[2016] JMCC Comm 31

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISON

CLAIM NO. 2016CD00353

BETWEEN	**SENTRY SERVICES SECURITY COMPANY LIMITED**	**CLAIMANT**
AND	**THE UNIVERSITY OF TECHNOLOGY JAMAICA**	**DEFENDANT**

IN CHAMBERS

Mr. Ransford Braham Q.C. and Mr. Jeffery Foreman instructed by Braham Legal for the Claimant.

Mr. Gavin Goffe and Mr. Jahmer Clarke instructed by Myers Fletcher & Gordon for the Defendant.

9th and 10th November, 2016

Injunction – Principles for grant

Contracts- Whether 'month to month' contract terminable by one month's notice

LAING, J

The application

[1] The Claimant by Notice of Application filed 1st November 2016 has sought injunctions preventing the Defendant from terminating its services in what the Claimant says is a breach of an agreement between the parties ("the Existing Contract"), the terms of which are contained in a letter from the Defendant to the Claimant dated 4th February 2016. The Claimant has also sought various declarations and other relief.

The Background

[2] The Claimant and the Defendant were parties to a contract dated 17th October 2013 which in fact came into effect on 11th November 2013 ("the Expired Contract"). It was expressly stated to be for aduration of 2 years and was terminated by effluxion of time. The Expired Contract provided for the Claimant to provide security services and systems to the Defendant.

[3] It is common ground between the parties that the Expired Contract is at an end (save to the extent that its terms and conditions may have been incorporated by reference) and that the current contractual relationship between the parties is pursuant to the letter dated 4th February 2016, the terms of which are set out hereunder:

> *" As you are no doubt aware, the contract for Security Services by Sentry Services Security Company Limited has expired and as a consequence the provision of security services by your company to the University of Technology, Jamaica is based on a month–to-month agreement.*
>
> *The Government of Jamaica requires that security services be acquired via the tender process.*
>
> *This is to advise that until the process is concluded, your organization continues to provide security services to the University of Technology, Jamaica as per the terms and conditions of the expired contract.*
>
> *I am sure that you are aware that this does not preclude your organization participating in the tender process.*
>
> *Please sign the attached copy of this letter acknowledging your acceptance of the month-to-month contract on the aforementioned terms and conditions."*

[4] By letter dated 10th October 2016, ("the Termination Letter") the Defendant gave notice to the Claimant that the month to month arrangements will cease effective 11th November 2016. It is following this notice that this application for an injunction was brought.

The applicable principles

[5] In determining the circumstances in which an interim injunction ought to be granted our courts have consistently been guided by the principles laid down **American Cyanamid v. Ethicon [1975] A.C. 396** which for convenience have often been reduced to three main considerations, which in summary are:

1. Is there a serious issue to be tried?;

2. Would damages be an adequate remedy?;

3. Does the balance of convenience favour the granting of an injunction?

Serious issue to be tried

[6] It is trite law that the application for interlocutory relief is not in itself a cause of action. The claim is for a breach of contract and the particulars of breach are set out in paragraph 9 of the particulars of claim as follows:

> *"PARTICULARS OF BREACH*
>
> ***9.1*** *Serving notice of termination of the agreement prior to the completion of the public procurement process for the provision of security services;*
>
> ***9.2*** *Serving notice of termination of the agreement in breach of the termination provisions contained in the expired contract (dated October 17, 2013)*
>
> ***9.3*** *Failing to complete the public procurement process for the provision of security services;*
>
> ***9.4*** *If the public procurement process for the provision of security services is completed, failing to permit the Claimant to participate;*
>
> ***9.5*** *Failing to observe the terms and conditions of the expired contract (dated October 17, 2013);*
>
> ***9.6*** *Breach of statutory obligation to follow the Government of Jamaica public procurement rules as outlined in the Handbook of Public Procurement; "*

[7] Mr. Braham Q.C. submitted that the letter dated 4th February 2016 has to be examined in its entirety in order to ascertain the terms and conditions of the Existing Contract. He argued that the use of the term "*month to month*" is qualified by the statement that "*until the process is concluded, your organization continues to provide security services to the University of Technology, Jamaica as per the terms and conditions of the expired contract.*" The natural and ordinary meaning of these words he argued, was that until the public procurement process is completed, the Claimant is required to provide security services to the Defendant according to the terms of the Expired Contract.

[8] Mr. Braham Q.C. confirmed that he was not suggesting that the Defendant could not terminate the Existing Contract. He conceded that even if the Court accepted his construction and interpretation of the plain and ordinary meaning of the words referred to in the preceding paragraph, the Existing Contract is terminable and what is arguable is the length of the appropriate period of notice.

[9] It was by submitted by learned Queen's Counsel relying on **Halsbury's Laws of England, Landlord and Tenant**, **Volume 62 (2012) Weekly, Monthly and other Periodic Tenancies para 233,** (as tailored and applied in the context of the relevant period under consideration), that a monthly or other periodic tenancy does not expire at the end of the month or period or at the end of each succeeding month or period, with a re-letting at the beginning of each month or period, but rather there is a springing or future interest which arises and which is determined only by a proper notice to quit.

[10] Learned Queen's Counsel submitted that there was the importation of the terms and conditions of the Expired Contract (including the termination clause) into the Existing Contract by the letter dated 4th February 2016. Accordingly, because the termination clause 9(h), provides that not less than three months notice of termination is effective, one effect of the importation of this clause is that the Defendant could not have properly terminated the Existing Contract by the Termination Letter dated 10th October 2016 which purported to give only one

month's notice. It is therefore useful to note from the outset, that on the Claimant's case for breach of contract, taken at its highest, the harm it may suffer as a result of the breach of which it complains is that it would be deprived of an additional two months notice. It is the compensation for the loss of these two additional months to which it would be entitled, if it is successful on its claim for breach of contract.

[11] Mr. Goffe in response submitted that the use of the use of the term "*month to month*" in the 4th February 2016 letter meant that the Existing Contract can be terminated on one month's notice as in the case of a monthly tenancy. He argued further, that the specific provision of the Expired Contract which required three months notice was applicable only in the event that a party wished to terminate the Expired Contract before the term of the contract. Mr. Goffe sought to rely on the case of **Thomas Hamilton& Associates Limited v Digicel (Jamaica) (Mossell) Limited 2016 JMCA Civ 22,** but I agree with learned Queen's Counsel that it is of limited assistance because in that case it was common ground that the second contract had expired by effluxion of time and there was no issue as to what was the appropriate contractual period of notice for termination based on an imported termination clause, as in this case. Furthermore, that case was concerned to a large extent with the issue of legitimate expectation.

[12] The Court is guided by Lord Diplock's cautionary statement in **American Cyanamid v Ethicon Ltd**. **1975 A.C 396 at 407 letter G** as follows:

> *"It is not part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at trial."*

[13] Whereas I accept that there is an issue of construction raised as it relates to whether the 3 month termination notice provision is applicable to the Existing Contract (which purports to be 'month to month'), this is not a case where the

legal rights of the parties depend on disputed facts which will have to be, or are more appropriately, determined by the Court at trial. I find that the issue of construction which has been raised can be adequately examined based on the documents which are currently before the Court in order to determine whether there is a serious issue to be tried.

[14] Having analysed the claim, the evidence before the Court and the arguments of counsel, I do not find that there is a serious issue to be tried in relation to the breach of contract claim as pleaded. The 4th February 2016 letter expressly provides that the contract is expressly stated to be "*month to month*" and I find that as a matter of construction, the referencing of the Expired Contract and the termination clause contained therein does not displace the right of the Defendant to give one month notice of termination, as would be the case in a monthly tenancy.

[15] One of the particulars of breach pleaded by the Claimant is "*Breach of statutory obligation to follow the Government of Jamaica public procurement rules as outlined in the Handbook of Public Procurement*". I do not accept that any such breach can be properly prayed in support of the claim for breach of contract as pleaded. Any such breach, in my view, cannot affect the validity of the notice of termination of the Existing Contract by way of the Termination Letter. This is particularly so, because the Existing Contract is clearly an interim arrangement which itself was not subject to the invitation of bids, but was one which benefitted the Claimant by virtue of it having been a party to the Expired Contract.

[16] It is noted that one of the orders sought on the claim is for a declaration that the Defendant is required to comply with the public procurement procedure as outlined in the handbook of Public Procurement Procedures. In my view this is a separate and distinct issue from the issue of whether the Claimant can properly terminate the Existing Contract by the Termination Letter. There is no pleading or evidence in support of the application which points to an existing breach of the Public Procurement Rules. What is suggested is that such a breach is anticipated

and in my view this is not a pre-existing cause of action and does not support a finding that there is currently a serious issue to be tried in this regard.

[17] Based on my finding that the Claimant has not demonstrated that there is a serious issue to be tried, the application fails at the first hurdle.

Are damages an adequate remedy?

[18] Notwithstanding my conclusion that the Claimant has not demonstrated that there is a serious issue to be tried, in an effort to give the application the widest latitude, I will also consider the application whether damages would be an adequate remedy in these circumstances of this case, had the Claimant demonstrated that there is a serious issue to be tried.

[19] Mr Braham Q.C. submitted that damages would not be an adequate remedy in this case because there are special circumstances. It was submitted firstly, that damages would not be an adequate remedy because of the effect of that the termination of the Existing Contract would have on the reputation of the Claimant, which it's Deputy General Manager Ms. Grace-Ann Ruddock deponed "*has been built over the past thirty Three years*". Ms Ruddock's evidence is that:

> *"...If UTECH terminates Sentry's services as of November 11, 2016 and the procurement process has not even started this will create the impression that the Company was not carrying out its duties or provided poor service. This especially so when UTECH allowed the previous security provider to continue to perform its services beyond the time of expiration of its contract with then"*

[20] I cannot see how the impression to which Ms Ruddock has referred could reasonably be arrived at by any potential client or any rational person. One would expect that there are a number of facts and considerations which would drive the decision of the Defendant to terminate the Existing Contract. This is especially so in light of the fact that a new procurement process is being contemplated or embarked upon. One such factor which would be foremost would be cost and what might have happened in relation to a previous service supplier is situation specific. Reasonable people understand this. The leap to the conclusion that a

termination of the Claimant's month to month contract is based on poor performance would be unsupported by any evidence and irrational, especially in the context of the asserted good reputation of the Claimant built up over thirty three years.

[21] I accept the submission of Mr. Goffe that injury to reputation would not be a recoverable head of damages in a claim for breach of contract and consideration of this point ought not to occupy the Courts time especially because there is no claim in tort. I also accept Mr. Goffe's submission that the Defendant is under no contractual obligation or duty to enhance (or I would add, to maintain) the profile of the Claimant in the security industry that would be in consistent with the terms of the Existing Contract and the right of the Defendant to terminate it.

[22] It was also submitted by Mr. Braham Q.C. that the effect on third parties is also another factor which makes this a case in which damages would not be an adequate remedy. Ms. Ruddock explains in the affidavit that the termination will not permit the Claimant to make adjustments across all of their operations to accommodate security guards at other locations because the other locations are smaller than UTECH and there is not enough space to place extra personnel. Her evidence is that:

> *"...If UTECH is allowed to proceed then Sentry will be required to terminate the contracts of approximately 150 guards right on the cusp of the Christmas season. This will result in hardship on those guards."*

[23] Mr. Goffe submitted that the Defendant has no duty to the security guards as third parties. If they cannot be redeployed then their only recourse is to the protections which the law provides in cases of loss of continued employment such as exists in the requirements for notice of termination and the provisions for redundancy. I accept Mr. Goffe's submission on this point and I do not accept that on the facts before the Court this is a consideration which weighs in favour of a finding that damages are not adequate.

[24] Mr. Braham Q.C. also submitted that because of the commercial hardship that the Claimant would suffer in the absence of an injunction the balance of convenience favours granting the injunctions. Learned Queen's Counsel relied on the first instance decision of R.J. Sewell J in the Canadian case of **Community Outreach Pharmacy Limited v British Colombia (Minister of health) 2015 BCJ No 2919** to support this submission. In that case an injunction was granted in circumstances where the court found that the applicant would suffer irreparable harm if its enrolment was terminated. In paragraph 25 of the Judgment the learned judge said as follows:

> *"Irreparable harm describes the type of harm rather than the magnitude of harm established by an applicant. Irreparable harm is harm that cannot be compensated by an award of damages"*

[25] The Court found that in all the circumstances of that case, including his conclusion that unless the injunction was granted the applicant would be put out of business, the balance of convenience favoured the granting of the injunction.

[26] In this case there is no evidence that the Claimant will suffer irreparable harm, or would be put out of business if the injunction is not granted. The Claimant is a commercial entity subject to the risks associated with doing business in Jamaica. One of these risks include the possibility of clients/locations, even "*high profile*" ones, being lost from time to time and the associated cash flow problems which may be consequential. I do not find on the evidence before me that that any commercial hardship which might be suffered by the Claimant is such that it could not be adequately compensated in damages.

Guiding Principles

[27] In ***National Commercial Bank v Olint Corp. Limited Privy Council Appeal No. 61 of 2008***, the Privy Council reaffirmed the American Cyanamid principles and has offered further useful guidance on the approach to interlocutory injunctions. At paragraph 16 of the Judgment delivered by Lord Hoffman it is stated as follows:

> *"16. ...It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in American Cyanamid Co v Ethicon Ltd [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted."*

[28] I find that this is a case in which damages will be an adequate remedy for the Claimant, and that there are no grounds for interference with the Defendant's freedom to terminate the Existing Contract by the termination Letter. As lord Diplock said in **American Cyanamid** (supra) at page 408 letter C:

> *"If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the Plaintiff's claim appeared to be at that stage."*

[29] There has been no evidence led or any assertion that the Defendant is not in a financial position to pay any damages which may be awarded if the Claimant is successful on the claim. I am therefore of the view that on the basis of the Court's finding on the issue of the adequacy of damages the application for injunction should be refused.

The Balance of Convenience

[30] According to Lord Hoffman in the **Olint** case (supra) :

> *"17. In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the American Cyanamid case [1975] AC 396, 408:*
>
> *"It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them."*
>
> *18. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases."*

[31] Learned Queen's Counsel has submitted that the balance of convenience lies in favour of the granting of the injunction. He relies on the Claimant's assertion that because of the commercial hardship and effect on third parties damages would not be an appropriate remedy. I have addressed these issues earlier in this judgment in considering the adequacy of damages.

[32] Learned Queen's Counsel also submitted that another factor weighing the balance of convenience in favour of maintaining the status quo is "*good public administration*" and the requirement for the Defendant to abide by the public procurement rules. He argued that the Defendant is required to secure the services of a new security provider by way of Local Competitive Bidding and not by utilising any other method there being no emergency circumstances since any

alleged ‘emergency’ would be as a result of the Defendant’s own conduct in terminating the Existing Contract.

[33] With all due respect to the learned Queen’s Counsel, it is a curious argument on the part of the Claimant which is claiming equitable relief, (and having obtained the benefit of a month to month contract without local competitive bidding), to say, that the Court should protect it and allow it to continue to enjoy the fruits of this Existing Contract obtained without tender, by preventing any other party from obtaining a similar temporary benefit. This is on the basis that if the Court allows the Defendant to select another party without local competitive bidding that would be contrary to law. I find this argument unconvincing in supporting the Claimant’s position that the status quo ought to be maintained.

[34] The affidavit of Mr. Jeffrey Foreman one of the Attorneys-at-law on behalf of the Claimant exhibits an advertisement taken from the Jamaica Observer newspaper in which the defendant is inviting proposals for tax compliant security Guard Companies to provide services at Defendant’s campuses. It is noteworthy that the Defendant indicated to the Claimant by letter dated 19th October 2016 that it is not precluded from the tender process. The Defendant has issued the Termination Letter and ought to be permitted to organize its affairs as it sees fit in preparation for the next phase of the procurement process.

[35] I have considered all the relevant factors in the round including my finding that there is no serious issue to be tried, but if I am wrong in that regard, I find that any harm suffered by the Claimant could be adequately compensated by an award in damages. I find that there is very little likelihood that the injunction will turn out to have been wrongly or withheld given the relative strengths of the parties’ cases and that the balance of convenience lies distinctly in favour of the refusal of the grant of an injunction. I do not find that there are any exceptional circumstances in this case.

[36] Mr. Goffe submitted that if the terms of the Expired Contract are imported into the Existing Contract then the Claimant would be in breach of the clause which provides for arbitration and ought to be denied equitable relief on this basis. I did not find favour with that submission and the issue of the arbitration clause and any possible non compliance with it did not influence my decision in this case.

Conclusion

[37] For the reasons outlined I make the following orders:

> *I. The application for injunctions and other relief made by notice of application filed on 1st November 2016 is refused.*
>
> *2. Costs of the Application to the Defendant in any event to be taxed if not agreed.*