

a concession fee as specified in the said agreement.

On or around the 1st December 1997 the Defendant took over the management of the said resort hotel and was assigned the agreement between the Plaintiff and Braco Operations Ltd. and thereby assumed the rights and obligations of Braco Operations Ltd.

The Plaintiff under this agreement acquired certain burdens and obligations. Similar agreements were entered into with other concessionaires each being confined to certain specified services only.

The dispute relates to the Defendant's stated intention to operate manicure and pedicure services which the Plaintiff contends competes with its rights to operate similar services. Shops were assigned as part of a scheme in which each concessionaire would have special rights to offer certain services and the Plaintiff claims that the Defendant now seeks to repudiate the agreement.

There is no dispute that BRL (Defendant) took over the Resort, nor is there any denial that there existed a subsisting agreement between the Plaintiff and Braco Operations Ltd. what is being disputed is that under the agreement made the Plaintiff would have exclusive rights to offer the said services at the said resort hotel during the period of concession.

It was submitted for the Plaintiff that the Defendant cannot maintain any credible denial of the collateral agreement or the agreement of the parties as to how the concession should be operated and for which there is specific evidence.

Referring to paragraph 7 of the affidavit of Mr. Cameron Burnet it was further argued that that paragraph made it clear that the Defendant could not by agreement, revoke the contractual rights of any of the concessionaires.

- 7 " (b) upon such assignment by Braco Resorts and its affiliated companies, BRL Ltd. would assume the contractual obligations of Braco Resorts Ltd. and its affiliated companies under the said concession contracts; and
- (c) that Braco Resorts Ltd. would use its best endeavours to cancel at its own expense any concessions which were not selected by Defendant. That in

the event Braco Resorts Ltd. was unsuccessful in having the concession contract cancelled Braco Resorts Ltd. would compensate the Defendant with an agreed formula as stated in the lease."

The first principle on which the Plaintiff relied was that an assignee takes subject to equities and in support of this referred to Cheshire Fifoot and Furmston 11th Edition page 5 at 03.

Further the Plaintiff contends that the Defendant has demonstrated that it voluntarily assumed the obligations in the agreement with the lessor. Several cases were cited. First was the case of **YAVERS V. STANDARD DEVELOPMENT CORPORATION & ORS. (1962) 8 JLR 32.**

This case, the Plaintiff states, demonstrates that where a 3rd party goes into possession in circumstances in which there are obligations owed to an existing lessee with the knowledge of the existence of lessees then equity will require that person's rights to be subject to the existing equities.

Secondly reference was made to the case of **SUNIVERS JA. LTD. V. LARSEN - CL209/1989** a judgment of Pitter, J. and which case the Plaintiff cited to demonstrate that in that case there was a specified formula to the lease as to how the Defendant should be compensated if they failed to terminate the lease - and if they failed to terminate the lease with the concessionaires then the Court rarely grants injunctive relief to prevent harm resulting to the Plaintiff's business.

The case of **PASEN V. DOMINION HERB DISTRIBUTORS INC. ET AL (1968) 57 DLR 405** was cited where Court does not at this stage decide whether Plaintiff has an enforceable contract as it contends, but only whether there is a serious question to be tried in respect of that allegation. Further this Canadian case demonstrates that the Court will grant an injunction to prevent the breach of an agreement in respect of exclusive rights in a commercial field.

EVANS MARSHALL CO. LTD. V. BERTOCA SA. 1973 WLR 349 was also cited by Plaintiff to support its contention.

In conclusion the Plaintiff is alleging that it has a contractual right to certain services, an allegation which the Plaintiff claims the Defendant has produced no evidence to disprove only a bald denial. The Plaintiff states that the Defendant has asserted that it can have no obligation to the Plaintiff in respect of an alleged right because it was not a party to negotiations or privy to the agreement or an assignee to the agreement. But the Defendant has continued to act since taking over the management of the property as the assignees of the lease and have, by the documents exhibited, including their own lease, not only shown knowledge of the concession agreement but accepted obligations under those agreements and sought from the original lessors compensation in the event that those concessions could not be broken.

The Plaintiff has been operating for some time under the agreement observing the arrangements for exclusivity which is part of the scheme for the concessionary agreements for the resort and the Defendant have shown knowledge of the exclusivity. Plaintiff submits that there is clearly a serious question to be tried and further that damages is not an adequate remedy on the basis of the evidence before the Court and the Courts have shown a readiness to grant injunctive relief to protect such commercial interests.

The Defendant's argument is that the simple issue to be looked at is whether on the basis of the affidavits put before the Court there has been adequate foundation to say there is a serious issue to be tried on the issue of exclusivity.

Further the Defendant states that this is not a case where there is an absolute denial of the Plaintiff to continue operations in so far as the Defendant is not seeking to prevent the Plaintiff from operating. The questions to be decided therefore are

- (1) was there any exclusivity.
- (2) what are the issues of law to be decided.

In dealing with the question of exclusivity the Defendant submitted that correspondence which took place between TIFRAN and BRACO (referred to paragraph 11 of the affidavit of Elizabeth Zaidie) ought not to be relied

on as this refers to a contractual relationship between BRACO Ltd. and another organisation not between BRACO & MISS BETTY'S BEAUTY SHOPPE (the Plaintiff).

It is my view that this letter between Tifran and Braco cannot form the basis of a conclusion in respect to this case as in fact that contract did not involve the Plaintiff in this action but another party and was in fact a totally different contract. At best it merely indicates that concessionaires were expected to adhere to the terms of the agreement and no breach was tolerated. This really does not establish that there was exclusivity in the contract this Plaintiff entered into with BRACO.

In effect the Defendant argues that the terms of the concession limited what the concessionaire was permitted to do on the premises, to the services limited in the concession but there was nothing to indicate that as a consideration for providing those services BRACO would allow no one else to provide similar services. Absolutely nothing in the agreement that speaks of exclusivity.

The Defendant contends there has been no agreement between Plaintiff and Defendant in respect to resort premises and reference in the Statement of Claim can only be a reference to the agreement between Plaintiff and BRACO. The Defendant states that the Plaintiff has decided to proceed against the Defendant not Braco Operations Ltd. The agreement they are relying on is with Braco Operations Ltd - they are saying that assignment made to Defendant. Reference was made to the affidavit of Nora Perez and to agreement - submits nothing in lease that speaks of exclusivity and since Nora Perez's affidavit not having stated that she was authorised to make it on behalf of Braco Ltd. and in circumstances where it is clear that she is making it on behalf of Miss Betty's Beauty Shoppe the contents of that affidavit does not add anything to the contention of the Plaintiff which supports the question of exclusivity.

The Defendant refers to affidavit of CAMERON BURNET - which the Defendant claims shows that prior to the assumption of management responsibility it had been made clear in the negotiations that among the claims to be implemented in this is the change for this resort to be

a superclub and the converting of certain facilities and the services they would be offering.

The Defendant contends there was no exclusivity and therefore no serious issue to be determined by Court and referred to all the cases cited by the Plaintiff as being of no assistance - the Plaintiff not having established exclusivity.

Defendant referred to each case and sought to distinguish it. **SUNDIVERS V. LARSEN** - action was taken to remove Plaintiff from the premises and set up competing business in such a way as to deny the Plaintiff to continue business. Of no assistance in instant case. **EVANS MARSHALL & CO. LTD. V. BERTOLASA**. Two main points in this case was whether

- (1) Plaintiff should be allowed to sue in England.
- (2) Whether there was a proper case for maintaining the status quo.

Not much help.

PASEN V. DOMINION HERB.

Deals with (1) Stay of proceedings (not applicable in instant case)

(2) Breach of exclusive distributorship, and **YAVERS C. STANDARD DEVELOPMENT CORPORATION & ORS.** stated to be significantly different from the case here as in that case premises was leased to Plaintiff and registered on title.

I have considered the submissions made and the authorities cited by both the Plaintiff and the Defendant. It is clear that each concessionaire was restricted to offering only the services which had been specified in the agreement they had entered.

I cannot ignore the affidavit of Nora Perez who signed the agreement between BRACO OPERATIONS LTD. and the Plaintiff in the capacity of Director/Secretary of BRACO OPERATIONS LTD. and also as Director/Secretary of Miss Betty's Beauty Shoppe Ltd.

In order to give effect to the arrangement made in any business agreement it may be necessary to imply terms which have not been expressly stated. Is there anything in the agreement that raises exclusivity? In my view that is a serious issue to be tried.

The other factor to be considered is whether the balance of convenience lies in favour of granting or refusing the relief sought.

The Defendant Company entered into a contractual relationship with Plaintiff Company by becoming the substitute of the original lessor. The lease the Defendant entered into included obligations and burdens - if the Plaintiff were to succeed at trial in establishing exclusivity the Plaintiff would not be adequately compensated by damages. In the first instance it might not be possible to accurately quantify the damages suffered by the Plaintiff and secondly if the Defendant embarks upon the course of offering to guests of the resort hotel, free of charge, manicures and pedicures under the umbrella of the "all inclusive superclub" this will, without doubt, effectively put the Plaintiff entirely out of business as far as the services of manicures and pedicures are concerned.

I will therefore exercise my discretion in favour of the Plaintiff and grant the Injunction prayed for.

The Order is made in terms of the Amended Summons dated 1st April 1998.

Liberty to apply.

Plaintiff gives usual undertaking as to damages.