

GRENADA

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. GDAHCV 2002/0056

BETWEEN:

JADINE LIMITED

Claimant

and

ANTONIO PICCOLO

Defendant

Appearances:

Mr. James Bristol, instructed by Grant Joseph & Co. for the applicant.
Mrs. Celia Edwards for the respondent.

2002: February 6, 8

JUDGMENT

ALLEYNE J.

[1] On Saturday, February 2, 2002, on an application without notice pursuant to Rule 17.3, it appearing to the court that there were good reasons for not giving notice, the applicant obtained an interim injunction in the following terms:

1. The defendant whether by himself, his servants, agents or otherwise be restrained until the 6th day of February, 2002, or until further order from:-
 - (a) Operating the business known as the Carenage Café situate on the Carenage in the town of St. George in Grenada;
 - (b) Entering on the premises of the said Carenage Café;

- (c) Removing any items or things from the said Carenage Café;
- (d) Preventing or in any way impeding free access to the said Carenage Café by the claimant, its servants, agents or otherwise.

2. Liberty to apply.

3. That the defendant do pay the costs of and occasioned by this application.

AND IT IS FURTHER ORDERED that this matter be adjourned until 6th February 2002 at 8.45 a.m.

[2] The respondent has filed a notice of application, whereby he applies for the discharge of the injunction, and for an injunction restraining the claimant from interfering with the right of the defendant's possession until trial and determination of the action or further action in the meantime.

[3] Both parties filed affidavits supported by exhibits in support of their respective applications.

[4] The applicant's application on notice, pursuant to the order of the court made in accordance with Rule 17.4(5), came on for hearing on Wednesday 6th February 2002, at which time the court also heard the respondent's application to set aside the injunction made pursuant to Rule 11.16, and his application for an injunction against the applicant.

[5] The facts, as deposed to in the parties' affidavits and confirmed by the exhibits thereto are essentially agreed and are, so far as relevant, as follows:

1. By agreement in writing made the 30th October, 2001, the applicant, the owner of the Café, which is located on the Carenage, St. George's, a

prime tourism location in the capital city, agreed that the respondent would operate the Café on the terms and conditions contained in the agreement.

2. The term of the agreement was to be one year commencing 15th November, 2001.
3. The respondent undertook to operate the Café in a proper and businesslike manner, and to maintain the standard of the business in all respects.
4. The respondent undertook to pay to the applicant a fee of \$250.00 EC per day during the term of the agreement. This sum was made payable to a nominated account at a named bank in favour of a named individual, Rita Joseph.
5. The respondent is entitled to all the proceeds of the business for the duration.
6. The rent in respect of the premises, separate and distinct from the fee, was to be paid to the landlord (not the applicant) on specified dates, the receipts for rent to be produced to the applicant's Solicitors within two days of payment.
7. The respondent undertook to pay for the stock at a value to be agreed, within three months of the date of the Agreement, i.e. on or before 31st January, 2002.
8. The respondent undertook to insure the contents of the premises and to provide the Solicitors with a copy of the policy and the receipt for the premium within one month of the commencement of the operations period, i.e. on or before 15th December, 2001.

9. The respondent undertook to maintain and keep in good repair and condition all the equipment and to replace all damaged equipment or parts thereof.
10. The respondent agreed to pay the applicant \$5000.00 EC on or before 31st December, 2001, to be held by the applicant (which I take, for the moment, to mean, for the purposes of this provision, Alberto Olivetti, described in the affidavit filed on behalf of the applicant as the sole shareholder and director of the applicant, a company) to defray expenses if he is compelled to return to Grenada as a result of the respondent being unable to perform his obligations under the contract.
11. It was agreed that the "agreement shall forthwith terminate
 - (i) If Mr. Piccolo fails to pay the rent to the Union on time
 - (ii) If Mr. Piccolo fails to pay the fee or any part thereof as provided for herein".
12. It was further agreed that if either party having committed a serious breach of the agreement, neglect or fail to remedy the breach within 30 days of being required by the other party to do so, and after service of a notice in writing summarily terminating the agreement, the agreement shall forthwith terminate.
13. There is provision for renewal.
14. The respondent is in breach of the agreement in that he failed to pay all of the fees due on 27th December, 2001, and 27th January, 2002, at which latter date the sum due was \$11,439.00.

15. On 27th December the respondent gave to the applicant's Solicitors a cheque in the sum of \$6,500.00, post-dated 5th January, 2002, in respect of the fees due on 27th December, 2001. This cheque was dishonoured by the bank upon presentation on 23rd January, 2002, the bank claiming that the respondent had no funds. This the respondent claims in his affidavit to be "as a consequence of error", without specifying on whose part the error occurred, his or the bank's. In any event, this is an admission of a breach of the agreement, and he further admits in his affidavit that he "was late in some of the payments to the Claimant and had verbally indicated to the Claimant by his Attorney that all payments would be made up to date by 1st February, 2002". He paid \$1561.00 on 29th January, 2002.
16. The amount of \$5000.00 payable by the respondent on 31st December, 2001, was not paid by the respondent until, effectively, 5th January, 2002.
17. Up to the date of the affidavit in support of the applicant's application, i.e. 2nd February, 2002, the respondent had not yet effected insurance on the contents of the premises, which he was obligated to do by 15th December, 2001.
18. The rent due on 31st December, 2001, was not paid until 14th January, 2002.
19. By letter dated 24th January, 2002, the applicant's Solicitor informed the respondent that "if December's fees are not paid today and/or if all monies due are not paid on Monday 28th January, 2002 then our client will exercise his rights to terminate. No further indulgences will be granted."
20. By further letter, dated 1st February, 2002, the applicant's Solicitors gave notice to the respondent "that the Management Agreement dated 30th

October, 2001 is terminated with immediate effect as a result of your several breaches complained of.”

- [6] In support of his application to continue the injunction learned counsel for the applicant argued that there is clearly a serious issue to be tried and that damages would be an inadequate remedy should the injunction not be granted and the applicant succeed in his claim in due course. Counsel claimed that it would be difficult to assess the damage to the business if the matters complained of continued. On the other hand, if the respondent were to be successful ultimately, damages would be an adequate remedy, witness the fact that he has claimed that he can be compensated in the sum of \$3000.00 per day.
- [7] In any event, counsel argued, on the balance of convenience the injunction ought to be granted for the reason that the contract at clause 17(ii) permits summary termination of the contract, that the respondent has admitted relevant breaches, that the applicant has admittedly, and justifiably within the terms of the agreement, terminated the contract, and that further proceedings would only be a waste of time and of the court's resources, would add pointlessly to costs, and would be contrary to the overriding objective of the CPR 2000. Counsel urged the court to use its powers under Rules 25 and 26 of CPR 2000 and on the admission of the respondent to enter final judgment for the applicant on the claim, and thus save cost and expense.
- [8] Counsel for the respondent did not accept that there is no dispute that the fees are outstanding. Further, counsel argued that clause 17(i) and (ii) cannot be read in isolation from 17(iii), and that the requisite notice under the clause had not been given. The circumstances surrounding the alleged breaches must be considered, and although the respondent did incur arrears, even at common law a reasonable time is allowed for a party in breach to rectify the breach before the other party is allowed to terminate. Counsel submitted that the letter, exhibit “B” to the respondent's affidavit, does not satisfy those criteria.

- [9] Counsel detailed the efforts made by the respondent to explain his difficulties and his efforts to satisfy the arrears and to seek indulgence on the part of the applicant. She submitted that the applicant had set impossible terms, and that failure to meet these terms could not be treated as a breach, in light of impossibility of compliance.
- [10] Counsel pointed out that the respondent had tendered the full amount due, admittedly late, and that the applicant had expressed willingness to accept the amount "with prejudice", by reason of which the respondent had not made the payment but sought legal advice. The respondent has taken all reasonable steps to remedy the breaches, and on the balance of convenience the injunction should be discharged.
- [11] In reply counsel for the applicant pointed out that the applicant had by letter of 24th January granted a final indulgence and had clearly indicated that failure to meet the deadline would result in termination. The respondent did not meet the deadline, and the applicant was entitled to exercise his rights freely agreed upon in a written contract whose terms are clear and unequivocal, which the applicant did by notice of termination dated 1st February, 2002.
- [12] Finally, counsel for the respondent submitted that to continue the injunction against the respondent would be to effectively resolve the substantive issue in the action, and that the court should hesitate to do so without a full hearing of the issues. While an injunction prior to a full trial would obviously adversely affect the respondent's position, the court is not constrained from granting such interim relief in appropriate circumstances.
- [13] I cannot agree that the court should in the circumstances grant the relief claimed in the action. It would be premature to do so. I also disagree with counsel that difficulty in assessing damages is a ground for granting an interim injunction. Difficult as it may be, it is the duty of civil courts to do so. Nevertheless, the respondent has admitted several breaches of the terms of his contract, and I agree

with counsel for the applicant that the balance of convenience favours continuing the injunction until trial or further order, and I so order. Costs in the cause.

Brian G.K. Alleyne
High Court Judge