

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO 2004 HCV 2087

BETWEEN	MOSSEL (JAMAICA) LIMITED	CLAIMANT
AND	MICHAEL IAN THRUSH	DEFENDANT

IN CHAMBERS

**Mrs. M. Georgia Gibson-Henlin and Miss Sherry-Ann McGregor instructed by
Nunes, Scholefield, DeLeon and Company for the claimant**

**Mr. Dennis Morrison QC and Mrs. Juliann Mais-Cox instructed by Dunn Cox
for the defendant**

September 21, 22, 23, 24, 25, and 29, 2004

Sykes J (Ag)

RESTRAINT OF TRADE: INJUNCTION

The business context

1. This is an extremely urgent matter. It involves an attempt by Mossel (Jamaica) Limited (Mossel), the claimant, to enforce a restraint of trade clause which it says allows it to prevent Michael Thrush, the defendant, from taking up employment with Telecommunications Services of Trinidad and Tobago Limited (TSTT), a provider of telephone services in the Republic of Trinidad and Tobago. Cable and Wireless has a 49% stake in

TSTT. The Government of Trinidad and Tobago has 51%. The matter is urgent because the period of restraint is twelve months which began August 24, 2004 and ends August 24, 2005. The case law makes it clear that although the American Cyanamid principles apply, if a trial is not possible early within the restraint period then it is proper for the court to consider the prospect of success. This additional consideration may mean that although the American Cyanamid principles are met an injunction until trial may not be granted. One month has already passed. There are eleven months to go and the matter is still at the interlocutory stage.

2. On August 25, 2004 Mossel was granted an ex parte interim injunction preventing Mr. Thrush from working with TSTT which is alleged to be the competitor of Mossel in Trinidad. This is now an inter partes hearing to determine whether the injunction should continue until the trial. In addition, the defendant has filed a notice of application for court orders in which he is seeking the following:

- a) the service of the claim form and particulars of claim dated August 25, 2004 as well as the injunction granted on August 25, 2004 be set aside under Rules 7.7 and 7.14(1) of the Civil Procedure Rules (CPR) 2002;
- b) further or in the alternative a declaration that this court has no jurisdiction to try the claim or should not exercise any jurisdiction which it may have under rule 9.6(1) of the CPR and an order that the service of the documents referred to at (1) be discharged;
- c) alternative to (a) and (b) that the injunction granted on August 25, 2004 be set aside and the notice of application heard on August 25, 2004 be heard again under rule 11.6(1);

d) alternatively to (c) that the injunction granted on August 25, 2004 be discharged.

3. These applications by the defendant will be dealt with much later at paragraphs 49 – 53.
4. Mossel seeks this pretrial remedy because it says that the contract it has with Mr. Thrush enjoins him from soliciting employees of Mossel (clause 2) while clause 9 prevents Mr. Thrush from "***engaging in any activity of a business nature with the Company's competitors.***"(my emphasis)
5. The contract has other features. The contract provides in clause one that any service provided must be under what is known as a Task Specification. It is by this Task Specification that Mr. Thrush would be asked to do specific kinds of work. He would be told, for example, the start date, the services to be provided and rates and details of compensation. The contract says at clause 8 that it comes into effect when signed by both parties and shall remain in effect until October 25, 2002 or it can be terminated earlier by each party giving 15 days written notice. The claimant says that this is not as bad as it seems because both parties have operated since 2002 on the basis that the terms and conditions of the 2002 contract governed the relationship. There is some merit to this argument since it is undeniable that the claimant and the defendant had a contractual relationship right up until August 24, 2004. Whether the post-October-25-2002 period was governed by the service agreement is undoubtedly a matter to be resolved at trial.

6. Of course, even the dullest of cases have a context to say nothing of a vibrant case such as this. I need to state what the real story behind the claim is. I now set out that story.

The rest of the story

7. The 1990's saw the rapid development of telecommunications technology and with it a change in the policy of many governments of the region. They sought to encourage competition. Prices have fallen and there is a phone for just about every imaginable type of consumer. The phones boast so many features that sophisticates and philistines alike are able to find a phone and a service package that suits his taste and pocket. The ring tones range from Beethoven to Anthony Moses Davis (Beenie Man). Those who fancy their composing skills can even compose their own melodies.
8. This new policy precipitated the arrival of a new wave of international investors to our shores. In this case, one of that new breed hails from the Republic of Ireland. He is Mr. Dennis O'Brien. In Jamaica he has taken the corporate form of Mossel (Jamaica) Limited. Many of Mossel's directors are Irish. Michael Ian Thrush, the defendant, comes from across the channel - from England.
9. The claimant alleges that when Mr. O'Brien turned his entrepreneurial eyes and fixed them on the Caribbean, he viewed the whole region as a single market. The different islands, some of which are independent, are only parts of the same market and not different markets. To put the matter starkly: the fact that some islands are nation states while others are either dependents territories or overseas departments of European nations

does not change the view that the Caribbean is a single market. In the eyes of Mr. O'Brien and his fellow investors the Caribbean telecommunications market is small not only in terms of population size but also small in terms of effective market, that is the persons who will purchase cell phones. Thus pricing and marketing assume even greater significance. If the pricing is wrong this can spell the end of a telecommunications provider. The margin for error is very small. It is in this context that the skills of Mr. Thrush rise to great significance. He is a pricing and marketing specialist. He is one of those persons who assists telecommunications providers to develop the right combination of prices for goods and services that are offered to the public. Mossel claims that Mr. Thrush has trade secrets that he might disclose to Cable and Wireless through TSTT. It is here that the story while quite simple to tell begins to generate complex issues of law.

10. Mr. O'Brien's perception straddles different nationalities, cultures, language groups and it ignores borders to say nothing of the Caribbean Sea that separates the islands. The claimant submits that (and this is the first complex point of law) that forming different companies in different islands was more in the nature of a business strategy rather than a desire to create separate independent legal entities. Therefore, says Mossel, the court should look at the reality and not pay too close attention to the legal principle that states that each company is a separate person. This will be explained in detail at paragraph 18.

11. The claimant says that because the region is one market and Trinidad and Tobago is a segment of that market the fact that it does not yet have a licence in Trinidad is no bar to it getting an interlocutory injunction. The

fact is that Mossel has a presence in Trinidad through two companies that are incorporated there. I now come to the second complex issue of law which is this: whether the two companies are agents of Mossel so that it has a presence in Trinidad so as to be regarded as a competitor of TSTT even though TSTT is the only company licensed to provide telephone services in Trinidad and Tobago. Let me expand on this so that the breadth of the claimant's proposition can be appreciated.

12. The claimant is saying this: despite the fact that it does not have a license to operate in Trinidad and Tobago it is a competitor of TSTT because the two companies registered there are its agent.

13. The defendant regards these propositions as legal apostasy. The propositions have departed too far from orthodoxy to be acceptable. Since it is well known that an injunction is not a cause of action but a remedy it is appropriate at this juncture to deal with the cause of action.

The claim

14. Mossel in the claim form says that it is a limited liability company with registered offices at 10-16 Grenada Way, Kingston, Jamaica. The claimant says that it *"is and was at all material times, inter alia, a wireless telecommunications provider with operations in the Caribbean region including Jamaica"* (my italics). Mossel says at paragraph three of its claim that "the Defendant agreed to supply consulting services to the Claimant for the initial period June 15, 2002 to October 25, 2002 and thereafter to the 24th day of August 2004 on the same terms". It is necessary to examine whether there is anything to protect since if there is not then that would be the end of the matter.

Is there anything to protect?

15. It is well established in this area of law that it is trade secrets that are protected. The previous employer cannot immunize himself from competition but he can protect his secrets. Mr. Morrison submitted that pricing/marketing is not "rocket science" and so one must be careful to see that the claimant is not overstating the case. However I believe that Mr. Morrison has understated the matter. The claimant, as I understand it, is saying that the defendant has participated in its business for such a long period between 2002 and 2004 that he knows how Mossel, in particular, develops and launches its products. He knows their pricing strategy. He knows their customer target group. Thus while all wireless service providers do the things that Mossel does, Mossel has distinguished itself in this field to the extent that it set a record for getting new customers (see page 1 of exhibit 4 of Seamus Lynch's affidavit). This success, the claimant suggests, by inference, has been replicated throughout the region. It is the secret that generates this kind of success that they say the defendant has and the only practical way of stopping the disclosure of this is to prevent him from working for a competitor in the region.

16. I am satisfied at this stage that there are secrets to protect. This is not just development of the skill and aptitude of the defendant. With this issue out of the way I can now proceed to examine the others.

American Cyanamid principles

17. ***American Cyanamid v Ethicon Ltd*** [1975] 1 All ER 504 applies here with the added consideration referred to in paragraph one. To repeat, the added consideration is whether a trial can be had early in the restraint

period. Trial here includes judgment. If this is not possible then I have to examine the prospect of success and if the prospect of success is not high then the injunction should not be granted (see ***Lansing Linde Ltd v Kerr*** [1991] 1 W.L.R. 251, ***Lawrence David Ltd v Ashton*** [1991] 1 All ER 385]). The rationale is that unless the trial can take place early in the restraint period any interlocutory injunction granted may effectively determine the matter before trial. This is consistent with the view that injunctions should not be granted if the effect will be to determine the outcome of the case.

Is there a serious issue to be tried?

a) The economic reality argument

18. The simple answer is yes but such a terse response would not properly indicate the nature of the claimant's argument which may have to be taken into account if I should have to consider the prospect of success. In brief, there is a contest between two schools of thought. One called the economic reality school and the other called the orthodox school. The economic reality school says that in certain circumstances the courts, when dealing with a group of companies, can ignore the legal significance of incorporation and treat the group as one. That is to say, although the law says that each company, properly incorporated, is a separate legal entity there are times when "economic reality" mandates that the courts ignore this and treat all the companies in the group as a single economic unit.
19. On the other hand, the orthodox school says that the courts cannot simply pray in aid the loose, vague and imprecise concept of "economic reality". No one knows when the courts will resort to this concept.

20. According to learned Queen's Counsel, this is not just a horse of a different colour; it is no horse at all. The orthodox school insists that when a company is incorporated it has an independent legal existence. This simple fact has many, many consequences. For example, even if the company is a wholly owned subsidiary it can contract with third parties, sue and be sued. When it comes to tortious liability will the economic realists say that the parent company is the same as the subsidiary? These basic considerations, says Queen's Counsel, demonstrate, even without much detailed analysis, how heretical the "economic reality" argument is.

21. The affidavits filed for the claimant have provided more information in support of the economic reality position. I now set out the relevant parts of the affidavits of Miss Jean Blackstock and Mr. Seamus Lynch.

22. Miss Blackstock asserts that Mossel is part of the Digicel Group of Companies (DGC). Mossel carries on the business of a mobile telecommunications provider in Jamaica, Barbados, the Cayman Islands, St. Lucia, St. Vincent and the Grenadines, Grenada and Aruba and with "plans for the rest of the Caribbean region including the Turks and Caicos Islands and Trinidad and Tobago".

23. Her affidavit goes on to say that on or about June 5, 2002 "the Defendant (sic) offered to perform consulting services for the Claimant (sic) and in particular as it relates to the Claimant's mobile telecommunications business in the Caribbean Region."

24. Mr. Lynch's affidavit is in much the same vane. However he adds some more information. He provides an overview of the structure and organisation of DGC. Mr. Lynch says that Mossel and the Digicel entities in the Caribbean are part of DGC. The companies in the Caribbean are under

the "umbrella" of an offshore company known as Digicel Limited (DL). The principal share holders in DL are Dennis O'Brien and Leslie Buckley. Mr. O'Brien is the major stakeholder either directly or indirectly in all Digicel entities across the world including the Caribbean.

25. Mr. Lynch says that the logo, the name Digicel, the common directorships and the fact that Mr. O'Brien is the main stake holder in DL means that all the entities in the Caribbean are to be treated as one.

26. According to Mrs. Gibson-Henlin the effect of these affidavits is to show that Mossel is present in other Caribbean islands. She adds that when one looks at the Caribbean region as a whole the economic reality is that Mossel and the other companies in the region are all controlled ultimately by Dennis O'Brien and they operate as a group. The fact that different companies operate in each island where the Digicel brand is used is a fact that the courts can ignore and look instead at the reality of common directorship, common use of the Digicel brand, the logo and a single prime stakeholder.

27. The legal consequence of this, Mrs. Gibson-Henlin submitted, is that since Mossel was the vehicle by which Digicel first entered the Caribbean and then spread across the region from Jamaica, Mossel is present in all the islands where Digicel operates. It is important to note how the argument is put here. She is not saying the Digicel Group of Companies or Digicel Limited is the parent company operating in the region holding the companies in the different islands. She is not saying that Mossel is the holding company of wholly owned Digicel subsidiaries throughout the region. It is because the argument was put in this way that she had to rely on the agency argument if the economic reality argument failed. Mrs.

Gibson-Henlin's way of making the argument is different, very different from the instances in which the courts have ignored the separate legal identity of companies. The cases suggest that the courts have ignored the separate legal personalities of companies in instances where the subsidiary is wholly owned by the parent company. The cutting-edge nature of Mrs. Gibson-Henlin's argument may become crucial if it turns out that an early trial cannot be obtained in this matter.

28. Both parties have relied on the case of ***Adams v Cape Industries plc*** [1990] BCLC 479. In that case an importer (Cape) of asbestos into the United States having been ravaged by a previous law suit sought to prevent a second group of plaintiffs repeating the success of the first set of plaintiffs. To this end Cape removed its assets to the United Kingdom but sold asbestos in the United States through Capasco Ltd and National American Asbestos Corporation (NAAC). The asbestos was mined by a South African company ultimately owned by Cape. Capasco and NAAC were marketing companies owned by Cape. NAAC was closed down and replaced by two companies known as Associated Mineral Corporation (AMC) and Continental Productions Corporation (CPC). The shares in AMC were held by a subsidiary of Cape and the shares in CPC were held by a former president of an NAAC.

29. The second group of plaintiffs secured a default judgment against Cape and then sought to enforce it in the United Kingdom. In order for them to do this they had to establish that Cape was present in the United States. The second group of plaintiffs sought to do this by arguing that since NAAC and CPC were present in the United States Cape was also present. They sought to establish by the "economic reality" principle.

30. One cannot help but note Slade LJ's less than enthusiastic reception of the economic reality argument. Indeed he began his analysis by stating at page 508g

There is no general principle that all companies in a group of companies are to be regarded as one. On the contrary, the fundamental principle is that each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities:'

31. The Lord Justice said this in response to the proposition that the courts will ignore the separate legal identities of the companies if the justice of the case demands it. His Lordship at page 513a delivered what Mr. Morrison hoped was the death blow to this kind of argument when he said:

As counsel for the defendants...submitted, save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle in Salomon v Salomon merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.

32. This passage along with others makes it quite clear that Slade LJ was going to be sailing as close to the wind of strict legal thought as possible. Mr. Morrison QC submitted that these passages buried once and for all this Denningesque excursion away from legal orthodoxy and that Slade LJ's views now represent the current view.
33. While I agree that Slade LJ was certainly sparing no effort to restrict this notion of economic reality and single economic unit he recognised that there were in fact instances in which the courts departed from orthodoxy. Interestingly, he did not say that cases of statute and contract were the only instances in which the courts did this. Admittedly in the cases referred to by Slade LJ in which the separate legal identity of each company was ignored the courts were there dealing with wholly owned subsidiaries.
34. At the risk of repeating myself I must restate that the claimant is relying exclusively on the common directors, common logo, common products, common stake holder and the fact of Mossel holding Digicel related trademarks in more than one island. These ideas clearly require deliberate, mature and some would add Solomonic wisdom. Despite this, one thing is clear; there is a serious issue to be tried. I now come to the second major complex argument.

b) The agency argument

35. The argument is that it can be argued that the companies in Trinidad are the agents of Mossel. There is no evidence of an express creation of agency between Mossel and the Trinidad companies. On this issue of agency the author of *Gower's Principles of Modern Company Law* (5th ed), Sweet and Maxwell, 1992, at page 132, the six edition of the same

text published by the same publishers in 1997 at page 173 and the seventh edition (same publishers in 2003 at page 187) have repeatedly made the same point that although a company may act as agent for its parent company and other companies in the group there is no presumption of agency and "*in the absence of an express agreement between the parties, it will be very difficult to establish one.*" The words in quotations have been repeated without change in each of the three editions cited. Again the difficulty of establishing agency in this context does not mean that there is not a serious issue to be tried. Difficult is not a synonym for impossible.

c) Interpretation of the clause 9

36. The defendant says that even if the claimant succeeds on these issues clause 9 of the contract is so badly drafted that it cannot be enforced. It is very wide and extends beyond what is necessary for the protection of the claimant.

37. However there is case law that suggests that even a badly drafted restraint clause can be saved. In ***The Littlewoods Organisation Ltd v Harris*** [1978] 1 All E R 1026 a wide clause was interpreted to give effect to the intention of the parties as found by the court. ***Littlewoods*** was an application of ***Haynes v Doman*** [1899] 2 Ch 25. Perhaps I should point out that in the ***Littlewoods*** case Lord Denning MR said that the law should have regard to the reality of business in this age of multinational corporations (see page 1036e).

d) The competitor argument

38. Mr. Morrison QC submitted that TSTT was and still is the only licensed phone service provider in Trinidad and Tobago. The liberalization of the Trinidad and Tobago market has not yet occurred. Mossel does not have a license to operate there. Mossel was not, is not and cannot be a competitor of TSTT. Therefore, he says, the restraint clause has no effect in Trinidad and Tobago. He relies on ***Commercial Plastics Ltd v Vincent*** [1965] 1 QB 623. Learned Queen's Counsel submitted that competitor means that the rivals are actually producing or selling goods and/or services in the relevant market at the time when the restraint clauses are to be enforced. Market for Mr. Morrison means the Republic of Trinidad and Tobago and not the Caribbean region. In my view this submission ignores the logic and scope of the economic reality argument. The issue is whether market is limited as the defendant contends or is it as wide as the claimant submits. This is a serious issue to be tried.

39. There is still one final twist to Mrs. Gibson-Henlin's submissions. TSTT is partly owned by Cable and Wireless. Cable and Wireless and Mossel are competitors in Jamaica. If the question is posed, "Does Mr. Thrush have trade secrets of Mossel that he can disclose to TSTT?" The answer is yes. Given that Cable and Wireless is alleged by Mossel to operate as a group in the Caribbean including Jamaica and given the fact that Cable and Wireless has a 49% interest in TSTT, wouldn't it be naïve to think that any information disclosed by Mr. Thrush to TSTT in which would not be passed to Cable and Wireless in Jamaica and so put Cable and Wireless in Jamaica in a better position to compete with Mossel more effectively? Once the question is posed in this way it should not be difficult to see that how *market* and *competitor* are defined in the context of cross border

operations is indeed a serious issue to be tried. The ***Commercial Plastics*** case did not have these considerations in mind when it was decided and so cannot be said to have provided the last word on the matter.

40. Within this last twist in Mrs. Gibson-Henlin's submissions there is slight bend in curve. I now refer to a statement allegedly made by Mr. Lapthorne, the new Chairman of Cable and Wireless in Trinidad. He is reported as saying in *The Trinidad Guardian* newspaper published May 20, 2004 that Cable and Wireless in Jamaica was "fat and lazy" at the time Mossel arrived in Jamaica. He adds

We are not gonna have a Jamaica re-run here because we were asleep in Jamaica and we're not asleep in Trinidad.

41. This provided traction for Mrs. Gibson-Henlin's submission. She says that this is certainly a bold statement for a 49%-shareholder to be making. Mr. Lapthorne, in the article, points out that TSTT is the only company in the region in which Cable and Wireless does not have the majority shares. This, Mrs. Gibson-Henlin, submitted suggests strong influence if not control. All this she says is indicative of the economic reality that Cable and Wireless, at least in Trinidad, regards Mossel as its competitor. This reality she says is at least as powerful a consideration as the fact that the majority of the shares in TSTT are held by the Government of Trinidad and Tobago. What she meant by this was that while she accepts that the company is owned by the Government, the statements and posture of the Cable and Wireless Chairman suggests more than just being a business partner with the Government. Cable and Wireless may well be the back

seat driver, a matter, she says that can only be explored at trial. As I understand the submission it amounts to this: share holding is one thing but influence and power are another. The influence and power of Cable and Wireless in TSTT may well be disproportionate to their shareholding. When put in this way, legal form, Mrs. Gibson-Henlin says, may well be less important than the "economic reality".

42. There is no doubt that there are serious issues to be tried.

e) Adequacy of damages

43. Damages are not an adequate remedy for the claimant. In looking at this issue from the defendant's perspective he says that his ability to earn has been curtailed and he is experiencing difficulty supporting himself. Significantly he has not alleged that he may suffer any long term damage by being out of the labour market for any extended period of time. If this is so, his long term loss is not any significant loss of skill but income. The claimant has said he is prepared to pay any damages for any injury suffered by the defendant. On this analysis, damages are an adequate remedy for the defendant.

44. In light of the above breath-taking submissions I now turn to what, in the context of this case, must now be a mundane but nonetheless important issue: that of non-disclosure.

The non-disclosure issue

45. Mr. Morrison QC sought to chip away at the feet of the claimant's edifice by submitting that the interim injunction should be discharged on

the basis of non-disclosure at the ex parte stage. The instances of non-disclosure he lists are:

- i. that at the time of application Mossel did not disclose that they did not have a licence in Trinidad and Tobago;
- ii. Mossel did not say that it had a licence to operate in Jamaica alone;
- iii. Mossel itself did not intend to apply for a licence in Trinidad;
- iv. Mossel did not say that only TSTT had a licence to provide telephone services in Trinidad and therefore was a monopoly;
- v. the claimant did not disclose that the deregulation of the Trinidad and Tobago market was in a fledgling state.

It is true that these matters were not disclosed and they are indeed material. The issue now is the remedy for this non-disclosure.

46. Mr. Morrison relied on the cases of ***Jamculture Ltd v Black River Upper Morass Development Company Ltd and another*** (1989) 26 J.L.R. 244 and ***Brink's – MAT Ltd v Elcombe and others*** [1988] 3 All E R188. These cases do establish that a court can discharge an injunction on the ground of non-disclosure even if an injunction would have been granted had the disclosure been made. The rationale for this power is that on an ex parte application the applicant ought to make known to the court all important facts. Failure to do this permits the court, as a punitive measure, the court to discharge the injunction. The merit of this is that it encourages candour. Balcombe LJ observed in ***Brink's MAT*** (cited above) that the rule deprives the wrongdoer of an advantage improperly obtained and acts as a deterrent to those who would not make full disclosure (see page 193j). Balcombe LJ also observed that the rule must not become an

instrument of injustice. This led him to conclude, after reviewing the cases, that if there is a discretion to discharge an injunction on the basis of non-disclosure there must also be a discretion to either continue the injunction or grant a fresh injunction.

47. Slade LJ in ***Brink's MAT*** made these sage observations at page 194h

Nevertheless, the nature of the principle, as I see it, is essentially penal and in its application the practical realities of any case before the court cannot be overlooked. By their very nature, ex parte applications usually necessitate the giving and taking of instructions and the preparation of the requisite drafts in some haste. Particularly in heavy commercial cases, the borderline between material facts and non-material facts may be a somewhat uncertain one. While in no way discounting the heavy duty of candour and care which falls on person making ex parte applications, I do not think the application of the principle should be carried to extreme lengths.

Applying this principle to this case I take note of the following:

- a. the defendant tendered his letter of resignation on August 24, 2004;
- b. on the afternoon of August 25, 2004 he was given a letter signed by the claimant's attorney reminding him of his obligations under clauses 2 and 9 of the service agreement dated June 5, 2002;
- c. the claimant filed the claim form and application for injunction on August 25, 2004;
- d. Miss Blackstock's affidavit was sworn on August 25, 2004;
- e. the defendant had made plans to leave the island;

f. by the time the injunction was granted and perfected it appears that the defendant had left the island.

48. This history shows that the claimant was working against time. With the best efforts and the accommodation by the courts the defendant left the island without being served. This was not the type of case in which, based upon the affidavit evidence, anyone knew that Mr. Thrush would have handed in his resignation on August 24, 2004 and then leave the island by the following day. This case is nowhere near the ***Jamculture*** case where there was a calculated decision to deceive the court. I have concluded that there was no intention to deceive the court and in the context of the speed of the developments to which the claimants were reacting the non-disclosure in this case are not sufficient to justify invoking the punitive power of the court. This might well have been a case where the claimant could have applied for an interim remedy under rule 17.2 which permits the court to grant an interim remedy upon an undertaking by the claimant to issue and serve the claim.

Jurisdiction and Enforcement

49. Unless I misunderstood the defendant's submission I did not understand him to be saying that as a matter of law this court had no jurisdiction over him. I did not understand him to be saying that he was not submitting to the jurisdiction of this court. Mr. Morrison QC raised the issue about the propriety of the claimant applying, ex parte, on September 6, 2004, for permission to serve abroad the claim form, particulars of claim and order made on August 25, 2004. By that date the claimant knew that the defendant had retained counsel. On further reflection I agree with Mr.

Morrison that it ought properly to have been an inter partes hearing. The matter was not put in the manner of a formal submission making it an issue to be decided by me so I concluded that paragraphs 1 and the first part of paragraph 2 of the defendant's notice of application for court orders was not being pursued.

50. Thus in respect of the first two paragraphs of the defendant's application I understood, during the course of hearing, that he was not raising the point that as a matter of law this court had no jurisdiction but was asking the court to decline jurisdiction under its discretionary power. I will refer to the parts of the affidavit of Mr. Thrush that confirmed my belief.

51. Paragraph 14 of Mr. Thrush's affidavit dated September 21, 2004 that was exhibited to the affidavit of Mrs. Mais-Cox said that the order granted on August 25, 2004 was made almost one month ago. The next sentence indicates that he has endured great hardship and has been severely curtailed. He is attributing his hardship to the order. The defendant filed an application under rule 28.17(2) of the Civil Procedure Code (CPR) in which he is asking the claimant or Miss Stacey Mitchell to produce documents verifying that the claim form, particulars of claim, affidavit of Jean Blackstock as well as an attested copy of the order made on August 25, 2004 was sent to London, England. The notice is addressed to the claimant's attorneys. This is hardly the conduct of a person disputing the jurisdiction of the court.

52. Let me make it clear that I did not attach any importance to the acknowledgment of service filed by the defendant in dealing with this issue of jurisdiction. Rule 9.6(2) states that even if the defendant wishes to

dispute jurisdiction he has to file an acknowledgment of service. That was done in this case. Under this rule the filing of an acknowledgment of service does not preclude the defendant from raising issue of jurisdiction, but as I have said I concluded that the issue was not being pressed.

53. The final point is one of enforcement. Mr. Morrison asks, "How would the court enforce its order if the defendant is overseas?". That to me at this point is not an insoluble problem. It seems to me that the real question is whether any judgment made by Supreme Court of Jamaica can be enforced elsewhere. That is a question of the rules relating to the enforcement of foreign judgments in the countries where the claimant may seek to enforce any order it gets. This is the approach taken to freezing orders. If they extend to assets outside of the jurisdiction the orders usually include a clause that says that it only has effect in foreign countries to the extent that those countries are prepared to enforce the orders of the issuing court.

Prospect of success

54. It has already been indicated that if it is not possible to have an early trial in this matter then the prospects of success is a factor that must be considered. An application was made by the claimant before Rattray J on Tuesday, September 28, 2004. He is the judge of the Commercial Court. The application was to see if the Commercial Court could take this matter and have an early trial. Rattray J on September 28, 2004 made an order for a speedy trial but the matter did not go to the Commercial Court List.

55. When the matter came back before me on September 29, 2004 the Registrar indicated that the court would be able to accommodate this

matter for ten days beginning on November 29, 2004. Both parties said that they could not meet this date or even this time period. The next available block of time is January 24 – 28, 2005 and January 31 – February 4, 2005. These dates are more acceptable to the parties.

56. The impact of these trial dates on this case is this: I have concluded that I now have to consider the prospects of success of the claimant's case because by the end of January the claimant would have received the benefit of having the defendant restrained for at least five months without a trial if the interlocutory injunction continues until then. This would be 41.66% of the twelve month period of restraint to which the claimant would be entitled to restrain the defendant if and only if it is successful at the trial. If the trial goes into February 2005 then the percentage would begin to climb towards the 50% mark.

57. I have already set out the nature of the principal arguments of the claimant at paragraphs 18 – 39. In my view when considering the prospects of success one should take a global view of the matter. If, as in this case, success depends upon a legal proposition that is not strongly supported by existing law then that is an indication that the prospect of success has diminished. In my view the further a legal argument is from the orthodox position the closer it has to be scrutinized. The claimant is relying on a principle called economic reality that to date has been "applied" in extremely limited circumstances. In addition the way in which the claimant is seeking to establish its case is not even squarely within the cases which seem to have recognised that although companies are separate legal identities for some purposes this should be ignored. This means that the claimant's case is not clearly and unambiguously within the

exception to the strong general that separate companies are to be treated as independent legal personalities.

58. The law in respect of agency indicates that the courts are not happy with a company acting as agent for another without an express agreement.

59. Similarly the definitions of market and competitor must be given very extended meanings if the claimant is to succeed.

60. In concluding on this point, there is nothing in the claimant's case that can fit easily within the normal legal principles applicable to the respective areas of law raised in this case. The only possible exception to what has just been said that relating to the interpretation of clause 9. If the claimant succeeds on the interpretation on clause 9 but fails on the others then it would mean the clause only applies to Jamaica.

61. For all these reason the prospect of success is not high and consequently the injunction must be discharged.

Conclusion

62. The defendant's application for setting aside the service of the claim form, particulars of claim and orders granted on August 25, 2004 are refused since as I have said he has submitted to the jurisdiction of the court by the conduct already described at paragraphs 50 - 52. The alternative application for a declaration that this court has no jurisdiction to try the claim or should not exercise any jurisdiction over the defendant is refused. The second alternative application that the order of August 25, 2004 be reconsidered and dealt with again has in effect occurred during this inter partes hearing. The rule that permits this application is rule

11.16(1). Its purpose as I understand it is to permit persons who were absent when a without-notice court order was made to have the matter reconsidered. At that new hearing they would be permitted to adduce such evidence and make such submissions as they would have been entitled to make had they been present. In the instant case the order made on August 25, 2004 was already set for further consideration. This further consideration has now happened and has the effect of dealing with the matter again. The application for a rehearing is refused.

63. At this hearing the claimant has satisfied the American Cyanamid test. I have taken into account the affidavits of Mr. Norris Campbell and Mr. Thrush which were filed on behalf of Mr. Thrush. Damages would not be an adequate remedy for the claimant. Further there is no evidence that the defendant would be able to meet any damages assessed if the claimant ultimately succeeds at the trial. Also the defendant could be adequately compensated in damages but this has to be balanced against the possibility of an interlocutory injunction effectively determining the issue before trial.

64. However since an early trial cannot be had I have looked at the claimant's prospect of success and concluded that it is not very high and so the injunction is discharged.

65. At the eleventh hour Mrs. Gibson-Henlin applied for an extension of the injunction until the appeal was heard. She referred to the case of ***Erinford Properties Ltd v Cheshire CC*** [1974] 2 All ER 448. I refused the application. These are my reasons. It is now well established that one of the fundamental principles in restraint cases such as the present one is that a trial should be had early in the restraint period. The second important principle is that an injunction should not have the effect of

determining the issue. **Erinford** was not a case in which the applicant was seeking to establish its case on propositions that were not well supported by case law or statute. It was also not a restraint of trade case such as the present where the court had to determine the prospects of success in the context of the inability to have a trial including judgment early within the restraint period. Thus while Megarry J's principles may apply generally they are not applicable in the specific context of this case. Finally, in this case there was no indication when this appeal would be heard. Thus unless there was evidence that an appeal could be heard within days, not weeks, it would not be appropriate to continue the injunction until appeal. Any continuation of the injunction absent a date for hearing the appeal would create the risk of granting the remedy to the claimant without a trial.

66. My order after this hearing is as follows:

- a) Injunction granted on August 25, 2004 is discharged.
- b) Costs to the defendant to be agreed or taxed.
- c) Leave to appeal granted.
- d) Injunction pending appeal refused.
- e) Trial by judge alone.
- f) Trial dates January 24 – 28, 2005 and January 31 – February 2005.
- g) Case Management Conference adjourned to November 8, 2004 at 9:00 am.
- h) Claimant's attorney to prepare, file and serve this order.