

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E296 of 1991

BETWEEN VICTOR BEEK PLAINTIFF
AND THE JAMAICA RECORD LIMITED DEFENDANT

Mrs. Pamela Benka-Coker and Terrence Balentyne for Plaintiff

Miss Hilary Phillips and Mrs. Denise Kitson for Defendants

HEARD: NOVEMBER 11, 12, 28, 1991 APRIL 24, 1992.

IN CHAMBERS

CORAM WOLFE J.

This is a summons for mandatory Interlocutory Injunction.

HISTORY

The Plaintiff commenced proceedings against the Defendant in Suit C.L. B004 of 1991. The Plaintiff obtained a Judgment against the Defendant in the sum of Three Hundred and Sixty Two Thousand Three Hundred and Ninety Dollars and Thirty One Cents (\$362,390.31) with interest thereon at the rate of 6% per annum from the 7th day of February 1991 until payment. The judgment remained unsatisfied and the Plaintiff applied for and obtained the issue of a Writ of Seizure and Sale to recover the amount due under the judgment.

On the 22nd day of February 1991 the Bailiff of the Resident Magistrate's Court for the parish of Kingston, acting pursuant to the Writ of Seizure and Sale, marked goods and chattels belonging to the Defendant. The Plaintiff and Defendant entered into discussions to avoid the marked goods, being removed from the Defendant's premises. Following the discussions the Plaintiff and Defendant entered into an agreement dated the 22nd day of February 1991. The portions of the said Agreement, relevant to the resolution of the issue which arises on this

summons, are set out hereunder:

- "(a) That the Defendant will forthwith commence to take steps to remove from the list of securities used by the Defendant to finance its loans and other financial arrangements the real property listed in the Schedule hereto which are owned by the Plaintiff's daughter ROSANNA RICKETTS, the Plaintiff's son DUDLEY BEEK, and the Plaintiff's son-in-law, MARK RICKETTS. That both parties hereto agree and acknowledge that there is no dispute between them as to the fact that the said properties are owned by the relatives of the Plaintiff listed aforesaid in the manner stated in the Schedule.
- (b) That the Defendant will ensure by whatever steps and by obtaining the signatures of any of its Directors and/or Shareholders and/or Managers that the securities hereinbefore referred to and listed in the Schedule hereto are entirely and completely freed from any incumbrances, mortgages, and/or other liens which are in any way related to the Defendant Company or its business.
- (c) That the Defendant herein assumes the full and unreserved responsibility of obtaining the consent and compliance of the bankers, financiers or other persons or companies who have any interest in the mortgages, liens, charges or other incumbrances on the properties listed in the Schedule hereto in order to effect the release of the said mortgages, charges, liens and/or incumbrances which now and as at the date herein exist in respect of the debts and obligations of the Defendant and for which the properties in the Schedule hereto were used as security.
- (d) That the Defendant will provide as necessary in order to meet its obligations under this agreement herein such replacement securities, guarantees, and/or other real estate and/or chattels which the holders of the mortgages, heirs, charges and/or incumbrances will require in order to release their interests against the properties listed in the Schedule hereto.
- (e) That the obligations of the Defendant under this clause will not attract as a consideration any cost or payment by either the Plaintiff or the owners listed in the Schedule.
- (f) That the Defendant herein agrees to accomplish and execute in full its obligations under paragraph 1a herein 180 days of the date hereof."

The Defendant performed all its obligations under the Agreement save and except those obligations contained in paragraph 1(a) to (f). The failure to so perform resulted in the Plaintiff commencing action, by writ of summons E296/91, seeking the following reliefs.

- (a) A declaration that the written agreement entered into between the Plaintiff and the Defendant and dated the 22nd day of February 1991 is valid and enforceable.
- (b) Specific performance of the said agreement in so far (sic) as the terms of the said agreement relate to, touch and concern the Defendant's legal obligation to secure the release from any incumbrances, mortgages, charges or liens premises registered at Volume 1041 Folio 691 of the Register Book of Titles in the name of Mark Ricketts and known as 46 Forsythe Drive, Kingston 6 in the parish of St. Andrew, and premises registered at Volume 1122 Folio 838 of the Register Book of Titles in the names of Rosanna Ricketts and Dudley Beek and situated at Papine Estate and Goldsmith Villa in the parish of Saint Andrew.
- (c) An injunction that the Defendant do forthwith secure the release of the said properties referred to in paragraph (b) of the within endorsement, from any encumbrances, mortgages, charges or liens in particulars (sic) from the mortgages in favour of the Eagle Merchant Bank of Jamaica Limited.
- (d) Further or alternatively damages for breach of contract.
- (e) Further or other relief.
- (f) Costs.

The summons before me dated the 23rd day of September 1991 seeks the following relief:

"An order that the Defendant do forthwith secure the release from all existing mortgages, incumbrances, charges or liens in favour of the Eagle Merchant Bank of Jamaica Limited premises registered at Volume 1041 Folio 691 of the Register Book of Titles in the name of Mark Ricketts and premises registered at Volume 1122 Folio 838 of the Register Book of Titles in the names of Rosanna Ricketts and Dudley Beek or alternatively an order that the Defendant do secure the release of premises registered at Volume 1041 Folio 691 and premises registered at Volume 838 of the Register Book of Titles from all mortgages, incumbrances, charges or liens in favour of the Eagle Merchant Bank of Jamaica Limited within 7 days of the date of Order herein."

Having outlined the History of the matter the contending positions may be summarised as follows.

Plaintiff

The Plaintiff contends that the Defendant is in breach of its undertaking as set out in paragraph 1(a) to (f) of the agreement dated the 22nd day of February, 1991 and prays the Court to compel the Plaintiff to perform its undertaking by the grant of a mandatory interlocutory injunction.

Defendant

The Defendant states that it has taken such steps as it can possibly take in the circumstances, that its obligations under the agreement as contained in paragraph 1(a) to (f) are not absolute and that to order a mandatory interlocutory injunction would in effect be to grant the Plaintiff the whole of the remedy sought in the substantive action.

Numerous authorities were cited during the course of the arguments. My failure to refer to all of these authorities must not be interpreted as an act of disrespect for the industry of Counsel, but I am firmly of the view that the matter can be disposed of without reference to ^{all} the authorities cited. The circumstances under which a Court will grant an interlocutory mandatory injunction have been settled principles.

In Shepherd Homes Limited v Sandham (1970) 3 All E.R. 402, Megarry J at p.409, in considering the matters which ought to be taken into consideration when deciding whether to grant or withhold a mandatory interlocutory injunction, opined:

"It is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action the Court will, of course, grant such injunctions as the justice of the case requires; but at the interlocutory stage when the final result of the case cannot be known, and the Court has to do the best it can, I think that the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation."

Continuing at page 412 the Learned Judge said:

"On motion, as contrasted with the trial, the Court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case, the Court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted, and this is a higher standard than is required for a prohibitory injunction."

The approach of Megarry J was approved by the English Court of Appeal in Locabil International Finance Limited v Agroexport (1986) 1 All E.R. 900 and was followed by the Jamaica Court of Appeal in S.C.C.A. No. 12/88. Esso Standard Oil S.A. Limited v Lloyd Chan (Unreported) March 1988.

Having stated the principles by which a Court must be guided in considering the grant of a mandatory interlocutory injunction, I ask myself what is it that the Plaintiff requires the Court to do in the instant case. Briefly put, the Plaintiff requires the Court to order that the Defendant either by payment of the outstanding amount due to Eagle Merchant Bank of Jamaica Limited or by providing alternative securities, forthwith secure the release of the premises concerned from all existing mortgages, incumbrances, charges or liens in favour of Eagle Merchant Bank of Jamaica Limited.

Paragraph 6 of the affidavit of Neville Blythe, Chairman of the Board of Directors, states:

"That further all other chattles owned by the Defendant are pledged to various financial institutions as security for sundry loans."

Paragraph 10 of the said affidavit states:

"That the Defendant has taken all steps possible to ensure the release of the premises, the subject hereof (sic). That the Defendant presently owns no other property which it has available to provide to the Bank as additional security for the loan."

At paragraph 7 of the affidavit dated November 11, 1991 the

Deponent Neville Blythe states:

"That as regards the remaining paragraphs of the Affidavit, I state that the Defendant company presently owes \$2,497,779.50 to Eagle Merchant Bank of Jamaica Limited, as is evidenced by the letter from that institution. That the Defendant is not presently able to repay the sum owed to that institution but has since July 1991 made firm arrangements to meet the monthly instalments presently due and has to date honoured that commitment."

The evidence contained in these extracts have not, in my view been successfully contraverted by the Plaintiff. I accept the evidence contained therein as true. In the light of such evidence to accede to the order sought by the Plaintiff would be to compel the Defendant to find money, which it says it does have, or to find alternative securities, which it says it does not possess, to release the encumbered properties.

Assuming the order is granted as prayed and there is default how would the Court ensure the performance? By imprisonment of the Corporate Plaintiff?

The present situation is not one in which the Directors can be made personally liable. To grant the order sought would be to act in vain.

Without deciding whether or not the Defendant has satisfied its obligation under the agreement, as was urged by Counsel for the Defendant, I am of the view that in the event that the Defendant is found to be in breach of the said agreement the remedy of the Plaintiff properly sounds in damages for Breach of Contract.

Further it must be borne in mind that ultimately the decision whether or not the securities are released resides in the Eagle Merchant Bank of Jamaica Limited, who is not a party to the present action.

For these reasons the relief sought is denied.