

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
COMMON LAW AND EQUITY DIVISION  
2011/CLE/gen/FP/190**

**BETWEEN**

**HEALING HANDS MINISTRY**  
*Plaintiff*

**AND**

**HUMMINGBIRD RESTAURANT LIMITED**  
*First Defendant*

**AND**

**SIVAD INVESTMENTS COMPANY LIMITED**  
*Second Defendant*

**BEFORE:** The Honourable Mrs Justice Estelle Gray-Evans

**Counsel for the plaintiff:** Mr Harvey O. Tynes, Q.C. along with  
Mr Hal O Tynes for the plaintiff

**Counsel for the defendant:** Mr Gregory Moss along with  
Mrs Lena Hield-Bonaby for the defendant

2011: 17 November; 24 November

**DECISION**

**Evans, J**

1. This is an application by the plaintiff for an injunction pursuant to a Summons filed 8 November 2011. The application was supported by the affidavit of David Williams filed 8 November 2011 on behalf of the plaintiff and opposed by the affidavit of Patrick Davis filed 16 November 2011 on behalf of the first defendant.

2. The relevant facts leading up to this application, as gleaned from the affidavits appear hereunder.

3. By an agreement made on 23 November 2006 between the first defendant, as vendor, and the plaintiff, as purchaser, the first defendant, agreed to sell and the plaintiff agreed to purchase the "hereditaments" as described in the schedule thereto, namely:

"ALL that certain piece parcel or tract of land containing by admeasurement 7,697 square feet being Tract B-8A situated in Yeoman Wood Subdivision Unit 1, at or about the intersection of Man-o-War Circle and Man-o-War Way in the City of Freeport on the Island of Grand Bahama AND building formerly known as Dunkin Donuts Warehouse and comprising 2,400 square feet."

4. The agreed sale price was \$170,000.00 payable by a deposit of \$29,000.00 with the balance payable with interest at 8% per annum by monthly installments of \$2,197.66, commencing on 1 January 2007. The plaintiff was granted vacant possession upon payment of the deposit and the completion date is set for 1 December 2013.

5. Clause 5 of the agreement provides as follows:

"If the monthly installments hereby agreed or any part thereof shall be unpaid for 30 days after becoming due and payable (whether same is formally demanded or not) then after giving the Purchaser a further 30 days to pay the sums due and the Purchaser failing to make such payment, the Vendor will give the Purchaser notice in writing affording the Purchaser 21 days to pay all outstanding amounts and if the Purchaser fails to pay said amounts within the said period then the Vendor shall without further notice at any time thereafter re-enter the hereditaments in whole and repossess the same and this agreement shall absolutely cease and the Purchaser will be required to immediately vacate the hereditaments and forfeit all deposits and all installments paid will be deemed rent."

6. Clause 10 of the agreement provides as follows:

"If the Vendor shall fail to deduce such a title to the said hereditaments as is provided for in this Agreement in accordance with the provisions hereof or shall fail to deliver the assurance hereinafter provided for then the purchaser may (but without prejudice to any of the purchaser's alternative remedies by way of damages specific performance or otherwise) require that the said deposit shall be returned to the Purchaser with interest of 8% along with all insurance and service charge amounts paid during the use of the building. All monthly amounts paid by the Purchaser would then revert to rent."

7. Curiously, it appears from the schedule to the agreement that the firm of Moss & Associates represented both parties, although Mr Moss assured the Court that his firm did not.

8. In any event, upon taking possession, the plaintiff proceeded to renovate the building, adding on to the eastern and western sides thereof and improving the landscape of the surrounding property.

9. Apparently things went well until in or about April 2011 when the plaintiff decided to build a picket fence on the land and, at the suggestion of Mr Patrick Davis, caused a survey to be done of Tract B-8A and was advised that a significant portion of the building was situated on the adjoining Tract B-4, which belongs to the second defendant.

10. Each of the defendants is beneficially owned by Mr Patrick Davis.

11. The plaintiff informed Mr Patrick Davis about the findings of the surveyor. Thereafter the first defendant returned the plaintiff's cheque for the April 2011 installment payment and by letter dated 21 April 2011 to Pastor David Williams proposed a meeting early the following week "to determine where we go from here."

12. The first defendant says Pastor Williams did not propose a meeting date so the meeting did not occur, but the parties apparently spoke by telephone between 21 April 2011 and 6 May 2011.

13. During that period the plaintiff had also tendered the May payment, the cheque for which was also returned by the first defendant along with the following letter dated 6 May 2003:

"Dear Pastor Williams:

Re: Agreement dated November 23<sup>rd</sup> 2006

Reference the above captioned agreement between Healing Hands Ministry and Hummingbird Restaurant Limited, our letter to you dated April 21, 2011 and our subsequent telephone conversation this week.

Please find enclosed your check #630 dated May 2<sup>nd</sup> 2011 for amount \$2,200.00 which I am returning herewith for the following reasons.

As you are aware we have now determined, based on the land survey conducted by Riviere and Associates on April 21, 2011, that the Building covered by the above captioned lease agreement is partly constructed on property owned by an organization not party to our agreement. Further, I have also indicated to you that the third party's property is under lien and thus a resurvey or sale of a portion of the third party's property is not an option which we can pursue.

As I have indicated to you, I cannot in good conscience accept your monthly payments under the agreement since it is now clear that Hummingbird Restaurant Limited will not be able to give clear title to the property and building now or at the end of the agreement in two years. These startling, extraordinary and unforeseen circumstances give us no alternative but to terminate the above agreement and enter into a new agreement which will both refund your deposit (with interest as agreed) and return to you the cost of structural improvement as mutually agreed by us.

Please let me know within the next thirty (30) days how you wish to proceed in the circumstances.

Yours sincerely,

Hemmingbird Restaurant Limited

(Sgd) Patrick L. Davis”

14. Although, in his affidavit David Williams deposed that “the first defendant by letter dated the 6<sup>th</sup> May 2011...terminated the aforementioned agreement contending that it could not give the plaintiff good title to the said property”, the plaintiff remained in possession of the property and tendered the June installment payment from the plaintiff, which the first defendant also refused to accept.

15. On or about 29 June 2011, the plaintiff obtained from The Grand Bahama Port Authority, Limited (“the Port Authority”), a Lot and Building Research Certificate showing that the Port Authority’s Technical Department had issued a building permit to the second defendant on 27 May 1997 in respect to Tract B-4 for the building (described on the research certificate as “warehouse and kitchen”) as well as the service station, apparently now situated on Tract B-4. According to the research certificate, the occupancy certificate for the building was issued on 16 December 1997 to the second defendant whose name is shown thereon as owner (original and present). Jervis Pumping & Hauling was listed as the contractor and the square footage of the said building was shown as 2400 square feet.

16. The plaintiff then commenced this action on 2 August 2011 by a specially indorsed writ of summons in which it claims:

- (1) A declaration that a notice in writing dated the 6<sup>th</sup> day of May, 2011 from the first defendant to the plaintiff was and is ineffectual either
  - (i) To determine the agreement dated the 23<sup>rd</sup> day of November, 2006 and made between the plaintiff and the first defendant for the sale by the first defendant to the plaintiff of the land therein described; or
  - (ii) To forfeit the equitable rights of the plaintiff in the said land
- (2) A declaration that the first defendant and the second defendant are trustees for the plaintiff of Tract B-8A as well as the said 5,976 square feet of Tract B-4 that the said building is thereon situated and are bound to assure to the plaintiff any legal estate or interest therein outstanding upon the plaintiff paying the balance of the purchase price.
- (3) To have the agreement specifically performed.
- (4) Damages for breach of contract in lieu of or in addition to specific performance
- (5) Alternatively, that the plaintiff may be relieved of the forfeiture (if any) of its rights and interests under the said agreement upon such terms as the Court may think fit
- (6) Costs.

17. The plaintiff says that subsequent to the commencement of this action, the first defendant through its attorney “sought to reinstate the said agreement but did not assert or confirm that it would be in a position to adduce good title to the premises.”

18. In that regard, several letters passed between counsel, from which it is evident that, notwithstanding the first defendant having returned the April and May payments,

and having refused to accept the June payment, the first defendant was expecting to receive those, as well as the other installments under the agreement, and in his 2 September 2011 letter, counsel for the first defendant demanded the payments for the months of May through September 2011.

19. In response to that demand, counsel for the plaintiff, in his letter dated 8 September 2011, inquired whether the first defendant could “adduce good title to the property”, to which counsel for the first defendant responded, inter alia, that although the first defendant could “make title to the subject Tract B-8A, it is not able to transfer title to the subject building in tandem with a conveyance of the said Tract B-8A as...a substantial portion of the said building is not situated on the said Tract B-8A but rather upon the adjoining Tract B-4”.

20. Nevertheless, the first defendant reiterated the demand for payment of the May through September installments and advised that should such payments not be made within thirty days of 2 September 2011, the first defendant would exercise its rights under clause 5 of the agreement.

21. On 31 October 2011, counsel for the first defendant wrote to counsel for the plaintiff advising that his client “shall today *“re-enter the hereditaments in whole and repossess the same”* whereupon the Agreement *“shall absolutely cease and the Purchaser will be required to immediately vacate the hereditaments”* whereupon the deposit herein shall be *“forfeited”* and all installments paid herein shall *“be deemed rent”*.

22. On that same date, Mr Davis, on behalf of the first defendant, changed the locks to the building, which prompted the plaintiff to file its summons, the subject of this application, seeking to have the defendants or either of them restrained from denying the plaintiff access to the building pending the resolution of this matter.

### **The Law**

23. It is not disputed that the Court has the power to grant interlocutory injunctions and that such power is discretionary. (See section 21 of the Supreme Court Act and Order 29(1) of the Rules of the Supreme Court).

24. The principles relevant to the grant of interlocutory injunctions are also not disputed. They were enunciated by Lord Diplock in the decision of the House of Lords in *American Cyanamid Co v. Ethicon Ltd.* [1975] A.C. 396, and summarized by Sir John Pennycuik in *Fellowes v. Fisher* [1976] Q.B. 122 at pages 140-141 as follows:

“(1) provided that the court is satisfied that there is a serious question to be tried, there is no rule that the party seeking an interlocutory injunction must show a prima facie case.

(2) The court must consider whether the balance of convenience lies in favour of granting or refusing interlocutory relief.

(3) “As to that” the court should first consider whether, if the plaintiff succeeds, he would be adequately compensated by damages for the loss sustained between the application and the trial; in which case no interlocutory injunction should normally be granted.

(4) If damages would not provide an adequate remedy the court should then consider whether if the plaintiff fails the defendant would be adequately compensated under the plaintiff’s undertaking in damages, in which case there would be no reason upon this ground to refuse an interlocutory injunction.

(5) Then one goes on to consider all other matters relevant to the balance of convenience, an important factor in the balance, should this otherwise be even, being preservation of the status quo. By the expression "status quo" I understand to be meant the position prevailing when the defendant embarked upon the activity sought to be restrained. Different considerations might apply if the plaintiff delays unduly his application for relief.

(6) Finally, and apparently only when the balance still appears even: "it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence."

### **Serious question to be tried**

25. The plaintiff contends that the first defendant by its letter dated 6 May 2011 terminated the agreement not because of any breach on the part of the plaintiff but rather on the basis of its own default, being its inability to adduce good title. However, counsel for the plaintiff submits, the first defendant had no right to terminate the agreement on that basis as the option to terminate for failure by the first defendant to deduce good title was conferred by clause 10 of the agreement on the purchaser/plaintiff and not the first defendant. In that regard, counsel for the plaintiff points out that the plaintiff had not sought to exercise its option under clause 10 aforesaid and the plaintiff avers in the statement of claim that it is ready and willing to carry out the terms of the agreement.

26. The first defendant denies that it terminated the agreement by its letter of 6 May 2011. According to Mr Davis, that letter "merely invited the plaintiff to join with the first defendant in agreeing to terminate the agreement and to enter into a new agreement" and counsel for the first defendant submits, as I understand him, that the first defendant in that letter was merely acknowledging that it could not give clear title to the plaintiff, while noting that the parties had no alternative but to terminate the agreement and proposing that the parties enter into a new agreement with respect to the reimbursement for improvements made by the plaintiff to the property.

27. Further, counsel for the defendant says, it was not until 31 October 2011 that the first defendant terminated the agreement "upon the default of the plaintiff in making monthly payments thereunder even after two separate 30 and 21 days notice periods with respect thereto (as required under the agreement) and even after express notice that the first defendant would terminate the agreement if such arrears were not paid." Therefore, in his submission, there was no extant agreement between the plaintiff and the first defendant and, therefore, no foundation for a claim for specific performance.

28. Consequently, Mr Moss submits, the plaintiff is unable to pass the first threshold test under *American Cyanamid*, that is, that there is a serious question to be tried.

29. Although the parties appear to agree that the first defendant terminated, or repudiated, the agreement, there is disagreement as to when and why?

30. Was it by the letter of 6 May 2011, prior to the commencement of this action, as the plaintiff contends or was it after the commencement of this action by the letter of 31 October 2011, as the first defendant contends?

31. Was it because the first defendant could not adduce good title as the plaintiff contends or was it because the plaintiff defaulted on making the payments under the agreement as the first defendant contends?

32. If the plaintiff is correct, did the first defendant have a right to terminate the agreement on the basis of its own assertion that it could not deduce good title to the plaintiff, an option admittedly available only to the plaintiff by clause 10 of the agreement?

33. If the defendant is correct, what was the effect of the first defendant returning the April and May, and refusing to accept the June, installment payments.

34. The plaintiff also raises the issue of proprietary estoppel against the second defendant.

35. The evidence is that both the building permit and the occupancy certificate for the building were granted to the second defendant, who appears to have also been responsible for the construction of the building. Further, both defendants are beneficially owned by the same person. The plaintiff alleges that the second defendant would have known about the agreement for the sale to the plaintiff and would have been aware of the renovations and improvements being done by the plaintiff to the building, and yet it stood by and said nothing. In those circumstances, I agree with counsel for the plaintiff that on those facts, the issue of proprietary estoppel against the second defendant is one that needs to be resolved at trial. I also accept that the application for injunction is made on affidavit evidence. In any event, pleadings may be amended at anytime.

36. From the foregoing, I am satisfied that there are serious questions to be tried.

37. Nevertheless, counsel for the first defendant submits that the plaintiff's application for an interlocutory injunction should be dismissed because even if the plaintiff were to succeed at trial, damages would be an adequate remedy and in that regard, he points out that the plaintiff has not suggested that the first defendant would not be in a position to pay any such damages.

38. On the other hand, counsel for the plaintiff expressed some doubts whether damages may not be an adequate remedy because, as I understood his submission, of the nature of the plaintiff's operation, it may not be easy to quantify the damages which the plaintiff has suffered and will continue to suffer if the defendants are not restrained from denying the plaintiff access to the building, which serves as the plaintiff's place of Worship.

39. The plaintiff says that in addition to using the building as its place of Worship, it also uses it for Bible study as well as for the occasional distribution of food, all of which the plaintiff contends the first defendant is aware. The plaintiff says further that between the purchase price and the amount spent on improvements to the building and the surrounding landscape, it has spent in excess of \$236,100.00 since being allowed into possession in 2006.

40. Although I accept Mr Tynes QC's submission that quantifying damages for the plaintiff in the event it succeeds may not be an easy task, I am yet of the view that damages would be an adequate remedy should the plaintiff succeed at the trial and as counsel for the first defendant pointed out, there is no suggestion that the first defendant will not be able to pay any such damages.

41. On the other hand, if the injunction is granted and the plaintiff does not succeed, the first defendant would be entitled to compensation in damages for any loss it would have suffered as a result of its being restrained from denying the plaintiff access to the building. In that regard, counsel for the first defendant pointed out that the plaintiff had not given any undertaking in damages and had not adduced any evidence to show that it would be in a financial position to make good on any such undertaking and therefore the interlocutory injunction should be refused.

42. In response, Mr Tynes Q.C. gave the usual undertaking on behalf of the plaintiff, and invited the Court to maintain the status quo.

43. Sir John Pennycuick in *Fellowes v Fisher* [H.L.] [1975] 2 All ER 829 at page 843f defined "status quo" as the "position prevailing when the defendant embarked on the activity sought to be restrained".

44. It seems to me that the *status quo* would mean that the plaintiff is back in occupation of the building, but, in my view, paying to the second defendant the monthly

payments under the agreement or, as Mr Moss contends, compensation for its continued use and occupation thereof.

45. So, although I am of the view that damages would be an adequate remedy if the plaintiff should succeed in this action, I am, nevertheless, prepared to accede to counsel for the plaintiff's invitation to maintain the *status quo* and grant the injunctive relief sought, but on condition.

46. So, in the exercise of my discretion and subject to the usual undertaking in damages, I grant the injunctive relief sought by the plaintiff on the condition that the plaintiff pays the installment payments for the months since April 2011, except for the period 31 October 2011 until the plaintiff is allowed back into possession, and continues making the monthly installments under the agreement until trial or further order.

47. Failing that the plaintiff's application is denied.

48. Costs will be in the cause.

49. In granting the order in the terms indicated, I have taken into consideration the fact that the building is used as the plaintiff's place of Worship, that the present state of affairs has no doubt caused some disruption in its Worship services and that there is a need for some semblance of order as it awaits the resolution of this matter. However, I also take into consideration that it would be unfair to the first defendant to permit the plaintiff to continue in occupation indefinitely without compensating the first defendant therefor. Perhaps, the parties may yet be able to come to some amicable solution to this matter.

DATED this.....day of.....A.D. 2011

Estelle G. Gray Evans  
Justice