



**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE COMMERCIAL DIVISION**

**CLAIM NO. SU2023CD00067**

<b>BETWEEN</b>	<b>JEREMIAH WALKER</b>	<b>1<sup>ST</sup> CLAIMANT</b>
	<b>MAUDLINE WALKER</b>	<b>2<sup>ND</sup> CLAIMANT</b>
<b>AND</b>	<b>DR. DAWKINS BROWN</b>	<b>1<sup>ST</sup> DEFENDANT</b>
	<b>DAWGEN MEDIA LIMITED</b>	<b>2<sup>ND</sup> DEFENDANT</b>

Interim Injunction – Memorandum of Understanding for sale of majority shareholding – Whether agreement illegal in that it contravenes section 5 of Broadcasting Act- Whether agreement is subject to contract – Whether part-performance – Whether Damages an adequate remedy – Whether undertaking as to damages adequately supported – Whether overall justice of the case supports grant of injunction – Whether status quo to be maintained until trial.

**Manley Nicholson, Lorna Phillips and Harrington McDermott instructed by Nicholson Phillips for the Claimants**

**Hugh Wildman and Duke Foote instructed by Hugh Wildman & Co. for the Defendants**

**Heard: 31<sup>st</sup> May &, 2<sup>nd</sup> June, 2023**

**IN CHAMBERS (by video conference)**

**BATTS, J.**

[1] On the 2<sup>nd</sup> day of June 2023 I made the orders, set out in paragraph 14 below, and promised to give my reasons at a later date. I now do so. The allegations in this claim are quite serious. It is alleged that the Defendants “*wrongfully and without legal authority*” caused the allotment, transfer and/or assignment, of shares held

in St. Thomas Cable Network Limited (hereinafter referred to as the company) to themselves. It is alleged that as the Defendants had been in a position of trust, being the Claimants' accountants, the Defendants acted in breach of fiduciary duty when causing the Claimants to execute certain documents. It is alleged also that the Defendants, having taken control of the Claimants' company, have acted negligently and/or deliberately to the Claimants' detriment by the manner in which the business of the company has been handled. Relief, pursuant to Section 213A of the Companies Act, is claimed in their capacity either as shareholders, former shareholders and/or debenture holders.

[2] The Defendants deny these allegations. They contend among other things that: the Claimants were, at the material time, represented by attorneys at law, (paragraph 9 of Defence); they have paid to the Claimant's "*all benefits due to them to date,*" (paragraph 11 of Defence); and, that their majority shareholding in the company was legally acquired, (paragraph 11 of Defence).

[3] The application is for an interlocutory injunction. The Claimants seek to restrain the Defendants, until trial, from continuing to operate and manage the company and/or that the Defendants hand over to them keys to the leased premises. In essence the Claimants wish to be put back in control of the company until the trial of this action.

[4] Several affidavits were filed on the Claimants' behalf. The Defendants filed one affidavit. The affidavits, as is to be expected, support the parties' respective averments. Each counsel filed written submissions and, at the hearing, was permitted one hour for oral submissions. I am grateful for the efforts of counsel and have read and considered them all. I will however only advert to the evidence and authorities to the extent that I find necessary in order to explain the exercise of my discretion.

[5] At this interlocutory stage the court is not to make any finding of fact save to the extent same is agreed or uncontested. Before the grant of an interim injunction the court must first be satisfied that there is a serious issue to be tried. If there is,

the court must then consider whether damages would be an adequate remedy for the Claimant. If it is the injunctive order ought to be refused. If it is not the court, before granting the injunction, needs to consider whether the Defendant is adequately protected by the Claimant's undertaking as to damages. It is when these considerations are evenly balanced, or otherwise indecisive, that the court will consider the balance of convenience or, in its more modern formulation, the justice of the case. The court when considering injunctive relief, at an interlocutory stage, should shy away from a "*box ticking approach*" and at all times bear in mind the overall justice of the case. Authority for these propositions is found in: ***National Commercial Bank of Jamaica Limited v Olint Corporation Ltd [2009] 1 WLR 1405***, explained and applied in, ***Algix Jamaica Ltd v J. Wray and Nephew Ltd [2016] JMCC Comm 2 (unreported judgment delivered 25<sup>th</sup> January 2016) (upheld on appeal (8<sup>th</sup> April 2016))***; and, ***Karibukai Limited v Sky- High Holdings Limited v Mystic Mountain Limited (In Receivership and Bankruptcy) [2022] JMCC Comm 38 (unreported judgment delivered 11<sup>th</sup> November 2022) at paragraphs 29 and 30.***

[6] I restate these principles because, when regard is had to the written submissions filed, there was a tendency to focus only on the "*justice*" of the case. It must be reminded that justice is achieved when established rules are applied equally to all. The established rules, as to the relevant considerations when deciding whether to grant an interlocutory injunction, have not changed. The Judicial Committee of the Privy Council in ***National Commercial Bank v Olint [cited above]*** made that clear. Lord Hoffman in his now famous words, at paragraphs 16 and 17 of his judgment, was indicating that when applying the established principles "*the overall justice of the case*" should be kept in mind.

[7] Applying these principles therefore it is clear that the claim is arguable. There are causes of action established and the evidence in support is credible. Similarly, the affidavit evidence in support of, the Defence demonstrates there are factual issues. Prime among these is the effect of the Memorandum of Understanding (hereinafter called the MOU) signed by the parties on the 15<sup>th</sup> day of July, 2022, see paragraph

6 of the affidavit of Jeremiah Walker filed on the 16<sup>th</sup> February, 2023 and exhibit JW3 thereto. The document commences with a statement of its purpose which is:

*“...to have [the 2<sup>nd</sup> Defendant] take over and assume complete management control of all activities related and associated with the business known as St. Thomas Cable Network Ltd”.*

Its terms are extremely detailed and state the price at which the Claimants' shares are to be purchased, the timeframe for the payment and, the interest to be paid. The purchase price is to be secured by a debenture, granted to the Claimants, over the assets of the company. The MOU also provides for prepayment, to the Claimants, of certain directors' loans. In effect the Claimants agreed to sell their shares. Payment for the shares was to be by a deposit with the balance payable over time. In the event of a failure to pay the Claimants would be able to call on the debenture and thereby regain their shares.

[8] There are two provisions in the MOU which I will quote in full:

*“Acquisition of 75% shareholding for Mr. and Mrs. Walker.*

*As agreed St. Thomas Cable Network Ltd. currently has no EBITA Value which will allow an attractive Sale price.*

*It is agreed that it does have potential and can yield profits after successful restructuring. Hence Dawgen Media Limited/Mr. Dawkins Brown will assign a value of Seventy-Five Million Jamaican Dollars \$75,000,000 to the 75% shareholding of Mr and Mrs Walker. This \$75,000,000 will be converted to a Debenture Note at an Interest Rate of Six (6) percent payable every 6 months and redeemable in seven (7) yrs. or earlier if Dawgen Media Offers to redeem it.*

*The debenture note will be prepared and stamped after the signing of this MOU.”*

The other provision which I wish to quote in full is:

*“Duration*

*This MOU is at will and may be modified by mutual consent of authorised officials from the parties below. This MOU shall become effective February 15, 2022 and will remain in effect for 30 days after which it will be replaced with a formal contract with the basic terms and conditions as follows:*

- 1. Dr. Dawkins Brown/Dawgen Media Limited and his nominees, listed shareholders and or agent(s) own cumulatively 75% of the allocated shares of St. Thomas Cable Network Ltd.*
- 2. Dawgen Media Limited will bear the cost of increasing the Authorised share capital to One Hundred Thousand Ordinary shares (100,000).*
- 3. The Increase and Authorised shares will be allotted to Dr. Dawgen Brown and Dawgen Media Limited.*
- 4. Dr. Dawgen Brown will be named a Director and assume the chairman of the entity.*
- 5. The shareholders certificate to be stamped at the government stamp office.*
- 6. Any other government, legal or accounting mandatory requirements will be included*
- 7. All stamping costs, legal fees etc. for the MOU and the preparation of the contract will be borne by Dr. Dawkins Brown/ Dawgen Media Limited.”*

[9] Mr. McDermott, in his usual careful manner, points to these clauses in support of a submission that the MOU was no longer in effect. The agreement he says was

subject to a contract which had never been prepared. Neither the debenture nor a sale agreement had been completed and therefore there was no binding contract in place. Mr. Wildman on the other hand, in his accustomed effusive style, urged that there had been significant part performance and both parties acted pursuant to the agreed terms long after the 30 days had expired. Equity, he submitted, would hold the parties to their bargain. He relied on paragraphs 6 and 7 of the 1<sup>st</sup> Defendant's affidavit, filed on the 12<sup>th</sup> April, 2023, which states that \$4,372,450 had been paid to the credit of the Claimants. At paragraph 11 it is asserted that, when the MOU was executed, Mr. Manley Nicholson acted for the Claimants.

- [10] The Claimant urged strongly that the contract is tainted with illegality and, for that reason also, should be paused at this interlocutory stage. The alleged illegality is supported by the affidavit of Leanne Golding, legal counsel for the Broadcasting Commission, filed on the 29<sup>th</sup> May 2023. The affidavit states that the licence to broadcast requires the approval from the Broadcasting Commission before any change in ownership or control of the licensee is effected. This approval has not been obtained by the parties in this case. Furthermore, that the licensee has not paid the requisite fees nor filed the required returns to the Commission. In his response to these facts, which he did not contest, Mr. Wildman relied on ***Patel v Mirza [2016] UKSC 42*** a decision of the UK Supreme Court delivered on the 20<sup>th</sup> July, 2016. He urged that a party to an illegality cannot rely on that illegality to escape his obligations. I think this is an issue best resolved at trial. In the realm of quasi-contractual relief and equitable remedies a court will first have to resolve factual issues to determine the extent of culpability and whether, for example, constructive or equitable trusts may emerge. I am not persuaded that the alleged illegalities are so decisive that, at this interlocutory stage, injunctive relief must follow, see ***Alexander House Limited v Reliance Group of Companies [2016] JMSC COMM 22 (unreported judgment dated 2<sup>nd</sup> August 2016)***, upheld on appeal on 3<sup>rd</sup> October 2017, which discussed and applied ***Patel v Mirza (cited above)***.

[11] On the matter of the adequacy of damages on the one hand, and the adequacy of the undertaking proffered on the other, the scales weigh evenly. Although the consideration for the shares is fixed the risk involved in the security is not. If the Claimants are correct, and the Defendants are running the company into ruin by not paying rent for example, then after seven years when the entire balance falls due they may be left with nothing. On the other hand, the Defendants says they have had to put in place certain changes to rehabilitate the company. If he is excluded from its management at this interlocutory stage, and ultimately succeeds at trial, he too may be left with a worthless company. Also, given the agreed price of the shares (see paragraph 8 above), I am not satisfied by paragraphs 9 and 10 of the second affidavit of Mr. Jeremiah Walker (filed on the 27<sup>th</sup> February 2023) that the Defendants are adequately protected by the Claimants' undertaking as to damages.

[12] This therefore leads to a consideration of the balance of convenience or, in its modern formulation, the justice of the case. Given the undenied fact that the Claimants signed the MOU and that, they continued for the better part of a year with the agreement and, that some consideration was made available to them, the court should be reluctant to, at this interlocutory stage, terminate the arrangement. It was agreed by the parties that the Claimants are still directors of the company and that the 1<sup>st</sup> Defendant is the only other director. I therefore suggested to both counsel that injunctive relief should mandate the holding of director's meetings with the intention that, until trial, the parties jointly manage and control the company. The Claimants are not happy with that proposal but, counsel said, would accept it rather than have their application refused. The Defendants' counsel gleefully endorsed the proposal. He submitted that the Claimants' ought, as directors, to have called a director's meeting rather than come to this court. I reject this latter submission as there is evidence which suggests that the Claimants' efforts to remonstrate, by dialogue with the Defendants, failed, see for example paragraphs 5 and 6 of letter dated 23<sup>rd</sup> January 2023 being exhibit JW13 to the affidavit of Jeremiah Walker filed on the 16<sup>th</sup> day of February, 2023.

[13] It is I think undesirable and not in keeping with the overall just of this case to, at this interlocutory stage, make an order which would put one party or the other in a position as if they were entirely successful in the claim. Granting the injunction as prayed will place the Claimants in that position. On the other hand to refuse the injunction will allow the Defendants to continue in full control notwithstanding the serious allegations levied. In these circumstances the fair thing to do is to mandate that the parties jointly operate the company, in the company's best interest, until the trial of the action. The company's return to profitability will be in everyone's best interest. This is so because if successful at trial the Claimants will have returned to them a viable company. If the Defendants succeed they will retain a viable entity. In all the circumstances therefore an order which preserves the status quo, but which protects the Claimants and the company from any alleged negligence or malfeasance, should meet the justice of this case.

[14] Therefore, and for all the reasons stated above, my orders are:

1. The Claimants shall be and remain directors of St. Thomas Cable Network Ltd (hereinafter referred to as the company) until the trial of this action or further order of the court.
2. The 1<sup>st</sup> Defendant shall be and remain the Chairman of the Board of Directors until the trial of this action or further order of the court.
3. The directors shall within four days of the date of this order take steps to ensure that the mandate on all the company's accounts in banks and other financial institutions require the signature of at least two directors one of whom must be the chairman of the board of directors.
4. A director's meeting of the company shall be convened within seven days of the date of this order at which the directors shall meet to consider and take such decisions as are in the best



interest of the company and as are in accordance with their duties under the Companies Act and the laws of Jamaica.

5. Director's meeting shall be held thereafter at such intervals and for such purposes as the directors may determine.
6. The Defendants are restrained from appointing any further or other directors and/or from transferring, assigning, pledging and/or, otherwise dealing with the shares in the company until the trial of this action or further order of the court as to which there is liberty to apply.
7. Liberty to Apply to all parties generally.
8. Costs thrown away in consequence of the Notice of Application for default judgment filed on the 19<sup>th</sup> April 2023 to the Claimants to be taxed if not agreed
9. No Order for the costs of this application.
10. Claimant's attorney to prepare file and serve formal order.

[15] On the matter of costs Mr. Wildman urged that they should favour his clients. The Claimants, he said, ought to have called a director's meeting rather than rush to court and further they have not obtained the orders they wanted. I do not agree. Their attempts to remonstrate with the 1<sup>st</sup> Defendant had fallen on deaf ears and therefore it seems to me not unreasonable that they would seek relief in this forum. I therefore made no order for the costs of the application.

**David Batts**  
**Puisne Judge.**