion is underlined by other evidence in the matter. In this regard there is documentary evidence, supportive of the Defendant's case and that of the Interested Parties, that the Holborn Road property had been sold (and money paid and a transfer executed) years before the Claimant's promissory notes were executed. This evidence consists of:

a. Letter dated 15th March 2010 to the 2nd Defendant from the 1st Interested Party. It encloses a cheque for $10,000,000 and requests instrument of transfer and Title. (exhibit PT 3 to affidavit of Peter Thomas filed on 21st August 2020)

b. Cheque dated 12th March 2010 for $10 million payable to the 2nd Defendant's firm of attorneys at law and drawn on the account of the 1st Interested Party. (exhibit PT 3 to affidavit of Peter Thomas filed on the 21st August 2020)

c. Letter dated 22nd April 2010 to the 1st Interested Party from the 2nd Defendant enclosing a Transfer of the Holborn Road property. (Exhibit PT3 to affidavit of Peter Thomas filed on 21st August 2020).

d. Letter dated 12th May 2010 to the 1st Interested Party from the 2nd Defendant stating among other things that the $11 million paid was for the 1st Defendant's 1/5th share (exhibit PT 3 to affidavit of Peter Thomas filed 21st August 2020).

e. A transfer dated 12th March 2010, but apparently stamped in October 2019, whereby the 1st Defendant transferred its interest in the Holborn Road property to the 1st and 2nd Interested Parties (exhibit PT3 to affidavit of Peter Thomas filed 21st August 2020).

[16] There is other correspondence which further reduces the likelihood of a successful claim, by the Claimants, to an interest in the Holborn Road property.

a. Letter dated 21st December 2018 from the 2nd Defendant to the attorney representing the Claimant at the time. This letter states that the caveat was lodged against Holborn Road in error and that *"all the other properties that you hold including the title for Karl Phillips are the replacement thereof."* (See exhibit LS 6 to the second affidavit of the Claimant filed 27th July 2020)

b. Letter dated 21st March 2019 from the 2nd Defendant to the Claimant's then attorneys which stated:

> *"Please note that the caveat you lodged on Benson Avenue confirms the following amounts.*
>
> *i. U$50,000.000 and U$15,000.000 respectively which was suppose (sic) to be on the Holborn Road title.*
>
> *ii. U$20,000.00 for outstanding interest.*
>
> *This is how the U$85,000.00 was arrived at.*
>
> *Pam Whittingham is been (sic) copied this letter for obvious reasons." (*exhibit PT9 to the affidavit of Paul Thomas filed 21st August 2020).

c. Caveat lodged 15 August 2018 by the Claimant with respect to the property at Benson Avenue (exhibit PT9 to the affidavit of Paul Thomas filed 21st August 2020).

d. Letter dated 25th February 2019, from the Claimants then attorneys to attorneys representing the 1st and 2nd Interested Parties, denying that the caveat on Holborn Road was lodged in error (exhibit PT 8 to affidavit of Peter Thomas filed 21st August 2020).

[17] The effect, it seems to me, is to underscore the fact that the Interested Parties, to the certain knowledge of the Claimant, had already entered into an agreement to buy the 2nd Defendant's interest in Holborn Road. Their equitable interest/claim predated the Claimant's. Therefore, as against the Interested Parties, the Claimant cannot hope to prevail, see ***Barclays Bank D.C.O. v Administrator General of Jamaica (Administrator of the estate of Gifford Reid, deceased) and Ransford Hamilton (1973) 20 WIR 344.*** In that case the Jamaican Court of Appeal underscored the point that a caveator, who knew of the prior equity, could not defeat that prior equity by lodging a caveat, see per Fox JA at pages 350C and 352H and per Hercules JA at 355H and 356 C. In equity the significant question, in a case such as this, is which of two innocent parties enabled the wrong to be perpetuated. That question becomes moot where, as in this case, the person with the interest second in time is aware of the interest of the person who is first in time.

[18] The Claimant subsequent to the transaction lodged another caveat, against a property located at Benson Avenue, with respect to the same loan. He explains, this later caveat, at paragraphs 7 and 8 of his Fourth Affidavit:

"7 *In response to paragraph 12 of Mr. Thomas' affidavit Mrs. Messado offered a charge over the property at Benson Avenue (then owned by Sonado) in August 2018 to secure the global amount then owed under both promissory notes, inclusive of interest (this amount was U$85,000.00). A caveat was then lodged on the Benson Avenue property on August 15, 2018.*

8. Mrs. Messado told me and I verily believe that Sonado had a purchaser for the Benson Avenue property and that sale would close in 90 days and from those proceeds, I would be paid out. She asked for the caveat on 10 Holborn Road to removed (sic), which I refused. At no time was it agreed that charge on Benson Avenue property would replace the charge over Sonado's interest in 10 Holborn Road.

The explanation is, to say the least, unconvincing. Even if true, it confirms that the caveat on Benson Avenue is with respect to the same loan that the caveat at Holborn Road was intended to secure.

[19] This case is another one of those situations in which one of two innocent persons must suffer for the wrongful conduct of a third. In this case the Defendants borrowed money from the Claimant on the strength of property which had already been pledged, or sold, to the Interested Parties or one or other of them. In such situations the court considers, in an endeavour to do justice, the relative culpability of all the parties. The question of which of the two innocents may have placed it in the power of the third to perpetuate the wrong is relevant. The knowledge or state of mind of the respective parties is also relevant. In this case the Claimant was aware that the Interested Parties had agreed to buy the property at the time the caveat was lodged. It does not appear that he took any precautions by, for example, contacting the Interested Parties to ascertain if they had already paid the purchase price. He, understandably, trusted the 2nd Defendant's word. In these circumstances a court of equity will favour the case of the 1st and 2nd Interested Parties. They were first in time and the Claimant had knowledge of their purchase

or intended purchase. There is therefore no serious issue to be tried as to which, of these competing equities, will prevail.

[20] I will not grant, at this interlocutory stage, an injunction to prevent completion of the sale of the Holborn Road property. It is unnecessary to consider the relative adequacy of damages or the balance of convenience. However, in the event I am wrong, I say a few words on those issues.

[21] It does appear that damages, although calculable, may not be recoverable as against the Defendants. Judicial note can be taken of the financial position of the second Defendant. Further, and as Claimant's counsel submitted, the debt remains outstanding. There does not seem to be a denial of liability. It is therefore safe to presume that it is an inability to pay which explains the failure to pay. On the other hand, there is insufficient evidence before me that the Defendants, and the Interested Parties, are adequately protected by the undertaking as to damages in the event at trial it is decided that an interlocutory injunction was wrongly granted. The loss to the Defendants being the potential loss of a sale, and to the 1st and 2nd Interested Parties being loss of bargain. In each case the profits, that may have been made from the income earned from the property in the interim, may be considerable. Indeed, it is in one sense incalculable. I am furthermore not satisfied, for reasons adverted to in paragraph 7 above, that the Claimant will be able to honour such an undertaking.

[22] The adequacy of damages, whether the injunction is granted or not, is in either case not satisfied. This case would therefore have to be resolved by considering the balance of convenience or the overall justice of the case. What, in all the circumstances, is the fair thing to do. In this regard, both the Claimant and the Interested Parties are innocent. The Claimant has loaned money to his lawyer of many years who he trusted implicitly. The Interested Parties agreed to purchase property, paid money and executed documentation, only to find out that the

relevant transfer was not registered. There is evidence that the 2nd Defendant was the attorney for all parties in that transaction (see paragraphs 5 and 6 of the affidavit of Peter Thomas filed on the 21st August 2020). It is clear that at some stage, and certainly before he lodged the caveat, the situation was brought to the Claimant's attention. He then had independent legal advice. Another property, the Benson Avenue land, was also caveated and, in the words of a letter from the 2nd Defendant, was *"the replacement thereof*." (See letter dated 21st December 2018 referenced above). There is no evidence before me as to the status of the Benson Avenue property. However, the fact that the Claimant accepted the pledge of the Benson Avenue property (even if it was additional, and not replacement, security) leans the scale of justice towards the Interested Parties.

[23] This is further compounded by the fact that the Claimant, on the evidence at this stage, had at all material times been prepared to allow a sale of the Holborn Road property. His major concern, as expressed in the declaration in support of caveat, was to receive payment out of the proceeds of sale. It may be true, as the Claimant says, he was unaware at the time the caveat was lodged that payment had already been made. However, when considering the fate of two innocent parties with equal equities, it is relevant to consider which was first in time. This analysis applies whichever of the two sales agreements is ultimately held to be the valid one (see exhibits LS 3 to affidavit of Claimant filed 27th July 2020, exhibit PT 2 to the affidavit of Peter Thomas filed 21st August 2020 and paragraphs 13 to 15 above). When the overall justice of this case is considered I would have refused the interlocutory relief claimed.

[24] Before closing it is right that I make some observations. This case involves an attorney entering into commercial transactions with her client. In the course of doing so she breached not one but two written undertakings. Furthermore, the evidence is that the attorney acted for all parties in a sale of property owned by her company. She pledged that property, after agreeing to sell it, as security for a loan

obtained from her client. Whether it was by mistake, as some correspondence suggests, or deliberate is yet to be determined. In either event issues, pertaining to professional misconduct, may arise. I will therefore be directing the Registrar of the Supreme Court to forward a copy of this judgment to the Chairman of the General Legal Council so he can take such action as he may deem appropriate.

[25] Finally let me underscore that, save where facts are admitted or there is concurrence between the parties, I make no finding of fact in this judgment. My decision, as to the Claimant's possibility of success on the claim for an interest in land, assumes findings of fact most favourable to his case. That assumption is not to be taken as an adoption of, or finding on, the evidence before me. All facts in dispute will still be open for the judge at trial to consider.

[26] In the result, and for all the reasons stated in this judgment, the Claimant's application for interlocutory injunctive relief is refused. I shall, if the parties agree, proceed to make orders for the further management of this case.

David Batts
Puisne Judge