UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA S. ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendant. This Document Relates To: All Actions	Master File No. 09-cv-118 (VM)

Affidavit of Mark A C Diel

Tab 11

IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION

2000: No. 213

BETWEEN:

FREDERICK WARRINGTON YEARWOOD

Plaintiff

and

THOMAS MILES & COMPANY LTD

Defendant

Mr Pepin Aslett for the Plaintiff
Mr David Kessaram for the Defendant

JUDGMENT

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1. These proceedings arise out of a contract ("the Contract") dated 28 July 1999, for the sale of property situate at 45 Front Street in the City of Hamilton ("the Property"), pursuant to which the Defendant ("the Vendor") agreed to sell 100% of its issued shares ("the Shares") and the Property to the Plaintiff ("the Purchaser") for the sum of $5,500,000.

2. Proceedings were commenced by Writ on 6 July 2000, and the Statement of Claim was dated 1 August 2000. This prompted an immediate application for the Statement of Claim to be struck out, pursuant to Order 18, rule 19 of the Rules of the Supreme Court 1985, and alternatively under the inherent jurisdiction of the Court. The application was made on the usual grounds, that the Statement of Claim:-

   (i) discloses no reasonable cause of action; and/or
   (ii) is scandalous, frivolous or vexatious; and/or
   (iii) may prejudice, embarrass or delay the fair trial of the action; and/or
   (iv) is an abuse of the process of this Honourable Court.

3. In support of the application, Mr Kessaram filed an affidavit on 7 November 2000, exhibiting material correspondence. Mr Aslett then swore an affidavit on 24 November 2000, exhibiting further correspondence and seeking information as to the basis upon

which the application to strike out was made. In the event, when the matter was argued before me, I was handed an agreed bundle of documents which included all material correspondence exhibited in those affidavits.

4. After Mr Kessaram had completed his submissions, Mr Aslett submitted that because the Vendor's application would involve a prolonged and serious argument and require in depth analysis of various areas of the law, I should decline to proceed. He relied upon the well known passage in the speech of Lord Templeman in *Williams & Humbert v W&H Trademarks* [1986] 1 AC 368, at 435/6. I would have thought that such an application would best have been made at the outset, but in any event I declined to halt the proceedings because

   (i) it seemed to me that the time estimate for the hearing of the application (half a day) did not involve a breach of Lord Templeman's stricture, in terms of hearing prolonged and serious argument,

   (ii) the material documents were relatively few in number, and the issues between the parties depended on the construction of the documents, without the need for any findings of fact, and

   (iii) the legal issues appeared not to be unduly complex.

   In short, this seemed a matter where it was appropriate to consider the merits of the Vendor's application, and hear the Purchaser in reply.

5. Let me now turn to set out the relevant facts. At the material time, the Purchaser was represented by the firm of Trott & Duncan ("T&D") and the Vendor by Cox Hallett Wilkinson ("CHW"). On 10 May 1999, T&D sent to CHW a cheque in the sum of $540,000 representing the deposit for the purchase of the Property. The payment of the deposit was said to be subject to the signing of a formal agreement and receipt of various documents. On 2 June 1999 Mr William Cox of CHW wrote to T&D, referring to a letter of 27 May 1999 which had enclosed a draft sales agreement, and suggesting various changes to that draft. Mr Cox then went on to advise that when Bermuda Fire & Marine Insurance Co Ltd had gone into liquidation in 1993 the liquidators had issued a Writ against all the shareholders in BF&M Ltd. which had included the Vendor in respect of its ownership of 4,500 shares. Mr Cox advised that these shares had been sold before the Writ had been served, and that he did not anticipate that any problem would arise out of the proceedings which were then before the Supreme Court. He continued... "In the unlikely event that any claim should arise against Thomas Miles & Co Ltd out of these proceedings Mr Mayor (the majority shareholder of the Vendor) on behalf of himself and the other shareholders undertakes to indemnify your client."

6. There was apparently a response to that letter which is not before me, and on 6 June 1999 CHW indicated to T&D that they were awaiting receipt of a revised form of agreement for execution by their clients. This revised document was produced on 13 July 1999, at which time it had been executed by T&D's client, the Purchaser. T&D noted that the contract provided for a 90 day completion, but said that their client anticipated completion earlier. They continued... "On a separate note, our client will require an undertaking from Mr Mayor on behalf of himself and the other shareholders to indemnify our client in relation to the Bermuda Fire & Marine Insurance Co Ltd matter."

7. On 2 August 1999, CHW sent to T&D one executed original of the contract, which had by then been dated 28 July 1999. They noted that the completion date in clause 3.1 remained blank and suggested 27 August 1999 as an appropriate date for completion. No reference was made in this letter to the undertaking which T&D had requested in their letter of 13 July. In due course, coincidentally upon the date suggested for completion, 27 August 1999, T&D followed up with CHW, indicating that they were still awaiting a response with regard to the indemnity, and saying that if they had not heard that a full indemnity was forthcoming within fourteen days, their client would have no alternative but to withdraw. No letter in reply was sent within that period, and on 13 September 1999, T&D wrote again to CHW, noting that they had received no response, indicating that their client had withdrawn his offer, and asking for the return of $500,000 plus interest, although presumably this should have been a reference to the full deposit of $540,000. A similar demand was made on 20 September 1999, and on 23 September 1999 Mr Ernest Morrison of CHW responded to T&D, setting out some of the history, maintaining that the Purchaser was bound to complete and that T&D were not entitled to impose any subsequent conditions after the execution of the Contract, particularly "with respect to the proposed indemnity, which is manifestly a completion item". Subsequent correspondence between the two firms of attorneys sought to justify the positions being taken on either side, and perhaps the only other fact of relevance is that on 20 April 2000, CHW sent to the Purchaser's present attorneys, King & Associates, a letter signed by Mr Mayor, confirming that Mr Cox had been authorised to give the undertaking to indemnify contained in the letter of 2 June 1999 ("the Cox Letter").

8. I now turn to the parties' submissions. Mr Kessaram submitted, first, that the existence of the Bermuda Fire proceedings and consequent risk of loss to the Purchaser did not constitute either a defect in title or an incumbrance; secondly, if, contrary to his first submission, the Bermuda Fire proceedings did constitute a defect in title, such defect had been cured by the indemnity which had been given in the Cox Letter; thirdly, he submitted that if the indemnity contained in the Cox Letter did not cure any defect in title, the Vendor had until completion to provide the necessary indemnity. The CHW letter of 23 September 1999 refers to completion having been fixed for 25 October 1999, whereas paragraph 4 of the Statement of Claim gives the date of completion as 26 October 1999. The difference is immaterial since the Purchaser had "withdrawn his

offer" on 13 September 1999. Mr Kessaram also referred to the Purchaser not having been entitled to make time of the essence by giving fourteen days' notice, nor to treat the agreement as repudiated at the expiration of that period, and maintains that in the circumstances, the Vendor was entitled to forfeit the deposit.

9. Mr Kessaram maintains that if he succeeds in establishing that the Purchaser's case will fail in any one of these three areas, then the Statement of Claim should be struck out, and I will therefore look at them in turn.

Defect in Title

10. Mr Kessaram starts with the proposition that this is a term of art in conveyancing parlance, and means a title free from incumbrances. He maintains that the term "incumbrances" means subsisting third party rights, and says that legal proceedings in which a claim may have been made but not established cannot constitute an incumbrance, and accordingly there was no defect in title.

11. In reply, Mr Aslett cited Halsbury's Laws, and the proposition that any fact calculated to prevent the purchaser obtaining such a title to the property as he was led to expect constitutes a defect of title. He argued that actual legal proceedings are an incumbrance since they could lead to a financial liability which would burden the purchaser. The parties argued whether the representation as to title was a warranty or a condition, and whether the Vendor was required to have good title (ie without defect or incumbrance) at contract or upon completion. These arguments do not seem to me to be relevant. Clause 6.1.2 of the Contract provided that the Vendor then had and would at closing have a good and marketable title to the Property. The existence of the Bermuda Fire proceedings clearly did not constitute any defect in title or encumbrance in respect of the Property. On the other hand, with reference to the Shares, one can clearly see that if the Bermuda Fire liquidators were to succeed against the BF&M shareholders, including the Vendor, the value of the Shares would diminish by the amount of the judgment debt. But that does not, it seems to me, constitute a defect in title in respect of the Shares, which could clearly have been transferred on execution of the necessary transfer documents.

12. To consider matters properly, one must have regard to the way the Purchaser has pleaded his case, and in this regard I set out below the relevant paragraphs of the Statement of Claim:-

> "5. It was an express term of the agreement that the Defendant had good title to the property and shares and that both were free from encumbrances.
>
> "6. It was an express term of the agreement that the Defendant would convey the property and shares with such good title.

"7. It was represented to the Plaintiff's attorneys in writing and by letter dated 2 June 1999 from Mr William Cox, that there was a defect in title due to the fact that the Defendant company was a defendant in the Bermuda Fire and Marine litigation (BFMIC Limited (in liquidation) and Others v BF&M Limited and Others, 1995 Nos. 7, 8 and 393) ("the defect in title").

"8. It was further represented by Mr Cox that an indemnity ("the indemnity") would be provided by a Mr Mayor, the majority shareholder of the Defendant company in respect of the defect of title.

"9. It was a condition precedent to the agreement that prior to completing the said agreement, the Defendant would make good the defect in title by providing to the Plaintiff or the Plaintiff's attorneys the said indemnity.

"11. The Defendant signed and sealed the agreement on 28 July 1999, thereby representing and warranting that the Defendant had good title in the shares and property. The Defendant failed to provide the indemnity or any indemnity at this time.

"13. The Defendant failed to provide and/or refused to provide the indemnity or any indemnity, such conduct leading to an unequivocal repudiation of the agreement as there would be a continuing defect in title and a total failure of consideration vis a vis title."

13. Two preliminary points arise from these paragraphs. First, it is patently not true to say, as pleaded in paragraph 7, that the Cox Letter represented that there was a defect in title. The words "defect in title" simply do not appear. Secondly, it is to be noted that in paragraph 9 it is the Purchaser's case that the indemnity should be provided prior to completion. Hence even on the Purchaser's case, the indemnity could be given immediately before completion.

14. I have already indicated that I cannot see how the existence of the Bermuda Fire litigation, something totally unrelated to the Property, could constitute a defect in title in relation to it, and neither do I believe that the existence of the Bermuda Fire litigation could constitute a defect in title so far as the Shares were concerned. That this litigation might affect the value of the Shares, and indeed that a purchaser with knowledge of the litigation would likely seek an indemnity to protect himself against any fall in value, I can understand, but it does not seem to me to be right to characterise the existence of the Bermuda Fire litigation as a defect in title either in respect of the Property or the Shares.

15. I would comment here that I did not find the authorities of *Cato v Thompson* (1882) 9 QBD 616, or *Manning v Turner* [1957] 1 WLR 91 of assistance. The former case was concerned with restrictive covenants which clearly ran with the land, and the latter with a potential liability to estate duty in the event that the donor of a gift survived a given period, which liability similarly would attach to the underlying property.

16. I now turn to Mr Kessaram's assertion that success on any one of his three principal objections is fatal to the Purchaser's proceedings. Certainly, the view I take that the Bermuda Fire litigation was not a defect in title would be fatal to the case which the Purchaser makes based on such a defect, and would no doubt lead to the deletion of most of the paragraphs which I have referred to above. However, I think that paragraph 9 of the Statement of Claim would survive, notwithstanding the reference in it to making good the defect in title. I regard the reference to "defect in title" as incidental to the case there being made, which is that it was a condition precedent to the Purchaser's execution of the Contract that the Vendor's attorneys would provide an indemnity prior to completion. I therefore continue to consider the position in regard to the indemnity.

The Indemnity

17. Mr Kessaram's first point was that the Cox Letter itself constituted an indemnity, and during the course of argument I indicated to Mr Aslett that that had been the way that I had read it. Where a person undertakes to indemnify another in the event that a claim should arise from a particular set of circumstances, he gives a representation which will be enforceable if the person to whom it is given (the promisee) relies upon it to his detriment. In the context of this case, one would expect the promisee to maintain that he had entered into the contract to purchase in reliance upon the promisor's promise to indemnify him, and he would have acted to his detriment had the indemnity not operated to protect him from any loss.

18. However, in this case, the Purchaser clearly did not enter into the contract in reliance upon the promise to indemnify. Instead, apparently not regarding the promise made in the Cox Letter as an agreement to indemnify, he sought an undertaking to indemnify as if it had not been given, and proceeded to enter into the Contract. First, I should make it clear that I think that an undertaking had been given; "undertake" in this context involves the taking on of the obligation (see the New Shorter Oxford English Dictionary). Having said that, I think there is a distinction to be drawn between the undertaking which the Purchaser sought in his attorney's letter of 13 July, and that which had been given by Mr Cox in his letter of 2 June. In the latter, it was Mr Cox who gave the undertaking on Mr Mayor's behalf, whereas in the former, the Purchaser required an undertaking from Mr Mayor on behalf of himself and the other shareholders in the Vendor company. The distinction may be a fine one, but given the stringent test which the Vendor has to pass

for the purpose of this application, I am not prepared to treat the undertaking given by Mr Cox as identical to that sought by the Purchaser's attorneys on 13 July 1999.

19. At the same time, I cannot lose sight of the fact that with their letter of 13 July 1999, T&D enclosed the Contract in duplicate, executed by their client. When CHW returned the executed agreement on 2 August 1999, there was a final binding contract for the sale of the Property and the Shares, which contained no reference to the grant of an indemnity. The requirement of an indemnity arose only from the 13 July 1999 letter, and I am quite clear that the effect of that letter was no more than to require an undertaking from Mr Mayor on or before completion. Accordingly, T&D's letters of 27 August and 20 September 1999 are extraordinary. At a time when their client, the Purchaser, had entered into a binding contract for the purchase of the Property and the Shares, they indicated that their client would "withdraw" if they had not heard within fourteen days that a full indemnity was to be forthcoming. Once that fourteen day period had expired, T&D indicated that the Purchaser "has withdrawn his offer".

20. It is trite law that an offer cannot be withdrawn once it has been accepted, and of course by this time the Purchaser's offer had been accepted, and the Contract executed by both parties. Hence there could not possibly be any reliance upon the Contract to justify the Purchaser's withdrawal. If and insofar as the Purchaser maintained that the indemnity given by Mr Cox on behalf of Mr Mayor did not meet his needs, and that his execution of the Contract was subject to delivery of the indemnity as sought in the 13 July 1999 letter, then his remedy was not to complete until such time as an indemnity was given by Mr Mayor himself. In his submissions, Mr Aslett maintained that the Purchaser was entitled to make time of the essence in regard to the indemnity. Time can only be made of the essence where it is open to a particular party to call for a particular thing – typically completion, where this has been delayed – and he does so by making time of the essence. One cannot make time of the essence to demand immediate compliance with an obligation which has not yet arisen, and I have already indicated that the obligation to provide the indemnity is one which, on the Purchaser's pleaded case, was only due "prior to completing" and in my view should properly have been due either on or before completion. On no basis can the indemnity be said to have been due on either 27 August or 13 September, and it follows that I reject the Purchaser's contention that he was entitled to make time of the essence in regard to delivery of the indemnity, or that he was entitled on any other basis to delivery of the indemnity on those dates.

21. It follows that in my view there is no legal justification for the Purchaser's withdrawal from the Contract.

22. These proceedings do of course seek the return of the deposit paid by the Purchaser, and the Contract is silent as to its return, simply stating in clause 2.1 that CHW should hold the deposit as stake holder until completion. In the absence of provisions in the Contract

governing the return of the deposit, a deposit will be taken to be required as security for the completion of the contract by the payer, and will be forfeited to the other party if the payer fails to perform his side of the contract – see Chitty on Contracts, 27th Edition, paragraph 29-041. The Purchaser's purported withdrawal clearly fits within this category, and accordingly I can see no basis upon which the Purchaser is now entitled to the return of the deposit.

23. It is now well settled that a pleading should be struck out only where the pleaded case is "obviously unsustainable", "unarguable", "hopeless", "one which cannot succeed", or other language to this effect. Before me both parties accepted the "plain and obvious" test, which comes from the judgment of Lord Pearson in *Drummond-Jackson v British Medical Association*, [1970] 1 WLR 688 at 696... "the order for striking out should only be made if it becomes plain and obvious that the claim ... cannot succeed". I take the view that it is indeed plain and obvious that this claim cannot succeed at trial, and that accordingly the Vendor is entitled to the relief which it seeks. I therefore make an order striking out the Statement of Claim, as sought by the Vendor's Summons.

24. On the issue of costs, counsel agreed that it was appropriate for me to circulate this judgment without requiring any further attendance, and that in the judgment I should deal with the issue of costs on a nisi basis. I would therefore make an order nisi in respect of costs that the Vendor should have its costs of this application, with liberty to the Purchaser to apply to vary that order within 28 days.

Dated the 9th day of March, 2001.

Geoffrey R. Bell

GEOFFREY R BELL
ACTING PUISNE JUDGE