IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C. L. C259/1979

Between Donald Chen and Gloria Chen

And Kurt W. Chen, Wayne Chen, Thelma Chen, Suzanne M. Burke, and Cathay Restaurant Ltd.

Application to set aside a Judgment

D. Muirhead, Q. C., Mrs. A. Hudson-Phillips, and Chen for the Plaintiffs

Goffe for the Defendants.

Heard on: 29th July, 1980

Handed down on: 2nd October, 1980

McKain J:

By an Agreement made 1st August, 1977, between Cathay Restaurant Ltd. Donald Joseph Chin otherwise known as Joseph Chen and Gloria his wife (all named as Vendors) for the one part and Kurt Chen, Wayne Chen, Thelma Chin and Suzanne Burke (all named as purchasers) of the other part, the vendors agreed to sell and the purchasers agreed to purchase:

(a) 5,000 shares in a company called Cathay Restaurant Ltd. for a total consideration of $4.00;

(b) The goodwill of Cathay Restaurant for the sum of $177,407;

(c) The Inventories of Cathay Restaurant Ltd. for the sum of $22,503; and

(d) The assets of Cathay Restaurant Ltd. for $87,461.00.

The total purchase price of $287,375 was to be paid:

(i) $100,000 cash on the conclusion of the agreement;

(ii) $87,321 in instalments of $2,000 per month with interest accrued on the said sum at the rate of 10% per annum from the 1st August, 1977, the first of such instalments to be payable on 1st October, 1977, and thereafter on the first of each month until the entire $87,321 should be paid, and the said interest and sinking fund to be computed from 1st August, 1977;

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(iii) The sum of $100,000 payable in instalments of $3,200 per month together with interest on the said sum of 10% per annum provided that the said $100,000 with the interest thereon was expressed not to be payable nor interest to commence accruing until the $87,321 together with interest thereon had been paid the plaintiff and in default of payment of the suns above stated the entire purchase price remaining unpaid would become immediately due and payable.

Paragraph 9 of the original agreement stipulates:

" Any dispute question or difference whatsoever which may at anytime hereafter arise between the vendors and purchasers or their respective personal representatives touching the construction meaning and effect of this Agreement or any provision hereof or the rights or liabilities of the parties or their respective personal representatives hereunder or as to the subject matter hereof shall be referred to a single Arbitrator in case the parties can agree upon one and otherwise to two Arbitrators one to be appointed by each party in accordance with the provisions of the Arbitration Act or any statutory modification or re-enactment thereof for the tine being in force. "

On the 18th December, 1979, the plaintiffs took out a Writ of Summons against the defendants for the sum of $167,617.25 being amount and interest due on the Agreement for Sale. There was default in the payment for August and from and including 1st March 1979.

On the 8th January, 1980 the plaintiff entered judgment in default of appearance against the first, second, third and fifth defendants. The sum claimed in the judgnent was for default payment in August, 1978 and from and including March 1979 being:

(a)	under para. (ii)	$ 55,321.00
	(and interest to 1/3/79)	4,379.58
(b)	under para. (iii)	100,000.00
	(interest at 10% from 1/3/79)	7,916.67
		$ 167,617.25

and interest thereon at the said rate of 10% per annun from the date of the Writ until Judgnent.

The defendants by affidavit sworn to by the first three defendants named in the plaintiffs' writ, seek to set aside the judgnent

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on the ground of irregularity and, in the alternative, that they have a good defence on the merits.

One feature of the irregularity referred to was that the interlocutory judgment was not entered for any precise sum and it was not possible to calculate the amount of the judgment nor the period for which the interest was claimed, though this could be inferred. As far as the claim for $167,617 was concerned the interest claimed as due from the date of the writ to the date of judgment would be interest upon interest and thiswas in conflict with sec. 3(a) of the Law Reform(Miscellaneous Provisions) Act. The section reads thus:

> "Nothing shall authorise the giving of interest upon interest "

The calculation used in arriving at the judgment is, therefore, erroneous as being in breach of the section cited above.

Another limb of the irregularity was the failure of the plaintiffs to exhibit the agreement when the affidavit of debt was filed.

The third irregularity was that interest could not be awarded at the interlocutory stage unless the written agreement so stated.

The defendants also contended that para. 9 of the agreement had made stipulation for reference to arbitration and the plaintiffs ought to have resorted to this clause before proceeding to suit.

Mr. Goffe for the defendants stressed the fact that the agreement in its recital named the fifth defendant as one of the vendors.

The plaintiffs' reply to the plea of irregularity was that para. 5 of the claim sets out how the interest was arrived at and therefore the amount of the judgment was calculable. They also contended there was no necessity to exhibit the agreement in view of the fact that interest was specifically pleaded, and once pleaded, it could be claimed in judgment. It was submitted that what they were claiming for the period referred to could only be interest due on the principal outstanding on the date immediately following the date of the Writ, and not on the total claimed in the interlocutory judgment.

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It was urged by the plaintiffs that if this proposition was not approved by the Court, there was power coupled with the discretion to amend the judgment, so as to make it clear that the additional sum claimed for interest was only applicable on the principal sum from the date immediately following the issue of the Writ.

With respect to the Arbitration Clause already mentioned, there was no necessity for arbitration since it was not made a condition procedent to bringing the suit, and the defendants ought to have taken out summons to stay the proceedings pending arbitration. Not having done so the defendants could not now use the clause as a defence. In any event para. 544 of Halsburys Laws of England Vol. 2, 4th Edition states that only when a clause required holding of arbitration precedent to filing of an action could that clause be set up as a defence.

The plaintiffs readily agreed, and conceded that the agreement showed that the 5th defendant (a company) was a vendor and the Writ now named this same vendor as one of the purchasers.

I was indeed surprised and confused on reading the agreement between the contending parties. The fifth defendant is indeed the first-named party among the three vendors, and it is also clear that what is being sold to the first four defendants were the shares held and owned by the first named vendor, although the same vendor is now the fifth defendant. The second part of the agreement recites:

"It is further agreed and declared as follows:

1. (a) The vendors have agreed to sell and the purchasers have agreed to purchase the goodwill of CATHAY RESTAURANT LTD. in the sum of $177,407;

(b) The vendors have agreed to sell and the purchasers have agreed to purchase the Inventories of CATHAY RESTAURANT LTD. in the sum of $22,503;

(c) The vendors have agreed to sell and the purchasers have agreed to purchase the assets of CATHAY RESTAURANT LTD. in the sum of $87,461. "

(the letters in block capitals as they appear in the agreement)

I am at a loss to understand in what circumstances the vendor became a purchaser and as such one of the defendants who had defaulted on the agreement for sale. Nowhere is it evident that the fifth defendant agreed to purchase anything from the two plaintiffs. The shares belong to the fifth defendant wholly. This defendant together with the plaintiffs were the persons who (the 5th defendant as owners of the shares, the two plaintiffs as Managing Directors of the 5th defendant company) were divesting themselves of the shares of the 5th defendant company. If as it appears, the 5th defendant was selling its shares, for money value, and did in fact receive part payment, as the writ so states, then how much does the 5th defendant owe itself for its own shares that it has now sold itself and for which it is being sued as a defendant defaulting in payment to the plaintiffs?

What is there to be gained for a man who sells his own property to himself and so puts himself in the position of being indebted for money to which he is entitled?

I took the view that before I could go into the merits of the submissions by the Attorneys for each side I ought to consider the true position of the 5th defendant in the writ.

I came to the inescapable conclusion that, by virtue of the recital in the agreement made on the 17th August, 1977, the 5th defendant, a registered company, was the owner of the shares, the subject matter of the agreement, as was stated in the said agreement. I find that the terms of the agreement are clear and without any ambiguity. The 5th defendant is a vendor, and it has not been established otherwise. The 5th defendant cannot be classed with the purchasers. There was nothing in the Writ, nor urged upon me to alter the fact that when the interlocutory judgment was entered by the plaintiffs, the 5th defendant was not at all material times the rightful and original owner of the shares, goodwill and the inventories, the subject matter of the sale agreement. I am satisfied there is grave irregularity from the very filing of the writ, and the great confusion occasioned by a vendor in the agreement being sued as a purchaser according to the recital in the writ is by itself sufficient to justify the setting

aside of the judgment.

However, submissions having been made on other aspects of the judgment, I consider the other grounds for setting it aside. The defendants having conceded there was no authority which said the plaintiffs had to exhibit the document proving an agreement for interest, I see no necessity to deal with the point as a feature of the irregularity complained of.

I listened to both sides with respect to the point where interest on interest is claimed. It is my view that nowhere is it clear that the 10% interest being claimed, as from the date of the writ, is on the outstanding balance of the principal, exclusive of the 10% interest due for the instalments, as provided for in the agreement. It was strongly urged by the plaintiffs that, if it was not so clearly stated, or understood, the Court had a discretion to alter or amend the judgment as entered, to reflect the true position. That is, that the claim for interest is on the balance of principal due and owing. Even were I so persuaded, any such action on my part would result in my entering a judgment upon a judgment. To alter the interlocutory judgment so as to let it reflect the true amount for which the plaintiff could properly quantify his judgment, I would be obliged to enter on the mathematical exercise of ascertaining the interest due on $155,321 the unpaid principal at the date of judgment. Then that interest would be added to the principal. On the total so arrived at as outstanding, adding the interest from 1st March, 1979 to the date of writ and entering judgment for the sum arrived at, an undertaking beyond my skill or competence.

The judgment as signed is irregular. It shows a claim for interest upon interest and goes beyond my discretion to amend.

I shall deal with the ground that there should have been a reference to arbitration.

The plaintiffs referred to Halsbury's Laws of England 4th Edition Vol. 2. paragraphs 543 and 544.

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Paragraph 543 which deals with ouster of the Court's jurisdiction reads:

" An agreement which purports to oust the court's jurisdiction is illegal and void as being contrary to public policy, but an arbitration agreement now expressly purporting to oust the jurisdiction is not to be read as doing so, in consequence, apart from the statutory right to stay proceedings, an arbitration agreement is not a bar or defence to proceedings, brought in respect of a dispute agreed to be referred to. It follows that when an arbitration for any reason becomes abortive the court may take upon itself any burden placed by an arbitration agreement on the arbitrators in order to help the parties out of their impasse. Thus, where a party to an arbitration agreement takes no steps to insist upon the determination by arbitration of a matter in dispute, as by applying to have a new arbitrator appointed in lieu of one who has refused to act, he will be precluded from relying upon the agreement as a defence, and the court will regain its full jurisdiction. "

Paragraph 544 reads:

" So long as an arbitration agreement only requires certain conditions precedent or subsequent in order to constitute the right of action it does not oust the jurisdiction of the court, and a provision in an arbitration agreement known as a "Scott vs. Avery" clause, whereby the making of the award is to be considered a condition precedent to any right or action in respect of any of the matters agreed to be referred, is valid. It follows that the existence of such a clause, quite apart from any right to stay proceedings constitute a defence to any proceedings brought before the publication of the award. Such a clause, however, does not operate to postpone the running of any period of limitation. A stipulation making arbitration a condition precedent to the right to sue may be waived by conduct.
Similarly, a clause known as an "Atlantic Shipping" clause barring all claims unless a claim is put forward in writing and an arbitrator appointed within a limited period has been held binding, but there is statutory power to extend time so as to avoid undue hardship and achieve justice, though statutory periods of limitation for commencing arbitration proceedings must not be prejudiced. A provision which purports to prevent a party from exercising his right to ask for a special case, whether consultative or in the award, has been held void as ousting the court's jurisdiction. Save for the court's power to order that a Scott vs. Avery clause shall cease to have effect, there is no difference in principle between the repudiation of a Scott vs. Avery clause and any other arbitration clause. "

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The plaintiffs contended that the defendants ought to have taken out a summons to stay the proceedings pending a reference to arbitration and not having done so could not set up clause 9 of the agreement as a defence.

They submitted, that under paragraph 543 referred to above, only when the claim required holding arbitration precedent to filing of an action could the clause be set up as a defence. I agree with, and accept the submission. But I find, that the defendants were not setting up clause 9 as a defence. They were not setting up any defence. What they were saying was that the plaintiffs hastily proceeded to action by way of a Writ of summons instead of adhering to the provisions of the clause.

I also accept that paragraph 543 says, and here I quote the plaintiffs "arbitration is not a bar or defence to proceedings brought in respect of a dispute agreed to be referred". But bearing in mind the obvious intentions of the parties when they signed the agreement, nowhere in this matter do I find that, in keeping with the terms of the agreement they agreed to refer to arbitration, and that such arbitration became abortive. The plaintiffs simply ignored and by-passed that clause.

I find that clause 9 of the agreement is binding on the parties to the agreement. It is clearly one of the written clauses in the agreement, and had the plaintiffs proceeded by way of arbitration the confusion as to who could sue whom may well have been avoided or resolved. It would seem to me that by the terms of the clause, the plaintiffs having elected to act on the agreement for a breach of the terms, ought to have proceeded by way of an attempt, at least, at arbitration and if for any reason arbitration became abortive, then proceeding to action by way of the Writ could have followed.

It is indeed unfortunate that the defendants changed their attorneys at such a late stage in the proceedings, and that a judgment was signed and bankruptcy proceedings begun before any positive steps

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were taken by them. It so happened that the first action taken by then after the service of the Writ of summons was this application to set aside the interlocutory judgment. However, I fully appreciate the reason for this tardiness in taking any action before now and quote below paragraph 3 of their affidavit in support of this application, by way of explanation therefor:

> " We were served with copies of the Writ of Summons herein in December, 1979, and took it to our then Attorneys-at-law who advised us to do nothing until the matter came up in Court. We were subsequently served with Bankruptcy Notices and then a Provisional Order which had a date for hearing, the 6th day of May, 1980. We took both documents to the Attorneys-at-law who advised us to do nothing until the day of the hearing. However, we became concerned at such inactivity in the face of so many documents, and we consulted our present Attorney-at-law who advised us to apply to set aside the judgment which by then had been entered against us, which we did on the 30th day of April, 1980. The Bankruptcy proceedings were adjourned to 1st July, 1980. "

Following my findings herein, I hereby set aside the interlocutory judgment entered against the 1st, 2nd 3rd and 5th defendants and grant them leave to enter appearance and file defence within 7 days from the date hereof.

Costs shall be the costs in the cause.