

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. HCV 2009/00557

BETWEEN	GS TRUCKING LTD	CLAIMANT
AND	SHIPPING ASSOCIATION OF JAMAICA LIMITED	1 <sup>ST</sup> DEFENDANT
AND	JAMES LEVY	2 <sup>ND</sup> DEFENDANT

Oswest Senior-Smith instructed by Oswest Senior-Smith & Company for the Claimant.

Christopher Kelman instructed by Myers, Fletcher and Gordon for the Defendants.

**Heard: 27<sup>th</sup> February 2009, 2<sup>nd</sup> and 5<sup>th</sup> March 2009 and 27<sup>th</sup> October 2009**

**Campbell, J.**

(1) The Claimant, a limited liability company, has been operating for the last three years on the premises of Kingston Wharves Ltd. as a hauling company. Prior to its incorporation, the managing director of the Claimant operated as a sole trader on those premises. The Claimant is a member of the Port Trailer Haulage Association, (PHTA) which promotes the interest of its members.

(2) The 1<sup>st</sup> Defendant is a Registered Trade Union, incorporated under the provisions of the Trade Unions Act. It is the representative organization of wharf and terminal operators, shipping lines, stevedoring contractors and operators on the ports of Jamaica and is responsible for providing several categories of labour on the port of Kingston. The 2<sup>nd</sup> Defendant is an employee, and trucking verification officer of the 1<sup>st</sup> Defendant. He had previously been associated with a haulage firm, Jamaica Freight and Shipping Company Limited.

## Memorandum of Agreement

- (3) On the 1<sup>st</sup> February 2008, the 1<sup>st</sup> Defendant and PHTA executed a Memorandum of Agreement (MOA), which established the 1<sup>st</sup> Defendant as the central monitoring and verification body of trailer haulage on behalf of the shipping and trucking industry. The purpose was to regulate equipment interchange in order to protect equipment owned by shipping lines, trucks and equipment companies. The MOA was entered into to deal with the escalating problem of missing containers, chassis and other equipment of the shipping lines. An important feature to achieve the protection was the execution of the Standard Equipment Interchange Agreement by all SAJ and PHTA members. The MOA was revised on the 24<sup>th</sup> October 2008.
- (4) Among its terms, the MOA stipulates:
- (a) The Standard Equipment Interchange Agreement will be adopted by all SAJ and PHTA members.
  - (b) PHTA members will sign agreement with each shipping agent based on the Standard Equipment Agreement.
  - (c) The SAJ will establish a register of trucking companies, ensuring compliance with all regulations concerning equipment interchange.
- Only trucks who sign the shipping industry standard interchange agreement and who satisfy the insurance requirements under the Interchange Agreement and who meet the terms and conditions established for members of the PHTA will be allowed to draw equipment belonging to members of the SAJ. Trucks who fail to meet this minimum standard will not be allowed to haul equipment owned by member companies of the SAJ who are covered under the Standard Interchange Agreement.
- Approved trucks will bear a sticker to be displayed on their windshield to indicate their approval on the scheme of registration for trucks.

## **The Dispute**

(5) On the 6<sup>th</sup> May 2008, a driver of the Claimant was sent to the premises of Kingston Wharves Limited to conduct business. Upon reaching the gate, he was advised that on the instructions of the 2<sup>nd</sup> Defendant he could not enter the premises.

(6) The Claimant states that he was advised during the week of the 2<sup>nd</sup> October 2008 of a new regime for haulers to enter the premises. The Claimant was advised of a list of requirements that would qualify haulers for obtaining stickers for entry. The Claimant alleges that he had satisfied the requirements which were prescribed by the 1<sup>st</sup> Defendant.

(7) At the heart of this dispute, is a determination by the 1<sup>st</sup> Defendant, which is deposed to at paragraph 12 of the affidavit of Trevor Riley, the Managing Director of the 1<sup>st</sup> Defendant that the Claimant has not complied with all the regulations concerning equipment interchange and has not met the minimum standards established under the MOA. Consequently the 1<sup>st</sup> Defendant has properly refused to issue an “Approved Trucker” sticker to the Claimant.

(8) The Claimant’s non-compliance is detailed at paragraph 13 of Riley’s affidavit. “The 1<sup>st</sup> Defendant’s basis of refusal is the Claimant’s unlawful and improper refusal to promptly and expeditiously settle its obligations to MMS for the theft of MMS’s chassis during the interchange. The Claimant’s unlawful refusal to honour its obligation to MMS constitutes the very mischief which the regime of the Equipment Interchange Agreement seeks to palliate. The avowed commercial purpose of the Equipment Interchange Agreement is a pay now, sue later regime responsibility on the part of haulers, including the Claimant.”

(9) The Claimant has not denied that a chassis that was rented from MMS was in fact stolen whilst at the premises of their client Poly Pet. They contend that Poly Pet has agreed to compensate MMS for the theft; however, negotiations have broken down due to a disagreement

as to the cost for compensation. The Claimant further alleges that the 2<sup>nd</sup> Defendant, at the material time, was employed to a company that shared a common principal ownership with MMS, a party to the dispute.

### **The Claim and the Injunction**

(10) On the 13<sup>th</sup> February, the Claimant filed a Claim Form and an Ex parte Notice of Application for Court Orders seeking:

1. A declaration that the trucks of the Claimant are entitled to access the premises of Kingston Wharves Limited and APM Terminals.
2. An injunction to restrain the Defendants from obstructing the entrance or otherwise preventing the trucks of the Claimant from gaining access to the premises of Kingston Wharves Limited and APM.

The Grounds for the injunction was that the Claimant had a good and arguable case. In their written submissions, it was stated that the issues were:

- (1) Whether the decision of the Defendants is invalid and unlawful?
  - (2) Whether the Claimant is entitled to enter the premises of Kingston Wharves Limited and APM Terminals in light of its fulfilment of the requirements to do so?
  - (3) Whether the Claimant is entitled to damages arising from the decision of the Defendants.
  - (4) What is the effect of the liability being accepted by the consignee to the Defendant?
- Was the decision to bar the Claimant invalid?**

(11) The Defendants contend that “aim of the transaction” and object of the parties “is stated in the Purpose and Problem preambles of the MOA. Further, that those provisions amply support the Defendants’ argument that the proper discharge of their contractual responsibilities under the MOA as a central monitor and verifier, on behalf of the entire shipping and trucking industry (of Jamaica), requires it to refuse to issue a sticker to the Claimant until the Claimant

purges its flouting of the scheme for the interchange and honour its obligations to MMS. It is also contended by the Defendants that they are so permitted to act pursuant to the very wide unlimited language of the MOA conferring the Defendants' powers of monitoring and verification.

(12) The Defendants contend further that the MOA gives the Defendant responsibility for ensuring compliance by trucking companies with all regulations concerning equipment interchange. That the matter of approval of a trucker is the responsibility of the 1<sup>st</sup> Defendant.

### **Prohibitory or Mandatory Injunction**

(13) Both sides' submissions were formulated along lines as to whether the Court was concerned with the grant of a prohibitory as distinct from a mandatory injunction. The Defendants argued that although framed as a restraining prohibitory order, what the injunction seeks to do is to mandate the Defendant to take the positive step of issuing the relevant sticker to the Claimant. The Defendants urge that the threshold to be established is the higher one governing the grant of a mandatory injunction. The Defendants relied on **Shepherd Homes Limited v Sandham** (1970) 3 All ER 402, where at page 412;

“..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 injunction 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 to enforce a contractual obligation.

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”

The Defendants submitted that **Shepherd Homes** has been approved and applied by the Court of Appeal in the local cases of **Esso Standard Oil SA Limited v Lloyd Chan** (1988) 25

**Ors.** 2007HCv04736 (unreported).

(14) The Claimants also urged that before the Court can proceed to consider the injunction it has to be certain of the nature or function of the injunction sought. It was argued that the Claimant was seeking an injunction for access to the premises. Therefore, what is sought is prohibitory as the trucks of the Claimant is being precluded or prevented from enjoying an entitlement that it had possessed.

### The Law

(15) The Privy Council in **National Commercial Bank (Jamaica) Ltd. v Olint Corp. Ltd.** (61/2008), delivered on the 28<sup>th</sup> April 2009, eschewed the approach of first deciding the classification of the injunction. Their Lordships described as box-ticking and barren, the approach of emphasizing the classification of the injunction as either prohibitory or mandatory, and opined that such an approach did not do justice to the complexity of the decision facing the court. The judgment in **Olint Corp. Ltd.** holds that what matters is “what the practical consequences of the actual injunction are likely to be.”

(16) The Privy Council in **Olint Corp. Ltd.** approved the judgment in **Film Rover International Ltd. and Others v Cannon Film Sales** [1987] 1 WIR 670.

The Court in that case considered the **Sheppard Homes Ltd.** (supra) and Hoffman J, who wrote the judgment in **Film Rover**, opined that a distinction should be made between fundamental principles and what are sometimes called guidelines. Hoffman, J. was of the view that a fundamental principle in interlocutory injunction application is that the Court should take whichever course appears to carry the lower risk of injustice. The guidelines for both kinds of interlocutory injunctions are derived from this principle. Megarry, J. statement in **Sheppard**

**Homes Ltd.** that “a court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction,” according to Hoffman, J., was plainly intended as a guideline rather than an independent principle.

### **The Purpose of the Interlocutory Injunction**

(17) The Privy Council in **Olint** stated, “It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial.”

The purpose of such an injunction is to improve the chances of the Court being able to do justice after a determination of the merits at trial. At the interlocutory stage, the Court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in **American Cyanamid Co. v Ethicon Ltd.** (1975) AC396, that means if damages will be an adequate remedy for the Plaintiff, there are no grounds for interference with the Defendants freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the Plaintiff could be prejudiced by the acts or omissions of the Defendant pending trial and the cross-undertaking in damages would provide the Defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.

### **Is there a triable issue?**

(18) The Claimant has alleged that the 1<sup>st</sup> Defendant had wrongfully and unlawfully and without reasonable cause prevented the trucks of the Claimant from entering the premises of Kingston Wharves Ltd. and APM terminals. The 2<sup>nd</sup> Defendant has argued that the authority, to act in the manner he did, is expressed in the terms entitled Purpose and Problem. Neither of

these terms will bear a construction that would permit the 1<sup>st</sup> Defendant to bar the entry of the Claimant to the Kingston Wharves Ltd. premises.

(19) All that the Purpose does is to acknowledge an agreement entered into between PHTA and the SAJ protects equipment owned by the shipping lines. The term entitled Problem expresses a situation of missing containers, chassis, etc. and notes the implementation of an Interchange Agreement, for the protection of the equipment.

(20) The powers ascribed in the MOA is relied on by the Defendant as support for the argument that the proper discharged of the 1<sup>st</sup> Defendant's function under MOA requires the 1<sup>st</sup> Defendant to refuse to issue a sticker to the Claimant.

As a matter of construction, it is extremely difficult to see how "to monitor and verify" would permit the finding of liability and would allow the decision maker to disregard a party who has admitted liability, and proceed to sanction the Claimant despite that admission.

The Claimant also raises the fact that the 1<sup>st</sup> Defendant having required the Claimant to fulfil certain requirements during the week of the 2<sup>nd</sup> October 20008, as a pre-condition to gaining entry to the Wharves, and the Claimant having acted on them to its detriment the Defendant is estopped from preventing the Claimant from entering the premises.

(21) I find that the Claimant has raised triable issues. Whether the injunction be prohibitory or mandatory, the underlying principle is the same. The better course is the course that that will create the least hardship, injustice and inconvenience, or to put it in the language of Privy Council in **Olini Corp. Ltd.**, the course that will "cause the least irremedial prejudice to one party or the other.

**Practical consequences relevant to this application**

(22) The refusal to grant the injunction will cause the Claimant to continue to be barred from entry to the wharf with the consequential loss of income and eventually loss of his clientele. The Claimant contends that he has had third parties in some instance honour his agreement, this has resulted in a loss of income. The Claimant may eventually lose his business. Damages may be inadequate if the business is ruined because of flight of customers.

It is unchallenged that Poly Pet has admitted liability for the loss of the chassis, which was on its premises, but the continued barring of the applicant from the premises may have the unintended consequence of the applicant appearing to be complicit in the loss/theft of the chassis.

(23) It may be that the granting of the injunction will not enhance the security, as the MOA may be perceived as being unable to bring wrongdoers to book, thereby undermining the security on the wharves.

The Claimant's case is the stronger of the cases. I am prepared to say that on the construction of the documentation before me, it is unlikely that the Defendants could prevail.

Where the Court, on a reading of the affidavits, forms a clear view of the relative strengths of the parties' cases, that view should be taken into account in deciding whether to refuse or grant the injunction. See **Seris 5 Software v Clarke** (1996) 1 All ER 835.

I find that the injustice suffered by the Claimants on a grant of this application, and should they (GFS) later fail at trial, would be greater than the injustice to SAJ if the application was refused and the Claimant later succeed at trial.

(i) The application is granted.

(ii) Costs to the Claimant to be taxed if not agreed.

