BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

CV No. 1442 of 2014

BETWEEN

CAROLINE ANNE MOORE **CLAIMANT**

AND

SIMPSON FINANCE LIMITED **FIRST DEFENDANT**
EXECUTIVE RENTALS INC **SECOND DEFENDANT**
GLOBE FINANCE INC **THIRD DEFENDANT**

Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High Court.

2015: October 15
2020: January 31

Ms. Lani Daisley and Mrs. Marilyn Moore, Attorneys-at-Law for the Claimant.
Mr. Hal Gollop Q.C., Attorney-at-Law for the First Defendant.
Ms. Safia Moore, Attorney-at-Law, holding papers for Mr. Marlon Gordon, Attorney-at-Law for the Second Defendant.
Mr. Benjamin Norris, Attorney-at-Law of Clarke Gittens & Farmer for the Third Defendant

DECISION

Introduction

[1] This is an application by the First Defendant, Simpson Finance Limited ("SFL"), for the discharge of an interim injunction granted by this Court on 25 September 2014.

Brief Background

[2] By a claim form filed on 24 September 2014, the Claimant, Ms. Caroline Moore ("Ms. Moore"), applied for urgent interim remedies. These included an order restraining SFL "whether by itself, its agents and or servants from repossessing Suzuki Grand Vitara vehicle registration number T2196 Engine No. J2CA700455 and Chassis No.JS3TE549A63087 which is currently in the possession of Ms. Moore".

[3] Ms. Moore had purchased the Vitara from the Second Defendant, Executive Rentals Inc ("ERI"), with a loan of $53,000.00 from the Third Defendant, Globe Finance Inc. ("GFI"). She also paid a fee of $455.50 for a bill of sale executed in favour of GFI. The Vitara was then registered in the name of GFI, in care of Ms. Moore.

[4] Subsequent to the purchase of the Vitara, SFL attempted to take possession of the Vitara from Ms. Moore. SFL claimed to be the true owner of the vehicle, and informed Ms. Moore that it was leased to ERI by SFL when ERI purported to sell the vehicle to her.

[5] This Court granted Ms. Moore an interim injunction restraining SFL from repossessing the Vitara. SFL then applied for the discharge of the injunction, citing a number of irregularities pertaining to Ms. Moore's application. SFL alleges that her application:

1. failed to conform with Rule 11.12(2) of the Supreme Court (Civil Procedure) Rules, 2008 ("the CPR"), in that Ms. Moore did not serve copies of the evidence which she undertook to file after the court hearing on 25 September 2014;
2. did not disclose a substantive cause of action as required by law;
3. was not filed with an accompanying acknowledgment of service; and
4. contained a return date of hearing of 11 November 2014 which far exceeded the normal five days stipulated by law for *ex parte* injunctions.

SFL contends that because of these irregularities the interim injunction granted to Ms. Moore is null and void.

[6] By order dated 10 March 2015, Ms. Moore, SFL and ERI were to file and serve written submissions with authorities on or before 17 April 2015. Leave was also granted to GFI to file and serve any necessary written submissions by 05 May 2015. Ms. Moore's written submissions were handed to the Court by her counsel Ms. Daisley, without objection, on 15 October 2015, at the hearing of SFL's application. No other written submissions were received by this Court.

[7] Curiously, during his presentation, counsel for SFL did not speak to the irregularities alleged in its application to discharge the injunction. Instead,

Mr. Gollop Q.C. focussed on whether damages would be an adequate remedy for Ms. Moore. He submitted that the balance of justice lay in the discharge of the injunction. Notwithstanding this omission, the Court will address the procedural issues raised in SFL's application.

The Procedural Irregularities

(1) Rule 11.12(2) of the CPR

[8] Rule 11.12 provides in relation to interim applications that:-

> "(1) After the court has disposed of an application made without notice, a copy of the application and any evidence in support, together with a copy of any order made, must be served by the applicant on all other parties.
>
> (2) Where an urgent application is made without notice and the applicant undertakes to file evidence after the hearing he must also serve copies of the evidence on all other parties affected by the order".

[9] SFL specifically referred to a breach of Rule 11.12(2), in that SFL alleged that Ms. Moore undertook to serve copies of evidence on the other parties, and that she did not do so. This was an urgent application by Ms. Moore. However, an affidavit of service was filed on 17 October 2014 by the process server, who deposed to serving all the relevant documents on SFL on 26 September 2014. SFL did not challenge the affidavit of service, and there is no evidence, that Ms. Moore is in breach of Rule 11.12(2) of the CPR.

(2) No Substantive Cause of Action

[10] The argument here is that Ms. Moore is not entitled to interim injunctive relief because, at the time of her application, no substantive claim had been filed on her behalf. There is no substance to this argument.

[11] Section 44 of the Supreme Court of Judicature Act, Cap.117A, provides that:

> "The High Court may, at any stage of any proceedings,
>
> (a)…..
> (b) grant a mandatory or other injunction;…
>
> where it appears to the Court to be just and convenient to do so for the purposes of the proceedings before it; and if the case is one of urgency, the Court may grant a mandatory or other injunction before the commencement of the proceedings".

[12] Rule 17.2(1)(a) of the CPR also permits this Court to make an order for any interim remedy at any time including before a claim has been made. Rule 17.2(2) sets out the preconditions for the grant of interim relief in such circumstances. Rule 17.2(2) provides that:

> "However
>
> (a) ….
>
> (b) the court may grant an interim remedy before a claim has been made only if
>
> (i) the matter is urgent; or

(ii) it is otherwise necessary to do so in the interests of justice;".

[13] Ms. Moore's application was certified as urgent by the Honourable Chief Justice on 25 September 2014. Therefore, she was within her right to seek an interim injunction prior to filing the substantive claim. The substantive claim was filed 07 October 2014, within twelve days of the perfecting of the order granting the interim injunction.

(3) Absence of an Acknowledgement of Service

[14] SFL is of the view that as Ms. Moore's application was not accompanied by an acknowledgement of service form, the interim injunction should be discharged. It is true that the forms used for initiating actions in the High Court, are served on defendants with an accompanying acknowledgement of service. However, in this instance Ms. Moore's application was without notice to the defendants. All the relevant documents were served on the defendants after the order for the interim injunction was granted. There was no prejudice to the SFL who responded with its application to discharge the injunction.

[15] There was no necessity for Ms. Moore to include an acknowledgement of service in the bundle of documents served on SFL. And likewise, there was no necessity for SFL to file an acknowledgement of service in response to the

order granting the injunction. The acknowledgement of service only became critical when Ms. Moore filed and served her substantive claim on 07 October 2014.

[16] There is no evidence from or allegation by SFL that it was not served with an acknowledgement of service when it received the substantive claim. The Court is not persuaded that an irregularity occurred or that SFL was prejudiced in any way.

(4) An Excessive Return Date

[17] Rule 17.4(5) of the CPR mandates that, after granting an urgent without notice interim order, a court must:

> "(a) fix a date for further consideration of the application;".

[18] The Rule does not set a time limit within which the court should give further consideration to the application. This Court adjourned the continuation of the matter to 11 November 2014, approximately six weeks after the granting of the interim injunction. SFL filed its own urgent application for the discharge of the interim injunction on 07 October 2014. This was about two weeks after the grant of the order.

[19] Bearing in mind that SFL was served with all the documents pertaining to the interim injunction two days after the court order, it was open to SFL to move the court for an earlier date of hearing. Nothing in the affidavit filed in support

of SFL's urgent application alleges that the return date of 11 November 2014 was in anyway prejudicial to SFL.

[20] For these reasons the Court finds that the four procedural grounds of impeachment referred to in SFL's supporting affidavit, when taken either separately or collectively, do not support the contention that the interim injunction is null and void.

The Oral Submissions

[21] Having treated with the procedural issues, the Court will now address the single issue raised on behalf of SFL when its application to discharge the interim injunction was heard. The submissions from Mr. Gollop Q.C. were that the injunction should be discharged and the *status quo* remain. In his opinion there was sufficient evidence before the Court to indicate that SFL was the owner of the Vitara. And in the event that judgment was entered for Ms. Moore, an award of damages would satisfy the justice of the case.

[22] Counsel for Ms. Moore countered that there were serious issues to be tried. There was no definitive proof that SFL owned the Vitara. Ms. Daisley emphasized that the balance of convenience was on Ms. Moore's side until the substantive matter was determined by the court; and that damages were not an appropriate consideration.

The Toojays Decision

[23] Both counsel prayed in aid the authority of the Court of Appeal decision in **Toojays Limited v. Westhaven Limited, Civ. Ap. No.14 of 2008, decision dated 16 September 2011**. This Court is bound by that decision in which Burgess JA, as he then was, speaking on behalf of a united appeal court, outlined the nature of the inquiry to be undertaking by this Court.

[24] The learned Justice of Appeal referenced the House of Lords landmark decision in **American Cyanamid Co. v. Ethicon [1975] 1 All ER 504**, and opined that:

> "[42]…the **American Cyanamid** guidelines must be taken to have established a two-stage inquiry. The first involves a consideration of whether there is a serious case to be tried and at the second stage the balance of justice (convenience) is the governing consideration".

[25] The Court of Appeal endorsed the statement in **Williams v. Canadian Imperial Bank of Commerce Trust Co (Caribbean) Ltd [1981] Barb. L.R 11,** at 17, that adequacy of damages is merely "a significant factor in assessing where the balance of convenience lies". Burgess JA reasoned that:

> "[54] The principle that adequacy of damages is to be considered as 'a significant factor in assessing where the balance of convenience lies' means that the question as to whether or not damages would be an adequate remedy must be assessed in the context of the overall function of the court in the granting or refusal of an interlocutory injunction which is to

> hold the balance as justly as possible between the parties until trial…
>
> [58]….Since justice is achieved at law by an award of damages, it follows therefore that equity can only in exceptional circumstances grant an injunction where compensation in damages should be otherwise adequate.
>
> [59]….. In this regard it appears from the cases that what constitute 'exceptional circumstances' are those circumstances where the interest of justice renders the general approach inapplicable. Thus, Sachs LJ in the English Court of Appeal decision of **Evans Marshall & Co. Ltd v. Bertla SA [1973] 1 All ER 992** at 1005 said:
>
> > 'The standard question in relation to the grant of an injunction, are damages an adequate remedy? might perhaps, in the light of the authorities of recent years, be re-written: is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?".

Applying Toojays to the Present Facts

A Serious Issue to be Tried

[26] The first stage of the inquiry is whether this Court finds that there is a serious issue to be tried. When SFL's application was heard by this Court on 15 October 2015, various documents had been filed and served by Ms. Moore and SFL. For Ms. Moore there was her affidavit in support of her application for interim remedies, the claim form, and the statement of claim.

[27] No defence had as yet been filed by SFL. However, other documents were

filed on its behalf. These documents are the affidavit in support of the application to discharge the interim injunction; and the affidavit and supplemental affidavit of SFL's regional finance manager, Donna E. Cumberbatch.

[28] Ms. Moore's claim is against three defendants. In relation to SFL she seeks the following:

1. a declaration that SFL is estopped from asserting ownership over the Vitara;
2. a declaration that she is the beneficial owner of the Vitara; and
3. an injunction restraining SFL from repossessing the Vitara.

[29] Ms. Moore also claims jointly and severally against SFL and ERI:

1. a declaration that she is the beneficial owner of the Vitara;
2. a declaration that she is a private purchaser without notice of the defect in ERI's title;
3. a declaration that ERI converted the Vitara; and
4. an order that ERI indemnify her for any damage for conversion claimed by SFL.

[30] The issues surrounding the interim injunction are between Ms. Moore and SFL. Therefore, the Court will confine itself to a determination as to whether there are triable issues between Ms. Moore and SFL. The ownership of the vehicle is one such triable issue. SFL has relied on documents submitted by

Ms. Cumberbatch. The first document is a lease agreement between SFL and ERI dated 10 December 2013. The duration of the lease is 36 months unless sooner terminated. ERI recognized SFL to be the owner of the Vitara. However, when Ms. Moore purchased the vehicle from ERI, ERI was registered as the owner of the Vitara with the Licensing Authority. SFL also alleges in another document that as at 26 January 2015, ERI owed SFL $48,468.84 on the lease.

[31] An undated mortgage endorsement to an insurance policy is annexed to Ms. Cumberbatch's supplementary affidavit. The endorsement declares that SFL is the owner of the Vitara. The Vitara is also said to be the subject of either a Hire Purchase Agreement or a Bill of Sale between SFL and ERI. Neither the original insurance police, nor a Hire Purchase Agreement, nor a Bill of Sale were presented to the Court. Another document is a schedule attaching to and forming part of the insurance policy. This schedule expired on 01 January 2011 before the filing of Ms. Moore's application.

[32] Mr. Gollop Q.C. argued that these document were *ex facie* evidence of SFL's ownership of the Vitara. Counsel for Ms. Moore pointed out the defects in the documents. Ms. Daisley submitted that they were insufficient to establish that SFL owned the vehicle at the time of the sale to Ms. Moore. And in any event, even if ownership was proved, it was contended that Ms. Moore was a

purchaser for value without notice. Therefore, SFL was estopped from asserting any rights of ownership in the Vitara. It was pointed out that the lease was not registered, and the information at the Registration Department at the critical time identified ERI as the owner.

[33] There are at least two serious issues to be tried. The first issue is who owned the vehicle when it was sold to Ms. Moore. And even if the Court is satisfied that SFL was the true owner of the Vitara, the Court must still conduct an inquiry as to whether, on the proven facts, Ms. Moore is a purchaser for value without notice. It cannot be said with certainty at this time that her claim is without merit.

The Balance of Justice (Convenience)

[34] Having found that there are serious issues to be tried, the **Toojays** guidelines exhort this Court to next consider the balance of justice (convenience). Part of that inquiry is whether Ms. Moore can be adequately compensated in damages. (See para.[25] supra).

[35] There is no claim by Ms. Moore for general compensatory damages against SFL. She does not allege any breach of contract or tortious conduct by SFL. What she wishes is for the Court to prevent SFL from exercising rights of ownership against the Vitara. Should the Court determine the claim in Ms. Moore's favour, a possible outcome is that the Vitara remains in her

possession. Alternatively, the Court may agree that she repudiated the contracts with ERI and GFI, thus raising the issue of her entitlement to damages from these other parties, and not from SFL.

[36] In the absence of a defence filed by SFL, the Court is not in a position to make a preliminary assessment as to the strength or weakness of any response that it may have to Ms. Moore's claim. All that may be deduced from the documents provided by SFL is the possibility of a cause of action in SFL's favour against ERI under the lease agreement. The Court also notes that there is on file an application by Ms. Moore for a default judgment to be entered in her favour against SFL, pursuant to SFL's failure to file a defence.

[37] Ms. Moore deposed to the immediate disadvantage she would encounter if SFL was permitted to remove the Vitara from her possession. It is the only means of transportation for Ms. Moore and her family. And without the vehicle she would continue to be liable to GFI for the repayment of the loan. It is unlikely that she would be able to finance the purchase of another vehicle while repaying the loan to GFI. There would be serious prejudice to Ms. Moore if the interim injunction was discharged.

[38] There was no affidavit in response by SFL to Ms. Moore's allegation of serious prejudice. It appears to the Court that she is caught up in the meltdown of ERI, whose chief executive officer was on remand in prison on fraud

charges when this matter was heard. It is questionable whether ERI would be in a financial position to compensate Ms. Moore for any loss that she might suffer, should she lose possession of the Vitara.

[39] SFL has not responded to or denied Ms. Moore's allegation that SFL was prepared to allows her to keep the Vitara if she paid that company $28,000.00, estimated to be half the value of the Vitara. This sum would be in addition to her existing loan with GFI. Ms. Moore's unchallenged affidavit evidence is that for her this a financially untenable option.

[40] For these reasons this Court is of the opinion the Ms. Moore's circumstances are exceptional. It would not be just to confine her to a possibility of damages, not from SFL, but from either ERI or GFI or both. If the interim injunction was discharged at this time, she would likely suffer the greater prejudice as the minnow caught up in a fallout between commercial big fish.

DISPOSAL

[41] The Court declines the application to discharge the injunction granted on 25 September 2014.

[42] I will now hear the parties on the issue of costs.

Sonia L. Richards
Judge of the High Court