



[2023] JMSC Civ 18

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU 2023 CV00163

BETWEEN	XTRINET LIMITED	1ST APPLICANT
AND	SYMBIOTE INVESTMENTS LIMITED	2ND APPLICANT
AND	DAVID WONG KEN AS 'DAVID WONG KEN & CO (A FIRM)	RESPONDENT

In Chambers

Mr. Anwar Wright instructed by Wright Legal for the Applicants

**Mrs Denise Kitson and Ms Rachel Kitson instructed by Grant Phillips and Co for
the Respondent**

Heard 23rd January 2023 and 1st February 2023

Injunction – Freezing order

SHELLY WILLIAMS, J

BACKGROUND

[1] The 1st applicant is a limited liability company registered under the Companies Act, with the 2nd applicant being a subsidiary of the 1st applicant. Both applicants are in the business of telecommunication. The respondent is an attorney at law who was retained to by the 1st applicant.

[2] A claim was filed by the first applicant against The Attorney General of Jamaica and Superintendent of Police Anthony McLaughlin. The parties entered into negotiations which resulted in a settlement. The respondent was retained to negotiate and settle the claim. The settlement concerned the repayment of licensing fees and regulatory payments which had been paid to Spectrum Management Authority (Spectrum). The parties arrived at a settlement on the 12th of August 2022 with the settlement funds being paid over to the respondent on the 12th of December 2022.

[3] The applicants filed an application for an ex parte injunction along with an affidavit in support on the 23rd of January 2023 seeking the following orders against the respondent: -

1. *An interim Injunction restraining the Respondent and /or his servants or agents or otherwise howsoever from disposing of, transferring, charging, diminishing or diminishing the value of, or in any way howsoever dealing with the proceeds of a settlement agreement between Symbiote Investments Limited and the Spectrum Management Authority, any part thereof, in his name, whosoever the same may be situate, up to the value of Five Million One Hundred and Forty Thousand Dollars and United States currency (USD \$5,140,000.00), for 28 days pending further consideration of his application.*
2. A date be set for an *inter partes* hearing of his application within 28 days of the date hereof.
3. Costs of this application be reserved.
4. Such further or other relief as this Honourable Court deems just.

The grounds on which the Applicants is seeking the Orders are as follows:

- a. *The Respondent holds monies on trust for the Applicants and have been depleting same through distribution to persons/entities without the authority or permission of the Applicants.*
- b. *The Applicants have a good and arguable case against the Respondent, and there is a real risk that the Respondent will continue to dissipate the said monies held on trust for the said Applicants.*
- c. *The interests of justice require the grant of the freezing injunction sought.*
- d. *The Court is empowered to grant injunctions pursuant to Section 49(h) of the Judicature (Supreme Court) Act [J] and the Civil Procedure Rules 2002.*
- e. *Part 17, including Rules 17.1 4 Civil Procedure Rules 2002.*
- f. *Full and frank disclosure is made in the Affidavits file in support of this application.*
- g. *Notice to the Respondent would defeat the purpose of this application.*
- h. *The Application undertake issue and serve a claim within 28 days of the date of orders made herein.*
- i. *The Applicants gives the usual undertaking as to damages.*

[4] The ex parte application was listed for hearing at 11 a.m. on the 23rd of January 2023, at which time the applicant was instructed to serve the respondent and return for inter parties hearing at 2 pm the said day. At 2 pm the respondent attended the hearing along with his attorneys. The applicant had drafted an affidavit along with exhibits which he had served on Counsel for the applicant, with the undertaking that it would be filed by the 24th of January 2023. The hearing of the application was adjourned to the 1st of February 2023 to allow Counsel for the respondent to file and serve the affidavit in response and to give Counsel for the

applicants an opportunity to peruse the affidavit, as well as to receive instructions from his client. The application was heard on the 1st of February 2023.

The Applicant's Evidence

[5] The representative of the applicant averred in his affidavit that the respondent had been retained to negotiate the settlement with Spectrum on the applicants' behalf. The agreement was for the respondent to: -

- a. negotiate and settle the dispute with Spectrum,
- b. negotiate with and settle the claims of creditors to the 2nd applicant,
- c. pay over, proportionately or as agreed any remaining sums less fees and reasonable expenses to the investors and shareholders of the company.

[6] The applicants' position was that the instructions as to settlement of the dispute as well as the payments to creditors could only come from Mr Hines who is the director of the applicants. Mr Hines averred that the applicants had no proven debts or judgments obtained against them by any creditors. The applicants and Spectrum arrived at a settlement agreement which was executed on the 12th of August 2022. On the 16th of December 2022 Mr Hines wrote to the respondent and gave instructions that no money was to be paid out from this sum. The applicants then filed this application seeking a freezing order and for an interim injunction to be granted in relation to the said sums.

The Respondent's Evidence

[7] The respondent averred in an affidavit filed on the 31st of January 2023 that he had been retained to not only negotiate and settle with Spectrum but to negotiate and settle with creditors of the applicants. Mr Wong Ken averred that he had received written instructions, which he exhibited to the Court, wherein he was instructed to negotiate with a number of creditors. He had received these instructions from Mr. George Neil who is the principal and beneficial owner of the shareholding in the 1st

applicant. Pursuant to these instructions, he had negotiated and caused to be discontinued four claims that were before the Court. The applicants were not named in those Claims but he was instructed to negotiate a settlement in those cases. The respondent exhibited the notices of discontinuance with his affidavit. The applicant also listed the creditors with whom he had negotiated and arrived at settlements with.

[8] The respondent exhibited to the Court the wire transfer forms, with the attached stamps from First Global Bank showing the request for the funds to be transferred to the creditors. Finally, the respondent exhibited to the Court the letters showing acknowledgment from the creditors that they had received the funds wired to them.

[9] The respondent also averred that he had forwarded a portion of the funds to two companies which were named by the said Mr Neil. This appeared to be the balance of the sums after the creditors had been paid and he had taken his fees. On the 6th of January 2023 the respondent sent a statement of account to the applicants showing how the money had been dispersed.

The Law

[10] The basis on which a Court will grant an interim injunction has been well established in the case of **National Commercial Bank v Olint** [2009] 1 WLR 1405 which echoes the principles laid down in the case of **American Cyanamid v Ethicon** [1975] 1 All ER 504 at pages 510-511 where Lord Diplock stated: -

... The use of such expressions as 'a probability', 'a prima facie case', or 'a strong prima facie case' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.

It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on 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 argument 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.

As to that, the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason this ground to refuse an interlocutory injunction.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

Decision

- [11] Counsel for the applicants had submitted to the Court that the respondent ought not to have taken instructions from anyone other than the director of the applicants. That may be an issue in a substantial claim, however it is not the issue presently before the Court. The Court is concerned with whether sums exist which can be the subject of a freezing order or an interim injunction.
- [12] Based on the evidence presented to the Court the sum paid over to the respondent in lieu of the settlement with Spectrum has been dispersed. This information had

been relayed to the applicants in a letter dated 6th of January 2023 wherein which a statement of account had been presented to them. This statement of accounts was attached and exhibited in the respondent's affidavit. There are no funds against which either a freezing order or an interim injunction can be granted. The Court will not act in vain.

[13] The order of the Court is:

- a. The application for interim injunction/ freezing order is dismissed.
- b. Cost to the respondent to be agreed or taxed.