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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP No. 656/88

IN THE MATTER of the Land Transfer Act 1952

BETWEEN D.F. QUADLING

Plaintiff

A N D B.D. BAMBURY and D.V. GARDINER

First Defendants

A N D THE DISTRICT LAND REGISTRAR AT AUCKLAND

Second Defendant

Hearing: 21 April 1988

Counsel: Mr A.D. Banbrook for Plaintiff
Miss C. Bradley for First Defendants

Judgment: 19 MAY 1988

JUDGMENT OF GAULT J.

The plaintiff seeks an interlocutory injunction, in effect, to restrain the first defendants from selling a holiday unit in a development undertaken by them at Russell in the Bay of Islands and known as Te Maiki Villas.

For the purpose of the present application I was informed that no remedy is sought against the second defendant.

The application originally was made ex parte and was placed before Henry J on 11 April 1988. He considered that

the matter should be dealt with on notice to the defendants but made an interim order to operate until 5 p.m. the following day. On 12 April counsel representing all parties appeared before Henry J. He allocated a fixture for the hearing of the application for 21 April and ordered the interim injunction to continue until that date.

On 21 April I heard argument in support of and in opposition to the application. The matter clearly called for urgent decision and I regret that pressure of other matters, also urgent, has resulted in the judgment being delayed.

The first defendants are trustees of a trading trust which bought a block of land at Russell and undertook development by construction of a series of units to be individually owned, but when not in use by the owners to be operated as a motel complex. Each unit is embodied in a separate title and tenure is by a separate company formed for each unit. The present proceedings relate to villa No. 6 which is referred to as unit "F" on the relevant unit title plan. The company formed to own this unit is Te Maike(sic) Hill No. 6 Limited. The company was incorporated on 30 September 1986. Shortly before that date, on 9 September 1986, an agreement was signed between the first defendants as vendors and the plaintiff as purchaser under which the plaintiff agreed to purchase all of the shares in the company. The agreement had annexed body corporate rules to apply to all units in the development.

The agreement provided for the payment of a deposit of $45,000 on the date of signing the agreement and for the balance of the purchase price being $145,000 to be paid on settlement on 19 December 1986.

There is no dispute that the plaintiff has not paid to the first defendants either the deposit of $45,000 or the balance of $145,000 provided for in the agreement. He says that prior to the execution of the agreement for sale and purchase, he entered into an agreement with the first defendant Mr Bambury which provided that in consideration for the plaintiff entering into the agreement for sale and purchase, the full purchase price of $190,000 would be satisfied other than for cash, i.e. by the plaintiff performing architectural design services on behalf of the first defendants both in relation to the development at Russell and elsewhere in New Zealand. He claims that to date he has performed services to a total value of $61,705.40 and stands ready to perform further services as required by the first defendants.

The alleged "collateral agreement" is said to have been made orally between the plaintiff and Mr Bambury and, before the dispute arose, was unknown to the other first defendant Mr Gardiner. To the assertion that any arrangement made with Mr Bambury personally could not bind the first defendants as trustees, the plaintiff says that the trust is just the particular vehicle selected by Mr Bambury for this development and that in other developments there have been

companies through which the plaintiff has provided services to Mr Bambury in the past. While details of the trust were not included in the evidence I find some support for the plaintiff's contention in clause 8.07 of the agreement for sale and purchase which specifically limits the liability of Mr Gardiner to the assets for the time being of the Maiki Hill Family Trust but there is no similar limitation of the liability of Mr Bambury. In addition copies of correspondence show a town planning application for the property in the sole name of Mr Bambury.

Mr Quadling and Mr Bambury were good friends for many years. They had business dealings in connection with various property developments and also in other areas. Mr Quadling has provided architectural design services, including services in connection with various town planning applications, for a number of developments investigated or undertaken by Mr Bambury. Mr Quadling's evidence is that this is not the first occasion on which they entered into an agreement whereby the value of his professional services were credited against the value of real estate. He says he previously acquired a section in the Onemana development the consideration for which was satisfied by the provision of architectural design services for Mr Bambury.

The evidence contains reference to a number of projects in relation to which Mr Quadling provided services from the early 1980s to August-September 1987. Much of this evidence is in dispute.

There seems to be no doubt that some agreement was reached with a view to the value of Mr Quadling's services being offset against the purchase price of the unit in the Te Maiki development which he agreed to buy. Mr Gardiner sets out his understanding of the position as follows:

> "2. I have been involved with the operation of the trust as it has developed the property at Russell and with the arrangements made to finance the development and to sell the units as they were completed.
>
> 3. I was consulted and agreed that the plaintiff's fee for his architectural services would be quantified at $45,000 and that that amount should be offset against the unit which the plaintiff had indicated he wanted to buy in the development.
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> 4. It has always been understood that the plaintiff would purchase unit 6. It was agreed that the deposit on unit 6 would be $45,000 and that the plaintiff would pay the balance in the normal way."

Mr Bambury claims to have a similar understanding. He has said -

> "On behalf of the trust I reached agreement with Mr Quadling concerning the amount he was owed by the trust for his architectural services on the development. Initially we discussed $40,000 but this was altered to take account of extra work and the final amount agreed upon was $45,000. To achieve a tax saving for the plaintiff, and at his request, it was agreed by the trust that that amount could be offset against the costs of the plaintiff's purchase of unit 6. It was agreed that $45,000 would offset the deposit required by the agreement for sale and purchase of shares in the company which owned unit 6.
>
> At no stage was there ever an agreement between the plaintiff and the trust or the plaintiff and me that the plaintiff's work as an architect would offset the full amount of the purchase price of unit 6."

Having paid no deposit the plaintiff entered into possession of the unit prior to Christmas 1986 and since then has attended meetings of the owners of the villas and has been treated in all respects as the owner of villa No. 6. He operated an account with the managers to which was credited rental income in respect of the unit and from which has been deducted outgoings chargeable against the unit, including management fees.

For reasons not fully explained in the evidence Mr Quadling and Mr Bambury have fallen out. Their differences now are such that their solicitor refers to at least two other substantial legal disputes between them. He expresses the opinion that it would be impossible for them to have to work together in any sort of relationship and certainly not in a developer/architect relationship.

In December 1987 Mr Bambury approached Mr Quadling and demanded payment of the sum of $145,000 being the balance due for the purchase price under the agreement for sale and purchase. This was almost a year after that sum was payable under the terms of the agreement and Mr Quadling claims this delay supports his claim that the balance was to be offset against further architectural design services. Mr Bambury says that there had been discussions in the intervening time as to payment by Mr Quadling, he says "throughout 1987 the plaintiff continued to assure me that, one way or another, he would find sufficient money to settle the purchase." Mr Bambury explains the delay in finally insisting upon payment

as forbearance because of financial difficulties of his friend and concentration by them on other business ventures in which they were engaged and which were in difficulties.

There is a conflict of evidence as to whether, when Mr Bambury demanded payment in December 1987, Mr Quadling made reference to the alleged arrangement for the balance of the purchase price to be set off against the value of further work.

A settlement notice dated 23 December 1987 was issued by the solicitors for the first defendants calling upon the plaintiff to settle the transaction within twelve business days of the date of service of the notice which was effected on 6 January 1988. The plaintiff instructed solicitors who lodged a caveat against the certificate of title in respect of the unit and wrote to the solicitors for the first defendants on 14 January 1988 asking for a copy of the agreement. It was after a letter from the first defendants' solicitors on 25 January 1988 giving notice of cancellation of the agreement and forfeiture of the deposit that the solicitors for the plaintiff wrote setting out fully the plaintiff's allegations and the terms of the alleged collateral agreement.

The first defendants challenge the right of the plaintiff to caveat the title on the basis of the agreement for sale and purchase of shares.

The plaintiff commenced these proceedings for a specific performance of the agreement for sale and purchase. The application for interlocutory injunction filed at the same time sought orders also against the District Land Registrar at Auckland as second defendant although, in the statement of claim, the plaintiff acknowledges that presently he has no direct legal or equitable interest in the land sufficient to support the caveat. As I have said, no order is now sought against the second defendant.

Since the application was filed the first defendants have received a conditional offer for the purchase of the shares in the company entitling the owner to occupation of unit No. 6. That agreement is in substantially the same form as the agreement signed by the plaintiff. The first defendants are anxious to proceed with the new agreement as there are other units in the development unsold and the proceeds of sale are needed for the purpose of reducing their indebtedness particularly under a bank mortgage which is due for repayment in about six months. The plaintiff's application is intended to prevent the first defendants from proceeding with the new contract and otherwise taking any steps which may preclude an order for specific performance of his contract in the event that he succeeds in his substantive claim.

The approach to applications such as this now is well established. The onus lies on the plaintiff to satisfy the Court that the injunction should be maintained, in the same way as the onus would have rested on the plaintiff had the

original application been on notice. Carter Holt Holdings Ltd v Fletcher Holdings Ltd [1980] 2 NZLR 80, 83-84. The principles to be applied since American Cyanamid Co. v Ethicon Ltd [1975] A.C. 396 are helpfully summarised in the judgment of the Court of Appeal in Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd [1985] 2 NZLR 129, 142

> "Whether there is a serious question to be tried and the balance of convenience are two broad questions providing an accepted framework for approaching these applications. As the NWL speeches bring out, the balance of convenience can have a very wide ambit. In any event the two heads are not exhaustive. Marshalling considerations under them is an aid to determining, as regards the grant or refusal of an interim injunction, where overall justice lies. In every case the Judge has finally to stand back and ask himself that question. At this final stage, if he has found the balance of convenience overwhelmingly or very clearly one way - as the Chief Justice did here - it will usually be right to be guided accordingly. But if the other rival considerations are still fairly evenly poised, regard to the relative strengths of the cases of the parties will usually be appropriate. We use the word "usually" deliberately and do not attempt any more precise formula: an interlocutory decision of this kind is essentially discretionary and its solution cannot be governed and is not much simplified by generalities."

In dealing with whether the plaintiff has shown there is a serious question to be tried, I must determine whether, on the affidavit evidence, there is an arguable case for the collateral agreement in the terms asserted by the plaintiff. It was an oral agreement alleged to have been made between Mr Quadling and Mr Bambury at a time when they were good friends and business associates. Now, after they have fallen out, their evidence conflicts. However there is no doubt there was an agreement in some form. The first defendants do not contest the plaintiff's claim that the amount of the deposit

under the agreement for sale and purchase was offset by the value of work done by the plaintiff. They say however, that that is the extent of the collateral contract and that after the accrued fees of Mr Quadling were applied to offset the deposit under the contract, the collateral agreement was either performed or discharged so there is nothing further to be specifically enforced.

At the interlocutory injunction stage it is not possible for the Court to resolve conflicts of evidence. It appears that there undoubtedly was an oral agreement and the dispute to be resolved after cross-examination of witnesses at the trial is as to the terms of that agreement. In those circumstances the finding must be that the plaintiff has crossed the initial threshold of establishing an arguable case.

It is not clear from the evidence whether the plaintiff will be able to overcome the difficulty that some of the fees he seeks to have applied in part payment of the purchase price arise from work done for Mr Bambury personally or companies controlled by him, whereas the first defendants development at Russell is as trustees.

It was argued for the first defendants that the collateral contract involving the provision of personal services would not be the subject of an order for specific performance. I was referred to Chitty on Contracts 25th edition, paras 1771-1778. That may be so but it will be

possible, if the plaintiff succeeds in establishing the terms of the alleged collateral contract, for the Court to order that further performance on the part of the plaintiff be by way of payment in cash rather than the provision of services. Therefore I do not consider that this submission seriously erodes the plaintiff's arguable case.

I turn to the balance of convenience. The authorities indicate clearly that if damages would be an adequate remedy for the plaintiff in the event of success at the substantive trial and the defendants are in a position to pay any likely award of damages, then an interlocutory injunction should not be granted. It was argued for the plaintiff that for the same reasons that the equitable remedy of specific performance generally is granted in respect of contracts for the sale of land because the common law remedy of damages is inadequate, so the interim relief of injunction should be granted. Land is treated as being of unique value so that the purchaser should have the opportunity of securing the specific piece of land he has selected. I was referred to Megarry and Wade Law of Real Property 5th edition p623.

For the first defendants Miss Bradley submitted that the uniqueness of the particular unit should not carry weight in this case since this is not a property which the plaintiff seeks to occupy as his residence, but rather is an investment proposition to provide a source of income. As such it could be substituted readily by another property.

While the development involves managing of the units as

motels when not occupied by the owners, it seems clear that they also serve as holiday accommodation for the owners. The evidence indicates that the particular unit the plaintiff seeks is one of the most attractive units in the development and was specifically selected by him. In those circumstances I do not think it can be said that he would be adequately compensated by an award of damages if the unit was sold to others and he is left only with that remedy.

The plaintiff questions the ability of the first defendants to meet a substantial award of damages and he refers to alleged financial difficulties being experienced by Mr Bambury. Mr Bambury has deposed that the trust has net assets of approximately $330,000 and claims his own personal net assets are worth approximately $1,500,000. There is no independant evidence verifying this. The trust is required to repay to the bank the sum of $385,000 in six months time and appears to have experienced difficulty with the sale of two other units which I assume comprise the major part of the value of the net assets of the trust.

The urgency with which Mr Bambury pressed for payment after having allowed almost a year to elapse during which similar pressure was not exerted on the plaintiff may provide some justification for the plaintiff's discomfort. However, even though the evidence is unsatisfactory, I do not consider that my decision in the matter should turn on the inability of the first defendants to meet an award of damages.

Turning to the position of the first defendants, it is

clear that they have undertaken the development for business purposes with the object of deriving profit from the sale of the units. So long as the Court can be satisfied that the plaintiff is in a position to pay damages on the undertaking he has given it cannot be said that the first defendants would suffer irreparable harm if restrained from selling the unit before the substantive issues are determined.

I was referred to the difficult market for the sale of units such as this at the present time and the opportunity presently available to the first defendants to proceed with the new contract they have received. It was submitted that if this is lost it may not be possible to replace it with another contract for sale in the event that the first defendants succeed at the trial. If that is so the losses to the first defendants flowing from that situation are readily capable of quantification and compensation in damages.

It is necessary then to examine whether the plaintiff is in a position to meet substantial damages in the event that an interim injunction is granted but he fails in his claim at the trial. The evidence of Mr Bambury is that Mr Quadling has been in financial difficulties over the past year which has led to the failure to make the payment of the balance of the purchase price under the contract. Mr Quadling contests this. He states in his second affidavit that he has the sum of $420,000 lodged to his credit in an interest bearing term deposit with his bank. He claims that from these funds he is

well able to settle the balance of the purchase price for the unit or alternatively to meet any award of damages that the Court might make against him following final determination of his claim. That evidence is not independantly verified although a photocopy of a solicitor's trust account cheque is exhibited to his affidavit. If he has these funds available the plaintiff clearly is in a position to meet any award of damages. It is within the power of the Court to ensure this by imposing a condition for the grant of an interlocutory injunction that an appropriate sum be set aside. Accordingly, an injunction need not be refused in this case on the ground of the inability of the plaintiff to pay damages.

Finally, it is a matter of assessing any other factors to be weighed in the balance of convenience and standing back to see where overall justice lies. First I think it should be said that it is a matter for regret that two former friends have been unable to resolve their difficulties other than by reference to the Court. As I indicated at the hearing, if the plaintiff clearly has the means to complete purchase of the unit, and if the first defendants' objective is to complete a sale of the unit, the matter should be capable of resolution without the expense and delays involved in proceedings. That two former friends should resort to allegation and counter-allegation in affidavits rather than seek productively to overcome the difficulty so that they might then concentrate on their separate affairs is indeed unfortunate. If this matter proceeds, the Court in due

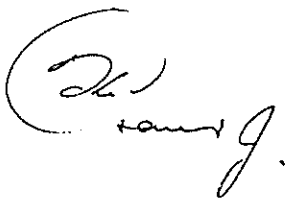
course, will need to resolve in an atmosphere of confrontation the conflicting accounts of what arrangement was made between these two men in circumstances of friendship and business co-operation. At the present time it is not possible to form any view as to the likely outcome. That will depend upon the evidence presented to the Court and particularly, in cross-examination. The plaintiff's case lacks independant corroboration in key areas. The first defendants accept that some arrangement was made with the plaintiff but contest the alleged terms. In the circumstances no views can be expressed as to the relative strengths of the cases.

The plaintiff is anxious to complete purchase of the unit. The first defendants have tolerated the present position for more than a year and, in the circumstances, I consider that a further period until the matter can be determined by the Court must be accepted by them. This means they will not be able to proceed with the contract for sale of the unit presently available to them. That disadvantage in my view, is outweighed by the disadvantage that would flow to the plaintiff in being denied the opportunity to have his case for specific performance of the contract to purchase the unit he has selected, heard and determined.

Therefore there will be an order that the interlocutory injunction continue against the first defendants. However, that order is to be subject to the condition that the plaintiff pay into Court, or otherwise provide security in a

manner acceptable to the first defendants, or to the Registrar for, the sum of $145,000. That should be deposited to earn interest in the meantime. In fixing that sum I am not attempting to assess in anticipation the likely level of loss to the first defendants. That is the balance payable under the contract (excluding interest) in the event that it is held to have been wrongly cancelled and will be available to ensure that the plaintiff will perform the contract. If he is unsuccessful, it will be available to meet any award of damages against him.

Costs are reserved.



Solicitors: Hesketh Henry, Auckland for Plaintiff
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