IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2018HCV00347

BETWEEN	**GULFSTREAM PETROLEUM SRL**	**CLAIMANT**
AND	**ANKRAIL LIMITED**	**DEFENDANT/ ANCILLARY/CLAIMANT**
AND	**THE PORTMORE CITY MUNICIPALITY**	**1ST ANCILLARY DEFENDANT**
	ST. CATHERINE MUNICIPAL CORPORATION	**2ND ANCILLARY DEFENDANT**

Applications for Summary Judgment – Injunction – Lease – Absence of building permit - Breach of restrictive covenant – Whether landlord entitled to demolish buildings the subject of the lease.

Michael Hylton QC, Mellissa McLeod and Justine Collins instructed by Hylton Powell for the Claimant

Sean Kinghorn instructed by Kinghorn & Kinghorn & Co. for the Defendant

Heard: 15th November, 2018

In Chambers

Coram: Batts J

[1] On the 15th day of November 2018 I made the following Orders:

a) It is declared that the Claimant has not breached the lease agreement as alleged by the Defendant.

b) The Defendant is restrained whether by itself its servants or agents or otherwise howsoever from entering or otherwise trespassing upon all that parcel of land part of Section 7 part of Cookson and Bushy Park Pen in the parish of St. Catherine and registered

at Volume 1473 Folio 741 of the Register Book of Titles ("the property") in breach of its lease agreement with the Claimant dated December 18th 2014.

c) The Defendant is restrained whether by itself its servants or agents or otherwise howsoever from removing, demolishing or damaging any building structure or tanks on the property or any of the Claimant's property, equipment, machinery and/or assets situated upon the property.

d) Costs to the Claimant to be taxed or agreed.

e) The above injunctive orders are limited to the parties and the issues raised in these proceedings.

I promised then to put my reasons in writing at a later date. This judgment is the fulfilment of that promise.

[2] There were three applications before me. The Claimant applied for summary judgment and, alternatively, for an interlocutory injunction until trial. The Defendant also applied for summary judgment. Both parties were of the view that there was no issue of fact which made a trial necessary. In the result this proved to be the case.

[3] The relevant facts can be shortly stated. On the 18th December 2014 property, containing a petrol filling station and multiple buildings, was sold by the Claimant to the Defendant. On the same date, and at the same time, it was leased by the Defendant to the Claimant for 15 years. The Defendant, by letters dated 9th July 2017, 27th July 2017, 7th August 2017 and 18th August 2017, alleged that the Claimant was in breach of the lease because material alterations had been made. Proposals were made for an increase in rent payments and a reduction in the term of the lease. The Claimant categorically rejected those allegations and overtures by letters dated 4th August 2017 and 25th August 2017. A further exchange of correspondence occurred in March and April 2018 to the same effect. By letter dated the 15th May 2018 the Defendant, for the first time,

asserted that the existence of multiple buildings on the property constituted a breach of a restrictive covenant. That letter concluded as follows:

> *"We accept that advice and hereby formally advise that we will be removing the 'multiple' structures on the said property leaving the one permissible building as set out by the Restrictive Covenant #1 on the Title. As we have leased the property to you as a Service Station, we propose to remove the building that presently houses the Burger King Restaurant as well the Generator House and Store Room. This of course subject to any wish on your part to have the alternative building which is closest to the Gas Pump Shed removed. We hereby give you notice that we propose to do this removal process within 30 days of the date hereof and will for your safety and the safety of the public require the buildings to be vacant by this date.*
>
> *Should you have a suggestion of another available legal option to address this troubling situation we welcome your input and are willing to meet to discuss this option with you. We suggest however, ex abundanti (sic) cautela that in the meantime you proceed to vacate those buildings in the likely event that we will have to remove them from the property.*
>
> *It is imperative that we have your written response within the next 14 days so that we can be fully informed of your position on this matter. We are sure you will agree with us that as good corporate citizen, (sic) national and multi-national, we are obliged to be exemplary in obeying the Jamaican laws.*
>
> *Kindly acknowledge receipt hereof on the accompanying copy letter."*

[4] The affidavit evidence establishes also that the multiple buildings in question existed prior to the 18th December 2014 when the sale and lease back occurred. The buildings are occupied by subtenants of the Claimant such as Burger King and Little Caesars restaurants. Texaco Star Mart, other retailers such as a pharmacy and an eyewear store, a compressor and generator house, a garbage receptacle area, Texaco gas pumps and a gas bay are all located on the premises. There had been, and this is uncontradicted, no structural alteration in breach of the lease agreement.

[5] There is registered, on the title to the premises, a restrictive covenant mandating that :

> *"no more than one building shall be erected on the said land."*

It is unclear when the several buildings located on the property were erected. In evidence, as part of the Defendant's exhibits, is a surveyors report dated the 13th June 2016. The report points explicitly to the breach of restrictive covenant.

[6] By letter dated the 11th August 2017 the Portmore Municipal Council wrote,

> *"Re: Little Caesars*
> *Braeton Portmore*
> *St. Catherine*
>
> *With regard to the captioned matter please be informed that after careful consideration of the matter this medium is being used to inform you that the Council doesn't have any objection to renovation works that have been done due to the fact that building approval is not required.*
>
> *Should you require additional information please contact the Planning Department at 740-7440-2."*

The Portmore City Municipality and the St. Catherine Municipal Corporation where joined, as Ancillary Defendants to this suit, by the Defendant. Although entering Acknowledgements of Service and filing Defences to the Ancillary Claim neither attended nor sent representatives to the hearing before me. In answer to a Request for Information the Claimant indicated it was unable to locate a copy of the building approval/building permit. Two letters, each dated the 23rd October 2018, were received from the St. Catherine Municipal Council. One indicated that a building plan had been received from McDonald's Fast Food Restaurant on the 26 March 1997 and relevant fees paid. There was no record of an approval being entered. The other letter revealed that a building plan had been received from Texaco Caribbean Incorporated on 7th October, 1996 and appropriate fees paid. Approval was granted on the 18th February 1997 for the application made by Texaco Caribbean Incorporated.

[6] Finally, insofar as the material facts are concerned, the Defendant is owned and controlled by Mr. Collin Karjohn and the Karjohn family. That family also owns, controls and operates petrol and service stations or lets lands to persons who operate service stations. Phoenix Fuels and Accessories Limited is a company owned by the Karjohn family. That company operates a petrol and service station a few hundred metres away from the property under consideration. The company is one of the Claimant's major competitors.

[7] The Claimant and Defendant each filed written submissions and bundles of authorities. Each counsel presented admirable oral submissions that were clear and concise. I will not repeat the rival contentions in this judgment. Having digested their respective offerings it became clear to me that the Defendant had no real prospect of succeeding in its Defence.

[8] On the question, whether the Claimant has acted in breach of the lease agreement, the Defendant's counsel indicated that that line of argument was not being pursued. I think it was a correct decision. The lease agreement contemplated structural alterations to the buildings. It is also clear that multiple use of the multiple buildings was in the parties' contemplation, see Clause 2 (d) (f) and 2 (l). There is no evidence to support a breach of the lease by the Claimant.

[9] The sole question therefore is whether, given the breach of a restrictive covenant and/or the failure to prove the existence of building permits, the Defendant ought to be permitted to demolish the offending structures. I think not.

[10] In the first place, and as Mr. Hylton Q.C. submitted, a restrictive covenant is an agreement between co-owners of land which is enforceable by, and against, the successors in title. In the absence of a claim or demand, by someone who is entitled to the benefit of the covenant or who may be charged with a duty to enforce it, the Defendant is under no legal obligation to do anything. The Restrictive Covenants (Discharge and Modification) Act does not create a

criminal offence. That statute sets out the circumstances in which covenants may be modified or removed. It is the reason why, even if someone does complain about the breach, removal of the buildings is not necessarily the only option, see generally ***Commonwealth Caribbean Property Law: 2nd edition by Gilbert Kodilinye @ 151.*** There is no evidence that anyone entitled to the benefit of the covenant has made a demand, brought a claim or otherwise complained. It is also not insignificant that the relevant municipal corporations, although made parties to this litigation, have made no complaint about the existence of the buildings or any alleged breach of covenant.

[11] In the second place it is a cardinal principle that a grantor, without more, will not be allowed to derogate from his own grant. Allied to this is the principle that a party will not be allowed to take advantage of his own wrong. In this case the Defendant knowingly purchased the premises from the Claimant. The Defendant, with selfsame knowledge, leased the premises with multiple dwellings to the Claimant. The stated purpose of the lease was to operate a petrol filling station and related business and to grant the subleases. The lease contemplated the use of the said buildings in the manner now complained of. Equity would surely not allow the Defendant to act in such a monstrously unconscionable manner as is proposed, see generally ***Megarry and Wade*** "***Law of Real Property***" ***4th edition page 820 et seq***.

[12] Thirdly, I agree with Mr. Hylton QC, that a breach of restrictive covenant does not render the existence of a building illegal. Neither does it make illegal the lease or the sale agreements. This is because no crime is committed when a restrictive covenant is breached. Insofar as the absent building permits are concerned

enforcement under the Building Act is the preserve of the public authorities. The public policy attitude of the courts, even where a contract to do an illegality is considered, does not necessarily render a contract void. The court, in a case of illegality, says it will not enforce the illegal contract. The contract may be relevant or applicable for other purposes. Furthermore, where parties are able to access a remedy without direct reliance on the illegal contract, the court in its discretion may grant that remedy. The court also considers other material circumstances such as the awareness, of either or both parties, of the facts constituting the illegality and whether a consequence of not enforcing it will result in an unjust enrichment. These matters were discussed generally by the English Supreme Court in ***Patel v Mirza [2016] UK SC 42 (20th July 2016).*** I stand by my own summary of the effect of that decision, see ***Alexander House Ltd v Reliance Group of Companies [2016] JMCC at Comm 22 (2nd August 2016) at paragraph 29*****.**

[13] In the case before me there is no question of an illegal contract. This is because neither the lease nor the sale agreement involved construction of the buildings alleged to be in breach of the covenant, or to have been built without a permit. The breach of covenant is unlawful, being akin to a contractual breach; however it is not a crime. Building without a permit carries criminal consequences. However, enforcement of the terms of the lease, which relate to quiet enjoyment, non derogation from grant or allowable use of buildings, would not be against public policy. This is because enforcement of the lease is possible without reference to, or reliance on, the alleged breaches. It is also a point to consider that, if the lease is illegal and void for the reasons advanced, then so too must be the sale. That seems to me an alarming prospect with perhaps unimaginable consequences. Thankfully the law, as I understand it, does not compel such a result.

[14] Finally, it is manifest that removal of the buildings is not the only course of action open to a person who is in breach of a restrictive covenant or who has built

without a permit. We have already seen that it is possible to apply to have the covenant removed or varied (See paragraph 10 above). In circumstances where a landlord grants a lease, with knowledge of a breach of restrictive covenant, one option is to attempt to have the covenant modified. In the event the landlord is exposed to some legal jeopardy, due to the breach of the covenant, he ought to take steps which are compatible with his equally important obligations to his tenant. In the event the covenant does not qualify for modification or removal then other considerations may apply. Similarly, in the case of building permits, owners may apply to regularise their affairs.

[15] There is insufficient evidence before me, on the question whether modification or removal of the covenant is likely, in this case. This is not surprising because no one entitled to the benefit of the covenant has complained about its breach. As regards the building permit it is significant that neither of the relevant public authorities have shown any interest in having the buildings, or any of them, demolished. The evidence suggests these buildings have been in existence for some considerable period. Further they constitute productive and viable assets of benefit to the society. In such circumstances a court or public authority may, all other things being equal, adopt an approach that would preserve the existence of the structures and not compel their destruction. The issue does not arise for my determination and I make no finding one way or the other. Suffice it to say that even if the breach of covenant or the absence of a permit constitutes an illegality there is, on the evidence before me, sufficient to suggest that demolition of the offending buildings is not an inevitable result. The Claimant is entitled to insist, as between its landlord and itself, that the Defendant honour the terms of the lease and not remove the buildings.

[16] In the result and for the reasons stated above I made the Orders at Paragraph 1 of this judgment.

David Batts
Puisne Judge