

Judgment Both

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L 1996/F111

BETWEEN FINANCIAL INSTITUTIONS SERVICES LIMITED PLAINTIFF

AND VEHICLES AND SUPPLIES LIMITED 1ST DEFENDANT

**AND VEHICLES & SUPPLIES (INDUSTRIAL DIVISION)
LTD. 2ND DEFENDANT**

Mr. M. Hylton Q. C and Miss Debbie Fraser instructed by Myers Fletcher and Gordon for the Plaintiff.

Mr. Abe Dabdoub and Miss K. Stanley instructed by Chancellor & Co. for the Defendants

Heard: May 17; June 23, 2000

IN CHAMBERS

HARRISON J.

The Application

The plaintiff has filed this application for summary judgment and also seeks an order that the Amended Defence of the defendants be struck out pursuant to section 191 of the Judicature (Civil Procedure Code) Law or alternatively on the ground that the Defence does not disclose an arguable defence and that there should be judgment for the plaintiff.

The Law

In these proceedings the burden is on the defendant to satisfy the Court that he has a good defence. Once the Court is satisfied that there are triable issues or there is an arguable defence, it must allow the matter to proceed to trial. Section 79(1) of the Judicature (Civil Procedure Code) Law (hereinafter referred to as the "Code") provides as follows:

"Where the defendant appears to a writ of summons specially indorsed with or accompanied by a statement of claim under section 14 of this Law, the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount claimed (if any liquidated sum is claimed), and stating that in his belief there is no defence to the action except as to the amount of damages claimed if any, apply to a judge for

liberty to enter judgment for such remedy or relief as upon the statement of claim the plaintiff may be entitled to. The Judge thereupon, unless the defendant satisfies him that he has a good defence to the action on the merits or discloses such facts as may be deemed sufficient to entitle him to defend the action generally, may make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed.” (Emphasis supplied)

According to Ackner LJ in **Banque et des Pays-Bas (Suisse) SA v de Naray** [1984] 1 Lloyd's Rep 21 at page 23:

“ It is of course trite law that O. 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendants' having a real or bona fide defence.”

In **Bhogal v Punjab National Bank, Basna v Punjab National Bank** [1988] 2 All E.R. 296 at 303 Bingham L. J putting the matter differently, said:

“But the correctness of factual assertions such as these cannot be decided on an application for summary judgment unless the assertions are shown to be manifestly false either because of their inherent implausibility or because of their inconsistency with the contemporary documents or other compelling evidence”.

With respect to the striking out of Pleadings, section 191 of the Code provides as follows:

“ The Court or a Judge may, at any stage of the proceedings, order to be struck out or amended any matter in any endorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action, and may in such case, if they or he shall think fit, order the costs of the application to be paid as between solicitor and client.”

In **Drummond-Jackson v DMA** (1970) 1 All E.R. 1094, Lord Pearson at page 1101 said inter alia:

“...the power should only be used in plain and obvious cases....No exact paraphrase can be given but I think “reasonable cause of action” means a cause of action with some chance of success when.....only the allegations are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail the statement of claim should be struck out”.

In **Wenlock v Moloney and Others** [1965] 2 All E.R. 871 Danckwerts L J stated at page 874:

“ In the case of the inherent power of the court to prevent abuse of its procedure by frivolous or vexatious proceedings in proceedings which were shown to be an abuse of the procedure of the court, an affidavit could be filed to show why the action was objectionable”.

Examination of the pleadings and evidence

I am most grateful to the Attorneys for their written submissions as they have assisted the Court tremendously in the preparation of this judgment.

In support of the application Carina Cockburn has deposed as follows:

“I have access to the books and records of the plaintiff and have carried out various investigations into the plaintiff's affairs. I hereby verify the claims set out in the statement of claim and I verily believe that the defendants have no defence to it.”

Now, what are the facts that the parties are relying upon? I will summarize them as best as I can.

The plaintiff alleges that it is the registered proprietor of premises known as lots 1, 2 and 15 Blaise Industrial Park, 69-75 Constant Spring Road ,Kingston 10 which are registered respectively at Vol. 1239 Folio 499, Vol. 1239 Folio 500 and Volume 1239 Folio 513 of the Register Book of Titles. Consolidated Holdings Limited was the previous registered proprietor of the lands but in April 1995, the Minister of Finance assumed temporary management of that Company. A Scheme of Arrangement was subsequently sanctioned by the Supreme Court in October 1995 whereby the assets of Consolidated Holdings were transferred to the Plaintiff.

The plaintiff also alleges that first defendant had lodged a caveat against the titles for the lands but having failed to respond to the Registrar of Titles notice warning it, the plaintiff was registered as the proprietor.

The defendants on the other hand, are relying upon an oral agreement that is alleged to have been entered into between Consolidated Holdings Limited and the first defendant. The defence also alleges that this agreement was reduced into writing for execution by the various parties. The defendants contend that the first defendant is entitled to possession of the lands and that the second defendant is in lawful possession of the lands as its tenant. Further, the first defendant contends that it has full equitable interest in the lands and that it is entitled to undisturbed possession as equitable owner and that the second defendant is its lawful tenant.

The issue which arises therefore, is whether the defendants are entitled to possession of the lands either as equitable owner or as a lawful tenant.

Mr. Hylton Q.C submitted that even if the first defendant is the equitable owner of the lands, it had no power to grant a tenancy to the second defendant as no one but the legal

owner of an interest in property has the ability to create a tenancy over the property. Furthermore, even assuming that the first defendant had a beneficial interest in the lands, it still could not grant a legal tenancy to the second defendant as the person with the paramount title could call for the eviction of the purported tenant. There was no evidence either that Consolidated Holdings Ltd or the Plaintiff in any way acquiesced in the first defendant granting the second defendant a lease of the property.

Mr. Hylton also submitted that the first defendant's case is inherently implausible and is contradicted by the contemporary documents. At this stage, an examination of the pleadings and affidavit evidence will be necessary so I have set them out below.

The Defence states inter alia:

"16. By an oral agreement made between the first defendant and Consolidated (hereinafter called the "Consolidated Agreement") it was agreed that:

- i) The first defendant would give up its 49% interest in the project to Consolidated;
- ii) The first defendant would realize its investment in the project ; and
- iii) Consolidated would satisfy its indebtedness to Dojap by transferring the said lands along with the partially completed buildings thereon to the first defendant. It was further agreed that the first defendant would take possession of the said land along with the partially completed buildings thereon and would complete the said buildings and outfit them."

Paragraphs 19 and 20 of the said Defence also state:

"19. That pursuant to the various oral agreements arrived at between Consolidated, Dojap and First Defendant, Mr. Raymond Clough of Clough Long & Co was instructed by Consolidated to reduce the various oral agreements into writing for execution by the various parties

20. The Defendants aver and say that on or about the 12th day of November, 1991 the first defendant presented with an undated Memorandum of Understanding and an undated Joint Venture Agreement including an undated Agreement for Sale and Instrument of Transfer made between Consolidated and the first defendant pursuant to the various agreements, which were executed by the various parties on the said day ...The defendants aver and say that subsequent to the signing, dates were placed on the various documents by Mr. Raymond Clough....The defendants will at the trial refer to, use and rely on the said Memorandum of Understanding and Joint Venture Agreement as well as the Agreement for Sale and Instrument of Transfer for its full terms and effect."

Now, the affidavit of Samuel Harrison sworn to on the 18th March 1997 states inter alia:

"2. ...in suit No. E 272 of 1996 , Vehicles and Supplies Limited v Financial Institutions Services Limited, and Consolidated Holdings Limited, the defendant herein, as Plaintiff in that action, sought a declaration that the property, the subject of this action is owned in equity by it and sought inter alia, an injunction restraining the plaintiff, the defendant in that action, from selling or transferring the said lots to any other person.....

3. That the said Vehicles and Supplies Limited sought in that action an interlocutory injunction restraining Consolidated Holdings Limited and Financial Institutions Services Limited from selling or transferring or disposing or pledging the property and supported that application with an affidavit of Donald Panton....

4. That the summons came on for hearing...on the 5th December, 1996 when I appeared with Mr. John Vassell on behalf of the defendants and Mr. Walter Scott with Ms. Carolyn Reid appeared for the plaintiff. Mr. Vassell took an objection to the reading by the Plaintiff's Counsel of paragraphs 15 to 18 of Donald Panton's affidavit on the grounds that the original stamped documents referred to in the said paragraphs were not produced and sought an order that those paragraphs be struck out. The objection was upheld and Mr. Scott applied for an adjournment until the day following, to try and produce the documents or to advise himself further regarding them.

5. That on the day following , Mr. Scott did not produce the documents and advised the Court that he had no choice but to withdraw the application for the injunction...."

In an Affidavit sworn to by Walter Scott on the 14th day of January 1998 he states inter alia:

"3. That the main reason for the discontinuance of suit No. E 272 of 1996 was because the defendant had brought the action herein subsequent to the defendant's action Suit No. E 272 of 1996 and I advised the defendant.....that the defendant's legal and financial interest would be best served by discontinuing suit No. E 272 of 1996 and pursuing the defendant's claim by way of Defence and Counter Claim to suit No. F111 of 1996 since the subject matter of the two suits touched on the same facts.

4. That the documents on which the defendant relies do in fact exist and a copy of the said documents was lodged by the defendant with the Registrar of Titles in support of a Caveat against Consolidated Holdings Limited, the registered owners of the said property. I exhibit hereto marked "WS 1" a photocopy of the said caveat with the supporting documents which was obtained from the Registrar of Titles.....

5. That Plaintiff is fully aware of the existence of the documents on which the defendant relies in its claim against the plaintiff...”

Paragraph 6 of the affidavit of Janice Causewell sworn to on the 23rd January 1998 on behalf of the plaintiff, deposes as to the non-existence of the titles. It states as follows:

“That I have seen the Affidavit of Walter Scott dated 14th January 1998, and filed herein and would say that, in light of the foregoing, the joint Venture Agreement exhibited to that Affidavit purportedly dated 1st November 1989, upon which the defendant is relying to establish its title, could not, in fact, have been entered into on that date since on that date the titles described at item 2 of the Schedule of the said agreement did not exist.”

Mr. Raymond Clough, the Attorney at Law who it is said prepared the documents, has sworn to an affidavit dated 17th May 2000 on behalf of the defendants and he seeks to explain the dating of the respective documents referred to above. He has stated inter alia:

“2. That sometime in late 1991, I was instructed by Consolidated Holdings Limited to prepare certain documentation to give effect to certain agreements arrived at between Dojap Investments Limited, Vehicles and Supplies Limited and Consolidated Holdings beginning in late 1989.

3. That in pursuance of those instructions I prepared a Memorandum of Understanding together with a Joint Venture Agreement, Agreement of Sale and Transfer which were all signed by various parties on the 12th day of November, 1991.

4. That I have read the affidavit of Walter Scott sworn to on the 14th day of January, 1998, and that the documents exhibited thereto marked “WS 1” were in fact prepared by me and executed on the 12th day of November, 1991. That the date the 1st day of November, 1989 appearing on the Joint Venture Agreement was in fact inserted by me when the document was engrossed as my instructions were that this Agreement was arrived at in late 1989.”

In light of the foregoing, Mr. Hylton submitted that the defendants’ allegations were “truly implausible given:

“ i)The contemporary documents between the parties.

ii) The manner in which the Memorandum and the Joint Venture Agreement documents were produced

iii) The fact that an explanation as to the “true” date of execution was only offered when Janice Causewell proved that in light of the issuance of the titles the documents could not have been entered into the dates they purported to be.

He further submitted it was more likely that the Memorandum and the Joint Venture Agreement were created for the purpose of deceiving the Registrar of Titles that the first defendant possessed a caveatable interest with respect to the lands.

An issue was also raised as to whether or not the purported Agreement satisfied the requirements of the Statute of Frauds. Mr. Hylton submitted that it was trite law that an oral agreement was not sufficient to transfer or create an interest in land and that there must be some memorandum in writing which satisfies the requirements of the Statute of Frauds. One such requirement was that the memorandum "must contain all the terms of the oral contract and not include any terms different from or additional to those of that contract". (See Vourmard's *The Sale of Land*, Third Edition, page 59). He further submitted that the consideration for the sale of the property must be clearly stated and in the instant case, the Memorandum did not provide a fixed price as the consideration for the property to the first defendant.

The alleged terms of the oral agreement are set out at paragraph 16 of the Defence and it is stated:

- “1. The first defendant would give up its 49% interest in the project to Consolidated Holdings.
2. The first defendant would realize its investment in the project; and
3. Consolidated Holdings would satisfy its indebtedness to Dojap by transferring the lands along with the partially completed buildings thereon to the first defendant and that the first defendant could take possession of the lands along with the partially completed buildings and would complete the buildings and outfit them.”

Now, the Memorandum of Understanding provides as follows:

- “ 1 Consolidated Holdings has agreed to purchase from Vehicles and Supplies Ltd its 49% share interest in the project aforementioned.
2. Vehicles and Supplies Ltd has agreed to sell its 49% share interest in the said project;
3. That Consolidated Holdings has agreed to transfer to Vehicles and Supplies Ltd and Vehicles and Supplies has agreed to accept in exchange and payment for the said 49% share interest the lots 1, 2, and 15 part of the lands known as numbers 69, 73 and 74 Constant Spring Road, Kingston 10... in the terms and conditions of the Agreement for Sale and Purchase and Transfer attached hereto marked “B” and “C” respectively.”

Mr. Dabdoud contended however, that "whether or not the written agreements superseded the oral agreements and whether or not they are to be relied on", are issues to be determined by the Court after hearing the evidence to be adduced by the parties. He also submitted that the defendants having occupied the premises and have provided good consideration, it is for the Court to determine the effect of these agreements and to say whether they entitle the defendants to any equitable interest since in keeping with the Scheme of Arrangement, the plaintiff assumed all the assets and liabilities of Consolidated Holdings Limited.

Mr. Hylton's final attack touched and concerned the indefeasibility of the registered proprietor of land title. He submitted that since the plaintiff is registered proprietor of the lands, its title is indefeasible. In such a situation, there could be no arguable defence to this claim. He referred to sections 70, 71, 161 and 163 of the Registration of Titles Act. He argued that the defendants did not allege any fraud on the part of the plaintiff therefore knowledge of any unregistered interest which the defendants may have would not suffice to defeat the plaintiff's registered interest. He relied upon the cases of Frazer v Walker [1967] AC 569; Assets Company Limited v Mere Roihi [1905] AC 176; Waimiha Sawmilling Company Limited v Waione Timber Co. Ltd [1926] AC 101, Boyd v Mayor of Wellington [1924] NZLR 1174 and Doris Willocks v George Wilson and Doreen Wilson (1993) 30 JLR 297.

With regards to the striking out of the Defence, Mr. Hylton submitted that it ought to be struck out on the grounds that :

1. No reasonable defence is disclosed by it.
2. It is frivolous and vexatious
3. It is an abuse of the process of the Court.

Mr. Dabdoud further submitted that since Counsel for the plaintiff has not taken any objections to the first defendant's counterclaim and the Defence and Counterclaim are grounded on the same facts, summary judgment ought properly not to be granted - see Morgan & Son Ltd v Martin Johnson & Co Ltd (1949) 1 KB 107.

Findings

I am well aware of the principle that the hearing of an application for summary judgment should not become a trial of the matter. I have given careful consideration to the evidence presented and the submissions of both Attorneys at Law, and have arrived at the following conclusions. I find:

1. That the first defendant could not, in view of the plaintiff's legal title in the lands in dispute, grant a tenancy to the second defendant.
2. That having regard to the abovementioned chronology of events, the Defence falls squarely within the principle enunciated by Bingham L.J in the case of Bhogal

referred to above. I agree with the submission made by Mr. Hylton that the defendants' claim is implausible given the contemporary documents between the parties, the manner in which the Memorandum and the Joint Venture Agreement documents were produced and the fact that the explanation as to the true date of the execution was only offered when Janice Causewell revealed that in light of the issuance of the titles, the documents could not have been entered into on dates they purported to be. It is also my considered view, that the explanation given by Mr. Clough as to the dates placed on the documents, cannot take the Defence any further.

3. That the written contract (the Memorandum of Understanding) that was purportedly dated 12th November, 1991 does not comply with the alleged terms of the oral agreement. Paragraph 16 of the defence referred to supra, has set out the terms of the alleged oral agreement but a close examination of both documents reveals that there are major differences in their contents.

4. That the Memorandum of Understanding does not provide a fixed price as the consideration for the property to the first defendant. It therefore fails to satisfy the requirements of the Statute of Frauds. I therefore hold that there is no memorandum in writing which could support the claim by the first defendant that it has an equitable interest in the lands.

5. That since the plaintiff is the registered proprietor of the lands, its title is indefeasible. (See sections 70, 71, 161 and 163 of the Registration of Titles Act, the Privy Council decision of Frazer v Walker [1967] AC 569 and the Court of Appeal decision of Willocks v Wilson and Anor, reported at Vol 30 JLR 297). Furthermore, since the defendants have not alleged fraud by the plaintiff, any unregistered interest that the defendants may have, would not suffice to defeat the plaintiff's registered interest.

Conclusion

It is therefore my considered view that the defendants have not satisfied this Court that there is a fair or reasonable probability that they have a real or bona fide defence. In the circumstances, I conclude that the plaintiff is entitled to summary judgment. Accordingly, IT IS HEREBY ADJUDGED AND ORDERED THAT:

1. The defendants have no interest legal or equitable in the commercial premises known as lots 1, 2 and 15 Blaise Industrial Park, 69 – 75 Constant Spring Road, Kingston 10, registered respectively at Volume 1239 Folio 499, Volume 1239 Folio 500, Volume 1239 Folio 513 of the Register Book of Titles.
2. The Defendants do forthwith deliver up possession of the said premises to the Plaintiff.
3. The Defendants pay to the Plaintiff Mesne Profits to be assessed.

4. The Defendants do pay the Plaintiff the costs in this action to be taxed if not agreed.
5. Certificate for Two (2) Counsels granted.
6. Leave to appeal granted