

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. B253/1995

BETWEEN	BLAISE BUILDING SOCIETY	PLAINTIFF
A N D	WINSTON DWYER	1ST DEFENDANT
	JOHN FRANCIS	2ND
	(JEFFREY PANTON)	3RD
	()	
	(DONALD PANTON)	4TH
	()	
	(JANET PANTON)	5TH
	JOSEPH ALLIE	6TH
	ERIC FULLERTON	7TH
	PAUL POWELL	8TH
	ORRETT HUTCHINSON	9TH
	RAYMOND GARCIA	10TH
	PAULINE BROWN	11TH
	NEVILLE DEWAR	12TH
	BLAISE TRUST CO. AND MERCHANT BANK LTD.	13TH
	CONSOLIDATED HOLDINGS LTD.	14TH

Enos Grant instructed by Raymond Clough of
Clough Long & Co. for 3rd, 4th, 5th, 9th,
10th and 12th defendants/applicants

Mr. G. Robinson and Mrs. Winsome Marsh for
plaintiff/respondent instructed by Nunes,
Scholefield, DeLeon & Co.

Heard: 6th - 11th November, 1995

13th November 1995

PANTON, J

The summonses filed are on behalf of the 2nd, 3rd, 4th, 5th, 9th, 10th and 12th defendants. Before me, no arguments were advanced on behalf of the 2nd defendant who has changed his attorney-at-law since the filing of the summons relating to him. Neither he nor his attorney-at-law appeared before me so I assume that it was not his wish to pursue the application. Accordingly, the order of Walker, J remains in full force, as amended by the Senior Puisne Judge against the 2nd defendant.

So far as the 12th defendant is concerned, he has denied being a director of the plaintiff. The only evidence indicating that he may have been a director is a letter dated 26th September, 1994 signed by the President and Secretary of the plaintiff. The President is the 10th defendant while the Secretary is the 11th defendant. There is no evidence to confirm this directorship as the 12th defendant is not alleged to have done a single thing in keeping with the status of a director.

In view of the manner in which the affairs of the plaintiff have been conducted, it is highly probable that the 12th defendant may not have been a director, but may only have been named as such without his concurrence. Accordingly the ex parte order of Walker, J. on the 10th July, 1995, against the 12th defendant is hereby discharged with costs to the 12th defendant.

The plaintiff's claim is for damages for -

1. breach of fiduciary duty;
2. abuse of power; and, or
3. fraud; and
4. unjust enrichment

The particulars advanced allege contravention of the rules of the plaintiff by the defendants, and actions on their part amounting to bad faith. Accordingly, there has been loss and damage to the plaintiff.

To prove the claim, the plaintiff has to prove that the defendants were in a position of power and trust; and that they misconducted themselves by breaching their obligations.

The 3rd, 4th and 5th defendants have admitted to being directors at some stage. In addition, a letter signed by the President and Secretary dated 16th September, 1993 under the seal of the plaintiff confirms their directorships. In the case of the 4th defendant there is also his signature as manager on a bank card dated 27th September, 1994.

The 9th defendant by the aforesaid letter is stated to be a director. He has also signed two bank cards - in one case as manager, in the other as a director. On the former card there is the date 27th September, 1994.

The 10th defendant has signed the card dated 27th September, 1994 asserting that he is managing director of the plaintiff.

In addition to the above, there is the affidavit of the 2nd defendant which demonstrates that the 4th defendant in particular was actively involved in the management and operations of the plaintiff.

There is, it would seem to me, to be sufficient evidence that the 3rd, 4th, 5th, 9th and 10th defendants were directors of the plaintiff.

The evidence further indicates that substantial loan transactions were made from the plaintiff to entities with which the 3rd, 4th and 5th defendants were intimately involved; and that the 9th and 10th defendants facilitated these transactions.

The loan transactions appear to be in breach of the rules of the plaintiff; and amount to a serious indictment of the stewardship of the directors. There is also evidence to suggest that there may have been unjust enrichment for some.

There has been no proper response or attempt to explain some of the transactions involving these defendants. There is in particular a deafening silence by them on matters such as the \$5 million loan to Unijam Ltd. Instead there appears to be an effort to hide behind a letter from their attorney-at-law to the temporary manager of the plaintiff.

Such silence has its consequences so far as inferences go and more so in relation to the exercise of the Court's discretion.

There has further been what appears to be an effort by the 5th defendant to at least confuse the situation by her failure to make frank and accurate disclosures in relation to her holdings.

The defendants' submission that the plaintiff had not disclosed material facts is unfounded. So too is the submission that the "threshold" requirement had not been met. Although there may have been a few statements by the temporary manager in his affidavits which do not qualify as evidence, it is clear that there has been sufficient compliance with the law for the affidavits to be regarded as valid.

Much reliance has been placed by the defendants on the absence of a "foreign element". This appears to be merely an attempt to make a point for discussion. In my view, there is no imperative requirement that there should be a foreign element before a Mareva Injunction may be granted. There is no authority to that effect. The injunction may be ordered where there is a real risk of the dissipation of assets at home or abroad.

Looking on the matter totally, I find that the plaintiff has a good arguable case that the defendants were directors of the plaintiff, and had misconducted themselves as such breaching the rules of the plaintiff and in breaching the confidence that ought to exist between them as directors and the plaintiff.

The whole conduct of the defendants gives the Court the feeling that there is a great risk that the defendants particularly the 3rd to the 5th may well cause their assets to be removed from the jurisdiction of the Court, or may dissipate such assets that they have within the jurisdiction.

Accordingly, as the evidence stands, the Court has no alternative but to refuse the application to discharge the order of Walker, J.

The Order is this -

In relation to the 12th defendant, the application is granted and the injunction ordered by Walker, J. on the 10th July, 1995, is hereby discharged with costs of the application to the 12th defendant. The plaintiff has liberty to apply in relation to the 12th defendant.

In relation to the 3rd, 4th, 5th, 9th and 10th defendants, the application is refused. The order of Walker, J., made on the 10th July, 1995, and as subsequently amended, remains in force. Costs to be costs in the cause. Leave to appeal is granted to these defendants.