[2024] JMCA Civ 19

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA

SUPREME COURT CIVIL APPEAL NO COA2020CV00082

BETWEEN	**PETROLEUM COMPANY OF JAMAICA LIMITED**	**APPELLANT**
AND	**HASHEBA DEVELOPMENT COMPANY LIMITED**	**1ST RESPONDENT**
AND	**SEAN KINGHORN**	**2ND RESPONDENT**
AND	**JUDY ANN KINGHORN**	**3RD RESPONDENT**
AND	**KINGHORN & KINGHORN (T/A PARTNERSHIP LAW FIRM)**	**4TH RESPONDENT**

B St Michael Hylton KC and Garth McBean KC instructed by Garth McBean & Co for the appellant

Abraham Dabdoub and Christopher Dunkley instructed Dabdoub Dabdoub & Co for the 1st respondent.

15, 16 and 17 April 2024

Civil procedure – Proceedings commenced by fixed date claim form – Claim for specific performance for breach of contract for sale of land – Claim for specific performance joined with other claims in fixed date claim form – Extension of time to file defence refused – Trial of claim for specific performance at first hearing in the absence of defence – Other claims ordered to proceed as if commenced by claim form – Whether claim for specific performance properly commenced by fixed date claim form – Whether judge erred in conducting a summary trial of the claim for specific performance on the fixed date claim – Rules 8.1(4)(d), 8.1(4)(f) and 27.2(8) of the Civil Procedure Rules, 2002

ORAL JUDGMENT

MCDONALD-BISHOP JA

[1] This is the unanimous decision of the court.

[2] This is an appeal brought by Petroleum Company of Jamaica Limited ('Petcom') against the decision of Laing J (as he then was) ('the learned judge') made in the Supreme Court on 27 July 2020, granting the 1st respondent, Hasheba Development Company Limited ('Hasheba'), orders for specific performance of three agreements for sale entered between Petcom and Hasheba.

[3] The entire background to this matter can be gleaned from the learned judge's judgment cited as **Hasheba Development Company Limited v Petroleum Company of Jamaica Limited** [2020] JMCC Comm 17. For these proceedings, the relevant facts are that, sometime in 2018, Hasheba negotiated and entered into three agreements to sell three parcels of land it owned to Petcom. The agreements were signed but not dated or stamped. Petcom made part payments towards the purchase price of each parcel under each agreement; however, Petcom made no further payments after December 2018. A dispute arose between the parties regarding the completion of the agreements.

[4] As a consequence, Hasheba commenced a claim in the Supreme Court, by way of fixed date claim form with particulars of claim and affidavit in support, naming Petcom as the 1st defendant and Sean Kinghorn, Judy-Ann Kinghorn and their law firm, Kinghorn and Kinghorn, (together 'the Kinghorn defendants'), as the 2nd, 3rd and 4th defendants, respectively. Petcom and the Kinghorn defendants are herein collectively called 'the 'respondents'.

[5] In the fixed date claim form, Hasheba sought against Petcom alone, specific performance of the agreements for sale, damages for breach of contract for failing to abide by the terms and conditions of the contract and an accounting for the payment of transfer tax, stamp duty and registration fees payable on the agreements for sale. In the

interest of brevity, we refer to the claims made against Petcom alone as 'the breach of contract claim'. Hasheba claimed damages against the Kinghorn defendants, collectively, for breach of fiduciary duty and/or responsibility, conflict of interest, and professional negligence based on their involvement in the sale as counsel for both Hasheba and Petcom. Hasheba also sought damages for conspiracy to defraud and breach of contract jointly and severally against Petcom and the Kinghorn defendants.

[6] The respondents all failed to file affidavits in response within the time prescribed by the rules of court, which was 28 days after the service of the fixed date claim form on them (see rule 8.8(2)(c) of the Civil Procedure Rules, 2002 ('CPR')). However, by the date of the first hearing, convened before the learned judge, the respondents had all filed affidavits in response. Hasheba filed a notice of application for court orders seeking certain orders in the absence of the affidavits in response, but that was dismissed.

[7] At the first hearing of the fixed date claim form, the respondents objected to the commencement of the claim by way of fixed date claim form, arguing that it ought properly to have been commenced by claim form, as it did not fall within any of the specified circumstances for use of a fixed date claim form under rule 8.1(4) of the CPR.

[8] In his written judgment delivered on 22 July 2020, the learned judge seemingly accepted Hasheba's contention that the claim was properly commenced by fixed date claim form pursuant to rule 8.1(4)(f) because the fixed date claim form included a claim for specific performance (see para. [23] of the judgment). The learned judge, however, reasoned that the additional claims made in the fixed date claim form created a difficulty because those claims may not be appropriately dealt with on the fixed date claim form procedure. The learned judge formed the view that there was an issue regarding the stage at which he could order the proceedings to proceed as if commenced by way of claim form. In his view, if he were to conclude that the fixed date claim was undefended, in full or in part, then that would provide a basis for a trial of the fixed date claim at the first hearing. The learned judge, accordingly, decided to conduct an enquiry into the case to make that determination. In doing so, he considered two satellite matters, namely,

whether the respondents should be granted an extension of time to file their defence; and whether he could try the breach of contract claim at the first hearing.

[9] After conducting an extensive review of the claim and the affidavits filed by the parties, the learned judge concluded that the respondents had failed to satisfy the conditions for an extension of time for their defence to be filed because the delay was inordinate, there was no good explanation for the delay, and the proposed defence, as set out in the respondents' affidavit evidence, had no merit. Regarding whether he could have tried the breach of contract claim on the fixed date claim form at the first hearing, in default of defence, he decided that affirmatively. Having refused to extend the time for the respondents to file affidavits in response, the learned judge concluded that "there are no disputes of fact that would make it inappropriate to resolve this element of the claim on the hearing of the fixed date claim form" (para. [100] of the judgment). Accordingly, he concluded that Hasheba was entitled to the remedy of specific performance sought on the fixed date claim form because Petcom had no meritorious defence.

[10] Having expressed the reasons for his approach to the disposal of the matter in his judgment, the learned judge made his orders on the fixed date claim on 27 July 2020. With respect to the breach of contract claim, the learned judge ordered, *inter alia*, as follows:

(i) specific performance of all three agreements for sale within 180 days (orders 2 and 3);

(ii) the production and delivery, to Hasheba's attorneys, of the original parent title for the land to which the three agreements relate, payment of stamp duties and registration fees in respect of the three agreements for sale and the payment of monies for the discharge of caveats (order 4);

(iii) the payment of the balance of purchase prices due under the three agreements for sale (order 5); and

(iv) that provision be made for the calculation of interest on the sums to be paid (order 6).

[11] The learned judge, however, decided that the fixed date claim form against the Kinghorn defendants should proceed as if commenced by claim form because the claims made therein could not properly be tried by the fixed date claim form procedure. He did so on the basis that those claims were "fact based and the affidavits filed on behalf of the parties demonstrate that there are fundamental disputes as to the material facts as between the parties" (see para. [94] of the judgment). He saw it fit to grant an extension of time to the Kinghorn defendants to file their defence to the aspects of the claim relating to them (order 7).

[12] Notably, although the learned judge stated, at para. [99] of his judgment, that Hasheba's claim for conspiracy to defraud was made against both Petcom and the Kinghorn defendants, no order was made disposing of that aspect of the claim against Petcom, or requiring that it proceed by way of claim form along with the claim against the Kinghorn defendants. Therefore, Hasheba's claim against Petcom for conspiracy to defraud remains extant and unresolved.

[13] Dissatisfied with the learned judge's orders for specific performance and the consequential orders made relative to those orders, Petcom filed its appeal advancing six grounds of appeal against the learned judge's decision – one attacking the decision on procedural grounds and the other five, on substantive grounds.

[14] The Kinghorn defendants, though named as parties in the notice of appeal, have not participated in the appeal, and it was not necessary for them to do so as nothing concerns them that is relevant to the issues to be resolved on the appeal.

[15] In considering the grounds of appeal, it became evident to us that ground (a) raised a procedural issue with respect to the learned judge's approach to the disposition of the proceedings in the court below, which was potentially dispositive of the appeal, in its entirety. Ground (a) complains that the learned judge erred in finding that the breach of contract claim was properly commenced by fixed date claim form pursuant to rule 8.1(4)(f) of the CPR and could be decided in that way. Therefore, it was apparent to the court that if ground (a) succeeds, the entire basis of the learned judge's disposition of the claim and the orders made thereon would be erroneous, thereby determining the appeal. In that event, there would be no need for the court to consider the remaining grounds of appeal.

[16] In the interest of saving time and expense in keeping with the overriding objective, counsel for the parties were directed to address the court first on ground (a), following which a determination would be made as to the necessity of oral arguments on the remaining five grounds of appeal.

[17] Having fully considered the oral and written submissions advanced by counsel on both sides on ground of appeal (a), we believe that the learned judge erred in concluding that Hasheba's breach of contract claim was properly commenced by fixed date claim form. We hold that the appeal should be allowed on that basis for the reasons which follow.

[18] Ground (a) raises the fundamental question of whether the learned judge erred in granting specific performance of the three agreements for sale and the relevant consequential orders, on the basis that Hasheba's claim for breach of contract was properly brought by fixed date claim form.

[19] The resolution of ground (a) rests on the application of rule 8.1(4) of the CPR, which specifies the limited circumstances in which civil proceedings should be initiated by fixed date claim form. The rule reads as follows:

> "(4) Form 2 (fixed date claim form) must be used –

(a) in mortgage claims;
(b) in claims for possession of land;
(c) in hire purchase claims;
(d) where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact;
(e)whenever its use is required by a rule or practice direction; and
(f) where by any enactment proceedings are required to be commenced by petition, originating summons or motion." (Emphasis added)

[20] As learned King's Counsel for Petcom, Mr Hylton, rightly pointed out, the learned judge, in appearing to accept as he did, at para. [23] of his judgment, that Hasheba's claim was properly brought under 8.1(4)(f), did not identify any enactment which requires proceedings for specific performance flowing from a breach of contract to be commenced by petition, originating summons or motion. We agree with Mr Hylton that there is no such enactment which requires that proceedings for breach of contract and specific performance, as in the circumstances of this case, be commenced by fixed date claim form. Accordingly, the learned judge would have erred in concluding that Hasheba's claim was properly brought by way of a fixed date claim form pursuant to rule 8.1(4)(f).

[21] Counsel for Hasheba, Messrs Dabdoub and Dunkley, submitted in oral arguments before us that Hasheba relied on both rules 8.1(4)(d) and 8.1(4)(f) in the court below, although the learned judge only referenced rule 8.1(4)(f) in his judgment. Counsel pointed out that the learned judge found that the breach of contract claim did not give rise to any dispute of fact (see para. [100] of the judgment), which they sought to demonstrate. Thus, they submitted, the breach of contract claim was properly brought by fixed date claim form under rule 8.1(4)(d).

[22] From the learned judge's reasoning, it appears that he may have had rule 8.1(4)(d) in mind when determining whether it was appropriate for the breach of contract claim to proceed by way of fixed date claim form. However, the learned judge made no express reference to the rule. In any event, having closely examined the fixed date claim form

and the affidavits filed by Hasheba in support, alongside the affidavits filed by the respondents in response, we accept Mr Hylton's submission that rule 8.1(4)(d) is inapplicable. Mr Hylton pointed us to three issues arising on the claim and affidavits which, we accept, raise substantial disputes of fact and preclude reliance by Hasheba on rule 8.1(4)(d) to assert that the breach of contract claim was properly brought by fixed date claim form. We are also of the view that the dispute between Petcom and Hasheba raises mixed questions of law and fact, which require full ventilation by way of the procedure applicable to claim forms.

[23] In sum, we agree that there are disputes of substance regarding:

(1) The payment and apportionment of a sum of $35,000,000.00 that was to be paid by Petcom to Hasheba through Hasheba's attorneys-at-law;

(2) unresolved issues regarding whether Hasheba's director, Mr Ronald Thompson, made certain statements and whether those statements, if made, are attributable to Hasheba and can be used to sustain the allegation that Hasheba committed an anticipatory breach of contract;

(3) whether the necessary subdivision approvals had been obtained in respect of the subject properties, thereby raising questions regarding compliance with the Local Improvements Act and the availability of specific performance as a remedy; and

(4) whether the lands forming the subject matter of the agreements are correctly identified and/or described.

[24] We are, therefore, satisfied that rule 8.1(4)(d) does not apply. The conclusion follows that the learned judge was wrong to conclude that Hasheba's claim was properly brought by fixed date claim form.

[25] We are also not satisfied that the learned judge was correct in concluding that Petcom's affidavit discloses no meritorious defence in light of the substantial issues of fact or mixed questions of law and fact to which it had given rise.

[26] Flowing from the erroneous conclusion that Hasheba's breach of contract claim was properly brought by fixed date claim form, the learned judge disposed of the breach of contract claim against Petcom at the first hearing of the fixed date claim form without the parties having ventilated the substantial disputes of fact, and mixed fact and law, raised in the proceedings. In doing so, the learned judge invoked the abbreviated procedure provided by rule 27.2(8) of the CPR. That rule permits the court to treat the first hearing of a fixed date claim as the trial of the claim if the fixed date claim is not defended or the court considers that the claim can be dealt with summarily. This procedure is not available for claims involving substantial disputes of fact or mixed law and fact, which do not otherwise fall within the ambit of rule 8.1(4), and are required to be initiated by claim form.

[27] The learned judge also exercised his case management powers to sever the aspects of the fixed date claim relating to the Kinghorn defendants, which, in his view, raised substantial disputes of fact and ordered them to proceed as though they had been initiated by claim form. We are of the view that this approach was not compatible with the overriding objective of dealing with the case justly on the following bases.

[28] Firstly, Hasheba had brought one claim against all the defendants relating to the agreements for the sale of the parcel of lands in question. The claims against all the defendants emanated from the same factual background and are intertwined. There is no justification shown, in the circumstances of this case, for a part of the claim to have been tried summarily on the fixed date claim form (as the learned judge did) and other parts to be permitted to proceed as if commenced by claim form, when the entire claim involves substantial disputed facts and questions of mixed law and fact.

[29] There is authority, as recorded by Stuart Sime in his helpful text, A Practical Approach to Civil Procedure, 15th Edition, page 242, which has established that under the equivalent rules of procedure in the United Kingdom Civil Procedure Rules 1998, where limited disputes of fact arise in proceedings commenced by the equivalent of a fixed date claim form (a Part 8 claim form), the court has the power to conduct a hybrid hearing with oral evidence to resolve the limited factual dispute. Where, however, the factual dispute has any substance, the claim must altogether be brought by way of an ordinary claim so the dispute can be defined and ventilated using statements of case (see **Forest Heath District Council v ISG Jackson Ltd** [2010] EWHC 322 (TCC)).

[30] We agree with Mr Hylton that the disputes of fact arising from Petcom's alleged breach of contract are of reality and substance. We are also of the view that, intertwined with the issues of fact, are important questions of law that need to be resolved, especially regarding the grant of specific performance within the context of the alleged breaches of the Local Improvement Act – an issue raised by Petcom in its affidavit in response to the fixed date claim, but which was not considered by the learned judge. The entirety of Hasheba's fixed date claim, including the unresolved claim against Petcom severally and jointly with the Kinghorn defendants for damages for conspiracy to defraud, ought to have proceeded as if commenced by claim form so that the substantial disputes of fact can be ventilated and resolved together.

[31] It is beyond doubt that there are instances in which a breach of contract claim can be brought by a fixed date claim form. For example, where a claim raises solely a question of the interpretation of a clause in a contract and does not give rise to a substantial dispute of fact, rule 8.1(4)(d) would apply, and such a claim could be brought by fixed date claim form. It should have been obvious to the learned judge, on the face of the fixed date claim form, and without any need for an in-depth inquiry into the parties' respective cases, that this was not such a case. Had the learned judge arrived at that conclusion, the enquiry he embarked upon would have been obviated. We are impelled to conclude that Hasheba had inappropriately deployed the fixed date claim procedure in this case, which raises intertwined questions of fact and law that are of substance.

[32] Secondly, rule 8.8 sets out the contents of a fixed date claim form. It specifically requires that the rule being relied on for bringing the claim by way of fixed date claim form must be stated and the basis for using that rule expressly established. So, in the circumstances of this case, if rule 8.1(4)(f) was being invoked, then Hasheba was required to state the enactment pursuant to which the claim by that method was brought. If rule 8.1(4)(d) was relied on, the question on which the court's decision was required should have been expressly stated, and if a remedy was being sought, then the basis for the remedy should have been expressly stated. Hasheba's fixed date claim form did not comply with any of the rules in these respects.

[33] Notwithstanding, Hasheba's failure to comply with the procedural rules, its claim was permitted to proceed against the Kinghorn defendants as if commenced by claim, without it being struck out, and the Kinghorn defendants, who were also in default, were given a reprieve. Petcom was not granted such reprieve, although it was not the only party in default. All the parties were in default. In such circumstances, closing out Petcom for a breach of procedure, when Hasheba was also in breach of procedure, was not dealing with the case justly. Given the nature of the claims, as detailed in the fixed date claim form and accompanying particulars of claim, it was quite evident, without any need for further enquiry, that the matter was initiated by the wrong procedure. The learned judge could have exercised his wide powers of case management to set everything right, which means giving the appropriate directions for the matter to be fully ventilated in open court where it belongs.

Conclusion

[34] For the foregoing reasons, we are satisfied that Hasheba's breach of contract claim was not properly brought before the court, having been commenced by fixed date claim form in circumstances where rule 8.1(4) did not permit it to be brought by that procedure. The learned judge, therefore, erred when he concluded otherwise. As a result, the appeal must be allowed, and the order of the learned judge, granting specific performance along with the relevant consequential orders, be set aside.

[35] Ground (a) is, therefore, dispositive of the appeal. Accordingly, the court need not consider the remaining five grounds of appeal, which challenge the substance of the learned judge's decision.

Costs of the appeal

[36] Petcom having been successful in its appeal would, under normal circumstances, be entitled to the costs of the appeal. However, notwithstanding Hasheba's default in proceeding with its breach of contract claim by the incorrect procedure, Petcom was not in time with its response to Hasheba's claim against it and now requires an extension of time from this court to defend the claim. Therefore, both parties are in default and require the intervention of this court to proceed in the court below in accordance with the rules of court. Having heard the submissions of counsel on this issue, we believe that the most just order should be for each party to bear its costs of the appeal.

Order

[37] In the result, we make the following orders:

1. The appeal is allowed.

2. Orders 2, 3, 4, 5, and 6 of the order made by Laing J in the Supreme Court on 27 July 2020 are set aside.

3. The fixed date claim with particulars of claim filed by Hasheba Development Company Limited, against the Petroleum Company of Jamaica Limited, shall proceed as though commenced by claim form and particulars of claim, and shall be heard together with the claim filed by Hasheba Development Company Limited against the 2nd, 3rd and 4th respondents (the Kinghorn defendants).

4. The Petroleum Company of Jamaica Limited is permitted to file a defence to the claim filed by Hasheba Development Company Limited within 21 days of the date of this order.

5. Each party to the appeal to bear its costs of the appeal.