IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMERCIAL DIVISION
CLAIM NO. 2010 CD 00104

BETWEEN	TOTAL JAMAICA LIMITED	CLAIMANT
AND	CHARLES CHEN CHARLES CHEN (Trading as Elysium Development)	FIRST DEFENDANT
AND	SUPER PLUS TRUCKING & EQUIPMENT LIMITED	SECOND DEFENDANT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMERCIAL DIVISION
CLAIM NO. 2010 CD 00105

BETWEEN	TOTAL JAMAICA LIMITED	CLAIMANT
AND	TIKAL LIMITED (Trading as Super Plus Food Stores)	FIRST DEFENDANT
AND	SUPER PLUS TRUCKING & EQUIPMENT LIMITED	SECOND DEFENDANT

Ms Carol Davis for Claimant.

Mr Garth McBean for Defendants.

Civil Procedure – Injunction - Application to restrain sale of products other than claimant's – Express prohibition in contract not to sell any products other than claimant's – Claimant not supplying product because of the defendants' unpaid debts – Effect of injunction on defendant - Balance of convenience – Whether favouring an interim injunction.

22 and 27 October 2010

IN CHAMBERS

BROOKS, J.

Total Jamaica Limited is engaged in the sale and distribution of petroleum products and other merchandise suitable for the purposes of the motoring public. From

time to time it enters into contracts with persons or companies who agree to distribute its products. These individuals and entities are referred to as dealers. I shall refer to the agreements herein as "dealer contracts".

The defendants, Mr Charles Chen and Tikal Limited, entered into separate dealer contracts with Total. Total has accused each of them of breaching their respective contracts. The nature of the alleged breaches is similar; both have, apparently, turned the respective petrol stations, used to distribute the products, over to Super Plus Trucking and Equipment Limited. Total also accuses them of distributing, in breach of the dealer's agreement, petroleum products other than Total's. Total has brought separate claims against Mr Chen and Tikal seeking payment for goods sold and delivered, as well as injunctions preventing all the defendants from selling products other than those supplied by Total.

The present application is for such an injunction, pending the trial of the claim. The defendants oppose the application. They assert that the balance of convenience lies in favour of a refusal. They say that an injunction would prove devastating to each of them, while damages would be an adequate remedy for the claimant. They also state that Total has remedies available to it, other than to seek an injunction.

The issue for determination is, where does the balance of convenience lie.

Factual Background

On 23 December 2004 Mr Charles Chen signed two dealer's contracts with Total. One was in respect of a petrol station located at Kingsland, Spur Tree in the parish of Manchester and the other for a petrol station at Main Street, Santa Cruz, in the parish of Saint Elizabeth. On 12 November, 2007 Tikal Limited, of which Mr Charles Chen is a

director, entered into a similar, though not identical, dealer's contract with Total. The contract concerned a petrol station at Norris, Yallahs, in the parish of Saint Thomas.

The contracting parties became embroiled in differences over pricing. There was also an exchange of correspondence concerning the possibility of another party taking control of at least one of the stations. It is disputed whether or not Total agreed to an assignment of control (to Super Plus Trucking and Equipment Limited) of the stations.

In applying for the injunction, Total led evidence that in or about May of 2010, it ceased supplying petroleum and petroleum products to the respective stations. This was as a result of the defendants failing to pay for products previously supplied. In the normal course of business, the evidence continues, the supplies of fuel, last delivered, would have lasted no more than four days, yet the stations continue to sell fuel. The conclusion which Total has drawn from the situation is that it "verily believes[s] that the petrol sold at the station is not supplied by [Total]". There has been no denial of the contents of that assertion of belief. Yet, Total's signage and its fuel pumps continue to be used at each of the stations.

Analysis of the issue of whether the injunction ought to be granted, will be assisted by the guidelines provided by *American Cyanamid Co. v Ethicon* [1975] 1 All E.R. 504 and by bearing in mind the guidance provided by the Privy Council in *National Commercial Bank of Jamaica v Olint Corp. Ltd* [2009] 5 LRC 370.

Analysis

The judgment of Lord Diplock in *American Cyanamid* is the main authority used as guidance for considering applications for interim injunctions. I continue to benefit from its worth.

Is there a serious question to be tried?

The first question to be answered, in following Lord Diplock's guide to considering injunctive relief, is whether there is a serious issue to be tried. On the face of it, Total has shown that there has been a breach of the distributor's contracts. It is a serious question for adjudication, whether there has indeed been a breach and what is the resulting damage.

Are damages an adequate remedy?

The second question to be analysed is whether damages would provide an adequate remedy in the event that Total were successful at trial. Miss Davis, for Total, submitted that the distribution of petroleum products other than Total's would result in damage to the brand. This damage, learned counsel submitted, would not be compensated by damages. On the other hand, Mr McBean submitted on behalf of the defendants, that damage to the branding could be compensated by damages.

I agree with Miss Davis that this type of loss is not easily calculated so as to make damages an adequate remedy. Firstly, there may be a difficulty in determining what products were sold during the period of the alleged breach, so as to calculate the loss of profit suffered by Total. Secondly, the loss of goodwill, in the event of there being dissatisfied customers, who have used some other product being passed off as Total's, would not, in my view, be quantifiable.

On that basis I find that damages would not be an adequate remedy for Total.

Other aspects of the balance of convenience

Lord Diplock, in addressing the issue of the balance of convenience, said, among other things, the following:

> "The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The Court must weigh one need against another and determine where "the balance of "convenience" lies." (see page 509 c)

Mr McBean submitted, firstly, that where contracts, such as the instant ones, were in restraint of trade, an injunction which would cause "catastrophic" consequences on the defendant, ought to be refused. Learned counsel referred to the case of *Potters-Ballatoni v Weston Baker* [1977] R.P.C. 202, cited in the ninth edition of *Injunctions* by David Bean (at paragraph 3.20). He, however, was unable to provide a copy of the case.

Not being convinced that "catastrophic consequences" were likely in the instant case, I was more impressed with a quote from Chitty on Contract 27th Edition, cited by Miss Davis. The learned editors stated at paragraph 27-040:

> "Where a contract is negative in nature, or contains an express negative stipulation, breach of it may be restrained by injunction. In such cases an injunction is normally granted as a matter of course, even though the remedy is an equitable and thus in principle a discretionary one. A defendant cannot, in particular, resist an injunction simply on the ground that observance of the contract is burdensome to him and that its breach would cause little or no prejudice to the plaintiff; indeed, breach of an express negative stipulation can be restrained even though the plaintiff cannot show that he breach will cause him any loss. In such cases, the court is not concerned with "the balance of convenience or inconvenience"...
>
> **Applications for interlocutory injunctions are likewise subject (*inter alia*) to the "balance of convenience" test; except where there is "a plain and uncontested breach of a clear covenant not to do a particular thing".**" (Emphasis supplied)

Although that text is somewhat dated, a similar opinion is expressed in the 28th edition of Anson's *Law of Contract* at page 638. The authority cited by both works, for

the highlighted portion of that quote is *Hampstead & Suburban Properties Ltd. v Diomedous* [1969] 1 Ch 248. In that, albeit pre-*American Cyanamid* case, the court granted an injunction to prevent a tenant from doing what he had contracted not to do. In his reasons for judgment Megarry J made, among others, the following observations, at page 259 B:

> "Where there is a plain and uncontested breach of a clear covenant not to do a particular thing, and the covenantor promptly begins to do what he has promised not to do, then in the absence of special circumstances it seems to me that the sooner he is compelled to keep his promise the better...."

In considering the question of the balance of convenience in the context of an application for an interim injunction, the learned judge said, again at page 259 D:

> **"I see no reason for allowing a covenantor who stands in clear breach of an express prohibition to have a holiday from the enforcement of his obligations until the trial...."** (Emphasis supplied)

Although the later approach required by the *Olint* case, is that the court considering the injunction, must seek to adopt a course which would "improve the chances of the court being able to do justice after the determination of the merits of the trial", I find that requiring obedience to the terms of a contract must rank very high on the scale of seeking to do justice. As a result, I respectfully agree with the principle cited by Megarry J, despite its pre-*American Cyanamid* vintage.

In my view, the defendants have not shown that obedience to the terms of the contract would be devastating to their business. Mr McBean submitted that if the injunction were granted the defendants would have to close their respective businesses. Implicit in that submission is an admission that the defendants have been selling other products in breach of the dealer agreement. That is significant in light of the position

taken by Megarry J, as cited above, in respect of defendants in clear breach of their contracts.

I also find that the evidence does not support Mr McBean's submission. What Total requires of the defendants is to sell Total's products. This, quite contrary to Mr McBean's submission, requires the defendants to keep the stations open and active. In addition, Miss Davis has indicated that Total is prepared to give an undertaking to supply products to the defendants, during the period of the injunction, provided that it is on a "cash on delivery" basis.

Mr McBean, on the issue of the balance of convenience, also suggested that Total could prevent any loss, by way of damage to its brand, by simply removing its signage and pumps from the respective premises. I cannot agree with Mr McBean that that is an appropriate response by defendants who are said to be in breach of a contract. My reading of the contracts reveals that there are procedures for bringing the contracts to an end. If it is that the defendants wish to terminate the contracts, then they or each of them, should adopt that procedure. In the circumstances I find that the balance of convenience lies with requiring the defendants to adhere to the terms of their respective contracts.

Based on my conclusion, I do not find the factors to be evenly balanced. I therefore hold that this is not an appropriate case to consider the preservation of the *status quo,* as a factor in determining where the balance of convenience lies.

Does the absence of a contract prevent the grant of an injunction?

There is a final point to be raised in this analysis. Mr McBean submitted that the fact that Total has no contract with Super Plus Trucking and Equipment Limited, which actually operates the respective stations, prevents the court from ordering injunctions in

this matter. Again, I am not in agreement with Mr McBean. The respective contracts prevent the defendants assigning the agreement without Total's written consent. No such consent has been exhibited. The defendants could not properly hope to avoid the terms of the contract by simply handing over the petrol station to another entity.

Conclusion

Based on the foregoing reasons, and upon the claimant, Total, having:

a. given the usual undertaking as to damages, and

b. further undertaken, through its counsel, to supply such products contemplated by the contracts between the parties, as are requested by the defendants and for which the defendants are ready, willing and able to pay, upon delivery, such payment being by way of a banker's cheque or draft,

the orders are as follows:

1. The Defendants, their servants and/or agents are hereby restrained, until the determination of these claims, from in any way whatsoever selling at the gasoline station premises mentioned below, any gasoline, diesel fuel, lubricant or any other petroleum products, car care or other products other than those supplied to the Defendants by the Claimant.

2. The premises referred to above are:

   a. all those premises situated at Norris, Yallahs P.O. in the parish of Saint Thomas and being part of the land registered at Volume 373 Folio 86 and Volume 397 Folio 74 of the Register Book of Titles;

   b. all those premises situated at Kingsland, Spur Tree in the parish of Manchester;

   c. all those premises situated at Main Street, Santa Cruz in the parish of Saint Elizabeth;

3. The time for the defendants to file and serve their respective statements of defence is hereby extended to 5 November 2010;

4. Costs to be costs in the claim.