SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.10 OF 2005

BETWEEN:

CARIBE (REALTIES) CANADA
LIMITED/IMMEUBLES CARIBE LTEE

BETTS REALTY LIMITED

S.P.A.S. LIMITED

Appellants

and

WYCLIFFE BAIRD

Respondent

Before:
The Hon. Mr. Hugh A. Rawlins — Justice of Appeal

Appearances: (By way of Written Submissions)
Mr. Damian Kelsick for the Appellants
Mr. Terence V. Byron for the Respondent

2005: March 20.

JUDGMENT

[1] RAWLINS, J.A.: This procedural appeal is against a judgment by learned Master Mathurin in which she dismissed the claim against four of the defendants, but not against the three appellants, who are also defendants in the action. The Master also refused to discharge an injunction, which was granted to the claimant in the case on 17th March 1993. A brief background to the substantive claim in this case, at the very outset, would put the applications and issues on this appeal into helpful perspective.

Background

[2] The claim in this case, which was brought by Mr. Baird, who is the respondent in this appeal, concerns lands on the South East Peninsula, St. Kitts. The initial defendants were David Goldgar, and his brother and sister, Dean J. Goldgar and Sue Goldgar; the estate of David Goldgar's deceased brother, Michael Goldgar by David Goldgar its legal representative, Paul Coburn, and his son Jules Coburn, Caribe (Realties) Canada Limited/Immeubles Caribe Canada Ltee, Caribe (Realties) Canada Ltd., Betts Realty Limited, S.P.A.S. Limited, and First Security Bank of Utah. Caribe (Realties) Canada Limited/Immeubles Caribe Canada Ltee, which was incorporated in Quebec, Canada in September 1958, subsequently amended its name to Caribe (Realties) Canada Ltd.[1] Its corporate charter was dissolved in November 1978, but it was subsequently revived in December 1990. Betts Realty Limited was incorporated in Quebec, Canada in November 1959. Its corporate charter was dissolved in October 1974, but was subsequently revived in December 1991. The other named defendants were S.P.A.S., a company registered in St. Kitts and Nevis, and First Security Bank of Utah, a financial institution in Utah, USA, which carries on the business of receiving money deposits.

[3] The statement of claim alleges that further to negotiations with David Goldgar, Mr. Baird entered into an option agreement, which was executed in 1989 and subsequently amended in March 1990, to purchase about 150 acres of land belonging to Caribe and Betts Realty Limited[2] at Major's Bay, on the South-Eastern Peninsula. David Goldgar and Paul Coburn prepared the agreement. David represented to him (Mr. Baird) that he (David) had the authority to bind Caribe and Betts and that these companies were lawfully entitled to enter into the option agreement and thereby to convey the lands to him. David knew or ought to have known that the companies were dissolved at the time. David and Paul represented to him that the lands were owned Caribe and Betts and gave him (Mr.

[1] These two companies will be referred to herein as "Caribe".
[2] Hereinafter "Betts".

Baird) a Solicitor's legal opinion as to title in May 1989, which confirmed this. David signed the option agreement as the authorized officer for Caribe and Betts.

[4] The statement of claim further states that Mr. Baird complied with the terms of the option agreement, paid a total of $1.4 million towards the lands, and took numerous steps towards the closing of the sale and the development of the lands. He made the payments to David Goldgar, personally, relying upon David's purported ostensible authority. Some of the payments were negotiated through or deposited with First Security Bank of Utah.

[5] According to the statement of claim, the first closing date was finally scheduled for 21st February 1991, in order to permit Caribe and Betts to deliver a warranty Deed and to take back a first mortgage securing a portion of the balance due on closing. At that date, however, neither David, Paul, Caribe nor Betts moved to complete the transaction. Mr. Baird had caused his Solicitor to submit a Requisition Letter in contemplation of that closing, but the terms thereof were not complied with by the time the action herein was instituted. A subsequent closing date, 2nd April 1991, was aborted. After numerous demands, David returned $760,000.00 to Mr. Baird, without interest, leaving an outstanding balance still unpaid, notwithstanding numerous demands. By reason of the monies that Mr. Baird expended, the value of the land has been significantly enhanced. Accordingly, he claims a priority equitable purchaser's lien on the land.

[6] Mr. Baird states, in the statement of claim, that he believes that the Goldgars and the Coburns were or are beneficial owners of Caribe and Betts. He also believes that the estate of Michael Goldgar may be entitled to a beneficial interest in all or part of the lands, which are the subject of the option agreement, through Caribe and Betts, and that that interest may have subsequently devolved to the Goldgars, Coburns and other persons. Mr. Baird states, further, that David and Paul Coburn represented to him throughout the course of their dealings, that the Goldgars and Coburns were entitled to share in the monies that he (Mr. Baird) paid on the option agreement. The statement of claim also states that notwithstanding the

agreement and the title opinion, Caribe conveyed an acre of the subject lands to William v Herbert in November 1989 in disregard of Mr. Baird's rights and that William Herbert subsequently conveyed the land to S.P.A.S., but that Herbert and S.P.A.S. had actual or constructive knowledge of Mr. Baird's interest.

[7] Against the Goldgars and the Coburns, Mr. Baird claims specific performance of the option agreement. He also claims damages for breach of contract, for breach of fiduciary duty, for misrepresentation, as well as for loss of reputation and loss of profits and goodwill. He prays for an order for the return of the outstanding balance of the monies that he paid to David Goldgar, and for punitive, aggravated and exemplary damages.

[8] Against all of the defendants, except First Security Bank, Mr. Baird claims a declaration that he is the owner of the lands under the option agreement. He also claims a declaration that he has a purchaser's lien in the lands, which is paramount and in priority to any interest that the defendants may have in those lands. He further claims an injunction restraining the defendants from dealing or interfering with the lands, or divulging or disclosing any information concerning the works that he had done or planned in relation to the lands. He claims, as well, an order to restrain the defendants from disbursing or releasing any funds which they received in respect to the lands.

[9] Against all of the defendants, except S.P.A.S. and First Security Bank, Mr. Baird seeks an order which compels them to deliver to him a Warranty Deed in respect of the land, free of any encumbrance or other interest. He also prays for an order, inter alia, that these defendants deliver to him a First Vendor-Take-Back mortgage, securing the principle face value amount on the lands under certain conditions.

[10] Finally, Mr. Baird prays for an order, which now validates the option agreement and the amendment thereto as of the date on which they were originally executed (nunc pro tunc). He also prays for a declaration that the conveyance of the land

by Caribe to William Herbert and then from Herbert to S.P.A.S. was null and void. He also asks the court to determine and consequential order on the question whether the lands were legally transferred to him (Mr. Baird) in the light of the legal capacity of Caribe and Betts. He also prays for orders for tracing and for the return to him of any funds that he should receive.

[11] The Master dismissed the claim against Jules Coburn, Dean Goldgar, Sue Goldgar and the estate of Michael Goldgar on the ground that the statement of claim does not contain any material facts which support a cause of action against them.[3] That decision was not appealed. The Master did not strike out the action against Caribe, Betts and S.P.A.S. and refused to discharge the injunction. I shall first consider whether the Master erred in her decision to refuse to dismiss the claim against Caribe and Betts. I shall then consider whether she should have dismissed the claim against S.P.A.S., and, finally, whether she erred by refusing to discharge the injunction.

Caribe and Betts

[12] Rule 26.3(1)(b) of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000,[4] empowers the court to strike out a statement of case or part thereof, if it appears to the court that the statement of case or part of it does not disclose any reasonable ground for bringing or defending a claim. This rule is similar in purport to Order 18 rule 19(1)(c) of the Rules of the Supreme Court, 1970, which permitted a court to strike out anything in any pleading on the ground that it discloses no reasonable cause of action or defence, which CPR 2000 repeals and replaces. The fact that the appellants used the formulating in the old Order 18, did not put them out of court[5] because, like Order 18 rule 19(1)(c) of the 1970 Rules, rule 26.3(1)(b) of CPR 2000 provides a summary procedure under which striking out should only be done in cases in which there is a total absence of a proper cause of

[3] See paragraph 17 of the judgment.
[4] Hereinafter "CPR 2000".
[5] Although it would be helpful if such applications would identify the specific authority under which it is made.

action.

[13] The learned Master correctly stated the principle on which a court would dismiss a claim against a defendant because it discloses no or no reasonable cause of action against them. She extracted it from the statement of Sir Dennis Byron, CJ, in the case of Baldwin Spencer v The Attorney General of Antigua and Barbuda et al[6] where it was stated that this summary procedure should only be used in clear and obvious cases, when it can be clearly seen on the face of the statement of claim that it is obviously unsustainable or is in some other way an abuse of the process of the court.

[14] The Master rationalized and explained the principle. She stated that the court has to caution itself against conducting a preliminary trial of a case without discovery, oral examination, or cross-examination. This, she stated, the court must balance against giving effect to the overriding objective of the Rules which is to deal with cases justly by ensuring the most efficient use of the resources of the court and to save the parties unnecessary expense, through the case management process, by preventing a claimant who does not have a reasonably sustainable case from proceeding to trial.[7]

[15] The application to dismiss the claim against Caribe and Betts because it discloses no or no reasonable cause of action against them was premised on the ground that the statement of claim makes it clear that these companies were dissolved at the time when the option agreement to sell the lands was purportedly signed on their behalf. Counsel for Caribe and Betts insisted that their dissolution meant that they were not in existence at the time of the option agreement, with the result that they had no legal capacity to enter into the agreement and could not therefore confer rights or create any legal obligations under the option. They submitted, as further ground, that since Solicitors for Mr. Baird did not plead ratification, it is not now open to the court to declare the agreement valid as of the date of execution.

[6] Civil Appeal No. 20A of 1997.
[7] See paragraph 12 of the judgment.

Counsel for Mr. Baird submitted, on the other hand, that the transactions on the basis of the option agreement were validated by the subsequent revival of the companies. He cited, as authority, Tymans Ltd. v Craven[8] and Re Vandervill's Trust (No. 2).[9] He submitted, further, that if, as Counsel for Caribe and Betts seemed to suggest, the sale by these companies to William Herbert was validated by the later revival of the companies, then the option would also have been similarly validated.

[16] In her decision, the Master found that the issue of the capacity of the companies is one that could only be properly determined in this case on the evidence. She stated,[10] further, the matter whether at all material time David Goldgar and Paul Coburn were ostensibly authorized to act on behalf of the companies, and whether Mr. Baird relied on their representations when he entered into the option agreement is a triable issue, upon which the issue of the capacity of the companies also hinge. She did not accept the submission by Counsel for the companies that the statement of claim discloses on its face that Mr. Baird accepted all along that the companies did not have the capacity to enter into the agreement. This, she said, was because Mr. Baird stated at paragraph 11 of the statement of claim that David Goldgar represented to him that the companies were lawfully entitled to enter into the agreement. She also thought that the sale of the land to William Herbert and the assertion of its validity may mean that the revival of the companies retroactively validated transactions made during the period of dissolution. She noted that there are allegations that negotiations in relation to the closing took place after the companies were revived. On her finding, these observations seem to signify that at least there was a course of dealing between the parties which could only be clarified, in relation to the issue of capacity, at trial.[11]

[8] [1952] 1 All E.R. 613.
[9] [1974] 3 All E.R. 205.
[10] At paragraph 15 of the judgment.
[11] See paragraph 16 of the Judgment.

[17] Learned Counsel for Caribe and Betts challenged these findings on this appeal. They state that the Master erred in her findings because the claimant had himself accepted that at all material times the companies were under an incapacity and Mr. Baird did not plead any ratification or other basis upon which it could be held that the agreement was binding against the companies.

[18] Learned Counsel for Mr. Baird noted, on the other hand, that the appellants did not raise the issue of ratification before the Master because they had not raised it in their defence and counter-claim. He submitted that the Master approached the matter correctly, in the knowledge that in such a summary proceeding, the burden was upon the applicants to satisfy the court that the statement of claim discloses no reasonable cause of action against the applicant, and that therefore, there are no triable issues. As far as Counsel for Mr. Baird is concerned, the Master's findings in relation to the issue of capacity were correct because a trial judge could rely on the evidence and also on expert legal opinions on the legal effect of the revival of the companies and the resulting effect upon the validity of the option agreement. Learned Counsel also drew attention to the fact that while, in their defence and counterclaim, the defendants (the appellants in these proceedings) seek a declaration that the option agreement is null, void and enforceable, they are relying on its existence to assert a right to the money that Mr. Baird paid to David Goldgar.

[19] I express no view in relation to the matter raised in the last sentence in the foregoing paragraph. The application to dismiss the claim merely requires the court to look at the claim and to determine whether on its face it contains a sustainable action against the appellants. Such an application should be made early in the proceedings. The appellants had a new opportunity to pursue it when the case was recently brought under the new case management process, which permitted the application at that stage. However, the Master was correct when she found that the issue of capacity could only be properly determined on the evidence and by the operation of law. It is not necessary to specifically plead ratification in order to invite a determination whether the companies had the

capacity to enter into the agreement or whether notwithstanding their dissolution, their subsequent revival validated the agreement. The appeal therefore fails on this ground.

S.P.A.S.

[20] The application to dismiss the claim against S.P.A.S. because it discloses no or no reasonable cause of action against them was premised on the said ground that since Caribe and Betts had no legal capacity to enter into the agreements with Mr. Baird, he obtained no interest in the lands, which could be prior to the interest which William Herbert obtained when he purchased land from the companies. The Master noted that the statement of claim asserts that both William Herbert and S.P.A.S. purchased the one acre of land in question with notice of Mr. Baird's interest in the lands. She therefore found, correctly, that the claim against S.P.A.S. is inextricably interwoven with the question whether Mr. Baird obtained an interest in the land under the option agreement. Since she had already found that this latter issue could only be determined on evidence at trial, it followed that the issue in relation to S.P.A.S. could itself only be determined on evidence.

[21] The Master's finding was correct. In effect, the critical consideration on which a cause of action might hinge against Caribe and Betts, as well as against S.P.A.S., is whether or not, in the first place, the transaction on the option agreement was properly carried out by David Goldgar and Paul Coburn as the authorized officers for Caribe and Betts, and if so, whether by virtue of the revival of Caribe and Betts the option agreement was validated retroactively. The appeal therefore also fails on this ground.

The injunction

[22] The application to discharge an injunction was made on the ground that the statement of claim discloses no legal or equitable right in the claimant/respondent, Mr. Baird, to justify the grant of the injunction. The application to discharge the

injunction was not supported by affidavit. Learned Counsel for Mr. Baird submitted that affidavit evidence was mandatory in relation to the application in relation to the discharge of the injunction. Rule 11.8(3) of CPR 2000 states that an applicant need not give evidence in support of an application unless this is required by a court order, practice direction or rule. While, however, rule 17.3(1) of CPR 2000 requires an application for an interim remedy to be supported by evidence on affidavit, CPR 2000 contains no rule which mandates the filing of affidavit evidence in support of an application to discharge an injunction. Notwithstanding this, it will always be helpful to follow the general principle that such applications be supported by affidavit. In any case, an application to discharge on the ground of failure to disclose, for example, must be supported by such evidence to inform the court of the evidential basis on which it should exercise its discretion to discharge the injunction. In the present case, however, the applicants before the Master were basically asserting that if the court agreed that the companies had no capacity to enter into the option agreement and there is therefore no sustainable cause of action against them, there is no basis for the continuation of the injunction. An affidavit is not critical to the determination of this issue.

[23] The Master held, in effect, that since she found that capacity and related questions going to the validity of the option agreement is to be determined on evidence at a trial, and, therefore, the question whether Dr. Baird has a legal or equitable interest in the lands would be definitively determined then, the injunction should remain in place until these matters are decided on the trial.

[24] In there appeal, Counsel for the appellants challenge this decision on three grounds. One ground states that there is no basis in the pleadings to support the injunction. Counsel then rely on two kindred grounds which were not specifically raised before the Master, and which seem to invite this Court to rehear the application to discharge the injunction. One ground is that Mr. Baird cannot obtain an order for specific performance on his pleadings. Learned Counsel for the appellants insists that this is merely another way of stating the ground in the application before the Master that the injunction should be discharged because Mr.

Baird has no equitable interest in the lands. Assuming that on this assertion this issue is properly within the jurisdiction of this Court, if the statement of claim clearly shows that Mr. Baird would not be entitled to an order for specific performance, but to damages only, if he prevails on his claim, there would be no basis on which the life of the injunction could be sustained. However, a definitive determination of this issue hinges on the need for the resolution of the issue of capacity, and, ultimately, the question whether the option agreement is valid, and, if so, whether Mr. Baird acquired an equitable interest in the subject lands on the execution of the agreement.

[25] The second kindred ground is that Mr. Baird's failure to prosecute his case diligently after it commenced constitutes such delay that he cannot obtain an order for specific performance. This is an entirely new ground. This Court does not have the benefit of a decision by the Master on it. It is interesting that it was Counsel for Mr. Baird who raised the issue of delay in relation to the filing of the application to dismiss the claim which came before the Master. The Master outlined a brief history of the matter from the filing of the claim in 1993 to the present time, which seems to indicate, from the record, that delay might not be an issue from which either party could benefit. In any case, however, it is clear that the issue whether there is such delay in the prosecution of this case by Mr. Baird that could deny him an order for specific performance is a matter that could only be determined on sworn and tested evidence and on the applicable legal principles.

[26] In the foregoing premises. The appeal against the order of the Master to dismiss the application to discharge the injunction also fails.

Costs and Order

[27] The general rule on costs that is stated in Part 64.6 of the Rules is that a successful party is entitled to costs, unless the court finds that there are circumstances that are provided in this Rule, which permits it to depart from this

Rule. None of the exceptional circumstances that the Rule provides exists on this appeal. Mr. Baird is therefore entitled to his costs in this appeal in the sum $3,000.00.

[28] In the hearing before the learned Master, she ordered the appellants to pay Mr. Baird's costs because she dismissed their applications to strike out his claim against them. She ordered Mr. Baird to pay the costs of the defendants Jules Coburn, Dean Goldgar, Sue Goldgar and the estate of Michael Goldgar because she struck out the claim against them. However, the Master made those awards subject to agreement between the parties, with no alternative provision in the event that the parties do not agree. The alternative should be provided. While, therefore, the award of costs by the Master to the various parties is confirmed because the appeal has been dismissed, those costs orders will be varied to provide that the costs should be assessed if not agreed between the parties. This matter shall be scheduled within 21 days of today's date for case management or pre-trial review directions.

[29] In the foregoing premises, the appeal is dismissed. The appellants shall pay $3,000.00 costs in this appeal to Mr. Baird. The Master's costs orders are hereby varied so that each will provide that the costs should be assessed if not agreed between the parties. This case shall be scheduled within 21 days of today's date for case management or pre-trial review directions.

Hugh A. Rawlins
Justice of Appeal