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IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 785/2002

BETWEEN:

MICRO INDUSTRIES INC.

23-05-03

Plaintiffs

AND:

CONDOCO GRAND CAYMAN RESORT LTD.

Defendants

APPEARANCES:

Counsel for the plaintiffs: Mr. Julian Malins, Q.C. & Mr. Kyle Broadhurst

Counsel for the defendants: Mr. Alberga, Q.C. & Mr. Anthony Mezies

HEARD: May 6, 2003

REASONS FOR JUDGMENT



Levers J.

I have before me two summonses. One in which the Plaintiff asks for injunctive relief, specific performance, damages in lieu of or in addition to specific performance and Interest. The other summonses brought by the Defendant asks this Honourable Court for the following Orders:

1. That the Plaintiff's Statement of Claim be struck out pursuant to the GCR O.18, rule 19 and/or under the inherent jurisdiction of the Court on the grounds that:
 - (1) it disclose no reasonable cause of action against the Defendant: and/or
 - (2) it is frivolous, or vexatious, and/or
 - (3) it is otherwise an abuse of the process of the Court, and

- (4) that the action against the Defendant be stayed or dismissed and judgment be entered for the Defendant; alternatively.
2. That pursuant to GCR Order 14, rule 12, the action against the Defendant be dismissed and judgment be entered for the Defendant on the grounds that the Plaintiff's claim has no prospect of success or that the Plaintiff has no prospect of recovering more than normal damages.
3. That the Plaintiff do pay the Defendant's costs of this action, the same to be taxed on such scale as the court shall direct, if not agreed.

It was agreed by both parties that the Defendant's summons should be heard first because if the Court ruled that the Writ was to be struck out then that would be the end of the matter.

A BRIEF HISTORY OF LITIGATION BETWEEN THE PARTIES

Both the Plaintiff and the Defendant have been in litigation over an agreement for sale whereby the Plaintiff agreed to purchase and the Defendant agreed to sell a condominium in a new prestigious Development on Seven Mile Beach, Grand Cayman (presently under construction). The matter was litigated in Grand Court number 721/02 and Civil Appeal No. 10/2002. The subject matter of the litigation and the subsequent appeal was to do with the square footage that the Purchaser contracted to buy and the Vendor had contracted to sell. The final outcome to

the litigation was that the Court of Appeal ordered specific performance of the contract in the following terms:

2. Pursuant to the written agreement and addenda dated the 7th February 2000 (and save to the extent of any variation thereof reasonable necessary to enable the Defendant to give effect to the following). The Defendant cause to be built and convey to the Plaintiff an apartment with approximately 5,490 square feet of livable area numbered 411 be contained in a building contracted on the North part of the land, described as Registration Section, West Bay Beach South, Block 12C Parcel 11 and 215. In consideration of a purchase price of US\$2,875,000.
3. There be liberty to apply to the Court below for such further or other direction as may be necessary.
4. The Appellant to pay costs of the Respondent here and below. The same to be taxed if not agreed.

That order is specific and deals with the specific performance of a contract for the purchase of an apartment no. 411 containing 5,490 square feet. In this application, Micro Industries Incorporated (the Plaintiff) contends that there is a further breach of the Agreement and alleges that by virtue of the Defendant (subsequent to the signing of the Agreement) obtaining planning permission to build 7 floors (originally the development was 5 floors) it is effectively selling it, the fourth floor of a seven storey building. As a result of the additional storeys,

The Plaintiff is no longer getting a “sub penthouse”. The Plaintiff’s contents that its original intention was to buy the fourth floor of a five storey building and therefore, the Defendant is in breach of his contract. The Court is now being moved for a further order for specific performance, injunctive relief and/or damages in lieu of specific performance. For purposes of this particular ruling and this application, the Defendant’s position is quite simply this that the Plaintiff is estopped from asking for specific performance of an agreement on which it has already got specific performance and that any order for specific performance made by this Court on this new application would place the Defendant in an impossible position to specifically perform the previous Order.

Mr. Alberga, Q.C submits that the issues raised are *res judicata* in the wider sense of the expression since the issues had been raised in the earlier proceeding and any issues raised could have been raised and should have been raised at the time of the order made by the Court of Appeal. Mr. Malins, Q.C. for the Plaintiff argues that it only applies if, in fact, the same issues were raised and that this Court can order specific performance of a contract twice as this application is based on the breach of a new condition under the agreement of sale. In this particular case the breach being the failure on the Defendant’s part to provide the fourth floor apartment of a fifth storey building as opposed to a fourth storey apartment of a seven storey building (in other words as he puts it the failure to provide a “sub-penthouse”.) I should mention that no where in the contract of sale are the words “sub penthouse” used. The apartment no. 411

was identified on a plan which shows it on the forth floor of a five storey structure, in the previous proceedings.

THE LAW

Issue estoppel may arise where one of the essential ingredients of a cause of action in the present proceedings was also an essential ingredient of one of the causes of action in previous proceedings between the parties and has already been decided upon between the parties in those previous proceedings. Whether the ingredient is the same in both actions, is the question that is not always easy to answer. Unlike causes of action estoppel issue of estoppel may be defeated where further material relevant to the correctness or incorrectness of the issue in question has become available after the earlier decision and could not have been adduced with reasonable diligence at their earlier hearing. It is the general principle of public policy that no one should be sued twice for one in the same matter. It is in the public interest that there should be an end to litigation and that multiplication of action should be avoided. The guiding principal was stated by Wigram VC in Henderson & Henderson [1843] in the following terms, at page 114-115:

“That where a given matter becomes the subject to litigation in, and of a adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under exceptional circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even

accident, omitted part of their case. The plea of *res judicata* applies, in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject litigation, and which the parties, exercising reasonable diligence, might have brought forward at this time.”

It is clear therefore that the rules covers not only matters already decided between the parties but also matters which might have been brought forward in the first action but were not.

As Lord Keith said in *Arnold and others v. National Westminster Bank Plc.* 2 A.C. [1991] at page 97:

“The basis of the *Henderson v Henderson* principle is the public policy of avoiding multiplicity of suits which imposes a duty on a litigant to bring forward before the Court for decision his whole case. It applies to cases where the issues or facts sought to be raised in the second proceedings are so clearly part of the subject matter of the earlier proceedings between the same parties and could so clearly have been raised but were not, that it would be an abuse of the process of the court for those matters to be raised in the later proceedings.”

In reviewing the principles to be applied, I bear in mind what Lord Upjohn said in *Carl-Zeiss-Stiftung v Rayner & Keeler Ltd.* (No 2) [1967] 1 AC at page 853:

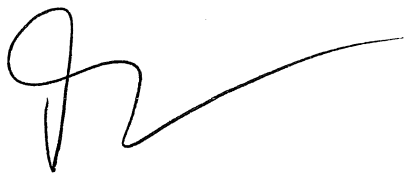
“All estoppels are not odious so as to work justice and not injustice and I think the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.”

In this particular case, the Plaintiffs' case is not identical but similar to that maintained in the previous proceedings, in that, he alleges a breach of another condition in the Agreement. The Plaintiff has asked for specific relief to order the Defendant to give the Plaintiff apartment 611 instead of apartment 411 and/or damages in lieu of specific performance.

The subject of the litigation in the second suit which is presently before me, is the same subject matter namely, the agreement to purchase. That therefore has been the subject of litigation in the construction of its terms specifically as to the square footage to be provided to the Defendant. The litigation in the first suit No. 721/02 was started and completed at first instance, in June 2002. The matter was appealed and the Plaintiff, Micro Industries Limited was, in fact, aware of the Defendant having obtained an amendment to the planning laws to ensure that its building was now to be seven storeys in height. At the time of the appeal in October 2002, the Plaintiff was aware that the Defendant intended to build up to seven stories. Specific performance and the resultant order could have been dealt with some specificity when the appeal was being heard. Although the considerations applicable to the determination of the issues in the present action are quite different in detail from those on which the Court was asked to pronounce in the earlier action, the Plaintiff could have asked in that action for an order detailing the square footage without identifying the apartment no. 411, as specified on the plan being noted on the order. This was even more important as he obviously had knowledge of the modification of the planning permission to seven storeys at the time of the order being drawn up in the Court of Appeal.

The relief sought by the Plaintiff in these proceedings if it were granted would it then make it impossible for the Defendant to perform the original order for specific performance? The Plaintiff submits the answer is "no" because the apartment no. 411 is purely a numerical description and by its inclusion in the order for specific performance by the Court of Appeal, it does not relieve the Defendant from its obligation to provide a "sub-penthouse apartment", namely an apartment just below the top floor. The Plaintiff was content at that time to specifically ask for apartment 411 which was designated by plan. The Plaintiff by its subsequent actions has urged and indeed, threatened the Defendant that he must act on the order for specific performance. It is my view that he is estopped from seeking specific performance of the same contract in the terms that the relief is now sought. I do not find that there are any special circumstances in this case to justify a departure from the usual rules and which merits the lifting of the estoppel. It is my view, therefore, that the Writ should be stuck out as an abuse of process. Costs to the Defendant, to be taxed, if not agreed.

Dated this 23rd day of May, 2003



P. Levers
Judge

