REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

In the Tobago Sub- Registry

Claim No. CV2010-00433

BETWEEN

LENNOX GIFT

Claimant/Respondent

AND

OSWALD GIFT

1st Defendant/Applicant

CITY HARDWARE LTD

ECOCITI RESORT AND CONDOMINIUMS LTD

2nd and 3rd Defendants

0

Before the Hon. Madam Justice Eleanor J. Donaldson-Honeywell

Appearances:

Carol Ann Bernard, Attorney at Law for the Claimant/Respondent

Christo Gift, S.C. and Jocelyn Gift Attorneys at Law for the 1st Defendant/Applicant

Delivered on May 15, 2017

Ruling

A. Introduction

1. The subject matter of the instant Application is property of two family businesses owned by the Claimant and the 1st Defendant. The businesses in question are the 2nd and 3rd named Defendants herein. The parties benefited some four years ago from the dispensation of Justice in the substantive Claim herein. It was a Claim against the 1st Defendant under **Section 242 of the Companies Act, 1995** for restraint of oppression against him in the two family businesses.

2. In her October 24, 2012 Order Madam Justice Jones, as she then was, granted reliefs to the Claimant that in effect provided that his directorship and 50% share ownership in both companies were to be implemented. The 1st Defendant was restrained from dealing with the company accounts of the 2nd and 3rd Defendants without approval of the Directors which would include the Claimant.

3. Over the years since the Order was made it has only been partially honoured by the 1st Defendant. 50% shares were never issued to the Claimant and the Claimant says he continued to be kept out of all decision making for the family businesses. Concerns related to various properties owned by the businesses continued to occupy the attention of the parties. Eventually on May 8 2015 they entered into an Agreement on how to deal with two of the properties.

4. The 1st Defendant by the instant Application filed on January 13, 2017 seeks relief herein by invoking the 'Liberty to Apply' provision included at the end of the October 24, 2012 Order. The relief sought is the removal of a Lis pendens registered one month later on November 20, 2012 by the Claimant. The Lis pendens served as Notice to prospective purchasers about the underlying Claim that had been determined by the October 24 Order. The 2nd and 3rd Defendant companies owned various properties as aforementioned but the Lis pendens in question was in relation to a parcel of land situate at Sherwood Park in the Parish of St. Andrew, Tobago ["the Sherwood Property"].

5. The 1st Defendant has been trying to sell the Sherwood Property to pay off mortgage debts owed to Republic Bank Limited for which the said property was used as security. He was forced to repay deposits received under agreements for sale when prospective purchasers conducted title searches on the property and discovered the Lis pendens. His instant application to have the Lis pendens removed is geared to allowing for sale of the Sherwood property and thereby avoiding foreclosure by the Bank.

B. Issue for determination

6. The sole issue for determination herein is whether the Court has jurisdiction under the 'Liberty to Apply' Order made on October 24, 2012 to grant the relief claimed. I conclude having considered the Application, the evidence filed on both sides as well as written legal submissions filed herein, that the relief claimed by the 1st Defendant was not appropriately pursued under the 'Liberty to Apply' order. This is so because the relief sought in the Application bears no relation to the substantive relief reflected in the October 24, 2012 Order.

7. Furthermore, the 1st Defendant seeks to tie in the 2015 Agreement entered into by the parties as being connected to the earlier Order. He further contends that included therein should have been a provision in relation to the Sherwood Property similar to the provision whereunder the Claimant promised to remove a Lis pendens on other property owned by the 2nd and 3rd Defendant companies.

8. He says that the Claimant failed to let him know about the 2012 Lis pendens when the 2015 Agreement was executed. Whatever may have been the understandings between the parties over the years after the 2012 Order, the position of relevance to my decision herein is that there is no provision relating to the Sherwood Property in the Agreement they arrived at in 2015. Moreover the 2015 Agreement does not arise from the Order made in 2012 and is not connected with it. The 2015 Agreement is in fact premised on the failure of the 1st Defendant to comply with the

terms of the 2012 Order and it embodies the parties coming to certain other consensually agreed terms that have nothing to do with the 2012 Order.

9. In all the circumstances, more fully explained herein, the relief sought will not be granted.

C. Evidence and Submissions

10. On receipt of the Notice of Application filed by the 1st Defendant as well as the Affidavit of Oswald Gift dated January 13, 2017 directions were issued by order made in Chambers on January 27, 2017. The directions included permission for the Claimant to file an Affidavit in response. Thereafter the parties were directed to file written submissions by February 24, 2017. Only the Claimant complied with the directions.

11. In his Affidavit the Claimant gave a detailed account of the 1st Defendant's failure to fully comply with the 2012 Order by neither having shares issued nor sharing any information with the Claimant on the operations of the 2nd and 3rd Defendant companies. He further deponed that the 2015 Agreement had nothing to do with the Order made in 2012. He said it was merely to facilitate satisfaction of debts of the 1st Defendant secured by the Sherwood Property.

12. What was decided as reflected in the Agreement was that property once owned by the Claimant at Pascal Village would be returned to him, while property at All Fields, Lowlands would be conveyed to the 1st Defendant so that he could sell it and use the proceeds of sale to repay the mortgage over the Sherwood Property. There was no mention of the earlier Lis pendens that the Claimant had placed on the Sherwood Property since 2012 and the Claimant provided proof in his Affidavit that the 1st Defendant knew about that Lis pendens since 2012.

13. On the evidence presented it could not have been by oversight or non-disclosure that the Lis pendens on the Sherwood Property was not addressed in the 2015 Agreement. The Claimant wanted that property to remain in the ownership of the Defendants and his intention in signing the 2015 Agreement was to prevent it being foreclosed by allowing for sale of other properties to repay the debt owed to Republic Bank Ltd.

14. The Claimant further contends as summarized in his Written submissions that shortly after the signing of the 2015 Agreement, the First Defendant sought to sell the Sherwood Park Property, without informing the Claimant who is entitled to an equal share in the Company which owns those properties, as per the 2012 Court Order. Upon the refusal of the Claimant to remove the Lis pendens, "*having been conned and burnt by the First Defendant so often*", the latter filed this application.

15. In written submissions herein Counsel for the Claimant set out the law as it relates to recourse to a 'Liberty to Apply' provision in a Court's order. In so doing she underscored that the 1st Defendant's attempt to secure relief by such recourse was without merit. Counsel submitted that

> "*The liberty to apply provision is usually sought when assistance is required from the Court in working out the terms of an Order or Declaration. It does not enable the Court to deal with matters which do not arise in the course of working out the judgment, or to vary the terms of the order except possibly on proof of change of circumstances:* ***Lord Mackay in Halsbury's Laws of England, 4th ed, Vol 37 para 1228.*****"**

16. Applying this to the instant matter, Counsel opined that the terms of the 2012 Order were clear and simple in providing that the Claimant must be appointed as a Director of both Companies; he was also to have 50% of the shares of each Company transferred to him. How the parties chose to manage the assets of the Companies was beyond the scope of the 2012 Order.

17. Counsel underscored that the parties themselves varied the terms of the Order by the Agreement of May 2015. She argued that to come before the Court seeking relief for a perceived breach of contract which is unrelated to the Order is an abuse of the liberty to apply provision; an abuse which is compounded by the fact that the property in issue does not form a part of the Agreement.

18. She noted that the problem encountered by the 1st Defendant/Applicant is due to his own efforts to bilk the Respondent out of his 50% share of the proceeds of any sale of the Sherwood property. In an analogous case, **Koh Ewe Chee v Koh Hua Leong [2002] 3 SLR 643**, the parties were brothers involved in a partnership. On dissolution of the partnership, an application was granted to the Plaintiff to appoint two named receivers and managers to realize the properties. Shortly after, the Plaintiff applied under the 'liberty to apply' provision for an order that the Court declare the firm a sole proprietorship and to discharge the receivers and to order the Defendants to transfer title to him as they were now holding the property on a resulting trust.

19. The learned judge held that a 'liberty to apply' order was not the correct procedure since the order sought was not a minor improvement and was not the appropriate forum to unravel the dispute. He went on to say that:

> "*…the liberty to apply order is a judicial device not dissimilar to its procedural cousin 'the slip rule'. It is intended to supplement the main order in form and convenience only so that the main orders may be carried out. To this end, errors and omissions that do not affect the substance of the main orders may be corrected or augmented, but nothing must be done to change or vary the nature or substance of the main orders because the variation of orders are governed by other rules*…"

20. The position in Trinidad and Tobago may allow even less so than outlined in the case above as it relates to the existence of other rules by virtue of which a Judge's Order can be varied. **Part 48 of the CPR** deals with variation of Judgments for

payment of money but only in very limited circumstances concerning payment terms not relevant to the instant application. There are also CPR rules governing the variation of charging orders and stop orders which do not to apply to the present case.

21. Some precedent exists for variation of an Order based not on the CPR but on the Court's inherent jurisdiction. In **HCA 1735 of 2005 Integrity Commission v Attorney General** for example Jones J., as she then was, varied her Judgement after it was delivered. This was done however only because questions of ambiguity arose and she provided clarification by the variation order. Otherwise, the proper recourse is through the appellate process.

22. The 1st Defendant/applicant after being served with the Affidavit of the Claimant dated February 9, 2017 as well as the filed submissions of Counsel for the Claimant sought permission to respond to the Affidavit and an extension of time to file written submissions. Eventually the submissions of the 1st Defendant/Applicant were filed on April 10, 2017. The submissions failed to address the main points of concern herein that render the recourse to the Liberty to Apply provision in the 2012 order to obtain further relief in appropriate. Specifically the submission failed to show either how the relief sought or the 2015 Agreement on which it is premised are connected with the 2012 order.

D. Conclusion

23. It is my finding that this application has nothing to do with the original order of 24th October 2012 and does not fall within the ambit of that Order. The First Defendant cannot ask the Court for an order to compel the Claimant to do something which is not a part of or related to the original order. If what the Claimant sought was variation of the 2012 Order to address matters related to disposal of property owned by the 2nd and 3rd Defendant Companies, recourse to the Liberty to Apply order was not the appropriate procedure. Furthermore any proceedings to obtain relief for breach of the 2015 Agreement would amount to a cause of action separate and distinct from the instant Claim.

24. As to the removal of the lis pendens, it is clear that its purpose was to prevent the sale of the Sherwood Property without consultation with the Claimant. It therefore serves as a means by the Claimant to enforce the terms of the 2012 Order granting him that entitlement to be consulted which were being breached by the 1st Defendant. It is my finding that removal of the lis pendens in the circumstances of this case could only be premised on and would therefore amount to a substantial reversal of the 2012 Order. Such a reversal would be outside the scope of the 'Liberty to Apply' remit of the Court.

25. In any event the Court's power to remove a lis pendens is very limited. This was made clear in **CV 2013-2030 Roberts v Taylor** where the following principles were distilled from analysis of lis pendens cases by Madam Justice Dean-Armorer:

    (i) The lis pendens does not confer an interest in land, but provides notice to the world that the title of the registered owner is being questioned.

    (ii) The principal effect of the lis pendens to provide constructive notice to purchasers who will not be able to contend that they were bona fide purchasers for value without notice.

    (iii) The Court has no statutory power to discharge a lis pendens, but may vacate it, pursuant to the Court's inherent jurisdiction as an abuse of the Court's process – See M-865 of 1977 **Susan Ramsay Moore Acton v. Alexander Acton**

    (iv) The Court will only vacate the lis pendens where it is clear that the plaintiff's claim can in no circumstances give him a right to interest in land.

26. The circumstances of this case are not appropriate for the variation of the earlier Order to be granted pursuant to the Liberty to Apply provision therein. Additionally there is no clear basis for removal of the lis pendens as it cannot be said that the Claimant/Respondent cannot claim an interest in the Sherwood Property. The 1st Defendant/Applicant must comply with the Order made on October 24, 2012

whereby the Claimant, as an intended director/shareholder, has an interest in the Sherwood Property.

27. Accordingly, the Notice of Application is dismissed and the 1st Defendant is to pay the costs of the Application to be assessed by the Registrar if not agreed.

……

Eleanor Joye Donaldson-Honeywell

Judge

Assisted by:

Christie Borely

Judicial Research Counsel