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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN MISCELLANEOUS

SUIT NO. M49/1991

BETWEEN	A & E APPLIANCE SALES & SERVICES LIMITED	APPLICANT
AND	METROPOLITAN PARKS AND MARKETS LIMITED	RESPONDENT

Dennis Goffe and Miss Minette Palmer for Applicant

Donald Scharschmidt Q.C. and Carl Dowding for Respondent

HEARD: OCTOBER 28, 29 and November 27, 1991.

IN CHAMBERS

CORAM: WOLFE J.

The Applicant is a Company duly registered under the Companies Act of Jamaica. The Respondent is also a Company duly registered under the Companies Act of Jamaica. The Applicant, since 1985, has been involved in the provisions of street cleaning and garbage collection services within the Kingston and Saint Andrew area zone 4. The Respondent is the body entrusted with the responsibility of keeping the Corporate Area clean.

On February 7, 1989 the Applicant entered into a written contract with the Respondent to provide street cleaning and garbage collection services within the Kingston and Saint Andrew area more particularly in the area designated as zone 4. The said contract is for three years in the first instance and clause 7(d) thereof provides that:

> "The contractor shall be remunerated by Metropolitan Parks and Markets Limited for his/her/its said services at the rate established between the parties as at February 7, 1989 (provided that such rates shall be reviewed within twelve (12) months of the date) and thereafter at the rates determined upon such review".

The net rate established as at February 7, 1989 is Twenty-Five Thousand Five Hundred and One Dollars and Sixteen Cents ($25,501.16) weekly. Notwithstanding the provision for review of the rate within twelve (12) months, no review has taken place in spite of many requests from Plaintiff and other contractors.

By letter dated February 12, 1991 the Defendant advised the Plaintiff that it had "reorganized the zone boundaries and amended the contracts". The new contract was enclosed and the Plaintiff was invited to execute same as evidence of its willingness to work with the Defendant. The Plaintiff, quite understandably, refused to sign the contract contending that the new contract was much more onerous than the older contract and that the contract was being unilaterally altered. A dispute

developed and the Plaintiff sought the co-operation of the Defendants' Attorney-at-Law in appointing an arbitrator to settle the dispute pursuant to Clause 7(f) of the Agreement. The Defendant demonstrated a total lack of interest in the invitation extended to it to appoint an Arbitrator. The Plaintiff therefore proceeded to nominate Dr. Lloyd Barnett as the Arbitrator and so notified the Defendant. This did not cause the Defendant to stir.

On June 18, 1991 Defendant delivered to Plaintiff a letter of even date the contents of which are set out herein.

> "Mr. Errol Stephenson
> A & E Appliances Sales Limited
> 21 Westminister Road
> Kingston 10
>
> Dear Mr. Stephenson:
>
> As a follow-up to our various discussions in the past, I wish to inform you that the revised zone boundaries come into effect in your zone on Sunday, June 23, 1991.
>
> This will be accompanied by the new rates payable under the revised Schedule 2.
>
> As you were previously advised, payments will be made fortnightly, and this arrangment becomes effective after week ending June 22,1991.
>
> Your allotments have been carefully prepared and we are sure that the re-organization currently being undertaken will promote greater efficiency.
>
> Thank you for your co-operation.
> Sincerely yours,
>
> Metropolitan Parks and Markets
>
> Randall WIlliams
> Public Cleansing Superintendent."

The Plaintiff refused to sign the new agreement. On Friday June 21, 1991 instead of paying the Plaintiff the sum of $25,501.16 the Defendant paid a sum of $20,121.07 which the Plaintiff refused to accept.

On the 4th July the Plaintiff filed an Originating Summons seeking the determination of the following question viz.

> "Whether on a true construction of the "Service Agreement" between the parties dated February 7, 1989 a term is to be implied that the Defendant will not act in such a way as to render the arbitration clause mugatory i.e. that the Defendant will not act in a way calculated or likely to cause the termination of the said Agreement without first allowing the Plaintiff to have such conduct go to arbitration".

And for the following relief:-

1. An injunction restraining the Defendant by its servants or agents howsoever, from reducing the weekly amount being paid by the Defendant to the Plaintiff under "Service Agreement" signed by the parties and dated February 7, 1989

and from paying the Plaintiff fortnightly instead of weekly, until the determination of arbitration proceedings under the abitration clause in the said agreement.

2. Such further or other relief as may seem just.

3. Liberty to Apply.

It must be noted that the Plaintiff has chosen to invoke the jurisdiction of the court not withstanding the arbitration clause.

On the 4th day of July 1991 Wesley JamesJ(Ag.) granted the Plaintiff an interim injunction for a period of ten days in the terms of an Exparte Summons dated July 4, 1991. This was further extended by K.S. Harrison J. (Ag.).

The matter now comes before me for hearing and the Plaintiff prays the following order:

> "That the Defendant, by its servants or agents or howsoever, be restrained from reducing the weekly amount being paid by the Defendant to the Plaintiff under the "Service Agreement" signed by the parties and dated February 7, 1989 and from paying the Plaintiff fortnightly instead of weekly, until the determination of arbitration proceedings under the arbitration clause in the said agreement, or alternatively until the hearing and determination of the Originating Summons filed herein".

The Plaintiff's application is supported by an affidavit sworn to by Mr. Errol Stephenson, Managing Director of the Plaintiff Company. The Defendant Company filed an affidavit in response, sworn to by Mrs. Greta Robinson. The affidavit of the Defendant states that the claim is a money claim and as such damages would be an adequate remedy and that the Defendant would be in a position to pay if damages were awarded to the Plaintiff.

Mr. Goffe for the Plaintiff submitted

1. The affidavit of the Defendant does not contradict any of the allegations of the Plaintiff hence the court is entitled to treat the Plaintiff's allegations as uncontradicted and consequently hold that <u>Defendant is in Breach of the "Service Agreement".</u>

2. That the question of whether or not there is a serious issue to be tried does not arise because on the bases of the affidavits filed no issue is joined on the facts. Similarly the questions as to where does the balance of convenience lie and the adequacy of damages do not arise for the consideration of the court. <u>Patel and Others v W.H. Smith (Eziot) Ltd. and Another</u> 1987 1 A.E.R. 569 at p. 575 was relied for this submission.

Balcombe LJ. said:

> "If there is no arguable case, as I believe there is none, then the questions of balance of convenience, status quo and damages being an adequate remedy do not arise. Prima facie the Plaintiffs are entitled to an injunction to restrain trespass on their land".

It must be noted that the cited case was concerned with the user of land. and was not an action which sounded in damages only.

3. That if the question re adequacy of damages arose the court should find, in favour of the Plaintiff in the particular circumstances of the case, that damages would not be an adequate remedy.

4. That the modern approach to the granting of injunction is far more flexible than in the past.

I implied in this submission is the view that even if the court were to find that damages would be an adequate remedy the court could nevertheless grant the injunction to protect the Plaintiffs' rights. Reliance for this view was placed on section 45 of the Supreme Court of Judicature (Consolidation) Act 1925 which states:

> "A mandamus or an injunction may be granted or a receiver appointed by an Interlocutory Order of the court in all cases in which it shall appear to the court to be just or convenient".

I am of the view the underlined portion of the section cited must be interpreted in the context of the age old principle that an injunction will not be granted where damages would be an adequate remedy. Further reliance was placed on Supreme Court Judgment in Suit C.L. H152 of 1983 Stephen Hill and Dorothy Hill v Maurice Croisan etal. The cited case was a claim for money and an injunction was nevertheless granted. However the instant case is readily distinguished. Hill's case was decided on the bases that the Defendants were all foreigners with no other assests in the jurisdiction other than those which they were restrained from removing. The injunction therein was granted on the basis of the Dictum of Lord Denning M.R. in the Mareva 1980 1 A.E.R. 213 at p. 214.

> "In my opinion, continued the Master of the Rolls, "that principle applies to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting judgment for it. If it appears that the debt is due and owing and there is danger that the debtor may dispose of his assests so as to defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assests".

Further support for this proposition was urged by citing Evans Marshall v Bertola S.A. [1973] 1 A.E.R. p. 992 at pp. 104 and 105.

At page 104 Sachs L.J. said:

> "It is true that this statement of Lord Denning M.R. was obiter but it expresses in felicitous language the view applied nine days earlier in his considered judgment and in mine in Hill v C.A. Parsons and Co. Ltd. There too when joining in rejecting a submission that a much followed practice had become a rule of law I held that flexibility was an essential feature of the court's jurisdiction. That was a master and servant case. There can always arise other special cases in which it is proper to maintain a status quo irrespective of whether the relief granted at trial will include a permanent injunction".

On the question of whether damages are an adequate remedy Sachs L.J. said at p 105.

> "The standard question in relation to the grant of an injunction, are damages an adequate remedy might perhaps, in the light of the authorities of recent years, be re-written: is it just, in all the circumstances, that a Plaintiff should be confined to his remedy in damages?......... The courts have repeatedly recognized that there can be claims under contracts in which, as here, it is unjust to confine a Plaintiff to his damages for their breach. Great difficulty in estimating these damages is one factor that can be and has been taken into account. Another factor is the creation of certain areas of damage which cannot be taken into monetary account in a common law action for breach of contract: loss of goodwill and made reputation are examples".

In Bertola's case it was not just question of money for the breach but the Plaintiffs' reputation would have been affected by the breach. The gravamen of the decision lies in the words of Sachs L.J. at p. 1007.

> "On the evidence so far before the court the Plaintiffs seem to have a reasonable prima facie case which could lead to success, whilst the defences, as so far raised, cannot be said to be impressive. If the Plaintiffs are right the disruption caused by the Defendants' action is unjustified, and so great that damages are not an adequate remedy.
>
> It is true to say that specific performance of such an agreement will not be ordered, but it is no less plain that the court will grant negative injunctions to encourage a party in breach to keep to his contract: As Salmon L.J. put it in the Decro Wall case in relation to an undertaking given in lieu of an injunction":

"If the Plaintiffs were released from it, they and the concessionaires they appointed in breach of their contract with the Defendant would be left free to take advantage of this breach and enjoy the fruits of the time, effort and money which the Defendants have expended during the last three years in creating and building up a thriving market for the Plaintiff's goods in the United Kingdom. Damages in such a case are very difficult to prove and I do not believe that they would by themselves be an adequate remedy."

It is clear from the underlined words that three factors influenced the court in granting the injunction viz.

(a) The Plaintiff and the new concessionaires would be the beneficiares of the hard work and investment of the Defendants.

(b) The difficulty in proving damages.

(c) Damages would not be an adequate remedy.

The conditions referred to in the underlined portion of the judgment do not exist in the instant case.

Finally Sachs L.J. said at p.1007.

"In the instant case, as in that case, an attempt is being made which, if unjustified would deprive the Plaintiffs of the benefit of having built up a name for Bertola sherry with the aid of expending the best part of half a million pounds for that purpose in a dozen years."

5. That the Plaintiff's claim is not merely one of money but the Plaintiff also contends that he is being forced out of business by the Defendants who have a monopoly over the kind of business in which the Plaintiff is engaged. Sky Petroleum Limited v V.I.P Petroleum Limited [1974] 1 A.E.R. p.955 was cited to support the contention that where a breach of contract by one party is likely to have the effect of forcing the other party out of business the court will grant an injunction to restore the former position under the contract until the rights and wrongs of the parties can be fully tried out. The head note of the case makes interesting reading:

"Under a contract made in March 1970, the Plaintiff Company agreed with the Defendant that, for a minimum period of ten years, it would buy all the petrol and diesel fuel that it needed for its filling stations from the Defendant. In November 1973 the Defendant purported to terminate the contract for an alleged breach of its terms by the Plaintiff Company. The Plaintiff Company brought an action against the Defendant and sought an interlocutory injunction to restrain the Defendant from withholding supplies of

petrol and diesel fuel from the Plaintiff Company. There was trade evidence that in November 1973 the petroleum market was in an unusual state and that the Plaintiff Company would have little prospect of finding an alternative source of supply."

Goulding J. in delivering judgment said at p.955.

"There is trade evidence that the Plaintiff Company has no great prospect of finding any alternative source of supply for the filling stations which constitutes its business. The Defendant Company has indicated its willingness to continue to supply the Plaintiff Company, but only at prices which, according to the Plaintiff Company evidence, would not be serious prices from a commercial point of view. There is, in my judgment, so far as I can make out on the evidence before me, a serious danger that unless the court interferes at this stage the Plaintiff Company will be forced out of business.

In those circumstances unless there is some specific reason which debars me from doing so. I should be disposed to grant an injunction to restore the former position under the contract until the rights and wrongs of the parties can be fully tried out."

Further at p956 Goulding J said:

"Here the Defendant Company appears for practical purposes to be the Plaintiffs' Company sole means of keeping its business going and I am prepared so far to depart from the general rule as to try and preserve the position under the contract until a later date. I therefore propose to grant the injunction".

It is clear from the judgment of Goulding J that the peculiar circumstances of the case influenced the grant of the injunction. The nature of the contract was restrictive. The Plaintiff was bound for ten years to buy all his supplies from the Defendant. The situation in the petroleum industry made it almost impossible for the Plaintiff to obtain supplies from anyone else.

Paragraph 4 of the supplemental affidavit sworn to by the Plaintiff states:

"Since 1985 the Plaintiff has been providing public cleansing services in zone 4 of the corporate area and has built up a good reputation. That reputation, and the goodwill which goes with it, will be irretrievably lost if the Defendant is allowed to breach the contract in the way outlined in my previous affidavit. Also, since the Defendant has a monopoly over the provision of public cleansing services in the corporate area if it succeeds in ousting the Plaintiff, the Plaintiff will not be able to do public cleansing for anybody else".

This contract between the parties is a public utility contract. In the performance of the contract there is no special relationship between the persons

who are the beneficiaries of the service and the contractor. There is no goodwill in this type of service. In a contract of this nature most people are unaware of the identity of the contractors responsible for collecting garbage. They know that Metropolitan Parks and Markets Limited, M.P.M. as they are more popularly known is, the Agency responsible for providing the service. So the question of reputation being lost is in my view merely an averment to bring the instant case within the principles of Sky Petroleum Limited (Supra). In Cutsforth and Others v Mansfield Inns Limited [1986] 1 A.E.R. 577 an injunction was granted to restrain unlawful interference with contractual relationships. The breach was of such a nature that it would have had the effect of terminating the contract.

In this case the Defendant has not attempted to terminate the contract what it has done is to attempt to re-negotiate the contract. The Plaintiff has resisted. This has given rise to a dispute to be resolved in the forum chosen by the parties to the contract, namely Arbitration. Mr. Goffe cited and relied upon S.C.M.A. M10/81. The National Workers Union and Collington Campbell v J.B.C. S.C.M.A.11/81. The Union of Clerical Administrative and Supervisory Employees and Beverly Newell v J.B.C. Both cases turned upon the fact that the Plaintiffs were claiming that their dismissals were unlawful and under the provisions of the Labour Relations and Industrial Disputes Act Section 12 (5)(C), the Industrial Disputes Tribunal would be obliged to order re-instatement, of the workers if they wish to to be re-instated, if it found that the workers were unjustifiably dismissed. In such circumstances therefore Damages would not be an adequate remedy.

Further reliance was placed upon the judgment of this court in Suit No. R244/82 Rosseau and Rosseau v National Commercial Bank Jamaica Limited dated June 15, 1983 in which Smith C.J. concluded that an injunctive order was justified in the circumstances because failure so to do could result in the deprivation of the shares and also because damages would be difficult to assess. He further expressed the view that he doubted whether or not damages would be an adequate remedy in the circumstances of the case.

Mr. Scharschmidt for the Defendant opened his submissions by stating a well established position namely that an injunction would only be granted if the Plaintiff was able to show that but for the injunction he would suffer irreparable injury. He further submitted that where damages provide adequate compensation an injunction will not be granted. For this proposition he cited and relied upon the hallowed decision in American Cyanamid Co. v Ethicon [1975] A.C. 397.

However the main thrust of his argument was that the claim by the Plaintiff sounded in Damages. I have already referred to the Originating Summons herein. The question for determination is "whether or not on a true construction of the "Service Agreement" between the parties dated February 7, 1989 a term is implied that the Defendant will not act in such a way as to render the arbitration clause nugatory i.e. the Defendant will not act in a way calculated or likely to cause the termination of the said agreement without first allowing the Plaintiff to have such conduct go to arbitration!

Clearly the issue for determination goes to the protection of the Plaintiff's right to have any dispute under the contract settled by Arbitration. But there is no evidence to support that view that the Defendants have taken any steps or are about to take steps to deprive the Plaintiff of that right. Indeed sections 6 and 7 of the Arbitration Act makes it impossible for the Defendant to deprive the Plaintiff of his right to have the matter referred to Arbitration or indeed to render the effects of the Arbitration Clause nugatory.

A question exercising my mind is this, under the Arbitration Clause would the Defendant have been entitled to an order restraining the Plaintiff from seeking to invoke the jurisdiction of the court before using the Arbitration Procedure as provided for the Service Agreement.

The Arbitration Clause states that -

> "all disputes arising between the parties hereto regarding the terms of this agreement or the construction thereof or the rights, duties or liabilities of the respective parties hereunder or anything pertaining hereto save and except the matters referred to at Clause 7(c) hereof shall be settled by reference to a single arbitrator in case the parties agree upon one, otherwise to two arbitrators, one to be appointed by each party and their umpire in manner provided by the Arbitration Act of Jamaica."

Clause 7(c) refers to the manner in which the contract may be terminated where the contractor fails to perform.

The term "all disputes" in my view embraces the question now being asked in the originating summons. It is therefore a question properly answerable by the Arbitration Procedure. The question posed is in my view no more than a ploy to support the injunctive relief sought, seeing that an injunction cannot stand on its own. This is nothing short of an abuse of the process of the court as

nothing can be gained by the Plaintiff from any answer which the court may give. Whatever answer is given the parties must resolve their dispute at the Arbitration table.

I hold that the Originating Summons seeks to protect the Plaintiff's right to Arbitration. The evidence discloses no real threat to that right. Hence the injunctive relief sought ought not to be extended. If I am wrong in this regard and what is being sought is to protect the Plaintiff against the reduction of the net weekly rate provided for in the service agreement then clearly the claim is a money claim and as such sounds in damages. I hold that such damages would readily be ascertainable, easily quantified and that damages would be an adequate remedy in the circumstances. On this basis I would refuse to extend the ExParte injunction granted by Wesley James J (ag.). Accordingly the Application is refused.

I hold that in the circumstances of this case the Exparte injunction ought not to be extended as Damages are readily ascertainable for any breach which may occur in the agreement between the parties and further that Damages would be adequate remedy in the circumstances. The Application for Interlocutory Injunction is acordingly denied.