



[2021] JMSC Civ 8

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2020 CV 04840

BETWEEN MARLIE TECHNOLOGY PARK LIMITED

1ST APPLICANT

AND GEOTECHVISION ENTERPRISES LIMITED

2ND APPLICANT

AND SAGICOR BANK JAMAICA LIMITED

RESPONDENT

IN CHAMBERS

Danielle Archer and Ashley Ximines instructed by Knight, Junor & Samuels Attorneys-at-Law for the Applicants.

Carlene Larmond and Andre Moulton instructed by Patterson Muir Hamilton, Attorneys-at-Law for the Respondent.

Heard: January 8 and 15, 2021.

Civil Procedure - In limine objection to further consideration of interim injunction granted ex parte - no order made by the court for the filing and service of claim form by specified date - applicant gave an undertaking in it application for without notice interim injunction to file and serve claim by a specified date - applicant failed to comply with own undertaking - court orally advised of the filing of claim form on the day of the hearing but not served on respondent at the time of the hearing - whether court is prevented from considering application further.

C. BARNABY J

[1] On the 8th January 2021 the Applicants' Ex Parte Urgent Notice of Application for Court Orders (the Application) came on for inter partes hearing. The Applicants

seek interim injunctions to restrain the Respondent mortgagee from exercising its power of sale in respect certain property in which they have an interest. It is supported by an Affidavit of Urgency sworn to and filed on the 9th December 2020. The application was heard and granted ex parte on the 10th December 2020 by a court otherwise constituted.

[2] At the hearing before me, Ms. Larmond, Counsel for the Respondent raised a preliminary objection. She contended that in the absence of a claim, there is sufficient basis for the court to dismiss the application without further consideration of the ex parte injunction granted to the Applicants. According to Ms. Larmond, the flaw was not merely procedural but went to the root of the court's jurisdiction to grant an interim injunction. I agree with this submission.

[3] Pursuant to the section 49 (h) of the **Judicature (Supreme Court)**, the court may grant an interlocutory order for an injunction in all cases where it appears just and convenient to do so, either conditionally or upon terms.

[4] No authority was cited by Ms. Larmond in support of her position, perhaps because it is well established. If there is need for authority however, it may be found in the dicta of Lord Diplock in ***Siskina (Owners of cargo lately laden on board) v Distos Compania Naviera S.A.*** [1979] AC 210, 256 who stated the matter thus,

A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a preexisting cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to

which his cause of action entitles him, which may or may not include a final injunction.

The starting position is that a claimant is not entitled to injunctive relief where he has not filed a claim. He is permitted however, in urgent cases or where it is desirable in the interests of justice, to obtain the relief on an interim basis. This is sanctioned by CPR 17.2 (b).

[5] Pursuant to CPR 17.2 (3),

Where the Court grants an interim remedy before a claim has been issued, it must require an undertaking from the claimant to issue and serve a claim form by a specified date.

[6] In response to Ms. Larmond's submission that the court is permitted to dismiss the application for interim injunction without further consideration of it, Counsel for the Applicants pointed to the absence of an order from the court directing that they file and serve a claim form by a specified date at the time the ex parte interim injunctions were granted.

[7] The question then, which I believe must be answered in the affirmative, is whether the Applicants were required to file and serve their claim form within fourteen (14) days of the grant of the ex parte interim injunction notwithstanding that it was not made an order of the court?

[8] Ground (h) (v) of the Application which was before the court on the occasion that the interim injunctions were granted ex parte, provides that "[t]he Applicants undertake to satisfy the following if the orders are granted: ... (v) To file a claim form herein within fourteen (14) days of the orders herein having been granted." The Applicant asks for six (6) orders on the Application, none of which reflects this undertaking. I have not seen a copy of any draft of orders which an applicant on an ex parte application is required to file pursuant to CPR 11.7 (3).

- [9] The Applicants therefore reduced to a ground in their application, that if the orders sought were granted, they undertake to file and serve and claim form within fourteen (14) days of their grant. An injunction is an equitable remedy and he who comes to equity must do so with clean hands. I think it would not only be terribly unfortunate, but that it would also be a good basis to refuse the request for a continuation of the interim injunction granted ex parte if the Applicants were allowed to resile from their undertaking because it was not reduced to an order of the court. It is in these particular circumstances that I have come to the conclusion that the court, in granting the ex parte interim injunction had received an undertaking pursuant to CPR 17.2 (3) by which the Applicants were bound.
- [10] Having regard to the fact that there is no jurisdiction to grant an injunction in the absence of a claim, the requirement of CPR 17.2 (3) is in my view to be regarded as a condition precedent to the grant of interim relief before a claim has issued. While it may be advisable for the court reduce the terms of the undertaking to file and serve a claim form by a specified date into an order, I do not believe the failure reduces in any way the force of Ms. Larmond's submission that in the circumstances of the case, the court was without jurisdiction to grant the interim injunction on the inter partes consideration of the Application.
- [11] The Applicant's failed to honour the undertaking given to the court. They did not issue and serve their claim form within fourteen (14) days of the grant of the ex parte interim injunctions.
- [12] It was only on completion of Ms. Larmond's submissions that Ms. Archer belatedly advised that a Fixed Date Claim Form was filed, albeit on the morning of the hearing. It was then disclosed that the claim had not been served on the Respondent. Ms. Archer with commendable candour conceded that it would be disingenuous to argue that the Applicants were unaware of the requirement to file a claim. Nevertheless, the court was asked to exercise the case management

power reserved to it by CPR 26.9 to rectify the procedural defect by accepting that the claim form was duly filed.

- [13] Were the court to make such an order, the implication is obvious. It would then be said to be in a position to give further consideration to the application for interim injunctive relief, rendering the jurisdictional challenge otiose. While I am of the view that the court could exercise its discretion in an appropriate case to abridge the time for the filing and service of the claim form, I do not believe that the circumstances in this case advise of such an exercise, for the reasons which appear below.
- [14] It was correctly contended by Ms. Larmond that CPR 26.9 does not assist the Applicants. The rule applies only where no rule, practice direction or court order specifies the consequence of failure to comply with a rule, practice direction or court order. Pursuant to CPR 26.9 (2), where the court exercises the power to rectify matters where there is a procedural error or failure to comply, unless ordered by the court, no step taken in the “*proceedings*” are invalidated. Until a claim is issued, there are no “*proceedings*” to which the power can be referable. This was addressed in **Stewart v Sloley Snr. and ors.** [2011] JMCA Civ 28. In the instant case the Applicants have failed to honour the undertaking given on an entirely ancillary application which are not “*proceedings*” within the meaning of CPR 26.9 (2).
- [15] Ms. Ximines went further to submit that it would advance the overriding objective of the CPR to deal with matters justly, for the court to accept that the claim form was duly issued by the Applicant.
- [16] The court may extend the time for compliance with any rule, practice direction, order or direction of the court even where the time for compliance has passed: CPR 26.1 (2) (c). The undertaking to file and serve a claim form within fourteen (14) days of the grant of the ex parte interim injunction was the Applicants’ undertaking, which though given to the court, was not the subject of an order, rule,

or practice direction. The court is nevertheless permitted, in addition to all the powers listed at CPR 26.1 (2), to “(v) *take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective.*” This power is undoubtedly wide and I am of the view that it could be exercised in an appropriate case to order a claim form filed and served outside of the time given in an undertaking to stand as duly filed and served, so as to ground the court’s jurisdiction to grant an interim injunction if warranted. I do not believe this is such a case.

[17] The Applicants were aware of the need for the filing and serving of their claim form and that they had given an undertaking to the court to do so by a specified date. This notwithstanding, no evidence was placed before the court to explain the failure to honour the undertaking and therefore put the court in a position to properly consider the merit of what is in substance an application to extend the time for the issuing of the claim form. The issue of the claim form on the very day of the inter partes hearing was only disclosed after Ms. Larmond had completed her submissions on the in limine objection and it had not been served on the Respondent. It was not before me. In the circumstances, to extend the time for issuing the claim form and accept it as duly filed and extend the time for its service on the Respondent would be an arbitrary exercise of any discretion I may have to extend and abridge time, and would be contrary to the court’s responsibility to give effect to the overriding objective of dealing with cases justly.

[18] On a final analysis, while a claim has now been filed, the Applicants failed to honour their undertaking to the court in obtaining the interim injunction ex parte and did not provide any evidence at the hearing to explain the failure, even though they were aware that they had not done all that was required to activate their right to obtain an interim injunction. In the circumstances, the court has not been placed in a position to properly consider an extension of the ex parte interim injunctions beyond the 8th January 2021. I note in passing that the Application was amended on the 10th December 2020 to limit the interlocutory reliefs “... *until January 8,*

2021.”

[19] It is in all the foregoing premises that I conclude that there is merit in the in limine objection raised by Ms. Larmond and accordingly, I order discharged the interim injunctions granted ex parte.

ORDER

1. The ex parte interim injunctions granted on the 10th December 2020 are discharged.
2. Permission to make an oral application for fresh interim injunctions is refused.
3. Costs of the Application to the Respondent to be taxed if not sooner agreed.