

GRENADA

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. GDAHCV2010/0218

BETWEEN:

**PETER GERNERT
URSULA GERNERT**

Claimants

AND

**EGMONT DEVELOPMENT INC
COMMO INC.**

Defendants

Appearances:

Cajeton Hood for the Claimants/Respondents
Michelle Emmanuel-Steele for the Second Defendant/Applicant

2011: September 30

DECISION

- [1] **HENRY, J.:** The second defendant, Commo Inc, (Commo) applies to the Court for an order pursuant to CPR Part 26.3 and Part 26.8 that the claim against it be struck out on the ground that the claim fails to disclose any reasonable ground for bringing a claim. In the event that such order is not granted, Commo also requests that it be granted an extension of time to file a Defence and for relief from sanctions.
- [2] According to the allegations in the Amended Statement of Claim, the claimants are joint owners of a residential property situate at Egmont Point, St. Georges. The first defendant is a company duly registered under the laws of Grenada. At all material times it was and still is engaged in the business of land acquisition and development in Grenada. Commo is also a company duly incorporated under the Laws of Grenada. It is the owner of certain lots of land being part or

originally part of the lands now known as Egmont Point formerly owned by the first defendant. The first and second defendants share common directorship.

- [3] The claimants allege that in January 2002, they expressed an interest in purchasing a parcel of land at Egmont Point Development (the development) from the first defendant. Specifically they were interested in Lot #160 as defined on the plan which showed the lots of the development. According to the claimants, they were attracted to the Development by a series of representations made by a Director of the first defendant, one Mr. Anthony McLeish. The representations involved a pictorial and oral depiction of Egmont Point as an exclusive development that would be subject to a series of protective covenants designed to ensure the quality of the development in the long term.
- [4] The claimants further allege that on a visit in or about January 2002, to the location of Lot #160 with Mr. McLeish, it was further represented to them that the land immediately south of Lot #160, whilst forming part of the Development, would not be subject to any form of construction and would remain in its natural state. It was also represented that these lands would not be sold and as a result the claimants would enjoy an unobstructed and unbroken view of the pristine coastline directly in front of their lot.
- [5] The claimants allege that in reliance on the above representations, specifically, that the first defendant would not assert their right to develop the lands to the south of Lot #160, the claimant agreed to purchase Lot 160.
- [6] No written agreement for sale has been pleaded. The Deed of Conveyance dated 4th September 2002 was duly executed by the claimants and first defendant. In fact, the deed sets out in paragraph 3 that the vendor (the first defendant) has laid out a portion of the property it owns in lots as a building estate to be called or known as Egmont Point as shown on the general plan of the said portion of the property. Lot 160, as described in the third schedule of the deed, is noted as being one of the lots in Egmont Point.
- [7] Paragraph 5 recites that it is intended that all purchasers of lots forming part of Egmont Point should enter into similar covenants to observe and perform the restrictions and stipulations set out in the Fourth Schedule, so as to create a building scheme and so as to entitle the Purchasers of

any of the lots to enforce the covenants entered into by the purchasers of all other lots in whatever order of time the respective purchases were made.

- [8] Paragraph 6 recites that the vendor has agreed with the Purchasers for the sale to them of Lot 160 for an estate in fee simple upon the terms set out. The vendor's covenants are thereafter set out, followed by the Purchasers covenants.
- [9] The fourth schedule sets out the applicable restrictions and stipulations; the fifth schedule sets out the rights conveyed and the sixth schedule sets out the rights accepted or reserved.
- [10] The claimants allege that subsequently, in further reliance on the said representations, with the intention of taking full advantage of the unobstructed view of the pristine coastline, they purchased a second lot of land, Lot #161, located adjacent to Lot #160. The Deed of Conveyance to that lot is in identical terms as the deed to Lot 160.
- [11] According to the claimants, covenants 1 and 3 of the conveyances stipulated that only one private dwelling shall be erected on a lot and that such dwelling shall be of one storey unless otherwise approved in writing by the vendor. Further, covenant 6 reserved in the first defendant a general power to modify, waive or release any of the covenants relating to adjoining or neighbouring land. The claimants aver that the conveyance therefore contained an implied term that this general power would be exercised fairly and reasonably.
- [12] The claimants have since built their residence on the lots, wherein they reside. They allege that the design and construction of their residence was done in a manner to take full advantage of the representation made to them.
- [13] The claimants furthermore allege that in July 2009, the first defendant conveyed two parcels of land to Commo; that these two parcels of land are stated in the conveyances to be situated at Egmont Point and are in fact part of the very lands south of the claimants' lot expressly represented by Mr. McLeish to them as being part of the Egmont Point and not intended for development.
- [14] The claimants aver that by virtue of the representations pleaded above, the first defendant is estopped from asserting their right to sell or in any way develop the property. They also aver that

by virtue of the provisions and restrictions in their conveyance and the matters pleaded above, equitable rights were created in the claimants' favour which right cannot and must not be unilaterally infringed and cut down by the first defendant, Commo or any purchaser of lots within Egmont Point. Among the rights ensuring to their benefit, the claimants allege, are the following:

- (a) The right not to have their view obstructed and/or restricted by uncontrolled development on neighbouring lots;
- (b) The right that all purchasers of lots within Egmont Point shall be treated equally and fairly by the first defendant and shall be equally bound by the same or similar covenants;

[15] According to the claimants, Commo has constructed or is in the process of constructing a two storey structure, in the process obliterating or significantly obstructing the claimants' view of the foreshore and coast line immediately south of their property.

[16] The claimants assert that Commo, by virtue of the common directorship it shared with the first defendant, knew or ought to have known of the existence of the restrictive covenants operating in favour of the claimants' land; that in constructing a two storey building, Commo is in breach of the said restrictive covenants. Alternatively, that by virtue of the common directorship, Commo knew or ought to have known of the existence of an equity in the claimant's favour in relation to the land directly south of the claimants' lots which is now owned and occupied by Commo.

[17] The claimants therefore claim against Commo as follows:

- (a) A declaratory order that Commo was under a restriction not to develop the lot or lots of land immediately south of the claimants' property.
Alternatively:
- (b) A declaratory order that Commo was under a restriction not to develop its lot or lots immediately south of the claimants' property without the same or similar restrictions as those which apply to the claimants' property.
- (c) A Declaratory Order that Commo by its actions in developing the lot or lots immediately south of the claimants' property in a manner that in the circumstances of the case is unreasonable and unfair to the claimants, has interfered with the

contractual rights of the claimants arising under their contract with the first defendant.

- (d) A declaratory order that the building now being erected by Commo on its lot or lots immediately south of the claimants' property within the Egmont Point Development Scheme is in breach of the planning permission granted to it or its Director, Derick Steele by the Planning Authority on April 8, 2009.
- (e) Damages.

[18] Commo now seeks an order striking out and dismissing the claim against it on the grounds that:

1. That Commo's property does not form part of the same development or building scheme as the property of the claimants. As such the claimants are not entitled to claim that Commo is restricted by the same restrictions and stipulations which affect the claimants' property.
2. The claimants conveyances from the first defendant in respect of their two lots are clear that the covenants contained therein affect a defined area which had been subdivided by the first defendant subject to the provisions of Clause 6 of the conveyance.
3. The Amended Claim Form and Statement of Claim do not set out a legally sufficient or sustainable claim with regard to the effect of certain alleged representations made by an officer of the first defendant in that the alleged representations were allegedly oral and not evidenced by any writing.
4. That the claimants are endeavouring to restrict an admitted contractual right granted by the claimants to the first defendant under a deed to which Commo is not a part. That this right is not a covenant enforceable against other lot holders. It therefore does not give any basis for an action by the claimants against the second defendant.
5. Commo has obtained planning permission in respect of its plans of a building which it is constructing on its land and is not in breach of the said planning permission; that the declaration claimed in the Amended Claim Form in this regard is an abuse of the court's process.

6. In all respects the contents of the Amended claim Form and Amended Statement of Claim do not disclose any cause of action against Commo or any basis upon which the claimants are legally entitled to the relief sought.

[19] The Civil Procedure Rules section 26.3 provides that “the Court may strike out a statement of case or part of a statement of case if it appears to the court that –

- (a)
- (b) The statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
- (c) The statement of case or the part to be struck out is an abuse of the process of the court ... “

[20] Note 23.24 in The Caribbean Civil Court Practice, pg. 231 commenting on provision (b) above notes that the provision addresses two situations:

- (1) Where the content of a statement of case is defective in that, even if every factual allegation contained in it were proved, the party whose statement of case it is cannot succeed; or
- (2) Where the statement of case, no matter how complete and apparently correct it may be, will fail as a matter of law.

[21] In **Citco Global Custody NV v Y2K Finance Inc.**, ECSC Civil Appeal No. 22 of 2009 [BVI], Edwards JA set out the principles which ought to guide a court when considering an application to strike out a party's statement of case. She stated:

“[13] On hearing an application made pursuant to CPR 26.3(1)(b) the trial judge should assume that the facts alleged in the statement of case are true. Despite this general approach, however, care should be taken to distinguish between primary facts and conclusions or inferences from those facts. Such conclusions or inferences may require to be subjected to closer scrutiny.

[14] Among the governing principles stated in Blackstone's Civil Practice 2009 the following circumstances are identified as providing reasons for not striking out a statement of case: where the argument involves a substantial point of law which does not admit of a plain and obvious answer; or the law is in a state of development or where the strength of the case may not be clear because it has not been fully investigated. It is also well settled that the jurisdiction to strike out is to be used sparingly since the exercise of the jurisdiction deprives a party of its right to a fair trial, and its ability to strengthen its case through the process of disclosure and other court procedures such as requests for information; and the examination and cross-examination of witnesses often change the complexion of a case. . .”

- [22] In his affidavit in support of the application to strike out the claim, Derick Steele, Director of Commo asserts that the property owned by Commo does not form part of the subdivision or development known as Egmont Point. In view of this, he asserts that the doctrine of mutual enforceability of covenants does not arise as between himself and the claimants. Further, that his property is not subject to covenants or to any similar covenant imposed on the lots forming part of Egmont Point. He admits that a building is being currently constructed on the property that is in excess of one storey but states that because of the distance of the building from the dwelling house of the claimants, the elevation on which the claimants house is constructed and the slope downhill of the second defendant's property, the building does not in any way obstruct the view of the claimants.
- [23] A second affidavit in support of the application is submitted from one Denis Thomas, a Surveyor. He deposes that in November 2008, he was engaged by Commo to conduct a survey of certain land Commo intended to purchase located at Egmont; that in order to conduct the survey he had to examine plans and establish boundaries of adjoining lands belonging to the first defendant. He states that the lots owned by the claimants are within a subdivision of the development known as Egmont Point, which is a portion of the larger property owned by the first defendant. He further states that upon consideration of the general plan and the plan annexed to the conveyance in favour of Commo, he can conclude that the property owned by Commo does not form part of the subdivision or development known as Egmont Point.
- [24] Commo therefore asserts that the claim against it ought to be dismissed.
- [25] Claimants in this action are seeking to enforce representations or assurances allegedly made by a representative of the first defendant against both first defendant and Commo, a successor in title. Claimants' contentions are that by virtue of these representations together with the provisions and restrictions in their conveyance, equitable rights over the lands south of Lot 160 were created. This right that the claimants seek to enforce has not been set out in any deed or conveyance or written agreement. In fact, the conveyances to Lots 160 and 161 makes no mention of this alleged right. Understandably, they have not sought to bring a claim in contract. Instead, they have proceeded on the basis of proprietary estoppel.

- [26] Therefore the issue is, keeping in mind that this is an application to strike, whether claimants' statement of claim properly sets out a cause of action in proprietary estoppel, as well as claims for contractual interference with their contract with the first defendant as well as violation of planning permission.

PROPRIETARY ESTOPPEL

- [27] The House of Lords in **Cobbe v Yeoman's Row Management Ltd.** [2008] 1 WLR 1752 addressed the nature of Proprietary estoppel. At page 1761 Lord Scott of Foscote stated:

"An 'estoppel' bars the object of it from asserting some fact or facts, or, sometimes, something that is a mixture of fact and law, that stands in the way of some right claimed by the person entitled to the benefit of the estoppel. The estoppel becomes a 'proprietary' estoppel – a subspecies of a 'promissory' estoppel – if the right claimed is a proprietary right, usually a right to or over land but, in principle, equally available in relation to chattels or choses in action."

- [28] There are three main elements requisite for a claim based on proprietary estoppel:
A representation made or assurance given to the claimant; reliance by the claimant on the representation or assurance; and some detriment incurred by the claimant as a consequence of that reliance, see **Thorne v Majors and others** [2009] UKHL 18; Megarry & Wade, Law of Real Property, 7th edition para. 16-001. The representation or assurance has to be sufficiently clear and unequivocal. The reliance by the claimant would need to be reasonable in all the circumstances and the detriment would also need to be sufficiently substantial to justify the intervention of equity **Thorne v Majors**, supra.
- [29] The claimants urge on the Court that on the above facts the ingredients of representation, reliance and detriment are present and an equity would arise, prima facie, against the first defendant; secondly that the claimants thereby have obtained rights over the property south of their lots on the basis of the operation of the doctrine of proprietary estoppel and that an issue arises as to whether the claimants' equitable rights operate against Commo after it succeeded the first defendant in title to the property. Claimants further submit that this issue is not only substantial but is concerned with a developing area of the law therefore the claim ought not to be dismissed.
- [30] Commo has advanced several arguments why the claimants' claim must fail as a matter of law and therefore ought to be struck out.

- [31] Firstly, Commo points to the plan and the contents of the surveyor's affidavit as showing that their property is not within the housing scheme known as Egmont Point. Therefore, they assert that they are not bound by the same covenants and that the claimants are not entitled to assert a claim against them.
- [32] However, at this stage of the proceedings, the issue is not only whether, in fact, Commo's land is a part of Egmont Point as shown on the plans, but also whether the alleged representations were made and whether the claimants could have reasonably relied on these representations in making the decision to purchase two lots. These are all issues of fact to be determined at trial. Reasonable reliance depends on the circumstances of the case, including the relationship between the parties.
- [33] Commo also points to the uncertainty in the identification of the land over which the claimants claim certain rights. The land is referred to in the pleadings only as the lands immediately south of lot 160. Commo contends that the subject of the representations relied on, to found a proprietary estoppel, must be certain.
- [34] So far as the relevant facts of this case are concerned, the extent of the land owned by the first defendant at the time the representations were allegedly made is capable of being ascertained and the land immediately south of the lot is not so vague as to be fatal. Any deficiency can be corrected by means of providing further and better particulars before trial.
- [35] Commo contends that the instant case asserts no legally recognized interest in or over land. That is, that the alleged representation, even if made, does not create an interest in or over land; that there is no right to a view, which is what claimants' assertions amount to.
- [36] Oliver J in the well known case of **Taylor Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd.** [1982] QB 133, 144 in setting out the requirements of proprietary estoppel referred to "a certain interest in land".
- [37] The certain interest in land in the Taylor Fashions case was an option to renew a lease. The problem was that the option had not been registered under the Land Charges Act 1925 and the

question was whether the freeholders, successors in title to the original lessors who had granted the option, could be estopped from denying the right of the lessees to exercise the option.

What is the comparable interest in land in the present case?

- [38] The representations are set out in paragraph 5 of the amended statement of claim. It states that the representations were firstly, that Egmont point would be subject to protective covenants; secondly, that the lands south of Lot 160 was a part of the Egmont point development and thirdly, that the lands south of lot 160 would not be subject to any form of construction; and further that these lands would not be sold.
- [39] By definition "interest" in relation to land includes a right, power or privilege over or in connexion with the land. **Maddalozzo v Commonwealth** (1978) 34 FLR 332 at 334. Claimants have set out a claim alleging a right in connection with the lands south of Lot 160 that is not merely a right to a view. It includes the right to have no development on the land in question or alternatively, development only in accordance with certain restrictions. The full extent of the right would need to be determined at trial.
- [40] Commo however asserts that the grant of any such interest in land, to be enforceable, must be evidenced in writing. Commo refers to Section 3 of the Real and Personal Property (Special Provisions) Act Cap 273. It provides:
3. "No leases, estates or interest, either of freehold or terms of years, or any uncertain interest of, into or out of any land, shall be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or his agent thereunto lawfully authorized by writing, or by act and operation of law;"
- [41] Commo asserts that proprietary estoppel cannot be used to defeat the effect of the statute.
- [42] In **Crabb v Arun District Council** [1975] 3 All ER 865 the plaintiff and the defendants were adjoining landowners. The plaintiff asserted that he had a right of way over the defendants' land giving access from his land to the public highway. The plaintiff had no grant, nor any prescriptive right. Nor did he have the benefit of an enforceable contract. His case was brought on the basis of proprietary estoppel. He asserted that the defendants had made certain assurances that he had the right of way and that based on these assurances together with the defendants conduct, they

were estopped from denying him a right of access over their land to the public highway. Lord Denning in his judgment had this to say:

"The basis of [this] proprietary estoppel – as indeed of promissory estoppel – is the interposition of equity. Equity comes in, true to form, to mitigate the rigours of strict law. The early cases did not speak of it as 'estoppel'. They spoke of it as 'raising an equity'. If I may expand that, Lord Cairns said in **Hughes v Metropolitan Railway Co.** 1877 2 App. Case 439 at 228: "... it is the first principle upon which all Courts of Equity proceed ... that it will prevent a person from insisting on his strict legal rights – whether arising under a contract, or on his title deeds, or by statute – when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties. ... if he makes a promise that he will not insist on his strict legal rights – even though that promise may be unenforceable in point of law, for want of consideration or want of writing – and if he makes the promise knowing or intending that the other will act on it, and he does act on it, then again a court of equity will not allow him to go back on that promise."

- [43] Lord Denning accepted that the defendant Council on the deeds had the title to their land free of any access to the plaintiff. But the Court held that the representative of the Council had led Mr. Crabb to believe that he had or would be granted a right of access at point B. The Court allowed the appeal and declared that the plaintiff had an easement.
- [44] In the more recent case of **Cobbe v Yeoman's Row Management Ltd.** [2008] WLR 1752, the House of Lords considered whether estoppel could be prayed to make enforceable an agreement which a statute declared void. There section 2(1) of the UK Law of Property (Miscellaneous Provisions) Act 1989 provided that a contract for the sale or other disposition of an interest in land can only be made in writing.
- [45] Lord Scott expressed the view that proprietary estoppel could not be prayed in aid in order to render enforceable an agreement that statute had declared to be void. He noted that the statute had expressly provided exemptions for constructive, implied and resulting trusts but not for proprietary estoppel. He therefore termed unacceptable the proposition that an owner of land can be estopped from asserting that an agreement is void for want of compliance with the requirements of section 2. He declared that "Equity can surely not contradict the statute".
- [46] It would appear at first glance that these two cases may be somewhat contradictory, in that Lord Denning seems to be saying that Equity will relieve a litigant from the strict rigors of the law. While Lord Scott says Equity cannot contradict the statute. However for purposes of this case, the Court need not delve into that issue. It seems that from a reading of section 3 of Cap. 273 of the Laws of

Grenada, an interest in land which is granted or comes into existence by an 'act and operation of law' is not caught by the statute. I am of the view that the term 'act and operation of law' would include interests in land which come into existence not only by means of resulting or implied trusts but also by the equitable principles of proprietary estoppel.

- [47] Furthermore, the law relating to proprietary estoppel is still in a state of development, especially the issue of the extent to which representations made to one party can be enforced against that party's successors in title. Additionally, to assess the strength or weakness of the claimants' case at this stage when it has not been fully investigated may not be prudent. Accordingly, I would not strike the claim based on proprietary estoppel at this stage of the action. The application to strike the cause of action based on proprietary estoppel is therefore denied.

Unlawful interference

- [48] By their amended Claim Form, the claimants also seek against the second defendant "A Declaratory Order that the second defendant by its actions in developing the lot or lots immediately south of the claimants' property in a manner that in the circumstances of the case is unreasonable and unfair to the claimants has interfered with the contractual right of the claimants arising under their contract with the first defendant."
- [49] The essence of the tort of unlawful interference with economic and other interests is set out in Clerk & Lindsell on Torts: It "is deliberate interference with the plaintiff's interests by unlawful means; and the intention to injure must be a contributing cause of the plaintiff's loss." The tort is committed where a defendant commits an actionable wrong, deliberately to harm the plaintiff.
- [50] The claimants in their Amended Statement of Claim have failed to set out any or any sufficient facts to constitute such a tort against the second defendant. While they allege that the first defendant and second defendant share a common directorship and that by virtue of same they ought to have known certain things, the allegations fall far short of the necessary ingredients to comprise this tort.
- [51] The application to strike this cause of action is therefore granted.

Breach of Planning Permission

- [52] The claimants also seek a declaratory order that the building now being erected by Commo on its lot or lots immediately south of the claimants' property is in breach of the planning permission granted to it or its Director, Derick Steele, by the Planning Authority on April 8, 2009.
- [53] A copy of the building plans approved by the Planning & Development Authority was placed before the court together with amendments and was not contested by the claimants. I do not think that this is live issue. The application to strike is also granted in regard to this cause of action.
- [54] Accordingly, Commo's application to strike the claim against it is granted only to the extent of striking the claims for Unlawful Interference and Breach of Planning Permission, otherwise denied. Accordingly, paragraphs 10 and 11 of the Amended Claim Form and the corresponding prayers in the Amended Statement of Claim are hereby struck out. Commo shall file and serve its defence within 14 days. Commo is also relieved from sanctions. The matter shall thereafter proceed in the usual manner. Written submissions on cost to be filed within seven days, if not agreed by the parties.


Clare Henry
HIGH COURT/JUDGE