IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CLAIM NO. C. L. T 005 OF 2002

(NO. 2)

BETWEEN	JOHN THOMPSON	FIRST CLAIMANT
AND	JANET THOMPSON	SECOND CLAIMANT
AND	GOBLIN HILL HOTELS LTD	FIRST DEFENDANT
AND	MIES INVESTMENT LTD	SECOND DEFENDANT
AND	MERVIN GOODMAN	THIRD DEFENDANT
AND	ROSALIE GOODMAN	FOURTH DEFENDANT

Roderick Gordon instructed by Audrey Mcleod of Alton Morgan and Company for the claimants

Lloyd Barnett instructed by Watson and Watson for the first defendant

Dacia Welds instructed by Cowan, Dunkley, Cowan for the second, third and fourth defendants

January 26, February 2, 15 and March 23, 2007

APPLICATION TO VARY JUDGMENT, APPORTIONMENT OF COSTS, PART 64 OF THE CIVIL PROCEDURE RULES

SYKES J.

1. The primary application before me is an application by Goblin Hill Hotels Limited ("GHHL"), the first defendant, to vary my judgment delivered on November 6, 2006. In that judgment I decided that the assessments and special assessments made by GHHL were incorrect and that they should be set aside. I also held that the forfeiture of the lease was therefore unlawful. GHHL now says that they have done new calculations on the basis of my judgment and the claimants are still found to be in arrears. Therefore, submits, GHHL I should accept their new calculation and since new figure is still outstanding

the forfeiture of the lease was valid. Needless to say the claimants have mounted strong resistance to this application.

2. Both sides have accepted that until an order is perfected the judge has control over the order and may vary it in certain circumstances. In light of this agreement there is no need for me to decide whether the circumstances here are appropriate for me to exercise that power.

The first defendant's submissions

3. Dr. Barnett drew on mortgage cases and the principle he derived from them was this. When a mortgagor is indebted to the mortgagee and the mortgagee demands his money and assuming that all the contractual or statutory formalities have been met the mortgagor is not excused from paying the debt if the demand overstates the amount of the debt. He relied on ***Campbell v Commercial Banking Co. of Sydney*** (1840) 40 L.T. 137; ***Barns v Queensland National Bank*** (1906) 3 C.L.R. 925 and ***Stubbs v Slater*** [1910] 1 Ch. 632. From this premise, Dr. Barnett went on to submit, reasoning by analogy, that the claimants in this case were indebted to the first defendant and on failure to pay the debt demanded, albeit it was overstated, the debtor is not free to refuse to pay. Consequently, he submitted, the lease was properly forfeited on the grounds of failure to pay the debt and so the judgment should be varied.

4. I fear that I cannot accede to this submission. The analogy with a mortgage is deceptive. In a mortgage, the principal and the interest are known at the outset. That is arrived at by agreement between the parties. The mortgagor knows the periodic or lump sum payment he is to make as well as the time and place of such payments. In the situation in this case this is not so. The first defendant under the lease and the articles of association of the first defendant is required to make an estimate at the beginning of each financial year or as soon as possible thereafter of the amount of money required to maintain the property and operate the company. When that is determined then the costs are allocated to the leaseholder/shareholder in proportion to the shareholdings the leaseholder/shareholder would have in GHHL. This is the effect of the provisions of the lease and articles of association. My previous judgment deals with the matter in greater detail. Until the first defendant carries out this exercise the claimant would not know the extent of his obligation for the year. The procedure for raising the special assessments is similar and it too is proportioned according to the shareholdings of each shareholder in the first defendant.

5. Until an assessment or special assessment is done in accordance with the lease agreement (between GHHL and the leaseholder) and articles of association of GHHL and the leaseholder/shareholder is informed of his financial obligation for a particular financial year such a person has no obligation to pay over any money to GHHL. The claimants were under no legal duty to pay what they thought was reasonable. The contract between the parties provided a mechanism for the determination of the assessment and special assessment. The claimants have a contractual right to have their obligations determined in accordance with the terms of the lease and articles of association. It is only if the leaseholder/shareholder declines to pay a lawfully imposed assessment or special assessment that any question of non-payment can arise. Until then, there is no basis for forfeiture. From this it should be obvious why the analogy with the mortgage breaks down very early in the analysis. It seems to me that if the basis of calculating the assessment and special assessment, a necessary precondition before the debt can arise, has been found to be erroneous then it is difficult to see how it can be said that the claimants are refusing to pay the debt owed.

6. Dr. Barnett sought to counter this by saying that once it was accepted by me that the costs of maintaining the property and operating the company had increased, that meant that the assessments had to be increased and therefore the claimants could not have expected to pay the same amount in the post-increase costs era as they did in the pre-increase costs era. All of this may well be true but before the assessment or special assessment can be levied it must be calculated according to the proper construction of the lease and the articles of association and that was not done. A necessary pre-condition was not met and until that was done the claimants were under no obligation to pay any increased assessments or special assessment. For these reason I dismissed the application to vary my order. The parties are to submit a draft order to give effect to the judgment of November 6, 2006. I now turn to the question of costs.

Costs

7. I now have to consider the appropriate cost order in this case. The matter took fifteen days and in my view it need not have done so had the claimants made a realistic assessment of their case. Their claim appeared to be quite formidable. They pleaded, fraud, abuse of power and conspiracy. This was in addition to raising the issue of the proper construction of the relevant provisions of the lease and

articles of association. On the first day of the trial both parties were in default in complying with the case management orders made previously. Nonetheless I enquired of the parties what was the real issue in the case as they saw it and whether the time allotted was sufficient. The defendants indicated that in their view the issue ultimately came down to a proper construction of the lease and articles of association. The claimants' position was that they needed to proceed with their entire claim.

8. When the trial commenced it certainly became clear to me that the claimants were going to have exceptionally serious difficulties in sustaining the allegation of fraud. In response to enquiries from the court, Mr. Gordon indicated that the alleged fraud was not immediately obvious and would have to be deduced from the viva voce evidence and the voluminous bundles that contained, literally, scores of documents. Eventually, the claimants abandoned the fraud aspect of their claim. As it has turned out, the claimants have failed in over fifty percent of the claim and have succeeded only on the point of construction of the document. In effect, it took fifteen days of trial to come back to the position indicated by the defendants on the opening day of trial.

9. Mrs. Thompson who testified for the claimants did not provide one shred of evidence capable of raising fraud. This was apparent from her witness statement. The point I am trying to make is that in the modern form of litigation in civil trials, the bad old days of pleading a formidable case with the defendant waiting in suspense for the damning-yet-unknown-till-trial witness to deliver salvo after salvo of devastating evidence are gone, hopefully, forever. Each party knows well before the trial, not only who the witnesses are to be called by either the other side but also their likely testimony. One of the intended consequences of this new style litigation is that litigants are to assess their case constantly as they know more about their opponent's case. They need to determine which issues they are likely to succeed or fail as the case progresses through case management and pretrial review and when that assessment is made, determine how their case is affected and ultimately ask themselves, do I have a real prospect of success? Under the new rules, there is progressive revelation and there is, as it were, knowledge of the opponent's case from its genesis to final revelation. There are no secret documents sprung at the last moment. If this happens that trial judge has the power to decide whether the document should be admitted with perhaps an adjournment to the surprised party. The judge may exclude the document all together.

10. There is not much excuse today for pursuing hopeless claims. Litigation today, is no longer the Columbus type voyage of exploration which saw the intrepid explorer returning to Europe ignorant of where he had been. The route is now clearly demarcated by the claim form, the particulars of claim, witness statements, disclosure of documents including document unfavourable to one's case and this is an ongoing duty, requests for further information, case management conferences where the judge is under a duty to identify to the real issues in dispute and pre-trial review where the issues are further narrowed and comes after full disclosure of documents and witness statements. Perhaps the time has come when costs on an indemnity basis should become more frequent.

11. However, in this particular case, when all the circumstances of the case are taken into account, the prospect of succeeding in fraud, conspiracy to injure and so on was unlikely in the extreme. The claimants failed to take advantage of all the disclosure made. Mrs. Thompson could not have provided that evidence and Mr. Jackson even less so. I go to the relevant rule of the Civil Procedure Rules (CPR)

12. Part 64 of CPR governs the award of costs in civil trials. With the emphasis on proportionality, rule 64.6 has been crafted with this principle in mind. The first thing to note about rule 64.6 is that it emphasises that costs are in the discretion of the court. The opening words of rule 64.6 (1) read, "If the court decides to make an order." The rule continues by stating the general rule that the successful party's costs will be met by the unsuccessful party. However, there are exceptions to this rule. Rule 64.6(2) states that the court may order a successful party to pay all or part of the costs of the unsuccessful party. Rule 64.6 (3) requires that the court has regard to all the circumstances when deciding who should be liable in costs. Rule 64.6 (4) sets out the seven matters that the court must have in mind. The possible orders are set out in rule 64.6 (5).

13. It is clear that not all the matters mentioned in rule 64.6(4) will arise in every case. For example, rule 64.6(4)(c) requires the court to have in mind any payment into court or offers to settle, but the claim may not necessarily be a monetary one and there might not have been any offer to settle.

14. In this case it was wholly unreasonable for the claimant to pursue the claim of fraud and conspiracy to injure when the prospect of success was quite remote even before the first word was spoken. The

pursuit of this aspect of the claim resulted in a disproportionate amount of the court's resources being spent on this case and also engaged the scare the resources of the first defendant. Other litigants were deprived of ten days which would have been available to them had the claimants made a careful assessment of their case.

15. To give a flavour of what I mean by the claimants failing to properly assess their case I shall refer to the expert evidence. At the commencement of the trial, I had ordered the experts to meet in order to resolve the differences between them. The meeting proved fruitless. The defendants' expert had pointed to serious flaws in the analysis of the claimants' expert. These flaws did not depend on expert accounting knowledge. It was more fundamental than that. The charge against the claimants' expert was that he was not comparing like with like and he failed to take account of the devaluations and inflation during the relevant periods. At the trial, the claimants' expert collapsed quite early. This was not a case in which it could be said that reasonable experts might disagree. The claimants' expert was so clearly and obviously in error that one wonders how he hoped to have persuaded the court to his point of view.

16. Mr. Gordon submitted, relying on ***Burchell v Bullard*** [2005] EWCA Civ 358 (delivered April 8, 2005), that the modern tendency is to award costs on an issue by issue basis. He submitted that since the claimants have succeeded on the issue of construction of the documents they should be awarded 75% of their costs against the first defendant. In this case, that approach would not be right.

17. I am not so sure how reliable that statement by the ***Burchell*** court is. Just three years before the that decision, Lord Phillips of Worth Matravers M.R. in ***English v Emery Reimbold*** [2002] 1 W.L.R. 2409 at paragraph 115 is reported as saying that making issue-based orders created difficulty at the assessment stage because the taxing master has to grasp every detail of the case in order to determine whether particular items are attributable to issues that have succeeded or failed. Lord Phillips stated at paragraph 115:

> *However, we would emphasise that the Civil Procedure Rules requires that an order which allows or disallows costs by reference to certain issues should be made* ***only*** *if other forms of order cannot be made which sufficiently reflect the justice of the case: see rule 44.3(7), above. In our view there are good reasons for this rule. An order which allows*

or disallows costs of certain issues creates difficulties at the stage of the assessment of costs because the costs judge will have to master the issue in detail to understand what costs were properly incurred in dealing with it and then analyse the work done by the receiving party's legal advisers to determine whether or not it was attributable to the issue the costs of which had been disallowed. All this adds to the costs of assessment and to the amount of time absorbed in dealing with costs on this basis. The costs incurred on assessment may thus be disproportionate to the benefit gained. In all the circumstances, contrary to what might be thought to be the case, a "percentage" order, under rule 44.3(6)(a), made by the judge who heard the application will often produce a fairer result than an "issues based" order under rule 44.3(6)(f). Moreover such an order is consistent with the overriding objective of the Civil Procedure Rules.

18. As recently as 2004, ***Blackstone's Civil Practice*** stated that percentage orders are preferred (see para. 66.12). I wish to emphasis the opening sentence of the Master of the Rolls. His Lordship is saying that cost orders should meet the justice of the case. In my view, neither a percentage order nor an issue based costs order would be appropriate to this case. I would not make an issue based order for the reasons stated by Lord Phillips, namely, that the Registrar who would be doing the taxation would be required to have virtually the same familiarity of the law and facts as the trial judge. This, obviously, could result in a prolonged dispute before the Registrar which ultimately might result in a disproportionate amount of time being spent on this issue. I would not make a percentage order for similar though not identical reasons. This case does not readily lend itself to a percentage based order because it is difficult to determine the size of the percentage of the claimants' case the issue on which the claimants succeeded. Having sat through the trial I am of the view that the case could have been resolved in four days at the maximum had the claimant appreciated the serious weaknesses in the case and the formidable evidential difficulties they faced. I am of the view that an order based on the number of days in which the matter could have been resolved is appropriate to this case.

19. Miss Webb, quite properly, brought to my attention the case of ***In re Elgindata Ltd. (No. 2)*** [1992] 1 W.L.R. 1207, a pre-CPR case, which reminds us that the general rule that costs follow the event, to use the old terminology, should be applied unless there is some good reason not to do so. Lord Justice Norse stated, at page 1214,

that even if the successful party was unsuccessful on some issues that fact should not deprive him of any part of his costs unless there was a significant increase on the length or cost of the proceedings. He added that if the successful party raised issues or made allegation improperly or unreasonably "the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs". My comment on this case is that it is no longer as authoritative in the CPR era. The CPR has placed efficiency and speed firmly on the judicial agenda. This is supported by the many rules designed to achieve early identification of issues so that the case can be managed appropriately. There is no uniformed approach save that of making such orders as are necessary to dispose of the case quickly, justly and cost effectively. When these matters are taken into account, the cost orders should take full account of the history of the matter and how the litigation was conducted. The CPR was intended to change our legal culture. In other words, it does not require much to displace to the general rule laid down in rule 64.6(1) of the CPR. It is simply a default rule that ought to be readily departed from once the circumstances of the case require.

Conclusion

20. I take account of the fact that the pleading was drafted in the pre-CPR days when much depended on the viva voce evidence at trial and there was no requirement for witness statements. However, this case went through the case management regime when the CPR came into force. Witness statements were exchanged. There was disclosure. There was the pre-trial review. It should have been obvious that the allegation of fraud was unsustainable as was the allegation of conspiracy to injure the interest of the claimants. Even after the trial commenced and Mrs. Thompson had given evidence and was cross examined, the claimants still persisted in the fraud allegation. Matters were no helped when the very witness who was to prove the fraud stated that she did not believe that the Goodmans were dishonest. Likewise, the evidence of Mr. Jackson was always liable to collapse which it did. Applying rule 64.6 (4) (d) (i) and (e) (ii) and (iii), it is my view that the claimants should only recover costs for the first four days of trial up to and including November 28, 2006. In relation to this application the claimants are entitled to one day's costs since they succeeded in resisting the first defendant's application.