



[2022] JMCC Comm 35

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO: SU2020CD00298

BETWEEN BARRINGTON GARDNER CLAIMANT

AND BALOGA FARMS LIMITED DEFENDANT

IN CHAMBERS BY VIDEO-CONFERENCE

Appearances: Natalie Douglas instructed by Wilson & Franklyn for the Claimant

Mr. Garth McBean KC instructed by Garth McBean & Company for the Defendant

Heard: 14th July and 25th November 2022

Injunctions – Part 17 of the CPR – Procedural Irregularity – Failure to Comply with CPR rule 8.8(2)(a) – CPR rule 26.9 – Res judicata – Estoppel

BROWN BECKFORD J

BACKGROUND

[1] Mr. Barrington Gardner, the Claimant, commenced proceedings by way of Fixed Date Claim Form, filed August 3, 2020, against Baloga Farms Limited (“**Baloga Farms**”), the Defendant, and Mr. Duane Thomas (then 2nd Defendant). An Affidavit of Barrington Gardner was filed 27th July 2020 in support of Ex-Parte Notice of Application for Court

Orders (“**NOA**”) filed the same date. The Claimant is seeking reliefs pursuant to **S.213A of the Companies Act of Jamaica**.

[2] The Claimant filed a Notice of Application for Interim Injunction dated 4th May 2022 against the Defendants which is the subject of this decision. The Claimant sought the following Orders:

- a. An interim injunction restraining the Board of Directors of the First Defendant Company and the Second Defendant from taking any actions in connection with the First Defendant Company until the trial of the action or further Order of the Court;
- b. An interim injunction restraining the Board of Directors of the First Defendant Company and the Second Defendant from holding any meetings of the Directors or Shareholders of the First Defendant Company until the trial of the action or further Order of the Court;
- c. An interim injunction restraining the Board of Directors of the First Defendant Company and the Second Defendant from executing any resolutions, recording any minutes, or entering into any agreements or contracts on behalf of or in the name of the First Defendant Company until the trial of the action or further Order of the Court;
- d. An interim injunction restraining the Second Defendant from dealing in the land situate at Thetford, Church Pen District, Old Harbour, in the Parish of Saint Catherine, which lands were on 15 November 2021 transferred from the First Defendant Company to the company Equimax Holdings Limited without the knowledge or consent of the Claimant/Applicant as a Director and 43.5% shareholder in the First Defendant Company until the trial of the action or further Order of the Court;

- e. An order that the First Defendant and Second Defendant do deliver up to the Claimant/Applicant within seven (7) days of the date of the Order any and all documents in connection with the transfer of lands at Thetford, Church Pen District, Old Harbour, in the Parish of Saint Catherine to the company called Equimax Solutions Limited, inclusive of but not limited to an Instrument of Transfer, an Agreement for Sale, a copy of a Vendor's Mortgage, receipts for the payment taxes and stamp duty, any engagement of and correspondence with external legal counsel, all correspondence with counsel having the carriage of sale of the land, all minutes and resolutions, and any and all other documents;

- f. An Order that the Second Defendant do disclose to the Claimant/Applicant within seven (7) days of the date hereof all of his interests in, proof of all shareholding in, and details of all Directors and other officers of the company called Equimax Solutions Limited.

On 30th September 2022, the Court made an order to remove Mr. Thomas as a 2nd Defendant to the proceedings. The Claimant conceded that he was not served and that the claim form had expired.

[3] Mr. Gardner was the sole shareholder in Baloga Farms prior to Mr. Thomas, an Attorney-at-Law who acted on his behalf, becoming the majority shareholder. Subsequently, a dispute ensued between the parties which apparently remains unresolved. There have been several matters before the court and this matter is the latest.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[4] Counsel Ms. Douglas predicates the application for an interim injunction on the cases of **American Cyanamid v Ethicon Limited** [1975] 1 ALL ER (“**American Cyanamid**”) and **National Commercial Bank v Olint Corporation** [2009] UKPC 16 (“**NCB v Olint**”) which espouses the considerations for the grant of an interim injunction. She contends that there is a strong issue to be tried on the basis that the Board of

Directors of Baloga Farms and Mr. Thomas approved the transfer and sale of the property situated at Thetford, Church Pen District, Old Harbour, in the parish of St. Catherine from the 1st Defendant to Equimax Solutions Limited, without his knowledge or consent as a Director of the Company.

[5] It was the contention of Counsel that the balance of convenience would lie in favour of Mr. Gardner, as the past conduct of Baloga Farms has shown that the company has acted oppressively and inequitably towards Mr. Gardner by transferring the land in question to Mr. Thomas.

[6] On the issue of the adequacy of damages, Counsel submits that damages would not be an adequate remedy to compensate Mr. Gardner for the loss or damage of being deprived of the land which was sold. Mr. Gardner gave an undertaking as to damages if it is decided that the injunction ought not to have been granted.

[7] Counsel Ms. Douglas asserts that the refusal of the injunction will cause irreparable harm to Mr. Gardner, as the Directors of Baloga Farms continue to usurp their authority and control minority shareholders. Consequently, Mr. Gardner was given no say in the operation of the company.

[8] Lastly, Counsel asserts that the company has acted oppressively on the basis that a compelling reason was not proffered for the sale of the land to Mr. Thomas. Further, the conduct of the Company prior to sale of the land was oppressive to Mr. Gardner. Reliance was placed on **S. 213 A of the Companies Act of Jamaica**.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

[9] Counsel Mr. McBean KC argued as a point *in limine* that Mr. Gardner failed to comply with **8.8(2)(a) of the Civil Procedure Rules (“CPR”) 2002 (as amended on the 3rd of August 2020)**. Mr. Gardner, in filing the Fixed Date Claim Form on August 3, 2020, opted to rely on the Affidavit of Barrington Gardner in support of Ex-Parte Notice of Application for Court Orders filed 27th July 2020 instead of filing an affidavit in support of

the Fixed Date Claim Form. Consequently, Counsel contends that the claim should be invalidated on this basis.

[10] On the application for the grant of an interim injunction, Counsel contends that the injunction should be refused on the basis that there was an inordinate delay in filing the application for an interim injunction.

[11] He further submits that the balance of convenience would lie in favour of Baloga Farms on the basis that a grant of the interim injunction would have the effect of closing down the business of the company. Additionally, Counsel Mr. McBean also contends that the grant of an interim injunction would prejudice Baloga Farms, having regard to the fact that there is an existing Vendor's Mortgage to Equimax Solutions Limited through which mortgage payments are made to the Company. He relied on **Junior West v Gerald Miller** 2017 JMS Civ. 105.

[12] Counsel submits that the court should refuse the interim injunction on the basis that damages would be adequate to compensate Mr. Gardner. In furtherance of the issue of damages, he submits that Mr. Gardner may not be able to give an undertaking as to damages as there are a number of costs orders entered against him.

[13] Lastly, Counsel raises the issue of *res judicata* and the issue of estoppel in relation to the MOU and Settlement Agreement. This was on the basis that the issue was already determined by a Court of competent jurisdiction. As such, Mr. Gardner should be precluded from raising these issues. In support of these submissions Counsel relied on **Joycelyn Thomas v MSB and others** [2019] JMCA Civ. 25.

ISSUES

[14] The issues to be determined are as follows:

- (1) Whether the claim should be invalidated for failing to comply with **Rule 8.8(2)(a) CPR?**

(2) Whether pursuant to **Part 17 of the CPR** the Claimant should be granted an interim injunction?

LAW & ANALYSIS

Whether the claim should be invalidated for failing to comply with rule 8.8(2)(a) of the CPR?

[15] **Rule 8.8(2)(a) of the CPR** states:

Where the claimant uses form 2 the claimant must file an affidavit containing the evidence on which the claimant intends to rely.

The extent to which a similar rule should be strictly complied with was examined in the case of **Chester Hamilton v Commissioner of Police** [2013] JMCA Civ 35. This case concerned judicial review proceedings in which the Court had to consider whether the provisions of **Rule 26.9 of the CPR** could remedy a party's failure to file an affidavit with the fixed date claim form as required by **Rules 56.9(2) and (3) of the CPR**. Phillips JA stated¹:

***The failure to file the affidavit required by rule 56.9(2) with the fixed date claim form does not invalidate the claim, but is an irregularity.** The affidavit filed in support of the application to obtain leave for judicial review does not satisfy the requirements of rule 56.9(2) and (3). (ii) The court is empowered under rule 26.9 to put matters right by extending the time to file the required affidavit, and/or directing the refiling of the affidavit filed in support of the application for leave to apply for judicial review, to be used in support of the fixed date claim form for judicial review, and ordering service of the fixed date claim form with the supporting affidavit on all interested persons, within the time frame in keeping with the rules. [Emphasis]*

Phillips JA took the view that in instances where there had been a failure to comply with said rule, failure would not nullify the application but would instead be considered an irregularity which could be cured by orders of the court, in keeping with the provisions of

¹ [2013] JMCA Civ 35, para 49

Rule 26.9 of the CPR. This case is clearly applicable to similarly worded rules as in coming to her decision Phillips JA considered a case dealing with a petition.

[16] Similarly, in the case of **Jamaica Defence Force Co-operative Credit Union v Georgette Smith** [2019] JMCA Civ 7. The aforementioned position was reaffirmed by Brooks JA whilst embarking on an examination of the scope of **Rule 29.6**, which I find useful to adopt below:

The learned judge was...correct in stating that he was empowered, in furthering the overriding objective to deal with the case justly, to actively manage it, which would include, among other things, the power to rectify matters where there had been a procedural error. In short, the learned judge was correct in his declaration that he was empowered to invoke his general powers of case management, particularly those conferred on him by rule 26.9 of the CPR, in treating with the error in procedure.²

Rule 26.9 provides³:

26.9 (1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.

(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.

(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.

(4) The court may make such an order on or without an application by a party."

By virtue of the fact that the relevant rules that were breached by the respondent were silent as to the sanctions to be invoked for violation of them, rule 26.9 could have been engaged in the resolution of the issue before him, as the learned judge himself recognised. He had the power, therefore, to refuse to strike out the claim, as was urged on him by the appellant. That was a matter completely within his

² [2019] JMCA Civ 7, para 38

³ *Ibid.* para 39

discretion. In Bupa Insurance Limited (trading as Bupa Global) v Roger Hunter [2017] JMCA Civ 3, this court stated that once the consequence for the breach of a rule is not provided by the CPR or otherwise, then rule 26.9 gives a judge an “unfettered discretion” as to how to proceed in resolving the breach.⁴ [Emphasis mine]

[17] In the case at bar, Mr. Gardner, having filed the Fixed Date Claim Form without an accompanying affidavit, and instead opting to rely on the affidavit accompanying the Ex-Parte NOA, was not in compliance with **Rule 8.8(2)(a) of the CPR**. The proper course would have been for Mr. Gardner to reproduce the contents of the affidavit in support of the NOA and serve same with the Fixed Date Claim Form as a new document. I view the course taken by the Claimant to be irregular.

[18] However, in keeping with the authorities cited above, I am of the view that though the course taken was irregular the claim is not invalidated. Pursuant to **Rule 26.9 of the CPR** the Court is empowered to put right matters where there has been a procedural error. I take this opportunity to emphasize that the Court’s overriding objective is never out of mind. The claim ought not be deemed invalid on the basis of a procedural irregularity, the effect of which will bar the Claimant from the seat of justice. To this effect, I find it would be sufficient for the Mr. Gardner to file and serve an Amended Claim form with the supporting Particulars of Claim in order to cure the error.

[19] There is another issue raised in the mind of the Court which is whether the matter should have begun by way of a Fixed Date Claim Form. **Rule 8.1(4)** provides that

- 8.1 *Form 2 (fixed date claim form) must be used –*
- (a) in mortgage claims;*
 - (b) in claims for possession of land;*
 - (c) in hire purchase claims;*

⁴ **Ibid. para 40**

(d) *where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact;*

(e) *whenever its use is required by a rule or practice direction; and*

(f) *where by any enactment proceedings are required to be commenced by petition, originating summons or motion.*"
[Emphasis Mine]

[20] Master N. Hart-Hines (Ag) (as she then was) thoroughly analysed this provision in **Manfas Hay v Clover Thompson and Jonathan Prendergast** [2018] JMSC Civ 26 and concluded that this rule was intended to deal with matters which were less complex and did not involve a considerable dispute as to facts. Where the facts were substantially disputed, it was appropriate for the Court to exercise its discretion to convert proceedings begun by Fixed Date Claim Form to continue as if commenced by Claim Form. I agree with her reasons and conclusions and adopt them for these purposes.

[21] Though the genesis of the Claimant's complaint concerns land, this is not a claim for possession. Further, having regard particularly to the history of proceedings between the parties, there could be no doubt that there would be serious disputes of fact. It is clear that this matter should have begun by filing a Claim Form with Particulars of Claim. In my view this is a proper case for the Court to exercise its discretion to convert these proceedings to continue as if begun by Claim Form. However, having regard to the irregularity of failing to file and serve an affidavit in support of the Fixed Date Claim Form, which needs to be put right, the Claimant is to file and serve a Claim Form with Particulars of Claim. Consequent actions are to follow the timetable as set out in the **CPR**.

Whether pursuant to Part 17 of the CPR the Claimant should be granted an interim injunction?

[22] The Court is empowered by **Rule 17.1(1) of the CPR** to grant interim injunctions. The requirements for the grant of an interim injunction was enunciated in the oft-cited cases of **American Cyanamid v Ethicon Limited** [1975] 1 ALL ER ("American Cyanamid") and **National Commercial Bank v Olint Corporation** [2009] UKPC 16 ("NCB v Olint"). The foregoing cases outline the considerations the Court ought to have

in mind when determining whether to grant an interlocutory injunction. I list them as follows:

- i) Whether there is a serious issue to be tried?
- ii) Whether damages is an adequate remedy?
- iii) The balance of convenience generally lies in favour of granting the interim injunction.

SERIOUS ISSUE TO BE TRIED

[23] In determining whether there is a serious issue to be tried, Lord Diplock in **American Cyanamid** referred to a statement made by Russell L.J. which stated⁵: “...if there be no prima facie case on the point essential to entitle the plaintiffs to complain of the defendants’ proposed activities, that is the end of the claim to interlocutory relief.” Lord Diplock furthered this reasoning by opining⁶:

The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.

...[U]nless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

[24] It is the evidence of Mr. Gardner, in his skeleton submissions filed 11th July 2022, that there is a serious issue to be tried on the basis that the Board of Directors of Baloga Farms and Mr. Thomas approved the transfer and sale of the property situated at Thetford, Church Pen District, Old Harbour, in the parish of St. Catherine from the 1st

⁵ [1975] 1 All ER 504, pg 404

⁶ *Ibid.* pg 510

Defendant to Equimax Solutions Limited, without his knowledge or consent as a Director of Baloga Farms Limited.⁷

[25] This claim was predicated on a resolution dated 27th May 2021 exhibited to the affidavit of Rudolph Emanuel Alphonso Muir in Support of Notice of Application for Interim Injunction dated and filed 18th May 2022. Mr. Gardner approved the sale of the property with the condition that *“the details of any sale shall be presented to the board for approval”* as evidenced by the signature of Mr. Muir, his then attorney-at-law and proxy, who signed on his behalf.

[26] He contends the sale had not been the subject of approval by the board. He further objects to the sale/transfer to Equimax, a company for which Mr. Thomas is also a director, in terms which suggest that the transaction was not at arm’s length and was not, or may not have been, to the benefit of the shareholders. The company owed a fiduciary duty to its shareholders. The claim raises issues of facts to be resolved at the trial. In the circumstances the claim is not frivolous or vexatious.

[27] Since a sale was already contemplated the issue then becomes a question of money. The company/directors have a fiduciary duty to get the best price for the land, therefore, the only issue is whether the company or its directors were in breach of that fiduciary duty. To this end and based on the assertions of Mr. Gardner, the new issues which would arise are:

- i) Whether the property should not have been sold/transferred to Equimax considering Mr Thomas’s capacity as a Director of Baloga Farms Limited and principal of Equimax? (Whether the best price was obtained).
- ii) Whether the property was sold without the approval of the Board of Directors?

⁷ **Skeleton Submissions filed 11th July 2022, pg 6**

DAMAGES AS AN ADEQUATE REMEDY

[28] In order to determine whether damages would be an adequate remedy, it is crucial to examine the practical consequences of a refusal to grant the injunction. In **American Cyanamid** the Court provided guidance in making such a determination, Lord Diplock stated⁸:

*As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. **If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial.** [Emphasis mine]*

This case makes it clear that an injunction should only be granted where damages are incapable of remedying the harm caused.

[29] As previously discussed, the issue at bar appears to be monetary with respect to the sale price for the property in question. Having already agreed to the sale of the property, I am of the view that Mr. Gardner could be adequately compensated by an award for damages.

[30] On the question of the Defendant's ability to pay damages if awarded, the affidavit evidence of Mr. Rainford is that the sale of the land allowed the company to commence

⁸ **Ibid.** pg 510

repayment of its debts and earn an income from vendor's mortgage granted to the purchaser. It is not clear whether the company has any other assets. Nonetheless as the company remains financially viable it is likely to be in a position to pay damages if it is unable to successfully defend the claim.

BALANCE OF CONVENIENCE

[31] Based on **NCB v Olint** the Court must consider the extent of the disadvantage the grant of this injunction would cause to both parties. In the foregoing case Lord Hoffmann opined⁹:

*In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. **The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other.** [Emphasis mine]*

[32] To grant the orders sought by Mr. Gardner would be to stifle the business of Baloga Farms. The orders would prevent the Company from entering into any commercial arrangements which could yield grave economic benefits and prevent shareholders from making any decisions imperative to the operation of the business. Further, though Mr. Gardner had pleaded that Baloga Farms has exhibited oppressive conduct and has acted in a manner that is not in the best interests of the company, from the evidence it is abundantly clear that these pleadings are in relation to the sale of the property in question. And I reiterate, should Mr. Gardner be successful at trial, damages would adequately compensate him. On the other hand, one does not know if the Baloga Farms is able to withstand the economic hardship it may face leading up to the trial and subsequently

⁹ [2009] UKPC 16, para 17

awaiting a determination from Court. I am persuaded to agree that the balance of convenience does not lie in favour of Mr. Gardner but in the favour of Baloga Farms.

UNDERTAKING AS TO DAMAGES

[33] The interim orders sought are broad in scope and would literally cripple the company as it could not operate. The financial toll on the company could be significant. Though Mr. Gardner in his skeleton submissions¹⁰ gave an undertaking as to damages, it appears that he is not in a financial position to pay same. As submitted, Mr. Gardner has a number of costs orders outstanding, one of which is a Default Costs Certificate issued against him in the sum of Two Million Seven Hundred and Fifteen Thousand Two Hundred and Sixteen Dollars and Twenty Cents (**\$2,715,216.20**). This was evidenced by the Default Costs Certificate exhibited in the Affidavit of Robert Rainford filed 6th July 2022 to which Baloga Farms contends is outstanding, as submitted in their written submissions filed 11th July 2022¹¹. Mr. Gardner has not denied this contention.

[34] On that note, the court is not minded to grant an interim injunction where the evidence suggests that Mr. Gardner would be unable to compensate Baloga Farms if the interim injunction ought not to have been granted. The court is not convinced that Mr. Gardner would be in a position to satisfy his undertaking as to damages.

RES JUDICATA/ISSUE OF ESTOPPEL

[35] Though not determinant of the application, I will address the submission made by Counsel on the issue of res judicata/issue of estoppel. The principle of *res judicata* bars parties from re-adjudicating matters that were already determined by a competent court,

¹⁰ **Skeleton Submissions filed 11th July 2022, pg 5**

¹¹ **Submissions on behalf of 1st Defendant in relation to Claimant's Application for Interim Injunction, para 30**

save for an appeal. In **Gordon Stewart v Independent Radio Company Limited and Wilmot Perkins** [2012] JMCA Civ 2, Harris JA stated¹²:

The doctrine of res judicata is to protect courts from having to adjudicate more than once on issues arising from the same cause, to protect litigants from having to face multiple suits arising from the same cause of action, and to protect the public interest that there should be finality in litigation and that justice be done between the parties.

[36] From the documents, default judgment and summary judgment was entered in favour of Mr. Thomas with respect to a Settlement Agreement between himself and Mr. Gardner. The Court found the Settlement Agreement superseded a MOU between the parties. There were no further proceedings that altered the terms of the default judgment or the summary judgment. This claim liberally intertwines the issues settled in the prior judgments. Nonetheless a thorough review of the claim shows new issues raised with respect to breach of the director's/company's fiduciary duty to Mr. Gardner, as shareholder, with respect to the sale of the land.

[37] An issue is also raised with regard to whether there was an oppressive conduct by the company and its majority shareholders. Those are new issues. To the effect that the claim deals with issues already determined, a court would act upon the appropriate application being made.

ORDERS

- 1) The Fixed Date Claim Form is to continue as if begun by Claim Form.
- 2) The Claimant is to file and serve an Amended Claim Form and Particulars of Claim on or before December 19, 2022.

¹² [2012] JMCA Civ 2, para 38

- 3) Consequent actions are to be in accordance with the time lines set out in the Civil Procedure Rules.
- 4) The Claimant's Notice of Application for Interim Injunction filed May 4, 2022 is refused.
- 5) Cost of the Application to be the First Defendant's.
- 6) Claimant's Attorney-at-Law to prepare file and serve this order.

JUDGE