[2013] JMCA App 7

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 72/2012

APPLICATION NO 118/2012

BETWEEN	**HEATHER MONTAQUE (Executrix of the Estate of Seaton Montaque)**	**APPLICANT**
AND	**G. M. AND ASSOCIATES LIMITED**	**1ST RESPONDENT**
AND	**GEORGE GORDON**	**2ND RESPONDENT**

Ransford Braham QC and Miss Marjorie E. Shaw instructed by Brown & Shaw for the applicant

Duane Thomas for the respondents

Franklin Halliburton for the applicant present

3, 13 July 2012 and 12 April 2013

ORAL JUDGMENT

IN CHAMBERS

McINTOSH JA

[1] On 13 July 2012 when I delivered my oral judgment in this matter refusing the applicant's application for an interim injunction to restrain the respondents from

transferring shares in the 2nd respondent company which were the subject of a bequest under the will of the late Seaton Montaque, I promised to transform the informal note I made into something more presentable and make copies available to counsel as soon as the editing process had been completed. This is the fulfillment of that promise.

[2] In a nutshell, this application has arisen as a result of the refusal by Campbell J of an application for interim injunctive relief heard by him on 11 May 2012. I cannot say a similar application to that now before me because they do not appear to be in the same terms. In addition, the application before Campbell J was made by Franklin Smellie, as 1st claimant (hereafter referred to as such), in his capacity as "Executor of the Estate of Seaton Montaque". In those proceedings the applicant was initially referred to as "the Third Party" and upon being granted permission by the judge to be added as a party to the claim she became the 2nd claimant. She was also given leave to appeal and is now the sole appellant in this matter.

[3] I must confess to being in some doubt as to the learned judge's intention in granting leave to the applicant only as her interest in the matter would seem to me to accord with the 1st claimant's as they are both executors of the estate of Seaton Montaque and the 1st claimant had commenced the claim by himself. Yet leave was not granted to him. In the circumstances of this case the learned judge's view on the merits of the application for an injunction and an appeal in that regard would be relevant to both claimants. So why give leave to one and not the other unless perchance she was the sole applicant for leave?

[4] Be that as it may, pursuant to the grant of leave to her the applicant filed notice and grounds of appeal on 28 May 2012 challenging the order of Campbell J and seeking to set it aside as it relates to his refusal of the 1st claimant's application for an injunction and his refusal of her application for an adjournment. She filed the application now before me on 29 June 2012, supported by an affidavit from Marjorie Shaw, seeking:

> "1. An injunction restraining and preventing the Defendants from transferring, or perfecting the purported transfer, of the 100 shares belonging to and/or held by the Estate of SEATON MONTAQUE to G. M. & ASSOCIATES LIMITED, GEORGE EDWARD GORDON and/or to any other entity or person;
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> 2. An injunction restraining preventing and/or precluding the Defendants, jointly and/or severally, from selling, disposing, transferring or otherwise dealing with the shares in the Company G. M. & ASSOCIATES LIMITED belonging to and/or held by the Estate of SEATON MONTAQUE, deceased;
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> 3. An injunction suspending restraining and/or preventing the Defendants, jointly and/or severally from any further dealings in respect of the shares in G. M. & ASSOCIATES LIMITED held or previously held by the Estate of SEATON MONTAQUE, deceased;
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> 4. Costs of the Application to be costs of the Appeal;
>
> 5. …"

[5] In order to give some perspective to this appeal it is necessary to briefly outline the genesis of the dispute between the parties which has caused them to seek the intervention of the court. Mr Seaton Montaque, an integral part of the company G.M. & Associates Limited and 50% shareholder, departed this life on 10 July 2010. One year and slightly less than six months prior to that unhappy event, he had executed his last

will and testament making provisions for his wife and children. In the first six paragraphs of his will he bequeath to them what seems to me to be substantial real estate holdings and in paragraph 7 he made the following provision:

> " 7. I GIVE AND BEQUEATH my half (½) share in J.M. Associates Limited which should be sold and the proceeds divided equally between my wife and all my children named in the said Will."

[6] One may well take the view that when Mr Montaque made that provision he could not have expected it to have created the problem which it has, bringing into question the application of certain of the company's Articles of Association. The executors of his will take the view that the shares in this bequest fall to be disposed of in accordance with Article 29A(viii) while the respondents argue that the relevant Article is 29A(vi), a view apparently shared by the learned judge in the court below.

[7] The notice of application for the injunction before Campbell J was not included in the documents before me but there is an anticipatory draft order which seems to contain what the 1st claimant sought in the court below and appears to me to be more extensive as it related not only to the shares held by Seaton Montaque but also "all classes of shares", restraining their registration and so on, without a duly executed transfer by the 1st claimant. Not so in the present application which seemed to recognize that the transfer was in progress. Indeed in Miss Shaw's affidavit at para 63 she referred to the advanced stage of the transfer of the estate's shares in G.M. & Assoc. and the 1st claimant's affidavit of 24 April 2012 exhibits copy transfer receipts.

Additionally, my examination of the material before me did not disclose a copy of the claim in the court below.

Submissions

[8] The Articles of Association relevant to the application and to the arguments of learned Queen's Counsel for the appellant, Mr Ransford Braham, are set out below for convenience.

> "29A(vi) If any person shall become entitled to any share by reason of the death or bankruptcy of any member he shall be bound forthwith to offer the same for sale to the members of the company at a fair price, such fair price to be determined by agreement between such person and the directors or in default of agreement by the auditors for the time being of the company whose decision shall be conclusive and binding and on all persons interested in the share and so soon as the said fair price has been determined the said person shall give to the secretary a notice of transfer in the manner hereinbefore mentioned containing as the price which he is willing to accept the said fair price and the same results shall follow as in the case of a notice of transfer voluntarily given. If the said person shall fail to give such notice of transfer the directors, may, as his agents, give the same for him.
>
> 29A(viii) Any member may, (subject to the provisions of the article next following) transfer by way of sale or otherwise or by will bequeath any share held by him to trustees in trust for or to a member or members of his family as hereinafter defined and in such case the foregoing provisions of this article shall not apply and in the case of such bequest the legal personal representatives of the deceased member may subject as aforesaid transfer the shares so bequeathed to such trustees (whether themselves or others) or to the legatee legatees or

beneficiaries. For the purposes hereof a member of the family of any member shall include a husband wife son daughter grandchild or a father mother brother or sister of such member but no other person.

32: On the death of any member (not being one of two or more joint holders of a share) the legal personal representatives of such deceased shall be the only persons recognized by the company as having any title to the share or shares registered in his name."

33: Any person becoming entitled to a share by reason of the death or bankruptcy of a member may upon such evidence being produced as may from time to time be required by the Directors elect either to be registered as a member in respect of such share or to make and execute such transfer of the share as the deceased or bankrupt person could have made. If the person so becoming entitled shall elect to be registered himself he shall give to the company a notice in writing signed by him that he so elects. The Directors shall in either case have the same right to refuse or suspend registration as they would have had if the death or bankruptcy of the member had not occurred and the notice of election or transfer were a transfer executed by that member."

[9] Briefly, Mr Braham QC argued that a proper construction of these Articles revealed three possibilities under which the shares of the deceased could have been dealt with. He submitted that even if the appropriate Article was 29A(vi) as the learned trial judge found, it was wrongly applied in that the Article required that the parties agree to a fair price failing which the auditors should determine the price. That Article entitled the parties involved to relevant information to accommodate negotiations leading to the determination of a fair price but Miss Shaw's affidavit indicated that

important information to facilitate that process was not provided by the company and its directors hence what occurred did not amount to good faith negotiations. This, learned Queen's Counsel argued, showed that there was an issue before the court to be tried and the learned judge erred in holding otherwise. Further, Mr Braham submitted, Article 29A(vi) required that in default of agreement between the parties as to a fair price, the auditors should determine same but the affidavit of the 2nd respondent indicated that this requirement was left to the company's accountants. Learned Queen's Counsel contended that an auditor is a special creature as is to be gleaned from the required qualifications set out in the Companies Act and such a person is not an accountant. There was no evidence before the court to indicate that auditors were properly appointed for the purpose.

[10] It was Mr Braham's further contention that on a proper construction of the will, as a matter of law, the executors were constituted trustees in relation to the shares, albeit trustees for sale. He referred to the case of **Cumming v Land Banking and Loan Co.**, 1892 Can LII 33 and particularly to the judgment of MacLennan JA at paragraph 20, in support of this submission. Therefore, learned Queen's Counsel submitted, if the executors were trustees the applicable Article would be 29A(viii). They were trustees to sell for the benefit of the beneficiaries and they would be entitled to take the shares in their names. This was the second possibility showing that there was a serious issue to be tried as to which Article is the applicable one.

[11] Learned Queen's Counsel argued that the third possibility is to be found in the provisions of Article 33 as by virtue of the death of Mr Montaque the executors became

entitled to the shares and were entitled to request registration as members. They could elect to transfer the shares to others and could not be compelled to transfer to the directors of the respondent company. The learned judge was again in error in holding that there was no serious issue to be tried, he argued. On the question of the adequacy of damages learned Queen's Counsel submitted that the judge was also in error in holding that damages would be an adequate remedy for the appellant(s). It would have been for the executors, as trustees, with the shares transferred into their names, to determine the appropriate time to sell the shares and in the meantime they could participate in the running of the company and could even become directors. Damages could never be adequate to compensate for the right to participate in the running of the company, Mr Braham submitted. In addition, although the will provided that the shares were to be sold, it did not specify when the sale should occur so that it was in the discretion of the trustees to make that determination. The company would have the discretion under Article 29A(vi) and that, learned Queen's Counsel submitted, would defeat the intention of the deceased.

[12] Mr Braham argued that even if the learned judge was correct and damages would be an adequate remedy there was no evidence that the 2nd respondent was in any position to pay damages as the evidence before the court indicated that although he said he was buying the shares he was utilizing company assets as part payment and in this regard learned Queen's Counsel referred to Article 9 which prohibits financial assistance for the purpose of share acquisition with certain exceptions. Mr Braham questioned whether the shares had been fully paid for as the 2nd respondent claimed

since the documentary evidence it supplied did not seem to bear that out. He also contended that there was no evidence that the transfer of shares had been completed but even so, the application before Campbell J sought to prevent further transfer so that an injunction to that effect was applicable. Mr Braham cited authorities dealing with the exercise of the court's discretion including **Lookahead Investments Limited v Mid Island Feeds** [2012] JMCA App 11 and **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042 and submitted that the refusal of the injunction in the instant case was not a judicial exercise of the learned judge's discretion as his decision had the effect of determining the issues since the shares would have been transferred and that was the main and fundamental issue in the appellant's case. The judge should have been mindful of the weakness of the respondent's case and on that basis he ought to have exercised his discretion in granting an injunction.

[13] Counsel for the respondents, Mr Duane Thomas, referred to the language of the will which he submitted, clearly invoked Article 29A(vi). It contemplates a sale by any person who has come into possession of shares by reason of death, counsel argued, as opposed to Article 29A(viii) which, in essence, contemplates a situation where the shares will be held by the beneficiaries who would become members of the company. He referred to paragraph 14 of the affidavit of Franklin Smellie sworn to on 23 April 2012 in which he averred that the beneficiaries wished to have the shares sold in keeping with the terms of the will. Counsel argued that it was clearly the intention of the executors to dispose of the shares, consistent with the testator's intention and this made the provisions of Article 29A(vi) the only appropriate Article in the circumstances.

Since the shares were dealt with in accordance with that Article, injunctive relief was not warranted and there was therefore no serious issue to be tried, he argued.

[14] The learned judge recognized that the executors are not barred from bringing a substantive claim in respect of the auditors' valuation of the shares, Mr Thomas argued and all related matters, such as whether the firm of accountants engaged for the valuation exercise were auditors as well as accountants for the 1st respondent and therefore recognized that an injunction was not necessary in the circumstances. Mr Thomas submitted that, in any event, the shares have already been transferred as an instrument of transfer was signed by the transferor and the transferee and transfer tax has already been paid. Counsel acknowledged that there was an ongoing debate between the parties as to what constitutes a transfer but he contended that there were sufficient steps taken to amount to a virtual transfer and sufficient documentary evidence (see MES11) constituting irrefutable evidence of an advanced transfer. They point, counsel submitted, to the impracticability of a mandatory injunction prohibiting the transfer. He urged the court to consider that the balance of convenience would lie in favour of the respondents who would be adversely affected by being forced to proceed in business with a significant unresolved issue of the transfer of the shares in the estate especially where on the executors' own evidence the beneficiaries wish to dispose of them in keeping with the expressed intention of the testator. He further submitted that it was clear that the testator never intended to involve his family in the running of the company. The affidavit evidence disclosed a good and harmonious

relationship between the parties throughout, with only the testator involved in the company's affairs.

[15] Counsel asked the court to consider, when assessing his ability to pay damages, that the 2nd respondent holds 100% of the shares in a valuable company. He submitted that the evidence of the company's managing director is that the shares have been fully transferred and that the annual returns reflected the shares in the estate only because of the requirements of Article 32. It was his contention that the efforts made by the respondents to arrive at an agreement on the share price had failed leading to the steps taken by the company to proceed in default of agreement by the signing of the transfer on behalf of Mr Smellie. Counsel also made mention of attempts to arrange for the balance on the share price to be paid and of the return of the payment cheques tendered to Mr Smellie, thwarting the respondents' effort to synchronize payment with transfer of the shares. Mr Thomas argued that inasmuch as the will provided for the sale of the shares and the evidence disclosed that the beneficiaries wished to sell the shares their interest was clearly pecuniary and damages would be adequate to address the concerns about valuation of the shares. He relied on the case of **National Commercial Bank Jamaica Limited v Olint Corp Limited** Privy Council Appeal No 61 of 2008 for the applicable principles governing the grant or refusal of an injunction and submitted that the interest of justice did not favour the granting of an injunction in the circumstances of this case. The application therefore ought to be refused.

Disposal

[16] The task is mine to determine whether injunctive relief is appropriate at this stage, according to the well-established principles, consistently approved and applied in our courts. Indeed, there is no dispute between the parties as to the applicable law in this area and I need do no more than refer to the leading case of **American Cyanamid Co v Ethicon** [1975] 1 All ER 504 approved and applied in **National Commercial Bank v Olint**, for a clear exposition of the principles which must guide the court in determining whether or not injunctive relief is to be granted or withheld. Applying those principles, I must first determine whether the applicant has shown that there is a serious issue to be tried. If that requirement is not met then the application fails *in limine*. If it is determined that there is a serious issue to be tried I must go on to determine whether damages would be an adequate remedy as in that event and if so, the injunction should not be granted. However, if an award of damages would not be an adequate remedy then I must consider the application on a determination of where the balance of convenience lies in the relation to the respective positions of the parties.

[17] In the **American Cyanamid** case the House of Lords held that if after that exercise the court is still undecided as to where the balance lies, "it is a counsel of prudence to maintain the status quo and in tipping the balance one way or the other, the court may as a last resort look at the relative strength of the parties' cases." As I understand the principles outlined by the House of Lords, even if the court were to find that there is a serious issue to be tried and that the claimant has a real prospect of

success, it could not grant an injunction unless it was convinced that damages would not be an adequate remedy for the claimant. The court would also have to be convinced that damages would be an adequate remedy for the defendant and that the claimant could pay such damages.

[18] Re-emphasizing the **American Cyanamid** principles in **National Commercial Bank v Olint** Lord Hoffmann had this to say:

> "…the purpose of such an injunction is to improve the chances of the Court being able to do justice after a determination of the merits at trial. At this interlocutory stage the Court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. If damages will be an adequate remedy for the plaintiff there is no ground for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omission of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained then the injunction should ordinarily be granted. The basic principle is that the court should take which-ever course seems likely to cause the least irremediable prejudice to one party or another."

[19] On the first principle it is my view that the learned judge was quite correct in concluding that there were no serious issues to be tried. It seemed to me that of the three possible ways, of dealing with the shares bequeathed by Mr Montaque in his last will and testament, identified by Mr Braham, namely, under the provisions of Articles 29A(vi), 29A(viii) or 33, the relevant Article was Article 29A(vi). Article 29(A)(viii) would be relevant only if the will provided for the shares to pass to the executors which it

clearly did not. To that extent the instant case is to be distinguished from **Cummings** where the testator gave and devised "all his estate real and personal to the executors upon the trusts and to the ends and purposes named therein" rendering the executors trustees from the beginning, with the property devised to them to invest and carry out other functions in relation to the estate. MacLennan JA did say that "an executor is always a trustee from the beginning to the end of his office" but the learned judge of appeal went on to add that he was speaking of a will of personal estate only because there are distinctions in the case of real estate. **Cummings** involved personal estate only but in Mr Montaque's will there were substantial bequests of real property as well as personalty. Article 29A(viii) speaks to the deceased bequeathing shares held by him to trustees but Mr Montaque made no such bequest. By the terms of paragraph 7 of his will Mr Montaque did not devise the shares to the executors nor did he bequeath them to his wife and children. His gift to his family was the proceeds from the sale of the shares. In my view, Article 29A(viii) was, therefore, not the appropriate Article.

[20] Neither can Article 33 be applicable. No one has become entitled to a share or shares in the company consequent upon the death of Mr Montaque because he made no bequest of his shares to anyone. His bequest did not give to his wife and his children the right of election to be registered and to participate in the running of the company. Therefore, of Mr Braham's three possibilities, the only applicable article is Article 29A(vi). The learned trial judge's finding to this effect seems unassailable to me and in this regard the application discloses no serious issue to be tried. Article 29A(vi) requires the shares to be sold and this accorded with the testator's wishes. By virtue of this

Article the executors are bound forthwith to offer the shares for sale to members of the company and this gives rise to no entitlement on the part of the executors to retain them and await a propitious time to sell.

[21] The other related matters such as the valuation of the shares and the alleged failure to follow the valuation procedure are not matters which, to my mind, may be described as serious issues to be tried sufficient to warrant the grant of interim relief. They are matters which may be addressed in a claim for damages. There was no evidence that the company is not a viable one and nothing but weak inferences that the 2nd respondent would be unable to meet an award of damages should one be made against him.

[22] There being no serious issue to be tried it is unnecessary to look to the adequacy of damages as that would not arise but if it did it is my view that damages would be adequate to compensate the applicant for any loss suffered by the estate in this matter, the interest of the estate being of an entirely pecuniary nature. The same does not seem to me to apply to the respondents and if it were necessary to look to the balance of convenience and to the order which would result in the least irremediable harm that balance in my view would favour the respondents for the reasons advanced by Mr Thomas (see paragraph [14] above).

[23] The applicant, as executrix of her father's estate, has similar concerns to those of the 1st claimant and can show no more than the latter could by way of seeking to convince the court that there are serious issues to be tried. It is true that having been

joined as a party to the claim her application for an adjournment (no doubt to prepare to support the 1st claimant in his application) was refused but it is difficult to see what else she could bring for the judge's consideration to establish any serious issue to be tried so that refusal could not in my view result in irremediable harm to her in all the circumstances of this case. Her remedy, if indeed one was warranted, was not to be found in the grant of an injunction. As mentioned earlier, I have not seen the claim but I rely on the submissions of Mr Thomas that it sounds in damages for economic loss so that the refusal of an injunction would not defeat the substance of the applicant's claim.

[24] In ground five of the notice of application for the injunction the applicant contended that irreparable and immediate prejudice harm and disadvantage will be suffered by the estate unless the conduct of the respondents is restrained or suspended and in ground six the contention is that "[U]nless the current activity of the [respondents] is suspended pending the hearing of the appeal ownership of the shares held by the estate will pass thereby extinguishing the substance of the claim and rendering the order of the court nugatory". It is my view that those complaints were not built on solid ground and could not have been sustained.

[25] By virtue of the terms of the will the shares were only to be transferred to the executors in transmission to facilitate the sale to the members of the company. Since ownership of the shares would thereby pass to the company no prejudice could be suffered by the executors if what was to occur did in fact occur. It bears repeating that the substance of the applicant's claim was not the shares but the value of the shares as that is what the testator bequeath to the beneficiaries through them. There is indeed no

serious issue to be tried and no basis for the grant of an injunction in the terms sought by the applicant or at all. The applicant's application for an injunction was therefore refused with costs to the respondent.