IN THE SUPREME COURT OFJUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. MCV2004/2993

IN CHAMBERS

BETWEEN	PETROLEUM COMPANY OF JAMAICA LIMITED	APPLICANT
AND	ERIC SANDERMAN (trading as Eric G. Sanderman)	RESPONDENT

Miss Alicia Thomas instructed by K. Churchill Neita and Company for the Applicant.

Mr. Harold Brady instructed by Brady and Company for the respondent.

Heard: December 20, 21, and 29, 2004

Coram: KING J

On this application for an Interim Injunction the following Orders were made and I now set out my reasons thereunder.

1. An injunction is issued to restrain the respondent Eric G. Sanderman, trading as Eric G. Sanderman at 17 Main Street, Mandeville P.O. in the parish of Manchester whether by himself, his servants, agents or otherwise howsoever, from accepting, storing ,and trading at the Petcom Service Station, 17 Main Street, Mandeville in the parish of Manchester, petroleum products supplied any organization which products are similar in composition and/or competitive to those marketed and/or manufactured by the applicant, and which products are

available from the applicant, until trial herein or further order.

2. This application is granted subject to the usual undertaking of the claimant as to damages

3. Leave to appeal is granted.

4. A stay of execution is granted until January 2, 2005.

5. Costs are to be costs in the claim.

The evidence in relation to this application was contained` in support of the application in the affidavits of Patrick Anderson and Vassell Bullock, and in opposition thereto in the affidavit of the respondent Eric G. Sanderson.

The evidence discloses that the parties entered into a written agreement dated July 1, 2000, whereby the applicant appointed the respondent as its authorized dealer with full licence and authority to use its logotype, trademarks, brand names and marketing materials. The respondent agreed, inter-alia, to:

i. retail exclusively the applicant's products at the location at 17 Main Street, Mandeville, referred to as the Petcom Station.

ii. purchase from the applicant the respondent's total requirements of the product and such other products sold and/ or marketed by the applicant which the applicant may require for sale or use at the Petcom Station during the term of the agreement which was for ten years with an option to renew for a further ten years.

iii. not to sell, advertise, or otherwise offer for sale at the Petcom station products of any other organization which are similar in composition to those marketed by the applicant, PROVIDED those goods are available from the applicant.

Payment

i. Payment was agreed to be by cash on delivery or such other terms as agreed.

ii. Where respondent fails to pay for products supplied to it, the applicant has the option to:

(a) either withhold further supplies of the products
until the amount due is paid, or

(b) immediately terminate the agreement.

iii. The exercise of either of these options is to be without prejudice to the applicant's other rights under the agreement or at law.

Termination

"Without prejudice to any remedy which either party may have against the other for breach or non-performance of the agreement, the agreement may be terminated where:

(a) either party is in breach of any of the provisions of this agreement, the other party may give to the party in breach notice in writing to remedy the breach within a period of time not less than twenty-eight (28) days from the receipt by the party in breach of the notice, and

(b) The party in breach fails or neglects to Remedy The breach to the satisfaction of the other party within the period of time given, THEN the party giving the Notice may on the expiration of the Notice period terminate the agreement after giving at least one (1) month's Notice to the party in breach".

Amendment (page 15)

An amendment or modification to or release from a provision or the agreement is effective only if made in writing and signed by both parties.

Arbitration

> "If any difference shall arise between the parties hereto touching the construction of this agreement of the respective rights, duties or liabilities of the parties herein, THEN the matter in dispute shall be referred to the arbitration in Jamaica, in accordance with the provision of the Arbitration Act, or any amendment, modification or replacement thereof, and such reference to arbitration shall be a condition precedent to litigation in the courts except where there is a claim by Petcom against the dealer for monies in respect of products supplied".

The applicant contends that the respondent has failed, neglected and/or refused to pay for products which he ordered from the applicant and delivery of which he has taken resulting in a sum being owed by the respondent to the applicant in excess of $6,000,000 (which is the subject of another suit between the parties). The applicant says that there not having been any agreed variation of the terms of payment " so to eliminate or absolve the respondent's liability to pay", the applicant has since the 16th April, 2004 invoked its option under clause 6(ii) to withhold its supply of fuel and other products.

The applicant further complains that the respondent has breached and continues to breach the Dealership Agreement, "by accepting and selling products and /or otherwise dealing, at the Petcom station, with other

organizations which are suppliers of products similar in composition to those marketed by and which are available from the applicant".

On the 7th December, 2004 the applicant brought action against the respondent seeking an Order for Specific Performance of the Dealership Agreement, damages, and an injunction to restrain the respondent from continuing the alleged breach. On the 16th December, 2004 this application for an interim injunction was filed.

The respondent, at paragraphs 11 – 15 of his affidavit, relates an arrangement made between the parties in May or June, 2003 at a meeting held at the applicant's head office. According to the respondent's account, several matters were discussed at that meeting including an amount overdue from the respondent to the applicant, which amount the respondent says then stood at $1,800,000. He says he agreed to put a lot of land on the market for sale to liquidate the indebtedness.

The applicant, says the respondent agreed to take over management operations of the station from May, and in July the applicant appointed a manager, undertook to pay the staff, and a bank account for its operative. The respondent says that it was further agreed that the profits after expenses would be shared 50/50 and that the amount due to him would go towards liquidating his outstanding trading debt. This arrangement, he says, continued until 17th April, 2004 when the applicant's representative informed him that effective immediately the applicant would no longer manage the operations of the station and that he was now indebted to it in the sum of $6,000,000.

The respondent says that he thereupon informed the applicant that it had by its actions terminated the agreement and must therefore remove its equipment from the location. To date, he says, the applicant has not removed it and has failed or refused to supply products.

It was argued on behalf of the respondent that the adoption by the parties of the management arrangement agreed upon by them at the meeting in May or June, 2003 constituted a variation of the dealership agreement and that the subsequent abandonment of that management arrangement by the applicant and its refusal to deliver products amounted to conduct which entitled the respondent to treat the contract as at an end.

There is no dispute that the parties entered into the dealership agreement, referred to earlier. There is no difference as to the terms of the written agreement, or, indeed, as to the construction of those terms as they affect the rights, duties, or liabilities of the parties. There is therefore no necessity for the dispute between the parties to be referred to arbitration as a pre-requisite to suit , nor was this urged by either party in their submissions.

Very much in dispute, however, are questions as to whether the effect of the management arrangement was to vary the terms of the written dealership agreement, whether the withholding of supplies subsequent to any such alleged variation entitled the respondent to terminate the agreement and if so, whether he did effectively terminate the agreement. These are all issues which will fall to be decided at the trial of the action.

The issue of whether, pending trial, an injunction should issue to maintain the status quo created by the written agreement which both parties admit having made is what I am called upon to decide.

I do not agree with Mr. Brady for the respondent that the status quo to be maintained is one in which the defendant has already ceased taking supplies from the applicant and has treated the agreement as terminated. I rely instead on the approach of the Court of Appeal in **Wingate Dairies Limited v. Bruce**. The Times, March 2, 1988 C A. A commentary in Commercial Litigation: Preemptive Remedies states, in relation to this case that "it was held that an interlocutory injunction to restrain alleged breaches of a covenant restricting an employee's activities after the end of his employment, should preserve the status quo as it had been before the breaches, not as at the date of hearing. In that case, the plaintiff alleged that the defendant milkman, the plaintiff's former employee, was in breach of a covenant not to serve plaintiff's customers after termination of his employment. An interlocutory injunction to restrain alleged breaches of covenant pending trial should preserve the status quo. The position to be maintained was that as it had been before the alleged breaches began not as the date of hearing. The appeal was allowed because to allow the defendant to continue to do acts alleged to be in breach of covenant was both inconsistent and contradicting with the decision that an injunction was necessary to restrain further breaches".

The evidence indicates that on the 17th August, 2004, the applicant wrote to the respondent complaining of breaches sought to be restrained, reminding

him of his contractual undertakings and threatening legal action if the breaches continued. In October, 2004, Mr. Vassell Bullock, an investigator, obtained proof of the breaches and on December 7, 2004 this claim was filed and an interim injunction sought. In my view there has been no unreasonable delay on the part applicant in seeking this relief and therefore despite the observations of Lord Diplock in **Garden Cottage Foods v Milk Marketing Board** (1984) 1 A C 130, 140, I hold that the status quo to be protected is that which was established by the written Dealership Agreement. Consequently I do not agree with Mr. Brady's assertion that the injunctive relief sought is mandatory rather than prohibitory.

Miss Thomas, on the other hand contends that since the injunction sought is prohibitory rather than mandatory and since it is being sought to enforce an express negative stipulation in the parties written Dealership Agreement, the respondent having contracted not to sell petroleum products other than those of the applicant, the court is being asked to do no more than give its sanction to what is already the contract between the parties. Here she relies on the reasoning of Lord Cairns in **DOHERTY v ALLMAN (1878) 3 ac 709 AT 719** which was adopted by Cooke J in **NATIONAL WATER COMISSION V DELTON KNIGHT (1997) 34 JLR 617.**

The relevant passage from Lord Cairns' judgment reads:

"If there had been a negative covenant, I apprehend, according to well settled practice, a court of Equity would have no discretion to exercise. If the parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say by way of

injunction, that which the parties has already said by way of covenant, that things shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the court to that which already is the constraint between the parties. It is not then the question of the balance of convenience or inconvenience , or of the amount of damage or injury – it is specific performance, by the court, of the negative bargain which the parties have made, with their eye open, between themselves".

Miss Thomas proposes that the injunction being sought, ought therefore, in these circumstances, to be granted as a matter of course. However, whereas the injunction being considered in **DOHERTY v ALLMAN** was a perpetual one, the present application is for interim relief. It is therefore necessary to examine the principles laid down by Lord Diplock in **AMERICAN CYANAMID CO. v ETHICON (1975) 1 ALL E R 504,** as was urged by both Mr.Brady and Miss Alicia Thomas for the applicant.

Lord Diplock's guidelines to the exercise of the Court's discretion require that the court determine:

i). whether there is a serious issue to go to trial.

ii). if so, would damages be an adequate remedy for the wrong complained of, and

iii) if damages are not adequate or there is doubt as to their adequacy, where does the balance of convenience lie.

The parties agreed that there are serious issues to be tried and therefore went on to address the question of adequacy of damages.

Miss Thomas' position is that damages would not be an adequate remedy for the following reasons:

i). The damages will be difficult to quantify.

ii). There is no substitute contract for performance equivalent to what was promised by the respondent

iii). The loss will be difficult to prove and to quantify.

iv). The respondent is not good for the money.

v). The Defendant would be unjustly enriched if damages were the sole remedy.

Miss Thomas made reference to the purpose for which the applicant had negotiated for, and contracted to have the station, as expressed in the preamble to Dealership Agreement signed by both parties viz; "as a means of competitively selling motor vehicle fuel throughout the country, Petcom is desirous of establishing a dealership network".

She also referred to the evidence of Patrick Anderson that the station "being central accessible and ideal for the applicant's business is crucial to the applicant's growth and continuity of the essential network as contemplated by the agreement".

Despite the respondent's evidence to contrary I accept Mr. Anderson's evidence on this point. Further I am not satisfied, that should damages eventually be awarded to the applicant at trial, the respondent will be in a position financially to satisfy that judgment. Consequently I am not convinced that damages would be an adequate remedy.

Finally, I consider the question of the balance of convenience. Mr. Brady argues, inter-alia, that :

1. The respondent has entered into other obligations since April,2004.

2. The respondent will be called upon to outlay up front capital for the purchase of supplies which he is not now required to do.

3. If the defendant is successful at the trial and the injunction is granted, he would then be called upon to find a supplier and to start operations all over.

4. The refusal to grant the injunction puts the applicant in no worse position than he is today.

These are all arguments in favour of a status quo arising out of the breach complained of, which I do not agree is the relevant status quo.

In my view the justice of the situation clearly required that the application for the injunction should be granted, and I so found.