Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. A 186 OF 1996

BETWEEN	JOHN AIRD	PLAINTIFF
AND	ESSO STANDARD OIL (S.A. LIMITED)	DEFENDANT

Dr. Lloyd Barnett, Norman Davis, Robin Sykes and Lancelot Cowan instructed by Messrs Alton Morgan and Company for the plaintiff. Gordon Robinson, David Henry, Lowell Morgan and Deborah Newland, instructed by Christopher Chedder of Messrs Nunes Scholefield Delon and Company for the Defendant.

IN CHAMBERS

HEARD ON the 16th, 21st, and 22nd and 31st days of January, 1997.

COURTENAY ORR, J

The plaintiff filed his undated writ and a summons for interlocutory injunction on 17th December, 1996. The summons was first fixed for hearing on Christmas Eve, 1996, before Ellis J, who then granted an injunction for fourteen days and it was thereby ordered that:

(1) The defendant, its agents and servants be restrained from re-entering service station situated at 60 Gilmour Drive, for the purposes of taking possession, or doing any act whatsoever calculated to interfere with the plaintiff's continued use and quiet enjoyment or to compel him to give up possession of the premises and in particular any act intended to disrupt the continuation of the normal business of the plaintiff at the Service Station.

(2) The defendants, its agents and servants be restrained from taking any action whatsoever against the plaintiff on or pursuant to the porported notice to quit dated the 10th day of September 1996".

The plaintiff now seeks, by a summons dated 6th January, 1997, an extension of the injunction until the trial of the action.

THE BACKGROUND TO THE DISPUTE

The defendant hereinafterwards called "Esso" is the owner and landlord of premises known as 60 Gilmour Drive, Kingston 20. These premises are located at the intersection of Washington Boulevard and Molynes Road, Kingston 20, St. Andrew, and house an Esso service station.

Sometime in 1988 or 1989, at the invitation of Esso, the plaintiff took over the operation of the service station. He paid Esso Four Hundred Thousand Dollars ($400,000.00), for the goodwill. At the time of his assuming the running of the service station it had been closed for almost a year. From late 1989, the terms of his possession and operation of the service station were contained in several successive leases for terms of one year.

In December 1995, the plaintiff entered into negotiations with Esso for a new three (3) year lease. They did not agree on the terms of such a lease and eventually in March 1996, the plaintiff signed a new "one year lease" stated in clause 1 (a) as expiring on 31st December, 1996.

In 1995 and 1996, leases are identical in many respects except for example in the amount of rental reserved. There is however a gap in the 1996 lease document. In both the 1995 and 1996 leases clause 5 (c) contained provisions empowering Esso without advice to forthwith terminate the lease in certain circumstances, but in the 1996 lease document those provisions are last recorded up to clause 5 (c) vii at the end of page 12, and page 13, begins with two lines which by themselves are unintelligible but correspond to the last two lines of clause 5 (c) of the 1995 lease. Thereafter the terms of clause 5 in both documents are similar and contain clauses (f) and (g).

> (c) The tenancy created shall terminate automatically at the end of the term for which the same was made.

> If the tenancy be continued by mutual consent beyond such date of expiration of the original term, then in the absence of a written agreement to the contrary such continuation shall be deemed to be a tenancy from year to year commencing on the date on which the previous term expired and terminable on the occurrence on any of the events set forth in clause 5 (c) hereof or by either party by giving three (3) months written notice expiring on the last day of any calender month, but otherwise upon the same terms and conditions as contained in this agreement".

The portion underlined consists of the two unintelligible lines at the end of the gap in the 1996 lease document.

Another oddity is the fact that the service station actually encompasses three parcels of land for which there are three separate titles, and are actually Nos. 58, 60 and 62 Gilmour Drive. Further a Certificate of Exemption under the Rent Restriction Act was issued for 60 Gilmour Drive. Indeed throughout the lease agreements exhibited and the correspondence between the parties and on the plaintiff's letter-heads, the location of the service station is always given as 60 Gilmour Drive.

On Monday, September 16, 1996, a notice to quit was served on the plaintiff. It was couched in the following terms:

NOTICE TO QUIT

> We Nunes Scholefield Deleon & Company Attorneys-at-Law and Agents for your Landlord Esso Standard Oil S.A. Limited hereby give you notice to quit and deliver up possession of all that parcel of land situated at 60 Gilmour Drive, Kingston 20, in the Parish of Saint Andrew together with the Service Station and fixtures thereon, which you now occupy as a tenant for a term of one (1) year commencing on the 1st day of January 1996, and expiring on the 31st day of December, 1996,

under a written Lease Agreement dated 25th March 1996, on or before the 31st day of December 1996.

AND FURTHER TAKE NOTICE that the reasons that this notice is served on you are as follows:

(a) To notify you that the tenancy created by written lease agreement dated the 25th of March 1996, expires on the 31st day of December 1996, and will not be renewed by your landlord.

(b) To notify you that you have committed breaches that fall under clause 5 (c), (vii), of the said Lease Agreement dated the 25th day of March 1996, in particular you have failed to comply with the provisions of clause 3 (h) of the said lease agreement.

Dated this 10th day of September 1996.

NUNES SCHOLEFIELD DELEON & CO.

Per..

Landlords, Attorney-at-Law and Agent"

Clause 3 (h) reads:

The Tenant HEREBY COVENANTS AND AGREES with Esso as follows:

(h) To attend regularly at and personally supervise and manage to standards from time to time required by Esso, the Service Station in the leased premises on a "whole time basis".

The notice to quit was accompanied by a covering letter dated September 11, 1996, and signed by Mr Donovan Jackson from the Attorneys-at-Law for the defendant. The material part reads as follows:

"Re: Lease Agreement - Premises 60 Gilmour Drive, expiration of one year term on December 31 1996. We are Attorneys-at-Law and Agents for your Landlord Esso Standard Oil S.A. Limited. Our instructions are to confirm their advice to you that the tenancy created by the written lease agreement with you dated March 25 1996, expires on the 31st day of December, 1996, and will not be renewed.

For the avoidance of doubt, we enclose herewith Notice to Quit and deliver up possession of the premises on or before the 31st December 1996".

The issue of goodwill is a bone of contention and in this connection it is important to note that the 1996 lease document as well as the 1995 lease agreement contain as clause 3 (y) a "goodwill exclusion clause" which reads:

(3) "The Tenant HEREBY COVENANTS AND AGREES with Esso as follows: .....

(y) At the expiration or sooner determination howsoever of this Agreement, not to make any claim against Esso for goodwill and to such end it is hereby expressly agreed that Esso shall not be liable to compensate the Tenant for goodwill of any sort or description (if any) accruing by virtue to the Tenant operating the Service Station pursuant to this Agreement".

After a notice to quit, there was correspondence between the parties, sometimes through their Attorneys-at-Law. There were also some three meetings between the plaintiff and Esso's management, the last of which was on 19th November 1996, but Esso remained firm in its position that it was under no obligation to pay compensation for goodwill to the plaintiff and that he should deal with the incoming dealer. Esso insisted that it had no intention of negotiating that matter with the plaintiff, or renewing the lease.

By virtue of a copy of its letter dated 6th December 1996, to Melvin Chung, Esso informed the plaintiff that that gentleman had been chosen to replace him as the dealer for the Service Station. In that letter Esso also requested Mr. Chung to commence negotations with the plaintiff.

THE SUBMISSIONS ON BEHALF OF THE PLAINTIFF

Dr. Barnett submitted as follows:

Sheer business sense indicated that having regard to the importance of the business and the substantial sum paid for goodwill the parties contemplated a more durable relationship that one might infer from the

The purpose of the leases was to facilitate annual negotiations rather than to terminate the relationship.

The notice to quit is invalid and the agreement wrongly terminated, and moreso in view of the defect in the 1996 lease document. The effect of the omission in the 1996 document is a matter of weighty legal argument.

The insistence by Esso that it is not obliged to pay the plaintiff for goodwill makes it all the more incumbent on Esso to act reasonably in allowing the plaintiff a reasonable time within which to negotiate with the incoming dealer. The plaintiff has deposed to such a practice in the trade.

The plaintiff had made it clear he will suffer great hardship if the injunction is not granted, so the balance of convenience is in his favour.

The reference in the notice to quit to a breach of clause 3 (h) which requires the plaintiff to attend regularly at and personally supervise and manage the service station raises an important issue of fact on which the plaintiff has a strong case having regard to the citations and awards he has received in the trade.

The multiplicity of titles for the premises raises the issue of whether the premises are properly exempt under the Rent Restriction Act as the certificate speaks to land contained in only one of the three titles. The relationship of the parties has nothing to do with the legal effect of the certificate.

The Court should determine what is the reasonable notice to be given by Esso as the premises are commercial premises.

To reject the plaintiff would undermine his ability to negotiate.

There are five major issues of law and fact which arise:

(1) Whether having regard to the circumstances in which the plaintiff took over the operation of the service station and the practice in the industry the defendant is under a legal or equitable duty to permit him adequate or reasonable time to negotiate for the disposal of his goodwill.

(2) Whether the provisions of the lease document dated March 25 1996, regarding termination and renewal are by reason of being incomplete or incapable of interpretation defective and void for uncertainty with the result that the plaintiff must be treated as a lessee from year to year.

(3) Whether the certificate of exemption issued under the Rent Restriction Act which is specifically expressed to concern 60 Gilmour Drive grants any statutory exemption regarding Nos. 58 and 62 Gilmour Drive, and whether the notice that relates to 60 Gilmour Drive is effective to terminate the occupation of all three parcels if the notice must satisfy the provisions of the Rent Restriction Act.

(4) Whether the notice is effective to terminate the tenancy having regard to the fact that it gives as a reason a breach of a term of the lease with regard to which there is no evidence to support the allegation and regarding which that ground has been abandoned.

(5) Whether in any event if all the three parcels are exempt from provisions of the Rent Restriction Act, the plaintiff will be entitled in the descretion of the trial Court to a reasonable period, as determined by that Court, to vacate the premises.

THE SUBMISSIONS ON THE DEFENDANT'S BEHALF

Mr Gordon Robinson submitted as set out hereunder:

The plaintiff has put forward several different cases since the filing of his writ. For example in the endorsement to his writ and the summons for injunction before Ellis J, he sought an injunction for three months apparently on the basis that he held over on the 1995 lease as a tenant from year to year. Now he is asking for an injunction until the trial of the action. Further, the claim that the Rent Restriction Act governs the tenancy is recently being hotly advanced.

Secondly, the plaintiff had misled the Court in his application before Ellis J, and for that reason his current application should be dismissed.

He deceived the Court when he stated in his first affidavit that after the end of the 1995 lease he continued to pay rental at the old rate and he omitted to indicate that the rental was increased when the 1996 document was signed.

Various items of correspondence were not exhibited. These would have shown that from the outset Esso was contending that the lease had expired and was not terminated. Letters which would have revealed that at first he did not protest that the notice to quit was invalid but merely sought and obtained meetings with Esso to discuss the issue of goodwill were also not exhibited.

Thirdly, the plaintiff's suggestion that the certificate under the Rent Restriction Act did not exempt the whole premises known as 60 Gilmour Drive, if taken to its logical conclusion would make the plaintiff a squatter on those areas of the Service Station on Nos. 58 and 62 Gilmour Drive.

Fourthly, Esso was not seeking possession by order of the Court, so the question of involving the Court's descretion as in Barrington Scott v Lerner Shop Limited RMCA 22/87, unreported did not arise.

Fifthly, the plaintiff had been dilatory in persuing negotations with Mr Melvin Chung and to date had not given him all necessary information for him to calculate the goodwill.

Sixthly, the alleged custom of Esso allowing time for the out-going and incoming dealers to negotiate the value of the goodwill was a matter of damages.

Seventhly, whatever view the Court may take of the 1996 lease document, it did at least contain an agreement for a lease for one year to end on 31st December, 1996.

Eighthly, the balance of convenience was in favour of Esso.

Ninthly, Melvin Chung had accepted the basis of the plaintiff's calculations so that ascertaining the value of the goodwill was now purely a matter of mathematics.

Tenthly, the plaintiff had no real prospect of success at the trial.

SHOULD THE PLAINTIFF BE GRANTED AN INJUNCTION?

Before assessing this application in terms of the guidelines in the case fo American Cynamid Company Limited vs Ethicon [1975] AC. 396. I wish to deal with a few matters which call for comment.

Mr. Robinson in asking the Court to refuse the plaintiff's application on the basis that he had concealed material information at the inter partes hearing before Ellis J, and that he had put forward several different cases, cited the following passage from Halsbury's Laws of England, 4th Edition Vol. 24 : para. 696:

> **"Necessity for disclosing material facts on ex parte applications.** If the application for an interlocutory injunction or interim order is made ex parte, the applicant must state his case fully and fairly to the court and disclose all material facts. The court has descretion to set aside an order made ex parte where the applicant has failed to make sufficient or candid disclosure. The affidavits in support of an ex parte application should also always state the precise time at which the plaintiff or those acting for him became aware of the threatened injury and should show, in effect, either that notice to the defendant would be mischeivous or that the matter is urgent that, if notice were served, the mischief would have been done before the injunction could be obtained. Unless the affidavits show the above, the application may be directed to stand over for notice to be served on the defendant.
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> At the hearing of the application the case put forward must correspond with that set out in the statement of claim, if any, and the plaintiff may not, when he puts forward prominently and relies upon a given case, and fails upon that case, spell out another say he might have framed his case so as to show a title to the relief asked. A party who might have brought forward his whole case at once but who brings forward a part only, when that fails may not remodel his case and rely on a different equity. The court never grants an injunction on general complaints, and general words in a notice of motion can be justified only by establishing a specific case of injury.

Whilst I agree that concealment of material facts may cause the Court to set aside an ex parte order, I do not regard the plaintiff as having fallen foul of the principles stated above so as to invite the sanctions mentioned, as the earlier proceedings, before Ellis J, were inter partes.

In the third edition of Equitable Remedies by I CF Spry, the learned Author speaks to this issue. He summarises the position regarding ex parte applicaitons thus at pages 476-478:

> "Where application is made ex parte, the obligation of the plaintiff is not merely not to mislead the court by expressly or impliedly making presentations that are untrue, as is otherwise ordinarily the case in an inter partes proceeding, but in addition he is under the duty of disclosing to the court all matters within his knowledge which are material to the proceedings at hand and which tend in favour of an absent party. A matter is regarded as material for these purposes either if it is relevant to the existence of a power to grant an injunction or if it is one of those circumstances that the court takes into account in exercising its descretion. Furthermore, the better view is that it does not have to be shown that the undisclosed matter in question would, if established, have been decisive, for one reason or another, against the party who has not made a proper disclosure. It is sufficient that is is relevant and of such a nature that it might foreseeably have been regarded by the court as of weight.
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> Although the duty of disclosure of the plaintiff is limited to matters of which he has obtained knowledge it has been held that he is not necessarily excused because he has believed that particular matters known to him are not material; here, however, his belief is probably relevant to the exercise by the court of its descretion.
>
> There has become established a general rule that if on an ex parte application the plaintiff does not make a sufficient disclosure, in the absence of special circumstances his application will simply be dismissed; and further, if through the ignorance of the court of the failure to make a sufficient disclosure an injunction does indeed issue it will ordinarily be dissolved or set aside as soon as that failure has subsequently been discovered".

(emphasis mine)

But the position on inter partes applications as was that before Ellis J, is somewhat different. I accept that the law on this matter is correctly stated by Spry op. cit, at pages 479-480.

He writes:

> "If the application in question is not made ex parte, but is made on notice, and the defendant nonetheless does not appear, the position is somewhat different, since the defendant has at least been given an opportunity of coming before the court in order to put forward any relevant matters in his favour. Here the extent of the duty of the plaintiff to disclose material facts is not altogether clear. In one case where the respondent, although served with notice, did not appear Romilly M.R. stated, "But if the respondent does not appear, and the plaintiff, taking advantage of his absence, entirely misleads the court, then I think that the court ought properly to visit the party, so dealing, with the consequence, though not with the same strictness as in the case of an ex parte injunction".

> It has not yet been established whether, when the defendant has been given notice, the plaintiff is also under a duty to disclose all matters of substantial importance which favour the absent party and which either are relevant to the existence of the power of the court to grant an interlocutory injunction or may properly be taken into account by the court in the exercise of its descretion".

The next issue is one on which neither side sought to address the Court but which is a relevant consideration. I refer to the question of whether the grant of an injunction would cause hardship to a third party, in this case Melvin Chung, the proposed incoming dealer. On this issue I respectfully adopt the remarks of the learned author of Spri op. cit. at pp. 456-457. He writes:

> Similar principles apply where the hardship that would be caused by the grant of relief would be caused to a third person, or to members of the public, rather than to the defendant. This consideration is taken into account by the court in determining whether it is just that an interlocutory injunction should issue; and in regard to perpetual injunctions it has already been noted, for example, that courts of equity "will not ordinarily and without special special necessity interfere by injunction, where the injunction will have the effect of very materially injuring the rights of third persons not before the court". In principle the interests of third persons and the public are no less material in interlocutory applications than in applications for final relief. However, the weight to be given to this consideration depends on other matters such as the extent of hardship that might be caused to the plaintiff and defendant respectively by the refusal or grant of relief and the degree of probability with which it appears that the plaintiff will ultimately succeed, at the final hearing, in obtaining a perpetual injunction or such other equitable relief as in question".

And in footnote 18 on the same page he writes:

> "Indeed, possible hardship to third persons may, if sufficiently direct, in some circumstances be given greater weight than hardship to the defendant, to the extant that the third persons in question are not alleged to be wrongdoers".

(emphasis mine)

I now turn to the principles enunciated in American Cynamid. The first question which arises is whether there is a serious issue to be tried, in other words, has the plaintiff shown that his claim is not frivolous or vexatious; and in this connectionI adopt the definition of "not frivolous" used by Eveleigh LJ in Cayne v Globel National Resources [1984] 1 ALL E R 225 at 230 D. He gave the meaning of that phrase as "one for which there is supporting material".

I hold that there is a serious issue to be tried in this matter.

The next issue for consideration is the first factor in an assessment of the balance of convenience, namely, is damages a sufficient remedy? This is an extremely important issue for as Lord Diplock stated in America Cynamin at p. 510g:

> "If damages in the measure recoverable at common law would be an adequate remedy and the defendant would be in a financial position to pay, then, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage".

(emphasis mine)

It is obvious that an important aspect to these proceedings is their power to enhance the plaintiff's bargaining position on the matter of goodwill. Indeed Dr. Barnett submitted that "to reject the plaintiff would undermine his ability to negotiate" and as the early correspondence between the parties shows, goodwill was uppermost in the plaintiff's mind from the very outset. I find that in view of the acceptance by Melvin Chung of the plaintiff's method of calculating goodwill, the ascertainment of its value is, as Mr. Robinson says, a matter of mathematics. I therefore hold that damages would be sufficient remedy.

The plaintiff has deposed that the refusal of this application would cause him financial hardship. But there is no material before me as to how an injunction would affect Melvin Chung the incoming dealer. Nor is there anything to suggest that the trial would take place very soon. Further the plaintiff's statement concerning hardships affects the question of whether he would be in a position to satisfy his undertaking as to damages. I have been presented with no information as to his ability in this regard. Although that cannot be decisive.

In Brigid Foley Limited v Elliot [1982] R.P.C. 433 at 436 Sir Robert Megarry V.C. said:

> "I should have been reluctant to dismiss the motion simply on the grounds of a failure to put in evidence that balance sheet; but I would emphasize that in applications for injunctions especially since Cynamid, one of the important matters always to be dealt with is the ability of a plaintiff to meet an undertaking in damages".

The plaintiff has been dilatory in supplying information to Melvin Chung for him to negotiate the amount of goodwill payable. So the fact that an agreement on goodwill is not yet completed is to a large extent his own fault.

In all the circumstances I hold that the plaintiff must fail both on the issue of the sufficiency of damages as a remedy and on the issue of hardship.

The application for an extension of the injunction issued by Ellis J is refused, with costs to the defendant Esso, to be taxed if not agreed.