Injunctions — Summons for injunctive relief — whether serious issue to be tried — balance of convenience — Interlocutory injunction granted — order for speedy trial

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Remedies

Civil Procedure

(Speedy trial etc)

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.C 075/89

BETWEEN	DONAVON CRAWFORD	PLAINTIFF
A N D	MUSSON (JAMAICA) LIMITED	FIRST DEFENDANT
A N D	DESMOND BLADES	SECOND DEFENDANT
A N D	RAYMOND HADEED	THIRD DEFENDANT
A N D	MRS ROSE HADEED	FOURTH DEFENDANT

W.K. Chin See Q.C., John Vassel and Andrew Rattray instructed by Rattray Patterson and Rattray for the Plaintiff.

David Muirhead Q.C., Angella Hudson-Phillips Q.C and Edward Ashenheim instructed by Milholland, Ashenheim and Stone for the first Defendant.

Emil George Q.C. and Edward Ashenheim instructed by Milholland, Ashenheim and Stone for the second Defendant.

Dr. Lloyd Barnett and Abe Dabdoub instructed by Colin S. Henry and Company for the third and fourth Defendant.

22nd, 29th, 31st March, 3rd, 4th, 5th, 6th and 19th April, 1989.

CLARKE, J.

This summons for injunctive relief is taken out by Donavon Crawford against Musson (Jamaica) Limited (which I shall call "Musson") and Desmond Blades. During the hearing of the summons I granted leave to Raymond Hadeed and Rose Hadeed to be added as defendants to the action and to appear before me by counsel on the ground that the determination of the summons would materially affect them. They are seeking in a related action interlocutory injunctions against Musson in respect of the same 'res' with which this summons is concerned and they await the outcome of this hearing.

By the summons the plaintiff, Donovan Crawford seeks injunctions restraining Musson and Desmond Blades until the trial of the action or further order from doing four acts or series of acts. The first such act is in reference to, Musson, whether by its officers, servants or agents or otherwise, disposing of 30,000 shares owned by Musson in Century National Bank Limited (which I shall call "the bank") or executing or registering any transfer of those shares. The second act concerns Musson and Blades carrying out or participating in any act which is directly or indirectly preparatory to the sale or disposition of the said shares or the execution or registration of the transfer of the said shares.

The third act is in relation to Desmond Blades taking action calculated to frustrate or which would have the effect of frustrating an alleged agreement between Musson and the plaintiff for the sale of the said shares or the registration of the transfer of the said shares. The fourth act which the plaintiff seeks to enjoin is the participation by Musson and Blades in any action calculated to change the composition of the board of directors of the bank before the registration of the shares in the name of the plaintiff and his nominee.

Before I apply the principles appropriate for the determination of the summons I will state the relevant facts which are not in dispute.

The plaintiff is the managing director of, and the registered holder of 26,250 shares in the bank. The bank has an issued share capital of 150,000 shares. Desmond Blades is the chairman and managing director and principal shareholder of Musson. He is a director of the bank. Raymond Hadeed is also a director and he and Rose Hadeed are the registered holders of 20,625 shares in the bank. All that too was the situation when the plaintiff received from Musson a letter dated January 23, 1989 offering to sell to him 30,000 shares in the bank. The contents of that letter signed by Desmond Blades and referred to in argument as the letter of offer are as follows:

MUSSON JAMAICA LIMITED
P.O. Box 96, 178 Spanish Town Road, Kingston 11, JAMAICA W.I. Tel: 92-38922

January 23, 1989

Mr. Donovan Crawford
c/o Century National Bank Limited
14-16 Port Royal Street
KINGSTON

Dear Sir:

We being the owners of 30,000 shares in Century National Bank Limited hereby offer the said shares for sale to you on the following terms:-

1. The sale price is $225.00 per share payable in full on acceptance of the offer and in exchange for stamped share transfer executed by the Transferor and the relevant share certificates;

2. This offer will expire unless it is accepted in writing and the purchase price paid in full by 4:00 p.m. on 21st February, 1989;

3. The shares will be sold ex dividend;

4. Transfer of the shares will be prepared in your names or your respective nominee in whatever proportions you direct;

5. One-half of the stamp duty on the share transfers will be paid by us and the other half by you. Transfer tax will be paid by us.

6. The shares are being offered for sale on the basis that the Transferor is only interested in selling the whole of its holding and will not entertain any purported acceptance of this offer which is only in respect of a proportion of the shares being offered for sale.

These shares will be offered to other interested parties if this offer is not accepted and the sale completed by the 21st February, 1989.

Yours faithfully,
MUSSON (JAMAICA)LIMITED.

Per:
A. Desmond Blades.

Letters of the same date and in identical terms were sent by Musson to the remaining shareholders including of course Raymond Hadeed and Mrs. Rose Hadeed. Within a few days of the date of these letters Musson received letters from four of these shareholders stating that they accepted Musson's offer and included among them were Raymond Hadeed and Donovan Crawford. Musson received from both men separate cheques in payment for the shares. Desmond Blades acting on behalf of Musson informed Crawford that inspite of the letter of offer he had sent he intended to transfer the shares to the shareholders of the bank in proportion to their existing allotment and confirmed this position when he wrote to Crawford returning his cheque. That was also the position Blades took in writing to Hadeed. Hadeed and Crawford have since then brought separate and competing actions for specific performance of what each claims to be a binding contract of sale for the sale of the shares and for injunctions to facilitate the transfer and registration of the shares.

Are there serious questions to be tried? I was invited to say that no triable issue of fact arises on the affidavits and that what are involved here are straight forward questions of law which I ought to determine at this stage of the proceedings.

If Musson is obliged to transfer the shares to one of the two men, I agree with Mr. Muirhead that the one who in law first concluded the contract with Musson would get the shares on the principle, qui prior est tempore potior est jure of which Potter v. Sanders (1846) 6 Hares Report 11 and Assaf v Fua [1955] AC 210 are illustrative. The defendants argue that by the force of what they say is the plain and unambiguous meaning of the letter of offer the time of the receipt of the letter intimating acceptance is crucial to the question as to when a binding contract for the sale of the shares was concluded.

Blades deposes that Hadeed was the first to accept Musson's offer and so it was submitted that there is unchallenged and incontrovertible evidence that Hadeed was first. As Mr. Vassel pointed out, the word 'first' does not define a specific time or date. It is descriptive of the relationship of one time or date with another time or date. So I have to look to Blade's affidavit to see what the word 'first' signifies in the context of that affidavit. He says he received Hadeed's letter of acceptance on the 26th January and Crawford's on the 27th. It is plain that in using the word 'first'he was describing a circumstance where Hadeed's letter came on the 26th and Crawford's came on the 27th. Yet there is evidence before me on Neville Roche's affidavit that on the 26th he delivered by hand to Blades, Crawford's letter. So if a trial court were to accept Roche on that point that would displace the assertion of first in time in the context in which that description was used by Blades. If Roche's evidence was found to be true an inference could be drawn by the court of trial that Blades was not truthful when he deposed that he received Hadeed's letter first. Therefore if Crawford were to satisfy that court that his letter was received by Blades first then he would have succeed, if the defendants view of the law affecting the matter is correct.

As the evidence of Blades as to who was first is not accepted by Crawford I am left in doubt as to the outcome of the trial on that issue. There is accordingly a very serious issue of fact to be tried which bears upon the defendants' own view of the law.

On the question of the letter of offer and the other documents in the case relating to it I agree with Dr. Barnett that in commercial transactions what one seeks to ascertain is whether the parties had come to an agreement and intended to create legal obligations among themselves.

So it was said that Crawford's use of the word 'accepted' in his affidavit showed that acceptance involved merely an intimation of acceptance but did not involve payment. Yet there is material before me that he also used the word 'accepted' as referring to the situation that obtained when he paid in full. Be it also noted that there is the question as to whether or not Musson regarded letters signifying acceptance as concluding a binding contract. By February 13th not only were cheques returned to Crawford and Hadeed but Blades on behalf of Musson inveighed against both men for purporting to accept an offer that according to him Musson could not have made in the light of what he said was some prior understanding by all the parties about how the shares should be allocated.

Therefore whatever value is to be derived from the responses and statements of the parties as to what amounted to acceptance, the letter of offer is of no small importance and falls to be construed at the trial. What does paragraph numbered 1 of the letter of offer when read with paragraph 2 mean? Does it for instance mean, as was submitted by the defendants, that there is acceptance when acceptance in writing is received without payment or does it mean as the plaintiff contended, that there is no acceptance without payment? In any case there is a great contest between Hadeed and Crawford as to which of them first paid the full sum for the shares. I agree with Mr. Vassel that if there is an ambiguity in the offer document it has to be resolved at the trial even if Dr. Barnett is correct that the ambiguity can be resolved by reference to the conduct of the parties. The trial is the forum for identifying the relevant conduct and assessing its meaning.

There is also a triable issue as to whether the receipt by Musson of the purchase money in full, in the context of an enforceable contract, renders it a bare trustee for the purchaser in accordance with whose direction it is obliged to vote the shares.

In relation to Blades in his capacity as a director of the bank the affidavit evidence shows that there are serious questions to be tried including (a) whether if he sit on the board of the bank on the matter of the registration of the transfer of the shares and matters incidental thereto he would be placing himself in a position where his duty to the bank would conflict with his personal interest in Musson of which he is the chief executive and principal shareholder and (b) whether, if there is such a conflict, as fiduciary agent of the bank he would on the question of the shares be likely to use his position to obtain some private advantage or for any purpose foreign to the power, to the prejudice of the plaintiff.

So then it is abundantly clear that the plaintiff's claim is not frivolous or vexations and that there are serious questions to be tried on which the available evidence is incomplete, conflicting and untested. As Lord Diplock said in American Cynamid v. Ethicon Ltd [1975] 1 All E.R 504 at 510 d :

> " It is not part of the court's function at this stage of the litigation to resolve conflicts of evidence on affidavit as to facts on which the claim of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations."

I now go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory injunctions sought. I must therefore consider whether if the plaintiff were to succeed at the trial damages would be an adequate remedy. Mr. George argued that as the value of the shares can be assessed damages would be an adequate remedy. However, assessibility of the loss is not the prinary consideration though if the loss cannot be assessed that may be warrant for holding that damages would not be adequate.

My primary enquiry is this: would the plaintiff, as was submitted on his behalf, be in all respects as well off, if he were left to his remedies at law, as he might be if I intervened by way of injunction? I think not.

A Court of Equity will not lightly refuse to intervene by way of injunction or specific performance on the ground of adequacy of damages if its intervention is to protect a contractual right especially where the subject matter of the contract are shares which are not readily available in the market.

As I hold that damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial I now consider whether if the defendants Musson and/or Blades were to succeed at the trial in establishing their right to do the acts which are sought to be enjoined they would be adequately compensated under the plaintiff's undertaking as to damages for the loss they would have sustained by being restrained from doing so between the time of the application and the time of the trial. It is manifest that damages recoverable under the plaintiff's undertaking as to damages would be an adequate remedy should they succeed at the trial. Damages are what they would be entitled to in that event.

The plaintiff has deposed that his total assets comprising real and personal property are in excess of $18,000,000 and that it was on the strength of his assets that he was able to obtain within a twenty four hour period the sum of $6,750,000 to pay for the shares in question. That was not challenged. I am satisfied, though it was urged that I should not be, that he would be in a financial position to pay the damages recoverable under his undertaking.

The defendants further submitted that the plaintiff ought not in any event to be granted equitable relief because according to them he has not come to equity with clean hands and also that as he seeks equity he must do equity. That submission is based on this: that while an exparte interim injunction obtained by the plaintiff was in force restraining Musson and Blades from inter alia participating in any action calculated to change the composition of the board of directors of the bank, Crawford at a meeting of the board of the bank held on 14th March, joined with others to change the composition of the board. I pause here to note two unchallenged facts pointed out by Mr. Chin See.

First, requests for the appointment of directors to take place at the meeting of the board on 14th March did not come from Crawford but other shareholders, namely, Lival Investment Limited and Raymond Hadeed. Second, it was the chairman of the board, Mr. R.N.A. Henriques who placed the request on the agenda fixed by him for the board meeting of 14th March.

Upon an examination of the conduct of the plaintiff as borne out by the affidavit evidence I find that there is no basis on which it can properly be said that the plaintiff is in breach of any obligation in voting or acting on a matter which had been placed on the agenda by the chairman at the request of Lival Investment Limited and Raymond Hadeed. The maxims invoked by the defendants do not in the result aid them.

I hold that the balance of convenience lies in favour of my exercising my discretion by granting the interlocutory injunctions in terms of the summons. I order that costs are to be costs in the cause with certificates to Queens Counsel and all Counsel.

The issues in the matter are of great importance and any appreciable delay to try the case could cause injustice. In all the circumstance I make an order for speedy trial of the case by a judge sitting alone and further order that defences be filed within thirty (30) days of today and reply, if any, be filed within fourteen (14) days of the delivery of the defence. Thereafter the matter is to be set down within fourteen (14) days of the delivery of the reply. The estimated length of the trial is ten (10) days.

It is further ordered by the consent of the parties that suit C.L.H 035 of 1989 be consolidated with the instant suit, C.L.C. 075 of 1989.

Cases referred to

Potter v Sanders (1846) 6 Hare Rep 11

Assaf v Fua (1955) AC 210.

American Cyanamid v Ethicon Ltd [1975] 1 All ER 504