



[2016] JMSC Civ. 205

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV 03695

BETWEEN	JAMAICAN PELICAN RESORTS LTD	CLAIMANT
AND	SEANIC INVESTMENTS (CAYMAN) LTD	1ST DEFENDANT
AND	GARTH 'GARY' SCOTT	2ND DEFENDANT

IN CHAMBERS

Michelle Ann Cousins, of counsel, for the Claimant

Rachel Dibbs is in attendance as a representative of the Claimant

Christopher Dunkley, instructed by Phillipson Partners, for the Defendants

HEARD: October 31, 2016 and November 18, 2016

APPLICATION FOR MANDATORY INJUNCTION - INTERESTS OF JUSTICE - WHETHER DAMAGES AN ADEQUATE REMEDY - FAILURE TO GIVE UNDERTAKING AND FAILURE TO GIVE CROSS - UNDERTAKING

ANDERSON, K. J

[1] Some of the reliefs being claimed for, by the claimant, pertain to matters arising from the construction of the wooden dock at the relevant premises, which the parties own, as tenants-in-common. One of the specific reliefs being sought is for that dock to be removed from the premises.

- [2] On one of the reliefs being sought, pursuant to this claim, the parties are in agreement and that is, that the property should be partitioned by court order and thus, divided as between the parties to this claim.
- [3] If this court were to make the orders which the applicant has sought, it would in large measure, have determined the entire claim, in the claimant's favour, save and except, as regards the claim for damages.
- [4] The claimant has also though, sought damages and to this court's mind, damages would be an adequate, alternative remedy for the claimant. Whether any damages will or ought to be ordered in the claimant's favour, will have to be determined based upon the applicable law, considered along with the evidence which will have to be given during an expected future trial.
- [5] The defendants are essentially, relying on the defence of promissory estoppel. They have contended that there was an agreement between the parties for the defendants to construct the dock on the premises and whilst that construction was ongoing, the claimant even expressed pleasure at the manner in which the construction work pertaining to same, was then proceeding. Of course, on the other hand, the claimant has contended that the said dock was built without its consent.
- [6] This court cannot, based solely on an assessment of written affidavit evidence, determine which of the deponents is, in that respect, being truthful and which of them, is not. In that regard, see: **Edward Seaga and Western Broadcasting Services Ltd.** – [2007] UKPC 19 and **Lascelles Chin and Ramona Chin** – [2001] UKPC 7.
- [7] If damages will be an adequate remedy to the claimant, then the overall interests of justice would require that the claimant's application for mandatory injunctive relief, be refused. See the renowned: **American Cyanamid Co. v Ethicon Ltd.** – [1975] A.C 396, as regards, what should be the court's approach to an

application for interlocutory injunctive relief, in circumstances wherein the court considers that damages would be an adequate remedy.

- [8] The over-arching consideration for this court, when deciding on whether a mandatory, or prohibitory injunction ought to be granted, is that the court should take whatever course appears to carry the lower risk of injustice, if it should turn out at trial, to have been “wrong”. See: **Films Rover International Ltd. v Cannon Film Sales Ltd.** – [1987] 1 W.L.R 670. In this case, at this stage, the applicant is seeking mandatory injunction relief.
- [9] Whilst that is the over-arching consideration though, it is by no means, the only consideration. This was made clear, in the Privy Council’s Judgment, in the case – **National Commercial Bank v Olint Corporation Ltd.** – [2009] 1 W.L.R 1405, per Ld. Hoffman at paragraphs 17 and 18.
- [10] Another important consideration is what the practical consequences of the grant or refusal of the injunctive relief being sought, are likely to be, because, if it appears that the grant of the injunction is likely to cause irremediable prejudice to the defendant, then a court may be reluctant to grant it, unless satisfied that the chances that it will turn out to have been wrongly granted, are low, that is to say, as was stated by Megarry J. in **Shepherd Homes Ltd. v Sandham** – [1971] Ch 340, at 351 – ‘a high degree of assurance that at the trial, it will appear that at the trial the injunction was rightly granted’. Of course, the converse would, of necessity, also be true.
- [11] The claimant has contended that the dock was illegally built, in that it was built without permission from the relevant environmental and/or local authorities. That may very well be so, but they have subsequently given preliminary and conditional approval for the dock to remain in existence, subject to the defendants, obtaining from the claimant, approval for the dock to remain there. According to the defendants, they were given that permission. That is the foundation of the defendants’ defence. This court cannot draw any conclusion as

to the veracity of that assertion at this stage. That will, in all likelihood, fall to be decided upon by a judge, following on a trial.

- [12]** If, following on a trial, this court concludes that the claimant gave approval for the dock to remain there and that the claimant is now estopped from retracting that permission, then, it will inevitably follow, that the relevant environmental and/or local authorities will, based on assurances/ preliminary and conditional approval earlier given by them, to then give final and unqualified approval. That may or may not happen, but whether that will be so, or not, will have to await the outcome of a trial of this claim, or at the very least, further court proceedings until this claim has been finally resolved.
- [13]** Finally, although the claimant has, in one of its grounds as stipulated in support of their application, stated that, 'The applicant undertakes to abide by any order as to damages caused by the granting and extension of the orders sought,' the applicants themselves, have not personally provided that undertaking. The claimant's officer – Mr. Joseph Dibbs, who deponed to affidavit evidence in support of the claimant's application, has not provided in that affidavit of his, any undertaking whatsoever. The application filed by the claimant, for injunctive relief, was signed by the claimant/applicant's counsel – Ms. Cousins. That therefore, does not constitute an undertaking given by the applicant. In any event, the mere providing of an undertaking would not have been enough, since the applicant should have gone on to show that they have the means to satisfy that undertaking.
- [14]** It must be stated though, that this court has noted that the defendants have also failed to give any undertaking as to damages. They also should have done so. That is what is described in legal textbooks, as a 'cross-undertaking in damages.' In circumstances like this therefore, where neither side has provided to this court, any undertaking in damages, the scales between the parties, are evenly balanced.

[15] For the reasons already provided though, with respect to whether or not the injunctive relief as sought by the claimant/applicant ought to be granted or refused, the overall interests of justice at this stage, favour the defendants.

[16] In the circumstances, the claimant's application for injunctive relief is refused.

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Hon. K. Anderson, J.