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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1996/G035

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| BETWEEN | GALAXY LEISURE & TOURS LIMITED | PLAINTIFF |
| A N D | WYNDHAM HOTEL COMPANY LIMITED | DEFENDANT |

Charles Piper, instructed by Piper & Samuda,
for the plaintiff

David Batts and Glenford Watson, instructed by
Livingston, Alexander & Levy for the defendant.

Heard: June 3, 5 and 11, 1996

PANTON, J.

The plaintiff has issued a writ endorsed with the following claims:

1. a declaration that by letters dated the 13th January, 1994,
the defendant contracted to grant to the plaintiff a con-
cession to operate 'the tour desk' within the defendant's
hotel for five (5) years with an option to renew;
2. a declaration that the plaintiff was granted a contractual
licence to operate the said tour desk for five (5) years
with an option to renew the said licence;
3. an order for specific performance of the agreement;
4. an injunction to restrain the defendant from evicting;
dispossessing or excluding the plaintiff from the said
premises; and
5. alternatively, damages for breach of the agreement.

This writ was filed on February 15, 1996. On that day Ellis, J. granted an
exparte injunction for a period of ten days restraining the defendant from
evicting the plaintiff. Since then there have been eight extensions of that
order while the parties have been preparing for this hearing.

The matter for determination at this time is whether an injunction should be
granted pending the trial of the action.

The affidavit evidence discloses that the parties have had dealings since 1991. The basic arrangement between them is that the hotel allows the plaintiff to operate, rent free, a tour desk in the lobby of the hotel; in return for this privilege, the plaintiff provides the hotel with a motor car for the use of its manager.

In 1993, the plaintiff commenced discussions with the manager of the hotel with the intention of securing a fixed period for the arrangements between them. The plaintiff wished a formal document from the hotel signifying that it had the right to operate for at least five years. That document was not forthcoming. The plaintiff supplied the hotel manager with a new car on the 13th January, 1994. The plaintiff is asserting that this act of supplying a new car is in keeping with its understanding that the defendant had agreed to the fixed tenure. On the other hand, the defendant is saying that this car is in keeping with the arrangements that have been existing since 1991, and that there has been no change.

On February 2, 1996, the defendant indicated to the plaintiff that it would be severing ties with it and asked the plaintiff to vacate the space it occupies in the hotel by February 18, 1996. It is this action on the part of the defendant that has resulted in these proceedings.

Is there a serious question to be tried?

In keeping with the guiding principles enunciated in American Cyanamid Co. v. Ethicon Ltd. (1975) 1 All. E.R. 504, the Court has first to determine whether there is a serious question to be tried. I bear in mind that it is not my duty or responsibility to determine the facts, especially in a situation where all the evidence has clearly not been put before me. On the basis of that which has been put before me, however, I am of the view that there is for determination the ~~question~~ whether there is a contract granting the plaintiff the right to operate the tour desk at the hotel for five years. It is a serious issue as the plaintiff is alleging that it has acted to its detriment in the belief that there is a contract.

Although I am of the view that there is a serious question to be determined at the trial of the pending action, I do not think that I am precluded from observing that the plaintiff may face some difficulty at the trial in obtaining

an order for specific performance, considering the nature of the contract that is alleged. The licence that is claimed here is one to share the use of the defendant's hotel lobby. It is not for exclusive occupancy. That may well be of importance to the trial court as it was to Megarry, J., in the case of London Borough of Hounslow v. Twickenham Gardens Developments Ltd. (1970) 3 All E.R. 362 at 339g where he quoted Goddard LJ in Thompson v. Park (1944) 2 All E.R. 477 as saying, "The Court cannot specifically enforce an agreement for two people to live peaceably under the same roof."

This, however, must await the trial.

Would damages be an adequate remedy?

The operation of a tour desk, as I understand it, involves a matter of dollars and cents. If an individual or group wishes to go on a tour, the operator obliges for a fee. It is a business operation. The plaintiff has been doing this at the defendant's hotel since 1991. The plaintiff is required by law to keep proper accounts. Its profits or losses, as the case may be, would be documented. There are thirty months left to complete the five year contract that the plaintiff says it has. If the plaintiff were to succeed at the trial, it should not be difficult to assess the loss that the plaintiff would have suffered during the thirty or so months. The situation that the plaintiff faces is not too dissimilar to that of the respondents in the case Cornwall Holdings Corporation (trading as Trelawny Beach Hotel) v. JUTA Limited and Neville Grant - Supreme Court Civil Appeal No. 15/87 (heard on 18th March and 6th April, 1987). There, the hotel barred a taxi operator from entering its premises to do business. The respondents had claimed that there was a contract between them and the hotel which gave them the right to enter the hotel's premises to "pick up and set down" guests. The Court of Appeal held that the lost trips could have been calculated, and that damages was an adequate remedy.

The plaintiff, by seeking damages as an alternative remedy, in the instant case may be said to be making a statement that it would be able to put before the Court evidence as to its losses. It is noted that it has not been said that the defendant would not be able to pay any such damages that may be awarded.

The likely effect of an injunction

The parties are at odds on the question of the existence of a contract. As said earlier, the alleged contract has thirty months to go. There can be no great

optimism that the trial will take place before another twenty months have elapsed. If the injunction is granted at this time, this Court would have effectively decided the action against the defendant before the trial. That would not be fair, especially if it turns out that there was no contract in existence.

On the basis of the foregoing reasons, the application for an injunction is refused. The summons is dismissed and the costs of these proceedings are awarded to the defendant.

On the application of the plaintiff, leave to appeal is granted. The injunction that is in force is extended for seven (7) days to facilitate the filing of the appeal. The plaintiff is to give the usual undertaking as to damages.