COMMONWEALTH OF THE BAHAMAS **2021/CLE/gen/00230**

IN THE SUPREME COURT

Common Law & Equity Division

BETWEEN

ISLAND MARITIME SERVICES LIMITED

PLAINTIFF

AND

ATLAS INDUSTRIES LIMITED

DEFENDANT

Before The Hon. Mr. Justice Neil Brathwaite

Appearances: Ryan Brown for the Plaintiff
Lakeisha Hanna for the Defendant

Date of Hearing: 3rd March 2023

DECISION

1. The Defendant is the owner of a building located at Crawford Street, which is occupied by the Plaintiff pursuant to a lease agreement entered into on 15th April 2019. The agreement contained an option to purchase. Following issues in relations between the parties, the Plaintiff was given notice in September and December 2020 that the lease would not be renewed. There followed negotiations for the purchase of the building by the Plaintiff, but an agreement was never signed.

2. By Amended Writ of Summons filed on the 26th day of March, A.D., 2021, the Plaintiff seeks the following reliefs:-

1. Specific performance of the agreement set out in Clause 1 of the Lease Agreement.
2. A Declaration that the Plaintiff is entitled to purchase the aforesaid premises at the fair market value of same.
3. An Order giving directions as the sale of the aforesaid premises pursuant to the material portion of Clause 1 of the Lease Agreement.
4. A Declaration that the Plaintiff is entitled to occupy the aforesaid premises after the Lease Agreement between the parties expire on 30 April 2021 in the circumstances.
5. An Injunction restraining the Defendant, its owners, officers, employees, agents and servants from interfering with the occupation of the aforesaid premises during the term of the lease or thereafter.
6. Damages for trespass and breach of the covenant of quite enjoyment.
7. Damages.
8. Interests pursuant to the Civil Procedure (Awards of Interest) Act 1992.
9. Such further and other Relief as the Court deems just; and
10. Costs.

3. By a Summons filed the 13th of February, 2023, the Plaintiff now seeks Judgment upon admissions pursuant to Order 31A Rule (18)(2) (i) and (e), Order 27 Rule 3 and/or under the inherent jurisdiction of the Court. The Plaintiff contends that paragraphs 4 and 10 of the Amended Defence and Counterclaim filed the 5th day of May, A.D., 2021, in which the Defendant admits paragraphs 10 and 11 of the Statement of Claim, amount to admissions sufficient to entitle the Plaintiff to judgment.

4. Paragraph 4 of the Amended Defence and Counterclaim reads as follows:

> "Clause 1 of the aforesaid Lease Agreement provides that the Tenant shall have the option to purchase the demised premises during the course of or at the end of the tenancy at the purchase price and upon such terms to be agreed between the parties thereto. The purchase price and the terms are not set out in Lease Agreement."

5. Paragraphs 10 and 11 of the Statement of Claim are in the following terms:

10. The Defendant on 18 February accepted the sum of $725,000 on the condition that the Plaintiff agree to an Earnest Money Deposit Agreement (the "Agreement") given to the Plaintiff on or before 20 February 2021. The Agreement set out a number of terms, which include, inter alia, the following:

a. The offer of $725,000 is the best and final offer of the Defendant.

b. The payment of the sum of $72,500 or 10% being an earnest money deposit to purchase the demised premises, which would not be deduction from the purchase price.

c. The requirement to pay the deposit referred to at paragraph a. to the Defendant's attorney within 3 days after the Agreement is signed.

d. A additional 10% deposit upon signing the agreement for sale.

e. Cash purchase or guaranteed financing and proof of total cash and/or approved financing in a form acceptable to the Defendant before the execution of the sales agreement.

f. Payment of the balance of the purchase price on or before 18 April 2021 with no extension.

g. In the evident that payment is not made to complete the sale, the deposit shall be forfeited and the Plaintiff shall vacate the demised premises by 18 April 2021.

h. An indemnity clause for the benefit of the Defendant.

i. The erection of a fence by the Plaintiff, at its own expenses, within 7 days of the acceptance of the Agreement.

j. Should the Plaintiff not agree to the terms set out in the Agreement and place the Earnest Money Deposit as stipulated by Wednesday, 24 February 2021 at 5pm, it should be accepted by all Parties that the Plaintiff will not be proceedings with the purchase of the demised premises and the Defendant has the right to advertise the demised premises to prospective buyers without notice to the Plaintiff during the term of the lease.

11. The Plaintiff did not accept the terms of the Agreement on the ground that it set out onerous terms.

6. Paragraph 10 of the Amended Defence and Counterclaim is as follows:

11. The Defendant admits paragraphs 10 and 11 of the Statement of Claim. With regard to paragraph 11 of the Statement of Claim, the Defendant avers that by letter dated the 4th March, 2021, the Plaintiff enclosed a redacted copy of the Earnest Money Deposit Agreement which set out the Plaintiff's counter proposal regarding the terms of the offer to purchase the demised premises. However, the Plaintiff advised that as the purchase price was not agreed a legal action would be commenced against the Defendant. The Plaintiff, therefore, admitted the terms of the option to purchase had not been agreed.

PLAINTIFF'S SUBMISSIONS

7. The Plaintiff relies on section 81(1) of the Evidence Act, Chap 65, which enacts the following:

> "Subject to subsection (2), no fact need be proved in any civil proceeding which the parties thereto or their agents agree to admit at the hearing, or which before the hearing they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time, they are deemed to have admitted by their pleadings."

8. The Plaintiff submits that admissions may be expressed or implied but must be clear, and cites ***Ellis v Allen [1914] 1 Ch. 904*** wherein Sargent J noted the object of the Order and said as follows:

> "The object of the rule was to enable a party to obtain speedy judgment where the other party has made a plain admission entitling the former to succeed. I do not think r. 6 should be confined as suggested. In my judgment it applies wherever there is a clear admission of fact in the face of which it is impossible for the party making it to succeed."

9. The Plaintiff also cites the Supreme Court decision of ***Stewart and Stewart v Harbour House Towers Condominium Association (2017/Cle/gen/FP/00224)***, where Justice Hanna-Adderley stated:

> "54. The Defendant has admitted (above) the material allegations of the Plaintiffs claim that the Defendant failed to attend to the necessary repairs

of the Apartments between October 2016 and the date of the filing of this action resulting in the Plaintiffs' loss of the use and enjoyment of the same and damages.

55. The Court's jurisdiction when granting an order pursuant to Order 27, Rule 3 of the RSC is discretionary. Therefore, I must consider if it would be just to grant such an order.

56. In the case of Ellis v Allen (supra) whereby the Court determined that for a party to be entitled to a judgment pursuant to Order 27, Rule 3 due to admissions made the admissions of facts relied on may be express or implied but they must be clear (emphasis mine). Sargent J determined that the rule applies wherever there is a clear admission of facts in the face of which it is impossible for the party making it to succeed.

57. In the instant case I believe it would be just to grant such an order, especially to save time and costs. I agree with the dicta of Sargant J in Ellis v Allen (supra) and the judgment in Technicstudy Ltd Kelland (supra) that the rule to be applied in these circumstances is that the admission of fact must be clear for the party to be successful on such application. I find that the evidence the Plaintiffs rely on the admissions of facts are clear."

10. The Plaintiff therefore submits that they are entitled to judgment on the issue of the existence of an option to purchase the demise premises as set out in clause 1 of the lease agreement, and on the admission that the Defendant introduced onerous terms in the form of the Earnest Money Deposit

Agreement that were not a part of the offer that was made by the Plaintiff and accepted by the Defendant.

DEFENDANT'S SUBMISSIONS

11. The Defendant submits that the language in the Lease Agreement is pellucid and the existence of an option to purchase is not denied by the Defendant, but that what is denied that the Plaintiff is entitled to Specific Performance of an option to purchase where NONE of the terms and conditions of the option have been or could be agreed.

12. The Defendant, therefore, submits that the question for the Court's determination is whether such a contract is enforceable in law, thereby entitling the Plaintiff to specific performance of the option to purchase. They submit that the Plaintiff must prove that

despite the absence of any agreed term and conditions regarding the option to purchase, the Court is nevertheless empowered to compel the parties to continue to negotiate to agree the terms and conditions and/or impose its own terms and conditions on the parties.

13. The Defendant therefore submits that there are clearly many questions and issues which have to be determined in this matter and as a result, the Plaintiff's request for Judgment on admissions to the allegations in paragraph 4 in the Amended Writ of Summons should be refused.

14. With respect to the purported admission that the Earnest Money Agreement was onerous, The Defendant submits that its admission of paragraph 11 was only to the fact that the Plaintiff advised that it did not accept the terms of the Earnest Money Agreement because the Plaintiff considered those terms onerous. The Defendant has in no way admitted that the terms of the Earnest Money Agreement were onerous.

15. The Defendant further submits that as a matter of semantics, the sentence must be interpreted as a statement being made by the Plaintiff, advising of the reason why it refused to accept the Earnest Money Agreement, and not as an indication by the Defence that the terms of that agreement were onerous.

16. The Defendant submits that it in turn merely agreed that it was told by the Plaintiff that the Plaintiff did not accept the Earnest Money Agreement because the Plaintiff thought that the terms contained therein were onerous, and that there was no express or implied admission by the Defendant that the terms in the Earnest Money Agreement were onerous, thereby entitling the Plaintiff to Judgment on admission.

17. The Defendant further submits that whether or not the terms were onerous is not a cause of action sufficient to warrant specific performance and Judgment, and that the Plaintiff has failed to plead or submit any legal principles which supports such a contention. They say that if the terms were onerous as the Plaintiff alleges, then the only logical conclusion is that the terms were not agreed between the parties, with the result that no contract exists, rendering the option to purchase unenforceable.

DISCUSSION

18. The jurisdiction to grant judgment on admissions is derived from Order 27, rule 3 of the Rules of the Supreme Court 1978 (R.S.C) which provides the following:

> "Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties, and the Court may give such judgment, or make such order, on the application as it thinks just. An application for an order under this rule may be made by motion, or summons."

19. In considering this matter, I bear in mind the principles enunciated in ***Ellis v Allen***, and accepted by the learned Hanna-Adderley J in as set out above. The Plaintiff has submitted that the admissions are clear, and pursuant to section 81 of the Evidence Act, there is no need to provide further evidence of those facts which have been admitted.

20. I accept that there is an admission that an option to purchase exists. As the Defendant has accepted, the terms of the relevant clause are unambiguous. However, to my mind it is not so simple as to say that the Plaintiff is therefore entitled to judgment on that admission. While the Defendant accepts that an option to purchase exists, they contend that the mere existence of that option is not enough, particularly as there is no evidence that the terms of that option have been indicated or agreed. It would therefore seem that while the admission is clear, the effect of that admission has yet to be determined, and that effect will depend on evidence to be led at trial, and submissions with respect to that evidence.

21. Upon an examination of the dicta in ***Ellis v Allen***, my view is that there are two stages to the consideration of a judgment on admissions. The first is a clear admission. The second is "in the face of which it is impossible for the party making it to succeed." The effect of the admission is therefore of critical importance.

22. With respect to the issue of an acceptance by the Defendant that the terms in the Earnest Money Agreement were onerous, I agree with the submission of the Defendant that, when read as a whole, the clause is merely an acceptance that the Plaintiff found the terms to be onerous, and not that the Defendant accepted that they were. This is not to say that the

terms were or were not onerous, but merely an indication that, in my view, there is no clear admission by the Defendant that the terms were onerous.

23. In all the circumstances of this case, I am unable to find that this is an appropriate case in which to exercise my discretion to grant judgment on admissions. The summons is therefore dismissed with costs to the Defendant to be taxed if not agreed.

Dated this 19th day of April, A.D. 2023

Neil Brathwaite
Justice