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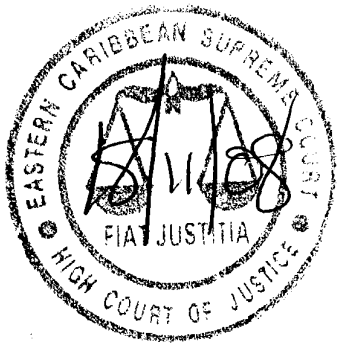

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO: 368/2008

BETWEEN:

AEROPOST TRINIDAD LIMITED	**1st applicant**
PETER EDWARDS	**2nd applicant**
AND	
VINCY AVIATION SERVICES CARIBBEAN FREIGHT & COURIERS LTD	**1st respondent**
	2nd respondent

Appearances: Mr. Jaundy Martin and Ms. Rochelle Ford for the applicants
Ms. Sandra Robertson – Drayton for Respondents

2008: November, 17th
November, 18th

DECISION

[1] **JOSEPH, Monica J :** On 31st October 2008 on a Without Notice application on behalf of the then applicants Vincy Aviation Services (Vincy Aviation) and Caribbean Freight and Couriers Ltd (Caribbean Freight), the Court granted injunctive relief against the then respondents Aeropost (Trinidad) Ltd. (Aeropost) and Peter Edwards.

[2] The Order restrained Aeropost and Peter Edwards and their directors or agents (a) from conducting business from 31st October 2008 to 17th November 2008; b) from printing, circulating, distributing or otherwise publishing notices of termination of any contracts between them, and restrained Aeropost, Peter Edwards, their servants or agents from opening any office in St. Vincent

and the Grenadines up to 17th November 2008, for the purpose of carrying on the same or similar services.

[3] Additionally, the Court granted an interim declaration that Vincy Aviation remain the agent of Aeropost and is entitled to commissions earned until 17th November 2008. The Court also granted an order permitting Vincy Aviation to withhold funds belonging to Aeropost which represent monies earned from 30th September to 17th November 2008, and that those sums be not paid over until accounts are properly verified and commission paid to Vincy Aviation.

[4] On 5th November 2008, a Notice of Application was filed on behalf of Aeropost and Peter Edwards for discharge of the interim injunction. On 10th November 2008, on submission made on behalf of Aeropost and Peter Edwards that the Order made on 31st October 2008 was unclear, the Order was amended. On 17th November 2008 I discharged the injunction and now state my reasons.

BACKGROUND

[5] First applicant Aeropost is a company with registered office in Trinidad and Tobago that offers systems, services, products, solutions and services through agents in Latin America and the Caribbean. Second applicant Peter Edwards is agent for the first applicant and provided affidavit evidence on behalf of both applicants.

[6] First respondent Vincy Aviation is a company registered in St. Vincent and the Grenadines that offers aviation services, courier and cargo handling services to the private and business communities in St.Vincent and the Grenadines. Its managing director is Ricardo Drayton who provided affidavit evidence on behalf of both respondents.

[7] Second respondent Caribbean Freight is a company registered in St.Vincent and the Grenadines that carries on the business of cargo and courier operation in the Caribbean. Its technical director is Ricardo Drayton.

Vincy Aviation had built up a good customer business of 185 customers when Drayton of Vincy Aviation acceded to an invitation from Aeropost and entered into a commercial agreement (Vincy Aviation and Aeropost) on 19th February 2007.

[9] There is a document dated 1st May 2008 (copy filed not signed) stated to be a Commercial Agreement between Aeropost and Caribbean Freight. There is a document, Amendment No.1 effective 1st August 2008 stated to be between Vincy Aviation and Aeropost which is signed by Drayton on behalf of Vincy Aviation on 3rd August 2008, but not signed by Aeropost.

APPROACH

[10] It is not for the Court at this stage to decide on the merits of the case. What is required is to ascertain whether there is a good arguable case that the parties are governed by the law of Trinidad and Tobago, and to determine on affidavit evidence on behalf of both parties whether the injunction should be discharged.

[11] I look for guidance to the case of American Cyanamid v Ethicon Ltd. (1975) A.C.397 at pg. 407: "G":

> "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to the facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

SHOULD INJUNCTION BE DISCHARGED

[12] This will be considered under five subheadings: (1) What is the issue (2) Dispute resolution – Arbitration (3) Applicable law (4) Validity of contract: Non disclosure/material representations (5) Cause of action

What is the issue

[13] Aeropost's Notice of Application claims that the real issue is whether or not a thirty day notice requirement had been breached and that damages would be capable of compensating the applicants.

[14] Mr. Robertson for Vincy Aviation agreed that the issue is - whether there is a contract breach due to lack of notice, and the points to be considered:

a) what is the period of notice breached;
b) if there is a breach what are the consequences of that breach;
c) was the contract unlawfully terminated

[15] He stated that the measure of damages is at large to be quantified. In exercising my discretion I have considered both factors: whether damages can be quantified and whether damages would be adequate remedy. I think that damages can be quantified from information in books and accounts of a business. I also think that an award of damages is an adequate remedy for Vincy Aviation. At p 408 "C" of Cyanamid Case, Lord Diplock said:

> "If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage."

[16] As I find that damages would be an adequate remedy the injunction should be discharged.

Dispute resolution - Arbitration

[17] For Aeropost, Miss Forde's submission was that paragraph 2 under applicable laws, dispute resolution of the agreement between the parties provide for dispute resolution by arbitration: that Vincy Aviation could invite intervention of the Court only with leave of the Court, in accordance with section 3 of the Arbitration Act (Cap.13) (the Act) which leave grant is non existent.

bc

[18] For Vincy Aviation, Mr. Robertson's submission was that that paragraph 2 of the agreement does not take into account a breach of contract on termination of contract but rather addresses matters other than contract termination: that that paragraph is of no effect in the circumstances of this case and that leave of the Court is not required to make application to the Court.

[19] Paragraph 2 under Applicable Laws, Dispute Resolution of Commercial Agreement of February 2007:

> "Any controversy produced during the relationship of this Commercial agreement, or any unresolved breach of the Commercial agreement terms will be resolved through a Conciliation and Arbitration Association recognized by the American Arbitration Association. The results of this Arbitration shall be respected and abided by both parties"

[20] My interpretation of that paragraph is that the paragraph governs all unresolved matters between the parties falling within or flowing from the Commercial Agreement including a claim of a contract termination breach.

[21] Section 3 of the Act enacts:

> "An arbitration agreement, unless a contrary intention is expressed therein, shall be irrevocable except by leave of the Court and shall have the same effect in all respects as if it had been made an order of Court."

[22] As I understand that provision, where a party to an arbitration agreement desires to bypass arbitration proceedings and commence legal proceedings, that party must obtain the leave of the Court. That understanding is strengthened by section 7 of the Act which provides that where a party to an arbitration agreement commences any legal proceeding against another party to the arbitration agreement that other party, before taking any step other than an appearance, may apply to the Court for a stay of the legal proceeding.

[23] I have considered whether a Without Notice Application applying for an injunction is a proceeding as contemplated by the Act. The answer is supplied by Lord Denning MR in Harkness v Bell's Asbestos and Engineering (1967) 2 QB 729 at page 735 "A":

> "First, it is said that at the time of the registrar's order, there were no 'proceedings' because no writ had been issued. So the rule, it was said did not apply. I think that this is far too narrow an interpretation. This rule should be construed widely and generously to give effect to its manifest intentions. I think that any application to the court, however informal, is a 'proceeding'. There were proceedings in being at the very moment that the plaintiff made his affidavit and his solicitor lodged it with the registrar."

[24] As leave of the Court was not sought as required by section 3 of the Act, the injunction is to be discharged.

Applicable Laws

[25] Mr. Robertson"s argument was that, in essence, the contract has its real and closest connection to St. Vincent and the Grenadines and that the Commercial Agreement was intended by both parties to be performed in St.Vincent and the Grenadines. Miss Forde's submission was that there is no need to consider the factors connecting the contract to Trinidad or St.Vincent and the Grenadines as the parties had agreed on the law to govern their agreement.

[26] I find that the intention of the parties is quite clear from the documents filed i.e., that the agreement 'is interpreted and directed in accordance with the laws of Trinidad and Tobago.' . However I shall attempt to approach the decision on this point, journeying on part of the route taken by the judge in Spiliada Maritime Corp v Cansulex Ltd. The Spiliada (1986) 3AER 843.

[27] In that case the Court was interpreting the Rules of the Supreme Court which provided that a writ can be issued and served out of the jurisdiction if a contract by 'its terms or by implication is governed by english law.' Before exercising his discretion as to service out of the jurisdiction, the judge was required to decide whether the contract was governed by English law.

[28] The report of the case discloses that the learned judge decided firstly, on whether there was a good arguable case that the shipowners and Cansulex (respondents) were parties to a contract governed by english law. The documentary evidence was that there was a charter party for the contracted voyage that contained a London arbitration clause. There were bills of lading that were accepted by the respondents which were endorsed with a statement that 'no matter where issued, shall be construed and governed by English Law, and as if the vessel sailed under the British Flag.'

[29] Having concluded that the documents evidenced that english law was the proper law, the judge secondly, considered whether the case had been shown to be a proper one where he should exercise his discretion in making an order for service out of the jurisdiction. It was in deciding on the service out of jurisdiction point that he considered connection factors, e.g., availability of witnesses, multiplicity of proceedings. His conclusion was that on those connection factors, the proper law was english law and that he could exercise his discretion on service out of the jurisdiction, in accordance with the rules of the Supreme Court.

[30] The judge therefore commenced his deliberations by paying heed to what the documents evidenced and I am attempting to follow on a portion of the path he trod. Having concluded that the documents evidenced that the law of Trinidad and Tobago is the proper law, I turn to consider connection factors although I do not think that the clear intention of the parties can be displaced by connection factors. The distinction between this case and the Spiliada case is that the judge in that case had to consider connection factors in relation to exercising his discretion under rules of Court relative to service out of the jurisdiction.

[31] The main issue in the present case is the question of the thirty day notice. The connection factors the Court looks at are: The notice of contract termination moved from Aeropost's management in Trinidad to Vincy Aviation's management in St.Vincent. I can make certain inferences: that for a trial there would possibly be documents in, and witnesses from Trinidad. Similarly there would possibly be documents in, and witnesses from, St.Vincent and the Grenadines. Those factors do not take the matter further as there is a virtual tie, a neutral factor.

[32] Another possible connection factor – the agreement for arbitration. The Agreement provides that the Arbitration Association selected must be recognised by the American Arbitration Association and is silent as to which country should host the arbitration. It is therefore necessary to fall back, so to speak, on the agreement between the parties, which states that the law governing the agreement is the law of Trinidad and Tobago and I so find.

[33] As the proper law governing the contracts between the parties is the law of Trinidad and Tobago the injunction should be discharged.

Validity of Contract: Non disclosure / Material Misrepresentation

[34] Questions that arise as to the effect and validity of partially signed contracts would be for trial. Drayton deposed on behalf of Vincy Aviation that on 25th October 2008 Vincy Aviation received a letter "purporting to terminate a non existing relationship" between Vincy Aviation and Caribbean Freight on one hand and Aeropost on the other.

[35] If there is a non existent relationship then on what Agreement is the Court being approached for relief? Can there be a contract termination if there is no existing contractual relationship? There is also a statement of Aeropost's Peter Edwards in his affidavit of 5th November 2008 "that the purported agreement dated 1st May 2008 (Aeropost and Caribbean Freight) was an unexecuted document which was principally in contemplation of the then First Defendant/Applicants expanding its business to Grenada and other territories in the region."

[36] In a further affidavit filed on 7th November 2008 (after the grant of the injunction) Vinci Aviation exhibited copy of Email from Aeropost on 8th August 2008 forwarding amended contracts and a further email of 7th September 2008 stating that the amended contracts had been forwarded for signature and inviting their return by 10th September 2008.

[37] Drayton for Vincy Aviation deposed on 7th November 2008, that he had signed the Amendment to the Commercial Agreement effective 1st August 2008. This document bears his signature but no signature on behalf of Aeropost. He also deposed that he had signed the amended contracts and had given them to Vincy Aviation's employee Edwards to file, which the latter denies. Edwards who is now agent for Aeropost was at that time Vincy Aviation's employee.

[38] The contract document of 1st May 2008 recites that the Agreement is 'to be executed in duplicate, one for each party'. I am puzzled as to why Drayton would give the contracts he had signed to Edwards to file in the office, when those signed contracts should have been winging their way to Aeropost. as the amended contracts would need to be signed by Aeropost.

[39] There is reference in Drayton's affidavit of a non existing relationship but there also seems to be an invitation to the Court to find that there is an existing relationship. For the Court to get as full a picture as possible in attempting to serve the interests of justice, I think the documents exhibited to the affidavit filed on behalf of Vincy Aviation and Caribbean Freight on 7th November 2008 (after the grant of the injunction) ought to have been exhibited when the application without notice was filed .

[40] The legal principles relative to nondisclosure are outlined in BVI Claim no 2003 [0209] Enzo Addari v Edy Gay Addari, Rawlins J (as he then was) in considering the grant of a freezing order stated the principle at page 6 paras 21 and 23:

Para 21

"A material misrepresentation of facts by an applicant for a freezing order has the same effect as a material non-disclosure. The former could overtly mislead a court to grant an order without notice. The latter could mislead a court to grant the order by virtue of omission to disclose information that is material.

Para 23

"An applicant, who seeks a freezing order without notice, is under a duty to make full and frank disclosure of all material facts that touch the case. The applicant must disclose all such facts that are within his or her knowledge, as well as facts that would have come to his or her attention with reasonable diligence or upon reasonable inquiries. The duty is a continuing one. An applicant must bring any material changes in circumstances that occur after the grant of the freezing order to the attention of the court. At this stage, a court should not attempt to resolve complex issues of disputed facts or law on an application to discharge or to vary a freezing order."

41] However, I appreciate that the process of preparation for an application without notice is a quick one: taking hurried instructions, in addition to a client possibly being upset and being required to collect documents quickly, that this may well have been a genuine error.

Cause of Action

[42] On my commenting (I did not order) that a claim form setting out a cause of action has not been filed in this matter, Mr. Robertson stated that that was being prepared and would be filed but this has not yet been done. An interlocutory injunction cannot stand on its own as there must be a cause of action set out in a filed claim form.

[45] In Siskina v Distos Compania Naveira S.A. 1979. A.C. 210 at page 256, "C" Lord Diplock stated:

> "A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the Court.. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction".

[46] This is a further reason for discharging the injunction.

[47] **The order:**

The application filed on 5th November 2008, on behalf of Applicants Aeropost and Peter Edwards, to discharge the interlocutory injunction issued by the Court on 31st October 2008 is granted. The injunction granted on 31st October 2008 be and is hereby discharged.

Costs to the applicants. I invite counsel to address me on the issue of costs in chambers.

Monica Joseph
High Court Judge (Acting)
20th November, 2008.