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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.H143/99

BETWEEN	PAUL A. HANNA	1ST PLAINTIFF
A N D	PATRICK W. FOSTER	2ND PLAINTIFF
A N D	RICHARD J. AYOUB	3RD PLAINTIFF
A N D	PHILIP E. J. FORREST	DEFENDANT

Dennis Morrison Q.C. and Katherine Francis
for the plaintiffs instructed by Verna Bennett.

Dennis Daly Q.C and Donald Gittens
for the defendant instructed by Daly, Thwaites & Co.

Heard: January 11, 12, 17, 18, 20, 31, February 3, 4 and March 24, 2000

RECKORD, J

The three plaintiffs and the defendant are Attorneys-at-law and were up to the 6th of December, 1999, partners in a law practice under the firm name of Clinton Hart & Co. at 58 Duke Street in Kingston.

Mr. Hanna was admitted to the partnership on the 1st of March, 1998 , and Mr. Ayoub on the 1st of July, 1997, Mr. Forrest on the 5th April, 1994 and Mr. Foster on 1st January, 1996.

Unfortunately, difficulties arose between the parties and on the 6th of December, 1999 the defendant, by notice in writing, brought this partnership to an end. However, on the following day, the 7th of December 1999, the three plaintiffs constituted a new partnership and have been carrying on the practice of law from that date at the same location under the same name of

Clinton Hart & Co.

It appears that large sums of money in an account of the firm had been transferred to another account held by certain partners of the firm without the knowledge of all the partners. Civil action had been taken against two, one a partner and the other an employee, who have since resigned. The defendant was insisting that criminal action should be taken against them and that some action be taken against Mr. Millingen and Mr. Mitchell, also former partners, yet the plaintiffs had done nothing. This seems to be one of the major complaints that the defendant had against the plaintiffs.

Another complaint by the defendant was that the plaintiffs ought not to have formed another partnership under the same name without his knowledge and consent.

Despite efforts made to settle their differences amicably, there has not been any satisfactory conclusion. Whereupon, the plaintiffs, claiming that their practice was being disrupted by the defendant who continued visiting the office he previously occupied under the former partnership, have issued a Writ of Summons against the defendant on the 14th of December, 1999, claiming for a :-

1. Declaration that the plaintiffs are entitled to operate a law partnership under the style and title Clinton Hart & Co.
2. That an account be taken of all sums and or property of the law firm.
3. Damages for fraud.

4. An injunction restraining the defendant from interfering with the assets of the partnership; from entering or remaining on the premises at 58 Duke Street, Kingston, from having any dealing with the conduct of the business of the partnership until the trial of this matter.

An ex-parte interim injunction was granted by the Supreme Court on the 14th of December, 1999, restraining the defendant for a period of twenty-five days from entering or remaining on the premises at 58 Duke Street, Kingston; from interfering with assets, bank account, drawing cheques of the partnership.

Subsequently, on the 21st of December, 1999 Attorneys-at-law for the plaintiffs applied by way of Summons, for an Interlocutory Injunction against the defendant. The hearing of this summons commenced on the 11th of January, 2000. On the 31st of January, 2000, on an application of counsel for the plaintiffs, the summons was amended. The amended summons was filed on the 4th of February, 2000, and sought for an order that:

1. The defendant by his servants and/or agents or otherwise

   (a) Be restrained until the trial of this action from entering or remaining on the premises situated at 58 Duke Street, Kingston from which the law partnership of Clinton Hart & Co. operates.

   (b) Be restrained until the trial of this action from dealing with or interferring with the assets and/or drawing cheques and/or issuing mandates with repect to or interfering with the bank accounts which now

exists in the name of the Partnership constituted on the 7th of December, 1999.

(c) Be restrained from and/or in any way dealing with the conduct of the business of the partnership constituted on the 7th December 1999 and/or directly communicating with the clients of the said partnership until the trial of this matter and or further Order.

(2) The plaintiffs give the usual undertaking as to damages.

(3) Costs of this application is to be costs in the cause.

TAKE NOTICE that at the hearing of this application the applicants will refer to and rely on the Affidavit of Paul A. Hanna, Patrick W. Foster and Richard J. Ayoub sworn to on the 14th day of December, 1999.

Several affidavits were filed in support of the summons by the plaintiffs and several in response by the defendant. The first was a joint affidavit sworn to on the 14th day of December 1999 by the plaintiffs. They complained that during the period they carried out the practice of law with the defendant, his conduct towards them and members of the staff was characterized by extreme hostility and belligerence to such a degree that it became impossible for them to have productive meetings with him for the purpose of carrying out the business of the firm.

He was known to them as a licenced firearm holder and had on a number of occasions threatened the life of the first plaintiff. On numerous occasions he had accused the plaintiffs of dishonesty in relation to clients funds held as partners - They complained tnat the defendant breached his fiduciary duty to them by converting to his own use and benefit the sum of $100,000.00 received from Mr. Ray Hadeed as fees for legal services provided by the firm.

Files taken from the firm by the defendant have not been returned despite requests for them. He had instructed staff members and the partners that they were not allowed to take conduct of any new matters in the name of Clinton Hart & Co. He had advised clients that the firm was dissolved and that they should take their matters to other attorneys-at-law or to himself. The new partners had been permitted by the owners to occupy the premises but the defendant, until restrained, continued to occupy offices previously occupied by him.

Mr. Ray Hadeed, in an affidavit filed on the 6th of January, 2000, confirmed that he paid $100,000.00 to the defendant on the 4th of August, 1998, as Attorney's fees for legal services at the request of the defendant and not as financial consultant or as banker.

Individually, the plaintiffs have complained about the defendant's behaviour. On the 27th of May, 1999, Mr. Foster wrote to the defendant saying inter alia; "your conduct generally and in particular over the past few days has been characterized by

rudeness, hostility and lack of respect for your partners." On that same day Mr. Ayoub wrote ,. "I feel it would be pointless to embark on a discussion of the items listed on the proposed agenda prior to meeting to deal with the fundamental and chronic under lying dysfunctionality of the partnership as currently constituted and conducted. On the 31st of May, 1999, Mr. Hanna wrote, "I cannot deny that in the past oral requests for formal meetings and/or formalization of informal gatherings have been brushed aside by you as being unnecessary, frivolous and a waste of time.------." Again, on the 31st of May, 1999, Mr. Ayoub wrote "what has happened is that as a result of your rude aggressive and (attemptedly) intimadatory conduct towards me over the past many months, the interpersonal relationship between us has deteriorated to such an extent that I have found it best to avoid having unnecessary casual contact with you."

Miss Arlene Dunn, a former secretary in the firm confirmed that at the defendant's request she gave him in August, 1998, the file concerning a matter of Ray Hadeed and Century National Bank - up to when she left the firm on the 28th of September, 1998, the defendant had not returned the file.

Miss Dorrett Headley has been a legal secretary at the firm since 1980, and secretary to the defendant from about October, 1996. With reference to the defendant's affidavit of December 22, 1999, she said at paragraph 4 of her affidavit sworn to and filed on the 6th of January, 2000, "that in relation to paragraph 11 of the said Affidavit it is incorrect for the defendant to state

that he had never been hostile and belligerent to his former partners. On a number of occasions I have observed and heard the defendant having discussions with the first plaintiff about partnership business in the defendant's office and during these discussions I have heard the defendant abusively referring to the first plaintiff and using expletives in this regard. These comments were usually made by the defendant in his office while shouting with his office door open and members of staff including myself, Mr. Webley Johnson, a Legal Clerk, and Mrs. Jacqueline Whitely have either heard or witnessed this abuse."

In response to all these allegations contained in the plaintiffs' affidavit of the 14th of December, 1999, the defendant in his affidavit of the 22nd December, 1999, at paragraph 3 referred to it as consisting "falsehood and half-truths calculated to mislead this Court into granting the injunction ordered against me."

He denied that there was hostility or belligerence by him to his former partners. Instead it was the plaintiffs deliberate exclusion of him from involvement in the business of the partnership that the relationship became strained. He denied ever threatening the first plaintiff and regarded allegations against him as malicious. Allegations of dishonesty and fraud were maliciously unture. He admits receiving $100,000.00 from Mr. Hadeed in his capacity as a financial consultant and not for legal services in the business of the partnership.

At paragraph 38 (b), he states:

> "That they alone and to my exclusion, now have unrestricted access to all the accounting records and clients' files of the dissolved firm, and have

> the opportunity for tampering if they are so inclined with these records to alter the true picture of the state of affairs between us as contending partners." And at paragraph 38(e). "That there is now the opportunity available to the plaintiffs while I am so excluded, to direct income belonging to the dissolved partnership to the coffers of their new partnership."

This led Mr. Morrison to refer to this as sheer conjecture and a slur on the partnership.

With respect to the interim injunction the defendant said "the continuation of the prevailing injunction is oppressive, inequitable and clearly in restraint of trade. He complained that "I have been effectively seperated from my clientele and barred from practising my profession as an Attorney-at-law."

In his affidavit of the 10th of January, 2000, the defendant said that Miss Headley's allegations of him using abusive language and using expletives to the first plaintiff were unture. It was also untrue that he told anyone he would not object to the use of the name Clinton Hart & Co. by the plaintiffs if there was an agreement to dissolve the firm. Despite efforts by him to obtain information from the plaintiffs pertaining to all payments received by them for work done by the old partnership, this had been denied by them.

Mr. Morrison, on behalf of the plaintiff, made oral submissions in support of their summons for interlocutory injunction and subsequently submitted in writing a summary of those submissions which are attached.

Mr. Daly in reply asked the Court to refuse the application. He noted that to date no Statement of Claim had been filed in support of the Writ of Summons.

Counsel submitted that in a dissolution, a winding up should take place - See Cordery on Solicitors, paragraph 422, page 485. He further submitted that the injunction being sought was substantially the relief the plaintiffs were claiming in the action. He referred to claim for Declaration - There was no need for this if injunction is granted.

Accounts:- There was no dispute between the parties on this claim.

Damages for fraud - This could not be a basis for injunction. This arose before the partnership was ever formed.

Injunction:- If granted, there will be no need for a trial - See W.D. Miller and Parks v. O.Cruickshank, 23, J.L.R. (1986) P.15U also Redco Holdings Ltd. v. The Proprietors Strata Plan 88 and Negril Beach Club Ltd.

Counsel referred to Mr. Hadeed's declaration as a masterpiece of evasion and double talk . See Lindley on Partnership 15th Edition page 492 - 493 and Aas vs. Benbow (1891) 2 CL. 214. Defendant not bound to account for the benefit obtained by him in connection with the new company. This claim had no basis for injunction; damages can suffice. The fact of the payment of $100,000.00 was thrown in to muddle the water to assist their case for injunction and to tarnish the defendant's name.

Mr. Daly submitted that what was being sought was a mandatory injunction but that the evidence brought by the plaintiffs failed to meet the standard which is require for interlocutory mandatory injunction which requires an unusually strong and clear case such that the Court would feel a high degree of assurance that at the trial it would appear that the injunction was rightly granted. A prohibitory injunction is one that tends to preserve the status quo until rights of the parties are determined at the trial.

Counsel referred to the case of Esso Standard Oil v. Lloyd Chan (1988) 25 JLR P. 110 at 112 - an interlocutory mandatory injunction will only be granted "where the injury is immediate, pressing, irreparable and clearly established and also the right sought to be protected is clear."

See also Victor Beck v. The Jamaica Record Ltd. (1992) 29 JLR. P. 135 - A mandatory injunction is more drastic than a prohibitory injunction and consequently the standard of proof required is higher.

With reference to the fiduciary relation of partners, counsel referred to Lindlay's on Partnership, chapter 3 page 33 - The general nature of partnership at page 35 - when a partner receives money belonging to the partnership he does not receive it in a fiduciary capacity. See Piddock v. Burt - (1894) 1 ch. 343.

Mr. Daly submitted that the case of Benham v. Grey (supra) cited by the applicants is no authority for saying that the defendant had no right to be on the premises after the partnership was dissolved. The letter from the Attorneys-at-law

Givans and Brown saying that the property was now rented to the new partnership cannot render the defendant a trespasser and keep him from the offices.

With reference to the allegations on which the plaintiffs were relying for injunction, Mr. Daly submitted that all of this put together amounts to nothing more than saying that the defendant was contankerous, and contentious and in relation to the clients accounts, nit-picking and overbearing in relation to the accounting staff especially Miss Ferguson who appears on the evidence to be singularly incompetent. The application for the injunction was based on their belief that the defendant would be applying for a receiver following the dissolution.

Mr. Daly submitted that the plaintiffs were complaining that the defendant did what he was entitled to do and using that as basis for injunction and inappropriately labelling it as acts undermining and causing irreparable damage to the new partnership. They had been left holding the bag with a $98M. deficit for which they had sued Mr. Chen and were considering suing others. Trial balance of clients trust accounts had not been struck for over a year and the accounts were in such a condition that the auditors recommended that Miss Ferguson should be fired.

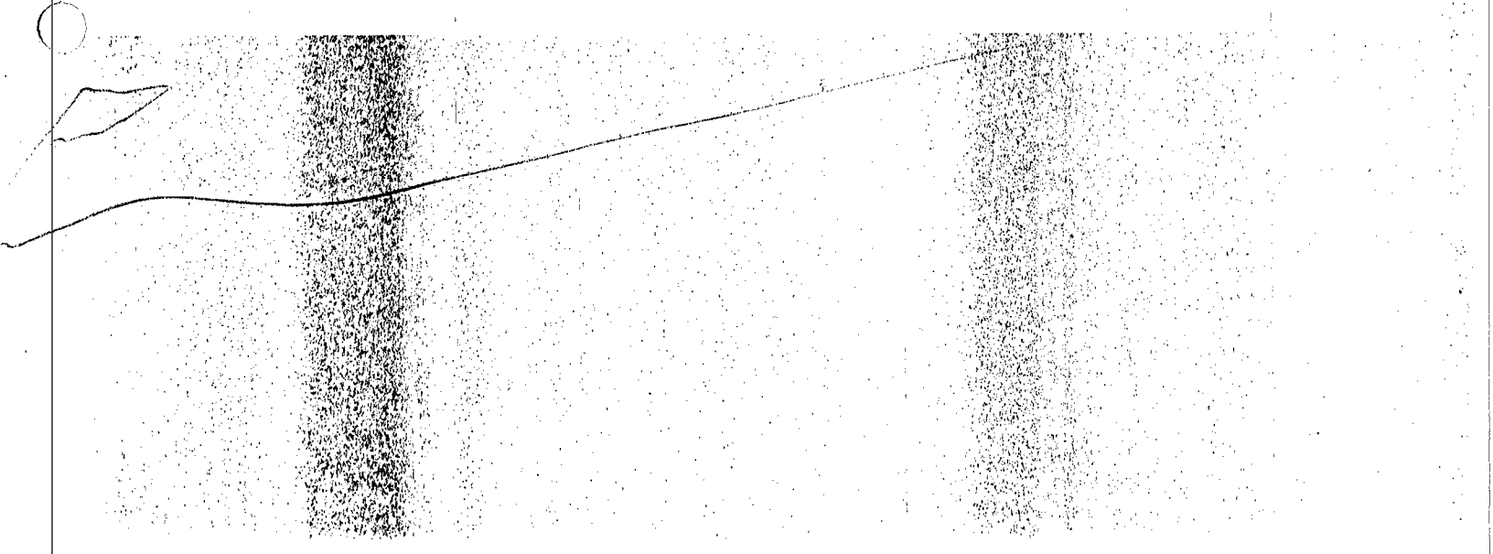
With reference to the allegations of threats, the only partner to complain was Mr. Hanna; there was no date as to when this took place; terms of other threats not given. There were no allegations that the defendant caused any violence to any person.

Even if the Court finds that this was not a mandatory injunction being sought and rejected submissions that the injunction was the major and substantial part of the relief sought, injunction should not be ordered in these interlocutory proceedings. Counsel further submitted that even on a balance of convenience the defendant will suffer greater and more substantial and irreparable damage by the grant of the interlocutory injunction than the plaintiffs will suffer from its refusal.

If the injunction was granted it would deprive the defendant of his just share in the management and winding up of the partnership, deprive his clients of their right to have him finish their incompleted work and deprive the defendant of his right to safeguard the property and assets of the dissolved partnership in the interest of the creditors as well as himself.

The defendant had already suffered irreparable damage to his reputation by the allegations made against him in support of the ex-parte injunction which he had no chance to defend. The grant now of an interlocutory injunction would perpetuate the harm already done but on a much wider scale as it would affect his entire clintele and virtually put an end to his career as a practising attorney-at-law.

With respect to disposal of goodwill, counsel referred to Lindley on 'Partnership, 15th Edition, page 255 - it seems impossible to hold that on a dissolution of a partnership whether any partner can continue the old business in the old name for his own benefit, unless there is some agreement to that effect. The case of Burchell v White



must be read with reservation and caution.

In relation to extension of the interim injunction, Mr. Daly stated that it has effectively stripped him of his legal rights to practise as an attorney, prevented him from having contact with his old clients; denied dealing with clients funds; he cannot discharge his fiduciary duties to his clients. If Court further extends interim injunction it should be modified by certain provisions which he indicated.

This was the end of submissions by the defendant's Counsel. Mr. Morrison responded to the defendant's submission in writing covering five pages which are attached hereto.

Mr. Morrison made application for an amendment to the summons for interlocutory injunction. Mr. Daly, stated he had no objection and the application was granted in the terms set out in an amended summons filed on the 4th of February, 2000.

This brought to an end the hearing of evidence and submissions on the summons for interlocutory injunction. Two other summons, 25 both by the defendant, were before me for deterermination and it may be appropriate to mention them here. They were for the appointment of a receiver, the dissolution of the interim injunction and for injunction to restrain the plaintiffs. This was dated and filed on the 29th of December 1999. The other was an application for partnership accounts and enquiries dated and filed on the 3rd of January, 2000. By agreement of Counsel on both sides and with the consent of the parties the Court made an order for accounts to be taken in the terms and conditions agreed upon.

With reference to the application for an injunction to restrain the plaintiffs from carrying on under the name of Clinton Hart & Co., regard should be had to what the defendant said at paragraph 13 of his affidavit filed on the 11th of January, 2000:

> "Regarding paragraph 22 of the aforesaid affidavit of the plaintiffs, I say it is untrue that I told anyone I would not object to the use of the name. What I in fact told the first plaintiff was that if there was an agreement to dissolve the firm, and I was compensated for the goodwill that I shared in it and its name, there could be no problem as to the continued use of the name."

It is patently clear that the defendant was here referring to compensation in damages which would be due to him for goodwill. It is well settled law that where damages is an adequate remedy and the other party is in a position to pay, no interlocutory injunction should normally be granted however strong the applicant's claim appears to be at that stage. See American Cyanamid Co. vs. Ethican Ltd. (1975) 1 A.E.R. p.504 - 510; See also paragraph 26 of the defendant's affidavit filed 22nd December, 1999, where he complains that the plaintiffs have continued using the former partnership name "and have failed to offer or pay compensation to me for its use."

The defendants' application for injunction against the plaintiffs is therefore refused.

This leaves for consideration the summonses for the dissolution of the interim injunction and the appointment of

a receiver. The first is tied up with the plaintiff's application for interlocutory injunction and they will be determined together.

CONCLUSION

It appears that my first task is to determine what is the nature fo the injunction being sought by the plaintiffs. Counsel for the defendant claims it is mandatory injunction and therefore a different test was to be applied to the grant of a prohibitory injunction. On the other hand counsel for the plaintiffs maintain that it was a prohibitory injunction being sought and therefore the principle laid down in the American Cyanmid case should be followed.

After listening to the submission from both sides and reviewed the authorities cited, I hold that the plaintiff was not seeking for an order for the defendant to do anything. Instead it was to restrain him from doing certain acts. It follows therefore that this was an application for an interlocutory prohibitory injunction, and I so find.

I further find that the plaintiffs have established that they have a good arguable claim to the rights they seek to protect; that the claim is not frivolous or vexatious, that is, that there are serious questions to be tried; that damages would not be sufficient remedy; that on the balance of convenience, more harm will be done by refusing the injunction than by granting it.

The defendant contends that the granting of the interlocutory injunction will have the practical effect of putting an end to the action and that injunction ought not to be

granted in such circumstances. See NWL Ltd. v. Woods (1979) 3 AER p. 614. However, this claim is unsupported by the evidence as it is clear that the allegations of fraud remains outstanding and also the plaintiffs claim of the right to practice under the former name of Clinton Hart & Co.

While not attempting at this interlocutory stage of the litigation to resolve conflicts of evidence nor to decide difficult questions of law which are matters to be dealt with at the trial, the conduct of the parties prior to the application for injunction being made is an important factor to be taken into consideration by the Court.

If the evidence of plaintiffs, members of staff and others as to the behaviour of the defendant is proved at the trial to be true, then no partnership, legal or otherwise could function satisfactorily in that scenario . Indeed it would be chaotic and utter confusion.

In the old case of Williamson vs. Rodgers (1864) 46 E.R. page 298 at 307 Lord Justice Turner had this to say

> "No doubt, if the covenant is clear and the breach of it is clear and serious injury is likely to arise from the breach, it is the duty of the Court to interfere before the hearing to restrain the breach."

More recently, in the case of Pride of Derby and Derbyshire Anglin Association Ltd. vs. British Celanese Ltd. (1952) Ch. 149 page 181 - it is now regarded as settled that:

> "The rule that where the plaintiff has established the invasion of a common law right and there is ground for believing that without an injunction there is likely to be a repetition of the wrong, he is in the absence of special circumstances, entitled to an injunction against such repetition."

For these reasons, the plaintiffs application for interlocutory injunction against the defendant is hereby granted in terms of the amended summons filed on the 4th of February, 2000 and attached hereto. Accordingly, the amended summons to dissolve the exparte injunction against the defendant is dismissed.

Re Appointment of Receiver

In this summons, Mr. Donald Scharschmidt, Q.C. along with Miss Katherine Francis represented the plaintiffs; the representation for the defendant remained the same.

The defendant in his affidavit of the 11th of January, 2000, at paragraph 16, states that "the appointment of a receiver is the only just way of winding up the dissolution partnership especially in circumstances where I have been restrained from entry on the premises of the dissolved partnership which still exists as a business until it is wound up, and excluded from the management of the business and access to its records generally."

Mr. Daly, Q.C. submitted that a consequence of the dissolution is a winding up with accounts being taken and unless the partners can agree on some other course of action to determine the assets and liabilities and how they are to be discharged, a receiver ought to be appointed. The plaintiffs have not been doing anything about winding up of the old partnership. He referred to Halbury's Laws of England, 3rd edition, volume 28,

at paragraph 1081 - circumstances which justify appointment of receiver. The Court will not usually appoint a receiver on an interlocutory motion before the trial of an action in which substantial issues are raised, but it will do so if the property is in danger, or if the partnership has been dissolved.

Mr. Daly referred to the letter from the bank and submitted that it appears that there is sufficient evidence that the partnership assets were in jeopardy. Further, he submitted that the plaintiffs were acting inconsistently with their duty on dissolution to carry out an orderly winding up of the partners assets and liabilities. The defendant was being excluded from the participation in the process that ought to take place on a dissolution by virtue of an interim injunction.

There has been allegation against the defendant of mis-appropriation of partnership funds and allegations that the plaintiffs fear that there may be further mis-appropriation and it is vitally important to the defendant's good name that these allegations be dealt with by an entirely independent body, - Most importantly, the need for an independent objective assessment by someone whose only duty is to the Court to decide what, if any, action should be taken to realize claims of the partnership against persons who are prima facie, tort-feasors and jeopardized the viability of the partnership.

The appointment of a receiver is the only practical way of ensuring that the rights of all concerned, namely, the plaintiffs, the defendants, the clients and the creditors of

the dissolved partnership would be properly and appropriately protected. The appointment of a receiver would not affect the legal position of the plaintiffs for the following reasons. The receiver would be appointed only in respect of the dissolved partnership and the plaintiffs would be able to carry on their practise under the new partnership. They would be entitled to complete unfinished business on their hands at the time of dissolution. They would be entitled to retain those clients of the dissolved partnership who wish to remain with them under the new partnership. Accordingly, a receiver ought to be appointed as applied for in the defendant's affidavit.

In response to affidavit by the plaintiffs filed on the 3rd of February, 2000, Mr. Daly commented that it simply re-enforces the preposition that the new partnership is a continuation of the old. Although they are seeking an injunction to restrain the defendant from interfering with the bank accounts of the new partnership they have not considered it worthwhile to say that they have opened a new account in the name of the new partnership.

The plaintiffs in their joint affidavit of the 6th of January, 2000 have stated at paragraph 34 that the circumstances disclosed in the affidavits filed in this matter are not such as would warrant or justify the appointment of a receiver. Such an appointment is unnecessary and the attendant costs and negative publicity would have a profound and prejudicial effect on the professional practice of parties and on the interest of their clients.

In response to the defendant's summons for the appointment of a receiver, the plaintiffs in a joint affidavit filed on the 3rd of February, 2000, stated "that apart from being completely unwarranted in the circumstances, the appointment of a receiver would do irreparable damage to the plaintiffs and the defendant in their professional capacities and would be unworkable in that supervision of clients matters by the receiver would be a breach of clients confidentiality and would prevent the attorneys conducting the matters from discharging their responsibilities as attorneys-at-law to exercise the full independent professional judgment to which the clients are entitled.

Mr. Scharschmidt Q.C. on behalf of the plaintiffs submitted that dissolution per se does not entitle a party to have a receiver appointed - He referred to Pollack on Law of Partnership, 15th edition, page 103 - footnote - There is no absolute right to have a receiver appointed after dissolution, but the Court will generally appoint a receiver on the application of a partner. Counsel referred to Kerr on Law and Practice as to to Receivers and Administrators - 17th edition, page 61 at 63. The Court will not, as a matter of course appoint a receiver of the partnership assets, even where a case of dissolution is made. And at page 64 - In the case of a professional firm, since the appointment of a receiver and manager may easily do more harm than good, the Court will be reluctant to make the appointment in such cases unless it is unavoidable.

See also Floyd v. Cheney and Another (1970) 1 A.E.R. - 446, at page 452, where Megarry, J, said:

> "Now, in the present case I do not think that any real case of jeopardy has been made out. The plaintiff is a professional man and there are no reflections on his integrity. The case is accordingly one in which although the Court may, in a proper case, appoint a receiver, it should be slow to do so, since the existence of any partnership is in issue and has yet to be resolved, and there is at least the possibility of serious injury to the plaintiff. I do not think that it can be denied that news of a receiver of a business or a professional practice has been appointed is news that may well cause members of the general public to hesitate in resorting to that business or practice. It may indeed be that some of the inferences that the public would draw from the appointment of a receiver would be quite wrong; but one cannot expect the public to have a precise appreciation of every aspect of the institution of receivership, one must remember that a professional man's reputation is a delicate blossom, which once injured, can often never be fully restored."

Mr. Scharschmidt further pointed out that it is public knowledge that at Clinton Hart & Co. there is litigation pending in that certain allegations made against a former partner Vincent Chen and a former employee Michael Matthews in which millions of dollars are involved. It was as a result of these problems why the partnership which was dissolved on the 6th of December, 1999,

came into being. He submitted that the appointment of a receiver would be creating problems with the new partnership as well for all the partners of the old partnership.

There was nothing before the Court to say that there is danger to any asset of the dissolved partners - There is no attack on the integrity of the plaintiffs - The Court should therefore refuse the application for appointment of a receiver.

After dissolution a partnership continues for winding up business on hand. There is no necessity for the appointment of a receiver - See Halsbury's Laws of England, 3rd edition Volume 28, paragraph 1221.

Re use of name of Clinton Hart & Co.

Counsel submitted that the name of a partnership which is dissolved may be continued to be used by members of the former partnership provided that the members using the name do not expose any former partner who is not in the new partnership to any risk of liability - See Burchell v Wilde (1900) 1 ch. page 551 Halbury's Laws of England - Volume 35, 4th Edition page 132. Lindley and Banks on Partnership 16th Edition page 205.

In response to new issues raised by the plaintiffs, Mr. Daly further submitted that receiver may be appointed for the following reasons:-

Where one of the partners is delaying the winding up;

Where there is a complete dead-lock between the partners; - See Sobell v. Boston (1975) 1 W.L.R. 1587 at 1593;

Where the assets of the partnership are in jeopardy - See Floyd v. Cheney (1970) 1 A.E.R. - 446;

Where there is allegation of fraud;

Where the due winding up of the partnership is endangered - See Goodman v. Whitcomb (1820) 1 JOC W 589;

From the above it appears that the main issue being questioned is "are the assets of the partnership in jeopardy?" Counsel for the defendant referred to the report from the bank showing that since the dissolution, there has been dimunition of the funds in some of the accounts. But does it necessarily follow that this reflects anything untowards. It could easily be due to genuine transactions which the plaintiffs would be entitled to perform on behalf of the clients. In any event, as Counsel for the plaintiff pointed out, this would come under the purview of those taking the account and enquiries as agreed upon by the parties. In addition, the new partners have given an indemnity to the bank concerning these clients trust accounts - See paragraphs 7 and 8 of the plaintiffs affidavit dated 3rd February, 2000.

The plaintiffs fear that the appointment of a receiver would do irreparable damage to them in their professional capacities. This was recognized by Mr. Justice Meggary in Floyd v. Cheney when he remarked:-

> "A professional man's reputation is a delicate blossom which once injured, can often never be fully restored."

Based on the evidence and submissions by Counsel, it appears to me that the appointment of a receiver would do more harm than good. All the fears entertained by the defendant seems to be more apparent than real. Any damages suffered by the defendant would be satisfied under the plaintiffs undertakings.

In the event, the application for the appointment of a receiver is refused.

JUDGMENT

1. Defendant's application for order for Accounts, and Enquiries granted by consent.
2. Plaintiffs' application for injunction against the defendant granted in terms of amended summons for interlocutory injunction filed 4th February, 2000.
3. Defendant's application to discharge interim injunction refused.
4. Defendant's application for injunction against the plaintiffs refused.
5. Defendant's application for appointment of a receiver is refused and summons is dismissed with costs to the plaintiffs to be taxed if not agreed.

SUMMARY OF PLAINTIFFS' SUBMISSIONS

SUIT NO C. L. 1999/H-143

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

BETWEEN	**PAUL A. HANNA**	**1ST PLAINTIFF**
A N D	**PATRICK W. FOSTER**	**2ND PLAINTIFF**
A N D	**RICHARD J. AYOUB**	**3RD PLAINTIFF**
A N D	**PHILIP E. J. FORREST**	**DEFENDANT**

The Plaintiffs have in the affidavits filed in support of their application for an interlocutory injunction clearly demonstrated what it is they fear that the Defendant will do against which they need protection. The salient points are as follows:

i. The Defendant has breached his fiduciary duty to the Plaintiffs by appropriating fees belonging to the partnership for his own use and benefit. Should the Defendant be allowed to return to the premises he may attempt to remove documents so as to frustrate the accounting being sought by the Plaintiffs and/or the determination of any other partnership monies he may have also misappropriated.

ii. The Defendant has removed partnership property in the form of documents, in particular the file relating to insurance coverage as well as others: see **Floyd v. Chaney**

iii. The Defendant's abusive, belligerent, intimidatory and threatening behaviour towards the Plaintiffs and members of staff results in a tense, stressful and non-productive atmosphere which is not conducive to the carrying on of a business. In fact, as a result of the Defendant's behaviour towards the 1st Plaintiff coupled with the fact that the Defendant is a licensed firearm holder, the 1st Plaintiff is in fear of his life especially now that these proceedings have commenced

iv. The Defendant's actions since the 6th of December, 1999 as regards

the firm's banking arrangements has severely hampered the carrying out of clients' work in that it has impaired the Plaintiffs' access to client funds, thus leaving the Plaintiffs open to be liable for negligence if clients' work cannot be completed for this reason.

v. The Defendant's conduct up to and including the 14th of December 1999 demonstrates the Defendant's sole intent to be a disruptive force within the firm with a view to undermining and damaging the plaintiffs in their efforts to carry on a law practice. It is clear from the evidence contained in the affidavits and the exhibits that the Defendant has resisted every attempt by the Plaintiffs to co-exist and conduct a partnership in a harmonious and productive manner. His presence on the premises of the new partnership will only serve to negative any attempts by the Plaintiffs to continue the partnership as was always and is clearly their right and intention.

vi. The Defendant no longer has the right to entry to the partnership premises at 58 Duke Street by virtue of his notice and also because he no longer has the permission of the owner to occupy the premises and as such has no right to do so: **Benham v. Gray.**

vii. If the injunction is not granted and the Defendant not restrained, damages would not be a sufficient remedy in the instant case as the damages/injury caused would be outside the scope of monetary compensation and would be difficult to assess. Further, without the injunction, the Defendant would be free to interfere with the continuation of the firm's business, frustrate the objectives of the Plaintiffs to continue the partnership and place them in an excruciatingly difficult situation with the creditors of the firm and to earn a livelihood. On the other hand, if the injunction is granted, the Defendant would suffer no harm. The Defendant in serving a notice of dissolution on the Plaintiffs has clearly indicated his intent and desire to no longer be in a law partnership with the Plaintiffs. The Defendant

is free to practice law anywhere he desires and those clients who wish him to continue representing them are free to have him do so. The granting of the injunction would not prevent an accounting from taking place, so as to ascertain what if anything is due to the Defendant. Should the Defendant suffer any harm, damages would readily compensate him as is his evidence before this court.

viii. The injunction is absolutely needed to protect the Plaintiffs' rights and to preserve the status quo of the parties until there can be a determination of the matter and in particular, the Plaintiffs' right to continue on in practice under the style and title Clinton Hart & Co. which from an examination of the law it appears that the Plaintiffs have every right to do. The court must ask itself this question, "what if after trial of this matter, it is determined that the law is as the Plaintiffs contend and they are legally entitled to continue on in practice under the style and title of Clinton Hart & Co?". The damages would be immeasurable if they had not been allowed to do so.

ix. On the other hand damages would be an adequate remedy for any damages, and it is not being stated that there would be any, which may result to the Defendant . Payment for the value and share of the partnership and/or any goodwill would be quantifiable and a sufficient remedy for the Defendant.

PLAINTIFFS' RESPONSE TO DEFENDANT'S SUBMISSIONS

Mandatory v. Prohibitory Injunction

1. What right(s) are the Plaintiffs seeking to protect? –

   a) The right to continue on in partnership under the name Clinton Hart & Co., as is the first relief the Plaintiffs are seeking in the Endorsement. The Defendant's presence in the firm for the purpose of winding up would be diametrically opposed to that of the Plaintiffs, which is to continue on the with the partnership. His presence on the premises to wind up would cause chaos and confusion for the plaintiffs, staff and most importantly the clients. This is particularly so in light of these proceedings which have commenced and the evidence which has been tendered by virtue of the various affidavits.

   b) The Plaintiffs are seeking protection from any interference by the Defendant, which interference the evidence has shown, is of a destructive nature and not conducive to the conduct of any proper business. And the destruction of the partnership would have been the result had the Defendant been allowed to remain on the premises whether for the purpose of winding up or not.

   c) The Plaintiffs are seeking protection from the Defendant's unpredictable and potentially dangerous behaviour. The 1st Plaintiff has given evidence that he is in fear of his life, we would ask that this court accept this evidence as credible and compelling.

2. Counsel for the Defendant is misguided when he contends that the Plaintiffs are seeking a mandatory injunction. A mandatory injunction is one the terms of which require something to be done. The terms of the injunction being sought by the Plaintiffs are clearly prohibitory as they

seek to restrain the Defendant from doing certain acts and not to perform particular acts or to bring about a particular state of affairs. In support of his contention, the Defendant placed reliance on the cases of Esso Standard Oil v. Lloyd Chan 25 JLR 110, Victor Beek v. The Ja Record Ltd. (1992) 29 JLR 135 and Broadway Import v. Palace Amusement Ltd. (1992) 29 JLR 163. Apart from the fact that these cases can be factually distinguished, these cases set out the standards to be met by a party in applying for a mandatory injunction and not a prohibitory injunction as is being sought here.

3. In Esso the respondent was a tenant of the appellant. The appellant gave notice terminating the lease and demanded immediate vacation of the premises; thereby, closing down the operations at the leased premises. The respondent immediately sought and obtained an exparte injunction to restrain the appellant from arbitrarily closing down the operations; in other words, to force the appellant to keep the operations continuing until a full determination of the matter. Also, the respondent did not fully disclose certain material facts to the court, a critical factor in determining whether to grant an injunction: see pg.112 (d) – (h). Campbell JA set out the applicable principle to the grant of a mandatory injunction which is comparable in nature and function to a mandamus; that it will ordinarily be granted only where the injury is immediate, pressing, irreparable, and clearly established and also the right sought to be protected is clear. Again, the Plaintiffs are not seeking a mandatory injunction, as they are **not** requiring the Defendant to do any particular act. The facts are entirely different from those in the Esso case.

4. In Victor Beek the term of the injunction being sought in that case at page 137 (d) is clearly on the face of it an application for a mandatory injunction.

5. In Broadway a case similar to that of Esso Standard as the plaintiff was applying for an injunction requiring the Defendant to do positive acts to restore the contractual relationship between the parties. In fact, Counsel

for the plaintiff in this case ultimately conceded the similarity to the court. The court therefore was bound to follow the judgment in Esso.

6. The reference to Lindley at page 33 – 35 on the nature of a partnership is one that the Court need pay little attention; as its relevance would arise at trial and not at this juncture. However, for purposes of completeness, let us examine the two points Counsel placed greatest emphasis on:

(a) *That the case of Benham v. Grey was not applicable because a firm cannot be tenant* - That sentence must be read in full and when so done, the context will be fully understood. That is, a firm cannot be a tenant and therefore cannot enjoy the protection of the rent restriction act. In the instant case, the letter from Givans & Brown does not state that the firm is a tenant but that the partnership, i.e. the partners have been allowed to possess the premises.

(b) That a partner receiving money belonging to the partnership does not receive it in a fiduciary capacity – Counsel 'latched on' to this principle as one which could exonerate his client but before he be allowed to do so, the case from which this principle is extracted should be examined so as to obtain a full understanding and to recognise that it can be distinguished from the case before your Lordship. That is the case of Piddocke v. Burt (1894) 1 Ch 343.

"American Cyanamid"- The principles governing the grant of an interlocutory prohibitory injunction

In their submissions Counsel for the Defendants skillfully skirted the applicable principles of law and in doing so, made reference to only two cases of any relevance.

1) The cases which the Defendant has sought reliance can all easily be distinguished.

(i) W.D. Miller & W. Parkes v. O'Neil Cruickshank (1986) 23 JLR 154 – Here the plaintiff, a student athlete, was seeking a declaration that he was eligible and entitled to participate in a cricket competition and represent his school in a particular school year, 1986 –1987. He was granted an interim injunction restraining the principal and Cricket secretary from prohibiting and preventing him from participating in the competition. It is clear that on these facts it is obvious that the grant of an interlocutory injunction would grant allow the Plaintiff to gain his entire objective and obviate the need for trial. That is not the case in the matter. The interlocutory injunction would not grant the Plaintiffs the declaratory relief which they seek; it does not award the Plaintiff the damages for fraud nor does it afford them the accounting which they seek. Further, the evidence in the case was thus far incomplete and issue of interpretation of the critical ISSA eligibility rule had yet been determined and it was Mr. Justice Rowe's view that in light of that, the possibility of the plaintiff succeeding was doubtful at best. Finally, the court found that in the particular circumstances which existed, the balance of convenience lied in not granting an injunction for to do so would cause an injustice to the Defendant. Posing the question **"what can a court do in its best endeavour to avoid injustice?"** A question which if posed in this matter would warrant the granting of the injunction.

(ii) Rodeo Holdings Ltd. v. The PSP 88 & Anor. – Here the plaintiff a registered proprietor of an apartment where one defendant was manager and the other the proprietor of 76 strata lots in PSP 88. The plaintiff alleged misappropriation and improper accounting. All the reliefs sought (see pg. 514) involved the appointment of an Administrator which was

term of the injunction being sought by the Plaintiff. This is entirely not the case in the matter before your Lordship. Examining the reliefs sought in Rodeo, it is patently obvious as counsel for the defendants, Ms. Hillary Philips submitted that the appointment of the Administrator was the "sole substantial relief" claimed in the action. To grant the injunction here would not as Mr. Justice Panton stated at pg. 516 " would defeat the purpose of the action".

Both of the above cases relied on the case of Cayne & Anor v. Global Natural Resources plc [1984] 1 All ER 225. There the court held that where the grant or refusal of an interlocutory injunction will have the practical effect of putting an end to the action, the court should approach the case on the broad principle of **what it can do in its best endeavour to avoid injustice, and to balance the risk of doing an injustice to either party**.

It is indeed ironic that Counsel should seek to make submissions and rely on the above cases, when the Defendant is seeking by virtue of an application for interlocutory injunction the substantive relief set out in his counterclaim.

2) It is essential that this Honourable Court in deciding whether to exercise its discretion and grant the injunction that Lord Diplock's principles be borne in mind.

(a) The plaintiff must establish that he has a good arguable claim to the right he seeks to protect;

(b) The Court must not attempt to decide this claim on the affidavits, it is enough if the plaintiff shows that there is a serious question to be tried.

(c) If the plaintiff satisfies these tests, the grant or refusal of an injunction is a matter for the exercise of the court's discretion on the balance of convenience

The factors relevant to the exercise of the discretion:

i. Whether damages would be a sufficient remedy; if so an injunction ought not be granted. Damages may also not be sufficient if the wrong is

(a) irreparable, or

(b) outside the scope of pecuniary compensation, or

(c) if damages would be very difficult to assess;

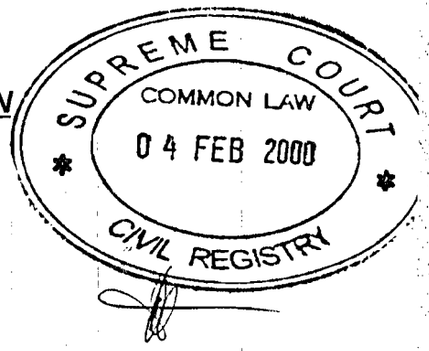
ii. Whether more harm will be done by granting or refusing an injunction.

3) The references by Counsel for the Defendant to Lindley at pages 492 – 3 on partnership demonstrate that there are serious issues to be tried and that the Plaintiffs have a good and arguable claim. Also too the case of Aas v. Benham. These are issues and matters for a trial judge but not for your Lordship.

AMENDED

SUMMONS FOR INTERLOCUTORY INJUNCTION

SUIT NO. C. L. 1999/ H-143



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

BETWEEN	*PAUL A. HANNA*	*1ST PLAINTIFF*
AND	*PATRICK W. FOSTER*	*2ND PLAINTIFF*
A N D	*RICHARD J. AYOUB*	*3RD PLAINTIFF*
A N D	*PHILIP E.J. FORREST*	*DEFENDANT*

LET ALL PARTIES CONCERNED attend before a Judge in chambers at the Supreme Court, King Street, Kingston on the day of January 2000 at 10:00 o'clock in the forenoon or as soon thereafter as Counsel may be heard on the hearing of an Application on behalf of the Plaintiffs for an Order that:

1. *The Defendant by his servants and/or agents or otherwise*

   (a) *Be restrained until the trial of this action from entering or remaining on the premises situated at 58 Duke Street, Kingston from which the law partnership of Clinton Hart & Co. operates.*

   (b) *Be restrained until the trial of this action from dealing with or interferring with the assets and/or drawing cheques and/or issuing mandates with respect to or interfering with the bank accounts which now exists in the name of the Partnership constituted on the 7th of December 1999.*

   (c) *Be restrained from and/or in any way dealing with the conduct of the business of the partnership constituted on the 7th December 1999 and/or directly communicating with the clients of the said partnership until the trial of this matter and or further Order.*

(2) *The Plaintiffs give the usual undertaking as to damages.*

(3) *Costs of this application is to be costs in the cause.*

TAKE NOTICE that at the hearing of this application the applicants will refer to and rely on the Affidavit of Paul A. Hanna, Patrick W. Foster and Richard J. Ayoub sworn to on the 14th day of December, 1999.

DATED the day of , 2000

TO: The Registrar
Supreme Court
King Street
Kingston

AND TO: The Defendant
c/o His Attorneys-at-Law
Messrs. Daly, Thwaites & Campbell
62 Duke Street,
Kingston.

FILED by VERNA BENNETT of No. 14 -16 Duke Street, Kingston, Attorneys-At-Law for and on behalf of the Plaintiffs herein