IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 13/89

BEFORE: The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Wright, J.A.
The Hon. Mr. Justice Gordon, J.A. (Ag.)

BETWEEN	JAMCULTURE LTD	PLAINTIFF
AND	BLACK RIVER UPPER MORASS DEVELOPMENT CO. LTD	1ST RESPONDENT
AND	AGRICULTURAL DEVELOPMENT CORPORATION	2ND RESPONDENT

Enos Grant & Miss Jacqueline Hall for Appellant

R.N.A. Henriques Q.C. & Allan Wood for both Respondents

22nd, 24th May & 3rd July, 1989

CAREY, J.A.

I will ask Gordon, J.A. (Ag.) to deliver the first judgment.

GORDON, J.A. (Ag.)

This is an appeal from the judgment of Ellis J. delivered on 3rd February, 1989 dismissing a summons brought by the appellant against the respondents for an interlocutory injunction. After hearing submissions from counsel we dismissed the appeal with costs to the respondents and promised to give our reasons in writing. We now do so.

The appellants had sought an order from Ellis J:

"(a) that the Defendants by themselves their servants and/or agents, be restrained from breaching the covenant of quiet enjoyment contained in the leases under which the plaintiff has leased lands from the Defendants; and/or

(b) that the Defendants be restrained from sending their servants and/or agents unto the said lands; and/or

"(c) that the Defendants be restrained from permitting and/or allowing and/or causing their servants and/or agents to remain on the said lands;

(d) that the Defendants within 1 day of the service of the Exparte Order made herein on them withdraw their servants and/or agents from the said lands;

(e) such other reliefs as to this Honourable Court may deem just.

Prior to this hearing, the appellant had obtained an ex parte interim injunction in similar terms on 19th November, 1988 for 14 days. This injunction was extended on 2nd December, 1988 to 13th December, 1988, and on 12th December, 1988 the acting Chief Justice discharged the injunction for material non-disclosure. From that order the appellant appealed to this court. (See S.C.C.A. 78/88). The facts which are common to that appeal and the present are fully set out in the judgment of Wright J.A. in S.C.C.A. 78/88 dated 22nd June, 1989 and I do not therefore propose to rehearse them: I need only give a brief summary thereof.

Under an oral agreement later formalised by two leases one for 1000 acres and the other for 3379 acres the plaintiff entered into possession of 4379 acres (approximately) in the parish of Saint Elizabeth on the 6th January, 1986. The agreement provided for the purchase by the appellant of rolling and fixed stock including machinery. The annual rental was fixed at $1,113,600.00 payable semi-annually in arrears in July and December of each year during the currency of the lease for 25 years. The formal lease was signed on 1st February, 1988 but to that date the appellant had not paid any rent. On 11th November, 1988 the 1st respondent after having given notice, re-entered into possession of the demised premises and determined the lease. No rent had been paid by the appellant up to that date.

By writ filed 18th November, 1988 the appellant sought:

"(a) a Declaration that -

(i) the defendants are in breach of the said covenant of quiet enjoyment; and/or

(ii) the plaintiff is entitled to possession of the said lands in accordance with the said leases; and/or

(iii) the Defendants have wrongfully taken possession of the said lands; and/or

(iv) the said leases are still valid.

(b) An Order for recovery of possession and/or delivery up of possession of the said lands by the defendants.

(c) Injunction -

(i) that the Defendants by themselves their servants and/or agents, be restrained from breaching the covenant of quiet enjoyment contained in the said leases; and/or

(ii) that the Defendants be restrained from sending its servants and/or agents unto the said lands in breach of the said lease.

(d) Such other reliefs as this Honourable Court may seem just.

Ellis J. in refusing the application found:

1) serious question to be tried,

2) (a) damages in full measure would be adequate to Plaintiff,

(b) damages to Defendant would not be an adequate remedy. I find no disclosure on Affidavits which constrain me to find any ability to pay damages on the part of the Plaintiff, were the Defendant to succeed.

3) If I am wrong as to 2) above, on a consideration of all the relevant circumstances on the affidavit before me, the balance of convenience is not in favour of the plaintiff.

The grounds of appeal which were argued are:

(i) that the Learned Judge misdirected himself as to the law relating to the balance of convenience, in particular as the matter in issue involved a negative covenant in the lease and/or the evidence disclosed that the actions of the Defendants destroyed the business of the Plaintiff and/or the defendants by dispossessing the Plaintiff were pre-empting the decision of the Court in a pending suit;

(ii) that the Defendants failed to make full and frank disclosure as to the material facts of the matter and thereby misled and/or attempted to mislead the Learned Judge;

(iii) that the decision of the Learned Judge is unreasonable, having regard to the evidence before him.

The thrust of the appellant's submission was that the respondents were in breach of the lessor's covenant, viz; for quiet possession, that the covenant was a negative covenant and that the breach entitled the appellant to the relief sought. Mr. Grant submitted that where the court has before it a negative covenant such as the covenant of quiet enjoyment in this lease, the balance of convenience is not one of the factors that the court takes into consideration. He said that when the Respondent exercised the purported right of re-entry, the plaintiff had a good claim by way of a set-off against the respondents and the lease could not therefore be justifiably terminated. As to the first proposition, he relied on Tipping v. Eskersley (1885) 2 K & J 264 and he found support for the second in British Anzani v. International Marine Management (1979) 2 All E.R. 1063.

I now reproduce Clauses 4 and 5 of the leases for easy reference. The terms are the same in each lease.

"Clause 4

LESSOR'S COVENANT

"The Lessor to the intent that the obligation may continue throughout the said term or any extension hereof HEREBY COVENANTS with the Lessee that the Lessee paying the rents hereby reserved and observing and performing the several covenants and stipulations herein on his part shall be given possession of the leased land free of any tenants and shall peaceably hold and enjoy the leased land during the term without any interruption by the Lessor or any person rightfully claiming by or under him or on his behalf."

Clause 5 (so far as material)

PROVIDED ALWAYS AND IT IS HEREBY AGREED AND DECLARED between the parties as follows:

(a) Power of Re-entry

(i) If the rents hereby reserved or any part hereof shall be unpaid for twenty-one days after becoming payable (whether formally demanded or not); or .....

then and in any of the said cases it shall be lawful for the Lessor at any time thereafter to re-enter upon the leased land or any part thereof in the name of the whole and thereupon this lease shall absolutely determine but without prejudice to the right of action of the Lessor in respect of any antecedent breach of the Lessee's covenants herein contained."

In support of his first proposition, Mr. Grant read this passage from Halsbury Laws of England 4th Edition paragraph 1003.

1003, examples where negative covenants implied -

"A contract to give a person the first refusal of property is deemed to involve a negative undertaking not to part with the property to any other person without giving that first refusal. A lessor who has covenanted with the lessee for quiet enjoyment will be restrained from acting in such a manner as to deprive his lessee of that benefit." (emphasis supplied)

Tipping and Eskersley (supra) is the authority referred to for this statement. The lessor in Tipping's case undertook not to interfere with the flow of water to the demised premises and to ensure this he "covenanted

not to construct any other wier or dam between the wier and bridge, and for quiet enjoyment of the demised premises according to the tenor of the demise." The landlord interfered with the flow of water to the demised premises and was held to be in breach of the covenant for quiet enjoyment. I find Tipping's case is not supportive of Mr. Grant's submission.

In this case the landlord's right of re-entry arose if the tenant was in arrears of rent. The appellant's right to quiet possession was conditional on his observing his obligation to pay the rent stipulated. The rent was not paid by the appellant therefore the landlord's right to re-enter was absolute under the contract. In my view the covenant for quiet possession in these leases is not a negative covenant. In Anzani's case, the landlord had an obligation to repair defects in the demised warehouse. The defects rendered the warehouse unusable. The tenants were sued for arrears of rent and possession. The tenants admitted owing rent but claimed that the amount owing was subject to a set-off in respect of their counter-claim for damages for loss of use. The preliminary issue that had to be decided was "whether the defendants were entitled in law or in equity to deduct or set-off against their admitted liability for rent and mesne profits the damages claimed against the Plaintiffs for breach of the agreement." Forbes J. at p. 1007 held "The defendants are entitled to defend the plaintiff's claim for rent and mesne profits by raising as set-off or defence a like sum of the moneys claimed by the defendants against the plaintiffs as damages for breach of the agreements ....."

The claim by the appellant in this case for a set-off is contained in the defence filed by them to suit C.L. 1988/A134 brought by the 2nd respondent claiming possession and $19,125.00 for rent due. The appellants denied the allegations in the statement of claim and claimed a set-off thus:

> "The defendant will set off so much of the damages claimed in the said suit No. C.L. J229 of 1988 - Jamculture Limited vs. Agriculture Development Corporation et alios - as will extinguished (sic) any amount which may be found due to the plaintiff on its claim for arrears of rent."

In Anzani's case the lessee admitted owing rent and sought to set-off of damages claimed by him. In this case the lessee denies owing rent, yet he seeks to set off damages he claims against "any amount which may be found due to the plaintiff for arrears of rent." The plaintiff in suit C.L. 1988/A134 is but one of the respondents in this appeal, and the lessor of 1000 acres of the 4379 acres leased. The claim for set off cannot apply to the lease for 3379 acres given by the 1st respondent. There is no support for Mr. Grant's contention in Anzani's case.

On the facts the appellant had agreed to purchase machinery from the respondents. In furtherance of this agreement the appellant in entering into possession took possession of the machinery. The appellant did not honour the obligations imposed under the contract and proceeded to sell a crane valued $2,500,000.00 for $1,000,000.00 and in his statement of claim in suit C.L. 1988/J229 the appellant seeks to recover from the Respondents $1,500,000.00 as special damages for "loss on sale of crane." The appellant's act in selling the crane ~~is~~ suggestive of conversion. A litigant seeking equitable relief must have clean hands. The appellant claims $128,000,000.00 for 10 years prospective net profits yet the injunction he seeks is to allow him to remain on the land. Mr. Grant claimed the appellant was entitled to remain on the land and pay no rent until the dispute is settled.

I find that there is a serious question to be tried, that the balance of convenience is in the respondents' favour and that damages would be an adequate remedy to plaintiff who has filed a suit claiming $136,540,000.00 in special damages and general damages.

I find no merit in ground II. Ground III was abandoned. I think that Ellis J. was eminently correct in deciding as he did in refusing to grant the injunction.

CAREY, J.A.:

The two points made by Mr. Grant are really without merit. The first postulated the novel theory that where there is a negative covenant in an agreement, the balance of convenience is not a consideration for the grant of an interim injunction. This is certainly against American Cyanamid Co. vs. Ethicon Ltd. [1975] 1 All E.R. 504. Gordon, J.A. (Ag.) has shown that the authority cited in support of Mr. Grant's argument is not apt.

With respect to the second point, Mr. Grant asserted that a landlord loses his right to re-entry if the tenant has a claim by way of set-off. But British Anzani v. International Marine Management [1979] 2 All E.R. 1063 makes no such sweeping statement, and indeed the plaintiffs, that is, the appellants, could not show that they were not in breach of any covenant in the lease; no rental had been paid by them at any time.

For the reasons which appear in the judgment of Gordon, J.A. (Ag.), I agree that the appeal should be dismissed.

WRIGHT, J.A.:

The judgment of Gordon, J.A. (Ag.) adequately reflects my reason for concurring in the dismissal of the appeal. I have nothing further to add.

Cases referred to:
(1) Tipping v. Eckersley (1885) 2 K & J 264
(2) British Anzani v International Marine Management (1979) 2 All ER 1063
(3) American Cyanamid Co v Ethicon Ltd (1975) 1 All ER 504