GRENADA

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. GDAHCV2010/0157

BETWEEN:

ANDRE GARVEY

Claimant

and

GRENREAL PROPERTY CORPORATION LIMITED

Defendant

Appearances:
Ms. Dia Forrester for Claimant
Mr. Raymond Anthony for Defendant

2010: July 20
2012: January 17

RULING

[1] **PRICE FINDLAY, J.:** This is a claim brought by the Claimant by way of Fixed Date Claim Form for the following relief:

"STATEMENT OF CLAIM

1. The Claimant is, under a lease made the 1st November 2005, the Tenant of the Defendant of certain premises known as unit no. 103B, being part of the St. George's Cruise Terminal Building in the Town of Saint George, and from which unit the Claimant operated a retail store.
2. On or about the 24th March 2010 the Defendant, without the consent of the Claimant, entered the Claimant's said property and took possession of it by padlocking the entrance door.

3. This act by the Defendant amounted to a trespass by the Defendant and the trespass is continuing. As a result, the Claimant has been unable to use and enjoy his property and has thereby suffered loss and damage.
4. And the Claimant claims:
   a. Possession; and
   b. Damages for trespass."

[2] It arose out of a tenancy arrangement between the Claimant and the Defendant whereby the Claimant rented a unit from the Defendant for the purpose of a retail store.

[3] The Claimant applied for and was granted an injunction whereby the following orders were made:

"IT IS ORDERED THAT:

1. Grenreal Property Corporation Limited be restrained and an order is granted hereby restraining the said Grenreal Property Corporation Limited from denying the Claimant access to his shop known as Unit 103B situate at the St. George's Cruise Terminal Building situate at Melville Street in the City of Saint George of which the Claimant is a tenant of the Defendant.
2. That the Defendant do forthwith remove all locks placed by the Defendant on the entrance doors to the Claimant's said shop.
3. This matter shall be fixed for further consideration on the **27th day of April, 2010 at 9:00 o'clock in the forenoon.**
4. This Order shall expire on the **27th day of April, 2010** unless an Order is made upon further consideration of this matter.
5. Costs reserved."

[4] On the return date on the injunction, the 27th April 2010, the parties entered a Consent Order in the following terms:

"BY CONSENT

IT IS ORDERED THAT:

1. The Claimant shall continue to occupy the premises the subject matter of the lease made between the parties hereto and dated 1st November 2005, and on the terms of the said lease.
2. The Claimant shall pay to the Defendant the sum of $10,000.00 on account of the cost of supplying air conditioning in accordance with Clause 3(3) of the said lease.
3. The sum of $10,000.00 referred to in paragraph 2 above shall be paid in two equal installments on the 30th day of April 2010 and on the 31st May 2010.
4. That the parties do agree within 30 days the actual cost of supplying air conditioning in accordance with Clause 3(3) of the said lease failing which, either party shall be at liberty to apply to the Court for directions as to the procedure to be adopted to ascertain the said cost.
5. Liberty to both parties to apply generally.
6. Each party shall bear its own costs."

[5] The Defendant prior to the entry of the Consent Order had filed an acknowledgement of service dated 7th April 2010, and thereafter a defence dated 26th April 2010.

[6] The Consent Order having been entered the Defendant on 14th July 2010 filed an application seeking the following relief:

"The applicant/defendant, Grenreal Property Corporation Limited of Melville Street, St. George's in Grenada applies to the Court for an order that:

1. The Claimant's fixed date claim form and statement herein be dismissed.

2. The Defendant be given possession of Unit 1103B on or before 31st July 2010 or on such date as the Court deem just.

3. Judgment be entered for the Defendant in the sum of $13,138.02 on the ancillary claim filed on the 26th April 2010.

4. The Claimant pay the cost of the application and cost of this action."

[7] This application was supported by an affidavit of Winston Whyte, a director of the Defendant.

[8] On the 19th July 2010 the Claimant filed his own application seeking the following relief:

> "The Claimant/Respondent, Andre Garvey of Springs in the parish of Saint George applies to the Court for an order that the Notice of Application of the Defendant/Applicant filed on 14th July 2010 be struck out."

[9] Both applications were dealt with by way of written submissions as ordered by the Court on 20th July 2010.

[10] The first question for the Court to decide is: whether or not the Consent Order entered into by the parties on 27th April 2010 was a final or an interim order.

[11] The Defendant argues that the Order of 27th April was subject to the fulfillment of a condition, and the Claimant failed to fulfill the condition and invokes CPR 43.3 (2) (a) & (b) to its aid.

[12] They argue that the Claimant obtained the benefit of the Order by being allowed to continue in occupation of the premises but had failed to comply with the conditions of the Order.

[13] The Defendant argues that the Claimant has as a result lost the benefit of the Order having failed to comply with the conditions.

[14] The Defendant asserts that the Claimant failed to pay the sum of $10,000.00 as ordered and therefore is in default.

[15] However in the Claimant's application dated 19th July 2010, the Claimant, while admitting that the initial two cheque payments of $10,000.00 was dishonoured by the Bank, deposes that subsequent to the first cheques having been dishonoured, he tendered further cheques which were honoured by the Bank. That these payments were made and the cheques honoured is not disputed by the Defendant.

[16] The Defendant also asserts that the Order of 27th April 2010 was not a final order. They argue that the matters in the claim were not dealt with in the Order, that is, damages for trespass and whether the re-entry was lawful.

[17] They also rely on the provision in the Order for a return to the Court to work out the calculations for the payment of the air condition expenses (if necessary) as evidence that it was not a final order.

[18] The Claimant in their submissions assert that the Order of 27th April was a final Order and also argue that the Defendant cannot apply to have judgment on those settled issues unless the Consent Order has been set aside.

[19] The Claimant further argued that the Defendant had made no application for the enforcement of the Consent Order if they were of the view that it had been breached.

[20] Further that the term "liberty to apply" did not extend beyond seeking the Court's help in carrying out the terms of the Court's Order.

[21] Whether an order of the Court is final or interlocutory has been subject to two tests:-

(1) The application test, or

(2) The order test.

[22] Under the application test, an order would be considered final if it was made on an application which would have determined the matter in litigation for whichever side the decision was given.

[23] Under the order test, the order is final if it finally determines the issue in litigation, or disposed of the rights of the parties.

[24] Looking at the Consent Order of 27th April 2010, it is to my mind an order which clearly settles all of the issues raised by the parties to the litigation, both the claim of the Claimant and the counterclaim of the Defendant.

[25] The Claimant was allowed to continue in possession of the subject premises in accordance with the terms of the lease; arrangements were in place for the Claimant to pay sums to settle the outstanding air conditioning account.

[26] If the parties failed to agree on the actual cost of supplying air conditioning then they had liberty to apply for directions as to the procedure to be adopted to ascertain the cost.

[27] In **Shubrook v Tufnell** [1882] 9 Q.B 621 the Court held that an order was final if it finally determines the matter in litigation.

[28] In **Salaman v Warner** [1891] 1 Q.B 734 the Court held that a final order is one made on such an application or proceeding that for whichever side the decision is given, it will, if it stands finally determine the matter in litigation.

[29] When the parties to this matter prepared the Consent Order, the Court is of the view that both Counsel would have had their varying claims in mind, and would have arrived at the consent position presented to the Court knowing that the Order would have brought the proceedings to an end. In effect both sides compromised their claims to arrive at a settlement.

[30] This was not a Consent Order with respect to part of the proceedings; it was a Consent Order presented to the Court with the express intention of bringing the litigation to an end.

[31] In looking at all the circumstances of this case, I find that the Consent Order of 27th April 2010 was a final Order.

[32] I find that the Order addresses all the issues which were before the Court and as such the matters were all disposed of in that Order.

[33] I do not find that the Order was conditional upon anything being done or any step being taken by either party. Therefore, I find that CPR 43.3 (2) (a) & (b) does not apply in these circumstances.

[34] If the Claimant had failed to pay any money under the terms of the Order the Defendant could take steps to have the terms of the Order enforced. They have not done so.

[35] The Defendant cannot be allowed to re-open litigation, the subject matter of a final Order. The Defendant can either appeal or apply for the Order to be set aside if they are of the view that there was some illegality, misrepresentation, fraud or other reason for the order to be set aside.

[36] The term "liberty to apply" is according to Atkin's Encyclopedia of Court Forms Civil Proceedings 2nd Edition, Vol. 12, at para 13 states:

> "It is a useful precaution to provide in a consent judgment or order that the parties should have "liberty to apply", or "liberty to apply for the purpose of carrying the agreed terms into effect", or "liberty to apply generally". These words have the effect of enabling the court to do what is necessary to carry out the agreement of the parties as embodied in the terms of the order (e), for prima facie these words refer to the working out of the actual terms of the order (f). The court cannot alter or vary the agreement between the parties or the terms of the consent order under or by virtue of the words "liberty to apply" (g). Even the omission of the words "liberty to apply" from a consent order does not deprive the court of jurisdiction it would otherwise have had ..."

[37] In the circumstances, I make the following Orders:

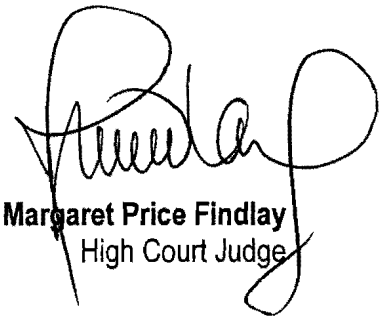
1. The application dated 14th July 2010 is hereby dismissed with costs of $750.00 to the Claimant.

2. The application dated 19th July 2010 is allowed, and the application of 14th July is struck out. Costs to the Claimant in the sum of $750.00.

[38] I wish to apologize to Counsel and to the litigants for the length of time it took for this judgment to be provided. I adopt the words of Michel J when he said he would penalize himself in costs but for the paucity of his judicial remuneration.

[39] It is a situation I intend to rectify and hope that it would not occur again in the future.

[40] I wish to thank Counsel for their insightful submissions.



Margaret Price Findlay
High Court Judge