In the Supreme Court

In Chambers

Before: Smith, C.J.

Suit No. E. 244 of 1982

Between Peter Edmond Rosseau

Patrick Hoppnor Orla Rosseau — Plaintiffs

And National Commercial Bank Jamaica Ltd. — Defendant

Emil George, Q.C., David Muirhead, Q.C. and Derek Jones — for Plaintiffs/Applicants

R.N.A. Henriques, Q.C., and Alan Wood — for Defendant/Respondent

May 25 & 26. June 15, 1983

In this action the plaintiffs' principal claims are for :

1. Specific performance of an agreement made on 3 September, 1982 whereby the defendant agreed to buy shares in Memphis Catering Ltd.from the plaintiffs.

2. A declaration that a loan of $3,567,000.00 made by the defendant to Memphis Catering Ltd. on 3 September, 1982 is not, and shall not be, due and payable until and after completion of the said agreement by the defendant.

The statement of claim was filed on 10 February, 1983 but the defendant having entered an appearance on 29 December, 1982, has not filed a defence.

On 4 May 1983, the plaintiffs applied by summons for an interlocutory injunction to restrain the defendant "from taking any steps to prosecute (a) demand for re-payment of the sum of $3,657,000.00 (sic) (Million) from N.C.B. Properties Limited (formerly Memphas (sic) Catering Ltd.) until the trial of (the) action."

The facts upon which this application is based are not disputed. In August, 1982, the plaintiffs together owned and controlled all the 60,000 fully paid up and issued shares in Memphis Catering Ltd., having a nominal value of $1.00 each. By agreement in writing dated 27 August 1982, the plaintiffs granted to the defendant the option to purchase their shares by 10 September 1982. The option was duly exercised by the defendant on 3 September 1982, thus bringing into effect heads of agreement, which were scheduled to the option agreement and which became the agreement of the parties for the sale

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and purchase of the shares.

Clause 1 of the agreement stated the purchase price to be $2,853,000.00; to be satisfied, on the exercise of the option, by the issue by the defendant of a debenture or debentures in the single or aggregate sum of $675,730.00 and, on the completion date, by a further issue in the single or aggregate sum of $2,177,270.00. Clause 2 fixed 31 October 1982 as the completion date. The provisions of cl. 3 are as follows :

> " In addition to the provisions of Clause 1 above, the Purchaser shall on or before the 31st day of August, 1982 :
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> (a) Make an interest-free cash loan to the Company in the amount of Three Million, Five Hundred and Sixty Seven Thousand ($3,567,000.00) to be utilised by the Company for the payment of existing liabilities of the Company.
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> (b) Assume full responsibility for the payment of all legal fees .... "

A debenture for $675,730.00 was delivered to the plaintiffs on 3 September 1982 and the loan was made to the company, Memphis Catering Ltd., on the same day. At the request of the defendant, the plaintiffs changed the name of the company to M.C.B. Properties Ltd. on 15 October, 1982. The defendant did not complete the purchase of the shares on the completion date as agreed, or at all, hence the action filed on 16 December 1982. By letter dated 2 March 1983 a demand was made on M.C.B. Properties Ltd. for repayment of the loan with a threat of action to compel payment if this was not made by 10 March. Hence the application for the injunction.

It is not disputed that the defendant was legally obliged, as a condition of exercising the option to buy the shares, to make the loan to the company - an obligation which was duly performed. What is in dispute is the time when the loan is repayable. The plaintiffs contend that the loan is not repayable until completion of the purchase, when the defendant, as beneficial owner of the shares in the company, would look to its new subsidiary for payment. The defendant contends that this was a loan repayable on demand and is repayable if demand is made before completion. There is evidence that the loan is entered in the defendant's books as a demand loan.

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It was submitted for the plaintiffs that from the terms of the agreement it must have been in the contemplation of the parties at the time the agreement was made that the date of completion would precede the calling in of the loan. Reference was made to particular clauses in the agreement in support of the submission. For the defendant it was submitted that the agreement does not expressly provide that the loan was not repayable before completion; that the basic agreement is for the sale of shares and how the purchase price is to be paid; that the terms and conditions of the loan or its repayment are not mentioned in the agreement; and that, in effect, no inference can be drawn from the terms of the agreement as will support the plaintiffs' contention.

In my opinion, when read as a whole, the language of the agreement is susceptible of a construction which would establish that it was the intention of the parties that the loan should not be repayable before completion of purchase of the shares. The following provisions of the agreement tend to this conclusion: the loan is interest free, unusual in ordinary commercial loans; a mere two months was to elapse between the making of the loan and completion of the purchase, when the company would become a subsidiary of the defendant; the loan was made for the stated purpose of paying existing liabilities, indicating that the company was, at the date of the agreement, apparently unable to pay those liabilities from its own resources and so was unlikely to be able to repay the loan from its own resources before the date fixed for completion; the company was obliged to acquire the lands and other property described in cl. 7(k) before the completion date, making it still more unlikely that the company would have the resources to repay the loan before that date; and the implied agreement by the defendant to acquire ownership of the company with the amount of the loan as the only outstanding liability (see cl. 7(p)).

Mr. Henriques, for the defendant, criticised the reliance on the provisions of cl. 7(p) in support of the plaintiffs' contention. He submitted that it was untenable to construe this warranty of the

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plaintiffs so as to create a contractual obligation on the part of the defendant not to recall the loan before the date of completion. He said that clear language for such an obligation is needed. It seems that Mr. Henriques would be right if this warranty was the only provision in the agreement on which reliance could be placed as showing the intention of the parties. As I have endeavoured to indicate, this warranty must be considered in the context of the agreement as a whole and not in isolation. Although this is the plaintiffs' warranty, it seems legitimate to take it into consideration with the rest of the agreement, as I have done, as giving rise to an implied agreement by the defendant to accept the company with the liability there stated.

The success of the plaintiffs in obtaining the declaration they seek depends on their being able to satisfy the court of trial that the agreement, properly construed, discloses the intention of the parties that the loan should not be repayable before the completion of the purchase of the shares. On the basis of the opinion I have expressed above, I am satisfied that in this respect there is a serious question to be tried.

But, Mr. Henriques asks: Whose legal rights are being infringed and who needs the injunction to restrain that infringement ? Is it the plaintiffs or the company ? He said that once the loan was made to the company a separate contract came into being with the consequent relationship of debtor and creditor as between the company and the defendant. He submitted that this separate contract exists outside the confines of the agreement between the plaintiffs and the defendant and stands on its own. It is under this separate loan agreement that the defendant has made the demand, Mr. Henriques said, and he cannot, therefore, understand how calling upon the company interferes with the legal rights of the plaintiffs. It seems to me that if the plaintiffs can establish their contention that it was part of their agreement with the defendant that the company owned by them should not be called upon to repay the loan before completion of the purchase of the shares, it is, prima facie, a breach of the agreement and, therefore,

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an infringement of the plaintiffs' legal right, for the defendant to demand repayment before completion. The more so as the company could not rely on the agreement between the plaintiffs and the defendant to establish a legal right enforceable against the defendant.

Then, Mr. Henriques said that he cannot understand what is the detriment the plaintiffs will suffer as a result of the defendant calling in the loan. He submitted that the plaintiffs' contract with the defendant is for the sale of shares at a fixed price and if the defendant is in breach as alleged all the plaintiffs are entitled to is the payment of the outstanding balance of the purchase price. So, he continued, even if it was agreed that the loan was not to be repaid before completion and the defendant, in breach, recalled the loan the plaintiffs would sustain no loss, injury or damage or suffer any detriment.

In my view, this submission was satisfactorily answered by Mr. Muirhead in his reply. He submitted that the detriment the plaintiffs will suffer is being left as owners of a company with a debt burden which it has been called upon to discharge and without the resources to meet the demand. The company would thus be liable to have a petition presented for it to be wound up on the ground of its inability to pay its debts. Whether or not a winding-up order was eventually made, it seems to me that there can be no doubt that there would be considerable depreciation in the value of the shares held by the plaintiffs, with a risk of their losing them altogether. The detriment which the plaintiffs would therefore suffer unless the defendant is restrained is the depreciation in the value of their shares, which is almost certain to result if the defendant is allowed before trial of the action to pursue its demand for repayment of the loan.

It was submitted for the defendant that in order to obtain the injunction there is a burden on the plaintiffs to satisfy the court that damages would not be an adequate remedy and that the plaintiffs' affidavit has failed to discharge this burden. It was submitted, further, that in no case whatever can the plaintiffs suffer irreparable damage as a result of the defendant's breach having regard to the nature

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of the transaction: that if the plaintiffs sustain damage as a consequence of the defendant's breach it would be easily calculable and provide an adequate remedy.

For the submission about the burden of proof, reliance was placed on observations of Browne, L.J. in Fellowes & Son v. Fisher (1975) 3 W.L.R. 184 at 198. I do not find support in anything said by Browne, L.J. for the argument that it is fatal to an application for an injunction if the applicant fails to establish by evidence that damages would not be an adequate remedy. Quite the contrary. As I understand it, what the learned lord justice said was that as there was no evidence as to damages being an adequate remedy either for the plaintiff or the defendant the first two of Lord Diplock's "governing principles" in American Cyanamid Co. v. Ethicon Ltd. ((1975) A.C. 396, (1975) 2 W.L.R. 316) did not arise for consideration in the case and this left him free to consider the balance of convenience generally, whether it was in favour of granting or refusing the interlocutory injunction. In my view, it is not necessary to prove that damages will not be an adequate remedy by a witness saying so in terms in an affidavit. It is sufficient if this can reasonably be inferred from the material before the court.

In my opinion, it is at least doubtful whether, if the plaintiffs succeed at the trial, they would be adequately compensated by damages for loss caused by refusal to grant the injunction for which they have applied. On the other hand, if the injunction is granted, it seems certain that if the defendant succeeds at the trial it would be adequately compensated under the plaintiffs' undertaking as to damages. The question of the balance of convenience therefore arises for consideration under the third "governing principle" of Lord Diplock in the American Cyanamid case as enumerated by Browne, L.J. in Fellowes & Son v. Fisher (supra).

As Mr. Muirhead for the plaintiffs pointed out, if the plaintiffs' application is refused they will lose their claim for a declaration before it can be adjudicated and in the absence of a statement of defence to the claim. Apart from this, however, the

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circumstances detailed above relating to detriment would apply equally to a consideration of the adequacy of damages and the balance of convenience. In other words, unless the defendant is restrained from pursuing the demand, by the time the plaintiffs' action comes to trial the company they own may have ceased to exist or the shares rendered worthless in value. It is doubtful whether they could recover damages for this loss in this action. If they could, it would be extremely difficult to assess, if, indeed, the disadvantages to them would be capable of being compensated in damages at all. If the defendant succeeds in the action the only inconvenience it will suffer as a result of the grant of the injunction is being deprived of the payment of the loan from the time of the grant until judgment in the action and the damages for this can easily be ascertained.

In my judgment, the balance of convenience is clearly in favour of granting the injunction. It is, accordingly, granted in terms of the summons. The plaintiffs must give the usual undertaking as to damages.