

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
TERRITORY OF ANGUILLA
(CIVIL)
AD 2008

CLAIM NO. AXAHCV/2006/0088

BETWEEN:

PATRICIA ANN HURST WILLARD
JOHN WILLARD

Claimants/ Respondents

AND

PARAGON HOLDING LTD
JOHN ERATO
MICHEL SOONS
TURTLE'S NEST BEACH RESORT

1st Defendant/ Applicant
2nd Defendant
3rd Defendant
4th Defendant/ Applicant

APPEARANCES:

Mrs. Cora Richardson Hodge and Mr. Michael Bourne for the Applicants
Mr. Gerhard Wallbank (by teleconference) and Ms. Tamika Davis for the Respondents.

Date: 2008: 1st February
9th April

JUDGMENT

[1] **GEORGE-CREQUE, J.:** On January 24th, 2008, the Applicants applied, inter alia, for for the retraction of a written statement circulated on 21st January, 2008, captioned "TAKE NOTICE" and entitled in the instant action("The Notice") by the Claimants' solicitors Webster, Dyrud Mitchell ("WDM") and for a written apology to be tendered to the Applicants in respect thereof, and also for an order that WDM be removed as solicitors from the record as having acted in conflict with the interests of the Claimants.

[2] It is necessary to set out salient portions of The Notice, titled as in the instant proceedings, thus:

"To all persons contemplating, intending to acquire, or in the process of acquiring title to and / or who may, pursuant to a purported registration of title, occupy or intend to occupy, or take possession of a unit, strata lot or any other part, by whatever name or description, of the condominium real estate property in the Island of Anguilla.... formerly known as Registration Section West End Block 17910B Parcel 59 and all strata lots sub registered thereunder also known as Turtle's Nest Beach Resort located at Mead's Bay:

The above named Claimantshave claims in legal proceedings pending in The High Court of Justice (Anguilla Circuit).... against the above named Defendants. The legal proceedings carry a High Court Registry Reference number AXA HCV 2006/0088.

The outcome of these proceedings potentially affects title or other rights or interests.

The purpose of this Notice is to give notice of these proceedings to such persons as are mentioned in the first paragraph above or otherwise of the claims.

The Claimants' claims have yet to be determined by the High Court. No suggestion is being made herein that the claims will necessarily be upheld at trial.

This Notice is without prejudice to any other actual or constructive notice of these proceedings. This Notice is not to be construed as an express or implied agreement that any person may be entitled to consideration pursuant to ... The Registered Land Act Section 140 subsection 2. Any person to whom this Notice is directed can contact the High Court Office and the Claimants' Anguilla Attorneys..... quoting reference PJW/GW and citing this Notice for further information or consult with their Attorneys."

[3] The underlying action brought by the Respondents as Claimants by fixed date claim is for a declaration that the Applicants/Defendants are in breach of the Condominium Declaration dated 24th September, 2004 (the First Declaration) in respect of Parcel 59 Block 17910B Registration Section West End in that new structures being constructed on Parcel 59 are not located in the correct location as per the survey specifications and for injunctions restraining the erection of such new structures. The Statement of Claim is not endorsed on the claim form but is a separate document particularizing the claim. In their Defence the 1st Applicant /Defendant pleaded at paragraph 14 an Amended Declaration recorded on 7th November, 2006 ("the Second Declaration"). This lead to an amended statement of claim and additional relief sought for declaring the Second Declaration as

being of no force and effect. The Claimants have not sought relief under section 140 of the Registered Land Act¹ which, in essence, gives the court power to rectify the register where it is proved that registration was obtained, made or omitted by fraud or mistake. No such assertions or particulars regarding fraud or mistake are pleaded by the Claimants. In short the gravamen of the Claimants' case is a reliance on the First Declaration by way of impugning the Defendants' actions and the Second Declaration.

[4] The Applicants contend in essence that:

- (a) the Notice is not justified under CPR as a document titled in the action; is not a filed document; contains prejudicial language and is calculated to injure their commercial interests;
- (b) WDM has acted and continues to act in direct conflict with the interests of the Respondents/Claimants and contrary to the interests of potential purchasers in Turtle's Nest Beach Resort some of whom are WDM's existing clients.

Their application is supported by the affidavit evidence of John Erato on behalf of the Applicants.

[5] The Respondents, in essence, contend in response that:

- (a) the circulation of such a Notice is not forbidden in law and does not purport to be a notice issued by the Court;
- (b) the Notice is not calculated to cause fear and alarm but merely invites addressees to consider the validity of the claims and form their own view of the matter;
- (c) the Notice contains true information which is of public record and thus does not interfere with the Applicants' business;
- (d) in essence, all persons are deemed to have constructive notice of documents recorded under the Condominium Act²; and
- (e) the Notice is intended to preserve the Court's ability to rectify matters so that were the court minded to order rectification same would not be blocked by the existence of a bona fide purchaser for value in possession without notice.

¹ The Registered Land Act R.S.A Cap R30

² Section 8(4)

The Notice was likened to a form of "lis pendens" an ancient common law doctrine particularly relevant to unregistered land systems of ownership.

- [6] With regard to the alleged conflict of interest, this is strongly refuted. WDM contends that the Application for their removal is in reality an application for an injunction restraining them from acting for the Respondents in the instant action in circumstances where the Applicants have failed to show the existence of any lawyer/client relationship as between the Applicants and WDM or that WDM has received any confidential information from the Applicants which is at risk the only arrangement being a referral arrangement.
- [7] The issues identified are thus (i) the propriety of the Notice and (ii) whether WDM is in a position of conflict. I propose to deal with the issues in the order as noted.

The Notice

- [8] The English cases **Bull-v- Hutchens**³ and **Bellamy –v- Sabine**⁴ are informative as to the nature of the common law doctrine of 'lis pendens.' Notice of a 'lis pendens' does not create any lien or charge on property. It is not necessarily a notice of an incumbrance. It merely amounts to a notice of a claim the subject of a suit which may possibly be unfounded. The Common Law of England was declared to be applicable to Anguilla by virtue of the Common Law (Declaration of Application) Act⁵ and still applies to the extent that it has not been altered by any written laws of Anguilla. The Registered Land Act⁶ of Anguilla came into force in the early 1970s and brought into being a registered land system in respect of all lands in Anguilla. Accordingly, proof of title by deed is a thing of the past. A Condominium Act⁷ was passed into law in Anguilla, in 1982. These written laws make provision for inspection of land registers and searches to be conducted in respect of entries contained thereon. Further, interested persons of strata lots are entitled to inspect all declarations recorded at the Land Registry and may also inspect same at

³ (1863) 32 Beav 615

⁴ (1857) 1 De G & J 566,

⁵ R.S.A C 60 - brought into force on 20th June, 1705

⁶ R.S.A. R30

the offices of the Strata Lot Corporation responsible for the condominium. The Registered Land Act also expressly provides that entries on the Land Register constitutes actual notice of such entries to every proprietor acquiring such land⁸. The Condominium Act section 8 (4) also provides that a Declaration when recorded constitutes constructive notice to subsequent purchasers and all other persons. The Registered Land Act also contains provisions for the lodging of cautions, and the making of orders for restrictions and inhibitions designed to put a subsequent or prospective transferee on notice in relation to any claims made in respect of any parcel of land and to prevent against any improper dealings in respect thereof.⁹

- [9] The question then is whether this ancient common law doctrine has been rendered otiose by virtue of these legislated regimes governing land and all interests therein. Counsel for the Applicants relied on the case of **T Damodaran s/o P-v- Raman**¹⁰ a decision of the Privy Council on appeal from Malaysia, where all lands in Malaysia were subject to the National Land Code which made the Torrens system of registration of title to land applicable to Malaysia. It is common ground that the Registered Land Act of Anguilla brought about a modified Torrens system of land registration in Anguilla. In that case where a lis pendens order had been entered on the register of title relating to the land in question, Lord Diplock opined at page 502 with regard to the Torrens System of registration of title to land thus: *“the whole purpose of the system is to get away from the complicated system of rules which in England regulate dealings with land particularly those relating to such matters as notice of encumbrances and trusts”*. He then cited with approval the Court of Appeal of New Zealand in relation to corresponding legislation in force there, where that court said thus:¹¹ *“The cardinal principle of the statute is that the register is everything and that, except in cases of actual fraud, on the part of the person dealing with the registered proprietor, such person upon registration of the title under which he takes ---- has an indefeasible title against all the world. Nothing can be registered which is not expressly authorized by the statute.”*

⁷ R.S.A C80

⁸ Registered Land Act R.S.A cap R 30 section 30 -

⁹ See: sections 124, 132 and 137 – Registered Land Act

¹⁰ [1980] AC 497 [Privy Council]

¹¹ In Fels –v- Knowles (1906) 26 N.Z. L.R. 604 @ 620

[10] Section 23 of the Registered Land Act of Anguilla also assures indefeasibly of title in respect of a registered proprietor. Lord Diplock then referred to the system of private caveats provided for under the statute which has the effect of preventing any dealing with land by the registered proprietor so long as such caveats remain in force whilst leaving the registered title unqualified and intact in respect of any claims to title or registrable interest in land. I have already referred to the private caveat mechanisms employed under the Registered Land Act, namely cautions, restrictions and inhibitions contained in Part 8 of that Act under the general heading *'Restraints on Disposition'*. In relation to the provision of such a system of private caveats, Lord Diplock opined at page 503 as follows:

"This method of protecting claims to land and to registrable interests in land under the Torrens System is wholly inconsistent with the concept of lis pendens as it was developed as part of the land law of England" which in theory was to ensure that so long as title to property was being litigated the parties to the litigation were incapable of alienating it so as to avoid a judgment of the court being frustrated. The Privy Council concluded that entry of the lis pendens order was a mere *'brutum fulmen'* as it served no useful purpose.

[11] Interestingly, the Defendant readily admits that The Notice is not a document filed in the action. Further, it is not noted on the land register in respect of the land. They also accept and indeed point out that persons would have constructive notice of documents recorded under the Condominium Act. In essence, the purpose of the Notice is to give notice of the very matters in respect of which all prospective purchasers and all persons would be deemed to have constructive notice. In my view, the legal position of any prospective purchaser is not affected to any greater or lesser extent by virtue of the existence and circulation of the Notice or by the lack of it. It is not contemplated within the scheme of the Condominium Act and less so under the Registered Land Act which clearly incorporates its own regime of private caveats. It is not contemplated under CPR 2000 and is not filed with the court. In my view it has no legal efficacy, is wholly superfluous and can only be considered as a *'brutum fulmen'*. In a pending action where title to registered land is in dispute, the proper way to suspend the registered proprietor's right to deal with the land is to employ one of the methods as may be suitable for lodging a caveat against the title as provided for under the Registered Land Act.

[12] Other aspects of the Notice also warrant comment. The Notice, given the manner in which it is styled and titled, tends to convey to members of the public that it is a court document filed in the underlying titled proceedings when in fact it is not and that information on the action will be given out by the court office, which is clearly not the case. Third or uninterested parties to proceedings may obtain certain documents (for example) the document originating the action,(the claim form) on payment of the prescribed fee and may access other documents such as the pleadings only upon application. Additionally, the portions of the Notice which tend to suggest that the outcome of the action may affect title and which go on further to make reference to persons who may be entitled to consideration pursuant to section 140(2) of the Registered Land Act are potentially misleading in that it tends to suggest that the underlying action is grounded in a dispute as to title to the property, and that relief under section 140 of the Registered Land Act is sought which is also not the case and to that extent mischaracterizes the nature of the dispute in the underlying action. Accordingly, I find that the Notice serves no useful purpose whilst affording a greater risk of misleading persons and potentially causing harm to the Applicants, in respect of the business of their condominium development, albeit unintentionally, by the Respondents. I accordingly order that the Notice be withdrawn and that the Respondents tender to the Applicants a suitably worded apology in respect thereof.

WDM - the conflict of interest

[13] The Respondents have, in my view, rightly contended (and accepted by the Applicants) that the Applicants application for removal of WDM as solicitors is in effect an application for an injunction restraining WDM from acting on behalf of the Respondents/Claimants. Such an application is a serious and weighty matter as the result would be to bar a litigant from utilizing the services of counsel of their choice. Such an application must, in my view, be supported by clear and cogent evidence justifying the grant of such relief. Whether a solicitor who at one point acted for one party may at some subsequent point act against that party, brings into play two considerations which the court must strive to balance, namely:

- (i) on the one hand, the legitimate right and expectation of a client placing his fullest confidence in his solicitor knowing that such confidential information relating to his affairs acquired by his solicitor will not be disclosed to anyone else. It is this relationship of confidence which underpins the well settled legal principles of legal professional privilege; and
- (ii) on the other hand, the freedom of a person to instruct a solicitor of their choice and the corresponding freedom of a solicitor to act on behalf of any person where there is no real need for constraint must be equally considered.

The required balancing of these considerations was clearly expounded by Lightman, J. in *Re A Firm of Solicitors*¹² cited by counsel for the Respondents. It was also held that a similar balancing requirement is equally applicable in the case of barristers. This case also indicated that the basis of the court's intervention is not the possible perception of impropriety but rather, the protection of confidential information. Lightman J. at page 10 further opined thus: *"On the issue whether the solicitor is possessed of relevant confidential information it is in general, not sufficient for the client to make a general allegation that the solicitor is in possession of relevant confidential information if that is in issue: some particularity as to the confidential information is required ."*¹³

- [14] Counsel for the Applicants relied on Cordery's solicitors¹⁴ which stated the following principles: *"As a general rule, a solicitor should not accept instructions to act for persons whose interests are or are likely to be in conflict. If he does so he acts at his peril and the onus of showing that the conflicting interests did not prevent him from doing his duty to both clients must rest firmly on the solicitor. The principle on which it [the court] restrains a solicitor from acting against a former client is the prevention of the abuse of confidence reposed in the solicitor by his former client. Accordingly, before an injunction can be obtained, the court must be convinced of the existence of such confidence and of the probability of its being abused."*

I conclude from this that counsel on both sides are ad idem on the legal principles applicable to this matter.

¹² [1997] Ch.1

¹³ Per. Lightman J – pg 10.

- [15] In the case at bar, the Applicants complain that the 1st Defendant represented by the 2nd Defendant entered into discussions and negotiations whereby it was eventually agreed that the Defendants would refer all their prospective buyers to WDM who in turn would on behalf of such buyer, once engaged, render legal services on a common fee basis in respect of such purchasers of the Applicants' Turtle's Nest condominium development. This is evidenced by WDM's letter of 10th June 2005. Further, they say that WDM has acted for at least one purchaser of a unit in the Phase II development which is the subject of attack by the Respondents/Claimants. As such they say that WDM's actions in acting on behalf of the purchasers wherein the demolition of the building is being sought whilst at the same time acting for purchasers of units of the same Phase II building clearly places them in a position of conflict in relation to the Respondents/Claimants.
- [16] Apart from this negotiation and agreement regarding a fee arrangement to be charged to prospective buyers of units, there is no evidence that the Applicants are or were clients of WDM. Also, notwithstanding any referral by the Applicants to WDM, purchasers were free to instruct any solicitor of their choice outside of WDM. Further, there is not the slightest hint that WDM were given information or acquired information in confidence pertaining to the Applicants or their affairs or indeed any particulars of such confidential information sought to be protected. It is clear that the mischief which the legal principles seek to address is the abuse of confidential information given or coming into the hands of a solicitor in that unique and special relationship between solicitor and client. The evidence in this regard from the Applicants is lacking. In my view, the existence of an agreement on a fee arrangement in respect of prospective purchasers of units in the Applicants condominium development falls far short of being considered in and of itself as establishing a solicitor/client relationship as between WDM and the Applicants or that same can be considered as confidential information in respect of the Applicants or their affairs.
- [17] Another strange factor of this case is that the Applicants appear to be making a case of conflict on behalf of the Respondents or other purchasers of the Phase II units for whom

¹⁴ 8th Ed. Pg. 64-65

WDM acts vis- a- vis the Respondents. Whilst it is probable that WDM may be in a position of conflict, that is at their peril and is not a point open to the Applicants to take in the circumstances. As was said in **Hood Sailmakers Ltd-v- Berthom Boat Co. Ltd.**¹⁵ it is also not a point for the judge to take of his or her own motion.

[18] Based upon the foregoing, I am not satisfied that the Applicants have made out a case warranting the exercise of the court's discretion enjoining WDM from acting on behalf of the Respondents/Claimants in the underlying action. I accordingly, refuse this relief claimed in their Application.

Costs

[19] The Applicants having succeeded on part of their Application and having failed on the other, I consider that the appropriate order is that there be no order as to costs.

.....
Janice M. George-Creque
High Court Judge

¹⁵ [1999] All ER (D) 324