IN THE SUPREME COURT OF THE TURKS AND CAICOS ISLANDS

HOLDEN AT PROVIDENCIALES

CL108/07

BETWEEN	**WINDSONG DEVELOPMENT LIMITED**	**PLAINTIFF**
AND	**PHOEBE ALBERT DRISCOLL**	**DEFENDANT**

CORAM: RAMSAY-HALE J

Mr Stephen Wilson instructed by Miller Simons O'Sullivan for the Defendant

Ms Monique Allan instructed by Saunders & Co for the Plaintiff

Heard on the 4th of May, 2012

Draft judgment issued on the 15th June, 2012

JUDGMENT

THIS APPLICATION

1. This judgment is on the Defendant's application for summary judgment on that part of her Re-Amended Counterclaim ("the Forgery Counterclaim") that seeks
    a. A declaration that the Alleged Restrictive Agreement was not executed by the Hemquists and is not binding on the Defendant as registered proprietor of the Driscoll Property and will not be binding on her successors in title;
    b. An Order that the registration of the Alleged Restrictive Agreement be cancelled; and
    c. An Order that the Writ of Summons and/or Re-Amended Statement of Claim and/or Defence to Counterclaim herein be struck out pursuant to the Rules of the Supreme Court 2000 Order 18 r19 (1)(b) and /or (d).

BACKGROUND

2. The Plaintiff is the registered proprietor of parcel 60813/31, the Bight & Thomas Stubbs, Providenciales ("the Windsong Property"). The Defendant is the registered proprietor of

the adjoining parcel 60813/32 ("the Driscoll Property"). Both properties are prime oceanfront properties in the Bight area of Grace Bay beach.

3. Up to December 1992, the Properties were under the common ownership of Country and New Town Properties (Providenciales) Ltd ("CNP"). By deed of transfer dated the 23rd day of December 1992, the Driscoll Property was conveyed by CNP to Michael and Pamela Hemquist ("the Hemquists"). The said deed of transfer which was signed on behalf of CNP but not signed by the Hemquists, contained the following wording:

> "This transfer is subject to the restrictive agreement annexed hereto which agreement shall run with the land and bind the Transferees, their successors and assigns."

4. A document entitled "Restrictive Agreement" ("the Alleged Restrictive Agreement"), made on the 24th of December 1992, is relied on by the Plaintiff to show that when the Defendant purchased the Driscoll Property from the Hemquists, the land was subject to a restrictive covenant. The document is signed on behalf of CNP and also purportedly signed by the Hemquists and the signatures witnessed by Conrad Howell with the notation "signed and sealed on this 30th day of December 1992,"

5. The Plaintiff purchased the Windsong Property in or around 2000 and built a condominium complex on the site. In or around March of 2007, the Plaintiff and the Defendant entered into what later proved to be unproductive discussions regarding the purchase of the Driscoll Property by the Plaintiff. On the 19th day of December, 2007 the Plaintiff commenced these proceedings against the Defendant seeking a declaration that the Alleged Restrictive Agreement remains in full force and effect.

6. The Defendant contends in her counterclaim that the signatures on the Alleged Restrictive Agreement which are purported to be those of the Hemquists are in fact forgeries and the Alleged Restrictive Agreement on which the Plaintiff relies is a nullity.

THE FORGERY COUNTERCLAIM

7. The Defendant's pleaded case relevant to this application is set out below.

> "3A. As regards paragraph 4:-
>
> (iii) No such restrictive agreement was ever entered into or agreed by the Hemquists and the transfer of the Driscoll Property from [CNP] to the Hemquists was subject to no restrictive agreement
>
> 3C. As regards paragraph 6:-

(ii) The (Alleged Restrictive Agreement) is apparently signed on behalf of (CNP) by one Elisabeth Fletcher and also bears the manuscript signatures of the names of the Hemquists. Such signatures are not the Hemquists' signatures and the Hemquists never agreed to or executed a document in such or similar form. In the premises the said document is a forgery by a person or persons unknown to the Defendant...

(iv) It is admitted that the (Alleged Restrictive Agreement) was noted on the Incumbrances section of the Land register in respect of the Driscoll Property under Instrument No 1130/92. Pursuant to s 94(3) of the Registered land Ordinance such registration affords the document no greater force or validity than it would have had if it had not been so noted. As a forgery it has not validity. Accordingly, notwithstanding such notation, the document has no validity.

10. As regards paragraph 13, the Plaintiff is not entitled to the declaration sought. The Alleged Restrictive Agreement was not executed or agreed by the Hemquists and accordingly is not a restrictive agreement and does not bind the Defendant.

11. The defendant repeats paragraphs 1 to 10 of the Defence above

11A. in the premises of paragraph 3C(ii) above the notation of the Alleged Restrictive Agreement on the Incumbrances Section of the Land Register in respect of the Driscoll Property was obtained by fraud by a person or person unknown to the Defendant. It was further made by mistake, namely the mistaken belief by the Registrar that it was a valid restrictive agreement."

8. The Plaintiff's response to the Forgery Counterclaim is as follows:

"1A Save and insofar as they consist of admissions, the Plaintiff puts the Defendant to proof of the facts and matters averred by way of re-amendment in Paragraph 3A, 3B, 3C, 10,11A,11B.

5. The Plaintiff repeats paragraphs 1 to 4 of the Amended reply above.

11.1 Save as aforesaid each and every allegation in the counterclaim is denied. The Defendant is not entitled to the relief claimed or any relief."

PRELIMINARY SUBMISSIONS

9. Mr. Wilson submitted that the Plaintiff's response to the counterclaim does not amount to a traverse under the Rules and therefore the alleged fact - that the signatures are forgeries- is deemed to be admitted. Order 18 rule 13 states that there is an implied admission of every allegation of fact made in a pleading which is not traversed in the next

succeeding pleading. Such admission has the same value and effect as if it were an express admission. A plea that the "defendant puts the plaintiff to proof" was held to be an insufficient denial in *Harris v Gamble* (1878) 7 Ch.D. 877: *White Book* 18/13/5.

10. He also submitted that the general traverse contained in paragraph 11 of the Plaintiff's Amended Reply and Defence was not sufficient to amount to a denial of the facts alleged. "Nowadays, almost every pleading on behalf of a defendant ends with a general traverse e.g. "save as hereinbefore specifically admitted, the defendant denies each and every allegation contained in the statement of claim as though the same were herein set out and traversed seriatim" (*per* Lord Denning in *Warner v Sampson* [1959] 1 QB 297 at 310-11). In dealing with a long and complicated statement of claim or counterclaim, and especially with allegations which are more or less immaterial, this practice is often convenient. It should not, however, be adopted in dealing with the essential allegations. So far as concerns the allegations which are the gist of the action the denial should be as precise as possible." *White Book* 18/13/6

11. The Plaintiff is entitled to show cause against an application under rule 1 'by affidavit or any other means' (O14 r4) so Mr. Wilson quite properly indicated that he was not relying on the technical matters raised, but in light of the position taken by Ms Allan - that it would be inconsistent with the Plaintiff's denials for any admission to be deemed - I say for the record that I accept Mr. Wilson's submissions *in toto* and would hold that the Plaintiff's pleading amounted to an admission of the Forgery Counterclaim.

SUBMISSIONS ON THE MERITS

12. The Defendant relies on the affidavits of the Hemquists who state that they would not have bought the Property if it were subject to a restrictive covenant. They deny signing the Alleged Restrictive Agreement bearing Conrad Howell's signature and say further, that they do not know and have never met Conrad Howell and don't recall signing any document in his presence. The entire transaction was conducted on their behalf by the real estate agent, Prestigious Properties Ltd. and they had no face to face dealings with CNP or its principal, Buddy Godwin.

13. The signatures on the Alleged Restrictive Agreement were examined and compared with the signatures of the Hemquists on the Deed of Transfer to the Defendant and on the witness statements made in 2011 by an expert, who states in his report that the Hemquists' signatures on the 1996 document and the 2011 witness statements are "in excellent agreement" despite the fact that they are separated by a good number of years and that the signatures on the Alleged Restrictive Agreement "display a total departure

and dissimilarity" to their standard signatures leading him to conclude that those signatures are not genuine.

14. Although the Hemquists' account is disputed by the Plaintiff, Mr. Wilson submits that the evidence of Mr. Saunders - who exhibits the draft affidavit of the realtor who conducted the sale and purchase of the land- and of Mr. Howell on which the Plaintiff relies is not a credible alternative to the direct and uncontroverted evidence of the Hemquists that that they did not sign the Alleged Restrictive Agreement, supported as it is by the expert evidence and by the inferences to be drawn from the fact that the Deed of transfer was executed on the 22nd of December but the Alleged Restrictive Agreement was not made until the 24th of December and not executed until the 30th day of December, 1992, belying the assertion that it was annexed to and formed part of the Deed of transfer.

15. Ms. Allan submits on behalf of the Plaintiff that the Defendant's claim seeks to undermine the Land Registry system of registration and that it would not be fair to the Plaintiff nor in the public interest for Land Registry documents, which were filed and accepted without question 20 years ago, to be thrown into question without a trial and that as a matter of public policy there ought to be a trial of the issues in dispute. The Court, she says, is not entitled to go behind the Register.

16. She submits, further, that the Hemquists' evidence that they did not sign the Alleged Restrictive Agreement is a matter that should be tested at trial in light of the evidence that would be given by Mr. Misick, that the Hemquists agreed the terms of the restrictive agreement and the evidence of Mr. Howell, that he would not have witnessed the signatures on the Alleged Restrictive Agreement without satisfying himself as to the identity of the signatories.

17. In reply, Mr. Wilson says that the draft Misick affidavit doesn't speak to the question before the Court, which is whether or not the Hemquists signed the impugned document. In the result, he contends, the Misick affidavit raises no defence to the Forgery Counterclaim. Even if the terms of the Alleged Restrictive Agreement had been agreed by the Hemquists, as is asserted in the draft affidavit, the Alleged Restrictive Agreement remains void and a nullity as a forgery and therefore incapable of binding the Defendant, though the Hemquists may have been personally bound by such oral agreement.

THE LAW

18. The purpose of Order 14 is to enable a plaintiff to obtain summary judgment without trial. The applicant for summary judgment must demonstrate that his right to judgment is

so clear there is no real question to be tried between the parties. In *Anglo-Italian Bank v Wells* (1878) 38 LT 197 at 201 Jessel MR stated

> "Where the Judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendant it is his duty to give judgment for the Plaintiff."

19. "The defendant may show cause against a plaintiff's application...by showing he has a good defence to the claim on the merits... or that a difficult point of law is involved or a dispute as to the facts which ought to be tried or...any other circumstances showing reasonable grounds of a *bona fide* defence": *White Book* 14/4/3. "As a general principle, where a defendant shows he has a fair case for defence, or reasonable grounds for setting up a defence or even a fair probability that he has a *bona fide* defence, he ought to have leave to defend": *White Book* 14/4/9.

20. The power to give summary judgment is "intended to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment and only where it is inexpedient to allow a defendant to defend for mere purposes of delay:" *Jones v Stone* [1894] AC 122. It should not be granted where fraud is alleged or where any serious conflict as to any matter of fact or any real difficulty as to a matter of law arises (*Crawford v Gilmore* 30 L.R. Ir 238) or where there is some other reason for trial such as circumstances which require to be closely investigated.

21. As Ms. Allan has submitted that the Court is not entitled to look behind the Land Register, I set out below the provisions in the Registered Land Ordinance ("RLO") relating to restrictive agreements:

> s. 94.(1) Where an instrument other than a lease or charge (hereinafter referred to as a restrictive agreement) by one proprietor restricting the building on or the user or enjoyment of his land for the benefit of the proprietor of other land, and is presented to the Registrar, the Registrar shall note the restrictive agreement in the incumbrances section of the register of the land or lease burdened by the restrictive agreement, either by entering the particulars of the agreement or by referring to the instrument containing the agreement, and shall file the instrument.
>
> (2) Unless it is noted in the register, a restrictive agreement is not binding on the proprietor of the land or lease burdened by it or anybody acquiring the land or lease.
>
> (3) The note of a restrictive agreement in the register does not give the restrictive agreement any greater force or validity than it would have had if it had not been registrable under this Ordinance and had not been noted.
>
> (4) Insofar as the restrictive agreement is capable of taking effect, not only the proprietors themselves but also their respective successors in title shall be entitled

to the benefit and subject to the burden of it respectively, unless the instrument provides otherwise.

DISCUSSION AND CONCLUSION

22. The issue is whether there is a fair or reasonable probability of the Plaintiff having a real or bona fide defence. The resolution of the issue turns on the credibility of the evidence relied on by the Plaintiff: *National Westminster Bank plc v Daniel* [1993] 1 WLR 1453.

23. I turn to a consideration of the draft affidavit of Philip Misick, which contains the assertions that the vendor would not have sold the land without a restrictive agreement and that the Hemquists must have agreed the terms of the restrictive agreement as otherwise the transaction would not have proceeded, and say that, taken at its highest, it does not assist the Plaintiff. It is not an answer to the Defendant's claim that the Alleged Restrictive Agreement was not signed by the Hemquists or made on their authority, to say that the terms of a restrictive agreement were discussed with the Hemquists and agreed. If the registration of the incumbrance is void because of fraud, then even if there were such an oral agreement as might have bound the Hemquists as parties to the agreement, it does not bind the Defendant who could only be bound by notice of the registration of a valid restrictive agreement.

24. I reject Ms. Allan's contention that the Court is not entitled to look behind the Register. The Register is not conclusive as to the validity or otherwise of a restrictive agreement as section 94(3) of the RLO makes clear. A restrictive agreement is a private written agreement between landowners to restrict the use and development of land for the benefit of their land. Such an agreement is valid only if signed by the parties expressing themselves to be bound by it. The Plaintiff must show by some evidence that the Hemquists either executed the Alleged Restrictive Agreement or that it was executed by someone on their behalf.

25. In this regard, the Plaintiff relies on Mr. Howell who has no direct memory of signing either the Deed of transfer or the Alleged Restrictive Agreement. He assumes that because his signature is on the page below three other signatures, that he in fact witnessed three persons signing. He confesses that he is relying on his usual practice to say that he must have satisfied himself of the Hemquists' identity before notarising their signatures. Without a memorandum to that effect, such as a Certificate of Identification under s108 of the RLO, such an assertion doesn't put the Defendant's evidence in issue. Mr. Howell's signature appears on the Deed of Transfer as does that of Elizabeth Fletcher. As Ms Fletcher also signed the Alleged Restrictive Agreement, it is as likely as not that it was her signature he was witnessing and not the signatures of the Hemquists.

26. Howell's evidence is not credible and even less so in light of the evidence of the document examiner, F. Harley Norwitch, whose expertise has not been impeached and whose findings have not been challenged by any expert evidence to the contrary.

27. Despite Mrs Allan's submission to the contrary, I am not satisfied that the Plaintiff reasonably or properly requires to cross-examine the Hemquists as to the circumstances surrounding the transfer. It is accepted that they did not sign the Deed of transfer. They have said that the entire transaction was conducted by Mr. Misick on their behalf, a claim that Mr. Misick does not contradict. The only purpose of a trial would be to permit the Plaintiff to test their assertion that they did not sign the Alleged Restrictive Agreement, an assertion which is unlikely to change under cross-examination and to which the only answer is the evidence of Mr Howell which is not credible.

28. I have also considered her submission that the Court should not grant summary judgment where there is an allegation of fraud and say that if the accusation of fraud were being levelled against the Plaintiff, I should certainly find the matter unsuitable for disposal without trial. However, neither the Plaintiff nor the Defendant were the original parties to the transaction and no allegation of wrongdoing by the Plaintiff is made or implied. It seems to me, if there is no real dispute as to fact, then summary judgment should be granted despite the fact that fraud is pleaded. The Defendant has produced clear evidence of forgery to which the Plaintiff can make no answer. I can see no other reason for this matter to proceed to trial.

29. In my judgment, there is no probability of the Plaintiff having a real defence to the Forgery counterclaim. I grant the Defendant's application for summary judgment and declare that the Alleged Restrictive Agreement is a forgery and order that it be removed from the Register.

30. The Plaintiff's claim rests entirely on the validity and enforceability of the Alleged Restrictive Agreement. The Plaintiff's claim cannot stand and is struck out.

31. Having considered Counsel's submissions on the matter of costs, I can find no good reason to depart from the general rule that costs follow the event. The rule enunciated in *Beoco Ltd v Alfa Laval Co. Ltd* [1994] 4 All ER 664 on which the Plaintiff relies, applies only where the Court is satisfied that the original claim would have failed but for the late amendment. This Defendant didn't bring the Plaintiff to court on what the Court has found to be an unmeritorious claim. Rather, she has had to defend an action brought against her by the Plaintiff and has succeeded in her application for summary judgment on a part of her counterclaim. Although she got judgment on the

amended counterclaim, there has been no trial of the matter and no finding that she would have failed on the counterclaim as originally pleaded. It is not for this Court to express a view or make a finding on the likely success of her original so as to deprive her of her costs.

32. The Plaintiff shall pay the Defendant's costs of the action to be taxed or agreed.

DATED THE 16TH DAY OF JULY, 2012

JUDGE OF THE SUPREME COURT