IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. N-247/1997

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| BETWEEN | NATIONAL WATER COMMISSION | PLAINTIFF |
| A N D | DELTON KNIGHT | DEFENDANT |

Andre Earle instructed by Rattray, Patterson and Rattray for the Plaintiff.

Huntley Watson instructed by Watson and Watson for Defendant.

Heard: 19th and 20th November,1997
and 28th November, 1997.

IN CHAMBERS

JUDGMENT

COOKE,J.

The plaintiff seeks interlocutory injunctions in the following terms:

1. A prohibitory injunction restraining the Defendant whether by himself, his servant and or agents from constructing or erecting or continuing to construct or erect any buildings whatsoever on the Plaintiff's premises known as Part of Hope Estate, Gordon Town, in the parish of St. Andrew until after trial of this action or until further order be granted, with the Plaintiff giving the usual undertaking as to damages;

2. A mandatory injunction compelling the Defendant whether by himself, his servants and/or agents to remove that portion of building, which has been erected on the Plaintiff's said premises, until after the trial of this action or until further order, with the Plaintiffs giving the usual undertaking as to damages.

3. Such other relief as this Honourable Court deems just.

4. Costs to be for the Plaintiff to be agreed or taxed.

The defendant now occupies land owned by the plaintiff by virtue of a lease agreement signed by the parties on the 20th of July, 1994. The commencement date is the 1st of January 1994. It was for a term of five (5) years. Clause 2.14 of the lease states that:

> Not without the consent in writing of the lessor first had and obtained to erect or suffer to be erected or constructed on the lease premises any dwelling house or any other permanent structure of whatever kind.

A witness to the document comprising the lease agreement was Mr. H. Earle Watson the attorney-at-law of the defendant.

In his affidavit the defendant relates his association with the leased land. I set out portions hereunder:-

1. My true place of abode is 71 Forsythe Drive, in the Parish of Saint Andrew; my postal address is Kingston 6 and I am the Managing Director of Knights Meat & Food Distributors Limited.

2. My aforesaid business Knights Meat & Food Distributors Limited is a growing distribution company situated on three locations on Gordon Town Road including the premises the subject of this action.

3. In or around 1987 my aforesaid business was experiencing a rapid rate of growth such that we had to acquire premises at 17 Gordon Town Road in the Parish of Saint Andrew, 19 Gordon Town Road in the Parish of Saint Andrew and the subject premises.

4. At the time of our first occupying the subject premises it was an open lot of land which had been in ruinate for several years. I made numerous inquiries as to the ownership of the

subject lands to no avail as there was no person in the community who could recall the ownership of the land at the time.

5. At the time I took possession of the land I took steps to clear it and prepare it for occupancy and placed two steel containers on it to store goods which I would purchase for use in my aforesaid business.

6. I continued to use the two containers to store the said goods until about April or May 1994 when I commenced construction of a more secure building on the said land.

7. I commenced construction of a concrete structure on the said lands with the knowledge and concurrence of the National Water Commission acting through its agent or authorised officers Mr. Burgess and Mr. Gilbert.

8. When I first commenced construction on the land I had recently discovered that the National Water Commission was the proprietor of the said land and had initiated discussions with the said National Water Commission with a view towards formalizing my legal status on the land through purchase or rental of the same so that I could increase the security of my storage facilities.

9. I was told by Mr. Burgess that the National Water Commission would have no objection in principle to leasing me the land for use by my business provided that I met certain guidelines. The guidelines set by the National Water Commission included fixing the boundary of any structure I erected on the land no closer than ten feet from the bank of a water way behind the said land.

10. Mr. Burgess subsequently told me that the Commission's legal department would produce a lease document in the format which is commonly used for their leases and that I would be required to sign this document.

11. I then mentioned that my situation had become critical and that I would like to commence constructing my warehouse/storage facility.

12. .....

13. .....

14. .....

15. The first time that the National Water Commission approached me about my building on the said lands was in or around August, 1997 when I was approached by Mr. Gilbert one of the officers of the Commission with whom I first dealt and whom I have known for several years as he is from the area and in fact he passes by the said land daily on his way to his home in Freetown.

16. Mr. Gilbert's comment at the time was that I appear to have given up the premises as he observed that I had expanded the premises at number 17 Gordon Town Road. At no time during this meeting or prior to this meeting did Mr. Gilbert or any representative of the National Water Commission comment that my building at Lot 35 Gordon Town Road was in breach of the lease agreement although this concrete building is in plain sight from the road.

17. Had the National Water Commission indicated to me at the time of my leasing the lands or even prior to my commencing construction and taking the building to such an advanced state of finish I would not have built this

structure. Mr. Gilbert's sole troubling observation at any time was that he requested to see my building approval thereby adverting me to the need for such approval. I exhibit hereto marked "DK1" for identity a true copy of letter dated September 17, 1997 whereby Mr. Gilbert requested information on my building approval.

The defendant says that structure of which the plaintiff complains commenced in May 1994. That is more than three years ago. And it is not yet finished! I have looked at the photographs of the structure and although fully aware of my lack of expertise in this area I see a picture of basic partial construction. Building blocks are yet to be laid. A substantial quantity of lumber is stacked. I find it inconcievable that this structure commenced in May 1994. Given that construction began as the defendant said, it would mean that at the time when the lease document was signed that there was already on the leased land a permament structure being erected by the defendant. So why did the parties sign a document which contained clause 2.14? This is entirely nonsenical. The defendant in paragraph 8 states that when he commenced construction he had recently discovered that the National Water Commission was the proprietor of the land and he then initiated discussions pertaining to his legal status. But look at a letter written by the defendant dated November 9, 1993.

**November 9, 1993**

**The Property Manager**
**National Water Commission**
**28 Church Street**
**Kingston.**

**Dear Sirs:**

**With regard to the parcel of land opposite my business place at 48 Gordon Town Road, St. Andrew, on which we have been allowed to put containers for storage, we hereby apply for the occupancy of the adjoining piece if your company has no immediate plans for usage.**

**We have enclosed a diagram which shows our proposal plan and development, and would be willing to comply with any expansion plans you may have.**

**If the need arises for us to vacate or alter any temporary structure which we may erect on this parcel of land with your permission, we will be willing.**

**If in the future this parcel of land is for sale, we are willing to purchase same.**

**Yours truly**

**Delton Knight**

This letter demonstrates that when the defendant says that it was in May 1994 that he "recently discovered" the ownership of the land that statement is not in harmony with the truth. It is to be noticed that in this letter there is reference to "our proposed plan of development". This is a hand drawn rough sketch showing 'lands now accupy' (sic) and "additional lands". There is not the slightest indication that any structure of any sort, permanent or otherwise was to be put on the "additional lands." There was an indication that the "additional lands" would be adorned with trees and flowers along its entire border. One final comment on this letter. The defendant writes:-

> "If the need arises for us to vacate any temporary structure which we may erect on this parcel of land with your permission we will be willing."

Even as early as November 9, 1993 the defendant fully recognised that he had to have had permission to put up any temporary structure. The construction of a permanent structure was not envisaged. Certainly it would be wholly unrealistic to hope that the plaintiff/owners would ever for a moment contemplate such a suggestion.

Nowhere in the defendant's affidavit has he stated that he advised the plaintiff about his actual construction. Paragraphs 9,10 and 11 of the defendants affidavit gives the impression that the plaintiff was well aware of his intention. (Incidentally the "Mr. Burgess" of whom he speaks is no longer employed to the plaintiff.) At this stage I wish to advert to a letter dated September 15, 1997 from the plaintiff to the defendant.

**September 15, 1997**

**Mr. Delton Knight**
**c/o Knight's Meat & Food**
**Distributors Limited**
**48 Gordon Town Road**
**Kingston 6.**

**Dear Mr. Knight:**

**RE: LEASE OF LAND AT GORDON TOWN ROAD**

A recent investigation which was carried out by the Properties Department of the NWC revealed the following:-

1) Major construction works are taking place on the property without the approval of the NWC.

2) You have occupied approximately 4,800 sq. ft. of land instead of the 3,000 sq. ft. which is stipulated in the Schedule (Item 6) of the Lease Agreement.

With regards to item #1 above, you have breached Clauses 2.06 and 2.14 of the Agreement thereof, despite the penalties outlined in the said document.

**Effective immediately,** please desist from carrying out any further construction works on the property. In the interim, the matter will be referred to our Legal Department and all other agencies concerned for the necessary action.

Yours faithfully,
**NATIONAL WATER COMMISSION**

**Michael Forbes**
**PROPERTIES ADMINISTRATOR(ACTG.)**

This letter was handed to the defendant in person.

I now refer to a letter of September 17, 1997 which speaks for itself.

**September 17, 1997**

**Rupert A. Cover Esq.**
**Properties Administrator**
**National Water Commission**
**28-30 Church Street**
**Kingston.**

**Dear Sir:**

**Re: Lease of lands at Gordon Town, St. Andrew**
**National Water Commission to Delton Knight**

**We act for Mr. Delton Knight.**

**From our instructions Mr. Knight leased approximately 3000ft² of land at Hope Estate, Gordon Town from the Commission in in about the year 1996. The term was five years with an option to renew.**

**Mr. Knight is now interested in buying the land.**

**Please advise us whether the Commission is at all interested to sell.**

**Yours faithfully**
**WATSON & WATSON**

**PER:.....**
**EARLE WATSON**

**HEW/dg**

**c.c. Mr. Delton Knight**

It would seem that having received the letter of the 15th September 1997 he forthwith sought out his attorney-at-law. It is impossible not to infer that the letter of the 17th September was not prompted by that of the 15th September. Quite interestingly the 17th September letter makes no reference to the 15th September letter. That omission speaks loudly- for there is in it no contest to the complaints contained in the letter of the 15th September. Now view this absence of challenge to the plaintiff's complaints alongside paragraphs 9,10 and 11 of the defendants affidavit. Surely it is a normal expectation that "from the off" the defendant would have set out his position. Is it an afterthought? For my part this is yet another example of the insincerity of the defendant's case.

I now turn to clause 2.14 of the lease agreement. With more than a little boldness counsel for the defendant has sought to argue that there was no breach of that clause. The submission is to the effect that the parties at the time of agreement well knew that the defendant wished to place on the land a secure structure for storage. This it is said is the purpose of the agreement. It was a contract for commercial purposes. Therefore the court should construe this clause so as to give expression to the intention of the agreement. There is no merit in this contention. Here all the terms of the agreement were reduced to writing. It was signed by the defendant and witnessed by his attorney-at-law. I should add here that there is provision in the lease agreement as to how temporary structures are to be dealt with. This 2.14 clause prohibits the construction of permanent structures. If the defendant believed (and I do not say he so did) that the agreement permitted him to erect a permanent structure he has made a bad bargain. His intention cannot avail him. There is no room whereby this agreement can be added to, varied or contradicted. But further, counsel would ask this court to say that this clause is ambiguous. He says that "any dwelling house or any other permanent structure of whatever kind" is unclear. It is unclear because it is uncertain if this clause is only as to dwelling houses and like clause structures. Suffice it to say that there is no ambiguity. No permanent structure is to be erected on the land. It can therefore be said with certainty that the defendant was in breach of clause 2.14.

I now turn my attention to the question of the prohibitory injunction. Perhaps not surprisingly, I will begin with the often quoted passage of Lord Cairns in **Doherty v Allman (1878) 3 A.C. 709, at p. 720.**

I accept this passage as a definitive statement of the law. However, where Megarry J, speaks of "where there is a plain and uncontested breach of a clear covenant" I would add the words "or a breach not subject to contest'. I add these words for a contest entirely without merit, as in this case should be regarded as uncontested. A specious contest is no contest at all. Megarry J. fully recognised that in the web of human affairs the law is not so omniscient as to anticipate future eventualities. Hence he qualified his enunciation by the phrase 'in the absence of special circumstances'. Are there any special circumstances in this case? The answer is an unequivocal no. When a covenantor embarks on a calculated act in wanton and very substantial defiance of his known obligation I cannot concieve of any special circumstances that could come to his aid. When I come to deal with the question of the mandatory injunction I will examine the circumstances surrounding the construction. As of now there is an order in terms of paragraph 1 of the summons.

It is well recognised that the grant of a mandatory interlocutory injunction is a very drastic step. In **Esso Standard Oil S A Limited v Lloyd Chan (S.C.C.A. no. 12/88) Campbell J.A.** delivered himself thus:-

> **"The principle applicable to the grant of a mandatory interlocutory injunction which is comparable in its nature and function to a mandamus is that it will ordinarily be granted only where the injury is immediate, pressing, irreparable, and clearly established and also the right sought to be protected is clear.**

The use of the word "ordinarily" should not be overlooked. The consideration of the presence of damage and the extent of such damage is an important factor. In **Durell v. Pritchard (1865) 1 CH App. 244 at p. 250 Sir G. H. Turner L.J,** said,

> "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 convenant, 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 of injury- it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves."

In **Hamstead v Suburban Properties Ltd. v. Diomedous (1969) 1 Ch 248 at p. 259. Megarry J,** in considering those words of Lord Cairns had this to say:-

> "Thirdly, there is Doherty v. Allman. I accept, of course, that Lord Cairns' words were uttered in a case where what was in issue was a perpetual injunction and not an interlocutory injunction. Indeed, the words seem to be obiter, for no negative covenant was present in that case. But these considerations do not preclude the words from having any weight or cogency in relation to an interlocutory injunction. 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 circumtances 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. Indeed, Lord Cairns' express reference to "the balance of convenience or inconvenience" suggests that he had not forgotten interlocutory injunctions. I see no reason for allowing a convenantor who stands in clear breach of an express prohibition to have a holiday from the enforcement of his obligations until the trial. It may be that there is no direct authority on this point; certainly none has been cited. If so, it is high time that there was such authority; and now there is."

> **"The authorities upon this subject lead, I think, to these conclusions- that every case of this nature must depend upon its own circumstances, and that this Court will not interfere by way of mandatory injunction, except in cases in which extreme, or at all events very serious, damage will ensue from its interference being withheld."**

A number of other authorities were cited to me as to the aspect of damages but this is such a well established consideration that I find it unnecessary to refer to them. In this case the plaintiff did not show how the construction adversely affected its waterworks on the leased land. Therefore the defendant says that since the plaintiff cannot demonstrate damage to itself consequent upon the construction no mandatory injunction should be granted. The question of damages for the alleged breach should await the trial. The defendant further contends that he has gone to great expense to put up the structure - which he says is almost 90% completed. The balance of convenience is all his way- he asserts.

In **Colls v. Home Colonial Stores Limited [1904] A.C. 179 Lord Macnaghten** in his speech at p. 193

> **"I rather doubt whether the amount of damages which may be supposed to be recoverable at law affords a satisfactory test. In some cases, of course, an injunction is necessary - if, for instance, the injury cannot fairly be compensated by money - if the defendant has acted in a high-handed manner - if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the Court. In all these cases an injunction is necessary, in order to do justice to the plaintiff and as a warning to others."**

In this case as I have already indicated the defendant set out to flagrantly disregard his obligation. To compound matters he constructed without any regard for the requisite statutory permission. It is only now that the defendant says in paragraph 22 of his affidavit that he has employed "a draughtsman to prepare a plan of the premises for submission to the Kingston and St. Andrew Corporation for its approval."

So on the case for the defendant he has been building for 4 years knowing that he did not have right so to do. It will be recalled that in paragraph 16 of the defendant's affidavit he said that the 'concrete building is in plain sight from the road.' This statement is misleading. The leased property had a 10ft. solid wall surrounding it. It was impossible to see what was taking place below the height of the wall. Construction was being carried out in a clandestine manner. From the beginning what the defendant really wanted was to purchase the land. I have no difficulty in saying that he has acted in a high-handed and devious manner. His behaviour was designed 'to force the hand' of the Plaintiff.

Our courts exercise great caution before an interlocutory mandatory injunction is ordered. In **Shepherd Homes Ltd. v. Sandham [1971] Ch. 340 at p. 349, Megarry J,** in his discussion concerning the grant of interlocutory prohibitory and mandatory injunctions said :-

> **"It is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course, grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation."**

Further at p. 351, he continued,

> **"In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction."**

Again at p. 352 - it was his view that:-

> **"No doubt, a mandatory injunction may be granted where the case for one is unusually sharp and clear; but it is certainly not a matter of course."**

I have already reviewed the evidence presented before me and despite the great caution which must be my constant companion in deciding this aspect of the case I conclude that the Plaintiff is entitled to an interlocutory mandatory order. I do not see how the defendant can complain when his loss in demolishing the construction is self induced. In the circumstances of this case it does not sit well on the tongue of the defendant to speak of comparative losses- or damage. He has not come to court with clean hands. I have already commented on his high-handed and devious behaviour. This is a case that is 'unusually sharp and clear.'

I wish to deal with one final aspect. It pertains to the submission that to grant the interlocutory injunction sought will effectively bring the matter to a close. Well in this regard I respectfully adopt the approach of Lord Denning M.R. in **Total Oil Great Britain Ltd. v. Thompson Garages (Biggin Hill) Ltd. (1972) 1 Q.B. 318** where at p. 323 he opined:-

> **"Finally, Mr. Thompson urged that this ought not to be dealt with on an interlocutory application; because it would, in effect, be deciding the case finally here and now. So be it. That often does happen on interlocutory applications. We have before us all the information which is necessary to decide it. It seems to me that, even though it may be deciding the case now, we should so decide it."**

It is my view that this case fits squarely in the category described. My treatment of the evidence will have already demonstrated this.

It is only left for me to say that there will be an order in terms of paragraphs 1,2 and 4 of summons dated 7th day of October, 1997.