JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 110 OF 2008

CLAIM NO. 2004 HCV 2364 CONSOLIDATED WITH 2004 HCV2189

APPLICATION NO. 185/09

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|---|---|---|
| BETWEEN | WATERSPORTS ENTERPRISES LIMITED | APPLICANT |
| A N D | JAMAICA GRANDE LIMITED | 1ST RESPONDENT |
| A N D | GRAND RESORT LIMITED | 2ND RESPONDENT |
| A N D | URBAN DEVELOPMENT CORPORATION | 3RD RESPONDENT |

Miss Kerry-Ann Ebanks instructed by Bishop & Fullerton for the applicant

Stephen Shelton instructed by Myers, Fletcher &Gordon for 1st Respondent

Brian Moodie and Danielle Chai instructed by Samuda & Johnson for 2nd Respondent

Miss Tenneshia Watkins instructed by Vacciannia & Whittingham for the 3rd Respondent

24th and 4th December, 2009

IN CHAMBERS

PHILLIPS, J.A.

The applicant by way of notice of application for court orders dated the 22nd October, 2009 sought an order that the second respondent, Grand Resort Limited, reconnect the applicant's electricity and water supply pending the determination of the appeal.

The grounds of the application are as follows:

"1. The Applicant had a collateral agreement with the 1st Respondent to pay the sum of US$500.00 for the supply of water and electricity whereby US$125.00 would be paid for electricity (sic) and US$375.00 would be paid for electricity per month.

2. The 2nd defendant (sic) recognized this collateral agreement by accepting the said payment per month for the electricity and water and agreeing to the payment of same.

3. The 2nd Respondent has now disconnected the water and electricity despite the Applicant paying the US$500.00 per month and is not in any arrears.

4. The Applicants (sic) business has been negatively affected by the disconnection and is now exposed to civil liability in respect of contracts that it has with several tour companies."

The application has come before the court on two previous occasions but had been adjourned. When the matter came before Cooke, J.A. on 10th November, 2009, the following note was made by the learned judge:

> "Matter adjourned to 24th November 2009 for Mr. Keith Bishop to consider his position in view of the preliminary questions as to whether that which is being sought is not in substance an order

> in the nature of a mandatory injunction and if so whether or not a single judge enjoys the jurisdiction to make any such order especially as regards the Court of Appeal Rules 2002 Rule 2.11(1) (c )."

When the matter came up before me on the 24th November, 2009, I indicated to the parties that the application could not proceed unless the abovementioned preliminary questions were determined, for if the matter ought to be placed before the Court of Appeal the sooner that was done the better, as it would save the parties time and expense, and avoid further waste of judicial time.

As a consequence, the parties agreed to provide written submissions to me on the preliminary questions as to whether the order requested was mandatory and whether a single judge could make the order requested. On the 14th December, 2009 I gave my decision that the single judge has no jurisdiction to do so, granted costs to the respondents to be paid by the applicant, and promised to put my reasons in writing, which I do now.

The power of the single judge with regard to injunctive relief appears quite limited. Rule 2.11(1)(C) of the Court of Appeal Rules reads

> "A single judge may make orders- ...
>
> (c) for an injunction restraining any party from dealing, disposing or parting with possession of the subject matter of an appeal pending the determination of the appeal."

**The submissions**

The applicant first submitted that the relief claimed was not by way of a mandatory order, but was a means of requesting " immediate redress having regard to the stay which had been granted" and "the breach of the stay of execution by the 2nd respondent." The applicant therefore submitted that it was "asking the court to remedy the breach of the stay of execution...." I wish to state right away that this is a formulation by counsel for the applicant, of the relief sought, as the notice filed on behalf of the applicant as set out above does not request any such remedy.

Harrison J.A. in delivering a stay of execution of the judgment of Brooks, J. in this matter, on 4th February, 2009, set out the relevant factual background in paragraphs 5 and 6, which I set out below:

> " 5. The facts reveal that the Applicant had been operating a Watersports business for over forty (40) years on properties registered initially in the name of the Urban Development Corporation (UDC) and Mallards Reef Hotel Limited. There were several agreements between Watersports, and adjacent hotel operators granting exclusive concession rights to Watersports. In December 2002, Watersports entered into an agreement with Jamaica Grande Limited (Jamaica Grande) whereby Watersports would be the exclusive provider of water sports services to Jamaica Grande's guests. Jamaica Grande owned and operated a hotel adjacent to the beach, at the northern section of the Ocho Rios Harbour. However, Watersports also provided watersports activities for persons other than the hotel guests.

> 6. In 2004 Jamaica Grande terminated its contract with Watersports as a result of the sale of the premises to Grand Resort Limited. Jamaica Grande sought to have Watersports remove its operation from the hotel property as well as from beach land adjacent to the hotel property. Watersports lodged caveats against the titles for the hotel property as well as for the beach land. It also brought a claim in which it sought damages for breach of the 2002 contract and the resulting loss of profit, relocation costs, a Declaration of proprietary estoppel, a Declaration that the Applicant had a licence coupled with an interest and/or an irrevocable licence and/or the Applicant had a licence only determinable by reasonable and adequate notice. The Applicant also claimed an injunction prohibiting Jamaica Grande from terminating the said 2002 contract. Watersports also sought declarations as to its interests in the parcels of land in question. Both Jamaica Grande Limited and the UDC filed Fixed Date Claim Forms claiming among other things discharge of the caveats lodged against the titles."

The learned trial judge in giving judgment for the respondents found, inter alia, that Watersports did not have any estate or interest in the UDC lands and or the hotel property and ordered that injunctions previously granted be discharged, that the caveats lodged be withdrawn, that the court ascertain if any damages had been suffered as a result of the caveats having been lodged, and, most importantly, ordered that Watersports quit and deliver up all those parcels of land that it had occupied .

At the hearing on the application for the stay of the execution of the judgment of Brooks J., Harrison, J.A. found that the learned trial judge

had drawn certain conclusions from the agreement of December, 2002, between the applicant and Jamaica Grande Limited although there was no documentary evidence placed before him as to the actual terms of any of the previous agreements. Consequently, Harrison, J.A. found there was a good and arguable case on appeal as it relates to the possessory title of the applicant in respect of the UDC lands, and "if the applicant should be evicted from the peninsula at a stage before the appeal is determined this would likely cause its business to be ruined." The learned judge therefore granted an order pursuant to paragraph 1 of the notice of application for court orders, which reads as follows:

> "That the judgment of Mr. Justice Brooks delivered on the 25th day of September 2008 be stayed pending the outcome of the appeal, in particular the order which requires the Appellant to vacate on or before the 31st October 2008 the premises it occupied and conducted its business from since the 1960's.; and.....
>
> There was no order for costs."

There is no mention in this order of any collateral agreement between the applicant and Grand Resort Limited or anyone else, with regard to the provision of electricity and water.

There is much evidence given however, in the affidavits in support and in opposition of the application before me, with regard to whether such a collateral agreement exists and the terms and content thereof. As I am

making a ruling on a preliminary point, I will only make a few comments on these assertions as I deem necessary, as the preliminary point must be decided within the framework of that dispute.

I have also perused the judgment of Brooks, J. and there is no reference whatsoever to this alleged collateral agreement or to any specific obligation on any of the parties for the provision of electricity and water, or to any of their agreed terms in respect thereof.

I cannot therefore at this stage accept that the effect of the order of Harrison J.A. was to preserve a status quo which at that time included the collateral agreement between the applicant and Grand Resort Limited to pay US$500.00 for the facilities and that therefore a disconnection of the facilities would mean a breach of the order, as suggested by counsel for the applicant. The applicant also submitted that the amount of US$500.00 has been paid every month and the 2nd respondent has accepted payment in this way and has accepted post dated cheques to cover amounts due. The 2nd respondent denied any such arrangement to accept the payment of US$500.00 per month for the use of the utilities and says they are paid on demand on the basis of metered readings. Further, the 2nd respondent said that the amounts allegedly due are taken from metres verified to supply electricity and water to the applicant solely. The court found, the respondent says, that Jamaica Grande had breached

the agreement of December, 2002, and there was no obligation to renew the same, which is the subject of the appeal, but in any event, this agreement has expired, and it was submitted that the applicant would now be obliged to pay for utilities based on actual usage. It was also submitted, that as the applicant owes substantial sums, the services were disconnected. The applicant, of course denied that there is any dedicated supply of utilities to it, as the lines supply hot tubs of the 2nd respondent and elsewhere, and submitted that the provisions of the collateral agreement were relevant notwithstanding the provisions of paragraph 3 of the agreement of December, 2002 , which speaks to the provision of utilities.

It is clear therefore that there are many issues relating to whether the collateral agreement exists and also whether the terms thereof have adjusted the terms of the agreement of December, 2002. This however, appears to be a separate and distinct matter which would have to be determined by a tribunal of fact. It does not appear to have been a matter in issue for the consideration of Brooks, J. and therefore does not form a part of the order stayed by Harrison, J.A.

I cannot therefore agree with the submission of counsel for the applicant that the basis of the application which is before the court now, is to ascertain whether there has been a breach of the stay of execution order

granted by Harrison, JA. In any event, I might as well state here, although not necessary for decision on the preliminary point, that in any event the single judge of appeal would not have any jurisdiction to entertain an application for breach of an order of a judge of this court.

The real question therefore is whether the relief claimed is by way of a mandatory order and whether the single judge of appeal has the power to make such an order. I accept the statement made in the submissions of the 2nd respondent, that "a mandatory injunction compels the respondent to do a specified act. In other words, a mandatory injunction, by nature imposes a positive obligation upon the respondent and is couched in positive form." The 2nd respondent relied on an authority of some antiquity, ***Jackson v Normanby Brick Company*** (1889) 1 Ch. 438, which states that:

> "An Injunction the effect of which is to require the performance of a certain act, such as the pulling down and removal of buildings, should now be made in a direct mandatory form, and not in the indirect form hitherto in use."

I therefore further agree with counsel for the respondent that the court is being asked to require Grand Resort Limited "to do a specific act," and that the "very nature of this order imposes a positive obligation." It is therefore a mandatory order/injunction to do a positive act. This finding would, in my view, dispose of the first aspect of the preliminary question.

Counsel for the applicant relied on the Judicature( Appellate Jurisdiction) Act, section 11, to ground jurisdiction of the court to "hear an injunction including a mandatory injunction" and to submit that since the court has the power, it is trite law that what is provided for in substantive legislation cannot be derogated from by subsidiary legislation. Counsel referred to rules 1.7 and 2.15 of the Court of Appeal Rules, dealing with the powers of the court and maintained that one should give rule 2.11 a purposive interpretation.

It is important to note that section 11(1) of the Judicature (Appellate Jurisdiction) Act is dealing firstly with circumstances in which an appeal does not lie to the Court of Appeal. Section 11 (1) also deals with appeals from interlocutory judgments or orders from a judge indicating the circumstances when leave is required and indicating certain special circumstances when leave is not required (section 11 (1)(f)). The only relevance of section 11 to this matter is that the substantive appeal is from the refusal to grant an interlocutory injunction, which is one of the circumstances in which an appeal lies to this court without leave. The matter before me is not an appeal from an interlocutory injunction or order. The appeal before the court relates to the judgment of Brooks, J. which includes the discharge of certain interlocutory injunctions. The particular application before me is therefore a procedural application and is governed by the rules of procedure. The Court of Appeal Rules set

out the powers of the court and the single judge to hear applications relative to the protection of the rights of the parties which are the subject of an appeal. The applicant's application of 22nd October, 2009, is one such application and falls to be considered under rule 2.11. I do not agree with counsel for the applicant that there are no provisions in the Court of Appeal Rules by virtue of which the Court of Appeal could hear this application.

I accept that in some cases no useful purpose would be served to do a detailed analysis as to the purport and effect of a particular act under review in order to determine whether a mandatory or prohibitory injunction is required, but suffice it to say, in this matter, the appeal itself is not before me. In fact not even the issue of whether the order as prayed ought to be made is before me, what is before me is the issue of whether the application requiring specific relief, which is clearly in mandatory form, can be heard by a single judge of appeal.

In my view, this application is not in compliance with the provisions of the Court of Appeal Rules. I do not as a single judge have the power to grant that particular relief.

**Conclusion**

(1) The declarations and orders made by Brooks, J. did not relate to any collateral agreement for the provision of electricity and water.

(2) The order made by Harrison J.A. stayed the orders made by Brooks J. pending the outcome of the appeal, particularly the vacation by the claimant of the subject premises.

(3) The disconnection of the utilities cannot be seen as a breach of the order for the stay of execution of the judgment of Harrison, J.A.

(4) In any event, the single judge of appeal has no jurisdiction to hear an application with regard to the breach of an order of a judge of this court.

(5) The application to restore the utilities is in substance an order in the nature of a mandatory injunction.

(6) A single judge of appeal does not have the jurisdiction to make such an order.