

ANGUILLA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. AXAHCV 0051/2008

BETWEEN:

THOMAS P. LYDON
SHARON K. LYDON

Claimants/Applicants

And

BARNES BAY DEVELOPMENT LIMITED

Defendant/Respondent

Appearances:

Mr. Gerhardt Wallbank for the Claimants/Applicants

Ms. Merline Barrett for the Defendant/Respondent

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2010: December 12
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DECISION

- [1] **BLENMAN, J:** This is an application for Interim Payment made by Thomas P. Lydon and Sharon K. Lydon against Barnes Bay Development Ltd. The application is vigorously opposed by Barnes Bay Development Ltd (also referred to as Barnes Bay).

Background

- [2] On 27th May 2006, Barnes Bay Development Ltd (Barnes Bay) entered into a Purchase and Sale Agreement (hereafter "the Agreement") with Thomas Lydon and Sharon K Lydon for the purchase of Unit No C203 of the Resort Residences at Anguilla located in Anguilla British West Indies, together with an undivided

interest as tenant-in-common in all or any portion of the common area (hereafter "the Unit").

- [3] Thomas P. Lydon and Sharon K. Lydon entered into a contract with Barnes Bay Development Ltd to purchase property known as Unit No C203, The Resort Residence, Anguilla for the price of US\$1,525,000.
- [4] By clause 2 of the Agreement the initial purchase price of the unit was subject to the provisions contained in the "Incentive Addendum", US\$1,525,000.00. Once the 10% discount was applied to the initial purchase price the purchase price of the unit was US\$1,372,500.00.
- [5] The Lydons were required to, and did, pay to Stewart Title Eastern Caribbean (hereafter "the Escrow Agent") a deposit of US\$274,500.00 which is 20% of the purchase price.
- [6] By clause 3 of the Agreement, Stewart Title Eastern Caribbean was designated as the Escrow Agent. The Escrow Agent was made a party to the Agreement for the sole purpose of agreeing to act as Title Company.
- [7] On the 29th July 2008, the Lydons issued a claim against the Barnes Bay Development Ltd in which they are seeking the refund of the deposit that they paid among other reliefs.
- [8] The Lydons say that it was an express term of the agreement that Barnes Bay Development Ltd would provide them with the property they have purchased, in accordance with the Agreement. The Lydons state further that, in accordance with the Agreement they paid Stewart Title Eastern Caribbean a deposit of US\$274,500 in part payment of the purchase price and to hold as Escrow Agent as provided by the contract.

- [9] The Lydons contend that it was an express term of the contract that Barnes Bay Development Ltd would provide them with property that was ready for occupancy on or about May 2008. This was the closing date. The Agreement provided for the closing date to be extended but this never occurred. Barnes Bay is therefore in breach of the Agreement.
- [10] The closing date has long passed and they are yet to receive the property on which they have paid a deposit of US\$274,000.00.
- [11] Alternatively, the Lydons have argued that even if the court were to come to conclusion that the closing date was capable and validly extended by Barnes Bay Development Ltd, then the extension was to December 2008 and this date has long passed. They were therefore able and properly in a position to terminate the Agreement.
- [12] Against that background, they have applied for interim payment pursuant to Part 17.6 (1)(d) of CPR 2000 which provides that:
- “The court may make an order for an interim payment if it is satisfied that, if the claim went to trial, the Applicant would obtain judgment against the defendant for a substantial amount of money or for costs”.*
- [13] Barnes Bay Development Ltd denies that it is in breach of the Agreement. It maintains that the closing date as defined in the Agreement has not yet been fixed and therefore has not yet passed.
- [14] Further, Barnes Bay Development Ltd says the date of May 2008 was the date that it was anticipated that the closing will occur. However, the Lydons knew or intended that the closing date was liable to be extended on account of delays due to labour problems, as occurred. These labour strikes were provided for in the

Agreement and were out of its control. These are matters that affected the date of the closing which date was for May 2008.

- [15] Barnes Bay Development Ltd says that its failure to convey title to the unit by May 2008 does not and cannot amount to a breach of contract since May 2008 was not the closing date as defined by the Agreement. Barnes Bay Development Ltd states that it validly extended the closing dates through several letters that it wrote to the Lydons. They extended the closing date to December 2008.
- [16] Barnes Bay Development Ltd says that all deposits under the Agreement were to be paid to the Escrow Agent, the latter who was required to pay same to the party entitled. In accordance with the Agreement, the deposit due and payable at the date of the Agreement was to be immediately released to Barnes Bay Development Ltd.
- [17] The closing date was lawfully extended, in the circumstances that obtained and the Lydons were not entitled to do as they did namely: terminate the Agreement. There was no failure to provide the property ready for occupancy by the closing date. Accordingly, the Lydons are not entitled to a return of their deposit.
- [18] Barnes Bay Development Ltd has counterclaimed against the Lydons. It says that the Agreement remains in full force and effect and that the Lydons' action in seeking to terminate the Agreement is wrongful and amounts to an anticipatory breach of the Agreement by the Lydons.
- [19] One of their contentions is that the closing date was lawfully extended to December 2008 and it is the Lydons who have breached it by terminating it. They are therefore not entitled to any sums claimed.
- [20] The court should not grant them the interim payment sought or any at all.

Claimants/Applicants' Submissions

- [21] Learned Counsel Mr. Wallbank urged the court to make an interim payment to the Lydons. Part 17.6(1)(d) of CPR 2000 gives the court the discretion to order an interim payment of US\$274,000.00.
- [22] Mr. Wallbank stated that the sum of US\$274,500.00 is a reasonable proportion of the likely amount of the final judgment. The Lydons in the Statement of Claim makes three claims (a) the return of the deposit of US\$274,500.00 (b) Interest at 18% per annum from 22nd May 2006 (which amounts to an excess of US\$105,453.12 and costs. Part 17.6 (1)(d) enables the court to take into account a prospective judgment for costs. Mr. Wallbank stated that if the Lydons were to succeed at trial in relation to the return of the deposit the prescribed costs would be in the sum of EC\$83,395.55.
- [23] Learned Counsel Mr. Wallbank reminded the court that it is empowered to make an interim payment order in a non personal injuries case if it is satisfied that, if the claim were to go to trial, the claimant would obtain judgment against the defendant from whom an order for interim payment is sought for a substantial amount of monies or costs.
- [24] Having said that, Learned Counsel Mr. Wallbank then proceeded on an elaborate review of the relevant clauses of the Agreement, in an effort to persuade the court that the application at Bar is an appropriate one in which the court should exercise its discretion. Much time was spent in trying to persuade the court as to the meaning that should be given to clause 4 (a) of the Agreement:

"As of the date of this Agreement, the seller intends that the closing date shall occur on or about May 2008, subject to delay beyond the reasonable control of seller which would constitute impossibility of performance under Anguillian Law".

[25] In addition, Learned Counsel Mr Wallbank reviewed several of the elaborate clauses of the Agreement in support of his contention that the closing date of the Agreement had long passed and therefore Barnes Bay Development Ltd was in breach of the Agreement.

[26] Mr. Wallbank referred the court to Simes: A practical approach to Civil Procedure in which it is stated that:

"orders are likely to be made in claims where it appears that the claimant will achieve at least some success and where it would be unjust to delay, until after the trial, payment of money to which the claimant appears to be entitled. The purpose behind this procedure is to alleviate the hardship that may otherwise be suffered by claimants who may have to wait substantial periods of time before they recover any damages in respect of the wrongs they may have suffered".

[27] In ***Shearson Lehman Bros Inc and others v Maclaine Watson & Co Ltd*** [1987] 2 All ER 181 at 190 Nicholls LJ in the English Court of Appeal stated that:

"The underlying purpose of the two (interim payment) rules is the same: to mitigate hardship or prejudice to a defendant which may exist during the period from the commencement of the action to the trial. Further the underlying task of the court under each rule is the same: ordering an interim payment of such amount as is just, having regarded to all the circumstances."

[28] Learned Counsel Mr. Wallbank opined that the legal issues in the substantive case can be readily determined on the affidavit evidence provided in the matter. There is no need for there to be a full trial.

- [29] Importantly, the matter can be determined on the basis of simply interpreting the Agreement. If the court were to have a close look at the Agreement it would readily conclude that Barnes Bay Development Ltd is in breach of the Agreement. In those circumstances, the Lydons should be able to recover their deposit without having to go to the trouble and expense of recovering it through legal trial.
- [30] Mr. Wallbank therefore advocated that the court ought to exercise its discretion and order the interim payment applied for by the Lydons.

Respondent/Defendant's Submissions

- [31] Learned Counsel Ms. Barrett stated that order for interim remedies is the subject of CPR Rule 17, Rule 17.1 which sets out a variety of interim reliefs that may be applied for, including but not limited to an order for interim payment. An order for interim payment is defined under Rule 17.1 (1)(m) as an order for payment by a defendant on account of any damages, debt or other sum which the court may find the defendant liable to pay.
- [32] Rule 17.5 sets out the procedure to be used when applying for interim payment and Rule 17.6 states the conditions which must be met to be successful in such an application. The relevant section is Rule 17.6 (1)(d) which reads as follows:

“(1) the court may make and order for interim payment only if satisfied that-

(d) if the claim went to trial the claimant would obtain judgment against the defendant from whom an order for an interim payment is sought for a substantial amount of money or for costs.”

- [33] Rule 17.6 (4) further provides that *“the court must not order interim payment of more than a reasonable proportion of the likely amount of the final judgment. Further, upon considering an application for interim payment pursuant to Rule 17.6*

(5) *"the court must take into account contributory negligence (where applicable) and any relevant set-off and counterclaim."*

- [34] If the Lydons establish a ground under the CPR for making an interim payment, the court nevertheless retains the discretion to make an order or not to make an order.
- [35] Learned Counsel Ms. Barrett said that the decision on whether to make an order for interim payment is arrived through a two tiered process. The leading English Court of Appeal authority on this is ***Shanning International Ltd. V George Wimpey International Ltd.*** [1988] 3 All ER 475. The first stage is the court considering whether the ground(s) for granting an interim payment has been satisfied and being satisfied that the claimant will obtain judgment for a substantial sum. The second stage is for the court to decide whether in its discretion it should make an order and if so what reasonable proportion of the likely judgment should be ordered as the interim payment. At both stages, the court is required to take into account the likelihood of a set off and other defences succeeding at trial.
- [36] Mr. Barrett posited that the standard of proof on an application for interim payment is on a balance of probabilities. The court must be satisfied that on a balance of probabilities that the Lydons would obtain judgment, i.e. that the Lydon will win. The probability is however on the upper end of the scale and is therefore a higher burden. It should be noted that pursuant to Rule 17.6 (1)(d) the court must be satisfied that the claimant will obtain judgment for a substantial sum of money or costs. If the defence is on the border of having a real prospect of success it is difficult to see how the court can simultaneously find that the claimant will win for the purposes of making an interim payment order.
- [37] Similarly, the existence of a set-off or a genuine arguable counterclaim which has some prospect of success may affect the first stage of the process when

considering the grounds of granting an interim payment and may prevent the court from being satisfied that the claimant will obtain judgment.

- [38] Ms. Barrett posited that it is worthy of mention that the interim payment has a relationship with summary judgment in so far as the concepts which determine both are similar. Summary judgment is available where the defence has no real prospect of success and interim payment is available where the claimant can show that liability will be established. If therefore, a claimant is not likely to succeed on an application for summary judgment it is very unlikely or questionable that he will or should obtain an order for interim payment.
- [39] If the court is satisfied with the ground for the interim payment has been established then it must consider whether it should exercise its discretion to grant the order for interim payment. In exercising that discretion, the court must consider all of the circumstances including but not limited to the means of the defendant and the hardships, if any suffered by the claimant. Once the court has determined to exercise its discretion it must consider the amount of interim payment to order.
- [40] Ms. Barrett reiterated that the court pursuant to Rule 17.6 (4) is not permitted to order an interim payment of more than a reasonable proportion of the likely amount of any final judgment. In determining what is a proportionate sum the court must consider any set-off or counterclaim or contributory negligence. A set-off is a defence and if successful may likely affect the amount of judgment and similarly a counterclaim if successful may affect the amount of judgment and this should be taken into account.
- [41] Pursuant to Rule 17.6 (1)(d) interim payment can only be made where the court is satisfied that there is a substantial amount to be obtained if judgment is in favour of the claimant. Therefore, if the set-off or remedies sought under the counterclaim are successful, this will significantly diminish or exceed the likely amount of the

judgment sum for the claimant and such judgment sum is not substantial then the court ought not to make an order for interim payment.

- [42] In the case at bar, the Lydons have applied under Rule 17.6 (1)(d) for an interim payment in the sum of US\$274,500.00. To make this order under Rule 17.6 (1) (d) court must first satisfy itself that if the matter goes to trial, the Lydons will obtain judgment in a substantial amount.
- [43] Learned Counsel Ms. Barrett submitted that in order to satisfy itself that Lydons will obtain judgment, the court must review not only the application before it but also all the pleadings, which in this case so far are the Claim Form and Statement of Claim, Defence and Amended Counterclaim and the Amended Reply and Defence to Counterclaim. Having reviewed same this court must feel satisfied on a balance of probabilities at the higher end that if the matter went to trial the Lydons would obtain judgment against the defendant.
- [44] Ms. Barrett stated that in this case the main issue which will determine the success of the Lydons claim or Barnes Bay Development Ltd Defence and Counterclaim at trial as revealed from the pleadings is whether the closing date for the Agreement was May 2008 as contended by the claimants in their Claim Form or the extended date of December 2008 as contended by the defendant in its defence. The issue of what was the closing date is not one that could be determined as a preliminary issue but one which was principally fact heavy and therefore required evidence being lead from witnesses before the court could determine that issue.
- [45] Learned Counsel Ms. Barrett submitted that court must consider the evidence on the issue of the closing date to determine whether the Lydons are likely to succeed at trial. However, no witness statements have been filed in this matter which could assist the court in considering the likely evidence to be led at trial. Without the evidence from the witnesses, Ms. Barrett argued that the court cannot properly

determine the closing date or whether same was duly and validly extended and therefore cannot satisfy itself on a balance of probabilities that the claim as made by the Lydons are likely to succeed, which the court must satisfy itself of before making an order for interim payment under Rule 17.6 (1)(d).

- [46] Ms. Barrett submitted therefore that the first stage of the test for making an order for interim payment is not satisfied and as such court should not exercise its discretion to make the order for interim payment.
- [47] The Lydons have brought their application under Part 17 of CPR and is therefore deemed to be fully aware if not themselves, through their solicitors, that pursuant to Rule 17.9 (4) the court cannot make an order for interim payment that is more than a reasonable proportion of the likely amount of final judgment. The likely amount of final judgment which can reasonably be anticipated now, excluding cost, is the sum claimed in the Claim Form which is also the exact sum of the deposit which was paid to the defendant pursuant to the Agreement namely US\$274,000.00.
- [48] It is noteworthy that the Lydons despite their belief in the success of their claim and that Barnes Bay Development Ltd has no defence, have not opted to apply for summary judgment where if successful they would have disposed of the claim and obtain judgment in the exact sum they are now asking the court to make order for interim payment.
- [49] Ms. Barrett further submitted that an order for interim payment in the sums applied for or at all would be highly prejudicial to Barnes Bay Development Ltd. Should an order for interim payment be made now, Barnes Bay Development Ltd if successful on its defence and counterclaim at trial, which it believes it has a real prospect of succeeding, would be left in a position where it would now have to try to enforce the order for specific performance against the Lydons not only for the balance of the purchase price but also the deposit which they are, under the

Agreement, are obligated to pay. Any order for interim payment made now would have the effect of the Barnes Bay Development Ltd losing its right under the provisions of the Agreement to forfeit the deposit.

[50] The Lydons on the other hand have not demonstrated in their affidavit supporting their application that they would suffer any prejudice or hardships if the order for interim payment is not made. Ms. Barrett submitted that in the circumstances the defendant stands to lose more should this court make an order for interim payment now and at trial judgment is given in favour of the defendant.

[51] Finally, Learned Counsel Ms. Barrett said Lydons state that if the closing date was extended as contended by the defendant to December 2008 that that date has long since passed and the claimants are able and have properly terminated the Agreement for breach of clause 6 (c) of the Agreement in failing to return the deposit. However, nowhere in the Lydons Reply or Defence to Counterclaim has this been pleaded. Moreover, Ms. Barrett submitted that it does not lie in the mouths of the Lydons to advance that argument given that they have claimed that they terminated the Agreement in June 2008. Ms. Barrett submitted that having not properly pleaded the above the Lydons cannot now rely on it in favour of an order for interim payment and this court ought not to take that ground into consideration. Application for Interim US\$500.00 costs ordered.

Court's Analysis and Conclusion

[52] The court has reviewed the very lucid submissions of both Learned Counsel and has perused the pleadings in the matter together with the documentary evidence that have been provided by the parties namely the Agreement.

[53] The court is not of the view that this is a matter in which a determination of who is in breach of the Agreement can be made simply by perusing the contract as argued by Mr. Wallbank.

- [54] An important aspect of this application is the determination of which of the two parties, if any, is in breach of the contract. This would of necessity require the court to hear evidence in the matter and be in a position to determine whether the closing date of the contract was May 2008 or December 2008. This determination would not only require the evidence to be tested but importantly the court would need to be assisted with forensic arguments.
- [55] It is noteworthy that at this stage of the proceeding witness statements have not been filed. The court is not of the view that this is a matter in which it is able to say, on the face of the pleadings that the Lydons are likely or not likely to succeed on their claim.
- [56] Accordingly, the arguments advanced by Ms. Barrett are very persuasive and attractive. The court therefore accepts them.
- [57] More importantly, the court is unable to say one way or the other whether or not the Lydons or Barnes Bay Development is in breach of the Contract.
- [58] The jurisdiction to grant relief under Part 17.6 (1)(d) should only be exercised in the clearest of cases where the court is satisfied that at the trial the defendant would obtain judgment. The application at Bar, is not one in which the court could properly make the order that is sought.
- [59] By way of emphasis, on the pleaded case, the court is unable to determine whether the Lydon's are likely to succeed in their claim. The determination of the claim will turn to a large extent on the evidence that is advanced in an effort to persuade the court of the closing date of the contract. This would require the parties giving oral evidence and being cross examined. The court need not proceed any further.

- [60] Accordingly, the court cannot be satisfied that the Lydons are likely to obtain judgment on the claim. Once the court so concludes this is fatal to their application for the interim payment pursuant to Part 17.6 (1)(d) of CPR 2000.
- [61] For the sake of completeness it is worth stating that the rule requires the court to be satisfied that the Lydons will win on a balance of probabilities. Being likely to succeed at trial is not enough. See *British and Commonwealth Holdings plc v Quadrex Holdings Inc* [1989] 2B 842 and *Herdelburg Graphic Equipment Ltd v Commissioners of HM Revenue and Custom* [2009] STC 2334.
- [62] Even if the Lydons establish a ground for making an interim payment, the court retains a discretion whether to make an order. In the application at Bar, the Lydons have not placed any sufficient evidence of the hardship they are experiencing while awaiting the determination of the claim.
- [63] The court finds it interesting that the Lydons are seeking an interim payment to the extent of the entire deposit which they paid Barnes Bay namely US\$274,000.00. Even though they have argued that, should they succeed the costs which they will be awarded is likely to be substantial, this is not a proper basis on which the court could make an award for the interim payment, if they have failed to meet the threshold of an important limb of the Rule.
- [64] In the court's view, the Lydons are required to reach the threshold of the first limb in order to trigger the application of Part 17.6 (1)(d). They have failed to attain this basic requirement.

[65] In the premises, the Lydons' application for interim payment is refused.

Conclusion

[66] Mr. Thomas P Lydon and Mrs. Sharon K Lydon's application for interim payment against Barnes Bay Development Ltd is refused.

[67] Costs are awarded in the sum of US\$500.00.

[68] The court acknowledges the assistance of both Learned Counsel.

Louise Esther Blenman
Resident High Court Judge
Anguilla