IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

H.C.V. 0647/03

BETWEEN	VILLAGE RESORTS LIMITED	CLAIMANT
A N D	MARK LOXLEY	DEFENDANT

Conrad George and Patrick McDonald instructed by Hart Muirhead Fatta for the Claimant

Stephen Shelton and Mrs. Michelle Champagnie instructed by Myers, Fletcher & Gordon for the Defendant

HEARD: May 1 and May 2, 2003

BESWICK, J.

In the parish of St. Mary, Jamaica, is a hotel owned and operated by Sans Souci Limited and which in April 2003 was known as Grand Lido Sans Souci.

Village Resorts Limited owns a subsidiary known as VRL Services Limited. Under a Management Agreement VRL Services Limited was contracted by Sans Souci Limited "to manage the hotel and ... provide such services ... to ensure continuous and efficient management of the hotel."

In April 2003 Mr. Mark Loxley held the position of Hotel Manager of Grand Lido Sans Souci.

A dispute arose between the owners of the hotel and the management , resulting in what is described as the repudiation of the Management Agreement on March 4,

2003 by the owners, but it was agreed that Village Resorts Limited would continue to manage the hotel until April 30, 2003.

On April 24, 2003 Mr. Loxley orally indicated that he did not intend to remain in the employ of the Claimant.

He thereby declined the offers by Village Resorts Limited for him to continue in their employ as Hotel Manager of another hotel, Grand Lido Braco, opting instead to take up employment with Sans Souci Limited as of May 1, 2003.

On April 29, 2003 the claimant filed suit seeking an injunction to restrain the defendant from breaching his contract of employment with the claimant.

On the same day, the claimant also filed an application for court orders, interlocutory in nature, including orders that:

> "(1) the Defendant be restrained and an injunction is (sic) hereby granted until 28th May, 2003 or further order restraining him from:
>
> (a) undertaking any employment, consultancy of any kind with any party other than the Claimant;
>
> (b) directly or indirectly by himself, his agents or otherwise howsoever competing in any way with the business or business interests of the Claimant and/or any subsidiary or holding company thereof."

The application was supported by affidavits from Mr. Sam James and Dr. Errol Holmes.

Mr. Sam James swore to being the Vice President of Operations of the Claimant and the acting General Manager of the Grand Lido Braco Hotel. In his affidavit he states that the claimant through its subsidiaries, operates a chain of seventeen resorts

" under the 'SuperClubs' brand" and is recognised as one of the leaders in the business of operating resorts, locally and internationally.

According to the affidavit, the defendant commenced employment with the claimant in October 1999 and was later promoted to be the Hotel Manager at Grand Lido Sans Souci.

In a letter dated September 14, 1999, Mr. Pierre Battaglia, the General Manager, confirmed the defendant to the position of Food and Beverage Manager of Grand Lido Sans Souci Hotel, and therein specified terms and conditions of his employment. One condition was that, except termination was for cause or for particular breaches, "four weeks notice should be given by either party to terminate the employment relationship."

The affidavit further states that in or about the second half of March 2003, in a meeting with the Chairman of the Claimant, Mr. Loxley did not object to being transferred to another position in the SuperClubs chain. Indeed, Mr. James indicates that the defendant formally made such a request by e-mail on April 1, 2003 and by letter dated April 17, 2003 the Treasurer of the Claimant advised him of the intention to transfer him to Grand Lido Braco as Hotel Manager, effective May 1, 2003. But, Mr. James continues, the defendant later indicated orally that he intended to remain at the Grand Lido Sans Souci Hotel after April 30, 2003.

The Claimant is concerned about this because of the belief that Sans Souci Limited intends to operate the property "in direct competition with the Claimant's operations" and the defendant possesses "sensitive and confidential information pertaining to the Claimant's business."

Mr. James describes the defendant as "an extremely capable member of the SuperClubs management team, who has been trusted with the Claimant's most sensitive trade secrets, confidential information, know-how and the like." He "received extensive on-the-job training."

Mr. James states the Claimant's interest in retaining the defendant's services and willingness to transfer him to the position of Deputy General Manager of the Grand Lido Braco Hotel. Mr. James further states in his affidavit, that in the event that the defendant does not wish to accept the transfer, then the Claimant would undertake to pay the defendant his salary and all contractual benefits, during the notice period, provided that he remains full-time in the Claimant's employ and works for none other during the period. He would not be required to carry out any duties on behalf of the Claimant if he did not wish to do so and could even remain idle at home. The Claimant is willing to also undertake not to claim damages for the period during which the defendant did not work for them.

Mr. George argues that an employee has a duty to advance the interest of his employer. He did not wish the defendant to be under any duty to a new employer as such an employer would benefit from having an employee "in the saddle" with knowledge of everything.

The other supporting affidavit was by Dr. Errol Holmes. As the Claimant's Vice President of Human Resources he exhibited inter alia the Management Agreement and Side Agreement under which the Claimant managed Grand Lido Sans Souci.

In their submissions, Counsel for both parties argued opposing views as to whether or not the contract would be breached by the defendant terminating his relationship with the Claimant.

I concern myself now with the question as to whether or not an injunction ought to be granted until May 28, 2003 or further order.

Counsel for both parties agree that an employer cannot get an injunction against an employee under a contract of service if the consequences of that injunction would be to put the employee in the position that he would either have to go on working for his former employers, starve, or be idle.

However, Counsel for the Claimant submitted that in certain situations that general principle may be varied and for this he relied on ***EVENING STANDARD CO. LTD.* V. HENDERSON** [1987] IRLR 64, an interlocutory appeal. There the English Court of Appeal was faced with a situation where the defendant gave approximately two months' notice of his intention to terminate his contract although the contract required one year's notice. The employer did not wish to release him and applied for an injunction to restrain him from working for a rival newspaper during the period which his contract had to run. The employer offered to pay the defendant his salary and other contractual benefits until such time as his notice period would have expired. In addition, the employer undertook not to claim damages from the employee "for the period when he was not working for them." Further, despite the breakdown in the relationship the employer was willing for him to continue working as Production Manager and he had in fact so done to some degree.

The Court of Appeal examined the balance of convenience and found that it would be almost impossible to quantify the damage the plaintiff would undoubtedly suffer if the defendant went to work very shortly with the rival newspaper.

The Court then considered that the offer of the various payments to the plaintiff, and the opportunity to continue working in the same job and location as he had been working, overcame what the Court described as "the trite law which does not allow an injunction to force an employee to work for an employer, nor to reduce the employee to starvation or idleness".

The Court thereafter found that the balance of convenience was in favour of granting the injunction.

Lord Justice Lawton at page 66 observed that:

> "Nowadays, the need for skilled personnel is very great indeed.....There is a great temptation on employees, who have been bound by contract for a period to an employer to break their contracts and go to other employers.....and, when they do..... as the law stands at present, they can snap their fingers at their old employers..... This seems to me to be a most unsatisfactory situation in the world of master and servant. It is time that some court examined the matter fully. But an interlocutory appeal is not an occasion on which there should be an in depth examination of the law".

The learned Judge appears therefore to be stating that the law concerning this area seemed to him to be unsatisfactory, given certain circumstances.

In my judgment, the case relied on is distinguishable from the present one. First, in that case the only serious issue was as to the remedy not as to liability. The

employee concerned there on one occasion had admitted to wanting to break his contract.

Here, varying opposing allegations are being put forward, so that the fact of whether or not the contract was broken or whether there was an intention to break it is very much in issue.

Secondly, in the ***EVENING STANDARD*** case (supra) the employee was given the option to work at the same location doing what he had been doing for the previous seven years.

This of course would be impossible in this case as the Claimant would no longer be managing the hotel.

Thirdly, in ***EVENING STANDARD*** (supra) the employee's contract of employment contained a provision preventing the employee from working for anyone else during the currency of the contract. It provided that "on no account are you to engage in work outside, unless special permission has first been obtained for you to do so".

The injunction sought and given in the ***EVENING STANDARD*** case (supra) was therefore to restrain him from doing what his contract had forbidden him to do, to wit, working for someone else during the period of the contract.

Here, however the letter containing the terms of the defendant's contract as Food and Beverage Manager of the Hotel contained no such restriction. Rather, it prohibited the defendant's disclosure of "propriety (sic) information" concerning the company. Additionally, the Management Agreement and its Side Agreement touched and concerned the Claimant's employees' working terms and conditions.

Further, in the ***EVENING STANDARD*** (supra), the defendant had intended to work with a competitor which had not yet started business. It is therefore clear that there would be difficulty in quantifying damages in that situation.

The circumstances in this case are therefore distinguishable from the ***EVENING STANDARD*** (supra) and the law concerning contract of service described therein as being "trite", applies and no injunction should properly be ordered.

An application of the general principles concerning the ordering of an injunction yields the same result.

The general principles governing the grant of interlocutory injunctions were repeated in ***AMERICAN CYANAMID CO. V. ETHICON LTD.*** [1975] 1 ALL E.R. 504. Lord Diplock, reflecting the unanimous decision of the House of Lords, stated that the first issue about which the court must be satisfied is that there is a serious question to be tried.

There is indeed a serious question to be tried here, concerning any breach of the defendant's contract of employment. It involves the interpretation of the Management Agreement and other relevant documents concerning the terms of employment of Mr. Loxley. Mr. George submits that the defendant is obliged to give four weeks notice of termination of employment and should be required to remain employed to the Claimant until that period has ended.

Mr. Shelton's argument is that on a proper interpretation of the documents, Mr. Loxley's contract had ended on the termination of the Management Agreement.

Lord Diplock, at page 510, continued that if there is a serious question to be tried the Court should then consider "whether the balance of convenience lies in favour of

granting or refusing the interlocutory relief that is sought." To do this, the Court must first consider whether the plaintiff would be adequately compensated by an award of damages for any loss sustained by the "defendant's continuing to do what was sought to be enjoined," and whether the defendant would be in a financial position to pay.

Mr. George argues that the Claimant's concern is that the defendant would utilize business contacts and practices which are those of SuperClubs and any damage arising would not be compensated by damages.

This concern, simply put, amounts to loss of business/profits.

Damages are an adequate remedy for any such loss that there may be in this regard. There is no evidence that the defendant would not be In a financial position to pay.

Mr. George's arguments also reflect the concern that the transition of Sans Souci to a new management arrangement would be effected smoothly, "without start up gremlins," because of the defendant not remaining in the employ of the Claimant, but rather taking up employment with Sans Souci Limited. The submission is that this would create an unfair advantage to Sans Souci Limited during its entry into the market as a competitor of the Claimant.

If this proves to be true, and there is a loss, damages would also be an adequate remedy and an application of the principles in CYANAMID (supra) would preclude the granting of an injunction.

It is therefore not necessary for further consideration of the issue of balance of convenience. Nonetheless I make the observation that on the one hand Village Resorts Limited will lose the services of a skilled Manager, which services they say "are

extremely difficult to find". However, they were quite prepared to do without his services at all, provided that he did not work for Sans Souci Limited. His services to them can therefore be taken to be dispensable.

On the other hand, Mr. Loxley was faced with an offer of a job at a time and place of his choice or continuing in the employ of employers for whom he no longer wished to work.

Based on an application of the law as I understand it, I refuse the orders sought.

Costs of this application to be the defendant's costs in the claim.