

JERSEY / JUDGMENT

Cornish and Cornish v Brelade Bay Limited [2018] JRC 153 (28 August 2018)

[2018] JRC 153

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judgment

the bailiff: 1. This is an application by the Respondent for lifting the caveat obtained by Advocate Santos-Costa on behalf of the Applicants. The circumstances in which the caveat was lodged are as follows. 2. On 1 st May, 2018, Advocate Santos-Costa appeared before me in Chambers seeking permission to lodge a caveat on behalf of the Applicants in relation to all the real estate in the Island of the Respondent. I granted that application but fixed 15 th May, to hear any application to set the caveat aside. The parties agreed to defer the hearing until 5 th June, when the application to set the caveat aside was made. 3. It is right to record that by a draft Order of Justice dated 4 th June, the Applicants/Plaintiffs claim a freezing order against the Respondent/Defendant, a disclosure order, damages, interest and costs. That Order of Justice has not been signed by the Bailiff and accordingly the claims for a freezing order and disclosure order would have to be determined on notice to the Defendant in the usual way. It is unclear whether the proceedings have yet been served in accordance with the draft. 4. The basis for the Applicants' claims arises in this way. Three houses and associated communal access ways, landscaping and services have been constructed and installed at a development site at ("the Development Site"). The Development Site is owned by the Respondent by virtue of its contract of purchase dated 29 th July, 2005. By an agreement dated 19 th December, 2014, entered into between the Applicants, the Respondent and Trinity Joinery (Jersey) (2005) Limited ("the Contractor"), subsequently varied by an agreement dated 4 th October, 2016, (and collectively the agreement and variation are referred to as "the Agreement") the Applicants purchased one of the houses at the Development Site namely House No. 1. The purchase price including fitting out was £11,353,586.25. The other two properties at the Development Site, namely House No. 2 and House No. 3 remain in the ownership of the Respondent. 5. The Agreement was not only an agreement for the sale of the freehold of House No. 1 but also a contract by which the Respondent agreed to procure some building and fitting out works which were to be undertaken by the Contractor. It is unclear from the Order of Justice whether the Applicants allege that there was any obligation owed to them by the Contractor under the building contract, which, in the Agreement is described as a building contract between the vendor (the Respondent) and the Contractor. It is clear that there is therefore scope for argument as to the extent to which there is a duty owed by the Contractor to the Applicants, and we have not been addressed on that in any detail. By clause 9.3 of the

Agreement, the Respondent has accepted responsibility for the performance of the building works and an obligation "to enforce the terms of the Building Contract against the Contractor and procure that the Contractor shall carry out and complete the Works and the Development Infrastructure ... in a good and workmanlike manner and time efficient manner and in accordance with good building practice" amongst other obligations. 6. The Contractor commenced work but, following complaints made by the Applicants in January 2016 as to the standard of work which had been undertaken, the Respondent removed the Contractor from the site at House No. 1 in February 2016 and thereafter removed the Contractor from the Development Site as a whole in March 2016. On 11 th April, 2016 the Respondent appointed Camerons Limited ("Camerons") as contractor with responsibility for management of all the outstanding completion and remedial works. It is unclear whether Camerons is still retained by the Respondent in relation to the building works required at the Development Site. 7. The Agreement entered into in 2014 had a target completion date for the building works of 31 st October 2015. The Applicants assert that House No. 1 is still incapable of being enjoyed as a home because of incomplete works and because of remedial works that have proved to be necessary. It is said that there is still an extensive snagging list of items to be completed, but more importantly, that there has been a significant deluge of water ingress on three occasions since December 2017. The Applicants claim that the water ingress persists and neither the Respondent nor anyone acting on its behalf or under its instruction appears to be able to remedy the problem. The Applicants assert that the communal areas have not been adequately completed, that a retaining wall which was constructed to provide privacy between House No. 1 and the adjacent house at a cost of £250,000 to the Applicants had not achieved that objective and in any event the wall may need structural strengthening. 8. The Applicants have appointed independent chartered architects to provide a report on the defects at House No. 1, and a preliminary report has been so provided. As a result of the report received, the Applicants claim against the Respondent for breach of the Agreement and/or statutory duty under the Supply of Goods and Services (Jersey) Law 2009 . 9. The current estimate of the cost of the works - both investigative and remedial is some £1,730,600 excluding GST. But it is said by the Applicants that the evidence which they have suggests that the total cost of the works will be subject to ongoing review and the present estimate may need to be amended following further investigation. 10. The date having been fixed, the parties appeared before us although Advocate Garrood had filed no summons to have the caveat set aside. He undertook to file with the Greffier such a summons paying the appropriate stamp fee. In the skeleton argument filed in support of his application, Mr Garrood indicated that the broad chronology set out in the affidavit of Mr Cornish was accepted, but he contended that the development of House No. 1 was 95% complete with some identified ongoing issues which the Respondent was seeking to correct. In particular, he noted in relation to the factual chronology that the development of House No. 1 was certified as being practically complete in July 2017 and works continued until May 2018 when Camerons was ordered off site by the Applicants. Immediately before the works had stopped, he said that the Applicants had identified a snagging list, and that the agreement provided for a twelve month snagging period which did not in fact expire until July 2018. It was noted that the Applicants had already received £300,000 by way of liquidated damages and that the Applicants were indebted to the Respondent

in the sum of approximately £300,000 albeit an invoice for that final payment had not as at that date been tendered. 11. The application to discharge the caveat was based upon the following submissions:- (i) The Applicants had not made full and frank disclosure of all matters which might militate against acceding to the application. (ii) The application for a caveat was premature, unnecessary and disproportionate. (iii) The balance of convenience lay in discharging the caveat. 12. In making these submissions, it was accepted for the purposes of the argument before us, that the Respondent was liable for defaults of the Contractor. The Respondent at present does not distinguish between the Contractor's liability and the vendor's liability. This was a helpful approach to take and we have proceeded accordingly. 13. Although the skeleton argument referred to liquidated damages for late completion of £300,000, in fact the amount paid to the Applicants was said to be £240,000. It is accepted that there was some water ingress, but Advocate Garrood contended that it was on the way to being remedied when Camerons was sent off site by the Applicants. He agreed that the Respondent was a special purpose vehicle incorporated for the sole purpose of developing the property and selling on the three houses constructed. The Respondent did intend to dispose of the remaining two houses at the Development Site, but any immediate disposal was not contemplated. There was outstanding work to complete on the two other properties, and on instructions he told us that his client wished to borrow against the property to complete that work. 14. We were informed by Advocate Garrood that there is a latent defects insurance policy as well as the snagging provision which meant that the Respondent had until 17 th July, 2018 to complete the uncompleted works on that list. Advocate Garrood submitted that these provisions should affect the extent of the security which the Applicants could reasonably require. 15. He submitted that there had been no prior notification of a problem before the caveat was lodged. He considered the balance of the Development Site was worth £14 million, but he accepted there was no evidence of this before the Court. He also pointed out, however, that there was no evidence of any intention to avoid payment by the Respondent of any sums due and he relied on the affidavit of Mr Stephen Marie, the managing director of Comprop (CI) Limited, an associated company of the Respondent, who had been authorised to make the affidavit in support of the Respondent's application to lift the caveat. Mr Marie emphasised that Brelade Bay had not at any time acted so as to avoid or attempt to reduce its responsibilities in relation to the property of the Development Site in general, and, until Camerons was required to leave the site by the Applicants, had taken steps to ensure the work contractually undertaken to be completed was in fact completed. 16. Advocate Santos-Costa submitted that the building issues around the development of House No. 1 were far more substantial than was being said by the Respondent. He could not identify what the costs of the remedial work would be but the preliminary indications were of a very substantial sum of money indeed. He submitted that the latent defects insurance policy was no comfort at all because the biggest cost which the Applicants faced lay in the waterproofing of the building and there was an exemption under the insurance policy which excluded any claim for that work

- although that claim was not abandoned as against the insurance company, he feared that that might be the position. He submitted that despite the caveat having been lodged, no evidence of any financial hardship had been submitted by the Respondent, and therefore

the caveat should remain in place. 17. As far as the Applicants were concerned, he considered that it was a question of protection pending the hearing of the case which they had brought. He agreed that on the provision of adequate financial information it would be possible to agree terms on which any proceeds of sale of the remaining properties at the Development Site might be dealt with, and he confirmed his clients had no intention of stifling the work of the Respondent or preventing it from doing the outstanding things it needed to do to complete its development. The law 18. We were referred to three decisions of this Court. The first is *Goldtron Limited v Most Investment Limited*

[2002] JLR 424 . This was not a case involving a caveat but one involving the discharge of a Mareva injunction, which is thus of course very analogous to the summons to discharge a caveat. In this case, the plaintiff sought to enforce an arbitration award and obtained a Mareva injunction freezing assets in Jersey up to a value to US\$10 million. Not relevant to the present proceedings, the Court also considered the gagging order which was imposed in that case. 19. The Royal Court ordered the Mareva injunction to be set aside and re-imposed it because the Plaintiff had failed to discharge its duty of disclosing all matters which militated against the making of the order in question and which might identify potential defences. This was a serious procedural impropriety, and as there had been inadequate disclosure, the injunction was set aside. The Court could follow that course even if it considered that the order made was just and convenient and would probably have been made even if there had been full disclosure. That emphasises the importance of the duty of making full and frank disclosure. 20. Nonetheless the Court found that it had a discretion to re-impose the injunction which had been discharged for non-disclosure and it noted the basis for exercising a discretion to do so. The Court should consider whether the injunction had been discharged to deprive the applicant of an advantage improperly obtained, and whether discharge would encourage full disclosure in all cases; it would consider whether defendants might stop applying to set aside injunctions obtained as a result of non-disclosure if re-imposition became routine; it would consider whether it was inappropriate to re-impose an injunction simply because there had been serious non-disclosure, and where there had been innocent non-disclosure, that would be a relevant but not decisive consideration, as an applicant for ex parte relief of this kind has a duty to make all proper enquiry and give careful consideration to the case being presented. 21. The Court also noted that there was a lower threshold for obtaining a Mareva injunction where one was considering a post-judgment application where liability between the parties had been established. 22. It is also clear from the judgment itself as opposed to the head-note that the Court considered the balance of convenience in deciding whether or not to re-impose the injunctions. Ultimately the Court is making an assessment as to where the balance of fairness lies, whether it approves an injunction ex parte or, as in this case, whether it was approving the lodging of a caveat. 23. In *McKinnon v Crill and Others*

[2006] JLR 499 the Court was considering an application to lift a caveat preventing the sale of a property. The caveat in that case was maintained, because it had been properly lodged to provide security for the respondent's claim. The Court approached the lodging of a caveat as it would the obtaining of an ex parte Mareva injunction. As the caveat restricted the applicant's ability to dispose of his property, the respondents and the Court had to be satisfied that it was necessary and proportionate in the interests of justice. 24. At paragraphs 16 - 19 of his judgment, Birt DB referred to a passage from Le Gros, *Traité du Droit Coutumier de l'Isle de Jersey* at page 331. In this passage Le Gros emphasised the seriousness of obtaining a caveat and described it as a privilege which should only be used in exceptional circumstances. Le Gros thought that it ought not to be obtained against a person who was solvent, and that creditors were obliged to use the normal means at their disposal of obtaining repayment of their debt before the courts of the Island. The Court held that Le Gros was merely a commentator and his observations were not to be construed as a statute. Furthermore the comments should be considered in the context of their time and that "nowadays money can move around the world at the touch of a button and courts are far more astute to ensure that a plaintiff's victory is not rendered pyrrhic because a defendant has removed his assets prior to judgment. The Mareva injunction was completely unknown in the time of Le Gros and was introduced in order to ensure that judgments were not rendered nugatory. A caveat is, in reality, a form of Mareva injunction relating to immovable property in Jersey." 25. We agree that whenever the customary law comes to be cited before the courts of this Island, care must be taken to ensure that the customary law itself is being analysed. In the case of a caveat, that is not in our judgment a question so much of customary law, but rather Le Gros was writing about a procedure which has existed for a very long time to ensure that the courts are able to do justice in their enforcement of the law. Procedures change as the Court noted, and we respectfully agree with its conclusions that the rules around the obtaining and setting aside and re-imposition of Mareva injunctions are entirely transferable to caveats. 26. In *Clarke v Callaghan and others*

[2011] JRC 158, Birt, Bailiff, was considering a question of costs which arose from an application by the plaintiff for summary judgment and an application by the defendants to lift a caveat obtained against them by the plaintiff. The substance of the dispute had fallen away and the only question was as to liability for costs. At paragraph 22(i), the Court said this:- "By its nature, a caveat is something of a blunt instrument because the debtor is restrained from dealing with his immovable property whatever the size of the claim in comparison to the value of the immovable property. That is why the Court in *McKinnon v Crill* endorsed the observations in Le Gros to the extent that, if there are alternative ways of securing a creditor's position, that is likely to point strongly against the granting of a caveat and in most cases an applicant for a caveat should have explored whether some alternative security is adequate ..." 27. At paragraph 22(ii) the Court also said this:- "... the affidavit in support of the application for a caveat made clear that Takilla is the owner of the hotel but then failed to make clear whose was the obligation under the mediation agreement.

Although the agreement was annexed, the text of the affidavit simply referred to all three defendants being in breach of the agreement. In *Goldtron Limited v Most Investments Limited*

[2002] JLR 424 the Court said this at para 16:- "... [it] is not sufficient for a plaintiff to be able to say that, buried somewhere amongst the voluminous exhibits, the point at issue was available to the judge. The duty is much more stringent. All defences actually raised by the defendant or which can reasonably be expected to be raised in due course must be identified and fairly summarised in the affidavit. If the affidavit itself is voluminous, counsel may need to refer the judge to the relevant points. The overriding duty of the applying party and its advocate is to ensure that all actual or possible defences (and other material matters) are brought to the specific attention of the judge so that he may consider them before making his order." 28. We endorse those comments. Discussion 29. We deal first with the question of non-disclosure. Advocate Garrood submitted that there were four particular points on non-disclosure: (i) The existence of the latent defects policy which might well cover up to nine heads of damage alleged by the Applicants. (ii) The fact that the Applicants have already received £240,000 in respect of the delay in completion. (iii) The fact that the Applicants owed outstanding money to the Respondent. (iv) The fact that it was the Applicants who had sent Camerons off-site in 2018, thus preventing the Respondent from completing the outstanding work. 30. Advocate Santos-Costa has asserted that the insurance policy against latent defects has an exclusion for water-proofing. What we have been shown is an endorsement which contains this language:- "In consideration of the payment of the undermentioned additional premium, the exclusion entitled seepage is deleted, and major damage is extended to include the necessary and reasonable costs incurred in repairing, replacing or rectifying any part of the external envelope caused by a defect in the design, materials or workmanship of those parts of the water-proofing elements of the external envelope below ground level. The above is endorsed on the policy provided that such defective or deficient water-proofing is first discovered and notified to the underwriter during the period of seepage insurance as stated below. This endorsement does not indemnify the policy holder in respect of:

- (1) Any defective or deficient water-proofing first discovered during the twelve month period after the date of inception of this policy;
- (2) Any major damage caused by or due to inadequate maintenance of or by abnormal use of or the imposition of any load greater than that for which the property insured was designed or the carrying on of any use for which the property insured was not designed, or any structural alterations, repairs, or additions to the property insured which materially affect the water-proofing quality of the property insured;
- (3) Any ingress of water into the property insured to the extent that such ingress of water was planned or allowed for in the original design." 31. The period of insurance is described as the period from 20 th July, 2017 to 20 th July, 2027 and the endorsement is dated 17 th October, 2017. 32. It is apparent to us that there are a number of possible arguments that

might take place in relation to this language, none of which we propose to resolve today. We are satisfied therefore that there was a material non-disclosure in that the Court was not informed of the existence of the latent defects policy even if there is a possibility that the Applicants might be correct in now pointing to a risk that the policy was not effective. 33. We also take the view that the fact that a substantial payment had been made by the Respondent to the Applicants for late completion was something which should have been disclosed. A good deal of emphasis was put by Advocate Santos-Costa both in the hearing in Chambers and before us that the Applicants had suffered enormously from the delay in completion. That delay is not directly relevant to the issues now under consideration, but having mentioned it, it would have been right to refer to the compensation paid already by way of liquidated damages. 34. Thirdly, we consider that it was also a material non-disclosure to omit mention of the fact that there was an outstanding claim by the Respondent against the Applicants for some £300,000 in terms of the balance of monies due under the building contract. The amount of that claim goes to the balance of convenience as to whether it is right to impose the caveat. 35. We do not take the view that a material non-disclosure occurred in relation to the Applicants sending Camerons off-site. I was told that in the hearing in Chambers when the caveat was approved. However, as is the case with the obtaining of an interim injunction *ex parte*, there ought to be a written note prepared by counsel for the applicants in respect of his or her hearing before the judge sitting alone to consider the imposition of a caveat. That is the requirement for an application for an *ex parte* injunction and it applies just as much to an application for a caveat. The questions which the judge puts to the applicant for the caveat and the responses which are made are relevant for consideration by any person interested in the property affected by the caveat when he comes to consider whether or not to apply to have the caveat discharged. Advocate Santos-Costa apologised that no such note of the oral hearing was available. We accept that apology, of course, but it does not meet the point that there is prejudice to the Respondent who was unaware of the exchanges which took place. 36. In the light of our finding that these are material non-disclosures, it appears to us inevitable that the caveat should be set aside. 37. We also noted, however, Advocate Garrood's contention that a creditor should notify the debtor that he has a claim before seeking a caveat, and explore the possibility of alternative security being made available. In *McKinnon v Crill*, at paragraph 20(i), Birt DB said that:- "In most cases an applicant for a caveat should have explored whether some alternative security is adequate but we are not to be taken as saying that a caveat can never be issued prior to such discussion. It may depend upon the urgency of the situation." 38. In the present case it does not appear that there was any such exploration of alternative possibilities. In our view, the fact that there remains further building work to be done - or that was the case as at 5 th June when we heard this application - indicates that the obtaining of the caveat was probably not as urgent as was contended. In those circumstances it would have been right to explore whether or not some alternative security would be adequate. This is a second reason why the caveat should be set aside. 39. That being the case, the next question for us is as to whether or not the caveat should be re-imposed, or any other steps taken in that regard. In support of the view that no caveat should be re-imposed, we have

regard to the following:- (i) The caveat has been set aside to deprive the Applicants of an advantage which they obtained improperly by failing to make full and frank disclosure. It would in practice prevent defendants from applying to set aside caveats so obtained if the re-imposition became routine. (ii) The non-disclosure of the latent defects policy goes directly to the extent of the risk which the Applicants are actually carrying. In those circumstances it was a serious non-disclosure, even though it might be argued that there was no cover under such policy by virtue of the exemption to which we have referred. (iii) The evidence of any dissipation of assets by the Respondent is weak. Essentially, it depends upon the acceptance by the Respondent that it is a special purposes vehicle which was incorporated for the purposes of carrying out the development. That of course means that it is likely to have limited assets outside the Development Site for the purposes of enforcing any judgment - but in our view one cannot necessarily deduce from the fact that a special purpose vehicle has been used the conclusion that those having direction and control of that vehicle would so arrange its affairs as to make the enforcement of any judgment against it impossible or ineffective. 40. As against that, the Court accepts that although this is a pre-judgment situation where liability has not been established, there is at least good evidence that the construction of House No. 1 has not sufficiently met the standards which would be required of such a significant investment in real property in the Island. That evidence arises not just from the detailed report which the Applicants have provided listing the alleged defects, but also from the chronology of events and the acceptance by the Respondent that there are defects albeit perhaps not to the extent that the Applicants claim. We also think that the fact that the Respondent is a special purpose vehicle is relevant to this extent, namely that it cannot have a need for access to the financial benefits from developing the Development Site outside the application of those funds to the Development Site itself. 41. A particular difficulty which arises in this case is that the extent of the protection which the Applicants could properly claim is very much unknown. The executive summary in the report as to quantum puts the potential cost at £1,730,600 plus GST, but it is accepted that that is very much a preliminary estimate and what is actually required may be quite different. Assuming however that that is the only figure the Applicants can come up with at present, it seems to us to be wholly wrong to re-impose a caveat which prevents any transactions in the balance of the Development Site which apparently has an overall value of some £14 million. Advocate Santos-Costa may be right that the cost of remedial work is very much higher than that which is currently contended for, but the balance of convenience does not lie in effectively freezing access to the entirety of the value in the Development Site just in case the remedial works will cost more than presently anticipated. That would not be fair to the Respondent. 42. In the Order of Justice, the Applicants claim interim relief including a freezing order in respect of the assets beneficially owned by the Respondent or those over which the Respondent has control. From what we have been told, those assets are limited to any monies in bank accounts and the freehold property remaining at the Development Site. We have not heard argument as to the interim relief sought in the Order of Justice, but it appears to us that that is much the better way of dealing with the question of security to which the Applicants claim they are entitled. It is not fair to the Respondent that its entire

freehold estate should be frozen in respect of an unquantified claim which may be only 1/10th of the value of that freehold estate. 43. It follows that we do not re-impose the caveat, and it is open to the Applicants to obtain a date for hearing of any application for interim relief under the Order of Justice which they issued on th June. It would seem to be appropriate that the parties have discussions as to the extent to which undertakings might cover the disposal of part of the sale proceeds of either of the properties remaining in the ownership of the Respondent, together with appropriate negative pledge covenants in respect of those properties as to give sufficient protection, but not excessive protection to the Applicants. 44. For these reasons, the caveat is set aside and not re-imposed. Authorities Supply of Goods and Services (Jersey) Law 2009. Goldtron Limited v Most Investment Limited

[2002] JLR 424 McKinnon v Crill and Others

[2006] JLR 499 Le Gros, Traité du Droit Coutumier de l'Isle de Jersey Clarke v Callaghan and Others

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