[2013] JMCA Civ 33

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 62/2011

BEFORE: THE HON MRS JUSTICE HARRIS P (Ag)
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE HIBBERT JA (Ag)

BETWEEN	**CARIB OCHO RIOS APARTMENT PROPRIETORS STRATA PLAN NO 73**	**APPELLANT**
A N D	**TREVOR CARBY**	**1ST RESPONDENT**
A N D		**2ND RESPONDENT**

Garth McBean instructed by Garth McBean and Co for the appellant

Dr Lloyd Barnett and Keith Bishop instructed by Bishop and Partners for the respondents

24, 25 January 2012 and 31 July 2013

HARRIS JA

[1] In this appeal, the appellant challenges an order of Sykes J made on 27 April 2011, in which he refused an application by the appellant for a mandatory injunction. On 25 January 2012, we dismissed the appeal and

ordered that costs be awarded to the respondents. We now fulfill our promise to furnish written reasons.

Factual background

[2] The appellant, a company incorporated under the laws of Jamaica, is the registered proprietor of property at Ocho Rios registered at Volume 1121 Folio 470 and Volume 1148 Folio 93. The 1st respondent is a strata corporation under the Registration (Strata Titles) Act and is the registered proprietors of property comprised in Strata Plan 73 formerly registered at Volume 1121 Folio 471. The properties are adjoining. The 2nd respondent is a member of the executive committee of the 1st respondent.

[3] The 1st respondent occupies the ground floor of a building on one of the properties, to which reference has been made as the office building. Its occupation of this area of the building was born out of an arrangement between the appellant and the 1st respondent for a lease which manifested itself as an Amenity Area Agreement as well as Annexures A, B, C, D and E hereto. It will only be necessary to refer to clause 3 of the Amenity Area Agreement for the purpose of this appeal. It reads:

> "Coral shall contemporaneously herewith grant to the Strata Corporation leases of the buildings designated as "office" and "laundry" on the said plan marked "A" on the terms and conditions contained in the draft Leases annexed hereto and marked "C" and "D" respectively which have been approved by the attorneys at law representing the parties hereto respectively."

Annexure B is an easement in respect of utilities. Annexure C is a lease in relation to the office building. Clause 3 of this Annexure C reads:

> "ALL THAT portion of the ground floor of the Office Building erected upon part of the parcel of land situate at Sylvia Lawn Ocho Rios, in the Parish of Saint Ann comprised in Certificate of Title registered at Volume…… Folio …….of the Register Book of Titles which premises are more particularly delineated in red on the plan annexed hereto marked "A" TOGETHER WITH the right in common with the Lessor its servants, agents licensees and all other persons entitled to the like right to use the lobby passage way and toilets situate on the ground floor of the said office building."

Annexure D is a lease in respect of the laundry building. Annexure E is an easement in relation to the use of the driveway.

[4] A dispute arose between the appellant and the 1st respondent, the gravamen of which related to the Amenity Area Agreement. This resulted in an action being brought by the appellant against the respondents. The suit was determined by Ellis J who, on 23 June 1998, made the following orders:

> "1. That [the] Amenity Areas Agreement dated the 9th day of June 1977 is a binding and enforceable contract between Carib Ocho Rios Apartments Limited and the Proprietors Strata Plan No. 73.
>
> 2. That the Amenity Areas Agreement dated the 9th day of June 1977 limits Carib Ocho Apartments Limited or their successors in title to develop 30 Residential units or less on the Lot numbered 1/3 on the plan of the Certificate of Title registered at Volume 1148 Folio 93 of the Register Book of Titles.
>
> 3. That the Proprietors Strata Plan No. 73 is entitled to exclusive and undisturbed possession of the ground floor of the office building and the laundry.

4. That by virtue of the Amenity Areas Agreement, Carib Ocho Rios Apartments Limited or its successors in Title are prohibited from constructing any residential or commercial building on any Lot other than Lot numbered 1/3 being the land registered at Volume 1121 Folio 470 of the Register Book of Titles provided for by the Amenity Areas Agreement dated the 9th day of June 1977.

5. That costs be that of the Defendants."

[5] The office area on the ground floor of the building was leased by the appellant to a third party. On 1 April 2010, the respondents took possession of this leased area, it having been vacated by the tenant. The appellant contended that this act was unlawful. Consequently, this formed the nucleus of a further dispute between the parties and on 22 July 2010, the appellant, by way of an amended claim form sought the following:

"(1) A Declaration that paragraph 3 of the order made on the 23rd June 1998 referred only to part of the ground floor of office and laundry.

(2) A Mandatory Injunction ordering the Defendants to vacate and deliver up possession to the Claimant of that part of the ground floor which the Defendants unlawfully took possession of on 1st April 2010.

(3) Damages for trespass.

(4) Damages for breach of contract against the First Defendant.

(5) The sum of $1,200,000.00 being rental lost for the period 1st April 2010 to 1st July 2010 plus any further sums found due and owing for lost rental since the 1st July 2010.

(6) An order for the First Defendant to vacate and deliver up possession of part of the ground floor of the office building.

(7) An order for the First Defendant to vacate and deliver up possession of the laundry building.

(8) As against the First Defendant the sum of $6.00 being rental for 6 years for part of the ground floor of the office building.

(9) The sum of $12,447,600.00 being maintenance charges.

(10) As against the First Defendant the sum of $6.00 being rental for 6 years for the laundry building.

(11) Interest pursuant to the Law reform [sic] (Miscellaneous Provisions) Act.

(12) Costs.

(13) Such further or other relief as this Honourable Court deems just."

[6] Further, in an application on 19 August 2010, the following relief was sought by the appellant:

"1. An order for a mandatory injunction until the trial of the action herein ordering the Defendants to vacate and deliver up possession to the Claimant of that part of the ground floor of the office building at Sylvia Lawn Ocho Rios in the parish of Saint Ann registered at Volume 1148 Folio 93 and [Volume] 1121 Folio 470 of the Register Book of Titles which the Defendants unlawfully took possession of on April 1, 2010.

2. An order that the Defendants pay the costs of this application."

[7] The learned judge, made the following order:

> "Coral has not made the case for an injunction and consequently the application for an injunction is dismissed with costs to the defendants to be agreed or taxed."

Grounds of appeal

[8] The grounds of appeal were stated as follows:

> "(a) The Learned Judge erred in finding as he did that the Appellant/Claimant had not adduced sufficient evidence to displace the conventional meaning of the words of paragraph 3 of the order of the Honourable Mr Justice Ellis made on June 23, 2008. The Learned Judge so erred for the following reasons:
>
> (1) The Amenity Areas Agreement which, was exhibited as RB2 to the First Affidavit of Mr. Radcliff Butler, placed an obligation on the Applicant/Claimant to grant leases to the First Respondent on the terms and conditions contained in draft leases annexed to the Amenity areas Agreement as Annexures C and D.
>
> (2) By paragraph 1 of the order of the Honourable Justice Ellis made on June 22, 2003 the said amenity Area Agreement was held to be a binding and enforceable contract between the Applicant and the First Respondent.
>
> (3) Clause 3 of Schedule to the lease, Annexed C, which the Applicant was bound to grant to the First Respondent, provides as following:-
>
> "ALL THAT portion of the ground floor of the office building erected upon part of the parcel of land situate at Sylvia Lawn, Ocho Rios, in the Parish of Saint Ann comprised in Certificate of Title registered at Volume [sic] Folio [sic] of the Registrar Book of Titles which premises

are more particularly delineated in red on The [sic] plan annexed hereto marked "A" TOGETHER WITH the right in common with the Lessor its servants, agents licensees and all other persons entitled to the like right to use the lobby passageway and toilets situate on the ground floor of the said office building".

(4) As a consequence of clause 3 above referring to "PORTION" as distinct from whole or entire the order of the Honourable Mr Justice Ellis must be construed as referring to a "PORTION" or part and not the whole of the ground floor. However, the Learned Judge would not have granted a greater than [sic] interest than provided in annexed C to the Amenity Area Agreement which he held to be binding and enforceable.

(b) The Learned Judge in erring as he did in ground of appeal (a) above also erred in finding that there was no serious issue or question to be tried (for the purposes of granting an injunction).

(c) The Learned Judge erred in finding that the Appellant having not appealed the order cannot get around the meaning of the order under the guise of seeking an interpretation of the order. The Learned Judge so erred for the following reasons:-

(i) The Appellant was not seeking to challenge the order of the Honourable Justice Ellis but merely asking for an interpretation of same which the Court has jurisdiction to do."

[9] A counter notice of appeal was filed by the respondents, the grounds of which have been couched in the following terms:

"(1) The decision/judgment of Ellis, J. made on the 23rd of June 1998 is lawful and binding and the principles of res judicata apply;

(2) The use in the Agreement of the word "part" which is relied upon by the Appellant cannot dispel the clear meaning and intent of Mr. Justice Ellis' Order that the office space would be for the exclusive occupation of the Respondents although the use of common areas such as the lobby, passageway and toilets would be shared with the Appellant, its servants, agents or licensees, there being a second floor to the building;

(3) Where the words are clear and there is nothing in the background material to dispel that meaning it will prevail, and a fortiori, where the background material provides a rational basis for the words actually used."

Submissions

[10] It was Mr McBean's submission that Sykes J erred in finding that there was no serious issue to be tried on the basis that sufficient evidence had not been adduced to displace the conventional meaning of the words in paragraph 3 of Ellis J's order. Sykes J, he argued, had jurisdiction to interpret the order and in interpreting it, he could have looked at the documents to decide whether there was an error in the language of the order, having regard to the fact that the contextual background does not make it clear. He relied on ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** [1998] 1 WLR 896 and ***Chartbrook Ltd v Persimmon Homes Ltd*** [2010] 1 P & CR, [2009] UKHL 38 among others, in support of this submission.

[11] It was also counsel's contention that the learned judge also erred in finding that the appellant having failed to appeal the order of Ellis J, cannot now

seek to circumvent the meaning of the order by seeking an interpretation of the order on the ground that the court has jurisdiction to interpret its orders.

[12] Clause 3 of the Amenity Area Agreement, he argued, places a duty on the appellant to grant leases to the 1st respondent on the terms and conditions specified in Annexures A and C of the agreement. Under the agreement, only a part of the office building on the ground floor was given to the 1st respondent, he submitted. Referring to a copy of the floor plan exhibited to an affidavit of Radcliffe Butler, counsel argued that this plan shows an area on the ground floor with diagonal lines which demonstrates that it should be shared by the appellant and the 1st respondent. Ellis J, he contended, in ordering that the 1st respondent should enjoy exclusive, undisturbed possession of the ground floor of the office building, would not have intended such possession to be applicable only to a part of the ground floor as the plan shows each party sharing the ground floor.

[13] Further, he argued there is a real likelihood of success of the appeal as something had gone wrong with the language of the order. Relying on ***National Commercial Bank Jamaica Limited v Olint Corporation Ltd***. [2009] UKPC 16, he submitted that the appellant would suffer greater prejudice than the respondents if an injunction is not granted as it has been in possession of part of the ground floor for 33 years and had been dispossessed of its income from that part of the building.

[14] Dr Barnett submitted that over the years, no challenge had been made to the order of Ellis J which was made in response to an application which had been fully argued by counsel for the parties. It was his further submission that a diagram exhibited to the 2nd respondent's affidavit of November 2010, shows a distinction between the office and the common area on the ground floor of the building. The delineation of the office is the subject matter of the exclusive possession and the 1st respondent had the right to occupy the office or the ground floor, he submitted. The laundry area to which Ellis J made reference, he argued, is not a part of the ground floor of the office building as it was situated in a different building and it was clear that Ellis J intended to accord the 1st respondent the exclusive right to possess it. Additionally, the only party having a right to the ground floor of the office building would be the 1st respondent, as delineated on the plan under the lease, he argued.

[15] It was counsel's further submission that the intention of the order of Ellis J is very clear. The word "exclusive" in the order shows that the office space is not to be shared and clearly, by the Amenity Area Agreement, that was the obvious intention of the parties, he argued. The terms of the lease must mean that they relate to the office and the appurtenants to the area, namely the vault and the reception area, he submitted.

[16] A rationale for the words used in Ellis J's order are provided for by the background material and the words, being plain and unambiguous, are binding

and will therefore prevail, counsel argued. Therefore, he submitted, the clear words of the order ought not to be disregarded. He cited ***Thompson v Goblin Hill Hotels Ltd*** [2011] UKPC 8, among others, in support of this submission.

Analysis

[17] In making a decision on an application for injunctive relief, the court is usually guided by the classical principles laid down by Lord Diplock in ***American Cyanamid Co v Ethicon*** [1975] AC 396, namely: there must be a serious issue to be tried; where there is a serious issue to be tried if damages are an adequate remedy and they can be paid, an injunction should not be granted. However, there are cases in which serious triable issues are raised and a claimant could be adequately compensated in damages. In such circumstances, consideration should be given to the balance of convenience as to whether or not an injunction should be granted.

[18] In ***National Commercial Bank v Olint Corporation***, the Board, while not departing from the principles in ***American Cyanamid Co*** was of the view that the basic principle is one which appears "least likely to result in irremediable prejudice to either party". At paragraph 17 Lord Hoffmann said:

> "In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The

> basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the American Cyanamid case [1975] AC 396,408:
>
> > "It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them."

[19] The critical issue in this appeal is whether the appellant has a case which raises a serious triable issue to warrant the grant of an injunction. The resolution of this issue rests on the question as to whether an examination of paragraph 3 of the order of Ellis J would force the court to embark upon an enquiry of the order to establish the meaning of the words therein and the intent of Ellis J when he conferred upon the 1st respondent, the right to enjoy exclusive possession of the ground floor of the office building and the laundry.

[20] The learned trial judge, at paragraph 12 of his judgment, in dealing with the issue, stated that:

> "The difficulty for Mr. McBean is that under the current law, a court properly construing the Amenity Area Agreement and the annexes can legitimately conclude that what the parties intended was to give [Proprietors Strata Plan] No. 73 exclusive possession of the entire ground floor even if one or all the documents used the word 'part'. This flows out of the logic of Lord Hoffman's [sic] five propositions in ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** [1998] 1 W.L.R. 896, 912 - 913:

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd [1997] A.C 749.

> *(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had."*

He went on to carry out an analysis of the propositions laid down by Lord Hoffmann and stated that they are applicable to virtually all documents.

[21] He further stated at paragraph 19, as follows:

> "These principles of contractual interpretation show that it was legitimate for Ellis J to have formed the reasonable view that despite the use of the word 'part' the parties meant to give exclusive possession of the ground floor to PSP No 73. The reason is that while courts do not lightly conclude that something has gone wrong with the language used in documents, especially formal documents and even more so in very formal documents such as court orders, it may well be that that is the case in a given circumstance. What Mr. McBean is asking this court to do is to reverse the conclusion of Ellis J. under the guise of construction of the order because it is being said that Ellis J's order properly construed could not really have meant what the conventional meaning suggests. In other words, something has gone wrong with the language of Ellis J. However, there is nothing in the context to suggest that this is the case."

The learned judge later said:

> "… the process of construction can give words a meaning other than their conventional meaning if the context demands such an outcome. That has not been demonstrated here. There is no serious issue arising on

> the construction of the order and even if there were, the case is not so strong so that this court can say that the risk of being wrong is low if an injunction was granted."

[22] The appellant has placed great emphasis on clause 3 of the Amenity Area Agreement and Annexure C to fortify its submission that the language of paragraph 3 of Ellis J's order requires construction and that the court is seized of jurisdiction so to do. It is an established rule that a court has jurisdiction to interpret documents. As can be readily observed, the principles by which a court should be guided in the interpretation of contracts, or other documents, or instruments are eminently outlined by Lord Hoffmann in ***Investors Compensation Scheme***.

[23] In ***Chartbrook,*** Lord Hoffmann, speaking to the question of construction of a contract or any other document, said at paragraph 14:

> " 14. *There is no dispute that the principles on which a contract (or any other instrument or utterance) should be interpreted are those summarised by the House of Lords in Investors Compensation Scheme Ltd v West Bromwich Building Society (No.1) [1998] 1 WLR 896, at 912-913. They are well known and need not be repeated. It is agreed that the question is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The House emphasised that 'we do not easily accept that people have made linguistic mistakes, particularly in formal documents" (similar statements will be found in Bank of Credit and Commerce International SA (In Liquidation) v Ali (No. 1) [2002] 1 AC 251, 269, Kirin-Amgen Inc v Hoechst Marion Roussel Ltd [2005] R.P.C 169, at 186 and Jumbo King Ltd v*

Faithful Properties Ltd (1999) 2 HKCFAR 279 at 296) but said that in some cases the context and background drove a court to the conclusion that 'something must have gone wrong with the language'. In such a case, the law did not require a court to attribute to the parties an intention which a reasonable person would not have understood them to have had."

[24] ***Chartbrook*** and ***Investors Compensation Scheme*** demonstrate that the object of interpreting the terms of a document is to discover the meaning which the words in the document would convey to a reasonable man who is seized of the background of all the known facts. There is a presumption that parties intend to use the words in a document. Such words should be construed as stated unless when viewed against the context and the background, a court is impelled to conclude that something went awry with the language of a document. The language of the document forms the substratum of the interpretation process. However, as distilled in ***Investors Compensation Scheme***, in interpreting a document, a distinction should be drawn between the meaning of a document and the meaning of its words. The background may assist in choosing between the meaning of words or may assist in concluding that the parties had erred syntactically or erred in employing the wrong words. However, Lord Hoffmann made it clear that it is not readily acceptable that linguistic mistakes are made and that words should be given their "natural and ordinary meaning".

[25] Mr McBean contended that the learned judge ought to have examined the order of Ellis J against the background of the Amenity Area Agreement and Annexure C to decide whether there was an error in the order. The real issue is whether the concerns of appellant would give rise to a serious question of construction of that paragraph of the order which the appellant disputes.

[26] It is clear from ***Investors Compensation Scheme*** and ***Chartbrook*** that the court will only engage in an exercise to investigate the meaning of the words in a document, if in its opinion, it is obvious that something was amiss with the language of the document. If it is evident that the words of a document portray a clear and logical meaning, the court will conclude that they carry their ordinary or traditional meaning. Where the court so concludes, the document remains binding. In ***Thompson and Another v Goblin Hill Hotels Ltd***, the Board, in construing a clause in a lease and a clause in an Article of Association, accorded to the words used in the respective clauses, their plain and ordinary meaning, pronouncing that the words in those documents could only be displaced if they produced a commercial absurdity and when read against the relevant background, the clauses could only be understood to bear their literal meaning.

[27] The order emanated from the Amenity Area Agreement and the Annexures which were before Ellis J. To undertake an interpretation of paragraph 3 of his order in the terms proposed by Mr McBean, it must be shown

that something went awry in Ellis J construing the documents which were before him. Paragraph 3 of the Amenity Area Agreement grants to the 1st respondent a lease of the office and laundry. In paragraph 3 of the agreement, specific reference is made to the office area which is embodied in a plan marked "A". "Plan A" is attached to Annexure C. The plan delineates in red, an area on the ground floor of the building, which houses the office. The designated area occupies all the ground floor of that building, save and except the lobby which is the common area. The laundry is not a part of the office building. It is located in a separate building to which reference is made in Annexure D.

[28] Ellis J's order is a formal document. Judicial authorities have shown that, ordinarily, linguistic mistakes are not made in formal documents - see ***Bank of Credit and Commerce International SA v Ali*** [2002] 1 AC 251. Although one is mindful that this proposition is not impervious, the court will only seek to interpret a document where, on its examination, within the background and the contextual milieu, it is observed that something went wrong with the language. In this case, there is no evidence showing that something had gone wrong with the language of paragraph 3 of Ellis J's order so as to impel this court to go behind it.

[29] There is nothing to show that, in assigning exclusive possession of the ground floor of the office building to the 1st respondent, Ellis J had made a mistake, or mistakenly omitted words, or included words, which he should have

excluded or incorporated in his order. When examined, the language of the order is clear. There are no linguistic difficulties arising from it requiring interpretation.

[30] It cannot be said that the words in the order would lead to an absurdity, or an inconsistency. Nor can they be viewed as repugnant. The order makes good sense. A reasonable man would conclude that paragraph 3 clearly and unequivocally expresses Ellis J's intention. As a matter of plain and ordinary language, the words of Ellis J's order granting exclusive possession of the office on the ground floor of the building to the 1st respondent are clear.

[31] Contrary to Mr McBean's submission, the learned judge rightly found that there was insufficient evidence before him to displace the conventional meaning of the words in paragraph 3 of the order. There is no evidence to indicate that the literal meaning of paragraph 3 of Ellis J's order is capable of being ousted by some other meaning to show that the ground floor of the office building should be shared by the appellant and the 1st respondent. It is without doubt that the order, when read against the relevant background, could only be reasonably understood to mean that which is depicted therein. That is, the 1st respondent should occupy the entire ground floor area of the office building as well as the laundry area.

[32] It is somewhat mystifying that the order of Ellis J had been made in 1998, the appellant was dissatisfied with it, sat back, did not appeal and 11 years after, it seeks to challenge a part of the order by inviting the court to construe it to

show that Ellis J meant something other than that which he had intended. If, as Mr McBean contends, Ellis J's order was wrong, it would have been incumbent on him to have had it tested on review by way of an appeal and not under the guise of construction as the learned judge rightly found. The learned judge was correct in finding that no genuine issue of construction arose.

[33] Clearly, the appellant has not demonstrated that the material before the court upon which it relies shows that there is a serious issue to be resolved at trial. This being so, the grant of an injunction would not be justified. The learned judge was undoubtedly correct in refusing the injunction.