

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES

HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV 2013/0240

BETWEEN:

THE ATTORNEY GENERAL OF GRENADA

Claimant

and

GRAND ANSE RIVIERA LIMITED

Defendant

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES

HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV 2013/0045

BETWEEN:

GRAND ANSE RIVIERA LIMITED

Claimant

and

THE ATTORNEY GENERAL OF GRENADA

Defendant

Appearances:

Ms. Celia Edwards Q.C, and Ms. Nicola Byer for the party Grand Anse Riviera Limited

Mr. Darshan Ramdhani and Mr. Adebayo Olowu for the party The Attorney General of Grenada

2013: May 22,
June 6.

RULING

- [1] Mohammed, J : The respective Claimant in the two matters before the Court, the Attorney General of Grenada in GDAHCV2013/0240 ("the first matter") and Grand Anse Riviera Limited in GDAHCV2013/0245 ("the second matter") has each applied for injunctive relief which touch and concern a five acre parcel of land situate at Grand Anse ("the property"). The property is the subject of a lease dated 1st August, 1962 between the Administrator of the then Colony of Grenada for and on behalf of the Government of Grenada as Landlord and the Grand Anse Riviera Limited as Tenant. For the purposes of this ruling I will refer to the Attorney General of Grenada as the Applicant and the Grand Anse Riviera Ltd as the Respondent. While both matters have not been formally consolidated by an order of the Court, both applications were heard at the same time since the issues were similar.
- [2] In the first matter, the Applicant has applied to stop the Respondent or its agents from remaining on the property. In effect this is a mandatory injunction for the Respondent to be removed from the property. The Applicant has also applied for an order to stop the Respondent or its agents/servants from using the said property as a used car sales depot.
- [3] In the second matter, the Respondent has applied to stop the Government of Grenada, its servants/agents from entering on the property, from evicting or attempting to evict it from the property and from doing any acts inconsistent with its occupation and possession of the property until trial.
- [4] At the hearing of these applications Counsel for the Applicant did not pursue the injunctive relief of stopping the Respondent from using the property as a used car sales depot. His main focus was with respect to the interim relief of having the

Respondent removed from the property. As such my ruling only addresses this latter injunctive relief.

[5] In determining both applications the parties agreed that the questions which the Court must consider in exercising its discretion were set out in the *American Cyanamid*¹ case, which are:

- (a) The Court must first examine whether there is a serious issue to be tried. If there is no serious issue to be tried then the injunction should not be granted, if there is a serious issue to be tried then the court should examine (b).
- (b) Whether the Applicant can be adequately compensated in damages by the Respondent for any loss suffered as a result of the Respondent's action if the Applicant is successful at trial and vice versa. If the Applicant/Respondent can be compensated then no injunction should be granted
- (c) If the party seeking the injunction cannot be adequately compensated with damages or if there is doubt, then the Court must examine where does the balance of convenience lies; or which party would suffer the greater injustice if the injunction is granted.

Serious issue to be tried

[6] I am satisfied that the claims brought by the Applicant and the Respondent respectively are not frivolous and vexatious. Indeed, I have been persuaded, based on the evidence before me, that there are several serious issues to be tried including:

- (a) Is the Respondent in breach of the terms of the lease executed on 1st August, 1962?

¹ [1975] 1 All ER 504

- (b) What are the Respondent's responsibilities under the terms of the lease?
- (c) Was the lease properly determined on the ground of non-payment of rent?
- (d) Was the acceptance of rent a waiver of the breach of the terms of the lease?
- (e) Does section 13 of the Landlord and Tenant Act applies to this matter?
- (f) Are the Arbitration and Termination Clauses separate in their scope and effect?
- (g) What is the nature of the relationship between the Applicant and Respondent? Is it landlord and tenant or vendor and purchaser?

Are damages an appropriate remedy for either the Applicant or the Respondent?

[7] Counsel for the Applicant submitted that if its application for injunctive relief is not granted the Government's plans to develop the property would likely crash with a consequential adverse impact on the national economy and that the damages which are likely to flow from this event would be considerable and perhaps impossible to assess. He also submitted that, on the other hand, any harm that the Respondent is likely to suffer, if it is later found that this injunction is improperly granted, would easily be quantifiable and the Government with its financial resources would be better placed to make good those damages since the loss the Respondent would have incurred is the lost opportunity to build its own hotel and run it for a number of certain years. This loss, he submitted, would not be impossible or difficult to assess. In any event, he submitted that the Respondent's ability to pay any damages is unknown and at best questionable.

[8] The evidence before me on the potential loss which the Government and by extension the people of Grenada would suffer if the Applicant's injunctive relief for

possession of the property is not granted was set out in paragraph 19 of the affidavit of Trevor Barclay². It is necessary I quote this paragraph since this is the crux of the Applicant's case with respect to damages not being an adequate remedy:

“ I am advised by the Permanent Secretary of the Ministry of Finance and I verily believe that the Government is engaged in discussion with several developers who are ready to embark on a development project on the said property, any of which projects will ensure national development for the Grand Anse area and Grenada as a whole. It is important that these discussions be finalized as soon as possible. Any delay and or interference with this developing the property by continued presence of the used car depot on the land, and the continued occupation of the land by the man Nyack, whether or not he is an agent of the Defendant, is likely to result in the failure of any of the proposed projects, causing significant damages to the Government, which damages will be impossible to assess, and in any event damages will not be an adequate remedy if Government declared National Economic Policy (disclosed at the National Budget presentation by the Hon Prime Minister on 16th April, 2013) is not fulfilled. The stalling of any development programme is likely to significantly affect Government National Economic Programme and have consequences of affecting the economy.”

- [9] In my view, the evidence which the Applicant has presented to persuade this Court that the Government will suffer irreparable damages if the injunction is not granted is at best bare. All that has been presented by the Applicant to this Court is an intention by the Government as announced in its budget plan for the financial year 2013-2014 which involves the property. There is no evidence before me of the stage of discussions, who are the proposed operators, the type of projected annual income, the proposed starting date of any project, the potential for job creation at various levels and the spin off effects on the Grenadian economy. This information is not unique or novel. This is not the first time that any project of a similar nature is

² Filed on May 9, 2013 in the first matter

proposed to be undertaken in this jurisdiction or in any other jurisdiction. Indeed, any prudent potential investor ought to be able to provide such information to any Government in order for the latter to determine the viability of such a project. In this regard, I do not share Counsel for the Applicant's view that the potential damage to the Government is impossible to calculate. In my view, the Applicant has failed to advance any evidence of the effect that the failure of any proposed project would have on the Grenadian economy. Further, it is reasonable for me to take judicial notice of the financial position of the Government of Grenada in considering its ability to pay any damages to be awarded to the Respondent if it is later found at trial that the injunction ought not have been granted.

- [10] On the other hand, there is evidence that the Respondent has secured financing to rebuild a hotel on the property. While I agree with Counsel for the Applicant that the Respondent's loss may be possible to calculate, there is no such evidence before me to form such an opinion, namely the quantum of damages the Respondent would sustain if it is removed from the property.
- [11] In my view, the evidence presented by both the Applicant and the Respondent on the adequacy of damages as a remedy are bare and since it leaves me with great doubt on the adequacy of damages as a relief, I will examine where the balance of convenience lies.

Where does the balance of convenience lie?

- [12] The question which the Court must ask itself is which party will suffer the greater inconvenience. The Applicant which is seeking to obtain possession of the property since it is in discussions with several developers "who are ready to embark on a development project" which will develop the Grand Anse area and Grenada as a whole, or the Respondent which is in possession, has an unexpired residue of a lease for a period of 16 years with an option to renew for 33 years and has secured funding to rebuild its hotel for its unexpired residue of 16 years at worse?

[13] In my view the Respondent would suffer the greater inconvenience if an injunction is granted in favour of the Applicant for the following reasons:

(a) Maintaining the status quo

- (i) The present status quo is the Respondent is in possession of the property and there is still an unexpired residue of 16 years on the lease. I do not share Counsel for the Applicant's view that the status quo is the lease has been determined on the basis of failure to pay rent since this is one of the substantive issues to be determined at trial. From the evidence presented to me I have not been persuaded that the Applicant would suffer any serious harm if the status quo is maintained. Indeed, in my view, if the present status quo is not preserved the Respondent would suffer the greater harm since the Government of Grenada has already signaled its intention to divest the property to a third party³ as part of its national economic policy.

(b) The effect of the interim relief if granted

- (i) The substantive relief being sought by the Applicant in its Fixed Date Claim filed 8th May 2013 is for possession of the property, injunctive relief to have the Respondent removed from the property, to stop the Respondent, its servants and or agents from using the property as a used car sales depot, to remove all the used cars and to recover arrears of rent. In the Notice of Application filed 9th May 2013 the interim relief being sought with respect to the removal of the Respondent from the property, even if requested on an interim basis, would in effect give possession of the property to the Applicant, which is paragraph 1 of its relief on

³ Paragraph 19 of the affidavit of Trevor Barclay filed on 9th May, 2013 in the first action

the Fixed Date Claim. The Caribbean Civil Practice at page 147 on interim remedies provides some useful guidance on the approach the Court should take when the grant of an injunction would in effect dispose of the action:

“Where a grant of an injunction will in effect dispose of action: where the circumstances of the case are such that the grant or refusal of an interlocutory injunction will effectively end the action (usually because, by the time the matter comes on for trial, there will be nothing worth fighting about) the court would look beyond the mere balance of convenience and form a view of the likelihood of success of the parties at trial”.

- (ii) I agree with Counsel for Respondent that one of the practical effects of granting the Applicant the interim relief for the mandatory injunction is effectively the Applicant would have succeeded in obtaining possession of the property. In any event, I cannot agree with Counsel for the Applicant's submission that the relief is interim since it is the Applicant's submission that the Government of Grenada has already engaged in discussions with developers with respect to that property. Indeed, in my view, if the Respondent succeeds at trial and the property is already divested to a third party, the status quo would have changed and effectively the Court's hands would be tied.

(c) Lack of Bona Fides

- (i) Injunctive relief is an equitable remedy and a party who seeks to persuade the Court to invoke its jurisdiction to grant an injunction must come with “clean hands”. Unfortunately the evidence as presented in this application has not convinced me that the Applicant has approached the Court with clean hands in seeking the injunctive relief sought.

- (ii) According to the Respondent's evidence⁴, in or about March 2013 the Government invited the Respondent to a meeting to treat with the property. After the meeting, Counsel for the Respondent wrote to the Attorney General on 28th March, 2013 following up on the meeting with a suggested course of action, namely *"We suggest that we agree a valuator. That such valuator be retained by Government to determine the value of our client's property. That a copy of that valuation be provided to us as soon as possible and that that valuation be used as a point of discussion between you and ourselves so that we may be able to advise our client of the outcome of such discussions"*⁵. According to the Respondent since there was no response to this correspondence, another letter was sent on 6th May 2013 with the following request: *"Following our client's conversation with the Honourable Prime Minister and your good self in March 2013 our client expected by now a firm offer would have been put on the table. Our client now wishes to learn Government's offer as all is in place for her development to start should the Government not make a suitable offer"*⁶.
- (iii) It is reasonable for the Respondent to assume that between 28th March, 2013 until 6th May, 2013 it was in negotiations with the Applicant concerning the future of the property since it was awaiting a response from the Applicant. The Respondent would not have been concerned with the budget presentation in April 2013 concerning the Government's plans for the property since it was under the impression during that time that it was still in negotiations with the Government of Grenada⁷.

⁴ Affidavit of Roylyn Nyack filed 13th May 2013 in the first matter

⁵ Letter dated 28 March 2013, exhibit H to affidavit of Roylyn Nyack filed 13th May, 2013 in the first matter

⁶ Letter dated 6th May 2013, exhibit I to affidavit of Roylyn Nyack filed 13th May 2013 in the first matter

⁷ Roylyn Nyack says in her affidavit filed 9th May, 2013 in the second matter that :

However, there was silence from the Applicant. Indeed, it was only after the 3rd May, 2013 notice was posted the Applicant formally wrote the Respondent on 7th May, 2013 with its change in position. In my view, the actions of the Applicant between 28th March, 2013 and 3rd May, 2013 cannot be interpreted as the Applicant acted with bona fides since it allowed the Respondent to believe that it was in negotiations while the evidence suggests to me that the Applicant was pursuing other options. The Applicant's response to the Respondent in its letter dated 7th May, 2013 indicated that the Government was of the view that the Respondent was in breach of the terms of the lease primarily for failure to pay rent and that on 3rd May, 2013 the Government terminated the lease and retook possession by posting a notice on the property. On 8th May, 2013 the substantive action was filed and on 9th May, 2013 the ex parte application for interim relief was filed. In my view this is a sharp about turn from the negotiations.

- (iv) Counsel for the Applicant has sought to persuade me that despite the parties meeting in March 2013 to negotiate the future of the property, their discussions were without prejudice to the Applicant's rights under the lease for the property. With the greatest of respect for learned Counsel, from the evidence which has been presented to me on the chronology of the events which has precipitated the Applicant's injunctive relief application, I am forced to draw no other

"3. During the Budget debate I heard the Prime Minister mention that a Major Hotel was going to be built on our property.

4. I have not authorized same.

5. Subsequent thereof I read in the National News Papers that Marriot Hotel was going to build 150 room Hotel on our land.

6. I have not authorized same."

conclusion but to find that the Applicant lacked bona fides in its actions which precipitated its application for injunctive relief.

(d) Material Non-Disclosure

- (i) The duty to give full and frank disclosure is well known to the parties in this matter but it will cause no harm if I repeat what the learned authors of *Gee on Commercial Injunctions* state on this duty:

“Any applicant to the court for relief without notice must act in the utmost good faith and disclose to the court all matters which are material to be taken into account by the court in deciding whether or not to grant relief without notice, and if so, on what terms. This is a general principle which applies to all applications for relief to be granted on an application made without notice. It applies not just to disclosure of facts but to anything which the judge should consider⁸.”

- (ii) The Applicant has submitted that the main limb which it relies on in its application for injunctive relief is the breach of the lease for non-payment of rent and it was on this basis that it purported to terminate the lease on 3rd May, 2013. However, the Applicant’s affidavit of Trevor Barclay⁹ failed to disclose the letter dated 28th March, 2013. Paragraph 12 of the affidavit of Trevor Barclay¹⁰ sought to address the discussions held by the parties. It states: *“Oral discussions with the Defendant, through their Attorney have shown clearly that the demands being made are unreasonable, and there appears to be no real intention to give up possession.”* In that paragraph the Applicant acknowledged the meeting of the parties and their discussions and exhibited the letter dated 6th May,

⁸ Steven Gee, *Commercial Injunctions* 5th ed (2004) para 9.001

⁹ Filed on 9th May, 2013 in the first matter

¹⁰ Filed on 9th May, 2013 in the first matter

2013 from Counsel for the Respondent to the Applicant and the letter dated 7th May, 2013 the Applicant's response. There are no details of the nature of the oral discussions, what are the unreasonable demands being made and how the Applicant formed the impression that the Respondent has "*no real intention to give up possession.*" He also fails to exhibit the 28th March, 2013 letter.

- (iii) In my view, the failure by the Applicant to disclose the 28th March, 2013 letter is a material non-disclosure by the Applicant since this letter paints a different picture to the Court of the nature and status of the negotiations between the two parties before the application for injunctive relief by the Applicant. Without this letter it would not have been unreasonable to form the impression that after the meeting in March 2013 nothing happened on both sides until the 6th May, 2013 letter, but that was not so. It is clear from the 28th March, 2013 letter that the Respondent was awaiting feedback from the Applicant.

[14] For the aforesaid reasons, I dismiss the Applicant's application filed 9th May 2013 and order the Applicant to pay the Respondent's costs of the application to be assessed if not agreed.

[15] As stated earlier, in the second action the Respondent also applied for injunctive relief. For the same reasons outlined above I grant the Respondent's application with the usual undertaking in damages. The Respondent being successful with its application for injunctive relief is awarded its costs.

Margaret Y Mohammed
Judge