

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. HCV-02553 of 2009

**BETWEEN WILD HARBOUR JAMAICA CLAIMANT
 LIMITED**

A N D MBJ AIRPORTS LIMITED DEFENDANT

Lancelot Cowan for Claimant instructed by Lancelot Cowan & Associates.

Camille Royes for Defendant

Heard: May 27, 2009 and June 2, 2009

**Claim for injunctive relief only - no cause of action pleaded -
whether any serious issue to be tried**

Cor: Rattray, J

(1) The parties to this action, Wild Harbour Jamaica Limited ("Wild Harbour") and MBJ Airports Limited ("MBJ Airports") entered into a Retail Module Licence Agreement for a period of one year commencing the 15th March, 2006 and ending on the 14th March 2007, under which Wild Harbour was permitted to operate a

kiosk at the Sangster International Airport, Montego Bay in the parish of St. James.

- (2) The nature of Wild Harbour's business involved inter alia, providing information to the local and international travel and leisure market, distributing an information book of attractions and events in Jamaica and selling discounted entrance fees to those attractions by way of booklets containing coupons, primarily to visitors to Jamaica on their arrival at the airport in Montego Bay. The location of such an enterprise was therefore of some importance, as direct access to visitors was crucial to its success. In that regard, the arrival section of the airport was described by the Claimant as the optimal location for its business.
- (3) Wild Harbour contended that on the expiration of its first licence, a new licence was entered into by the parties for a two (2) year period commencing June 18, 2007 to May 17, 2009, but it was accepted by both parties that that licence was never executed.
- (4) By letter dated 15th April, 2009, MBJ Airports wrote to Wild Harbour giving Notice of Cancellation of the

licence under which it operated the kiosk at the Sangster International Airport, effective the 17th May, 2009. That is the date on which the second licence, had it been executed, would have terminated by effluxion of time. Wild Harbour objected to this Notice, complaining that it was in breach of Article 28 of the second licence which provided for cancellation or termination at any time by 90 days notice in writing. The Notice given only provided a 32 day notice period.

(5) Wild Harbour, through the Affidavit of its Director, Bruce Wedderburn objected to the conduct of representatives of MBJ Airports during the currency of both licences and relied on letters and e-mail in support of those objections. It also alleged that the purported cancellation was unjustified and unlawful and would cause it to suffer severe and irreparable harm, loss and damages, which would not only affect its business, but would also impact negatively on its reputation in the tourism industry.

(6) As a consequence Wild Harbour instituted proceedings by way of Claim Form on the 15th May, 2009 against MBJ Airports seeking the following:

- (a) An injunction restraining the Defendant by itself, its servants or agents from evicting or otherwise removing the Claimant from its occupation of the retail module kiosk at the Sangster International Airport presently occupied by Claimant; and
- (b) An injunction restraining the Defendant by itself, its servants or agents from entering or remaining on the retail module kiosk at the Sangster International Airport, presently occupied by the Claimant; and
- (c) An injunction restraining the Defendant by itself, its servants or agents from interfering in any manner in the Claimant's business operations at the Sangster International Airport; and
- (d) An injunction restraining the Defendant by itself, its servants or agents from carrying out, enforcing or otherwise acting upon the Notice of Cancellation dated April 15, 2009, served on the Claimant by the Defendant.

2. Damages for loss of business;

A Notice of Application for Court orders was also filed on the 15th May, 2009 seeking the same Injunctive relief as set out in the Claim Form until the trial of this action.

(7) MBJ Airports in responding to this Claim filed its Defence on the 20th May, 2009 and an Affidavit of Elizabeth Brown Scotton, its Chief Commercial Officer in response on the same day. While admitting the initial licence agreement, the Defendant denied that any new licence was ever executed between the parties after expiration of the first licence. It contended that Wild Harbour continued to occupy the licenced space on an overholding basis pursuant to Clause 29 of the original lease, and as such conducted its operations on a month to month basis. That clause provided that:-

"If the Licensee continues its operations after the end of the Term of this Licence and without the execution and delivery of a new licence or written renewal or extension of this Licence, then the Licensee will be considered to be conducting its operations on a month to month basis at the sufferance of the Licensor, and during such period of continued operations, the parties shall be subject to the covenants and conditions herein contained except as to length of term."

- (8) It further contended that it sought to terminate Wild Harbour's licence in March, 2008, but was blocked by an Injunction obtained on an ex parte basis by Wild Harbour in a previously filed suit against MBJ Airports. In order to dispose of matters on an amicable basis, MBJ Airports agreed to allow Wild Harbour to remain in the licensed space until May 17, 2009, the date the second license would have expired, on condition that the Injunction obtained in that earlier suit be withdrawn.
- (9) The Claimant however made attempts to obtain an extended period of eighteen (18) months to continue its business at the Airport, which were rejected by the Defendant. Correspondence exhibited to the Affidavit of Mrs. Brown Scotton reflected the Defendant's position that it would not agree to Wild Harbour remaining at the airport after May 17, 2009.
- (10) MBJ Airports maintained that its letter of April 15, 2009 only sought to terminate the license of Wild Harbour by reason of expiration of time and that Wild Harbour was aware, even before that letter was sent, that the licence would have expired on or around that

date and that MBJ Airports had no intention to extend the Claimant's licence to occupy the kiosk at the Airport past that date.

(11) Counsel for the Defendant argued that as the licence expired on the 17th May, 2009, the Claimant had no licence or legal authority to occupy or operate a business from the Airport premises after that date. Further, that no cause of action had been shown on the face of the pleading filed on behalf of Wild Harbour, and that on a consideration of the applicable principles with respect to the grant of an injunction, no such order should be made in the circumstances of this case.

(12) Section 49(h) of the Judicature (Supreme Court) Act empowers the Court to grant an injunction,

“... by an interlocutory order of the Court, in all cases in which it appears to the Court to be just or convenient that such order should be made.”

The learned authors of Bullen and Leake and Jacob's Precedents of Pleadings in the 12th Edition at page 534;- stated

"The true principle, however, on which the court should act in granting an injunction to enforce any right, legal or equitable, was laid down by **Jessel M.R. in Aslatt vs Corporation of Southampton (1881) 16 Ch.D 143 at 148** where he said:

'The words 'just or convenient' did not mean that the court was to grant an injunction simply because the court thought it convenient: it meant that the court should grant an injunction for the protection of rights or for the prevention of injury according to legal principles; but the moment you find that there is a legal principle, that a man is about to suffer a serious injury, and that there is no pretence for inflicting that injury upon him, it appears to me that the court ought to interfere.' "

- (13) It is trite law that the Court will only grant an injunction to support a legal or equitable right. The question then has to be asked, what is the legal or equitable right for which this Claimant seeks protection? The licence under which it was allowed to occupy space at the Sangster International Airport

expired on the 17th May, 2009, over two (2) weeks ago. Perhaps this question can be put another way. What is the cause of action on which the Claimant relies in bringing these proceedings?

- (14) The Claim Form filed on Wild Harbour's behalf sought the four (4) orders for Injunctive relief mentioned earlier in this ruling, as well as Damages for Loss of Business. An application for interlocutory relief is not in or by itself a cause of action. Damages for loss of business is a form of relief. I can do no better than to borrow from the wisdom of Lord Diplock when he opined in the case of Siskina (Owners of Cargo) and others vs Distos Compania Naviera S.A 1979 AC 210 at page 256

"A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary

and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction."

- (15) This Court is a Court of Pleadings. Nowhere on the face of Claim Form or the Particulars of Claim has a cause of action been alleged or pleaded. Without a cause of action, the relief sought cannot be granted. It follows that if no cause of action has been pleaded, there is no serious issue to be tried. My view in this regard is reinforced by the inability of the Claimant to show any legal right it has, for which it has sought protection. The licence by which it was permitted access to and occupation of a kiosk at the Airport complex terminated on the 17th May 2009. Correspondence before this Court clearly and unequivocally outlined MBJ Airports' position that such access would end on that date and the company was not prepared to extend the licence or that deadline.

(16) It was Lord Diplock in the noted case of **American Cyanamid Company vs. Ethicon Ltd (1975) 1 AER 504 at page 510** who stated:

"So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

(17) I am satisfied that there is no need to consider where the balance of convenience lies in this matter, as the material before this Court fails to disclose that the Claimant has any real prospect of succeeding in its claim for a permanent injunction at trial. The application for injunctive relief is therefore refused.