

IN THE SUPREME COURT OF JUDICATURE  
HIGH COURT

Civil Jurisdiction

No. 1418 of 2002

BETWEEN

NATIONAL HOUSING CORPORATION          Plaintiff

AND

BARRACK CONSTRUCTION LIMITED          Defendant

Before the Honourable Madam Justice Elneth Kentish, Judge of the High Court.

2002: July 02, 04, 15, 17 and 25.

Mr. Alair Shepherd Q.C., Ms. Wendy Maraj and Mr. Kevin Boyce for the Plaintiff.

Mr. Andrew Vanroy Thornhill and Mr. Gregory Nicholls for the Defendant.

**JUDGMENT**

**Facts**

[1] The plaintiff employed the defendant to construct an office building (the 'building') at Warrens, in the parish of St. Michael under a written contract which comprises a number of documents including the JCT standard form of contract ('the JCT Contract') all of which have been put before the Court. Clause 22 of the JCT Contract provides for the payment of liquidated and ascertained damages by the defendant upon the issue of a certificate of the Architect that in his opinion the Works ought reasonably to have been completed by the date set for completion or within any extended time allowed by the JCT Contract. Clause 30 of the JCT Contract provides that the Architect shall from time to time ... issue interim certificates stating the amount due to the Contractor from the Employer, and the Contractor shall be entitled to payment therefor within fourteen (14) days from the presentation of the certificate. Clause 35 of the JCT Contract provides that any dispute or difference either during the progress of the Works or after completion... shall be referred to arbitration in accordance with the Arbitration Act Cap. 110 the Laws of Barbados ('the Act'). The Architect having issued a certificate on 10<sup>th</sup> April 2001 stating that in his opinion, the Defendant should reasonably have completed the works by the 22<sup>nd</sup> February 2001, the Plaintiff by letter dated 8<sup>th</sup> May 2001 wrote to the Defendant notifying it of the Plaintiff's intention to deduct liquidated and ascertained damages in accordance with the terms of the JCT Contract. Simultaneous with that letter, the Plaintiff deducted \$100,000.00 from Certificate of Payment No: 27 then due for payment and further advised the Defendant that the Plaintiff would deduct out of further certificates, all damages (that is liquidated damages) which were not paid. On the 31<sup>st</sup> May 2002, the Architect issued Certificate of Payment No: 28 in the sum of \$766,234.03 (Certificate No: 28) to the Defendant. By letter dated 14<sup>th</sup> June 2001 the Plaintiff wrote to the Defendant enclosing a cheque in the sum of \$380,117.02 in respect of Certificate No: 28 and advised that the Plaintiff had deducted the sum of \$380,117.01 as liquidated and ascertained damages in accordance with the contract.

[2] The Defendant contending that the Plaintiff had not paid Certificate No. 28 within the 14 days allowed for such payment, by letter dated 14<sup>th</sup> June 2002 demanded payment of the sum of \$760,234.03 within 7 days and notified the Plaintiff that if payment was not received within 7 days, the Defendant would terminate the contract on giving the requisite notice of determination. Further contending that the Plaintiff failed to pay the sum of \$760, 234.03 as demanded, the Defendant by letter dated 25<sup>th</sup> June 2002 to the Plaintiff purported to terminate the contract and began to remove from the building site temporary buildings, tools, equipment goods and materials ('the equipment') intended for delivered to and placed on or adjacent to the Works. The Plaintiff then issued a generally endorsed writ claiming inter alia an injunction restraining the Defendant from removing from the site any of the equipment and at the same time applied for an exparte injunction.

**The History of the Applications**

[3] The Plaintiff's application supported by an affidavit of Nigel Whitehall ("the Whitehall Affidavit No. 1) came before me on the 2<sup>nd</sup> July 2002 and upon the usual undertaking by Counsel as to damages an order was made inter alia restraining the Defendant from removing the equipment until the 4<sup>th</sup> July 2002 on which date the Plaintiff's application for the grant of injunction would be heard inter partes.

[4] On the 4<sup>th</sup> July 2002 when the Plaintiff's inter partes application came on for hearing, the Defendant had on 3<sup>rd</sup> July 2000 filed an application of its own. This application was supported by an affidavit of the Defendant's Managing Director Alphaeus Annassar Barrack.

[5] The ex parte injunction granted on the 2<sup>nd</sup> July 2002 having been automatically discharged, and after hearing brief submissions on the part of Counsel for the Plaintiff and Defendant respectively, an order was made continuing the injunction until determination of the applications before the Court, and the applications were adjourned.

[6] By the time the adjourned applications came on for hearing on the 15<sup>th</sup> July 2002, both parties had filed additional affidavits. The Plaintiff also filed an amended summons in which it sought mandatory injunctions to:

- (a) order the defendant to return to the site all equipment removed therefrom; and
- (b) compel the Defendant to deliver to the Plaintiff possession of the site.

**Jurisdiction to Grant injunction:** Cause of Action

- [7] By the writ of summons the plaintiff claimed the following substantive relief:
- 1 A declaration that in all the circumstances of the case the Plaintiff is entitled to use and employ all temporary buildings, plant tools equipment goods and materials intended for delivered to and placed on or adjacent to the works on the building site at Warrens;
  2. A declaration that in all the circumstances of the case the Defendant is not entitled to remove any and/or all temporary buildings, plant tools equipment goods and materials intended for delivered to and placed on or adjacent to the works on the building site;
  - (3) An injunction to restrain the Defendant its servants and/or agents from removing any and all temporary buildings, plant tools equipment goods and materials intended for delivered to and placed on or adjacent to the works on the building site at Warrens and to restrain and prevent the defendant from using all temporary buildings and plant tools equipment goods and materials intended for delivered to and placed on or adjacent to the works until the works are completed.
- [8] It is a fundamental principle of law that an interlocutory injunction will only be granted to an applicant who establishes that he has a cause of action against the person sought to be enjoined. In the words of Lord Diplock in the *Siskina [1977] 3 All E.R. 821 at 824* "A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent on there being a pre-existing 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".
- [9] Counsel for the defendant contends that the Court has no jurisdiction to grant the prohibitory injunction sought as the writ of summons filed by the plaintiff does not disclose a cause of action.
- [10] Further Counsel for the defendant refers to (a) the provisions of Order 6 Rule 2(1)(a) of the Rules of the Supreme Court of Judicature which stipulates that:
- 2 (1) "Before a writ is issued it must be endorsed -
    - (a) with a statement of claim or, if the statement of claim is not indorsed on the writ, with a concise statement of the nature of the claim made or the relief or remedy required in the action begun thereby;
    - and to (b) paragraph 6/2/3 of the Annual Supreme Court Practice 1999 ("the Whitebook") which by way of an explanatory note on the meaning of 'a concise statement of the nature of the claim made or the relief or remedy required' states "Where the claim arises out of a contract, the indorsement should state the date of the contract (whether oral or written), between whom made, and the nature of the claim or the relief or remedy arising thereunder." ("the particulars")
- [11] It is common ground that there is a written contract between the plaintiff and the defendant relating to the construction of an office building at Warrens. But the argument of Counsel for the plaintiff is that the writ of summons makes no reference to that contract.
- [12] Counsel for the defendant further submits that when the indorsement on the writ is subjected to close scrutiny the facts set out in the indorsement are insufficient to found a cause of action because those facts do not contain the required particulars nor are the particulars set out in the Whitehall Affidavit No. 1 on the basis of which the exparte injunction was granted. This failure to plead the particulars necessary to establish a cause of action it is submitted, is so fatal that the exparte injunction ought not to have been granted on 2nd July, 2002 and should not be continued.
- [13] In response, Counsel for plaintiff says that the plaintiff relies on the power conferred on the Court under the provisions of section 14 (5)(h) of the Act and submits that the cause of action requirement enunciated in the *Siskina* case is not relevant where the power of the Court to grant an injunction is being invoked under the provisions of section 14(5)(h) of the Act. The cause of action requirement, says Counsel is only relevant to an application invoking the Court's general power to grant an injunction under section 44 of the Supreme Court of Judicature Act Cap 117A which provides:
- "The High Court may at any stage of any proceedings
- ...
- (b) 9... grant a mandatory or other injunction; or
  - (c) appoint a receiver, where it appears to the Court to be just or convenient to do so.
- [14] It is further submitted by Counsel for the plaintiff that the general power of the Court under section 44 of the Supreme Court of Judicature Act is not being prayed in aid for the continuation of the injunction, but even if that were the case, insofar as the endorsement on the writ claims declaratory relief, a cause of action has been disclosed. Now I turn to deal with the power of the Court to grant an interim injunction under Section 14 (5)(h) of the Arbitration Act
- Section 14 (5)(h) of the Act provides
- (5) "The Court shall have for the purpose of and in relation to a reference, the same power of making orders in respect of :-
    - (h) interim injunctions ... as it has for the purpose of and in relation to an action or matter in the Court."
- [15] It is clear from the wording of this section that it vests the Court with the same power to grant interim injunctions for the purpose of and in relation to a reference as the Court has "for the purpose of and in relation to an action in the Court."
- [16] Counsel for the defendant concedes that the Court does have the power under this section to grant an interlocutory injunction but submits that the words "as it has ... in relation to an action in the Court" prohibits the Courts from granting an interlocutory injunction unless the 'cause of action requirement' enunciated in the *Siskina* case is satisfied.

- [17] Approaching the matter as one of construction of section 14(5)(h) of the Act I hold that there is nothing in the section to suggest that any requirement other than a reference must be satisfied before the Court's power under that section can be exercised. Any doubt I may have had in this regard has been dispelled by the decision of the House of Lords in the case **Channel Tunnel Group Ltd. and Another v Balfour Beatty Construction Ltd [1993] A.C. 334.**
- [18] In that case the Court considered the Court's power to grant an interlocutory injunction both under section 12 (6)(h) of the U.K. Arbitration Act 1950 which is identical in terms to section 14 (5)(h) of the Act and under section 37(1) of the United Kingdom Supreme Court Act 1981 which is similar in terms to section 44 of the Supreme Court of Judicature Act Cap 117A.
- [19] The House of Lord's decision of the Court was delivered by Lord Mustill who dealt with the Court's powers under section 12 (6)(h) of the Arbitration Act 1950 and its powers under section 37(1) of the Supreme Court Act 1981 separately.
- [20] In dealing with interim relief under section 12(6)(h) of the Arbitration of the Act 1950 Lord Mustill stated at page 357  
 "The appellants base their claim for an injunction first on the *special powers* conferred by section 12 (6)(h) of the Act of 1950 and secondly on the general power of the Court to grant an injunction under section 37(1) of the Supreme Court Act 1981. These different foundations for the claim raise entirely different issues, which call for separate consideration."
- [21] Lord Mustill then traced the historical development of the interim relief under section 12(6)(h) of the Act before turning to treat the courts power to grant an injunction under section 37(1) of the Supreme Court Act 1981.  
 At page 360 of the decision he states:  
 "I turn to the claim for an interlocutory injunction under section 37(1) of the Supreme Court Act 1981. The focus of the inquiry now shifts from the numerous types of remedy under section 12 of the Act of 1950 which are *specially designed for the narrow purpose of promoting the efficacy of the arbitral process*, to a single remedy which is not so designed, and which is capable of employment in a wide variety of situations, many far removed from the present. Under section 37(1) by contrast the arbitration clause is not the source of the power to grant an injunction but is merely a part of the facts in the light of which the Court decides whether or not to exercise a power which exists independently of it. Accordingly, it does not follow that even in a situation where, if section 12(6)(h) applied to the arbitration in question the Court would be equally justified in making an interim order under section 12(6)(h), the Court would be equally justified, or would even have the power, to do so under section 37(1)."
- [22] The above passages from Lord Mustill's decision expose the fundamental difference between the power of the Court to grant interim relief derived from section 12 (6)(h) of the 1950 Act and the power of the Court to grant such relief derived from section 37(1) of the Supreme Court Act 1981.
- [23] Put succinctly the one is a specific, special and narrow power conferred by Act in relation to a reference under the Act, and in respect of which the Siskina doctrine is not applicable. The other is a general power conferred by the Supreme Court of Judicature Act for the purpose of dealing with a multiplicity of situations and in respect of which the Siskina doctrine is applicable.
- [24] I therefore reject the submission of Counsel for the defendant and hold that the Siskina doctrine does not apply to section 14(5)(h) of the Act.
- A reference under the Act**
- [25] By an opinion (submitted with the leave of the Court and consent of Counsel for the plaintiff after the hearing of the applications were completed and the matter reserved for decision by the Court), Counsel for the defendant raised another objection to the jurisdiction of the Court to grant an injunction under section 14(5)(h) of the Act.
- [26] The objection is that the term "reference" is defined by section 2 of the Act as "a reference made under an order made by the Court". Counsel for the defendant submits that this definition of "reference" leads to the irresistible conclusion that only where there is a Court ordered reference, may the Court exercise the power of granting an interim injunction under section 14 (5)(h).
- [27] Counsel for the defendant then refers the Court to the U.K. Arbitration Act 1950-14 Geo 6 ("the U.K. Act") on which it is conceded the Act is modelled. Counsel says that the U.K. Act unlike the Act does not define the term reference. Consequently it is submitted by Counsel for the defendant that the **Channel Tunnel Group Ltd** case in which section 12(6)(h) was considered cannot be relied on as authority for the power of this Court in the matter now before it to grant an interim injunction in the action under the equivalent section 14(5)(h) of the Act.
- [28] Counsel for the plaintiff disagrees and submits that if the Court were to strictly apply the statutory definition of 'reference' to all sections of the Act the Court could not interpret logically or reasonably sections 8 to 12 inclusive in Part III of the Act. Counsel for the plaintiff cites **F.A.R. Benion on "Statutory Interpretation" 1984** edition dealing with limited rules of interpretation laid down by statute. At page 275 it is stated  
 "Whether or not framed as such, (*the rules*) are in essence *definitions* of some word or phrase, which must then be understood in the stipulated sense.  
 "They (definitions) may be general or restricted to the appearances of the defined term in the defining Act. Whether it is so stated or not, they do not apply if the contrary appears from the Act in which the defined term is used."
- And at page 278 the learned author continues  
 "this is so because the legislator is always free to disapply a definition whether expressly or by implication and the interpreter needs to remember that draftsmen are fallible creatures."
- [29] To accept the submission of Counsel for the defendant could lead to the absurdity that Parliament having expressly given the Court certain powers in relation to the arbitral process under an arbitration agreement then nullified those very powers merely by its definition of 'reference' as 'a reference under order of Court'.
- [30] The question for the Court is whether the definition of 'reference' applies to each and every section of the Act where the word reference appears or only to such sections where that definition is clearly intended to apply and would not create such an absurdity.
- [31] A detailed comparison of the Act with that of the U. K. Act seems to provide a conclusive answer.
- [32] While the U.K. Act does not define the word 'reference' at all it also does not contain any provisions equivalent to those appearing in Part VII of the Act which is headed 'References Under Order of Court'.
- [33] The very inclusion of this Part makes it clear that the Act is dealing with two different types of references that is a reference by agreement of the parties as in Parts II to VI inclusive and a reference under order of Court as in Part VII of the Act.
- [34] To put the matter beyond any doubt section 33 of the Act inserted in Part VII thereof provides:

"The Court shall in relation to references, have all the powers which are by this Act conferred on the Court as to *references by consent out of Court*."

[35] Effect must be given to this section which by its terms expressly and unambiguously confers on the Court the same powers in relation to Court ordered references as are conferred on the Court by the Act in relation to "*references by consent out of Court*". The phrase "references by consent out of Court" can only mean a reference to an arbitrator in accordance with an arbitration agreement made by the parties thereto.

[36] I therefore also reject the submission of Counsel for the defendant that the Court only has power under the Act to grant an interim injunction where there is a court ordered reference and hold that the Court has such power under section 14(5)(h) of the Act whether the reference is court ordered or made under an arbitration agreement.

[37] Holding as I do that the Court is seised of the power to grant an interlocutory injunction under section 14(5)(h) of the Act, I do not consider it necessary to determine whether the Court has power in this case to grant the interlocutory relief sought by the plaintiff under section 44 of the Supreme Court of Judicature Act Cap 117A.

**The right of Defendant to determine the contract**

[38] In opposing the plaintiff's application for the grant of an injunction on the plaintiff's amended inter parties summons filed on 12th July, 2002, Counsel for the defendant also contends that the contract between the plaintiff and the defendant for the construction of the office building at Warrens was properly determined by the defendant on the 25th June, 2002 in strict compliance with the procedure set out in clause 26 of the JCT form of Contract. That being the case, Counsel further contends that the defendant became absolutely entitled at anytime after the 25th June, 2002 to remove the equipment from the building site.

[39] The defendant's entitlement to determine the contract, it is argued, rests on the failure of the plaintiff to pay to defendant the sum of \$760,234.03. This sum was certified for payment by the Architect Design Collaborative under Certificate No. 28 issued on 31st May, 2002, and fell due to the defendant on the 14th June, 2002 being 14 days from the date of issue in accordance with clause 26 (1) (a) of the JCT Contract which provides:

26(1) Without prejudice to any other rights and remedies which the contractor may possess, if

(a) the employer does not pay to the contractor the amount due on any certificate within 14 days from the presentation of that certificate and continues such default for seven days after receipt by registered post or recorded delivery of a notice from the contractor stating that notice of determination under this condition will be served if payment is not made within seven days from receipt thereof;

...

Then the Contractor may thereupon by notice by registered post or recorded delivery to the Employer or Architect forthwith determine the employment of the Contractor under this Contract provided that such notice shall not be given unreasonably or vexatiously.."

[40] The plaintiff having failed to pay the certificate within 14 days as required, the defendant set in motion the procedure laid down in Clause 26 (1) (a).

[41] First, the defendant by letter dated 14th June, 2002 notified the plaintiff of its intention to determine the contract if the sum of \$760,234.03 was not paid to the defendant within seven days of the date of the said letter. This letter was sent by recorded delivery and it is not disputed that it was received by the plaintiff on the 18th June, 2002.

[42] Secondly, payment not having received by the defendant of the sum of \$760,234.03 by the 25th June, 2002 (being 7 days after the receipt by the plaintiff of the defendant's letter of 14th June, 2002), the defendant by letter dated 25th June 2002 purported to determine the contract and thereby complied with procedure set out in clause 26(1)(a) for so doing.

[43] But the plaintiff says that even if the defendant strictly complied with the procedure set out in clause 26(1)(a) the real issue is whether the defendant was entitled to put that procedure in motion. Further, Counsel for the plaintiff says that he wrote to the defendant by letter dated 27th June, 2002 contending that the defendant's purported termination of the contract by letter of 25th June, 2002 was a wrongful repudiation of the contract and that the plaintiff accepted such repudiation as evidence of the defendant's clear determination not to carry out the contract.

[44] There is plainly a dispute ("Dispute No. 1") as to whether the defendant was entitled to determine the contract when it purported to do so for the alleged failure of the plaintiff to pay to the defendant the sum of \$760,234.033 due under Certificate No. 28. The plaintiff contends that the defendant is not so entitled because

(i) under cover of letter dated 14th June, 2002 (Exhibit NW10) to the Whitehall Affidavit No. 1 the plaintiff sent to the defendant a cheque in the sum of \$380,117.02 and advised that the plaintiff had deducted the sum of \$380,117.01 as liquidated and ascertained damages in accordance with the terms of the contract. These two figures together total the sum of \$760,234.03 due under Certificate No. 28 and

(ii) during a meeting on the 19th June, 2002, the defendant refused to accept the plaintiff's cheque in the sum of \$380,117.01 as alleged in a letter dated 19th June, 2002 (Exhibit NW11) to the Whitehall Affidavit No. 1.

[45] Indeed both the receipt of the plaintiff's letter of 14th June, 2002 and the payment of \$380,117.01 are denied by the defendant in paragraph 20 (iv) and (vi) of the affidavit of Alphaeus Annassar Barrack, the defendant's managing director, filed on 3rd July, 2002.

[46] There is another dispute (Dispute No. 2) which has arisen and is of critical importance to a determination of Dispute No. 1. The defendant says that the extension of time granted by the Architect for the completion of the Works was unfair and unreasonable. The defendant therefore calls in question the validity of the Architect's certificate of completion issued on 10th April, 2001 on the basis of which the plaintiff exercised its alleged right to deduct liquidated damages from the certificates of payment issued by the Architect. Consequently, also called into question is the plaintiff's right to deduct liquidated damages from Certificate No. 28.

[47] Upon a resolution of these disputes depends the right of the defendant to (a) determine the contract and (b) remove the equipment pursuant to Clause 26 of the JCT Contract.

[48] Against this background of disputed facts I am asked by the defendant to find that it was entitled to determine the contract between the parties on the 25th June, 2002 and thereafter to remove the equipment without any hindrance from the plaintiff.

[49] What therefore ought to be my approach in determining the application of the plaintiff for the continuation of the *ex parte* injunction granted on the 2nd July, 2002.

[50] Many affidavits in support of the plaintiff's application and in opposition thereto have been filed and they all contain disputed matters and conflicting evidence. Further the existence of Dispute I and Dispute II leave me in no doubt that there are serious issues that ought properly to be tried.

[51] Mindful of the established principle that the hearing of an application for an interlocutory injunction is not a trial on the merits I consider

that in light of the parties declared intention to refer the matter for arbitration, these issues should be left for the determination of the arbitrator.

[52] I am guided by the words of His Honour Judge Peter Bowsher Q.C in the case of **Tara Civil Engineering Ltd v Moorfield 15 Con. L. R. at p. 52-53**

“My concern is with the provisions of the contract regulating what is to happen between today and the date when the arbitrator announces his decision. The parties have made an agreement about what I should do, and so as far as possible I should seek to enforce that agreement .....”

[53] The Tara Civil Engineering case arose out of a contract under which Tara was employed by the defendant Moorfield to construct certain roads for the development of a site. At issue in that case was an engineer’s certificate on which Moorfield relied to expel Tara from the building site in accordance with clause 63 of the contract. Tara having obtained an exparte injunction restraining Moorfield from so expelling Tara, Moorfield then applied for a discharge of that injunction, an order that Tara’s licence to occupy the site be revoked and that Tara remove itself from the site on completion of their sub-contract with a third party and not return.

[54] The submissions made by Counsel for Moorfield in that case are essentially the same as those made by Counsel for the defendant in the case now before me.

[55] Counsel for the plaintiff in this case relies on the direction of His Honour Judge Peter Bowster Q.C. at page 52 in the Tara case and says that, like His Honour,

“I should only go behind the (Architect’s) certificate, ... relied on as setting in motion the clause 63 procedure if there is either a lack of documents which on their face appear to set the procedure in motion or there is proof of bad faith or proof of Wednesbury unreasonableness.”

[56] Under clause 22 of the JCT form of contract the plaintiff is entitled to liquidated damages for non-completion where the Architect certifies in writing that in his opinion the works ought reasonably to have been completed and to deduct such liquidated damages from any monies due or to become due to the defendant under the contract. The Architect’s certificate of non-completion was issued pursuant to this clause. Clause 22 is a term of the JCT Contract which I am of the opinion falls within the dictum of His Honour Judge Peter Bowster, Q.C. at page 53 of the Tara case where he said -

“The Court’s present concern is to enforce the terms of the contract with regard only to the matters presently under consideration, namely, the regulation of the conduct of the parties pending the resolution of the substantive dispute by arbitration.”

[57] Accordingly as no bad faith or Wednesbury unreasonableness has been alleged in relation to the issue of the Architect’s certificate of completion, I hold that full effect should be given to that certificate on the basis that this clause was intended to regulate the parties conduct pending arbitration.

#### **Should the injunction be granted**

[58] The principles on which the Court should act in deciding whether or not to grant prohibitory injunctive relief are now well settled by the decision of the House of Lords in **American Cyanamid Co. v Ethicon Ltd [1925] AC 396**. The first principle is that the court must be satisfied that ... there is a serious question to be tried and it is only if the parties have not shown that there is a serious question to be tried that other principles, that is, inadequacy of damages and the balance of convenience must be considered by the Court.

[59] As I have already stated, I am satisfied that there are serious issues to be tried. Some of these are of law and others are of fact. Subject to the usual undertaking as to damages, I therefore grant the injunction in favour of the plaintiff restraining the defendant in the terms prayed for in paragraphs 1 and 2 of the amended summons of the plaintiff filed on 12th July, 2002 until the determination of the proposed arbitration proceedings or until further order.

#### **The Mandatory injunction to return equipment**

[60] The plaintiff in its said amended summons also seeks a mandatory injunction ordering the defendant to return all equipment removed from the site by the defendant.

[61] The test to be applied by the Court in deciding whether to grant a mandatory injunction is to be found in the dictum of Megarry J in **Shepherd Homes Ltd v Sandham [1971] Ch. 340 at 351** (approved by the Court of Appeal in **Locabail International Finances Ltd. v Agroexport [1986] 1WLR 657 and Leisure Data v Bell [1988] FSR 367**) where he said:

The court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction.”

Megarry J. added that:

“the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought to enforce a contractual obligation.”

[62] In **Rover International Ltd v Cannon Film Sales Ltd [1987] 1WLR 670** Hoffman J stated that:

“the fundamental principle on interlocutory applications for prohibitory and mandatory injunctions alike is that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out at trial to have been wrong.”

[63] In this case serious issues of law and fact are yet to be determined and on the view I hold of the conflicting evidence and disputed facts, I do not feel that “high degree of assurance” enunciated by Megarry J. that at the trial it will appear that the injunction was rightly granted.

[64] Relying on the dictum of Hoffman J. in the Rover International Ltd. case I shall not order the return of the equipment already removed from the building site by the defendant as this course seems to carry the lower risk of injustice in the event I should be later proved to have been wrong.

[65] As it has been agreed by both Counsel for the plaintiff and the defendant that the plaintiff is, notwithstanding the submissions of either Counsel, entitled to possession of the site, the defendant is hereby ordered to deliver up forthwith possession of the building site at Warrens to the plaintiff.

#### **The inquiry as to damages**

[66] It has been conceded by Counsel for the defendant that the inquiry as to damages should await the final determination of the arbitration

proceedings. The application for such an inquiry is therefore dismissed.

[67] Counsel for the defendant has conceded the application that the defendant be at liberty to enter judgment for damages and interest is consequential upon the order sought for an inquiry as to damages. This application must therefore also be dismissed.

**A stay of the action**

[68] It has been conceded by Counsel for the plaintiff that the defendant is entitled to have all further proceedings in this action stayed pursuant to section 6 of the Arbitration Act Cap 110 of the Laws of Barbados.

[69] Accordingly it is hereby so ordered save and except for purpose of giving effect to this order.

[70] Costs of the applications are reserved.

[71] Liberty to apply.

**Elneth O. Kentish**  
**Judge of the High Court.**