IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L. 1993/J320

BETWEEN	JAMAICA CITIZENS BANK LTD	PLAINTIFF
AND	DALTON YAP	DEFENDANT

Mr. Norman Wright and Mr. Christopher Dunkley instructed by Wright and Dunkley for the Defendant.

Mr. P. McDonald instructed by Myers Fletcher and Gordon for Plaintiff.

IN CHAMBERS

Summons for Order to proceed to Inquiry and Assessment of Damages

Heard: February 23; April 27, 1998.

HARRISON J

Introduction

On the 8th October, 1993 the plaintiff filed a writ of summons against the defendant claiming the following:

1. Damages for breach of contract of employment.
2. Further and/or in the alternative, damages for conspiracy.
3. Further and/or in the alternative, damages for deceit.
4. Further and/or in the alternative damages for negligence.
5. Costs.
6. Interest
7. An Injunction to restrain the defendant from disposing of and/or dealing with his assets wheresoever situate in so far as the same do not exceed the sum of US $400,000 until judgment.

On the said date the plaintiff also applied for a Mareva Injunction and Reid J made the following order:

> "... upon reading the affidavit of Ewart Scott sworn to on the 8th day of October, 1993 and filed herein and upon the Plaintiff by his said Attorneys - at - Law undertaking,
>
> .....
>
> **IT IS HEREBY ORDERED THAT**:
>
> (A) The Defendant be restrained, whether by himself, his servants or agents, or howsoever otherwise from disposing of and/or dealing with his assets wheresoever situate in so far as the same do not exceed the sum of US $400,000.00 and in particular from withdrawing or transferring the funds in his accounts at Jamaica Citizens Bank until judgment or further order herein.
>
> (B) Liberty to the Defendant and any Third Party affected by the Order to apply on notice to the Plaintiff's Attorneys - at - Law to set aside or vary this order.
>
> ....."

This injunction was discharged by Theobalds J on the 26th day of November, 1993. The learned trial Judge's order to discharge the injunction was challenged on appeal and eventually the order of Reid J was re-instated by the Court of Appeal.

At the trial of the action before Panton J, judgment was entered for the plaintiff. The learned trial judge found that the defendant had committed a breach of his contract of employment and was liable in respect of losses arising therefrom amounting to US$106,226.04.

Present application

I now turn to the application before me. The summons was filed on the 13th day of January

1998 and the defendant seeks inter alia, an order:

> " That there be an inquiry whether the defendant has sustained damages by reason of the Mareva injunction dated October 8, 1993 which the plaintiff ought to pay according to their undertaking as to damages contained in the said order."

Submissions

Counsel for the defendant/applicant contended that the plaintiff was completely exonerated by Panton J from charges of fraud and conspiracy and that the decision of the Court of Appeal to re-instate the injunction was based primarily on the allegations of fraud and conspiracy. According to him , fraud was the "lynch - pin" and it failed on the merits. He submitted inter alia:

> "We invite the Court to look at the judgment of the Court of Appeal, in particular that of the Honourable President Mr. Justice Carl Rattray in which the court stated the basis on which it had taken the decision to reinstate the injunction. (see pages 9, 10, & 14). We further invite this Court to look at the judgment of Mr. Justice Panton, in which his findings make it quite clear that the basis put forward by the Court of Appeal which were allegations of fraud and conspiracy at the trial proved to have been unsustainable and unfounded. It is interested to observe that at the commencement of the trial the plaintiff withdrew the allegations of conspiracy against the defendant. It is our contention therefore that insofar as the injunction was granted and subsequently re-instated for those specific reasons, it is clear that it ought not to have been granted in the first place.
>
> The only finding against the defendant on the basis of which judgment was awarded to the Plaintiff is that he was guilty of a breach of his contract of employment. It is our contention that had the plaintiff approached the Court for a Mareva Injunction based on such an allegation it would never have obtained the injunction, as the Plaintiff Bank would have been obliged as any other would-be Plaintiff and to recover any judgment obtained in the normal way as opposed to giving itself a preferred position as a creditor which was the effect of the Mareva Injunction...."

Mr. Wright further submitted:

> "....in the instant case was the Plaintiff Bank right in preventing the Defendant from having access to the funds in his several accounts merely because it had a claim for breach of contract against the defendant? The answer to this question must be in the negative and it follows from this that the injunction ought not to have been granted and the order to proceed to Inquiry and Assessment of Damages should be made."

Mr. McDonald contended that the Plaintiff's case did not fail on the merits. He submitted inter alia:

> "... the defendant has omitted to say that the judgment of the learned trial judge was in fact in favour of the Plaintiff in the amount of U.S $106,224.04 as damages for breach of contract, which as is obvious from the endorsement on the writ of summons, was the Plaintiff's primary claim against the defendant. Costs were awarded against the defendant. The fact that a part of the Plaintiff's case against the defendant did not succeed cannot mean that the Plaintiff's case has failed on the merits.
>
> The Defendant places great reliance on the fact that the Court of Appeal seemed to have been concerned about the allegations of fraud against the defendant in upholding the grant of the injunction, since these allegations were later dismissed.
>
> The Defendant's position is only plausible if one accepts that the Mareva injunction was granted in respect of the Plaintiff's Claim against the Defendant as far as fraud and conspiracy was concerned. This is not so. The injunction was granted because the plaintiff had a claim against the Defendant on several different bases, the chief of which was breach of contract,(the claim which succeeded) and there were circumstances which existed at the time of the grant of the injunction which caused the plaintiff (and the Hon. Mr. Justice Reid and the Court of Appeal) to accept that there was a risk that the defendant would deal with his assets in such a manner that any judgment which the plaintiff obtained might be unsatisfied. That claim was established at the trial..."

Inquiry as to damages

The authorities establish that an enquiry as to damages will not be ordered in these cases until either the plaintiff has failed on the merits at the trial or it is established before trial that the injunction ought not to have been granted in the first place. Let me refer to two of the cases. The first is *Newby v Harrison* (1861) 3 De GF & J 287; 45 ER 889. The judgment reads inter alia:

> " An undertaking given by a plaintiff upon obtaining an injunction, to abide by any order the Court may thereafter make as to any damages that may be occasioned to the Defendants by the injunction, remains in force notwithstanding the dismissal of the bill. An inquiry as to damages will in such a case be granted where the Plaintiff's case fails by reason of his having no right to interfere with the act which he seeks to restrain, though the Defendant was a mere trespasser."

In *Griffith v Blake* (1884)27 Ch 474 Cotton LJ stated inter alia :

> "....the rule is, that whenever the undertaking is given, and the plaintiff ultimately fails on the merits, an inquiry as to damages will be granted unless there are special circumstances to the contrary."

The Court further held in *Griffith* (supra) that:

> " where an interlocutory injunction has been granted on the usual undertaking as to damages, if it is afterwards established at the trial that the plaintiff is not entitled to an injunction, an inquiry as to damages may be directed, though the plaintiff was not guilty of misrepresentation, suppression, or other default in obtaining the injunction."

Did the plaintiff in the instant case fail on the merits at the trial? That question may only be answered in my view, after one peruses the judgment of Panton J delivered on the 22nd day of September, 1997. The learned trial Judge in making his findings stated inter alia:

> "These findings have been made after full consideration of the evidence placed before me and the submissions of the attorneys - at - law. I have also considered the demeanour of the witnesses as they gave their evidence. Thought has also been given to the fact that the

> witnesses had a special relationship with the plaintiff, and they themselves were active players in the operations of the plaintiff. I am of the view that it would have been unwise to ignore this aspect as consideration has to be given to whether the evidence of any of these witnesses is coloured by anything apart from the truth..."

The learned trial judge then looked at different heads relating to the several causes of action. He dealt firstly with certain agreements in relation to international credit card services(referred to as FTA). He has stated :

> "I find that in relation to the FTA arrangements the defendant was neither negligent not in breach of contract. He did not conspire with anyone; nor did he commit the tort of deceit. There is no false statement that was made by him, intending for the plaintiff to act on it, which has resulted in the plaintiff acting thereon and suffering loss. As said earlier, the activities in relation to the account in Chicago were the result of the contract that the plaintiff knowingly made, under legal advice, with FTA, coupled with the fraudulent behaviour of Mr. Palmer and the laxity of those who were in charge of the plaintiff's finances."

The second heading in the learned trial judge's findings dealt with Telemarketing. He made certain findings as to the re-opening of certain accounts. He said finally:

> "In my judgment, the re-opening of LMP Marketing and the opening of Worldwide Marketing constituted a breach of the defendant's contract of employment with the plaintiff. This was clear defiance of the plaintiff's policy. It follows that the defendant is liable for the losses sustained by the plaintiff from this breach. In the case of Worldwide Marketing Ltd he is laible for the loss recorded at page 507 of Ex. 2 that is, US $106,226.04. In respect of LMP Marketing, if I understand the chart at page 507, there does not appear to have been a loss to the plaintiff, in any event, no loss was pleaded.
>
> In the circumstamces as I find them, the defendant has also committed the tort of negligence. However, I agree that where there is the protection of a contract,

> it is impermissible to disregard the contract and allege liability in tort.."

This is how the learned trial judge summarised his written judgment:

> " I find that the defendant has incurred no liability so far as the FTA issue is concerned. He is also not liable in respect of the telemarketing accounts prior to July 6, 1993. However, he committed a breach of his contract of employment in opening the account in the name Worldwide Marketing Ltd., and is liable in respect of the losses arising therefrom. Accordingly, judgment is entered for the plaintiff for US $106,226.04. Interest is awarded at the rate of 12% per annum from June 30, 1994. Costs to the Plaintiff are to be agreed or taxed."

The Court of Appeal judgment

Mr. Wright submitted that the decision of the Court of Appeal to re-instate the injunction was based primarily on the allegations of fraud and conspiracy. He argued that since fraud was the reason why the injunction was re-instated and Panton J had exonerated the defendant from charges of fraud and conspiracy, the plaintiff had failed on the merits at trial. This is how the Court of Appeal made reference to the issue of fraud. Rattray P, having examined the affidavit of Ewart Scott, the acting General Manager of the Bank, he stated inter alia, at page 10:

> "...A scrutiny of the defendant's activities, if accepted at the hearing will:
>
> 1. Establish a strong inference which can legitimately ground the belief of the plaintiff as stated in paragraph 14 "that the defendant is likely to remove or otherwise deal with those assets in such a manner as to frustrate any judgment which may be awarded against him, unless restrained by the Court".
>
> 2. Taken with the other allegations and for the purpose of meeting the "risk" criteria, provide "direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied on." [Ninemia (supra) 406]

> These are the factors which the plaintiff relies upon to discharge the burden placed upon it to satisfy the judge of the existence of "a good arguable case" as well as the probability of risk.
>
> It must be kept in mind that this action is based upon allegations of fraud and the question of probity of the defendant is therefore very material.

Then at page 14 of the judgment the learned President stated:

> "The defendant placed in a position of heightening the awareness of the plaintiff and calming its fears by disclosing some of his other assets is merely content to rely on a statement that he has "substantial assets in Jamaica". This in my view is very unsatisfactory, particularly within the forum of a jurisdiction in equity and an allegation by the plaintiff of fraud..."

Forte J.A expressed himself as follows:

> "On the evidence, as a whole, can there be a conclusion that there was a good arguable case? The plaintiff alleges that the respondent, while an employee of its Bank, conducted himself in circumstances which amounted to either a fraudulent or negligent treatment of its funds resulting in loss of an amount of about US $400,000.00. In my view the content of the respondent's affidavit and in particular his general denial in the face of an allegation of fraud made against him does not displace the inferences arising in the evidence of the appellant, which clearly discloses a good arguable case."

Downer J.A, in his judgment, referred to the defendant's responsibility in relation to the credit card operations and what the Bank stated were improper credit card relationship worldwide with Telemarketers . Then he said:

> "The other allegation was that, as a manager, he conspired with others to set up a fictitious office to defraud the Bank of its funds. These allegations also suggest that there may have been a "fraudulent breach of fiduciary duty."

At page 49 of the judgment Downer J.A states:

> "In his reasons for judgment, Theobalds J.A makes no mention of the serious allegations of fraud made by the Bank and supported by the affidavit evidence..."

And at page 52 the learned Judge said:

> ".....since there are allegations of fraud against Yap, and his bank accounts are frozen, it would be in the interests of justice that there be an order for a speedy trial."

Findings

I have carefully considered the evidence put before me and the submissions of the Attorneys - at - Law. I have also advised myself on the relevant authorities.

Mr. Wright has placed great emphasis on the issue of fraud because, according to him, it was the "lynch-pin" of the plaintiff's case and it failed on the merits. He therefore argued that the defendant is entitled to the order sought.

Now, it is beyond dispute that serious allegations of fraud were made by the Plaintiff, but to my mind, there were different bases upon which the plaintiff Bank sought to present its case against the defendant. The trial judge had to concern himself with issues of breach of contract of employment, negligence, conspiracy and deceit. He found that so far as the FTA claim was concerned, the defendant did not conspire with anyone nor did he commit the tort of deceit and neither did he make any false statements which resulted in the plaintiff acting thereon and suffering loss. He also found that the defendant had committed a breach of his contract of employment in relation to the telemarketing activities hence, judgment was awarded in favour of the plaintiff with interest and costs.

The evidence presented, also reveal that material facts, including the defendant's contract of employment, were put before Reid J for the grant of the Mareva injunction. It is quite evident that the learned Judge in making the order was satisfied that the Plaintiff had a good arguable case and

that there was a risk that if the defendant was not restrained, he would deal with his assets in such a manner that any judgment which the plaintiff obtained might be unsatisfied.

It is my considered view therefore, that although fraud was one of the issues at the trial, it was not the primary one. I also hold, that the plaintiff's failure to establish fraud on the part of the defendant did not mean that there was no merit in its case and for that reason the injunction ought not to have been granted. The plaintiff's success at trial in respect of the breach of contract of employment is an indication to me, that it did have a good arguable case. As a matter of fact when the matter came before the Court of Appeal this is how Forte J. A expressed himself :

> "....In my view the content of the respondent's affidavit and in particular his general denial in the face of an allegation of fraud made against him does not displace the inferences arising in the evidence of the appellant, which clearly discloses a good arguable case."

In the circumstances, I must say that I was not persuaded with the arguments and submissions made on behalf of the defendant. On the other hand, I am constrained to accept the submissions made by Mr. McDonald.

Delay in applying

The issue of delay in applying for an inquiry was also raised by Mr. McDonald. He submitted that there was delay on the part of the defendant hence, this should be another reason why the application should be refused. He argued that the Mareva injunction was granted in October 1993; trial ended in November 1996 and judgment delivered was delivered on the 22nd day of September 1997 yet the application was not made until the 13th January 1998. It was contended by Mr. Wright on the other hand, that the defendant had applied within a reasonable time.

The authorities are very clear that if the applicant for an inquiry delays unduly in seeking an inquiry as to damages, he may be refused an order.(See *Smith v Day (1882)* 21 Ch D 421, *Re Wood, ex parte Hall* (1883) 23 Ch D 644.) I am of the view however, that although there was some delay in applying, it was not unduly long so as to deprive him of his right to apply for an order .

Conclusion

Finally, it is my considered view that the defendant has not satisfied me on a balance of probabilities that I should exercise my discretion in making the relevant orders. The orders sought in the summons are refused and the summons is therefore dismissed with costs to the plaintiff to be taxed if not agreed.