# IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

## IN CIVIL DIVISION

## CLAIM NO. 2006 HCV/01377

| | | |
|---|---|---|
| BETWEEN | MARIE-CLAIRE FERNANDES<br>*(Beneficiary/Executor for the estate of Mildred May Mullings, deceased)* | 1ST CLAIMANT |
| AND | AMARYLLIS MARIA MOO<br>*Beneficiary/Executor for the estate of Mildred May Mullings, deceased)* | 2ND CLAIMANT |
| AND | PARTICK EYICHE ADIZUA | DEFENDANT |

Miss Raquel Dunbar for the Claimants
Mr. Debayo Adedipe for the Defendant

HEARD: SEPTEMBER 11 AND 21 2007

MCDONALD J

On 31st August 2007 the defendant filed an application before this Court (i) to have interim injunction obtained by the Claimants on August 17, 2007 set aside and (ii) to refuse to grant on injunction on an inter partes hearing and for the Court

(iii) to strike out the claim as having no reasonable prospect of success and/or as being an abuse of the process of the Court –

(iv) That there be an enquiry as to damages that he suffered as a result of the ex parte injunction granted against him – (v) an order that the Claimants pay the costs of these proceedings.

The applications before the court involve some of the same principles of law and can conveniently be heard together.

The Claimants are the executrices and sole beneficiaries of the estate of their mother Mildred May Mullings deceased whose will has not yet been probated.

On August 17, 2007 an order was made appointing them representatives of the said estate for the purposes of these proceedings.

As beneficiaries they inherited property located at 37 Main Street, Mandeville, Manchester comprised in Certificate of Title registered at Volume 419 Folio 85 of the Register Book of Titles.

This property was the subject of a subdivision into lots for commercial purposes, and one of these lots, lot 11 sold initially to George Jones and then to the Defendant.

The subdivision was subject to a number of Restrictive Covenants. Restrictive Covenants were endorsed on the splinter title being the

land comprised in Certificate of Title registered at Volume 1299 Folio 649 otherwise referred to as lot 11, 37 Main Street Mandeville Manchester. These Covenants included Covenants 10 and 11 made pursuant upon the transfer entered into by Mildred May Mullings deceased and George Jones.

On or about 8th September 2005, the said property was transferred by George Jones to the defendant who is now the registered proprietor.

In April 2007, the Claimants observed construction beginning on Lot 11. as a result their Attorneys Coke Coke and Fernandez wrote letters dated 10th April 2007 and 3rd May 2007 exhibits 'M-CF and AMM4' to the Defendant's Attorney, Mr. Adedipe and he responded by letters dated 16th April 2007 and 15th May 2007 exhibits "PEA1".

Essentially, the Claimants letters made reference to Restrictive Covenants 10 and 11 on Certificate of Title for lot registered at Volume 1299 Folio 649 and requested sight of the Defendant's building plans. Letter dated May 3, 2007 points out that the proprietor who intends to build on his lot is under a duty to seek the approval of the registered proprietor of the parent title so that

his building should conform to the overall design for the subdivision.

The Defendant's response is that such a meaning as stated above cannot be attributed to the covenants. Further the Covenants do not authorize the Claimants to call for the Defendant's plan.

Restrictive Covenant 10 endorsed on Certificate of Title registered at Volume 1299 Folio 649 reads as follows:

"No building of any kind other than a commercial or professional building shall be erected on the said land and shall not be built other than in accordance with plans designed and specifications prepared by an Architect who is a registered member of the Jamaican Institute of Architects and approved by the former registered proprietor her successors assignees or nominees."

Restrictive Covenant 11 reads:

> "The registered proprietor shall not paint the exterior of the building on the said land in a colour other than in a colour approved by the former registered proprietor her successors, assignees or nominees and shall not make any addition change or variation to the exterior of such building and shall

not permit same to be done or allow same to remain without the written approval of the former registered proprietor her successors assignees or nominees."

The Claimants have filed one Affidavit and the Defendant four Affidavits in support of the application.

The Claimants in their Affidavit dated 17th August 2007 state that:-

"The Restrictive Covenants were invoked to ensure that the entire subdivision would be developed in a uniform manner in order to maintain uniformity and harmony of the development and to ensure that the value and beauty of the lots in the subdivision, including the Defendant's own lot, are preserved and enhanced.

That the vision for the subdivision was a professional centre containing buildings that are no more than two (2) storeys high and capture the old Mandeville great-house charm of the area.

That the subdivision is a commercial development which currently has villa type units on some of the lots that maintain the old Mandeville great-house charm of the area. That it contains

approximately twenty (20) lots with limited parking spots allotted for each lot.

That the Defendant's building is not yet completed but is now going up a fourth storey which could impact negatively on the parking spots allotted to the owners of the rest of the subdivision.

That in light of the above they are exposed to their rights being further breached, parking problems developing due to the sheer size of the building now under construction and the devaluation of the surrounding lots as a result. That they are in danger of having no effective resolution to the continued breach of their rights should the Defendant be allowed to continue with the construction as the building would already be in existence and the vision of the development and its value would be severely compromised.

Miss Dunbar submitted that the purpose of the Restrictive Covenants is that the original owner had a vision for the subdivision and that is why the Restrictive Covenants were imposed so that there could be a cohesive development of the subdivision.

She said that the Claimants needed to act quickly to have a stop put to further breach. Further the Claimants would be left without a remedy if the building was completed and any judgment in their favour would basically be a nullity.

She said that the Claimants position is that the Defendant has acted in breach of Restrictive Covenant 10 in commencing construction on his building without first seeking the Claimants' approval of the Architect and/or building plans. The Claimants also contend that Restrictive Covenant 11 is or is likely to be breached.

The Defendant is saying that Restrictive Covenant 10 does not entitle the Claimants to call for or approve his plans.

Miss Dunbar submitted that request by letter was made to the Defendant's Attorney for sight of the building plans only, as at that stage the building was already being constructed and the Architect would have already been involved in the matter and drafted up the plans. In order for the defendant to have commenced construction, the plans would have had to be drawn up and approved.

Mr. Adedipe opined that the central issue in this case is what does the Restrictive Covenant 10 mean and everything else is going to turn on the meaning of the Covenant.

He said that Restrictive Covenant must be specific. In order to buttress his interpretation of Covenant 10 he submitted specimens from the 18th volume 4th Edition of Encyclopaedia of Forms and Precedents.

He said that these specimens show clearly how one structures a Restrictive Covenant when one wants to impose an obligation on a registered proprietor to either submit plans for approval or to cause plans to conform to a particular format.

Mr. Adedipe said that when one looks at covenant 10 and have regard to what is the contention of the Claimants that they had a vision of a particular sort of development – there is absolutely no vision in Restrictive Covenant 10 so that it can be imposed on 10

He said that without express provision in the Covenant – the Claimants cannot unilaterally or at a whim or otherwise impose a

requirement that the design of the building conform to a vision that they or their predecessors in title had or might have had.

He said that the Claimants cannot seek to use this Covenant to restrain construction on account of the size or design of the building, the Covenant does not go that far.

Mr. Adedipe said that, even if the Covenant did go so far, which it does not, such a breach would be one at best remedied by damages.

Also if the Covenant did make the plans subject to the Claimants' approval, which is not admitted, compliance cannot be enforced by injunction once there has been a breach. The only remedy in such a case would be damages. He made reference to Powell v. Hemsley (1909) 1 ch p. 680 at pp 688 – 689.

Mr. Adedipe also submitted that Restrictive Covenant number 10 is invalid and unenforceable because it conflicts with the pre-existing Restrictive Covenant endorsed on the parent title registered at Volume 419 Folio 85 of the Register Book of Titles and those Restrictive Covenants have not been discharged or modified.

I find no merit in this submission. There is no allegation of fraud and sections 88 and 68 of the Registration of Titles Act clearly do not support such a contention.

In dealing further with the interpretation to be placed on Covenant number 10, Mr. Adedipe submitted that the highest the Restrictive Covenant goes is to require the name of the Architect who should be a member of the Institute of Architects and should be approved by the Registered Proprietor, her successors, assignees or nominees. Miss Dunbar submitted that it does appear that this is in effect an admission on the part of the Defendant that the Restrictive Covenant does impose on him some duty or burden to do something which he has failed to discharge before he started construction on the lot.

The Defendant is also saying that the Claimants saw the building being constructed and uttered not a word about wanting to approve the Architect. They expressed themselves in writing to be seeking sight of his plans only.

Mr. Adedipe said that the Claimants are estopped by their conduct from later complaining that they had not been furnished with the name of the Architect to approve it.

The Court has to ask itself, in circumstances where the Claimants did not ask about the Architect, does that mean that the Defendant is entitled to build without approval of the former registered proprietor, her successors, assignees or nominees.

Section 49(h) of the Judicature (Supreme Court) Act provides that

> "an injunction may be granted by 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."

Civil Procedure Rule, Rule 17 (1) gives the Court power to grant interim injunctions.

In the American Cyanamid Co. v. Ethicon Ltd. (1975) AC 396, Lord Diplock at page 406 said

> "The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right 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."

The test to be applied by the Court when considering this application for an interlocutory injunction is that laid down in the American Cyanamid Co. v. Ethicon Ltd (supra).

I take cognizance of the well known principles derived from the speech of Lord Diplock in this case, in particular the following at page 407 – 409

"(a) that the grant of an interlocutory injunction is a remedy that is both temporary and discretionary;

(b) In those cases where the legal rights of the parties depend on facts that are in dispute between them, the evidence available to the Court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination.

(c) It is no part of the Court's function at this stage of the litigation to try to 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.

(d) The Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.

(e) So unless the material available to the Court at the hearing of the application for 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."

I also adopt the following passage which was taken from the judgment of Wolfe C.J. in the case of Ciboney Group Limited and anor. v. Neuson Limited and anor Suit C.L. 073 of 1998 delivered on July 15, 1999.

At page 4, the learned Chief Judge said:-

"In Fellowes and Son's v. Fisher (1976) 1 Q B 122 at page 137, Browne LJ set out Lord Diplock's guidelines in American Cyanamid (supra) in an enumerated series which judges throughout the ages have found helpful in dealing with applications of this kind. I set out below the guidelines –

1. The governing principle is that the Court should first consider whether, if the Plaintiff succeeds at the trial, he would be adequately compensated by damages for any loss caused by the refusal to grant an Interlocutory Injunction. If damages would be adequate remedy and the defendant would be in a financial position to pay them, no Interlocutory Injunction

should normally be granted, however, strong the Plaintiff's claim appeared to be at that stage.

2. If on the other hand, damages would not be an adequate remedy, the Court should then consider whether, if the injunction were granted, the defendant would be adequately compensated under the Plaintiff's undertaking as to damages. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the Plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an Interlocutory Injunction.

3. It is where there is doubt as to the adequacy of the respective remedies in damages that the question of the balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

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

5. The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies.

6. If the extent of the uncompensable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party.

7. In addition to the factors already mentioned there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

I am of the opinion that the American Cyanamid case continues to be the leading authority by which Courts faced with Interlocutory applications must be informed, despite numerous attempts at refinements.

Is There a Serious Question to be Tried?

I find that there is a serious question to be tried as regards the interpretation of Restrictive Covenant #10 endorsed on Certificate of Title registered at Volume 1299 Folio 649. The issue being whether the defendant has indeed acted in breach of the said covenant.

The Claimants and Defendant have different interpretations as to the proper construction of covenant #10. The long submissions by both sides and authorities cited clearly indicate that there is a serious question to be tried on the merits

Having determined that there is a serious question to be tried the Court must then go on to consider the "balance of convenience."

This term is perhaps better explained by titling it "the balances of justice" as expressed in Francome v. Mirror Group Newspaper (1984) 2 ALL ER 408 at page 413 or "balance of the risk of doing an injustice" as expressed by May LJ in Cayne v. Global National Resources plc (1984) 1 ALL ER 225 at page 237.

In determining where the balance of convenience lies, the Court must consider -

(a) Whether the Claimants could be adequately compensated in damages should they succeed at trial

(b) And whether the defendant would be adequately compensated under the Claimants' undertaking as to damages.

I find that given the Claimants overall vision of the scheme, if the Defendant is found to have acted in breach of the Covenant and he is not stopped the Claimants could not be adequately compensated in damages.

On the other hand if the Defendant should succeed then damages would be adequate to compensate him for any loss suffered consequent on the issuing of the injunction. In this case damages would be quantifiable.

I adopt the words used by Kerr JA in National Commercial Bank Jamaica Ltd. V. Peter Rousseau et al SCCA 50/83 – delivered on January 31, 1985 at page 15.

"There is no complaint concerning the genuineness or reality of the undertaking"

The Claimants are business woman and Attorney-at-law respectively and have a beneficial interest in the dominant property – registered at Volume 419 Folio 85 of the Register Book of Title.

Nothing has been put before me which would cause me to set aside the order made on August 17, 2007 for an interim injunction such as for example material non-disclosure.

In exercise of my discretion I make the following orders:-

(i) Application to set aside interim injunction dismissed.

(ii) The Defendant is to cease construction of the building at lot 11, 37 Main Street, Mandeville in the parish of Manchester being the land comprised in Certificate of Title registered at Volume 1299 Folio 649 of the Register Book of Titles until the final determination of the matter.

(iii) The Claimants give the usual undertaking as to damages

(iv) Costs to be costs in the claim

Leave to appeal granted.