



[2012] JMSC Civ 121

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV 05102 OF 2011

BETWEEN	SRM PARTNERS LP (A Delaware Limited Partnership)	CLAIMANT/RESPONDENT
AND	PALMYRA PROPERTIES LIMITED (In Receivership)	1st DEFENDANT/APPLICANT
AND	PALMYRA RESORT & SPA LIMITED	2nd DEFENDANT/APPLICANT

Mr. Garth McBean, instructed by Garth McBean & Company for the claimant/respondent.

Ms. D'Andrea Butler, instructed by Samuda & Johnson for the 1st defendant/applicant/.

Application by Defendant for Stay of Proceedings – Principles Governing Grant of Stay – Forum Non Conveniens – Jurisdiction Clause in Written Agreement – Court's Discretion.

IN CHAMBERS

Heard: April 5 & September 17, 2012.

Coram: F. Williams, J.

The Application

[1] By a Notice of Application for Court Orders dated October 6, 2011, the 1st defendant/applicant, a company incorporated under the laws of St. Lucia, seeks, *inter alia*, the following orders:

“1. A declaration that the Supreme Court of Jamaica has no jurisdiction to try the Claim herein and that the court should not exercise jurisdiction in this claim.

2. An order that the requirement for filing a Defence in this matter be stayed pending the hearing of this Application.”

[2] The foundation of its application is clause 22 of the agreement between itself and the claimant/respondent for the construction of a condominium unit, which clause states:

“22. Governing Law and Jurisdiction

This Agreement is governed by the laws of the Cayman Islands (as a neutral body of law chosen by the parties for this purpose), and the parties hereby submit to the exclusive jurisdiction of the courts of the Cayman Islands in relation to any suit or other proceedings in connection with any claim or dispute arising out of or otherwise relating to this Agreement. Each party hereby waives any defence of inconvenient forum in relation to such suit or other proceedings.”

[3] I will now give more by way of background to the suit itself before delving further into an examination of the issues in this application.

Background

[4] The claimant/respondent, by way of claim form dated August 15 and filed on August 17, 2011, seeks from this court relief in respect of the alleged breach by the defendants of contracts made with them in the year 2007.

[5] The contract which the claimant/respondent made with the 2nd defendant, on or about February 27, 2007, was for the purchase of a strata lot, part of strata plan

numbered 2446, being part of the land known as “The Northern Estates”, now known as “The Palm at Rose Hall” and comprised in Volume 1389, Folio 431 of the Register Book of Titles, which land is located in the parish of Saint James, Jamaica. More particularly, it is strata lot number B110, Unit number PH1203 located on the 12th level of the building known as “Silver Palm”.

[6] Against the 1st defendant/applicant, the claimant/respondent alleges breaches of a contract (also made in 2007), under which that defendant was to have constructed the infrastructure and a building on the said strata lot. More particularly, the claimant/respondent’s contention is that the 1st defendant/applicant:

“11. In breach of the said agreement and in particular clause 1 of the said agreement the 1st defendant failed, refused and/or neglected to complete the interior and exterior work of the unit which the Claimant contracted to purchase in a good substantial and workmanlike manner.

PARTICULARS

- a. Incomplete and/or defective installation of kitchen cupboards and appliances.*
- b. Broken glass doors.*
- c. Incomplete and/or defective installation of infrastructure and amenities in common areas.*
- d. Failure to furnish as required by Schedule B of the Claimant’s written agreement with the 1st Defendant.”*

(Paragraph 11 of the Particulars of Claim).

[7] The claimant/respondent also alleges breaches of the Real Estate (Dealers and Developers) Act against the 1st defendant/applicant, seeking damages and the right to rescind and to withdraw from the said agreement and to recover monies paid

thereunder. In essence, the basis of its claim against the 1st defendant/applicant under that Act is that that defendant, which would be regarded as a “developer” within the meaning of that Act, entered into what the Act would regard as a “prepayment contract” with it, without being registered as a developer under and as required by the Act.

The Parties

[8] The claimant/respondent is a limited partnership registered in accordance with the laws of Delaware in the United States of America.

[9] As previously indicated, the 1st defendant/applicant is a company incorporated under the laws of St. Lucia. Its office for the service of notices and other communications is stated in clause 3 of Schedule A to the agreement to be : “c/o Palmyra Resort and Spa Limited, Number 3116, Half Moon Post Office, St. James, Jamaica, West Indies.” (emphasis added).

[10] The 2nd defendant is also a company incorporated under the laws of St. Lucia. Similar to the 1st defendant/applicant, its office for the service of notices and other communications is stated in item 3 of the First Schedule to its agreement to be: “Number 3116, Half Moon Post Office, St. James, Jamaica, West Indies”. (emphasis added).

The Rules Governing This Application

[11] The relevant part of the Civil Procedure Rules that governs applications for a stay of execution where a challenge on the basis of lack of jurisdiction is being made, is Rule 9.6. This is what the rule states:

“Procedure for disputing court’s jurisdiction etc

9.6 (1) A defendant who-

(a) disputes the court’s jurisdiction to try the claim; or

(b) argues that the court should not exercise its jurisdiction, may apply to the court for a declaration to that effect.

(2) A defendant who wishes to make an application under paragraph (1) must first file an acknowledgment of service.

(3) An application under this rule must be made within the period for filing a defence.

(Rule 10.3 sets out the period for filing a defence.)

(4) An application under this rule must be supported by evidence on affidavit.

(5) A defendant who –

(a) files an acknowledgment of service; and

(b) does not make an application under this rule within the period for filing a defence, is treated as having accepted that the court has jurisdiction to try the claim.”

[12] There is also authority from the Privy Council (on appeal from the Eastern Caribbean Court of Appeal), which suggests that in some cases an application for a stay of proceedings might also be made pursuant to the inherent jurisdiction of the court (see **Texan Management Limited & ors v Pacific Electric Wire & Cable Company Limited** – [2009] UKPC 46). That case also treats with a situation such as this, when an application for a stay is made outside of the time limited by the rules for filing a defence. However, since that point did not feature prominently in this case (the arguments having been focused on the substance of the rules relating to an application for a stay), it will not be dealt with now; but rather, later on in this judgment after all the main issues have been dealt with.

Summary of Submissions

For the 1st defendant/applicant

[13] On behalf of the applicant, Ms. Butler placed heavy reliance on the case of **Spiliada Maritime Corp. v Cansulex Ltd; The Spiliada** [1986] 3 All ER, 483 and on the dicta of Lord Goff of Chieveley in particular. Her submissions might be summarized in the following points: (i) Where a defendant seeks a stay on the grounds of *forum non*

conveniens, there is a general burden on that defendant to show that an alternative forum, having competent jurisdiction, exists; (ii) Where the defendant does so, the burden then shifts to the claimant/respondent to show that “special circumstances” exist which make it just for the trial to take place in the forum for which the claimant/respondent contends; (iii) The court’s decision at the end of the day should be based on its assessment of which forum will likely produce the just result; (iv) The agreement between the parties that the Cayman Islands should be the forum, should be given effect and no party should be allowed to renege from that agreement; (v) The “just result” which the court should seek is that which would give effect to the legally-binding contract between the parties; (vi) In this case, there are no “special circumstances” which the claimant/respondent can demonstrate to discharge the burden which has shifted to it; (vii) A previous judgment of G. Brown, J ordering that the trial of a similar matter be held here, is of persuasive authority only and discloses no ratio that this court might follow.

For the claimant/respondent

[14] On the claimant/respondent’s behalf, Mr. McBean contended the following points: (i) That there are “strong reasons” for the court not to enforce that part of the agreement governing jurisdiction, citing, for example the case of **Donohue v Armco** [2002] All ER, 749; (ii) The existence of these strong reasons displaces the 1st defendant/applicant’s prima facie entitlement to having the provision concerning forum enforced; (iii) Among these strong reasons (relying on **The Eleftheria** [1970] P 94), are the considerations that : (a) evidence for this case is more readily available in Jamaica than in the Cayman Islands; (b) The law in the Cayman Islands is materially different from that in Jamaica: if the matter should be heard in the Cayman Islands, the claimant/respondent would not be able to avail itself of the provisions of the Real Estate (Dealers & Developers) Act, on which a part of its claim is based, as the Cayman Islands do not have similar legislation. (c) Neither party is connected with or related to the Cayman Islands – any such connection is with St. Lucia (where the 1st defendant/applicant is registered) and Jamaica (where the defendants have their addresses for service of notices); (d) The subject matter of the claim is in Jamaica,

where it would be more readily accessible; (e) The 1st defendant/applicant does not genuinely desire trial in the Cayman Islands but is simply seeking a procedural advantage over the claimant/respondent. In support of this point, it was contended (in addition to the points already mentioned above), that (i) there is a related contract for the purchase of the strata lot itself which contract is governed by the laws of Jamaica; and the rights under the two contracts are related. (f) There has been a recent decision in this court in the case of **Sharrie Ann James and Lance James v Palmyra Resort & Spa Limited and Palmyra Properties Limited** (Claim No CD 00027 of 2011) in which the Honourable Mr. Justice Glen Brown refused to grant a stay in similar circumstances.

[15] We may now proceed to examine the law and its requirements.

The Law

[16] In paragraph 131 of **Halsbury's Laws of England**, 4th Edition, Volume 8(3), (cited in argument by Mr. McBean for the claimant/respondent), the factors that the court should consider in deciding whether or not to grant a stay and whether or not there exists another forum which is "clearly and distinctly more appropriate" than that contended for by the applicant for the stay, were stated to include the following:

- "1. The residence of the parties.*
- 2. The factual connection between the dispute and the Courts, such as the place where the relevant events occurred, and the residence of the witnesses.*
- 3. The law which will be applied to resolve the dispute.*
- 4. The possibility of a lis alibi pendens or other proceedings;*
and
- 5. The question whether other persons may become parties to the litigation.*

The question of which factors are relevant, and the weight to be accorded to each of them (which will vary from case to case),

is essentially one for the discretion of the trial judge, with whose assessment an appellate court will be reluctant to interfere.”

[17] It is best, at this stage, to discuss these individual considerations with reference to the facts and circumstances of this case:-

The Residence of the Parties

[18] The claimant/respondent, it will be remembered, is a limited partnership, registered in the state of Delaware in the United States of America. On the other hand, the 1st defendant/applicant is a corporation that is registered in the island of St. Lucia. (So, too, is the 2nd defendant).

[19] It is apparent, therefore, that this consideration does not assist us much (if at all) in trying to arrive at a determination of this matter as neither party can be said to be resident either in Jamaica (the alternative jurisdiction that the claimant/respondent seeks to persuade the court to accept), or in the Cayman Islands.

[20] It is, therefore, to the other considerations that we must look in order to find the answers that we seek.

The Factual Connection between the Dispute and the Courts

[21] It is important to remember the nature of the cause of action in this claim: - it is a claim for damages for an alleged breach of a contract for the construction of a condominium unit. That alleged breach is based on the claimant/respondent's averment of a failure on the part of the 1st defendant/applicant to complete the interior and exterior works of the unit in a good, substantial and workmanlike manner, with incomplete and/or defective installation of infrastructure and amenities.

[22] In a matter of this nature and with these issues, it is a foregone conclusion that a visual inspection of the unit must be the main basis on which the claimant/respondent's claim and the 1st defendant/applicant's defence will be eventually assessed. If the trial is

held in the Cayman Islands, the need for a visual inspection will likely necessitate a visit to the *locus in quo* by the court (including counsel on both sides and at least one member of the court staff). It seems to me that if the trial should be held in Jamaica, then the expense that would be incurred by the Caymanian court making an overseas trip (including air fare and perhaps hotel accommodation), will be obviated; or, certainly, lessened by having the matter decided in a Jamaican court. In the latter case the inspection could easily be done in one day and would, at the most, require a journey between Kingston and St. James; thus saving time and considerable expense.

[23] Further, the parties are at odds over this fact: that it is Jamaica in which the events that form the subject of complaint in this suit, occurred.

[24] Additionally, in the court's estimation, the witnesses (which are expected to comprise the contractor, any subcontractor(s) and workmen) are likely to be Jamaicans, whose evidence can be more easily obtained (and with less expense and time) if the trial should be held in Jamaica, than would be the case if it were held in the Cayman Islands.

[25] A consideration of the matter from this perspective, therefore, would clearly incline the court to regard Jamaica as a suitable, and indeed, the more appropriate forum.

The Law Which Will be Applied to Resolve the Dispute

[26] As previously observed, one aspect of the claimant/respondent's case is a claim pursuant to the Real Estate (Dealers and Developers) Act – an act which provides for both civil relief and criminal sanctions. Mr. McBean's submission that there exists no equivalent legislation in the Cayman Islands was not countered by counsel for the 1st defendant/applicant; and the court has not otherwise been made aware that a similar piece of legislation exists there.

[27] If in fact either of the defendants in this suit engaged in real estate business as a developer and/or entered into a prepayment contract with the claimant/respondent

without being registered as the Act requires, and similar legislation is not available in the Cayman Islands, then giving jurisdiction to the courts of the Cayman Islands would rob the claimant/respondent of these particular remedies, leaving them to avail themselves of the general remedies in contract.

The Possibility of a Lis Alibi Pendens; or Other Proceedings

[28] The possibility of a *lis alibi pendens* (another suit pending elsewhere) is of very real concern in this case for one main reason: the contract between the claimant/respondent and the 1st defendant/applicant does not exist in a vacuum – in the court’s view it is inter-related with the contract between the claimant/respondent and the 2nd defendant for the sale of the strata lot. It is self-evident that the condominium unit has to be constructed somewhere and that “somewhere” has to be a strata lot. The one (the condominium unit or the agreement for its construction), could not exist without the other (the strata lot or the agreement for its sale and purchase).

[29] That inter-related agreement (the one for the sale and purchase of the strata lot), contains a provision as to the jurisdiction to be used by the parties in case any dispute arises. It (special condition 14 (o)), reads as follows:-

“This Agreement is governed by the laws of Jamaica, and the parties hereto submit to the exclusive jurisdiction of the Jamaican courts in relation to any suit or other proceedings in connection with any claim or dispute arising out of or otherwise relating to this Agreement. Each party hereby waives any defence of inconvenient forum in relation to such suit or other proceedings.”

[30] So that, what exists in relation to these two inter-related contracts, is that two different jurisdictions are named in which disputes are to be dealt with. The claimant has brought a claim against the 2nd defendant in relation to the sale and purchase of the strata lot – that is, for failure to complete in a timely manner. It is clear that if the

Cayman Islands should be given jurisdiction in respect of that aspect of the suit concerning the issue between the 1st defendant/applicant and the claimant/respondent, then there would be in existence simultaneously two different suits in two different jurisdictions relating to what is, in effect, the same property. And, if the parties (in this case, the claimant/respondent and the 2nd defendant) were of the view that Jamaica would be a suitable forum for any disputes concerning the strata lot to be dealt with, what reason could there possibly be for considering the Cayman Islands the forum most suited for addressing disputes relating to the construction of the condominium unit? I can discern none. I can see no advantage that the parties might have perceived would have been available to them by having the construction contract governed by Caymanian law instead of by Jamaican law, as the strata lot contract is.

[31] This aspect of the matter, therefore, has to be resolved in favour of the claimant/respondent.

The Question Whether other Persons May Become Parties to the Litigation

[32] In a matter in which the basis of the claim is incomplete or defective performance of a building contract, it is not unusual, in the court's experience, for the defendant(s) to join others (whether a sub-contractor and/or supplier of the materials used in the construction). By this means, other persons might very well become ancillary parties to the claim. If, (as is likely the case – especially with the sub-contractor(s)), those other parties are Jamaicans, then that would also add weight to the claimant/respondent's contention in this case that Jamaica would be the most or more appropriate forum.

[33] Additionally, the 2nd defendant, it should be remembered, is also a party to this suit, as a result of the contents of special condition 14 (e) of the contract between the claimant/respondent and the 2nd defendant, which (so far as is relevant), reads as follows:-

“The Purchaser shall enter into a separate contract, with a builder nominated by the Vendor, to complete

*the interior and exterior works and finishing's (sic)
of the Unit..." (emphasis added).*

[34] So that this is one reason for the joinder of the 2nd defendant as a party in this claim (see paragraph 22 of the particulars of claim).

[35] These matters apart, there are two particular clauses of the agreement between the claimant/respondent and the 1st defendant/applicant that, in the court's view, have a bearing on the main issue in this matter – these are clauses 6 and 14, which read as follows:-

"6. STATUTORY COMPLIANCE

The Contracted Builder shall conform, and ensure that all of the sub-contractors and sub-sub-contractors conform, to the provisions of the statute, regulation and other applicable laws and codes for the time being in force in Jamaica affecting the Contracted Works, and any applicable environmental and labour laws and regulations."

"14. INTEREST ON LATE PAYMENTS

The Client shall be liable to pay interest on the unpaid balance of any sum falling due...at the rate which is Five per cent (5%) per annum above the prime lending rate from time to time of National Commercial Bank Jamaica Limited..."

[36] In the court's view, clause 6 of the agreement shows that it is Jamaican law that will guide each and every aspect of the performance of the agreement between the claimant/respondent and the 1st defendant/applicant. Clause 14 shows that where there is a breach and interest is to be applied to late payments, it is a Jamaican bank whose

rates will be used as a guide. Does all this not point to the suitability of the Jamaican courts (rather than the Caymanian courts) to deal with disputes arising under the agreement; and so point to Jamaica being the more appropriate forum? In the court's view, it does.

[37] An additional feature of this case is that both defendants are now in receivership. In respect of the 1st defendant/applicant, Mr. Kenneth Tomlinson was appointed receiver and manager on the 23rd day of April, 2011 by the National Commercial Bank Jamaica Limited, a company registered and licensed for banking pursuant to the laws of Jamaica and having its registered office in Jamaica (on its own behalf and as representative of two other companies). Mr. Tomlinson was appointed receiver/manager pursuant to a debenture dated the 23rd day of April, 2007. Is it not likely that the receiver and the local company by whom he was appointed would be likely to have significant interest in the outcome of the substantive proceedings; which it will be better able to monitor and participate in as they see fit, if the trial takes place here in Jamaica? It appears to the court that it is.

[38] We may now proceed briefly to examine the requirements of the main case that was cited (**the Eleftheria**). It is worthwhile observing at the outset, however, that most of its requirements or guidelines are similar to, or the very same as, those already discussed with reference to the criteria stated in **Halsbury's Laws of England**.

The Eleftheria

[39] These are some of the matters which the judgment in **the Eleftheria** case suggested could be considered in considering which forum should be selected:-

- (a). In what country the evidence of the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English/Jamaican and foreign court;
- (b). Whether the law of the foreign court applies and, if so,

whether it differs from English/Jamaican law in any material respects;

(c).With what country either party is connected, and how closely;

(d).Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages;

(e).Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would – (i) be deprived of security for that claim; and/or (ii) be unable to enforce any judgment obtained.

[40] The issues relating to the matters set out at paragraphs (a) to (c) have already been directly addressed in the foregoing discussion. It is only the matters at paragraphs (d) and (e) that are left to be directly addressed. The words “directly addressed” are used in relation to paragraph (d) advisedly, as, from the foregoing discussion, which reveals that Jamaica would be the more appropriate forum, it cannot be seen what advantage (legal or otherwise) the 1st defendant/applicant could possibly gain by having the Cayman Islands adjudged the more appropriate forum. However, we will give more direct consideration to this issue.

Whether the Defendant Genuinely Desires Trial in the Foreign Country, or Is only Seeking Procedural Advantages

[41] With respect to this issue, Mr. McBean for the claimant/respondent sought to focus the court’s attention on, *inter alia*, (i) the fact that both agreements are inter-related; (ii) there is no connection between the defendants and the Cayman Islands; (iii) the defendants share the same address for the service of documents, which is in the island of Jamaica; (iv) the contract for the purchase of the strata lot is expressly stated to be governed by the laws of Jamaica.(v) if the court were to adjudge the Cayman Islands the appropriate forum, the claimant/respondent would lose the civil and criminal sanctions that are available to it under the Real Estate (Dealers and Developers) Act, thus giving the defendants an unfair procedural advantage.

[42] With these submissions the court is in entire agreement. With these and the matters earlier addressed, the court can discern no advantage to either side by having the Cayman Islands adjudged the appropriate forum. Why then should it grant the stay?

Whether the Claimant/respondent would be Prejudiced by Having to Sue in the Foreign Court Because It Would – (i) be Deprived of Security for that Claim; and/or (ii) be Unable to Enforce any Judgment Obtained.

[43] The matter of a possible loss of security by the claimant/respondent was not addressed in argument, and so the court will not express a view on it – that not being necessary for a resolution of the issues in this matter.

[44] Neither was the question of the claimant/respondent's inability or otherwise to enforce any judgment obtained. What the court will say about this latter point in passing, however, is that it seems that it would be far easier for the claimant/respondent, were it to eventually obtain judgment against the defendants, to both obtain its judgment and seek to enforce it here in Jamaica in which, presumably, the 1st defendant/applicant would have assets or equipment which it used or is using to construct the units; the 2nd defendant would have its ownership of the various strata lots; and (also presumably), where both defendants would likely have at least some of their bank accounts.

Conclusion

[45] Having regard to all the circumstances of this case, therefore, the court, in the language of Lord Goff of Chieveley, is of the view that the Jamaican courts have competent jurisdiction to try this claim and is the appropriate forum for the trial of this action.

[46] In the court's view the parties' aim of having "a neutral body of law" in which their disputes might be resolved will be met by having Jamaica adjudged to be the appropriate forum and that this selection is the one that will most likely produce the most "just result".

[47] The claimant/respondent has demonstrated sufficient “strong reason” for the court to adjudge Jamaica the appropriate forum and not to give effect to the forum originally selected by the parties.

[48] As previously mentioned at paragraphs [11] and [12] of this judgment, the usual requirement is for an application such as this to be made within the time limited for filing a defence. Failure to do so might sometimes be taken to mean that the defendant has submitted to the jurisdiction of the court. That requirement (for making the application within the time limited for filing a defence), was not adhered to in the instant case. However, as the **Texan Management** case shows (see, in particular, paragraphs 73 and 74 of that judgment), that is not necessarily fatal to the application, the court being empowered to exercise a wide discretion in such matters. Additionally, as also previously indicated, the issues were joined between the parties on the substantive questions and not on this procedural one.

[49] In the result, the submissions of Mr. McBean for the claimant/respondent are accepted and, in the exercise of its discretion, the court rules that the application for the stay is dismissed.

[50] Although it is normally open to the judge who hears such an application to make orders as to the filing of a defence and so on, the court will refrain from doing so in this case as it has seen no affidavit evidence or other material which would ground the exercise of the court’s discretion to extend time in this case.

The orders therefore will be:

- (i) **Application dismissed.**
- (ii) **Costs to the claimant/respondent to be agreed or taxed.**