JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 35/85

BEFORE: THE HON. MR. JUSTICE KERR - PRESIDENT (AG.)
THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.

BETWEEN: UNIVERSAL LEASING & FINANCE LIMITED - DEFENDANT/APPELLANT

A N D : PARADISE TOURS & RENTALS LIMITED - PLAINTIFF/RESPONDENT

Mr. Hugh Small, Q.C. for the Appellant

Mr. David Muirhead, Q.C. and Mr. W. Williams for the Respondent

June 24, 25 and 26; and December 17, 1986

KERR, P. (AG.):

This is an appeal from an Order of Edwards J. granting the plaintiff an interlocutory injunction in the following terms:

"1. An injunction to restrain the Defendant UNIVERSAL LEASING & FINANCE LIMITED, by their Directors, Officers, servants, workmen or agents or any of them or otherwise howsoever from taking possession of or from interfering with the possession and/or used by the Plaintiff, its servant and/or agents and/or invitees and/or hirers/licencees and/or any person having control with the authority of the Plaintiff of the motor vehicles mentioned and described in the Lease Agreement dated the 25th day of May, 1984 and made between the Plaintiff and the Defendant until the trial of this action or until further order.

2. Costs to be costs in the Cause.

3. That the Plaintiff prosecute the action with diligence.

4. The Plaintiff in the meantime undertakes not to dispose of any of the cars now in its possession by virtue of the Lease and to continue payments under the said Lease."

We dismissed the appeal and affirmed the Order with the following modifications:

> "It is further ordered that the trial of the case be held in October, 1986."

I now set out herein my reasons for concurring in that decision.

Pursuant to an agreement dated 25th May, 1984 the defendant company leased to the plaintiff company a number of motor cars (forty-eight) to be used by the plaintiff in its car-rental business. The lease was for a period of thirty months commencing on 28th idem with monthly rental of $80,995.64 and the value of the 'equipment' as stated therein, $2,429,869.32. This was the second agreement of its kind between the parties. The first agreement dated 17th February, 1984 was an elaborate document providing for a wide range of eventualities. The second agreement with which this appeal was concerned was a comparatively simple document and certain terms directly relevant to the appeal will be hereafter quoted or referred to in greater detail.

The plaintiff by writ dated 9th May, 1985 sought the following:

> "1. A declaration that the Lease Agreement dated the 25th May, 1984 as varied in or about August, 1984 made between the Plaintiff and the Defendant is valid and subsisting and that the purported termination thereof by the Defendant is unlawful, void and of no effect.
>
> 2. An Injunction to restrain the Defendant whether by itself or by its servants or agents or otherwise from taking possession of or from interfering with the possession and/or use by the Plaintiff, its servants and/or agents and/or invitees and/or hirers/licencees and/or any person having control with the authority of the Plaintiff of the motor vehicles mentioned and described in the Lease Agreement dated 25th May, 1984 and made between the Plaintiff and the Defendant.

"3. An Order that an account be taken to determine the sum payable by the Plaintiff to the Defendant to settle the Lease Agreement as varied made between the Plaintiff and the Defendant and dated the 25th May, 1984."

The learned trial judge after considering voluminous affidavits filed by or on behalf of both parties held that there were serious issues to be tried, that having regard to the plaintiff's business, damages did not appear to be an adequate remedy and the balance of convenience clearly lay in the granting of an interlocutory injunction. He expressed himself as being guided to his conclusions by the principles in American Cyanamid Co. v. Ethicon Ltd. (post) which principles have been approved and adopted by the Courts in this country.

As a gambit to his submissions on the specific questions raised on appeal, Mr. Small urged that although in the recent case National Commercial Bank v. Rousseau - Supreme Court Civil Appeal No. 50/83, judgment delivered January 31, 1985, this Court had adopted the approach of Appellate Courts in reviewing the grant of an interlocutory injunction in the Court below as advocated by Lord Diplock in Hadmor Productions Ltd. v. Hamilton (1982) 1 All E.R. 1042; (1983) A.C. 191; there was another and older approach which ought to be preferred. This view he said was clearly expressed by Lord Wright in Evans v. Bartlam (1937) 2 All E.R. p. 646; (1937) A.C. 473 at 486 and that the difference between that approach and Lord Diplock's was recognized in Amin Rasheed Shipping Corporation v. Kuwait Insurance Company (1983) 1 All E.R. 873.

Now in the Hadmor Productions case in a judgment in which all the other judges unreservedly concurred Lord Diplock said at (1982) 1 All E.R. p. 1046:

"..... An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application

> "for it is heard. On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it."

In the earlier case of American Cyanamid Co. v. Ethicon Ltd. (1975) 1 All E.R. at p. 508; ([1975] A.C. 396 at 405) Lord Diplock dealt with the inherent nature of an interlocutory injunction thus:

> "The grant of an interlocutory injunction is a remedy that is both temporary and discretionary. It would be most exceptional for your Lordships to give leave to appeal to this House in a case which turned on where the balance of convenience lay."

and later at p. 510 (at p. 407):

> "Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expressions as a 'probability', 'a prima facie case', or 'a strong prima facie case' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
>
> It is no part of the court's function 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 difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that 'it aided the court in doing that which was its great object, viz. abstaining from expressing any opinion upon the merits of the case until the hearing' [Wakefield v. Duke of Buccleuch - (1865) 12 LT 628 at 629]. So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

It is against a recognition of these special and peculiar features of an interlocutory injunction, namely, the inconclusive and temporary nature of the remedy, the preliminary type of evidence before the judge, the anticipatory provision by the plaintiff's undertaking in damages in the event that the defendant suffered unjustly by the grant of the injunction, that the approach advocated in the Hadmor case should be understood. The passage of Lord Wright's judgment in Evans v. Bartlam (supra) on which Mr. Small sought some measure of comfort reads [1937] 2 All E.R. at p. 654; ([1937] A.C. at p. 486):

> " It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction, unless the court is clearly satisfied that he was wrong. But the court is not entitled simply to say that, if the judge had jurisdiction, and had all the facts before him, the Court of Appeal cannot review his order, unless he is shown to have applied a wrong principle. The court must, if necessary, examine anew the relevant facts and circumstances, in order to exercise by way of review a discretion which may reverse or vary the order. Otherwise, in interlocutory matters, the judge might be regarded as independent of supervision. Yet an interlocutory order of the judge may often be of decisive importance on the final issue of the case, and may be one which requires a careful examination by the Court of Appeal. "

In that case the master had dismissed an application by a defendant to set aside a default judgment and to grant leave to defend. On appeal, the judge in Chambers reversed the master's order by granting the application. The Court of Appeal by a majority directed that the order of the master be restored. On further appeal to the House of Lords, it was held that there was no reason to interfere with the discretion of the judge in Chambers unless it was clear that the judge's discretion was wrongly exercised.

The decision to grant leave to defend is manifestly a more conclusive determination than an interlocutory injunction and the statement referred to by Mr. Small must be interpreted against the background of the circumstances of the case and in relation to the question before the Court. In the Hadmor case, Lord Diplock was dealing specifically with interlocutory injunctions. He spoke no heresy but the self-evident truth, namely, that having regard to the very nature and purpose of an interlocutory injunction, the scope for interference by an appellate court would be limited.

Such doubts concerning the approach advocated in the Hadmor case as were implied by May L.J. in the Amin Rasheed case at pp. 884-5 were certainly dispelled by Lord Wilberforce's lucid statement in Garden Cottage Foods Ltd. v. Milk Marketing Board (1983) 2 All E.R. at p. 784(j):

> "..... the Hadmor Productions Ltd case laid down no new law: it restated, by way of reminder, in clear and vigorous terms principles long applied to appeals from discretionary decisions, ..."

No question therefore arises as to there being any real conflict of principles between the approach in the Hadmor case as applied by this Court in National Commercial Bank v. Rousseau (supra) and the general principle with respect to the reviewing role of an appellate court on the exercise of a judge's discretion. As was said in Ratnam v. Cumarasamy and Another (1964) 3 All E.R. at 934 (I):

"The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice."

Before dealing with the arguments on the specific questions the following terms in the second agreement of the 25th May, 1984 are pertinent to the appeal:

"1. .....

3. The Lessee shall:

(a) during the continuance of this lease pay to the Owners without previous demand by way of rent the monthly sums as specified in the Schedule;

(b) during the continuance of this lease not sell, or offer for sale, mortgage, pledge, underlet, lend or otherwise deal with or part with the possession of the motor vehicles or any part thereof without the previous consent in writing of the Owners;

(c) forthwith insure the motor vehicles at the expense of the Lessee against risks under Full Comprehensive Insurance Policy including Acts of God, for its full value with an Insurance Company approved by the Owners and the Lessee;

.....

(i) permit the Owners, their servants servants and agents at all reasonable times in the day time to have access to the motor vehicles for the purpose of inspection.

4. Subject to the terms of this Clause the Lessee may terminate this lease within the first six months hereof by paying:

" (a) an amount equivalent to six months' rent;

(b) reasonable expenses incurred by the Owners relative to the preparation and perfection of this agreement;

(c) the guaranteed residual value set out in the Schedule hereto;

(d) the specified costs set out in the Schedule hereto less the total of all rents paid before such termination;

(e) interest at ....(sic) percent on the specified cost aforesaid for the period up to the date of such termination and payment.

5. The Lessee may also terminate this lease after six months of the date hereof by giving one month's written notice of its intention so to do and by paying the items mentioned in (b), (c), (d) and (e) above.

.....

7. The Owners may determine this lease at any time by giving one month's previous notice in writing expiring on one of the days appointed for payment of rent or [sic on?] the occurence of any of the following events:

(a) upon the Lessee making default for Fourteen (14) days in the payment of the rent;

(b) on the making of a provisional order in bankruptcy against the Lessee;

(c) upon the Lessee calling a meeting of creditors or executing any assignment for their benefit;

(d) upon any execution or distress being levied upon any Lessee and not satisfied within seven (7) days;

(e) upon the Lessee having made any misstatement in the Schedule or committed any breach of any of the terms and conditions of this Agreement,

> " and in any such case the Owners may retake possession of the motor vehicles and for this purpose may enter upon the premises where the motor vehicles are located and such determination by the Owners shall not affect the right to recover any money due at the time of such determination or to recover damages for any breach of this Agreement before such determination."

In summary, Mr. Small submitted that having regard to the pleadings and the evidence before the learned trial judge, the injunction could only be properly understood on the basis that the learned trial judge assumed that there was a valid option to purchase exercisable by the plaintiff and therefore the injunction rested upon an assumption of a proprietary right in the plaintiff to possess the cars beyond the contractual period.

Mr. Small sought to extend the ambit of his argument by an application to amend his grounds of appeal to enable him to argue that, if option there be, it transgressed the Statute of Frauds for want of a proper memorandum in writing. The application was strongly opposed. The Court refused the application on the grounds (i) that it was never raised or considered in the Court below and (ii) in all probability it involved a triable issue.

In his judgment, Edwards J. identified the issues in contention thus at p. 9:

> "In the instant case the Defendant has contended that the Plaintiff is in clear breach of the Defendant's legal rights in that it appears that it has sold certain of the vehicles which were the subject matter of the lease and at any rate has admitted that it sold one vehicle. Secondly, that the Plaintiff is in breach of the insurance provisions of the Agreement in that the vehicles are insured on a third party basis instead of comprehensively. Thirdly, the Plaintiff has failed to allow the vehicles to be inspected despite oral and written requests furthermore there has been no breach by the Defendant."

This was clearly supported by the affidavits filed exhibiting, inter alia the letter dated May 3, 1985 from the defendant to the plaintiff which reads:

> "Sirs,
>
> Despite our efforts to inspect the motor vehicles leased to your Company under Lease Agreement 25/5/84 and pursuant to Clause 3(ii) we still have not been able to do so.
>
> Our Agent, Mr. Vic Bowen advises us that on May 1, 1985 he visited your Offices to carry out the inspection and was told by your Mr. Desmond Panton that there were no cars to be inspected.
>
> We do not understand what Mr. Panton meant by this statement which could be construed to mean that the vehicles have been sold, in which cases that would be a matter for the C.I.B. In addition to the above we are further disturbed that you have created a serious breach of your Lease by deleting the Insurance Coverage on several vehicles.
>
> We do hope for your sake that the vehicles have not been sold, as we are certain you are fully aware that the vehicles belong to us. You are hereby advised that you being in breach of the lease Agreement dated 25/5/84 the said agreement is now terminated forthwith pursuant to Clause 7E of the Agreement.
>
> You are advised to deliver the vehicles to 27½ Half Way Tree Road, Kingston 5 by Friday 10/5/85 at the latest 4 p.m. At the expiration of such time we intend to have the services of our baliff re-take our vehicles."

It is obvious that the imminent threat in this letter prompted the filing of the writ with the prayer for injunctive relief.

The plaintiff's complaint was identified by the judge thus:

> (1) Under the lease agreement one month's notice in writing was a condition precedent to the giving of notice of termination of the agreement and no such notice was given.

(2) That the defendant failed to obtain rates for comprehensive insurance comparable to the rates for third-party insurance coverage and that the agreement had provided for defendant to comprehensively insure the vehicles to the costs of the plaintiff if plaintiff was in default.

(3) As regards inspection of vehicles it was not reasonably practical at the time inspection was demanded.

(4) That the plaintiff had an interest in the cars as a deposit of $242,986.92 had been made which was a part payment on the cars in anticipation of the exercise of an option to purchase. (This was challenged by the defendant who contended that the amount was no more than a security deposit equivalent to three months rental).

These contentions arise from averments in the affidavits filed on behalf of both parties. They reveal that there are indeed serious and varied issues to be tried. Accordingly, it is enough to say that Mr. Small's interpretation that the grant of the injunction rested on an assumption that the plaintiff had a proprietary right in the interest of the cars is not an accurate assessment of the bases on which the trial judge held that there were serious issues to be tried.

Mr. Small further submitted that there were certain terms, conditions and covenants in the agreement, breaches of which empowered the defendant to terminate the agreement before expiration of its term. The effect of the injunction, says Mr. Small, was to give the plaintiff a holiday from his obligations under the contract. Mr. Muirhead's reply was incisive and effective. An order of this nature, submitted Mr. Muirhead, was not a charter or licence for the committal by the plaintiff of breaches of the agreement. It was made having regard to the facts at the time and the matter adjudicated on. If after that time, the plaintiff was in breach of the obligations under the contract, it was open to the defendant to apply for a discharge

of the injunction. Mr. Muirhead is eminently right. He is supported by the following passages from Fry's Equitable Remedies (1971) pp. 515-516 under the heading "Sufficiency of Protection of the Parties":

> "Again, thirdly, it may be found that the court is able so to frame its order as to give to the defendant what is, in the circumstances, sufficient protection to render the grant of an injunction fair and reasonable. Thus where in cases of this nature an injunction issues it may be said that 'the whole benefit of the injunction is conditional upon the plaintiff's performing his part of the agreement, and the moment he fails to do any of the acts which he has engaged to do, and which were the consideration for the negative covenant, the injunction would be dissolved'. For this purpose it has sometimes been thought to be appropriate expressly to reserve the defendant liberty to make application to the court on subsequent occasions, though probably in an equitable, as opposed to a legal, order of this kind an express reservation is unnecessary."

and later at p. 516:

> "There may indeed arise circumstances where it is desirable that the injunction which is issued should be made expressly dependent upon the performance by the plaintiff of his own obligations; and a condition so expressed may operate either as a condition precedent or as a condition subsequent of the operation of the injunction in question. Generally, however, it is found in practice to be sufficient that an absolute injunction should issue, which the defendant may later apply to have dissolved if he so wishes."

These statements were founded on cases such as Stocker v. Wedderburn (1857), 3 K. & J. 393 at p. 405 and Metropolitan Electric Supply Co. Ltd. v. Ginder (1901) 2 Ch. 799.

It would be wholly incompatible and indefensible for the plaintiff while praying for a declaration that the agreement was still in force to engage in breaches of his obligations under the agreement.

The remedy of discharge of the injunction on the grounds that the plaintiff is in breach of essential obligations under

the contract is sufficient to allay any apprehension that the grant may result in unfairness to the defendent.

On the balance of convenience the learned trial judge said at pp. 12-13 of his judgment:

> "The Plaintiff operates a fleet of cars as the representative of a well known international company - HERTZ Rent-A-Car. The Plaintiff's patronage is derived largely from tourists thereby helping the Island's tourist industry. To interrupt the Plaintiff in the conduct of its business as the representative in Jamaica of an internationally established enterprise by seizing the cars some of which may be in the possession of tourists who have paid to hire them would cause untold inconvenience and harm to the Plaintiff, since it would have to start again to establish its goodwill in the event of its succeeding at the trial. It has not been demonstrated that the Defendant would be in a position to meet any damages that might be awarded to the Plaintiff should it succeed. Affidavit evidence for example, shows that the Defendant owes a Debt of Seven Million Dollars, and there is no evidence as to what its assets may be.
>
> As far as the Defendant is concerned its loss can be quantified easily in monetary terms. The value of the cars can readily be ascertained at any stage, and the Defendant expected to receive a certain sum monthly as rental for the cars under the Lease. The Plaintiff has been diligent in making its monthly payments and it has also indicated its willingness to purchase the cars from the Defendant. The Plaintiff has also given an undertaking to the Court that it would not dispose of any of the cars in its possession by virtue of the Lease, and to continue the monthly payments. When all things are considered the balance of convenience clearly lies in favour of granting the interlocutory injunction which the Plaintiff is seeking."

On the evidence such a finding was fair and reasonable. Mr. Small, however, pointed out that at the rate at which fixtures of trial dates are made in the Supreme Court, the plaintiff by virtue of the injunction will be likely to be in possession of the vehicles beyond the contractual period. He asked that if Court is minded to affirm the order, that it be

modified to direct trial in October.

The injunction was granted as far back as July 31, 1985.

The appeal first came before this Court in March, 1986. Urgency, therefore, has already been lost. However, Mr. Muirhead expressed recognition of the desirability that this case should be heard and determined before the expiration of the agreement on the 24th November, 1986 and approval of directions for trial in October, 1986.

The appeal was dismissed with costs to the respondent and the order of the Court below affirmed subject to the modifications set out earlier above at page 2 of this judgment.

Carberry, J.A.: I agree

Wright, J.A. I agree