[2008] SC (Bda) 45 Civ (2 September 2008)

In The Supreme Court of Bermuda

CIVIL JURISDICTION

COMMERCIAL COURT

2007: No. 296

BETWEEN:

COMMERCIAL PROPERTIES LIMITED

Plaintiff

-v-

SAGO PROPERTIES LIMITED

Defendant

RULING

Date of Ruling: September 2, 2008

Mr. Kevin Taylor, Appleby, for the Plaintiff
Mr. Delroy Duncan and Mr. Eugene Johnston,
Trott & Duncan, for the Defendant

Introductory

1. On October 16, 2007, the Plaintiff ("CPL") issued a Generally Indorsed Writ of Summons seeking, *inter alia*, a permanent injunction restraining the Defendant ("Sago") from developing its City of Hamilton commercial property in a way

which would unlawfully interfere with the right to light and right of way appurtenant to CPL's own neighbouring commercial property. At the commencement of these proceedings, Sago had already obtained planning permission in respect of an application filed on December 18, 2006 with revisions submitted on March 5, 2007 despite objections and an appeal by CPL. The Planning authorities appear to have taken the view that it was for the courts to determine whether a proposed development interfered with disputed private property rights. CPL did not seek interim injunctive relief at the commencement of the proceedings, nor did it obtain undertakings from Sago not to proceed with the development pending trial.

2. As far as the status of the present action generally is concerned, the position may be summarised as follows. On January 7, 2008 by Consent, discovery was ordered to take place later that month, expert reports to be exchanged on February 8, 2008 and witness statements to be exchanged, and convenient trial dates to be submitted to the Registrar, by February 18, 2008. With Sago's List of Documents filed by February 6, 2008, CPL applied by Summons dated February 20, 2008 for a split trial on injunctive relief (first) and damages (second). On February 28, 2008, the Chief Justice declined to order a split trial but did accede to CPL's oral application for each side to be able to have leave to adduce two expert witnesses. CPL has itself taken no steps before this Court to enforce the expedited trial schedule it agreed to on January 7, 2008. Although CPL sought interlocutory relief on at least two occasions (in January and February) before the interlocutory injunction application was filed in late July 2008, (a) it did not seek an interim injunction, and (b) Sago did not undertake (nor was required by the Court to undertake) to delay its development plans until trial.

3. After construction work initially commenced on Sago's property in December 2007, with some encroachment on the right of way apparently taking place, CPL threatened to apply for interim injunctive relief. Sago gave no undertaking not to proceed with construction until trial, but CPL again did not promptly seek interim injunctive relief. CPL waited until July 28, 2008, when it observed further construction activity on the site, to apply for injunctive relief. This was over eight months after the commencement of the action and after their Planning objections had been rebuffed, making it obvious that there was a risk that Sago might proceed with its development plans in contravention of CPL's alleged property rights.

4. At the initial ex parte hearing on July 29, 2008, I directed that Sago be given notice of the ex parte hearing. After hearing oral argument at an ex parte on notice hearing, I adjourned CPL's application for interim injunctive relief to an *inter partes* hearing to enable Sago to file evidence in opposition. The *inter partes* hearing was fixed for Monday August 25, 2008, with Sago expressing concerns about the commercial impact of delaying its construction schedule. As I was unexpectedly unavailable on that date, both parties elected to forego an oral hearing and submitted written arguments.

CPL's evidence

5. CPL relied on the First Affidavit of Brian Madeiros sworn on July 28, 2008 and the Second Affidavit of Brian Madeiros sworn on August 20, 2008. CPL owns three lots at 11 Par-la-Ville Road Hamilton including a lot on which the building known as Atlantic House stands. The "Sago Property" is located at 9 Par-la-Ville Road. Madeiros further deposes that (a) a significant portion of the northern boundary of Atlantic House is glass through which a substantial amount of light enters the building, and has done since at least 1999 (b) evidence will be adduced at trial that this light has been enjoyed since at least 1975, (c) that the Sago development would permanently impair CPL's right of way over the Sago Property.

6. In the Second Madeiros Affidavit, CPL responds to the complaints of delay essentially as follows: (a) CPL has from the outset put Sago on notice that it would apply for injunctive relief, and (b) CPL had no need to apply for relief until it was clear Sago was about to commence actually erecting the building, as opposed to impeding the right of way as occurred in December. It is also deposed that CPL would be able to meet any undertaking given as to damages as a commercial landlord. Madeiros does not substantiate on oath the submission subsequently made by CPL in argument that Sanz Pearman's evidence as to damage, that Sago is paying interest in an amount of $109,976.46 per month and would suffer this loss if restrained from proceeding, is simply not credible.

Sago's evidence

7. Sago relied upon the Sanz Eugene Pearman Affidavit sworn on August 13, 2008. Sago's position on the right of way complaint is somewhat ambiguous. In broad terms there appears to be no unambiguous denial that some encroachment of the right of way may incur. However, it is asserted in effect that any encroachment will not unreasonably interfere with CPL's rights. Pearman frankly admits that the Sago Development will eliminate all light presently entering the northern side of Atlantic House. However, he suggests that (a) CPL will suffer no meaningful loss because of the high demand for commercial property in the area and the availability of artificial light, and (b) Atlantic House likely has natural light on its Eastern and Western sides. It is further deposed that it is shocking that CPL have waited so long to seek interim injunctive relief, especially since CPL was aware of the proposed development as long ago as 2005 and was involved in a similar dispute with Sago in 2006 regarding its parking lot Planning application. The Pearman Affidavit expresses doubts as to whether CPL is financially able to honour its proposed undertakings since Sago's loss would be $109,976.52 per month.

Legal and factual findings: does CPL have a serious issue to be tried or good arguable case on its claim for permanent injunctive relief?

8. It is common ground that CPL must demonstrate that (a) it has a good arguable case for permanent injunctive relief (i.e. irreparable harm that cannot be compensated by way of damages), and (b) that the balance of convenience favours granting interim relief. These factors must be considered with respect to CPL's right of way and right to light claims.

9. As far as of CPL's easement of way is concerned, it is conceded that CPL must establish "*a substantial interference with the right*": '*Gale on Easements*', 17th edition, paragraph 13.03. CPL's complaints are that (a) pillars will be constructed on a portion of the right of way, and that (b) a ceiling will be placed over a portion of the right of way restricting the height of vehicles which will be able to traverse the area in question. At this stage it is difficult to say that there is a obviously a serious issue to be tried on irreparable damage flowing from the alleged interference with the right of way, although the case for damages appears far clearer. CPL's case raises at best marginally a serious issue to be tried as regards the claim for permanent injunctive relief in respect of the alleged infringement of CPL's right of way.

10. As far as CPL's claim for wrongful interference with a right to light is concerned, it is even more difficult to conclude at this stage that there is a serious issue to be tried as far as the claim for permanent injunctive relief is concerned. Firstly, there is no direct evidence before the Court that the light in question has been enjoyed for "*such period as would justify the presumption of a lost grant*": *Colls-v-Home and Colonial Stores Limited* [1904] AC 179 at 182. This point is not decisive because it seems plausible that the requisite evidence of long enjoyment may be adduced at trial. But, secondly, CPL accepts that the crucial test is that "*there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying on his accustomed business….on the premises as beneficially as he had formerly done."*[1] Firstly, the infringement complained of relates to one side of Atlantic House. Secondly, it is unclear to what extent the same rights to light exist in a commercial area of Hamilton as in the case of residential property. In other words, it is unclear at this juncture whether substantial loss of commercial enjoyment will be sustained by the loss of light of which CPL complains. And thirdly, as Mr. Duncan pointed out, the water is further muddled by the fact that it appears CPL has development plans of its own, the precise nature of which are unclear. The present claim may become academic: *Midtown limited et al-v- City of London Real Property Company Ltd.* [2005]EWHC 33(Ch), paragraph 76.

[1] [1904] AC 179 at 187.

11. It is entirely possible that CPL may be able to fortify its case at trial through expert evidence. I also accept Mr. Taylor's submission that if CPL succeeds at trial it will prima facie be entitled to a permanent injunction in respect of a continuing interference with its right to light: *Regan-v-Paul Properties DPF No.1 Ltd.* [2007] Ch 135. Yet even assuming that CPL is able to strengthen its case on liability through expert evidence at trial, the authorities presently before the Court would still not clearly support the need for a permanent injunction (as opposed to substantial damages) at trial. CPL has not demonstrated at this interim stage, albeit almost one year after it commenced the present action, that there is clearly a serious issue to be tried in respect of its claim to permanent injunctive relief for interference with its right to light, albeit that such claim is nevertheless not wholly unarguable. Having regard to the undesirability of attempting to assess the merits of the parties' respective cases before trial[2], I would nevertheless hold that that CPL has very marginally demonstrated a serious issue to be tried in respect of its light-related claim for permanent injunctive relief.

Legal and factual findings: the balance of convenience

12. The balance of convenience in the present case does not clearly point in favour of either party. It is inconvenient to CPL to have rights which may be established at trial infringed in circumstances where it seems possible that a trial could take place in a matter of months. It is inconvenient to Sago to have to stop its ongoing construction plans in the light of a late interim injunction application. In both cases, however (assuming that any offending structures were, if necessary, ordered to be removed), damages would appear to be adequate compensation for the inconvenience caused. The status quo, as at the date of the CPL interim injunction application in July 2008, was essentially that Sago had commenced its construction activities as long ago as in December, 2007. These facts mitigate against the grant of interim relief. The position would have been otherwise if CPL's application had been promptly made prior to construction commencing at the commencement of these proceedings nearly a year ago.

13. Even if maintaining the status quo, somewhat artificially, were characterised as the present state of the Sago Development, CPL's delay in seeking interim relief would justify the refusal of its application at this stage. If Sago wishes to assume the commercial risk of being ordered to tear offending structures down, as appears to be the case, this is not the sort of case where the permanent injunctive relief which CPL seeks at trial will be stultified by the refusal of interim relief. Moreover, CPL itself appears to have elected, despite hollow threats of applying for interim injunctive relief in the past, to run the risk of the trial taking place at a date by which the damage which was prospective at the outset had become actual damage.

Legal and factual findings: CPL's delay

[2] *American Cyanamid-v-Ethicon* [1975] AC 396 at 407 G.

14. It is well settled that interim relief must be sought promptly and commercial men and women are entitled to certainty in this area of the law. Where they are sued in respect of major commercial development projects, businessmen ought to be assured that if a plaintiff does not seek interim relief at the commencement of an action in respect of a proposed development which has not started, they will not have their plans interrupted before judgment unless they are in breach of undertakings given to their opponent or the Court. This Court should not lightly and without good cause depart from established principles governing the circumstances in which interim relief is granted as this may lead to uncertainty in a settled area of the law. The position will of course be different in cases where a defendant mid-way through an action does something which a plaintiff had no reason to expect. As is pointed out in the following passage in '*Snell's Equity*', 31st edition, on which Sago relied:

> "*A lesser degree of acquiescence of laches suffices to debar a claimant from interlocutory relief than from obtaining a perpetual injunction….Moreover, interim relief is granted only in matters of urgency, so that a claimant who delays thereby demonstrates the absence of any urgency requiring prompt relief.*"

15. No or no satisfactory explanation has been advanced by CPL as to why it could not have sought interim injunctive relief before Sago commenced construction in December 2007 and continued construction in July 2008, in circumstances where (a) the action was commenced in October 2007, (b) Sago never expressly or impliedly undertook to halt the project until the conclusion of the trial. This ground alone justifies declining to grant the interlocutory injunction CPL belatedly seeks.

Summary

16. Accordingly, the Plaintiff's application for interim injunctive relief is refused.

17. Unless either party applies to be heard as to costs within 28 days, I would award the costs of the present application to the Defendant in any event.

Dated this 2nd day of September, 2008

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KAWALEY J