[2015] JMCC COMM 21

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CONSOLIDATED CLAIM

CLAIM NO. 2013 CD 00 116

BETWEEN	**GEORGE MURRAY**	**1st CLAIMANT**
AND	**KARIN MURRAY**	**2nd CLAIMANT**
AND	**SAM PETROS**	**DEFENDANT**

2013 CD 00156

BETWEEN	**SAM PETROS**	**CLAIMANT**
AND	**GEORGE MURRAY**	**1ST DEFENDANT**
AND	**KARIN MURRAY**	**2ND DEFENDANT**

C. George & A. Jones for Sam Petros instructed by Hart Muirhead & Fatta

Simone Mayhew & Carol Davis and Jennifer Messado George and Karin Murray

IN CHAMBERS

Heard: 15th, 16th and 23rd October, 2015

Applications to strike out and for summary Judgment –Whether no reasonable prospect of success – Whether offer to purchase conditional – Whether jointly appointed agent an arbiter authorised to accept offer - whether matter to proceed to trial.

Coram: Batts, J.

[1] Two applications came on for hearing before me, these were

a) An Amended Notice of Application filed on the 13th July, 2015 filed by attorneys for George and Karin Murray (hereafter referred as the Murrays)

b) A Notice of Application filed on the 24th July 2015 filed on behalf of Sam Petros (hereafter referred to as Petros)

[2] On the 27th July 2015 the Honourable Mr. Justice Bryan Sykes ordered that those applications were to be heard by the Honourable Justice C. Edwards and that the application filed by the Murray was to be heard first. The parties have not made clear to me why the matters have not been listed before Justice Edwards however they advert to some discomfort expressed by one party. Suffice it to say the parties have agreed to my hearing the matter as well as to the order of hearing. Speaking for myself it does appear that both applications may conveniently be heard together.

[3] Counsel for Petros made a preliminary objection to the Murrays reliance on an Amended Defence filed on the 17th September 2015. He contends that it was filed out of time and without permission. In reply, Counsel for the Murrays asserted that as the Case Management Conference had not commenced Order 20 rule (1) applied, and the Defence might still be amended without permission.

[4] After hearing submissions, I decided that the amendment could not be allowed to stand without the permission of the court. It is clear that on the 27th July 2015 Sykes J made Orders on the Case Management Conference in that among other things he ordered that the applications would be heard in a certain order and by a certain judge. These were Orders in the course of managing the conduct of the litigation and they were made at the adjourned Case Management Conference, which a Judge had fixed for 24th July 2015 but which I am told was eventually heard on the 27th July, 2015.

[5] I therefore invited Counsel for the Murrays to make submissions seeking permission to extend time and for the Amended Defence to stand. In this regard I was referred to Order 20 Rule (4) and Order 11 Rule (8). It was pointed out that Petros had had the Amended Defence since September. Further, that the document contained no new allegations and its sole purpose was to bring the Defence in CD156/2013 in line with the Claim in CD116/2013. In his reply Counsel for Petros eventually conceded that the Amended Defence was in accordance with the Further Amended Particulars in the other suit. The "new" assertions he submitted were an about face of the old.

[6] I ruled that permission was to be granted, time extended and the Amended Defence stand. My reasons were:

a) The pleadings now mirrored earlier pleadings which the Honourable Mr. Justice Laing had ruled should stand (see his Order of the 30.6.15).

b) It is in the interest of Justice that, provided there is no prejudice to the other party, a party should be allowed to put forward its true position even if it necessitates an amendment or an adjournment. The nature of the change in position can after all be fodder for the cross-examiner at trial.

[7] Counsel for the Murrays thereafter commenced submissions in the application filed on the 13th July, 2015. In that application the following relief was claimed:

a) Summary judgment under part 15 of the CPR

b) An Order that the Claim be struck out

c) Costs

The grounds were stated thus:

- ‘Pursuant to CPR Rule 15.2(a) the Claimant has no real prospect of succeeding.”

- “Pursuant to CPR Rule 26.3 (c) the Claimant’s claim discloses no reasonable ground for bringing the Claim.”

- “In keeping with the Court’s overriding objective to deal with cases justly.”

The issue for determination of the court was stated in the Notice of Application as being:

> “Whether the Claimant’s claim for Specific Performance is barred and/or not sustainable.”

[8] Counsel also relied upon Written Submissions handed in on the day of the hearing (although dated the 23rd July 2015). These made clear, that which was not stated in the Notice of Application, the reason it was urged that Petros had no real prospect of success at trial. Miss Mayhew put forward a well structured and attractive submission.

[9] It is necessary at this stage to briefly look at the history of this litigation. The parties had once been 50:50 partners. The business was in the form of a Company with 50% of the holding to Petros the other 50% to the Murrays. As a result of disquiet and deadlock an application was made to court in another suit. This was settled by Tomlin Order, which provided among other things for a valuation and sale of shares. The parties by agreement departed from the detailed terms of that order deciding instead that each party would submit bids to a Mr. Ken Tomlinson who was then to accept the highest and best offer.

[10] It is the short contention of the Murrays that Mr. Tomlinson accepted a conditional bid whose preconditions were never satisfied. In consequence, there never has come into existence an agreement for the sale or purchase of shares. Specific Performance is therefore impossible. It is further contended that on the documentation it is manifest that Mr. Tomlinson exceeded the terms of his remit

or agency and for that reason also no enforceable agreement binding on the Murrays had come into existence. Reliance was placed on **Vol 1 Halsbury 4d para 820; Vol 95 Hals (2013) para 380; Hals Vol. 22 (2012) para 271; Andrew Burrows Remedies for Tort and Breach of Contract Third Edition page 456** and **Doyle v East [1972] 2 AER 1013.**

[11] When regard is had to the general grounds contained in the Murrays Notice of Application, it is not surprising that Counsel for Petros indicated that he was taken by surprise by the argument put forward. I therefore stood the matter over the 16th October for continuation. On that day counsel for Petros also presented written submissions. On an objection being taken Paragraphs 44 and 45 of those submissions were struck out, without serious resistance, because it referenced remarks by Sykes, J during discussions at the Case Management Conference.

[12] Petros' submissions rely on a recitation of a history of the matter not unlike that stated by the Murrays. They however contend that Mr. Kenneth Tomlinson was the parties "joint agent." He was to decide who should buy out whom and on what terms. They relied on a judgment of Sinclair – Haynes J in an earlier interlocutory application (see judgment delivered on the 19th July 2015, [2013] JMCC Comm 14.

[13] It is submitted by Petros that both parties clothed Mr. Kenneth Tomlinson with authority and a duty to accept the highest and best offer. Further, it cannot be doubted that he did so because one offer was a cash offer and the other had no satisfactory financing available or demonstrated. Furthermore, the alleged condition appended to the offer which was ultimately accepted, was a term of the offer which Mr. Tomlinson was entitled to consider when deciding which offer was better. In any event if, as the Murray contend, Mr. Tomlinson breached their instructions to him, then that is a claim against him and cannot impact Petros.

[14] Petros' attorneys relied on ***Sweet & Maxwell v Universal News Services Ltd. (1964) 23 All ER 30*** and ***Volume 22 Hals (2012) para 271*** and submitted that

whether a term is a condition precedent and the effect of a condition precedent are mixed issues of fact and law. They contend that the correspondence and documentation relied on by the Murrays, is at least ambiguous.

[15] Having considered the respective submissions the legal authorities cited and the documentation in evidence, I agree with Petros' submission and conclude that this application for Summary Judgment must be refused. My reasons can now be shortly stated.

[16] At this juncture, I am not required to make any findings of fact. My duty is to consider whether, as the Murray contend, Petros' case has no real prospect of success. In doing so I first had regard to the correspondence by email which the Murray contend establish that a condition precedent, contrary to their instruction, was acceded to by Mr. Tomlinson. Further whether this was ultra vires the terms of his agency.

[17] The alleged "instruction" to Mr. Tomlinson are contained in various emails form Murray to Mr. Tomlinson and copied to Petros. The material portions of which are as follows:

"Email dated 21.2.13 15:02:15 GMT, Karin Murray to Kenneth Tomlinson copied to Petros.

> "I propose we declare an interim dividend on accumulated profit for the Financial year beginning 1st July 2012 to completion as per policy and the balance of the profit be sold with the company.
>
> Last week I proposed an interim dividend of US$60,000.00 on the YTD (31 January 2013) accumulated profit of US$134,114 and I propose it again. Mr. Petros has voted giving no explanation for his position. Please advise us of your position."

Email dated 21 February 2013 20:04:32 GMT Kenneth Tomlinson to Kerin Murray copied to Petros.

> "I have indicated to Sam that prior to the transfer of the shares to the successful bidder all share holders would be

entitled to some form of dividend based on the profits of the Company as at the date of the transfer.

Let us await the outcome of the February 2013 unaudited financials and then we can determine the level of distribution.

Email dated 24th March 2013 17:20 from Kenneth Tomlinson to Murray copied to Petros.

"I would recommend $72,000 for an interim dividend as we still have four months left in the financial period.

I am awaiting a response from Sam in relation to a possible call on Tuesday"

Email dated 24th March 2013 7:37 a.m. from Murray to Tomlinson copy to Petros.

"I'm available for a conference call on Tuesday. Do you Skype?

Meanwhile, I propose an interim dividend of US$100,000. There are adequate funds immediately available to make a payment."

Email 27th February 2013 7:47 a.m. Murray to Tomlinson copy to Petros and all attorneys.

"Further to your email below, I would like to clarify our position regarding item 3.

Our offer would expect to include all assets inclusive of retained earnings as indicated on the Balance Sheet with the exception of any interim dividend declared on unaudited profits for this final period prior to completion.

We have discussed this previously and regard this as fair and equitable."

Email dated 27 February 2013 14:19 GMT from Murray to Tomlinson copied to Petros and all attorneys.

"Confirmed"

Email dated 27 February 2013 13:56 GMT from Tomlinson to Murray

> "Hi Karin,
>
> All assets and liabilities would be retained in the companies except for any interim dividend declared on unaudited profits."

[18] Those "instructions" must however be read in the context of the authority with which Mr. Kenneth Tomlinson was conferred. Rather than being an agent. It certainly is arguable that he was an agent appointed to act as an arbiter on the outstanding issue between the parties. The terms of his remit is no longer a matter open to question. It was pronounced upon by my sister Sinclair-Haynes J in a judgment delivered on the 19th July 2013 in suit 2013 CD 00066 (2013 JMCC Comm. 14 at Para 29) –

> ***"They further agreed to vary the contract by conferring upon Mr. Tomlinson the discretion to determine the acceptable bid. Instead of accepting the highest bid, the parties conferred on Mr. Tomlinson the discretion to accept the highest and best offer. In so doing, they dispossessed the new board of that authority. This variation removed the right which the schedule had given the party with the highest bid to have his bid accepted. The parties were of one, accord until the client's bid was accepted."***

[19] The offer which Mr. Tomlinson decided was the "highest and best" is contained in a letter dated 6th March 2013 and contains the following statement."

> **"It is a condition of this offer that, in the event of its acceptance, for the period between the acceptance of this offer and completion of the sale, the Murrays covenant with Sam Petros that prior to completion and without the prior written consent of Sam Petros, Tensing Pen Jamaica Ltd. shall not (and they shall so procure) (i)- (iv)**

(v) save as is expressly provided for herein, declare, make or pay any dividend or other distribution of do or suffer anything which may render its financial position less favourable than as at the date of this offer."

(vi) to (viii).

The stipulations at (i) to (viii) appear designed to ensure no wasting or diminution in value of the asset being purchased in the period between acceptance of the offer and completion. It appears to be a most reasonable term to impose, and hence not unreasonable to accept.

[20] It is therefore far from clear that those were conditions precedent to an agreement to purchase. Arguably, once Mr. Tomlinson accepted the offer with these terms, an enforceable agreement came into being. This is not however a matter for me to determine at this stage. I am only required to say whether Petros' contention is unarguable in the sense that his claim has no real prospect of success. This I cannot say on the documentary evidence.

[21] The issues are best determined after a trial before a judge who has seen and heard the witnesses. In particular the evidence of Mr. Kenneth Tomlinson. It will be a mixed question of law and fact as to the common intention and whether there was one. Was there an offer and acceptance and if so what was accepted. Also was there a limitation to the authority conferred on Mr. Tomlinson was he an agent or an arbiter and if an agent what were the terms of his agency. All these issues are best resolved by a tribunal, which has seen and heard witnesses.

[22] The application by the Murrays is therefore dismissed. In relation to Petros' application, this will be adjourned to a date to be fixed by the Registrar.

[23] In the result, the Murray's application is dismissed with costs to Petros to be taxed if not agreed.

David Batts
Puisne Judge