



[2016] JMSC Civ. 69

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012HCV05617

BETWEEN	MARK ANDERSON JONES	CLAIMANT
AND	MID ISLAND POULTRY LIMITED	FIRST DEFENDANT
AND	DONOVAN HUNTER	SECOND DEFENDANT
AND	DARMAC POULTRY LIMITED	THIRD DEFENDANT
AND	ARMC INVESTMENT LIMITED	FOURTH DEFENDANT
AND	WENDY MCMASTER	FIFTH DEFENDANT
AND	RAYMOND MCMASTER	SIXTH DEFENDANT
AND	ADRIAN CLARKE	SEVENTH DEFENDANT

IN CHAMBERS

Conrad George instructed by Hart Muirhead and Fatta for the claimant

Ransford Braham QC and Danielle Turnquest Moulton instructed by Braham Legal for the third defendant

Glenroy Mellish instructed by Mellish and Rushton for the fourth, fifth, sixth and seventh defendants

April 21 and May 5, 2016

CIVIL PROCEDURE – DISCHARGE OF FREEZING ORDER – MATERIAL NON-DISCLOSURE - DISCHARGE OF NORWICH PHARMACAL ORDER – REMOVAL OF DEFENDANTS FROM CLAIM

SYKES J

- [1] Mr Mark Anthony Jones is owed money by Mr Donovan Hunter. Lots of it. As of November 22, 2012, the date of the default judgment against Mr Hunter, the total debt (principal and interest) stood at J\$94,230,405.84. But that was over three years ago and Mr Jones is still out of pocket.
- [2] Mr Hunter seems to be the twenty first century incarnation of St John, the fourth century Archbishop, who was called Chrysostomos (golden-mouthed) because of his great eloquence and persuasive powers. Mr Hunter convinced Mr Jones to lend him J\$57,544,830.70. It was unsecured. The money was lent to further Mr Jones' ambition of becoming a poultry farmer. The company through which Mr Hunter was to realise his goal was Mid Island Poultry Limited ('MIPL').
- [3] The business did not prosper and neither was the money repaid. This led Mr Jones to sue both MILP and Mr Hunter. In addition to the default judgment, Mr Jones eventually secured a provisional charging order over MIPL's properties.
- [4] Mr Hunter's Chrysostom-like qualities proved themselves once more. Somehow, he managed to convince Mr Jones to lift the provisional charging orders so that all of MILP's assets could be sold and transferred to Darmac Poultry Limited ('Darmac') which would then be the company Mr Hunter would use to revive his poultry farming yearnings. Mr Jones was further convinced by Mr Hunter that he (Hunter) would use his dividend payments and any other payments to which he was entitled to repay the debt to Mr Jones. Mr Jones agreed to this and sought to

capture this agreement in writing which was acknowledged by Darmac. To put in the Jamaican language, Mr Hunter give up sure (the provisional charging orders) fi unsure (a promise to pay in the future).

- [5] A few words about Darmac. Darmac had two shareholders. Mr Hunter who held 1/3 of the shares and a company named ARMC Investments Ltd ('ARMC') which held 2/3 of the shares. ARMC's shareholders were Mr and Mrs McMaster ('the McMasters') and Mr Adrian Clarke. At the time Darmac acquired MILP's assets there was an existing mortgage over the land which had to be paid off. This loan was paid off by another loan which was taken out by Darmac.
- [6] Darmac itself ran into financial troubles. It was never on a sound financial footing. Darmac had significant problems funding its day to day operations. It is fair to say that Darmac was in intensive care from time of its birth and eventually succumbed to its persist and chronic illness of lack of cash to meet its current liabilities. All of Darmac's assets have now been sold and Mr Jones is still out of pocket. The money has been used to pay off Darmac's creditors. These creditors included ARMC and the bank from which Darmac borrowed money to pay off MILP's mortgage.
- [7] Mr Jones still wishes to recover his money. On February 8, 2016 this court granted a freezing order upto US\$1.1m (against all the defendants), a Norwich Pharmacal order (against the third to fourth defendants) and an order adding the third to the seventh defendants as defendants to the claim. A receiver was also appointed in respect of the first to the fourth defendants. This was on a without notice application in respect of the third to the seventh defendants. The first two defendants were represented by counsel who had no objection to the orders sought. At the on notice hearing, on April 21, 2016, all the orders were discharged in respect of the third to the seventh defendants.
- [8] At the without notice hearing this was the picture presented through the affidavit evidence of Mr Mark Jones:

- a) MILP had properties that were the subject of a provisional charging order and also subject to a secured mortgage;
- b) the provisional charging order was discharged on the understanding that those properties would now be sold and transferred to Darmac;
- c) the property now having been transferred to Darmac which was 2/3 controlled by ARMC, a company controlled by the McMasters, eventually became subject to a mortgage in favour of ARMC;
- d) the properties which were now Darmac's were encumbered in such a manner that would ensure that the McMaster's interests would be served at the expense of Mr Jones';
- e) Darmac at all material times was struggling financially and the McMasters with full knowledge of all the surrounding circumstances including the agreement between Mr Jones and Mr Hunter conducted the affairs of the company in such a manner that advanced their interest at the expense of Mr Jones. Mr Clarke was said to be part of the scheme to extract money from Darmac at the expense of Mr Jones;
- f) Darmac's assets were sold at a substantial undervalue.

[9] The slant given was that the McMasters and Mr Clarke had come to together to dispose of the assets of Darmac and pay themselves first from the proceeds of sale and all this was to undermine the possibility of Mr Jones ever recovering any money from Mr Hunter. Paragraph 15 of Mr Jones' affidavit states that '[t]he above has caused me to come to the inevitable conclusion that Mr Hunter, apparently with the assistance of the McMasters, has worked to dissipate the assets of Darmac so as to avoid 1/3 share coming to me in satisfaction of the judgment debt in breach of the Agreement (sic), and the Consent Order (sic), and to ensure that I recover nothing.' It was in these circumstances that the court granted the orders mentioned earlier.

[10] At the on notice hearing other facts emerged:

- a) the Masters through ARMC provided virtually all the working capital of Darmac in the form of loans;
- b) there was no evidence that Mr Hunter had put up any money to meet the operational expenses of Darmac;
- c) there was abundant evidence that the McMasters through ARMC had paid significant debt on behalf of Darmac and pumped very significant sums of money into the company.

[11] A fuller picture emerged. Darmac acquired the assets of MIPL by means of a loan from National Commercial Bank. The assets included live chickens which had to be fed, watered and maintained. The money came from the shareholders of ARMC, namely the McMasters and Mr Adrian Clarke.

[12] Mr Ransford Braham QC submitted on behalf of Darmac, and the court agrees, that Mr Jones has not established the existence of a cause of action against Darmac. It was further submitted that his cause of action is against Mr Hunter. Learned Queen's counsel also submitted that Mr Jones' recovery was contingent upon Mr Hunter actually being entitled to any payment and if such payments were actually made. The court agrees with this.

[13] On closer examination it is now very clear that the arrangement between Mr Jones and Mr Hunter was a private one that had nothing to do with Darmac. The document acknowledged by Darmac is nothing more than that: an acknowledgment. It recognises the existence of the arrangement but that document did not constitute any commitment by Darmac to pay Mr Hunter's private debt.

[14] The court has heard submissions from Mr Mellish who represented the fourth to the seventh defendants and the court has also examined the affidavit evidence

placed before the court. The court concludes that ARMC advanced huge sums of money for Darmac's operations.

- [15]** One of the more disturbing aspects of this case is the now-too-common instance of material non-disclosure. In this particular case, Mr Jones overstated the debt by US\$200,000.00. This omission was pointed by Mr Raymond McMaster in his affidavit evidence seeking to have the orders discharged.
- [16]** Mr Jones has conceded that he did not tell the court that he actually received US\$200,000.00 in payment from ARMC as part of the conditions of the sale of assets to Darmac.
- [17]** In the application for the order the debt was stated as US\$1.1m and not US\$900,000.00. Counsel, Mr Adam Jones (no relation to Mr Mark Jones), in his affidavit, sought to explain the error as a clerical error. The statement of the debt as US\$1.1m is consistent with Mr Jones not mentioning that he was paid US\$200,000.00 in his affidavit.
- [18]** Mr McMaster's affidavits points out further instances of non-disclosure by Mr Jones. Mr Jones gave the impression that ARMC's registration of a mortgage over Darmac's property came as a surprise when Mr Jones took action by way of a without notice application to prevent ARMC from registering its mortgage. This he did in late 2015.
- [19]** Mr Jones failed to disclose that National Commercial Bank was threatening to sell Darmac's assets which were used to secure the loan that was used to pay MIPL's debt to another bank. In effect, Mr Jones omitted to present the full financial picture so that the court could have a full and complete understanding of all the facts and circumstances of the application.
- [20]** It has repeatedly been stated by courts in the West Indies and England that there is a high duty on persons making without notice applications. As recently as 2015 the Court of Appeal of Jamaica dealt with this matter. Morrison JA (now

President) held in **Venus Investments Ltd v Wayne An Holdings Ltd** [2015] JMCA App 24 at paragraph 25:

*There is therefore an unbroken line of authority in support of the proposition that, **on a without notice application, the applicant is obliged to act in good faith by disclosing all material facts to the court, including those prejudicial to its case, and that failure to do so may lead to an injunction being discharged. The duty of disclosure extends not only to material facts known to the applicant, but also to any additional facts which he would have known had he made proper enquiries. Material facts are those which it is material for the judge hearing the without notice application to know and the issue of materiality is to be decided by the court, and not by the assessment of the applicant or his legal advisers. Nevertheless, there is a discretion reserved to the court to make a fresh order on terms, notwithstanding proof of material non-disclosure.***

[21] The applicant for a without notice order ‘must show utmost good faith and disclose his case fully and fairly, and he **must disclose all facts which reasonably could or would be taken into account** by the judge in deciding whether to grant the application’ (emphasis added) (**St Merryn Meat Ltd v Hawkins** [2001] CP Rep 116 [59]). Hughes LJ in **Standford International Bank Ltd (In Receivership)** [2011] Ch 33 at paragraph 191:

*...it is essential that the duty of candour laid upon any applicant for an order without notice is fully understood and complied with. **It is not limited to an obligation not to misrepresent. It consists in a duty to consider what any other interested person would, if present, wish to adduce by way of fact, or to say in answer to the application, and to place that material before the judge. That duty applies to an applicant for a restraint order under POCA in exactly the same way as to any other applicant for an order without notice.***

[22] Even the Judicial Committee of the Privy Council had to comment on the duty of full, frank and fair disclosure. Lord Hughes in **Re Assets Recovery Agency (Jamaica)** (2015) 85 WIR 440 at paragraph 21 stated:

Moreover, the duty of the applicant to the court is of great importance. Applications of this kind will normally be made ex parte. All ex parte applications impose on the applicant the duty to disclose to the judge everything which might point against the grant of the order sought, as well as everything which is said to point towards grant. ... The duty of the applicant in such circumstances is, in effect, to put himself into the place of the bank, but also of the person whose affairs are under investigation, and to lay before the judge anything which either could properly advance as reasons against the grant of the order sought.

- [23] The rule may seem highly technical but the reason is that a without notice order is always exceptional because it is in fact an order made in breach of the fair hearing rule which is that no man should have an adverse order made against him before he is heard. However, in some instances a departure from this fundamental principle is justified. The result of permitting the departure is that the applicant is under a very high duty of candour. There is no need to find that he deliberately misled the court. Even if the omission arose because of an honest mistake it is still a breach for which the usual result is a discharge of the order. In this case Mr Jones failed to put before the court or adduce evidence of what ARMC may have said in answer to the application. ARMC would have undoubtedly pointed that it paid Mr Jones US\$200,000.00 of the debt owed. ARMC would have undoubtedly pointed that the debt amount was overstated. ARMC would have pointed out that payment of part of the debt did not mean that it was assuming Mr Hunter's liabilities.
- [24] Mr Mellish on behalf of his clients has convincingly demonstrated that payment of US\$131,125 was paid by ARMC to CWT Farms International Limited; another sum of US\$67,116.91 was paid to Syfrett Feed Company Inc; US\$7,600.00 to Jamaica Flour Mills and other bills amounting to US\$158,730.16. What has been stated is not exhaustive.
- [25] In short Mr Jones' affidavit did not present a full and complete picture. For that reason alone the discharge of the orders is justified. In any event, on closer

examination, as Mr Braham pointed out, at the heart of the matter is the fact that Mr Jones and Mr Hunter made a private arrangement for settling Mr Hunter's indebtedness. Those debts were never the debts of Darmac.

[26] There is one further matter. The court has made orders that Mr Jones pay the costs of disclosure by the third to the seventh defendants. There is now serious doubt over whether Mr Jones will be able to meet those costs orders. It is true to say that Mr George did disclose to the court that Mr Jones had some difficulty with the United States of America's Securities and Exchange Commission. Counsel did not have detailed information on the nature of Mr Jones' problems at the time of the application. We now have more details.

[27] The allegation against Mr Jones by the United States of America authorities is that he engaged in a fraud involving nearly US\$10m. It is alleged that he solicited these funds from private persons on the basis that he would be making bridging loans to persons in Jamaica. The investigations to date have not indicated any evidence of bridging loans being made. He is accused of using the money for personal expenses and making payments to previous investors. Mr Jones was arrested on March 13, 2016. The Commission was seeking the freezing of Mr Jones' assets. In light of these circumstances it seems that the third to the seventh defendants may not recover the costs of complying with the disclosure.

[28] Additionally, Mr Jones has received virtually all the information sought under the order and no useful purpose would be served keeping the Norwich Pharmacal order in place.

[29] In an oral judgment, delivered April 21, 2016, the court had discharged all the orders made against the third to the seventh defendants. The court had also agreed that the orders continue against MILP and Mr Hunter. The only reason for continuing the order against Mr Hunter and MILP is that at February 8, 2016 hearing these defendants were represented by counsel who indicated that he had no objection to the orders sought.

Conclusion

[30] The orders made against the third to seventh defendants are all discharged.
Costs to the third to seventh defendants to be agreed or taxed.