IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 2000/H-86

BETWEEN	HARD ROCK LIMITED	1ST PLAINTIF
A N D	HARD ROCK CAFÉ INTERNATIONAL (U.S.A.) INC.	2ND PLAINTIFF
A N D	HARD ROCK INTERNATIONAL LIMITED	3RD PLAINTIFF
A N D	HARD ROCK HOLDINGS LIMITED	4TH PLAINTIFF
A N D	HRC CANADA INC.	5TH PLAINTIFF
A N D	RANK HOLDINGS (NETHERLANDS) BV	6TH PLAINTIFF
A N D	HARD ROCK LIMITED	1ST DEFENDANT
A N D	HARD ROCK CAFÉ FACTORY OUTLET JAMAICA LIMITED	2ND DEFENDANT
A N D	HARD ROCK REGGAE LIMITED	3RD DEFENDANT
A N D	HERB ROCK CAFÉ LIMITED	4TH DEFENDANT

Mrs. S. Minott-Phillips for Plaintiffs
Ms. K. Brown for 1st Defendant
Mr. Winston Spaulding, Q.C. and
Mrs. Beecher-Bravo for 2nd, 3rd and 4th
Defendants

Heard: 26th February 2001, 4th April, 2001
and 30th November, 2001

CAMPBELL, J.

The matters before the Court, are applications by way of Summons brought by the Defendants as preliminary issues to the Plaintiffs' application for injunctive relief. There are three categories of applications by the Defendants before the Court.

(i) Application for leave to cross-examine deponents;

(ii) Application for Security of Costs;

(iii) Application to strike out the third Defendant from the action.

The Plaintiffs are six companies incorporated under the laws of some five countries; the United States, Canada, Netherlands, United Kingdom and Channel Islands. The four Defendants are registered under the Laws of Jamaica.

On 25th January, 2001, the Plaintiffs filed Writ of Summons dated 31st August, 2001 and an Amended Statement of Claim, in which they sought the following reliefs:

1. Damages for passing off and/or infringement of trade mark and/or arising from the Defendant's contravention of section 37 of the Fair Competition Act.

2. An order that the Defendants change their names within six (6) weeks of the date of judgment to such name as does not use the words "Hard Rock", "Herb Rock" or "Hard Rock Café" or any colourable imitation thereof.

3. An injunction restraining the Defendants, whether by themselves, their directors, officers, servants or agents or any of them, or otherwise howsoever from:

   (a) infringing the Plaintiffs' trade marks;

   (b) passing-off or attempting to pass-off the Defendants' business as and for the business of the Plaintiffs by the use in connection therewith, in any form or manner or for any purpose whatsoever, the name or trading style "Hard Rock Café" or "Hard Rock" or which so nearly resembles same or any colourable imitations thereof.

   (c) carrying on any business under the name or style "Hard Rock Café" or "Hard Rock' or any name or style which includes the words "Hard Rock Café" or "Hard Rock" or any name or trading style containing the words "Hard Rock Café" or "Hard Rock" or which so nearly resembles the same or any colourable imitation thereof.

4. Obliteration upon oath of all marks upon all tags, signs,

banners, advertising material or other articles which bear the name, mark or style "Hard Rock Café" or "Hard Rock" or which would be a breach of the aforesaid injunction prayed for and verification upon oath by the Defendants that they no longer have in their possession, custody or control any sign advertising material or article so marked.

5. Interest

On the 17th November, 2000, the Plaintiffs filed a Summons for Interlocutory Injunction applying for an order in terms of paragraph 3 of the relief claimed on the Endorsed Writ of Summons.

On the 5th March, 2001, the deponent filed their defence and counter claim. The application for Interlocutory Injunction came on for hearing on the 6th March, 2001 but was adjourned.

The second and fourth Defendants each filed two summons seeking:

1. Leave to cross-examine Deponents at the hearing of the summons for Interlocutory Injunction.
2. That the action be stayed unless the Plaintiffs give security for Costs, within 10 or 14 days respectively of the order.
3. The third Defendant applied to be removed from the action, or alternatively that the pleadings filed in relation to the third Defendant be struck out on the ground that this disclose no

reasonable cause of action against the third Defendant.

The second and fourth Defendants made a joint application in respect of each summons. Their application to cross-examine was in respect of three deponents two of whom were resident in the United States of America. The other was a local resident. The application in respect of the foreign-based deponents was withdrawn during the course of the hearing.

The summons for leave to cross-examine deponents

S. 406 of the Judicature (Civil Procedure Code) Law, states:

> "**S. 406 Upon any motion, petition or summons, evidence may be given by affidavit; but the Court or a Judge may on the application of either party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence unless by the special leave of the Court or a Judge".**

Substantively similar provision is made by Order 38/2 of the Supreme Court Rules (U.K.), although differently worded makes provision for the attendance for cross-examination of deponents. Both the Jamaican and U.K. rules give the Court a discretion, to order the attendance for cross-examination of an affiant which as Counsel for the Applicant concedes is very rarely used in applications for interlocutory injunctions.

The notes to the rule of 1997 Practice at page 647 states:

> **"There is a discretion as to ordering cross-examination on affidavits filed in interlocutory applications (see para.(3)). Cross-examination upon affidavits sworn in applications for interlocutory applications is very rare. It was ordered by consent, in *The Berkely Hotel Co Ltd v. Berkley International (Mayfair) Ltd [1970] F.S.R. 300".***

It was nonetheless argued on behalf of the Defendants that the circumstances of this case had special features that should cause the Court to exercise its discretion and order cross-examination. Firstly it was argued, that the substantive application for injunctive relief should it succeed would have the effect of disposing of practically all the rights of the parties. An examination of the Writ of Summons and Statement of Claim reveals that the rights being complained of is wider than those being sought to be protected by the interlocutory application for example, the interlocutory application does not claim for contravention of S.37 of the Fair Competition Act. Neither is there an interlocutory application for a change of the Defendants name within six weeks of the Court order.

The Defendants claim that the interlocutory application will dispose of the rights of the parties, would if correct, constitute a bar to the grant of the interlocutory injunction that is sought. In **Cayne vs Global Natural Resources Plc** [1984] 1 All.E.R. 225. May, L.J. observed at page 238, Letter F:

> **"Where a plaintiff brings an action for an action for an injunction, I think that it is, in general, an injustice to grant one at an interlocutory stage, if this effectively precludes a defendant from the opportunity of having his rights determined in a fair trial."**

The second ground forwarded by Counsel for Defendants for the exercise of the Court's discretion is that the affidavits were defective, irregular and deficient. He also complained that they contained contradictions, confusions and gap in the affidavits.

Counsel for the Plaintiffs, has submitted that the grant of an order for cross-examination of the Plaintiffs deponents on their affidavits is not consistent with the function of the Court on the hearing of an application for an interlocutory injunction.

In support of that proposition, Lord Diplock's judgment in **American Cyanamid vs Ethicon** [1975] All. E.R. 504 is referred to; where at page 510, letter E, he states:

> **"It is no part of the Court function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to the facts on which the claims of either party may alternatively depend nor to decide difficult questions of law which call for determined argument and mature consideration".**

See also the comments of Eveleigh, L.J. in **Cayne and Another v Global Natural Resources Plc.** (supra) at page 229 letter J, 230 letter A.

The application for cross-examination of the deponents in support of the application for interlocutory relief, was to resolve contradictions and inconsistencies that will arise at the hearing if oral cross-examination is not available. The authorities are clear that there is no need to resolve conflicts of evidence and to undertake something in the nature of a trial. The application for cross-examination of the deponents is therefore refused in respect of the deponent Wendel Segree. The application in respect of the deponents who reside abroad have been withdrawn, in any event those application would have been refused.

Summons for Security of Costs

S. 663 of the Judicature Civil Procedure Code provides:

> **663. The Court may, if in any case it deems fit, require a plaintiff who may be out of the Island, either at the commencement of any suit or at any time during the progress thereof, to give security for costs to the satisfaction of the Court, by deposit or otherwise; and may stay proceedings until such security is given.**

Mr. Villarsetty Vijay Kumar, in his affidavit dated 14th February in support of the Summons for Security For Costs, states at paragraph 6:

> **"That all of the Plaintiffs are entities located outside of the Island of Jamaica and outside of the jurisdiction of this Honourable Court. In the circumstances should the Fourth Defendant succeed at the trial of this action**

> **and/or should costs be awarded against the Plaintiffs in favour of the Fourth Defendant at the trial or in respect of any other matters, this Defendant would have no way of recovering those costs against the Plaintiffs."**

The language of S. 663 of the Code confers upon the Court a discretion that permits the examination of all the circumstances to enable the Court to say whether Security of Costs should be awarded and if so, to what extent.

In **Watersports Enterprises Ltd v. Frank** (1991) 28 J.L.R. 111, Rowe, P at page 113 letter G:

> **"A plaintiff who resides outside this jurisdiction as does this respondent, ought to be ordered to give security for costs, unless there are special circumstances which would make it unjust to do so. Although a major matter for consideration is the likelihood of the plaintiff to succeed, parties are discouraged from embarking upon a too detailed examination of the merits of the case unless it can be clearly demonstrated one way or the other that there is a high degree of probability of success or failure see *Porselack K.G. v. Porzelack (U.K.) Ltd* [1987] 1 W.L.R. 420".**

Mr. Villarsetty Vijay Kumar, affidavit, contains a skeleton bill of costs, which is detailed as follows:

(1) Costs already incurred - $300,000.00 with total costs of

$7,240,000.00

Queens Counsel cost are calculated at $350,000.00 for the

first day and refreshers of $150,000.00 per day.

Of these costs Mr. Clayton Johnson in his affidavit dated 21st February, 2001 filed in opposition to the application states at paragraph 4

> **"I have seen the two affidavits each of Villarsetty Vijay Kumar and Kerri-Gay Brown sworn to on the 14th and 15th days of February, 2001, respectively. In my opinion the Skeleton Bills of Costs set out in the affidavit in support of the application for Security of Costs are gross over generally and particularly of the fees payable to instructing counsel, junior counsel and Queens' Counsel."**

The party and party costs in the Supreme Court is based on the Registrar of the Courts for determination with Schedule A of the Rules of The Supreme Court (Attorney-at-law Cost) Rules 2002 as base figure.

Rule 3 (1) provides:

3. (1) In the event that a party in any cause or matter who obtains an order or judgment for costs in his favour considers that the costs awardable under Schedule A are insufficient or inadequate he may file a bill of costs setting out the factors relied upon for an increase in the costs to be awarded over and above the sum set out in Schedule A.

(2) A bill of costs filed pursuant to this Rule shall be taxed by The Registrar who shall be guided by what is necessary or proper for the attainment of justice or for enforcing or

defending the rights of the party whose costs are being taxed including the following:

(a) the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;

(b) the responsibility required of and the time and labour expended by the attorney-at-law;

(c) the number and importance of the documents prepared or perused;

(d) the place and circumstances in which the work involved or any part thereof was done;

(e) where money or property is involved, its amount or value;

(f) whether the item or the cause or matter is appropriate for senior counsel or counsel of specialised knowledge and skill; and

(g) the matters set out in Schedule B and the liability for the payment of General Consumption Tax on the sums taxed hereunder.

The hearing of the Summons for Interlocutory Injunction is estimated at three (3) days. There is a cost calculated for attendance at Court for seven (7) days, for matters that Counsel are unable to define or explain other than to say that a matter of this complexity will make these seven (7) days attendance necessary. A further substantial cost was by way of the estimate of twelve (12) trial days for hearing of the trial. I am unable to allow the seven (7) days cost in the absence of a reasonable explanation as to why they

are likely to be incurred. I cannot allow a trial period of twelve (12) days. I think that a period of five (5) days must be more reasonable. The preparation and research required for the cases of the 2nd and 4th defendants enjoy the benefit of having the same attorney appearing on their behalf, costs should be discounted proportionately. The basis of an award for security of costs is two thirds of the party and party costs.

In the **Watersports Enterprises Case** Rowe, P said:

> **"This Court will apply the conventional approach by which the Supreme Court has always proceeded i.e., to fix the sum at about two-thirds of this estimated party and party cost up to the trial of the action".**

Having considered the issues adumbrated in Rule 3(2) we are of the view that party and party costs of $3.7 million is reasonable in all the circumstances. Discounted by a third, this figure is rounded off to $2.5m. This sum is then divided equally amongst the three defendants (no application was made in respect of the third defendant).

On behalf of the first Defendant it was urged that the security of costs so determined should be paid within a period of 10 days. The second and fourth Defendants indicated a period of fourteen (14) days. The six Plaintiffs are situated in five different countries with registered offices in three countries. The local banking practices are relevant in considering the period for payment. In the **Price Ltd Inc vs. Costco Trading Co. Ltd. and**

Gassan Azan Srn. C.L. P088/1988 Orr, J ordered payment within a period of thirty (30) days. No stay of proceedings was granted until payment. In **Watersports Enterprises Ltd. v. Errol Frank** ***(supra)*** a period of eight weeks was ordered. I think a period of 30 days is reasonable in all the circumstances. The application for stay of proceedings until payment is refused.

The application to strike out the Third Defendant was abandoned. The Third Defendants Summons is therefore dismissed.

Costs to the Plaintiffs on all three applications to be agreed or taxed.