[2022] JMCC Comm 20

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2022CD00212

BETWEEN	**CHAGOD TOUR JAMAICA LIMITED (formerly Shago Tour Jamaica Ltd.)**	**CLAIMANT**
AND	**NATIONAL COMMERCIAL BANK JA. LTD.**	**DEFENDANT**

Interlocutory injunction- Mandatory effect – Defendant (bank) froze Claimant's (a customer) accounts –Claimant's business in jeopardy - Breach of contract - Whether reason advanced justifies breach - Whether speculation as to possible breach of Proceeds of Crime Act a sufficient justification.

Mrs. Georgia Gibson Henlin QC and Ms. Tamiko Smith instructed by Smith, Afflick, Robinson & Partners for Claimant

Mrs. Sandra Minott - Phillips QC and Ms. Jenna Phillips instructed by Myers Fletcher & Gordon for the Defendant

Heard: 16th, 20th & 23rd June, 2022

In Chambers by Zoom.

BATTS, J.

[1] This judgment was orally delivered, and the orders at paragraph 12 made, on the 23rd June 2022. I then invited counsel to type and submit it to me for approval. Neither has to date done so. I have therefore reduced the judgment to writing, using my handwritten note, and issued it in a permanent form.

[2] *Audi Alteram Partem* is a principle which is fundamental to the Rule of Law. It is reflected in our Constitution, see sections 13(2) (r) and (q), 13(5), 15, 16(2) and,

16(3). This right to be heard necessarily includes the right to, know the case alleged and, an opportunity to respond thereto. It is fundamental to the jurisprudence of the common law. The Constitution makes the right, as with all other rights, subject to such measures or activity as may be "*demonstrably justified in a free and democratic society".* Just as a court ought not to ignore an illegality, for breach of a statute which comes to its attention, neither should a court overlook a constitutional breach. The Constitution does not say, or even suggest, that only a Full Court may consider its provisions. Indeed, being our Supreme Law it must at all times be the backdrop, the foundation or, the rock if you will, against which all courts apply the full tapestry of laws. Therefore, whereas this claim is not one seeking constitutional relief it is appropriate, when considering the issues raised, to bear in mind the fundamental right of every person to fairness.

[3] The Claimant complains of a breach of contract and negligence. In this oral judgment I will not go into the details, save to say that, the Claimant and Defendant are in a banker customer relationship. It is one which includes a "Universal Terms & Conditions Merchant Agreement," see (Exhibit A). The Claimant, a tour company with international connections, depends on the processing and payment of credit cards for its business to survive. It contends that, without explanation, the Defendant has frozen all its bank accounts (there are 3 of them). It is therefore unable to access any of the approximately US$3 million in one of them. It is unable to pay its staff, or to honour any expenses connected to its business. It says that email and other correspondence, some of which have been copied to state institutions , has shed no real light on the matter. The only issue raised with them concerns "*call back"* issues related to suspected fraudulent activity by third party cardholders. It has exhibited correspondence demonstrating its answers to queries raised by the Defendant in relation thereto. The Claimant says these claims do not now exceed US$400,000.

[4] The Defendant for its part does not seriously challenge these assertions. The explanation, for freezing the Claimant's accounts, does not rely on any alleged breach of contract by the Claimant. Rather, and I say this respectfully, it relies

mostly on unsupported aspersions against the Claimant. Changing the name of a company, having only one US dollar bank account and requesting payment in cash do not together, or separately, amount to evidence of wrongdoing. Defence counsel cited the Proceeds of Crimes Act and relied on sections which impose confidentiality duties and time periods for investigations. The suggestion, not entirely articulated, is that the Claimant, or its money, is tainted and that the authorities may have an interest. Alternatively, the suggestion may be, and I put it this way because Queen's Counsel says her client's obligations of confidentiality prevent any clear assertion, that the potential exposure whether to fraudulent claims or otherwise may amount to US$9million. Hence the need to freeze all the Claimant's accounts.

[5] This matter was filed on the 31st May, 2022. I directed, on the 3rd June, 2022, that the Defendant be served with a claim and particulars of claim. The parties returned on the 16th June 2022 when submissions commenced and was part heard to the 20th June, 2022. Ultimately, arguments have been heard and affidavits filed by both parties. Prior to that the Claimant had been in written communication with the Defendant since the 10th May, 2022, see Exhibit JTG3 to the affidavit of Josefina Torres Garbey filed on the 31st May 2022. A letter of the 16th May 2022 had been copied, by the Claimant's attorneys, to the Financial Investigations Division (Ministry of Finance), see exhibit JTG4 to the same affidavit. It seems to me there has been ample time for anyone having an interest in the Claimant's funds to articulate that interest. It does seem unfair, whether that unfairness is the one required at common law or by the Constitution, for no explanation to be provided to the Claimant.

[6] I say all this to demonstrate that the first limb for the court's consideration, when deciding whether or not to grant interlocutory relief, has been satisfied. On the evidence before me the Claimant has a real prospect of success in its claim that the Defendant is acting in breach of contract when freezing assets worth US$3 million, on account of alleged fraudulent activity by a third party, totalling

approximately US$400,000. In the course of submissions, it emerged that the amount had since increased.

[7] It is clear also, as I continue to apply ***National Commercial Bank v Olint*** **[2009] UKPC16,** that damages will not be an adequate remedy. The approach is the same even where the effect of the order is mandatory. Simply put if this injunction is refused, but the Claimant ultimately succeeds at trial, the victory may be entirely pyrrhic as on the evidence the Claimant and its business may by then have collapsed. No money damages, as with Humpty Dumpty, will be able to put that business together again. Even if its business survived, the loss in credibility and goodwill (due to disgruntled customers or loss of potential customers) will be incalculable. On the other hand, the Defendant will still have the option of reimbursement from sums held on account if at trial it ultimately succeeds. To the extent that there is an unexpressed possibility of a liability, to the state or others for releasing the funds at this time, the Defendant will have an absolute defence as it would be acting pursuant to the coercive order of this court. There can be no liability, in contract or by criminal statute, where the conduct is involuntarily and pursuant to an order of this court. Therefore, there is adequate relief to the Defendant, in the event at this interlocutory stage I am wrong. Furthermore, the Claimant has suggested that I not release the entire account but allow to be frozen an amount which takes into account the disputed credit card transactions. This is a further hedge and is also supportive of the undertaking as to damages against potential exposure.

[8] If I am wrong, and the consideration of the respective adequacy of damages is evenly balanced, I will briefly look at the balance of convenience or, as it is more accurately put nowadays, the overall justice of the case. This clearly favours the Claimant whose business is on the point of collapse. Its staff and expenses cannot be paid and its customers and potential customers are dissatisfied. All this in circumstances where no clear, or justifiable or, particularised basis for freezing its entire account has been articulated.

[9] I make no findings of facts at this stage. Nothing I have said indicates a preference for one party's version of the facts over the other's. However, a court of law would be failing in its duty if it did not grant relief merely because of suspicion, conjecture, hyperbole, fear or aspersions unsupported by evidence. If there are circumstances surrounding a transaction, or series of transactions, which justified a report under POCA, the Defendant will have done its duty if it made such a report. Thereafter it is for any relevant third party or agency to act or to intervene. It would be unfair at this interlocutory stage for the court to refuse relief without any evidence of circumstances which would allow for the freezing of the accounts. These circumstances of course could relate to the laundering of money or the proceeds of crime. However, there is no evidence to support such allegations before me. The Claimant has come to this court for relief and relief it shall have. The evidence allows for no other result at this interlocutory stage.

[10] Upon delivery of this oral judgment counsel for the Defence complained that no Defence had been filed and that one affidavit had not been answered. Let me be clear, this decision was made on the affidavit evidence and the respective submissions. Applications for interlocutory relief do not usually require a close of pleadings before being heard. Secondly at no time was any request, for time to respond to affidavit evidence, refused. Queen's counsel requested leave to appeal and this was granted so too was a 14-day stay of execution.

[11] It is therefore the order of this court that:

1. The Defendant shall forthwith release all sums in the Claimant's bank accounts Nos. 305326941, 395326933 and 301463499 which are over and above US$600,000.00 until the trial of this action or a further order of the court.

2. Claimant through its counsel gives the usual undertaking as to damages.

3. Defence and Counter Claim if any are to be filed and served by the 29th July, 2002.

4. Parties are to proceed to mediation which is to be completed on or before 28th October 2022.

5. Case Management Conference fixed for the 4th November, 2022 at 10:00 a.m.

6. Leave to Appeal granted to the Defendant

7. Stay of execution granted for 14 days.

8. Costs in the Claim.

9. Claimants attorney to prepare, file and serve formal order.

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David Batts
Puisne Judge.