[2011] JMCA Civ 23

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 40/2010

BEFORE: **THE HON MR JUSTICE MORRISON JA**
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE HIBBERT JA (Ag)

BETWEEN	**MARIO ANDERSON**	**APPELLANT**
AND	**QUALITY CHEMICALS LIMITED**	**1ST RESPONDENT**
AND	**ANDREW FRANKSON**	**2ND RESPONDENT**
AND	**DOREEN FRANKSON**	**3RD RESPONDENT**
AND	**ALSTON STEWART**	**4TH RESPONDENT**

Lord Anthony Gifford QC, Conrad George and Miss Kimone Tennant instructed by Hart Muirhead Fatta for the appellant

John Givans instructed by Vaccianna & Whittingham for the respondents

4, 5 and 29 July 2011

MORRISON JA

[1] After hearing counsel in this matter on 5 July 2011, the court made the following order:

1. The appeal is allowed and the order of Donald McIntosh J made in the Supreme Court on 23 March 2010 is set aside.

2. The parties shall have liberty to apply to the Supreme Court for other orders, if deemed necessary.

3. There will be no order as to the costs of the appeal.

[2] These are the promised reasons for this order. The appellant and the second, third and fourth respondents are shareholders in the first respondent, which is a company duly incorporated under the Laws of Jamaica ("the company"). A dispute having arisen between the shareholders, the appellant sought relief from the Supreme Court under section 213A of the Companies Act by filing Claim No. 2008 HCV 01429. On 10 April 2008, Marva McIntosh J made an order, by and with the consent of the parties, staying the action upon terms agreed between the parties and set out in the Schedule to the order ("the Tomlin Order").

[3] Under the terms of the agreement between the parties, the appellant was given the right to purchase the shares in the company held by the second, third and fourth respondents ("the respondents"), failing which they would in turn have the right to purchase his shares, upon terms set out in the agreement contained in the Schedule. Further disputes then arose between the parties regarding the implementation of the agreement, with each side laying the blame for the failure of the parties to arrive at consensus at the feet of the other. Thus, the appellant complained that the respondents failed to provide him with all the information that his potential investors required, while the respondents for their part accused the appellant of delay. In due course, a basis for the extension of the agreement was agreed by the parties, under the terms of which the respondents promised to provide the requested information and, in

turn, the appellant was allowed additional time to produce a binding offer to purchase the respondents' shares in the company.

[4] However, disputes again arose between the parties and by notice of application for court orders filed on 11 August 2009 the appellant sought an order (a) lifting the Tomlin Order, for the purpose of facilitating enforcement of the terms contained in the Schedule, and (b) that the respondents carry out the terms of the agreement. In addition, or alternatively, the appellant sought an order appointing a receiver to manage the affairs of the company and to facilitate the purchase of the shares by the respondents, in accordance with the Tomlin Order.

[5] Further, on 8 October 2009, the appellant also filed a petition (Claim No. 2009 HCV 5292), pursuant to section 213A of the Companies Act, on the ground that the respondents had been guilty of conduct unfairly prejudicial to him and seeking relief in essentially similar terms to that sought by their notice in the original action. By notice filed in these proceedings on 28 October 2009, the appellant also sought the appointment of a receiver to oversee the affairs of the company and to facilitate the carrying into effect of the agreement embodied in the Schedule to the Tomlin Order.

[6] Both claims were consolidated by order of Sinclair-Haynes J on 9 October 2009 and on 23 March 2010 the application filed on 11 August 2009 in the first claim and the application filed on 28 October 2009 in the second claim came on for hearing before Donald McIntosh J. By this time, both claims had generated a considerable amount of affidavit evidence on either side. While that evidence confirmed that the parties were

sharply divided on the reasons for the non-implementation of the Tomlin Order, neither party asked for its discharge. Nevertheless, the learned judge felt able to make an order discharging the Tomlin Order and refusing the application contained in the notice of application for court orders dated 27 October 2009. No mention was made in the judge's order of the outcome of the application dated 11 August 2009 and there is no record of his reasons for the order which he did make.

[7] Hardly surprisingly, the appellant, dissatisfied with this, on the face of it, unexpected result, appealed (with the leave of the judge) to this court. He sought "a declaration that the agreement contained in the Schedule to the Tomlin Order dated 4 April 2008 (as amended) remains in effect and may be enforced by the parties within a reasonable time".

[8] When the matter came on for hearing on 4 July 2011, the court of its own motion raised with counsel the question whether, given the nature of the two applications which were before him, it had been open to Donald McIntosh J to make an order discharging the Tomlin Order. After a short adjournment overnight for the parties to consider their positions in the light of this enquiry, upon the resumption of the matter on 5 July 2011, learned counsel for the respondents, Mr John Givans, quite properly conceded that the judge ought not to have made the order discharging the Tomlin Order and, further, that he had failed altogether to rule on the appellant's application dated 11 August 2009, seeking a stay of the Tomlin Order. Lord Gifford QC submitted that in these circumstances the only proper course would be to set aside the judge's order in its entirety and to remit the matter to the Supreme Court to be dealt with

anew. Mr Givans accepted this, and the court therefore made the order set out at para. [1] above.

[9] In the light of the disposal of the appeal, the parties were understandably anxious that it should not be taken in any subsequent proceedings in this matter as an endorsement or rejection of their respective positions. These reasons have therefore been provided to ensure that there is no such misunderstanding at any time in the future.

DUKHARAN JA

[10] I agree with the reasoning and conclusion of my brother Morrison JA and have nothing to add.

HIBBERT JA (Ag)

[11] I too agree.