THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO. 468 OF 2007

BETWEEN:

TANIOS SABA	**First Claimant**
ALEXIS EL-KHOURY	**Second Claimant**
v	
MICHEL FARAH	**First Defendant**
PIERRE CHIDIAC	**Second Defendant**

Appearances: Mr. S.E. Commissiong for the Claimants
Mr. Anthony Astaphan and Mr. Grahame Bollers for the Defendants

---
2008: January 28
February 1

JUDGMENT

[1] **THOM, J**: This is an application to discharge an interim injunction.

[2] The First Claimant and the First Defendant each own fifty per cent (50%) of the shares in Mitchell Cosmetics Inc., an International Business Company registered in the State of Saint Vincent and the Grenadines. The Second Claimant was the sole Director of Mitchell Cosmetics Inc. until June 16, 2007. The Claimants allege that on June 16, 2007 the Second Defendant was fraudulently appointed Director of the Company and the Second Claimant removed as Director.

[3] On 20th December 2007 the Claimant obtained an injunction without notice. The order reads as follows:

> "IT IS HEREBY ORDERED:
> 1. That an injunction is hereby granted and the Second Defendant, Mr. Pierre Chidiac, is hereby restrained from acting as a Director of Mitchell

Cosmetics Inc. and from carrying out the duties and responsibilities of a Director of Mitchell Cosmetics Inc., with immediate effect.

2. That the First Defendant, Mr. Michel Farah, forthwith inform the International Financial Services Authority that the resolutions purported to have been passed at a Special Meeting of the shareholders of Mitchell Cosmetics Inc. by struck from its company files on the ground that such resolutions were false, forged and fraudulent.

3. That leave is hereby granted to the Claimant to serve the claim form, statement of case and related documents, together with the restraining order and a further order on the Defendant out of the jurisdiction at their respective addresses, by Federal Express:

   (i) Michel Farah: 1 S.E. 3rd Avenue, Suite 1860, Miami, Florida 33131, United States of America, and
   (ii) Pierre Chidiac, Building Al-Tilal, Achrafieh, Beirut, Lebanon.

4. That time for entering appearance be 21 days, and filing a defence be 42 days from the date of receipt of the said Claim Form and Statement of Claim.

5. Costs of the application to be costs in the cause."

[4] On the 16th day of January 2008 the Defendants made an application to the Court to discharge the said injunction.

[5] On the 21st day of January 2008 the Claimants made application to the Court to continue the injunction granted on December 20, 2007.

[6] At the hearing on January 28, 2008 Learned Counsel for the Second Defendant submitted that the injunction should be discharged on the following grounds:

(a) No existing cause of action.
(b) No urgency justifying an injunction without notice.
(c) Non-disclosure and misrepresentation of material facts.

EXISTING CAUSE OF ACTION:

[7] Learned Counsel for the Second Defendant submitted that the Claimant's allegation of "forged documents" or "phantom meeting" and claims for loss which may arise in the future do not give rise to a cause of action and referred the Court to the decision of the Eastern Caribbean Court of Appeal in ***Mirsand Planning and Architects Ltd. V Samuel S. Conde Associados*** No. 20 of 2006 (BVI).

[8] Learned Counsel for the Claimants in response submitted that the Second Claimant was unlawfully removed as a Director. The Second Defendant was unlawfully appointed a Director of the Company and the First Claimant has suffered loss which he has not been able to quantify as yet. This right is enforceable and referred the Court to the case of ***Gouriet v Union of Post Office Workers*** [1978] A.C. 455 at p. 501.

[9] It is settled law that an applicant for an interlocutory injunction must have an existing cause of action against a defendant at the date of the application. This principle was stated by Lord Diplock in The Siskena [1977] 3 AER p. 803 at p 824 as follows:

> "A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent on there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened, by him of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the Court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the Court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction."

[10] While I agree with the submission of the Learned Counsel for the Second Defendant that the alleged financial loss in the future does not give rise to any existing cause of action, the Claimants pleaded case is also that the Second Defendant's appointment as Director was contrary to International Business Companies Act and the By Laws of the Company, and the Second Claimant was unlawfully removed as Director of the Company. I therefore find that this ground of the Second Defendant's submission fails.

URGENCY:

[11] Learned Counsel for the Second Defendant submitted that the Claimants failed in their Without Notice Application to comply with Part 17 of CPR 2000 in that they provided no explanation to the Court why notice could not have been given to the Defendants, and the Claimants waited approximately six (6) months after the Second Defendant assumed management of the company to make the application and approximately three (3) months after the Court in Lebanon had ruled against the Claimants in relation to the resolution appointing the Second Defendant a Director of the Company. Learned Counsel referred the Court to ***Bates v Lord Hailsham*** [1972] 3 AER p. 1020 at p. 1025 letter f – h where the Court stated:

> "An injunction is a serious matter, and must be treated seriously. If there is a plaintiff who has known about a proposal for ten weeks, in general terms and for nearly four weeks in detail, and he wants an injunction to prevent effect being given to it at a meeting of which he has known for well over a fortnight, he must have a most cogent explanation if he is to obtain his injunction on a ex parte application made two and a half hours before the meeting is due to begin. It is no answer to say a counsel for the plaintiff sought to say, that the grant of an injunction will do the defendants no harm, for apart from other considerations, an inference from an insufficiently explained tardiness in the application is that the urgency and the gravity of the plaintiff's case are less than compelling. Ex parte injunctions are for cases of real urgency where there has been a true impossibility of giving notice of motion. The present case does not fall into that category. Accordingly unless perhaps the plaintiff had an overwhelming case on the merits, I would have refused the injunction on the score of insufficiency explained delay alone."

[12] Learned Counsel also referred the Court to the case of ***Re First Express Ltd*** [1992] BCLC p. 824 at p. 828 where the Court stated:

> "It is a basic principle of justice that an order should not be made against a party without giving him an opportunity to be heard. The only exception is when two conditions are satisfied. First, that giving him such an opportunity appears likely to cause injustice to the applicant, by reason either of the delay involved or the action which it appears likely that the respondent or others would take before the order can be made. Secondly, when the court is satisfied that any damage which the respondent may suffer through having to comply with the order is compensatable under the cross-undertaking or that the risk of uncompensatable loss is clearly outweighed by the risk of injustice to the applicant if the Order is not made.
>
> There is I think a tendency among applicants to think that a calculation at the balance of advantage and disadvantage in accordance with the second condition is sufficient to justify an ex parte order. In my view, this attitude should be discouraged. One does not reach any balancing of advantage and disadvantage

> unless the first condition has been satisfied. The principle audi alterem partem does not yield to a mere utilitarian calculation. It can be displaced only by invoking the overriding principle of justice which enables the court to act at once when it appears likely that otherwise injustice will be caused."

[13] In response Learned Counsel for the Claimants submitted that the case of ***Bates*** is distinguishable from the present case in that in ***Bates*** the court found that the Plaintiff had no chance of success whereas here, the Claimants' case contains serious issues to be tried.

[14] Part 17 of CPR 2000 deals with the grant of interim remedies. The relevant provision is Part 17.4 (4) which reads as follows:

> "The Court may grant an interim order under this rule on an application made without notice for a period of not more than 28 days (unless any of these Rules permits a longer period) if it is satisfied that –
> (a) in a case of urgency no notice is possible; and
> (b) that to give notice would defeat the purpose of the application"

[15] The affidavit of Ms. Eveta Davis dated 19th December 2007 filed in support of the application gives no reason why it was not possible to give notice. In the certificate of urgency issued by the Claimants' solicitor it is stated that:

> "The application…is as a matter of extreme urgency and ought to be heard without notice in the first instance so as to bring some immediate and temporary relief to the Claimants in these proceedings. The Claimants seek the indulgence of the Court to put an end to the wrongful acts of the Defendants until this matter can be fully heard on its merits. There is a real and serious danger that the Defendants will plunder the assets of the company without any oversight and control from the Claimants and put the Company's financial interest at risk. It will also put the financial interest of the First Claimant at risk."

[16] The above mentioned reasons are not reasons why notice had not been given. Also it was not disputed that the application was made some six (6) months after the Second Defendant was appointed Director of the Company and that the Claimants were aware of the appointment.

[17] In view of the above I agree with the submission of Learned Counsel for the Second Defendant that there was no evidence of urgency, no reason was given to show why it was

not possible to give notice, nor if notice was given that would have defeated the purpose of the application. Also I find that it cannot be said that the Claimants have an overwhelming case on the merits based on the pleadings. The Claimants contend that the First Claimant on June 16, 2007 did not approve the removal of the Second Claimant as Director and approved the appointment of the Second Defendant as Director of the Company. On the other hand the Defendants contend that the First Claimant was present at the meeting on June 16, 2007 and approved the removal of the Second Claimant and the appointment of the Second Defendant. These are questions of fact which will have to be determined at trial.

NON-DISCLOSURE/MISREPRESENTATION:

[18] Learned Counsel for the Second Defendant submitted that several material facts were not disclosed by the Claimants. I will deal with some of these facts that have been admitted by the Claimants. These are:

(a) That on September 13, 2007 the Second Defendant and Mitchell Cosmetics Inc. et al instituted legal proceedings against the Claimants in Florida in which they claimed inter alia an accounting of the Lebanese operations of Mitchell Cosmetics.

(b) The First Claimant had instituted legal proceedings against the Second Defendant in Lebanon alleging that the appointment of the Second Defendant was fraudulent.

(c) There was a meeting held in Lebanon on June 16, 2007.

[19] Learned Counsel for the Second Defendant submitted that an applicant for a without notice injunction must act in the utmost good faith; that a duty of full and frank disclosure is imposed on an applicant. The Claimants had an obligation to disclose all material facts and not to misrepresent the facts or law. The Claimants have not given any probative or amenable explanation for their failure to disclose the aforementioned facts in their affidavit in reply.

[20] The law relating to the duty to disclose when applying for a without notice injunction is well settled. Counsel on both sides agree that the law is as stated in cases such as ***Brinks Mat Ltd***, ***Bank Mellat*** and ***Re First Express Ltd***. An applicant who seeks injunctive relief on an application without notice must disclose to the court all facts material to the issues before the Court. A failure to disclose all facts material to the issues is a ground for discharging an order made without notice.

[21] Learned Counsel for the Claimant submitted that the Miami Litigation is irrelevant. I do not agree. The basis of the Claimant's application without notice is that the Second Defendant was not lawfully appointed Director of Mitchell Cosmetics Inc. and that the Defendants were "bleeding" the assets of the Company and the First Claimant was at risk of losing his financial interest in the Company. In the Miami litigation the Second Defendant et al were seeking inter alia an accounting from the Claimants of the operations of Mitchell Cosmetics. Also in light of the Claimants' admission that they had not produced accounts for the Company for almost six years and that prior to the appointment of the Second Defendant the operations of Mitchell Cosmetics Inc. in Lebanon were on the verge of bankruptcy.

LITIGATION IN LEBANON:

[22] Learned Counsel for the Claimants submitted that based on the Defendants' exhibit which shows that the Defendants' Attorney advised that the Lebanese Courts have no jurisdiction in a shareholder and Director dispute of a foreign company the litigation in Lebanon was not relevant. The Claimants had appealed the ruling of Judge Al Hassan.

[23] Judge All Hassan in his ruling on September 18, 2007 stated:

> "1. Oblige the Administration and Exploitation of Beirut Port to recognize the Plaintiff's company appointment of the new manager, Mr. Pierre Chidiac prima facie and until a decision to the contrary is issued by the courts of first instance, and to run the Company's business pursuant to this appointment; and to charge clerk Muwaffaq Yassine with the notifications provided that the Plaintiff advances the sum of L.L/150,000/ as transportation allowance therefor.

2. Reject the request to declare the validity of the Partners Meeting Decision for non-competence."

[24] Having regard to the basis of the Claimants' application as stated earlier, the litigation in Lebanon ought to have been disclosed to the Court.

MEETING:

[25] Ms. Eveta Davis in her affidavit dated December 19, 2007 in support of the Claimants' application deposed at paragraph 7 as follows:

> "The fraudulent intention of the Defendants is to seize control of the management of the Company by any means, even resorting to lying, forging Minutes of an alleged Meeting which never took place and with fraudulent design to take over the management and control of the Company."

[26] Ms. Eveta Davis in her Affidavit in Reply dated 22nd January 2008 deposed at paragraph 8.11 as follows:

> "The First Claimant wishes to be more specific about the meeting of 16th June 2007. His contention was that there was a meeting on that date to discuss the sale of the First Claimant's interest in the company by the sale of the shares of the First Claimant to the First Defendant. The meeting was not called to appoint the Second Defendant as a Director of the Company. To that extent the Defendants' Minutes of that Meeting were false and misleading, and obviously forged."

[27] Based on the affidavit in support of the application and the Statement of Claim the Court was no doubt led to believe that there was no meeting on June 16, 2007, and not that there was a meeting but it was not called to appoint the Second Defendant as Director of the Company. This was a misrepresentation of a material fact.

[28] The facts referred to above that were not disclosed and misrepresented were material in determining the application having regard to the basis of the Claimants' application. The non-disclosure and misrepresentation are grounds for discharging the injunction.

[29] Where there is material non-disclosure which justifies the discharge of a without notice injunction the Court has a discretion to continue the injunction or to grant a new injunction

where the justice of the case requires that an injunction is granted. In ***Brink's Mat Ltd***. Bascombe LJ at p. 1358 stated:

> "The rule that an ex parte injunction will be discharged if it was obtained without full disclosure has a two fold purpose. It will deprive the wrong-doer of an advantage improperly obtained. See ***Rex v Kensington Income Tax Commissioners, Ex parte Princess Edmond de Poligrac*** [1917] 1 K.B. 485, 509. But it also serves as a deterrent to ensure that persons who make ex parte applications realize that they have this duty of disclosure and of the consequences (which may include a liability in costs) if they fail in that duty. Nevertheless, this judge-made rule cannot be allowed itself to become an instrument of injustice. It is for this reason that there must be a discretion in the court to continue the injunction, or to grant a fresh injunction in its place, notwithstanding that there may have been non-disclosure when the original ex parte injunction was obtained. See in general ***Bank Mellat v Nikpour*** [1985] F.S.R. 87, 90 ***and Lloyds Bowmaker Ltd v Britannia Arrow Holdings Plc.*** [1988] 1 W.L.R. 1337, a recent decision of this court in which the authorities are fully reviewed. (1) Whilst having regard to the purpose of the rule, the discretion is one to be exercised sparingly, I would not wish to define or limit the circumstances in which it may be exercised. (2) I agree with the views of Dillon L.J. in the ***Lloyds Bowmaker*** case at p. 1349 c – o, that if there is jurisdiction to grant a fresh injunction, then there must also be a discretion to refuse, in an appropriate case, to discharge the original injunction."

[30] I will now consider whether or not to continue the injunction or grant a fresh injunction.

[31] The grant of an interim injunction is discretionary. The ***American Cyanamid*** case sets out the principles by which the Court should be guided in the exercise of its discretion. ***Halsbury's Laws of England*** 4th Ed. Vol. paragraph 863 states these principles as follows:

> "Interim injunctions are generally granted only when the applicant has established a serious issue to be tried, damages will not be adequate remedy, the balance of convenience lies in favour of granting the injunction in that it will do more good than harm and the applicant is and will be able to compensate the Respondent for any loss which the order may cause him in the event that it is later adjudged that the injunction should not have been granted."

SERIOUS ISSUE:

[32] Is there a serious issue to be tried? In determining whether there is a serious issue to be tried, the Court needs to be satisfied that the Claimants' cause of action has substance

and reality. In this case, the Claimants' claim inter alia that the Second Defendant was not lawfully appointed Director of the Company. The Defendants in their defence allege that the Second Defendant was lawfully appointed; the First Claimant approved his appointment. I am satisfied that there is a serious issue to be tried.

DAMAGES:

[33] Damages would not be an adequate remedy for the Claimants if the claim succeeds. It would be difficult to assess what damages should be awarded if the Second Defendant was not lawfully appointed Director of the Company.

BALANCE OF CONVENIENCE:

[34] The Court must consider where the balance of convenience lies, in granting or in refusing the injunction. In the ***American Cyanamid case*** Lord Diplock stated at p. 723:

> "The extent to which the disadvantages to each party would be incapable of being compensated in damages is always a significant factor in assessing where the balance of convenience lies…
>
> Where other facts appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo."

[35] Both the First Claimant and the First Defendant own fifty per cent (50%) of the shares of the company. The Claimants have not disputed that the Company was on the verge of bankruptcy prior to the Second Defendant assuming the role of Director of the Company and the accounts of the Company have not been audited for approximately six (6) years. The Second Defendant has been managing the company for approximately six (6) months. It would also be difficult to assess damages to the Defendants if the Defendants were to succeed. Similarly, it would be difficult to assess damages to the Claimants if they were to succeed. I find that the status quo should be preserved.

[36] The status quo is the state of affairs before the Defendant started the conduct complained of. In ***Garden Cottage Foods Ltd v Milk Marketing Board*** (1984) A.C. 130 the Court stated that where there has been unreasonable delay in making the application the status

quo is the state of affairs immediately before the application. In this case the application is being made some six (6) months since the Second Defendant assumed the role of Director of the Company. He is the sole Director of the Company. The Claimants were aware of the Second Defendant's appointment. I am satisfied that there has been unreasonable delay in making the application. The status quo is that immediately existing before the application.

[37] The application is dismissed. It is HEREBY ORDERED THAT:

(1) The injunction granted on December 20, 2007 and continued on the 22nd and 28th days of January 2008 is hereby discharged.

(2) The Claimant shall pay the Second Defendant costs in the sum of $2,500.00 on or before the 28th day of February 2008.

.....
Gertel Thom
HIGH COURT JUDGE