

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

DIVISION

No. 1824 of 2013

Consolidated with No. 1487/2013

BETWEEN:

ALVIN DAVID BRYAN

CLAIMANT

AND

ANTHONY THEOPHILUS BRYAN

DEFENDANT

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

Dates of hearing: 2014 January 29, 30 and 31

Date of decision: 2014 January 31

Appearances:

The Claimant in person

Ms. Susanna Thompson with Mrs. Janelle Jones-Carter, Attorneys-at-Law for the Defendant

DECISION

The Application

Judge's note: The extracts quoted in this decision are taken verbatim from the documents filed on behalf of the Claimant and the Defendant and have not been edited by the Court.

[1] This matter involves an application for the following orders contained in the

affidavit of the Claimant filed 11th December 2013 namely that the Defendant:

- i. "Restore the water and electricity back to the house [called "Astoria" situate at Dayrells in the parish of St. George inserted by the Court];
- ii. Replace all the doors removed by Defendant;
- iii. Repair and replace all the security bars and windows back in their original position;
- iv. Be restrained his servants and agents from harassing Claimant or being abusive or threatening manner against the Claimant and his immediate family;

- v. Be restrained his servants and agents from entering the property to commit any breaches of the herein agreement which exist between the Claimant and the Defendant.
- vi. To produce all necessary documents in order to complete the valuation of Lot 2;
- vii. Further or other relief;
- viii. Costs.”

Brief Background

[2] The Claimant is the son of the Defendant and his wife Astoria Londa Bryan, now deceased. On 23rd August 2013 the Claimant filed a Form 1 notice under **The Supreme Court (Civil Procedure Rules) 2008 (CPR)**, bearing suit number 1487 of 2013, claiming the following relief against the Defendant:

“An injunction to restrain the Defendant whether by himself whether by directors, officers, employees, servants or agents, affiliate or subsidiary companies or otherwise from doing or authorising any acts or any of them that is to say from breaching the Claimant’s right to an irrevocable contract of licence to exclusively occupy the property at No. 1 Astoria Court, Astoria in the parish of Saint George in this Island in any manner whatsoever and or any other Orders for injunction as enunciated in the Notice of Application.”

[3] On that said date the Claimant filed a Form 10 notice seeking ex-parte [without notice] an interim injunction in the following terms, namely that:

- “(1) The Defendant be restrained, whether by servants or agents or otherwise from doing or authorising any acts or any of them that is to say from further breaching the Claimant’s contractual licence in any manner whatsoever;
- (2) The Defendant be restrained, whether by servants or agents or otherwise from removing any further doors, windows, fixtures, furniture or effects of either freehold or leasehold in nature from the property situate at No. 1 Astoria Court, Astoria, St. George, Barbados;
- (3) The Defendant reconnect the water supply;
- (4) The Defendant restore the property at No. 1 Astoria Court, Astoria to the state and condition which it was prior to the removal of doors and windows thereof and the damage done to the said property by Mr. Anthony Bryan his servants or agents;

- (5) The Defendant is restrained from until further order [sic] from entering the property with his servants or agents save and except in compliance with this Order;
- (6) Further or other relief;
- (7) The costs occasioned by this application are costs in any event.”

[4] The grounds of the application were as follows:

- “(1) Claimant entered into a contractual licence with the Defendant to reside in the premises at No. 1 Astoria Court, Astoria in St George.
2. The Defendant agreed again with the Claimant that he, his wife and two children could occupy the premises during the lifetime of the Defendant.
3. The Defendant agreed with the Claimant that the said contractual licence would be irrevocable until such time.”
4. Under grounds 4, 5, 6 and 7 the Claimant alleged breach of the contractual licence by revocation of the period of the licence, removal of the doors and disconnection of the electricity supply, seeking to occupy the property with the Claimant and his family and seeking to re-enter and re-occupy the property.
5. Ground 8 alleged that the “Defendant has breached the procedural rules under the provisions of the *Landlord and Tenant Act Chapter 230* in that there was wrongful service of the Notice of Intention to apply to a Magistrate to recover possession, in that the Claimant was not personally served with any valid Notices under the said Act.”
6. Ground 9 stated that the “Defendant has no pending case and or is complaint before a Magistrate whereby any summons was issued by to [sic] the Claimant as a result the Defendant has no authority to re-enter, re-occupy and or evict the Claimant and his immediate family.”
7. Ground 10 stated that “Unless restrained by this Honourable Court, the Defendant threatened and intend [sic] further to breach the Claimant’s contractual licence rights whereby the Claimant and his immediate family will unable [sic] to occupy the premises at No. 1 Astoria Court, Astoria [sic], St. George, Barbados.”

[5] An amended ex-parte application for an interim injunction was filed on 27th September 2013 containing the same grounds. The chronology of documents filed is as follows:

- “(1) The claim for interlocutory relief was supported by an affidavit filed by the Claimant on 23rd August 2013.
- (2) A fourth affidavit in support was filed on 18th October 2013.
- (3) On 18th October 2013, the Defendant filed his affidavit in response to the Claimant’s affidavit filed 23rd August 2013.
- (4) On 11th December 2013 the Claimant filed a fourth affidavit in response of the interlocutory injunction.

- (5) On 18th October 2013 the Defendant filed an ex-parte [without notice] application for the following relief under file No 1824/2013. On 18th October 2013 the Defendant filed an “ex-parte” [without notice] application for the following relief under file No 1824/2013:

- “(a) The Defendant be restrained whether by himself his servants or agents or otherwise from harassing and abusing the Claimant at the property of the Claimant situate at Number 1 Astoria Court, Astoria in the parish of Saint Michael [sic] in this Island;
- (b) The Defendant be restrained whether by himself his servants or agents or otherwise from changing the locks and otherwise preventing the Claimant from accessing his property situate at Number 1 Astoria Court, Astoria in the parish of Saint Michael in this Island;
- (c) The Defendant is restrained whether by himself his servants or agents or otherwise from interfering or removing the personal effects of the Claimant from the said property situate at Number 1 Astoria Court, Astoria in the parish of Saint Michael in this Island;
- (d) The Defendant be restrained until further order from entering the property with his family, servants and/or agents save and except in compliance with the terms of the Order;
- (e) Further and/or other relief;
- (f) The costs occasioned by this application to be borne by the Defendant.”

[6] At the time of filing his application the Claimant represented himself. The Court suggested that the Claimant seek independent legal representation.

[7] As a result Mr. Samuel Legay, Attorney-at-law appeared as his counsel on 11th November 2013. On that said date the parties reached a consent order (the consent order) in the following terms which order was approved by the Court:

- (1) Civil Suit Number 1487 of 2013 be consolidated with Civil Suit Number 1824 of 2013 with Number 1487 of 2013 being the leading file.
- (2) The Claimant will completely vacate the property inclusive of the removal of his household furniture situate at Number 1 Astoria Court Astoria in the parish of Saint George in this Island by midnight of 12th November 2013.
- (3) The claimant will vacate the Crane Hotel situate at the Crane in the parish of Saint Philip in this Island on the 12th day of November 2013 at 12 o'clock in the afternoon.
- (4) The Claimant will obtain reasonable rental accommodation from the 11th day of November 2013 until the 31st day of December 2013 with the Defendant paying the security deposit and rent

payable for the first month's rental and the Claimant paying the rental for the remaining period of his occupancy.

- (5) The Claimant withdraws his application for injunctive relief and the amended application filed on the 27th September 2013 filed against the Defendant herein and the Defendant withdraws his application for injunctive relief filed against the Claimant herein on the 18th day of October 2013.
- (6) Each party shall bear their own costs in this matter.

[8] This order was presented by counsel for the Defendant and filed on the 22nd day of January 2014. It bears mentioning and it is important to note that the draft consent order of 11th November 2013 was presented in draft and amended by the parties and all manuscript amendments and deletions were initialled by Ms. Thompson, as the Defendant's counsel, Mr. Legay as the Claimant's counsel and the Court. It was signed off and approved as amended by **Chandler J.**

[9] The claim for interlocutory relief was effectively compromised by the Consent Order leaving the substantive claim still pending.

[10] It must also be noted that on the 21st day of October, 2013 the parties agreed and it was ordered by consent, inter alia, that the Defendant would pay for the Claimant's accommodation at the Hilton Hotel until further order and this was done. This is the reason for the order at paragraph 4 of the consent order. It was also ordered that the Claimant would vacate the premises at Astoria, St. George by midnight of the 21st day of October 2013.

[11] It is against this background that the application of the Claimant was brought.

The Claimant's Submissions

[12] The Claimant now appeared in person having terminated the services of Mr. Legay. He submitted that the consent order was obtained by fraudulent misrepresentation and/or material non-disclosure, he relied upon *Fiton Technologies Corp. v Attorney General of Barbados (unreported), Civil Suit No. 844 of 2008*

(date of decision 17 June 2013) and *Allison Olivia Clarke v BNB Inc.* (unreported), Civil Suit No. 343 of 2011 (date of decision 19 July 2011).

[13] He also submitted that, after the order initialled in court had been failed, he did not sign it since the Defendant refused to withdraw his pending application before the Magistrate's Court which was a requirement for his signing off on the order. His signature was required for the order to be valid and effective, and in the absence of his signature before the order was perfected, it was not binding. He further submitted, that the order was not served on him as required by **CPR 37.1**, consequently his application for injunctive relief was not effectively withdrawn.

[14] He also submitted that he was entitled to make an application for interlocutory relief at any time and in any form. He relied upon **CPR 17.2** and the principles upon which interlocutory relief is granted as espoused in *Toojays Limited v Westhaven Limited*, **Civil Appeal No. 14 of 2008 (unreported) (date of decision 16 September 2011)**. He submitted further that he had a subsisting claim for substantive relief before the Court namely an action for breach of his irrevocable contractual licence to occupy the property, he was therefore entitled to seek interlocutory relief in respect of that subsisting cause of action which was never withdrawn. His failure to use Form 10 was not fatal since he could avail himself of **CPR part 17.2 and 17.3**.

The Defendant's submissions

[15] The Defendant submitted that the Claimant had not disclosed the material non-disclosure upon which he relied. Ms. Thompson argued that, in any event, the allegation that the Claimant stated in his e-mail to her that he would not sign the consent order unless the Defendant withdrew his ejectment proceedings in the Magistrate's Court (which the Claimant alleged that she did not vouchsafe to the Court) was irrelevant since the order had been signed by the Defendant's counsel and

had been perfected. There had been no appeal of that order which was binding on all parties from the time it was made. She relied upon **CPR part 42.2 (a) and 42.8**.

[16] Counsel conceded that the Claimant still had a subsisting cause of action before the Court, namely the application under Form 1 for substantive relief but submitted that the Claimant had failed to produce any evidence to substantiate the claim for an irrevocable licence by way of affidavit. She argued that such a claim did not meet the threshold of being a serious issue to be tried, applying **Toojays**.

[17] It was further submitted that, since there was a subsisting claim, the Claimant ought to have used **Form 10 of CPR** to bring his application rather than making it part of his affidavit.

[18] Counsel also submitted that damages would be an adequate remedy in the event that the Claimant was successful in the substantive matter and, therefore, injunctive relief ought not to be granted.

The Issue

[19] The issue before the Court is whether the Claimant is entitled to the relief sought in the circumstances as above outlined. This involves a consideration of:

- (a) the effect of the initialling of the order upon the parties,
- (b) whether there has been material non-disclosure and/or fraudulent misrepresentation, and
- (c) whether the Claimant is debarred from making his application *de novo*.

The Law

[20] Part 42.7 of CPR applies to consent judgments or orders. Part 42.7 (5) provides that:

Where this rule applies the order must be

- (a) drawn up in the terms agreed;
- (b) expressed as being “By Consent”;

- (c) signed by the attorney-at-law acting for each party to whom the order relates; and
- (d) filed at the Registry for sealing.

[21] CPR 42.2(a) provides that:

A party is bound by the terms of the judgment or order whether or not the judgment is served where that party:
is present whether in person or by a legal practitioner when the judgment is given or the order is made.

[22] CPR 42.8. provides that:

A judgment or order takes effect on and from the day it is given or made, unless the court specifies that it is to take effect on a different date.

Discussion

[23] The Claimant submitted that the consent order is invalid since he did not sign off on it and **Part 42.7(5) of CPR** was not complied with. The Claimant is not only a litigant in person but is an Attorney-at-law engaged in private practice in Barbados. He was present in court on the 11th November 2013 when the consent order was reached. The order was signed in the presence of the Claimant, the Defendant and the Court as presently constituted. It was drawn up in the agreed terms and signed by the Attorneys-at-Law for all parties. It was expressed to be by consent. He cannot feign ignorance of the nature and purport of the order.

[24] This was the consent order approved by the Court. The Claimant's submission that he did not sign the faired order is spurious. His counsel's signature was affixed to the consent order when it was made. His signature was not then required. The Claimant's termination of his counsel's retainer could not alter that fact. He has not alleged that the filed order was not in accordance with the order initialled in Court.

Disposal

[25] The Court therefore finds that there is no merit in the Claimant's submissions and dismisses the Claimant's submissions that the order was ineffective because of non compliance with **CPR 42.7 (c)**.

Fraudulent misrepresentation/material non-disclosure

[26] Having partially complied with the consent order, the Claimant now submits that the said order was obtained by fraudulent misrepresentation and/or material non-disclosure. The Court asked the Claimant whether he had pleaded particulars of the fraudulent misrepresentation and who made the misrepresentation. He replied that the Defendant was the person who made the misrepresentation but did not adequately deal with the first question. Suffice it to say that the affidavit evidence contained no particulars of the alleged fraud. Fraudulent misrepresentation is a most serious allegation. In *Derry v Peek (1889) 14 App. Cass. 337* Lord Herschell noted that "fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false." This Court is of opinion that particulars ought to be contained in the affidavit evidence and must be strictly proved. A Defendant ought to know the particulars of the case he is being asked to meet.

[27] In his reply to the Defendant's submissions he alluded to the fact that between the date the consent order was made and the date it was perfected, he informed counsel for the Defendant that he would not sign the order since her client refused to discontinue the ejectment proceedings.

[28] The Claimant in his affidavit of 13th January 2014 at paragraph 2 deposed that the draft order was amended and initialled by all parties, attorneys-at-law and the Court. In paragraph 3 he deposed that Ms. Thompson forwarded a copy of the faired draft of

the consent order to himself which he forwarded to Mr. Legay. He terminated Mr. Legay's services on 20th November 2013 and informed the Defendant's counsel.

[29] In paragraph 7 he deposed that he attended the Magistrate's Court where an application for his (the Claimant's) ejectment (the ejectment proceedings) from the house "Astoria" was due to be heard. He proceeded to the clerk's desk with counsel for the Defendant and told her that his client "needs to withdraw this matter [ejectment proceedings] given I had provisionally given permission that I would withdraw my application from the High Court".

[30] He further deposed in paragraph 10 of that affidavit that Ms. Thompson and the Defendant failed to disclose to the Court that he [the claimant] stated that he would not sign to the draft consent order unless he received in writing his client's intention to discontinue the matter in the Magistrate's Court. As soon as he received it he would sign the order, he also requested certain documents relative to his mother's estate.

[31] In paragraph 11 he deposed that the absence of written notice of the discontinuance of his claim for interlocutory relief and the failure to provide the requested financial were the reasons he refused to sign the consent order. That he operated under the "honest belief that there was no consent order as between the parties vis-a-vis to the withdrawal of my applications..."

[32] He never returned the consent order to Ms. Thompson for final approval with his signature for sealing by the Registrar of the Supreme Court. He verily believed that, in consequence, there was no consent order between the parties on the terms therein contained and therefore no withdrawal of his applications. Thus, the matter was still before the Court for hearing including the action relating to the determination of the irrevocable licence given to him by the Defendant to occupy Lot 1 together with the

said applications and amended applications filed on 23rd August and 27th September 2013 respectively.

Decision

[33] The consent order of 11th November 2013 was made freely and voluntarily in the presence of this Court as presently constituted and in the presence of the Claimant and his then Attorney-at-Law who ably represented him. He never said that he did not understand the order or that it did not represent what was agreed. Nor did he indicate that the consent order was subject to any conditions. There is no evidence to suggest that the consent order was procured by mistake or fraud. The Claimant's submissions that he did not sign the order (and that it is ineffective because of his insistence that the Defendant withdraw the ejectment proceedings in the Magistrate's Court) is without legal foundation.

[34] The order is clear and it does not specify that it is to take effect at any other time. In fact the urgency with which the Claimant required housing must have brought home to his mind the clear intent of the order. The Claimant cannot, after the consent order was made, seek to attach conditions to it. I am of the view that the Claimant is aware of this. When asked about the issue of fraudulent misrepresentation which he alleged, he stated that that issue might not be for this Court to deal with. This implies that he is aware that he would have to appeal the consent order. He has not done so.

[35] In the premises, the Claimant's submission in respect of fraudulent misrepresentation or material non-disclosure is rejected.

Equity and Compliance with Orders of Court

[36] **CPR 42.9** provides that: "A party must comply with a judgment or order immediately unless

- (a) the judgment or order specifies some other date for compliance;

- (b) the Court varies the time for compliance including specifying payment by instalments; or
- (c) ...”

[37] The Defendant complied with the terms of the Consent Order by giving the one month's rent and the security deposit in cash on the date of the order. The Claimant complied with paragraph 3 of the order by vacating the home and he partially complied with paragraph 4 by finding rented accommodation; executing a lease; paying the first month's rent; paying the security deposit and moving into that accommodation. The Claimant has failed to meet his obligations under the consent order by paying the rent for the subsequent months of the tenancy. He has not appealed the order nor has he applied to vary it.

[38] It has not been denied that the Defendant paid the security deposit and the first month's rent for the Claimant's rental accommodation to the Claimant. Indeed the Defendant's counsel said that it was paid in cash to the Claimant on the same date the order was made.

[39] Exhibit “ADB” attached to the Claimant's affidavit filed the 11th day of December 2013 is a copy of the tenancy agreement between Mrs. Lenora Churaman and the Claimant dated the 12th day of November 2013. It speaks to the Claimant paying the security deposit and agreeing to pay the rent as and when it accrued due. The tenancy is for one year commencing the 12th day of November 2013 with an option to renew.

[40] Can he take advantage of his own failure to comply with the consent order and seek to impugn it? The answer is clearly no. No Court exercising its equitable jurisdiction would allow this. It would be inequitable to allow the Claimant to take advantage of his own wrong doing. I will return to this later in this decision. The order, therefore, remains unimpeached.

[41] In light of my findings, it is convenient to dispose of the issue of whether the application for injunctive relief could be revived at this juncture. Having by the consent order discontinued the application for injunctive relief, the Claimant could not thereafter revive the application.

Application for new injunctive relief

The Law

[42] **CPR 17.2 (1)** provides that an application for injunctive relief to be made at any time, including

- (a) before a claim has been made; and
- (b) after judgment has been given.

[43] The procedure is set out in **CPR 17.3**. A Form 10 application is required. (**See CPR 11.4 (4)**) – However, **CPR 17.3 (1) and (2)** provides for a departure from this procedure in cases of emergency.

[44] The Claimant ought to have used the procedure required by CPR 11.4(4) since the matter was ongoing and, as he argued and which was conceded by opposing counsel, he had a subsisting cause of action under his Form 1 application. Nevertheless, in exercising its jurisdiction under **CPR part 1.2** and having regard to the overriding objective set out in **CPR part 1.1**, the Court will not hold this procedural irregularity against the Claimant. A Court of equity would never countenance such a situation especially when one of the major criticisms of equity was its lack of formal rules.

The Case Law

[45] It is widely accepted that the Court of Appeal of Barbados' decision in *Toojays* is the signal local authority on the law applicable to the grant or discharge of interlocutory injunctions. The two considerations for the Court which are to be distilled from the decision are: (1) whether there is a serious case to be tried and if the answer is in the affirmative, then (2) whether the balance of justice favours the granting or refusing

of the interlocutory relief **Burgess J.A.** went on to note that equity follows the law and if the law regards justice as being best achieved by an award of damages, the Court must consider as a significant finding and in assessing the balance of justice the question whether if the Plaintiff succeeds he would be adequately compensated by damages for loss sustained between application and trial. If the Plaintiff can be so compensated in damages the Defendant should not be restrained by an injunction except in exceptional circumstances.

Discussion

[46] The Claimant submitted that he had a strong arguable case based upon the breach of an irrevocable contractual licence granted to him by the Defendant to occupy the property at Astoria, St. George. The Defendant's counsel submitted that, whilst he admitted that a licence existed, it had been revoked and that the Claimant failed to plead particulars of the irrevocable licence.

Irrevocable Licence and the Grounds of Application

[47] The grounds of the application have already been set out at paragraph 4 of this decision. The only particulars of the licence which were pleaded were contained in the Claimant's affidavit filed 23rd August 2013 the relevant paragraphs of which are now reproduced verbatim:

"1...

2. I was in arrears of my rent and the Landlord was seeking to evict me from the said premises. I thereupon spoke to the Defendant in or about the month of May 2011 and explained to him my situation with my arrears of rent and imminent eviction. I asked him whether I can come and reside at one of his townhouses located at Palm Villas, Astoria House, Astoria in the parish of St. George.
3. The Defendant indicated to me that I could not be allowed to come and reside at Palm Villas with my family since he does not want me up there with him so he said that the best he can do for me is to let me move in by myself and immediate family at No. 1 Astoria Court Astoria, in the parish of St. George (hereinafter called 'the Property'), since he understood my predicament, I had nowhere to go but to return to the family home.

4. ...
5. The Defendant also indicated the house was not habitable at the time since my mother Astoria Londa Bryan no longer lived in the house, but that I could move in exclusively with my family, fix it up and occupy the property during his lifetime since no one was inside the house, with the understanding I will have to upkeep the grounds of the property.
6. ...
7. I and my family therefore moved our possessions from the said Apartment into the said property on May 13, 2013 based on the agreement between myself and the Defendant. Thus my family and I occupied the property exclusively.”

[48] The Defendant, in his affidavit filed on 18th October 2013, denied that an irrevocable contractual licence existed. He deposed that the Claimant was renting a house and had built up significant arrears of rent. The Claimant asked his permission to move back to Astoria since he had no other accommodation. He allowed him to do so since the house was vacant but told him that it was badly in need of repairs. He could live there until he was ready to commence repairs.

[49] He deposed further that he never gave the Claimant exclusive occupation of the house since he retained his separate bedroom where he stored his personal items. When he was ready to commence repairs he served notice on the claimant who refused to vacate. He offered alternative accommodation which was refused. The Claimant “... insisted on remaining in the house even though it meant exposing his family of two young girls and his wife to less than desirable conditions.” There was no cross-examination of the Claimant or the Defendant.

[50] The Court has examined the affidavit of the Claimant and the allegation of the creation of a contractual licence in paragraphs 3, 4 and 6 of the Claim filed 23rd August 2013. I have also considered the affidavit evidence of the Defendant.

[51] There has been no cross-examination of either party. The Claimant deposes to an irrevocable contractual licence to exclusively occupy the premises given to him by the Defendant. The Defendant denies this and deposed to the fact that he kept his

clothes and belongings in his bedroom. He deposed also that he was unable to access his property because the Claimant changed the locks and had placed additional bolts on the entrance doors. The Defendant did not furnish him with a key. It is difficult for me to find as a fact from the affidavit evidence that the Defendant gave up exclusive occupancy of his home to the Claimant.

[52] I am also unable to find that the issue which remains to be tried is so serious as to merit the relief sought.

[53] In light of the consent order, the compliance therewith by the Defendant and the partial compliance therewith by the Claimant, I do not consider it unjust for the Claimant to be confined in these particular circumstances to a remedy in damages. He had agreed by the consent order to be responsible for the rental of his accommodation. His failure to pay is no fault of the Defendant. The Claimant refers to the possibility that he and his family will be evicted by his landlord. Whose fault is this? The answer is clearly his own. He is sui juris.

Certainty - An Examination of the Affidavit Evidence in support of the Injunction

[54] The burden is on the Claimant to establish his case. There must be some certainty as to the relief sought and the facts on which he relies. The Claimant in paragraph 4 of his further affidavit filed 11th December 2013 deposed that it was agreed at a meeting of 12th November 2013 that the Defendant would pay the rental of the house until valuation of the property at Astoria since the Claimant had a share [in the house] as a result of his mother's death on 12th May 2011.

[55] He deposed at paragraph 7 that he informed the Defendant's Attorney-at-law at the Magistrate's Court, St. Matthias of his mother's interest in the said property at Astoria by way of shareholding in the founding company called Crown Caribbean Publications Limited.

- [56] At paragraph 18 he further deposed that on 11th December 2013 the Landlord's agent called the Claimant to inquire about the \$2000.00 rent due for the house. The Claimant told him that he would get back to him later. The Defendant's Attorney-at-law stated that her client would not be paying for the rental since he had already paid \$4000.00 and the Claimant must now pay for the house.
- [57] At paragraph 19 the Claimant stated that this was not the arrangement between the Defendant [sic]. "On the contrary the Defendant **agreed to pay for the rental of the said house until such time the valuation is completed for the said property**" --- (emphasis mine).
- [58] At paragraph 20 he deposed as follows:
- "Thus the Defendant agreed to pay for the suitable alternative accommodation **until such time he has paid the Claimant's fair market value for his interest in the said property by virtue of his mother's death**" (emphasis mine) has been breached since the Defendant has refused, failed or neglected to pay for the rent of Lot 65 Clear View Heights in the parish of St. George – The Defendant's arbitrary action may cause the Landlord to issue a Notice to Quit under the lease.
- [59] I have found much uncertainty in this affidavit evidence. It also contradicts the terms of the lease which the Claimant himself put into evidence. I am unable to place much credence in it.
- [60] The Claimant alluded, in his affidavit evidence, to having an interest in "Astoria" on his mother's death by virtue of her shareholding in Crown Publications Limited. The conveyance dated 10th August 1989 is made between Barbados Broadcasting Services Ltd (as Vendor) and the Defendant (as Purchaser). It is for Lot 1 Dayrells. The Claimant's mother was not a purchaser in the conveyance. His remedy with respect to his mother's shareholdings in the company is against the Administrator of his mother's estate and against the corporate entity in respect of which those shares were issue not against the Defendant personally even though he is the administrator.

Conflicting Orders

[61] The Court will not make an order the effect of which is to undermine a pre-existing order which has not been varied. This is even more so in the case where the pre-existing order was made by consent. If the Court were to accede to this application and grant the injunction sought, it would undermine the consent order. It would also have the effect of rendering nugatory the basis upon which the Defendant consented to the order in the first place, namely that the injunction would be discontinued and that his money would be applied toward the Claimant's rental accommodation with the Claimant paying the rent as it accrued due. In his reply, the Claimant noted that the consent order was contractual in nature. I hold that it would be inequitable to undermine the consent order by the order sought by the Claimant.

Insistence that Ejectment Proceedings be withdrawn

[62] In ground 8 of the amended ex-parte application the Claimant stated that the Defendant "... breached the procedural rules under the provisions of *Landlord and Tenant Act Chapter 230* in that there was wrongful service of the Notice of Intention to apply to a Magistrate to recover possession, in that the Claimant was not personally served with any valid Notice under the said Act." In ground 9 he states "the Defendant has no pending case and or is complain[t] before a Magistrate whereby any summons was issued by the Claimant as a result the Defendant has no authority to re-enter, re-occupy and or evict the Claimant and his immediate family."

[63] When the Claimant first appeared before me one of the considerations the Court took into account was the fact that it was alleged that the Defendant had commenced work on the house, had removed windows and doors whilst the ejectment proceedings were still pending. This is reflected in ground 8.

[64] It is ironic that the Claimant should now seek to insist that the Defendant's ejectment proceedings be withdrawn whilst he pursues his substantive claim in the High Court. He cannot dictate to the Defendant if to continue his case or to withdraw it. In addition, the Magistrate's Court is the appropriate forum to determine whether the procedure for service of the notice of intention to proceed was validly served under the *Landlord and Tenant Act* since the complaint for ejectment is made before the Magistrate's Court.

Equity

[65] I have already found that the issue with respect to the alleged irrevocable contractual licence is not so serious as to merit the application sought. It is clear that the Claimant and the Defendant, though father and son, are not getting on well together. They both brought applications against each other with respect to allegations of threatening conduct and intervention by the police which were withdrawn by the consent order. Any order that would put two persons who are not getting on well together in the same environment would not be in the interest of justice.

Disposal

[66] In all the circumstances of this case, I find as a fact that the balance of justice does not favour the grant of the injunctive relief sought.

[67] It is ordered that:

- (1) The Claimant's application for the interlocutory relief sought is dismissed.
- (2) The matter is adjourned at the Claimant's request for a date to be fixed so as to allow him to respond to the application for costs.
- (3) The Claimant is to file and serve his submissions on costs within fourteen days of today's date.

- (4) The decision with respect to costs is reserved until the adjourned date of hearing.

William J. Chandler
Judge of the High Court