COMMONWEALTH OF THE BAHAMAS **2018/CLE/gen/01046**

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

BETWEEN:

EDNOL FARQUHARSON **APPLICANT**

AND

KAREN HAMILTON **RESPONDENT**

Before: **The Honourable Mr. Justice Keith H. Thompson**

Appearances: **Attorney Nicholas Mitchell for the Plaintiff**
Attorney Margaret Gonsalves-Sabola for the Defendant

Hearing Date: **1st February, 2019**

J U D G M E N T

[1] This is an application by way of Summons issued on September, 21st 2018 (the Summons) filed on behalf of the Respondent. It is supported by an Affidavit sworn by Karen Hamilton the Respondent herein.

[2] This application is made pursuant to the Rules of the Supreme Court (RSC) Order 32, rule 6, which states;

"The court may set aside an order made ex-parte."

[3] The Summons seeks the following;

(i) That the Order made on the 12th September, 2018 and filed herein on the 13th day of September, A.D., 2018 (the Eviction Order) be set aside on the grounds that;

(a) There was material non-disclosure on the part of the Applicant as a result of which this Honourable Court was misled into making the Eviction Order, and

(b) There was no urgency which warranted the making of the Eviction Order on an *ex*-parte basis.

(ii) That there be an inquiry into the damage sustained by the Respondent as a result of the granting of the Eviction Order, and

(iii) That the costs of the application be borne by the Applicant, such costs to be taxed if not agreed.

[4] The application for injunctive relief was by way of Ex-Parte Summons filed on September 11th, 2018 supported by the Affidavit of Renee Farquharson also filed on September 11th, 2018.

[5] The Order prayed for pursuant to the Ex-Parte Summons was perfected on the 13th September, 2018. That Order is set out below:

COMMONWEALTH OF THE BAHAMAS

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CLE/gen/01046/

2018

EDNOL FARQUHARSON

APPLICANT

AND

KAREN HAMILTON

JHMM 13/09/18

RESPONDENT

Grant Thompson 13 September 2018.

ORDER

BEFORE Mrs. Justice Cheryl Grant-Thompson, Justice of the Supreme Court, in Chambers situated Swift Justice Building, Bank Lane, Nassau, New Providence, The Bahamas:

Dated the 12th September 2018

UPON APPLICATION by the Applicant by way of Ex-Parte Summons filed 11th September 2018

UPON READING: The Affidavit of Renee Farquharson filed 11th September 2018

UPON HEARING: I.A. Nicholas Mitchell of Counsel for the Applicant

AND the Applicant by its Counsel undertakes to abide by any Order that this Honourable Court may make as to damages in case the Court shall hereafter be of the opinion that the Defendants have sustained any damage by reason of this Order which the Plaintiff ought to pay

IT IS HEREBY ORDERED THAT

1. The Respondent gives Vacant Possession to the Applicant of the subject premises situate in Mount Vernon known as Lot #29 **immediately;**

2. The Respondent is at liberty to apply and must give Counsel for the Plaintiff at least Two (2) clear days' notice of any such application.

REGISTRAR"

[6] The substantive grounds on which the application to set aside as prayed for by the Respondent are;

Substantive Grounds for this Application

4. It is submitted that the Eviction Order ought to be set aside on the following grounds:-
   (1) The Applicant's material non-disclosure or failure to provide full and frank disclosure on the *ex parte* hearing,
   (2) The Applicant's failure to comply with RSC Order 29 rule 1(3),
   (3) Lack of urgency, and
   (4) Abuse of the *ex parte* procedure.

Material Non-Disclosure

5. **The Applicant did not adhere to his duty to provide full and frank disclosure to the Court of all material matters. The matters not disclosed to the Court in the *ex parte* application were numerous**

and material to the Court's decision whether or not to grant injunctive relief. The material non-disclosures include:

(a) Failing to disclose to the Court that at the time the *ex parte* application was made, no originating process had been issued out of the Supreme Court Registry on behalf of the Applicant and there were no substantive proceedings pending before the Court. Bahamian courts have no jurisdiction to grant free-standing injunctions:

***Meespierson (Bahamas) Ltd. v. Grupo Toras SA [1999]* BHS J No. 31**

***Bimini Blue Coalition Limited v. Christie Prime Minister of The Commonwealth of The Bahamas (in his capacity as the Minister Responsible for Crown Lands) and others – [2014] 1* BHS J 153.**

(b) Failing to disclose to the Court that the proceedings brought by the Applicant in the Magistrates Court seeking an order for vacant possession were dismissed by the Magistrate due to the existence of the arbitration clause in the Purchase Agreement which requires the parties to settle all disputes by arbitration. The arbitration clause was actually deleted from the copy of the Purchase Agreement produced to the Court. In the circumstances, the Court was not made aware that the Applicant was not at liberty to pursue any claim under the Purchase Agreement in the Supreme Court. Despite the Applicant's submission to arbitration under the Purchase Agreement, the Farquharson Affidavit avers at paragraph 9 that it was always the Applicant's intention to pursue a claim in the Supreme Court for debt/arrears. The affiant did not draw the Court's attention to the provision for arbitration.

(c) **Misrepresenting to the Court the nature of the Purchase Agreement entered into between the parties and the true legal relationship of the parties as described in the Purchase Agreement. Specifically, the Farquharson Affidavit stated untruthfully that the Purchase Agreement was a Lease or a Lease-to-Own Agreement when the document was in fact a Purchase Agreement. The title of the document was deleted in the copy produced to the Court on the *ex parte* application.**

(d) **Misleading the Court in the Farquharson Affidavit by describing the Applicant as the "Landlord" and the Respondent as the "Tenant" when those descriptions appear nowhere in the Purchase Agreement. The parties to the Purchase Agreement were clearly described in the Purchase Agreement as "Seller" and "Purchaser".**

(e) **Representing to the Court as true a document that was substantially altered by the deletion of material provisions of the Purchase Agreement. The deletions occurred on every page of the purchase Agreement. RF-1 is anything but a true copy of the Purchase Agreement.**

(f) **Falsely stating to the Court at paragraphs 7 and 9 of the Farquharson Affidavit that the Respondent had not remitted any part of the "rental" funds since June 2017 and that she "remains obstinate and intent on residing in the premises without paying rent." This statement is not only incorrect but is refuted by the by the Applicant's own evidence at paragraph 10 of his Supplemental Affidavit filed on 17th December, 2018 when he admits that he closed the bank account into which the Respondent deposited payments to prevent the Respondent**

from making any further payments. This fact was not disclosed to the Court on the interlocutory *ex parte* application.

(g) Placing before the Court partial or incomplete evidence as to the totality of the payments made by the Respondent up to the date of the *ex parte* hearing."

DISCUSSION

MATERIAL NON-DISCLOSURE

[7] The Respondent alleges that at the time of the *ex parte* application no originating process had been issued out of the Supreme Court's Registry on behalf of the Applicant. In this regard, the Respondent says that there were no substantive proceedings pending before the Court.

[8] We agree with this ground. The *Ex parte* Summons was filed on September 11th, 2018 and supported by an Affidavit of Renee Farquharson in support thereof also filed on September 11th, 2018.

[9] The Writ of Summons which in this case would have been the originating process was only filed on December 03rd, 2018 almost some three (3) months subsequent to the *ex parte* Summons. This speaks for itself. In the case of MEESPIERSON (BAHAMAS) LTD. V. GRUPO TORAS SA. [1999] BHS J. No. 31 (supra). Gonsalves-Sabola P. stated at paragraphs c, d and e, page 637:

"I am concluding this judgment with certain broad commonsense observations on the importance of the

requirement of substantive domestic proceedings on a justiciable cause of action as the basis of Mareva relief. In the first place, no person who does not have a cause of action within the jurisdiction ought to be able to invoke the court's assistance to restrain another person's control over that person's own assets. No one would contend that a Mareva injunction which imposes such a restraint should be available on demand. A seeker of it must be able to make a case for such extraordinary relief. The essential nature of the Mareva is that it is interlocutory. It essentially derives from substantive proceedings as ancillary relief. If it did not so derive there would be a lack of logic in the legal sense, of its grant. The court which is applied to for Mareva relief would not be able to have in view a prospective judgment whose probability, or even possibility, could be used as a touchstone to determine whether it was just and convenient to grant the relief."

[10] In the very same decision (Meespierson) (supra) Carey J.A. said at page 645 paragraphs a, b and c;

"In my view, it is settled law that a Mareva injunction will not be granted to any applicant who has no cause of action against a defendant at the time of the application. See Beldam LJ in *The Veractuz Transportation Inc v VC Shipping Co Inc and Den Norskee Bank A/s , The Veractuz [1992] 1 Lloyd's Rep 353 at 358 citing with approval the words of Bingham J in Siporex Trade SA v Comdel Commodities Ltd [1986] 2 Lloyd's Rep 428at 436. The views of Lord Nicholls, it must be said, are not only attractive, but are very appropriate on this jurisdiction which is*

an important off-shore banking country, but those views do not represent the law as I understand it to be at the present time.

I am driven therefore to hold that the learned judge had fallen into error and accordingly her ruling must be set aside. The appeal should therefore be allowed with costs, both here and below, to the appellants, to be taxed if not agreed.

[11] Hall J.A. in the Meespierson case (supra) said at page 647 paragraphs c-h:

"Mr. Barnett poses the question before us as being simply;

> **"d. Does the court have jurisdiction to grant Mareva relief against a sole Defendant(s) where the only relief claimed against the sole Defendant(s) is that of Mareva relief and no substantive cause of action exists or is being pursued against the Defendant(s)either here or The Bahamas or elsewhere?"**
>
> **e. Of course, thus stated, the answer – on authority and as a matter of practical common sense – must be emphatically in the negative. However, the reality is not so straightforward as the English proceedings hover over the application in this jurisdiction like Banquo's ghost at Macbeth's banquet.**
>
> **Mr. Barnett begin with the headwater authority on Mareva relief, the principal speech of Lord Diplock in the House of Lords in Siskina (Cargo Owners) v Distos SA, The Siksina [1977] 3 All ER 803. This highly distinguished expositor of the common law (to quote Lord Nicholls of Birkenhead in Mercedes-Benz A.G. v Leiducle [1995] 3 LRC 227 at 250, in the course of his dissenting judgment (to which I will return) in which he felt obliged to**

diffidently part company with Lord Diplock) there articulated the orthodox view {1977} 3 All ER 803 at 822):

"A Mareva injunction is interlocutory, not final; it is ancillary to a substantive pecuniary claim for debt or damages; it is designed to prevent the judgment against a foreign defendant for a sum of money being a mere brutum fulmen...."

And again ([1977] 3 All ER 803 at 824);

"A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court."

[12] There is no doubt in our mind that there was a material failure to disclose to the court at the time of the *ex parte* application by the Applicant, in the instant matter that no originating process had been issued out of the Supreme Court Registry. As such, the authorities dictate on that basis alone that the injunction granted must necessarily be set aside.

[13] The other ground on which the injunction must necessarily be set aside is the fact that the injunction was obtained in reliance on a deficient document. The document was an incomplete document. Whether it was by inadvertence or intentional is irrelevant.

[14] In such circumstances which we say were extremely egregious, the status quo must necessarily return.

[15] Order 29 (1), (3) of the Rules of the Supreme Court states;

"The Plaintiff may not make such an application before the issue of the Writ or Originating Summons by which the cause or matter is to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the Writ or Summons and such other terms, if any, as the Court thinks fit."

[16] In the instant case, the order made no provision for the issue of the Writ after the granting of the injunction. In fact the court was never made aware that no legal proceedings were issued out of the Supreme Court Registry or that as a result of the urgency, the Applicant undertook to file and issue an originating process out of the Supreme Court Registry.

FURTHER MATERIAL NON-DISCLOSURE.

[17] It is alleged by the Respondent that there was a material non-disclosure upon the obtaining of the injunction. The entire purchase agreement was not before the court. Had it been, then it would have made the court aware that the very clause which was missing obligated the parties to avail themselves of arbitration before approaching the court for relief.

[18] The principle which emanates from arbitration clauses is to be found in an ancient case, SCOTT V. AVERY (1855) 5 HL Cas 811, the brief facts of which were,

Facts:

The respondent, Avery, took out a policy of insurance on a ship from the appellant. A clause in the policy stated that in the case of any dispute about an award, the matter should first be referred to arbitration. This was said to be a "condition precedent" to the maintaining of an action. The respondent claimed under the policy for losses, but a dispute arose as to the amount to be awarded. Avery was dissatisfied by the amount offered. He refused to refer the matter to arbitration and instead took the matter directly to court.

Issues:

The respondent argued that the clause requiring the matter be referred to arbitration was illegal. He claimed that by denying the parties the right to sue for any amount except that which the arbitration panel committee awarded him the agreement was ousting the jurisdiction of the court to settle such claims and make such awards as they saw fit.

Held:

The House of Lords found for the insurers. Lord Cransworth distinguished between a clause that ousted the jurisdiction of the court where a cause of action had already risen, and the present case. Here, the clause stated that there was no cause of action until an arbitration decision had been made. He stated that the principle against ousting the court's jurisdiction was one of public policy and said (at 853):

> **"I can see not the slightest ill consequences that can flow from such an agreement, and I see great advantage that may arise from it."**
>
> **Therefore, the clause to refer the matter to arbitration did not offend public policy and as enforceable.**

[19] As in the Avery case (supra), we say that in the instant case no cause of action would have arisen unless and until arbitration had taken place and an arbitral decision arrived at.

[20] In the case of **WESLEY INTERNATIONAL LIMITED and others vs. ARTIS CONSUMER GROOMING PRODUCTS Ltd.** [2018] 1 BHS J. No. 1 Winder J. stated at paragraphs 13 – 14:

13. **"There is little dispute between the parties as to the law relative to non-disclosure/failure to be full and frank on an ex parte application. I need only refer to the oft cited dicta of *Ralph Gibson LLJ in the case of Brink's Mat Ltd. v Elcombe [1998] 1 WLR 1350 at 1356.***

"In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following. (1) The duty of the applicant is to make "a full and fair disclosure of all the material facts." *See Rex v Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac [1917] 1 K.B. 486, 514, per Scrutton L.J.*

(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see Rex v. Kensington Income Tax Commissioners, per Lord Cozens-Hardy M.R..., at p. 504, citing Dalglish v. Javie (1850) 2 Mac. & G. 231, 238, and Browne-Wilkinson J. in Thermax Ltd. v. Schott Industrial Glass Ltd. [1981] F.S.R. 289, 295.

(3) The applicant must make proper inquiries before making the application: see Bank Mellat v. Nikpour [1985] F.S.R. 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of

the order on the defendant: see, for example, the examination by Scott J. of the possible effect of an Anton Piller order in Columbia Picture Industries Inc. v. Robinson [1987] Ch 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries; see per Slade L.J. in Bank Mellat v. Nikpour [1985] F.S.R. 97, 92-93.

(5) If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction [without full disclosure... is deprived of any advantage he may have derived by that breach of duty." See per Donalsdon L.J. in Bank Mellat v. Nikpour, at p. 91, citing Warrington L.J. in the Kensington Income Tax Commissioners' case [1917] K.B. 486,509.

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration to the case being presented.

(7) Finally, it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded; "per Lord Denning M.R. in Bank Mellat v. Nikpour [1985] F.S.R. 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms.

"when the whole of the facts, including that of the original non-disclosure are before [the court, it] may well grant ... a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed:" per Gildewell L.J. in Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings Plc., ante, pp. 1343H-1344A.

14. In this jurisdiction, the decision in Brinks Mat Ltd. v. Elcombe was confirmed by the Privy Council in the decision of Walsh v. Deloitte and Touche Inc. 59 WIR 30.

[21] We have considered the above and have concluded that the Respondent's case warranted the discharge of the injunction and a return to the status quo before the still born application inclusive of awarding damages pursuant to the terms set out in the injunction.

Urgency:

[22] In this regard, there obviously was no urgency as the affidavit in support of the application, ("The Farquharson Affidavit") was executed on August 28th, 2018, more than two weeks prior to the filing of the ex parte summons.

[23] In the case of **BATES V LORD HALISHAM OF ST. MARYLEBONE & OTHERS [1972] 3 All ER, 1019** Megarry J. said at page 1025:

> **"Finally, there is the point that I raised, that of timing. An application made at 2:00 pm for an injunction to restrain certain acts which may take place at 4:30 pm on the same day is an application made at a desperately late hour. Indeed, when the submissions of counsel continue until 4:15 pm, the application could scarcely run it finer. There are, of course, occasions when circumstances make an earlier application impossible. But here, the dates speak for themselves. The announcement by the Lord Chancellor of the proposal to abolish scale fees altogether was made over two and a half months ago. The association's first circular was sent out at about the same time. The draft order was published nearly a month ago. Well over three weeks ago it was in the hands of solicitors generally. Not until a week ago**

did the association send its submissions to the committee, following them up with individual letters some five days ago. For nearly three weeks the association has known that the committee was to meet today. On what counsel for the plaintiff told me in answer to questions, it seems that it was not until 8 July that the executive committee of the association sent a memorandum to the chairman, and then on 10 July the chairman instructed the secretary to consult counsel. On these facts counsel for the plaintiff did his best; but the material was intractable. An injunction is a serious matter, and must be treated seriously. If there is a plaintiff who has known about a proposal for ten weeks in general terms and for nearly four weeks in detail, and he wants an injunction to prevent effect being given to it at a meeting of which he has known for well over a fortnight, he must have a most cogent explanation if he is to obtain his injunction on an ex parte application made two and a half hours before the meeting is due to begin. It is no answer to say, as counsel for the plaintiff sought to say, that the grant of an injunction will do the defendants no harm, for apart from other considerations, an inference from an insufficiently explained tardiness in the application is that the urgency and the gravity of the plaintiff's case are less than compelling. Ex parte injunctions are for cases of real urgency, where there has been a true impossibility of giving notice of motion. The present case does not fall into that category. Accordingly, unless perhaps the plaintiff had had an overwhelming case on the merits, I would have refused the injunction on the score of insufficiently explained delay alone. As it is, the plaintiff's case fails both on the substance and on the technicality."

Conclusion:

[24] We therefore find that;

1. The Applicant failed to make full and frank disclosure upon applying for the eviction order;

2. Failed to comply with the rules governing the commencement of issuance of proceedings in the Supreme Court;

3. Failed to comply with the rules governing the granting of interlocutory injunctive relief.

[25] In light of the above therefore and in all the circumstances;

(1) The eviction order granted is hereby set aside in its entirety. There will be a return to the status quo as it was before the Applicant was evicted.

[26] It is therefore adjudged that;

(2) The Applicant is to return to the subject property without disturbance or interference from the Respondent, his servants, agents or assignees until further order of this court or until the completion of the substantive hearing of the instant matter.

(3) Damages to the Respondent to be assessed.

(4) Costs to the Respondent to be taxed if not agreed.

Dated this 14th day of March A.D., 2019.

Keith H. Thompson
Justice