

IN THE SUPREME COURT OF JUDICIATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.W. 207/1979

BETWEEN WATER SPORTS ENTERPRISES LTD. PLAINTIFF

A N D MICHAEL DRAKULICH DEFENDANT

Mr. Frank Phillips Q.C. and Mr. Raphael Codlin for Plaintiff

Mr. Dennis Morrison Q.C. and Donald Walker for Defendant.

JUDGMENT

HEARD: 16.3.98. 17.3.98., 18.3.98., 20.4.98., 21.4.98
23.4.98. 16.10.98. 17.10.98. 18.10.98. 1.2.99, 31.7.2000

THEOBALDS, J.

This matter has had a long and chequered history. At this point it is merely an enquiry as to damages suffered by the Defendant Michael Drakulich arising from a long standing feud between the Plaintiff Company Water Sports Enterprises Ltd., or more particularity between the Managing Director of Water Sports Enterprises Ltd. (one Ernest Smatt) and the Defendant (Michael Drakulich) . This suit had its genesis in an interlocutory injunction ordered by the (Honourable Mr. Justice Chambers) retired, on

the 13th day of March 1980. The terms of this order, jointly made in a similar action C.L.N. 245/1979 between the same parties, but which said action is not before me now, were as follows:

..... The interim injunction which I now grant in this joint hearing is that the Smatt Water Sports interest shall be confined to the use or portion of the shore and hotel facilities at the National Hotel Properties Ltd. as is mentioned in this suit and Mr. Michael Drakulich confined to the use of the shore and hotel facilities at the other portion such portions to be agreed now between the parties and approved by me or other wise I shall arbitrarily set out which portions apply to each.

An injunction is further granted that neither of these two parties namely the Smatt interest or Mr. Drakulich interest shall in any way restrict or interfere with the other in such limited performance, and the hotel interests are also required to allow both parties to carry out such portion of the contract and or the supposed other contract in accordance with the proper regard to this order.

This order to remain in force until the determination of the trial or until further order. Each party namely Mr. Michael Drakulich and the Smatt Enterprises undertaking to pay such damages that the other may have suffered as a result of this order. The Court now orders that the Smatt interest do operate for and on behalf of the Intercontinental Hotel and Mr. M. Drakulich operate for and on behalf of the Mallards Beach Hotel. Each party to have the joint use of the Water Sports Centre at the Intercontinental without interference one from the other. Liberty to apply.

Cost of these summons to be cost in the Cause. Both parties to remove their respective signs from the pool area and lobby of the other's hotel.

The Plaintiff's Company, through its Managing Director and Chief Executive Officer, Mr. Ernest Smatt, brought an action against the Defendant Mr. Michael Drakulich. This Writ was filed from as far back as the 18th December ,97. The endorsement to the Writ was as follows:

The Plaintiff claims against the Defendant damage for inducing a breach of contract, the said contract being made on the 11th day of April, 19976, between the Intercontinental Hotel Ocho Rios and Mallards Beach Hyatt Hotel on the one hand and Water Sports Enterprises Ltd. on the other.

Plaintiff claims against the Defendant an injunction to restrain the Defendant, either by himself, his servants or agents or otherwise from interfering with the Plaintiff's performance of the terms of its contract aforesaid, either by the Plaintiff its servants or agents or otherwise, either to the premises of Ocho Rios Intercontinental Hotel and Mallards Beach Hyatt Hotel or wheresoever the performance of the said contract may take place, until the determination of the issues herein.

As a follow up to this Writ the Plaintiff Company filed a Summons dated the 28th day of December 1979 seeking an interlocutory injunction restraining the Defendant whether by himself or by his servants or agents or otherwise from interfering with the performance by the Plaintiff of his contract of April 1976 herein or in any other way offering any form of service connected with Water Sports at Ocho Rios Intercontinental Hotel and Mallards Beach Hyatt Hotel either by himself his servants or agents or otherwise which falls within the Plaintiff's concession until the trial of this action or until further order by the Court. The injunction sought is as wide in its terms as is the seven page affidavit in support thereof given by Ernest Smatt. This includes a 2 page exhibit annexed thereto. In addition a 3 page affidavit of one Ralph Purcell dated the 28th day of December, is filed

in support of the Plaintiff's application. Two, not insignificant features of Purcell's affidavit have not escaped my notice. Firstly, at the time of swearing to the affidavit Purcell had been in Smatt's employment for a period of 22 years. He was his Operation's Manager from 1968. Secondly he purports to corroborate Smatt's statement that on 15th December 1979 Drakulich approached Smatt and himself and was accompanied by about ten men. Smatt simply swore that Drakulich "had a gun in his waist." Purcell adds to that somewhat by saying "Drakulich had a gun in his waist under his shirt." Slight inconsistency one might urge, but more importantly, a tribunal of fact is being asked to accept that about 10 men, the leader of whom is armed with a gun, approach 2 unarmed men (Smatt & Purcell) and one of the 2 exchanged blows with Drakulich, (the leader) and Purcell and Drakulich had scuffle. That is all we are ever told about a gun although the police came on the scene. I accept Drakulich as truthful when he says he had no gun. His evidence on this point is corroborated by the evidence of Mr. Rolf Schraegle, General Manager of Mallards Beach Hyatt Hotel in his affidavit of the 4th January 1980. It follows that both Smatt and Purcell are not witnesses of truth in relation to this gun.

Returning to Smatt's affidavit abovementioned one cannot fail to be impressed by his curriculum vitae. 27 years in the Water Sports business and providing service for all the major hotels on the North Coast. Additionally West Indies Water Sports Skiing Champion for many years, and Winner of the Jamaican International fishing Tournament, worldwide consultant even to the Aga Khan in Water Sports and boating operations with vast experience in all forms of tourist attractions relating to Water Sports. Mr. Smatt's Companies have provided employment for many Thousand Jamaicans and netted millions of dollars in foreign exchange

earnings. I underline the word "netted" as I propose to return to it later in this judgment.

In all cases of this nature considerable importance must attach to the findings of fact, the reason being that one party and his witnesses both in pleadings and in actual evidence invariably seek to deny what the other side is putting forward as the truth. The importance therefore of finding fair, accurate and impartial facts cannot be underestimated. Every worthwhile judgment must depend on fair and accurate ascertainment of facts. This is done by careful observation of each witness as he or she takes the stand. You use your knowledge and experience of life and of fellow Jamaicans and then you ask yourself how much of each witnesses' testimony do I accept and how much, if any do I reject? You can accept all of what a witness tells you if you believe that witnesses' testimony is reliable and untainted. By the same token you reject the evidence of any witness who you believe in either lying or mistaken. You can also accept a portion of what a witness tells you and reject a portion, and the reason why a Court enjoys this wide flexibility or discretion is that the Court is in search of the truth. In the opening pages of this judgment I had dealt with a specific finding of fact in relation to the statement by Smatt and his witness that the defendant Drakulich was armed with a gun. It may be untidy in a written judgment such as this to deal with the subject of this gun, divert from it, and return to it later on as regrettably I find myself doing. One asks "why introduce it at this trial?" The only answer must be: to cast, Drakulich in an unfavourable light before this court. Why not have brought this gun to the attention of the

police who attended at the scene for them to ascertain whether or not it was a legal or illegal firearm although there was no evidence adduced as to it having been brought into play at all on the 15th December, 1979 by the so-called "aggressor."

A feature of Michael Drakulich claim which initially caused me some concern was the well recognized principle of law that both actual loss and the quantum there of fall in the category of special damages and require strict proof before they can be recovered. It is clear that Smatts' company, the plaintiff in this suit, sought an injunction against Drakulich's free exercise of his contractual rights at the Mallard's Beach and Intercontinental Hotels. It is clear also on the evidence and I so find that Smatt and his employees forcefully interfered with Drakulich' right to the joint use of the Water Sports Centre as ordered by the injunction of Chambers, J. Unless a claimant enjoys a fixed salary or is under a contract to be remunerated at an agreed figure common sense would dictate that precise evidence could never be available to quantify the amount of loss. From as far back as 1951 Lord Justice Devlin stated in *Biggin vs. Permanite* (1951) 1KB page 442 "where precise evidence is obtainable the court naturally expects to have it, but where it is not the court must do the best it can." Since actual work was not done, or rather done to a limited degree because of the unwarranted interference by Smatt and his employees with the attempts by Drakulich to fulfill his contract with the Mallard's Beach and Intercontinental Hotels the court cannot shelve its responsibility to both parties by making a genuine attempt to arrive at the figures. Drakulich uses his years experience in

the Water Sport's business coupled with his previous experience as an operator at the Jamaica Hilton Hotel to provide the court with some figures. These figures must be classified as helpful and instructive because there was no complaint then of any interference by Smatt and his employees or anyone else for that matter. They provide, if accepted, a useful bouncing board from which the court can dive into the deep troubled waters of making a worthwhile assessment of Michael Drakulich' losses. He is a qualified attorney at law both locally and in the U.S.A. Is it too much to assume that he must have some basic knowledge of bookkeeping and the way a profit and loss account is compiled? Having been wrongfully deprived by the plaintiff company Water Sports Enterprises Ltd., through it s Managing Director Smatt and his employees of the opportunity to fulfill his contracts he has done the best that he could possibly do to assist this court. The question here is in relation to his integrity and honesty and credibility. From as far back as 1892 in the case of Ratcliffe vs. Evans (1892) 2 QB page 524 Lord Justice Bowen had this to say:-

“ In all actions accordingly on the case when the damage actually done is the gist of the action the character of the acts themselves which produce the damage and the circumstances under which these acts are done must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleadings and proof of damage, as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”

I have no difficulty whatever in recalling with clarity and precision the demeanour of the witnesses on both sides in this drama. It has been a long time since the evidence was heard, and the several affidavits perused, but one's memory as to detail is only allowed to fade after delivery of a judgment. The notes of evidence complete with pencil notations made on a daily basis during the hearing are at hand. It had been my intention to embark upon a critical analysis of each witness' testimony, but in retrospect I no longer see the need for any such exercise.

There is no aspect of Michael Drakulich' evidence against which I could with justification place a question mark. A favourable impression was formed by me as to his credibility and that of his witnesses, particularly

Mr. Rolf Schraegle (mentioned earlier in this judgment), Mr. Everett Heron,

Mr. Leo Wynam (now deceased), and Mr. Lionel Reid. On the other hand

Ernest Smatt has done irreparable damage to his credibility in five different areas.

Firstly in his account of the confrontation on the 15th December, 1979 between himself and Drakulich when he and his witness Ralph Purcell claimed that Drakulich was armed with a gun. Secondly, his statement that he netted 5 – 10,000 U.S. weekly from his Water Sports activities for nearly all his working life of 30 years and upwards, his puerile attempt to explain the use of the word "netted" is outrageous.

Thirdly his complete disregard of the interim injunction issued by Chambers, J. on the 13th March 1980 particularly in relation to the joint use of the Water Sports Centre at the Intercontinental Hotel without interference one from the other.

Fourthly, his clearly stated prejudice at the hearing against Drakulich as he "objected to any foreigner coming in" and competing with him. Indeed one paragraph of his affidavit of 28th December 1979 in support of his application for Interlocutory Injunction consisted of nothing more than "I was born in Jamaica." We Jamaicans go all over the world and

capitalize on our natural talents or industry and hardwork and do well so it is a sad reflection for any successful foreigner here in Jamaica to be stigmatised for not being born in Jamaica. In any event Drakulich had by choice become a Jamaica citizen.

Fifthly, more than once at the hearing Ernest Smatt, had stated he was prepared to accept Drakulich's figures so why the attempt to adduce evidence from the Income Tax Department. The court would have been far more impressed had Mr. Smatt produced his own audited accounts on which his 96% - 97% operational costs were based. It is not difficult to see why no attempt was ever made to justify such outrageous figures which would have netted a 3% to 4% profit over the years. A man of Mr. Smatt's business acumen whose company operations over the years has employed and trained thousands of Jamaicans and netted millions of dollars in foreign exchange earnings for Jamaica would never have settled for a 3% - 4% profit.

I had given an undertaking to have this judgment ready for the first week in the coming August vacation, but other matters have necessitated the bringing forward of this promise to the last week of the present month.

My assessment of damages suffered by Mr. Michael Drakulich as a result of the Interlocutory Injunction ordered by the late Mr. Justice Chambers on the 14th March 1980 is as follows:

(i)	At the intercontinental Hotel Ocho Rios	U.S.	\$361,978.00
(ii)	At the Mallards Beach Hyatt	U.S.	\$323,128.00
(III)	For lost earnings outside of his contract	U.S.	\$102,256.00
(iv)	For incentive travel and scuba group	U.S.	\$ 60,000,00

This makes a total of U.S. \$847,362.00 and not the U.S. \$867,363.00 as alleged in Counsel's submissions. I consider the request for an amount to cover the alleged lost opportunity to acquire exclusive contracts with cruise ship operators as too remote. On the question of interest on the above sums no consideration is given to the award of

30% per annum as requested by Drakulich. The loan to purchase equipment obtained by him from the Jamaican Development Bank provided an excellent opportunity to provide the court with some information as to the amount he is charged for interest by the Jamaican Development Bank but no evidence was led on that aspect. In all the circumstances and bearing in mind that the Smatt Enterprises have continued to operate in defiance of the Interlocutory Injunction on which this assessment is based and have on their own figures, disregarding of course their ridiculous assessment of 96 – 97% operational cost, been enjoying the benefit of a multi-million U.S dollars annual income, I consider a reasonable award for interest would be 10% per annum from the date of the Interlocutory Injunction to the date of this Assessment. Costs to Drakulich to be taxed if not agreed. Certificates for Queens Counsel and Junior Counsel.

The delay in handing down this assessment/judgments is sincerely regretted but is attributable to the debilitating effect of medication as far as night work is concerned. The days are fully taken up with court work and chambers matters. An error in the submissions made to date is that the award of 2000 dollars made by me on 14th July 89 on Drakulich Claim was for damages for assault only and had nothing to do with destruction of signboards and tickets. I recall pointing out then that slapping in the face with a newspaper in public would attract a substantial award in other jurisdictions such as, U.S.A. as an affront to one's dignity but is classified here as a trivial assault. The fine imposed at the Criminal trial was a mere \$40.