Sup. Ct: Injunction — Application for — whether serious question to be tried — where lies balance of convenience — whether damages adequate remedy. Injunction granted. No undertaking to

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. S 209 OF 1989

Delivery date: 25.10.89

BETWEEN	SUNDIVERS JAMAICA LIMITED	1ST. PLAINTIFF
AND	CRAIG LARSEN	2ND PLAINTIFF
AND	RICHARD SALM	1ST DEFENDANT
AND	CLUB CARIBBEAN LIMITED	2ND DEFENDANT

Mr. Dennis Goffe instructed Myers Fletcher-Gordon, Manton & Hart for Plaintiffs.

Mr. Lloyd Bernett instructed by Dun Cox and Orrett for Defendants.

The Plaintiffs Sundivers Jamaica Limited operated a Water-sports concessionaire for the Defendant Club Caribbean Hotel Limited at Runaway Bay, St. Ann since 1981. Pursuant to an agreement amoungst other things the second Defendant provided on their premises at Runaway Bay a building from which the Plaintiffs operated. In June, 1988, the first Defendant advised the Plaintiffs by letter that they were employing Horizaute A.G. Switzerland to take over the running of the hotel and it was therefore terminating the agreement with them effective November 30, 1988. In November the first named Defendant Craig Larsen met with the first named Plaintiffs Richard Salm in Toronto and had discussions regarding new proposals for the continuation of concessionaire. The negotiation resulted in an agreement that Mr. Salm would purchase 50% of the shares in Sundivers Jamaica Limited for U.S. $100,000 from Craig Larsen and that Sundivers Jamaica LImited would continue to operate the Water-sports concession at Club Caribbean Hotel.

Horizaute agreed to these proposals (The agreement was subsequently reduced to writing). In March, 1989, a further agreement was arrived at for Mr. Salm to make a down payment and subsequent monthly instalment of U.S. $10,000 per month.

The document containing the agreement did not find favour with the Plaintiffs as they contended that an agreement had already been arrived at and that the terms set out in the written document prepared by the Defendant did represent what was previously agreed on. Mr. Shelton of Myers Fletcher and Gordon, Manton and Hart Attorneys for the Plaintiffs, on the 22nd May, 1989 wrote the Defendant pointing this out.

By letter dated 31st May, 1989, the Defendant requested the Plaintiffs to cease operations and to remove their assets and personnel from their premises on or before the 30th June, 1989. The Plaintiffs responded by letter dated 7th June, 1989, advising the Defendants of steps they would take if they tried to remove them from their present location at Club Caribbean Hotel Limited.

By Letter dated the 5th June, 1989, the Defendant advising the Plaintiffs that since negotiation had broken off, they, the Defendant would be operating their own Water-sports business at the hotel and that the Plaintiffs should vacate the Defendants' premises not later than the 25th June, 1989. This was followed up by a letter from the Defendants dated 12th June, 1989, advising the Plaintiffs that since they were no longer concessionaires at the hotel, their lease on the shop was also being terminated - with a month notice effective 31st. July, 1989.

In August, 1989, the Defendants formed a company Jamaqua Limited to operate the Water-sports at the hotel premises as of the 1st November, 1989. The Plaintiffs contend that it breach of the agreement the Defendants have:-

(a) Removed their road signs and refused to replace them.

(b) Disconnected their electrial supply.

(c) Disconnected their water-sports activities.

(d) Threatened to block their entrances door and knocked down a wall adjoining the building occupied by them.

(e) Harassing their staff.

That on the 24th August, 1989, the Defendant caused padlocks to be placed on the entrance door to the part of the premises occupied by them as also posted refusal of entry notice on the guard gate by the entrance to the premises.

The Plaintiffs secured an injunction against the Defendant on the 19th September, 1989, but complained that the Defendants on the 21st September, had breached the order by allowing Jamaqua Limited to be operating the concessionaire. Several other breaches were complained of to the extent that the Plaintiffs are unable to carry on their operations on the premises. The Plaintiffs further complained that the Defendants have displayed the logo Jamaqua on the premises whilst removing the Plaintiffs equiptment therefrom. The claimed irreparable loss and damage would be suffered by them if the injunction is not granted.

1. The opportunity for joint promotion with Club Carribbean would be lost forever.
2. Competitors would capture the market now held by the Plaintiffs.
3. Plaintiffs would have to abandon altogether their operations as Water-sports Concessionaires so pain-stakingly built up over the years and would never be able to re-establish themselves because adequate beach front facilities no longer exists on the North Coast.
4. That they are in a unique position in that they occupy private property on Jamaica's well-reknowned North Coast and to deprive them of this would do them irreparable harm.

On the other hand the Defendants assets that irreparable harm would be suffered if the injunction is granted in that:-

1. They would be struck with a water-sports operator in whom they had no confidence.
2. That the hotel as a first class hotel in Jamaica and abroad would suffered and Jamaqua is not likely to keep itself available to operate the concession when the matter is eventually tried.
3. That Club Caribbean Limited possesses substantial assets and is willing to give and satisfy any undertaking as to damages as may be ordered by the Court.
4. That they believed that damages can adequately compensated the Plaintiffs for any loss and that compensation of the loss would not be problamatic.

In considering the application first have to satisfy myself that the claim is not frivolous or vexations, that is, that there is a serious question to be tried. The Plaintiffs caused of action is founded in Contract. Is there a contract as the Plaintiffs claimed and is there a right to be protected? The Defendants' response is no.

(a) That no valid and enforceable agreement has been alleged in that:-

(1) There is no commencement date or duration of the term.

The answer to this is to be found in the Certificate of Richard Salm where he exhibits "Proposed coperate structure of Sundivers Companies - "RS3" (para 1.).

(2) That the nature of the proposals in requiring the payment in U.S. currency would breach the provisions of the Exchange Control Act. That the authorisation of the Minister was required.

(3) That no interest acquired by non-resident in transaction relating to shares where at the material times he was now-resident.

(4) That the nature of the right which the Plaintiffs seek to protect is lack-

ing in clarity in particular its duration - see Ex. "RS3".

5. That the agreement is invalid, un-enforceable and void.

Mr. Goffe for the Plaintiffs contends that the Exchange Control Act provides exemptions by the Minister. To determine questions of law raised by the Defence, the judge would have to consider relevant questions of the Act and decided cases which is not relevant at this stage. That the Court ought not to consider whether contract void or voidable - that is a matter for consideration by the Trial Judge.

It 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 with a monthly instalment per annum - both parties on this.

As to whether the contract is void, voidable or illegal are all questions which must be solved at the trial. I am therefore satisfied that there is a serious question to be tried .

Lord Diplock at page 510 in American Cyaramed v. Ethicon observed:-

> "It is no part of the Courts functions 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 different questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial".

Having found that there is a serious question to be tried, I now proceed to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief sought.

There is no doubt that the Plaintiffs occupied the premises uninterrupted since 1981. The evidence is that the Plaintiffs operated the concessionaire on a year to year basis up to the time they were given a written notice to give up the premises. I find that the notice is invalid, such notice should be a reasonable one, perhaps a year - the premises being used for commercial purposes.

If the Plaintiffs were to suceed at the trial in establishing their right to a permanent injunction, on the evidence before me, they would not be adequately compensated by an award of damages for the loss they would have suffered as a result of the Defendant continuing to do what was sought to be enjoined between the time of the application and the time of the trial.

Damages therefore would not be an adequate remedy. If however, the Defendant should succeed at the trial, they would be adequately compensated under the Plaintiff's under-

taking as to damages for the loss they would have sustained by being prevented from doing so between the time of the application and the time of the trial.

On the totality of the evidence before me and having consider the arguments and relevant authorities cited, I will exercise my descretion in favour of the Plaintiffs in granting the injunction prayed for. The order is therefore made in terms of the amended summons dated 13th October, 1989.

Cost to be cost in the cause. Certificate for Counsel.

Leave to Appeal granted.