Judgement Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1992/B091

| | | |
|---|---|---|
| BETWEEN | BROADWAY IMPORT EXPORT COMPANY LIMITED | PLAINTIFF |
| A N D | PALACE AMUSEMENT COMPANY (1921) LIMITED | DEFENDANT |

Mr. John Vassell with him Mr. John Givans for the Plaintiff.

Mr. N.A. Henriques Q.C. with him Mr. R. Braham for the Defendant.

HEARD: MAY 21, 22 AND JUNE 1, 1992.

SMITH, J.

Before me is a, Summons dated 15th March 1992 for Interlocutory Injunction. The applicant plaintiff was the tenant of premises numbered 8, 9, and 10 and situated at the ground floor of the Odeon Shopping Centre, 2A - 4 South Odeon Avenue, Kingston 10. The Defendant is the owner of the said premises and was the landlord of the plaintiff in respect of the said premises.

By a Writ of Summons dated 11th March 1992 and filed on the following day the plaintiff claims:

(1) A declaration that the Lease under the Registration of Titles Act bearing date June 1, 1991 in respect of premises situated at and known as Shops 8, 9, and 10 Ground Floor, Odeon Shopping Centre, St. Andrew governs the relationship between the plaintiff and the defendant.

(2) An injunction to restrain the defendant whether by itself, its servants and/or agents from interfering with the plaintiff's quiet possession of the said premises or from taking steps to retake possession thereof, until the determination of this action or until the matter goes to Arbitration under the terms of the said lease; and

(3) Damages for breach of contract.

The Statement of Claim filed on the same day as the Writ has a prayer for reliefs which are of the same vein as those above. On the 12th of March 1992 the plaintiff filed an ex parte summons for interim injunction. This ex parte summons came on for hearing on 16th March 1992. The learned judge with, in my view, commendable foresight ordered that the defendants be served with a view to continuing the proceedings inter partes. On the 17th March 1992 a Summons dated 16th March 1992 for Interlocutory Injunction was filed. It is with this Summons that we are now concerned. An application was made and granted for the amendment of the Order sought by the Summons to read:

> "(1) The defendant be compelled forthwith to remove padlocks and armed guards from premises known as Shops 2A - 4 South Odean Avenue, Kingston 10, Saint Andrew and be restrained by itself, its servants and or agents or otherwise howsoever from interfering with the plaintiff's quiet enjoyment of the said premises until the trial of this action".

It is necessary to first determine whether the plaintiff is seeking an interlocutory mandatory injunction or an interlocutory prohibitive injunction. Mr. Vassell's initial stance was that "where a tenant licensee makes a timely application to be put back into possession after he has been wrongfully evicted, the Court will not regard itself as granting an Order for Mandatory Injunction". He argued that the Court will only regard an injunction as mandatory where the acts which are required to be done involve the destruction or removal of structure (as in Shepherd Homes Ltd. v. Sandham (1970) 3 All E.R. 402) or the expenditure of a substantial sum of money (as in Locabail International Finance Limited v. Agro Export (1986) 1 All E.R. 900). But, he argued, where as in this case it is sought to have a landlord remove padlocks and security personnel from premises the question of hardship to the defendant does not arise. If the Court were to order, the defendant to put back the plaintiff into possession

such an order can occasion no hardship on the defendant and so the Court may make such an order without reference to the question of whether in doing so it was granting a mandatory or prohibitory injunction.

After making a valiant attempt to distinguish the instant case from Esso Standard Oil S.A. Limited v Lloyd Chan SCCA No.12/88 delivered 14th March 1988, Mr. Vassell ultimately conceded that they could not properly be distinguished.

As I understand the decision in the Esso Standard Oil case the Court of Appeal held that where a contract has been effectively determined then an order requiring that by positive acts a party was to restore the contractual relation was not a prohibitory but rather a mandatory injunction.

Thus it was conceded that what the plaintiff is here seeking is an interlocutory mandatory injunction. The plaintiff must therefore satisfy me that its claim that the defendant had acted unlawfully and in breach of contract is "unusually strong and clear" and is such that would make me "feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted". It is now trite to say that this is a higher standard than is required for a prohibitory injunction.

Mr. Vassell for the plaintiff referred to five affidavits of Richard Morgan, the Managing Director of the plaintiff company. He pointed out certain discrepancies between particular dates contained in the first affidavit dated 11th March 1992, and the amended statement of claim, filed on the 16th April 1992, and submitted that these were mere errors. Mr. Henriques Q.C., for the defendant did not share this view.

In outlining the plaintiff's case Mr. Vassell said that an oral lease for a fixed term of three years came into existence between the parties in November 1990. The rent was fixed in that lease. The lease is, by reason of sections 1 and 2 of the Statute

of Fraud valid though not in writing, he submitted. The cardinal terms of a lease are the parties, the property, the rent and the duration, he contended. These were all expressly agreed and together with the terms implied by the Rent Restriction Act they constitute a complete lease he further submitted.

The first affidavit of Mr. Morgan dated 11th March, 1992, discloses that the plaintiff entered into possession of the aforesaid premises sometimes in November 1990. The rent was set at $10,500.00 per month and the maintenance charged $300 monthly. In this affidavit Mr. Morgan deponed that:

> "Sometime in or around late February to early March 1992, the defendant through its Attorney-at-Law, informed the plaintiff through me that it was not prepared to lease the said premises and that the plaintiff was to vacate the premises by February 29, 1992. This came as a surprise to me because the premises were already leased to us. Only the formal lease document remained to be signed once the matter of the maintenance was cleared."

He then went on to state that:

> "In or around late February to early March 1991 (sic) the defendant .....unlawfully and in breach of contract, padlocked the entrance to the said premises and prevented the plaintiff from gaining access thereto."

In an affidavit sworn to on the 14th March, 1992 Mr. Lloyd Alberga a director the defendant company, stated that the premises were let to the plaintiff on or about November 1990, as a monthly tenant. Mr. Vassell attacked this affidavit on the basis that it contains hearsay evidence and should not be accepted.

He submitted that although hearsay evidence is admissible in interlocutory proceedings the source of the information must be disclosed. The affidavit must state that the deponent 'verily believes' and must give the reason for the belief. He argued that Mr. Alberga's affidavit is deficient in that it does not state that he was speaking of his own knowledge or if not the source of his information.

Mr. Alberga deponed that he is a director of the defendant company and duly authorised to depone on behalf of the defendant.

It does not appear on the face of his affidavit that his evidence is hearsay. It was open to the plaintiff to require the presence of Mr. Alberga in Chambers with a view to cross-examining him. No such request was made. In my view there is no basis on which I may find Mr. Alberga's evidence to be hearsay.

Mr. Alberga stated that around 2nd January 1992, the defendant obtained a Certificate of Exemption from the provisions of the Rent Restriction Act. That on the 31st January, 1992, a Notice to quit was served on the plaintiff and that this lawfully mi determined the plaintiff's monthly tenancy.

Non Disclosure

It is important to note that the plaintiff did not disclose the fact that it was served with a notice to quit. This notice was exhibited to the affidavit of Mr. Alberga. This notice refers to premises which the plaintiff "occupies as a monthly tenant". The fact that this notice was served on the plaintiff is not disputed. The plaintiff took no step whatsoever to challenge the validity of this notice. It is a cardinal principle that when an application is made for an injunction the applicant should make a full disclosure of all material facts.

Now in this case the plaintiff is contending that there was an oral lease for a fixed term of three years. The defendant is saying that there was no such thing; but that there was a monthly tenancy and a promise to offer the plaintiff a formal lease for a fixed term etc. It seems to me that the fact that a notice to quit was served on the plaintiff and that it was upon the effluxion of the period of the notice that the defendant re-took possession of the premises is a material fact. Indeed it is consistent with the claim of the defendant that there was a monthly tenancy. In my view such non disclosure disentitles the plaintiff to the injunctive relief sought.

Again the plaintiff failed to disclose in its affidavits that the defendant had retaken possession of the premises by

placing guards on the premises. Only in the last of some five affidavits is an oblique reference made to the security guards. In the last affidavit sworn to on the 20th May, 1992, Mr. Morgan said:

> "Beyond putting security guards or padlocks in the premises, the defendant has done nothing to re-take possession of the premises neither has it gone into occupation or assumed any control or exercised any acts of possession there over".

This is the belated response to Mr. Alberga's statement in his affidavit that the defendant upon expiry of the notice took possession of the premises and has been in possession since. The plaintiff made no mention of the security guards in its 1st, 2nd, 3rd and 4th Affidavits. This to my mind is another material fact which ought to have been clearly disclosed by the plaintiff applicant.

Before leaving this matter I should attempt to deal with submissions made in respect of an application before the Rent Board to revoke the certificate of exemption already referred to.

This application is by a third party. Mr. Vassell submitted that the fact that such an application has been made and that a date is set for its hearing is a factor that the court may take into account in considering whether the equitable relief sought should be granted. I agree with Mr. Henriques that the application to the Rent Board cannot affect my decision. It is clear to me that if during the period of the notice to quit the plaintiff had come to the court seeking to restrain the defendant from terminating the tenancy then the fact of such an application to the Rent Board would be relevant.

In such a case the applicant would be seeking a prohibitory order. It is equally clear to me that where, as in this case, a mandatory order is sought the fact of such an application pending before the Board is of no moment. This must be so since the court may only grant an interlocutory mandatory injunction where it is satisfied that the applicant has a strong and clear case. Indeed

the court would have to first satisfy itself that the applicant's case before the other tribunal is unusually strong and clear before the mere existence of such an application could properly affect the decision of the court.

Having come to the conclusion that there has been non disclosure of material facts by the plaintiff, I need not go further. I will nonetheless state my view on the strength of the plaintiff's case as regards its application for an interlocutory injunction. In doing so I must refrain from embarking on a finding of fact. Let me repeat that the plaintiff's case is that an oral lease for a fixed term of three years came into existence between the parties in November 1990.

Mr. Vassell skilfully argued that no reasonable businessman would take a commercial lease, enter into possession, spend substantial sums of money and set up his business on nothing more certain than a month to month tenancy. The plaintiff he said has made out a strong and clear case. He contended that damages would not be adequate and in this regard he made reference to the plaintiff's affidavits and to decided cases.

He submitted that the defendant has stolen a march on the plaintiff by the "almost Nicodemus descent upon him with locks and security men." The balance of convenience favours the grant of the injunction, he urged. In this regard he also referred to authorities. As the principles which these authorities decide are not in issue, I do not think it necessary for me to discuss them.

Mr. Henriques on the other hand submitted that the case as outlined by counsel for the plaintiff is not consistent with the evidence as deponed in the several affidavits. He pointed to what he described as an attempt by the plaintiff to tailor his evidence in order to found a cause of action. Let me repeat by way of emphasis that I will say as little as possible about the disputed facts which remain hereafter to be resolved. It is enough to say that on a careful examination of the pleadings, affidavits and documents exhibited thereto, I agree with Mr. Henriques that :-

(1) The plaintiff has failed to put before me any evidence with sufficient cogency to satisfy me that there is a strong and clear case and a high degree of assurance that the plaintiff will succeed in establishing that it was granted a three year oral lease so as to be entitled to a mandatory injunction.

(2) The plaintiff has failed to put before me any evidence which satisfies me that there is a serious issue to be tried that the plaintiff was granted a three year oral lease so as to be entitled to a prohibitory injunction.

In the end, the instant case falls considerably short of any standard on which it would be proper to grant an injunction at this interlocutory stage. Accordingly the application fails. Costs to be the defendant's to be taxed if not agreed. Certificate for counsel granted.