IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 55

Civil Appeal No 140 of 2016

Between

RGA Holdings International Inc

… *Appellant*

And

(1) Loh Choon Phing Robin
(2) Loh Yin Kuan

… *Respondents*

GROUNDS OF DECISION

[Civil Procedure] — [Injunctions]

TABLE OF CONTENTS

RGA Holdings International Inc
v
Loh Choon Phing Robin and another

[2017] SGCA 55

Court of Appeal — Civil Appeal No 140 of 2016
Chao Hick Tin JA and Judith Prakash JA
5 July 2017

25 September 2017

Chao Hick Tin JA (delivering the grounds of decision of the court):

Introduction

1 In the High Court, the appellant, RGA Holdings International Inc ("RGA"), applied for: (a) an interim prohibitory injunction to restrain Mr Loh Choon Phing Robin ("Robin Loh") and Mr Loh Yin Kuan ("Peter Loh") (collectively "the respondents") from parting with, selling, charging or otherwise disposing of two properties, until the disposal of High Court Suit No 226 of 2016 ("Suit 226") or further order, and (b) in the alternative, an interim mandatory injunction that the sale proceeds of the properties be held by its solicitors as stakeholders pending further order.[1] The two properties in question are situated at Carpmael Road, Singapore. One of these properties ("248 Carpmael") is owned by the first respondent, Robin Loh, and his wife. The other

---

[1] Appellant's Core Bundle ("ACB") Vol 2 at p 8

("246 Carpmael") was owned by the second respondent, Peter Loh, until he sold it in April 2016.

2 The basis for the injunction application was a term of a Share Sale Agreement between RGA and the respondents, by which the respondents undertook not to sell the two properties in return for RGA extending loans to KK Asia Environmental Pte Ltd ("KK Asia"), a company in which they are shareholders.

3 The High Court judge ("the Judge") dismissed the application: see *Forest Fibers Inc and another v K K Asia Environmental Pte Ltd and others* [2017] 3 SLR 823 ("GD"). This was primarily for the reason that the undertaking in the Share Sale Agreement did not create a caveatable interest in the properties. In the Judge's view, all RGA had under the Share Sale Agreement was only a personal claim against the respondents for breach of their undertaking not to sell the properties.

4 After hearing from counsel for RGA and also from the respondents, who appeared in person, we allowed the appeal but only to the extent that we granted an interim prohibitory injunction to restrain the respondents from selling 248 Carpmael until the determination of Suit 226 or further order. In our view, and with respect, the Judge erred in finding that an interim prohibitory injunction could only be granted if RGA had an interest in land – in this case, a proprietary interest in the properties. An interim prohibitory injunction will normally be granted to restrain the breach of a negative covenant in a contract unless it would cause undue hardship to a defendant. In such cases, the court is not normally concerned with the balance of convenience or whether damages would be an adequate remedy, because it is simply holding the party in breach to the terms of the contract until the determination of the trial. The undertaking in the Share

Sale Agreement not to sell the two properties was a negative covenant. The respondents had already breached that undertaking because of Peter Loh's sale of 246 Carpmael. It was therefore necessary, in our judgment, to restrain them from selling 248 Carpmael and thereby from continuing to breach their contractual undertaking.

5 We did not grant the mandatory injunction to compel the respondents to pay over the sale proceeds of 246 Carpmael to its solicitors to be held as stakeholders pending further order. Since RGA only sought an interim mandatory injunction as an alternative to the interim prohibitory injunction, there was strictly speaking no need for us to consider this request in light of our decision to grant the interim prohibitory injunction. In any event, a high threshold had to be met for the grant of an interim mandatory injunction and we did not think that threshold was met here.

6 We now give our reasons for granting an interim prohibitory injunction to restrain the respondents from selling 248 Carpmael until the determination of Suit 226 or further order. We will begin by setting out some background to the case.

Facts

The parties

7 RGA is a Panamanian company. It is the second plaintiff in Suit 226. The first plaintiff is a Canadian company named Forest Fibers Inc ("Forest Fibers"). Both companies are in the business of buying, selling and/or recycling waste material and/or selling recycled products.[2] RGA and Forest Fibers share

[2] GD at [1]; Statement of Claim (Suit 226) at para 1 (Record Of Appeal "ROA") Vol 2 at p 18)

a common director and sole shareholder, a Canadian national by the name of Mr Colubriale Domenico ("Mr Domenico").[3]

8 Peter Loh and Robin Loh are each directors and 25% shareholders of KK Asia,[4] a Singaporean company in the same business as RGA.[5] KK Asia, Robin Loh and Peter Loh are the first, second and third defendants in Suit 226. Robin Loh is Peter Loh's son.

The Share Sale Agreement

9 The Share Sale Agreement was entered into on 9 July 2015 between RGA and the respondents.[6] It came about because the respondents had invited Mr Domenico or one of the companies he was associated with to invest and be an equal business partner in KK Asia. As a result, RGA agreed to invest in KK Asia.[7]

10 Pursuant to cl 2.1 read with cl 1.1 of the Share Sale Agreement, RGA was to purchase 50% of the shares in KK Asia from the respondents for US$200,000 (Robin Loh and Peter Loh each held 33% of the shares in KK Asia prior to the execution of the Sale Share Agreement).[8] Having paid the purchase price, RGA presently holds 50% of the shares in KK Asia.[9] Clauses 3.1–3.3 of the Share Sale Agreement deal with the process for completing the sale of the

---

3 GD at [1]

4 Statement of Claim (Suit 226) at para 3 (ROA Vol 2 at p 19)

5 GD at [2]

6 ACB Vol 2 at pp 10–15

7 ROA Vol 3 at p 10, paras 11–12

8 ACB Vol 2 at p 10

9 ACB Vol 2 at p 16, para 13

shares and grant RGA an option to sell back the shares to the respondents. For the purposes of the appeal, there was no need for us to concern ourselves with the clauses dealing with the sale of the shares by the respondents to RGA.

11 Clauses 3.4–3.7 of the Share Sale Agreement were germane to this appeal as they formed the basis for some of the claims by RGA against the respondents in Suit 226; cl 3.7 was also the basis for RGA's application for an injunction. We reproduce them here:

> **3. Completion and Undertakings**
>
> …
>
> 3.4 [RGA] undertakes to extend a loan of up to US$30,000.00 to [KK Asia] to finance its operations upon the request of the [respondents] to be made on or before 1 October 2015.
>
> 3.5 The [respondents] acknowledge that [KK Asia] is indebted to [RGA] for the sum of US$120,000.00 being a previous loan extended by [RGA] to [KK Asia]. The [respondents], jointly and severally, undertake that in the event that [KK Asia] fails to fully repay the said sum of US$120,000.00 plus simple interest at 5% per annum to [RGA] by 30 December 2016, they will pay 50% of the outstanding balance to [RGA] by 31 December 2016 and the balance 50% of the outstanding balance shall be absorbed and/or waived by [RGA].
>
> 3.6 The Parties acknowledge that there is a rolling account of accounts payable by [KK Asia] to [Forest Fibers]. In the event that [KK Asia] is unable to pay such outstandings which are overdue, the [respondents] undertake to pay 50% of the said overdue outstandings and [RGA] undertakes to pay the balance of 50% of the said overdue outstandings to [Forest Fibers].
>
> 3.7 In light of the aforesaid undertakings, the [respondents] further undertake not to sell their respective properties at [248 Carpmael] and [246 Carpmael].

Procedural History

RGA lodges caveats over the properties

12 According to an affidavit filed by Mr Domenico in Suit 226, it became clear to him, a few months after the Share Sale Agreement had been signed, that the respondents were "abandoning" KK Asia.[10] Anticipating that RGA might file a claim against KK Asia or the respondents, Mr Domenico instructed his solicitors to lodge a caveat against each of the properties.[11] The solicitors did so on 21 September 2015 in RGA's name.

Forest Fibers and RGA commence Suit 226

13 On 9 March 2016, Forest Fibers and RGA commenced Suit 226 against KK Asia and the respondents. There were three groups of overlapping claims. First, Forest Fibers claimed, against KK Asia, the repayment of loans it had extended to KK Asia, allegedly via an oral agreement.[12] The loans amounted to US$59,488.38.

14 Second, RGA claimed, against KK Asia, the repayment of four loans it had extended to the latter between May and July 2015, amounting to US$149,578.05.[13]

15 Third, as against the respondents, RGA had three claims. The first claim was for a sum of US$29,744.19.[14] RGA asserted that the respondents were liable for this amount because:

---

10 ROA Vol 3 at p 13, para 23

11 GD at [17]; ROA Vol 3 at p 13, para 24

12 Statement of Claim (Suit 226) at paras 6 to 10 (ROA Vol 2, pp 19–20)

13 Statement of Claim (Suit 226) at paras 11–18 (ROA Vol 2 at pp 20–22)

(a) KK Asia failed to repay loans totalling $59,488.38 to Forest Fibers pursuant to an oral agreement (see [13]); and

(b) Pursuant to cl 3.6 of the Share Sale Agreement, RGA was entitled to demand 50% of that sum from the respondents, which was US$29,744.19. The respondents did not respond to this demand; hence this claim against them was made.

16 The second claim was for a sum of US$74,789.02.[15] RGA asserted that the respondents were liable for this amount for the following reasons:

(a) Clause 3.5 obliged the respondents to repay 50% of the US$120,000 loan in the event that KK Asia failed to do repay the full loan;

(b) The respondents' undertaking in cl 3.5, RGA argued, also extended to the US$30,000 mentioned in cl 3.4. This was not reflected in cl 3.5 and, accordingly, RGA sought rectification of cl 3.5.

(c) Therefore, pursuant to the Share Sale Agreement, as rectified, the respondents guaranteed the repayment of 50% of US$150,000. The actual loans disbursed by RGA to KK Asia amounted to US$149,578.05. KK Asia had failed to repay the outstanding amount of US$149,578.05, as mentioned at [14].

(d) RGA therefore demanded that the respondents repay 50% of the outstanding amount, *ie*, US$74,789.02, but they did not; hence RGA made this claim for that amount against the respondents.

---

14 Statement of Claim (Suit 226) at paras 19–24 (ROA Vol 2 at pp 22-24)

15 Statement of Claim (Suit 226) at paras 25–34 (ROA Vol 2 at pp 24-25)

17 Third, RGA asked for a declaration that it is the equitable chargee of the properties under the Share Sale Agreement. It pleaded that, by way of cl 3.7, the respondents created a fixed charge over the properties in favour of Forest Fibers and RGA as security for the various personal undertakings given by them in cll 3.5 and 3.6 of the Share Sale Agreement.[16]

18 KK Asia and the respondents denied that they were liable to repay any of those sums. They also have a counterclaim against Forest Fibers amounting to US$508,259.79.[17]

Application to cancel the caveats and sale of 246 Carpmael

19 On 22 February 2016, the respondents filed an application to cancel the caveats. On 24 February 2016, the Singapore Land Authority notified RGA that the caveats would be cancelled unless it obtained and served, on the Registrar of Titles, an order of court to the contrary by 28 March 2016.[18]

20 Hence, on 16 March 2016, RGA filed Summons 1255 of 2016 ("Sum 1255") asking that (a) the caveats on the properties be maintained, or (b) the respondents be restrained from cancelling the caveats, or (c) the respondents' application to cancel the caveats be suspended.[19]

21 On 28 March 2016, the caveats were cancelled – the hearing of Sum 1255 did not proceed in time. Peter Loh then sold 246 Carpmael in April 2016 for $2,350,000.[20]

---

16 Statement of Claim (Suit 226) at para 35 (ACB Vol 2 at p 25)

17 Defence and Counterclaim at para 37 (ROA Vol 2 at p 34)

18 ACB Vol 2 at p 23

19 GD at [20]

High Court dismisses application to maintain caveats

22 On 13 April 2016, Aedit Abdullah JC heard Sum 1255. As the caveats had already been cancelled, he allowed RGA to amend the summons to one seeking an order that they be allowed to file and maintain caveats against the properties. Even then, he dismissed the application based on this amended summons. His reasons could be summarised as follows:[21]

(a) The test for whether the plaintiffs should be allowed to file a new caveat should be the same as the test for granting an interim injunction – that is, whether there was a serious issue to be tried.

(b) There was no serious issue to be tried. Clause 3.7 of the Sale Share Agreement did not create any caveatable interest in land. The respondents' undertaking in cl 3.7 not to sell their property did not amount to them putting up their property as security. The parties probably agreed to the undertaking in cl 3.7 to "preserve the position" pending determination of whether security needed to be given. What that undertaking created was not a security interest but, at most, "the expectation or possibility" that a security interest might be given down the line.

RGA applies for an injunction

23 On 23 May 2016, RGA filed Summons 2494 of 2016 ("Sum 2494")[22] which had three prayers:

---

20 ROA Vol 3 at p 61

21 ACB Vol 2 at p 25–27

22 ACB Vol 2 at p 8

(a) That the respondents be restrained from selling, charging or in any way disposing of the properties (246 Carpmael and 248 Carpmael) until the final determination of Suit 226 or further order;

(b) In the alternative, that any sale proceeds from the sale of the properties (less mortgage repayment, CPF repayment, agent fees and solicitors fees) be paid to and held by its solicitors as stakeholders pending further order; and

(c) That the respondents provide RGA with the contact details of the purchasers of 246 Carpmael. On appeal, RGA did not pursue this third prayer.

Decision below

24 Before the Judge, RGA argued that in selling 246 Carpmael, the respondents had clearly breached the negative covenant in cl 3.7 of the Share Sale Agreement; it followed that they should be compelled to keep their contractual promise (GD at [23]). The respondents made a number of arguments in response, one of which was that Sum 1255 had already been dismissed by Abdullah JC (GD at [31]).

25 On 3 June 2017 the Judge heard and dismissed Sum 2494, observing that RGA's application for an injunction was "similar to what [it] had tried to obtain from JC Abdullah in [Sum 1255]".[23] She explained her reasoning in greater detail in the GD which she subsequently issued.

---

[23] ROA Vol 3 at p 283

26 According to the GD, the Judge's primary reason for dismissing the application was that RGA had no caveatable interest in the properties. In her view, the cases cited by RGA as authority for the grant of an injunction for breach of a negative covenant could be distinguished because they related to negative covenants concerning immovable property or leases. RGA was wrongly attempting to "elevate a personal undertaking given by the [respondents] into a negative covenant pertaining to land" (GD at [51]). It had no caveatable interest in land, only a claim against the respondents for breach of their undertakings in cl 3.7 (GD at [57]). The Judge thus concluded that RGA was seeking "via the 'backdoor'" and by an interim injunction what had been denied by Abdullah JC in Sum 1255. If RGA "had no basis to lodge the Caveats, it most certainly had no basis to apply for an injunction" (GD at [58]).

27 There appeared to be another reason why the Judge did not grant the injunction. She did not think the respondents had "deliberately breached a negative covenant merely by a breach of the undertaking in cl 3.7" (GD at [56]). KK Asia was indebted to Standard Chartered Bank ("StanChart") for a loan that had been guaranteed by the respondents. Thus, the sale of 246 Carpmael might have been to meet the bank's demand for repayment, by a certain deadline, of a sum of money. Had Peter Loh not sold off 246 Carpmael to repay that debt, there was "every likelihood" that the bank would have foreclosed on and sold the property (GD at [55]–[56]).

Our decision

The applicable legal principles

28 The general rule, which is well accepted, is that a court will grant an interim injunction to preserve the status quo pending trial if: (a) there is a serious question to be tried; and (b) the balance of convenience lies in favour of granting

the injunction. As this court suggested in *Chuan Hong Petrol Station Pte Ltd v Shell Singapore (Pte) Ltd* [1992] 2 SLR(R) 1 ("*Chuan Hong*") at [88], the general rule is founded on the fundamental principle that:

> … the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong at trial in the sense of granting relief to a party who fails to establish his rights at the trial, or of failing to grant relief to a party who succeeds at the trial.

A similar pronouncement can be found in *Maldives Airports Co Ltd and another v GMR Male International Airport Pte Ltd* [2013] 2 SLR 449 at [53], where this court said that this principle is necessary because the court is asked to assess the balance of convenience at an early stage and based only on affidavit evidence.

29 Interim injunctions may be of two kinds, prohibitory and mandatory. Interim injunctions are prohibitory if they forbid the commission or continuance of an act. They are mandatory if that they compel the defendant to do some positive act to repair an omission or restore the status quo by undoing some act.

30 The general rule applies to interim prohibitory injunctions except in one particular situation: when a defendant is about to breach, or has already breached, a negative covenant in a contract, and the interim prohibitory injunction sought is to restrain a prospective breach or a further breach, as the case may be. We will expand on this principle from [32] onwards.

31 The general rule also does not apply where an interim mandatory injunction is sought. Such an injunction is "a very exceptional discretionary remedy" and there is thus "a much higher threshold to be met in order to persuade the court to grant such an injunction as compared to an ordinary prohibitive injunction" (*NCC International AB v Alliance Concrete Singapore*

Pte Ltd [2008] 2 SLR(R) 565 ("*NCC International*") at [75]; see also *Chuan Hong* at [84]). Various phrases have been used to express the need for caution in granting an interim mandatory injunction. It has thus been said that such an injunction should only be granted if there are "special circumstances" (*NCC International* at [75]), in a "clear case" or if there is a "high degree of assurance" that it will appear at trial to have been rightly granted (see *Chuan Hong* at [85]–[86]). The need for caution arises from the recognition that an interim mandatory injunction is a more invasive remedy and, as such, may lead to irreversible prejudice to a defendant. A court must therefore be sure, in accordance with the fundamental principle described above, that the grant of the interim mandatory injunction is indeed the course of action which carries the lower risk of injustice – in other words, that the prejudice to the applicant from not granting the interim mandatory injunction outweighs that to the defendant from granting it. This will not be an easy hurdle to surmount.

32 When a defendant is about to breach, or has already breached, a negative covenant in a contract, an interim prohibitory injunction will readily be granted to restrain a prospective breach or a further breach, as the case may be. A clear exposition of the applicable principles may be found in *Chitty on Contracts Vol 1* (Hugh Beale gen ed) (Sweet & Maxwell, 32nd Ed, 2015) ("*Chitty on Contracts*") at paras 27-065 and 27-067. We summarise these principles as follows:

(a) A prohibitory injunction to restrain the breach of a negative stipulation in a contract is normally granted as a matter of course.

(b) The court is not concerned with the balance of convenience. That damages would be an adequate remedy is not generally a relevant consideration.

(c) As the remedy is an equitable one, it is in principle discretionary, and it may be refused on the ground that it would cause particular hardship as to be oppressive to the defendant. But the burden caused by having to observe the contract does not qualify as hardship.

(d) These principles above apply equally to the grant of a final injunction as they do to the grant of an interim injunction.

This is the same position expressed in the other standard reference works: see Edwin Peel, *Treitel on the Law of Contract* (Sweet & Maxwell, 13th Ed, 2011) at paras 21-051 and 21-053; Tham Chee Ho, "Non-compensatory Remedies" in Ch 23, *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at paras 23.156 and 23.159; Steven Gee QC, *Commercial Injunctions* (Sweet & Maxwell, 6th Ed, 2016) ("*Commercial Injunctions*") at paras 2-012 to 2-014).

33 In other words, the general rule we mentioned at [28] does not apply to an application for an interim prohibitory injunction where the defendant is about to breach, or has already breached, a negative covenant in a contract; the court in such a case does not ask itself whether there is a serious question to be tried and whether the balance of convenience is in favour of granting such an interim injunction. The reason for this position, which favours the grant of an injunction, has been put by Steven Gee in this way at para 2-014 of *Commercial Injunctions*:

> There is a strong policy for enforcing bargains and this goes to the extent of enforcing a negative covenant. There is a strong presumption that the covenant will be enforced by injunction, albeit the matter remains discretionary.

In line with this strong policy for enforcing bargains, any argument that granting an injunction to uphold a contractual bargain would cause hardship should be

"treated with some scepticism, since the defendant has undertaken the obligation voluntarily": David Bean, Isabel Parry & Andrew Burns, *Injunctions* (Thomson Reuters, 11th Ed, 2012) at para 2-10. It is for this reason that an injunction will only be refused if a defendant shows hardship over and above that which results from having to observe the contract.

34 We think it would be useful to retrace the route that the law has taken to reach this position given that there appears to be little direct authority on this in our jurisprudence.

35 The starting point is commonly taken to be an *obiter* comment by Lord Cairns LC in *Richard Wheeler Doherty v James Clagston Allman* (1878) 3 App Cas 709 ("*Doherty*"). It was *obiter* because the case concerned the breach of a positive contractual obligation. Before turning to address that issue, however, Lord Cairns paused to make the following observation (at 719–720):

> …if there had been a negative covenant, I apprehend, according to a well-settled practice, a Court of Equity would have had no discretion to exercise. If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or injury – it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves.

36 Although *Doherty* concerned the grant of a final (or "perpetual") injunction, this statement of principle by Lord Cairns was applied in the context of interim injunctions in *Hampstead & Suburban Properties v Diomedous* [1968] 3 WLR 990 ("*Hampstead*"). There, Megarry J rejected an argument by the party seeking to resist the grant of an injunction that Lord Cairns' words in

Doherty had no application to an interim injunction. That they were *obiter* and uttered in a case concerning final injunctions did not, in his view, "preclude [them] from having any weight or cogency in relation to an interlocutory injunction" (at 997). Megarry J then continued:

> Where there is a plain and uncontested breach of a clear covenant not to do a particular thing, and the covenantor promptly begins to do what he has promised not to do, then in the absence of special circumstances it seems to me that the sooner he is compelled to keep his promise the better. In such a case I do not think that the enforceability of the defendant's obligation falls into two stages, so that between the issue of the writ and the trial the defendant will be enjoined only if that is dictated by the balance of convenience and so on, and not until the trial will Lord Cairns' statement come into its own.

37 Two points are worth emphasising. First, this statement affirms that the balance of convenience test does not apply when what is sought is an interim prohibitory injunction to restrain the breach of a negative covenant – Megarry J rejected the idea that the defendant would only be enjoined if that was "dictated by the balance of convenience". Second, Megarry J said that an interim prohibitory injunction should normally be granted "in the absence of special circumstances". That qualifies Lord Cairns' statement, which is in more absolute terms, that a court would have had "no discretion to exercise" as long as the injunction was sought to restrain a breach of a negative covenant (see [35] above).

38 Indeed, courts in Australia and Hong Kong have, while adopting Lord Cairns' statement in *Doherty*, eschewed the idea that a court would have "no discretion to exercise" when what is sought is a prohibitory injunction to restrain the breach of a negative covenant. In the High Court of Australia's decision of *Dalgety Wine Estates Pty Ltd v Rizzon* (1979) 141 CLR 552, Gibbs J said (at 560) that Lord Cairns' statement about there being no discretion appeared to be an "overstatement" and Mason J said (at 573) that it was "not accurate".

Nonetheless the court was in accord with the general principle that an injunction would normally be granted to restrain a breach of a negative covenant. It cited with approval (at 560) the following statement of principle from its previous decision in *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282 at 299:

> If…a clear legal duty is imposed by contract to refrain from some act, then, *prima facie*, an injunction should go to restrain the doing of that act. It appears to be of little importance now whether the duty is imposed by a term of the contract expressed in negative or affirmative language.

39 In the Hong Kong Court of Appeal's decision of *The Incorporated Owners of South Seas Centre, Mody Road v Great Treasure Development Ltd* [1994] HKCA 416, Godfrey JA said that Lord Cairns' statement had never been cited to "exclude altogether the general discretionary considerations which always fall to be considered when the question for the court to decide is whether or not to grant an interlocutory injunction" (at [14]). Godfrey JA then formulated the applicable principles as follows:

> Where a defendant is proposing to act in breach of an express negative stipulation binding upon him he will normally be enjoined from doing so, and, save in exceptional cases, damages will not be regarded as an adequate remedy; but the defendant may nonetheless be able to establish special circumstances of such a nature that the hardship that the making of the order would cause him would so far outweigh the inconvenience to the plaintiff through denying the plaintiff specific relief that the court considers that its intervention would be unjust, In addition, general discretionary considerations, such as unfairness, acquiescence or delay, may make the grant of an interlocutory injunction inappropriate.

We agree that the "general discretionary considerations" as mentioned in this extract may be considered in deciding whether or not the grant of an interim prohibitory injunction would be appropriate.

40 The cases above contemplate that this particular rule on injunctions applies to restrain all manner of breaches of negative contractual obligations. But, in the present case, the Judge found that the principles in *Doherty* and *Hampstead* were inapplicable because they had "nothing to do with negative or any covenants concerning immoveable property or leases" (GD at [51]). There is, however, clear authority that this particular rule is not limited in this way, although it should be said in fairness that this authority was not cited to the Judge. In *Vefa Ibrahim Araci v Kieren Fallon* [2011] EWCA Civ 668 ("*Araci v Fallon*"), an interim prohibitory injunction was granted to restrain a jockey from acting in breach of a negative covenant in his contract with a racehorse owner not to ride a rival owner's horse; the injunction was necessary because the jockey had informed the owner a week before a derby that he would be riding a rival owner's horse. This case did not concern any negative covenant pertaining to land, yet the court applied the principles articulated in *Doherty* and *Hampstead* in reaching its decision. With respect, therefore, we could not endorse the Judge's attempt to confine the principles in *Doherty* and *Hampstead* to breaches of negative covenants pertaining to land.

41 We would make two further comments about *Araci v Fallon*. First, it appears that there was no consensus between the two Lord Justices who heard the appeal about whether the adequacy of damages was a relevant consideration in determining whether an injunction should be granted to restrain a breach of a negative covenant. Jackson LJ found that it was a relevant consideration and went on to find that an award of damages in lieu of an injunction would not be an adequate remedy (at [53]). Elias LJ, on the other hand, found that the adequacy of damages was "not generally a relevant consideration when the injunction restrains the breach of a negative covenant", because the court was simply enforcing the bargain of the parties (at [70]).

42 We prefer the view that the adequacy of damages is not a relevant consideration. We note that this is the position taken in academic works such as *Commercial Injunctions* at para 2-014 and *Chitty on Contracts* at para 27-065. This appears to us correct as a matter of policy. If a plaintiff seeks an interim prohibitory injunction to restrain a defendant from breaching, or continuing to breach, a negative covenant, the court, in refusing the injunction, would essentially be allowing a defendant to breach his contractual obligations on the basis that the plaintiff can be compensated for this by damages later. The court would effectively be releasing the defendant from its contractual bargain. It does not seem right to us that the court should lend its aid to such a course of conduct, unless the circumstances are exceptional – for example, if not doing so would cause undue hardship to the defendant. Otherwise, the court should, where possible, uphold contractual bargains (provided of course that there has been or will be a clear breach of a negative covenant).

43 The second comment concerns the relevance of the manner in which a defendant has breached or is about to breach the negative covenant. In *Araci v Fallon*, Elias LJ held that an injunction may be refused if it is oppressive, but that it would hardly be oppressive to prevent one from "acting in cynical disregard of the obligations he has voluntarily undertaken" (at [70]). Jackson LJ echoed this point in explaining why the judge below had been wrong to refuse the injunction: he said that the defendant "voluntarily entered into a contract for substantial reward containing both positive and negative obligations" and there was nothing special about the world of racing entitling the major players to "act in flagrant breach of contract"; therefore, the defendant's promise should be enforced (at [65]). In a similar vein, Steven Gee QC notes that "[u]nreasonable or heavy-handed conduct in breach of a negative covenant can be a strong factor reinforcing the case for an injunction" (*Commercial Injunctions* at para 2-014).

These statements show that it is hardly right to refuse an injunction when a defendant has breached a negative covenant deliberately or is about to do so.

44 We should add that prior to this case, the only decision of our courts which appears to have considered *Doherty* and *Hampstead* was *Rajaram v Ganesh (trading as Golden Harvest Trading Corp) and others* [1994] 3 SLR(R) 79. The judge in that case made reference to the principle that where there was a clear breach of a negative covenant, the balance of convenience test would not apply (at [27]–[28]). However, the case is not a direct authority for determining when a prohibitory injunction would be granted to restrain a breach of a negative covenant. The interim injunction in that case had been granted to restrain a bank from calling on, invoking or encashing a guarantee on the ground that it knew that the person for whose benefit the guarantee had been issued had not complied with a condition for the issue of the guarantee. Thus, the bank would be participating in the beneficiary's breach by paying money to him under the guarantee. In other words, the interim injunction against the bank was not based on its own breach of any negative covenant but on its knowledge of the beneficiary's breach of the terms of the guarantee. In this regard, although, like the Judge, we had doubts about the relevance of this case to the present application, our reasons for so thinking differed from hers (see GD at [45]).

Application to the facts

Prohibitory injunction

45 We now explain why we granted the interim prohibitory injunction to restrain the respondents from selling 248 Carpmael, thus reversing the Judge's decision in this regard.

46 In our view, and with respect, the Judge's first reason for refusing to grant the injunction was based on an error. The Judge erred in assuming that because cl 3.7 of the Share Sale Agreement did not create any interest in land in favour of RGA, thus giving RGA no basis for lodging a caveat against the properties, RGA could not obtain an interim prohibitory injunction to prevent a breach of the negative covenant in the Share Sale Agreement. By making this assumption, she was led to the conclusion that since Abdullah JC had dismissed RGA's application in Sum 1255 to lodge caveats against the properties, it should follow that RGA's application for an injunction should similarly be dismissed.

47 However, the fact that there was no interest in land, and hence no basis for lodging a caveat, could not conclusively determine whether an injunction could be granted. In assuming that an interim prohibitory injunction could only be granted if RGA had a caveatable interest in the properties, the Judge conflated the contractual right of RGA to insist that the respondents not sell their properties with a proprietary right in those properties. Whether RGA also has a proprietary interest (by way of a charge, as it claims) is an issue that will be decided in Suit 226 itself. At this stage, RGA was only seeking to enforce a contractual right that it undoubtedly has in cl 3.7 of the Share Sale Agreement. As we have mentioned, there is clear authority that an interim prohibitory injunction will normally be granted to restrain the breach of a negative covenant in a contract because that gives effect to the contract between the parties. To adapt Megarry J's words in *Hampstead*, the respondents here promptly began to do what they had promised not to do. In the absence of special circumstances, the sooner they were compelled to keep their promise, the better.

48 We did not think there were such special circumstances in the present case. The only reason the respondents could put forth to resist the grant of the injunction was that they were in financial difficulty. Ordinarily, that would not

have constituted a good enough reason for not holding them to their contractual bargain. There was no suggestion that their financial difficulties were particularly grave or dire such that the grant of the injunction might cause them undue hardship. In fact, they had informed the Judge during the hearing below that they had no intention of selling 248 Carpmael.[24] That afforded an additional reason for us to think that the grant of the injunction would not cause them any undue hardship.

49 In any event, as we informed the respondents during the hearing of this appeal, if they should need to sell 248 Carpmael, it was open to them to apply to lift the interim prohibitory injunction. But they would need to show that the continued existence of the injunction would cause them undue hardship or be oppressive.

50 We were also not convinced by the second reason given by the Judge for refusing the injunction – that is, that the respondents had not deliberately breached cl 3.7.

51 The Judge thought that the respondents might have been "forced by circumstances" to sell 246 Carpmael in order to stave off legal proceedings. But that did not mean that the breach of cl 3.7 was not deliberate. The respondents (specifically, Peter Loh) still chose to sell 246 Carpmael despite knowing that cl 3.7 obliged them not to sell the properties. It was true that StanChart had informed KK Asia by a letter dated 25 January 2016 that the latter was in default under the terms of their banking facility which was secured by a mortgage over 246 Carpmael. StanChart warned that it would take steps to protect their interests including commencing legal proceedings against the mortgagor. But

---

[24] ROA Vol 3 at p 279, lines 5–7

there was no evidence that StanChart, as the mortgagee, had foreclosed on 246 Carpmael. Had that been what happened, it might be asked whether there was in fact a breach of the negative covenant in cl 3.7 in the first place. We noted that the mortgage was executed in favour of StanChart even before the respondents had entered into the Share Sale Agreement – the title search on 246 Carpmael showed that StanChart lodged a caveat as mortgagee on 21 October 2014.[25] However, these were not the facts before us. As far as the evidence in this case showed, the respondents made the conscious decision to sell 246 Carpmael. That was a deliberate breach of cl 3.7.

52 In any event, even assuming that the respondents' breach of cl 3.7 had not been deliberate, that only meant that the case for an injunction was not as strong as it otherwise would have been. As we highlighted at [43], if a defendant has acted in deliberate or even flagrant breach of a contractual obligation, a court is less likely to have any hesitation in granting the injunction. However, it does not follow that an injunction can only be granted if the breach is deliberate. As long as the breach is uncontested, the cases show that the injunction should be granted as a matter of course to prevent a continued breach of that obligation.

Mandatory injunction

53 However, we found no reason to grant the interim mandatory injunction to compel the respondents to pay over to RGA's solicitors the net sale proceeds of 246 Carpmael. Since it was an alternative prayer to its prayer for the interim prohibitory injunction, there was strictly speaking no need for us to deal with it. In any case, as we have said at [31] above, the threshold for granting such an

---

[25] Record of Appeal Vol 3 at p 61

injunction was a high one. We were not persuaded that this threshold had been crossed.

54 RGA argued that the risk of injustice to them if the mandatory injunction were refused was far greater than the risk of injustice to the respondents if the injunction were granted. It contended that there was a risk, in light of the respondents' precarious financial situation, that any judgment it obtained against them would be a paper judgment.[26]

55 We could not see why RGA should be placed in a better situation than any other creditor of the respondents. As we mentioned, until Suit 226 was heard and the effect of cl 3.7 determined, RGA could not be said to have any security in the properties or their sale proceeds. Before us, RGA readily accepted this. Counsel for RGA explained during the hearing of the appeal that they would only hold the sale proceeds as a stakeholder; were any creditor to come to it and assert, for example, that it had an enforceable judgment against the respondents, they would have to satisfy that creditor's judgment debt from the sale proceeds held by them. But that would only raise the question as to the purpose of compelling the respondents to pay over the sale proceeds to RGA's solicitors in the first place.

Conclusion

56 For the reasons given, we allowed the appeal to the extent mentioned at [4] above. We ordered the respondents to pay RGA the costs of the appeal fixed at $15,000. We also made the usual consequential orders.

---

[26] Appellant's Case at para 89

Chao Hick Tin
Judge of Appeal

Judith Prakash
Judge of Appeal

K Muralitherapany and Ng Lip Kai (Joseph Tan Jude Benny LLP) for the Appellant;
The Respondents in person.
