IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. P084 OF 1985

BETWEEN PARADISE TOURS & RENTALS LIMITED PLAINTIFF

AND UNIVERSAL LEASING & FINANCE LIMITED DEFENDANT

HEARD: 10th, 11th, 12th, 29th and 31st days of July, 1985.

Mr. D. Muirhead Q.C. instructed by Warrington E. Williams & Co. for Plaintiff.

Mr. R.N.A. Henriques, Q.C. instructed by A.U. Dabdoub & Co. for Defendant.

EDWARDS J. (Ag.)

This Judgment was delivered on the 31st July, 1985. I promised then to put it in writing. This I now do.

This is a Summons for Interlocutory Injunction to restrain the Defendant from taking possession of or from interfering with the possession and/or use by the Plaintiff, its servant and/or agents and/or invitees and/or hirers/ licensees and/or any person having control with the authority of the Plaintiff of the motor vehicles mentioned and described in a Lease Agreement dated 25th May, 1984, and made between the Plaintiff and the Defendant until the trial.

On the 25th of May, 1984, the Plaintiff entered into a Lease Agreement with the Defendant for the lease of a number of motor vehicles (47) to be used in the Defendant's Rent-a-Car business as a Licensee of the international firm of Hertz Rent-a-Car. The Lease contained a provision in Clause 10 which would entitle the Defendant who was described in the Lease as the Owners to determine the Lease in the circumstances specified in Clause 7 of the Lease. This Clause provides that:

> "The Owners may determine this Lease at any time by giving one month's previous notice in writing expiring on one of the days appointed for payment of rent or the occurrence of any of the following events

(a) upon the Lessee making default for Fourteen (14) days in the payment of the rent;

(b) on the making of a provisional order in bankruptcy against the Lessee;

(c) upon the Lessee calling a meeting of creditors or executing any assignment for their benefit;

(d) upon any execution or distress being levied upon any Lessee and not satisfied within seven (7) days;

(e) upon the Lessee having made any mis-statement in the Schedule or committed any breach of any of the terms and conditions of this Agreement, and in any such case the Owners may retake possession of the motor vehicles and for this purpose may enter upon the premises where the motor vehicles are located and such determination by the Owners shall not affect the right to recover any money due at the time of such determination or to recover damages for any breach of this Agreement before such determination".

In purported exercise of this power the Defendant on the 3rd of May, 1985, by letter, advised the Plaintiff that it was in breach of the Lease Agreement and that the Agreement "is now terminated forthwith pursuant to Clause 7 (E) of the Agreement". The letter is reproduced hereunder:

"May3, 1985
Paradise Tours & Rentals,
c/o Crown Motors Limited,
29 Hagley Park Road,
Kingston 10.

Sirs,

Despite our efforts to inspect the motor vehicles leased to your Company under

Lease Agreement 25/5/84 and pursuant to Clause 3 (ii) we still have not been able to do so.

Our Agent, Mr. Vic Bowen advises us that on May 1, 1985 he visited your Offices to carry out the inspection and was told by your Mr. Desmond Panton that there were no cars to be inspected.

We do not understand what Mr. Panton meant by this statement which could be construed to mean that the vehicles have been sold, in which case that would be a matter for the C.I.B. In addition to the above we are further disturbed that you have created a serious breach of your Lease by deleting the Insurance Coverage on several vehicles.

We do hope for your sake that the vehicles have not been sold, as we are certain you are fully aware that the vehicles belong to us. You are hereby advised that you being in breach of the Lease Agreement dated 25/5/84 the said agreement is now terminated forthwith pursuant to Clause 7E of the Agreement.

You are advised to deliver the vehicles to 27½ Half Way Tree Road, Kingston 5 by Friday 10/5/85 at the latest 4 p.m. At the expiration of such time we intend to have the services of our balif re-take our vehicles.

Yours truly,
UNIVERSAL LEASING & FINANCE LIMITED

(Sgd.) Finzi
Winston Finzi
Chief Executive Officer

The notice when annalysed shows that the grounds for termination are:

1. Inability of the Defendant to undertake an inspection of the motor vehicles pursuant to "Clause 3 (ii)" of the Lease.
2. That the Plaintiff committed a breach "by deleting the insurance coverage on several vehicles". The hope is also expressed that the vehicles have not been sold.

The Plaintiff's response as gleaned from the numbrous Affidavits which have been filed in the matter is that under the Lease one

month's previous notice in writing was a condition precedent to the giving of notice of termination and since this was not done, proper notice had not been given pursuant to the Lease Agreement. They also contended that the Defendant had agreed to obtain insurance coverage for the vehicles at a rate comparable to the rate for third party coverage and that it had been agreed that the comprehensive insurance coverage on vehicles which had been in existence prior to the commencement of the Lease should continue until the arrangements for new insurance coverage at the special rate were put in place, but the Defendant failed to honour that obligation. The Plaintiff further contended that the Lease provides specifically for the penalty or action which should be taken in the event of a default by the Lessee of the insurance requirements in that Clause 3(c) after stating that the Lessee shall "forthwith insure the motor vehicles at the expense of the Lessee against risks under full comprehensive policy including Acts of God, for its full value with an Insurance Company approved by the Owners and the Lessee" went on to say that:

> "In case of default by the Lessee the Owners shall be entitled to effect and maintain such insurance themselves and any aamounts paid shall be payable by the Lessee on demand."

As regards the inspection of the motor vehicles the Plaintiff say that the notice is defective in that it refers to Clause 3(ii) of the lease, when there is no such clause. The Plaintiff also states that its principal place of business is in Montego Bay and it was not reasonably practicable for it to take all the cars to Kingston at one time for inspection and that in any event it had been in discussion with the

Defendant with a view to its acquiring the entire interest in the vehicles and that consequent on these discussions the Defendant had advised it that the inspection would no longer be required. The Plaintiff furnished correspondence on which it relied in support of this contention. The Plaintiff also argued that it had an interest in the cars which exceeded that of mere Lessors as it had deposited with the Defendant, interest free, a sum of $242,986.92 as part payment on the cars in anticipation of the exercise of an option to purchase the cars and the Defendant was not therefore entitled to give notice of termination simpliciter. The Defendant said that the payment of $242,986.92 was a security deposit equivalent to three months rental and that this payment was not required by the Lease and would not affect the terms of the Lease as the Letter requesting the payment was dated the 24th of May, 1984, i.e., one day prior to the Lease, and the Lease contains a Clause, Clause 10, which in effect said that no representation or arrangement which was made prior to the execution of the Lease would be binding on the Defendant without is written consent. Clause 10 reads as follows:

> "The Owners are and shall be bound only by the terms of this Agreement notwithstanding any warranty proposal representation or arrangement whether verbal or in writing that may have been made or suggested prior to the signing hereof by any person firm or Company whatsoever or in any advertisement, circular or advertising matter or otherwise and no variation in the terms and conditions of this Agreement shall be binding on the owners without their written consent".

The letter in question which is dated May 24, 1984, is set out hereunder:

"May 24, 1984

Paradise Tours & Rentals,
11 Oxford Road,
Kingston 5.

Attn: Mr. Desmond Panton

Dear Sirs,

Re: Lease Agreement on 48 (47) Motor Vehicles.

Please be good enough to make your cheque payable to Universal Leasing & Finance Limited in the amount of $348,641.25 as per details below:-

1.	3 months deposit ¢ $80,995.64 per month	$242,986.92
2.	First month's rental	80,995.64
3.	1% Committment Fee	24,298.69
4.	Stamping of Documents	360.00
		$348,641.25
	add	300.00
		349901.25

Enclosed are documents for your signature. Please affix Company Seal and Stamp where necessary.

We look forward to your early response.

Yours truly,
UNIVERSAL LEASING & FINANCE LIMITED.

Clause 4 of the Lease gives the Lessee the power to terminate the Lease within the first six months by providing as follows:

"Subject to the terms of this Clause the Lessee may terminate this lease within the first six months hereof by paying:

(a) an amount equivalent to six months' rent

(b) reasonable expenses incurred by the Owners relative to the preparation and perfection of this agreement;

(c) the guaranteed residual value set out in the Schedule hereto;

(d) the specified costs set out in the Schedule hereto less the total of all rents paid before such termination;

(e) interest at percent on the specified cost aforesaid for the period up to the date of such termination and payment."

Clause 5 also gives the Lessee the power to terminate the Lease after six months by providing that:

'The Lessee may also terminate this Lease after six months of the date hereof by giving one month's written notice of its intention so to do and by paying the items mentioned in (b), (c), (d) and (e) above.- the reference being to Clause 4.

Clause 4(c) of the lease shows that one of the payments to be made by the Lessee in the event of termination is the "guaranteed residual value set out in the Schedule hereto" as well as (d) - "the specified costs set out in the Schedule hereto less the total of all rents paid before such termination." The Schedule does not show what the guaranteed residual value is but it lists the cost of equipment as $2,429,869.32 and it shows the period of the Lease as thirty months at a monthly rental of $80,995.64. Clauses 4 and 5 when read in conjunction with the terms which are set out in the Schedule such as the cost of equipment, would suggest that the Lessee on payment of the specified cost, i.e., the cost of equipment, since no other costs are specified, might become owner of the equipment although this is not expressly stated.

These issues concerning Notice and its adequacy, or questions such as whether or not there was a breach of the right to inspect, whether or not there was a breach of the covenant to insure and if so whether it would entitle the

Defendant to terminate the contract, Whether or not there was any other breach, of which proper notice had been given and which would entitle the Defendant to terminate the contract are best left for determination at the trial but they all raise what may conveniently be described at this stage as triable issues.

For the purposes of an application for interlocutory injunction there is a triable issue between parties if there is a serious question to be tried i.e. one for which there is some supporting material of which the outcome is uncertain. See Cayne and Anor. v. Global Natural Resources PLC. /1984/ 1 A.E.R. p.225 - 238.

Lengthy affidavits with voluminous supporting material have been submitted by both the Plaintiff and the Defendant in support of their respective claims and arguments. In many instances the same supporting document is relied on by both parties but a different interpretation is put on it by each party.

The sole evidence available to the court was affidavit evidence, which of course was untried and untested. The grant of an interlocutory injunction is a remedy that is both temporary and discretionary. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the right or the violation of it or both is uncertain and will remain uncertain until the final judgment is given in the action. It was to mitigate the risk of injustice to the Plaintiff during the period before that uncertainty could be resolved that the practice arose of granting relief by way of interlocutory injunction, which is now-a-days subject to the Plaintiffs undertaking to pay damages to the Defendant for any loss sustained by reason of the injunction, if it should be held at the trial that the Plaintiff had not been

entitled to restrain the Defendant from doing what he was threatening to do. The Defendant must alos be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the Plaintiff's undertaking to pay dmages if the uncertainty were resolved in the Defendant's favour at the trial. The Court must weigh one need against another and "determine where the balance of convenience" lies. These principles were enunciated by Lord Diplock in American Cynamid vs. Ethicon /1975/ 1 A.E.R. 504 at 509.

In the instant case the Defendant has contended that the Plaintiff is in clear breach of the Defendant's legal rights in that it appears that it has sold certain of the vehicles which were the subject matter of the lease and at any rate has admitted that it sold one vehicle. Secondly, that the Plaintiff is in breach of the insurance provisions of the Agreement in that the vehicles are insured on a third party basis instead of comprehensively. Thirdly, the Plaintiff has failed to allow the vehicles to be inspected despite oral and written requests furthermore there has been no breach by the Defendant.

It is observed that the insurance provisions of the lease agreement dated 25th May, 1984 differ somewhat from those of the earlier lease agreement dated 17th February, 1984 between the Plaintiff and the Defendant which was attached as an exhibit to an Affidavit dated 15th May, 1985 by Mr. Winston Lloyd Finzi the Chairman of the Defendant Company.

Clause 5 (j) of that lease enjoined the Lessee (referred to as the Hirer) to:

"immediately on the execution of each schedule, insure the Equipment comprised in that schedule and keep the same insured throughout the term at his expense under at least a Third Party insurance policy in such Insurance Company as shall be approved by the owner ....."

Clause 3 (c) of thelease dated 25th May, 1984 simply required the Lessee to "forthwith insure the motor vehicles at the expense of the Lessee against risks under full comprehensive policy including Acts of God, for its full value with a Insurance Company approved by the owners and the Lessee."

It is to be noted that apart from differences in the type of Insurance contemplated i.e. third party vis-a-vis comprehensive, the second and later policy differed from the first in that:

(i) it did not specifically impose a continuing obligation on the Lessee to "keep the (equipment) insured throughout the term under at least" a full comprehensive policy;

(ii) the insurance company had to be approved by both the owner and the Lessee.

The Lessee complied with the initial requirement to "forthwith insure" under full comprehensive policy but said that the owner had agreed to arrange a cheaper form of comprehensive policy but failed to do so. This is set out in paragraphs 7(b) and 16 - 20 of the affidavit of Mr. Desmond Panton, a Director of the Plaintiff.

Although the notice purporting to terminate the Lease Agreement dated 25th May, 1984 did not specifically include as a reason for termination the sale of cars by the Lessee contrary to the terms of the Lease Agreement, and although it did not identify the cars which were said to be sold, the Plaintiff states that except for one car which was sold inadvertently out of its fleet of 360 cars the cars allegedly sold by them were in fact sold on the instructions of Crown Motors the true owners of the cars at the

time of sale which was prior to the 14th August, 1984.

The Lease Agreement dated 25th May, 1984 listed certain cars and referred to the Defendant as owner, but the Plaintiff by affidavit said the cars were owned by Crown Motors and the Defendant did not secure the finances to pay Crown Motors for them until the 14th August, 1984. Until that date the Plaintiff say the Defendant had no title or interest in the cars. The Defendant deny that this is so and argue that letters of understanding in respect of the cars had been issued on its behalf by a Bank to Crown Motors.

Having read the various conflicting affidavits and listened to the arguments of Learned Counsel for several days, I am constrained once more to turn for guidance to the principles set out by Lord Diplock in American Cyanamid v. Ethicon to which I have already referred.

In that case Lord Diplock at P. 510 said that:

"It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on Affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages or a grant of an interlocutory injunction was that it aided the Court in doing that which was its great object, viz:- abstaining from expressing any opinion upon the merits of the case until the hearing.

So unless the material available to the Court at the hearing of the application for an interlocutory injunction fails to disclose that the Plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

The governing principle here is that the Court should first consider whether if the Plaintiff were to succeed at the trial, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the Defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial.

If damages would be an adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the Plaintiff's claim appeared to be at that stage.

If damages would not provide an adequate remedy for the Plaintiff if he should succeed at the trial, the Court should then consider whether if the Defendant were to succeed, whether he would be adequately compensated under the Plaintiff's undertaking as to damages. If damages in the measure recoverable under the undertaking would be an adequate remedy and the Plaintiff would be in a position to pay them there would be no reasonable ground to refuse an interlocutory injunction.

In the instant case where does the balance of convenience lay?

The Plaintiff operates a fleet of cars as the representative of a well known international company - HERTZ Rent-A-Car. The Plaintiff's patronage is derived largely from tourists thereby helping the Island's tourist industry. To interrupt the Plaintiff in the conduct of its business as the representative in Jamaica of an internationally established enterprise by seizing the cars some of which may be in the possession of tourists who have paid to hire them would cause untold inconvenience and harm to the Plaintiff, since it would have to start again to establish its goodwill in the event of its succeeding at the trial. It has not been demostrated that the Defendant would be in a position to meet any damages that might be awarded to the Plaintiff should it succeed. Affidavit evidence for example, shows that the Defendant owes a Debt of Seven Million Dollars, and there is no evidence as to what its assets may be.

As far as the Defendant is concerned its loss can be

quantified easily in monetary terms. The value of the cars can readily be ascertained at any stage, and the Defendant expected to receive a certain sum monthly as rental for the cars under the Lease. The Plaintiff has been diligent in making its monthly payments and it has also indicated its willingness to purchase the cars from the Defendant. The Plaintiff has also given an undertaking to the Court that it would not dispose of any of the cars in its possession by virtue of the Lease, and to continue the monthly payments. When all things are considered the balance of convenience clearly lies in favour of granting the interlocutory injunction which the Plaintiff is seeking.

I am not unmindful of the fact that there are cases where the grant or refusal of an interlocutory injunction will have the practical effect of putting an end to the action because the harm that would be caused to the losing party would be complete and of a kind for which money cannot constitute any worthwhile recompense. In such instances the "degree of likelihood that the Plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial, is a factor that ought to be brought into the balance by the Judge in weighing the risks that injustice may result from his deciding the application one way rather than the other," per Lord Diplock in N.W.L. Limited v. Woods (1979) 3 A.E.R. at P.626.

In the present case, the grant of the interlocutory injunction would certainly not have the effect of putting an end to the case and any risk of injustice is therefore quite remote.

The Court accordingly orders, directs and grants the interlocutory injunction in terms of the summons to restrain the Defendant from taking possession of or from interfering with the possession and or use by the Plaintiff of the motor vehicles mentioned and described in the Lease Agreement dated 25th May, 1984. Costs to be costs in cause. The Plaintiff to prosecute the action with deligence and to undertake not to dispose of any of the cars now in its possession by virtue of the Lease and to continue the payments under the Lease.