[2016] JMCC Comm 30

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2016CD00120

BETWEEN	**ANSA COATINGS JAMAICA LIMITED**	**CLAIMANT**
AND	**ASAPH PROMOTION & DISTRIBUTION COMPANY LIMITED**	**1ST DEFENDANT**
	CHRISTOPHER BOWEN	**2ND DEFENDANT**
	KENAZ PROPERTIES & DEVELOPMENT COMPANY LIMITED	**3RD DEFENDANT**

Interlocutory Injunction – Mareva – Mandatory – Trademark – Sub-franchise Agreement – Whether damages adequate remedy – Whether sufficient evidence of likely dissipation of assets – Justice of the case.

Ronald Young instructed by Young & Parker for Claimant

Kelly Greenaway instructed by Samuda & Johnson for Defendants.

Heard: 22nd July 2016 and 29th July, 2016 & 28th October, 2016

In Chambers

BATTS, J.

[1] On the 29th July 2016 I dismissed the Claimant's application with costs and promised to reduce my reasons to writing at a later date. This judgment fulfils that promise.

[2] The Application was filed on the 13th June 2016 and is for 12 paragraphs of relief as follows:

i. An Injunction prohibiting the 1st Defendant whether through its agents assigns or otherwise from occupying 74 Lady Musgrave Road, Kingston 6 in the parish of St. Andrew

ii. An Injunction prohibiting the 1st Defendant from selling any products including paints and paint accessories relating to such paint and paint products distributed by the Applicant, including tinted bases and products manufactured by other persons to be promoted and sold by the Applicant.

iii. An Injunction prohibiting the 1st Defendant from soliciting the customers of the Applicant, or any of the customers engaged in the sale or distribution of the Applicant's paint or paint products or to sell to the customers of the Applicant any paint or paint products.

iv. An Order to return to the Applicant any leftover paint products remaining at 74 Lady Musgrave Road, Kingston 10,

v. An Order that the 1st Defendant must immediately provide the Applicant with all customer accounts, customer information, books and records, promotions and price lists and all other records, files and materials relating to the operations of the franchise business of the Applicant.

vi. An Order mandating the 1st Defendant to immediately and permanently cease to use by way of advertising in any manner the trademarks, trade names, and service marks associated with the Applicant and its products.

vii. An Order that the 1st Defendant yield up possession of the premises being that of 74 Lady Musgrave Road, Kingston 10 and/or all of the property thereon being all fixtures which are affixed to the premises.

viii. An order to Abraham Kong, Warner Kong and Lola Kong whether through their agents, or otherwise to provide keys to the Applicant for the shop located at 74 Lady Musgrave Road, Kingston 6 or in the alternative an Order that Kenaz Properties and Development Company Limited do provide keys to the Applicant.

ix. An Injunction restraining the 1st and 2nd Defendant from removing sums in their accounts held at National Commercial Bank, Sagicor Bank or other deposit taking institution.

x. An injunction preventing the Defendants from dissipating or removing any assets, which are owned by them from the jurisdiction.

xi. An Order that the Defendants make a disclosure of all sums which are currently being held in accounts in Jamaica or elsewhere, in the name of Asaph Promotion and Distribution Company Limited; for the shop located at 74 Lady Musgrave Road, Kingston 6.

xii. An Order to Disclose accounting including accounts receivables for paint and paint products sold on behalf of the Applicant.

[3] The application is supported by an affidavit of Trevor Lloyd, dated the 10th June 2016 and filed on the 13th June 2016 and 2 affidavits of Lisa Kong one dated and

filed 4th July 2016 and the other filed on 13th July 2016. The Defendants filed an Affidavit in answer on the 15th July 2016. Particulars of Claim and a Defence have been filed in the action.

[4] I am indebted to the parties for their respective written submissions. These were supplemented by oral submissions. The submissions have been of inestimable value. The fact that I do not repeat them in detail reflects more on my desire to be concise than on their utility.

[5] The claim concerns alleged breaches of a sub-distribution and sub-franchise agreement entered into on the 16th December, 2014 between the Claimant and the 1st Defendant (Attachments ANSA 5 and ANSA 6 to the Particulars of Claim). The sub-franchise agreement is the only one exhibited to the Affidavit of Trevor Lloyd dated 10th June 2016 and filed in support of the application. It is alleged by the Claimant that the 1st Defendant has breached the agreements by failing to pay for product delivered and sold. The Claimant says that it duly terminated the agreement and therefore the 1st Defendant ought to deliver up possession of the premises occupied pursuant to and in accordance with the terms of their agreement. The Claimant also alleges fraud against the 1st Defendant. As regards the 2nd and 3rd Defendants fraud and conspiracy to defraud are alleged.

[6] The Claimant says it was induced to, jointly with the 1st Defendant, enter a lease agreement with the 3rd Defendant. The 3rd Defendant, it is alleged, purported to be the property manager for the registered proprietor of the said premises. The 2nd Defendant was the sole director of the 3rd Defendant. The 2nd Director is also a director of the 1st Defendant. Paragraphs 9 and 10 of the Particulars of Claim:

> "9. That based on a representation by the 2nd Defendant that the amount to be paid as rent to the Registered Proprietor was US $2,600, it was agreed that the 1st Defendant would pay to the 3rd Defendant the amount of US $2,600 monthly which is the amount payable to the

Claimant pursuant to the sub-franchise agreement to the owners of 74 Lady Musgrave Road, Kingston 6 for the occupation of the premises.

10. That the 3rd Defendant the only director of whom is that of the 2nd Defendant who is also a Director of the 1st Defendant was set up for the purposes of defrauding the Claimant, as the sums paid by way of rent for occupation of 74 Lady Musgrave Road Kingston 6 was not US $2,600 but approximately US $1,200 monthly."

The Defendants admit the entry into the contracts alleged. It is however alleged that the 2nd Defendant signed the lease agreement on behalf of the 1st Defendant and not in a personal capacity. It is also alleged that subsection 4.1 of the sub-franchise agreement was "consensually modified by consent" so as to allow the 1st Defendant to pay the rental directly to the 3rd Defendant. The Defendants further contend that as the 1st Defendant was a co-lessee with the Claimant it was at all times orally agreed that Clause 17.5 (c), requiring delivery up of possession on termination of the sub-franchise agreement, was not applicable. The Defendants challenge the accuracy of the Claimant's statement of account as well as the allegations of fraud. The Defendants asserts that they remain in possession of the premises and are prepared to allow the Claimant to attend and remove all its possessions and equipment. The Defendant's also admit that they intend to supply paint of a different brand from that location. By way of an ancillary claim the 1st Defendant counter claims against the Claimant for damages for:

a) Failure to deliver in any reasonable quantity or at all the wood care products in a certain purchase order

b) Failure to deliver paint and paint products in certain purchase orders.

c) Placing on hold the 1st Defendant's line of credit in breach of the sub-franchise agreement.

d) Failing to supply 2k bases in accordance with an automotive paint product agreement.

The 1st Defendants pleads also a set-off with its counterclaim.

[7] It is clear from a perusal of the Claim, Defence and the respective affidavits that there are triable issues of fact. It cannot be gainsaid, and it is not alleged, that the claim has no real prospect of success. It is also appreciated by both sides that it is not for me at this interlocutory stage to resolve any of these factual issues.

[8] The relevant principles applicable to the consideration of interlocutory injunctive relief are well known and are to be found clearly articulated in ***American Cyanamid Co V Ethicon Ltd [1975] 1 AER 504*** *and* ***NCB v Olint*** [2009] 1 WLR 1404. In the latter case their Lordships clarified the relevance of a distinction between simple prohibitory injunctions and those which required the respondent to do a particular act i.e. mandatory injunctions. Their Lordships said in this regard, at para. 20,:

> ***"There is however no reason to suppose that in stating these principles, Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases, the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other ... What is true is that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than in cases in which a Defendant is merely prevented from taking or continuing with some course of action ... But this is no more than a generalisation. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the***

> ***injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the Defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in Shepherd Homes Ltd v Sandham [1971] Ch 340, 351, "a high degree of assurance that at the trial it will appear that the injunction was rightly granted."***

Their Lordships went on in the judgment to discourage a "box ticking" approach to the determination of these issues.

[9] In this matter, the Claimant seeks an assortment of Orders. Some of them require the Defendants to quit and deliver up premises although the landlord is not a party to these proceedings. The Claimant is a co-tenant of the 1st Defendant, but the Claimant is not in possession. The relief claimed also includes Mareva and Anton Pillar type Orders with respect to the bank accounts and assets of the Defendants. Injunctive relief in relation to the use of the Claimant's trade and service marks and sale of Claimant's product are also sought. Orders for disclosure/discovery of information and an accounting are the third category of injunctive relief applied for.

[10] As it relates to the freezing orders, the Claimant has failed to provide any evidence to support its expressed fear that the Defendants may dissipate their assets to avoid paying damages. Indeed as Counsel for the Defendants points out, her clients were given more than a month's notice of the application. Even so, there is no evidence they have taken any step to dissipate in the interim.

[11] Claimant's counsel relies on the authorities of ***Bank of Bermuda v Todd BM 1993 CA 1 (4TH February 1993)*** and ***Neidersachen [1984] 1 All ER 398,*** to which that case refers, in support of a submission that previous conduct by a Defendant which demonstrates a want of probity will support the grant of a freezing order.

[12] I understand from the authorities that a freezing order is granted if a Claimant establishes:

a) The Court has jurisdiction over the claim

b) The Claimant has a good enforceable claim

c) The Defendant has assets in the jurisdiction

d) There is a real risk that the assets will be removed from the jurisdiction or otherwise dissipated.

e) There is a real risk that if an injunction is not granted the Defendant will be unwilling or unable to satisfy the claim

f) There is a balance of convenience in favour of the grant of the injunction. In this regard, the ultimate test is whether the case is one in which it is just and convenient to grant the order.

[13] The Claimant has not provided any evidence to support a suggestion that there is a real risk of dissipation. Unlike in the cases cited there is no referable history of disregard for legal processes or criminal conduct. The mere allegation that the Defendants or one or the other of them had misled the Claimant as to the amount of rent and/or their status in relation to the owner of the premises is inadequate to satisfy the requisite standard. Moreso, because these are allegations actively denied by the Defendants.

[14] As regards relief relating to the use of trade and service marks or sale of product, there is no evidence that the Defendant is now trading or using the mark, or is threatening to do so. The submission that the leased premises is somehow attached to the Claimant's brand and associated with it, is unsupported by evidence on affidavit. In ***Kali Kwik Printing (UK) Ltd v. Rush (I995) IP & T***

Digest 32., on which the Claimant relied, it does appear there was an express covenant barring competition for 2 years within a 10 mile radius. The agreement attached as Exhibit 1 to the Affidavit of Trevor Lloyd contains no such provision. The Defendants are not at this time operating although they say they plan to reopen and to sell product other than the Claimant's. This is, to my mind, not to be prohibited at this interlocutory stage inasmuch as the factual issues are yet to be determined. The Defendant is in possession and would suffer a greater irremediable loss if they were to be prevented from trading now but were ultimately successful at trial, than would the Claimant if the injunction is refused.

[15] A similar concern relates to the Claim for a possessory order at this interim stage. Surely, the co-tenant who has always been in possession ought not to be disturbed unless there is evidence such as to indicate the likely result at trial or that damages would be incalculable. This latter is unlikely as the co-tenant who remains in possession would necessarily have to account either for the portion of the rent collected and/or a share of profits earned. Again, these are issues ultimately to be resolved by a court at trial. At this juncture the justice of the case favours the maintenance of the status quo insofar as the possession of the leased premises are concerned.

[16] Orders for discovery and accounting are really not appropriate at this interlocutory stage. The Order to account, would be a final remedy. In any event at the Case Management stage of proceedings the court will no doubt consider standard and/or specific disclosure Orders.

[17] The Claimant's applications however fail for other more generic reasons. In the first place, and as the Defendants' counsel submitted, there is no evidence that the Claimant is in a position to honour any undertaking as to damages. This is very important and particularly in a case such as this, where the Claimant is a company recently incorporated in Jamaica for the purpose of distributing goods of an overseas principal. It suggests that the Claimant may not have any assts in Jamaica. Its undertaking as to damages may not be worth much.

[18] In this case, also, it does appear that damages may be an adequate remedy for the Claimant. The claim is for loss in relation to amounts invested in the premises. These are quantified. The goodwill and loss of business are also matters that courts, in matters of this nature, quantify. Evidence as to sales history and expert opinion, can be guides. The losses and potential losses of the Claimant are more likely to be accurately computed than any losses to the Defendant in the event the injunctions were to be granted. This is because there is a history, albeit a short one, of the sale of Claimant's product in Jamaica. On the other hand if the Defendant is prevented from trading in other brands of paint, or from utilizing the premises, there will be no track record by which to guide a court as to their actual or estimated earnings and hence very little from which to compute their loss. Insofar as damage would be an adequate remedy it does appear that it is less likely to be so for the ultimately successful Defendant in this case than for the Claimant.

[19] In the final analysis therefore, the application for interlocutory injunctive relief was refused because on the evidence the least irremediable prejudice will be caused by refusing the injunction and allowing the status quo to remain. That status let me be clear is that (a) the Defendants are in possession of the premises; (b) they are not trading in the Claimant's goods or goods branded with the trademark associated with the now terminated sub-franchise agreement. (c) The Defendants have expressly agreed to allow the Claimant to attend to remove all their property and products from the premises.

[20] On the matter of costs I agree with the submissions at Para 80 of the Defendant's written submissions filed on the 21st July 2016. Costs will go to the Defendant to be taxed or agreed.

David Batts
Puisne Judge