IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2008 HCV 00118

BETWEEN	OLINT CORP LIMITED	CLAIMANT
AND	NATIONAL COMMERCIAL BANK JAMAICA LIMITED	DEFENDANT

IN CHAMBERS

Huntley Watson instructed by Watson and Watson for the claimant

The Hon. Michael Hylton O.J., Q.C. and Carlene Larmond instructed by Michael Hylton and Associates

DECEMBER 18 and 22, 2008

APPLICATION TO DISCONTINUE CLAIM - RULES 1.1, 1.2, 37.2 (1), (2) AND 37.5 (2),(3) OF THE CIVIL PROCEDURE RULES- HOW DISCRETION TO BE EXERCISED WHEN INTERIM INJUNCTION AND UNDERTAKING TO PAY DAMAGES ARE IN PLACE - INTERIM INJUNCTIONS - UNDERTAKING TO PAY DAMAGES - STEPS LEADING TO ENFORCEMENT OF UNDERTAKING TO PAY DAMAGES

SYKES J.

1. This is an application by Olint Corporation Limited ("Olint"), the claimant, for permission to discontinue its claim against National Commercial Bank ("NCB"). This is by way of notice of application for court orders dated November 27, 2008. NCB opposed the application. I dismissed the application and these are my reasons.

The context

2. I shall recount the history of this matter briefly so that the significance of the application can be appreciated. Olint is a customer of NCB with accounts at the Hagley Park Road branch. At some point, NCB decided to close Olint's accounts. Olint went, ex parte, to the Supreme Court and obtained injunctions preventing the bank from closing the accounts. On April 18, 2008, Jones J., at a contested inter partes hearing, discharged the injunction. Olint appealed. On July 18, 2008, the Court of Appeal reversed Jones J., granted an injunction

until trial and ordered a speedy trial. On July 28, 2008, the Court of Appeal refused NCB's application for leave to appeal to Her Majesty in Council.

3. On August 5, 2008, NCB petitioned the Judicial Committee of the Privy Council for special leave which was heard and granted on November 6, 2008. Both sides agreed that the hearing of the appeal should be expedited because the trial date of March 9, 2009, had been set at a case management conference held on October 1, 2008.

4. A hearing date of January 26, 2009, has now been set for the hearing of the appeal by Board. During the application before me I was informed that the record of appeal has been settled and was being sent to the Registrar of the Judicial Committee of the Privy Council by the weekend of December 19, 2008.

5. This application is governed by the Civil Procedure Rules ("CPR") to which I now turn.

The Civil Procedure Rules

6. The relevant rules are 37.2 (1), (2) and 37.5 (2), (3). Rule 37.2 (1) and (2) states:

> *(1) The general rule is that a claimant may discontinue all or part of a claim without the permission of the court.*
>
> *(2) However -*
>
> > *(a) a claimant needs permission from the court if he wishes to discontinue all or part of a claim in relation to which -*
> >
> > > i. *the court has granted an interim injunction; or*
> > >
> > > ii. *any party has given an undertaking to the court.*

7. It was this rule that necessitated this application by Olint. Olint has been the beneficiary of an injunction and it also gave an undertaking to pay damages to NCB should it have suffered any damage by the granting of the injunction.

8. Rule 37.5 (2) and (3) reads:

> *(2) The claim or the relevant part of the claim is brought to an end as against that defendant on that date [that is the date on which the notice of discontinuance is served on the defendant].*
>
> *(3) However, this does not affect -*
>
> *(a) the right of the defendant under rule 37.4 to apply to have the notice of discontinuance set aside; or*
>
> *(b) any proceedings relating to costs.*

9. The actual text of the rules is plain enough but I should make some observations about them. The first thing to observe is that rule 37.2 (1) of the CPR states a general rule. This is in keeping with the proposition that civil litigation is between party and party and in general, a party is free to discontinue proceedings should he so choose. The second thing to observe is that rule 37.2 (2) expressly states that where a court has granted an interim injunction the leave of the court is necessary. Leave is also necessary where a party has given an undertaken to the court. It is not hard to see why these circumstances require the leave of the court. When an interim injunction is granted and an undertaking in damages is given, the undertaking is given to the court and thus the court should have control over the discontinuance in these circumstances since the issue of enforcement of the undertaking may arise. Also other issues might have arisen since the injunction was granted which might necessitate directions from the court. The third thing to observe is that according to rule 37.5 (3) a discontinuance does not affect any

proceedings as to costs. The fourth thing is that none of part 37 indicates the specific factors a court should have in mind when considering whether a claim in which an interim injunction has been granted or an undertaking to the court has been given should be discontinued.

10. In the absence of clear criteria in part 37 where the rules for discontinuance appear, then I have to go back to rule 1.1 where there is the overriding objective in order to determine how my discretion ought to be exercised in this particular case. The rule emphasises that I am to deal with the case justly and the court "must seek to give effect to the overriding objective when interpreting these rules or exercising any powers under these rules" (see rule 1.2). Rule 1.1 sets out some of the considerations that a court ought to bear in mind. The list is not exhaustive. One of the factors not listed in the rule but which must be taken into account is the possible effect of a discontinuance on Olint's undertaking to pay damages which was given when it was granted the interim injunction by the Court of Appeal. Then I have to see how significant this factor is in the context of this particular case. This requires an examination of the nature of an undertaking as to damages and how it is enforced.

11. As is well known, when an interim injunction is granted one of the usual terms is that the beneficiary of the injunction is required to give an undertaking as to damages. The purpose of this undertaking is to secure to the party who is restrained by the injunction the possibility of recovering any damage he may have suffered while the injunction was in force, should it turn out that the injunction ought not to have been granted. As will be shown below, the undertaking is given to the court, and before any question of enforcement can arise there must be a decision on whether the injunction was wrongly granted. I should make it clear that wrongly granted does not mean that it must be established that the beneficiary of the injunction acted improperly, suppressed information or such like. There is no requirement of moral turpitude or sharp practice on the part of the party who secured the injunction. What is meant is that the injunction is wrongly granted when looked at, objectively, in light of all the circumstances that existed at the time of the grant.

12. Mr. Watson has submitted, relying on the Irish High Court case of ***Shell E & P Ireland Limited v Phillip McGrath et Ors*** [2007] IEHC 144 (delivered April 18, 2007 by Laffoy J.) which in turn relied on the case of ***Newcomen v Coulson*** (1877 - 78) LR 7 Ch. D. 764 for the proposition, that an undertaking as to damages will survive a notice of discontinuance and is therefore enforceable, without more, once the claimant discontinues the claim. It becomes necessary to see what ***Newcomen*** decided and to examine its subsequent history to see its standing in the legal community. In that case, the claimant had given an undertaking as to damages in a case in which he brought an action against the defendant and obtained an injunction them from building a bridge. The claimant discontinued his action. Eleven months later the defendant sought an enquiry into damages. Malins V.C. refused to accept the proposition that the claimant could deprive the defendant of an enquiry into damages simply by discontinuing the claim. The matter was referred for an inquiry into damages. It appears, that like the current CPR, the then civil procedure rules were silent on the undertaking as to damages when a claim was discontinued. It is not quite clear from the Vice Chancellor's judgment whether he had decided, without stating clearly, that the discontinuance before trial by the claimant was a concession that the injunction should not have been granted, or whether he regarded an order an inquiry in to damages followed automatically once the claim ended, whether by trial or discontinuance, against the claimant.

13. In ***Ushers Brewery Ltd. v. P. S. King & Co. (Finance) Ltd.***[1972] Ch. 148 Plowman J. said at pages 154 - 155:

> ***It is in my judgment established by the authorities that an inquiry as to damages will not be ordered in these cases until either the plaintiff has failed on the merits at the trial or it is established before trial that the injunction ought not to have been granted in the first instance.***
>
> ...
>
> *All the cases to which I was referred are, I think,*

consistent with the opinion I have expressed. In Newby v. Harrison, 3 De G. F. & J. 287 to which I have already referred, and in Graham v. Campbell (1878) 7 Ch.D. 490, the plaintiff failed at the trial of the action and an inquiry was ordered. In Smith v. Day, 21 Ch.D. 421, and Ex parte Hall (1883) 23 Ch.D. 644, the plaintiff also failed at the trial of the action or on appeal, but the inquiry was refused as a matter of discretion on the ground of delay. In Novello v. James (1854) 5 De G. M. & G. 876, the injunction was dissolved and an inquiry ordered before the trial, but this was because a decision of the House of Lords in another case decisively concluded the case against the plaintiff. In Newcomen v. Coulson (1878) 7 Ch.D. 764, the plaintiff discontinued the action before trial and so in effect threw his hand in. In Ross v. Buxton [1888] W.N. 55, the plaintiff obtained an ex parte injunction on the usual undertaking in damages, but an injunction was refused when the motion became effective. The defendant then moved for an inquiry as to damages which was ordered, the judge saying that the ex parte injunction was improperly obtained. ***No case was cited to me where the inquiry was ordered before the question whether the injunction was rightly granted had been disposed of.***(my emphasis)

14. From this extract, Plowman J. was clearly of the view that an inquiry in to damages does not follow as a matter of course merely because the claimant has discontinued the action. It appears to me that Plowman J. must have treated ***Newcomen*** as a case in which the discontinuance of the claim was itself a determination that the injunction ought not to have been granted in the first place. I say this because, having regard to Plowman J.'s statement of principle before and after his examination of the authorities, if ***Newcomen*** was not so treated then it is difficult to reconcile with his major premise. If ***Newcomen*** is understood as a case in which referral to inquiry as to

damages is automatic then it does seem out of step with the principle established earlier in the nineteenth century which was that an inquiry into damages is discretionary. It does not appear that the learned Vice Chancellor thought that he was making any radical decision. I think that, it was perhaps, as happens in cases, the outcome is obvious to the parties and to the court as the case progresses but the judge does not make explicit what his thought process is so that later readers are very clear what he had in mind, although the parties present are in no doubt about what the judge was thinking. Even with all this rationalisation of ***Newcomen*** it is not easy to see how the fact of discontinuance before trial, without more, could or should lead to the conclusion that the injunction was improperly granted where the injunction was granted by a court of competent jurisdiction. If this is what ***Newcomen*** is really saying then I must respectfully disagree with this reasoning. The basis on which the Vice Chancellor concluded, in the case before him, that there must be an inquiry as to damages is not very obvious but the clear law is that an inquiry is not an automatic consequence of a claim being decided against the beneficiary of the injunction or the claimant discontinuing the claim.

15. Plowman J.'s reasoning is consistent with the proposition that an injunction is granted in the exercise of the equitable jurisdiction of the court, and as with all equitable remedies, the remedy does not follow as a matter of right though it is true to say that if certain facts are found to exist then it is normally the case that the remedy follows.

16. Since the undertaking as to damages is given to the court and not to the other party in the case it is therefore within the full discretion of the court whether to order or decline to order an inquiry as to damages. The decision is exercised according to equitable principles. The litigant restrained by the injunction has no right or entitlement to the enforcement of the undertaking though he is at liberty to apply for its enforcement. What is clear from the cases is that the enforcement of an undertaking as to damages is arrived at in a specified sequential way. First, there must be a decision on whether the injunction was wrongly granted. If it was wrongly granted then the other stages of the process follow. If it was rightly granted then that

is the end of the matter. Second, the court must decide whether the undertaking should be enforced. Third, once the decision to enforce the undertaking is made then the court must make an order for the enforcement of the undertaking. Fourth, the court must order an inquiry into damages. Fifth, the court determines when the inquiry should take place, that is to say, the court decides whether the inquiry should take place before the trial if the injunction was discharged before trial, at the trial, or after the trial. It is only at the point where the court permits the inquiry and damages are awarded that any right arises in favour of the restrained party. All these five points were stated clearly in the case of ***Cheltenham & Gloucester Building Society v Ricketts*** [1993] 1 W.L.R. 1545. Sixth, damages are assessed on the principles applicable to a breach of contract. Seventh, only damages caused by the grant of the injunction are recoverable. Eighth, losses flowing from the litigation itself are not recoverable. It is patent that issues of causation loom large when there is an inquiry as to damages. These three principles come out of ***Air Express Ltd v Ansett Transport Industries*** 146 C.L.R. 249, a decision of the High Court of Australia.

17. From the review of the law so far, even if I were to agree with Mr. Watson that ***Newcomen*** decided what has been attributed to it by Laffoy J. in ***Shell E & P***, that is to say, that an undertaking as to damages survives a notice of discontinuance, that does not take care of the point made by Plowman J. that an inquiry as to damages is not automatic and that before an inquiry is made the court must decided whether the injunction was properly granted. It is only when this issue is determined that there can be any consideration of whether there ought to be an inquiry into damages. The issue going before Her Majesty in Council is whether the injunction was properly granted, that is to say, the foundation requirement for an inquiry is the issue to be resolved. In the case before me, the first instance judge, Jones J., had discharged the ex parte injunction but this was reversed by the Court of Appeal, which gave extensive reasons why the injunction should be granted until trial. Thus on the face of it, should I exercise my discretion to permit Olint to discontinue the matter NCB might be faced with the possible argument that since the Court of Appeal has held that it was appropriate to grant the injunction and that decision

has not been reversed then the necessary precondition for an inquiry into damages has not been met and so there cannot be an inquiry as to damages. At the risk of repetition, if ***Newcomen*** decided that a discontinuance before trial, in and of itself, precipitates an inquiry into damages then I do not share that view. It is not consistent with strong authority from England and Australia.

18. NCB has now been granted an opportunity to test the correctness of the Court of Appeal's decision. If successful, then it would have a decision from our final court that the injunction should not have been granted. This outcome, as stated above, does not necessarily mean that there must be an enquiry into damages because the authorities indicate that an inquiry is not a necessary and inevitable consequence of a finding that the injunction was wrongly granted.

19. I need to address a specific passage of her Ladyship, Laffoy J. in ***Shell E & P Ireland*** where she stated at page 20 (slip op):

> *It is clear on the authority of Newcomen v. Coulson, that, as a matter of law, the defendants'* ***entitlement to an inquiry as to damages*** *on foot of the undertaking given by the plaintiff on the application for the interlocutory injunction is not affected by the discontinuance of the plaintiff's claim. Such an entitlement as the defendants have to such an inquiry will survive the discontinuance of the plaintiff's claim.* (my emphasis)

20. Her Ladyship, in this passage, is treating the inquiry as to damages as an entitlement of the defendant. This is putting it too highly. All that the defendant can do is apply to the court to enforce the undertaking provided the preconditions are met. If it is treated as an entitlement then it would seem that for Laffoy J. an inquiry as to damages follows as a matter of course upon a discontinuance, a position that has been shown to be out of step with developments in England and Australia which appear to me to be correct.

21. The point being made is two fold. First, the ***Newcomen*** decision, in light of how it has been interpreted by Plowman J. is not strong authority for the proposition that an undertaking as to damages is automatically enforced as suggested by Laffoy J. Second, if Plowman J. is incorrect in his interpretation of ***Newcomen*** it would mean that it is arguable that the law is in a state of flux and so prudence would indicate that the discretion be exercised in favour of continuing the claim so that any undertaking as to damages can be addressed properly without the undertow of a discontinued claim.

22. It does not appear that the judgment of Plowman J. or ***Cheltenham*** or ***Air Express Ltd.*** was brought to the attention of Laffoy J. and it is by no means certain, analysing her reasoning, that her conclusion would necessarily have been the same had ***Ushers Brewery*** been brought to her attention. I say this because Laffoy J. did not feel it was necessary to examine fully whether an undertaking survives a discontinuance. She seems to have accepted that ***Newcomen*** was conclusive on the point and so she did not see the necessity to embark upon any examination of the rule she stated.

23. I think justice and fairness demand that I dismiss this application. NCB should not be lightly deprived of the opportunity to have the issue of whether the injunction was properly granted by the Court of Appeal tested in our highest court. Until the judgment of the Court of Appeal, the banker/client contractual relationship did not attract the slightest controversy. No one made a link between the Banking Act, the Fair Competition Act and the banker/client contract.

24. Should I decide otherwise Olint would have received what it wanted without a trial and then be protected against an inquiry into damages. This could not be a fair outcome. This is what Olint would receive were the matter to be discontinued now. First, a judgment, although challenged, which could be used as basis to say that the injunction was properly granted which could mean that NCB may not likely be able to demonstrate that the injunction was wrongly granted and so the gate way to an inquiry into damages may be closed. Second, a costs order in its favour. Third, the accounts would have been kept open thereby enabling Olint to have the full benefit of banking services. I pose the

rhetorical question, can it be just to deprive NCB of the opportunity of demonstrating that the injunction was not properly granted and so place itself in a position to persuade the court that the undertaking as to damages should be enforced in the event that the matter does not come to trial? I say no.

25. Let me now look at the countervailing arguments that were presented to me by Mr. Watson. Learned counsel submitted that the affidavit of NCB does not reflect that it suffered any damage. However, with respect, that is not the issue at this stage. The issue is whether I should exercise my discretion to permit Olint to discontinue its case which, if granted, would mean that the injunction would be dissolved. But as I have indicated, it is by no means a foregone conclusion that there must be an inquiry since according to the cases, such an inquiry only arises if it is established that the injunction was wrongly granted.

26. Mr. Watson has also quite rightly stressed that a court should not force a litigant to continue against his will. This is a very important consideration but clearly is not decisive of the issue.

27. Olint, according to Mr. Watson, cannot afford to go to the Judicial Committee of the Privy Council because the time between the appearance before the Board (January 26, 2009) and the date of trial (March 9, 2009) would make the cost of pursuing the claim prohibitive. The question of costs is always important and so far as possible the courts are under a duty to see that no party is unfairly prejudiced by his inability to finance the litigation. There are, however, limits to what a court can do in this regard. I am not sure that a court can prevent a more prosperous litigant from pursuing a valid and legitimate legal course merely because his opponent is having difficulty funding the legal battle. This is especially so when there is no evidence that NCB is using its financial might to gain an unfair advantage. Having said this, it is also important to appreciate that a litigant, in this case NCB, is entitled to pursue its legal remedies to the highest court if it feels that this is necessary. It is might be possible to argue permit the discontinuance in these circumstances may infringe NCB's constitutional right to have it contentions decided by a properly a fair, impartial and properly constituted court.

28. Finally, on the aspect of cost. Even the dullest of persons would have realised that this particular case was going to be keenly contested every step of the way. NCB's position from the beginning has been that it has the right to terminate the contract it has with the customer on reasonable notice if the contract did not stipulate the notice period necessary before the contract could be terminated. Olint, for its part, embarked on a highly sophisticated argument, predicated on subtle and intricate interpretations of the Banking Act and the Fair Competition Act. The "new legal position" regarding banker/customer contractual relations that Olint was endeavouring to say now exists because of the Banking Act and the Fair Competition Act is adequately set out in the judgments of Jones J. and the Court of Appeal. The arguments deployed by Olint, I must say, were not ones that would readily come to mind when reading the statutes. It was these arguments Olint relied on to secure the injunction. In effect, what I am saying is that this type of litigation was always going to be fiercely contested, expensive and exhausting. Competition law cases tend to be quite expensive. Proving dominant position and abuse of dominant as Olint was alleging is never an easy task. The identification of the relevant market would be a crucial factor in such case. One would have thought that Olint would have given great thought to the possible costs before embarking on its chosen path. It would be a stunning bit of lawyering if the possibility of an interim order going to the highest court in our legal system had not crossed the minds of the Olint's legal advisers. This ought to have been factored in when embarking on this litigation. One would expect that the possibility of this happening was raised and considered, then after mature reflection a rational decision taken of the risks and costs involved. One would have expected Olint to ask its legal advisers the what-if questions. One could hardly be heard to complain if an obvious worse case possibility has come to pass. After all, one cannot pull a tiger by the tail and then be heard to complain if it responds quite ferociously with all the power at its disposal.

29. At the end of the judgment which was in draft form, Olint applied for leave to appeal. I declined to grant leave to appeal. I promised to include the reasons in the final judgment. This I now do.

30. The Court of Appeal in the case of ***Bailey v Incorporated Lay Body of the Church in Jamaica and the Cayman Islands in the Province of the West Indies*** S.C.C.A. No. 103/2004 (delivered May 25, 2005) had to interpret rule 1.8 (9) of the Court of Appeal Rules 2002. It reads:

> *The general rule is that permission to appeal will only be given if the Court or the Court below considers that an appeal will have a real chance of success.*

31. This rule had to be interpreted in a case in which the judge at first instance had granted leave to appeal. The respondent to the appeal took the point that the leave to appeal ought not to be granted because there was no real prospect of success and so leave to appeal ought not to have been granted. The Court of Appeal agreed and set aside the grant of leave to appeal

32. In effect, the court held that a first instance judge needs to determine whether the appeal has a real prospect of success. This places the judge in the somewhat awkward position of deciding whether there is a real prospect of his order being reversed having given a considered view of the matter.

33. Applying that test to this case I have concluded that Olint has no real prospect of success because the law as I have stated it does not appear to be in doubt and this case falls squarely within the legal principles.

Conclusion

34. Application dismissed with costs to NCB. Leave to appeal refused.