THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2015-00490

BETWEEN

P&R MAHARAJ AND SONS LIMITED

TARA KATAKI MAHARAJ

Claimants

AND

F.W. HICKSON & COMPANY LIMITED

FREDERICK HICKSON

MITRA RAMKHELAWAN

Defendants

Before the Honourable Mr. Justice Frank Seepersad

Appearances:

1. Mr. W. Seenath, Ms. V. Gayadeen for the Claimants
2. Mr. K. Thompson for the First Defendant
3. Mr. E. Koylass S.C leds Ms. D. Roopchand Ms. N. Sharma for the Second and Third Defendants

Date of Delivery: June 28, 2017

DECISION

1. Before the Court for its determination are the consolidated matters CV 2015-00490 (the first matter) and CV 2015-01774 (the second matter). It was however agreed that the Court would first determine the first matter as the outcome of same may affect the course to be adopted in relation to the second matter.

Procedural History

2. On 13th February, 2015, the Claimants in the First matter filed a Notice of Application seeking injunctive relief supported by the affidavit of the Second Claimant along with Claim Form and Statement of Case. On 11th March, 2015, two affidavits were filed in opposition to the application on behalf of the First/ Second Defendant, namely, those of Frederick Hickson and Leary Ballah. On 11th March, 2015 the Third Defendant also filed an affidavit in opposition to the application for injunctive relief.

3. The Claimants claimed that its quarry situate at Granby Hill, Studley Park, Tobago ('the quarry') was by Deed of Lease dated 4th October, 2010, (the Lease), was leased to the First Defendant for ten years subject to an annual lease rent of $20,000. On the 15th October, 2014, the First Claimant re-entered the quarry and determined the lease by letter dated 22nd October, 2014. The First Claimant claimed that the First Defendant failed to pay the yearly payment on 1st October, 2014. The First Claimant claimed that the First Defendant breached the lease in failing to commence operations on the quarry since the inception of the Lease and thereby failed to pay the First Claimant sums due, namely $7.50 per cubic yard of material. Further, the First Defendant failed to follow up on its electricity application and failed to keep proper books of account.

4. The First/Second Defendant's defence stated interalia that the failure to commence operations and to pay was due to the absence of the grant of the required permits and approvals and/or the First Claimant's failure to have the lessee noted on the existing permits. Further, the First/Second Defendants pleaded that they made extensive efforts to pay the yearly payment but that the Second Claimant and another director of the First Claimant refused to accept same. Nevertheless, the First/Second Defendants claimed that the rent was eventually paid into the Second Claimant's account on 29th October, 2014.

5. The First Claimant's claim against the Third Defendant is that on 17th and 22nd October, 2014, he/his servants or agents trespassed unto the quarry to commence operations thereon and that the Third Defendant employed watchmen so as to exclude the Second Claimant from the quarry.

6. The Third Defendant in his Defence denied the trespass and explained that he is a quarry consultant with whom the Second Claimant consulted prior to her re-entry unto the quarry and that his advice was sought on issues in relation to the termination of the lease. The Third Defendant asserted that having conducted company searches he discovered irregularities in the Second Claimants status with the First Claimant.

7. The matters were initially before another Court and it was ordered on the 23rd March, 2015 as follows:

    (1) The Third Defendant without prejudice to his contention that he is not a proper party to the action undertakes not to enter the subject premises until the trial of this action or until further order, and,

    (2) the First and Second Defendant undertake to refrain from blasting, excavating or removing material from the quarry site until trial or until further order.

8. On 4th May, 2015, the Third Defendant filed an application for Summary

Judgment and a supporting affidavit. No affidavit was filed in opposition. On the 4th and 6th May, 2015 the Third Defendant and First/ Second Defendants respectively filed Defences. On 20th May, 2015, the Claimants filed a Reply. The summary judgment application was not determined by the Court.

9. On 27th July, 2015, the previous Court struck out inter alia 'Frederick Hickson' as a party to the proceedings.

10. On 19th October, 2015, the Claimants filed its Reply stating that F.W.Hickson and HJJ were not operating illegally because F.W.Hickson was in possession of a Blasting Permit and further was entitled to mine while its licence was 'in process' as authorized by the Ministry of Energy.

11. On 23rd November, the previous Court recused itself from hearing the instant matter and the second matter.

Background facts

12. By a deed dated the 4th day of October 2010, the First Claimant granted to the First Defendant a lease of certain lands situate at Studley Park in the island of Tobago for the purpose of carrying out certain quarrying functions for a period of ten years at an annual lease rent of $20,000.00 and the First Defendant took possession of the demised property soon after the lease was executed.

13. Prior to the execution of the deed of lease, the First Defendant executed with Mr. Ramnath Maharaj, the husband of the Second Claimant and a director of the Frist Claimant, a Memorandum of Understanding (MOU) dated the 5th day of April 2010.

14. On the 15th day of October 2014, the First claimant acting though the Second Claimant purported to determine the lease by entering the demised premises and took control of the same and cited alleged breaches on the part of the First Defendant which breaches it claimed were communicated to the First Defendant by several items of correspondence but ignored.

15. The Claimants allegedly sent letters to the First Defendant and one of the letters sent

to the Frist Defendant with respect to the alleged breaches, was dated the 2nd day of October 2013. Further, according to the Claimants, the purported determination of the lease was communicated to the First Defendant by letter dated the 22nd day of October 2014, seven days after the Claimants sought to take possession of the demised premises.

Issues

16. The issues which arose for the Court's determination are as follows:

    a. Whether the terms of the Memorandum of Understanding (MOU) should be incorporated into the lease and/or whether it should be read in conjunction with the lease.

    b. Whether there were breaches of various clauses of the leases mainly clauses 2(a), 2 (c), 2(f), 2 (g), 2(h), 2(k), 3(b), 4(a), 4(c), 4(d), 4(g) and 4(h).

    c. If the MOU does form part of the contractual relationship as between the parties, whether the Claimants failed to have effected amendments to existing permits to reflect that the First Defendant was the operator of the quarry and whether the Claimants failed to follow up with the application for electricity with T&TEC.

    d. Whether the Claimants properly determined the leasee

    e. Whether the Second Claimant's placement of a padlock on the gate to the premises was justified and whether the Claimants re-entry into possession of the premises was justified.

    f. Whether or not the Claimants accepted lease rent by way of deposit into a banking account held in the name of the Second named Claimant.

g. Whether the Third Defendant in the Frist action committed an act or acts of trespass.

h. Whether the Claimants are entitled to damages.

i. Whether the First Defendant is entitled to exclusive possession of the demised premises.

j. Whether the First Defendant is entitled to damages as a result of the actions of the Claimants.

The Relevant Clauses in the Lease

17. The relevant clauses in the lease to can be summarized as follows:

i. 2(a)The obligation to pay annual lease rent.

ii. 2(c) – "to fulfill all relevant statutory obligations under the law and to comply with all obligations imposed under or by virtue of any Act or Acts of Parliament for the time being in force, do and execute or cause to be done and executed all such works, acts, deeds, matters and things under or by virtue of any such Act or Acts are or shall be properly directed or necessary to be done or executed in or in respect of the Demised Premises or any part thereof and at all times shall keep he Lessor indemnified against all claims demands and liability in respect thereof".

iii. 2(f) – the lessee ought not assign, demise, underlet or otherwise part with possession of any part of the demised premises or to permit others to utilize same in whole or any part thereof for all or any of the said term without the consent in writing of the lessor first hand and obtained, such consent not to be unreasonably withheld.

iv. 2(g) – the obligation to "during the first three years of the term to pay to the lessor $7.50 per cubic yard or thereabouts per year of material placed in the primary jaw crusher."

v. 2(h) – To keep proper books of accounts.

vi. 2(k) – To follow up and carry into effect the approval and implementation of the three phase electricity application lodged with the Trinidad and Tobago Electricity Commission in respect of the demised premises.

vii. 3(b) – Which provided that the Claimant had to amend or cause to be amended all permits so as to have the 1st Defendant noted as the authorized operator of the quarry.

viii. 4(a) – If the Lessee shall cease operations on the demised premises for any reason whatsoever for a period of 6 months then and in any of the said cases it shall be lawful for the lessor at any time thereafter and notwithstanding the waiver of any previous right of re-entry to re-enter into and upon the demised premises.

ix. 4(c) – Written communications from the Claimant to the Frist Defendant are required to be effected by registered mail.

x. 4(d) – Ultimately disputes between the parties was to be referred to arbitration.

<u>Resolution of the issues</u>

Were there breaches of the lease?

18. It was evident to the Court that neither the pleadings nor the evidence adduced at the trial established that the 1st named Defendant commenced mining operations at the quarry.

19. Based on the uncontroverted evidence before the Court, a Memorandum of Understanding dated 5th April, 2010 was arrived at as between the 1st Defendant and the 2nd Claimant's now deceased husband and the said document provided for terms which the 1st Defendant contends should govern the business relationships between the parties with respect to the quarry's operations. The Court therefore considered whether the terms of the said MOU should be implied into the lease or whether they could be read in

conjunction with the lease and to enable this determination it had regard to the following cases.

20. In **Shirlaw v. Southern Foundries Limited (1939 2 K.B. 206)**, Mac Kinnon LJ stated, the "officious bystander test" for determining whether a term should be implied in fact. At page 227, the learned judge said, "Prima facie that which in any contract is to be implied and need not to be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common "Oh, of course!".

21. In **Imperial Oil Ltd v Young (1998) Canlii 18026**. At paragraphs 136 and 137 the Court explained that the proper approach to interpretation of a contract is to examine the words used, considered in their context , both in relation to the other language of the agreement and the factual background surrounding the making of the agreement. Further, the Court noted that the time for applying the literalist approach to interpretation has long passed.

22. **An application of either of the aforesaid tests, results in a circumstance where this Court is of the view that the terms of the MOU were in fact implied and incorporated into the lease and that without such an implication the lease lacked the cloak and colour of the requisite agreed business characteristics. In addition it would not have been legally possible for the 1st Defendant to discharge the obligations as set out under the lease until the various licenses and requisite approvals which are mandated under the law, were obtained. The 1st Defendant had to obtain interalia a blasting permit, a quarrying certificate and an environmental management agency clearance certificate so as to commence operations. Clause 2(c) of the lease expressly provided that the 1st Defendant had to obtain the requisite licenses and approvals, accordingly, the commencement of any mining operations was contingent upon the obtaining of the requisite approvals and without same, it would have been unlawful for the Defendant to commence operations of the quarry. The obligation, therefore, to pay $7.5 per cubic yard of**

material would only have arisen when the quarry became functional. While the Court recognizes that the Claimants may have had the expectation that hundreds of thousands if not millions of dollars could have been generated as 'royalties' from the quarry, these payments could have only commenced when the quarry became functional, a reality that still has not materialized.

23. No evidence was adduced before this Court so as to establish that the quarry was in fact functional prior to the institution of the instant proceedings. Given the circumstances Clause 4 (a) of the lease could not have applied as the "ceasing of operations" was contingent upon the "commencement of operations". Clause 4 (a) was predicated upon the actual operation of the demised premises as a quarry and the factual matrix clearly established that operations never commenced as the pre requisites to enable such commencement have not yet been granted by the various departments and/or agencies being bodies over which the 1st Defendant has no control. It does appear however that the process to obtain the requisite approvals is shrouded in bureaucracy, is long, complicated and potentially frustrating. In the context that this Republic is blessed to have many natural resources and given the need to find alternative sources of revenue, there is a need for an urgent review of the current process to enable the issue of the requisite grants and approval for mining operations so that the process does not frustrate persons who may wish to pursue the viability of quarrying operations.

24. With respect to clause 2(k), the 1st Defendant in its evidence and pleadings said that it made to the Trinidad and Tobago Electricity Commission (T&TEC) the requisite application for the electricity supply but did not obtained approval for the same. During his cross examination, Mr. Frederick Hickson, said that the application for the electricity supply was before T&TEC and in cross examination, Mrs. Maharaj stated that while her husband was following up the electricity supply with T&TEC, he fell ill and the process was not finished.

25. The lease clearly provides for the payment by the lessee of the annual sum of $20,000.00 and the Claimants alleged that the 1st Defendant breached this obligation and that such breach also triggered the Claimants' right of re-entry.

26. The 1st Defendant's case is that the annual lease rent was paid but that Mrs. Maharaj attempted to evade the receipt of payment of the said sum for the year 2014 and as a result Mr. Hickson deposited the sum into her bank account. In her evidence during cross examination, Mrs. Maharaj admitted that the said sum of $20,000.00 was paid into her account but said that it was not paid by Mr. Hickson but by someone else.

27. The Court found that Mr. Hickson's version of the events with respect to the attempts to pay the lease rent was plausible and probable as it generally found that he proved himself to be a man of candour. The Court formed the unshakable view that he was frank, forthright and forthcoming and on a balance of probabilities, found as a fact that the 2nd Claimant did attempt to evade collection of the lease rent for 2014 and that as a consequence of her actions the rent was deposited into her Republic Bank Account which was held at the Siparia Branch.

28. The Court found that Mr. Hickson was not evasive nor did he demonstrate a lack of knowledge with respect to varied aspects of the 1st Defendant's operations. The Court also found that it was highly probable that he may not have had within the remit of his own knowledge the names of the various companies with whom the 1st Defendant interacted and from whom equipment may have been sourced or information as the antecedent associated costs and the Court felt that it was probable and plausible that such information may have been known by the 1st Defendant's accountant.

29. Consistent with what was pleaded at paragraph 16 of the 1st Defendant's defence, a deposit slip for $20,000.00 was provided and the 2nd Claimant accepted that $20,000.00 was deposited into her personal account. At paragraphs 77 to 81 of her witness statement the 2nd Claimant gave evidence as to a deposit of $20,000.00 into her savings account at Scotia Bank Tobago. The Court on a balance of probabilities was disinclined to accept Mrs. Maharaj's evidence that the 2nd Defendant did not make a deposit of $20,000.00 into

her account and was not satisfied with her explanation as to how the money was paid, more importantly, the Court found that the important factor was that the lease obligation for the annual rent was actually discharged. The Court therefore found as a fact that no rent was in arrears when the Claimant issued the letter on the 22nd October, 2014. Even if the Court's finding of fact on this issue is wrong, the Court is of the view that the evidence established that the "termination" letter was not duly served by registered mail in accordance with the provisions of Claus 4 (c) of the lease. The Court therefore accepted the position as advanced by the 1st Defendant that no notice of any alleged breach was ever received prior to the Claimants attempt to reenter and take control of the demised premises.

30. Pursuant to Section 70 of the Conveyancing and Law of Property Act Chapter 27.12, a right of re-entry in a lease for a breach of any covenant or condition in the lease shall not be enforceable unless certain conditions are fulfilled with regard to notice. The notice must:

    a. Specify the particular breach complained of,

    b. If the breach is capable of a remedy a call upon the lessee to remedy the breach must be made

    c. In any case it is required that an opportunity should be given to the lessee to make monetary compensation for the breach.

    d. It is only if the lessee fails to comply that the re-entry should occur.

31. Having considered all the relevant provisions of the lease, the MOU and Section 70 of the Conveyancing and Law of Property Act Chapter 27.12 the Court found as a fact that there was no breach of the operative contractual provisions by the 1st Defendant which justified and/or enabled the reentry by the Claimants unto the demised premises and by virtue of which the term of years as provided for under the lease, in relation to the demised premises, could have lawfully been determined.

32. The next issue to which the Court addressed its mind was whether the 3rd Defendant committed an act of trespass.

33. In the witness statement of Mrs. Maharaj, the allegations of trespass against the 3rd Defendant was not limited to him in a personal capacity but extended to his servants and/or agents. The previous court who was seized of the matter, struck out her evidence in relation to 'servants and/or agents' and the only aspect of the evidence retained in the witness statement was that which directly related to the 3rd Defendant. Having considered the evidence, the Court formed the view that no probative evidence was adduced so as to establish that the 3rd Defendant was seen on the demised premises on the days of the alleged trespass. Mrs. Maharaj expressly stated in cross examination that she never saw Mr. Ramkhelawan and any information which she sought to advance was based on what was told to her. The Claimant also failed to establish on a balance of probabilities that persons over whom the 3rd Defendant exercised control were on the lands and the witness stated that she never saw a Mr. Baboolal (who was an alleged servant and/or agent of the 3rd Defendant) nor did she see the 3rd Defendant's vehicle.

34. At the trial the 3rd Defendant elected not to give evidence and a no case submission was advanced. The Court formed the view that the said submission was not devoid of merit. The Claimants failed to adduce probative or credible evidence in support of their pleaded case of trespass and therefore did not discharge the burden of proof that rested upon their shoulders. Therefore the 3rd Defendant has no case to answer. Accordingly the Claimant's claim in relation to the 3rd Defendant must be and is hereby dismissed and in the circumstances the 3rd Defendant's application for summary judgement is dismissed with no order as to costs, but the Claimants shall pay to the 3rd Defendant costs on the Claim.

35. The Court also formed the view that the Claimants' claim for damages for breach of contract is devoid or merit and on a balance of probabilities must be and is hereby dismissed. As stated earlier in this judgment the Court found that no evidence was adduced so as to establish that the 1st Defendant breached any term of the lease or the

MOU. The evidence established that Mrs. Maharaj had in fact engaged the 3rd Defendant as a Quarry Consultant and she sought to do so although she was not at the time one of the 1st Claimant's directors and in circumstances where the 1st Defendant was the bona fide lessee. The Claimants also failed to adduce any evidence so as to contradict the assertions as advanced by the 1st Defendant and the Court found that the Claimants re-entry unto the demised premises was unlawful.

36. For the reasons that have been outlined the Claimants claim as against the 1st Defendant is dismissed.

37. On the 1st Defendant's counterclaim, the lease in relation to the demised premises is still subsisting. The 1st Defendant must pay to the Claimants all the arrears of lease rent that is owed and the 1st Defendant is entitled to exclusive possession of the demised premises for the unexpired residue of the 10 year term created under the Deed of Lease. The court further declares that the terms of the Memorandum of Understanding dated 5th April, 2010 are to be incorporated into and read in conjunction with the Deed of Lease.

38. On the evidence adduced there exists no circumstance that can enable the Court to grant an award of damages to the 1st Defendant, as the requisite permissions, licenses, permits and/or approvals have not yet been obtained and therefore the quarry cannot be operationalized and no evidence has been adduced to satisfy the Court that any revenue from the quarry was generated prior to the 15th October, 2014.

39. Having regard to the events as they unfolded the Court is of the view that injunctive relief is required and the Claimants are hereby restricted by themselves, their servants and/or agents from preventing the 1st Defendant its servants and or agent from entering and/or remaining upon the said demised lands for the unexpired residue of the ten years created under the Deed of Lease.

40. The Claimants shall also pay the 1st Defendant costs on the claim and counterclaim and the parties shall be heard in relation to the appropriate quantum of costs both on the claim, counterclaim and in relation to the injunctive proceedings which were filed.

____

FRANK SEEPERSAD

JUDGE