[2021] JMSC CIV. 132

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2021CV00329

BETWEEN	**FLIGHT CONNECTIONS LIMITED**	**APPLICANT**
AND	**PAC KINGSTON AIRPORT LIMITED**	**RESPONDENT**

Mr. Hugh Wildman, Ms. Indira Patmore and Ms. Faith Gordon instructed by Hugh Wildman & Company for the Applicant

Mr. Emile Leiba and Mr. Nickardo M. Lawson instructed by Dunn Cox for the Respondent

Heard: May 13 and June 11, 2021

Interim injunction – Breach of Concession Agreement – Whether notice was in breach of s. 26 of the Rent Restriction Act – Whether the matter ought to have been referred to Arbitration as per the Agreement.

ICOLIN REID J (AG)

ORAL JUDGMENT - IN CHAMBERS

[1] I have considered the oral and written submissions of both parties and have read the authorities that they have relied on. I have decided that an oral judgment is appropriate in this instance because the issue of an interim injunction is one that has had many judicial writings expounding the length and breadth of the legal principles involved. I bear in mind that each case is fact-specific but the principles are the same when one considers the remedies being sought. I will give a brief outline of the case for Flight Connections Limited ('the Applicant') and Pac

Kingston Airport Limited ('the Respondent') and thereafter deal with the legal issues which arise.

The Applicant's case

[2] The Applicant filed a Notice of Application for Court Orders seeking the following relief:

> *"An injunction prohibiting the Respondent whether by itself, its servants and or its agents from taking any steps to terminate the Concession Agreement between itself and the Applicant in breach of said Agreement, pending the referral of the dispute between the Applicant and Respondent, before the Arbitration Tribunal established under said Agreement, to resolve the dispute between the Applicant and Respondent, concerning the interpretation of the said Agreement."*

[3] The grounds on which the Applicant sought the injunction was that it is a limited liability company, operating its business under a concession agreement at the Norman Manley International Airport ('NMIA') between itself and the Norman Manley International Airport Limited ('NMIAL'), dated July 15, 2011. In October 2019, the NMIAL issued letters to all its lessees and affiliates indicating that the Respondent would be assuming full responsibility for all existing tenants, licensees and concessionaires, in keeping with the terms and conditions of the operating agreements, which would be transferred to the Respondents on October 10, 2019. After the Respondent assumed operations of the NMIAL, the Coronavirus pandemic occurred, which severely affected operations at NMIA. For a period of three months, NMIA was shut down and so no passenger commercial flights were allowed. The security deposit of US$54,176.42, paid by the Applicant to the Respondent, was used to offset any valid claims that arose during the three months' period.

[4] The effect of the pandemic was still being felt and it had also severely affected the operations of the Applicant. The Applicant had fallen into arrears in the payment of fees and the Respondent had extended the period for repayment to October 2020 to restore the deposit. The Applicant sought a loan from a financial institution to fulfil its obligations to the Respondent and informed the Respondent of this

process. However, on January 8, 2021, the Respondent wrote to the Applicant informing them that they were in breach of their agreement with the Respondent by failing to pay concession fees for more than 45 days and failing to replace the security deposit. The Respondent also issued to the Applicant a notice to quit and deliver up the premises by February 13, 2021.

[5] The Applicant contended since it (the Applicant) was unable to seek compensation from NMIAL during the closure of the airport, then, similarly, the Respondent should be estopped from seeking to enforce the contract during the same three months period.

[6] Counsel, Mr. Hugh Wildman, argued that as all the ingredients for the award of an interim injunction are present, the Applicant would be entitled to specific performance in accordance with the decision of **Tewani Limited v Kes Development Co Ltd and & Another, (unreported), Supreme Court, Jamaica,** Claim No. 2008HCV2729, judgment delivered on July 9, 2008. He pointed out that since all the issues in the case touch and concern real property it raised a presumption that damages was not an adequate remedy.

[7] He further relied on **Verral v Great Yarmouth Borough Council** [1981] 1 QB 202 for support that an injunction can be granted to restrain a party from terminating a contractual licence even in circumstances where the Applicant has not yet entered into actual possession.

[8] Counsel further argued that the one-month notice period was unlawful and a breach of s. 26 of the Rent Restriction Act, which provided for a six months' notice for commercial leases. Counsel also sought to rely on Clause 2.0 of the Concession Agreement which provided for a 12 months' notice period. They further submitted that the Applicant would be severely affected if given less than six months' notice to vacate the premises. Counsel emphasized that if the company was shut down within the one-month period, it would face significant liability for redundancy and notice pay from its over 186 employees. Additionally, the

Applicant would be exposed to legal actions from its clients and affiliates who require six months' notice for termination of services.

[9] Mr. Wildman pointed out that the Applicant was also relying on the Arbitration Clause which provides that any dispute between the parties concerning the Concession Agreement shall be referred to Arbitration. Clause 17 of that agreement is as follows:

> *"17.0 ARBITRATION AND GOVERNING LAW*
>
> *(1) Any dispute between the parties touching or concerning this Agreement shall be referred to Arbitration before a single arbitrator appointed by mutual agreement by the parties or failing such mutual agreement, by a single arbitrator appointed at the request of either party by the President of the Jamaica Bar Association. The provisions of the Arbitration Act of Jamaica or any enactment replacing the same shall apply to such arbitration.*
>
> *(2) In the conclusions, interpretation, performance and enforcement of the covenants, stipulations and provisions of this Agreement, the parties agree to be bound by the Laws of Jamaica in force from time to time and further agree that the Supreme Court of Judicature shall have jurisdiction to hear and determine all matters arising out of or in connection with the Agreement that may properly be heard and determined by a Court."*

The Respondent's case

[10] The Respondent relied on the Affidavits of Sitara English Byfield and Kadia Dawes Wynter. The Respondent contended that it took over operations of the NMIAL on about October 10, 2018. It had an agreement with the Airport Authority of Jamaica for a one-year transitional period for the actual management and operations of the airport. The Respondent sought to manage the various concessions which were operating at the NMIA.

[11] Some were in good standing while others, including the Applicant, were delinquent and payment plans were prepared to facilitate bringing them into proper standing before the transition date of October 2019. An examination of the Applicant's accounts led them to write to the Applicant in June 17, 2019, indicating that the

Applicant was in arrears, in both space rental and concession fees, for US$108,778.72 and JD$1,865,323.80 for utilities.

[12] Several letters were sent and discussions and meetings were also held with the Applicant but they remained in arrears. In June 2020, at one of those meetings between the parties, a payment plan was agreed upon whereby the Applicant would be able to eliminate its arrears by December 2020. This agreement was made on June 11, 2020, and signed by both parties. It is reproduced in full below:

> *"2020 June 11*
>
> *Mr. Brian Taylor*
> *Chief Accountant*
> *Flight Connections Limited*
> *Norman Manley International Airport*
> *Palisadoes, Kingston*
>
> *Dear Mr. Taylor,*
>
> *Re: Payment Plan – Flight Connections Limited*
>
> *PACKAL, by way of this document, accepts the payment plan terms proposed on Wednesday, June 10, 2020 to clear balances of US$104,959.28 and JM$325,535.78. The details of the payment plan are outlined below for your acceptance:*
>
> 1. *The Security Deposit in the amount of $54,176.42 will be drawn on Monday, June 15, 2020 and used as first payment against the outstanding balance as of US$104,959.28.*
> 2. *The Security Deposit must be replaced on or before October 15, 2020. Failure to have it replaced by the date, will be considered a material breach of the Concession Agreement and will result in termination.*
> 3. *Six (6) monthly payments in the amount of Eight Thousand Four Hundred & Sixty—Three Dollars and Eighty-One Cents (US$8,463.81) are to be made on or before the 15th of each month starting July 2020, to clear the remaining balance of US$50,782.86*
> 4. *Two (2) monthly payments of JM$162,767.89 each to be made on or before the 15th of July and the 15th of August 2020.*

5. *All current charges (MAG/Rent, Electricity and Water) must be paid on time, that is, within 15 days after the issuance date of the respective invoices.*
6. *This Payment Proposal will become null and void if a monthly payment is missed, and by extension, this means that the Concession Agreement can be terminated for non-payment of charges. Considering the current month-to-month terms of the current Agreement, Flight Connections would be given one (1) months' notice to terminate the Concession Agreement.*

To demonstrate agreement with the abovementioned terms, kindly sign and return the letter via email to the undersigned by close of business on June 15, 2020. One (1) duly executed copy of the original letter must be returned to us as soon as possible thereafter.

Kindly note that all other terms and conditions of the Concession Agreement remains the same.

Please feel free to contact us should you require any further clarification.

Yours Truly

Sitara English-Byfield

Director, Finance and Administration

Agreed and Accepted

Name: Brian Taylor

Title: Chief Accountant

Flight Connections Limited"

[13] The Applicant, however, breached this agreement. Counsel, Mr. Emile Leiba, argued that the Applicant had either not been able or willing to make the scheduled payments on time nor replace the security deposit. Counsel also referred to Clause 3.2 of the Concession Agreement and the Termination Clause.

[14] Clause 3.2 of the Concession Agreement states:

"3.2 Security Deposit

a) *The Concessionaire agrees to submit to NMIAL, no later than ten (10) days following the execution of this Agreement, and maintain throughout the term of the Agreement, a Concession Security Deposit in the amount of twenty-five percent (25%) of the Minimum Annual Guarantee for each twelve (12) month period of the Concession. The Concession Security Deposit shall ensure the full and faithful performance by the Concessionaire of all the covenants, terms, and conditions of this Agreement and stand as security for payment by the Concessionaire of all valid claims by NMIAL. The Concessionaire's failure to provide a deposit under this paragraph shall be a material breach of this Agreement for which the termination may apply."*

[15] The Termination Clause reads, in part, as follows:

> *"9.0 <u>TERMINATION FOR CAUSE</u>*
> *(1) Notwithstanding the duration hereinbefore fixed, this Agreement may be terminated by NMIAL immediately on giving notice in writing to the Concessionaire to this effect and without payment of compensation in any of the following events: -*
> *a. …*
> *b. If any payment to be made under this Agreement or any part thereof shall be in arrears and remain unpaid for a period of forty-five days after the same shall have become payable in accordance with the terms of the Agreement,"*

[16] The Applicant sought financial help from the National Commercial Bank and it indicated to that bank that it was seeking a loan to address its obligations to the Respondent. This letter was sent to the Respondent by the National Commercial Bank. However, in January 2021, when the termination letter was sent to the Applicant, there were still monies owing for several months.

Discussion and analysis

[17] The Court will now consider the principles to be analysed when determining whether an interim injunction should be granted to the Applicant.

Serious issue to be tried

[18] In the leading case of **American Cyanamid Co v Ethicon Ltd** [1975] A.C. 396, Lord Diplock stated that the first question that the court should consider in determining whether an interlocutory injunction should be granted is whether there is a serious question to be tried.

[19] A thorough analysis of the Applicant's case leads me to determine that, at minimum, it had admitted to owing the security deposit of US$54,879.65. This money had been outstanding for several months before the notice letter was issued to the Applicant and was still owing at the date of the Application. I also form the view that other monies to include fees were owing at the date of the termination letter. I considered several documents to assist the Court in determining this issue.

[20] I have looked at the correspondence dated June 17, 2019, between the NMIAL and the Applicant, in which it was stated that the Applicant was in arrears. There was also correspondence from Brian Taylor, Chief Accountant of the Applicant, dated September 3, 2019, copied to Ms. Kaydian Dawes, the Director of Finance and Administration of the Respondent, itemising the various accounts which had outstanding debts and making arrangements to settle them over a period of several months.

[21] I also considered the agreement dated June 11, 2020, from the Respondent and signed by the Applicant's chief accountant, which admitted that at June 2020, it was in arrears of the security deposit and other fees. I note the terms of this agreement and, specifically, the term which provided that the notice period would be one month if there was a failure to abide by the payment proposal.

[22] I have examined the letter exhibited by the Respondent from the National Commercial Bank, dated December 22, 2020, which speaks to the Applicant applying for a loan facility but also stating that the loan was not yet approved because the process was incomplete.

[23] I also had regard to the Respondent's letter dated January 08, 2021, which served notice on the Applicant to vacate the premises by February 13, 2021, for failure to pay Concession fees for more than 45 days and failure to replace the security deposit.

[24] I paid close attention to the Applicant's letter dated January 15, 2021, to the Respondent, seeking forbearance in respect of the lack of payments of fees and security deposit. It asked for consideration due to the hardships it has been facing on account of the pandemic. This letter demonstrates that, at minimum, the Applicant would still be in default of the payment of the deposit.

[25] I have analysed the statement of accounts exhibited to the Applicant's affidavit in response dated April 9, 2021, indicating that they owed no monies. However, I do believe that based on all the evidence presented by the Applicant, it was indeed in arrears at all times during its dealings with the Respondent.

[26] I do not find that the basis of the agreement between the parties is the Concession Agreement dated May 15, 2017. I rely on the letter signed by the Applicant's chief accountant, dated June 11, 2020, as the basis for the agreement between the parties. That letter is the contract that is being considered by the Court.

[27] The Applicant's case was that the Respondent was in breach of s. 26 of the Rent Restriction Act. However, the Rent Restriction Act provides at s 8(1) "*that the Minister may by order declare any class of premises specified in such order to be exempted premises"*. The Rent Restriction Order Rule 2 (viii) provides that the NMIA is exempted.

[28] Although the Applicant had itself urged the court to consider whether the matter ought to have been first referred to Arbitration, interestingly, I note that it was the Applicant who first approached the Court. Moreover, the details of the correspondence between the parties do not indicate any dispute as to fact. I find that throughout the history of the communication, the Applicant had admitted that it was in arrears of sums to be paid to the Respondent (and also to its predecessor

in title). Never once did the Applicant contest that they were not in arrears and, as such, I do not believe that there was any issue which warranted a referral to Arbitration.

[29] Thus I find that the Applicant was in breach of the agreement contained in the June 11, 2020 letter, by virtue of its failure to pay the requisite amounts pursuant to that agreement. I also find that the Respondent was on good ground when it issued the notice to quit to the Applicant. I, therefore, find that there is no serious issue to be tried.

Whether damages would be an adequate remedy for the Applicant

[30] In **National Commercial Bank Jamaica Limited v Olint Corporation Limited** [2009] UKPC 16 paragraph 16, Lord Hoffmann on behalf of the Board stated that *"[t]he 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. The House of Lords in **American Cyanamid Co v Ethicon** pointed out that this meant that if damages would be an adequate remedy for the Plaintiff, then there were no grounds for interference with the Defendant's freedom of action by the grant of an injunction.

[31] Counsel for the Applicant has answered this query in the negative. However, an analysis of the Applicant's case reveals, that the highest remedy being sought from the Court, in its Fixed Date Claim Form, was damages for breach of contract. In my view, the Applicant's request for damages is an indication that this remedy is adequate to deal with the issue if it is found at the conclusion of the trial, that the injunction was wrongly withheld. I agree with Mr. Leiba that the absence of a request for specific performance is also an indication of the Applicant's acceptance that damages is an adequate remedy.

[32] It was also pleaded by the Applicant that the notice period issued to the Applicant was too short. However, should the Court so find, then damages would be sufficient to deal with that issue.

[33] Moreover, I do not find that the Applicant had a legal interest in the land at the NMIAL. The basis of the agreement was for the operation of a concessionaire on the premises and not to pass an interest in the land.

[34] In all those circumstances, an award of damages would be a more suitable remedy for the Applicant.

Whether the undertaking as to damages is adequate for the Respondent

[35] The Applicant has given the usual undertakings as to damages as is required. However, I bear in mind that the evidence, as revealed by the affidavits and the supporting documents, does indicate that the Applicant has suffered severe financial difficulties because of the pandemic. It thus begs the question of whether the Applicant will be able to honour any undertaking as to damages which it has given. I must point out that it is not sufficient to say I give my undertaking as to damages, especially in the instant case, where it is very plain that the Applicant is experiencing severe financial challenges. I note also that, to date, that the Applicant still has not paid the security deposit. I do believe that any undertaking as to damages given by the Applicant is probably unenforceable given the Applicant's dire financial straits.

[36] The Respondent, on the other hand, has given its cross-undertaking as to damages, and by its evidence, has shown, that it has the financial capacity to honour its undertakings if the injunction was wrongfully withheld.

Balance of convenience

[37] In **NCB v Olint**, Lord Hoffmann said, at paragraph [17], that:

> *"… 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."*

[38] The evidence before the Court is that the Applicant has an agreement with the Respondent and the Applicant has failed to make the contractual payments. The Applicant has argued that severe hardships will be caused to its operations if the injunction is refused. While I agree that the Applicant will suffer financial fallout should the injunction be refused, I do believe that the balance of convenience lies in favour of the Respondent. In this case, although both parties would be exposed to a financial fallout, I find that more damage would be done to the Respondent if the injunction was granted, as it (the Respondent) would be forced to deal with a party (the Applicant) that so far has shown, by the history of its dealings, that it is unable to fulfil its financial obligations.

Conclusion

[39] In the light of the foregoing, I would deny the application for the interim injunction.

Costs

[40] An application was made for the costs to be taxed immediately pursuant to Rule 65.15 of the CPR. Mr. Lieba argued that the Court's refusal of the application may result in the Applicant failing to act expeditiously to pursue the claim. This would mean that the Respondent may have to wait inordinately long to recover its costs. He was also mindful of the fact that if the Applicant's claim was unsuccessful, it might not be able to satisfy the costs that would be awarded against it, bearing in mind the financial challenges it is facing.

[41] Ms. Faith Gordon resisted this application and relied on **Raziel Offert v George Thomas** [2012] JMSC Civ 184. Counsel argued that, in the case at bar, there was no misconduct on the part of the Applicant's Attorney-at-law and so the Court should refuse the application. The Court was urged not to depart from the general rule that costs should be taxed at the end of the trial of the claim as the Applicant

would honour his financial obligations if the court makes an adverse finding against him at the conclusion of the trial.

[42] The court considered the very brief submissions by both counsel. I also gave thought to Rule 65.15 which is relevant to this issue. I believe that **Raziel Offert** is distinguishable from the case at bar. I do agree with counsel Ms. Gordon that there was no misconduct on the part of the Applicant's counsel, in their presentation of the matter before this court. I also do not believe that sufficient evidence has been put before the court to make a determination that the Applicant will be unable to satisfy any costs awards that may be made against it at the end of the proceedings. As Mangatal J. opined in **Raziel Offert**, "t*he real rationale behind the rule must have been to assist litigants in recouping expenses in circumstances where it would be difficult or inconvenient for such litigants to wait until proceedings have culminated*".

[43] Having considered the submissions, I do not believe that the Applicant's situation is as grave as the Respondent would have the court believe. Consequently, I am not persuaded to exercise my discretion to make an order for immediate taxation. I would therefore award costs to the Respondent to be agreed or taxed.

ORDERS:

1. The Notice of Application filed on January 29, 2021 is refused.
2. Costs of the application to the Respondent to be agreed or taxed.
3. The Applicant's attorneys-at-law to prepare, file and serve this order.