

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF
GUYANA
COMMERCIAL JURISDICTION

2019-HC-DEM-CIV-SOC-421

BETWEEN:

BOURSE INTERNATIONAL ASSET
MANAGEMENT LIMITED a duly registered
external company under the Companies Act, Chapter
89:01 of the Laws of Guyana.

Claimant

-and-

1. DEMERARA BANK LIMITED, a company incorporated under the Companies Act, Chapter 89:01 of the Laws of Guyana and whose registered office is at 11 Lamaha Street, Queenstown, Georgetown, Guyana.
2. TRUST COMPANY (GUYANA) LIMITED, a company incorporated under the Companies Act No. 29 of 1991 of the Laws of Guyana whose registered office is located at Lot 230 Camp Street, Georgetown, Guyana.
3. THE GUYANA ASSOCIATION OF SECURITIES COMPANIES AND INTERMEDIARIES INC., a company incorporated under the Companies Act, Chapter 89:01 of the Laws of Guyana and whose registered office is at 1 Avenue of the Republic, Georgetown, Guyana.

Defendant

The Honourable Justice Navindra A. Singh, Puisne Judge

Messrs. C. A. Nigel Hughes and Jed Vasconcellos for the Claimant

Mr. Manoj Narayan for the First Named Defendant

Mr. Timothy M. Jonas SC for the Second Named Defendant

Mr. Nikhil Ramkarran for the Third Named Defendant

Delivered July 24th 2023

DECISION

BACKGROUND

The Claimant is an investment company.

The Third Named Defendant [TND] is a company that lists and advertises securities/ shares on its stock exchange.

The First Named Defendant [FND] is a company whose shares were listed on the TND's stock exchange by First Caribbean International Bank (Barbados) Limited [FCIB], one of its [the FND's] shareholders.

The Second Named Defendant [SND] is the Registrar of the FND.

On December 4th 2017 the Claimant, through a Broker, that was licensed and registered with the TND, purchased 4,500,000 of the FND's shares from FCIB.

FCIB's Broker confirmed receipt of the sum of \$160,200,000.00 from the Claimant as full consideration for the purchase of the shares.

The required share transfer forms were prepared and submitted to the FND shortly thereafter.

By written correspondence dated January 23rd 2018 the SND informed the Claimant's Broker that the FND was exercising its option under its Articles of Association to decline to register the transfer.

By written correspondence dated February 9th 2018 the SND informed the Claimant's Broker that the FND had secured other purchasers for the shares sold by FCIB at the same price that the Claimant was paying and enquired to whom a refund cheque for \$160,200,000.00 should be made payable.

The Claimants instituted this Claim on December 5th 2019 and the FND and SND were served with the Claim on December 12th 2019 and by March 31st 2021 the pleadings were closed and witness statements were served and filed by all parties.

In June 2022 the Action was assigned to this Court and after two further case management conference a pre-trial review was scheduled for November 9th 2022.

At the hearing on November 9th 2022 Attorney-at-Law for the SND, Mr. Jonas SC, stated that he was of the view that the pleadings and witness statements disclosed no cause of action. Attorney-at-Law for the FND, Mr. Narayan, joined in that oral submission.

Attorney-at-Law for the TND, Mr. N. Ramkarran, stated that he did not believe that any cause of action was disclosed against the TND.

As a result the Court treated the such submissions as an oral Application to Strike Out the Claim and ordered written submissions to be filed. On February 9th 2023 the Court ordered further submissions to be filed addressing the various statutory provisions involved in the sale and transfer of shares of a public company listed on the stock exchange.

ISSUE I

Does the Statement of Claim disclose a cause of action.

ARGUMENTS & ANALYSES

The FND and SND have submitted that the prayers for the Declarations and the Injunction are not causes of action and the remaining prayers (claims) against them, to wit, (a), (c), (m) and (p) cannot be sustained from the pleadings or witness statements.

The claims against the TND are found at (b), (c), (n), (o) and (p), however Counsel for the TND did not file any submissions which the Court interpreted to mean that though Counsel expressed the view that no cause of action against the TND was disclosed, he did not wish to pursue an Application to Strike Out the Claim.

ARGUMENT I

With respect to (a) [wrongful or fraudulent conversion of the Claimant's property, to wit, the shares], the FND and SND contend that the legal nature of shares preclude them from being converted.

The FND and SND submitted that at English common law conversion lies in respect of dealings with corporeal personal property and therefore does not include choses in action and since a share certificate is simply a piece of paper, the shares themselves are intangible and consequently can only give rise to a chose in action.

The FND and SND further submitted that in any event the Claimant had not acquired any legal, proprietary or beneficial title or interest in the shares since the FND, by its Articles of Association, had a right to pre-emption and/or an absolute discretion to decline to register the transfer of the shares and the FND did in fact exercise such right and declined to register the transfer of the shares to the Claimant, therefore the Claimant never acquired any interest in and to the shares.

The Claimant submitted that pursuant to **section 199 of the Companies Act; CAP 89:01** of the Laws of Guyana the beneficial ownership of the shares passed to the Claimant when the Transfer Form was signed and full payment for the shares was received and accepted by the shareholder selling the shares [FCIB].

ANALYSIS I

It is not disputed that FCIB contracted to sell 4,500,000 shares that it held in the FND to the Claimant and that the Claimant and FCIB did all that they were required to do to have the contract performed.

The Transfer Form was completed and signed by FCIB and the Claimant and certified by the TND [the stock exchange] on December 7th 2017 [Exhibit "I" attached to the witness statement of Subhas Ramkhelawan (Claimant's witness)/ Exhibit "B2" attached to the witness statement of Deborah Williams (SND's witness)/ Exhibit "GE17" attached to the witness statement of George Edwards (TND's witness)].

It is not disputed that the transfer was presented to the FND shortly thereafter.

By virtue of section 199 (4) (b) of the Companies Act the Claimant became the beneficial owner of the shares when the FND received the aforementioned Transfer Form.

This Court is of the view that given the manner in which business is presently conducted globally a vast amount of wealth and property presents itself and is represented as intangible assets which are many times wrapped up in contractual rights.

The circumstances of the case at bar is unique and demonstrates that no principle of law can contemplate and therefore provide a clear answer to every situation that arises.

It is contrary to logic to assert that because the shares themselves are intangible and cannot be physically possessed by the Claimant, the benefits of ownership of the shares cannot be the subject of an action in conversion if the Claimant is denied those benefits, not by the seller of the shares, but by a third party, who, because of the process adopted to execute the transaction determined that it had the authority to nullify the agreement between the seller and the buyer.

Conversion was originally a remedy for the wrongful taking of another's **lost goods**, bridging the gap that existed between the law of trespass and the law of detinue, and as such it applied only to tangible property, however, as is well known the remedy has long developed to include much more than lost goods.

Where an English Common Law principle seemingly does not contemplate a given situation the Court must determine whether the situation is in fact excluded by the principle as opposed to it being specifically included.

This Court finds favour with the reasoning in **Kremen v Online Classifieds Inc.** (2003) 337 F 3rd 1024, to wit,

“Property is a broad concept that includes “every intangible benefit and prerogative susceptible of possession or disposition.” We apply a three-part test to determine whether a property right exists: “First, there must be an interest capable of precise definition; second, it must be capable of exclusive possession or control; and third, the putative owner must have established a legitimate claim to exclusivity.”

Following this reasoning it is not difficult to see that though shares are intangible they are capable of being converted and not excluded as per the law of conversion.

Certainly the shares are precisely defined, a shareholder does exercise exclusive possession and control over its shares and by virtue of **section 199 (4) (b) of the Companies Act** the Claimant possessed a legitimate claim to the shares.

As the learned author Wolfgang Friedman argued, the law must adapt itself to social change if it is to remain the strength of creating social order in society, and I add, especially in the corporate world which has all but evolved into a virtual world.

There must necessarily be a remedy for the conversion of every specie of personal property.

CONCLUSION I

In this regard the Court finds that the Claim does disclose a cause of action in the tort of Conversion.

The question of whether the FND and SND have a defence based on their reliance on the FND's Articles of Association is simply a defence to the claim but cannot change the fact that the cause of action exists.

ARGUMENT II

With respect to (c) [breach of the provisions of the **Securities Industry Act**], the FND and SND contend that the Claimant by its pleadings are in fact alleging that the FND breached the rules of the Stock Exchange which are not laws and as such the allegation that the FND and/ or SND are liable for breach of statutory duty is unfounded.

ANALYSIS II

The Court finds that the pleadings do not disclose with any particularity or at all what statutes/ laws were allegedly breached by the FND and consequently it is not possible to determine whether such breach would create a private law right of action and further whether the Claimant is in a class intended to be protected by the Legislature.

CONCLUSION II

In this regard the Court finds that the Claim does not disclose a cause of action in Breach of the provisions of the Securities Industries Act.

ARGUMENT III

With respect to (m) [tortious interference by the FND and SND in the agreement of sale between the Claimant and FBIC for the FND's shares], the Attorneys-at-Law for the FND and SND submissions mainly address inducement to breach a contract as opposed to the claim that the FND and/ or SND wrongfully interfered with the contract between the Claimant and FBIC.

With respect to the allegation of interference with the contract between the Claimant and FBIC, the FND contends that it has not been established that the FND interfered with the contract.

That submission is based on the contention that the FND exercised a right of pre-emption provided for in its Articles of Association and therefore its actions were lawful and even if that caused the contract to be frustrated that would not amount to interference with the contract.

ANALYSIS III

The Claimant is not alleging that the FND and/ or the SND caused or induced FBIC to breach the contract, in fact the Claimant is not alleging that FBIC breached the contract.

It is obvious from the fact that the Claimant did not name FBIC as a defendant that the Claimant recognise that FBIC did all that it was required to do to enable the Claimant to be registered as a member of the FND in respect of the shares.

FBIC did all that it was required to do to have the contract performed.

All that remained to be done was for the FND, who was not a party to the contract, to formally enter the Claimant in the company's register as the owner of the shares sold by FBIC.

When the FND refused to so do, the FND interfered with and obstructed the performance/ completion of the contract.

The peculiarities of the circumstances of this case are such that a party who was not a party to the contract was able to frustrate the contract without the having to do anything with, or to, either of the parties to the contract.

That, in the Court's view establishes a cause of action of wrongful interference with the contract.

The question of whether the FND and SND have a defence based on their reliance on the FND's Articles of Association is simply a defence to the claim but cannot change the fact that the cause of action exists.

The FND's and SND's pleading and insistence that the action taken by the FND was within the FND's legal rights does not extinguish the cause of action.

It is for a Court to determine whether the acts of the FND were lawfully permitted and therefore establish a defence to the claim/s.

CONCLUSION III

In this regard the Court finds that the Claim does disclose a cause of action in tortious interference by the FND and SND in the agreement of sale between the Claimant and FBIC for the FND's shares.

It is noted, again, that the facts of this case may not fit nicely into the definition of a particular tort founded in English Common Law but it would be folly to blindly search for that tort. The duty of the Court is to determine whether an actionable wrong has been committed against the Claimant by any of the Defendants and not to say to the Claimant, the facts of your case does not fit perfectly into a four corner test for wrongdoing so we will not hear you.

ARGUMENT IV

With respect to (p) [acts of bad faith and/ or with malicious intent to harm and/ or damage the Claimant's interest], the Court finds that the pleadings do disclose such a cause of action. The supposed acts of bad faith or acts showing or tending to show malice were not pleaded.

CONCLUSION IV

The Court finds that the Claim does not disclose a cause of action under the prayer at (p).

In the circumstances the Application to strike out the Claim and grant summary judgment against the Claimant is refused with costs which are to be assessed at the conclusion of the Action.

The Court having examined the pleadings and the witness statements and having made the foregoing determinations recognises that the defence pleaded by the FND and SND, to wit, that the FND did what it was legally permitted to do, does not require a trial.

There appears to be no material fact in dispute. The question as to whether the FND had a right to pre-emption is, in this case, a matter of law and so the Court, acting in accordance with **Part 15.02 (3) of the Civil Procedure Rules** will proceed to determine the Claims summarily.

ISSUE II

Did the FND have a legal right to pre-emption over its shares bought by the Claimant from FBIC.

FACTS

The facts are as stated previously.

LAW

Section 2 of the Securities Industry Act; CAP 73:04 of the Laws of Guyana, which sets out the following definitions;

“public company” means a company -

(a) any of whose issued shares or debentures are or were part of a distribution, or an offer, to the public; or

(b) That is the issuer of a security that is beneficially owned by more than fifty persons.

“reporting issuer” means an issuer that has filed a registration statement under section 56 and has not been the subject of an order of the Council altering its status as a reporting issuer.

Section 56 (1) of the Securities Industry Act provides;

“From the date of commencement of this Part, all public companies shall become reporting issuers and shall, within ninety days from that date, file with the Council a registration statement in the prescribed form.”

Section 56 (6) of the Securities Industry Act provides;

“Where a reporting issuer ceases to be a public company, the Council may on its own motion or on application by the issuer or another interested person make an order declaring, subject such conditions as it considers appropriate, that the issuer is no longer a reporting issuer.”

Trust Company (Guyana) Limited v Guyana Securities Council [2021] CCJ

11 (AJ) GY

ANALYSIS

It is undisputed that the FND falls within the definition of a public company as set out in **section 2 of the Securities Industry Act**. The FND is in fact a public company under both definitions set out in the section having traded its shares in excess of 290 times on the stock exchange between 2005 and 2019 and having more than 50 shareholders.

The section is clear and its interpretation settled by the Caribbean Court of Justice in the case **Trust Company (Guyana) Limited v Guyana Securities Council**.

It is also undisputed that the FND was a Reporting Issuer and further, that at no time prior to the sale of shares to the Claimant, applied under **section 56 (1) of the Securities Industry Act** to declare that it was no longer a public company.

It is disingenuous for Counsel for the FND to argue that despite the enactment, to wit, **section 2 of the Securities Industry Act**, effectively designating the FND a public company, it remained a private company by virtue of the FND not amending its Articles of Incorporation "*whether inadvertently or deliberately*".

Counsel for the FND, through submissions, apparently seeks to now challenge whether the FND was properly registered as a Reporting Issuer, two decades after its registration with the Council and the TND. This was never pleaded by the FND and in any event is without merit, not only because of the fact that by operation of a statute the FND is a public company, but its actions in all previous dealings with its shares on the stock exchange demonstrate that it operated as a public company.

The FND is and was a public company as defined in the Securities Industry Act at all material times whether it chose to refer to itself as a private company or not and as a matter of common sense any provisions in the FND's Articles of Association that are contrary to the rules governing the handling of shares of a public company on the stock exchange would be unenforceable.

Despite the fact that there are no provisions in Securities Industry Act that state that the shares of a public company must be freely transferrable, it is an obvious and implied requirement, especially when the public company is trading its shares on the stock exchange.

“If the shares in public companies were not freely transferrable, then stock exchanges could not operate properly because the buyers and sellers of shares could not know if their transactions would be enforced.” [**Charlesworth's Company Law**; Eighteenth Edition; para 7-033; page 154].

Further when the FND registered to trade on the TND's stock exchange it agreed to abide by the rules of the stock exchange and that included a requirement that its shares are freely transferable and as stated above the FND's shares were traded hundreds of times freely on that stock exchange prior to this sale.

CONCLUSION

The FND did not have a legal right to pre-emption over its shares bought by the Claimant from FBIC.

In the circumstances the FND wrongfully and unlawfully declined or refused to recognise the sale of its shares by FBIC to the Claimant.

The FND was under a legal obligation to register the Claimant as the owner of those shares.

RULING ON CLAIMS

1.

By its own admission the FND then transferred the shares, of which the Claimant was legally the beneficial owner to another or others.

The FND intended to transfer the shares to another/ others and therefore the act by the FND that resulted in the conversion was intentional and that is all that is required. It is irrelevant whether the act was done in good faith or lack of knowledge.

The Court finds that in those circumstances the FND and SND are liable to the Claimant for damages for the tort of Conversion.

Paragraph 1 (a) is granted.

2.

The Claimant failed to establish that the TND breached the terms of the licence issued to it by the Guyana Securities Council.

Paragraph 1 (b) is refused.

3.

For the reasons stated in ARGUMENT II the claim at paragraph 1 (c) is refused.

4.

Since the FND did not have a lawful right to decline or refuse to recognise the sale of the shares from FBIC to the Claimant, it follows that it was a violation of the Claimant's legal rights to interfere with its contractual relations with FBIC.

There was no sufficient justification for the FND's obstruction of the completion of the contract.

No company can justify damaging another in the course of commerce by obstruction of that company's contractual dealings without just cause.

By the actions of the FND and its Registrar, the SND, the Court finds that they interfered with and intentionally obstructed the contract between FBIC and the Claimant for the sale of the FND's shares to the Claimant.

Paragraph 1 (m) is granted.

5.

Since the Court finds that the shares were in fact freely transferrable the Claims at paragraph 1, subparagraph (n) and (o) are refused.

6.

For the reasons stated in ARGUMENT IV the claim at paragraph (p) is refused.

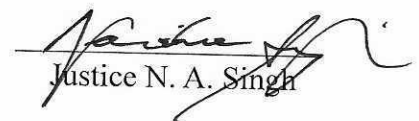
It would be remiss of the Court not to state that the pleadings of the FND, done by its previous Attorney-at-Law, Mr. Vidyand Persaud SC was graceless, and unprofessional, unbecoming of a Senior Counsel who ought to be upholding the high standards of the Bar.

In the circumstances the Court grants paragraph 1, subparagraphs (a), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (t) and (u) of the Amended Claim.

Paragraph 1, subparagraphs (b), (c), (n), (o) and (p) are refused.

Since there is no finding of liability against the TND, its Crossclaim is dismissed except that the Court will assess and award costs to the TND against the FND and SND.

The Court will now conduct a Case Management Conference with a view to conducting a hearing to assess the damages to be awarded after which costs will be assessed.


Justice N. A. Singh