



[2021] JMSC Civ. 39

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2019CV04837

BETWEEN	ALRICK WRIGHT	CLAIMANT/RESPONDENT
AND	DONNA FARQUHARSON	DEFENDANT/APPLICANT

IN CHAMBERS

Mr. Ashford Washington Meikle for the Claimant/Respondent

Mr. Neco Pagon instructed by Peter C. Champagnie Q.C. for the Defendant/Applicant

Heard: January 19 and February 24 2021

Civil practice and procedure– Interlocutory injunction– Whether there is a serious issue to be tried– Balance of inconvenience– Whether damages is an adequate remedy

PALMER HAMILTON, J

BACKGROUND

[1] This application emanates from a sale of property situate at Shop No. 2 Hotel Street, Compton House, Mandeville in the parish of Manchester. The facts giving rise to the application are aptly set out by Learned Counsel for the defendant (hereinafter referred to as “the applicant”) and I will adopt them in an effort to preserve precision and render the proceedings intelligible.

- [2] The applicant owned and operated a retail store trading under the business name “Sharon’s Meat”. The business location is leased from the Jamaica Agricultural Society (hereinafter “JAS”).
- [3] The applicant contemplated migrating to the United States of America which resulted in her decision to sell the business. The applicant and the claimant (hereinafter “the respondent”) met in or around 2019 and subsequently entered into an oral agreement for the sale of the business which included the sale of the business name and/or goodwill, the inventories, business fixtures, chattels and a HiAce bus.
- [4] There is a disparity between the parties as to the consideration for the sale of the business and the amount in part payment that was received towards the sale price. What is not in dispute is that a part payment was received and the applicant handed over the business operations to the respondent on the understanding that the remainder would be paid while she was overseas. The applicant maintained that as security for the payment for the balance of the purchase price, the title to the HiAce bus was not handed over to the respondent nor did the applicant reassign the Jamaica Public Service contract and lease to the respondent.
- [5] The relationship subsequently disintegrated, the crucial reasons for this being the alleged indebtedness of the business to JAS, Jamaica Public Service and to various suppliers. This amidst other factors led the respondent to institute legal proceedings in the civil division of this Court claiming a reimbursement of the sum of Four Million Five Hundred and Sixty-Four Thousand Three Hundred and Fifty-Four Dollars (\$4,564,354.00) with interest for monies paid to the applicant for the purchase of the business. The applicant counterclaimed for the following: -
1. The sums of Two Million Five Hundred and Fifty-One Thousand and Sixty-Three Hundred Dollars and Twelve Cents (\$2,551,063.12) being the outstanding balance due on the purchase price;

2. Five Hundred and Sixty Thousand Dollars (\$560,000.00) being the outstanding amount due on the rental payable for the period of September 2019 to January 2020; and
3. Four Hundred and Twenty Thousand Dollars (\$420,000.00) being the outstanding rental due and payable for the period of January 1, 2020 to April 1, 2020 and continuing.

THE APPLICATION

[6] By way of Notice of Application for Court Orders filed on the 11th day of June 2020, the applicant sought the following orders: -

- "1. This claim be transferred to the Commercial List pursuant to the Supreme Court Civil Procedure Rules ("CPR") Rule 71.6.*
- 2. The parties be referred to mediation within 90 days from the date of this Order pursuant to CPR Rule 74.3(2).*
- 3. The hearing of a Case Management Conference be fixed in this matter.*
- 4. An interim injunction to restrain the Claimant, whether by himself, servants and/or agents or otherwise from continuing to enter upon property situate at Shop No.2, Hotel Street, Compton House, Mandeville in the parish of Manchester (hereinafter referred to as the "leased premises").*
- 5. The Defendant be indemnified by the Claimant against all liabilities, claims, loss, damages, costs, interests, demands, legal fees, whether now apparent or not in relation to the Claimant's use and or occupation of the leased premises.*
- 6. Costs.*
- 7. Such Further and other relief as this Honourable Court deems fit.*

[7] When the matter came before me for hearing on the 23rd day of July and on the 5th day of August 2020, I made the following Orders: -

- "1. This claim is transferred to the Commercial List pursuant to the Supreme Court Civil Procedure Rules ("CPR") Rule 71.6.*
- 2. The parties are referred to mediation to be completed within Ninety (90) days from the date of this Order pursuant CPR Rule 74.3(2).*
- 3. Fees attached to the granting of this transfer are to be paid by the Applicant/Defendant.*

4. *By consent, the Applicant/Defendant is indemnified by the Claimant against all liabilities pertaining to rent due and owing to the Jamaica Agricultural Society and in respect of the Claimant's use and occupation of the leased premises being Shop No. 2, Hotel Street, Compton House, Mandeville in the parish of Manchester.*
5. *Costs to the Applicant/Defendant to be costs in the claim.*
6. *Case Management Conference is fixed in the Commercial Division on the 24th day of November 2020 at 10:00am for two (2) hours.*
7. *The inter partes hearing on the interim injunction is adjourned to the 24th day of November 2020 at 10:00am for two (2) hours.*
8. *Skeleton submissions and list of authorities pertaining to the application for interim injunction are to be filed and exchanged by 13 November 2020.*
9. *The Applicant's/Defendant's Attorney-at-Law to prepare, file and serve the Orders made herein."*

[8] What is now left to be determined from this application is the hearing of the interim injunction which was subsequently traversed to the 19th day of January 2021. I thank Counsel for their submissions and the supporting authorities which provided great assistance to the Court. I do not believe it is necessary to address all the submissions and authorities throughout my judgment but will refer to them to the extent that they affect my findings.

SUBMISSIONS OF THE APPLICANT

[9] Learned Counsel for the applicant Mr. Pagon in summary made the following submissions: -

1. The interim injunction

The application is made pursuant to section 49 (h) of the **Judicature Supreme Court) Act**. An injunction may be granted where in the circumstances it appears to the Court to be just or convenient. The practice and procedure are set out in part 17 of the CPR. The case of **American Cyanamid Co. v Ethicon** [1975] AC 396 sets out the guidelines upon which a Court should exercise its discretion to grant or refuse an interim injunction.

2. There are serious issues to be tried between the parties as set out in the pleadings.

The claim by the respondent is for reimbursement of monies advanced for the purchase of the applicant's commercial enterprise. The counterclaim by the applicant is to specifically enforce the terms of the contract for the purchase of her commercial enterprise to the respondent and other relief to include payment for outstanding debt. The claim therefore amounts to a breach of contract.

3. The applicant satisfies the balance of convenience test.

Learned Counsel averred that on the question of whether the applicant would be adequately compensated by damages, the answer is no. The applicant stands to suffer embarrassment and loss of reputation as a responsible business owner and tenant. That loss may not be quantifiable. The applicant is also exposed to litigation. On the other hand, the respondent has already quantified his loss by making a claim for reimbursement for monies advanced for the purchase of the applicant's commercial enterprise. In essence, the respondent seeks rescission.

The applicant is prepared to abide by any order of this Honourable Court in the form of an undertaking and the respondent would be adequately protected by the applicant's undertaking in damages.

The orders sought by the applicant are necessary to preserve the status quo.

4. Special circumstances

The applicant complains that she is exposed to litigation by the landowners for the business premises for which she still holds the tenancy. The respondent's occupation of the property is based on the purchase of the applicant's commercial enterprise of the applicant. The respondent has not

paid any rent since his occupation and he now seeks rescission whilst the applicant is exposed to rent arrears and litigation. The status quo would therefore be preserved by issuing the injunction. the case of **Azzuro Coast Limited v Dennis Atkinson et al** [2016] JMCC Comm 36 was cited in support of this submission.

[10] Mr. Pagon concluded his submissions by submitting that in all the circumstances of the case this Honourable Court should exercise its discretion in granting the applicant relief as sought in the application.

SUBMISSIONS OF THE RESPONDENT

[11] Learned Counsel for the respondent Mr. Ashford Meikle adumbrated his submissions by commending to the Court the cases of **American Cyanamid Company v Ethicon Limited** (supra) and **National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Jamaica)** [2009] UKPC 16 as setting out the test governing the granting of interlocutory injunctions.

[12] On the issue of whether there is a serious issue to be tried Mr. Meikle submitted that the applicant's prayer for injunctive relief must fail because it was frivolous and vexatious for the following reasons: -

1. It is an abuse of process caused by her vindictiveness and an attempt to unjust enrichment. The applicant engaged in a campaign of harassment against the respondent. She held out herself as a representative of JAS delivering a letter to the respondent, written by her, in which she claimed JAS needed the premises and that he should quit the premises. The applicant reported to the police that the HiAce bus and the police, acting on the report, seized the bus and papers from one of the respondent's employees.

2. An action was brought by the applicant in the Manchester Parish Court against the respondent for trespass. She sought injunctive relief arguing that she did not sell the business to the respondent however, she sold the meat shop's fixtures to the respondent and he refused to vacate the premises. She subsequently expressed that she was willing to buy back the meat shop business from the respondent. She however reneged on her offer and is determined that the respondent's life should be upended.
3. The applicant has now completely changed her story involving the sale of the meat shop and subsequent business transactions from her sworn affidavit from the Manchester Parish Court. The applicant reportedly perjures herself in the affidavit accompanying the application and she now truthfully admits that she sold the meat shop to the respondent.

[13] On the question of whether damages are an adequate remedy, it was submitted that damages would be an adequate remedy and the injunction ought not to be granted. The applicant claims that the rent is overdue and that she fears legal actions against her. Mr. Meikle proffered that the applicant is being dishonest in claiming that the respondent has not been paying rent on the premises. He has continued to pay rent and is up-to-date as of November 2020. The respondent is in negotiation with JAS to formalise leasing the said business premises. To the best of the respondent's knowledge, the applicant still owes the JAS rental arrears.

[14] In answering the question of whether the granting of the injunction will cause irreparable harm, Learned Counsel submitted that the applicant has not been prejudiced by the respondent's occupation of the premises and any claim to the contrary is patently false and dishonest. Mr. Meikle maintained that since the respondent bought the business, he has made substantial investments in it, spending millions in its upgrade. The granting of the injunction would essentially drive the respondent into financial ruin, destroy his investment into the business

as well as to upend the lives of his employees who have family obligations and mouths to feed.

[15] Learned Counsel submitted that on the contrary, were the injunction to be granted, the applicant stands to lose nothing. The submissions were concluded by urging the Court to deny the orders sought and ordering the applicant to pay costs to the respondents.

[16] I must indicate at this juncture that learned counsel predicated the bulk of his oral submissions on the proceedings that transpired in the lower court between the parties. Despite the nudge from this Court to Counsel that the proceedings in the lower court are not before this Court for consideration, his written submissions were replete with those proceedings. I disregarded any reference to those proceedings along with any scandalous remarks made by Counsel pertaining to the applicant.

ISSUES

[17] The primary issue for my determination is whether or not the applicant is entitled to the reliefs sought.

LAW AND ANALYSIS

[18] It is widely accepted that the governing principles relative to the grant or refusal of an Interlocutory Injunction are set out in the well elucidated case of **American Cyanamid Co. vs Ethicon Ltd.** (supra). The oft-cited words of Lord Diplock directs the Court that it *"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."*

[19] Lord Diplock at page 510 further prods the Court that: -

"So unless 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."

[20] These principles have been manifoldly applied in our jurisprudence and have been confirmed in the celebrated case of **National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Jamaica)** (supra) which underpins the purpose of granting or withholding an injunction. At paragraph 19 of that judgment, Lord Hoffman stated:-

“The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result.”

Is there a serious issue to be tried?

[21] Upon the guidance of the above pronouncements, I will launch into determining whether the injunctive relief should be granted by settling whether there is a serious issue to be tried. In assessing the evidence, if I find that there is material before the Court that raises no question requiring a further analysis at trial, then no injunction should be granted.

[22] In determining this issue, I bear in mind the direction given by the Honourable Mrs Justice Bertram Linton in the case of **Arleen McBean v Sheldon Gordon, Patrae Rowe and The Police Federation** [2019] JMSC Civ. 38. At paragraph 35 Bertram Linton, J said: -

*“My role is not to delve into a resolution of the opposing views raised by the parties but to determine as described by Gleeson CJ in **Australian Broadcasting Corporation v Lenah Game Meats Pty Limited** [2001] HCA 63; 185 ALR 1, that the issue raised by the Applicant has “sufficiently plausible grounds for granting the final relief.”*

[23] I also adopt the canonical statement of Lord Hoffman at page 323 of **American Cyanamid Co. vs Ethicon Ltd.** (supra): -

“It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial...”

[24] As already indicated, the substantive claim surrounds the breach of an oral agreement for sale. Given that the contract was an oral one, the nature and terms

of the contract can only be provided by the parties. Both parties purport rival evidence surrounding material terms of the agreement. One material term being the consideration given for the purchase of the property. On the applicant's case the consideration for the sale of the business was agreed at Seven Million Dollars (\$7,000,000.00) payable in two instalments; Four Million Dollars (\$4,000,000.00) in September 2019 and the remainder of Twenty-Five Thousand United States Dollars (USD\$25,000.00) payable in October 2019 through the Respondent's aunt. According to the applicant, she did not receive the balance as agreed and as such she counterclaimed inter alia for the balance of the purchase price. On the respondent's case, the consideration for the purchase of the building was Four Million Dollars (\$4,000,000.00) which he claimed he paid to the Respondent, in addition to Five Hundred and Sixty-Four Thousand Three Hundred and Fifty-Four Dollars (\$564,354.00) representing other payments made under the agreement.

- [25]** Other disparity in the version of events includes the purported obligation of the respondent to pay rent and his failure to do so on the applicant's case. In my judgment, these are matters that require a fuller investigation into the facts and the court would need to thoroughly examine all the circumstances, inclusive of the conduct of the parties and the material negotiations to determine what was intended. The matter would involve an assessment of the credibility and veracity of the parties.
- [26]** I note that Learned Counsel for the respondent placed considerable emphasis on the proceedings that took place in the Court below. It is my view that it is not appropriate and convenient for this court to consider the proceedings below to determine the case at bar, that, by its very nature, is separate and distinct.
- [27]** The applicant's claim cannot be said to be either frivolous or vexatious, or described as one which fails to disclose any real prospect of success of her claim for a permanent injunction at trial. There is certainly a serious question to be tried and I therefore find accordingly.

Where does the balance of convenience lie? Is it in favour of the granting the injunction?

- [28] Having considered that there is a serious issue to be tried, I now turn my focus in determining whether the balance of convenience lies in favour of granting or refusing the injunction. It is the applicant's evidence that the respondent remains on the premises without paying rent and that she is exposed to legal proceedings being brought against her because of the respondent's failure to make good on his obligations. She further deposed that to avoid legal proceedings, she had to make advanced payments to the Attorneys-at-Law for JAS towards the outstanding rent. The applicant averred that the rent is continuing to accrue and that she is unable to sustain these payments for the respondent who owes her. She prayed that unless the court grants the orders prayed for the rent will continue to increase and her exposure to litigation will materialize. It was submitted on the Applicant's behalf that she also stands to suffer loss of goodwill and her reputation as a responsible business owner and tenant.
- [29] The respondent gave evidence that he vested tangible interest in the business. It was submitted on his behalf essentially that the granting of the injunction will drive the respondent into financial ruin, destroy his investment into the business and upend the lives of his employees who have family obligations and mouths to feed.
- [30] Brerton J in **Goyal v Chandra** 68 NSWLR 313 guided the courts in assessing this factor by giving the key consideration of whether or not irreparable injury will occur if an injunction is not granted. The onus is therefore on the applicant to show as a precondition that there is a threat of irreparable injury, which if not prevented by injunction cannot be afterwards compensated for by damages.
- [31] I have no doubt that the respondent stands to lose his investment in the property. However, this element was juxtaposed and considered against the nature of the respondent's substantive claim, that being a recession of the purported sale. If it

is that he is successful on his claim he would in any event unwind the transaction and be put back in the position that he was in before the sale.

[32] Robert J. Sharpe, in the text **Injunctions and Specific Performance**, loose-leaf, (Aurora, on: Canada Law Book, 1992) identified irreparable harm as a consideration that is made on a case by case basis. He posited that the courts have held that irreparable harm includes loss of goodwill or irrevocable damage to reputation, loss of market share and permanent loss of natural resources. Having considered the evidence, I am persuaded that there is a high possibility in the applicant suffering irreparable harm to her good will and her loss of reputation if the injunction is not granted. I accept the submissions of Mr. Pagon that the respondent has already quantified his loss by making a claim for reimbursement for monies advanced for the purchase of the applicant's business. The granting of the injunction, in my view, would merely seek to uphold the effect of the respondent's substantive claim.

Would damages be an adequate remedy?

[33] Having determined that the balance of convenience lies in favour of granting the injunction, I now shift my focus to determine whether damages would be an adequate remedy to compensate the respondent for any harm suffered should the injunction be granted. Clarke J. in the case of **Sheridan v The Louis Fitzgerald Group Ltd.** [2006] IEHC stated: -

"It is well established that in order to obtain interim or interlocutory relief a plaintiff must satisfy the court that damages would not be adequate to compensate the plaintiff in the event that he should establish his case at trial but not have obtained an interlocutory injunction....In Smith Cline Beacham [sic] PLC v. Genthon BV (unreported, High Court, 28th February, 2003, Kelly J.) this court noted that the onus was on the plaintiff, as a matter of probability, to demonstrate the risk that damages would prove to be an inadequate remedy."

[34] I also take guidance from the case of **Arleen McBean v Sheldon Gordon, Patrae Rowe and The Police Federation** (supra). Bertram Linton

"On the authority of Brerton J in Goyal v Chandra (supra), an application for an interlocutory injunction should not be granted where there is an adequate remedy"

in damages. However, if damages are available as a remedy but are inadequate, the onus is on court to use its discretion while considering among other things "the extent to which any damage to the plaintiffs can be cured by payment of damages rather than by the granting of an injunction". The germane question should be "is it just, in all the circumstance, that a plaintiff should be confined to his remedy in damages?"

[35] In the light of the reasons previously stated, in my judgment, it is unlikely that damages would suffice as the applicant will be unable to get back what she lost in terms of her reputation or her goodwill if the injunction is not granted. On the contrary, I find that damages will cure any harm suffered by the respondent if the injunction was granted considering he has already quantified his losses.

[36] Furthermore, there are some special circumstances which are relevant considerations to minimizing the risk of injustice. Considering that the respondent is still in possession of the property, one that he will have to give up possession of if he is successful on his substantive claim, it will likely cause irremediable harm to the applicant to have him enjoy the property pending trial. This would in effect dismantle the preservation of the status quo. In any event, the applicant has indicated that she is prepared to give the usual undertaking as to damages.

[37] I therefore conclude that the injunction requested ought to be granted until trial, when the dispute between the parties on the substantive claim is determined or until further orders of the court.

ORDERS & DISPOSITION

[38] It is hereby Ordered that: -

1. The Claimant, whether by himself, servants and/or agents or otherwise is restrained from continuing to enter upon property situate at Shop No.2, Hotel Street, Compton House, Mandeville in the parish of Manchester until the Claim is determined or further orders of the Court.
2. The Defendant, through her Counsel, is to give the usual undertaking as to damages.

3. Costs to the Defendant in the Application to be taxed if not agreed.
4. Leave to Appeal is refused.