JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 104/2005

BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A. (Ag.)

BETWEEN	**NATION HARDWARE LIMITED**	**APPELLANT**
AND	**NORDUTH DEVELOPMENT COMPANY LIMITED**	
AND	**ADRIAN NORTON**	**RESPONDENTS**

Gordon Robinson & Harold Brady instructed by Brady & Co., for appellant

Crafton Miller & Mrs. Patricia Roberts-Brown instructed by Crafton Miller & Co., for respondents

1st, 2nd, 5th, December 2005 & 20th December 2006

HARRISON, P.

This is an appeal from the judgment of Sykes, J., on 3rd October 2005 discharging the interim injunction granted on 16th August 2005, and removing caveat lodged by the claimant. In addition, the learned trial judge dismissed the claim of the appellant and granted a special certificate of costs to two counsel.

We heard the arguments in this matter and dismissed the appeal, in part. These are our reasons in writing.

The relevant facts are that the first respondent was the owner of land at Duthieston in the parish of Westmoreland consisting of 135 acres and registered at Volume 1328 Folio 476 and Volume 1049 Folio 417. The second respondent was a director of the first respondent and the holder of 75% of the shares of the first respondent. The remaining 25% of the said shares were owned by the estate of Henry Harry Norton, deceased.

In April 2005, on the appellant's case, negotiations were conducted between one Ian Hayles, a director of the appellant company and the second respondent on behalf of the first respondent in respect of the purchase of the said land for $36,000,000.00. This was to be effected by way of the purchase of 100% of the shares in the first respondent, whose sole asset was the said land.

On 6th May 2005, the appellant paid to the second respondent the sum of $200,000.00. The receipt inter alia reads:

> "... represents down payment on the Dutchieson (sic) (Farm Pen) property (135 acres) located in the parish of Westmoreland. The folio numbers and the volume numbers are 417 & 476 and 1328 & 1047(sic) respectively..."

It was agreed that the appellant would acquire 100% of the shares in the respondent company.

The draft agreements for the sale of the shares and for the sale of the said land along with a copy of the title were sent by the respondents' attorneys-

at-law to the attorneys-at-law of the appellant, Messrs Grant, Phillips Stewart & Co. These agreements were never signed. The second respondent informed Ian Hayles that he was in the process of obtaining the consent of the beneficiaries of Henry Norton's estate and he would inform him (Hayles) when such written consent had been obtained. Nothing thereafter was heard from the second respondent.

In June 2005 Hayles received information that the second respondent had been in negotiations to sell the said land to one Herbert Williams of Savanna-la-mar, Westmoreland.

On 27th June 2005 Hayles had discussions, by telephone, with the second respondent who did not deny the discussions with Herbert Williams for the sale of the land. On 28th June 2005, at a meeting, the second respondent advised Hayles that he had obtained the consent of the said beneficiaries of the estate of Henry Norton. Hayles advised the second respondent that the appellant was prepared to complete the sale of the land. At the request of the appellant, its attorneys-at-law sent to the respondents a cheque for the sum of $6,000,000.00. On 30th June 2005 the second respondent returned the said cheque to the appellant's attorneys-at-law.

Previously, on 11th March 2005 Messrs Allison, Pitter & Co., Chartered (Valuation) Surveyors, wrote to Mr. Michael Palmer, attorney-at-law, advising him that:

> "Adrian Norton has accepted an offer to purchase the property at Farm Pen. You are therefore requested to prepare a sale agreement... ,"

and advised him that the purchasers were Hubert Williams, Josephine Williams and Robert Williams of Savanna-la-mar and that the purchase price was $36,000,000.00. On 29th March 2005 Messrs. Dunn Cox wrote to the said Michael Palmer, referred to the said letter of 11th March 2005 from Messrs. Allison Pitter & Co, and advised him that the widow of Henry Norton, deceased, the executrix was:

> "... agreeable to the proposed sale ..."

On 5th July 2005, an agreement for sale and a transfer in respect of the said land were signed by the parties Hubert, Josephine and Robert Williams as purchasers and Adrian Norton on behalf of the first respondent, as vendors. The sale price was $36,000,000.00 and a deposit of $12,000,000.00 was paid by the purchasers "to assist the beneficiaries of the estate of Henry Norton, namely his widow and two (2) young children and be given early possession." The purchasers were put in possession of the said land on 5th July 2005.

On 10th August 2005 the appellant filed a fixed date claim form against the respondents seeking (1) a declaration that there was a valid agreement between them for the sale of the land (2) specific performance of the said agreement evidenced by a receipt dated 6th May 2005 issued by the 2nd respondent in respect of the said purchase and (3) an injunction to restrain the respondents from transferring the property.

On the said 10th August 2005 an interim injunction was granted restraining the respondents from transferring the land.

On 3rd October 2005 Sykes, J refused the interlocutory injunction. This appeal resulted.

Sykes, J., in a written judgment held that there was no enforceable contract between the parties. There was no act of part performance referable to a contract. The payment of money, $200,000.00 is equivocal and not referable to any contract for the sale of the said land. The receipt for $200,000.00 did not contain all the essential terms of an alleged contract. Neither the share sale agreement, the agreement for sale of land nor the agreement for sale of chattels were signed by the parties, consequently, there was no contract. He also found that:

> "... there is no reasonable grounds for continuing the claim. The foundation of the claim has been eroded the claim cannot stand and is struck out."

Before this Court the appellant argued that the learned trial judge failed to apply the test laid down in ***American Cyanamid v Ethicon*** [1975] 1 All ER 504 in respect of the granting of an injunction and erred in embarking on a trial of the facts at the interlocutory injunction stage. He erred in finding that the payment of $200,000.00 was insufficient to sustain an action based on part performance, and that the documents evidencing the contract were insufficient to satisfy the Statute of Frauds. The learned trial judge erred in finding that no

response to the presentation of a draft contract for the sale of shares meant that there was no contract.

In our view we agreed that the test to be applied by a judge to whom an application is made for the grant of an injunction, is that laid down in the ***American Cyanamid v Ethicon*** (supra). The test is whether or not there was a serious question to the tried.

The agreement for the sale of land and the agreement for the sale of chattels were not signed by the parties. In neither document was the sum of $200,000.00 mentioned as paid, or as paid "as a deposit" and as the appellant claims. The respondents claim that it was a personal loan. The absence of this sum in either of these two documents, though unsigned, may well support the contention of the respondents that it was not a payment in respect of a deposit in relation to the purchase of the said land.

There was no enforceable written agreement for the sale of land between the parties. A mere oral agreement for the sale of land though valid is unenforceable if not evidenced in writing, as required by the Statute of Frauds.

There was therefore no serious question to be tried in respect of the sale of the land to the appellant. The balance of convenience did not therefore arise. Sykes, J., was correct to follow the dictum of Lord Diplock in the ***American Cyanamid*** case (supra). Lord Diplock at page 510 said:

> "... 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."

Sykes, J., found, at page 242 of the record:

> "The agreements for sale of land and sale of chattels were not accepted by the defendants. If there is no contract then the injunction cannot be extended."

He was correct in so finding. However, in so far as he said, on page 225:

> "... a judge is entitled to take the most favourable view of the claimant's case and if on that view the claimant would fail at trial, as the two decisions from the Court of Appeal demonstrate the judge at the interlocutory stage should not pass on to the trial judge what he can do himself." (Emphasis added)

he was in error. All the pleadings were not yet in, nor had the issues all been joined. A judge is unwise to seek to examine in any detail, disputed evidence of fact and make findings at this interlocutory stage where the prime consideration is, is there a serious question to be tried to support the grant or refusal of an injunction. Lord Diplock himself in ***American Cyanamid*** (supra) at page 510 cautioned:

> "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."

The learned judge expressly ignored this caution and thereby fell into error.

There was an oral agreement for the sale of shares in the company, Norduth Development Ltd (whose sole asset was the land). Such an agreement

for the sale of shares if proven, may be enforceable. Equally enforceable could be the agreement for the sale of chattels.

The second respondent Adrian Norton in paragraph 17 of his affidavit dated 29th August 2005 admitted:

> "I told him at that meeting that if I should think of selling the property to him, it would be the sale of the Company's shares and not the property solely as this would bring greater returns due to the difference in taxation."

and in paragraph 18:

> "That Ian Hayles then told me that it would be a cash purchase for the $36,000,000.00 and the further sum of $6,000,000.00 would be paid to me. The Company purchasing same would be the Claimant herein and he made no further mention of Cherian Consultancy Inc. He agreed to pay me a deposit of 20% of the purchase price and a further 20% 30 days later and the balance within 60 days. This was put on paper which he wrote and gave me as is exhibited hereto an '**AN-3**' I told him that I would have my lawyer prepare the agreement for sale of shares and send same to his Attorneys-at-law..."

It seems to us that it may well be proved that there was at least an enforceable oral agreement for the sale of the shares in the first respondent company, whose sole asset was the said land at Duthieston valued at $36,000,000.00. If the appellant so succeeds at trial the remedy would be one in damages.

The intended purchase by the appellant was for development purposes. It was essentially a monetary transaction. Any losses incurred was a loss of

bargain translated into damages. The issue of the sale of the shares was a live issue. There is no basis on which the learned judge should have dismissed the claim. Although specific performance would not have been granted, a declaration was sought on the claim.

For all the above reasons the appeal refusing the injunction is dismissed. The order dismissing the claim is set aside. Sixty percent (60%) costs of the appeal are ordered to be paid to the respondents to be agreed or taxed.

COOKE, J.A.

I agree.

McCALLA, J.A.

I agree.

HARRISON, P.

ORDER

1. The appeal from the refusal of the injunction is dismissed.
2. The order dismissing the claim is set aside.
3. Sixty percent (60%) costs of this appeal are ordered to be paid to the respondents to be agreed or taxed.