[2012] JMCA Civ 14

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 91/2009

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE M^C^INTOSH JA

BETWEEN	**CABLEMAX LIMITED**	**1ST APPELLANT**
AND	**J. T. CABLE NETWORK LTD.**	**2ND APPELLANT**
AND	**STONY HILL CABLE SERVICES LTD.**	**3RD APPELLANT**
AND	**LOGIC ONE LTD.**	**RESPONDENT**

Barrington Frankson and Miss Norma Fearon instructed by B.E. Frankson and Company for the 1st, 2nd and 3rd appellants

Christopher Kelman and Miss Shuana Kaye Hanson instructed by Myers, Fletcher and Gordon for the respondent

22 March; 29 July 2011 and 30 March 2012

PANTON P

[1] I have read in draft the reasons for judgment of my sister McIntosh JA. I agree with her reasoning and have nothing to add.

DUKHARAN JA

[2] I too have read the reasons for judgment of McIntosh JA and agree.

McINTOSH JA

[3] This is an appeal from a judgment of Brooks J (as he then was) which was delivered on 1 June 2009. The court heard arguments on 22 March 2011 and handed down its decision on 29 July 2011 as follows:

> "Appeal dismissed.
> Order of Brooks J affirmed.
> Costs to the respondent to be agreed or taxed."

My reasons for agreeing that this appeal should be dismissed are now set out below.

A brief background to the appeal

[4] The parties were, up to 1997, four of the providers of cable television services in Jamaica, operating in close proximity to each other in the same general geographical area. This was prior to the introduction of a regulatory framework by the Government of Jamaica which required that providers of such services be licensed. The number of licences available was limited and competition was keen among the contenders. In order to strengthen their position and enhance their chances of securing the only remaining licence in their area, the appellants agreed to merge their operations and to make a joint application though in the name of the 2nd appellant only. The 1st appellant's evidence was that they agreed that they would share in the profits of the

licensed operation to the extent of $33^1/_3\%$ each but no formalities were worked out. The 2nd appellant said the merger of the three entities would facilitate an increase in the equity of that company from which new shares could be allotted to benefit all of them. The application was not successful, however and when the opportunity presented itself for Logic One Limited (LOL) to join with them, pooling its head end equipment with theirs, all four entities agreed to make an application, again in the name of the 2nd appellant. Each contributed one quarter of the cost of the application and also contributed equally to the expenses of the merged operation. A second application was made by LOL, with no input from the appellants, according to LOL, but the appellants maintained that both applications were the result of their agreement and equal contribution to the costs involved. Then, in April 1998, the Broadcasting Commission announced that LOL was the successful applicant and, upon that event, discord reared its ugly head.

[5] The appellants contended that when LOL joined with them there was a verbal agreement that they would merge their operations and operate as one system from a single head end and that the entity whose application was successful would issue to each of the others a 25% interest in its shareholding. On the grant of the licence, however, instead of honouring their verbal agreement, the principal of LOL, Mario Francis, proposed a distribution of LOL's shareholding by virtue of which 55% would be retained by LOL, 10% would be allotted to the 1st appellant, 15% to the 2nd appellant and 20% to the 3rd

appellant. On the other hand, Mr Francis contended that upon being advised of the success of LOL's application the appellants "…immediately demanded shares without payment in LOL on the basis of the oral agreement". He said that "the oral agreement was restricted only to the use of shared head end equipment and a collaborative effort in the application in the name of JT Cable". Furthermore, he said, there was never any previous discussion about a 25% share transfer in the share capital of the company. Mr Francis said that shares in a company are sold "and never just given away for nothing", so there would have to be payment for any allotment of LOL's shares to the appellants.

[6] Several meetings were held and attempts made to resolve the matter, but these were not successful and the appellants filed suit in July 1999. Then, at the conclusion of the trial which lasted three days, (16, 17 and 19 June 2008), the learned trial judge took time to consider his decision after which he gave judgment with costs to LOL on the appellants' claim, finding, inter alia, that there was no agreement to transfer shares in LOL to the appellants and consequently they were neither entitled to the declaration or the other orders they sought. The appeal in this matter stemmed from that decision.

The appeal

[7] The appellants were firmly of the opinion that on the material before him, the learned trial judge erred in his findings of fact to the extent that this court

would be justified in setting them aside and they formulated their complaints against his judgment as follows:

Ground 1

"Having found:

a. That there was an agreement between the parties to operate the four companies as one under an "umbrella" J.T. Cable and a similar agreement in respect of Logic One.

b. That the parties contributed equally to the application fees for the applications made by J.T. Cable Network Limited and Logic One Limited and to the cost incurred in combining the head ends.

[c]. That the parties acted in reliance on the agreement after the grant of the licence to Respondent in that they;

i. had a meeting with all the parties

ii. all used Logic One receipts

iii. advised customers that a relationship existed between the parties.

The (sic) Learned Trial Judge erred in holding that the Appellants were not entitled to any of the Orders sought by them in the Court below."

Ground 2

"The Learned Trial Judge erred in that he failed to use his inherent jurisdiction to ensure that justice was done and an equitable decision reached as having found that there existed an agreement on which the parties relied and acted the Learned Trial Judge's

> Judgment fails to take into consideration his own findings as his Judgment has left the Appellants without a remedy."

Ground 3

> "The Learned Trial Judge erred in law:
>
> a. in that he failed to determine what damages were suffered by the Appellants and flowed from the agreement which he found to have existed between the parties and for which he found there was consideration."

Ground 4

> "The decision of the Learned Trial Judge is against the weight of the evidence."

Submissions

[8] Mindful that the appellants were challenging the learned trial judge's findings of fact, Mr Frankson sought to convince the court that the particular circumstances of this case gave it jurisdiction to come to a contrary conclusion and make orders in the appellants' favour. Counsel accepted ***Watt (or Thomas) v Thomas*** [1947] 1 All ER 582 as establishing the approach of appellate courts in reviewing the findings of fact of a trial judge, interfering only if the judge clearly erred in arriving at his conclusions on the facts or if the trial judge's findings were obviously and palpably wrong. He submitted, however, that ***Watt v Thomas*** does not lay down "an inflexible rule and circumstances may give rise to the matter becoming at large for the appellate court" (see ***Algie Moore v Mervis L Davis Rahman*** (1993) 30 JLR 410 per Patterson JA).

Counsel relied on ***Algie Moore*** for his submission that the circumstances of the instant case gave this court jurisdiction to review the factual matrix and to come to a different conclusion from that of the trial judge. He referred to the words of Sankey LC taken from ***Powell v Streatham Manor Nursing Home*** (1935) All ER 58 at page 61 (quoted by Patterson JA in ***Algie Moore***) that:

> "There is certainly jurisdiction in the Court of Appeal to reconsider the facts in the way they do reconsider them and to come to an opposite conclusion to that arrived at in the court below. The judge at first instance is not the possessor of infallibility, and, like other tribunals there may be occasions when he goes wrong on a question of fact…"

On the evidence in the instant case, this court would be justified in disturbing the findings of fact by the learned trial judge, he submitted, "As it is abundantly clear that the trial judge erred in reaching his conclusion of facts".

[9] Mr Frankson then sought to demonstrate that the learned trial judge erred in finding that the umbrella agreement did not involve the transfer of shares in LOL but was concerned only with the merger of their operations insofar as it was necessary to comply with the requirements of the newly instituted regulations. He submitted that the evidence of the admission of LOL to the verbal agreement to merge head - end and of all four entities agreeing to operate under the umbrella of the licensee; the 25% contribution that each made to the application fees and the cost of operating the merged equipment, the calling of the meeting to determine the terms and/or shares and the attempt to fully integrate the appellants into LOL, the issuing of

the receipt books and the authorization of the use of LOL's name in their businesses after the licence was granted, demonstrated that the agreement went further than the need for compliance with the new regulations and this conduct of the parties supported the existence of a valid contract in the terms alleged by the appellants. It was Mr Frankson's contention that the evidence substantiated the appellants' claim that this was a joint enterprise by the principals of the four companies, with each contributing equally to the joint enterprise, resulting in an equal sharing in the entity to which the licence was granted and there was no other evidence upon which the learned trial judge could have arrived at a contrary finding. Therefore, Mr Frankson submitted, the finding of the learned trial judge ought to be set aside.

[10] Responding on behalf of LOL, Mr Kelman submitted that this case presented no basis for a departure from the rule in ***Watt v Thomas***. The learned judge took advantage of the opportunity he had to assess the witnesses and his finding of fact as to what the parties actually agreed is entitled to great weight. Mr Kelman submitted further that none of the findings referred to by the appellants was inconsistent with the judge's findings that the merger was of head ends only and that there was no merger of businesses and no agreement for automatic transfer of shares. The meeting called by LOL after the licence was granted did not indicate that there was any pre licence agreement to transfer shares to the appellants as all that LOL was then seeking to do was to see whether the parties could now work out how they were going to proceed under

the umbrella of the licence, an umbrella which the learned trial judge understood to refer to a collaboration umbrella. Further, there were no negotiations with regard to shares in LOL before 1998 as was clear from the letter written by LOL's attorney to which reference was made by Mr Frankson and no contemporaneous correspondence or other document to indicate otherwise.

[11] The learned trial judge had recognized from the outset that the primary issue was the nature of the agreement between the parties, Mr Kelman said and the other issues could only be answered after that issue was determined. Viva voce evidence and such relevant documentary evidence, as existed, would be necessary to prove the terms of an oral agreement. As there was conflicting evidence with regard to the terms of the agreement, credibility was a live issue and in his assessment, the learned trial judge found the evidence on behalf of LOL to be more reliable than that advanced on behalf of the appellants. Credit worthiness, counsel said, was the province of the learned trial judge and, even if the respondent is also not credit worthy, it does not have the burden of proof. There was more than sufficient material before him which can reasonably be regarded as justifying the trial judge's conclusions that there was no agreement to transfer shares to the appellants so that they could not obtain a declaration that they were entitled to 75% or any share in the ownership of LOL. Therefore, the learned trial judge properly found that they were not entitled to any of the orders sought consequent upon such a declaration, Mr Kelman submitted and he cannot be faulted for rejecting the appellants' contention of a pre-licence

agreement for share allotment and for accepting LOL's witness as being more capable of belief. Therefore it was his submission that the learned trial judge's findings of fact ought not to be disturbed.

Analysis

Ground one

[12] The principles which have been consistently approved and applied by this court when required to review a trial judge's findings of fact are indeed as stated in ***Watt v Thomas***. The opinions of their Lordships are oft quoted before this court in such cases and some extracts from their judgments bear repeating here. In general terms, Viscount Simon said:

> "… an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached on that evidence should stand, but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide, but if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses

before him and observing the manner in which their evidence is given."

In those cases where the appellate tribunal is disposed to differ from the trial judge's findings Lord Thankerton had this to say at page 587:

> "I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus:
>
> I Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.
>
> II The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> III The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court…
>
> It may be well to quote the passage from the opinion of Lord Shaw in ***Clarke* v. *Edinburgh & District Tramways Co.,*** *(15)* (1919 S.C. (H.L.), 35, 37] which was quoted with approval by Lord Sankey, L.C., in ***Powell* v. *Streatham Manor Nursing Home*** (1) ([1935] A. C. 250). Lord Shaw said:

In my opinion, the duty of an appellate court in those circumstances is for each judge to put it to himself, as I now do in this case, the question, Am I - who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case - in a position, not having those privileges, to come to a

> clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment."

[13] The appellants contended that because the learned trial judge found that there was an agreement to operate under the umbrella of the licensee, because they shared equally in the cost of the applications and the expenses incurred in combining the head ends and because they took the steps as outlined in ground one, relying on that agreement then they were entitled to the orders they sought. This, in my view, is a misunderstanding of the learned trial judge's findings. He did find that there was an umbrella agreement but, as Mr Kelman submitted, he explained what that meant and his explanation did not accommodate the agreement in the terms contended for by the appellants. It was an agreement, the learned trial judge said, by virtue of which the parties merged "head-ends, not businesses". Under that agreement each company would and did continue to operate their separate business, as before. Indeed, in his oral submissions, Mr Frankson said that "there would be no agreement as to allocation of shares until it was known which company got the licence". He further submitted that "… on 5 September 1997 when both applications were submitted the arrangement and agreement between the parties was accomplished". The learned trial judge accepted that what the parties were seeking to do in the post licence meetings was to arrive at an agreement as to how the umbrella was to work. Was it to facilitate all parties doing their

separate businesses under the umbrella of the licence granted to LOL? Were they to form a new company (an option which the witnesses for the 1st and 2nd appellants expressed) and allot shares or were the appellants to operate as agents of LOL under a franchise agreement? This was the time that agreement was to be reached as the pre licence agreement did not involve this.

[14] Furthermore, he made no finding that could correctly have been interpreted to mean that because the parties had shared equally in the application fees and the costs of merging their equipment they were therefore entitled to a 75% interest in the shareholding of LOL. In fact, he quite emphatically expressed the contrary view when at page 10 he said:

> "I find, on a balance of probabilities, that there was no understanding or agreement at the time of merging the head end and preparing the applications for the licence, that the shareholders of the successful licensee would surrender majority control in the entity."

He referred to the evidence elicited in the cross examination of the 1st and 2nd appellants, as supportive of this finding. The testimony of Mr Thompson, managing director of the 2nd appellant was that "[we] said that as soon as we knew the terms and condition of the licence we would refer it to the lawyers to see if another company could be formed" and the evidence from Mr McFarlane for the 1st appellant was that "[we] agreed to continue to collect our own fees from our own customers as we were doing before until the licence was granted and we took the direction of the legal part that would add flesh to our

agreement". Mr McFarlane went on to say that "[when] we merged, Cable Max did not become a shareholder in any of the other companies. None of the companies changed its names". In my opinion, the learned trial judge cannot be faulted for his assessment of this evidence and I agree with Mr Kelman's submission that "[it] would be quite a leap for the payment of a quarter share in the expenses met by the parties to be translated into a 25% share in the respondent company".

[15] In his analysis of the evidence before him the learned trial judge expressed his unhappiness at the many areas of fact on which the parties disagreed, the paucity of documentary evidence on important aspects of the appellants' case and the lack of candour on the part of the witnesses for the parties. In such a scenario he would have had to place great reliance on the advantage he had to observe the witnesses and to make his assessment of their credibility. From his judgment he clearly did this reminding himself of the appellants' burden to prove their case and, having given due consideration to the material before him, including the evidence of the conduct of the parties before and after the licence was granted, he concluded that more reliance was to be placed on the testimony of Mario Francis for LOL. This was his exclusive domain and he sought in his judgment to show what he found supportive of this conclusion, in the viva voce evidence and documents available to him, mentioning for instance the testimony of the witness for the 2nd appellant that LOL sought payment for the shares which he found to be consistent with LOL's

evidence that the appellants were told that they would have to pay for any share allotment.

[16] The learned trial judge made no finding that the appellants acted in reliance on the agreement as contended for by them. The agreement to which he was clearly referring in the second full paragraph on page 11 of his judgment, was the umbrella agreement which he had just explained in the two preceding paragraphs as concerning their operations on the merger of head ends only and not a merger of businesses when he said:

> "In seeking to find a way to meet the requirements of their agreement as well as to comply with the terms of the licence, the parties initially set up an receipt books by which each could continue to transact business with their respective customers".

He clearly rejected the testimony of the appellants that there was a term in their agreement that each company would be issued 25% of the shareholding of the successful licensee and the general lack of knowledge of the operations of LOL which was evident in their testimony on cross examination gave the learned trial judge more than sufficient reason for so doing.

[17] Mr Frankson's submission that the parties had entered into the agreement to merge their operations so that they could continue in the business of providing cable service accords with the finding that they collaborated/merged in order to enhance their chances in obtaining the only remaining licence in their area. The evidence showed that there were other providers who were attempting

to make applications for the available licence in their zone so that their joint application made good business sense, as the appellants' witnesses testified, but that was the extent of their initial agreement. Brooks J found that it was only after the licence was granted (not issued, as that date was 1 July 1998) that there was any offer of shares by LOL. The documents upon which the appellants placed reliance as showing that there was an agreement in the terms they allege did not in fact have that effect and the learned trial judge correctly found that they all related to the post licence period evidencing efforts to agree on the way forward and could not be linked with the pre licence agreement. In fact, there was no post licence agreement as none of the proposals put forward by LOL materialized.

[18] In my opinion, the evidence taken as a whole can reasonably be regarded as justifying the conclusions reached by Brooks J which he expressed with commendable clarity. The orders sought by the appellants, as set out in their amended statement of claim filed on 14 November 2002 are summarized below:

1) A Declaration that the Plaintiffs are entitled to seventy-five percent (75%) of the shareholding of the Defendant Company.

2) An Order for the issuance of twenty-five percent (25%) of the said shares to each Plaintiff.

3) An Order that the register of the members of the Defendant's Company be rectified to include the Plaintiffs as members.

4) An accounting of all income received and expenditure incurred together with the receipts for such expenditure

with respect to the operation of the Defendant's Company from the period April of 1998, to the determination of this matter.

5) That a valuation be done of the Defendant's Company to determine its current market value.

6) An Order for the Defendant to provide inventory of and values of all items of equipment owned by the Defendant's Company.

7) An Injunction restraining the Defendant from selling or in any way dealing with all or any of the assets of the said company prior to the issuance of the said shares and without the approval of the Plaintiffs.

8) Damages for Breach of Contract

9) Interest at a commercial rate from the grant of the said licence to the final determination of this suit.

Having concluded that there was no agreement that the appellants were entitled to a 75% interest in the shareholding of LOL and that they were therefore not entitled to the declaration they sought, Brooks J was clearly correct in his further finding that the other orders they sought which hinged on the grant of that declaration could not be granted. Ground one therefore failed.

Ground two

[19] This ground must also fail as it was essentially based on the same unsuccessful arguments which the appellants relied on for ground one. The learned trial judge's decision was based on his harmonious findings and the complaint that his judgment failed to take into consideration his own findings

was entirely without merit. There was nothing in the procedure followed by Brooks J to arrive at his decision that would have made it appropriate for him to consider exercising the inherent powers of the court, such powers being concerned with procedural law and not substantive law. After a careful analysis of the evidence, Brooks J found that the agreement on which the appellants relied and acted resulted in no more than the applications to the Broadcasting Commission and the merger of the head ends. Further, the actions in the post licence period such as the issue of the receipt books and the advice to customers were attempts to come to an agreement on how they would operate under the umbrella of the licensee, but no agreement was reached. The appellants had not proved their case and in circumstances where the learned trial judge accepted the evidence of LOL as to the non existence of the agreement alleged by the appellants there was clearly no scope for the exercise of the court's inherent jurisdiction.

Ground three

[20] The contention in this ground was that the learned trial judge ought to have awarded damages to the appellant for breach of the agreement which he found to have existed between the parties and for which he found that there was consideration. This is a misunderstanding of the learned trial judge findings as the one reference which he made to any consideration for an allotment of LOL shares to the appellants was in the letter written by LOL's attorney to JT Cable, dated 4 June 1998, after the licence had been granted. It was the post licence

negotiations to which the learned trial judge was referring when he said that the transfer of shares "involved consideration passing from JT Cable". In that letter the attorney wrote:

> "We have received instructions on behalf of Logic One Ltd that they are in negotiation with you regarding the transfer to you of an interest in the Company.
>
> We understand that part of the consideration for such a transaction is the immediate infusion of an amount of Ten Thousand United States Dollars ($10,000.00) as you have stated your willingness to share equally in the financing of the amount required to complete certain other negotiations now in process..."

This clearly related to the attempts to reach agreement in the post licence period and cannot be relied on by the appellants as supportive of an agreement prior to the grant of the licence. There was no basis upon which the learned trial judge could have proceeded to any assessment of damages in the circumstances and this ground also failed.

Ground four

[21] No separate submissions were advanced on this ground either in the written or oral submissions on behalf of the appellants. Suffice it to say however, that there was ample evidence to support the findings of the learned trial judge and, in my view, there was no basis to disturb his decision.

Conclusion

[22] In the final analysis, I am of the opinion that Brooks J took proper advantage of the opportunity he had to see and hear the witnesses, sufficient to justify the conclusions he reached. Furthermore, the arguments advanced by the appellants in support of their contention that he was wrong were unconvincing and provided no reason to interfere with his conclusions which, in all the circumstances, were entitled to great weight. Accordingly, I agreed that the appellants' appeal should be dismissed with the consequential orders referred to in paragraph [3] above.