[2022] JMSC Civ 109

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2022CV01357

BETWEEN	**VINAYAKA MANAGEMENT LIMITED**	**CLAIMANT**
AND	**GENESIS DISTRIBUTION NETWORK LTD**	**1ST DEFENDANT**
AND	**NOHAUD AZAN**	**2ND DEFENDANT**
AND	**ASHNIK HOLDINGS LIMITED**	**3RD DEFENDANT**

IN CHAMBERS (VIA VIDEOCONFERENCE – ZOOM PLATFORM)

Mr. Ian Wilkinson QC with Mr. Lenroy Stewart and Mr. Jhawn Graham ins by Wilkinson Law for the Claimant

Mr. John Graham QC with Ms. Peta Gay Manderson and Ms. Kristina Graham for the 1st Defendant

Dr. The Hon. Lloyd Barnett with Mr. Weiden Daley and Ms. Denise Beaumont Walters ins by Hart Muirhead Fatta for the 2nd and 3rd Defendant

Heard: July 6 and 7, 2022

Application for Injunction – Breach of Contract – Whether or not Interim Injunction should be extended – Whether Balance of Convenience is in Favour of the Claimant.

Application for Discharge of Injunction – Breach of Contract – Whether the Claim is Frivolous or Vexatious – Whether or not Balance of Convenience is in favour of the Defendant to justify discharge of injunction – Whether injunction should be discharged.

STAPLE J (Ag)

BACKGROUND

[1] The Court considers this case to be surrounded by red flags for a multitude of reasons that will become apparent in the course of the discussion of this case. It can serve as a cautionary tale for those who are keen observers.

[2] The Claimant, a company of relative recent vintage, in or around October/November of 2021 entered into an agreement for sale with the 1st Defendant to purchase a parcel of land in St. James. The property is registered at Volume 1439 Folio 71 and 1115th share in common properties comprised in certificate of title registered at Volume 1219 Folio 753 of the register book of titles (hereinafter the property).

[3] There was a clause in the agreement for sale known as special condition 21 by which the 1st Defendant purported to unilaterally terminate the contract between itself and the Claimant on the 28th December 2021.

[4] At some time in December 2021, the 1st Defendant and the 2nd Defendant began negotiations with a view to the 1st Defendant selling the 2nd Defendant the property. There is a dispute as to whether or not these negotiations preceded the termination of the contract between the Claimant and the 1st Defendant.

[5] Suffice it to say that the ultimate result was that the 1st Defendant sold the 2nd Defendant the property in January (or March) of 2022 and the 2nd Defendant named, on the instrument of transfer, the 3rd Defendant as its nominee. Mr. Vangani lodged a caveat to the title for the property to secure the money that was paid. The caveat was warned and this action is the result.

[6] The Claimant company filed a Claim Form (later amended to include the present 2nd and 3rd Defendants) alleging that the 1st Defendant was in breach of contract and for specific performance to compel the 1st Defendant to complete the agreement for sale between the two of them. They challenge the 1st Defendant's ability to terminate the agreement unilaterally without cause pursuant to Special

Condition 21 of the Agreement for sale and their contention is that the Special Condition 21 does not give the 1st Defendant the power to cancel the agreement for sale unilaterally without cause.

[7] They seek specific performance of the agreement for sale dated November 10, 2021; a declaration as to the validity of the contract entered into between them and the 1st Defendant; a declaration that the purported rescission of the said agreement for sale by the 1st Defendant was ineffective and invalid; a declaration that the November 10, 2021 contract takes precedence over the January 7, 2022 contract between the 1st and 2nd Defendant; an injunction against the 1st Defendant and Damages for breach of contract as against the 1st Defendant.

[8] The 1st Defendant, in their Defence, assert that the Agreement for Sale was validly terminated and the subsequent sale of the property to the 2nd Defendant was proper.

[9] The 2nd and 3rd Defendants, in essence, join with the 1st Defendant in saying that the November 10, 2021 agreement for sale between the Claimant and the 1st Defendant was validly terminated and that there was no breach of the Agreement for Sale between the Claimant and the 1st Defendant. Further, they assert that for the reasons set out in their joint Defence, there is no reason for the November 10, 2021 Agreement for Sale to take precedence over the January 7, 2022 Agreement for Sale.

[10] The Claimant Applied for an obtained an interim injunction against the 1st Defendant restraining them from completing the sale of the property to the 2nd Defendant and the 2nd Defendant's nominee, the 3rd Defendant. The present matter before the court is to determine whether or not the injunction should continue until the determination of the Claim.

[11] The 2nd and 3rd Defendants filed their own application on the 24th May 2022 for the discharge of the injunction and this matter is also before the Court for determination.

THE UNDISPUTABLE FACTS

[12] Having read the affidavits filed in this Claim, I realise that there are a number of peripheral facts that the disputants no doubt think pivotal to the ultimate resolution of the Claim at trial. However, I have identified some indisputable facts that form the core substratum of the dispute between the parties.

[13] The Claimant is a limited liability company duly incorporated in the island of Jamaica. Mr. Vangani is a director of the company and duly authorised by the Claimant to conduct business on its behalf.

[14] The 1st Defendant is also a limited liability company duly incorporated in the island of Jamaica. It is currently the registered proprietor of the property.

[15] The 2nd Defendant is a businessman and the 3rd Defendant is another limited liability company incorporated under the laws of Jamaica. The 2nd Defendant is the principal of the 3rd Defendant.

[16] Mr. Vangani used 3 companies to attempt to purchase the said property from the 1st Defendant. To this end there were three agreements for sale. One with a company called Blue Lagoon Limited, the second with a company called Royal Palm Limited and then finally the present Claimant.

[17] During the course of the negotiations and the initial sale between the Claimant and the 1st Defendant, the Claimant and the 1st Defendant were both represented by Counsel that are not the ones handling the Claim presently before the Court.

[18] The agreement for sale between Royal Palm Limited and the 1st Defendant was not dated but it was executed by Mr. Vangani on behalf of Royal Palm Limited and Mr. Feare on behalf of the 1st Defendant. There was a payment made to Mr. McCurdy (the 1st Defendant's then Attorney-at-Law) from Mr. Vangani on the 17th September 2021 of US$220,000.00 representing the deposit on purchase of a parcel of land 12 Bogue Estate. This payment was made on behalf of Royal Palm Limited. It had to be as the present Claimant did not exist as a legal entity until October 5, 2021.

[19] The agreement for sale with Royal Palm and the Defendant is identical to the one entered into with the Claimant and the 1st Defendant. The Agreement for Sale with Royal Palm and the 1st Defendant was never stamped. This agreement was never officially cancelled. There is no evidence of any assignment from Royal Palm Limited to the Claimant of the contract.

[20] The Claimant came into existence on October 5, 2021 (see certificate of incorporation exhibited to 1st Affidavit of Mr. Vangani).

[21] It was agreed between Mr. Vangani and the 1st Defendant that the sale agreement between Royal Palm and the 1st Defendant would not be pursued and a new agreement entered into between the Claimant and the 1st Defendant. The reason for the change is irrelevant at this stage.

[22] The Agreement for Sale between the present Claimant and the 1st Defendant was signed by Mr. Vangani on behalf of the Claimant and Mr. Derrick Feare on behalf of the 1st Defendant. Both signatures were witnessed by Mr. McCurdy of counsel.

[23] Mr. Clayton Morgan, Attorney-at-Law, represented the Claimant company at the material time. It was Mr. Morgan who consented to the new agreement being made between the Claimant and the 1st Defendant instead of Royal Palm Limited.

[24] The Agreement for Sale between the Claimant and the 1st Defendant was sent to the Stamp Office for Assessment and stamping. The assessment was done, but not stamped. To date, it remains unstamped.

[25] Sometime in November/December of 2021, the 1st Defendant and the 2nd Defendant began having discussions with a view to the 1st Defendant selling the property to the 2nd Defendant. By this stage, the 1st Defendant's, who had been having misgivings about selling the property to the Claimant, had grown increasingly uncomfortable with the Claimant.

[26] Meanwhile, the negotiations with the 1st and 2nd Defendants eventually concretized into an informal agreement and the 2nd Defendant paid a deposit over to the 1st Defendant to demonstrate his intent to purchase the property. This deposit was paid on the 23rd December 2021 (see paragraph 4 of the Affidavit of Nohaud Azan sworn on the 26th May 2022). It is to be noted that this was not some random sum of money. This was before the Agreement between the Claimant and the 1st Defendant was terminated and the deposit returned. So at this stage, Mr. McCurdy had in his hand deposits from 2 different purchasers (technically 3 as the Deposit sum was being held for Royal Palm Limited officially, by the actions of the parties they treated it as being for the Claimant company and he had the deposit for the 2nd Defendant) for the same parcel of land. The Court's eyebrows were raised.

[27] On or around December 28, 2021, the 1st Defendant finally terminated the Agreement for Sale between itself and the Claimant purportedly in reliance on special condition 21 of the Agreement for Sale. They refunded the deposit to Mr. Clayton Morgan. Mr. Morgan attempted to return the deposit sum. When it was refused, Mr. Morgan put the money in escrow. The 1st Defendant sent the cancelled unstamped agreement to the Claimant.

[28] On January 7, 2022, the 1st and 2nd Defendants formalized what had been verbally agreed and a written agreement for sale was now entered into between them for the sale and purchase of the property. Things moved quickly.

[29] In the meantime, Mr. Vangani lodged a caveat to the title on the 11th January 2022. It is important to note from the Caveat itself that it was lodged by Mr. Vangani to secure what he says is an interest in the property of US$220,000.00. Two things to note;

> *(1) the purported deposit for the Claimant was in the exact same amount; and*
> *(2) the portion of the document for execution by a company was left blank.*

[30] By notice dated April 8, 2022 the Registrar of Titles served a notice of warning to Mr. Vangani, the Caveator, warning his caveat lodged on the 11th January 2022. The notice pointed out that the 1st Defendant had lodged, amongst other things, an instrument of transfer to the 3rd Defendant for the property.

[31] The Claimant then filed the Claim and the Application for Injunction.

THE GENERAL LAW ON INJUNCTIONS

[32] As this is an application for an interim injunction, the Court had regard to the well established guidelines from the celebrated cases of *American Cyanamid Co v Ethicon Limited*[1] and the judgment of Lord Diplock. This was further affirmed in the local Privy Council decision of *NCB Limited v Olint Corporation*[2] (hereinafter *Olint*). These considerations are:

(i) Is the Claimant's case frivolous or vexatious? Meaning, is there a serious issue to be tried?
(ii) If the answer to the above is no, then the injunction ought not to be granted. If the answer is yes, then I must next consider whether or not damages would be an adequate remedy.

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[1] [1975] 1 All ER 504

[2] Privy Council Appeal No. 61/2008, April 28, 2009.

(iii) If there is no clear answer to the question of whether or not damages would be an adequate remedy to compensate either the Plaintiff or the Defendant, then I will go on to examine the balance of convenience generally;

(iv) If, after considering the balance of convenience generally, the Court is still unable to come to a definitive conclusion, and there are no special factors, it is advisable to have the status quo remain.

[33] In the case of ***Tapper v Watkis-Porter***[3] Phillps JA stated that, "An analysis of the balance of convenience entails an examination of the actual or perceived risk of injustice to each party by the grant or refusal of the injunction"

[34] Earlier in the said judgment at paragraph 36, she adumbrated and distilled the principles on the concept of the balance of convenience from the ***American Cyanamid*** and the ***Olint*** cases. I can do no better than to quote from the eminent jurist:

> In considering where the balance of convenience lies, the court must have regard to the following:
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> *"Whether damages would be an adequate remedy for either party. If damages would be an adequate remedy for the appellant and the defendant can fulfil an undertaking as to damages, then an interim injunction should not be granted. However, if damages would be an adequate remedy for the respondent and the appellant could satisfy an undertaking as to damages, then an interim injunction should be granted.*
>
> *If damages would not be an adequate remedy for either party, then the court should go on to examine a number of other factors to include the risk of prejudice to each party that would be occasioned by the grant or refusal of the injunction; the likelihood of such prejudice occurring; and the relative strength of each party's case."*

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[3] [2016] JMCA Civ 11 at para 37

[35] At the end of the day though, the Court should try to take the course that will result in the least irremediable prejudice to either party[4].

ISSUES

[36] In keeping with the principles as set out in the cases above, the Court considers the following to be the issues surrounding whether or not to allow the injunction put in place by Henry-McKenzie J to remain until the outcome of the trial:

(i) Is the Claimant's case frivolous or vexatious? Meaning, is there a serious issue to be tried?
(ii) If the answer to the above is no, then the injunction ought not to be granted. If the answer is yes, then I must next consider the balance of convenience generally;
(iii) If, after considering the balance of convenience generally, the Court is still unable to come to a definitive conclusion, and there are no special factors, it is advisable to have the status quo remain.

ISSUE 1 – IS THE CLAIMANT'S CLAIM FRIVOLOUS OR VEXATIOUS?

[37] At this stage it is difficult to say that there is a serious issue to be tried. I say this for a few reasons.

[38] Firstly, as the 1st Defendant has rightly identified, there is presently no stamped agreement for sale before the Court. Section 36 of the Stamp Duty Act prohibits the entry into evidence of any such unstamped agreement for sale as being valid and effectual for its enforcement.

[39] The Court acknowledges that ss. 43 and 44 of the same Stamp Duty Act provides a mechanism by which the Agreement for Sale may eventually be admitted into

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[4] Id

evidence, but until this is done, then there is no enforceable agreement for sale before the Court. If there is nothing to enforce, then there can be no injunction.

[40] Mr. Wilkinson, in oral submissions, sought to get around this argument by asserting that no attempt was made by them to stamp the cancelled agreement for sale as the Stamp Office would have rejected it. This is speculative. However, s. 43 does not make it a condition of its operation that the document to be stamped must be an "un-cancelled" document. No authority was presented to say that an agreement for sale marked "cancelled" could not be stamped for the purposes of putting it into evidence for enforcement in accordance with ss. 43-45 of the Stamp Duty Act. He also relied on the authority of *Robinson v Chen et al*[5] in support of his claim that the fact that the document was not stamped does not mean it cannot be enforced. But I am not sure that that case can be relied upon for setting out such a principle and, in any event, Fraser J (as the then was) did not make any express ruling on the point as he was not called upon so to do[6].

[41] Mr. Wilkinson also argued that the 1st Defendant's former Attorney-at-Law did not fulfil his responsibility to have the document stamped and the 1st Defendant should not be allowed to benefit from his wrong doing. He cited 2 authorities from two eminent jurists on the point. These are *Wilfred Emmanuel Forbes and Cowell Anthony Forbes v Miller's Liquor Store (Dist) Limited*[7] and *Harry Abrikian et al v Arthur Wright et al*[8]. In both those cases the Court was of the view that it had a discretion to allow an unstamped document into evidence in circumstances where

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[5] [2014] JMSC Civ 146

[6] See paragraph 88 of the judgment.

[7] **(unreported) Supreme Court Jamaica Suit No E 478 of 2001, Anderson, J delivered on October 18, 2002**

[8] **(Unreported CL A 083/1994, June 16, 2005, Sykes J)**

the evidence disclosed that the party who was seeking to rely on s. 36 of the SDA to avoid the enforcement of the contract, had deliberately sought to obstruct the process of it being duly stamped. The case at bar is different as the evidence clearly shows that the document went to the stamp office, was duly assessed, but not stamped. No reason was given as to why it was not stamped. So the Court is not in a position to say, at this stage, that there was any deliberate attempt by the 1st Defendant not to stamp the agreement for sale.

[42] The 1st Defendant relied on the case of *Lookahead Investors Limited v Mid-Island Feeds (2008) Limited et al* as authority for saying that the Court should not look at the unstamped agreement.

[43] I must say that I am more inclined to agree with the *Lookahead* approach as it is from the Court of Appeal. I do not agree with Mr. Wilkinson's argument concerning the explanation for the absence of a stamped agreement for sale at this stage, especially when one considers that the problem was raised but there was no attempt to address the issue in any way.

[44] But if I am wrong, I will move to the other point of weakness. In their written submissions, the Claimant sought to argue that the Claimant did not agree to special condition 21. That is very difficult to reconcile with the evidence of Mr. Vangani, the principal of the Claimant. In his Affidavit in Support of the Application for Injunction (Affidavit number 1), at paragraph 6, Mr. Vangani stated that he attended the office of Mr. McCurdy, Attorney-at-Law on behalf of the Defendant, with the Claimant's Attorney-at-Law, Mr. Clayton Morgan. There they reviewed and signed (emphasis mine) the Agreement for Sale and then signed it.

[45] But this is not factually accurate. Mr. Morgan did not sign the impugned agreement for sale between the Claimant and the 1st Defendant. The impugned agreement was witnessed by only Mr. McCurdy on behalf of both the Claimant and the 1st Defendant. This agreement, to which Mr. Vangani referred in his first Affidavit, must be a reference to the Agreement between Royal Palm Limited and the 1st

Defendant. And I so find. This agreement still exists. Special Condition 21 was in that Agreement between Royal Palm and the 1st Defendant.

[46] Note well that according to paragraph 21(b) of Mr. Vangani's Affidavit in Response sworn on the 26th May 2022 and filed on that date, Mr. Morgan's office did get the impugned agreement for sale in hand to facilitate it being sent to the stamp office for assessment and stamping. It was assessed and sent back to Mr. McCurdy, but it was never stamped. There is no factual dispute that the impugned agreement for sale is identical, particularly with regard to special condition 21, to the agreement for sale signed between Royal Palm Limited and the 1st Defendant which was witnessed by Mr. Vangani and Mr. Morgan as purchasers.

[47] It is factually agreed between the parties, regardless of the reasons for same, that a new agreement for sale, on identical terms to the one signed between Royal Palm Limited and the 1st Defendant, was signed to change the name of the Purchaser from Royal Palm Limited to the present Claimant. The lawyers for both sides – vendor and purchaser – were in agreement with this. Thus, to now claim that the Claimant did not agree to Special Condition 21 is without foundation. He even got legal advice on an identical agreement for sale and the document was reviewed by the said lawyer and it was signed.

[48] I agree with the submissions by all the Defendants in this regard on this point.

[49] Thirdly, the Court has some concerns in relation to the pleaded case against the 1st Defendant. On the part of the Claimant, there is no fraud pleaded. The Claimant does not raise any special plea of *non est factum*; it does not claim in the pleadings that the specific clause was hidden from them before signing; they admit to signing the document.

[50] The issue comes down to the Particulars of Breach:

(a) The time being of the essence argument is not relevant as the Claimant did not issue to the 1st Defendant a notice to complete to say that they were

ready willing and able to complete and demand completion within a certain time. In fact, on the evidence now before the Court, they did not have financing at the time.

(b) Paragraph B is also of no real moment as there was no pleading of a loss as a result of the non-stamping.

(c) Paragraph C is factually sound but may not be relevant as the Claimant has not asserted a loss as a result of the non-stamping.

[51] So we look now to paragraphs D, E and F of the Particulars of Breach. These all turn on the question of whether or not special condition 21 is a valid method of terminating the Agreement for Sale. Note very well that the Claimant has not asserted that the agreement was not terminated pursuant to special condition 21.

[52] Again, the Claimant has not asserted any factual basis for avoiding the clause. It has not pleaded fraud, non-est factum, misrepresentation or anything else. In the absence of this pleading, those factual assertions cannot be relied upon at trial. So it is essentially a legal question: is there a legal basis for not upholding the termination of the agreement under special condition 21?

[53] The Claimant asserts that special condition 21 cannot be invoked as, in essence, the vendor can only terminate the agreement for sale for cause (see paragraph 18 of the Particulars of Claim). But that is a very difficult argument to make successfully. On the face of the document, special condition 21 does not appear dependent on any other clause in the agreement. There is no cross-referencing between Special Condition 21 and any of the other clauses. It stands alone. I agree with the 1st Defendant's submission that the plain meaning of special condition 21 can be gleaned from the reading of the document.

[54] The 2nd and 3rd Defendants buttress the point by relying on the authors of the treatise Cheshire, Fifoot & Furmston's, Law of Contract 15th ed. The learned authors say:

> *"It is not unusual for contracts to contain provisions entitling one party to terminate without the other party having done anything wrong. At first sight this seems strange, but there are many situations where it makes excellent sense."*[9]

[55] Mr. Graham relied on the authority of *Reda et al v FLAG Limited*[10] as an illustration that an agreement with a clause for termination without cause was valid and the employee was properly dismissed pursuant to that without cause clause. Mr. Wilkinson distinguished the authority on the basis that the clause in that agreement specifically used the words "without cause" as distinct from the case at bar where no such wording is stated.

[56] It is a fair distinction to make, but I do not find that it helps the Claimant much. Special Condition 21 is plain in its meaning. It says that the Vendor may terminate the contract and if he does then certain things are to follow. I agree with Dr. The Hon. Lloyd Barnett's submissions and authorities that we cannot import language into an agreement, especially where it was drafted and agreed by counsel on both sides, to avoid the harsh consequences of same.

[57] Is the clause unfair? An argument could be reasonably made for that position. But it would not have much prospect of success if any at all. I agree with the assertions of the Defendants on this issue from their submissions. The negotiations were arms' length; the parties both had legal advice (in fact, one might argue that the Claimant was in the stronger position given that it had on its side a prominent senior attorney-at-law in western Jamaica with tremendous experience); the agreement off which the impugned agreement was based was reviewed by Mr. Vangani and his lawyer and there was no issue raised; there is no evidence that

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[9] Cheshire, Fifoot & Furmston's Law of Contract 15 ed at p 700.

[10] [2002] UKPC 38

this clause posed a problem for either party at the time of signing. So the argument of the clause's unfairness may not hold much, if any, weight at trial.

[58] Fourthly, a legal conundrum presents itself for the Claimant. It is to be recalled that the evidence is that Royal Palm Limited entered into a contract for purchase of the property from the 1st Defendant before the Claimant did. The deposit was paid to the 1st Defendant's then attorney-at-law from before the incorporation of the Claimant. The inference that can be drawn from these facts, which I accept, is that, and I so draw and find, the deposit was paid for the benefit and on behalf of Royal Palm Limited pursuant to its (as yet un-cancelled) agreement for sale.

[59] It is Mr. Vangani and his lawyer and the 1st Defendant and their lawyer that agreed for a new contract to be drawn on the same terms as the Royal Palm contract. But nowhere is there evidence that the Claimant paid a deposit in furtherance of this new contract. The lawyers and Mr. Vangani all acted as though the deposit paid for the benefit and on behalf of Royal Palm Limited was then treated as the deposit for the benefit and on behalf of the Claimant. But there is no evidence that Royal Palm Limited assented to this and assigned this benefit to the Claimant. No resolution, which would be evidence of the assent by Royal Palm Limited, has been exhibited.

[60] I raised the issue with the parties and Mr. Wilkinson's argument is that the court should not be too focused on this at this stage and that in any event, it is a matter between Royal Palm Limited and the Claimant. I disagree with Mr. Wilkinson on the basis that at this point, as a matter of fact, there is no evidence that Royal Palm Limited consented to this course of action. The money being claimed, therefore, remains for the benefit of Royal Palm Limited on its contract and not the Claimant. The Claimant therefore hasn't even established it has a legal financial interest in the deposit. That being the case, we have to examine whether special condition 1 of the impugned agreement for sale has been fulfilled. It says that it is a condition precedent to the coming into effect of this Agreement that it be signed by the

vendors and purchasers and the initial payment paid to the vendors Attorney-at-Law.

[61] It is to be remembered that this Agreement was not an *assignment* of the earlier agreement between Royal Palm Limited and the 1st Defendant. It was an entirely new agreement. So no benefit would have passed from Royal Palm Limited to the Claimant. So, *at this stage,* (emphasis mine) there is really no evidence that the Claimant has paid the deposit as required by special condition 1.

[62] This also affects the Affidavit and Statutory Declaration of Mr. Morgan used to secure the first caveat by Mr. Vangani. In that Affidavit, Mr. Vangani conflates the Agreement and deposit paid for and on behalf of Royal Palm Limited from the 21st September 2021 with the second agreement between the Claimant and the 1st Defendant. There was no disclosure to the Registrar that the September 21, 2021 Agreement and Deposit was for and on behalf of a different entity. For reasons known only to Mr. Morgan, in his statutory declaration at paragraph 3, he agreed with what Mr. Vangani said and said he believed it to be true.

[63] This last argument may ultimately prove to be a legal nicety and it was not raised by the Defendants in their Defence nor did it seem to appear to them. The Court acknowledges this. But at this stage, taken together with the other weaknesses highlighted, it does severely undermine the seriousness of the Claimant's case at this stage where the Court is considering whether to extend the injunction. The Claimant has repeatedly made assertions in its Affidavits, through Mr. Vangani, that it paid the deposit. This is not so as a matter of fact. It also highlights the ham-fisted, cavalier and loose handling of the transactions by both sides.

[64] So for these reasons, I am not satisfied that there is a serious issue to be tried.

Where Does the Balance of Convenience Lie?

The Undertakings as to Damages – Would damages be an adequate remedy for the Claimant and Can the Claimant meet its undertaking as to Damages?

[65] If I am wrong on the question of whether there is a serious issue to be tried, I will examine where the balance of convenience lies.

[66] I do agree with the Claimant's submission that land is *usually* of a unique character and so damages are not usually an adequate remedy where real property is concerned[11]. But this is a rebuttable presumption.

[67] The evidence presented shows that the purpose of the land is commercial in nature. In other words, the loss to the Claimant or the Defendants is capable of assessment and a figure can be put to same because they are using the land for investment purposes only.

[68] An important thing to consider though is the nature of the interest in the land that the parties have at this stage of the proceedings. Recalling that the purpose of the injunction is to preserve the interest of the Applicant until the final determination of the issues after a trial, the Applicant must establish that he has an interest that needs to be protected through the coercive power of the injunction. In the case of *Verrall v Great Yarmouth Borough Council*[12] Roskill LJ said, in the context of an application for specific performance of a commercial contract to lease a hall:

> *"It seems to me that, since the fusion of law and equity, it is the duty of the court to protect, where it is appropriate to do so, any interest, whether it be an estate in land or a licence, by injunction or specific performance as the case may be."*

[69] The Court is not satisfied that the Claimant company has any legal or equitable interest in the property at this stage of the claim. It starts with the caveat lodged by Mr. Vangani, not the Claimant, on his own behalf and not, on the face of it, on

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[11] *Carlton Coakley et al v Earl Jackson* [2020] JMCA App 28 at para 66

[12] [1981] 1 QB 202 at page 220 B-C

behalf of the Claimant. Mr. Wilkinson valiantly tried to get around this error by firstly saying it was an error, then saying that it clearly was intended to be for and on behalf of the company in the context of the Affidavit of Mr. Vangani and the Declaration of Mr. Morgan that accompanied the caveat. The Court agrees with the Defendants' arguments, however. Again, this caveat was lodged by very experienced and senior counsel[13]. But let us assume that Mr. Vangani was acting on behalf of the Claimant. It was a caveat to secure money and money only. There was no other interest claimed.

[70] It is also inarguable that no legal or equitable interest has yet passed to the Claimant company. The mere signing of an agreement for sale and payment of a deposit does not confer any legal or equitable interest in property[14]. There has to be more[15].

[71] Contrast with the 2nd Defendant who lodged a caveat to secure money, but there is also an instrument of transfer lodged. He identified himself as having an equitable interest and identified himself as "purchaser and equitable owner". So he actually is claiming and seeking to protect an equitable interest in the property

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[13] In this regard the authority of *Aedan Earle v National Water Commission* [JMSC] Civ 69 as relied upon by the 1st Defendant at paragraph 24 of their submissions is quite appropriate here as well.

[14] Interest in property means that a person has the immediate entitlement to use, possess or deal with their interest in the property without permission. See the case of *Frank McKenzie et al v AG for Antigua & Barbuda* [2022] UKPC 25 at para 54 where the Privy Council adopted the reasoning of Bennett JA from the Court below as to why the Land Act 2007 did not confer on Barbudans an interest in property that was protectable under s. 9(1) of the Constitution of Antigua and Barbuda.

[15] For example, the Purchasers would have had to enter into possession or do some other act to give rise to an estoppel. See *Harry Abrikian et al v Arthur Wright et al* (Supreme Court of Jamaica, Unreported CL A 083/1994, June 16, 2005, Sykes J (as he then was))

(equity regards as done what ought to be done). As does the 3rd Defendant as the nominee. So this is, at least, an equitable interest in the realty.

[72] Thus one can see that the interest to be protected for the Claimant (if such an interest even exists) is purely a financial interest. In my view, damages would be an adequate remedy for the Claimant and I so find. In those circumstances, I find that the Defendants have more than demonstrated that they are able to satisfy the Claimant on their cross-undertaking as to damages.

[73] On the other hand, I am satisfied that the Defendants have all demonstrated that they would suffer very serious financial losses should the injunction be maintained. The Claimant has not shown an asset base that satisfied me that it can meet the financial losses that would be visited upon the Defendants if the injunction is to be maintained to the end of the matter.

[74] The Court closely scrutinized the 6 affidavits that came in on the 4th July 2022 from Mr. Vangani. Affidavit number 5 seems to function as the affidavit of means. However, it demonstrated nothing about the capacity of the Claimant to meet its undertaking. In it the Claimant speaks to raising funds to meet the debt. But what that has demonstrated, wittingly or unwittingly, is that the Claimant is not now (emphasis mine) in a position so to do. The Court, is not concerned with what might happen in the future. It must be satisfied that the Claimant has the means to meet the undertaking now.

[75] In the *Lookahead* case, Brooks JA, as the then was, also found that Mid-Island was not in a financial position to satisfy an undertaking as to damages given its perilous financial state and upheld the decision of the Court below to refuse the injunction on that basis (amongst other things). Mr. Wilkinson valiantly argued that the Claimant had the deposit sum of US$220,000.00 to call upon. But, as I have earlier found, that is, strictly speaking, not its money.

[76] The other major issue to consider is that the greater hardship lies with the Defendants. There is evidence of a registrable mortgage[16] which suggests that the financing of the purchase is on a more secure footing than just "approved" it seems on the verge of disbursement and the instrument prepared. The Claimant isn't near that stage yet. There is also no evidence from Mr. Vangani as to whom the sum stated in his Affidavit 9 from JMMB would be disbursed. Him or the Claimant?

[77] It seems to this court that on the totality of the evidence, the greater hardship would like in granting the injunction than in refusing it.

[78] So, in the circumstances, I am satisfied that the balance of convenience is in favour of the Defendants.

CONCLUSION

[79] In the circumstances, I am not satisfied that the injunction granted should continue. I find that there is no serious issue to be tried as between the parties as there is no stamped Agreement for Sale before the Court presently. In any event, there is no factual dispute about the signing of the Agreement and that the terms were all agreed after being reviewed by counsel for both the Claimant and the 1st Defendant at the time of signing. The issue regarding the termination of the contract under special condition 21 will be very difficult for the Claimant to win at trial.

[80] Even if I am wrong on the question that there is no serious issue to be tried, I am satisfied that the balance of convenience lies in the Defendants favour and not in the Claimants. It is quite evident that damages is an adequate remedy for the

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[16] See warning notice exhibited at SV-9 of Vangani Affidavit Number 1.

Claimant in the circumstances of this case and I am satisfied that the Defendants all have the means to satisfy the Claimant's claim in damages.

[81] Accordingly, the injunction will not be extended and the Application for its discharge made by the 2nd and 3rd Defendants will be granted.

DISPOSITION

[82] The Application for interlocutory injunction is refused;

[83] The Application by the 2nd and 3rd Defendants for discharge of the injunction is granted.

[84] Leave to Appeal is granted.

[85] The Claimant is granted an interim injunction pending the outcome of an application for an injunction in the Court of Appeal in accordance with orders 1(i)-(iv) made on the 6th July 2022. The said Appeal and Application for Injunction in the Court of Appeal shall be filed no later than the 11th July 2022 by 3:00 pm.

[86] Costs to be the Defendants;

[87] Claimant's Attorneys-at-Law to prepare, file and serve this Order.

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Dale Staple
Puisne Judge (Ag)