[2014] JMSC Civil 168

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV 04076 OF 2014

BETWEEN ALEXANDER HOUSE INCORPORATED CLAIMANT

AND THE SALVATION ARMY DEFENDANT

Mr. Abraham Dabdoub & Ms. Karen Dabdoub, instructed by Dabdoub, Dabdoub & Co. for the claimant.

Mr. Emile Leiba & Mr. Courtney Williams, instructed by DunnCox for the defendant.

Inter-partes Application for Interlocutory Injunction - Alleged Breach of Agreement – Whether Terms of Agreement Are As Alleged by Claimant or Defendant – Serious Question to be Tried – Whether Damages an Adequate Remedy – Whether Material Non-Disclosure at Ex-parte Application for Interim Injunction – Whether Grant or Refusal of Injunction would be Effective End of Matter – Whether Condition to be Imposed on Grant of Injunction.

IN CHAMBERS

Heard: October 17, 24 & 30, 2014.

Coram: F. Williams, J.

Background

[1] In this matter, the claimant seeks an injunction from this court in the following terms:

> *"restraining the defendant, whether by itself, and/or its agents, employees or servants from posting any advertisement, public notice, or any other signage whatsoever on behalf of any third party, or any other*

person or entity whatsoever, on the structures that currently obscure the billboard site at the north-eastern corner of the Claimant's land that is the subject of the contract between the parties.

[2] The claimant's land in this case is located at number 1 Waterloo Road, in the parish of St. Andrew and is registered at volume 1353, folio 797 of the Register Book of Titles. It is that lot located at the north-western side of the busy intersection of Hope, Trafalgar and Waterloo Roads in New Kingston; and is north of the familiar landmark of the Young Men's Christian Association (YMCA) property; and west of the at-least equally familiar landmark of Devon House. It is used primarily (if not solely) to earn advertising income by the renting of billboard and other types of advertising space. The billboards are displayed to motorists and pedestrians travelling north and south on Waterloo Road; and east and west on Hope Road. Depending on their placement, some might even be visible to persons on Trafalgar Road.

[3] The defendant's land adjoins the claimant's at the latter's northern boundary and it is billboards that were and are to be placed there that are the subject of the dispute in this matter.

[4] Of importance to this claim is a written agreement dated February 17, 2012, between the claimant and the defendant. It will be useful to set out its more important terms, which are as follows:

a. A mango tree on the defendant's premises near to the boundary with the claimant's land, would be removed by the claimant at its own expense.

b. In consideration of this, the claimant would plant three trees to be chosen by the defendant, on the defendant's property.

c. The claimant would pay the annual fee of $120,000 for a period of not less than five years.

[5] As it turns out, the terms of this agreement are not free from dispute, as there are different arguments as to whether this agreement was made with reference to the billboard that is nearer to the north-eastern boundary ("billboard 1"); or another that is located or to be located to the west of and beside billboard 1 ("billboard 2").

[6] Dispute also surrounds the currency or otherwise of the agreement: the claimant, on one hand, contends that it is current and that it is not in breach of it. On the other hand, the defendant contends that, for a number of reasons, the claimant is in breach of the agreement and the agreement was abandoned by the claimant some time ago. For one, the defendant argues, the claimant delivered only one tree (and not three as the agreement required). Additionally, the annual fee of $120,000 was not paid annually and on the anniversary of the payment of the first annual fee. Instead, one fee was paid on the execution of the agreement in 2012; and the fee in respect of the other years was not paid. It was not until in July of this year that the claimant attempted to do so by tendering a cheque for the sum of $480,000 representing the balance for the remaining period. This sum was returned by the defendant through its attorneys-at-law in an effort to rescind the agreement. The claimant's position, however, is that, since this sum was accepted and a receipt issued, the agreement is extant and will not expire until 2017.

[7] Apart from the existence of this agreement, there is, it is fair to say, very little else that is agreed between the parties. Almost every other instance of interaction and factual circumstance is given a different interpretation and significance by either side.

[8] It emerged from the affidavits filed as well that a third party (National Outdoor Advertising Ltd. – "NOA") also has some involvement in this matter. NOA at one time had business dealings with the claimant which saw it renting billboard space on the claimant's land. The relationship between NOA and the claimant soured and ended in or about July of this year. A corollary of that is that NOA entered into two agreements with the defendant to erect two billboards on the defendant's land in close proximity to the billboard sites of the claimant. This, the claimant contends, if permitted and not

restrained by way of an injunction, would see the view or line of sight of the billboards on the claimant's premises, when approaching from the north, being obstructed. Indeed, in paragraph 4 of the affidavit of Major Stanley Griffin on behalf of the defendant sworn and filed on September 4, 2014, it is stated:

> *"That the billboard displaying the "Samsung" sign in the said photograph is the same which was later moved by NOA from the Claimant's side of the boundary onto the Defendant's side of the boundary, in equivalent position".*

[9] Affidavits have been filed by the defendant speaking to third-party contractual arrangements with the defendant. (An attorney-at-law (Ms. K. Greenaway, instructed by Messrs. Samuda & Johnson); and a representative of NOA also attended the hearing and were permitted to observe, but not participate in the proceedings, as no leave to intervene as an interested party or otherwise to become formally involved in the matter was sought or granted).

[10] That, in summary form, is the factual background to this matter. It is expedient at this stage to briefly discuss the different considerations that a court should bear in mind in applications of this nature, as suggested by the higher courts.

The Law

[11] The best starting point for a discussion of an application of this nature is the well-known and oft-cited case of **American Cyanamid Co. v Ethicon Ltd.** [1975] 1 All ER 504.

[12] In that case (at page 510, paragraph d), the following guidance was given in the judgment of the court delivered by Lord Diplock:

> *"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)."*

Discussion

[13] To my mind the claimant has successfully demonstrated that there is at least one serious question to be tried: that is, whether the agreement that is at the centre of this dispute was, on the one hand, abandoned by the claimant and/or has been successfully rescinded by the defendant as it has sought to do; or, on the other, whether the agreement is still in force. It will be necessary to resolve this issue as a precursor to the resolution of the other issues in the case, such as the exact terms of the agreement and as to which billboard it relates.

[14] It will be recalled as well that one of the court's first observations in this matter was to the effect that there are very few matters that are not being disputed by one side or the other. This fact "translates" into "conflicts of evidence" in the dicta of Lord Diplock, which are not for resolution at this stage of the matter. The resolution of the central serious issue is itself enveloped in disputes of fact and variations of evidence that cannot be resolved at this stage. I have considered the approach taken by Mangatal, J in **Michelle Smellie & Others v NCB** – claim no. 2012 CD 00134 in assessing the veracity or credibility of some aspects of the evidence before her on an application for an injunction. However, in my view, there is no stark or readily-discernible incredibility or

lack of veracity in this case for me to take a similar approach. Analysis of all the facts in the course of a trial, assisted by cross-examination, will be necessary.

[15] For me to form a contrary view would necessitate findings of fact and an assessment of the credibility of affiants at this stage, which approach would run counter to the guidance given in the **Cynamid** case.

[16] We may therefore proceed to consider the other principles, based on the guidance of the **Cynamid** case:

> *"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."*

Adequacy of Damages & The Balance of Convenience

[17] In the **Cynamid** case, the approach to be taken in considering adequacy of damages and the balance of convenience was delineated by Lord Diplock thus:

> *"As to that, the governing principle is that the court should consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction would normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then*

> *consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason on this ground to refuse an interlocutory injunction."*
>
> *"It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises."*

Discussion

[18] Each party submitted that damages would be an adequate remedy for the other. This, because any loss suffered by either side would be purely commercial and relatively-easily quantifiable.

[19] In keeping with its submissions and arguments that the agreement related to the second billboard site, and not the first, the defendant submitted that the claimant has not utilized the said second site for over two years. Its losses, if any, are speculative.

[20] To consider the defendant's case first, it would appear that damages would be an adequate remedy for the defendant if it should be prevented from doing what it wishes to do now; and be vindicated in its position at trial. Its loss would be the annual sums that it would be paid by NOA for the permission to use its property for advertising. NOA (which, it will be remembered, is not a party to this suit) might also stand to lose financially – bearing in mind the agreements it indicates that it has with its clients. NOA also mentions the possibility of damage to its reputation. Figures have been provided that would make calculation of damages to be awarded to the defendant relatively

simple. In relation to the loss to the defendant itself, the exhibits SG 1 and SG 2 would suggest that the annual fee for each billboard is $200,000 with each lease set to last until 2019 (that is, five years each). In paragraph 16 of the affidavit of Karen Allie-James filed September 5, 2014, the estimated loss per annum to NOA is some $5.9 million. Additionally, NOA has also spent some $4 million in acquiring a double-sided, tri-media billboard and obtaining the requisite approval for the Kingston and St. Andrew Corporation (KSAC) for its use (see paragraph 9 of the affidavit of Karen Allie-James filed September 5, 2014.

[21] In relation to the claimant's ability to pay any such damages, we have the undertaking as to damages given by the director of the claimant, Mr. Christopher Moore at paragraph 17 of his affidavit sworn to on August 25, 2014. We also know that the claimant owns the land situate at number 1 Waterloo Road in the parish of St. Andrew as a copy of the certificate of title forms one of the exhibits in this matter (KJ 8). At paragraph 16 of the said affidavit, he also states that the claimant's assets are valued at more than US$1.7 million. The certificate of title itself indicates that the land was transferred to the claimant in 2010 for the sum of $1 million Jamaican dollars and there does not appear to be a mortgage affecting the property.

[22] To consider the claimant's case, on the other hand, the information provided is that it has invested in a new double-sided LED billboard, which investment will be lost should the defendant be permitted to persist in what it is attempting to do. Mr. Moore also states in his affidavit (at paragraph 12 of that filed August 25, 2014), that :

> *"…third parties that have paid to advertise on the Billboard are losing value".*

[23] At paragraph 17 of his affidavit filed September 12, 2014, Mr. Moore states:

> *"17. The claimant, unlike NOA, has only the advertising site, which is amongst the most popular in the corporate area. Any blockage of the view of that site will cause immeasurable harm to the site generally, which*

cannot be quantified in damages."

[24] One important matter to consider as well is this statement of Major Stanley Griffin on behalf of the defendant in paragraph 4 of his affidavit filed on September 1, 2014. He states:

> *"4. The owner of the property which neighbours the Defendant's, along its southern boundary ("the Boundary") is Alexander House Incorporated ("Alexander House") which is in turn owned and operated by one Mr. Christopher Moore. I am advised by my colleague, Lieutenant-Colonel Sydney McKenzie, and verily believe that the owners/occupiers have had control of the property for many years prior to the facts giving rise to this matter." (Emphasis supplied).*

[25] In relation to the adequacy of any damages that might be awarded to the claimant should the application to extend the injunction be refused and the claimant's position should be vindicated at trial, therefore, there are quite a few matters to be considered. Here we have a claimant which claims that this is its only advertising site situated at a prime location. We have the defendant confirming that the claimant has been operating at this site for some time. We have information (although not information with the kind of specificity that one might have liked) that the claimant as well has contracts with third parties and, even without those, might stand to lose financially if the view of its billboard from the north is blocked as a result of the completion of the billboards on the defendant's land. The fact that the payments under the agreement are to be made for at least five years suggests that the earliest date of expiration of the agreement between the parties (if, indeed, it still exists) would be 2017.

[26] These matters, considered together, make it difficult for me to conclude definitively that damages would be an adequate remedy for the claimant. However, even if one were to conclude that damages would be an adequate remedy, can it definitively be said that the defendant would be in a position to pay them?

[27] Although the defendant's name is well known; and it is known to have international connections, there is not much information before the court as to its ability to satisfy an award of damages that this court might make, should the case be ultimately decided in the claimant's favour. From all indications, the defendant is the proprietor of the premises that adjoins the claimant's and which is known as number 3 Waterloo Road, in the parish of St. Andrew; but where is the information as to its size and value; and, is it or is it not encumbered?

[28] In this regard, the court is unable definitively to say whether the defendant will be in a position to pay any such award of damages.

Another Consideration – Grant of Injunction an End to the Matter?

[29] Another point was put forward for the court's consideration on behalf of the defendant. It was done citing the well-known authority of **Miller and another v Cruickshank** (1986) 44 WIR, 319. The head note to that case reads as follows:

> *"Where there is a triable issue between the parties but no claim for damages and the grant of an interlocutory injunction would give the plaintiff all that he sought in the substantive action, the court should not grant such an injunction either in order that injustice be avoided or on the balance of convenience."*

[30] The court was also urged to consider the possibility that this matter might not come on for trial until 2017 – that is, the year any agreement that the claimant might have with the defendant is set to expire; and so the grant of an injunction until trial might have the effect of determining the matter once and for all.

Discussion

[31] The court has given careful consideration to these submissions. However, the court is of the view that while it is aware of the practicalities in these courts surrounding the setting of matters for trial, this matter, in the first place, is not clothed with the urgency of

the facts of **Miller v Cruickshank**, in which the finals of the Sunlight Cup cricket competition were fast approaching. The court is of the view that the potential for the feared finality of the order, though possible, is by no means certain or likely; and that the trial could be brought on much earlier with some effort.

[32] The court, of course, is also obliged to consider the other "side of the coin" – that is, that, should the injunction not be granted, and the feared delays do materialize, then the defendant's contracts with the third party, NOA, could also run their course before the issues in this matter are resolved. If the claimant should be vindicated at trial, what would there be to specifically perform?

[33] Additionally, although no particulars of damages have yet been given by the claimant, it is to be observed that in the claim form filed in this matter, the claimant does in fact seek damages, "further or in the alternative" to its main claim for specific performance of the agreement in question, with interest at commercial rates. In the case of **Miller v Cruickshank**, the main relief sought by the respondent before the court of appeal was a declaration, following upon the court's interpretation of rule 1 of the rules governing the cricket competition.

[34] Additionally in this case, either party, pursuant to rule 17.10 might apply for an early trial.

<u>The Balance of Convenience</u>

[35] In this connection, it is useful to have regard to the words of Lord Diplock in the **Cynamid** case (at page 511, paragraph a):

> *"It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight*

to be attached to them. These will vary from case to case.

Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark on a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.

Save in the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application some disadvantages which his ultimate success at the trial may show he ought to have been spared and the disadvantages may be such that the recovery of damages to which he would then be entitled either in the action or under the plaintiff's undertaking would not be sufficient to compensate him fully for all of them…"

[36] Where the balance of convenience is concerned, the court has observed that the claimant has been in the business of leasing advertising space for some time (as indicated by Major Griffin in his affidavit of September 1, 2014). On the other hand, paragraph 15 of the affidavit of Christopher Moore filed August 25, 2014, along with the exhibits "CM 7" to which reference is made in the same paragraph, suggest that the first billboard on the defendant's land is not yet operational. Additionally the Jamaica Public Service (JPS) electricity meter for the second billboard has not yet been activated; and the construction of the second billboard has been halted by a stop order from the KSAC, with no evidence as to when, if at all, it might be lifted.

The Olint Case

[37] Also cited by both counsel for the parties was the case of **National Commercial Bank Ja. Ltd. v Olint Corpn Ltd**. [2009] UKPC 16.

[38] Among the several issues discussed in that case, the head note discloses the following guidance that is immediately relevant to this matter:

> *"In deciding at the interlocutory stage whether granting or withholding an injunction is more likely to produce a just result, the basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other."*

[39] This is the approach that I have also used in assessing the issues and various considerations in this case, and, especially, in trying to resolve where the balance of convenience lies.

[40] I have attempted to outline and consider the various guidelines set out in the **Cynamid** case as a means of trying to adopt a systematic approach; and not so much as a "box-ticking" exercise, which Lord Hoffman, delivering the Board's opinion, felt would not do justice to "the complexity of a decision as to whether or not to grant an interlocutory injunction."(page 410, paragraph 21).

[41] The court's aim has been to try to arrive at a just result in all the circumstances.

[42] In this case the court has not thought it wise to attempt to any great degree to assess the strength of the case for each side, in light of the fact that :

> *"…the available evidence is incomplete, conflicting and untested…". (page 512, paragraph d of the **Cynamid** case).*

[43] As indicated earlier in the judgment, the relationship between the claimant and the NOA has soured considerably. Almost every averment of one of these entities is being denied by the other. An eviction notice and court action featured prominently in their

eventual parting of the ways. In the court's experience, this type of interaction can, at the very least, colour parties' recollection of the true course and occurrence of events.

Conclusion

[44] Having attempted to address the individual considerations set out in the **Cynamid** case; as well as having considered the matter broadly with a view to producing a just result, the court is of the view that it should exercise its discretion in this matter by continuing the injunction until the matter can be tried, thus preserving the status quo; and, in the interim, to refer the matter to mediation. This, it seems to the court, is the course which is likely to cause the least irremediable prejudice. It appears that the continuation of the injunction will prevent the defendant from doing something that it has not done before and is only now in the process of embarking on.

[45] It also appears to the court to be best in the circumstances for the extension of the injunction to be subject to a condition – that is, the payment of the sum of J$5 million to bolster the claimant's cross-undertaking as to damages, and ensure that the defendant will not be left empty-handed should the trial be eventually decided in its favour. This condition ought not to be overly-onerous for the claimant – given the stated value of its assets of US$1.7 million.

[46] In the circumstances, as well, and unless persuaded otherwise, I am minded to order that costs be costs in the claim.

The orders of the court will therefore be as follows:

i. That the injunction restraining the Defendant whether by itself and/or its agents, employees and/or servants from posting any advertisement, public notice, or any other signage whatsoever on behalf of any third party, or any other person or entity whatsoever, on the structures that currently obscure the billboard site at the north-eastern corner of the Claimant's land that is the

subject of the contract between the parties be continued until the trial of this matter;

ii. That as a condition for the continuation of the injunction, the claimant shall pay the sum of J$5 million into an interest-bearing account in the joint names of the parties or provide a guarantee from a financial institution satisfactory to the Registrar of the Supreme Court within twenty-one (21) days of the date hereof; failing which the injunction shall stand discharged.

iii. That the matter is referred to mediation, such mediation to take place within 45 days of the date hereof;

iv. Costs to be costs in the claim.

v. Liberty to apply.

vi. Leave to appeal granted to both parties