



[2015] JMSC Civ. 10

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2015CD00029
(formerly 2013HCV06172)**

BETWEEN	Haresh Daswani	CLAIMANT
And	Monique Daswani	1st Defendant
AND	Surf Classic Company Limited	2nd Defendant
AND	Sun Kissed Jamaica Limited	3rd Defendant

**Notice of Application – Consent Order-Whether Defendant in breach of Order-
Whether Consent Order is to be varied – Interpretation of Consent Order –
Whether a party to be joined for purposes of Discovery Orders.**

Mr. Seyon Hanson instructed by Seyon T. Hanson & Co. for Claimant.

**Mr. Gordon Steer, Kay-anne Parke and Mr. V. Goloub instructed by Chambers
Bunny & Steer for 1st Defendant.**

Heard: 19th May 2015, 5th June 2015.

In Chambers

Cor: Batts J.

[1] On the 5th June 2015 I delivered this judgment orally. When the hearing commenced I was advised that the 2nd and 3rd Defendants had not been served. The Claimant intended to proceed only against the 1st Defendant. This, as it turns out, is not surprising because the 2nd and 3rd Defendants are companies now owned and controlled by the Claimant.

[2] At my invitation Claimant's counsel opened fully to the facts and issues before me. The application (filed on the 2nd March 2015 in HCV6172 of 2013 before being transferred to the Commercial Division) seeks to enforce the terms of a Consent Order made between the parties. The Claimant also wishes to add a party Pink Pineapple Limited, to these proceedings. In the alternative the Claimant seeks to vary that Consent Order. The 1st Defendant's counsel indicated an intention to take a preliminary point as to the power of a court to vary a Consent Order. I indicated that I would hear all submissions and make a determination of that issue at the end of the hearing. Claimant's counsel stated that only the Claimant's evidence would be relied upon as their other affiant would not be called.

[3] The Claimant and the 1st Defendant attended before me and gave evidence. Their respective affidavits stood as their evidence in chief and they were both extensively cross-examined. At the end of the day I have not found the issues of fact difficult to resolve. I bear in mind that in these matters proof is on a balance of probabilities. It is the Claimant who bears that burden. In other words I must be satisfied that it is more probable than not that the situation is as the Claimant avers.

[4] More challenging perhaps has been the interpretation of the Consent Order earlier alluded to. Each party has placed its own construction on what ought to have represented a meeting of the minds. That order was made on the 10th day of December 2013 by and with the consent of the four parties to the claim. They were all represented by counsel. So too was an interested party CIBC First Caribbean Jamaica Ltd. There were 14 substantive paragraphs to the Order. Paragraph 15 gave liberty to apply.

[5] The Claimant contends that the 1st Defendant has combined with the intended additional Defendant (Pink Pineapple Ltd.) to breach paragraph 11 of the said Consent Order, paragraph 11 reads:

“That the Claimant will assist the 1st Defendant to produce a new clothing line overseas for the

purpose of sale in Jamaica that will not compete with the clothing lines currently being sold by the 2nd and 3rd Defendant companies up until the final payment.”

The Claimant asserts that the words of that provision, when read in the context of the consent Order as a whole, meant and were intended to mean that the Claimant would not compete with the 2nd and 3rd Defendants in Jamaica until the Claimant had completed payment for the 1st Defendant's interest in the 2nd and 3rd Defendants' companies.

[6] It is common ground that this litigation commenced in consequence of certain marital issues between the Claimant and the 1st Defendant. The Claimant by Fixed Date Claim filed on the 7th November 2013 sought injunctive Orders, Orders for disclosure and for permission to purchase the 1st Defendant's shares in the 2nd and 3rd Defendant companies. After some negotiation the Consent Order, the subject of the present application, was made. By that Order the Claimant purchased the 1st Defendant's interest in the 2nd and 3rd Defendant' companies. The payment was to take place by monthly installments over several years. The 1st Defendant would however “forthwith” cease to be a Director of the companies and would hand over and remove her name from all bank accounts. In effect the Claimant's control of the 2nd and 3rd Defendant companies commenced immediately. The 1st Defendant was however given full control of Sun Kissed USA LLC a company incorporated in the United States. The 1st Defendant was allowed to sell the products of the 2nd and 3rd Defendants in the wider Caribbean. The 2nd and 3rd Defendants agreed to supply the 1st Defendant with products for that purpose at cost price.

The Consent Order also provided that the parties agreed to take the necessary steps to commence divorce proceedings in the United States of America.

[7] The 1st Defendant denies there has been a breach by her of paragraph 11 of the Order. At paragraph 4 of her affidavit filed on the 11th March 2015 she states,

“4. Paragraph 8 is denied. The intention and construction of Order 11 referred to a clothing line that the said Claimant would assist me in creating. There was no agreement either verbal or otherwise that prohibited me from creating my own clothing line.”

[8] Her counsel Mr. Gordon Steer did not appear to be as didactic about this in the course of making submissions. His skeleton submission does not postulate a construction for Clause 11 but states;

“The affidavit does not in any way adduce any evidence that the 1st Defendant has breached any restraint of trade clause, whether set out in the Order (as there is none) or by way of an implied term.”

In oral submissions he was content to deny the construction placed on Clause 11 of the Order by the Claimant. He pointed out that the Claimant has already filed a passing off action against the 1st Defendant and Pink Pineapple Ltd. and that their application for an injunction was refused.

[9] Whilst cross-examining the Claimant however the following exchange occurred:

“Q: Sun Kissed had a passing off action against Monique (1st Defendant) and Pink Pineapple.

A: Yes

Q: Paragraph 11 of the Order does not speak to any formal restraint is that correct?

A: I don't understand

Q: Paragraph 11 says you will assist Monique to produce clothing line “that will not compete”

A: Yes

Q: In fact it does not say she could not compete?

A: Correct”

[10] I am satisfied that the words of Clause 11 of the Consent Order read in the context of the Order as a whole, do not prohibit competition by the 1st Defendant. The Clause to my mind prohibits the 1st Defendant for a certain period (that is whilst the payments were being made to her) from producing a line of clothing which would compete with the lines being sold by the 2nd and 3rd Defendants. The Claimant according to Clause 11 would assist the 1st Defendant to produce a new line of clothing for sale in Jamaica which ought not to compete with the 2nd and 3rd Defendants' existing lines. There is no general bar to competition in the Order; nor is there any bar to the 1st Defendant, for example, going to work as a sales agent for another distributor of clothing. It seems to me that the focus of Clause 11 was the production of a line of clothing. What the parties were concerned to prevent was the 1st Defendant's use of her knowledge of the 2nd and 3rd Defendants' styles to replicate or create similar or competing items within the Jamaican market place. Competition simpliciter was not barred.

[11] This being my interpretation of Clause 11, it is manifest that no breach by the 1st Defendant has been proved. There is no evidence that the 1st Defendant “produced” by herself or otherwise a line of clothing. At best it alleges that she purchased items through a company owned by her mother.

[12] Lest I am in error with that narrow construction of clause 11 however, I will consider briefly the position on the construction contended for by the Claimant's counsel. That is that Clause 11 prohibits the 1st Defendant from competing with the 2nd and 3rd Defendants in Jamaica.

[13] Claimant's counsel in his oral submissions summarized the facts established which he asserts demonstrates a breach of this anti-competition clause:

- a) The First Defendant was seen at a trade show in China in May 2014
- b) She did not respond positively to the invitation extended by the Claimant to create a clothing line.
- c) Pink Pineapple Ltd. Is close to her, using her residential address and was formed by her mother.
- d) Her mother resides overseas.
- e) Her mother had been unemployed for 3 years.
- f) Pink Pineapple Ltd. is selling to the same customers as the 2nd and 3rd Defendants.
- g) Her mother had not been in that business before.
- h) The 1st Defendant has not tried to sell other products in particular swim wear because she has been so consumed with Pink Pineapple Ltd.

[14] Counsel relied heavily on the decision of Gilford Motor Company Ltd. v Horne [1993] Ch 935 that case be it noted contains the blueprint for an anticompetition clause properly so called,

“The managing director shall not at anytime while he shall hold the office of a managing director or afterwards, solicit, interfere with or endeavour to entice away from the company any person, firm or company who at any time during or at the date of the employment of the defendant as managing director were customers of or in the habit of dealing with the company.”

[15] That case also allowed the piercing of a corporate veil but in circumstances where, the employee established a business at his own home; it was carried on in his name, it supplied the same goods as his former employers (parts for Gilford vehicles),

the “boss” of the business was the former employee and this latter evidence came from an eye witness.

[16] The evidence before me falls woefully short of that. Certainly to the extent that the Claimant relies or hopes to rely on an inference the primary facts have not been established. When cross examined the Claimant admitted that the 1st Defendant’s primary role in his company had been administrative although she did occasional sales calls. He admitted that he had no personal knowledge that the 1st Defendant had solicited the customers of the 2nd and 3rd Defendants. He admitted that an injunction had been refused in a passing off action brought against Pink Pineapple Ltd. He admitted having no personal knowledge of the 1st Defendant’s involvement with Pink Pineapple Ltd. When pressed he stated that he had seen the 1st Defendant leaving a sales meeting at a resort store. This was prior to his affidavit being filed but it was not stated in the affidavit. I reject that bit of evidence as being an afterthought. In any event it is far from clear how he could, even had he seen her leaving, determine that she had been in a meeting or if so what that meeting was about. His affidavit evidence and the evidence in cross-examination demonstrate at most suspicion or belief. It does not prove on a balance of probabilities, that the 1st Defendant was using Pink Pineapple Ltd. as a device to compete with the products of the 2nd and 3rd Defendants.

[17] The 1st Defendant’s evidence was largely unchallenged. Her affidavit and viva voce evidence provided a credible narrative and explanations whenever same was necessary. She for example, states that her mother had been in one type of business or another for most of her working life. She denied any active involvement in Pink Pineapple Ltd. Her visit to China was to consider gym wear, the line she intends to produce for sale in Jamaica. Her mother resides both in Jamaica and in the United states (a not uncommon situation for certain sectors of Jamaican society I should add). She admits her mother had discussed with her the plans to commence business as Pink Pineapple. She pointed her mother to sources of goods which she said were readily available on the internet. When it was suggested to her that Pink Pineapple’s customers were the same as the 2nd or 3rd Defendant’s she said she was not surprised because:

“the customers are the same for everyone in this industry. Set customers list that everyone has.”

She pointed out that the resort areas were well known and her mother from prior discussions with the Claimant was well aware of who the various customers were. It was in any event a relatively small concentrated market. She denied approaching the 2nd or 3rd Defendants’ customers on behalf of Pink Pineapple Ltd. It was even suggested she had recruited “Jonathan” from the 2nd and 3rd Defendants to work for Pink Pineapple Ltd. This she denied and explained that “Jonathan” was a family friend known to her brothers, her mother and herself since she was 16 years old. When challenged on the similarities between Pink Pineapples products and that of the 2nd or 3rd Defendants she indicated that Pink Pineapple Ltd. like the 3rd Defendant sells ladies clothes.

[18] When faced with photographs of the two product lines the 1st Defendant stated that the only similarities were the word “Jamaica” which appeared on each and the garment had the same “cut”.

“Q: Based on similarity you have identified would Pink Pineapple product be competing.

A: No because looks like a different theme. I could be wrong. The cuts are universal across the board. To my knowledge not invented by Sun Kissed.”

[19] The Claimant endeavoured to rely on various emails and letters. However, they do not contain any admissions by the 1st Defendant, nor do the contents directly contradict the 1st Defendant’s evidence.

[20] In the result and having considered the evidence I do not find that the 1st Defendant has acted in breach of Clause 11 of the Consent Order.

[21] As regards the application to amend the Consent Order this is refused. I agree with the submission that the circumstances in which orders made by consent can be amended are very narrow. Such an order, in a case like this, is really an agreement or contract. In the absence of misrepresentation, common mistake or fraud the court is very reluctant to amend, see: Glenford Christian et al v Western International et al CL 2012CD00092 [2015] JMCC Comm 1 (applying Causewell v Clacken SCCA 129/2002 and Richardson v Richardson [2012] JMSC Civil 12). No circumstance sufficient to warrant a variation have been alleged or proved. The Claimant asserts hardship because his business he says is down. Even was that a sufficient change in circumstances to warrant a variation, and I strongly doubt that it could be, there was not sufficient evidence before me of that. No books of account or evidence of sales comparisons over the period were shown. Nor was anything like income tax returns or profit and loss accounts exhibited. The Claimant admits there were other players in the market and there was no evidence to directly connect the activity of Pink Pineapple Ltd. to any alleged losses being suffered by the Claimant or the 2nd and 3rd Defendants. I refuse the application to vary the Consent Order.

[22] It follows from the decisions in paragraph 20 and 21 that I also decline to join Pink Pineapple Ltd. as a party to this action. There is, as I have found no evidence to implicate Pink Pineapple Ltd. in the alleged or any breach of the Consent Order by the Claimant. Nor will I allow joinder for purposes of Orders for disclosure as sought in paragraph 4 of the Notice of Application. This would amount to a fishing exercise, in the hope that evidence to mount a case can be elicited.

[23] The Consent Order was meant to bring an end to the dispute between the parties. Each party is obliged to abide its respective obligations. It is not the purpose of applications under “liberty to apply” to insert terms not thought of but perhaps now regarded as desirable; nor is it the function of the court in the absence of a

demonstrable cause of action to make orders for the purpose of investigating suspicious activity in the hope that evidence to make a case may be uncovered.

[24] The Claimants Notice of Application filed on the 2nd March 2015 is therefore dismissed with costs to the 1st Defendant to be taxed if not agreed.

David Batts
Puisne Judge