

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No. 554 of 2016

BETWEEN:

R THREE ELECTRICAL

CLAIMANT

AND

**OKKAM CORPORATION
(ACTING BY THE RECEIVER)**

DEFENDANT

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

Appearances:

Mr. Dennis Headley, Attorney-at-Law for the Claimant

Mr. Marcel El Daher in association with Mr. Lamar Quimby of Daher and Associates, Attorneys-at-Law for the Defendant

Decided on written submissions filed on behalf of the Claimant on 29th June 2015 and written submissions filed on behalf of the Defendant on 28th June 2016.

Date of Decision: 2016 August 30th

Decision

The Parties

[1] The Claimant is a registered business name under the **Registration of**

Business Names Act, Cap. 317 of the **Laws of Barbados** and carries on the business retailing of electrical products and electrical installation under the name or style **R Three Electrical** with offices situate at 9E 1 Eleise House, Black Rock Main Road, St. Michael (Eleise House). The principal is Wayne Otho Robinson.

- [2] The Defendant is a Limited Liability Company incorporated under the **Companies Act, Cap. 308** of the **Laws of Barbados** and also carries on business at Eleise House. Mr. Wayne Otho Robinson is one of its directors. The Defendant is the Claimant's landlord.

Brief Background

- [3] The Defendant obtained mortgage facilities from Royal Bank of Canada (Barbados) (RBC) Limited which appointed Mr. Christopher Sambrano of EY Management Limited as a receiver of the Claimant company by virtue of a deed of appointment dated 15 July 2015.
- [4] On 21 April 2016 the Claimant applied for orders which included:
- (1) An order in the terms of the undertaking hereafter described.
 - (2) That the Defendant be estopped from in any way interfering with or harassment of the Claimant in the conduct of its business including but not limited to employees and/or sub-contractors of the Claimant.

(3) That the Defendant not distrain on the goods and/or property of the Claimant.

(4) That the Defendant pay the Claimant's court costs of the application.

[5] On 27 April 2016 the Defendant gave, and the Court accepted, an undertaking by the Defendant acting by the Receiver/Manager to remove locks, chains or any other physical restraints to the Claimant's entry into its business premises before 4.00 p.m. that day. The Court also accepted the Defendant's undertaking to release to the Claimant items distrained upon by the said 4.00 p.m. on 27 April 2016 until further order.

[6] The matter was adjourned until 20 June 2016. The Claimant undertook through its counsel to continue to pay rent to the Defendant in the sum of \$1,050.00 per month until further order. This undertaking the Court also accepted. It was further ordered that the Claimant file and serve its application for principal relief on or before 18 May 2016.

[7] The Defendant complied with the undertakings given to the Court.

[8] The Claimant filed its application for principal relief on 17 June 2016.

The Applications

[9] The application before the Court was filed 28th June 2016 by the Defendant for the following relief:

(1) Dismissal of the Claimant's application filed 21st April 2016.

(2) An order that the lease dated 2nd January 2015 between the Defendant and the

Claimant is of no effect.

- (3) Alternatively, that the lease is terminated and the Claimant vacate the premises within three (3) months of the date of the Court order.
- (4) That the Claimant pay the Defendant's costs of the application.
- (5) Further or other relief.

[10] That application is supported by an affidavit filed on even date and deposed to by the Receiver/Manager.

[11] The issues before the Court on the return date set on the Claimant's application of 21st April 2016 are (1) whether the undertaking ought to be continued and (2) whether the Defendant ought to be granted the relief sought on the application of 28th June 2016.

The Affidavit Evidence in Support of the Claimant's Application

[12] Mr. Robinson filed an affidavit on 21st April 2016 wherein he deposed that:

- “(a) On 18 April 2016 the locks and doors to the Claimant's office were changed and he was locked out by K9 Kings Security and Bailiff Services on instructions from Daher and Associates.
- (b) The office furniture and the appliances were locked in the office together with information confidential to the Claimant and the daily cash takings and float.
- (c) There was a written lease dated 21st January 2015 between the Claimant and Okkam at a monthly rent of \$1,050.00. The lease was exhibited but it was unsigned by any of the parties.
- (d) Okkam went into receivership in July 2015 but the Claimant was not notified in sync with the other tenants of Eleise House.
- (e) The lease reserved a right of re-entry if the rent was unpaid for 365 days or longer.

- (f) At an office meeting on 13th July 2015 between the Receiver/Manager and a Ms. Obanwanji it was agreed that the Claimant as a matter of convenience would pay for the cleaning service of the common areas in the building and those payments would be offset (since the obligation was a landlord's obligation) against rent payable by the Claimant.
- (g) The Claimant paid \$8,671.57 for cleaning between July 2015 and 1st April 2016 and forwarded receipts to the Defendant.
- (h) The Claimant disputed that it owed rent for a period in excess of 365 days and disputed that the Defendant had a right to re-enter the premises.
- (i) The Claimant received in December 2015 a letter dated 22nd December 2015 addressed to R3 Electrical (Co. No. 27014) purporting to claim in excess of \$170,000.00 on behalf of the landlord and purporting to give the Claimant 3 months' notice to quit the premises.
- (j) The Claimant has no past or current ties with R3 Electrical.
- (k) He wrote outlining his concerns to the Receiver and there was no response - In consequence the Claimant suffered loss and damage since it was unable to use its tools of trade and the Defendant had threatened to sell off the items seized."

The Affidavit in Support of the Defendant's Application

[13] The affidavit filed was deposed to by Mr. Sambrano. The salient aspects of the affidavit are: -

- “(a) Mr. Sambrano deposed that Mr. Robinson is a director of the Defendant and is also the sole beneficiary of the issued and outstanding shares in the Defendant and Spectrum Electrical Corporation (one of the other tenants of the Eleise House) at R3 Inc.
- (b) He was unaware of the particulars of the Claimant's tenancy despite numerous requests for details of the tenancy from Mr. Robinson. The copy of the lease agreement was only received on 29 August 2015.
- (c) The terms of the lease were inconsistent with the lease arrangements with the other tenants and were at variance with the terms of logical commercial leases.

- (d) When he was appointed receiver, he took full control of the maintenance and upkeep of the common areas of Eleise House.
- (e) He advised Mr. Robinson that consequent upon the appointment of the receiver his duties as Director of the Defendant Company ceased. He also advised him by letter that maintenance of the common areas must be instructed and authorised solely by the receiver by virtue of a letter dated 5th February 2016. Therefore the alleged expenses incurred were not authorized by himself as receiver.
- (f) Despite numerous requests the Claimant and Mr. Robinson failed to provide details or evidence of payment of rent by the Claimant to the Defendant specifically since January 2nd 2015.”

The Claimant’s Submissions

- [14] The Claimant filed submissions on 29 June 2016. Counsel submitted that the issue for determination was whether the Court should exercise its discretion and extend the time for filing and serving the application for principal relief. He referred to **CPR 8.10 and 26.1** et seq and submitted that striking out is appropriate where there is a serious breach or where the delay is such that it is impossible for have a fair trial (**UCB Corporate Services Ltd. V Halifax (SW) Ltd. 1999 CPLR 691: Purdy v Cambran [1999] CPLR 843** and **Taylor v Anderson [2003] RTR 305**). He submitted that striking out is a draconian measure to be used only where there has been a deliberate abuse of the Court’s process.
- [15] Finally he relied upon the overriding objective to urge that the Court should not shut out the Claimant for a simplistic breach of the rules of Court and

that the Defendant had shown no prejudice or detriment suffered by the late filing of the Claim form. The Claimant's submissions, in the opinion of the Court did not deal with the issues at hand. I have therefore not reproduced them in this decision.

The Defendant's Submissions

- [16] Counsel submitted that the Defendant legally exercised its right to distrain and seize the goods of the Claimant to satisfy the arrears which were owed. Following the court's acceptance of the undertaking the Defendant released the goods distrained and gave the Claimant possession. Under this context, the Defendant submitted that if the Claimant was entitled to any special damages, the return of goods and possession being returned, absolved the Defendant of such.
- [17] Further, it was submitted that R Three Electrical is not a registered company capable of separate legal personality and cannot therefore sue or be sued.
- [18] The Defendant also submitted that the Claimant, being in breach of the court orders given on the 21st of April 2016, abused the process and as such its application should be dismissed with costs.
- [19] It was finally submitted by the Defendant that the Claimant failed to satisfy the tests for an injunction as damages have been proven to be an adequate

remedy for any damage determined by the court. Further, the balance of convenience lays in favour of the Defendant.

[20] I will briefly deal with the Defendant's submission that R Three Electrical is not a registered company capable of separate legal personality and cannot therefore sue or be sued.

The Law

[21] **Part 22.2** of the **C.P.R** is intituled '**Person carrying on business in another name**' and provides that:

“**22.2** (1) A claim may be made by or against a person carrying on business within the jurisdiction in a name, whether or not it is that person's name, or who was carrying on business within the jurisdiction in such a name when the cause of action accrued

(a) in his own name;

(b) in his own name, followed by the words "trading as X.Y.";

(c) as "X.Y." followed by the words "(a trading name)"; or

(d) as "X.Y." followed by the words "a firm".

(2) Where a claim is made by or against a person in that person's business name, the rules about applications by or against partners apply as if that person had been a partner in a firm when the right to claim arose and his business name were the firm's name.”

Discussion

The Preliminary Issue

[22] Mr. Sambrano exhibited the form of application for registration of the business name R Three Electrical in his affidavit filed the 26th of April 2016 (“Exhibit CSS 4 a”). He deposed that the Certificate of Registration was exhibited, however it was not. The exhibit shows that Wayne Otho Robinson was the person registering the business name. On his own admission R Three Electrical is a registered business name. It is not a limited liability company registered under the Companies Act of Barbados.

[23] Mr. El Daher made the point in his submissions that the effect of rule **CCR 0.5 r 10 (The Supreme Court Practice U.K. (The White Book) 2004, Sweet & Maxwell, page 1982)** is that a sole trader is enabled to carry on business in a name other than his own and be sued in that name as if it were a firm name. However, unlike partners, a sole trader cannot sue in his business name.

[24] The point must be made that the limitation that a sole trader cannot sue in his business name under CCR 0.5 r. 10 is not contained in the **CPR** of Barbados.

[25] The Claimant has therefore satisfied the requirements of the law for registration of a business name, and has locus to bring these proceedings pursuant to **CPR 22.2**. He has failed to add his name to the firm name as required by the **CPR** or to comply with the **CPR 22.2 (1) (c) and (d)**. This may be corrected by way of amendment if the Claimant applies. I do not think

the overriding objective will be achieved by striking out a legitimate claim, which may be saved by applying the rules relating to amendment of pleadings.

The Defendant's submission is therefore overruled.

The Substantive Issue

[26] It is clear law that, on an application for relief in the form of a mandatory or prohibitory injunction the Court is empowered to accept an undertaking given by a party which has the same force as an order of Court. The effect of the undertaking by the Defendant was to nullify the distress for rent levied by the receiver on behalf of the Defendant for unpaid rent.

[27] The issues of (1) whether or not the undertaking ought to be continued and (2) whether or not the order sought by the Claimant ought to be made, remain to be dealt with. These may conveniently be dealt with together since similar principles of law apply.

[28] The law with respect to the grant or discharge of an interim injunction is now accepted in our courts to be the **American Cyanamid** test as interpreted by the Court of Appeal in **Toojays Ltd v Westhaven Ltd [2012] 2 LRC 65 (Toojays)**. That test has two limbs, namely: (i) Whether there is a serious issue, in the sense of not being frivolous or vexatious, to be tried; and (ii) Whether the balance of justice lies in favour of granting or refusing interlocutory relief.

- [29] I find that there is a serious issue to be tried, namely whether there is a breach of the terms of the lease. There is a further issue of whether the rental has been lawfully increased by the Defendant. I now turn to the second limb whether or not the balance of justice lies in favour of granting the relief sought.
- [30] **Burgess JA.** in **Toojays** opined that, because equity follows the law and the law regards justice as being best achieved by an award of damages, the Court must consider as a significant factor 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 interlocutory injunction except in exceptional circumstances.
- [31] The Claimant through its counsel undertook to continue to pay rent at a rate calculated in accordance with the agreement between the parties prior to the raising of the rent by the Receiver/Manager. In effect the undertakings restored the parties to the position they were in before the distress was levied and before the rent was raised. In other words it restored the status quo ante between the parties.
- [32] The contractual responsibility of the Claimant is to pay the rent as and when it becomes due under the lease or rental agreement. Default in so doing is a

breach of the contract between the parties. This is a separate and distinct consideration from default in payment of rent for a period of 365 days. In the former case, the landlord may sue for breach or invoke its right to levy distress for rent.

[33] In this case the Defendant, through the Receiver/Manager chose to terminate the lease by notice to quit and levy distress.

[34] **Section 15(1) of the Landlord and Tenant Act Chapter 230 of the Laws of Barbados** provides that:

“It shall be lawful for any person having any rent in arrear or due upon any lease for life, years or at will, ended or determined to distain for such arrears after the determination thereof, in the same manner as he might have done if the lease had not been ended or determined, provided the distress is made within six calendar months after the determination of the lease and during the continuance of such landlord’s title or interest and during the possession of the tenant from whom the arrears became due.”

[35] **Section 28 (1) and (2)** provides:

“Where any distress is made for any kind of rent justly due, and any irregularity or unlawful act is afterwards done by the party distraining, or by his agent, the distress itself shall not be deemed to be unlawful, nor the party making it be therefore deemed a trespasser *ab initio*.

(2) The party aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage he sustains thereby, and no more, and where the plaintiff recovers in such action, he shall be paid his full costs of suit and have all the like remedies for the same as in **other cases of costs.**”

[36] Mr. El Daher relied on English authority in relation to the remedy of distress quoting **Halsbury’s Laws of England Third Edition Volume 12**. It is important to note that the process of distress for rent is now also statutorily

regulated by the **District Auctioneers Act, Cap 114** of the Laws of Barbados (the **DAA**).

[37] As stated earlier, compliance by the Defendant with the undertaking given to the Court effectively and effectually put an end to the distress which was levied. To continue the undertaking would have the result that the Defendant, acting through the Receiver/Manager, would be estopped by Court order from exercising its right to levy distress and the Defendant thereafter confined to bringing an action for breach of the lease.

Resolving the issues of (1) whether or not the undertaking ought to be continued? and (2) whether or not the order sought by the Claimant ought to be made?

[38] The Claimant gave the Court an undertaking to continue to pay rent at the alleged contractual rate from the date of the undertaking until further order. On the return date of 20 June 2016, counsel for the Claimant advised the Court:-

- “(1) That the substantive pleadings were filed out of time and not served and he required additional time to serve the same on the Claimant; and
- (2) This his client had given him the cheque for the rent owed to the Defendant for last year (2015 presumably) minus money spent on the property as agreed by the receiver at an earlier meeting.”

[39] This is not in compliance with the Claimant’s undertaking given to the Court. The undertaking did not allow for any deductions from the rent nor did it allow for, or contemplate that, the Claimant would wait until a convenient

time to tender payment. It clearly stated that the Claimant would continue to pay the rent of \$1,050.00 per month until further order.

[40] The Claimant was therefore obliged to pay the rent in the manner it alleged that it contracted to pay and at the contracted time.

[41] An undertaking given to and accepted by the Court has the same effect as an order of Court, and a breach thereof is a contempt, which is enforceable in the same manner as a breach of an order of Court. **Halsbury's Laws of England, Fifth Edition (2012), Volume 22, paragraph 85 on Contempt of Court, Civil Contempt, Breach of undertaking** states that:

“An undertaking given to the court in pending proceedings by a person or corporation (or by a government department or Minister of the Crown acting in his official capacity) on the faith of which the court sanctions a particular course of action or inaction, has the same force as an injunction made by the court and a breach of the undertaking is misconduct amounting to contempt.

The court will not commit a defendant unless both the terms of the undertaking and breach are clear and beyond question. Moreover, a person will not be held guilty of the breach of an undertaking unless he has proper notice of its terms.”

[42] The Claimant was present in court, in the person of Mr. Robinson, when the undertaking was given and accepted. He therefore had full knowledge of its terms which are in *pari materia* with the order he had applied for.

[43] In the circumstances, the Claimant is in breach of the undertaking. No explanation has been given for the breach. To allow the undertaking to continue in these circumstances would be for the Court to countenance a

breach of an undertaking which it has accepted, in such a manner as to deprive the Defendant, acting through the receiver, of a legitimate right to recover its rent due by levying distress upon the Claimant's goods, if so advised.

[44] The Claimant has also breached its legal obligations to the Defendant and cannot claim equitable relief if its hands are unclean. The maxims of equity are that: “He who seeks equity must do equity” and that “He who comes to equity must come with clean hands.”

[45] In relation to the issue of whether or not the application for injunctive relief ought to be granted to the Claimant, I consider that damages are an adequate remedy for any breach of the obligations under the lease. Furthermore **Section 28** of the **Landlord and Tenant Act** provides a remedy for a Claimant. I do not consider, therefore, that the balance of justice favours the grant of injunctive relief.

The claim for an order restraining interference with and harassment of the Claimant’s employees and/or subcontractors

[46] There is no affidavit evidence to support the claims of interfering with or harassment of the Claimant’s employees and/or subcontractors. The Claim for relief is therefore dismissed.

[47] Mr. Robinson deposed that he received a letter dated 22 December 2015 addressed to R3 Electrical purporting to claim in excess of \$170,000.00 on

behalf of the landlord and purporting to give the Claimant 3 months' notice to quit the premises. He further deposed that the Claimant had no current or past ties with any company R3 Electrical Company 27014.

[48] In terms of the application before me, nothing turns on this. This matter concerns distress for rent levied by the Defendant, acting through the Receiver, on the Claimant which has admitted the relationship of landlord and tenant between itself and the Defendant. Counsel for the Claimant admitted to the Court that his client is in arrears of rent notwithstanding the affidavit of Mr. Robinson.

[49] Any issue in relation to the notice to quit is to be resolved in the substantive proceedings for breach of the tenancy agreement. No issue has been raised by the Claimant here.

The Filing of the Application for Principal Relief Out of Time

[50] The Claimant filed its application for principal relief out of time. There is no application for its dismissal notwithstanding the Claimant's breach of the order that it should file the application by 18 May 2016. In any event, I do not believe that the Court ought to drive the Claimant from the judgment seat on an interlocutory application, having found that there is a serious issue to be tried.

The Defendant's Application

[51] The orders sought by the Defendant under paragraphs 2 and 3 of its application filed 28 June 2016 go to the substantive claim and cannot be dealt with at this interlocutory stage. Accordingly, the Court dismisses the claims under those paragraphs.

[52] In the circumstances, I do not consider that the undertaking ought to be continued. I also am of the opinion that the application for injunctive relief ought to be dismissed.

[53] In the circumstances the Court orders as follows:

1. The Defendant is discharged from the undertaking given to and accepted by the Court on 27th April 2016.
2. The Claimant's application filed 21 April 2016 is dismissed.
3. The Defendant's application for the orders sought under paragraphs 2 and 3 of its application filed 28 June 2016 is dismissed.
4. The Defendant shall have its costs of the application for dismissal of the Claimant's notice of application to be assessed if not agreed.

William J. Chandler

High Court Judge