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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 245 OF 1994

IN CHAMBERS

BETWEEN	MOORE AND SONS SERVICE CENTRE LIMITED	PLAINTIFF
A N D	THE SHELL COMPANY (W. I.) LIMITED	DEFENDANT

H. Hamilton Q. C. and R. D. Codlin instructed by Raphel Codlin and Company for Plaintiff

W. K. Chin-See and A. Earle instructed by Rattray, Patterson and Rattray for Defendant

Heard August 17, 23, and 25, 1994   October 28, 1994

GORAM W. JAMES, J

By summons dated June 17, 1994 the Plaintiff sought an injunction restraining the Defendant from with holding delivery of all goods ordered by the Plaintiff Pursuant to a written contract headed "Licence for operation at property owned by Shell" and dated 21st June 1990, ordering the Defendant to deliver all petrol products and other goods ordered by the Plaintiff from the Defendant, such delivery to be made in accordance with the instrument aforesaid or any other written agreement bearing the same date under which the Defendant is required to deliver goods to the Plaintiff, until the matter is heard or until the Court otherwise orders; the Defendant should carry out all contractual terms which the Defendant is liable to carry out pursuant to written contracts as aforesaid and otherwise signed between the Plaintiff and the Defendant on the 21st June 1990.

The Shell Company (W. I.) Limited is a company incorporated under the Laws of England in having its principal office at Rockfort, Kingston Jamaica and referred to in the agreement as "the Licensor" and Moore and Sons Service Centre Limited of 81-83 Half Way Tree Road, Kingston 10, referred to as "the Licensee" entered into an agreement called "Licence for operation at Property owned by Shell" on June 21, 1990. Premises at 81-83 Half Way Tree Road, Kingston 10 are owned by the Licensor and it is their intention that these premises shall be used as a Service Station.

The Licensee agreed to operate a service station on the premises above-mentioned. Without setting out in details, the preamble to the agreement is in accord with their intention.

Clause IV (a) thereof reveals .... that the parties have agreed "To enter into this agreement for the grant of a licence of the licensed premeises by the licensor to the licensee for the operation by the licensee of a service station to be tied to the sale of certain products distributed by the licensor."

An examination of the provisions dealing with "termination" provide that the licensor may terminate the licence if certain conditions are not fulfilled by the licensee. Clause II (ii) stated:- "If the licensee fails to order or having ordered fails to accept and take delivery of petrol and/or gas oil in excess of an average of Thirty Thousand (30,000) gallons per month during the first three (3) consecutive calendar months and an average of Forty Thousand (40,000) gallons per month during any three (3) consecutive calendar months thereafter and having been served with a notice of the fact within Sixty (60) days of the end of such three (3) months period fails to order or having ordered fails to accept and take delivery of petrol and/or gas oil in excess of an average of Forty Thousand (40,000) gallons per month over the Three (3) calendar months immediately following the calendar month in which such notice was given.

The writ filed in this action on June 15, 1994, is endorsed in part as follows:
The Plaintiff's claim against the Defendant for a declaration that the document signed between the Plaintiff and the Defendant on the 21st June 1990 and headed "Licence for operation at property owned by Shell" constitutes a lease and is therefore covered by the Rent Restriction Act.

The Plaintiff's claim is against the Defendant for a declaration that the document signed and served on the Plaintiff by the Defendant headed "Notice to Quit" is invalid in that it does not conform with the Rent Restriction Act.

The Plaintiff's claim is against the Defendant for a declaration that the Plaintiff continues as a statutory tenant up to the time of the filing of these presents and continuing and is therefore entitled to all the benefits conferred by the lease aforesaid.

It is Mr. Codlin's contention that the agreement signed on 21/6/90 is a lease and not a licence and that it matters not by what the parties call it or thought it is, what matters is what it is in law.

He then submitted that if it is a lease certain consequences would follow, the most important of which would be that the agreement would be subjected to the provisions of the Rent Restriction Act. Further in that regard the notice to quit served is invalid as it does not conform to the Rent Restriction Act. He further submitted that even if the tenure has expired the Plaintiff would have held over as a Statutory tenant under the Rent Restriction Act. Thereby entitling him to all the terms of the agreement as if it (the agreement) had not come to an end.
Mr. Codlin then submitted that even if the aggrement creates a licence it is a contractual licence which cannot be revoked at will, but rather in terms of its provisions.
Then Mr. Codlin makes a submission which is a fundamental principle in equity - He states if certain conditions of an agreement have been broken by a party, he cannot rely on any of its terms. To which I would add without first remedying the breach. He went on to say that there is no allegation before the Court that the Plaintiff has done anything wrong. He submitted that notwithstanding the effect of the Rent Restriction Act (if it applies) or that if a contractual licensee, on the basis of the amount expended on the premises with knowledge and consent of the Defendant expressed or implied that expenditure creates in the person undertaking it an equity in the land and it is for the Court to decide in what way the equity shall be satisfied.

Mr. Codlin further submitted that the injunction sought by Plaintiff is not mandatory for although the Defendant would be compelled, if the order is made to deliver goods to Plaintiff it would be in fulfilment of a contractual obligations. He also said that the Plaintiff was inexclusive possession and as such is a Lessor and not a licensee.

Mr. Chin See began his response by distinguishing the features between a mandatory and prohibitory injunction and submitted that it is incorrect to say that a mandatory injunction loses its character if what is sought to be enforced relates to a contractual obligation.

He cited Shepherd Homes v Sandham (1970) 3 AER 402
He conceded that a mandatory injunction can be granted on an interlocutory application but should be granted only in special circumstances.
He submitted that a Plaintiff who is blameworthy cannot move the Court in the exercise of its judicial discretion.

He further submitted that in dealing with mandatory injunction the principle applicable to specific performance applies.

He submitted that there can be little doubt that the purpose behind the agreement between the Plaintiff and the Defendent is the operation of the premises as a Service Station to promote and sell the Defendant proudcts.

Mr. Chin See examined in some details several preambles to the agreement and made the following submissions:

(a) the use to which the premises must be put is not a mere limitation as to user, it's the entire purpose.

(b) restricts user to sale of and advertisement of Defendant's products only.

(c) that under provision for the termination of the agreement the Plaintiff must satisfy certain minimum quantity as to sales.

In his submission dealing with Plaintiff's obligation as to quantities, he referred to the affidavit of Denniston Brown, Marketing Manager of Defendant, showing that Plaintiff was in breach of the agreement.

Then in reliance on Australian Hardwoods Pty limited Commissioner for Railways (1961) 1 AER 737

Mr. Chin See submitted that a Plaintiff who askes the Court to enforce by mandatory order in his favour some stipulation of an agreement which itself consists of interdependent undertakings between the Plaintiff and the Defendant cannot succeed in obtaining such a relief if he is at the time in breach of his own obligations.

He submitted that the failure of the Plaintiff to take the amount of fuel and gas oil in keeping with the contractual obligations preceded the decision of the Defendant to with hold supply.

He further submitted that in addition to the Plaintiff's clear breaches as to quantities of fuel and gas oil, he had failed to pay for supplied delivered and has come to seek an order compelling the Defendant to supply products without disclosing any plan by which it could be judged whether Plaintiff would be in any position to order and pay for quantities stipulated in the contract.

In making his submissions dealing with the nature of the agreement, Mr. Chin See said the case turns on contractual rights and obligations and not whether the document is a licence or a lease.

He further submitted that the supply of oil has nothing to do with the relationship of landlord and tenant under the Rent Restriction Act and a contract for the supply of goods is not consistent with a tenancy.

He referred to a letter dated 14/6/93 as Ex D. B. 1 sent to Plaintiff in which it was brought to Plaintiff's attention that the average monthly sales was below that stipulated under their agreement - and say that the above letter should be treated as a notice or warning given by Defendant to Plaintiff.

He concluded after a thorough examination of a number of clauses of the agreement that the Plaintiff does not have exclusive possession nor exclusive occupation and that the document is in the nature of a licence. He also submitted that the application should fail as damages are an appropriate remedy should there be found to be any breach by the Defendant.

I am grateful to counsel for the industry they have displayed for their valuable assistance.

By clause 2 (ii) of the agreement hereinbefore mentioned the parties convenanted that the licensor may without notice immediately terminate this licence and all the licensee's rights hereunder and re-enter and in any manner resume possession of the licensed premises.

(i) ....

(ii) "If the Licensee fails to order or having ordered fails to accept and take delivery of petrol and/or gas oil in excess of an average of Thirty Thousand (30,000) gallons per month during the first three (3) consecutive calendar months and an average of Forty Thousand (40,000) gallons per months during any three (3) consecutive calendar months thereafter and having been served with notice of the fact within Sixty (60) days of the end of such three (3) months period fails to order or having ordered fails to accept and take delivery of petrol and/or gas oil in excess of an average of Forty Thousand (40,000) gallons per month over the three (3) calendar months immediately following the calendar month in which such notice is given."

Turning now to the affidavit of Denniston Brown, the Defendant's Marketing Manager and in particular paragraph 7, thereof, reference is made to a notice to the Plaintiff advising it that fuel purchases were below that stipulated in the licence and requesting the Plaintiff to take the necessary steps to improve the required levels.

I hold that the letter dated June 14, 1993 is sufficient to constitute a notice under the terms of the agreement.

I do not agree with Mr. Codlin's submission that the provisions of the Rent Restriction Act apply to this case. The parties contractual rights and obligations are contained in the agreement.

Having to hold that the letter of 14/6/93 constituted a notice, it is necessary to determine whether the Plaintiff remedied or took steps to do so. I cannot say that it has.

The order sought is not one which seeks to prevent or preserve the status quo until the rights of the parties can be determined. Before the injunction was sought the Defendant had ceased making deliveries of petrol and/or gas oil to the Plaintiff.

Although Mr. Codlin does not call it a mandatory injunction, I think that is what is being sought.

In Shepherd Homes Limited v Sandham (1970) 3 AER 402

Megarry J. as he then was at page 409 in considering the matters which should be borne in mind when determining whether to grant or with hold a mandatory interlocutory injunction said:

> "It is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court, will of course grant such injunctions as the justice of the case requires: but at the interlocutory stage when the final result of the case cannot be known, and the Court has to do the best it can, I think that the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought to enforce a contractual obligation."

Although Mr. Codlin placed some reliance on the

American Cyanamid Company v Ethicon Limited (1975) 1 AER 504

In Locabail International Finance Limited v Agro Export (1986) 1 AER 900

it was stated that the principle enunciated in Shepherd Homes Limited case

as it related to mandatory injunctions is not affected by the Cyanamid case.

It appears from the affidavit evidence tendered on behalf of the Defendant

that the Plaintiff has not fulfilled certain obligations under the agreement.

It that is so it would tend to weaken the Plaintiff's case.

In Total Oil v Thompson Garages Limited (1972) 1 Q. B. 318

Lord Denning M. R. said at page 324.

"So long as they were in breach themselves

So long .... they could not insist on the tie."

That statement when applied to the instant case would be so long as the

Plaintiff is in breach it cannot insist on obligations to be performed by the

Defendant.

Having regard to the affidavit evidence, I do not think that the Plaintiff

has presented an unusually strong and clear case to obtain the grant of a

mandatory injunction.

It would appear that if the Defendant is in breach, damages would be an

adequate remedy.

The summons is therefore dismissed.

Costs to the Defendants to be agreed or taxed.

Certificate of counsel granted.