IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 02945/2008

BETWEEN	CYBERVALE LIMITED	CLAIMANT
AND	CABLE & WIRELESS JA. LTD	DEFENDANT

Mr. Gordon Robinson and Ms. Taneisa Brown instructed by Nunes Scholefield & DeLeon for the Claimant

Ms. Hillary Phillips Q.C. and Mrs. Denise Kitson instructed by Grant Stewart & Company for Defendant

Heard: September 18, 2008 and October 22, 2008

Interlocutory Injunction - Breach of the Fair Competition Act - Material Non Disclosure - Adequacy of Damages

Straw J

The claimant, Cybervale Limited, is an Internet Service Provider (ISP) and has carried on business since 1998. The defendant, Cable & Wireless Jamaica Limited (CWJ) is one of several telecommunications providers in Jamaica and holds a substantial position in the market for the provision of internet access.

On September 9, 1998, Cybervale entered into an agreement with Carrier Services Division of CWJ for the provision of Channelised TIs, and Dedicated Internet Access to facilitate the sale of Dial-up Internet Access to the public.

On March 28, 2006, Cybervale entered into a White-Labelling Service Agreement with the Retail Division of CWJ for the provision of ADSL Internet Access to the public.

On March 3, 2008, Carrier Services Division sent a letter of demand to Cybervale Limited in relation to arrears on the account of $1,921,262.68 as of February 29, 2008. A request was made for payment of the said sum or for suitable arrangements for payment to be made, failing which, legal action would be instituted.

On May 27, 2008, Mrs. Angella Williams of CWJ sent a letter to Mr. Michael Henlin, director of Cybervale Limited, in relation to outstanding amounts due on the White-Labelling Account. The total debt is listed as $10,433,917.27. A payment plan was attached with the caution that the ADSL Services would be disconnected if the agreement was breached.

Ex Parte Injunction

On June 10, 2008, Cybervale filed an *ex parte* application for an injunction. The matter was heard by Mr. Justice Pusey and the following order was made:

> *"1. An injunction to restrain the defendant whether by itself, its servant and/or agents from disconnecting or interfering with the claimant's access to the defendant's network which enables the claimant to carry on its business of providing internet services to the public for 21 days until July 1, 2008 or further order.*
>
> *2. Matter fixed for further consideration on July 1, 2008 at 10:00 or as soon as Counsel may be heard.*
>
> *3. Costs of the application be costs in the claim."*

On July 3, 2008, the interim injunction was extended to July 22, 2008 by Mr. Justice Campbell. Campbell J also ordered that the usual undertaking in damages be continued.

The interim injunction was extended on other dates until September 18, 2008, when this court considered affidavits filed and submissions by both Counsel at the *inter partes* hearing.

Principles to be considered for an Interlocutory Judgment

The guidelines laid down in the House of Lords decision in **American Cyanamid Co. v Ethicon Ltd**. 1975 AC 396, are regarded as the leading source of law on the subject of interim applications for prohibitory injunctions. These guidelines may be grouped under the following headings:

a. A serious question to be tried;

b. Inadequacy of damages to either side;

c. The balance of convenience;

d. Special factors.

The court will therefore discuss the evidence presented and the decisions made under the headings.

(A) Is there a serious issue to be tried?

In order to grant an interim injunction, the court must be satisfied that the claim is not frivolous or vexatious but that there is a serious issue to be tried.

In considering whether there is a serious issue, the court bears in mind the words of Lord Diplock (**American Cyanamid,** supra, page 510d):

> *"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 consideration. These are matters to be dealt with at the trial."*

The claimant's Particulars of Claim pleads *inter alia*, breaches of the Fair Competition Act and in particular Sections 20 and 34 (1) (b) which deals respectively with 'abuse of dominant position' and 'the refusal to supply goods or services to or otherwise discriminate against any other person engaged in the business.' The Particulars list a litany of offences by CWJ including

unfair pricing or discriminatory pricing, preventing the claimant from participating in promotions and/or restricting the claimant's ability to compete for customers in the ADSL market, (high speed internet access); eliminating and/or removing the claimant from and/or impeding the ability of the claimant to compete in the market for the provision of internet services; directly or indirectly imposing unfair purchase prices on the claimant; engaging in anti competitive practices by delaying the provisioning of the claimants' customers in comparison to its own customers and using the information provided by the claimant as part of its request for service to provision the claimants' customers for the defendant's benefit.

The claimant alleges that as a result of all of these activities *inter alia,* the claimant's revenue was drastically cut and although the claimant admits that there may be some indebtedness, it is not in the amount alleged and in any event it is likely to be extinguished by amounts due for the various breaches and from the amount due from its entitlement to the revenue share.

The defendant has taken issue with all these allegations and has stated, through the affidavit of Ms. Wynter (17.07.08) that CWJ has not been determined as dominant in the market and is not able to operate free of market constraints as there are other players in the market which affect the price of CWJ's internet products.

She has also averred (affidavit filed on 25.08.08) that since 2005, increased competition, *inter alia,* in the market place, has resulted in CWJ's revenue share being decreased and the decrease in the revenue since 2005 was not unique to the claimant but occurred with all providers.

In relation to these issues of anti competitive practices, the court is guided by the remarks of Morrison J in **Olint Corporation Ltd. v National Commercial Bank Ja. Ltd**. SCCA No. 40/2008 (pg. 33, para.45) with regard to competition issues:

> *"---it is clear that this area, still relatively new to our jurisdiction, is one that will require the most careful consideration both in respect of the evidence and the law."*

And also at paragraph 46:

> *"Competition law is a field in which there is a clear intersection --- between the disciplines of law and economics --- I have no doubt that at the trial of this matter both sides may need to elucidate .for the court by expert evidence the concepts of 'a position of economic strength' and 'effective constraints,' neither of which can be described as legal terms of art."*

He then expressed the view at paragraph 47 that the learned judge fell into error by treating the application for the interlocutory injunction as if it were a trial and straying beyond the requirements to discover as a purely preliminary matter if there were serious issues to be tried.

On the issue of the Fair Competition Act, Counsel for the defendant, Ms. Phillips, submitted that by virtue of Section 46 of the said Act, only the Fair Trading Commission has *locus standi* to enforce a finding of anticompetitive behaviour in relation to Part III which includes Sections 20 and 34. She further submitted that the claimant has no *locus standi* to claim damages for breach of any of the provisions pursuant to Section 48 without a finding by the Fair Trading Commission. On this point, Mr. Robinson referred the court to the judgment of Downer J A in **Infochannel Ltd. v Cable and Wireless Ja. Ltd**., SCCA No 99 2000. This case centered around the Telecommunications Act (1st March 2000).

Downer JA expressed the view that the injunctive relief sought was not prohibited by the statutory provisions of that Act and made the following statement (per page 78).

> *"The appellant's complaint is based on its contractual relations with the respondent, and therefore is not precluded from proceeding at common law for injunctive relief despite the statutory scheme of the Act. The appellants' rights in contract cannot be construed to be excluded by the Act except by express provision or necessary implication. The appellant was free to choose the procedure that suited him best (Davy v Spelthorne Borough Council 1993 3 ALL ER 278) Reckord J, therefore, was entitled to exercise his discretion in considering the grant of injunctive relief in accordance with section 49 (b) of the Judicature (Supreme Court) Act."*

Although the Acts are distinct, the issue is, in my opinion, similar in concept.

In **Olint** (supra) Morrison J also considered the issue of the remedies available under the Fair Competition Act and stated at page 42, paragraph 65:

> *'While it is obviously correct that the only reference to an injunction in the Act is Section 47 (1) (b) which gives the court the power to grant an injunction at the instance of the Fair Trading Commission, in respect of uncompetitive conduct in breach of certain provisions of the Act, it does not necessarily follow from this in my view that a citizen whose statutory rights have been infringed is precluded from seeking injunctive relief under the court's general equitable jurisdiction in a proper case (See Duchess of Argyll v Duke of Argyll (1967) Ch 302 per Ungoed Thomas J at page 346). "I see no reason why the court should refuse to protect a right by injunction, merely because it is a statutory right."'*

In relation to the issue of revenue share, the claimant alleges that it is entitled to share the revenue calculated in minutes based on the additional value placed on the defendant's

network and this entitlement is based on the additional traffic measured in minutes that it places on the local loop without adding costs to the network.

The claimant avers (through Mr. Michael Henlin) that the defendant has failed to account for such revenue share since 1998. He refers to a copy of a letter dated April 3, 2006 sent by the defendant to the claimant acknowledging such an entitlement. However, the court notes there is no such letter exhibited to the affidavit.

He estimates the amount due for the year 2003 to be in the sum of $8,216,915.00 based on 82,169,154 minutes at ten (10) cents per minute. The calculation of minutes is based on traffic data collected by the defendant and attached to Mr. Henlin's affidavit dated July 31, 2008 as MPH 14.

The defendant (through the affidavit of Simone Wynter, dated July 17, 2008), disputes the entitlement to revenue share by the claimant. She avers that in 2006, the Carrier Services Division of CWJ decided to offer revenue share arrangements to ISPs. A copy of the agreement is exhibited to the affidavits of Mr. Henlin as MPH6.

She refers to Section 3.1 of the said agreement which reads as follows:

> *"This supplemental agreement takes effect on the date of signature and shall continue in full force and effect for a period of one year or upon expiration and/or termination of the service schedule whichever comes first."*

She further states that Cybervale has to date refused to sign the agreement since it was sent to them on April 3, 2006 and it is therefore not entitled to set off any alleged revenue share against the sums properly due and owing to CWJ. She also disputes that Cybervale has any entitlement to revenue share from 2003, that CWJ commenced offering revenue share

in 2006 and that even if Cybervale had signed the agreement, the only account that they would have received a revenue share rebate on is the Carrier Services Account.

Mr. Henlin, in response, states that the sum of ten (10) cents per minute was agreed prior to 2006 but by 2006 dial-up was on the decline so that agreeing revenue share as of that date would have made no economic sense for the claimant.

He also states that at that time (2001), given the decline in minutes due to the rise of ADSL, ISP's were asking for an increase in the price per minute to forty (40) cents and that the contract of April 3, 2006 was sent to the claimant to sign in the face of these negotiations to change the rate to forty (40) cents.

Mr. Henlin's electronic mail of May 7, 2008 – 'MPH 15' indicates that information as to Cybervale's dial-up minutes is required as 'we intend to engage your department in using the revenue share monies to settle some of the debt.'

Although the terms of the contract are quite clear, this court cannot make a finding at this stage of the proceeding as to if, and for what period of time, Cybervale would be entitled to revenue share. This is a matter that will have to be determined at the trial. Having regard to all the salient factors, this court is of the view, that there is a serious issue to be tried.

Cybervale's claim against CWJ is based on contract, and these are issues to be determined apart from the breaches of the Fair Competition Act. I am of the view that this court would not be precluded from a consideration of whether or not to grant injunctive relief.

(B) The Inadequacy of Damages

The court now has to consider the issue of adequacy of damages in relation to two limbs.

(1) Firstly, are damages an adequate remedy for the claimant?

The claimant's ultimate quest is for damages to be awarded against the defendant for anticompetitive actions and for an accounting based on revenue share withheld. Any amount awarded would be used to set off the debt owed by them to the defendant. There is no doubt that money is owed on both service contracts.

However, the claimant contends that it's livelihood would be destroyed by a refusal to grant the injunction.

Is this contention illusory or a realistic assessment?

The claimant's Counsel, Mr. Robinson has submitted that damages would not adequately compensate the claimant as the said disconnection of the services offered by the defendant would result in the disruption of the claimant's business. He has asked the court consider the following factors:

1. The defendant is a monopoly provider of the local loop.
2. The claimant currently provides internet access services to it customers and the ADSL customers will be disconnected.
3. The claimant will be unable to provide ADSL access to its customers.
4. The claimant will suffer financial ruin especially because most of its customers are ADSL consumers.
5. The claimant will suffer business reputational risks in so far as the service to its customers will be abruptly disrupted and it would be difficult to explain the circumstances to customers or to recommence business on the basis that it is a good customer services provider.

The affidavit of Simone Wynter (17.07.08, para. 54.) vigorously denies that the claimant would suffer financial ruin as there are alternative services such as FLOW or the use of VSET.

However, the claimant maintains that it will suffer business and reputational disruption as the defendant is and remains the monopoly provider of access to the local loop. Mr. Henlin explains (second affidavit, para. 38) that the local loop is the only technology at this time that enables ADSL and Dial-up access which is the claimant's current business model and he avers that FLOW's technology is different, offering broadband over cable.

Based on the conflicting evidence before the court, it would appear that the disruption of the claimant's business is an important issue.

Mr. Robinson cited the case of **J. Lyons and Sons v Wilkins** 1896, 1 Chancery 811 (per Kay L J at page 827):

> *"In all these cases of interlocutory injunctions, where a man's trade is affected one sees the enormous importance that there may be interfering at once before the action can be brought on for trial, because during the interval, which may be long or short --- a man's trade might be absolutely destroyed or ruined by a course of proceedings which --- may be determined to be utterly illegal, and yet nothing can compensate the man for the utter loss of his business by what has been done in that interval."*

In relation to the issue as to whether the defendant would be in a position to pay damages to the claimant if the claimant were to succeed, the court is of the view that it would be. Ms. Wynter's affidavit reveals that CWJ is worth several billion (JA) dollars and is able to pay damages. There has been no challenge to this and the court accepts this evidence as determinative of the point.

The court also has regard to the statements of Morrison J in **Olint** (supra, page 41) that the trial judge ought to have paid some regard to factors such as the sensitive nature of the appellant's business which were put forward by it limiting the efficacy of damages as a remedy. Having regard to the circumstances of the present case, the court does entertain some doubts as to whether damages would be an adequate remedy for the claimant.

(2) If damages are not an adequate remedy for the claimant, is the claimant's undertaking in damages adequate for the defendants?

The claimant contends through Mr. Henlin (first affidavit, paragraph 49) that it has been in business since 1998 and has assets such as mail servers, intellectual property in the software and data base, goodwill and subscriber base valued in excess of Eight Million Jamaican Dollars ($8,000,000.00) and would be in a position to honour its undertaking as to the damages.

The court has to consider whether, on the evidence presented, in the event of the defendant being successful at trial, there would be adequate compensation under the claimant's undertaking for the loss that would be sustained between the time of the application and the time of the trial.

The court takes into account the following factors in coming to a determination of this issue:

a. The claimant and the defendant are in a contractual relationship whereby the defendant supplies services to the claimant and sends out monthly bills for payments.

b. The claimant has been unable to satisfy its contractual obligations from as far back as 2006. The obligations include outstanding arrears as well as current monthly payments.

c. Based on letter dated July 18, 2007 to Angella Williams (CWJ) from Faith Roberts (claimant), the claimant stated its intention to pay $400,000.00 monthly in order to liquidate the growing debt.

d. Between September 2007 to December 2007 the claimant issued four (4) cheques to the defendant in the amounts of $400,000.00, $30,050.01,

$300,000.00 and $527,124.96. These were all dishonoured by the bank and stamped 'refer to drawer.'

These were all in relation to the White Labelling Account.

e. In relation to the Carrier Services Contract, there were dishonoured cheques on the 11th May 2006 in the sum of $347,383.79, the 16th January 2007 in the amount of $350,000.00, the 24th January 2007 in the amount of $350,000.00, 30th January 2008 for $400,000.00, 13th February 2008 in the amount of $500,000.00 and the 10th March 2008 in the amount of $400.000.00.

The evidence of dishonoured cheques against the background of a growing debt is of great importance in relation to this issue.

One can only look suspiciously at the claimant's undertaking as to damages. If the defendant is unable to terminate the services to the claimant, the service charges will continue unabated until a determination of the issues at trial. The court has grave doubts as to whether the defendant would be adequately compensated under the claimant's undertaking as to damages.

The balance of convenience

The court is of the view that prudency requires further consideration in relation to the balance of convenience as the inadequacy of damages affects both the claimant and the defendant.

In **American Cynamide** (supra pg. 511a), Lord Diplock states as follows:

> *"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 the balance of convenience arises."*

Lord Diplock went on to say that various matters may need to be taken into consideration in deciding where the balance lies and these will vary from case to case.

In relation to the balance of convenience, the court considers the fact of material non disclosure by the claimant.

Although the claimant disclosed (through the affidavit of Mr. Henlin during the exparte application) that it admitted some indebtedness and that it made arrangements to pay in good faith fully expecting the defendant to allocate the revenue shares towards the debt, no disclosure was made that cheques were drawn and dishonoured by the bank.

The fact that a letter dated May 27, 2008 from CWJ to Cybervale refers to several returned cheques on the account as well as short payments on the agreement does not constitute proper disclosure.

In Jamculture Limited v Black River Upper Morass Limited and Agricultural Development Corporation (1989) 26 JLR pg 244, the Jamaican Court of Appeal held as follows at page 245:

> *"(1) that on an exparte application uberrima fides is required and it is therefore incumbent upon an applicant to make a full and frank disclosure of all material facts. The appellant had not made a full and frank disclosure as the affidavit in support of its exparte application had made no mention that the appellant owed any rent to the respondent and the fact that there were annexures to the affidavit in which there may have been some admission that rent was due was not sufficient as it was not the task of a judge to wade through exhibits to unearth such an admission; rather, what is required of an applicant is to make full and frank disclosure by deposing expressly to the facts to enable the court to form its judgment;"*

Mr. Robinson has submitted firstly, that there was no material non disclosure and, in any event, the concept of material non disclosure has no place in an inter parties having for an

interlocutory injunction in assessing the balance of convenience as this not an application to discharge an exparte injunction.

The court is of the view that the fact of dishonoured cheques is material in the circumstances as it affects the credibility of the claimant in relation to its undertaking and this is so, despite Mr. Robinson's submission that the debt remains a live issue for trial. The court, however, agrees with Counsel's submission that at this stage, material non disclosure is not a reason by itself to refuse the grant of the injunction.

Morrison J discussed the issue in **Olint** (supra, pg. 49) and offered the opinion that at the stage of the *inter partes* hearing, it is among the various consideration which the court will take into account as part of the discretionary mix.

In weighing the balance of convenience, the court is of the view that it would be prudent to distinguish differences between **J Lyons** (supra) and **Olint** (supra) and the circumstances of this present case.

The court referred to these two cases when considering the issue of the adequacy of the damages for the claimant.

In **Lyons,** (supra) the English Court of Appeal upheld a decision of the trial judge to grant an interlocutory injunction against the defendant officers of a trade union, who ordered a strike against the plaintiff manufacturers and also against S, a person who made goods for the plaintiffs only. The union had people bearing pickets who watched and beset the workers of the plaintiffs and of S for the purpose of persuading workers to abstain from working for the plaintiff.

In **Olint,** the claimant had applied for an injunction against its bankers who had threatened to close its account. Neither of these cases involved a debt arising from a contract

owed by the party seeking the injunction to the other.

In relation to the White Labelling Account, the amount owing as of 27th May 2008 is $10,433,917.27.

The claimant has not indicated, through any of the affidavits submitted that is has sought to pay any of the amount alleged pending trial of the matter although Mr. Henlin has admitted some indebtedness. The court cannot fail but to be disturbed by this obvious lack of good faith.

Special Factors

Mr. Robinson has asked the court to consider the defendant's dominant position in the market as a relevant consideration under the heading of special factors. He referred the court to the definition contained in Section 19 of the Fair Competition Act:

> *"For the purposes of this Act, an enterprise holds a dominant position in a market, if by itself or together with an interconnected company, it involves a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors."*

This is one of the issues that is yet to be determined at trial and does not tip the balance of convenience in the claimant's favour.

In all the above circumstances, the balance of convenience and justice lay in favour of refusing the injunction.

Application for Interlocutory Injunction is refused. Costs of the application to the defendant to be agreed or taxed.