

**BARB ADOS**  
**[Unreported]**

**THE SUPREME COURT OF JUDICATURE**  
**HIGH COURT**

**CIVIL DIVISION**

**No 941 of 2004**

**BETWEEN**

<b>FISH OF BARBADOS LIMITED</b>	<b>Plaintiff</b>
<b>AND</b>	
<b>THE BARBADOS PORT AUTHORITY</b>	<b>First Defendant</b>
<b>LAND RECLAIMERS LIMITED</b>	<b>Second Defendant</b>

**Before the Honourable Mr. Justice William Chandler, Judge of the High Court**

**2004: June 18, 24; Jul 22,**  
**2006: April 12, 18; June 2, 12;**  
**2012: June 08**

**Mr. Alair Shepherd QC. in association with Ms. Wendy Maraj for the plaintiff.**  
**Mr. Patterson Cheltenham QC. in association with Mr. Alrick Scott for the**  
**defendants.**

**DECISION**

- [1] On 18 June 2004 the plaintiff applied to and obtained from this court an interlocutory injunction against the first and second defendants prohibiting them from, *inter alia*, (1) demolishing or removing any parts from any buildings or structures situate therein at Lot 4 Harbour Extension, Spring Garden Highway in the parish of Saint Michael; (2) entering Lot 4 Harbour Extension, Spring Garden Highway Saint Michael and removing any equipment thereon; and (3) carrying out any works upon the said premises until further ordered.
- [2] In the substantive action, the plaintiff sought, *inter alia*, (1) possession of the property situate at Lot 4 Harbour Extension, Spring Garden, Saint Michael; (2) relief from forfeiture of the lease dated 28 August 1989; and (3) damages for the

destruction and damage of buildings and equipment situate at Lot 4 Harbour Extension, Spring Garden, Saint Michael.

- [3] In this application, filed 14 July 2004, the first defendant sought, *inter alia*, to have the injunction granted by this court on 18 June 2004 discharged.

### **BACKGROUND**

- [4] On 28 August 1989 the plaintiff and the second defendant entered into a leasehold agreement for a term of thirty years with respect to Lot 4 Harbour Extension, Spring Garden, Saint Michael. By deed of conveyance dated 26 June 2000 the second defendant conveyed the land, the subject of the lease, to the first defendant for an estate in fee simple. Subsequently, they informed the plaintiff by letter dated 20 July 2001 that the land had been sold to the first defendant and that the first defendant would now be the plaintiff's landlord.
- [5] The plaintiff had leased the land for the purpose of carrying on a fish processing plant, a diesel facility and an ice making plant. In accordance with the provision of the lease, the plaintiff (the tenant) erected buildings and purchased equipment for the carrying on of this business.
- [6] The plaintiff fell into significant arrears in the payment of land tax over a 13 year period totalling \$278,267.00 and rent totalling \$53,804.12 over a 3 year period. In June 2004, after the submission of invoices to the plaintiff, the first defendant sought to invoke the forfeiture clause in the lease with respect to non-payment over the respective periods.
- [7] In the period leading up to re-entry, two fires had occurred at the premises of the plaintiff and had caused significant damage to the property. Some time afterwards, the first defendant in the exercise of its right to re-entry under the lease, started to demolish some of the remaining structures on the property.

### **THE DEFENDANTS' APPLICATION**

- [8] In support of their application the defendants submitted the affidavits of Mr. Kenneth Atherley, Divisional Manager Corporate Development of the first defendant; Mr. Louis Sealy, Chief Security Officer; and Mr. Larry Tatem, Chairman of the Board of Directors. On the basis of the affidavits, the defendants claimed that the affidavit filed in support of the ex parte junction by Mr. Anthony Bryan, Director of the plaintiff was misleading and that full and frank disclosure was not made.
- [9] The defendants submitted thereafter that the present derelict state of the buildings presented a serious security threat to the business of the Barbados Port and surrounding businesses and could result in the first defendant's derogation from

internationally required security standards. Additionally the Lot 4 Harbour Extension was now home to vagrants and had become a serious health risk. They submitted, further, that the plaintiff was in clear breach of covenants made under the lease to pay the rent in the prescribed manner; to pay all existing rates, taxes, assessments and outgoings payable by law; and to keep in good and substantial repair, the buildings thereon and the boundary fences of the demised premises. In any event, the defendants stated, the landlord was a reputable entity with assets in excess of \$50 Million and should the plaintiff be successful, it could be adequately compensated in damages.

#### **THE PLAINTIFF'S SUBMISSION**

- [10] The plaintiff submitted that there has been full and frank disclosure given the serious time constraints under which the *ex-parte* injunction was made. They were of the view that the application to discharge the injunction should not be considered as the material on which the defendants relied was neither relevant nor capable of causing prejudice to the defendants.
- [11] The plaintiff stated that it was now in a position to clear the outstanding rents and that the second defendant had been sympathetic to the difficulties prevailing in the fishing industry. Further, it claimed that the second defendant had agreed that rent would be paid as the plaintiff was able to pay it.

#### **THE INJUNCTION**

- [12] In the exercise of its discretion, this court must decide whether to uphold the defendants' submissions and discharge the injunction or to deny the defendants' application and maintain the status quo.
- [13] On an *ex parte* injunction before the court, *uberrimae fides* is required, and the applicant had a duty to put all matters before the court which were material to the application. It was not just a question of the applicant being under a duty not to deceive the court. The duty of disclosure is for counsel to put, not only his or her client's case but to make the court aware of those matters which may not be favourable to their client's case, since the court, on an *ex parte* application is being asked to make orders which impact seriously on the rights of a party before the court.
- [14] There is no suggestion however, that counsel for the plaintiff in any way deceived the court. Far from it, counsel informed the court of the short period of time in which she had to take instructions and to move the court for the injunction; and the court readily accepted her explanation. No impropriety on her part is suggested or implied.
- [15] The law is, however, that even if the court was of the view that there had not been full and frank disclosure, the court still had discretion as to whether it should or should not discharge the injunction. (*R v Kensington Income Tax Commissioners, ex parte princess Edmund de Polignac* [1917] 1 KB 486)

- [16] The court must therefore consider all the circumstances of this matter. The issues that fall to be decided are whether or not there has been material non-disclosure; what those non-disclosures were, if any; and what was the impact of the new information presented to the court.
- [17] On a careful reading of all the affidavits submitted, it was clear to the court that very vital information was not before it at the time of the previous hearing. The plaintiff's affidavit of 18 June 2004 did not disclose
- (1) The length of time that the plaintiff had been in arrears and the nature of all the arrears i.e. rent *and* land tax;
  - (2) Whether the plaintiff was trading and if not, the last date of trading;
  - (3) The existing state of the premises before the defendant's re-entry.
- [18] It is understandable that the proceedings were instituted at a very short notice but the court had at all times to make decisions based on the information before it and it was quite arguable that it could have decided otherwise had the information identified been presented.
- [19] The length of time the plaintiff was in arrears in both land tax and rent and the respective amounts was very relevant information and would have helped the court to determine whether the plaintiff had an arguable case with respect to relief from forfeiture within the terms of the lease. Given that the plaintiff sought an injunction stopping the demolition of buildings on the premises, the last date of trading and the state of the premises were paramount in any decision to maintain the status quo. This was important information that should have been disclosed to the court at the time of application.

#### **THE APPLICATION**

- [20] When the court considered all the circumstances surrounding the application, it was clear that it must exercise its discretion to resolve the instant matter. It is, in the court's view, not simply a matter of if the status quo should be maintained as that would clearly result in an already unsatisfactory security concern being allowed to continue. An important factor which the court must also consider is the extent to which damages could be a suitable remedy for each party and the ability of the other party to pay, or whether in the circumstances, damages would be an adequate remedy if the injunction was to be continued.
- [21] Had the plaintiff been trading, it would have presented some difficulty in ascertaining the loss that it would have suffered if the injunction was lifted. This,

however, is no barrier to the court's duty to assess damages if the plaintiff was successful at trial. There is clearly no running loss in terms of income and since the interests of both parties are purely commercial, the question is whether the defendant was "good for the damages."

- [22] The first defendant had submitted that it has a worth of about \$50 million. Clearly payment is not an issue. The plaintiff has an arguable case but all the circumstances indicate that an award of damages is an adequate remedy. Given the present state of the property, the financial strength of the first defendant, the security concerns and the real danger posed with regard to the present state of the property, this court is of the view that a right and proper exercise of its discretion would favour the discharge of the injunction. These aforementioned concerns were addressed in the affidavit filed in support of the application to discharge the injunction.
- [23] The court must, however, consider whether the balance of justice requires the court, in the exercise of its equitable jurisdiction to continue the injunction or discharge the same. Having regard to the several matters referred to in this decision, especially with respect to the state of the buildings and of the business formerly housed therein; the threat to security posed to the other businesses in the locality, cruise ships which are berthed there from time to time and their passengers; and the concomitant risk to tourism and the national economy, I am of the opinion and hold, therefore, that the balance of justice supports discharge of the interlocutory injunction granted 18 June 2004.

#### **DISPOSAL**

- [24] Accordingly, the defendants' application to have the *ex parte* injunction of 18 June 2004 discharged is granted and the injunction is therefore discharged.
- [25] The costs of this application to be costs in the cause.

**William Chandler**  
Judge of the High Court.