IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2006/HCV 01679

BETWEEN	PETROLEUM COMPANY OF JAMAICA LIMITED	CLAIMANT/APPLICANT
AND	DESMOND GOULBOURNE	DEFENDANT/RESPONDENT

Lawton Heywood for claimant/applicant.

André Earle and Anna Gracie instructed by Rattray Patterson Rattray for the defendant/respondent.

Heard 17th, 20th and 21st July 2006 and 4th June 2008

Campbell J.

Interlocutory Injunction Prohibitory and Mandatory Principles Applicable to the Grant of Unusually Strong and Clear Case

(1) The claimant, Petroleum Company of Jamaica (Petcom) is a petroleum marketing organization engaged in the sale and distribution of various petroleum based products including different types of motor gasoline and automotive diesel oil.

The respondent is a lessee of lands situated at Boundbrook Bay Industrial Park and registered in the name of D. R. Gould and Company Limited of which the respondent is a director and shareholder.

(2) The parties signed a letter dated 3rd June 1998, which summarized the major points of agreement arrived at between them pursuant upon the application of the respondent to operate a Petcom service station. It was agreed inter alia;

1) Petcom will lease from you the premises at which the service station will operate for a period of ten years at an annual rental of $100,000.00

2) Petcom will sublease the said premises to you for a period of nine (9) years and eleven months at an annual rental of $100,000.00

3) You will not retail any competitive product which Petcom carries from the said premises.

4) Petcom undertakes to provide the following equipment;

a) Fibre Glass tanks
b) Double Suction Pumps Signs
c) Air Scale
d) Modern Lit Canopy
e) Hoist
f) Compressor
g) Major Identification and Price
h) Console

5) Petcom will loan you $2m for five years at a rate of interest of 25% p.a. on the reducing balance repayable as a surcharge on fuel purchases. Disbursements will be subject to Quantity Surveyors Report.

6) Petcom undertakes to assist in training and other marketing activities along with any future development of the location that will enhance productivity and efficiency.

7) You or any other entity owning, managing or operating the service station agree not to solicit, negotiate or accept any other offer for a Dealership Agreement from any other petroleum marketing organization between the date hereof and the execution of Dealership, Lease and sub-lease Agreements with Petcom.

8) This letter is intended to create a legal binding relationship between us and will be followed by a formal Dealership, Lease and sub-lease Agreement which when executed will supersede and replace the agreement contained herein.

(3) The parties executed a Lease and sub-lease Agreements on the 19th April 2000 for a term of 10 years and nine years and eleven months respectively, at rental of $10,000 per month. The lease was a grant from the respondent to Petcom with an option to renew after a tenancy of 10 years. The sub-lease was granted by Petcom to the respondent.

(4) The Lease was expressed to commence from the 28th August 1999. The Lease provided for abatement of the rent, "in the event of any of the buildings or other erections or any of Petcom's equipment on the leased premises being damaged or destroyed, so as to render it the leased premises wholly or partially unfit for use as a petrol filing and service station .....until the leased premises shall be fit for use as a petrol filing and service station.

(5) The Lease at (x111) provides that;

> The Landlord agrees that he shall not terminate this lease for any breach of covenant either in this lease or any sub-lease entered into by Petcom. In respect of the leased

premises caused by any acts or omission on the part of the sublessee unless Petcom is given a reasonable opportunity to remedy such breach.

(6) The sub-lease provides;

The Dealer covenants with Petcom;

(1) To observe the covenants and conditions on the part of Petcom contained in the Head Lease.

(7) The station became operable around August 1999, and it is common ground that the Console was not installed. In so equipping the station, Petcom contended that they obtained all the necessary permits and authorizations to enable the station to perform. Petcom's unchallenged assertion is that it expended $20,000,000.00 to configure the leased premises as a petroleum retail and distribution service station.

(8) Petcom further asserted that in addition to the sum of $2,000,000.00 stipulated in the Letter of Agreement, dated 3rd June 1998 (see para 2 above), the respondent was loaned a sum of $1,079,989.47 for paving and fencing the leased property.

(9) On 26th November 2003, the respondent wrote to Petcom complaining of, among other things, a leaking gas tank, water being discovered in a fuel tank and problems with the unleaded 87 fuel pumps. This letter was followed by another dated 25th May 2004 in which the respondent enclosed a report from his accountant dated 23rd February 2004, claiming losses of $2,683,093.98. A further letter dated 2nd July 2005 requested that Petcom purchase the interest of the owner and operator of Petcom Port Antonio. He intimated that, "There are competitors in the industry that have shown interest and are ready to negotiate".

(10) Petcom refused the respondent's claim for losses which it was claimed was sustained during the closure of the service station for repairs. Petcom ceased delivery of products to the respondent's station and advised that the reason for not delivering the respondent's supplies was that as of 23rd January 2006, the respondent was indebted to the claimant in the sum of $8,183,182.60 being the cost of product sold and delivered. The cheques in repayment to $5,359,319.64 drawn by the respondent had been dishonoured.

(11) Between the 22nd June 2005 and the 23rd March 2006, Petcom carried out remediation work on the tanks by replacing the storage tanks, fittings and fixtures at a cost of $5,870,843.41 in response to the defendant's complaints.

(12) Eight days before the completion of the remedial works undertaken by the claimant, the respondent served on Petcom a "Notice of Termination" dated 15th March 2006, and expressed to be effective immediately, and that the Notice would expire at midnight on the 17th March 2006

The reasons given by the respondent for the Notice were:-

1 Petcom has not supplied me with a Console (as per the Agreement as of 3rd June 1998).

2 The state of disrepair of the underground tanks has caused me substantial loss of profits – tanks were of improper design (i.e. 1/4 thick fibre glass and single – walled instead of double-walled ½ thick fibre glass)

3 Failing to compensate me for all the damages for the years 2003 and 2005.

4 The Service Station has been closed since August 22, 2005 when one of the underground tanks burst and I am suffering financial ruin.

(13) The next move on the part of the respondent was to remove the fixtures and fittings installed by Petcom and repaint the station in the colours of the competitor, "Cool Oasis". On the 8th May 2006, Petcom filed a claim against the defendant seeking damages for breach of the Dealership Agreement made on the 3rd day of June 1998.

(14) On 12th May 2006, Petcom filed a Notice seeking,

(1) an Interim Injunction to restrain the defendant by himself, his servants or agents or otherwise howsoever from operating a service station other than a Petcom Service Station on all that parcel of land known as Lot 138n part of Boundbrook, Bryans Bay Industrial Estate in the parish of Portland, being part of the land formerly comprised in Certificate of Title registered at volume 165 Folio 50 of the Register Book of Titles and now comprised in Certificate of Title registered at Volume 1363 Folio 647 of the Register Book of Titles until the trial of the claimant's claim against the defendant or until the Court otherwise orders from continuing to infringe the claimant's right to the use of Lot 138n as a Petcom Service Station.

The grounds on which the orders were sought were;

1) By a Dealership Agreement made on or about the 3rd of June 1998 between the claimant and the defendant it was agreed that the defendant would operate a Petcom Service Station on land to be used exclusively for that purpose, at Lot 138n part of Boundbrook Bryans Bay Industrial Estate in the parish of Portland being part of the land registered at Volume 165 Folio 50 of the Register Book of Titles.

2) At the time of the Dealership Agreement, the defendant was the lessee of the said Lot 138n Bryan Bay Industrial Estate, and by a lease made on the 19th April 2000 pursuant to the Dealership Agreement, the defendant leased the said Lot 138n Bryans Bay to the claimant for a term of 10 years to the intent that the claimant shall have and enjoy the right to possession for the purpose of operating same as a Service Station and with full power to further sub-let the same during the term of the Lease. Pursuant to the Dealership Agreement and the said Lease, the claimant sub-let the leased premises to the defendant for a term of 9 years, 11 months to the intent that the defendant would operate a Petcom Service Station thereon.

3) The claimant and related entities have made a substantial financial expenditure on the leased premises in furtherance of the Dealership Agreement.

4) By Notice of Termination dated 17th March 2006, the defendant has terminated the Dealership Agreement and has since have been operating a "Cool Oasis" Service Station on the leased premises, contrary to the Dealership Agreement and the lease to the claimant made pursuant thereto.

5) That the defendants, being in breach of the claimant's right to operate a Petcom Service Station on the leased premises, ought to be restrained from continuing his breach.

(15) Mr. Heywood for Petcom submitted:

> That is a Dealership Agreement and Lease Agreements, between the parties as evidenced by the letter dated 3rd June 1998. That there is a serious point of law to be tried. The claimant considers that there has been a breach of contract. Damages being inadequate, an order for injunction ought to go.

There was an agreement that respondent's land to be used exclusively to retail and distribute Petcom's products. In absence of Dealership Agreement, there has been a course of dealings.

Although the console was not supplied, it is not fundamental in giving effect to the Agreement. No outstanding claim for breaches. Petcom has not done anything to prevent

respondent from using property as a service station. In nature of trade that goods delivered must be paid for in a reasonable time. The respondent was not entitled to terminate. The balance of convenience lies in granting the mandatory injunction, notwithstanding whether prohibitory or mandatory. The claimant has made a strong and clear case against the respondent. No evidence that respondent has addressed this particular debt. Inequitable to allow the respondent to infringe on the applicant's right to the leased premises.

(16) Andre Earle for the respondent, submitted:

This application is for the purpose of enforcing rights. It is in the nature of specific performance, Dealership Agreement terminated 17th March 2006. Not an application coming through June 1998 Agreement. It is an application coming after termination. That is what makes it akin to specific performance. The claimant would have to show a heightened degree of assurance that he is entitled to the injunction at this stage. See **Shepherd Homes v Sandham** (1970) 3 All ER. 402. The test is an unusually strong and clear case. On the facts before the Court, the claimant's case is for an interlocutory, mandatory case, is not unusually strong and clear, has not satisfied test laid down in **Shepherd Home Ltd. v Sand** (1970) 3 All ER.

Damages are an adequate remedy. The claimant has breached the Agreement by not providing the Console. The 87 tank was for 7 months unserviceable. In August 2005, the 87 tank burst again. Station closed August 2005 – March 2006. They refused to supply any product until the sums owing were paid. Moore and Sons, in refusing the application, quoted Justice Jones in **Shephard Home Ltd. (Supra),** "applicant has not fulfilled certain obligations". The application is an abuse of process in that the claimant has fragmented the case when it could all be done together. The claimant is still in breach of the June 1998 Agreement. Complaints were not addressed.

The respondent ceased operating as a dealer of the claimant prior to the application for injunction. The effect of that is; what is being sought is tantamount to a mandatory interlocutory injunction, although called a prohibitory injunction.

(17) **Analysis**

The principles that govern the grant of an interlocutory injunction was propounded in the House of Lords decision **American Cyanamid Co. v Ethicon Ltd** (1975) 1 All ER 504 reversing the decision of the Court of Appeal which had overturned the patent Judges' ruling to the effect that on the available evidence, Cynamid had made out a strong prima facie case against Ethicon and on a balance of convenience, an interlocutory injunction should be granted to maintain the status quo. In its decision, the Court of Appeal stated that there was a well established rule of law that a court was precluded from granting an interlocutory injunction or from considering the balance of convenience between the parties unless *the evidence adduced at the hearing satisfied the court on a balance of probabilities that, at the trial the plaintiff would succeed in establishing his right to a permanent injunction. (Emphasis mine)*

(18) At page 510 of the judgement, Lord Diplock said;

> "Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of the expression as a "probability", a prima facie case, or a strong prima facie case in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. *The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, there is a serious question to be tried.*" (Emphasis mine)

(19) The court should not involve itself with an attempt to resolve conflicts on the evidence. There appears to be looming conflicts on the evidence, the nature of the defects, if any, on the equipment supplied by the claimant and to the importance of the Console of which the respondent has complained. This application is not the place for difficult questions of law that will require mature considerations to be resolved.

(20) At letter f on page 510, Lord Diplock states;

> "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"

(21) Mr. Earle has urged that here, the application is for an interlocutory mandatory injunction and the court, in its exercise of its discretion, should more readily withhold such a grant than if the applicant had been seeking a prohibitory injunction. Relying on submissions of Mr. Heywood, he says the application is in the nature of an order for specific performance.

(22) In **Shephard Homes Limited v Sandham** (1970) 3 All ER 402, illustrated the differences between prohibitory and mandatory injunction. At page 411, Megarry J. said;

> "As it seems to me, there are important differences between prohibitory and mandatory injunctions. By granting a prohibitory injunction the court does no more than prevent for the future the continuance or repetition of the conduct of which the plaintiff complains. The injunction does not attempt to deal with what has happened in the past; that is left for the trial, to be dealt with by damages or otherwise. On the other hand, a mandatory injunction tends at least in part to look to the past, in that it is often a means of undoing what has already been done, so far as that is possible. Furthermore, whereas a prohibitory injunction merely require abstention from acting, a mandatory injunction requires taking of positive steps, and may (as in the present case) require the dismantling or destruction of something already erected or constructed. This will result in a consequent waste of time, money, and materials if it is ultimately established that the defendant was entitled to retain the erection. As Kindersley V. C. said in **Gale v Abbot**, an interlocutory application for a mandatory injunction was one of the rarest cases that occurred, 'for the Court would not compel a man to do so serious a thing as to undo what he had done except at the hearing' .....Another aspect of the point is that if a mandatory injunction is granted on motion, there will normally be no question of granting a further mandatory injunction at the trial, what is done is done, and the plaintiff has on motion obtained, once and for all, the demolition or destruction that he seeks. Where the injunction is prohibitory, however, there will often still be a question at the trial whether the injunction should be dissolved or continued, except in relation to transient events, there will usually be no question of the plaintiff having obtained on motion all he seeks. I may add that I do not think that any question arises of the court refusing to grant an injunction on motion, merely because that in effect, constitutes the sole relief claimed, for there is no rule against making such a grant; see **Woodford v Smith**"

(23) This application is not to prevent for the future the continuance of the respondent's conduct of shedding the colours of Petcom and taking on Cool Oasis franchise, it is to undo that act undertaken by the respondents, after the issuance of the termination notice. It does not require an abstention or a restraint of action on the part of the respondent; it demands the taking of positive steps, the dismantling of the Cool Oasis style, colour and product range of the station and the re-introduction of the colours, products and image of Petcom.

(24) If this application is in the nature of a mandatory interlocutory injunction, what are the principles that are applicable for the court's consideration? In **Shepherd Homes Ltd.**, the defendant, purchaser of lands in a housing development had built a fence in breach of a covenant, to protect his home garden from marauding sheep. The developer sought a mandatory injunction that he forthwith demolish the fence.

At page 409 of the judgment

> "Nevertheless, 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 to enforce a contractual obligation."

See also **Moore and Sons Service Centre Limited v Shell Company (W.I) Limited** (1994) 2 SCCA 382 (unreported).

(25) Has the applicant made out an "**unusually strong and clear case**", this is a contractual arrangement that the applicant claims that the respondent has breached. Petcom has a Lease for 10 years of the property. It is clear that the respondent has installed a competitor's marketing organization method on the applicant's leased property. The respondent has in contravention of the "Dealership Agreement Letter" of the 3rd June 1998 been retailing Petcom's competitor's goods. The respondent has had several of his cheques issued to the applicant dishonoured on presentation. The applicant is owed the sum of $8,183,182.60 for goods delivered. The respondent has refused to employ the arbitral process provided by the Agreement. It is unusually strong and compelling evidence that the applicant had just completed substantial repairs amounting to $5,870,843.41 on the property when the respondent purported to terminate the Agreement. There is clear violation of the express terms of the Dealership Agreement.

(26) Mr. Andre Earle invoked the equitable maxim, he who comes to equity must do so with 'clean hands', and submitted that the applicant was the author of the respondent's misfortune. He relied on **Chappel v Times Newspapers Ltd.** (1975) 2 All ER 233 at 240 letters c and g.

> "It has long been settled both at common law and in equity that, in a contract where each has to do his part concurrently with the other, then if one party seeks relief, he must be ready and willing to do his part in it...Not being ready and willing to do their part, they cannot call on the employers to employ them. They are seeking equity when they are not ready to do it themselves."

(27) The strong and clear evidence adduced before the Court was that Petcom had, in the months preceding the purported termination of the Agreement, expended large sums in addressing the concerns of the respondent. In addition to their contractual duty, they have made a loan of $2,000,000.00, with which to fence and pave the leased premises. Desmond Thomas, it seems to me that the applicants have done equity, General Manager of the claimant, at para 12 of his affidavit in support of the application, states;

> "That by the 28th day of February 2006 all the issues raised by the Defendant had been addressed and the Claimant proposed that the parties refer the outstanding issue of the claim for compensation for losses sustained by the Defendant to an Arbitrator. That by the said date all the alleged breaches of the Dealership Agreement of June 3, 1998 had been satisfactorily addressed and the Port Antonio Petcom Service Station was in first class operating condition."

Although the Console had not been provided, it appears that it is only utilised in twenty-four hour operations. There is nothing in the applicant's conduct that would prevent the court from granting the injunction requested.

(28) Is damages an adequate remedy in these circumstances? It is urged that damages was an adequate remedy in this case, and that as proof, Petcom had quantified its loss at a total of $24,846,185.00. The applicant is a marketing organization, which has had its equipment removed and replaced by similar equipment of its competitor and has had its leased property "rebranded" to that of its competitor. The respondent is heavily indebted to the applicant and has had seven (7) cheques dishonoured on presentation for the reasons of "insufficient funds/refer to drawer". These cheques totalled $8,183,182.67. Should Petcom succeed, damages would be inadequate and it appears the defendant would not be in a financial position to pay such an award of damages. However, no concerns were raised before me of the ability of Petcom to adequately compensate the respondent under Petcom's undertaking for damages, should the respondent succeed. Such damage recoverable would provide adequate remedy to the respondent.

(29) The Court must consider what kind of mandatory order will provide a "fair result". In **Shepherd Homes Ltd v Sandham**, Megarry J, at page 411, examining the factors for consideration, relied on **Charrington v Simons & Co. Ltd**, where Bukley J, at trial, said;

> "In this connection, the court must, in my judgment, take into consideration amongst other relevant circumstances the benefit which the order will confer on the plaintiff and the detriment it will cause the defendants. A plaintiff should not, of course, be deprived of relief to which he is justly entitled merely because it will be disadvantageous to the defendant. On the other hand, he should not be permitted to insist on a form of relief which will confer no appreciable benefit on himself and will be materially detriment to the defendant."

The damage to the applicant is considerable both in terms of economic and legal terms. The relief granted will confer on the applicant the ability to restore his brand to the leased premises.

(30) Order in terms of Notice of Application for Court Orders, at paragraph 1. Costs to the claimant/applicant to be agreed or tax.