

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

Civil Suit No: 778 of 1997

BETWEEN

- (1) Hugh Brian Mac Nicol**
- Robert Knowles Mac Nicol**
- David Alexander Mac Nicol**
- Executors of the Estate of Barbara I.**
- Kidell**
- (2) George B. Kiddell**
- (3) David Mac Nicol**
- (4) James E. Delaney**
- (5) Patsy Ann Delaney**
- (6) Kaino Hamu**

Plaintiffs

and

- (1) Windjammer Landing Company Limited**
- (2) Windjammer Landing Company St. Lucia**
- (1992) Limited**

Defendants

Appearances:

Mr. Dexter Theodore for the Plaintiffs

Mrs Brenda Flossiac–Fleming for the Defendants

2000:April 14;
May 19.

JUDGMENT

- [1] **d’Auvergne, J:** On the 20th day of January 2000 the Plaintiffs filed a Notice of Exparte Application for injunction under **Order 29 Rule 1** seeking to restrain the Defendants or either of them, whether by themselves, their servants or agents or howsoever otherwise from transferring title of lots described as:

- (a) Block 1053B parcels 287, 459, 461, 467, 470, 471,
472, 473, 482, 489, 491, 492, 493, 494, 498, 507,
511, 518, 520, 521, 522, 523, 525, 533, 537, 539,
545, 548, 552, 632, 641, 642, 643
- (b) Block 1054B parcels 136, 137, 188, 189, 190, 191,
192, 193, 194, 208, and
- © Block 1054C parcels 1, 2, 3, 4, 5, 7, 8, 9, 10, 12,
13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25,
26, 27, 28, 29, 30, 31, 32, 33, 34, 37, 38, 39, 40,
41, 43, 44, 45, 46, 47, 48, 49, 51, 52, 53, 54, 55,
56, 57 and 58,

whether with or without villas or building units erected thereon, or from selling same on a time share basis or from otherwise dealing with or encumbering the same in any manner whatsoever pending the hearing and determination of the matter.

- [2] This application was supported by the affidavit of James E. Delaney the fourth named Plaintiff who deposed that the parcels of land mentioned above were conveyed to the Plaintiffs subject to the condition inter alia that the development will incorporate villa type accommodation, condos-stacked or otherwise, and that any change to the character of the development must be approved by 80% of the owners including the Plaintiffs, that on or about October 1992 the first Defendant commenced to sell the following units and villas forming the subject matter of the

development (herein after called the unsold lots) on a time share or vacation ownership sale basis contrary to the express or implied restriction against the same and despite the written assertion of the first Defendant that the practice would be discontinued.

- [3] He further deposed that he was presently in St Lucia and was informed and believed that the Defendant, or either of them, were in the process of negotiating to sell Windjammer Landing Beach Resort including all of the unsold lots and/or villas to a buyer whose name he had not yet ascertained and that the intended closing date for the sale was January 22nd 2000; that he had read the Affidavit of Lynne Smith Cram filed on the 15th July 1999 and that contrary to her assertion that **Windjammer's** conveyance of the **Specific Assets to Windjammer 1992** had not rendered **Windjammer** judgment proof because Windjammer still owned the Windjammer Resort Hotel which consisted of land, hotel and movables valued at more than \$20 million U.S (\$54 million E.C.C.) and which was more than adequate to satisfy the most generous damages which could conceivably be awarded against Windjammer in this suit No 778 of 1997, that it was his belief that such a sale as was contemplated would effectively render the Defendants judgment proof because their assets would have been transferred to a purported bona fide purchaser for value and that he was convinced that the Defendants, intended unless restrained by the Court to complete the said sale to the detriment of the Plaintiffs and therefore he was seeking an injunction to restrain them from doing so.

- [4] The injunction sought was granted on the same day viz 20th January 2000 in the following terms “pending the determination of this action from until after the hearing of the said Notice returnable on the 14th day of February 2000 or until further order.” The said order of injunction was served on the Defendants on the same day.
- [5] On the 31st January 2000 the Second named Plaintiff filed an affidavit in support of the order of injunction. He deposed that the Defendants were going through serious financial difficulties of which Lynn Smith Cram was well aware of since before February 1st 1993 as evidenced by “A Strategy for Survival” (the four first pages of that document were filed as an exhibit.) He gave the history of the involvement of his deceased wife Barbara Kiddell and himself in the formation of Windjammer Owners Association as a result of conflict that arose between the Villa owners and the Defendants. He concluded in stating that based on the financial difficulties being experienced by the Defendants it was the belief of the Plaintiffs including himself that the Defendants intended to defraud the Plaintiffs.
- [6] On the 14th February 2000 no High Court Civil matters were held in St Lucia. The judge had to attend a meeting of the **new rules** at the Court of Appeal building for the entire day.
- [7] A perusal of the Court file indicates that the matter was transferred to the next call over list.

On the 6th of March 2000 Lynne Cram on behalf of the Defendants filed an extremely lengthy Affidavit. She criticized the granting of the exparte injunction which she said was highly prejudicial to the Defendants and that the impact “on the Windjammer Resort has been significant and damaging” and “were the injunction to continue Windjammer will suffer irreparable and immeasurable damages in addition to damages already suffered.” She denied that any assurances were given to the Plaintiffs on or about October 1992, that the Defendants would discontinue the sales of Time Share or Vacation Ownership.

[8] On the 9th of March 2000 the Plaintiffs filed Notice of motion for leave to issue **writ of sequestration** and gave for the ground of the application that on the 10th February 2000 the Defendants through their agent Frances Valmond, Sales Representative of Time Share Division offered for sale a time share unit to Evan Hermiston; that Time Shares in the said property disobeyed the spirit and intent of the said order of injunction which required them to abstain from selling Time Shares in the resort forming the subject matter of this action.

[9] The aforementioned application was supported by the affidavit of Evan Hermiston. He deposed that he had a schedule meeting with Frances Valmond at the principal place of business of the Defendants at La Brelote Bay, Gros-Islet and that she explained that Time Shares were available for sale, that he returned two days later for a tour of the selected villas and that she further told him that the Resort was divided into what was called the Original and the New Developments

and that on the following day the said Frances Valmond told him that she would accept a down payment of 20% on account of Time Share purchase and a promise of a further 5% discount.

[10] The matter was set down to be heard on the 13th day of March 2000. The matter was not heard on that day for the judge's sister had died, the matter was further adjourned.

[11] **Arguments**

On the 14th day of April 2000 the two applications were set down to be heard in Chambers and Learned Counsel for the Respondents informed the court that the Exparte injunction had never been served on the Respondents but published in the Star newspaper and that she wished to take a point **in limine**, that there was no injunction before the court. Her contention was that the exparte injunction had expired. She said that the injunction was granted on the 20th January 2000 to the 14th day of February 2000 "or until further order of the Court" and that on the said 14th day of February 2000 no order was made extending the injunction to a specified date. She argued that for an injunction to be valid it must specify a time, a date on which it would expire and that if an injunction is for an unspecified period it was improper and invalid.

Ansah v Ansah 1977 2ALLER 638

[12] She quoted order **29 Rule 1** of the **Supreme Court Practice 1995 edition** at pages 517 and 518 which clearly states that exparte applications for injunctions should only be granted where there are strong grounds to justify its being exparte, that it was a matter of real urgency “where there has been a true impossibility of giving notice of motion” **Bates v Lord Hailshan of St Marylebone and others 1972 3 ALLER** page 1019. She argued that where an injunction was granted to extend over a certain day or until further order it meant that the injunction may be dissolved at an earlier date than the day limited, but cannot continue beyond such date without a fresh order.

[13] She concluded her arguments by stating that in a small island like St Lucia it could not be said that the parties could not be found and based on the cases quoted earlier it was her contention that there was no injunction in force at present before the court, for it had expired. She further argued that the injunction should not have been granted.

[14] Learned Counsel for the Plaintiffs/Applicants gave the history of the application from the 20th January 2000 to the present date. He argued that it was no fault of the Plaintiffs/Applicants that the matter was not heard before. He said that the injunction granted was for a specified time and should not be compared with case of **Ansah v Ansah** quoted earlier which simply stated “until the further hearing of the application.” He contended that the formula used by the Court was accepted in **Atkins Court forms** and all books of legal precedent; that

a time and date was specified by the order but due to unavoidable circumstances the Court did not sit.

- [15] He argued strenuously that the matter was very urgent and that the Plaintiffs/Applicants were apprehensive of the Respondents' closing down the following day. He confirmed that the Respondents were served on the 20th January 2000 at 4.35 p.m. on an employee, namely, Andrew Charles.
- [16] He insisted that the application was one of urgency and contended that it could not be said that the injunction had expired, for the adjournment was granted on the Court's own motion. He concluded that the Respondents were protected by the undertaking as to damages and urged that the Respondents be afforded an opportunity to seek to discharge the injunction which was still in existence unless they intended to stand on their submission.
- [17] Learned Counsel for the Respondents reiterated what she had said earlier and further stated that the affidavit of James Delaney was based on a rumour of sale and that there was an injunction against every villa and therefore the Respondents could not be compensated by the Plaintiffs/Applicants if the injunction was to continue.

[18] **Conclusion**

Order **29 Rule 1(8)** of the **Supreme Court Practice 1995 Edition** provides that an application for an *ex parte* injunction will not be granted “unless it is made promptly and it must be shown that there are strong grounds to justify its being made **ex parte**.”

[19] The evidence before me on the 20th of January 2000 was that the Defendants or either of them were in the process of negotiating to sell Windjammer Landing Beach Resort including all of the unsold villas in two days time namely the 22nd of January 2000 and that such a sale would render the Defendants’ judgment - proof because their assets would have been transferred to a purported bona fide purchaser for value. I found that was merit enough for the grant of an injunction having regard to the background of the case. I then proceeded to make a check on the court’s list and the earliest available date (bearing in mind that there was only one judge available) was the 14th of February 2000.

[20] In my judgment the injunction was valid up to the specific date stated namely the 14th day of February 2000. **Ansah v Ansah**.

However, though unfortunate, the adjourning of the returnable date without any mention of a specific date on which the injunction would expire was improper and would render the injunction discharged from the 14th February 2000.

Ansah v Ansah mentioned earlier.

[21] My order is therefore as follows:

The injunction is discharged.

Costs to be Costs in the Cause.

**Suzie d'Auvergne
High Court Judge**