MAHTANI v. ARROW SECURITIES LIMITED and CHANRAI (GIBRALTAR) LIMITED

SUPREME COURT (Pizzarello, Ag. C.J.): May 28th, 1997

Contract—collateral contracts—meaning and effect—oral collateral warranty may exist in parallel with written contract which it modifies if never intended to be incorporated—heavy burden on plaintiff to show oral contract exists, in face of terms of written agreement

Injunctions—interlocutory injunction—balance of convenience—on balance of convenience, may grant interlocutory injunction to prevent dealing in land pending outcome of proceedings for specific performance—necessary that not possible to compensate plaintiff by damages—relevant, e.g. that (a) defendant capable of being compensated for wrongful injunction by award of damages and plaintiff gives undertaking; and (b) plaintiff apparently in disadvantageous position, e.g. not had independent legal advice

The plaintiff sought an interim injunction pending the trial of his action for specific performance of a contract with the defendants for the sale of commercial premises.

The defendant companies owned the freehold of commercial premises which they sought to sell to a third party but shortly before a contract had been concluded, they agreed to sell them to the plaintiff instead.

Both parties wished to conclude a binding contract as quickly as possible and although the plaintiff initially intended to obtain his own legal advice, the defendants prevailed upon him, in the interest of saving time, to visit their solicitor, who had already drawn up documents which could be adapted for the sale to the plaintiff. A new clause was added which allowed the defendants seven days from the date of the contract in which to withdraw without incurring any penalty; this right was not, however, accorded to the plaintiff. Despite his initial objection to this clause, the plaintiff agreed to its inclusion and he alleged that he had only done so on the strength of an oral warranty from the defendants' director that the defendants intended unequivocally to complete the sale and that the clause was only intended to be used in the event of the former buyer's bringing legal proceedings against them for failure to complete the sale to him. The defendants later denied that this was the sole reason for the inclusion of the clause.

The defendants subsequently withdrew from the contract by invoking the added clause and sought to conclude the original contract with the third party. The plaintiff accordingly brought the present proceedings for

specific performance of the contract, on the strength of the oral warranty, and also applied for an interim injunction to restrain the defendants from dealing with the premises pending trial (and gave an undertaking in damages).

The plaintiff submitted, *inter alia*, that (a) the oral warranty formed a binding collateral contract by virtue of which he was entitled to specific performance of the contract of sale; and (b) because he was therefore clearly entitled to the freehold of the premises, an injunction was necessary to prevent the defendants from selling them to the third party prior to the trial—were they to do so, an award of damages would not be sufficient to compensate him for the defendants' default.

The defendants submitted in reply that (a) there had been no oral warranty and the parties were bound by the terms of the written contract, which clearly allowed them to do as they had done and in any case, the plainitiff, an experienced businessman, had had the opportunity of rejecting or altering the clause if he had wanted to protect his position further; and (b) there was therefore no serious issue to be tried but even if the court found in the plaintiff's favour, he could adequately be compensated by damages and the injunction should not therefore be granted.

Held, allowing the application:

(1) There was nothing to prevent the trial court from giving effect to the collateral warranty if it existed and in those circumstances there would be no need to rectify the written contract; indeed, it had clearly never been the intention of the parties that such a warranty would be incorporated. However, at the trial the plaintiff would be under a formidable evidentiary burden to show that the written terms of the contract did not represent the real agreement between the parties. It would not be enough merely to provide evidence which, on its own, would be sufficient to establish an oral contract on a balance of probabilities; rather, it had to be sufficiently strong to overcome the fact that the parties had signed a different agreement (page 129, line 38 – page 130, line 17).

(2) In the present case, there appeared to be a serious issue to be tried, even though the evidence currently before the court appeared to favour the defendants (which would usually be the case when an oral agreement was alleged to contradict the terms of a written one); whether the plaintiff succeeded depended on the credibility of the witnesses, which was a matter for the trial court. The fact that the plaintiff had not had the benefit of independent legal advice was also relevant at this stage. It appeared that damages would not be an adequate compensation if the plaintiff were to succeed in his action and that if the injunction were subsequently found to have been wrongly granted, the defendants could adequately be compensated in damages (for which an undertaking had been given). The balance of convenience therefore fell in favour of granting the injunction (page 130, line 42 – page 132, line 41).

Case cited:
(1) *Earl* v. *Hector Whaling Ltd.*, [1961] 1 Lloyd's Rep. 459; (1961), 105 Sol. Jo. 321, *dicta* of Holroyd Pearce, L.J. applied.

H.K. Budhrani for the plaintiff;
P.J. Isola for the defendant.

PIZZARELLO, Ag. C.J.: The application is for an injunction pursuant to O.29 of the Rules of the Supreme Court to restrain the defendants from dealing with freehold property at 124–128 Main Street, Gibraltar ("the premises") contrary to the terms of an agreement entered into between the parties on April 22nd, l997. The plaintiff maintains that the terms of the agreement are subject to a collateral warranty entered into orally at the time, express or implied.

For the purposes of this application the relevant events are as follows: Prior to April 21st, 1997 there had been preliminary discussions between the plaintiff and Mr. Bhojwani, a director of both defendants, regarding the sale of the premises by the defendants to the plaintiff. The first defendant, as a member of the Chanrai group of companies, is the freehold owner and the second defendant is a retail shop of the same group and they are inextricably entwined in this matter. Nothing came from these discussions.

On April 21st, 1997, the parties met and the matter was discussed again, the defendants at that stage being close to finalizing negotiations for the sale of the premises to another party—the contract was due to be completed on April 22nd, 1997. Nevertheless, they agreed to meet the following day.

On April 22nd, 1997, in the early morning, the parties met at the Elliot Hotel, and for a price of £445,000, Mr. Bhojwani agreed to sell the premises with vacant possession save for a flat on the second floor, and terminate the negotiations he was engaged in with the other party. Both the plaintiff and Mr. Bhojwani were anxious to settle the agreement as soon as possible and agreed to bind their agreement in writing, and Mr. Bhojwani telephoned his solicitors, Messrs. Isola & Isola, to make an appointment. The plaintiff says he then came to realise that the other party was his brother.

The parties duly attended at the lawyers' office and Mr. Albert Isola, one of the partners of the firm, saw to them. He had drawn up the documents for the sale of the property from the defendants to the other party and so that contract was used as the basis for the agreement between the defendants and the plaintiff. However, Mr. Isola inserted a new clause, cl. 15, into the agreement. That clause reads:

> "The first vendor and the second vendor reserve unto themselves notwithstanding the agreement herein contained the right to terminate this agreement by notice in writing given at any time

before the expiry of seven days from the date of this agreement and this agreement shall then become null and void and terminated, but in such an event the first and second vendors shall forthwith return the deposits paid herein and no further liability shall accrue to the first and second vendor under this agreement."

The reason why Mr. Isola inserted that clause is explained by him in his affidavit sworn on May 16th, 1997:

"I had only had intimation of the sale one hour earlier and I felt it was necessary for our clients to have a 'period of reflection' in respect of the transaction that was proposed to be rapidly entered into at the request of the plaintiff and consequently I believed that time was required in order to enable the defendants to consider properly all aspects of the commercial transaction that they had entered into including the position of the other purchaser, the plaintiff's brother, Mr. Sunder Mahtani."

I pause to observe that Mr. Isola is in error when he attributes haste only to the plaintiff. Both the plaintiff and Mr. Bhojwani wanted the transaction to be processed quickly.

The plaintiff did not like this. He understood the clause to bind him firmly to the agreement but that the vendors were at liberty to call off the transaction any time during the following seven days, and questioned the presence of cl. 15. He states in his affidavit that Mr. Bhojwani assured him that the defendants regarded themselves as equally bound by the agreement and that the clause had been inserted in order to safeguard the defendants should the other party take legal action to stop the sale to him, a matter the plaintiff did not understand because there had been no concluded contract with the other side and therefore the defendants were free to contract with another party. Mr. Bhojwani, he states, "assured me, however, that the defendants regarded themselves as unconditionally bound by the agreement and that cl. 15 would be invoked only if the other party took legal action against the defendants."

The plaintiff did not insist on the deletion of the clause. Instead, in an attempt to safeguard his position, he suggested a clause entitling him to £100,000 damages were the defendants to renege on the transaction. This suggestion was refused and the plaintiff states that Mr. Bhojwani said such a requirement was quite academic because he was sure the defendants would complete the transaction on the due date. On the strength of the assurance referred to above, the plaintiff signed the agreement, which included cl. 15 as drafted by Mr. Isola.

I am not certain whether Mr. Bhojwani signed the agreement at the same time on behalf of the defendants. It seems not, despite the plaintiff's assertion at para. 17 of his affidavit. The document had to be sealed by the defendant companies and that was not possible because the defendants' company secretary was not then available. The photocopy exhibit GTM referred to in para. 17, as I understand the paragraph, is supposed to be a

photocopy of the photocopy given to the plaintiff by Mr. Isola and referred to in para. 20 of the plaintiff's affidavit. It is not. It is a photocopy of the agreement as finally executed by both parties. The photocopy of the document which was not sealed, *i.e.* the photocopy given by Mr. Albert Isola to the plaintiff, is not before me. The documents were retained by Mr. Isola for sealing by the defendants' secretary and were to have been sent to the plaintiff the following morning. Mr. Isola failed to do so and on April 24th, 1997 after 5.00 p.m., the plaintiff had his copy of the contract collected from Mr. Isola's office. That copy was accompanied by a compliments slip which in Mr. Isola's handwriting bore the message: "I think the problems are now over." The companies' seals were affixed in the presence of K. Bhojwani, who I assume to be the same Mr. Bhojwani who negotiated with the plaintiff and Fiduciary Management Ltd., presumably the companies' secretaries.

The next event was a question on April 25th, 1997 by Mr. Bhojwani to the plaintiff whether the plaintiff would release the defendants on payment of 50% of £50,000. The plaintiff refused and this was followed on April 28th, 1997 by Mr. Bhojwani's telephoning him to say that he, Mr. Bhojwani, had to "walk out of the deal." As a result, the plaintiff consulted his lawyer, Mr. Budhrani, who wrote to Mr. Chanrai as follows:

> "I have been consulted by Mr. Gul Mahtani in connection with his agreement on April 22nd, 1997 to purchase the above-mentioned property from Arrow Securities Ltd. and Chanrai (Gibraltar) Ltd. on the terms and conditions set out in the said agreement.
>
> He has been given to understand by those entrusted by yourself with responsibility for this transaction that the vendors might not proceed with the sale after all and he is very concerned that the agreement entered into by the parties might not be worth the paper it is written upon.
>
> I have tried to reassure him that it is inconceivable that the vendors would withdraw from this transaction in the absence of very compelling reasons and I would appreciate your confirmation by return that Mr. Mahtani need not be unduly troubled by the prospect of his purchase being aborted.
>
> I look forward to hearing from you at your earliest convenience."

Instead of receiving the reassurance, an hour later the plaintiff received a letter from Messrs. Isola & Isola terminating the agreement pursuant to cl. 15 and returning his deposit.

The events set out above seem to me to be common ground except that there are different emphases, as is to be expected. The main discrepancy, which I do not believe to be relevant, is that Mr. Bhojwani says when the arrangement to meet on April 22nd was made, the plaintiff already knew that the other party was his own brother, Sunder. Any matter of credibility which may arise from this is a matter for the trial and not now.

As to cl. 15, Mr. Bhojwani says:

> "When going through the draft contract, which the plaintiff and I both insisted should be prepared there and then, as we did not want to leave the offices without that contract signed and the deposit paid, the contents of the contract were very clearly explained to us by Mr. Albert Isola. Clause 15 was particularly explained to us."

He says the plaintiff clearly understood the terms of the clause. In effect, he states that no warranty was given and contrary to what the plaintiff alleges, he says: "I informed him [the plaintiff] that I could only see the defendant pulling out of the transaction if they were offered a substantial amount of money for the property." He denies that the reason for the insertion of the clause was to safeguard the defendants should the former intended purchaser take legal action to stop the sale to the plaintiff, but he does accept that that was one of the matters which could cause a problem and was discussed and he agrees with Mr. Isola's reasoning and did agree at the time with it. He states:

> "The plaintiff was therefore in no doubt of the number of possible situations which could prompt the defendants to exercise this right to withdraw from the agreement as provided for in cl. 15. It was never a condition that this clause in the agreement would only be invoked if the other party took legal action against the defendant. Had that been the intention, it would clearly have been stated in the agreement."

Mr. Isola's affidavit supports Mr. Bhojwani. Paragraph 10 of his affidavit states:

> "There was no condition expressed or implied that cl. 15 would be invoked only if the other purchaser took legal action. The clause was totally unconditional and was amended to enable our clients to have a period of reflection and to make a decision within a fixed period of time and take into consideration all the factors surrounding the sale of the property, one of which was certainly the possibility of legal action from the other purchaser."

After the deposit was returned, the plaintiff telephoned Mr. Albert Isola, stating that he would match his brother's offer and more and Mr. Isola says that further negotiations were refused. Mr. Bhojwani adds that he had concluded an agreement with Sunder Mahtani on April 28th, 1997, in which there was no equivalent to cl. 15, so the defendants were legally bound to complete it.

There is no doubt that if a collateral warranty exists, notwithstanding the absence of writing, this court may give effect to it. If there is such a warranty, there is no need to seek rectification of the agreement as Mr. Isola suggests. For rectification there has to be a common intention to insert such a provision in this lease and it seems clear from the evidence now before me that there was no such intention. But if a warranty exists, it is incorporated into the contract in the sense that the contract is treated as a whole together with the warranty. In my opinion, Mr. Budhrani is

right on this and Mr. Isola's objection to the application on this ground is rejected.

However, the plaintiff faces a formidable task, for to quote Holroyd Pearce, L.J. in *Earl* v. *Hector Whaling Ltd.* (1) ([1961] 1 Lloyd's Rep. at 468):

> ". . . [W]hen parties put their hands to an agreement, it will take convincing evidence to show that the agreement does not contain the intended bargain. For in such a case there must be enough weight in the evidence to outweigh the inherent probability that they meant what they wrote. It is a question of fact and degree what weight of evidence is needed to overcome that inherent probability, and to establish that, contrary to it, the parties did not mean what they wrote. Such evidence would normally have to be very strong. It cannot be regarded as sufficient merely because it would, on a balance of probabilities, establish an oral agreement. It must be strong enough to overcome the fact that the parties have signed a different agreement."

The position here is that this is not the trial of the action but an interlocutory application for an injunction and while for the moment I do not have to decide on the evidence, I have to take a view on the affidavits before me and the submissions of counsel.

Before going further, I should dispose of the submission by Mr. Isola that I should not grant an injunction at this stage because the plaintiff has not been candid in his application to the court. In the plaintiff's affidavit, the plaintiff alleges that damages will not be adequate compensation as an alternative to specific performance, because the premises in this matter are freehold with vacant possession for retail and premises of this sort are not readily available in Gibraltar. Well, says Mr. Isola, that is not so to the plaintiff's knowledge because he is in the process of buying such premises in Main Street, practically opposite to his present trading outlet. That was not disclosed to the court and that puts him out of court at least in respect of his application for an injunction.

Mr. Budhrani replies that the plaintiff must disclose all material factors and this is not one such factor. True, these premises are in Main Street, but they are in an area of Main Street which is not relevant to these proceedings, which are concerned with premises in a prime area of Main Street. Furthermore, he argues, these premises are opposite his present retail shop and what good will it do him to compete against himself? He wants the premises as an investment and to let. I have given this submission anxious thought and come to the conclusion that in the circumstances, there is no materiality in the non-disclosure.

The view I have taken is that there is an issue to be tried. It is true that the preponderance of the evidence as articulated in the affidavits appears to favour the defendants, but that will always be the case where an oral agreement is set against the clear language of a written agreement. The

matter revolves in this case around the credibility of the witnesses and for that one has to wait for the trial. One of the witnesses is an officer of this court but not for that reason may his evidence not be tested; Mr. Budhrani suggests that there are inconsistencies between Mr. Isola's affidavit and that of Mr. Bhojwani which point to the need of clarification by cross-examination.

I am also concerned that in this case the plaintiff did not have the advantage of legal advice. Mr. Isola acted very properly and prudently in protection of his client's interest and since it was his view (as I understand it) that it was the plaintiff who wanted the transaction to be concluded quickly, he can hardly be criticized if he did not mind the plaintiff's business for him. But the plaintiff had gone into the meeting with Mr. Albert Isola to complete what he had agreed with Mr. Bhojwani—what he, the plaintiff, thought was an unconditional agreement and, say what he might about that in his affidavit, that, in my view, is exactly what Mr. Bhojwani thought at the time. The plaintiff had wanted to see his lawyer and Mr. Bhojwani knew that. Yet because Mr. Bhojwani knew that there existed a document, an agreement with another party which could be tailored rapidly to suit this new party, he persuaded the plaintiff to come to the offices of Messrs. Isola & Isola to sign the deal. And Mr. Bhojwani knew that the terms of that agreement (which it bears repeating was to be signed that very day) did not contain the equivalent of cl. 15: that swam into his ken only when Mr. Isola thought about it. And Mr. Bhojwani also wanted to close the deal quickly, so is it surprising that he did not call attention to that omission? Perhaps he did not have to: of course the plaintiff is an experienced businessman who could look after himself—after all, he did pick up the relevance of cl. 15—and while it can be said, as Mr. Isola did, that the plaintiff might have attempted to seek his lawyer's advice in the interval between the meeting at the Elliot Hotel and the meeting at Isola & Isola, at that stage, it seems to me, there was no need for it.

In his affidavit, Mr. Bhojwani says: "At this stage I would not agree with the plaintiff that an 'unconditional agreement' had been concluded, as we had not even started going through the purchase contract and clearly until such time as the purchase contract was agreed, signed and a deposit paid, there was no agreement in place." All that is very true, but it sounds very hollow to me at this stage. The warranty will eventually have to be proved by evidence and on this aspect, it appears to me that there were occasions when Mr. Isola was not present together with the plaintiff and Mr. Bhojwani and of course the detail of all this is ideally a matter for trial. Lastly, in very general terms, as observed by Mr. Budhrani, when the plaintiff has gazumped his brother, is he likely to have left himself open to the same process?

So I think there is a serious issue to be tried and the next question is whether damages would not be an adequate remedy. If a warranty is held

to have been given, then the plaintiff would be hard done by if, having entered into a binding agreement for the purchase of a freehold with vacant possession, that should not be ensured for him by the court. Mr. Budhrani is at pains to point out that the fruits of this transaction will be difficult to replace; it is in the circumstances of Gibraltar of special significance, so for the plaintiff damages are clearly not an adequate remedy. 5

Mr. Isola submits that the plaintiff can be adequately compensated in damages. If the defendants were to have backed off, the plaintiff was prepared to take £100,000 damages; that was his own suggestion to be incorporated in the agreement. If he really had wanted to protect himself, 10 he would have insisted on the warranty to be incorporated into cl. 15. Mr. Isola submits further that at the time of the breach, the plaintiff did not act as a person whose legal rights had been infringed. He attempted to increase his bid and offered more. As well as going towards his credibility, that goes to damages. The plaintiff is not so much interested in 15 trading as in making money; the plaintiff suggests that Mr. Bhojwani offered him 50% of £50,000: apart from the fact that it is incredible that Mr. Bhojwani would have made that offer, why should he? It reflects a greedy attitude on the part of the plaintiff and it is not true. The purchase of freehold property at 268 Main Street is for investment. All this, 20 suggests Mr. Isola, goes to show that damages are adequate compensation.

In so far as the balance of convenience is concerned, I do not think Mr. Isola is right when he seeks to persuade me that the balance of convenience entails a consideration of the other party's involvement and 25 that the defendant will be in breach of their agreement. If they lose this action, the defendants will have to compensate the plaintiff, for they have entered into a contract with Mr. Sunder Mahtani which they should not have.

Considering all the factors set out above and placing them in the 30 context of the plaintiff's burden of proof as adumbrated by Holroyd Pearce, L.J., I am of the view that the balance of justice requires an injunction to be granted. This is a case which can only be resolved by a trial and the function of the court in relation to the grant or refusal of interlocutory injunctions in this sort of case is to hold the balance as justly 35 as possible. If the warranty exists, the plaintiff should have his freehold: if it is held that an injunction should not have been granted, the defendants can be amply compensated in damages (as can, incidentally, the third parties). I have heard no suggestion that the plaintiff will not be able to meet all these damages and counsel has given an undertaking as to 40 damages. There should be a speedy trial.

Injunction granted.