IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2008 HCV 2729

IN CHAMBERS

BETWEEN	TEWANI LIMITED	CLAIMANT
AND	KES DEVELOPMENT CO. LTD.	1ST DEFENDANT
AND	ARC SYSTEMS LIMITED	2ND DEFENDANT

Miss Carol Davis for Claimant.

Mr. Walter Scott and Miss Elizabeth Salmon instructed by Rattray Patterson & Rattray for 1st Defendant.

Mr. Nigel Jones, Ms. Rowena Budding and Ms. Nicholene Nelson instructed by Brady & Co. for 2nd Defendant.

Practice and Procedure - Application for injunction – Application to oblige access to land – Claimant holding an instrument of transfer for the title to the land - Presumption that damages never an adequate remedy when the subject matter of the claim is land - Preservation of the *status quo*

Heard: 26th June and 9th July 2008

BROOKS, J.

Tewani Limited seeks an order obliging ARC Systems Limited to permit Tewani access to a town-house in a complex for which ARC has control of the main gate. On Tewani's case, it is the beneficial owner of the lot on which the town-house stands, having bought the fee-simple in it from some persons called Hugh Sam. Tewani asserts that given access, it could complete the construction of the town-house, which KES Development Co. Ltd. should have done, but failed and seems to be unable, so to do.

ARC's resistance to the application is that it holds the duplicate certificate of title for the lot and control of the complex, by way of an agreement with KES. Under that

agreement, KES assigned to ARC all its interest in construction contracts in respect of the complex. ARC asserts that Tewani's agreements to purchase the land from Hugh Sam and for KES to build a town-house on the land, both arose from a contract between Tewani and KES, which contract is null and void and therefore both are tainted by that contract. As a result, says ARC, Tewani has no proper claim to the land or access thereto. ARC further asserts that Tewani is seeking a mandatory injunction and its case not being unusually strong and clear, the court ought not to grant that relief.

Analysis

Although there are a number of aspects to the submissions which were made by counsel for the parties, I seek to address the matter by reference to the principles set out in the cases of *American Cyanamid Co. v Ethicon Ltd*. [1975] 1 All ER 504 and *Esso Standard Oil S.A. Ltd. v Lloyd Chan* (1989) 25 J.L.R. 110.

The first of those cases is of course the touchstone for considering applications for interlocutory injunctions. It sets out the steps for that consideration and I shall first seek to follow those steps.

Is there a serious question to be tried?

The first question to be answered, in following this guide to considering injunctive relief, is whether Tewani has established that there is a serious issue to be tried. There is no doubt that the issues raised in this case are serious ones requiring adjudication. Tewani has the additional advantage of being able to point to the fact that it is real property which it claims and as such, success at trial would mean that it would most likely be granted access to the land.

Are damages an adequate remedy?

The second question to be analysed is whether damages would provide an adequate remedy for a claimant who succeeds at trial but was denied an interim injunction. Where damages will provide an adequate remedy then the injunction should not be granted. (*Per* Lord Diplock in *American Cyanamid* (cited above) at page 510 g)

The significance of the subject matter being real property, raises a presumption that damages are not an adequate remedy, and no enquiry is ever made in that regard. The reason behind that principle is that each parcel of land is said to be "unique" and to have "a peculiar and special value". Hardwicke, L.C. in *Buxton v Lister & Cooper* (1794) 3 Atkyns Reports 383 said at page 384:

> "As to the cases of contracts for the purchase of lands, or things that relate to realties, those are of a permanent nature, and if a person agrees to purchase them, it is on a particular liking to the land, and it is quite a different thing from matters in the way of a trade."

The principle seems to apply even if the land has been bought as part of a commercial venture. In *Verrall v Great Yarmouth Borough Council* [1981] 1 QB 202 at page 220 B-C Roskill, L.J. said:

> "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."

As a result of that reasoning, damages would not be an adequate remedy for Tewani, if it were to lose its interest in this parcel of land. It must be asked however, whether the current circumstances indicate that Tewani faces that risk. It holds an instrument of transfer in its favour from the Hugh Sam's and it appears to have lodged a caveat against the title, in order to protect its interest. What it does not have is the duplicate certificate of title in order to have the instrument of transfer registered. It

would appear that once it is protected from loss of its interest in the land, then the other aspects of its claim may be considered.

The first of those other aspects is that Tewani wishes to have access to the land in order to complete the town-house. According to Victoria Stephenson, in her affidavit filed in support of Tewani's application, KES has failed to complete the town-house and "is experiencing financial difficulties, such that work on this and other housing developments commenced by [KES] have come to a standstill". She continued in paragraph 27 of her affidavit to say that she believed that KES "is no longer in a position to complete the townhouse, and that the only way to protect my company's investment is to take possession of the townhouse and to complete it ourselves".

At paragraph 16 she spoke of recovering the cost of construction as a judgment against KES. A similar comment was made about the transfer tax and stamp duty payable on the transaction, as it appears that these liabilities had not been paid.

These latter matters are clearly money matters. They raise the issue of damages. Even if it is said that KES would not be in a position to meet those damages, it would seem that Tewani's claim for the delay in securing possession would no longer lie, or solely lie, at the door of KES, but instead ARC would share in that responsibility. No allegation of impecuniosity has been levelled at ARC.

Finally, Tewani wishes for a Quantity Survey to be appointed to assess the cost of completion of the town-house and the exterior appurtenances thereof. This aspect also ties into the question of damages. If the injunction is not granted and Tewani is successful at trial, but the town-house has not been completed by then, Tewani will have the opportunity to have its loss assessed. If the townhouse has by then been completed,

then Tewani would have got what it had contracted to receive. There is no need for the Quantity Surveyor to carry out any work at this stage.

The balance of convenience

Mr. Jones, on behalf of ARC submitted that there was no evidence that Tewani has the ability to support an undertaking as to damages. He said that "there is an assertion but no evidence". I do not think that Mr. Jones is on good ground. Wolfe J. (as he then was) in *Gloria Moo Young and anor. v Geoffery Chong and others* (1990) 27 JLR 433 at page 488 F said that "the undertaking [as to damages] ought to be interpreted to mean that the plaintiffs have the ability to pay such damages as may be awarded". I also take into account that ARC has presented no evidence for the court to doubt the validity of Tewani's undertaking.

It has not been argued that ARC, should this injunction be granted, would suffer loss other than that of a monetary nature. Like Tewani, if ARC were to be successful at trial, it would be able to have its loss, attributable to the delay imposed upon it, assessed. ARC has not sought to adduce any evidence to the contrary. KES, for the most part, is a bystander at this stage of the proceedings. It has assigned its contract with Tewani, to ARC and has nothing to lose from any delay in the completion of the townhouse.

The Status Quo

Lord Diplock at page 511 a of *American Cyanamid* (*supra)* advised that:

> "Where other factors appear to be evenly balanced then it is a counsel of prudence to take such measures as are calculated to preserve the *status quo.*"

It would seem that preserving the status quo in this case is the prudent course to be taken. There will be no "uncompensatable disadvantage" caused by either granting or

refusing the injunction concerning access to the land. Hence this last guide by Lord Diplock seems appropriate.

Mandatory Injunction

Though I have resolved the issues using the classic guidelines of Lord Diplock, I should not part with this matter without stating that Tewani's application for a mandatory injunction ordering ARC to deliver to Tewani the duplicate certificate of title, does not meet the standard required of mandatory injunctions. The Court of Appeal in the cases of *Esso Standard Oil v Chan* (cited above), *Natural Resources Conservation Authority v Seafood and Ting International Ltd.* (1999) 58 WIR 269 and *Infochannel Ltd. v Cable and Wireless Jamaica Ltd.* (2000) 62 WIR 176 has stressed, that in this jurisdiction a claimant must normally demonstrate that he has an "unusually strong and clear" case, before this court will grant a mandatory injunction.

In this case, although Tewani has shown a *prima facie* case that it is entitled to be registered as the proprietor of the land in question, the issue of whether its transaction for its purchase, is tainted by a breach of the Moneylending Act, is a live issue. I find that that issue is not so overwhelmingly in favour of Tewani that a trial court would find that an injunction, allowing it to be registered as the proprietor, was rightly granted.

Conclusion

The issues raised by Tewani in this application involve the matter of ensuring the protection of its interest in the subject property. That protection may be secured by preserving the *status quo* in respect of the duplicate certificate of title for the property. Apart from that issue, all other issues are such that an award of damages would be adequate to compensate Tewani and therefore do not require the grant of an injunction.

There is no basis for granting Tewani a mandatory injunction for the delivery up to it of the duplicate certificate of title for the land. Its claim does not meet the standard for the grant of mandatory injunctions. It is not "unusually strong and clear", nor is the issue so urgent that it cannot await the trial of the claim.

The orders therefore, are as follows:

1. The Defendants, their servants and/or agents and/or attorneys-at-law are hereby ordered to preserve and not to part with, pledge, mortgage, or otherwise encumber, until the completion of the trial of this action or the further order of this court, the duplicate certificate of title for all that parcel of land part of Number Four Dillsbury Avenue in the parish of Saint Andrew being the lot numbered 5 on the plan of Lot 373 part of Barbican Heights, being all the land comprised in Certificate of title registered at Volume 1396 Folio 749 of the Register Book of Titles;
2. The Claimants application for other injunctive relief is refused;
3. Costs to be costs in the claim.