

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV2015/0422

BETWEEN:

**HANS PAULIG
MARLEN PAULIG**

Claimants

AND

**EVA KACHERIESS ABAN
WILLIAM ABAN
PALM TREES IMMO LTD.**

Defendants

Appearances:

Ms. Cathisha Williams and Ms. Hazel Hopkins for the Claimants
Mr. Ruggles Ferguson for the Defendants

2015: December 7.

Civil – Interim Remedy – Injunction – Inter Partes hearing – Whether to continue injunction granted to claimants – Material Non-Disclosure – Principles to be considered for grant of interim injunction – Criteria for Injunction – Urgency of Application – Courts overriding objectives – Disclosure – Case Management – Saloman v Saloman – Company Law principles – Shareholder’s rights to property owned by the company

REASONS FOR DECISION

[1] **AZIZ, J.:** This is the inter partes hearing in relation to an (ex parte) injunction granted in favour of the claimants on the 3rd October 2015. All the respective parties were present for the inter partes hearing, and there has been a substantial number of affidavits filed in support of each side’s position on whether the injunction ought to continue or be discharged. The defendants also had further applications which were as follows:

1. "The applicants seek leave of the court to apply for the following additional orders in its application dated the 16th October 2015:

i. The order discharging the ex parte injunction dated 3rd October 2015 granted to the respondents against the Applicants.

ii. An Order setting aside the Cost Order dated the 3rd October 2015, granted ex parte against the applicants."

[2] The basis upon which these applications were sought, were in relation to what the applicants/defendants submitted was a material non disclosure by the claimants at the time of applying for the ex parte injunction. The applicants also applied for a stay of the costs order¹.

The Claimants' Submissions

[3] The claimants submitted that the court was correct and properly ordered the ex parte injunction against the defendants. Counsel for the claimants was adamant that there was no material non disclosure and the court had all the relevant matters before it on the 3rd October 2015.

[4] The court was referred to the **American Cyanamid Co. v Ethicon Ltd** [1975] A.C. 396 in which case the general principles or criteria for consideration in relation to injunctions were laid out. They are well known but I will state them in summary here; they are:

- I. Is there a serious issue to be tried?
- II. Are damages an adequate remedy for the applicant for the loss that he would have sustained as a result of the respondent continuing to do that which was sought to be

¹ In the applicants 'Notice of Application' dated and filed on the 2nd November, the applicants in paragraph 4 set out "The applicants complied with the Cost Order but by oversight the Application dated 16th October did not include the relief of setting aside the Cost Order."

enjoined between the date of the application and the date of the trial?

iii. Are damages an adequate remedy for the respondent for the loss he would have sustained by being prevented from so acting between the date of the application and the date of the trial?

iv. Where does the balance of convenience lie?

Serious issues to be tried – Material Non-Disclosure

[5] The claimants have submitted that there are serious issues to be tried, and Mr. Ferguson for the defendants submitted that there were issues to be tried and that those such issues were narrow ones.

[6] Mr. Ferguson referred the court to a letter dated the 18th August 2015, which he says was not fully disclosed to the court at the time of the ex parte application and therefore there was material non disclosure, which in all of the circumstances meant that the ex parte order ought not continue. Mr. Ferguson goes a little further and submits that had the court been made aware of the contents of that letter then the interim injunction would not have been granted in the first place.

[7] I do not agree with that submission in relation to the material non disclosure at this stage of the proceedings. For the record, the claimants did refer to the letter of the 18th August 2015 in their affidavits of 3rd October 2015² and also the 19th October 2015 at paragraph 12(xi). The affidavit and certificate of exhibits³ of the 3rd October 2015 set out the following:

“By letter dated the 18th August 2015 the defendant stated that we had no legal title or beneficial interest in the property. We find this rather preposterous as we had invested numerous

² See paragraph 26 of the joint affidavit of Hans and Marlen Paulig in support of their notice of application.

³ The full letter of the 18th August 2015 signed by the 1st named defendant was exhibited “R” within the bundle filed on the 3rd October 2015.

sums of money into the property the company which we are directors and shareholders.”

[8] Ms. Williams on behalf of the claimants also submitted that damages would not be an adequate remedy, as no award of damages could compensate them for the feelings of intimidation, fear, and also for the loss of use of their allocated part of the Fort Jeudy property as they contended that even though they travel back and forth to Germany, they still resided in Grenada.

[9] Mr. Ferguson on behalf of the defendants did not agree with that particular submission and did submit that damages could, and I stress, could be an adequate remedy for the claimants. Ms. Williams for the claimants relied on the defendants submissions⁴. The particular passage relied upon was:

“In the case of the first and second defendants, the Fort Jeudy Property is their home. It is their only home. If they were to be deprived of the peaceful and quiet enjoyment of their home, an award of damages cannot adequately compensate them for this great inconvenience.”

[10] Ms. Williams therefore indicated to the court that the defendants by their own submissions believe that damages could not be an adequate remedy for them, so why would damages be or potentially be an adequate remedy for the loss of use of the property in Fort Jeudy for the claimants? As far as these issues were concerned, Ms. Williams on behalf of the claimants reminded the court as to the reasons why the ex parte injunction was imposed in the first place, and stated that the balance of convenience⁵ remained with the injunction continuing until trial of the substantive matters.

Events on 3rd October 2015

⁴ Titled “Skeleton Arguments and Authorities on Behalf of the Applicants/Defendants” filed on the 9th November 2015. See paragraph 29 of those submissions.

⁵ Reference made to the authority of Ex. p Factortame

- [11] The claimants engaged the court because there was an incident on Saturday the 3rd October 2015, which warranted police involvement. The claimants submitted that leading up to that date (3rd October 2015), they resided in a portion of the premises situate in Fort Jeudy (along with the defendants) residing in a separate living area of the same premises.⁶
- [12] It was submitted on behalf of the claimants that they resided in their portion of the premises up to April 2015, before returning to Germany. The claimants later returned to Grenada on the 16th September 2015 and found that there were locks on their part of the premises that they had not fitted. The claimants subsequently changed those locks, and resumed living in their portion of the property without interfering or disturbing the defendants at any time.
- [13] On the 3rd October 2015, it was alleged that the 2nd named defendant smashed the windows and the doors on the claimant's premises and further placed a vehicle in the front of premises, which blocked the claimants' car from being able to be moved. The claimants also alleged that in addition to what has been stated above, the second defendant along with two other men stood in front of the door with pieces of iron in their hands and threatened the claimants, which caused the claimants to become fearful for their lives. The police were called to deal with the matter, and the car which blocked the claimants' car had to be physically removed to allow the claimants to visit their Attorneys.
- [14] The claimants submitted that they had nowhere else to stay and required the court's intervention in restraining the defendants. The claimants in their joint affidavit filed on the 3rd October 2015, averred to staying with friends in Westerhall, which was uncomfortable for them, and furthermore all their clothes and personal belongings were inside the premises in Fort Jeudy, including medication. This was where they lived until returning to Germany.

⁶ The premises in Fort Jeudy is owned by the 3rd named Defendant "Palm Trees Immo Ltd" and comprises of two separate living accommodation. The third defendant purchased the property for the purposes of constructing a town house for two families. It is submitted by the Claimants that the two families are the 1st and 2nd Defendant and the Claimants family. The pleadings illustrate that the living accommodation for the 1st and 2nd Defendant was to the left and the living accommodation for the Claimants were to the right of the property in Fort Jeudy.

There was, it seems, communication between the claimants' attorneys and the defendants by way of letter on the 18th September 2015. The first defendant responded to that letter indicating that the claimants have been refused access to the premises as they (the claimants) do not have any interest in the premises at Fort Jeudy.

[15] The court was also furnished with photographs⁷ of various events that took place on the 3rd October 2015. The photographs illustrated the following:

1. Broken Window Glass
2. Broken Window Glass (Close up photo)
3. Broken Glass on tiled floor
4. Two men, one standing on tiled front patio area, and another inside the doorway, pushing door open or holding door handle
5. Doorway with a door missing into what looks like the kitchen area
6. X-Trail Jeep facing white gate, with a white car PS977 parked in front of it and behind those cars and gate is a police jeep

The claimants also relied on the affidavit of ASP Godfrey Victor filed on the 16th October 2015.

[16] Based on the affidavit evidence provided, and having consideration for the urgency of the matter to be dealt with and it being a Saturday when the events took place, it was the conclusion of the court that it could properly make the ex parte order that it so did.

[17] The application to pay the costs of the ex parte application was not proceeded with, as the costs awarded were paid prior to the matter being heard. This was a moot point at this stage.

[18] Finally, Ms. Williams asked for a book of accounts to be disclosed to the claimants for the purposes of the substantive matter. I will say that at this

⁷ Certificate of Exhibits filed on 3rd October 2015, marked as pages 48 and 49, and all photographs marked as "A".

stage this is the inter partes hearing for the continuation of the injunction and not a disclosure hearing, despite the claimants setting out their request for the accounts. It is my view that this application could be considered as part of the court's management powers to ensure that matters are dealt with as efficiently and effectively as possible. The court should also strive to ensure that it can deal properly with as many aspects of the case as possible. Now while this may be the inter partes hearing concerning injunctive relief, the court has been made aware of and identified some of the issues which will have to be determined at a later stage. The court should also strive to ensure that all parties are on an equal footing, in other words, that no party gains any unfair advantage by reason of any non disclosure of all relevant facts prior to a trial⁸. The Civil Procedure Rules, also sets out that:

“the court may –

(w) take any other step , give any other direction, or make any other order for the purpose of managing the case and furthering the overriding objective”⁹.

The documents sought are the book of accounts as it relates to Palm Trees Immo Ltd. This is a named party to the proceedings and is a separate entity, of which the claimants and the 1st and 2nd named defendants all agree owns the property in Fort Jeudy and furthermore this company manages the property through its directors/shareholders. There is a material issue which will be raised as far as investment by the parties into the company are concerned, as some suggest they have invested more than others, and therefore have more of a controlling interest.

There are cases for interim remedies in which the court has ordered that disclosure of information take place. Such examples are in relation to freezing orders. The court's jurisdiction to require a party to vouchsafe information as to the extent, nature, value and location of its assets together with other details

⁸ See the Civil Procedure Rules – Part 25

⁹ See CPR - Part 26.(2)(w)

is normally invoked at the same time as the freezing order is sought. I see no reason why the same cannot apply to an injunction hearing. The information sought is specific and relevant to the issues to be tried. It is the book of accounts for the 3rd named defendant, Palm Trees Immo Ltd. It is limited to that of the 3rd named defendant which at the outset seemed to be set up with the parties having a 25% share in the company. In my view this is not some sort of a red herring and neither do I consider it to be a fishing expedition¹⁰.

I do not consider this request for the information concerning the company accounts to be wider disclosure than is reasonably necessary, in addition to considering the overriding objectives. This is a far cry from the situation where the applicant does not have any evidence of a prima facie case and needs new information to decide if they have a case. This is a case where there are many issues and serious issues to be tried.

The Defendants' Submissions

[19] Mr. Ferguson for the defendants submitted that the injunction ought to be discharged and that there were not necessarily serious issues to be tried, so that the court really did not need to go much further in relation to the criteria as per **American Cyanamid**. The submission was really that there were issues to be tried which were narrow but not “serious” issues.

[20] The submission was prefaced by setting out the three criteria as per **American Cyanamid** and referred to earlier:

1. Serious issues to be tried
2. Damages and adequate remedy
3. Where does the balance of convenience lie

[21] Mr. Ferguson submitted that we need not cross the first hurdle and asked rhetorically whether there was in fact a “serious” issue to be tried, regarding

¹⁰ Parker v CS Structured Credit Fund Ltd [2003] EWHC 391 (Ch)

the claimants' right to remain in occupation of the property. It was very clear that there were issues in relation to the 3rd defendant which was the owner of the property and all others being directors/shareholders. The extent of shareholding will have to be determined, but again, that is not a matter that the court is concerned about at this stage.

[22] Mr. Ferguson in the submission referred to the fact that the claimants had attempted to sell the property. The claimants indicated that it was a mistake in the advertisement, and the entire property was not meant to be put up for sale but the part that they say they own. Again this raised the question of ownership and/or proprietary interest in the property. This, in my view, is clearly a serious question to be tried. There are serious question marks about the directorship and shareholding, who owns what shares, how the company is run, how directors were appointed and removed. Again this is not a matter for which the court was concerned at the inter partes hearing. The issue really for the parties to resolve is the nature of their involvement in Palm Trees Immo Ltd, the 3rd defendant.

[23] Mr. Ferguson, again, asked rhetorically, how do these claimants arrive at a proprietary interest in the company. The court was referred to the principles expressed in the case of **Salomon v Saloman & Co. Ltd**¹¹. This case provides the highest authority for the principle that a duly incorporated company is a legal entity wholly separate from those who incorporate it, with rights and liabilities of its own. It is also worth noting for the purposes of the defendants arguments, which I stress are not applicable at this stage of the case at bar the following¹²:

"It follows from the fact of a company's separate identity that its property belongs beneficially to the company itself and in no sense belongs, either in law or equity, to its shareholders, who

¹¹ [1895-9] All ER Rep 33, HL.

¹² Cited from *Prest v Prest and others* [2012] EWCA Civ 1395 at [100] & [101]. If any further authoritative support is required for the principle referred to above then see *Macaura v Northern Assurance Co Ltd* [1925] AC 619 at 626, [1925] All ER Rep 51 at 54, where Lord Buckmaster said: 'Now, no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein.'

have no interest of any nature, whether proprietary or otherwise, in its assets. If they are working members and are remunerated by the companies for their efforts, the money so paid to them will cease to be the company's money and become theirs. Likewise if a dividend is lawfully declared and paid to them; and likewise again, if upon liquidation, the surplus assets after paying the creditors are divided between them. Until however, any such events occur, the money or the property hitherto held by the company does not belong to the shareholders but to the company."

- [24] In the case of **Macaure v Northern Assurance Co Ltd**, it was stated that what was meant is that no shareholder is entitled to any item of property. Lord Wrenbury said¹³ '*....the corporator even if he holds all the shares is not the corporation, and neither he nor any creditor of the company has any property legal or equitable in the assets of the corporation.*'
- [25] There is, in my view, in the case at bar, nothing to suggest that power equals property.
- [26] The submission in the end by Mr. Ferguson, which I accept is correct, is that ownership of shares does not mean ownership of the property. I do not accept that if there is no serious issue with the property then there is no serious issue to be tried because at the end of the day all of the parties involved entered into an arrangement in as far back as the year 2000. Various monies were invested between the parties for the purchase of the property to construct a townhouse for them to be able to live in, and we must remember that these parties were good friends for sometime, and whatever the intentions were, the court will have to determine at the trial what rights either party have in relation to the property.

¹³ ([1925] AC 619 at 633, [1925] All ER Rep 51 at 55

[27] There is and will be serious issues to be determined about how the 3rd named defendant operated, even though the property is property belonging to the company. This was in essence the submission of Mr. Ferguson, because he submitted that an issue is whether the claimants own shares in the 3rd named defendant, and that forms a central thread throughout the pleadings. This, he submitted, went to the heart of the issues, to what extent the claimant owned shares.

[28] I have already referred to the letter of the 18th August 2015 in which the 1st named defendant wrote terminating the tenancy of the claimants. These are matters to be determined at the trial. Mr. Ferguson submits that the material point is that the claimants received that letter but still decided to come to the property in Fort Jeudy. This he says was the cause of the confrontation between the parties, and that this letter is the most critical document. Again this may be so but it's not in my view a reason for determining whether the injunction ought to continue or be discharged by itself. The various issues in relation to company law and operation have been set out above about the ownership by the company of the Fort Jeudy property and of course the serious issue of the extent of ownership of shares within Palm Trees Immo Ltd.

[29] The court accepts that all material facts must be placed before it when determining any matters or issues of fact and/or law. It must be remembered that this was an urgent application that took place on a Saturday because of the nature of the events unfolding and police having been called. Let me make it clear that I am not taking into account the Magistrate's Court proceedings and I don't think, based on the wealth of evidence presented by both sides, that I need to, but the court has to do what is right and fair in the particular circumstances. I have stated that the letter of the 18th August 2015 was disclosed and referred to within two affidavits of the claimants, and I do not think at this stage that it is fair to say that the claimants came in for confrontation because the question that is most obvious in the case at bar, is what

authority did the 1st named defendant have to write such letter on behalf of the company or as landlady? The court had affidavit evidence before it that Palm Trees Immo Ltd. was formed by the claimants and the defendants¹⁴ who each had 25% shareholding.

[30] The submission by Counsel for the defendants that should the court allow the injunction to continue, then the court is saying that the claimants have an implicit right to stay there in the property, is not right and the court is not, at this stage determining who has an implicit right to stay in the property but rather is concerned with the third principle of the **American Cyanamid** case and that is maintaining the status quo and determining where the balance of convenience lies. As Counsel for the claimants postulated, what allows the defendants to have a superior right to occupy the property, and that is a serious issue to be determined at the trial.

Conclusion

[31] In relation to the issues raised about non disclosure of material information, I have found that there has not been a material breach. I have considered the authorities referred to in both claimants' and defendants' bundles. It is widely accepted and trite law that there is a duty on applicants to make full and fair disclosure of any material facts.

[32] If a court has found that there has been a breach of that duty on an ex parte application then the court has the jurisdiction to discharge any order made and refuse any further application to renew that particular order. The principles governing that duty of disclosure was stipulated in the case of **Brink's Mat Ltd. v Elcombe and Others**¹⁵ in which it was stated that:

¹⁴ At the time of incorporation it was the 1st named defendant's husband who has since passed away that was a shareholder and not the current 2nd named defendant.

¹⁵ [1988] 3 All ER 188; See Tab 1 of Defendant's Arguments and Authorities filed on 9th November 2015.

“The extent of the inquiries which will be deemed to be proper will depend on all the circumstances of the case, including the nature of the applicant’s case when making the application and the probable effect of the order on the defendant. Whether a 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 that fact to the issue to be decided by the judge on the application. The fact that non disclosure was innocent, in the sense that it was not known to the applicant or that its relevance was not perceived, is an innocent, but not decisive, consideration in whether to order an immediate discharge. However the court has a discretion, notwithstanding proof of material non disclosure which justifies the immediate discharge of an ex parte order, to continue the order or to make a new order on terms.”

- [33] I do not, based on the evidence and affidavits filed, find that there has been a ‘material’ non disclosure and the letter complained of was within the material placed before the court when making the ex parte order. Therefore, in my view, there was not a deliberate and calculated breach by the claimants in their duty of full and frank disclosure, and furthermore I do not find any misleading as to the issue of urgency.
- [34] In relation to damages, it is clear and both parties accept that damages would not be an adequate remedy for their respective clients, and for this the claimants relied on the defendants’ submissions, as the defendants’ position was that damages would not be an adequate remedy for their loss of use and quiet enjoyment of their property. As the defendants do not have any proprietary interest in the property at Fort Jeudy, the same considerations would apply to the claimants, and, as submitted, damages would not be an adequate remedy for them.
- [35] The court finds that there has been no interruption with the ownership of the property and it is clear that the 3rd named defendant is the owner of the property, but the serious issue to be tried is in relation to the running, functioning and management of the company, Palm Trees Immo Ltd. On whose authority was the letter terminating the claimants’ tenancy sent? These are matters that will have to be dealt with at the substantive hearing or trial of the matter.

[36] As far as the balance of convenience, the court has determined that the balance of convenience lies in continuing the injunction which was granted on the 3rd October 2015. It has been stated that it would be unwise to attempt to list all of the matters which may need to be taken into consideration in determining where the balance of convenience lies, but I have considered what would seem to be the right, just and equitable position in the case at bar.

The underlying principle is that the court should take whichever course seems likely to cause the least irremedial prejudice to one party or the other. Keeping this in mind, the court has examined all of the particular relevant facts at this juncture of this case and considered the consequences of granting or withholding the injunction for either side. The original order will be amended to include the following paragraph:

“The claimants and the 1st and 2nd named defendants must keep the peace, and not cause harassment, alarm or distress and neither are they to use any abusive, insulting and/or threatening words and/or behavior to each other.”

[37] In all of the circumstances, I find that the injunction granted on the 3rd October 2015, is to continue having regard to the relevant principles and considerations advanced by the parties. The defendant's application for an injunction is refused and the court orders that the book of accounts relating to the 3rd named defendant, Palm Trees Immo Ltd is to be disclosed or a copy made and served on the claimants.

Shiraz Aziz
High Court Judge