IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. S - 125 OF 1990

BETWEEN	SUN FISH HATCHERIES JAMAICA LIMITED	PLAINTIFF
AND	PARDISE PLUM LIMITED	DEFENDANT

Dr. B. Manderson-Jones for the Plaintiff

Dr. Lloyd Barnett and Mrs E. Wright-Goffe for the Defendant

Heard in Chambers 1st, 2nd, 3rd and 8th August 1990

Coram: Courtenay Orr J.

This is a Summons for an Interlocutory Injunction brought by the Plaintiff against the Defendant.

The Plaintiff by Writ dated 5th June 1990 seeks an injunction, specific performance and damages in respect of two agreements in writing dated 18th February 1985 and 13th June 1989, for the sale by the defendant to the Plaintiff of a total of some 51 acres of land.

It is common ground that the first sale was not completed and that the parties entered into the second agreement which encompassed a much greater acreage and indeed included the land the subject m atter of the first agreement. And that the defendant, asserting that the agreement was terminated retook possession of the lands in question on the 18th day of May 1990, that subsequently the defendant delivered up possession to the plaintiff as a result of an order of Harrison J., that this order has since been set aside by the Court of Appeal and that the plaintiff is now in possession.

The cheques tendered by the plaintiff in payment of the deposit were returned by the bank but the plaintiff eventually paid the deposit.

This action has arisen because the defendant seeks to treat the agreement as at an end, whereas the plaintiff contends that it is not, and states that it is ready and able to complete the transaction.

Dr. Manderson-Jones for the Plaintiff argued that there is a serious issue to be tried and pointed, inter alia to the following areas of conflict which the Court would be required to resolve at the trial:

(1) Whether the notice making time of the essence is invalid.

(2) Whether it was waived by the correspondence between the parties.

(3) Whether any alleged delay in completion or failure to comply with the notice (if valid) was due to the defendant's failure to provide a true and accurate statement of account, and a conflict in the amount stated as owing.

(4) Whether special condition 3 of the agreement dated 13th June 1989 making the agreement subject to mortgage was a condition precedent or condition subsequent,

(5) Whether it was a term which existed solely for the benefit of the plaintiff as purchaser and can be waived by them.

(6) Whether the second agreement was, as Dr Barnett contends, a novation of the first agreement or whether both agreements exist as asserted by the plaintiff in the Statement of Claim.

(7) The Claim for trespass to land, goods and fish.

(8) Whether payment of interest entitles the plaintiff to possession under a presumed lease as stipulated in the first agreement or whether payment of interest is merely the natural result of being in possession with an outstanding balance.

Dr Barnett argued that the plaintiff had no real prospects of success, and contended :

(1) That the plaintiff was not entitled to possession as there is not in existence an enforceable contract which takes away the defendant/owner's rights.

(2) That there was a novation of the first contract as its 22 acres were included in the 51 acres of the second contract.

(3) Continued occupation under the first contract ended on its discharge and the occupation after its discharge was a mere licence granted by the defendant. The demand for interest arises from the plaintiffs continued use

of the land and not from the perpetuation of a discharged contract.

(4) Whether special condition 3 was treated as a condition precedent or as a condition subsequent the agreement was properly terminated by the defendants and they were entitled to possession of the lands.

(5) That the mere giving of additional time for completion is not waiver of the other party's obligation to complete by the extended time or of fact that time is of the essence of the agreement.

(6) As regards the document which the plaintiff offered as a undertaking it was at most an conditional one, and therefore inadequate.

Is There a Serious Issue To be Tried ?

I accept the test enunciated by Lawton L.J. in Tetrosyl Ltd vs Silver Paint and Lacqueur Co. Ltd reported at N.L.J. August 28 1980,

"A serious question ... can only arise if there is some evidential backing for it" but I also agree that at this stage it is no part of the Court's function to resolve conflicts of evidence on the affidavits.

Arising out of my recent trip to London I obtained some notes from the Fleet Street Reports, which I find useful.

In Mothercare Ltd vs Robson Brooks Ltd.[1979] P.S.R. 466 at p. 476 (a passing off action) Sir Roberts Megarry V-c said:

> "The prospects of the plaintiff's success are to be investigated to a limited extent, but they are not to be weighed against his prospects of failure. All that has to be seen is whether the plaintiff has prospects of success which, in substance and reality exist. Odds against success no longer defeat the plaintiff, unless they are so long that the plaintiff can have no expectation of success but only a hope. If his prospects of success are so small that they lack substance and reality, then the plaintiff fails, for he can point to no question to be tried which can be called 'serious', and no prospect of success which 'can be called 'real'."

Again in Alfred Dunhill Ltd vs Sunoptics SA. [1979] F.S.R. 337 at p. 373 Megaw L.J. said:

> "It is irrelevant whether the court thinks that the plaintiff's chances of success in establishing liability are 90 per cent or 20 per cent."

I find that there is a serious issue to be tried, and in keeping with the approach of Lord Diplock in Cyanamid I too will express no opinion on the prosepcts of success of either party, and have refrained from dealing with the affidavits in detail and giving reasoned assessments as to the relative strengths of each party's case.

Are Damages an Adequate Remedy?

In Evans Marshall & Co. Ltd vs Bertola SA. [1973] 1All ER 992 Sachs L.J. said: at 1005 line 'd'.

> "The standard question in relation to grant of an injunction, 'are damages an adequate remedy?' might perhaps, in the light of the authorities of recent years, be rewritten,: is it just in all the circumstances, that a plaintiff should be confined to his remedy in damages?"

Having regard to the subject matter of this suit and the nature and scale of the plaintiffs operations and the issues raised I think that damages would not be an adequate remedy.

The Balance of Convenience

Lord Justice May echoing the view expressed by Sir Robert Megarry V-C at first instance, declared in Cayne vs Global Natural Resources plc [1984] 1 All Er, 225 at 237 H: that

> "The 'balance of the risk of doing An injustice' better describes the process involved."

However one may describe this requirement, when one considers the nature of the plaintiff's use of the land and the special fact of the admission by the defendant that it is ill-equipped to take care of the fish, and all other factors taken together, I am clearly of the opinion that the balance of convenience lies in the plaintiff's favour and that it is the defendant who can best be compensated by an award of damages. I hold therefore that the plaintiff's possession of the lands ought to be preserved until the trial of the action.

Plaintiff's Undertaking as to Damages

Dr Barnett pointed to portions of evidence which he said suggested that the plaintiff's might be having financial difficulties, and argued that if the plaintiff's financial position was insecure any undertaking given may be illusory.

I bear in mind that by requiring an undertaking the court seeks to ensure that the order for an injunction is so framed that neither party wei will be deprived of the benefit to which he is entitled, if at a later stage the injunction is discharged.

In England, when applying for an interlocutory injunction, it is usually incumbent on the plaintiff to tender in evidence particulars of his financial position.

In Brigid Foley Ltd vs Elliot [1982] RPC. 433 Sir Robert Megarry V-C said at page 435 -6

> "I should have been reluctant to dismiss the motion simply on the grounds of a failure to put in evidence that balance sheet; but I would emphasize that in applications for injunctions, especially since Cyanamid, one of the important matters always to be dealt with is the ability of a plaintiff to meet an under-taking in damages"
>
> (emphasis mine)

Nevertheless the authorities suggest that in general, the court will not deny a plaintiff an interlocutory injunction to which he would otherwise be entitled, simply because his undertaking as to damages would be of limited value.

I find the case of Allen v Jambo Holdings [1980] 1 WLR. 1252 helpful. This was a case of an application for a Mareva Injunction; The English Court of Appeal held that an undertaking as to damages could properly be taken from the plaintiff even though he was legally aided. The Court attributed this decision to the proposition that the question of financial ability ought not to affect the position in regard to what is the essential justice of the case. (But stricter criteria apply to Anton Piller orders)

Accordingly, in this case I am willing to accept the plaintiff's undertaking as to damages.

I am aware that in a proper case a plaintiff may be ordered to fortify his undertaking e.g. by paying a sum into the joint names of the Attorneys for each party (see Baxter v. Clayton [1952] W.W. 376 and SccA Roden Holdings v Negril Beach Suit C.L. 187 of 1987 a decision of Gordon J.

I regard this as a proper case in which to ask the plaintiff to fortify

his undertaking. I therefore order that he pay into Court the sum of $320,000 - on or before 29th August 1990.

Hearsay in Affidavits

Dr Manderson-jones objects to certain sections of Affidavits of Samuel Lawrence filed on behalf of the Defendants. I hold that on page 55 paragraph 22 the following words should be strick out as improper hearsay in that the sources of the allegations are not disclosed:

> "If failed to make payments to its suppliers of fish feed who visited the site on several occasions seeking Mr Monturell. The Jamaica Public Service has threatened to disconnect the electricity to the site because its bill in excess of $24,000.00 has been outstanding for several months."

I also struck out the following sentences from the further affidavit of Samuel Lawrence dated 30th July 1990, at page 172 paragraph 5, beginning at line 7.

> " ... I also refer to paragraph 22 which deals with the failure of that company to pay its suppliers of fish feed and to pay the Jamaica Public Service Company . In addition the company which rents a 2 way radio system to Sunfish Hatcheries Limited has told me that the company owes it money."

I did so because the source of the allegation is not stated with sufficient particularity.

I have already indicated that I would grant the injunction.

The order of the Court is as follows:

Injunction granted in terms of paragraph 1 of summons dated 5th June 1990, as amended.

Plaintiff gives usual undertaking as to damages.

Plaintiff ordered to pay into an account in the joint names of the Attorneys for both parties the sum of $320,000.00 on or before 29th August 1990, failing which injunction shall cease.

Costs be costs in the cause.

Liberty to apply.