

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. 2002/M-08

**CORAM: THE HONOURABLE MR. JUSTICE WOLFE, CHIEF JUSTICE
THE HONOURABLE MISS JUSTICE BECKFORD
THE HONOURABLE MR. JUSTICE MARSH**

BETWEEN	ICWI INVESTMENTS LIMITED	1ST APPLICANT
AND	PATRICK ROSSEAU	2ND APPLICANT
AND	IVOR CAMPBELL	3RD APPLICANT
AND	THE FINANCIAL SERVICES COMMISSION	RESPONDENT

Dr. Lloyd Barnett and Dave Garcia for the Applicants

Miss Ingrid Mangatal and John Francis for the Respondent

Ransford Braham for L.O.J. Holdings Ltd. The Intervenor

HEARD: July 17, 18, 19, 25, 2002 July 10 and December 19, 2003

WOLFE, C.J.

This claim is for an order of certiorari to quash a decision made by the Financial Services Commission exempting L.O.J. Holdings Ltd. from having to make an offer to minority shareholders of Life of Jamaica, consequent upon the acquisition by L.O.J. Holdings Limited of the Government of Jamaica's 76 % of the ordinary shares in L.O.J.

The exemption was granted pursuant to section 26 (2) (b) of The Securities (Take-Overs and Mergers) Regulations 1999 (see Jamaica Gazette Supplement November 27, 2000).

Section 26 (2) (b) states as follows:-

“(2) The Commission may in writing exempt from the provisions of paragraph (1) a person who, by a transaction or a series of transactions, acquires control of a company in the following circumstances –

- (a) or
- (b) the shares are acquired by that person for the purpose of recapitalizing or rehabilitating the company in order to restore it to solvency and to enable it to continue to carry on its business as a going concern”.

The applicants contend that the Commission acted -

- (1) unlawfully, and in excess of the limits provided in regulation 26(2);
- (2) in breach of the principles of natural justice;
- (3) ultra vires.

Hearing of this matter commenced on the 17th day of July 2002 and continued through to the July 25, 2002 when the matter was adjourned for continuation on a date to be agreed by the parties.

During the adjournment Life of Jamaica Holdings Limited made the mandatory offer to the shareholders on September 9, 2002. The fact of the offer having been made was not denied by the applicants.

On July 10, 2003 when the hearing resumed the respondent advised the court of what had taken place during the interim and submitted that no useful purpose would be served in granting the order sought.

Dr. Barnett for the applicant was of a different view. He submitted that the offer, having been made at the stage where the proceedings were far gone, ought not to form a part of the court's deliberation.

The hallowed principle comes to mind viz, a court must never act in vain. To do so is to make a mockery of the court's jurisdiction.

The offer having been made, the exemption granted by the Commission ceases to be of any effect. What then is the purpose of an order to quash the decision granting the exemption. The making of the offer is a clear indication by Life of Jamaica Holdings Limited that it is no longer relying on the exemption granted by the Commission. The offer is an admission by Life of Jamaica Holdings Limited that the applicants are entitled to be offered the option of selling their shares in the company.

I am satisfied that to grant the order sought is an exercise in futility. Further the refusal to grant the order will in no way prejudice the applicants.

If the applicants have sustained any loss, because of the offer not having been made at the correct time, such loss is recoverable in an action for damages.

It must be borne in mind that certiorari is a discretionary remedy. The fact that a person aggrieved is entitled to certiorari ex debito justitiae does not alter the fact that the court has power to exercise its discretion against him, as it may in the case of any discretionary remedy.

I am not unmindful that the greatest care must be taken in the exercise of this discretion.

For the reasons stated, I would refuse the application for an order of certiorari.

Beckford, J.

I have read the judgments of the Honourable Chief Justice and Justice Marsh and I am in total agreement with their reasons and conclusions.

Marsh J.

The Applicants' Notice of Motion dated February 21, 2002 sought an Order of Certiorari "to quash the determination of the Respondent Financial Services Commission by which it in November, 2001 granted a waiver exempting the LOJ Holdings Limited as purchasers of shares in Life of Jamaica Limited, from making a mandatory offer, pursuant to the Securities (Take-Overs and Mergers) Regulations 1999, to the minority shareholders of Life of Jamaica Ltd."

The grounds for the Application were:-

- (1) the Commission acted unlawfully and in excess of limited provided in regulation 26(2);
- (2) in breach of the principles of Natural justice,
- (3) ultra vires

The hearing of this Motion began on the 17th day of July, 2002 and continued to 25th July, 2002 when it was adjourned for a date to be agreed.

Hearing continued on 10th July, 2003, but between the 25th July, 2002 and 10th July, 2003; on September 9, 2002, in fact, Life of Jamaica Holdings Limited made the mandatory offer to minority shareholders.

On July 10, 2003, the Court was informed by respondent of the development of September 9, 2002. It was submitted then by respondent that as a result of that development, no useful purpose would be served by the Court granting the order sought on the motion.

Dr. Barnett who appeared for the applicants was of a different mind. He countered that what happened on September 9, 2002, should not form any part of the Court's consideration.

Since the decision, which applicants sought to impugn, was revisited and the decision taken that the mandatory offer be made, it seems an exercise in futility to make the order sought.

A Court making such an order would be a Court acting in vain. It is trite law but apt that a Court should never act in vain.

The rights of the applicants to seek to recover any loss or damages incurred by them as a result of the earlier decision remain intact.

It is for these reasons that I would refuse to grant the order sought in the said Notice of Motion.

Wolfe, C.J.

It is hereby ordered that the claim be dismissed.