

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV 2005/0558

BETWEEN:

RUSTON CORNWALL

Claimant

And

ANTIGUA BARBUDA INVESTMENT BANK LTD

Respondent

Appearances:

Mr Anthony Greer for the Claimant

Mr Cornwall Shepherd for the Respondent

.....
2005: October 26th
November 30th
December 6th, 8th
.....

JUDGMENT

- [1] **Blenman, J:** This is an application to continue an injunction restraining a bank from selling or advertising the sale of property. The bank seeks to have the injunction discharged.
- [2] On 6th December 2005, I heard oral arguments on the applications and gave an oral judgment. The following represents my reasoned judgment.
- [3] Mr Ruston Cornwall (Mr Cornwall) is indebted to the Antigua and Barbuda Investment Bank Ltd (ABIB) in respect of over draft facility of \$1,300,000 for a period of 2 years secured by legal charges. ABIB granted him the overdraft facility in 1999 and it was secured over his property registered as Registration Section: **Ottos New Town, Block 610 1791B Parcel 34** the property measures 0.45 acres and has 2 buildings (the property).

Applications

- [4] Mr Cornwall caused an application without notice together with an affidavit in support to be filed on the 25th October 2005 seeking to prevent the sale of his property which was advertised for sale on 27th October 2005. In his affidavit, he says that he serviced his loan, which was granted in 2000, properly until recently when he defaulted. He complains that the ABIB is purporting to sell his property at a grossly undervalued price since in 2004, he obtained valuations of the property which indicates that the market value of the property is \$3,981,820.00EC (three million nine hundred and eighty one thousand eight hundred and twenty Eastern Caribbean dollars) He has been informed that ABIB intends to sell his property for the grossly undervalued forced sale figure of \$2,100,000.00 (two million one hundred thousand Eastern Caribbean Dollars)
- [5] On 26th October 2005, the application was brought before the court and pursuant to rule 17.3 of CPR 2000, it appearing to the court that there were good reasons for not giving notice, and upon the usual undertaking as to damage the court immediately granted Mr Cornwall an interim injunction in the following terms:
- (a) The Respondent whether by themselves, their servants or agents or otherwise be restrained from selling publicly or privately, the property of the claimant known as Registration Section: Ottos New town, Block 610 1791B Parcel 34 until further order or trial by the court.
 - (b) That the Respondent ceases to advertise the said property for auction with immediate effect until further order or that
 - (c) The Applicant shall issue a Claim Form forthwith and serve a copy of the Claim Form together with a copy of this order on the Defendant
 - (d) And it is further ordered that the matter be adjourned to 7th December 2005.
- [6] On 9th November 2005, ABIB filed a Notice of Application to have the discharge of the injunction. The grounds of the application include the following: -
- (1) The applicant suppressed evidence with respect to payments made by him on his account.

- (2) There is no proper evidence before the court, the respondent intended to sell the applicant's property at an undervalue \$2,100,000.00.
- (3) The applicant's undertaking in damages is worthless.

ABIB's Evidence

- [7] Mr Joseph Williams (Mr Williams) Branch Manager of ABIB deposed to an affidavit in support of ABIB's application. Mr Williams says that on the 3rd March 1999, ABIB granted Mr Cornwall an overdraft facility in the sum of \$1,300,000.00 for a period of one (1) year. The facility was secured by a charge over his property, and "save and except for two instalments of \$50,000.00 each that Mr Cornwall paid in the months of October and November 2000 in order to forestall the sale of property, he made no other payments."
- [8] Subsequently, Messrs Clarke and Clarke solicitor for acting on behalf of Mr Cornwall wrote letters to ABIB requesting on his behalf an extension of time to make good his indebtedness. However, Mr Cornwall has failed to pay any further sum to ABIB.
- [9] Under the terms of the charge, Mr Cornwall was obligated to insure the buildings and keep them insured. He failed to do so and ABIB in order to protect its interest was forced to pay the insurance premiums on the property.
- [10] Mr William stated further, that in addition, Mr Cornwall's principal place of business is presently advertised for sale at public action by Antigua Commercial Bank and ABIB fears that Mr Cornwall would not be able to satisfy any order damages, which the court might award against the Applicant.
- [11] More importantly, he says that at all times ABIB encouraged Mr Cornwall to sell the property by private treaty but he informed the court that he could not find a buyer.

Mr Cornwall's Evidence

- [12] Mr Cornwall stated in his affidavit upon which he relied to obtain the injunction that he had been a customer of ABIB for a number of years. He obtained a loan from ABIB which he serviced satisfactorily until recently. In consequence of default the first named Respondent indicated to him that it would proceed to auction my property.
- [13] In 2004 he obtained a valuation report from Haynes Smith in respect of the property and the report reflected a market value of (\$3,981,820.00) three million nine hundred and eighty one thousand eight hundred and twenty dollars. He says that ABIB intends to sell his property at a grossly undervalued forced sale figure of approximately two million one hundred thousand Eastern Caribbean Dollars (EC\$2,100,000.00) in reliance on a report prepared by one Wayne Smith.

Submissions

- [14] The court heard the applicant's arguments to continue the injunction together with arguments on behalf of ABIB, the latter which urged that the injunction be discharged.
- [15] Mr Greer, learned counsel for Mr Cornwall stated that while his client was not disputing ABIB's right to sell the property he maintained that they should seek to obtain a fair value for the property. While he admitted that Mr Cornwall was not sure that indeed ABIB was in the process of advertising the sale of the property for \$2,100,000.00 since he was unable to obtain the valuation report, counsel indicated that Mr Cornwall had reliable information to this effect. He advocated that ABIB is obligated to obtain a fair value for the property and if ABIB were to sell the property at the price of \$2,100,000.00 Mr Cornwall's best interests would not be protected.
- [16] I note that Mr Greer did not take issue with the factual matters deposed to by Mr Williams.
- [17] Mr Shepperd, learned counsel for ABIB submitted that the court should discharge the injunction granted on 21st October 2000 since Mr Cornwall failed to make material disclosures to the court in obtaining the without notice injunction. Counsel's main

contention in support of ABIB's application for the discharge of the injunction is that Mr Cornwall has misled the court and not acted in good faith in obtaining the injunction without notice. Mr Cornwall did not provide the court with the true circumstances that exist, the court should therefore discharge the injunction.

[18] He said that Mr Cornwall failed to inform the court that for several years he was in default of his payments in relation to the overdraft facilities. In 2003, ABIB caused its solicitors to issue a Notice to pay off to Mr Cornwall, under the section 72 of the Registered Land Act 1975, requiring him to pay off the outstanding sums failing which they would proceed to sell by public auction the property securing the indebtedness. Mr Cornwall sought time to make good his indebtedness and he has not effected any payments to ABIB as he promised. In fact he failed to communicate with ABIB for a long time after ABIB had granted him extension of time to liquidate his indebtedness. It was only after the moratorium that ABIB granted Mr Cornwall had expired that ABIB caused another Notice to pay off to be issued. Once again, Mr Cornwall failed to liquidate his indebtedness. ABIB was left with no alternative than to advertise the property for sale by public action.

[19] Mr Shepperd submitted that Mr Cornwall provided the court with erroneous information that ABIB propose to sell the property at a value of \$2,100,000.00 is untrue and there is no reliable basis for Mr Cornwall's views. The court should not act on his assertion.

The Law

[20] It is the law that a claimant's suppression of a material fact may taint the hands of the claimant for equitable relief See: **Ross v Buxton [1888] W.N 55**

[21] In the well known case of **R v. Kensington Income Tax Commissioners, exp Princess Edmond de Polignac [1917] K.B 486 at page 509** Mr Lord Justice Warrington stated.

"It is perfectly well settled that a person who makes an *exparte* application to the court that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings and he will be

deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him.”

[22] Injunctions are discretionary/equitable remedies that are granted by the court. A party that seeks to obtain an ex parte or without notice application must ensure that fair and frank disclosure is made of all facts that are material.

[23] Further, In **Beese v. Woodhouse [1970] 1 WIR 586 at p 590** Mr Lord Justice Davies said:

“The second point is that it is fundamental to any ex parte application for an injunction that the party applying for it should show the utmost good faith in making the application, and that the doctrine of uberrimae fidei in effect applies.”

It is trite law that where an applicant has failed to make material disclosures to the court in obtaining a without notice injunction, the court is obliged to discharge the injunction without investigating the merits. See **Thermax v. Schott Industrial Glass Ltd [1981] FSR 289**.

Analysis

[24] I have no doubt that the duty to make disclosure required Mr Cornwall to place before the court the relevant background of the case and to present to the court the material facts in seeking to obtain the without notice (ex parte) injunction. The material facts are those which are necessary to enable the court to exercise its discretion properly and fairly between the parties, bearing in mind that the court at that stage had not heard from ABIB and bearing in mind also that the defendant may experience hardship and inconvenience as a consequence of the court’s granting the injunction.

[25] The basis on which Mr Cornwall initially obtained the without notice injunction is that ABIB was in the process of advertising the sale of his property at grossly undervalue figure of \$2,100,000.00. This evidently was a false premise and he had no reliable basis for this view. He was unable to substantiate it and ABIB indicates to the contrary.

[26] Based on the uncontroverted facts that ABIB placed before the court, I am of the view that it was Mr Cornwall’s responsibility to inform the court about all of the indulgences he

obtained from ABIB over the years in relation to his indebtedness. He failed to do this. This is a material non-disclosure.

[27] I have no doubt that Mr Cornwall was also obliged to inform the court that ABIB encouraged him to sell the property by private treaty and that he advised them that he was unable to find a buyer. It was only then that ABIB sought to advertise its sale. This was another material fact which Mr Cornwall should have made the court aware of when he sought to obtain the without notice injunction. Mr Cornwall should have placed before the court the facts, both favourable and adverse. He did not. The facts that he provided to the court were not fairly stated.

[28] I am of the firm opinion that the material non-disclosures by Mr Cornwall are fatal to the continuation of the injunction he obtained on 26th October 2005. As stated earlier, he was under a duty to make full disclosure to the court of all material matters within his knowledge and he failed to do so.

Conclusion

[29] In these circumstances and for the above reason the court must discharge the injunction without going into its merits.

[30] I therefore order that the injunction granted on 26th October 2005 is discharged forthwith. I make no order as to costs.

Louise Esther Blenman
High Court Judge