[2020] JMSC Civ. 223

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2020CV01705

BETWEEN	**ALEXANDER WILLIAMS**	**1ST CLAIMANT/APPLICANT**
	CAROL WATSON-WILLIAMS	**2ND CLAIMANT/APPLICANT**
AND	**BARRY GROUP LIMITED**	**DEFENDANT/RESPONDENT**

IN CHAMBERS

Daniella Gentles-Silvera and Kathryn Williams instructed by Livingston, Alexander & Levy for the Claimants/Applicants.

Latoya Green and Kimica Hibbert instructed by Green & Company for the Defendant/Respondent.

Heard: October 27, 2020 and November 10, 2020.

Injunction - interim - inter partes hearing - whether there was material non-disclosure - anticipatory breach of restrictive covenant - no application or order for modification of restrictive covenant - whether there is a serious question to be tried - balance of convenience.

C. BARNABY J, (AG)

INTRODUCTION

[1] The Applicants and the Respondent are proprietors of 12 and 5 Lakehurst Drive, Kingston 8, St. Andrew, respectively. The Applicants reside at 12 Lakehurst Drive while the Respondent, a property developer, is desirous of constructing

apartments on its lot at 5 Lakehurst Drive. The development is opposed by the Applicants on the basis that it would be in breach of the restrictive covenant for which they have the benefit.

[2] The certificate of title for the Applicants' property is registered at Volume 1020 Folio 623 of the Register Book of Titles and that belonging to the Respondent is registered at Volume 895 Folio 31. With the exception of *"£2,000"* which follows the words "*Two Thousand Pounds"* on the Applicants' certificate of title, the following restrictive covenant numbered 2 appears on both titles.

> *No building of any kind other than a private dwelling house with appropriate outbuildings appurtenant thereto and to be occupied therewith shall be erected on the said land and the value of such private dwelling house and outbuildings shall in the aggregate not be less than Two Thousand Pounds. Provided however that the erection of a duplex building shall not be deemed to be a breach of this covenant. The outbuildings to be erected in a line not nearer the road boundary than the main building itself.*

There is no dispute that the Applicants are entitled to the benefit of the covenant.

[3] The Respondent initially sought approval from the Kingston and St. Andrew Municipal Corporation (KSAMC) for the construction of twenty (20) apartments at 5 Lakehurst Drive. The Applicants expressed concern to the Respondent about the proposed development and the latter withdrew its application for approval of those building plans. In its place, amended building plans for the construction of four (4) townhouses and nine (9) studio apartments, down from the twenty (20) units it initially proposed to construct were submitted. Approval is said to have been granted by the KSAMC in respect of the amended building plan on June 8, 2020.

[4] The withdrawal of the initial building plans and the submission of the amended building plans to the KSAMC for approval was not communicated to the Applicants.

According to the Respondent, it only discovered the failure to advise the Applicants of the fact when it was served with an order on 29th June 2020. The default is placed at the feet of the Respondent's then attorneys-at-law. Nothing much turns on this however as both developments, on their faces, would appear to breach the restrictive covenant numbered 2 if done in the absence of a modification or discharge of the said covenant.

[5] Being aware that the Respondent had applied to the KSAMC for approval of its building plan relative to the construction of twenty (20) apartments at 5 Lakehurst Drive; and having observed the clearing of the land by the Respondent, the Applicants came to anticipate a breach of the restrictive covenant.

[6] With a view to enforcing the said covenant, the Applicants by way of a Without Notice Application for Interim Injunction filed on the 1st June 2020, pursue

> *An injunction to restrain the Defendant whether by itself, its servant or agents or otherwise howsoever from carrying out construction and developing property known as ALL THAT parcel of land part of CONSTANT SPRING ESTATE now known as ARMOUR HEIGHTS in the Parish of SAINT ANDREW being the Lot numbered One Hundred and Eight on the Plan of Armour Heights comprised in Certificate of Title registered at Volume 895 Folio 31 of the Register Book of Titles known as 5 Lakehurst Drive, Kingston 8, registered in the name of the Defendant, into a multi dwelling complex until trial of this claim or further order of this court.*

[7] It is contended by the Applicants that if the Respondent is not restrained, they will suffer loss, damage and be disturbed in the use and enjoyment of their home. An award of damages is said to be an inadequate remedy.

[8] The Applicants obtained an *ex parte* interim injunction on the 15th day of June 2020. It was extended following adjournments of the *inter partes* hearing on several occasions thereafter.

[9] At the *inter partes* hearing on the 27th October 2020, the Respondent opposed the application for interim injunction and requested the discharge of that which was granted *ex parte*. The bases upon which the discharge is sought are that there was material non-disclosure in obtaining the *ex parte* interim injunction; there is no serious question to be tried; damages would not be an adequate remedy for the Defendant/Respondent should its defence succeed at trial; and that the balance of convenience lies in favour of refusing the interim injunction.

[10] I thank Counsel for their submissions and the authorities which were helpfully provided in support. While a number of such authorities were cited and have been duly considered by me, I do not believe it necessary to address them all in the course of the judgement. I am grateful to be permitted that liberty.

[11] Having heard Counsel for the parties and on consideration of the applicable law, I find that there was no material non-disclosure by the Applicants in obtaining the *ex parte* interim injunction; that there is in fact a serious question to be tried; and that the balance of convenience lies in favour of continuing the interim injunction pending a determination of the issues at the trial of the claim. The reasons for these various conclusions are set out below.

Material Non-disclosure

[12] A number of authorities concerned with material non-disclosure on an *ex parte* application for an interim inunction were cited, but I believe it sufficient to refer only to the decision in **Brink's MAT Limited v Elcombe and Others** [1989] 1 F.S.R. 211 (1987) 1350, which was relied on by Counsel for the parties. The following principles distilled by Ralph Gibson L.J., with which the rest of the court agreed is instructive.

> *(1) The duty of the applicant is to make 'a full and fair disclosure of all the material facts…*
> *(2) The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by*

the court and not by the assessment of the applicant or his legal advisers…

(3) *The applicant must make proper inquiries before making the application… The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.*

(4) *The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant… and (c) the degree of legitimate urgency and the time available for the making of inquiries…*

(5) *If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure…is deprived of any advantage he may have derived by that breach of duty:" see per Donaldson L.J. in Bank Mellat v Nikpour, at p. 91, citing Warrington LJ in the Kensington Income Tax Commissioners' case [1917] 1 K.B. 486 at 509.*

(6) *Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.*

(7) *Finally, it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded": per Lord Denning M.R. in Bank Mellat v Nikpour [1985] FSR 87 at 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms,*

> *"… when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant… a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed:" per Glidewell L.J. in Lloyds Bowmaker Ltd. v Britannia Arrow Holdings Plc. [1988] 1 W.L.R 1343H-1344A.*

[13] It is with these principles in mind that I approach the resolution of the Respondent's two-fold complaint of material non-disclosure. In the first instance, it is that the

Applicants failed to disclose that the Respondent has a restrictive covenant numbered 1 endorsed on its title which provides as follows.

> *No lot shown on the sub-division Plan of Armour Heights with an area of less than three-quarters of an acre may ever be sub-divided. Lots of an area of not less than one acre may be subdivided with the approval of the Kingston and Saint Andrew Corporation provided that no lot is of an area of less than one-half of an acre.*

[14] The said covenant is reproduced in full at paragraph 13 of the Affidavit of Mr. Williams sworn and filed 26th May 2020 and 1st June 2020 respectively. This was the evidence filed in support of the Without Notice Application for Interim Injunction. It was quoted by Mr. Williams while traversing the history of the titles and the endorsement of the restrictive covenants on them. While there was no specific averment that the title for 5 Lakehurst Drive had the restrictive covenant endorsed thereon, a copy of the said title was exhibited in Mr. Williams' affidavit. In the face of this evidence, I cannot find that the failure to specifically aver to the terms of the restrictive covenant numbered 1 on the Respondent's title amounts to non-disclosure, whether material or otherwise.

[15] The second allegation of material non-disclosure is that the Applicants, at the time of obtaining the *ex parte* interim inunction, failed to disclose the existence of approximately eight (8) apartment developments on Lakehurst Drive, some of which contain as many as twenty (20) units, including a development at 8 Lakehurst Drive; and that there was a 2007 modification of the restrictive covenant numbered 2 on the title for 3a Lakehurst Drive which enables construction of apartments with the approval of the relevant authority. I note that this modification precedes the Applicants' acquisition of their property, the filing of their claim and application for an interim inunction. 3a Lakehurst Drive is said to adjoin the Respondent's property and is registered at Volume 1400 Folio 805 of the Register Book of Titles.

[16] In Mr. Williams' affidavit filed in support of the *ex parte* application for interim injunction, he refers to having observed the demolition of a single bungalow, trees and foliage from 5 Lakehurst Drive. This prompted him to make enquiries of relevant authorities as well as the Respondent. Correspondence to the latter dated 24th October 2019 is exhibited to the affidavit. In it Mr. Williams states,

> *As you will appreciate from the restrictive covenants numbered one and two (which is endorsed on your title, as well as on ours) we have a proprietary expectation that the character of the neighbourhood remains unchanged which is that of single family dwelling houses with large lot sizes.*
>
> ***This character is well established and remains unchanged, despite a few townhouse developments**, and the neighbourhood offers quiet and comfortable accommodation with little or no through traffic.*
>
> **[Emphasis added]**

On this evidence, I am unable to agree with the Respondent that there was material non-disclosure by the Applicants in obtaining the *ex parte* interim injunction by failing to state that there were developments on Lakehurst Drive other than a private dwelling house on each lot.

[17] Even if the foregoing evidence is found wanting, I would have arrived at the same conclusion - that there was no material non-disclosure - having regard to the nature of the claim, the particular circumstances of the case, and the status quo which Applicants seek to have preserved pending trial.

[18] A permanent injunction in terms similar to the interim relief is being claimed by the Applicants on their Fixed Date Claim Form filed on 1st June 2020. The Respondent in its Defence filed 20th August 2020 contends that due to changes in the character

of Lakehurst Drive, the restrictive covenant numbered 2 is obsolete and prays that the relief claimed by the Applicants on the claim be refused.

[19] The fact of any change in status of the restrictive covenant numbered 2 on titles to property at Lakehurst Drive that share a common title; or changes in the character of the neighbourhood, are undoubtedly material on an application to discharge or modify a restrictive covenant on the basis that it is obsolete. However, the substantive claim and the reliefs sought by the Applicants are aimed at preventing a breach of the restrictive covenant numbered 2. This is in circumstances where the Respondent applied for approval of building plans for the construction of structures other than a private dwelling house, and had commenced preparatory works at 5 Lakehurst Drive in the absence of at least an application for modification of the restrictive covenant. It is not disputed that no application has been made.

[20] It is the unchallenged evidence of Mr. Williams that until the Respondent filed its affidavit in answer to his, there was no indication of an intention to apply for modification of the restrictive covenant. In fact, on the application to the KSAMC for approval of its building plans relative to the construction of twenty (20) apartments, which was exhibited in Mr. Williams' affidavit, in response to the question, "*Would covenant be breached as a result of the proposal?"*, the Respondent had answered *"No".*

[21] In the absence of an application to modify the restrictive covenant or an expressed intention to make such an application, the modification of the restrictive covenant on some titles to enable development of the kind contemplated by the Respondent was not a material fact on the application for an *ex parte* interim injunction. The interim injunction is aimed at preventing a breach of the restrictive covenant in respect of 5 Lakehurst Drive, the benefit of which the Applicants enjoy, pending the trial of the Applicants' enforcement claim. A discharge of the *ex parte* interim on the basis of material non-disclosure is therefore without merit.

[22] Even if I am wrong in so concluding, I would nevertheless be permitted to allow the interim injunction to continue or make new orders in terms, if the facts before me allows the exercise of my discretion either way. It is to that enquiry which I now turn.

Serious question to be tried

[23] It is submitted by the Respondent that there has been a change in the character of the neighbourhood which renders the restrictive covenant obsolete. This has led it to submit that there is no serious question to be tried. I am unable to agree with this contention.

[24] The parties rely on the well-established principles espoused by Lord Diplock in **American Cyanamid Co v Ethicon Ltd** [1975] 1 All ER 504, 510 albeit to different effect. His Lordship stated the matter thus,

> *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.*
>
> *…[U]nless the material available to the court at the hearing of the application for an 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.*

[25] It is the evidence of Mr. Williams that he and his wife purchased 12 Lakehurst Drive in 2009 and at that time, they had the expectation that the character of the neighbourhood would be that of single family dwelling houses, with relatively large lots, with little to no traffic and therefore quiet.

[26] The Respondent's evidence is that the character of the neighbourhood has changed since 2009 as there are approximately eight (8) apartment developments in the area, some of which contain as many as twenty (20) units. The apartment complex at 8 Lakehurst Drive is given as an example. Evidence has also been produced that the restrictive covenant numbered 2 which appears on the title for

property at 3a Lakehurst Drive, which adjoins 5 Lakehurst Drive, has been modified to permit the erection of apartments. It is also asserted on the affidavit evidence that the interim injunction unreasonably impedes the Respondent's use of its land without securing any benefit to either the Respondent or the Applicants. Although the Respondent has indicated an intention to apply for a modification of the restrictive covenant, no such application has in fact been made.

[27] Mr. Williams' evidence in response is that the character of the neighbourhood has not changed. Lakehurst Drive is described by him as a very long road which can be characterized into two neighbourhoods. When he looks to the right and left of his property, he is unable to see the first neighbourhood which he says ends at the bend in the road. It is also his evidence that 5 and 12 Lakehurst Drive are both located in the second neighbourhood. In respect of 8 Lakehurst Drive, the evidence is that it cannot be seen from either the Applicants' or Respondent's property as it is in the first neighbourhood and does not interfere in any way with the use and enjoyment of 12 Lakehurst Drive. Mr. Williams goes further to aver that there are thirty (30) lots on Lakehurst Drive, four (4) of which are town house or apartment developments in the first neighbourhood. The remaining twenty-six (26) lots are single family dwelling homes, all located in the second neighbourhood.

[28] At this stage of the litigation the court is not concerned with the resolution of conflicts of facts on the affidavit evidence nor in deciding difficult questions of law. While it is for the court at trial to determine whether or not the character of Lakehurst Drive has so changed to render the restrictive covenant obsolete, the Claimants/Applicant's claim cannot be said to be either frivolous or vexatious, or described as one which fails to disclose any real prospect of success in its claim for a permanent injunction at trial. On the competing evidence of the parties, there is certainly a serious question to be tried. I therefore find accordingly.

Balance of Convenience

[29] Having concluded that there is a serious question to be tried, on the authority of **American Cyanamid,** the enquiry must now turn to whether or not the balance of convenience lies in favour of granting or refusing the interim injunction. It is the Respondent's submission, with which I do not agree, that it lies in favour of refusing the interim injunction.

[30] Although lengthy, the dicta of Lord Diplock in respect of the balance of convenience which appears at pages 510-511 of **American Cyanamid** is worthy of repetition in full. It is this,

> *… the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law 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. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. 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 this ground to refuse an interlocutory injunction.*
>
> *It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of 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.*
>
> *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. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark on a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.

Save in the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application some disadvantages which his ultimate success at the trial may show he ought to have been spared and the disadvantages may be such that the recovery of damages to which he would then be entitled either in the action or under the plaintiff's undertaking would not be sufficient to compensate him fully for all of them. 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; and if the extent of the uncompensatable 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 on 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. The court is not justified in embarking on anything resembling a trial of the action on conflicting affidavits in order to evaluate the strength of either party's case.

[31] The Respondent has not given an undertaking as to damages and even if it had, I do not believe that an award in damages would be adequate compensation if the Applicants succeed in getting a permanent injunction at trial.

[32] It is the evidence of Mr. Williams that the Applicants would suffer irreparable harm if the Respondent proceeds with its proposed development. The property which the latter wishes to develop is across from the residence of the former. There would be vehicular traffic each day for the purposes of entry to and exit from the complex when the units are occupied as well as increased noise. Additionally, it is his evidence that the view from their home at 12 Lakehurst Drive would be radically changed as they would have a view of the development from the master

bedroom, living room, foyer garden, patios and driveway whereas they currently have views of the hillside and greenery.

[33] On the other hand, it is the evidence of the Respondent that it does not intend to commence the development for which it has received approval until it has received an order for the modification of the restrictive covenant. That notwithstanding, it says it intends to do preparatory works in order to save time so that the land would be ready as soon as such an order is obtained. The interim injunction is said to have prevented the engagement of builders and labourers to undertake these preparatory works.

[34] In light of the Respondent's posture in respect of the development of 5 Lakehurst Drive, for builders and labourers to begin preparatory works for the development, I believe that in the absence of an interim injunction, those works would in fact proceed. This is on the Respondent's very bold assumption that it will receive an order from the court to modify the restrictive covenant in a manner favourable to it. The very disruption in enjoyment which the Applicants are seeking to prevent by their claim would likely be realised in respect of such preparatory works. There would undoubtedly be noise, increased traffic and potential loss of the view they currently enjoy from many parts of their home. I do not believe an award of damages at trial would be adequate compensation for that loss of enjoyment if the Applicants are successful in enforcing the restrictive covenant at trial.

[35] The Respondent's evidence is that the imposition of the interim injunction has caused and will continue to cause it irremediable and immeasurable financial loss should it remain in effect. Perhaps it is for that reason that no attempt has been made to quantify the perceived loss which is associated with what appears to be a purely commercial venture.

[36] Mr. Williams has given a wide undertaking as to damages but there is nothing before the court which advises of the value of any loss the Respondent would suffer should the interim injunction continue up to trial. While I am in no doubt that

an award of damages would be an adequate remedy to compensate the Respondent for purely financial loss suffered if it is determined at trial that the interim injunction was wrongly granted, in light of the paucity on the evidence of the potential value of such loss, to which a generalised undertaking as to damages is given, I am unable to assess the Applicants' financial position to pay.

[37] In determining where the balance of convenience lies, I therefore consider the Respondent's indication in these proceedings that it will await an order for modification of the restrictive covenant and will not proceed with its development until then. No application has been made and the Applicants have expressed that it would be opposed by them.

[38] Implicit in the Respondent's indication that it would not proceed with construction until it receives an order of the court modifying the restrictive covenant, is an acknowledgment that there will have to be, at the very least, a delay in carrying out its proposed development at 5 Lakehurst Drive. It also appears to me that unless and until the restrictive covenant is in fact modified to permit the development, to persist would be to knowingly commit a breach. I therefore conclude that the balance of convenience lies in favour of continuing the interim injunction until trial, when the dispute between the parties on the substantive claim is determined or until further order of the court.

ORDER

1. The interim injunction which was granted on the 15th June 2020 restraining the Defendant/Respondent whether by itself, its servant or agents or otherwise howsoever from carrying out construction and developing property known as ALL THAT parcel of land part of CONSTANT SPRING ESTATE now known as ARMOUR HEIGHTS in the Parish of SAINT ANDREW being the Lot numbered One Hundred and Eight on the Plan of Armour Heights comprised in Certificate of Title registered at Volume 895 Folio 31 of the Register Book of Titles known as 5 Lakehurst Drive, Kingston 8, registered in the name of the Defendant/Respondent,

into a multi dwelling complex is to remain in force until trial of this claim or further order of this court.

2. Costs to be costs in the claim.

3. The Applicants' Attorneys-at-Law are to prepare file and serve this order.