J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 63/86

BEFORE: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.

CHALLENGE INTERNATIONAL AIRLINES INC. - APPELLANTS

AND

CHALLENGE INTERNATIONAL AIRLINES JAMAICA LIMITED

AND

JAMAICA DISPATCH SERVICES LIMITED

- RESPONDENTS

Dennis Goffe, Michael Hylton and Arthur Hamilton instructed by Myers, Fletcher & Gordon, Manton and Hart for appellants.

W.K. Chin See, Q.C., and Maurice Tenn instructed by Ripton McPherson for respondents.

March 25-27; April 2-3; & June 5, 1987

ROWE, P.:

On December 4, 1986, the respondents filed a writ against the appellants claiming damages for trespass and seeking an injunction to restrain them from entering or remaining in those portions of the Norman Manley International Airport of which the first respondent is the tenant of the Airports Authority. Reckord J. (Ag.) on December 17, 1986, granted an interlocutory injunction in terms of the endorsement on the writ and from this order

the present appeal was taken. We dismissed the appeal after a protracted hearing and after the court had granted every indulgence to the parties to seek to arrive at a consensual arrangement for shared occupation of the disputed space. These are the reasons for that decision.

The appellants, a Florida Corporation, operated an airline into Jamaica, using the Norman Manley and Donald Sangster International Airports. The first respondent is a Jamaican company registered under the Companies Act. Its name was approved by the appellants, prior to registration, but the appellants have neither share-holding nor beneficial interest in the first respondent company. The second respondent is an affiliate of the first respondent, and by resolutions of October 8, 1986, the business of both respondents were amalgamated and there-after operated under the name of the second respondent. Mr. Gwynro Jones and his wife Phyllis are the principal shareholders and directors of the respondent companies.

The Airports Authority of Jamaica rented space at the Norman Manley International Airport to the first respondent. An issue before the learned trial judge was whether the first respondent was tenant in its own right, or it was an agent for the appellants, who were then in substance the real tenant and entitled to possession as against their agents. Reckord J. (Ag.) found that the first respondent was the tenant and in our view he had the most abundant evidence on which to base such a finding. Significant to this aspect of the case was a "Letter of Understanding" dated November 11, 1986,

between Jamaica Dispatch Services Ltd. and the appellants, Challenge International Airlines Limited. The opening paragraph of that letter of understanding was based on the assumption that the appellants were not the tenants of the space at the Norman Manley Airport in that it stated:

> "This subject letter precedes a Ramp Handling Agreement and a Sub-tenancy arrangement",

and the second General Condition of that letter expressly provided that:

> "Jamaica Dispatch Services will sub-let to Challenge Inc. office and counter space at each Airport. In Kingston the space will exclude the office occupied by Mrs. Thomas and the adjacent office to the right of that office."

It was in pursuance of this letter of understanding that the appellants were handed keys to the offices at the Norman Manley Airport. However, the appellants promptly repudiated the terms of the letter of understanding, but remained in possession, and excluded the respondents from the space they had handed over to the appellants. The history of the contractual arrangements between the parties do not suggest that the respondents were acting as agents for the appellants in renting space at the Norman Manley International Airport, and it seems to be an over-generous interpretation to say that there is a serious question for trial as to which of these contending parties is the tenant.

Mr. Chin See cogently relied upon Balls v. Westwood [1809] Vol. 2 Campbell's Reports p. 11 for his submission that once the appellants admit that they are sub-tenants of the respondents they have no power to challenge their

landlord's title. So strong is this rule of law that Lord Ellenborough said of it in Balls v. Westwood, supra:

> "You may as well attempt to move a mountain. You cannot controvert the continuance of the title of the person under whose demise you continue to hold"

Mr. Goffe sought in his fourth ground of appeal to jettison from the case all the evidence adduced by the respondents in the affidavit of Mrs. Jones on the basis that it was sworn to before the commencement of the action.

The short history of the proceedings is this. On December 3, 1986, the appellants filed a suit, C.L. 495/86, seeking an injunction to restrain the respondents from trespassing on the appellants' premises at the Norman Manley and Donald Sangster International Airports. On the following day, December 4, 1986, the respondents filed their own suit, C.L. 497/86, against the appellants seeking a similar relief. In each case an ex-parte summons seeking an interlocutory injunction was filed and both came before Reckord J. (Ag.) on December 4 and 17, 1986. They were heard together. The order of the court was that the summons of the appellants were to be dismissed and he then granted the injunction in favour of the respondents which is the subject of this appeal.

Although the actions C.L. 495 and C.L. 497 were not consolidated, they were heard together. Phyllis Almena Jones, a director of the respondent companies swore to an affidavit on December 3, 1986, in support of the respondents' summons for interim injunction. As we said earlier, the writ C.L. 497/86 was not filed until December 4, 1986.

The principle in Adanac v. Black is supported by Williams v. Davis, English and Empire Digest Vol. 28 p. 1123 at para. 1205, and Fennell v. Brown [1854] 18 Jur. 1051.

Mr. Chin See found an effective counter when he submitted that the authorities do provide that in some circumstances the affidavit which pre-dates the writ can be looked at and acted upon by the judge, for example, where the attorney gives an undertaking to have the affidavit re-sworn, which indicates that the pre-dated affidavit is not bad for all purposes. He submitted that in the instant case there was no necessity for a re-swearing of the affidavit, because the appellants had effectively introduced it in to evidence by a properly sworn affidavit after action was brought. It became crystal clear to us that the court could not understand the affidavit of Mr. Gordon White of December 9, 1986, without looking at the affidavit of Mrs. Jones to which it made such full references. We, therefore, hold that Mrs. Jones' affidavit was incorporated in to that of Mr. Gordon White, and that it could be looked at by the learned trial judge and become the basis of his order granting to the respondents an interlocutory injunction.

Much debate turned upon the balance of convenience. The appellants, it was said, have an airline but cannot operate it without space at the airport, while the respondents have the space and no airline. It was even suggested that the respondents were holding on to the space in order to compel the appellants to contract with them on grossly unreasonable terms. That argument can be disposed of summarily. The shareholders of the respondents had been in business on their own account prior to the

establishment of the appellants and they accommodated the appellants by providing certain local services for the appellants' airline when it begun to operate in Jamaica. There was evidence to show that there were other handling agents in Jamaica who could provide the services formerly performed by the respondents on behalf of the appellants. In any event the respondents had been in sole possession of the disputed space until November 28, 1986, when they handed over their keys to the appellants under and by virtue of a letter of undertaking of Friday, November 29, 1986, which the appellants unilaterally repudiated, and then on December 1, 1986, excluded the respondents from possession of any part of the premises. A restoration of the status quo would require that the appellants vacate the premises and restore them to the respondents pending the trial of the action. On the balance of convenience the respondents are entitled to possession and consequently the order for interlocutory injunction in their favour was validly made.

CAREY, J.A.:

I entirely agree and have nothing useful to add.

WHITE, J.A.:

I agree with the judgment of Rowe P.

However, the appellants replied to the affidavit of Mrs. Jones of December 3, 1986, through their general manager, Mr. Rupert Gordon White, and he specifically referred to the affidavit of Mrs. Jones sworn to on December 3, 1986. At paragraph 2 of his affidavit Mr. Gordon White said:

> "I beg to refer to the affidavit of Phyllis Almena Jones sworn to on the 3rd December, 1986 and filed herein and deny that the 1st Plaintiff is the tenant of the area referred to in paragraph 2 thereof."

Then in paragraphs 6, and 11 Mr. Gordon White made detailed references to Mrs. Jones' affidavit and denied the contents thereof.

Mr. Goffe submitted that there was no admissible evidence before Reckord J. (Ag.) in favour of the respondents as Mrs. Jones' affidavit of December 3, 1986 could not be used in support of a writ filed on December 4, 1986. He relied on the decision of the Court of Appeal of Trinidad and Tobago in Adanac Industries, Ltd. v. Black [1962] 5 W.I.R. 233. In that case Wooding C.J. said:

> "On November 15, that is to say, five days later, he sought and obtained an ex parte injunction restraining the defendants in the terms of the injunction sought by the writ of summons. That application was made ex parte. It was supported by affidavit which was sworn to on November 7, 1962, that is to say, three days before the writ was filed. The rules are very clear. An affidavit can only be sworn in matters of this kind after the writ of summons has been duly issued because, as required by O. 38, r. 2, of the R.S.C. [T], every affidavit must be intituled in the cause or matter in which it is sworn, and it cannot be so intituled unless and until there is a cause or matter. The affidavit having been prematurely sworn to, the learned judge should never have acted upon it unless or until he had it re-sworn or had got an undertaking from the proper party that it would be re-sworn and re-filed: so that was one major error which the learned trial judge committed."