[2017] JMCC COMM.08

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**COMMERCIAL DIVISION**

**CLAIM NO. 2017 CD 000794**

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| **BETWEEN** | **LIGUANEA CLUB LIMITED** | **CLAIMANT** |
| **AND** | **SUNSHINE PUMP AND AMUSEMENT COMPANY LIMITED** | **DEFENDANT** |

**IN CHAMBERS**

**Mr. Ransford Braham QC, and Mr. David Johnson instructed by Samuda & Johnson for the Claimant.**

**Mr. Leonard Green and Mr. Makene Brown instructed by Chen, Green & Co for the Defendant.**

**Heard: 2nd March 2017 and 5th April 2017.**

**Civil Procedure - application for summary judgment - principles to be applied**

**Leases - defence of frustration - whether applicable to leases**

**Arbitration- construction of arbitration clause - effect of failure to file application to stay proceedings - effect of party seeking to invoke arbitration clause filing defence.**

**LAING, J**

**The Application**

**[1]** By amended notice of Application filed on 9th November 2016, the Claimant has applied for summary judgment to be entered against the Defendant and other relief.

**[2]** Part 15.2(b) of the Civil Procedure Rules, 2002 ("CPR") provides that the court may give summary judgment on the claim or on a particular issue if it considers that the defendant has no prospect of successfully defending the claim or the issue.

**[3]** Our courts have repeatedly approved and adopted the statement of Lord Woolf MR in **Swain v Hillman [2001] 1 All ER 91 at 92 J** that;

> *"The words "No real prospect of succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success or, as, Mr. Bidder QC submits, they direct the court to the need to see whether there is a "realistic" as opposed to a fanciful prospect of success."*

**The Claim**

**[4]** The Claimant is the registered proprietor of land located in New Kingston in the parish of Saint Andrew (hereafter referred to as the "Liguanea Club"). By the terms of lease Agreement dated 1st January 2011, entered into between the Claimant and the Defendant (the Lease Agreement"), the Claimant demised a portion of the Liguanea Club to the Defendant (hereafter referred to as the "Demised Premises") for the operation of a mini amusement park (the "Amusement Park").

**[5]** The Lease Agreement provided that the lease would be for a term of thirty six (36) months commencing 1st January 2011. It is not disputed that on the expiry of the term of the said Lease Agreement on 31st December 2013, the Defendant held over the Demised Premises as a monthly tenant.

**[6]** It is also disputed that the Urban Development Corporation ("UDC") divested lands owned by it which were used by patrons of the Amusement Park (the "UDC Parking Area"). A hotel which is part of the Marriot brand chain of hotels was constructed and subsequently commenced operations on or using the Parking Area.

**[7]** The Defendant accumulated significant arrears of rent and the Claimant filed the claim herein. The particulars of claim were amended to reflect a claim to recover the sum of $7,745,292.80 which represents rent, for the months February 2014 to October 2016.

**The approach of the court to the analysis of the evidence**

**[8]** The case of **ED & F Man Liquid Products Ltd V Patel and Anor [2003] EWCA Civ 472** was an appeal against the refusal of the trial judge to set aside a judgment in default of acknowledgment of service. In considering the English Civil Procedure Rules 13.3 and 24.2 (the English Civil Procedure Rules 24.2 being almost identical to our CPR 15.2), at paragraph 10 Lord Justice Potter commented as follows:

> *It is certainly the case that under both rules, where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial: see per Lord Woolf MR in Swain v Hillman [2001] 1 All ER 91 at 95 in relation to CPR 24. However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save cost and delay of trying an issue the outcome of which is inevitable; see the note at 24.2.3 in Civil Procedure ( Autumn 2002) Vol 1 p467 and Three Rivers DC v Bank of England (No.3) {2001] IKHL/16,[2001 2 All ER 513 per Lord Hope of Craighead at paragraph [95]*

This passage has been approved and adopted by our Court of Appeal, see by way of example the case of **ASE Metals NV v Exclusive Holiday Elegance Limited [2013] JMCA Civ 37.**

A. *Issues arising on the defence*

(1) Breach of contract by the Claimant

**[9]** The Defendant asserts that throughout the duration of the lease it only had possession of a portion of the Demised Premises, because the remaining portion was wrongfully leased to other commercial concerns with the effect that the Claimant was deprived of full use of the property for which full payment was made. It is further asserted that the consequence of this, was that the Claimant was in breach of the Lease Agreement and the Defendant would be entitled to damages. These damages the Defendants says arose from it having paid more than it was obliged to pay for the time it was in possession of the Demised Premises.

**[10]** It is noteworthy that in the Lease Agreement provides for the Defendant to take "*that portion of the building which is described at Item 3 of the schedule*..." The plan referred to in Item 3 of the said schedule, which bears the Defendant's corporate seal and is annexed to the Lease Agreement, clearly shows the presence of areas labelled "Jerk Centre" and "Subzero" as areas adjacent to, but not included in the shaded area representing the "*leased premises*". It is therefore clear on the documentary evidence that the Defendant's assertion on this point is without merit.

(2) The variation of the terms of the Lease

**[11]** The Defendant also avers that it held over and remained in possession of the Demised Premises on terms pursuant to an oral agreement which are quite different from those set out in the particulars of claim and as a consequence the oral agreement constituted a waiver of the original Lease Agreement. The pleading is evasive and general. The Defendant has not pleaded with sufficient specificity the terms of this asserted oral agreement sufficient as to amount to a defence in law. Neither has the Defendant given any details as to what portions

of the Lease Agreement were amended and what it asserts are the current operative terms of the Lease Agreement.

**[12]** In these circumstances the assertions of the Defendant on this issue are wholly insufficient to provide a defence with a real prospect of succeeding. The Claimant in evidence filed on its behalf denies these oral agreements as but I find it unnecessary to make a finding of fact in view of my earlier expressed conclusions in this paragraph.

(3) Frustration of the Lease Agreement

**[13]** The crux of the Defence is encapsulated in paragraph 4 as follows;

> *"The construction of the Marriot Hotel Complex made it impossible for the Defendant to do business at the demised property since there was no facility for the patrons to park so as to access the venue. The result of that activity meant that the venue was no longer viable to carry on business as an amusement park in the New Kingston area."*

**[14]** The evidence on behalf of the Defendant as contained in paragraph 10 of the affidavit of Clinton Thompson filed 14th November 2016 is that it was a well established understanding and arrangement between the Claimant and the Defendant that the Defendant could only operate the Amusement Park if it could have access to parking within the vicinity of the demised premises. The Defendant explains the failure to have this understanding documented by the fact that he did not have independent legal advice. I do not accept the Defendants bald assertion that there was any such understanding as between the parties. In any event it is not pleaded in the Defence and there is nothing in the correspondence exhibited which shows that the Defendant raised the existence of any such understanding with the Claimant.

**[15]** The Defendant's case as advanced is that the divestment of the UDC parking Area deprived its patrons of suitable parking. Furthermore, during the period of construction of the hotel and its subsequent operations, the few parking spots on the side of the road were "extinguished". It was not expressly so stated but the

Court infers that it is being asserted that this was as a result of the use by the visitors to other facilities in the vicinity of the Amusement Park and the Court takes judicial notice of the close proximity of the Emancipation Park. The Defendant argued that since the vast majority of the patrons using its facility were drivers, the basis for operating a "*mini amusement park*" was totally extinguished. As a consequence, the Defendant argued that the termination of the parking arrangements with the UDC and the construction and development of the hotel (which were matters outside the control of the Claimant or Defendant) had the effect of automatically and immediately discharging the Defendant's obligations under the lease.

**The doctrine of frustration as applied to leases.**

**[16]** In the case of **National Carriers Ltd and Panalpina (Nothern) Ltd [1981] 2 WLR 45,** the House of Lords traced the history of the law relating to the doctrine of frustration. Lord Hailsham of St Marylebone L.C. was attracted to Lord Radcliffe's often quoted formulation of the theory in **Davis Contractors Ltd. v Fareham Urban District Council [1956] A.C. 696** at page 728 as follows:

> *"...frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do. "*

Lord Simon of Glaisdale and Lord Roskill also adopted similar formulations of the principle.

**[17]** As it relates to leases, the House of Lords held in the **National Carriers** case (supra) (Lord Russell of Kilowen dissenting), "*that the doctrine of frustration was in principle applicable to leases, though the cases in which it could properly be applied were likely to be rare*."

**[18]** In **Davies ( supra)** Lord Radcliffe gives additional guidance as to the approach a court should take at page 729 where he states:

> *There is, however, no uncertainty as to the materials upon which the court must proceed. "The data for decision are, on the one hand, the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred" (Denny, Mott & Dickson Ltd. v James B. Fraser & Co. Ltd., 25 per Lord Wright).*
>
> *In the nature of things there is often no room for any elaborate inquiry. The Court must act upon a general impression of what its rule requires. It is for that reason that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.*

**[19]** In analysing the facts before me, I am constrained to adopt a similar conclusion to that reached by Lord Radcliffe in **Davies** and say if the statement of the law in the preceding paragraph is the law, which I accept that it is, the Defendant's case "*seems to me a long way from a case of frustration*". The Lease Agreement provided for the Defendant to have use of the Demised Premises to operate a mini amusement park and to pay a monthly sum for such usage. It appears clear to me that the loss of access to the UDC Parking Area did not in any prevent the Defendant's operation of the mini amusement park. Its provision of mini amusement park facilities to its patrons did not become "radically different" from what it provided previously. Potential patrons still had access although it is not disputed that such patrons would not have had access to the additional space previously provided by the UDC Parking Area. The Court draws the reasonable inference that there was more intense competition for the limited parking area on the side of the road and that this may have deterred some patrons leading to a decline in the Defendants business (although the only evidence of this is the Defendant's assertion to this effect). But even if this is so, any hardship, inconvenience or financial loss suffered by the Defendant as a result of the loss of the UDC Parking Area would not be such as to raise the loss of that area to the level of a frustrating event.

**[20]** I understood Mr. Green for the Defendant to be submitting that the Court at this stage was incapable of making such an assessment as to whether there was a frustrating event. Counsel argued that this issue ought properly to be determined at trial where the Court would have the ability to review the evidence related to the Defendant's profit and loss accounts, then perform an analysis by month. Thereafter, the Court would determine whether there was a decline in the Defendant's business which made it commercially unsustainable and if so, whether there is a correlation between the decline in the Defendant's profits and the loss of the UDC Parking Area. As counsel expressed it, the Court must determine whether a viable business could still be sustained not just whether the business could continue to operate by providing the services which it had been providing.

**[21]** It is noteworthy that other than the Defendant's bare assertion that its business is no longer viable and that this has been caused by the loss of the UDC Parking Area, the Defendant has not produced any documentary evidence to support this assertion. If Counsel's submission on this point is correct, then this omission might not be fatal, because a detailed analysis involving accounts would properly be a matter for the trial Judge and would not be needed at this stage. In my view, in any event it is not necessary for any court to embark on such an "*elaborate enquiry*" at a trial in order to determine whether there was a frustrating event in the loss of the UDC Parking Area. Neither is this an issue to be reserved exclusively for the determination of a trial judge. As Lord Reid succinctly puts the test for frustration in **Davies** at page 721, which is similarly applicable on these facts:

> *"The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end."*

In this case, I have concluded that I do not need to perform an analysis of the Defendant's accounts to find, as I have found, that the Lease Agreement is wide enough to cover the new circumstances which arose and which have existed

since the UDC Parking Area became unavailable. In other words, I have concluded that the nature of the outstanding rights and obligations of the Claimant and Defendant were not so "significantly changed" by the loss of the UDC Parking Area "*from what the parties could have reasonably contemplated at the time of [the execution of the Lease Agreement] that it would be unjust to hold the parties to it*." Consequently, I find that the Lease Agreement and the contract governing the period after its expiry when the Defendant held over was not frustrated.

**[22]** The **National Carriers** case (supra) provides an example of the non-applicability of the doctrine of frustration. In that case, a building which was fitted to be a warehouse was demised to the defendants for a period of 10 years on terms that it be used only for that purpose. The sole vehicular access to the warehouse was by a street which the local authority closed because of the presence nearby of a derelict Victorian building which was a protected building and consequently could not be demolished without the consent of the Secretary of State for the Environment. The application for the demolition and eventual demolition of the derelict building took over 18 months, although at the time the anticipated length of closure was somewhat uncertain. The Defendant was sued for arrears of rent and the sole defence raised was by the Defendants was that by reason of the closure of the access street, the lease had become frustrated and was at an end.

**[23]** In his judgment at page 61 in **National Carriers** case, Lord Wilberforce, commented as follows;

> *"...My lords, no doubt, even with this limited interruption the appellant's business will have been severely dislocated. It will have had to move goods from the warehouse before the closure and to acquire alternative accommodation. After reopening the reverse process must take place. But this does not approach the gravity of a frustrating event. Out of 10 years it will have lost under two years of use; there will be nearly three years left after the interruption has ceased...."*

**[24]** There are clearly differences in the facts involved in Lord Wilberforce's analysis in the **National Carriers** case and the factual matrix with which this case is

concerned. One factor of significance is that the closure of the street in that case was “temporary though prolonged”, whereas the loss of the parking area due to the divestment of the UDC property in this case is final. Nevertheless, for the reasons outlined earlier in this judgment I find that the loss of the UDC Parking Area does not constitute a frustrating event.

**The conduct of the Defendant**

**[25]** In this case, it is of relevance that on the expiry of the term of the Lease Agreement on December 31, 2013, the Defendant held over the Demised Premises as a monthly tenant. The evidence on behalf of the Defendant to which reference has already been made is that the Defendant could only operate the Amusement Park if it could have access to parking within the vicinity of the demised premises (and I put to the side the issue of whether this was communicated to or appreciated by the Claimant).

**[26]** If the persons in charge of the Defendant were so intimately tuned to the necessity for adequate parking, then one would expect that the notification by the UDC of its intention to divest the Parking Area would have been a bombshell as far as the Defendant was concerned. One would expect that the date of the actual loss of the UDC parking lot would similarly be of paramount significance to the Defendant. It is therefore rather odd that there is an absence of any evidence on behalf of the Defendant as to when the UDC Parking Area was lost, since this is the frustrating event on which the Defendant is placing reliance.

**[27]** As it relates to the date of notification by the UDC of its sale of the parking area, what Mr. Clinton Thompson in paragraph 9 of his affidavit filed 14th November 2016 states is that “*in and around 2013*” the Defendant was advised by the UDC that it was selling the Parking Area. The date that the Defendant became aware of the proposed sale is material. It certainly would be of assistance to the Court in its analysis if it were advised as to whether the Defendant was informed of a

specific date of the sale or a date beyond which the Parking Area would cease to be available to the Defendant's patrons or potential patrons.

**[28]** Nevertheless, in the absence of this evidence from the Defendant, if for the sake of argument the Court adopts the position most favourable to the Defendant in examining Mr. Thompson's evidence and if the Court assumes that the Defendant was advised of the proposed sale in December the final month of 2013, then as at that time, the Defendant, would have been put on notice as to the likely impact that the loss of the Parking Area would have on its operations. Knowing the critical importance of parking to its operations (as it asserts), if the Defendant was not advised of a specific date then one would expect that, if possible, it would have taken steps to ascertain the effective date of divestment by the UDC. If the Defendant was a reasonable commercial entity, one would have expected that steps would have been taken to ensure that operations at that venue would be wound up once the Parking Area became inaccessible to its patrons, (if not before) in view of that reality looming large. In fact, after the Lease Agreement expired on December 31, 2013, the Defendant as a monthly tenant would have been well placed to give notice of termination and vacate the Demised Premises immediately given its knowledge of the likely impact of the loss of the existing amount of parking spaces. Instead, the Defendant continued to occupy the Demised Premises and now pleads frustration of the lease in his defence.

**[29]** In the affidavit of Mr. Thompson filed 11th November 2016, he complains that the Lease Agreement made no arrangement for the time that it would take to install and remove the equipment that would be used in the Amusement Park. He complains that at the time the Defendant executed the lease it had no advice on issues of that nature and as a result the Defendant was severely disadvantaged in the arrangements. This is not a factor to which the Court can have any regard. The Defendant is a commercial entity that was undertaking a commercial venture. It was incumbent on its director or directors to factor into the duration of the lease the time it would take to assemble any equipment it planned to use in

the venture and the time for the reverse process of disassembly and removal. The consequences of the Defendant's decision not to take adequate legal or other professional advice cannot be laid at the feet of the Claimant in the absence of any special relationship.

**[30]** As Lord Simon of Glaisdale speaking of the doctrine of frustration said in the **National Carriers** case (supra) at page 64:

> *In the first place, the doctrine has been developed by the law as an expedient to escape from in justice where such would result from the enforcement of a contract in its literal terms after a significant change in circumstances. As Lord Summer said giving the opinion of a strong Privy Council in Hirj Mulji v Cheong Yue Steamship Co. Ltd [1926] A.C. 497,510: "It is really a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands".*

**[31]** I have earlier in this judgment concluded that the doctrine of frustration does not avail the Defendant as a matter of pure construction of the Lease Agreement as applied to the changed circumstances following the UDC Parking Area becoming unavailable. However, that aside, it would be wholly unjust for the Court to permit the Defendant, having been aware of this possibility since (on its evidence) "*in and around 2013",* to continue to occupy the Demised Premised until October 2016 and to then rely on the doctrine of frustration to escape its financial obligations to the Claimant. The Claimant has been deprived of its property for the period for which it claims damages as a direct result of the Defendant's deliberate conduct. The authorities demonstrate that there are not many cases in which a defence based on the doctrine of frustration has succeeded and I am of the firm view that this is not a case in which the defence of frustration as pleaded has a real prospect of success.

**The procedural point – the arbitration clause**

**[32]** The Defendant has submitted that pursuant to the arbitration clause contained in clause 4.12 of the Lease Agreement this matter should be dealt with in arbitration and this court is not a convenient forum in which to determine the matter.

**[33]** Mr Braham Q.C. has submitted that, as a matter of pure construction, the applicable arbitration clause does not cover the dispute. Counsel commended the case of **Leighton Chin Hing v WISYNCO Group Limited SCCA No 15 of 2013** for the Court's consideration. In that case, a similar arbitration clause was considered but in the circumstances of the termination of a lease and for that reason I did not find the case to be helpful. However I do not find it necessary to decide this issue on a point of construction because I find that in any event the Defendant cannot at this stage raise the issue of the arbitration clause.

**[34]** Section 5 of the **Arbitration Act** provides as follows:

> *" If any party to a submission, or any person claiming through or under him, commences any legal proceedings in the Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings, and the Court or a Judge thereof, is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."*

**[35]** As it relates to taking a step in the proceedings, in the ***Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd*** **[1978] 1 Lloyd's Rep 357**, Lord Denning MR put the principle in this way (at p 361):

> *"On those authorities, it seems to me that in order to deprive a defendant of his recourse to arbitration a "step in the proceedings" must be one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration".*

The courts are always robust in their protection of litigants right to arbitration, where they have agreed on this process, (see for example the comments of Brooks, JA in **William Clarke v Bank of Nova Scotia Jamaica Ltd. [2012] JMCA Civ. 8**) but a stay of proceedings is not automatic and there has not been an application by the Defendant to stay the proceedings in favour arbitration. To the contrary, the Defendant has filed and served pleadings (statement of case) in the form of its defence. In these circumstances it is clear, in my opinion that the Defendant cannot at this stage invoke the arbitration clause even if that clause as framed is wide enough to cover the dispute. I have not been provided with, nor have I been able to identify any legal authority which suggests otherwise.

**[36]** For the reasons expressed herein, I find on a balance of probabilities that the defendant has no prospect of successfully defending the claim. I also find that there is no reason for the Court declining jurisdiction to hear the claim.

**The claim for interest**

**[37]** In the Court of Appeal decision of **British Caribbean Insurance Company Limited v Delbert Perrier** SCCA No. 114/94 it was held that it is open to the Court to award interest to a successful claimant in matters of commerce. In the **Perrier** case, Carey JA expressed the view that the issue was not subject to debate and said at page 16 of the Judgment:

> *"I do not think it can be doubted that where a person has been found to have failed to pay money which he should have, it is only right that he should pay interest to cover the period the money has been withheld".*

Carey JA referred to the statement of Forbes J in **Tate & Lyle Food Distribution Ltd. V Greater London Council & Anor** [1981] 3 All ER 716 as to the basis for awarding interest at page 722 as follows:

> *Despite the way in which Lord Herschell LC in London, Chatham and Dover Railway Co v. South Eastern Railway Co. [1893] AC 429 at 437 stated the principle governing the award of interest on damages, I do not think the modern law is that interest is awarded against the defendant as a punitive measure for having kept the plaintiff out of his money. I think*

> *the principle now recognised is that it is all part of the attempt to achieve restitution in integrum. One looks, therefore, not at the profit which the defendant wrongfully made out of the money he withheld (this would indeed involve a scrutiny of the defendant's financial position) but at the cost to the plaintiff of being deprived of the money which he should have had. I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the plaintiff would have had to borrow money to supply the place of that which was withheld. I am also satisfied that one should not look at any special position in which the plaintiff may have been; one should disregard, for instance, the fact that a particular plaintiff, because of his personal situation, could only borrow money at a very high rate or, on the other hand, was able to borrow at specially favourable rates, the correct thing to do is to take the rate at which plaintiffs in general could borrow money."*

**[38]** The Claimant has sought interest on the outstanding rental of $6,648,320.00 at the average rate of one percentage point above the average commercial bank prime lending rate and the interest paid by the bank of Jamaica on Treasury Bills during the period, from February 1, 2014 to the date of payment in full. I appreciate that because the Claimant has succeeded on a summary judgment application evidence has not been presented to the Court in support of the claim for interest and for that reason I will defer the final ruling on that issue.

**[39]** In the premises, the Court makes the following orders:

1. Summary Judgment is awarded in favour of the Claimant in the sum of $7,745,292.80.

2. There is to be a further hearing to determine the issue as to the claim for interest.

3. Costs of the claim to the Claimant to be taxed if not agreed.