JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 78/88

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (Ag.)

BETWEEN	JAMCULTURE LIMITED	APPELLANT
AND	BLACK RIVER UPPER MORASS DEVELOPMENT CO. LTD.	1ST RESPONDENT
AND	AGRICULTURAL DEVELOPMENT CORPORATION	2ND RESPONDENT

Mr. Enos Grant and Ms. Jacqueline Hall for appellant instructed by Clough, Long & Co.

Mr. R.N.A. Henriques, Q.C., and Mr. Allan Wood for both respondents instructed by Livingston, Alexander & Levy

May 24, 25 and June 22, 1989

CAREY, J.A.:

I will ask Wright, J.A. to deliver the first judgment.

WRIGHT, J.A.:

On May 25, 1989, we dismissed this appeal, affirmed the order of the Court below and ordered that the respondents should have their costs to be taxed if not agreed. These reasons are in fulfilment of our promise to put our reasons for judgment in writing.

The issue for determination in this appeal was the correctness of the discharge by Rowe, C.J. (Ag.) (as he then was) on December 12, 1988 of an Exparte Injunction

made by Reckord, J. on November 18, 1988 and extended on December 2, 1988 to expire on December 13, 1988.

The brief oral judgment of Rowe, C.J. (Ag.) is as follows:

> "Pleadings voluminous but I think matter can be disposed of if one isolates real issue important to grant of Injunction, i.e., did the Plaintiff owe rent at 11th November, 1988.
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> No reference to Statement of Claim as to whether Plaintiff owed rent. Affidavit of Hutchinson, no expression of rent. Inclusion of documents without culling from them would not bring this to the attention of trial Judge. No reference in pleading as to situation of rent after execution of Lease. I hold there was a material non-disclosure and this non-disclosure would have effect on Judge, because had he been told Plaintiff in breach of covenant to pay rent in June 1988, it is my view unlikely that he would have granted Injunction. Doubt exists as to right to set-off damages in Suit by Landlord for rent. Therefore, one cannot say there is an arguable defence on Landlord's action for rent.
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> Not persuaded there is arguable case on estoppel as written terms of Lease set out payment schedule after alleged moratorium. However, I rest on first ground that there was non-disclosure.
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> Ex Parte Injunction dissolved with costs to the Defendants to be agreed or taxed.
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> Leave to appeal granted."

As the judgment states, the injunction was discharged for material non-disclosure. This was challenged by the appellant's grounds of appeal which read as follows:

> "(i) that the Learned Judge misdirected himself as to the law relating to:
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> (1) Affidavits and exhibits thereto;
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> (2) Set-off;

"(ii) that the Learned Judge erred in law in not considering relevant the issues in Suit No. C.L. J-229 of 1988 in which the Plaintiff/Appellant had claimed substantial damages against the Defendant/Respondents;

(iii) that the Defendants failed to make full and frank disclosures as to the material facts of the matter and thereby misled and/or attempted to mislead the Learned Judge;

(iv) that the decision of the Learned Judge is unreasonable, having regard to the evidence before him."

That such a ground for discharge of an injunction is of ancient and respected authority is beyond question. In Rex vs. Kensington Income Tax Commissioners Ex Parte Princess Edmond De Polignac (1917) 1 K.B. 486 at 504, Lord Cozens-Hardy, M.R. in dealing with the need for full disclosure in such matters said this:

> "It is a case in which it seems to me there was plainly a suppression of what was material, and we cannot be too strict in regard to that which to the best of my belief has been a long established rule of the Court in applications of this nature and has been recognized as the rule. The authorities in the books are so strong and so numerous that I only propose to mention one which has been referred to here, a case of high authority, Dalglish v. Jarvie 2 Mac. & G. 231, 238, which was decided by Lord Langdale and Rolfe B. The head-note, which I think states the rule quite accurately, is this: 'It is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction, and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward.' Then there is an observation in the course of the argument by Lord Langdale: 'It is quite clear that every fact must be stated, or, even if there is evidence enough to sustain the injunction, it will be dissolved.' That is not to say he would not decide upon the merits, but said that if an

> "applicant does not act with uberrima fides and put every material fact before the Court it will not grant him an injunction, even though there might be facts upon which the injunction might be granted, but that he must come again on a fresh application. Then there is a passage in Lord Langdale's judgment 2 Mac & G. 241, 243 which is referred to in the head-note. It is this: 'There is, therefore, a question of law, whether having regard to the facts thus appearing, the plaintiffs are entitled to the protection they ask; and there is also a question of practice, whether the facts stated in the answer being material to the determination of the question, and being within the knowledge of the plaintiffs by whom the case was brought forward, and who obtained an ex parte injunction upon their own statement, whether the omission of the statement of these facts in the bill does not constitute a reason why the ex parte injunction so obtained should be dissolved.' They held that the injunction ought not to be granted although there might be materials apart from this question upon which the injunction might have been granted."

The next step, therefore, is to examine the manner in which this injunction was obtained in the light of what is required to be done when applying for an injunction, the emphasis here being on the question whether uberrima fides has been shown.

In contemplation of the execution of a lease agreement and a sub-lease between the parties, the appellant entered into possession as lessees of approximately 4,379 acres of land in the parish of St. Elizabeth on the 6th January, 1986. There were specific provisions regarding crops, machinery, pumps and spare parts. These were to be purchased at a total cost of $13,527,754. The lease would be for twenty-five years with an annual rental of $1,113,600 payable semi-annually in arrears in July and December of each year. The purpose of the lease was to

enable the appellant to cultivate certain zoned crops, viz. rice, onions, corn, cucumbers and chinese vegetables. The provision regarding machinery was for the purchase by the lessee of farm machinery valued at $6,200,000 to be paid for over a period of five years. The lease was not actually signed until February 1, 1988 by which time four payments in respect of rental were due and payable but nothing had been paid towards the discharge of this obligation. Indeed, in respect of the first payment the appellant by letter dated 18th June, 1986 had sought a moratorium which was granted until December 1986. The concession was granted but neither that payment nor the payment due in December 1986 was ever made. Indeed, by letter dated August 31, 1987 a further moratorium was sought. This was granted on condition that arrears amounting to $1,653,016 were paid within sixty days of the finalisation of the lease. No portion of the arrears nor any other sum in respect of rental was ever paid.

During the process of preparing the lease the appellant was represented by the firm of Myers, Fletcher & Gordon, Manton and Hart who agreed that the lessors should have security by way of a Bill of Sale in respect of the sale of the farm machinery which the lessee was contracting to purchase. The Bill of Sale was prepared but before there was final agreement on the terms the appellant, towards the end of 1987, changed its attorneys. The new attorneys are Clough, Long & Co., one of whose earliest acts was to repudiate the Bill of Sale and to deny any authority in the former attorneys to agree to a Bill of Sale. In the meantime, however, although no payment had been made in respect of the machinery the appellant had proceeded to sell at a price of $1,000,000 one piece of the machinery viz. a crane, the price for which had been agreed in the lease agreement

at $2,500,000.

Among the several stipulations in the lease, two are of particular relevance to this appeal -

(a) The provision for quiet and peaceful enjoyment, and

(b) The Power of Re-entry.

As to (a) Clause 4 of the lease is as follows:

> "Lessor's Covenant
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> The Lessor to the intent that the obligation may continue throughout the said term or any extension hereof HEREBY COVENANTS with the Lessee that the Lessee paying the rents hereby reserved and observing and performing the several covenants and stipulations herein on his part shall be given possession of the leased land free of any tenants and shall peaceably hold and enjoy the leased land during the term without any interruption by the Lessor or any person rightfully claiming by or under him or on his behalf."

The provision regarding (b) so far as is relevant to this case is set out thus:

> "5. (a) Power of Re-entry
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> If -
>
> (i) the rents hereby reserved or any part thereof shall be unpaid for twenty-one days after becoming payable (whether formally demanded or not), or .....
> .....
>
> then ..... it shall be lawful for the Lessor at any time thereafter to re-enter upon the leased land or any part thereof in the name of the whole and thereupon this lease shall absolutely determine but without prejudice to the right of action of the Lessor in respect of any antecedent breach of the Lessee's covenants herein contained."

In exercise of the right of re-entry the respondents on November 11, 1988 (up to which date, no rent had been paid) gave notice and re-entered into possession of the leased premises and determined and forfeited the lease.

By the affidavit of Clive Edwards, a director of the National Investment Bank of Jamaica Limited, dated 5th December, 1988 on behalf of the respondents it was disclosed that as of that date, there were due and owing to the respondents in respect of rental and otherwise amounts of $10,114,259 and $42,440 respectively which remained unpaid.

However, before that date, namely on August 19, 1988 the respondents had issued two Writs of Summons, Suit Nos. C.L. 1988/B233 and C.L. 1988/A134, both claiming possession of the leased property and amounts for unpaid rental. Suit No. C.L. 1988/B233 was eventually struck out for misjoinder of causes of action and defence was filed in Suit No. C.L. 1988/A134 in which the claims of the respondents were specifically denied. Further, in the meanwhile, the appellant had filed Suit No. 1988/J229 claiming certain reliefs and damages amounting to $136,540,000 which were set out in its statement of claim dated 27th July, 1988. In its defence to Suit No. C.L. 1988/A134, in addition to denying the respondent's claims, the appellant claimed a set-off thus:

> "The Defendant will set-off so much of the damages claimed in the said Suit No. C.L. J-229/1988 - Jamculture Limited vs. Agricultural Development Corporation et alios - as will extinguished (sic) any amount which may be found due to the Plaintiff on its claim for arrears of rent."

Default judgment was entered in Suit C.L. J229/88 but steps were being taken to set it aside.

The respondents having re-entered into possession on 11th November, 1988, the appellant on 18th November, 1988 brought Suit C.L. 1988/J301 against them claiming:

"(a) a Declaration that -

(i) the Defendants are in breach of the covenant of quiet enjoyment contained in leases whereby the Plaintiff has leased lands from the Defendants; and/or

(ii) the Plaintiff is entitled to possession of the said lands in accordance with the said leases; and/or

(iii) the Defendants have wrongfully taken possession of the said lands; and/or

(iv) the said leases are still valid.

(b) Order for recovery of possession and/or delivery up of possession the said lands by the Defendants.

(c) Injunction -

(i) that the Defendants by themselves their servants and/or agents, be restrained from breaching the covenant of quiet enjoyment contained in the said leases; and/or

(ii) that the Defendants be restrained from sending its servants and/or agents unto the said lands in breach of the said leases.

(d) Such other reliefs as to this Honourable Court may seem just."

On November 19, 1988 the appellant obtained, from Reckord, J. (Ag.), an ex parte interim injunction which reads:

"(1) that the Defendants, by themselves their servants and/or agents, be and are hereby restrained from breaching the covenant of quiet enjoyment contained in the leases under which the Plaintiff has leased lands from the Defendants; and

(2) that the Defendants be and are hereby restrained from sending their servants and/or agents unto the said lands.

(3) Injunction granted for 14 days from the date hereof;

"(4) Plaintiff undertakes to abide by any order which the Court may make as to damages."

On December 2, 1988 this injunction was extended until December 13, 1988. It is the discharge of this injunction by Rowe, C.J. (Ag.) which is challenged on this appeal.

Let me now consider the application on the strength of which Reckord, J. was induced to grant the injunction bearing in mind the words of Lord Cozens-Hardy, M.R. in Rex. vs. Kensington Income Tax Commissioner (supra) at page 505:

> "That is merely one and perhaps rather a weighty authority in favour of the general proposition which I think has been established, that on an ex parte application uberrima fides is required, and unless that can be established, if there is anything like deception practised on the Court, the Court ought not to go into the merits of the case, but simply say 'We will not listen to your application because of what you have done'."

It is important, therefore, to determine whether the appellant had made a full and frank disclosure of all material facts or whether any deception was practised on the Court such as disentitled the appellant to the relief which he sought by way of injunction.

The application was supported by the affidavit of Orrett Hutchinson, a director of the appellant company. This affidavit contains twelve paragraphs and is very selective in what it chooses to disclose. In none of those paragraphs was it admitted that the appellnnt owed any rent whatsoever to the respondents. Mr. Grant submitted that that is not fatal because exhibited to this affidavit are several documents (totalling 60 pages) which on the authority of In re Winchliffe (1895) 1 Ch. 117 are as much a part of the affidavit as if they were copied out therein. I take no issue with the decision of the Court of Appeal

(Lord Herschell, L.C., Lindley and A.L. Smith, L.J.J.) in re Hinchliffe but I do hold that any understanding of that case which leads one to conclude that he is excused from disclosing what he must disclose or fail, is based upon a fallacy. For if that view were correct, all that would be necessary is just a paragraph referring to the annexures without deposing expressly to any fact. Among those documents are, the several Writs filed together with statements of claim and the defences including the Defence to Suit C.L. 1988/A134 with the paragraph claiming a set-off (supra).

But even that paragraph, which follows the denial of the amount claimed for rent does not admit that any rent was owed. But even if buried somewhere in those sixty pages of exhibit there was some admission by the appellant that rent was due, why should it be the task of the learned judge to wade through those pages to unearth such an admission? What is required of the applicant is a full and frank disclosure of "facts which the Court thinks are most material to enable it to form its judgment" (Rex vs. Kensington Income Tax Commissioners (supra)). Questioned about this, Mr. Grant at first took refuge in Re Hinchliffe (supra) and insisted that the applicant had made the appropriate disclosure. However, when it was evident that the Court was not being persuaded by this submission he adopted the stance that the omission was innocent in which event, he contended, the injunction would not necessarily be discharged or, in the alternative, a new order could be made. So, he maintained, Rowe, C.J. (Ag.) could in the circumstances have continued the injunction or make a new order on terms. For this submission reliance was placed on the seventh factor set out by Ralph Gibson, L.J. when considering the effect of material non-disclosure on the grant of an injunction in Brinks Mat Ltd. vs. Elcombe (CA) (1988) 1 W.L.R. 1351, at page 1357.

But in order not to isolate this factor from its context I think it appropriate to set out all the factors the relevance of which will be obvious. Said the learned Lord Justice at page 1356:

> "In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following. (1) The duty of the applicant is to make 'a full and fair disclosure of all the material facts:' see Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac [1917] 1 K.B. 486, 514, per Scrutton L.J.
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> (2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see Rex v. Kensington Income Tax Commissioners, per Lord Cozens-Hardy M.R., at p. 504, citing Dalglish v. Jarvie (1850) 2 Mac. & G. 231, 238, and Browne-Wilkinson J. in Thermax Ltd. v. Schott Industrial Glass Ltd. [1981] F.S.R. 289, 295.
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> (3) The applicant must make proper inquiries before making the application: see Bank Mellat v. Nikpour [1985] F.S.R. 87. The duty of disclosure therefore 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.
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> (4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J. of the possible effect of an Anton Piller order in Columbia Picture Industries Inc. v. Robinson [1987]

'Ch. 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see per Slade L.J. in Bank Mellat v. Nikpour [1985] F.S.R. 87, 92-93.

(5) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure ... is deprived of any advantage he may have derived by that breach of duty:' see per Donaldson L.J. in Bank Mellat v. Nikpour, at p. 91, citing Warrington L.J. in the Kensington Income Tax Commissioner's case [1917] 1 K.B. 486, 509.

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it 'is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded:' per Lord Denning M.R. in Bank Mellat v. Nikpour [1985] F.S.R. 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms.

> 'When the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant ... a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed:' per Glidewell L.J. in Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings Plc., ante, pp. 1343H-1344A'."

But in order to claim protection under the cover of innocence, the non-disclosure must have been inadvertently done; there must not be any intention to deceive or mislead the Court. And this is exactly the claim that Mr. Grant could not make. Asked why could not the applicant state frankly that no rent had been paid, and that rent was due and owing, even if a set-off was being claimed, Mr. Grant was forced to admit that the appellant could not admit owing rent because such an admission would sustain the respondents' claim of re-entry. Accordingly, what at first blush paraded itself as a confused approach to the issue was really a calculated deception of the Court which disentitles the applicant to the relief sought and which if granted should not, in the light of the relevant authorities, be allowed to stand. Accordingly, the merits of the appellant's case with specific reference to the covenant for peaceful and quiet enjoyment upon which Mr. Grant expended so much effort supported by several authorities ought not to engage the Court's consideration.

But the fact of non-disclosure was exacerbated by further evidence which was presented to Rowe, C.J. (Ag.) in the form of two affidavits filed on behalf of the respondents together with exhibits covering another sixty-seven pages. Relevant material contained therein did not appear in the material put before Reckord, J. although such material was within the knowledge of the appellant. There was also a bundle of correspondence which had passed between the parties - sixty-four pages - which the appellant disclosed by an affidavit of Jacqueline Hall dated 12th December, 1983 - the very day the application for discharge came before Rowe, C.J. (Ag.). Paragraph 4 of Miss Hall's affidavit reads:

> "That on the 9th day of December, 1983 I made a search of our correspondence files for the Plaintiff in respect of the subject

> "matter the dispute of this action and discovered that there are several material items of correspondence between the parties and their agents NATIONAL INVESTMENT BANK OF JAMAICA LIMITED and AGRO 21 CORPORATION LIMITED and their Attorneys-at-Law which were omitted from the said Affidavit."

No explanation is offered for the failure to make the search earlier so that these "material items" could have been brought to the attention of Reckord, J. on either the occasion of the grant or the extension of the injunction. Paragraph 3 of this six-paragraph affidavit refers to the affidavit of Clive Edwards in support of the application to dissolve the ex parte injunction and it is apparent that but for Mr. Edwards' disclosures this affidavit would not have been furnished. It is patent that principles numbers 3 and 4 listed in Brinks Mat (supra) have been breached and there are no mitigating circumstances.

Mr. Grant had attempted to salvage his case by contending that the covenant for peaceful and quiet enjoyment is a negative covenant the breach of which will be protected by the grant of an injunction but, as I have pointed out, that is a question relating to the merits with which the Court ought not to concern itself because of the deliberate attempt at manipulating the Court, a matter against which the Court must set its face sternly. In my view, the discharge of the injunction by Rowe, C.J. (Ag.) is unassailable.

CAREY, J.A.:

The question of the payment of rent was a material fact of which Reckord, J. (Ag.) should have been apprised. The affidavit of the appellant was noticeably silent on this point. Such an omission could hardly be regarded as innocent and to be overlooked. It was of the greatest importance to show at least that the appellant had honoured his obligations. He, at any event, is not entitled to say he did not appreciate its importance. For the reasons stated by Wright, J.A. I entirely agree that Rowe, C.J. (Ag.) was correct to dissolve the interim injunction.

GORDON, J.A. (Ag.):

I agree.