



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2017CD00482

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| BETWEEN | CABLE AND WIRELESS JAMAICA LIMITED | CLAIMANT |
| AND | SRETLAW MEDIA COMPANY LIMITED | DEFENDANT |

Application for summary judgment - Contract – Flow Super Cup- Claim and Counterclaim- Defence that amounts collected were spent for the Claimant’s benefit –Whether real prospect of success- Counterclaim reliant on an oral agreement – Whether real prospect of success.

Malaica Wong and A. Montaque instructed by Myers Fletcher and Gordon for Claimant

Phillip Bernard and S. Johnson instructed by Bernard & Co. for the Defendant

IN CHAMBERS

Heard: 11th and 24th July 2018; 31st October 2018 and 11th January, 2019.

Coram: Batts J.

[1] In this matter the Claimant applied for Summary Judgment on the Claim and Counterclaim. On the second day of the hearing, the Claimant made a written application to adduce further evidence. The hearing was therefore further adjourned to the 31st October, 2018. On that date the supplemental affidavit of Carlo Redwood, filed on the 20th July 2018, was allowed into evidence. The Defendant was allowed to rely on the affidavit of O’Neil Walters dated the 31st August, 2018. On that date also both parties indicated they had nothing to add to

the submissions already made. The matter was therefore adjourned for judgment to be delivered on the 11th January 2019.

[2] Before me therefore were affidavits of Carlo Redwood, dated the 12th April 2018 and 20th July 2018, and Litrow Hickson, dated 11th July 2018; all in favour of the Claimant. The Defendant relied on the affidavits of O'Neil Walters, dated the 3rd July 2018 and 31st August, 2018. Both parties filed written submissions and authorities and each made oral submissions.

[3] The Claim is for a liquidated amount of \$15,500,000.00. It is alleged that the Defendant collected Sponsorship fees, on behalf of the Claimant, and neglected and/or refused to hand them over to the Claimant. The Defendant filed a defence denying that sums were owed and counterclaimed for damages for breach of "confidence or contract." The Claimant contends that there is no real prospect of the Defence and Counter claim being successful and has applied for summary judgment pursuant to Rules 15.2(a) & (b) or 26.3(1)(c) of the Civil Procedure Rules 2002.

[4] The Claimant trades under the brand name "Flow." The contract in question concerns the "Flow Super Cup," a schoolboy football competition of recent vintage. The Claimant contends that it conceptualised and created the event and contracted the Defendant to conduct "project management" services. The Defendant contends, on the other hand, that it came up with the idea and that the Claimant retained them to implement it.

[5] The Claimant's evidence is that the event was first staged in the year 2014 and the Defendant was then paid on the basis of invoices tendered. There was then no written agreement. An agreement was put in place for the 2015 staging of the event and Exhibit CR4, to the affidavit of Carlo Redwood dated the 12th April 2018, was initially relied upon. The Claimant's evidence is that for the 2016 staging a "Match Administration and Sponsorship Management Agreement" was signed, see Exhibit CR5 to the same affidavit. The Defendant entered into several sponsorship agreements as part of its management functions. These

agreements provided that the sponsor would pay “donations” to the Defendant on behalf of the Claimant. The sponsorship agreements are exhibited, as Exhibit CR7, to the Carlo Redwood affidavit dated 12th April 2018.

[6] The 2016 Agreement, the Claimant contends, expired on the 1st February 2017 and was not renewed. Another entity was contracted to stage the 2017 Flow Super Cup. The Claimant says that the Defendant admitted owing the amount of \$15,500,000 being sponsorship fees collected on behalf of the Claimant. The letters dated 1st May, 2017 and 27th July 2017, and relied on as admissions, will be quoted in full:

- a. Letter dated 1st May 2017 (exhibit CR 11 to the affidavit of Carlo Redwood dated 12th April 2018) :

It is headed “Without Prejudice” and reads,

Dear Mr. Redwood,

Re: Flow Super Cup 2016 Sponsorship Agreement

As we aim to close the books on the management and collections of sponsorship revenue for the Flow Super Cup 2016.

Sponsorship of Fifteen Million Five Hundred thousand (\$15,000,000) in cash and kind was received as follows:

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| <i>Brand Solution (KFC)</i> | <i>- \$5,000,000</i> |
| <i>Wisynco</i> | <i>- \$8,000,000</i> |
| <i>Bank of Nova Scotia</i> | <i>- \$2,500,000</i> |
| <i>Huawei</i> | <i>- \$0.00</i> |
| <i>Locker Room</i> | <i>- \$0.00</i> |

This amount less expenses incurred will be repaid no later than within ninety (90) days by cheque/wire transfer. Please indicate the legal name of the entity that will be in receipt of the funds.

Due to our standard financial procedures the funds above has to be audited and reconciled in our system

against all expenses incurred (bank wires, credit facilities interest accrued) on the facilitation on the project.

We are working assiduously to have the payments processed with the committed timelines above.

Thank you for your kind cooperation in this matter and we anticipate that both parties will continue to conduct business in an appropriate and confidential manner as we continue to build on our successes.”

- b. Letter dated 27th July 2017 (Exhibit CR 12 to the affidavit of Carlo Redwood dated 12th April 2018.) :

“Dear Mr Redwood

Re: Flow Super Cup – 2016 Sponsorship Funds & Administration/Production 2017

We refer to our letter of May 1, 2017 and our five (5) year production agreement re the staging of the “Flow Super Cup” product; it feels like yesterday when we sat to conceptualize and negotiate the highly successful “Super Cup” product. Each year since the first staging in 2014 has exceeded our expectations and by all accounts the feedback from sponsors and the wider public has been overwhelmingly positive.

In preparation for the 2017 staging (8) weeks away – there remains the reconciliation of the net sponsorship proceeds from 2016 and confirmation of the 2017 budget. As is customary, the production work has already begun and we are well on our way to staging an even bigger and better “Super Cup 2017.”

In light of the time constraints and the fact that funds held on account for Flow from the 2016 staging have already been applied in good faith to the 2017 staging, we propose that the 2016 amounts be set off against our total fees for producing the Flow Super Cup 2017 competition.

The total cost for our services in 2016 was \$19,000,000 (Nineteen Million Dollars) covering event administration, brand management and intellectual support. We hope that our proposal is acceptable and

will address some of the shortcomings which resulted in the reconciliation delays and belated settling of accounts between our institutions.

As always it has been a pleasure working with Flow and we look forward to another highly successful staging of the "Flow Super Cup." We look forward (sic) your prompt feedback."

- [7] The Claimants' response to this letter is quoted for good measure (Exhibit CR 13 to the affidavit of Carlo Redwood dated 12th April 2018) :

"Re: FINAL Letter of Demand for Outstanding Sums for Flow Super Cup 2016 Sponsorship Agreement.

Cable and Wireless Jamaica Limited (hereinafter referred to as "Flow") refers to the captioned Agreement and letter dated July 27th 2017 in which you have indicated that the outstanding sum of Fifteen Million Five Hundred Thousand Jamaican Dollars (JM\$15,500,000) will not be paid but "set off against our total fees for producing the Flow Super Cup 2017."

Flow wishes to advise that the captioned Agreement expired on February 1, 2017 there have been no discussions for renewal or continuation of the relationship for the execution of the 2017 event.

We thereby issue this FINAL demand for the sum of Fifteen Million Five Hundred Thousand Jamaican Dollars (JMD\$15,500,000) to be paid no later than the close of business today July 31, 2017 in accordance with the 90 day period for submission as set out in our letter dated May 1, 2017. A failure to do so will result in legal action without further reference to you."

- [8] Mr. O'Neil Walters in his affidavit dated the 3rd July 2018, and sworn on behalf of the Defendant, stated that in 2012 the Defendant was the sports marketing agent of the Inter-Secondary School Sports Association (ISSA). He says the Claimant approached the Defendant seeking to lobby to oust Digicel as the sponsor for

schoolboy football in Jamaica. The Defendant in response proposed that the Claimant sponsor a new hybrid tournament. The result was what became known as the Flow Super Cup. He asserts that it was verbally agreed that, in return for developing, commercializing and successfully negotiating ISSA's endorsement, the Defendant would be paid to execute the concept and manage its administration for a minimum of five (5) years beginning 2014 "or for as long as Flow was permitted to host the tournament."

[9] Mr Walters says further that the Defendant relied on the Claimant's promise of a 5 year deal and in "good faith" developed the concept for the Claimant. They successfully managed implementation of the concept in 2014, 2015 and 2016, "without a written contract taking instructions from and reporting to Mr. Redwood." He asserts that it was never agreed that sponsorship money collected would be paid directly to the Claimant. He denied that the agreement, exhibited as CR4 by Mr. Redwood, is an agreement for staging the Flow Super Cup. Mr. Walters asserts, at paragraphs 17 and 18 of his affidavit, that in January 2017 the Defendant was presented with a contract for 2017. He says that the Claimant refused to pay outstanding fees due to the Defendant unless the contract was signed. He therefore signed it. He expresses surprise at receiving a demand letter dated 31st August 2017 (Exhibit CR 14 to the affidavit of Carlo Redwood dated 12th April 2018). Mr Walters says he was surprised to receive that letter because it was customary, and in the normal course of dealings, to set off amounts accruing to one year's staging against expenses for the following year "or as instructed by Mr Redwood". The Defendant asserts that the Claimant terminated their agreement without notice and in breach of the dispute resolution clause. He, in the affidavit, denies that the Claimant is entitled to the \$15,500,000 as "all amounts collected have been applied in accordance with the agreement."

[10] In his second affidavit, filed on the 5th September, 2018, Mr. O'Neil Walters referenced the supplemental affidavit of Carlo Redwood dated the 20th July 2018. He reviewed the document attached, entitled "2015 Agreement", and denied that

it was entered into by the Defendant. He says one signatory to the document, Mr. Carlton Baxter, is unknown to him. Although acknowledging that another signature appears to be his, he does not accept that the “entire” document was signed by him in its current form. He points out that the document has not been witnessed or dated and he denies its authenticity. Mr. O’Neil Walters summarises the Defendant’s case at paragraph 19 of his affidavit, thus,

“I have always maintained and continue to maintain that there was no agreement between Sretlaw and Flow for sponsorship funds collected in respect of Flow Super Cup to be paid to Flow. The Agreement and course of dealing is and has always been that sponsorship funds and products collect (sic) would be applied to offset production cost of staging the tournament.”

[11] In the supplemental affidavit of Carlo Redwood, to which Mr. Walters referred, Mr. Redwood admitted that an incorrect contract was attached to his first affidavit as Exhibit CR 4. He exhibited the correct document, with respect to the 2015 staging, as Exhibit CR 15. He pointed out that the document was relied on to demonstrate that the parties’ relationship had been governed by a written agreement since 2015, contrary to the assertion of Mr. Walters.

[12] On this evidence I cannot say that the Defence has no real prospect of success. The Defence raises at least 3 relevant factual issues:

1. Whether or not the Claimant made a representation that the relationship would be for 5 years
2. Whether or not there had been a course of dealings in which sponsorship fees were not paid directly to the Claimant but were rolled over and applied towards the following year’s objectives, and,
3. Whether or not the amounts claimed are in fact due and owing, that is, have they been applied towards the event.

[13] The Claimant says that the documentation contradicts these assertions and, therefore, there is no real prospect of the Defence succeeding. I am well aware

that the courts have stated, and the Privy Council most recently reaffirmed in ***Sagicor Bank Jamaica Limited v Taylor Wright [2018] UK PC 12***, that on a summary judgment application it is the evidence not just pleading which must be considered. In that case the United Kingdom Privy Council upheld the decision to enter judgment on the basis that, although forgery was alleged, there was no denial that the money in question had been borrowed.

[14] In the case before me the situation is different. The letters of admission, on which reliance is placed, are at best ambiguous. The Defendant, in the letters, assert that the reconciliation of debt and expenses was incomplete and that the money had been applied toward the upcoming event. The letters are consistent with the present denial that anything is owed. In support of its assertion of a course of dealings, and hence an expectation that such sums could be applied towards the expenses of the upcoming event, the Defendant exhibits emails and requisitions, see Exhibits SM2 and SM3 to the affidavit of O'Neil Walters dated the 3rd July 2018.

[15] It is I think also relevant that some of the documentation, on which the Claimant relies, is imperfect. The lately admitted document (in place of the one erroneously exhibited as exhibit CR 4 to the affidavit of Carlo Redwood dated 12th April 2018) has signatures which are not witnessed. It has a "cover document" headed "Standard Contract Completion Form" which is not signed by any representative of the Defendant. The affidavit of Mr. Carlo Redwood, dated 12th April 2016, refers in paragraph 16 to "the 2016 agreement" between the Claimant and the Defendant. In fact that document, Exhibit CR 15, has a commencement date of 1st January 2017 and an expiration date of 28th February 2017. That may call for an explanation. The agreement does however have a standard "entire agreement" clause and fixes the fee payable to the Defendant at \$19 million. Mr. Redwood depones that the fees were paid in full to the Defendant. That is not disputed.

[16] It is significant that the sponsorship agreements, Exhibit CR 7 to the affidavit of Carlo Redwood dated 12th April 2018, all state that sponsorship payments were to be made to the Defendant which was the Claimant's authorised agent. It is therefore clear that the Defendant was to collect sponsorship monies as agent of the Claimant. The Defendant admits collecting these amounts. It is true that neither in these proceedings, nor in any of the correspondence exhibited, has there been an attempt to prove, or vouch by documentation, how the money collected was spent. The Defendant's letter dated 27th July 2017 proposed that the 2016 sponsorship amounts, collected and allegedly "applied to the 2017 staging," be set off against total fees for the 2017 competition. This proposal was categorically rejected by the Claimant. These factors weigh in favour of the Claimant.

[17] However, at this interlocutory stage, I am not required to decide factual issues. I am only required to say whether, on the evidence presented, the Defence has a real prospect of succeeding. The claim is for a fixed amount of damages; it is not for an account. The Defendant is in effect saying I, in accordance with previous practice, utilised the money for the Claimant's benefit in anticipation of a contract for the upcoming season. If true the Defendant may not be liable. I cannot, on the evidence, say that that position has no real chance of success, in whole or in part, as it relates to the fixed amount claimed.

[18] With regard to the Counterclaim different considerations apply. The Defendant contends that it is entitled to damages for "breach of confidence," and alternatively, for breach of contract. The confidence/ contract relates to the promise of a five year relationship. The Defendant has taken no issue with the terms or authenticity of the contract dated the 1st day of January 2017. Mr Walters admits signing it. He says he did so because he was told that, unless he did so, the balance due to the Defendant for the previous year would not be paid. He made a commercial decision, signed the agreement, and collected the fee. I know of no principle of law that, on those facts, will enable the Defendant to escape its contractual obligations. The contract clearly outlines the intellectual

property rights (clause 10), the term of the agreement (clause 1) and that it represents the entire agreement superseding any prior agreement, whether oral or written (clause 15). In the face of this contract the Defendant's counterclaim has no real prospect of success.

[19] It is one thing to say that, because of our course of dealings and notwithstanding the strict contractual terms, I went ahead and expended sums for the Claimant's benefit in anticipation of a renewal. It is quite another to say that, notwithstanding my agreement in writing that all previous oral agreements are subsumed in this written contract, I am entitled to a remedy for breach of a prior oral agreement with inconsistent terms. The latter is most unlikely to succeed.

[20] I therefore dismiss the application for summary judgment on the Claim but enter summary judgment on the Counterclaim, which is dismissed. I make no order for the costs of the application as the spoils today have been equally shared.

David Batts
Puisne Judge.