IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L I 016/01

BETWEEN	I.C.WI INVESTMENTS LIMITED	PLAINTIFF
AND	COLONIAL LIFE INSURANCE COMPANY LTD.	1ST DEFENDANT
AND	BARBADOS MUTUAL LIFE ASSURANCE CO.	2ND DEFENDANT
AND	FIRST LIFE INSURANCE COMPANY LTD.	3RD DEFENDANT
AND	FINSAC LIMITED	4TH DEFENDANT
AND	LIFE OF JAMAICA LIMITED	5TH DEFENDANT

Mr. Michael Hylton Q.C, Miss I. Mangatal and Mr. John Francis instructed by Miss Valerie Alexander for the 4th Defendant/Applicant.

Mr. A. Wood and Mr. R Braham instructed by Mrs. Susan Risden Foster for the 5th Defendant/Applicant.

Mr. D. Scharschmidt Q.C instructed by Mrs. P. Levers for the Plaintiff.

Heard: April 24, 25; May 2, 2001

HARRISON J

Background to the application

This matter concerns an application by the 4th and 5th named defendants respectively to set aside an ex-parte order for injunction granted to the plaintiff. No objections were raised to the applications being heard together.

Before I proceed to deal with the applications however, it will be useful to look briefly at the background surrounding this issue.

The plaintiff is a registered company and up and until December 2000, it was the largest single shareholder in the fifth defendant (LOJ) with the Hon. Dennis Lalor O. J owning majority of the shares.

The fourth named defendant, (FINSAC) is a company established and funded by the Government of Jamaica. It has utilized public funds in the amount of approximately $3.2 Billion by way of capital injections in L.O.J due to its insolvency. As a result of that investment, FINSAC now holds approximately 76% of the shares in L.O.J. It has indicated its intention to sell these shares in L.O.J and has invited offers. The first three defendants have each tendered bids in order to purchase those shares.

The plaintiff, a minority shareholder of the fifth named defendant has brought this action against the defendants and it seeks a declaration that each and all of the defendants have breached their statutory duties under the Securities (Take Over and Merger) Regulations. It also seeks an injunction against the defendants.

The ex-parte injunction

On April 12, 2001, McIntosh J who heard the ex-parte application made the following order :

i) The first, second and third defendants and their servants and/or agents or otherwise howsoever and each and/or either and/or all be restrained from proceeding with their offers to purchase a majority of the ordinary shares in the fifth named defendant from the fourth named defendant which were made in breach of the "Regulations and without first complying with the terms of the said "Regulations" in particular Regulations 4, 10, 14 and 26.

ii) The fourth defendant as the offeree company and its servants and or its agents or otherwise howsoever be restrained from accepting any of the said offers from the first, second and/or third defendants which were made in breach of the said Regulations, and without first itself complying with Regulation 8 of the said Regulations..

iii) The fifth named defendant as the offeree company and its servants and or its agents or otherwise howsoever be restrained from approving and registering the said transfer of shares without the said fifth named defendant itself first complying with the terms of the said Regulations and secondly without the Offeror so complying as well..

iv) That the fourth named defendant and/or its servants and/or agents or otherwise howsoever be restrained from selling and/or transferring 140,816,330 ordinary shares in the fifth named defendant to the First and/or Second and/or Third named defendants or any third party without first complying with the option granted to the Plaintiff by an Agreement between the said Fourth and Fifth named defendants and the plaintiff dated 21st May, 1997.

v) The fifth named defendant and/or its servants and/or agents or otherwise howsoever be restrained from approving and registering the said transfer in breach of the said Agreement dated 21st May 1997,

For 30 days from the date of this Order or until further order.

vi) The plaintiff have leave to serve the order granted herein and the Writ of Summons and Statement of Claim on the 1st and 2nd Defendants out of the jurisdiction on their registered offices.

vii) Costs to be costs in the cause."

The fourth and fifth defendants respectively, are now seeking to set aside the above order. There is no application by the plaintiff for an interlocutory hearing so, the only matter before me is that concerning the summons to set aside the exparte order.

Concession

At the hearing before me, Mr. Scharschmidt Q.C for the plaintiff, conceded at the very outset that paragraphs 2 – 5 inclusive, of the above order ought to be set aside. These paragraphs in the aforesaid order touched and concerned the fourth and fifth named defendants respectively. No concession was made however, with respect to the facts alleged in the affidavits in support of the applications to set aside.

The first, second and third defendants failure to apply to set aside the order

Mr. Scharschmidt submitted quite forcefully, that the injunction ought to remain in force against the first, second and third defendants since they were served with the order of the 12th April, but have failed to enter an appearance and to make any application to set aside the said order. He submitted that neither Counsel for the 4th nor 5th defendants could argue on their behalf.

I disagreed with that submission and gave Mr. Hylton Q.C, leave to argue for and on behalf of these defendants as amicus curiae. Here are my reasons for granting leave:

1. It is now well known, that the first three defendants have respectively tendered bids to the 4th defendant to purchase its shares in the 5th defendant and paragraph 1 of the said order restrains them now from proceeding with these offers. It is therefore my considered view that paragraph 1 of the injunction would affect the 4th defendant equally since the paragraphs subject to the concession, have restrained the 4th defendant from proceeding to accept the respective offers. It does mean that if the 4th defendant with knowledge of paragraph 1, proceeded to accept the offers, it could be in contempt of court as the 4th defendant would be abetting those defendants to breach the order.

2. If the action were brought against the first three defendants and the only order was that contained in paragraph 1, the 4th defendant would have been entitled to be added to the action for the purpose of applying to set aside this very order. See section 100 of the Judicature (Civil Procedure Code) Act which provides inter alia:

> "100. .....The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties whether plaintiffs or defendants who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added...." (emphasis supplied)

This section came up for consideration in the Court of Appeal decision of **Jamaica Citizen's Bank v Dyoll Insurance Co. Ltd and Leon Reid** (1991) 28 JLR 415 which held inter alia :

> "(i) that the power of the Court to add a party or parties was set out in section 100 of the Civil Procedure Code which stated (inter alia) that the Court or Judge at

any stage of the proceedings may order that the names of any parties whether plaintiff or defendant who ought to be joined and whose presence before the Court is deemed necessary for the Court to effectually and completely adjudicate and settle all questions involved in the cause or matter. This was bolstered by the common law position that when two parties are in a dispute and the determination of that dispute will affect a Third Party in his legal right or in his pocket, then the Court in its discretion may allow him to be added.

3. A jurisdictional issue arose with respect to the order for service of the writ of summons on the first and second defendants outside of the jurisdiction.

The decision to hear Counsel is further supported by material contained in Vol. 22 of Atkin's Encyclopaedia of Court Forms at page 75 where it states:

> " An injunction may be dissolved on the application of one defendant, as against other defendants who do not themselves seek such discharge or indeed, take any part in the proceedings, if the defendant making the application is affected thereby." (See **Cretanor Maritime Co. Ltd v Irish Marine Management Ltd, The Cretan Harmony** [1978] 2 All E.R 164.)

Setting aside for non-disclosure

The summonses to discharge the exparte injunction relied inter alia, upon the ground that the plaintiff was guilty of non-disclosure of material facts when it applied for the injunction.

The authorities have made it abundantly clear that on an exparte application for an injunction, *"uberrima fides"* is required and it is therefore incumbent upon an applicant to make full and frank disclosure of all material facts. See **Jamculture Ltd v Black River Upper Morass Development Co. Ltd** (1989) 26 JLR 244.

In considering whether there has been relevant non-disclosure and what consequences the Court should attach to any failure to comply with the duty to make full and frank disclosure it should consider whether the applicant made proper inquiries. The authorities indicate also, that the duty of disclosure applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

In **Tharmax Ltd v Schott Industrial Glass Ltd** [1981] Fleet Street Reports 289 it was held that even where failure to disclose was an error of judgment only and not deliberate, the order must be discharged without investigating its merits.

If the facts suppressed would not have altered the decision of the judge the injunction will not necessarily be dissolved. See English and Empire Digest Vol. 28(2) 1121 para. 676.

The question that arises at times is what should the Court do in a situation where new material has been put forward. **In Minister of Foreign Affairs Trade and Industry v Vehicles and Supplies Ltd and Another** (1991) 4 All E.R 65 it was held inter alia that :

> " A Judge of the Supreme Court had jurisdiction under R.S.C Ord. 32 r. 6 as applied to Jamaica by section 686 of the Civil Procedure Code, to vary or revoke an exparte order made by another judge, and in light of the new material put forward.....for the order to be set aside, the second Judge had acted within his discretion in setting aside the exparte order made by the first Judge."

Should the order be discharged?

The affidavit evidence is indeed voluminous but I have read and carefully considered the several issues raised by the parties. I have also given careful consideration to the submissions by each Counsel.

The application for the injunction was supported by an affidavit sworn to by Mr. Dennis Lalor on the 11th April 2001.It contended inter alia:

1. That the first, second and third defendants had made offers to purchase the fourth defendant's shares.
2. That the first, second and third defendants had breached Regulation 4 by failing to give the Plaintiff or other minority shareholders of the fifth named defendant the relevant information as to those offers.
3. That the first, second and third defendants had also breached regulation 26 by failing to make an offer to the plaintiff and other minority shareholders to purchase the shares.
4. That the 4th defendant as majority shareholder had failed to consult with the plaintiff and other minority shareholders, in breach of Regulation 8.
5. That the fifth defendant had breached Regulation 14 in failing to give notice to the plaintiff and other minority shareholders of the offers which had been made.
6. That the 5th defendant had also breached Regulation 10 in failing to consult or advise its shareholders with respect to such offers.
7. That by an agreement dated the 21st May 1997, the 4th and 5th defendants had covenanted that the plaintiff and other shareholders would have an option in respect of 140,816,330 of ordinary shares in the fifth defendant owned by the 4th defendant, and that the alleged option has been breached as the 4th defendant has agreed to accept offers for its total shareholding.

The affidavits filed on behalf of the 4th and 5th defendants revealed additional facts that:

1. The plaintiff was the majority shareholder in control of the 5th defendant up to the 21st May 1997 when a refinancing agreement was made between the plaintiff, the 4th and 5th defendants in order to save the 5th defendant from insolvency.
2. There was a further re-financing agreement between the parties on the 6th November 2000.

3. The 4th defendant had utilized public funds in the amount of approximately J$3.2 Billion by way of capital injection in the 5th defendant.
4. The acquisition by the 4th defendant of majority control of the 5th defendant had occurred some six weeks prior to the plaintiff's application for the injunction following upon the formal rescission by the 4th defendant of the first refinancing agreement on the 26th February 2001 due to breach of the agreement by the plaintiff and 5th defendant.
5. Under the first agreement in return for the capital injection made by the 4th defendant, the 4th defendant received 140,816,330 ordinary shares together with 1,056,683,670 cumulative redeemable preference shares which had to be redeemed at its face value of $1 each together with cumulative preference dividends at 12.5% per annum until 1st July, 2002.
6. The option to repurchase the 4th defendant's 140,816,330 ordinary shares was conditional upon the repayment of the redemption cost of $1,627,437,222.30 together with the cost of the ordinary shares of $245,070,924.30 as computed on March 1st 2001.
7. Resolutions were passed at an extraordinary general meeting of the shareholders held in November 2000 in order to sanction the issue of further shares to the 4th defendant as well as the conversion of the redeemable preference shares.
8. The further terms of the second refinancing agreement was that the 4th defendant would be entitled to sell its entire ordinary shareholding in order to find a shareholder not only to repay the sums of money invested by the 4th defendant but also able to sufficiently capitalize the business of the 5th defendant.
9. The acquisition by the 4th defendant of the majority of the ordinary shares in the 5th defendant was granted exemption from the Regulations by the Securities Commission pursuant to regulation 26(2)(b) on the basis that the 4th defendant's acquisition was necessary for the purpose of recapitalizing or rehabilitating the 5th defendant in order to restore it to solvency and in order to enable it to continue to carry on its business as a going concern.
10. There was a similar exemption that was granted by the Jamaica Stock Exchange in relation to its rules governing mergers, takeovers and acquisition.
11. The numerous correspondence exhibited, show that the dispute was one concerning compensation to Mr. Lalor and there was no reference to any other dispute. Neither was there reference to the purchase of shares or the Regulations.
12. There was correspondence between the plaintiff and the 4th defendant which indicated FINSAC's intention to sell its shares to an outside investor.
13. The Plaintiff had failed to bring regulation 12 of the Securities (Take Over and Merger) Regulations to the attention of the learned Judge which makes it clear that any obligation to communicate with minority shareholders or to make an offer to such shareholders would only arise upon acquisition of control by the first, second and third defendants.
14. The plaintiff had not disclosed its ability to honour the undertaking as to damages or how it would meet the financial obligations in respect of the alleged option to reacquire shares from the 4th defendant. See **Lock International Plc v Beswick** [1989] 1 WLR 1268.

I hold therefore, that on a totality of the evidence presented by the defendants there was non-disclosure of material facts by the plaintiff. Had these facts been brought to the learned Judge's attention, he would in all probabilities have refused to grant the injunction.

The plaintiff cannot say that because it has conceded to the setting aside of the injunction against the 4th and 5th defendants, the undisclosed facts referred to above are no longer relevant matters for the court to consider setting aside the order against the other defendants. There is the maxim which says that "he who comes to equity must come with clean hands."

Damages an adequate remedy and the balance of convenience.

Once it is established that damages is an adequate remedy, the interim injunction ought not to have been granted. It is abundantly clear from the claim and the evidence in support of the injunction, that the dispute between the parties is a money claim. It is a claim that touches and concerns the purchase of shares hence it is my considered view that damages would be an adequate remedy and the injunction would have to be dissolved in these circumstances.

It is further my view, that the balance of convenience does not favour continuing the injunction.

The jurisdictional issue

The question concerning the learned Judge's jurisdiction in ordering service of the writ of summons on the 1st and 2nd defendants outside of the jurisdiction must be dealt with now. Both defendants carry on business in Trinidad and Tobago and Barbados respectively and were out of the jurisdiction at the time when the writ was issued. Mr. Hylton Q.C and Mr. Wood both submitted that the writ was not properly issued against these two defendants and the Court by exercising its inherent jurisdiction should strike out the writs against them.

Now, section 7A of the Judicature (Civil Procedure Code) Law (C.P.C) provides as follows:

> " A writ of summons for service out of the jurisdiction or of which notice is to be given out of the jurisdiction shall not be issued without leave of the Court or a Judge."

There is provision in section 26A of the C.P.C for the issuing of a concurrent writ. Section 26A (1) states:

> " The plaintiff in any action may at the time of or at any time during twelve months after the issuing of the original writ of summons, issue one or more than one concurrent writ, each concurrent writ to bear teste of the same day as the original writ, and to be sealed and marked by the Registrar with the word "concurrent" and the date of issuing the concurrent writ."

It is without dispute that the plaintiff did not apply to have a concurrent writ of summons issued and Mr. Scharschmidt has rightly conceded this. The plaintiff could have sought leave to issue a concurrent writ from the very outset or it might do this at any time during twelve months after the issuing of the original writ. However, the plaintiff now faces a problem. Before leave is granted to issue the concurrent writ the plaintiff has been granted leave to serve the writ out of the jurisdiction. This order would amount to a nullity and warrants the striking out of the writ of summons against these two defendants. See **Greene v Green** (1975) 25 WIR 36.

Conclusion

In view of the foregoing, the Court hereby orders as follows:

1. The exparte injunction ordered on the 12th day of April 2001, is hereby dissolved.
2. The 4th and 5th named defendants have liberty to proceed with an enquiry as to damages pursuant to the Plaintiff's undertaking as to damages.
3. The writ of summons is hereby struck out against the first and second defendants.
4. There shall be costs to the 4th and 5th named defendants to be taxed if not agreed.