

JAMAICA

SUPREME COURT CIVIL APPEAL NO. 40 OF 2008

APPLICATION NO. 58 OF 2008

BEFORE: THE HON. MR. JUSTICE HARRISON, J.A.

BETWEEN: OLINT CORP LIMITED APPLICANT/APELLANT

AND NATIONAL COMMERCIAL BANK RESPONDENT
JAMAICA LIMITED

IN CHAMBERS

Mrs. Georgia Gibson-Henlin, Maurice Manning and Miss Catherine Minto, instructed by Nunes Scholefield Deleon and Company, for the Applicant/Appellant.

Michael Hylton, Q.C. and Miss Carlene Larmond, instructed by Michael Hylton and Associates, for the Respondent.

April 22 & 30, 2008

HARRISON, J.A.:

1. This is an application before a single Judge of Appeal for the grant of an injunction pending hearing of the appeal between Olint Corp. Limited ("the appellant") and National Commercial Bank Jamaica Limited ("the respondent")

The background

2. The Claimant, Olint Corp. Limited, filed a Claim Form in the Supreme Court seeking inter alia, declarations that National Commercial Bank Jamaica Limited has:

(a) abused its position of dominance by threatening to close the appellant's accounts;

(b) acted in breach of the Fair Competition Act and;

(c) directly or tacitly conspired with others to limit the supply of banking services to the appellant.

3. The Claimant also sought the grant of injunctions and on January 11, 2008 it was granted an ex-parte injunction restraining the respondent from closing its accounts. There were further extensions of the ex-parte injunction and on March 17, an inter partes hearing took place before Jones, J. Judgment was reserved and on April 18, 2008 the learned judge dismissed the application for an injunction. He also refused to grant an injunction pending the hearing of the appeal against his order.

4. The appellant lodged a Notice of Appeal in the Registry of the Court of Appeal within an hour of the delivery of the decision by Jones, J. It also filed an application for court orders and sought an order for an injunction to be granted in order to restrain the respondent from closing the accounts pending the hearing and disposition of the appeal. The application came before my brother Smith, J.A. on April 18, and he granted an interim order. He further ordered that there should be a hearing on an inter partes basis on April 22, 2008. This application was heard by me and I reserved my decision until April 30, 2008. This is my judgment.

The legal basis for the grant of an injunction pending hearing of the appeal

5. The Court of Appeal Rules 2002 provides that a single judge of Appeal has the jurisdiction to grant an injunction pending the determination of an appeal. Rule 2.11 states inter alia:

“2.11.-(1) A single judge may make orders -

...

(c) for an injunction restraining any party from dealing, disposing or parting with possession of the subject matter of an appeal pending the determination of the appeal;

...

6. In deciding whether or not an injunction should be granted, the question is not whether the appellant has a good arguable case but rather, does it have a good arguable appeal? In ***Ketchum International plc v Group Public Relations Holdings Ltd and others*** [1996] 4 All ER 374 Stuart-Smith L.J said at pages 381 and 382:

“This is likely to be a more difficult test to satisfy, and, if the case turns upon questions of fact which the judge has resolved against the plaintiff, may well be insuperable. This threshold must be at least as high as that which has to be satisfied when the court considers whether or not to grant leave to appeal, where that is required.

...

Furthermore, this court will not interfere with relevant findings of fact which the trial judge has made based in part on his assessment of the witnesses, and in so far as the grant of injunctive relief is a matter of discretion, is unlikely to differ from the trial judge, save on well-established principles. The only matter on which this court may, as a rule, be in a better position to decide than the trial judge, is whether the plaintiff has a good arguable appeal.”

In *Erinford Properties Ltd v Cheshire CC* [1974] 2 All ER 448 at 454, Megarry J said inter alia:

“There will, of course, be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on. But subject to that, the principle is to be found in the leading judgment of Cotton LJ in *Wilson v Church (No 2)* ((1879)12 Ch D 454 at 458), where, speaking of an appeal from the Court of Appeal to the House of Lords, he said, “when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory”. That was the principle which Pennycuik J applied in the *Orion* case ([1962] 3 All ER 466, [1962] 1 WLR 1085); and although the cases had not then been cited to me, it was on that principle, and not because I felt any real doubts about my judgment on the motion, that I granted counsel for the plaintiffs the limited injunction pending appeal that he sought. This is not a case in which damages seem to me to be a suitable alternative.”

He continues:

“Although the type of injunction that I have granted is not a stay of execution, it achieves for the application or action which fails the same sort of result as a stay of execution achieves for the application or action which succeeds. In each case the successful party is prevented from reaping the fruits of his success until the Court of Appeal has been able to decide the appeal.”

Is there a good arguable appeal?

7. I turn now to consider whether the appellant in this matter has shown that it has a good arguable appeal. Twenty-two grounds of appeal have been filed, but for the purposes of this application, it will not be necessary to examine and comment on all of the grounds.

8. Jones, J in a well-reasoned judgment, considered the reasons given by the respondent for its decision to terminate the banking relationship and close the accounts.

He concluded that the bank had acted lawfully and that "there is no serious issue to be tried, nor is there any assurance whatsoever that the Claimant can succeed at trial on this issue." He also held that damages would be an adequate remedy for the appellant since first, section 48 of the Fair Competition Act provides that damages is the remedy for breaches under that Act and secondly, the English case, *Prosperity Limited v Lloyds Bank Limited* (1923) 39 Law Times Report 372 provided a good authority for his decision. In that case, the court had refused an application for an injunction made by a customer against the bank. It had taken the view that to grant an injunction would have amounted to specific performance of a contract to provide personal services of a confidential nature and also that the injunction would be a direction to the bank to constitute itself a borrower of the customer's money.

9. I have given serious consideration to the submissions of Counsel on both sides and I am of the view, that there are a number of factual matters which give rise to questions of law, regarding the rights and duties of the appellant as customer and the respondent as banker, under the Banking Act. There is also the issue regarding the legal status of the Guidance Notes issued by the Bank of Jamaica. These Notes were issued pursuant to its role as supervisor of banks under the Banking Act. The Appellant contends that not only is it at risk but the entire financial sector or public interest is at risk if the said Guidance Notes and/or regulatory machinery of the Guidance Notes is permitted to be used "as an engine of oppression". The Appellant further contends that such use does violence to the spirit and intent of the Banking Act which was specifically amended in 1997 to prevent unsafe and unsound banking practices by banks acting through their managers and directors.

10. Of course, there is also the issue concerning the question of damages. The appellant contends that damages would not be an adequate remedy as the threatened action on the part of the respondent would in all probability result in serious business disruption, confidences being lost, and irreparable harm done including damage to reputation.

Conclusion

11. In my judgment, the issues which I have highlighted above cannot be said to be frivolous matters. They do constitute good arguable grounds which favour the preservation of the *status quo*. There would be the risk that if the injunction is not granted, the right of appeal could be rendered nugatory. I have been in dialogue with the Registrar of the Court of Appeal and she has informed me that the appeal could be accommodated on May 12, 2008. I sincerely hope that the parties will make use of this date.

12. It is therefore ordered, that the injunction be granted until the hearing of the appeal. The appellant will give the usual undertaking to pay to the respondent's damages if the appeal is dismissed.

ORDER:

The application for the injunction is granted pending hearing of the appeal. Costs to be costs in the appeal.