

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L. 2002/P040

BETWEEN	PFIZER LIMITED	CLAIMANT/RESPONDENT
A N D	MEDIMPEX JAMAICA LIMITED	1 ST DEFENDANT/APPLICANT
A N D	NMF PHARMECUTICALS LIMITED	2 ^N DEFENDANT
A N D	LASCO DISTRIBUTORS LIMITED	3 RD DEFENDANT/APPLICANT

Miss Hilary Phillips Q.C. and Mr. Kevin Williams
instructed by Grant Stewart Phillips for Claimant/Respondent.

Miss Dorothy Lightbourne and Mr. Ian Robins
instructed by Tenn, Russell, Chin-Sang, Hamilton and Ramsay for 1st
Defendant/Applicant.

Mr. R. N. A. Henriques Q.C. and Mr. Vincent Chen instructed by Chen, Green and Co.
for 3rd Defendant/Applicant.

Application for stay of injunction pending appeal

Heard: 17th, 23rd June and 4th July 2005

BROOKS, J.

On March 29, 2005 Mrs. N. E. McIntosh, J. ordered that the defendants to this claim be restrained from conducting any dealings with any product containing the Besylate Salt of Amlodipine until the trial of the action.

Specific restrictions were also placed against Medimpex Jamaica Limited (Medimpex) and Lasco Distributors Limited (Lasco) respectively, in relation to products known as "Normodipine" and "Las Amlodipine", again until the trial of the action. The order was made at the instance of Pfizer Limited (Pfizer) which claims that these particular products were in breach of Pfizer's rights in a patented product.

Medimpex and Lasco are both aggrieved by the order of the learned judge and have filed appeals against same. Their present application is for a stay of the effect of the said order until the appeals have been heard. It came before me because McIntosh J. was not available at the time, she being otherwise engaged.

Pfizer has strongly opposed the application and it is for the court to consider the bases on which such a stay may be granted and whether they apply to this case.

Background

An outline of the background of the matter would enhance the understanding of the issues to be resolved.

Pfizer sells its patented product under the brand name Norvasc. Norvasc, according to Pfizer, has been on the Jamaican market since 1994. It is used in the treatment of patients suffering from hypertension and ischemic disease.

In 2001, before the grant of the letters patent in Jamaica, Medimpex began and continued thereafter to import and distribute Normodipine. It is not immediately clear when Lasco commenced trading in Las Amlodipine, but in paragraph 5 of an affidavit sworn to on 31st January 2005, Mr. Lester Woolery on behalf of Lasco deposed that Lasco had "for many years sold the products complained of by (Pfizer) in Jamaica".

Neither Medimpex nor Lasco are manufacturers of the respective products. The products are imported respectively from Hungary and India.

Applicants' submissions

Mr. Henriques Q.C. made the submissions on behalf of Lasco. Miss Lightbourne for Medimpex adopted these. The submissions may be summarized as follows:

1. The appeal has a good prospect of success.

2. Damages are an adequate remedy and are capable of being accurately quantified.
3. The prejudice to their businesses and to the public is so significant that the balance of convenience is in favour of the products remaining on the market.
4. The grant of the injunction would effectively result in a final order in the claimant's favour.

Pfizer's Submissions

Miss Phillips Q.C. for Pfizer made submissions which are along the following lines.

1. Pfizer is the patent holder and its rights as such should be respected and protected until the court declares otherwise.
2. There is no evidence to support the claim that the respective businesses of Medimpex and Lasco will be significantly affected and that there will be loss of employment as a result. This is because both of these companies sell other products.
3. There are other anti-hypertensive drugs on the market which are available to the public, and some at lower prices than the infringing products.
4. The application is essentially one for a rehearing of the application for the injunction. This should be left to the Appellate Court.
5. The court will not usually suspend the operation of the injunction pending appeal, and especially when the defendant is not a manufacturer.

6. The injunction will not effectively be a final disposition of the matter; there is an undertaking as to damages and clear case management guidelines governing the preparation for trial.
7. Both Medimpex and Lasco have acted in breach of the injunction and as such, have not approached the court with 'clean hands'.

Both sides provided authorities in support of their respective positions.

Bases on which a stay may be granted

An appeal does not operate as a stay of the order or judgment of the court. It is for this court or the Court of Appeal to order the stay, if it is so minded. (See rule 2.14 of the Court of Appeal Rules 2002).

By rule 42.13 of the Civil Procedure Rules 2002 (the CPR) a judgment debtor may apply to the court to stay execution of a judgment or order. The rule states as follows:

“A judgment debtor may apply to the court to stay execution or other relief on the grounds of –

- (a) matters which have occurred since the date of the judgment or order; or
- (b) facts which arose too late to be put before the court at trial, and the court may grant such relief, upon such terms, as it thinks just”

Though the term “judgment debtor” is not defined in Part 42 of the CPR, it is defined in Part 43 as meaning (for that Part), “a person who is liable to enforcement under (a) judgment or order, even though the judgment or order is not a money judgment”. (See rule 43.1.) There being nothing in Part 42 which is inconsistent with the application of such a definition I shall apply it to rule 42.13 for these purposes.

I find support for this position in the United Kingdom Civil Procedure Rules (RSC 45.11) which uses more a neutral term:

“Without prejudice to Order 47, rule 1, a party against whom a judgment has been given or an order made may apply to the court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the court may by order grant such relief, and on such terms, as it thinks just.” (Emphasis mine.)

The filing of the appeal could be termed a matter which has occurred since the date of McIntosh, J.’s order in this case. Medimpex and Pfizer are therefore, *prima facie*, entitled to make this application.

From as far back as 1992 there has been a shift from the very stringent test concerning the grant of a stay of execution which previously obtained. In Linotype – Hell Finance Ltd v Baker [1992] 4 All E.R. 887 the United Kingdom Court of Appeal ruled that “it is a legitimate ground for granting the application (for a stay) that the defendant is able to satisfy the court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success.” (See page 887 b). Our Court of Appeal, in the case of Flowers, Foliage and Plants of Jamaica and ors. v. Jamaica Citizens Bank Ltd. (1997) 34 J.L.R. 447 has adopted that more modern position. It is true that both those cases concerned appeals from final judgments, but I find that the distinction is not significant for these purposes.

The principles which must be borne in mind at all times, including in interlocutory proceedings are: firstly however that a successful litigant should not be deprived of the fruits of his judgment, or more accurately in this case, the order in his favour (The Annot Lyle (1886) 11 P. 141 at p.146); and secondly that the court ought to see that a party exercising his right to appeal does not have his appeal, if successful, rendered nugatory. (See Wilson v Church (No 2) (1879) 12 Ch. D 454 at p.458-9). It is now a matter of applying common sense and the balance of advantage but the starting

point will be the first principle stated above. (See Winchester Cigarette Machinery Ltd. v. Payne and Anor. (No 2) TLR 15th January 1993.)

In the matter of injunctions, Mr. Henriques submitted that a stay of execution will be granted where the injunction would have a life-threatening effect on the members of the public who use the product affected.

He cited in support the case of Roussel – UCLAF v G.D. Searle and Co. Ltd. and Anor. [1977] F.S.R. 125. In that case an application for an injunction to restrain the sale of a particular drug was refused because, among other reasons, there was no precise equivalent to the drug on the market and the drug could be life saving.

Mr. Henriques also submitted that where severe unemployment is likely to result from the injunction it ought not to be granted. He cited in support an excerpt from Terrell on the law of Patents 12th ed. at paragraph 942.

The learned authors there stated:

“A stay will, however, be ordered where such an injunction would cause extensive unemployment.”

The learned authors in support of their contention cited three cases. In all three, the defendants were manufacturers and there was a stay of the injunction granted in each case. However in two of the cases there was nothing in either judgment which disclosed the reason for the stay being granted.

In the third; “Deighton’s Patent Flue and Tube Co. Ltd. 18 R.P.C. 233 it was the defendant’s counsel who advanced the matter of the dislocation of the defendant’s business and the aspect of the effect on employment. The learned judge (Cozens-Hardy J.) did not state that this was the basis on which he granted the suspension but did stipulate (at page 240), that he did so only for the purposes of enabling the defendants to

present their appeal and to apply to the Court of Appeal for its order as to a stay. He granted the suspension from 26th April to 1st May 1901. His approach was approved by Graham J. in Minnesota Mining and Manufacturing Co. v. Johnson and Johnson [1976] R.P.C. 671 at p. 673-4.

Despite the scant support for the principle advanced in Terrell, it is still evident that it is a common-sense approach, which is to be applied. The effect on employment, if raised, I find, should properly be taken into account in considering the balance of convenience. It is instructive to note however in the very paragraph of Terrell cited above, the learned authors go on to say “(the stay) will probably not be ordered where the defendant is merely a dealer or agent for sale and not a manufacturer.” I shall address this aspect more fully at a later point in this judgment.

In respect of the assertion that in a normal case the injunction ought not to result in a final disposition of the matter, Mr. Henriques cited the judgment of Diplock L.J. in N.W.L. Ltd. v. Woods [1979] 1 WLR 1294.

In that case the learned Law Lord, at p 1306, said:

“My Lords, when properly understood, there is in my view nothing in the case of *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396 to suggest that in considering whether or not to grant an interlocutory injunction the judge ought not to give full weight to all the practical realities of the situation to which the injunction will apply. *American Cyanamid Co. v. Ethicon Ltd.*, which enjoins the judge upon an application for an interlocutory injunction to direct his attention to the balance of convenience as soon as he has satisfied himself that there is a serious question to be tried, was not dealing with a case in which the grant or refusal of an injunction at that stage would, in effect, dispose of the action finally in favour of whichever party was successful in the application, because there would be nothing left on which it was in the unsuccessful party’s interest to proceed to trial.”

Miss Phillips in support for her submission that the court will not normally grant a suspension of an injunction cited the cases of Lanston Monotype Corporation Ltd. v. Martin J. Slattery 42 RPC 366 (a 1925 case) and Samuel Parkes & Co. Ltd v Cocker Bros. Ltd. 46 RPC 241 (a 1929 decision).

In the former case, in response to an application for a stay of execution, Astbury J. said at page 396:

“I do not think the injunction should be stayed because the defendant is not a manufacturer”

and later:

“I do not think that I ought to stay the injunction having regard to the fact that the defendant is a mere agent for sale”

In the Samuel Parkes case Tomlin J. queried of the applicants counsel (at page 248):

“A stay of the injunction is not very usual under any circumstances, or on any terms, is it?”

He subsequently refused the application for the stay of the injunction.

The application of the principles to the instant case

Mr. Henriques submitted that the appeal has a strong likelihood of success. Among the reasons for his confidence is the fact that, on his submissions, this is a clear case where damages provide an adequate remedy.

His submission in this regard was concisely stated as follows:

“The claimant would not sustain any injustice because despite Mr. Camps’ affidavit, this is one where damages is an adequate remedy and an accounting is possible to compute the damages. Sales records can be accessed ... (It is possible to) assess the damages starting from the date of the breach.”

He relied on the Roussel-UCLAF case (supra) in support of the submission.

I find that the decision in that case does not support Mr. Henriques in the instant circumstances. The claimants in Roussel-UCLAF had agreed that accounts, sales records and market information were available to assist in ascertaining its loss but also submitted that there was a difficulty in assessing their future position in the event that the defendants were allowed to establish a presence in the market.

Graham J. found that the claimant's fears were exaggerated in the context of the market for the particular drug and the small market share which their product held.

Apart from that finding however, it seems to me that there is something repugnant about an application which asks me to consider, and to reach a different conclusion to that of my learned sister, on questions which she was required to, and did, consider and resolve and did so in Pfizer's favour.

On the issue of the adequacy of damages she stated at page 14 of her judgment:

"The Claimant and the Defendants all say that in each case, damages would not be readily ascertainable and would not be an adequate remedy for each though on one hand the Claimant says it would be adequate for the Defendants and the Defendants say it would be adequate for the Claimant so that there is some doubt as to the adequacy of damages in each case"

On the issue of the balance of convenience the learned judge stated at page 15:

"On the evidence before me I am inclined to the view that the balance of convenience favours the Claimant. It seems to me that greater hardship will be caused to the Claimant should the Defendants be allowed to continue to offer their products on the Jamaican market";

and at page 17, said in respect of the relative strength of each party's case.

"I tip the balance in favour of the Claimant as it appears to me that the Claimant on a consideration of all the material available to me at this stage has a stronger case and every chance of succeeding at trial."

Admittedly there is some evidence before me which was not before that learned judge, but that new evidence as it affects these questions, (a) was available to, or could have been secured by, the parties at the time of the hearing before McIntosh J., and (b) does not assist Medimpex and Lasco insofar as it shows that there are other products on the market (some at lower cost than theirs) which are designed for the treatment of hypertension. Thus the public would not be at risk from the absence of their products.

I therefore decline to make any finding in respect of the questions of the prospect of success on appeal, the adequacy of damages or the balance of convenience. In my judgment those are issues for the appellate jurisdiction and there are a number of cases where a judge of appeal has granted a stay pending appeal. One such is Scotland District Association Inc. v. Attorney General and Ors. (1996) 53 W.I.R. 66.

I turn now to the question of whether the effect of the injunction is such that it will result in a final order. This was alleged in the evidence provided subsequent to McIntosh J's. judgment. It was, however, the subject of some dispute.

Mr. Henriques submitted that the result of this injunction would in effect be a termination of Lasco's whole commercial venture. Miss Lightbourne adopted that submission insofar as Medimpex is concerned.

The evidence however, does not support those submissions. Mr. Camps deposing on Pfizer's behalf stated that both Medimpex and Lasco have several other products on the market. The deponents on behalf of both companies have not denied this. They have, however insisted that their respective businesses will be severely affected by the injunction. What they failed to say is what share these products have of their respective total sales.

In this regard I also note that though Mr. Henriques originally submitted that Lasco was the manufacturer of Las Amlodipine, it was eventually agreed by counsel on all sides that these were all imported products as indicated earlier in this judgment. Neither Medimpex nor Lasco would therefore have the benefit of the forbearance which would be granted to manufacturers as indicated in the Lanston Monotype case *supra*.

Conclusion

It is perhaps unfortunate for Medimpex and Lasco that McIntosh J. was not available to hear this application. Its nature is, for the most part, such that it seeks a re-consideration of the very issues which that learned judge considered and ruled upon. This approach, I find, is improper, in the absence of relevant new evidence which was not available at the hearing.

In the new evidence which was produced in other areas, Medimpex and Lasco have not demonstrated that either of them is likely to be irreparably harmed by this injunction pending the hearing of the appeal. Similarly they have not demonstrated that the health of the consuming public will be placed at risk by this court-imposed restraint on the trade in these products.

Even if I were permitted to consider all the areas which I have eschewed, I would have found in favour of Pfizer because neither Medimpex nor Lasco are manufacturers of the products affected by the injunction, and it is not the only product that they sell.

The applications are refused.

Costs are awarded to the claimant in the sum of \$16,000.00, which costs are to be paid in equal shares by the first and third defendants on or before 29th July 2005.