Judgement Book

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 12/88

BEFORE: The Hon. Mr. Justice Rowe - President
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Wright, J.A.

BETWEEN	ESSO STANDARD OIL S.A. LTD	DEFENDANT/APPELLANT
AND	LLOYD CHAN	PLAINTIFF/RESPONDENT

R.N.A. Henriques, Q.C., & Allan Wood for the Appellant

J. Sinclair for the Respondent

February 24, 25, 26 & March 14, 1988

CAMPBELL, J.A.:

The respondent was the tenant of the Appellant in respect of "tied premises" situate at No. 60 Gilmour Drive at the corner of Molynes Road and Washington Boulevard in the parish of Saint Andrew. Under an agreement entered into on 21st October, 1981 the respondent covenanted under Clause 2 (m) of the aforesaid agreement:

> "Not to sell at the leased premises any gasoline, oils, greases, or other petroleum products other than those supplied to the tenant by Esso, unless Esso shall be unable to supply an adequate quantity of its branded products."

By Clause 4 (a) of the said agreement, so far as is relevant the appellant with reference to Clause 2 (m) reciprocally covenanted as follows:

> "4 (a) That Esso will during the said term sell to the Tenant all products marketed by Esso in Jamaica as and when required by the Tenant at Esso's current list prices and terms and conditions to dealers from time to time for such products."

By Clause 4 (c) (iv) the appellant is given the right, without notice forthwith to terminate the lease agreement and all the tenant rights thereunder and to re-enter and in any manner resume possession of the leased premises if inter alia -

> "The Tenant sells or holds out for sale as Esso's any substance or product which is not Esso's."

Apart from this provision for summary termination of the lease together with the collateral tenant rights, there is a provision for determination of the lease for continuing breaches of its provisions after fifteen days written notice, and finally there is a further provision for unilateral determination by either party giving to the other, three months written notice expiring on the last day of any calendar month.

The appellant notified the respondent on December 22, 1987 that under Clause 4 (c) (iv) it had summarily determined the lease and the tenant rights thereunder for breach by the respondent of Clause 4 (m). It demanded immediate vacation of the leased premises. The letter containing the reason for the summary determination states as follows:

> "We hereby advise that your lease Agreement with us is terminated with immediate effect following the happenings earlier today when petroleum product, not sold by us was delivered at the station into storage tank at the service station, and this is in breach of section 2 (m) of the lease agreement.
>
> Kindly vacate the premises immediately."

The respondent's immediate response is contained in a letter to the appellant dated December 24, 1987 exhibited by the appellant. Therein the respondent denied that any petroleum product had been delivered into his storage tank on that day even though he admitted that a tanker had arrived to make delivery. The respondent therefore asserted that no breach had been committed by him, and accordingly he was not obliged to comply with the demand to vacate the premises. The respondent in the said letter invoked the arbitration provision in the lease agreement. On December 28, 1987 the respondent despite the arbitration provision, invoked the jurisdiction of the court by issuing a writ claiming damages for breach of contract, and injunction restraining the appellant from arbitrarily "closing down" the operations at the leased premises.

The respondent immediately thereafter sought an exparte injunction which was granted on December 30, 1987 limited to expire 14 days after the date of the order.

On January 19, 1988 the respondent by "inter partes" summons sought an interlocutory injunction which, despite the "14 days relief" sought in the summons, was by agreement between the parties before the learned judge stated to be relief pending the trial of the action.

The usual affidavits and relevant exhibits thereto were filed. The summons was heard by the learned judge on February 4 and 5, 1988. At the conclusion of the hearing he granted the order of interlocutory injunction in these terms:

> "The Defendant be restrained from arbitrarily closing down the operations carried out at the gas station operated by the plaintiff at the corner of Washington Boulevard and Molynes Road, in the parish of Saint Andrew and that the Lease Agreement remains in force until the determination of the issues between the parties."

The appellant appealed this order on grounds which inter alia read as follows:

> "2. The learned Judge failed to appreciate that in substance and in effect the interlocutory injunction was mandatory, and so a different test was to be applied than was applied to the grant of a prohibitive injunction to determine whether such interlocutory injunction was to be granted."

The learned judge in an oral "Reasons for Judgment" said as follows:

> "First look at what Defendants are saying. To summarize they say Plaintiff in breach in that on diverse days and particularly on 22nd December, Plaintiff received or was in course of receiving gasolene not supplied by Defendant. Defendant denies this and says the truck came in error. Judge not trying issue on merits. Cannot gainsay that there is a serious issue to be tried i.e., whether Plaintiff in breach. One must now look at where balance of convenience is. Mr. Henriques submitted it would be granting a mandatory injunction, in my view, it is not a mandatory injunction, what it is saying is let status quo continue. Different consideration apply to supply of products and we will cross that bridge when we come to it."

The above excerpt clearly revealed that the learned judge applied the principle appropriate to a summons for an interlocutory prohibitory injunction. He cannot however be faulted for this, because the contents of the appellant's letter dated 22nd December and the respondent's reply dated December 24, 1987 did not disclose that the appellant had fully and effectively completed the termination process in that it had closed down the respondent's gas station, by locking off the petrol pumps which are owned by it and also re-entering into possession of the premises which also are owned by it. This information was only disclosed in this Court by the respondent in response to a question from us as to the reason for his invoking the jurisdiction of the court having earlier intimated to the appellant that he was invoking the arbitration provision in the lease. Had these facts been disclosed in the affidavit of the respondent, the learned judge could hardly have said:

> "In my view it is not a mandatory injunction. What it is saying is let status quo continue."

A prohibitory injunction seeks to preserve the status quo until the rights of the parties can be determined, by restraining the party enjoined from doing particular acts which in the case of a contract would be in breach thereof. Its effect is to continue the status between the parties created by the contract until trial, not to impose a new status, or to restore a status that has been interrupted. This is what the learned judge intended, but from the facts known to us, but unknown to him, the effect of his order would be to restore a status which had already been interrupted. This was not a prohibitory but rather a mandatory injunction requiring that by positive acts the appellant was to restore the contractual relation.

The principle applicable to the grant of a mandatory interlocutory injunction which is comparable in its nature and function to a mandamus is that it will ordinarily be granted only where the injury is immediate, pressing, irreparable, and clearly established and also the right sought to be protected is clear.

In Shepherd Homes Ltd vs. Sandham (1970) 3 All E.R. 402 Megarry J., at page 409 in considering the matters which should be borne in mind when determining whether to grant or withhold a mandatory interlocutory injunction said:

> "It is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course, grant such injunctions as the justice of the case requires; but at the interlocutory stage when the final result of the case cannot be known, and the court has to do the best it can, I think that the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation."

And at page 412 he said:

> "On motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case, the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted, and this is a higher standard than is required for a prohibitory injunction."

In Locabail International Finance Ltd v. Agroexport (1986) 1 All E.R. 900 the Court of Appeal in England approved the principle enunciated in Shepherd Homes Ltd (supra) and stated that such principle was not affected by the principle laid down in American Cyanamid Co., v. Ethicon Ltd (1975) 1 All E.R. 504. At page 907 Mustill, L.J., speaking for the court said:

> "It was pointed out in argument that the judgment of Megarry J., antedates the comprehensive review of the law as to injunctions given by the House of Lords in American Cyanamid Co., v. Ethicon Ltd (1975) 1 All E.R. 504, (1975) A.C. 396, but to my mind at least, the statement of principle by Megarry J., in relation to the very special case of the mandatory injunction is not affected by what the House of Lords said in the Cyanamid case."

The approach adopted by the learned judge in confining himself to the determination whether on the affidavit evidence there existed "a serious issue to be tried i.e., whether plaintiff in breach" was in the actual circumstances inadequate. He should have gone on to consider, having regard to the aforesaid evidence whether the plaintiff's claim that the defendant had breached its contract was "unusually strong and clear" such that he would feel "a high degree of assurance" that at the trial it will appear that the injunction was rightly granted.

There was before the learned judge on behalf of the appellant the affidavit evidence of two independent eye-witnesses namely Clifton Williams a supervisor of a security firm, and Corporal Wedderburn to the effect that on December 22, 1987 they had the respondent's gas station under surveillance on behalf of the appellant. They each deponed to the fact that a tanker-truck, licence number CC 057D driven by Errol Pennycooke arrived at the respondent's gas station. The sideman of the tanker-truck connected the hose from the tanker-truck to one of the station's under ground tanks and commenced to unload fuel therein. The driver of the tanker-truck was then approached by them and asked to produce the invoice covering the delivery. He informed them that there was none, but that he had been directed by the respondent's station manager Mr. Ansel Berry, to make the delivery. The unloading of fuel was thereafter discontinued. Though these affidavits do not disclose that the tanker driver's statement was made in the presence and or hearing of Mr. Ansel Berry, and if in his presence, what his response, if any, was, they do provide evidence which if believed would establish that the respondent was in breach of Clause 2 (m) of the lease agreement by actually receiving an unauthorised delivery of fuel.

The respondent's answer to these affidavits, ignoring the affidavit of the respondent himself which was largely hearsay, rests exclusively on the affidavit of Charles Powell the Chief Pump Operator in the employment of the respondent. In his affidavit he says he was in charge of the unloading of fuel on 22nd December, 1987. He admitted the arrival of the tanker-truck on the day in question. He further admitted that the sideman of the tanker-truck had connected "the delivery hose to the outlet valve" but he swears that no delivery of fuel was received because before delivery could commence he stopped the sideman on being so ordered by the secretary at the respondent's gas station, Miss June Coleman, who informed him that the invoice presented to her by the driver, was a wrong invoice. There was no affidavit from Miss June Coleman nor from Mr. Ansel Berry, the alleged manager of the station.

On this state of the affidavit evidence, with the credibility of the deponents so critical an issue, it could not be said that the respondent had presented a clear case for an order for a mandatory injunction on the basis that he had not breached clause 2 (m) of the lease, much less was his case "unusually strong and clear."

Had the learned judge been apprised of the real situation which existed, necessitating a different test to that which he applied, he in our opinion, would have required of the respondent much more evidence to determine by reference to that higher standard appropriate to an interlocutory mandatory injunction whether the order should be made and in the absence of such further evidence, he undoubtedly would have refused the order.

It is for the above reasons that we allowed the appeal on February 26, 1988 and set aside the order for interlocutory injunction.