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BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 10 of 1985

BETWEEN:

LAKE DEVELOPMENT CO. LTD - Appellant

and

SHELL ANTILLES & GUIANAS LTD - Respondent

Before: The Hon. Mr. Justice Robotham - Chief Justice
The Honourable Mr. Justice Bishop
The Honourable Mr. Justice Moe

Appearances: Dr. F. Ramsahoye, Q.C., and E.A. Hewlett for Appellant
J.S. Archibald, Q.C., and Janice Creque for Respondent

1986: Jan. 15, 17.

JUDGMENT

BISHOP, J.A.

This is an appeal against the refusal of the learned trial Judge to grant an application for an interim injunction. The appeal is brought on behalf of Lake Development Company Limited, a company duly registered under the Laws of the British Virgin Islands and carrying on business at Road Town, Tortola. That company sought an order restraining Shell Antilles and Guianas Limited, a company registered in England, and carrying on business in Tortola (with its office at Fish Bay), its servants and/or agents and persons claiming by or through the said company from "entering or remaining upon or conducting business with any person other than the Defendant on the premises at Lower Estate, Road Town, Tortola, comprising by admeasurement 0.514 acres and used as a Shell Service Station, from changing and/or keeping changed any locks used by the Plaintiff on the premises whether on the buildings and erections thereon or on the petrol pumps thereon or on any other place on the said premises whatsoever, from taking any measures concerning the storage and sale of petrol and petroleum products other than those in use by the Plaintiff immediately before the 1st November 1985, from

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bringing to an end the supply of petrol and petroleum products to the Plaintiff in pursuance of the agreement made between the Plaintiff and the Defendant on the 1st February 1983, and from doing any act or thing to prevent the free use and enjoyment of the said premises by the Plaintiff and the carrying on of the business of a Shell Service Station thereon until after the hearing and determination of a Summons to continue this Order.....".

The ex parte application was by way of affidavit sworn by Patsy Lake, of John's Hole, a director of Lake Development Company Limited (also hereinafter called the Company), on the 1st November, 1985.

Also filed at the same time as the application was a Writ of Summons endorsed with a claim for damages for breach of an agreement made on the 1st February, 1983, by which Shell Antilles and Guianas Limited (also called Shell) granted a licence to the Company to operate a Shell Service Station at Lower Estate, Road Town, containing by admeasurement 0.514 acres with the building and erections thereon, and for an injunction in terms similar to those set out above.

The learned trial Judge allowed Shell, through Counsel present at the time, to be heard on the ex parte application. Clearly this was done in the interest of justice and to save time.

The arguments and submissions were confined to the facts disclosed in the affidavit and the law that Counsel regarded as relevant.

THE FACTS

On the 1st February 1983, the parties entered into an agreement for the grant of a licence by Shell to the Company to operate a service station for petroleum and petroleum products supplied by Shell, on premises owned by Shell, for a period of 5 years, and thereafter from month to month, until terminated in accordance with the provisions of the agreement.

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On the 31st July, 1985, or within five years of the date of the said agreement, Shell - through its Marketing Manager - sent a notice to the Company stating that it was acting under clause 15 of their agreement and giving "Notice of Termination of the said Agreement three months after the first day of August 1985, that is to say, with effect from the first day of November 1985".

On the 30th October 1985, or about three months after the date of the notice, the solicitor for the Company wrote Shell in the following terms:

> ".....upon the proper construction of the agreement your Company may not properly terminate the licence within the first five years of its term unless our clients have been in breach of the agreement. Our clients are not and have never been in breach of the agreement and you have not alleged any breach at any time prior to the service of the notice dated 31st July 1985 or at all.
>
> There is now clearly a dispute involving the proper interpretation of the agreement in relation to rights of termination and our clients are able ready and willing to proceed to Arbitration in terms of the Agreement to resolve the issue. If therefore you maintain your position that the agreement is terminable or terminated at this time without breach on our clients' part we hereby give you notice that we wish to proceed to Arbitration in terms of the agreement."

The solicitor's letter also mentioned a method for the selection of an Arbitrator and referred to the eventuality of waiver of arbitration but it is unnecessary to quote these aspects.

Now it is not clear when that letter of 30th October 1985 first came to the attention of Shell Antilles and Guianas Limited; but in my view the facts existing prior to the receipt of the letter permitted the conclusion that Shell was entitled to believe that the Company had acquiesced and that the Notice of Termination remained unopposed. Almost 3 months had elapsed and just about 2 days were left before the notice became effective, according to the letter.

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On the 1st November 1985, Shell by its servants and/or agents went on the premises at Lower Estate, Road Town, and, according to Patsy Lake, they sought to force her therefrom and to close the business by changing the locks on the building and the pumps with petroleum. She also alleged that she was being intimidated and put in fear for her personal safety, while in the office.

THE HEARING

The application went before the trial Judge on the afternoon of the 1st November 1985 and learned Counsel for the applicant sought to obtain an answer to the question: whether on a proper construction of the agreement the Notice of Termination was a valid notice which properly had the legal effect of ending the agreement between the parties? This, however, was not the only point that was raised. The Record showed that the Judge was also invited by learned Counsel for the parties to give consideration to the almost 3 months delay on the part of the Company in not responding to the notice dated 31st July 1985, the preservation of the status quo based upon the existing facts and circumstances, the balance of convenience and the fact that the claim sought damages for a breach of contract. I understood learned Counsel for the parties to say that there was no dispute between them as to whether there was a triable issue or serious question raised for decision, or that such question involved the interpretation of certain of the 18 clauses of the agreement dated 1st February 1983.

Having heard the contentions of learned Counsel, the trial Judge adjourned until the following day when she delieverd an oral judgment refusing the application for an interim injunction.

THE APPEAL

There were some 14 grounds of appeal related in some way to the Notice of Termination and the construction of the agreement. Learned Counsel for the appellant submitted that this Court should decide the

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issue of the proper construction of the agreement and that would bring an end to the whole case. Then, putting asside the question of construction of the clauses in the agreement, Dr. Ramsahoye submitted - inter alia - that the learned trial Judge had exercised her discretion improperly and had not addressed her mind to the correct principles. He contended that in refusing the application she could not have seen that (a) there was a serious question to be decided and (b) the balance of convenience merited the grant of an interim injunction. It was pointed out that the grounds of appeal did not refer to the decision of the Judge on these aspects and Counsel contended further that "assuming that she held that there was a serious question to be decided and assuming that she saw where the balance of convenience lay, it was inexplicable how she exercised her discretion the way she did."

Learned Counsel for the respondent submitted, among other things, that the facts and circumstances of this case showed that it was not a proper case in which an interim injunction should be granted. Mr. Archibald pointed out that the Statement of Claim filed by the solicitor for the appellant had quantified the damages allegedly suffered as a result of the alleged breach, and he analysed six principles by which, he said, this Court might be guided. Counsel further urged what in his opinion, the function of the Court of Appeal ought to be in an appeal against an interlocutory matter.

Learned Counsel on each side cited a number of cases in support of his submissions. I am grateful to them for their assistance. I have read and considered these authorities but I do not think it will help to deal with them in any way other than I have done.

In my view it must remain foremost in the mind of this Court that what was before it was the refusal of the trial Judge to grant a specific interim injunction and an appeal against that particular decision. Consequently, we must determine, after hearing both sides, whether or not the appellant has shown that the trial Judge (a) failed to apply the relevant principles of law or (b) applied the wrong principles of law or (c) applied the proper principles of law wrongly; (d) whether or not the appellant has proved that the trial Judge exercised her judicial discretion in a manner which offended the law. It was not for us to

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indicate whether we ought to be counted among the "thousands of judges" who, in the opinion of Dr. Ramsahoye would grant the injunction, or whether we should be numbered alongside the single judge who refused it. As Lord Diplock said in BIRKETT v JAMES (1978) A.C.297 (at page 317 letter H et seq.) "An appellate Court ought not to substitute its own 'discretion' for that of the judge merely because its members would themselves have regarded the balance as tipped against the way in which he had decided the matter. They should regard their function as primarily a reviewing function and should reverse his decision only in cases either (1) where they are satisfied that the judge has erred in principle by giving weight to something which he ought not to have taken into account or by failing to give weight to something which he ought to take into account or (2).....in order to promote consistency in the exercise of their discretion by the judges as a whole where there appear, in closely comparable circumstances, to be two conflicting schools of judicial opinion as to the relative weight to be given to particular considerations." Birkett v James was a case considered by the House of Lords. In a more recent case, EAGIL TRUST CO. LTD. v PIGOTT-BROWN and ANOTHER (1985) 3 All E.R. 119, heard in the Court of Appeal (Civil Division) in England, Griffiths L.J. made the following observations on the court's approach to appeals from the exercise of the judicial discretion:

> "The House of Lords has in a series of recent decisions reminded this court that its function is to review the exercise of the judge's discretion and not to entertain an appeal from it in the sense of being invited to substitute its own discretion for that of the judge..... Sometimes it is also said that the judge's discretion can be attacked if it is clearly wholly wrongly exercised. But in my view, the greatest caution should be adopted in that approach because it comes perilously close to a means of substituting this court's discretion for that of the High Court judge; and that is not permissible..... .....as to the judge's duty to give his reasons for his decision. A professional judge should, as a rule, give reasons for his decision.....in the field of discretion there are well established exceptions."

Lord Justice Griffith then gave as examples of the exceptions, the exercise of the judge's discretion on costs which are not of an unusual

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nature, and where leave is refused to appeal to the Court of Appeal having refused leave to appeal from an arbitrator's. At letter G on page 122, he continued thus:

> "I cannot stress too strongly that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what he says shows the parties and, if need be, the Court of Appeal the basis on which he has acted, and if it be that the judge has not dealt with some particular argument but it can be seen that there are grounds on which he would have been entitled to reject it, this court should assume that he acted on those grounds unless the appellant can point to convincing reasons leading to a contrary conclusion."

This Court did not have the benefit of the reasons of Bertrand J. for her decision. However, I have already indicated what the Record revealed at the hearing. It was also agreed before us that there was an arguable or triable issue remaining for decision. We must, in my view, assume, in the absence of anything to the contrary, that the learned Judge considered all the grounds urged for granting and for refusing the application. There were grounds available to her on which she could have properly refused the application and bearing in mind the role of this Court in this matter, I am of opinion that the appellant has failed to show to this Court that the trial Judge failed to exercise her discretion judicially or in a manner which recognised the principles of law. It was not enough, in my view, for learned Counsel to say that it remained inexplicable how she exercised her discretion as she did. The burden on the appellant went beyond that.

I would therefore say that the appellant having failed to show that the trial Judge acted improperly and ought not to have refused the application, the appeal must fail and so be dismissed; with costs in this Court and in the Court below. All costs agreed at $3,000.00.

/E.H.A.....

E.H.A. BISHOP,
Justice of Appeal

L.L. ROBOTHAM,
Chief Justice

G.C.R. MOE,
Justice of Appeal