

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 87/39

BEFORE: The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Forte, J.A.

BETWEEN	RICHARD SALM CLUB CARIBBEAN LTD	1ST DEFENDANT/APPELLANT 2ND DEFENDANT/APPELLANT
A N D	SUNDIVERS JAMAICA LTD CRAIG LARSEN	1ST PLAINTIFF/RESPONDENT 2ND PLAINTIFF/RESPONDENT

Dr. Lloyd G. Barnett & John W. Vassell for Appellants

Dennis Goffe & Douglas Leys for Respondents

December 19 & 20, 1989 & March 12, 1990

CAMPBELL, J.A.:

The respondents issued a writ against the appellants on August 25, 1989 endorsed generally, so far as relevant as hereunder:

- "1. The plaintiffs claim against the Defendants - specific performance of an oral agreement made on or about November 1988 and subsequently acted upon by the plaintiffs for the sale and transfer of shares in Sundivers Jamaica Limited.
3. An injunction restraining the Defendants, from acting in breach of the contract by seeking or attempting to remove the first named plaintiff from the defendants' premises."

No Statement of Claim was filed setting out the facts on which the above general endorsement is predicated. On the face of the aforesaid endorsement a breach of the oral agreement allegedly entered into in November 1988 for the sale and

transfer of shares prima facie provides no factual basis for the injunction sought which is to restrain the defendants from the rightful use of their premises to the exclusion of the plaintiffs, unless the latter can show some proprietary right or interest in the premises.

Notwithstanding the absence of a basis in the writ for the injunction sought, an application for an ex parte interim injunction was made on the same date as the Writ. Subsequently, an inter parties interim injunction was sought and the facts in support of these applications are stated in affidavits of Ms. Susan Clare a director on behalf of Sundivers Jamaica Limited while the facts in opposition to the grant of the interim injunction are stated principally in the affidavit of Mr. Salm, Chairman, on behalf of Club Caribbean Limited. It is exclusively on the basis of the facts deposed by Ms. Susan Clare together with such facts in the affidavit of Salm as are admitted either by Ms. Clare, Salm or both that the justification for an interim injunction, applying accepted principles, must be sought.

The substance of the affidavits submitted in evidence on behalf of Sundivers Jamaica Limited (hereafter called Sundivers) is that:

- (a) Sundivers has been the watersports concessionaire for Club Caribbean Ltd at their Club Caribbean hotel since 1981. Sundivers had a licence to use the hotel as a base for operating the concession.
- (b) On June 24, 1988 Sundivers was notified in writing of the appointment by Club Caribbean Ltd of Horizonte A.C. of Switzerland as managers of Club Caribbean hotel and that the new management was minded to discontinue the services of Sundivers as concessionaires. Consequent on this notification,

Sundivers was given notice on the same date and in the same communication that its concession would determine on November 30, 1988. Sundivers apparently accepted this notice as validly determining its concession and accordingly commenced arrangements for relocating its activities.

- (c) In or about November 1988 Richard Salm who was the majority shareholder in Club Caribbean Ltd approached Sundivers with 'a new proposal for a new contract' between Sundivers and Club Caribbean Ltd.
- (d) Sundivers and Club Caribbean Ltd negotiated and subsequently agreement was reached that -
 - (i) Richard Salm acting for Club Caribbean Ltd would purchase from Craig Larsen 50% of the latter's shareholding in Sundivers.
 - (ii) The purchase price was U.S. \$100,000.00 but there was reservation by Ms Susan Clare about the share purchase which was resolved at a meeting in Las Vegas in February, 1989. In March, 1989 they further agreed that the first defendant (Salm) should make a downpayment and thereafter make monthly instalments of Ten Thousand United States Dollars (U.S. \$10,000.00).
 - (iii) Sundivers would continue to operate the watersports concession at Club Caribbean hotel on a year to year basis as before.
 - (iv) The financial management and structure of Sundivers would remain unchanged.
 - (v) Richard Salm was to contact Sundiver's attorneys-at-law for the latter to reduce the abovementioned agreement into writing.

- (e) Richard Salm submitted to the attorneys-at-law of Sundivers in May 1989 terms and conditions for the preparation of the written agreement which were different from the terms and conditions previously agreed upon. Richard Salm was advised that the terms and conditions submitted by him differed from those orally agreed. His response was that no final agreement had been or was likely to be concluded, therefore Sundivers was required to cease operation and to remove its assets and personnel from the premises on or before June 30, 1989.

In substance the affidavit of Richard Salm states that:

1. Sundivers was granted a concession in 1981 to operate watersports at Club Caribbean hotel for which it was given space in the hotel premises for office and to store equipment.
2. Club Caribbean Ltd signed a management agreement with Horizonte in June 1988 under which the latter would assume full managerial and operational control of the hotel including the selection of watersports operators. This inter alia necessitated the termination of the arrangements with Sundivers which was done by letter dated 24th June, 1988.
3. In November 1988 he submitted proposal to Sundivers through its Chairman Craig Larsen in Toronto, Canada which involved -
 - (i) acquisition of 50% of shares in Sundivers at a price of U.S. \$100,000.00;
 - (ii) Control of Staff of Sundivers through Horizonte and access by the latter to Sundivers books and accounts.
 - (iii) Submission of the above proposals, if approved by Sundivers, for final approval of Horizonte with such added conditions as Horizonte may consider

prudent, as providing the basis on which the latter would engage Sundivers as concessionaries.

4. Craig Larsen approved the proposal but Ms. Susan Clare had reservation necessitating a further meeting in Las Vegas in February 1989 at which she appeared to be in agreement.
5. In or about May 1989 he submitted to the attorneys-at-law of Sundivers, documents incorporating the proposals after having consulted with Horizonte and incorporated the further conditions of the latter. Sundivers has rejected the contents of the documents as constituting a departure from what was orally agreed upon.
6. There was never at any time a concluded agreement. They were still at the negotiation stage when the proposals were withdrawn and Sundivers who had until then, been permitted to operate on a month by month basis notwithstanding the termination of its concession was given reasonable time to vacate.

The learned trial judge in granting the interim injunction sought by the respondents found as a fact that there was a contract as claimed by them. He further found that the contract had a commencement date evidenced by an exhibit to Salm's affidavit captioned "Proposed corporate structure of Sundivers Companies 'Rs3'". He also found that the right sought to be protected was not lacking in clarity as the duration of the contract had also been fixed in the abovementioned exhibit.

The learned trial judge concluded on the issue of the contract in these words.

"Is there a contract as the Plaintiff contends? The evidence reveals that the constituent parts are present. There is the offer to purchase made by the Defendants. There is the acceptance by the Plaintiffs and then there is the consideration of U.S. \$100,000.00 with a monthly instalment per annum - both parties ad idem on this'. As to whether the contract is void, voidable or illegal are all questions which must be resolved at the trial. I am therefore satisfied that there is a serious question to be tried."

A further fact found by the learned trial judge which constituted a part of the totality of the evidence on which he exercised his discretion in granting the interim injunction was that the notice given to the respondents to give up the premises was invalid being unreasonably short because the premises was being used for commercial purposes and should therefore attract a year's notice.

On appeal before us, many grounds of appeal were canvassed some of which it is not necessary to particularise, others are stated hereunder:

- "(a) the learned judge erred in law and on the facts in holding that any valid contractual right had been alleged by the respondent;
- (b) the learned judge erred in law in holding that there was any serious issues to be tried on the material disclosed to him or that the issues raised were such that they could not be properly determined on the hearing of the said Summons;
- (c) the learned judge erred in law and on the facts in not finding that the balance of convenience was against the making of the said order;
- (d) the learned judge erred in law in making an order which had the effect of enforcing an agreement for a period of time which could or was likely to exceed the duration fixed by its own terms."

The gist of Dr. Barnett's submission relative to the first two of the above grounds is that the factual situation disclosed in the affidavits of Ms. Susan Clare was that the old concession had admittedly ended, but that a new concession had been agreed upon as an integral part of the oral agreement concluded in November 1988. However, he submitted, since the sale and transfer of shares to Club Caribbean Ltd was the foundation of and therefore indispensable to the grant of the new concession, no such new concession could be granted until at the least, there was a concluded agreement for the sale and transfer of the said shares. The evidence before the court in the affidavits of Ms. Susan Clare did not establish that any such oral agreement was reached in November 1988. Further, certain statutory preconditions for a valid contract for the sale and transfer of shares had not been complied with. To the contrary Mr. Goffe submitted that all material facts were before the court to enable the learned trial judge to exercise his discretion which he had correctly exercised.

We think Dr. Barnett's submission particularly with regard to the emergence of a contract has considerable merit. Ms. Susan Clare in answer to Salm's affidavit that she had reservation on his proposal for acquisition of shares in Sundivers as she did not trust Salm, deposed thus:

"In February 1989 because of certain reservations I had about the 1st Defendant (Salm) we met in Las Vegas and the Plaintiffs and the Defendants again confirmed the agreement."

This in our view prima facie can only mean that as late as February 1989 no definitive agreement had been reached. This doubtlessly explains why the manner of payment for the shares was only agreed upon in March, 1989.

We think the learned trial judge erred on the facts in not discerning that on the affidavit evidence, which was all that he had before him to support the claim in the writ, there was no oral agreement in existence in November, 1988 in consequence of which no rights then existed capable of being enforced by specific performance and/or protected by interim injunction. We think the error into which the learned judge fell, was due to his initial error in using the appellants' exhibit "Rs3" above, as providing evidence of the commencement date of the contract namely July 1989 when in fact "Rs3" was the proposal which the respondents rejected as being different from the oral terms previously agreed. The learned trial judge in erroneously using "Rs3" above as he did, overlooked the fact that what he had before him was a claim that there were rights flowing from an agreement reached in November 1988, and not July 1989 which were in need of protection. There being plainly no contract subsisting at the date as claimed in the writ, no interim injunction could properly issue in preservation of rights therefrom which did not exist.

As regards the other two grounds of appeal listed above, they related to the balance of convenience. Dr. Barnett submitted that even if a new contract had been established on the evidence, it did not confer any proprietary interest on Sundivers in the appellants' property. On Sundivers own admission it had a concession under the new contract from year to year. This implied that the concession could be terminated within the year. Dr. Barnett further submitted that the learned judge must have been greatly influenced by the erroneous view that the notice which was given terminating the original concession was invalid hence the old concession which had existed since 1981 was still operative and ought to be protected. In any case, he submitted, the nature of the

concession necessitated such close co-operation and interfacing of the staff of Sundivers and the appellants that the grant of an interim injunction would, contrary to principles on which a court of equity operates, compel the appellants and Sundivers to continue intimate personal relationships notwithstanding the objection of the appellants and Horizonte to Sundivers' presence on their premises and of the latter continuing to act as their agents in implementing watersports activities. Finally he submitted that monetary compensation was adequate and easily ascertainable in the event of success by the respondents.

We considered that these submissions were well-founded on the facts and were not fairly and squarely met by Mr. Goffe who relied more on the reputation of Sundivers which he submitted had been built up over the years and which would be irreparably damaged and for which damage, no adequate compensation could be assessed. In our view the reputation built up was a personal one which Sundivers could take with it wherever it relocated and it is not readily apparent how such reputation could be damaged merely because it was operating from a different location than Club Caribbean Hotel.

In our view, the very close inter-personal relationships between Sundivers and Club Caribbean Ltd/Horizonte which the successful and profitable operation of the concession admittedly demanded, made it undesirable to enforce the alleged concession by interim injunction pending trial. In this regard Evans Marshall & Co. Ltd v. Bertola S.R. (1973) 1 All E.R. 992 relied on by Mr. Goffe did not prove helpful because in that case the court was dealing with a plaintiff whose sole distributor-ship agency in England of the defendants "Bertola Sherry" had been terminated at a time when it had fourteen years more to run and after the plaintiff had expended about

half a million pounds in building up the name for "Bertola Sherry" in England. The goodwill built up by the plaintiff at his business premises and his trade reputation relative to this Bertola product was in danger of being irretrievably lost with the termination of the distributorship agreement which had been operated satisfactorily for the past twenty years, and, as earlier stated had some fourteen years more to run. The damage was incalculable in money. The balance of convenience clearly dictated that the status quo should be preserved pending trial.

In the present case, however, as earlier stated, the reputation of Sundivers for good service in providing watersports is not being taken from them, secondly, the concession which it alleges has been newly created is from year to year and need not extend beyond a year, it is thus a short term licence, the compensation for the services rendered is fixed and calculable because Sundivers asserts that the operation was to be as before. To the contrary the inconvenience to Club Caribbean Ltd of having Sundivers continuing to operate on the premises of the former as their agent when there no longer existed between them any mutual trust or willingness to interface and co-operate is obvious and weighed heavily in favour of the interim injunction being refused.

We were of the view that the learned judge did not consider fully the above facts which were in evidence but instead considered and exercised his discretion on facts which were not and could not be relied on by the respondents namely, the invalidity of the notice given to Sundivers terminating the concession agreement. In this he was clearly wrong, and

Sundivers did not complain that the written notice given in June 1988 limited to expire on 30th November 1988 was invalid. It accepted it as valid but asserted that a new oral agreement had been reached in November 1988 granting a new concession which it was seeking to protect by injunction.

It was for the above reasons that we allowed the appeal on December 20, 1989 and set aside the order of interim injunction.

CAREY, J.A.

I agree.

FORTE, J.A.

I agree