SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

(CIVIL)

Suit No.77 of 1994

Between:

BARBARA I KIDDELL

Plaintiff

vs

WINDJAMMER LANDING CO LTD

Defendant

Mr K Monplaisir, QC and,
Mrs S Lewis for the Plaintiff

Mrs B Floissac-Flemming for the Defendant

1994: August 5 & 8
October 25

JUDGMENT

d'Auvergne, J.

By summons supported by two affidavits filed on July 15, 1994 the Plaintiff applied for an Interim Injunction against the Defendant (whether by its servants or agents) in the following manner:

1) Not in any way to interfere with the electricity and water supply or any other service connected to the Plaintiff's villa No.23 situate at Windjammer, La Brelotte Bay, Saint Lucia.

2) Restore the electricity and water supply connected to the Plaintiff's villa, No.23 situate at Windjammer, La Brolette Bay, Saint Lucia until the determination of the suit herein.

3) Sustain the maintenance provisions and other obligations as provided for in the Rental Pool Master Agreement and the Maintenance Agreement and the covenants, servitudes and other stipulations in the Deed of Sale by the Defendant to the Plaintiff registered in the Land Registry in Saint Lucia in Instrument No.2593/90 until the determination of the suit herein.

The Plaintiff in her supporting affidavit states that she is the owner of villa No.23 at La Brelotte Bay, Saint Lucia in the Defendant's holiday resort complex.

She further states that between the 25th and 27th July 1994 the Defendant wrongfully and deliberately disconnected electricity and water supply from her villa and consequently she is unable to use the said villa effectively. She concludes her affidavit by stating that if the injunction is not granted she will suffer hardship and irreparable loss and damage.

The second affidavit was deponed by Shirley Gustave who states that she is employed by the Plaintiff to clean and maintain the said villa. She said that when she left work on Saturday, June 25, 1994

the said villa had both electricity and water but on her return on Monday, June 27, 1994 the villa had neither electricity nor water and was still without those necessities to date. She concluded that under the circumstances she was unable to perform her duties properly.

Lynne Cram, Director of the Defendant Company filed an affidavit in reply on August 2, 1994 and stated *inter alia* that by the terms and conditions of the Maintenance Agreement between the parties filed as Exhibit E of a former affidavit sworn on March 9, 1994 and filed on March 11, 1994 (and which forms part of her reply). She was free to choose to act as she did. She noted Clause 4.1 of that agreement which reads as follows:

> The owner shall pay to Windjammer monthly during the first operating year of the term the sum of $500.00 U.S for maintenance service as herein set out . . . . the sum of $500.00 U.S. is an estimate for budgeting purposes only. The budget will be adjusted up or down depending on the actual figures.

She deponed that in accordance with the said agreement, the 1993 maintenance costs for the Plaintiff's villa was sent to her by registered post. The amount was $1,247.31; that by another letter dated September 15, 1993 the Plaintiff was provided with a statement of maintenance fees for the six months ended June 30, 1993; another letter dated November 15, 1993 was sent to the

Plaintiff in which the Plaintiff was provided with a statement of maintenance fees for the nine (9) months ended September 30, 1993; and finally by letter dated May 12, 1994 an audited statement of maintenance fees for the year ended December 31, 1993 which indicated that the actual cost of maintenance fees was $1,832.25 monthly.

The Defendant further deponed that on September 29, 1993 the Plaintiff was informed by correspondence that the maintenance payment for the year 1994 would be $1,855.00 but that despite these notices the Plaintiff continued to pay the Defendant $500.00 U.S. monthly.

She also noted in her affidavit the earlier application for an injunction in which the Plaintiff was one of the moving parties who sought to restrain the Defendant from charging more than $500.00 U.S. per month for maintenance fees and that on April 20, 1994 the Learned Judge refused to grant the order restraining the Defendant from charging more than $500.00 U.S. per month maintenance fee; that, despite that order the Plaintiff has continued to pay $500.00 per month.

She further deponed that the failure of the Plaintiff to pay the actual maintenance fees has caused undue hardship and distress to the Defendant and to the other villa owners; on April 15, 1994 the Plaintiff was advised by the Defendant of the state of her default

and if she did not remedy the said default the Defendant would have no alternative but to abide by the default provisions contained in Clause 7.2 of the Maintenance Agreement, the termination of the Maintenance Agreement.

Despite the above mentioned correspondence of April 15, 1994 the Plaintiff did not reply nor did she reply to the notice sent by registered mail dated June 7, 1994 in which she was advised that the Maintenance Agreement was being termnated. The Plaintiff once more did not reply and therefore on June 25, 1994 the Maintenance Agreement was terminated.

The matter came up for hearing on August 5, 1994, and Learned Senior Counsel for the Plaintiff commenced his arguments by quoting Lord Diplock in **AMERICAN CYANAMID CO vs ETHICAN LTD [1975] AC 396 A ALL ER 504** reiterating the pre requisites for an order of injunction which are as follows:

1) The Plaintiff must establish that he has a good arguable claim to the right he seeks to protect.

2) The Court must not attempt to decide this claim on the affidavits; it is enough if the Plaintiff shows that there is a serious question to be tried.

3) If the Plaintiff satisfies these tests, the grant or refusal of an injunction is a matter for the exercise of the Court's discretion on the balance of convenience.

He submitted that damages could never be a remedy for placing someone in a situation where he or she is prevented from having the basic necessities of life. He said that the affidavit of Lynne Cram was alleging that money was owned and therefore the Defendant

was forced to act in the manner in which it did.

Learned Counsel argued that Clause 7.2 of the Maintenance Agreement does not give the Defendant the authority to cut off the electricity and the water; that by the cutting off of the water and electricity the Defendant had created a clear nuisance. He argued that Clause 7.2 allows the Defendant to act in a more judicial manner, and stressed that the Defendant would not get their fees from the cutting off of electrical and water supply.

He concluded his argument with reference to paragraph 954 of Halsbury's Fourth Edition, Volume 24

> ***Threatened injury.*** *an interlocutory injunction will be granted to restrain an apprehended or threatened injury where the injury is certain or very imminent, or where mischief of an overwhelming nature is likely to be done, especially destructive operations. The court will interfere if the thing sought to be prohibited is in itself a nuisance or, although not in itself a nuisance, will manifestly end in such a nuisance as the court normally restrains. Where the mischief sought to be restrained is not in itself noxious, but only something which may prove to be so, an interlocutory injunction will not be granted.*

Learned Counsel for the Defendant contended that the application before the Court was for three interlocutory injunctions, the first

one of which was prohibitory, the second and third were mandatory. She told the Court that villa 23 was withdrawn from the rental pool on March 5, 1993 and the Defendant accepted the proposal ten (10) days later; that the Defendant wrote stating "as from March 21, 1993 the villa 23 will no longer be in the rental pool agreement and subsequently the Rental Pool Agreement for villa 23 was terminated and therefore the Plaintiff could not apply to the Court to sustain obligations provided in the Rental Pool Agreement when that agreement no longer exist between them.

She argued that for the applicant to successfully claim an interlocutory injunction she must satisfy the pre-requisites as laid down in the **AMERICAN CYANAMID CO vs ETHICAN LTD [1975] 1 ALL ER 504** She stressed that there must be a serious question or issue to be tried and the Plaintiff must have a real prospect of succeeding in her claim for all three injunctions and quoted **SMITH vs INNER LONDON EDUCATION AUTHORITY [1978] 1 ALL ER PAGE 411**.

She further said that the Plaintiff must show that she has a legal right which is being infringed before she can claim that she has a real prospect of succeeding in her claim for final injunction.

She said that exhibit E of affidavit of Lynn Cram filed on March 11, 1994 shows that there is a Maintenance Agreement between the parties, the owners of the villas are to pay for the maintenance of the services rendered by Windjammer; that the

services are dependant upon the villa owners satisfying their part of the contract. She further stressed that this right had ceased to exist because the contracts from which the rights were derived were resinded or terminated by the Defendant.

She contended that the Defendant could terminate the agreement if they cared to, since by clause 7.2, page 35, line 2 of the said exhibit states:

> "*Failing remedy of the said default, Windjammer may at its option and in its absolute discretion terminate this agreement*", that the termination was lawful since it is open to an innocent party in a repuditory breach either to accept the breach and terminate the agreement or to waive the breach and keep the contract alive.

She argued that since the Defendant as the innocent party having notified the Plaintiff by registered mail as was required by the agreement of the maintenance costs (see paragraphs 8-13 of Lynn Cram's affidavit in reply) and the Plaintiff did not adhere to her part of the agreement the Defendant terminated the agreement, that since electricity and water are services supplied pursuant to the agreement the latter having been terminated the Plaintiff had no legal right, a pre requisite for the granting of an order of injunction and that what the Plaintiff was in fact requesting was that the Court restore a contract that had been terminated.

She said that the Plaintiff's contention that she was only entitled to pay $500.00 monthly and had done so is incorrect and quoted clause 4.1 of the agreement.

> *"The owner shall pay to Windjammer monthly during the first operating year of the term the sum of $500.00 US is an estimate for budgeting purposes only. The budget will be adjusted up or down depending on the actual figures;"*

moreover, the Plaintiff is estopped from contesting the validity of the quarterly statements **(CASTAWAYS HOTEL LTD vs UNIVERSITY OF DOMINICA [1992] CIVIL APPEAL NO.4 OF 1992 SEPTEMBER 14)**.

She told the Court that on April 20, 1994 the Plaintiff was refused an order of injunction to reduce the maintenance fees to $500.00 US. She concluded her argument by saying that since the Plaintiff was seeking an equitable relief she should therefore come *'with clean hands'*; and that she had not done so.

At this juncture Learned Counsel for the Plaintiff withdrew paragraph 3 of the summons and replied by stating that by accepting accounts one is not precluded from examining and questioning them. He concluded that if the order of injunction was not granted the Plaintiff would suffer hardship and irreparable loss and damage.

CONCLUSION

As I see it the Plaintiff and the Defendant entered into an agreement, a contract, on the first day of September 1989. (Lynne Cram's affidavit Exhibit E dated March 9, 1994 and filed March 11, 1994 wherein the terms and conditions were stated).

Clause 4.1 under the Rubic Renumeration reads as follows:

> *The owner shall pay to Windjammer monthly during the first operating year of the term the sum of $500.00 US for maintenance services as herein set out . . . . the sum of $500.00 US is an estimate for budgeting purposes only. The budget will be adjusted up or down depending on the actual figures."*

Four sets of correspondence between September 24, 1992 and May 12, 1994 were sent to the Plaintiff by the Defendant informing her of the maintenance costs for 1993. The correspondence of May 12, 1994 was an audited statement of maintenance fees for the year ended December 31, 1993 which pointed out that the actual cost of maintenance fees was $1,832.25 per month.

The Plaintiff was also informed by another correspondence viz September 29, 1993 that the monthly maintenance payments for the year 1994 would be $1,855.00. Despite these notices the Plaintiff continued to pay $500.00.

In my judgment the Plaintiff by her conduct has breached the contract and consequently the Defendant could either accept the breach and terminate the contract or waive the breach and keep the contract alive. The Defendant chose the former and terminated the contract.

The water and electricity services were services which flowed from the agreement and were therefore contractual, legal rights; that the contract having been terminated these services or rights would cease.

Learned Counsel for the Plaintiff argued that by clause 7.2 the Defendant had "*to force the owner to remedy the said default.*"

It is my view that the Defendant did so by the various correspondence sent to the Plaintiff and by the authority of the same said clause 7.2, line 2, page 35 which reads as follows:

> "Failing remedy of the said default Windjammer may at its option, and in its absolute discretion terminate this agreement".

Based on the above the Defendant was free to terminate the contract.

Again in my judgment this is not a case where the balance of convenience as enunciated by the House of Lords in the **Cyanamid's Case** can be applied.

I accordingly dismiss the summons.

Costs will be cost in the cause.

SUZIE d'AUVERGNE
PUISNE JUDGE