[2017] JMSC Civ 210

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2017HCV03295

BETWEEN	**NEVILLE PERALTO**	**1ST CLAIMANT**
AND	**KARLA CHIN-PERALTO**	**2ND CLAIMANT**
AND	**COK SODALITY CO-OPERATIVE CREDIT UNION LTD**	**DEFENDANT**

IN CHAMBERS

Rudolph E.A. Muir for the claimants

Georgia Gibson-Henlin Q.C. and Stephanie Williams instructed by Henlin Gibson Henlin for the defendant

December 18 and 20, 2017

Application for Prohibitory and Mandatory Injunctions – Ultimate test for grant – Court should adopt the course that will cause the least irremediable prejudice to one or other party – Adequacy of damages – Balance of convenience – No exceptional circumstances justifying departure from Marbella principle – Effect of delay on application for injunctive relief – Desirability of preserving status quo

D. FRASER J

The Issue for Determination

[1] The issue for this court's determination is whether or not injunctive relief should be granted to the claimants:

(a) restraining the defendant, the mortgagee of the claimants' property from exercising powers of sale granted by the mortgage deed over the claimants' property, and/or taking any steps for the sale of the real property assets of the claimants on condition that an amount sufficient to satisfy the bona fide claims of the defendant mortgagee be paid into court by the claimants on or before January 15, 2018; and

(b) requiring the defendant to:

(i) produce the agreement for sale it has entered into with parties unknown;

(ii) produce forthwith to the court the most recent valuation of the subject property;

(iii) permit the sale of the property by the defendant or the claimants at the closest offer to the most recent market valuation;

(iv) permit the sale of the property to purchasers identified by the claimant on condition that the full amount of the mortgage debt including interest be paid into court by the claimants; and

(v) present to the court an up to date comprehensive accounting and reconciliation of all the principal, interest and other charges incurred on the claimants' mortgage loan account.

The Law

[2] The application of the claimants has been brought pursuant to part 17 of the Civil Procedure Rules 2002 (Revised at September 18, 2006) (CPR) which empowers the court to grant an Interim injunction [17.1 (1)]. Rule 17.2 (1) empowers the court to grant an interim remedy at any time, including before a claim has been made. In such a case Rule 17.2 (2) (b) permits the court to grant an order before

a claim has been made if the matter is urgent or it is otherwise desirable to do so in the interests of justice.

[3] The governing considerations that must be satisfied before an interlocutory injunction may be granted are those outlined by the House of Lords *in* ***American Cyanamid Co. v Ethicon*** [1975] 1 All ER 504 at pages 510-511. These are:

(a) Whether there is a serious question to be tried.

(b) Whether damages would be an adequate remedy for the applicant.

(c) Whether the undertaking in damages is adequate protection for the respondent it being the overriding consideration on the Balance of Convenience

(d) The balance of convenience.

[4] I agree with the submission of counsel for the defendant that the test is applied in sequential stages and each factor stands on its own. Whether or not the court considers the next question depends on the answer to the last question. If the applicant fails at any stage there is no need to go to the next question.

[5] The ***American Cyanamid*** principles were applied in the leading case in this jurisdiction of ***National Commercial Bank of Jamaica v Olint Corp Limited*** [2009] UKPC 16***.*** In that case it was decided that an interlocutory injunction should only be granted if there was a serious question to be tried and the balance of convenience favoured the grant. If either condition is not satisfied, the injunction should be refused.

[6] Importantly the case also established that what matters most is not whether an injunction is prohibitory or mandatory and therefore which of two different tests should be applied, i.e. *"serious issue to be tried"* in the case of a prohibitory injunction or *"a high degree of assurance that at the trial it will appear that the injunction was rightly granted"*, in the case of a mandatory injunction. The guiding

principle was identified as being that the court should take whichever course appeared likely to cause the least irremediable prejudice to one party or the other.

Analysis

The Background Facts

[7] It is common ground between the parties that the claimants are indebted to the defendant in respect of a mortgage taken out over the claimants' property to secure the loan advanced to the claimants by the defendants to purchase their property. There is some dispute as to the exact amount of the indebtedness as the claimants have asserted in the claim filed on the morning of the hearing of the application that there was a bridging loan mortgage which was later subsumed into the main mortgage that the defendant is still incorrectly claiming has been unsatisfied and remains undischarged. In effect the claimants allege breach of contract through double counting on the part of the defendant.

[8] That dispute aside, which concerns about $4.65M, even if the claimants are correct in relation to that sum they would still be indebted to the defendant for at least in excess of $39M.

[9] It is also undisputed that in or about July 2015 the claimants defaulted on their loan payments which default continues to today. The claimants have remained in possession of the property. The claimants have been trying to sell the property as have the defendants under their power of sale under the mortgage. The main angst of the claimants is that they claim the defendant has now negligently entered into an agreement to sell the property for $39M at a gross undervalue that is below the market value ($58-59M) and even the forced sale value of the property ($46.8M) as outlined in a valuation obtained by the claimants in October 2017. The prohibitory injunction they assert is necessary to prevent them being

left exposed to continuing indebtedness and economic loss that would occur should the sale proceed as indicated.

Application of the Relevant Tests

i. Is there a serious issue to be tried/Is there a high assurance that at trial it would appear that the injunctions had been rightly granted?

[10] As briefly outlined in the background facts, the claim which was filed over two months after the filing of the application for the injunctions on the morning of the hearing, alleges breach of contract in respect of a "bridging loan mortgage" and negligence regarding the value of the purchase price agreed for the sale of the subject property in relation to default on the "main mortgage".

[11] In respect of the negligence claim, the main thrust of the claimants' assertions is that apart from a very short period which was inadequate to allow for a purchaser to be identified and negotiations concluded, the defendant consistently advertised the property for sale at a significant undervalue. This practice operated to undercut the claimants' ability to secure a sale at or close to market value, though they had over time received a number of expressions of interest. They contend that now they have a firm offer from an overseas company Potenza/HRC Health and can conclude arrangements with that company to be able to pay into court by January 15, 2018 "an amount sufficient to satisfy the *bona fide* claims of the defendant mortgagee".

[12] The claim was, up to the time of hearing, not properly served on the defendant who was therefore unable to respond directly to its merits. This is significant as the ***American Cyanamid*** case contemplates the court taking a preliminary view of the claimant's case without making findings of fact on disputed evidence. In deciding whether there is a serious question to be tried the court should generally focus on the pleadings that outline the issues and not the affidavits. The application was however filed as urgent without a claim being filed as permitted

under CPR r.17.2. The effect of delay in the filing of the claim, given that there was a time lag of over two months from the filing to the hearing of the application for the injunction, will be dealt with separately below.

[13] It is sufficient at this point therefore to note that the defendant, responding on the affidavit evidence filed in support of the application, submitted that the claimants case was frivolous or vexatious as they were not disputing either the validity of the mortgage, the fact of their default or the defendant's right to exercise its power of sale. The claimants, the defendant contended, were only seeking to have the court direct sale at a higher price or to a company HRC Health, from which they allegedly secured an offer on October 10, 2017. An offer unsecured by a deposit. The defendant submitted that it was unchallenged that it had afforded the claimants significant time to honour their obligations under the mortgage, which remained outstanding, despite numerous promises.

[14] In the circumstances where the defendant has, through no fault of its own, been unable to respond directly to the claim as now filed but not served, the court is disinclined to decide the application on this point and will, to enable consideration of the next point provisionally deem without making a conclusive finding, that there may be a serious issue to be tried.

ii. Are damages an adequate remedy?

[15] As recognized in ***American Cyanamid*** most if not all cases are really about money (in differing ways and with varying levels of adequacy of compensation). There are additionally sometimes other considerations, especially where there are elements of intangible value such as a sentimental attachment which homeowners may have to their family home, which a court may be asked to weigh in the balance when considering whether or not damages may be an adequate remedy.

[16] It is significant I find that, at this point, all the solutions put forward by both the claimants and the defendant involve a sale of the claimants' property. There is no permutation that contemplates the claimants retaining the property in the long term. The issue is the value to be derived from a sale. The complaint is that the property is being sold at an undervalue, to the detriment of the claimants.

[17] In positing that damages were an inadequate remedy, the claimants relied on the case of ***Gilbert Gardiner v International Trust and Merchant Bank*** CL G.056/96 in which Reckord J indicated that where a sale was not by public auction but by private treaty there must be a current valuation and the property must have been adequately advertised. Relying on the Court of Appeal decision in ***Moses Dreckett***, Reckord J further highlighted that a mortgagee owes a duty to take reasonable precaution to obtain true market value at the time of sale. It was submitted that the inadequacy of damages was evident based on the actions of the defendant which precipitated the situation the claimants find themselves in and also the fact that the defendant has claimed for possession which hearing is set for February 1, 2018.

[18] Without deciding whether or not the position stated in ***Gilbert Gardiner*** relying on ***Moses Dreckett*** remains the current state of the law particularly in relation to the question of the "precaution to obtain the true market value" there is a statutory position relevant to this application. With reference to the exercise of a power of sale after default, section 106 of the **Registration of Titles Act** provides, *"…any persons damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power"*. The defendant has demonstrated through the affidavit of Ms. Roshene Betton, legal officer at the defendant company, who exhibited the defendant's financial statements for the years 2015 and 2016, that it is in a position to pay damages.

[19] The claimants have not challenged the ability of the defendant, a large Credit Union, to pay damages, nor have the claimants asserted their ability to pay

damages that may be occasioned by the granting of an injunction, in a context where this matter is before the court due to their over two years default in failing to make mortgage payments. Further, while the claimants allege that they have now identified a purchaser, apart from a signed letter making an offer to purchase the property for $59M subject to contract, dated October 5, 2017, purporting to be under the hand of Hernan Restrepo Director Potenza/HRC Health, there is no affidavit evidence of any concrete steps taken to conclude the deal. No sale agreement. No deposit.

[20] I therefore agree with the submission made on behalf of the defendant that in these circumstances, to use Lord Hoffman's language in ***NCB v Olint***, adjusted for the fact that the claimants in this matter are natural rather than a juridical person, they should be *"left to [their] remedy in damages"*.

iii. <u>The balance of convenience</u>

[21] The court's decision that damages are an adequate remedy is determinative of the application. However, in the event that I am wrong on that point I go on to consider the other factors. In ***Mosquito Cove Limited v Mutual Security Bank Ltd. et. al*** [2010] JMCA Civ 32, Morrison JA, as he then was, concluded that the ***Marbella*** principle is "alive and well" — see paragraphs 2 and 48. The principle is that a mortgagee will not be restrained, except in exceptional circumstances, from exercising its powers of sale, unless the mortgagor pays the sum due into court before the mortgagor enters into a contract of sale.

[22] In this case, a contract of sale has been entered into with Mr. and Mrs. Jide Carlton Lewis on November 7, 2017, under which monies have already been paid with completion being due in 90 days from the date of signing. The date of November 7, 2017 is significant, as while the affidavit of the 1st claimant in support of the application which exhibited the offer to purchase at $59M was sworn to on October 11 and filed October 12, 2017, the defendant alleges the

application and supporting affidavit were served on it after it concluded an agreement with purchasers for the property pursuant to its power of sale.

[23] Thus apart from there being no payment into court before the defendant entered into a contract of sale the defendant did not even have notice of the prospective sale alleged by the claimants prior to entering into contract with Mr. and Mrs. Lewis. This assertion was not countered by the claimants. The continued applicability of the ***Marbella*** principle has been reaffirmed recently in the case of ***Alexander House Limited v Reliance Group of Companies*** [2016] JMCC Comm 22.

[24] There are no exceptional circumstances in this case that would justify even the contemplation of a departure from the well established ***Marbella*** principle. There is no challenge to the fact of indebtedness (though there is a dispute as to the amount), or to the validity of the mortgage. The main dispute is as to the value to be obtained on sale. Damages are an adequate remedy, if any liability for breach of contract and/or negligence is established in respect of the defendant. The balance of convenience therefore clearly favours the refusal of the application.

iv. Delay

[25] **Gee on Commercial Injunctions** Sixth Edition, para 2-022 and the cases of ***Shepherd Homes Ltd v Sandham*** [1971] Ch 340 and ***Osmond Hemans and Thelma Hemans v St. Andrew Developers*** (1993) 30 JLR 290 all highlight that delay in pursuing injunctive relief will weigh against the exercise of the court's discretion to grant the injunction sought.

[26] In this matter the claimants have been in arrears since July 2015. While it could be argued that no action was taken initially because the parties were in dialogue, in April 2017 it must have become clear that negotiations or understandings had broken down as the defendant brought a claim for the outstanding debt and then subsequently in October 2017 brought an action for recovery of possession.

Additionally, after the claim was filed on October 12, 2017, the substantive claim was not filed until December 18, 2017, the morning of the adjourned hearing. The delay has resulted in third party rights of bona fide purchasers for value without notice having now intervened. In these circumstances the delay in the claimants pursuing this relief as outlined militates against the relief sought being granted.

v. The maintenance of the status quo

[27] As outlined in ***American Cyanamid***, and expanded upon and explained in the ***Garden Cottage Foods Ltd v Milk Marketing Board*** [1984] AC 130, where all other factors are evenly balanced it is prudent to maintain the status quo, i.e. in this case the state of affairs existing immediately preceding the application for the interlocutory injunction. I have not found that all other factors are evenly balanced, but if I had, this would have been a final hurdle that the claimants' application would have been unable to surmount.

[28] The fact is there is in being a concluded sale agreement involving innocent third parties. That agreement commenced immediately before the application was served and the defendant would have had no notice of the application or the offer made to the claimants. Therefore though the action would have been filed before the agreement was signed, on the evidence of the defendant it was served after the signing. In any event what is most important is that there has been no payment into court before the signing of the sale agreement took place, which is the strict requirement under the ***Marbella*** principle. The present status quo should not be disturbed.

Order

[29] With the possible exception of the 1st consideration — whether or not there is a serious issue to be tried, on which I have made no conclusive finding — the claimants have failed to show that the other considerations weigh in favour of the

grant of an injunction. In the premises the application of the claimants is therefore refused, with costs to the defendant to be agreed or taxed.