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Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 026/1993

BETWEEN	EMANUEL CLASEMO	PLAINTIFF
A N D	BARNETT LIMITED	DEFENDANT

Mrs. Margaret Forte and Mrs. Georgina Gibson-Henlin for Plaintiff instructed by Gaynair and Fraser.

John Vassell instructed by Dunn Cox and Orrett for Defendant.

Heard: April 18, 20, May 19, 20, & September 23, 1994.

LANGRIN, J.

This is an application on a Summons for an interlocutory injunction whereby the plaintiff is seeking an order that:

1. The Registrar of Titles be restrained from registering any transfer of 32 lots of land situated on the plan part of Fairfield in the parish of St. James being lands comprised in Certificate of Titles at Folio 717-718 of the Register Book of Titles.
2. That the matter be allowed to go to trial for the determination of the existence of a contract.

In deciding whether to grant the plaintiff's request it is necessary to look at the factual situation as evidenced by the affidavits of the parties. The facts as revealed by the affidavits are that on the 24th September 1992 the defendant company agreed to sell to the plaintiff 32 lots of land in the Granville sub-division for a price of $1.2 million. The offer to sell the lots of land was comprised in a letter sent to the plaintiff on the 24th September, 1992. On the 10th October, 1992 the defendant sent to the plaintiff another letter to which was attached a draft agreement for the plaintiff's perusal and comments. Later on the 15th October, 1992 the plaintiff sent a letter to the defendant, with an amended draft agreement which proposed changes other than those in the defendant's draft agreement.

The plaintiff amended draft agreement proposal to change the method of payment and omitted the special condition in the defendant's draft which reserved to the defendant the right to rescind from breach of any term of the agreement. To the plaintiff's proposed draft amendment the defendant made no reply. On the 3rd November, 1992 the plaintiff accepted in writing the defendant's offer and tendered a manager's cheque for $1 million. The cheque was returned on the 5th November, 1992 by the defendant. On that same day the plaintiff lodged a caveat on the certificates of title on the lots of land. On the 14th June, 1993 the plaintiff was informed that the Registrar of Titles intends to register a transfer of the land if the plaintiff fails to obtain an order from the Supreme Court forbidding the transfer.

The question then for determination, putting it broadly is whether, when the plaintiff sent the amended draft agreement he was merely making an enquiry and thus seeking information; or whether as the defendant claimed the amended draft agreement amounted to a counter-offer and therefore rejected the defendant's original offer.

Mrs. Forte, Learned Counsel for the plaintiff in applying for Interlocutory injunction submitted that the only question to be considered is whether there is a serious issue to be tried. She quite skilfully argued that the letter of the 18th October, 1992 was making an enquiry of the defendant and was merely seeking to put different terms to the defendant. It was submitted that the cases of Stevenson v. McLean (1880) Q.B.B. 346 and Hyde v. Wrench (1840) 3 BR 340 should be distinguished. It was further submitted that the 'exchange' of drafts between the parties do not affect the offer by the defendant. Counsel for the plaintiff also contended that the exchange of 'drafts' was merely an expression of the desire of the parties as to the manner in which the contract which had already been concluded would proceed. See Roseter v. Miller (1874) - 80) ALL ER Rep. 468. It was also submitted by the plaintiff that the question of estoppel arises to prevent the defendant from refusing to perform the contract. In the light of all these questions to be

considered it was strongly urged on the court that there was a serious issue to be tried.

Mr. Vassell, Learned Counsel for the defendant argued that if there was a triable issue then the injunction should be granted. He conceded that the balance of convenience was in the plaintiff's favour. However, he submitted that the Court can at this stage decide the issues between the parties since firstly it raises a question of law and secondly all the pleadings are before the Court. That being so this Court would be in just as good a position as the trial Judge to settle the question to be determined and therefore should decide the question of law there and then. The cases of Fellowes v. Fisher (1975) 2 AER 829 and George Johnson v. Myers No. 74/87 C.A. was relied on for the aforementioned propositions.

Counsel for the defendant submitted that when the plaintiff accepted by letter of 3rd November, 1992 the offer of 24th September, 1992, the offer had by that time cease to exist. Firstly, the offer had been overtaken by the exchange of draft agreements between the parties and secondly the offer had been rejected by reason of counter offer made by the plaintiff in his letter and draft agreement of October 15, 1992. Reference was also made to the omission of the special condition on the defendant's draft, the effect of which the defendant contends was a serious consequence going to the root of the contract.

Mr. Vassell, relied on several cases to support his argument that there was a rejection of the offer made on the 24th September, 1992 by the plaintiff's letter of 15th October, 1992. Among the cases relied on was Jones v. Daniels (1894) 2 Ch. 332. It was also submitted that the use of the term draft agreement meant that the parties were still negotiating and that no final contract could emerge until those negotiations ended and a formal agreement was executed. Reliance was placed on meanings of 'proposed' and 'draft' as stated in the Concise Oxford Dictionary. It was finally submitted that the letter of the 15th October, 1992 amounted to a counter offer and therefore the plaintiff had rejected the original offer.

The dominant consideration for the Court, he argued, was that since there was no conflict as to facts the Court was in as good a position as a Trial Judge to entertain the legal arguments. Therefore this Court should determine the legal issue there and then and not leaving it for the trial Court.

Section 49(h) of the Judicature (Supreme Court) Act states the legal basis of the grant of an interlocutory injunction as follows:-

Lord Diplock in the well established case of American Cyanamed v. Ethicon (1975) 1 ALL ER 504, 509 stated the principles which guide the Courts in granting relief by way of injunction as follows:

> "The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial, but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in defendant's favour at the trial. The Court must weigh one need against another and determine where the balance of convenience lies."

I have now come to what I regard as the greatest difficulty in the case and the dominant consideration is as stated by Lord Diplock at page 510 of the judgment.

> "It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence in affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed arguments and mature considerations. These are matters to be dealt with at the trial .... so unless the material available to the Court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

The law Vendor and Purchaser, a treatise by Roy Miller Stanlais stated that "an acceptance which is conditional, or qualifies any of the terms in the offer or adds a term, not comprised in the offer is a Counter offer." In short an acceptance must be unqualified and must correspond to the terms of the offer. See Hyde v. Wrench and Jones v. Daniel (Supra). However a mere request for information whether other terms would be accepted does not itself have the result of a counter offer. Stevenson v. McLean (Supra).

In the treatise by Spry "The Principle of Equitable Remedies" at page 450 it was stated that if there is no conflict in the evidence as to matters of fact, then on an application for interlocutory injunction the Court can decide the questions of law just as a trial Judge can and therefore there is no need to go to a trial court. The question therefore arises as to whether there is before this Court all the evidence necessary to determine the issue in this matter. If the defendant's contention is correct then unless better reasons were presented before the Court, this Court could very well settle the questions of law presented based on the facts outlined in the affidavit evidence.

There are, however, conflicts on the affidavit evidence pertaining to the issues before me and I shall only mention a few of them:

1. What is meant by the letter of 24th September 1992 which states that we agree to sell you the 32 lots in the Granville Sub-division for a net price to the Company of $1.2 million?
2. In the context of the situation, what is meant by a draft agreement and 'for your perusal and comments' sent on 8th October 1992.
3. The plaintiff's proposed draft agreement sent on 15th October, 1992 for your perusal and comments. Was this a counter-offer or mere request for information?
4. Has the affidavit evidence raised the issue of estoppel on the part of the defendant? These facts are disputed but in any event, Counsel argues, they are omitted from the pleadings.

Based on the authorities cited and the dispute as to questions of fact, there is little doubt that there is a serious question to be tried. The plaintiff may indeed be able with a considerable degree of skill and effort at the trial to make out a formidable case in support of its contentions just as the defendant may be able to make out a formidable case in reply. With the full procedure of the trial coupled with the advantage of seeing and hearing the witnesses and the testing process of cross-examination the Court will be able to reach a firm conclusion one way or the other. Because I lack these advantages in dealing with the disputed question of fact it is my judgment that the plaintiff has made out a case for the remedy which he seeks.

In light of the foregoing reasons it is the judgment of the Court that the interlocutory injunction should be granted and the matter be allowed to go to trial for a final determination of the issues. Costs to be costs in the cause. Plaintiff gives usual undertaking as to damages. Leave to appeal granted.

I am grateful to Counsel on both sides for the very able and exhaustive arguments advanced in the presentation of the case.