

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. T077/78

BETWEEN Alfred D. Thompson Plaintiff
A N D Clement George Stephens
(Receiver, Eagle Farms Limited) 1st Defendant
A N D Workers Savings & Loan Bank Ltd. 2nd Defendant

W.B. Franksen Q.C., instructed by Gaynair & Fraser for plaintiff

R.N.A. Henriques, Valrie Alexander and A. Brandon instructed by Livingston, Alexander & Levy for defendants.

Heard: October 5, 6, 7, 12, 1981

Delivered: July 21, 1982

Judgment

Morgan J:

On the 10th October, 1981 I gave a judgment in this matter and promised to put my reasons in writing which I now do.

The plaintiff claims against the defendants in trespass detinue and/or conversion and for an order of possession of properties known as Pleasant Farm, Rose Hall, Shenton in Saint Catherine and mesne profits. The second defendant is sued as a Banking Company and the first defendant, the duly appointed Receiver for Eagle Farms Limited a company registered under the Companies Act, is sued as the servant and or agent of the second defendant who acting as such Receiver trespassed on the three abovenamed properties and removed and detained 22,000 chickens the property of the plaintiff a chicken farmer and has remained and continue to remain in possession of the farms.

The plaintiff gave evidence that he returned to Jamaica in 1973 after living in England for twenty-five years, and started the business

of a chicken farm for the sale of chickens to the local market. He established a factory at Knollis, Bog Walk, St. Catherine. This business was in June 1972 duly registered as a Limited Company in the name of Eagle Farm Company Limited (hereinafter called "the Company") under the Companies Act with two shareholders, the plaintiff as principal shareholder holding 220,000 shares and Louis Granville Howell with 40,000 shares. By Clause 77 of the Articles of Association of this company both were directors and also a Mr. Joscelyn Thompson. The plaintiff was the Managing Director. He said that Mr. Howell failed to pay for his shares in the company but did not resign. The directors took no steps to call upon him in respect of the unpaid shares or to advise the Registrar of Companies. The result is that his name has remained on the memorandum and articles of association as a shareholder. Under the Companies Act therefore, his liabilities and obligations also remain, as the directors are empowered to call on him at any time.

The company was at first financed by Barclays Bank, but ran short of cash. This bank refused to allow them any further sums so in early 1974 the company went to the Jamaica Development Bank who introduced them to the Workers Savings Bank the second defendant.

On 1st May, 1974, the company executed a debenture with the second named defendant to secure \$50,000.00. This debenture exhibit 3 created a floating charge in respect of all the assets of the company by paragraph 9 which reads:

"The company as Beneficial Ower HEREBY CHARGES with the payment of the principal, interest and other moneys hereby secured its undertaking and all its property and assets both present and its uncalled capital and goodwill subject, however, to the Debenture issued by the Company to Jamaica Development Bank on 4th February, 1973 (hereinafter

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"called "the First Debenture"). The said Charge shall be a Specific Charge on the real and leasehold property now or in the future belonging to the Company and on its goodwill and a first floating charge on all the remaining property and assets of the Company subject, however, to the First Debenture."

This debenture also gave the bank the right to upstamp the document as a continuing security when and if the loan was at anytime increased. At paragraph 10 it reads:

"This Debenture shall be impressed in the first instance with stamp duty covering an aggregate indebtedness of Fifty Thousand Dollars (\$50,000) but the bank shall be and is hereby empowered at any time or times hereafter without any further licence or consent of the Company to impress additional stamp duty hereon covering any sum or sums by which the Company's indebtedness to the bank may exceed the said sum it being the intent of these presents that until its discharge, the Debenture hereby created shall be a continuing security covering indebtedness from the company to the bank to such aggregate as the stamp duty impressed hereon will extend to cover and shall avail the bank in respect of all present and future indebtedness of the company on any account whatsoever and is in addition to any security which would be implied or arise in the ordinary course from the business relations between the company and the bank and shall be deemed to continue notwithstanding any payments from time to time made by the company or any settlement of account or any other thing whatsoever."

By way of collateral security the plaintiff executed (exhibit 4) a Deed of Guarantee in his personal capacity, of even date.

The company's operation involved the purchasing of day old chicks and the manufacturing of their feed. The chickens were given out to farmer contractors otherwise called Broiler Suppliers under a standard written agreement entered into with the company whereby the company would supply the farmers with feed, medication and expert help enabling the farmers to rear the chickens. When the chickens attained a stage ready for processing, they would be returned to the company who in consideration of the services

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would pay to the farmers a sum of money or fee calculated with the help of a charted formula which took into account the amount of feed etc. supplied, the mortality rate etc. This was to be operated similar to a system used by the Jamaica Broilers Limited, another company which operated a chicken business. Learned defence counsel in his opening explains it in this way:

"During the course of the operational cycle the chickens change ownership between the company and the farmers."

All farmers sign a contract the terms of which are embodied in an agreement of standard form a copy of which was produced as exhibit 5. Clause 4 of this agreement reads:

"The said chicks shall at all times remain the sole property of the company."

In the face of this I do not adhere to counsel's view. The farmer in my view has mere physical possession or custody of the chicks but the constructive possession, property and ownership is that of the company. The conclusion then is that on the farms the chickens remain the sole property of the company. The company is the owner of farm lands and chicken houses at Bog Walk known as Shenton and at Linstead known as Rose Hall.

The plaintiff leased land from Alcan Jamaica Limited at Pleasant Farm on which he had chicken houses and operated as a farmer/contractor or "Broiler Supplier" having entered into contracts with the company. But he also operated "Shenton" and "Rose Hall" the company's properties by virtue of a lease agreement which he said he made with the company and tendered as exhibit 1. I will return to this agreement. On all three farms he had chickens and the Receiver first defendant entered each farm and took possession of all the chickens; by his Statement of Claim, of a total value of \$84,700.00, by his letter of demand exhibit 7; \$27,419.48 and on his evidence "in the vicinity of \$80,000.00."

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The pith of his case was that ^a Receiver was appointed who trespassed on lands in his possession and removed chickens which belonged to him solely and converted them to the company's use for and on behalf of the bank. It is not in dispute that the company was unable to pay its debts that a lawfully appointed Receiver took control of the company by virtue of the debenture issued by the company on the 1st August, 1978 and continued the operation of the company and that the company is now indebted to the second defendant and to the Government of Jamaica to the extent of one to three point three million dollars.

The defendants called no witnesses and rested their case on submissions based on law.

Mr. Henriques for the defendants referred to Clause 8 of the debenture which gives power to the holder to enter any premises where the property charged is situated - it reads:

"The bank by its officers and agents shall be entitled at all times during the continuance of this security with or without workmen, agents or servants to enter upon any lands and hereditaments of the company and any premises at which the company carries on its business and any premises where the property charged hereunder or any part thereof shall then be situate."

It follows as I see it that there can be no liability in trespass where the second defendant is concerned. Defence Counsel referred also to Clause 17:

"The Bank may at any time after the principal moneys hereby secured shall have become payable by writing under the hand of its General Manager appoint any person whether an officer of the Bank or not to be a Receiver of the property hereby charged....."

This gives the bank I find the power to appoint a Receiver. He next referred to Clause 18:

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"A Receiver so appointed shall be the agent of the company."

It is in my view without doubt that the first defendant Clement Stephens was lawfully appointed by the bank, the second defendant, as a Receiver for the company and was in that capacity the agent of the company within the powers as set out in Clause 18 (a) to (h). On the Writ the first defendant is sued as the servant/agent of the second defendant which he is not. The bank is therefore not liable for the actions of the Receiver who is neither his servant nor his agent. The case against the bank is conversion and detinue which also clearly fails so that the second defendant is entitled to judgment.

Paragraph 3 of the Statement of Claim states that the first defendant purporting to act as Receiver for Eagle Farm broke and entered the plaintiff's close at Pleasant Farm, Rose Hall, Shenton and removed 22,000 chickens. The case against the first defendant now properly rests as Mr. Frankson for the plaintiff concedes on whether or not the plaintiff's possession of these properties was legal and whether or not the Receiver acted properly in taking the chickens from the three farms.

The document exhibit 1 to which I have already referred, is a lease agreement produced by the plaintiff in respect of Shenton in Bog Walk and Rose Hall in Linstead, properties of the company, dated 16th August, 1977. It is in itself a unique revealing, and interesting document. It was typed on paper bearing the company's letter head and is for a term of seventeen years. The plaintiff said he formulated the terms of the lease therein. It was signed on behalf of the company by himself as lessor and he signed on his own behalf as lessee. There is no witness to the document and though dated on 16th August, 1977 it was not stamped until 2nd October, 1978, after the matters complained of, the subject of this action, had occurred.

The plaintiff explained that he did not know it should have been stamped until it was brought to his attention. I would be inclined to think that it is only a person with some enthusiasm for the law who would be capable of arranging this document in the style as it is presented and such a person in my view ought to have known that such a document to have its legal effect would attract stamp duties. I find myself in grave doubt as to whether his excuse is an acceptable one and am inclined to the view that this document was concocted by him to bolster his case. Mr. Frankson argues that the act of granting a lease to himself was permissible under article 86 (3) of the Articles of Association - exhibit 2. This article so far as it is relevant reads:

"And no director shall be disqualified by his office from contracting with the company either with regard to his tenure..... or as vendor, purchaser or otherwise nor shall any such contract..... entered into by or on behalf of the company in which any director is in any way interested, be liable to be avoided nor shall any director so contracting be liable to account to the company..... by reason of such director holding that office or of the fiduciary relation thereby established."

Generally speaking because the office of a director is a fiduciary one vis a vis the company, a director cannot contract in his personal capacity with himself in his capacity as a director of the company but this restriction on his power to contract with the company is normally relaxed. This Article, 86 (3), makes exactly this allowance but it is not in my view, an isolated provision but one limited to Article 86 (1) which says:

"A director who is, in any way, whether directly or indirectly interested in a contract or proposed contract with the company shall declare the nature and extent of his interest at a meeting of the directors in accordance with Section 188 of the Act."

There was no such declaration or meeting, Mr. Thompson holding tenaciously in his evidence to the statement that no meeting was necessary.

Mr. Henriques for the defendants submitted that the lease was void and was not binding on the debenture holder as it infringed.

1. Clause 5 of the debenture (exhibit 3)
2. Section 94 of the Registration of Titles Act
3. Article 86 (1) of the Articles of Association (exhibit 2)
4. Section 188 of the Companies Act

Clause 5 of the debenture states:

"During the continuance of this security the company shall not have power to lease, let or devise its lands or any part without the consent in writing of the bank first had and obtained."

When faced with this Mr. Thompson artfully replied that he had received oral permission from Messrs Bonnick and Ennis, officers of the Jamaica Development Bank and Workers Savings Bank but neither of these gentlemen was called to say so. He said they told him it needed not to be in writing, and though he averred that he had letters written by them confirming their agreement, none was forthcoming. The onus lies on him to satisfy the Court as to the validity of this infringement of the rules. He has made no attempt to do so and offered no explanation for his failure.

Section 94 of the Registration of Titles Act provides for the execution and registration of leases and adds:

"No lease of any land subject to a mortgage or charge shall be valid or binding against the mortgagee unless he shall have consented in writing to such lease prior to same being registered."

The section clearly provides for the consent of the mortgagee in writing and the registration of the lease. If this was not done it could easily operate

against a mortgagor if the mortgagee is in possession.

Article 86 (1) of the Articles of Association provides for him as director to disclose his interest to the Board and has already been quoted (page 7 supra). The lease is dated 16th August, 1977. In evidence the plaintiff admitted that between January and August, 1977 the company had seven (7) directors an arrangement made by the Jamaica Development Bank and the Workers Savings Bank subsequent to loan agreement. ^AMr. Ray McKinley was appointed as Managing Director he said but he still protested that it was not necessary for him to have Mr. McKinley sign the lease on behalf of the company. Yet there was no resolution from any meeting of the directors as the plaintiff replied haughtily "A Resolution? There was no need for a resolution from any Board." The arrogance of this plaintiff was beyond understanding. It is sufficient to say that there was nothing in evidence whether in writing or otherwise to indicate that he had complied with any of these provisions.

Section 188 of the Companies Act is similar to Article 86 above and sub-section (2) states that declarations must be made - in the case of a proposed contract at

"The meeting of the directors at which the question of entering into the contract is first taken into consideration

otherwise

"at the next meeting of the directors held after he becomes so interested

or if he becomes interested after the contract is made

"at the first meeting of the directors held after the director becomes so interested."

This sub-section clearly contemplates a declaration at the earliest possible opportunity. None of these provisions was met by the plaintiff.

I accept the submissions of Mr. Henriques on the law as valid and find on an abundance of evidence that the purported lease of Shenton and Rose Hall is void and does not operate against the debenture holder.

It is the duty of a Receiver to take possession of and protect and get in all property of the company on behalf of a debenture holder and a floating charge given to a debenture holder constitutes a charge on the whole of the property which gives him the right to pursue the company's goods wherever they are and carry on the business with a view to taking in all its assets and continue the business as a going concern.

I find that Shenton and Rose Hall were the property of Eagle Farm Company Limited and was at all times in their possession, that the chickens thereon were the property of the company and covered by the floating charge. The act of the Receiver in taking the chickens from these farms was accordingly lawful.

The plaintiff had leased lands in his personal capacity from Alcan Jamaica Limited at Pleasant Farm and operated another chicken house there as farmer/contractor with the company. The agreement he says was on the standard form exhibit 5 to which I have already referred and which sets out the system as between the company and the Broiler Supplier. The plaintiff in his evidence admitted that this farm operated under the normal scheme, that is, this agreement exhibit 5.

On the 1st August, 1978 when the Receiver came, there were chickens on this farm and in September he took them as the property of the company. The plaintiff contends that these chicks were not originally received from the company, that he had entered into an oral agreement with the company that when chicken or feed was not available from them he would be allowed to

buy his own chicks which would be sold to the company and a higher price would be negotiated and paid. A price one presumes as Managing Director he would negotiate with himself. This oral agreement he says was made at the same time with the written agreement. The Statement of Claim does not mention this oral agreement which makes the chickens his own as against the normal written agreement, nor was it mentioned by plaintiff's counsel. Indeed counsel's arguments were that "during the course of the operational cycle the chickens change ownership between company and farmers." They certainly did not include the content of the written agreement which by Clause 4 made the chicks at all times the sole property of the company. This disclosure of an oral agreement by the plaintiff came after the luncheon adjournment. He admitted that he was told by his counsel during the luncheon interval that he was shown a copy of the written standard form of contract by defence counsel which was not yet in evidence. It is obvious that consequent on that information the plaintiff in cross-examination changed directions. I am fortified in this belief as I find that this information is the gravamen of any possessory title which the plaintiff would seek to claim in the chicks and it was omitted in his instructions and his evidence in chief. If what he now says is the true position one would have expected in all the circumstances that it would have formed a part of the pleadings, the opening and the evidence in chief. He called two witnesses who supported the existence of this oral agreement. They were Mr. Roy McKenzie, the Accountant of the company during the period he was Managing Director (1974 - 78) who was also Manager of his farm, lived on Pleasant Farm Property, and left the company on the day the Receiver took over; and Mr. David Smith, the Production Manager employed by the company from

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(1973 - 78). Both said that some farmers bought their own chickens, that the company gave to some and did not give to others. Mr. McKenzie said neither chicken nor feed was given to the plaintiff during the period.

Mr. Frankson submitted that the plaintiff's evidence supported by two witnesses, stands uncontradicted and so the Court ought to accept it. It is my view that the absence of rebuttal evidence in circumstances where the facts he speaks of are peculiar to the plaintiff only, does not preclude the Court from looking at the evidence in an effort to determine its truth or otherwise.

I have found that the lease agreement, exhibit 1, is void and of no effect but the terms are helpful in assisting one to ascertain whether or not the plaintiff is speaking the truth. Paragraph 6 of this agreement in part states:

"It is agreed by the company and Mr. A.D. Thompson that Mr. A.D. Thompson will rear chickens on these farms exclusively for Eagle Farms Company."

It is to be observed that when the company's farmers rear chickens on the basis of the farmer/contractor agreement, exhibit 5, it makes the chickens "the sole property of the company" and the contract sets out in its entirety the method by which the company provides the chicks feed, medication, etc. So this lease agreement in its terms as underlined is taken to intend the normal farmer/contract arrangements.

Paragraph 6 of the lease agreement states:

"If no chickens are available because of circumstances over which the company has no control.....The company will take no steps to sue or take any other legal action for arrears of rent that might occur in accordance with this lease agreement. The company will then give a deduction on its rental for the period in which it was unable to place chickens on this farm."

The words underlined here surely contemplate a loss situation when the chicken houses are without use because the company is unable to supply chicks, that is, no chickens, decreased rental. What is worthy of note is that it is silent about the alternative that is, the farmer providing his own chicks during this period even though at the purported date of the agreement as the plaintiff says the oral agreement as to the plaintiff providing his own chicks in such a situation was in existence and the agreement recognizes a situation where the company fails to provide chickens. It is reasonable to assume that if this oral agreement was in existence this purported lease agreement, exhibit 1, would surely have recited the alternative agreement of the farmer buying chickens.

The essence of the plaintiff's case is that he bought his own chicks, his own feed etc. but he was unable to produce even one bill or anything in writing to support any of these purchases from any of the firms. I find there was no such oral agreement and that the chickens were the property of the company.

In amplification I shall add this. Produced in evidence are seven Flock Payment Vouchers, exhibit 7. These are vouchers on which the payment to the farmers are calculated. They list inter alia, the number of chickens delivered to the farmers, the number returned by the farmers, the mortality number, the number rejected by the factory, the amount of feed supplied and other information on the basis of which the total sum to be paid is calculated. The plaintiff gave evidence that when the Receiver came to the company on 1st August, 1978 the chickens were seven to nine weeks old. Shenton was about five weeks and Pleasant Farm about eight to nine weeks. He wrote a letter of demand to the Receiver and he said that at the date of that letter 15th September, 1978 the chickens were being reaped and some had already

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been killed and eaten. He also said that the last lot was reaped in October and some were reaped when eighteen weeks old. His evidence is uncertain as to the number or age of the chickens or the dates taken or dates received.

Of the seven Flock Payment Vouchers there are three which are relevant to this case; those in respect of Rose Hall dated 9th October, 1978, Shenton dated 30th October, 1978 and Pleasant Farm dated 19th October, 1978. Together they indicate that the company delivered chickens to these farms between 17th June and 20th July and received chickens back from these farms between 29th September and 18th October - a period of Receivership. The figures thereon show:

<u>Chickens</u>	<u>Rose Hall</u>	<u>Shenton</u>	<u>Pleasant Farm</u>	<u>Total</u>
Delivered to farm	12,074	16,700	10,856	39,630
Delivered to Company (by way of Receiver)	2,450	4,510	5,118	12,078
Feed supplied by Company	41,010 lbs	71,820 lbs	51,590 lbs	144,420 lbs
Chickens died	9,624	12,190	5,738	27,552

The calculations are in respect of chickens supplied to him in June and July by the company but reaped in September to October. This was not debated during the arguments but I nevertheless mention it as it serves to reinforce the conclusion that I reached without their aid, that he got both chickens and feed from the company during the period of which he complains.

I find that the chickens and feed were received from the company that the plaintiff had physical possession of them but that the property remained at all times in the company. The plaintiff said that he stopped sending his chickens to the company after the 1st August, 1978. The chickens

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were assets of the company and they were at risk at being sold off by the plaintiff to the company's detriment. It was the duty of the Receiver to do what he could to preserve them and he did just that. I find that in so doing he committed neither trespass, detinue nor conversion.

It may be that what the plaintiff is entitled to, is the equivalent of fees paid to farmers for rearing the company's chickens but that is not his claim. He has not spoken the truth. The fact is that I was not at all impressed with him as a witness. The more he was cross-examined the more it became evident that statements he made with reference to a great many matters were ill-founded and he was driven to invent falsehoods as the case proceeded to overcome the effect of prior evidence.

I find he has failed to prove any head of his claim and the defendant is therefore entitled to judgment.

Judgment is therefore entered for the first and second defendants against the plaintiff with costs to be taxed or agreed, and the application for an injunction which was not really pursued is ^{accordingly} refused.

Morgan M.
Judge