EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE (CIVIL)

CLAIM NO. ANUHCV 2017/0272

BETWEEN:

[1] BLUE CAP ENTERPRISES LIMITED T/A TRANS CARIBBEAN MARKETING

Claimant

and

[1] EDWARD DONALD MEYER

[2] JOHN MCDONALD

[3] BEVERAGE MARKETING SERVICES LTD.

Defendants

Before: The Hon. Mde. Justice Rosalyn E. Wilkinson

Appearances:

Mr. Justin L. Simon Q.C. and with him Mr. Kwame L. Simon for the Claimant Mrs. Karen A. De Freitas-Rait for the First Defendant

Mr. Roger Forde Q.C. and with him Ms. Andreen Vanriel for the Third Defendant

2017: August 1st

August 21st

ORAL JUDGMENT

[1] **WILKINSON, J.:** On 29th May 2017, Blue Cap Enterprises Limited ("BCE") filed its claim form, statement of claim and application seeking an interim injunction. The application was supported by the affidavit of Mr. Irving Edwards. Mr. Myer, Mr. McDonald and Mr. William Cooper, a director of the Beverage Marketing Services Limited ("BMS") filed their respective affidavits in response to the application on 14th June 2017. On 22nd June 2017, BCE filed an amended application together with amended claim form and amended statement of claim. Further affidavits from the Parties followed.

[2] By the amended application BCE sought an interim injunction restraining Mr. Meyer from acting in breach of the terms of his contract of employment by actively seeking to.acquire the exclusive distribution rights for Heineken products in Antigua and Barbuda through the incorporation and operation of BMS and in direct competition with BCE, the authorised distributor of Heineken products in Antigua and Barbuda pursuant to an exclusive distribution agreement.

[3] The grounds of the application were that:-

1. BCE is a wholesale distributor of produce and beverages in Antigua and Barbuda.

2. Mr. Meyer held the position of Managing Director of BCE and thereafter the position of Business Director. Mr. Mc Donald held the position of Beverage Line Manager of BCE.

3. Article 5 of Mr. Meyer's contract of employment contains a restraint of trade clause preventing Mr.·Meyer from actively engaging in business activity of a competitive nature during his term of full-time employment with BCE or within two years after termination of his contract of employment.

4. Article 1 and 6 of Mr. Mc Donald's contract of employment permits BCE to terminate the employment of Mr. Mc Donald for breach of the covenant against competition and engaging in conduct detrimental to the best interest of BCE.

5. A company search conducted at the Intellectual Property & Commerce Office revealed that BMS was incorporated by Mr. Meyer and Mr. William Cooper on 13th April 2017. Further, BMS' business plan indicates that the sole purpose of BMS is to provide beverage distribution services for Heineken products in Antigua and Barbuda. Mr. Meyer and Mr. Mc Donald are the operators of BMS.

6. BCE is the authorized distributor of Heineken products in Antigua & Barbuda for the past fourteen {14) years. Both Mr. Meyer and Mr. Mc Donald were retained as employees of BCE to manage the ongoing relationship with the Heineken brand and to ensure that the exclusive distribution rights for the Heineken products remained with BCE given their intimate working relationship with the Heineken brand and its representatives.

7. BCE believes that unless restrained by the Court, Mr. Meyer will continue to actively pursue the acquisition for the exclusive distribution right for Heineken products in Antigua and Barbuda

through the operation of BMS in breach of his contract of employment, thereby causing BCE to suffer serious loss and damage.

The Evidence

[4] In passing the Court observes that several exhibits to the first affidavit of Mr. Edwards were marked with only 1 identifier, "IE-1" and the same observation applies to the second affidavit of Mr. Dennis Francis -"DE-2". The Court refers Counsel to CPR 2000 rules 30.4 and 30.2{d) {iv). Each exhibit is to be separately marked and referred to in the affidavit by its identification mark.

[5] BCE is a company incorporated at Antigua and Barbuda and is in the business of obtaining sole distributorship of certain produce and drinks as a wholesaler and selling same throughout Antigua and Barbuda. Mr. Meyer together with Mr. Richard Cappelluzzo owned all of the shares in BCE. At 31st January 2003, Heineken Trading N.V agreed to give BCE exclusive distributorship of its products in bottles/can/kegs in Antigua {"the Heineken agreement"). It is observed that Barbuda is not cited in the Heineken agreement. The Heineken agreement amongst its several terms providing for termination also provided as follows:

"10. The Agreement enters into force on April 1s12003, and shall remain in force for a period of one (1) year. In the absence of one (1) month's prior notice of termination given to the other party in writing this Agreement shall be automatically extended for an indefinite period of time until it is terminated by either party upon three (3) months' notice in writing to the other."

[6] By written contract dated 1st March 2003, BCE employed Mr. Meyer as beverage line manager with reporting to the managing director and who was himself.

[7] According to the affidavit of Mr. Edwards, BCE suffered from severe cash flow problems and in and around September 2016, VMI Ltd., a company with which Mr. Denis Francis is involved, gave BCE a loan to settle its overdue trade debts, court judgments connected to trade debts and to support loan payments to its bank. In return for the loan, there was a charge registered by VMI Ltd. over all of the issued shares in BCE.

[8] Mr. Edwards further deposed that during negotiations for the loan, it was recognised by the Parties that the Heineken agreement was probably the most important asset of BCE and that all efforts should be made to preserve it for BCE.

[9] At or about September 2016, VMI Ltd. exercised its option under its agreement with BCE and converted the loan into equity with 5000 shares or 33 percent shareholding. At September 2016, in view of the pending change in share ownership and control, a management team was put in place and Mr. Meyer was to cease being the managing director and be re-hired under a new contract as business director.

[10] By contract date-d21st September 2016, BCE employed Mr. Meyer as business director to provide operational advice to its board of directors and to collaborate with the board in ensuring the smooth transfer of ownership of BCE. Mr. Meyer's employment contract provided as follows:

"5. **Extent of Services:** BUSINESS DIRECTOR shall diligently and conscientiously devote his entire time, attention and energies to the COMPANY'S business and shall not, during the term of full-time employment under this Agreement or within two years after the termination of this Agreement solicit or endeavour to entice away from or discourage from dealing with the COMPANY any person who was at any time a supplier, customer, client, distributor, agent or independent contractor of or to the COMPANY, or pursue or be actively engaged in any other business activity of a competitive nature. Provided That BUSINESS DIRECTOR is permitted to passively invest in projects as he sees fit, and derive income therefrom."

Mr. Meyer challenges the circumstance under which this employment contract came into force.

[11] On 13th April 2017, BMS was incorporated, its directors were listed as Mr. Cooper and Mr. Meyer. Under the articles of incorporation filed on the said 13th April 2017, paragraph 5, BMS is stated to have been established to manage real and personal property, and engage in any and all business activities permitted by the Laws of Antigua and Barbuda. The name search request had stated that the business of BMS would be beverage distribution services.

[12] On March 2017, VMI Ltd, finalised its acquisition of all the remaining shares of BCE from Mr. Meyer and Mr. Cappelluzzo.

[13] The Heineken agreement it was said contributed significantly to BCE's financial bottom line. The Court was informed that it could be as much as 55 percent. Mr. Meyer's role according to Mr. Francis was to preserve the Heineken agreement for BCE.

[14] BCE's management discovered on its computer previously used by Mr. Meyer emails dated between 24th March 2017 and 24th May 2017, and exchanged between Mr. Meyer, Mr. McDonald and Mr. Shane Ramjit, Heineken's Caricom manager and a business plan for distribution of Heineken products at Antigua and Barbuda. By the plan, a new company, BMS was to be incorporated, Mr. Meyer and Mr. Cooper were to be appointed directors, Mr. McDonald was to be appointed general manager and the shares in BMS were to be held 42.5 percent each to Mr. Meyer and Mr. Cooper and 15 percent to Mr. McDonald.

[15] By letter dated 29th May 2017, BCE terminated Mr. Meyer's employment citing discovery of the emails and the business plan. BCE was of the view that such actions would have direct and substantial adverse effects on BCE and viewed Mr. Meyer's actions as amounting to a material dishonesty, breach of trust and gross misconduct in the circumstances of his employment as business director, he was terminated forthwith.

[16] Mr. Irving Edwards in his first affidavit filed on 29th May 2017, in support of BCE's application at paragraph 23 stated that on the said 29th, a supervisor of BCE received a telephone call from Heineken's representative, Mr. Ramjit informing that Heineken intended to terminate the Heineken agreement but it had not as yet received an official notification.

[17] On 27th July 2017, the Court on reviewing the file in preparation for hearing of the application observed that there was no written statement by Heineken disclosed as to termination of the Heineken agreement and so made written inquiry of Counsel for the Parties through the

Deputy Registrar as to what was Heineken's position in the matter. On 31st July 2017, Mr. John McDonald filed an affidavit to which was exhibited a statement from Mr. Ramjit. He wrote:

II July 28th 2017

To whom it may concern,

This is to confirm that Heineken Brouwerijen B.V. has entered into a signed contract with Beverage Marketing Services Limited of Antigua by which, commencing September 1st 2017, Beverage Marketing Services Limited will be the official sole distributor of Heineken brands and products for the territory of Antigua & Barbuda.

Heineken Brouwerijen B.V. has terminated its contract with Trans Caribbean Marketing as distributor for the territory of Antigua and Barbuda, with effect on August 31st 2017.

Sincerely, Regards,

(signed) Shane Ramjit

Area Export Manager- Caricom."

[18] Up to date of hearing on 1st August 2017, none of BCE's witnesses had disclosed if BCE had received the termination notice in writing as required by the Heineken agreement. No reason was given by BCE as to why it did not disclose that Heineken had in fact terminated the Heineken agreement. Counsel for BCE did say that BCE had no fight with Heineken and perhaps this was to protect a position as Counsel told the Court, in what the Court believes was "tongue in cheek" that at this juncture Heineken could recall the notice and things would be as there were before.

[19] In so far as BSM is concerned _the Court believes that it ought to record the pleadings in the amended statement of claim against that company. They were:

"4. The Third Defendant was incorporated by the First Defendant and William Cooper with the specific object, if not the sole purpose of representing Heineken products in Antigua and Barbuda as a full service distribution company with experienced staff to provide specialized attention and guaranteed distribution for Heineken products.

17. According to the business plan the sole purpose of the Third Defendant is to acquire the exclusive distribution rights for Heineken products in Antigua and Barbuda through the acquisition of a distributorship agreement between the Third Defendant and Heineken.

22. A company search conducted at the Intellectual Property & Commerce Office revealed that the Third Defendant was incorporated on the 13th April 2017 to provide beverage distribution services for Heineken Products in Antigua and Barbuda. The First Defendant and William Cooper are listed as the incorporators of the Third Defendant.

23. The First Defendant is recorded as a Director of the Third Defendant in the Notice of Directors.

28. The Claimant believes that, unless restrained by order of the Court, the First and Second Defendants will continue to actively pursue the acquisition of the exclusive distribution rights for Heineken products in Antigua and Barbuda through the Third Defendant in breach of their respective contracts of employment, thereby causing the Claimant to suffer serious loss and damage."

The Law

[20] CPR 2000 rule 17.1(b) provides the Court with the authority to grant an interim injunction. The applicable principles to be applied in granting an interim injunction are still to be found in the case of **American Cyanamid Co. v. Ethicon Ltd1 .** At this juncture the Court is· not justified on embarking on anything resembling a trial of the action on conflicting affidavits in order to evaluate the strength of any of the Parties' case. The matters to which the Court is to have regard and must confine itself in determining whether to grant the interim injunction sought and which must be satisfied are that:

(a) the applicant has established a serious issue to be tried;

(b) damages are not an adequate remedy;

(c) the balance of convenience lies in favour of granting such relief (that is, the grant of an injunction will do more good than harm); and

(d) the applicant is able to compensate the respondent for any loss which such injunction may cause him in the event that it is later adjudged that the injunction ought not to have been granted.

[21] In **American Cyanamid2** Lord Diplock at page 510 and 511 said:

"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 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. One of the reasons for the introduction of the practice requiring an undertaking as to damages on the grant of an interlocutory injunction was that it aided the court in doing that which was its great object, viz abstaining from expressing any opinion upon the merits of the case until the hearing...So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

1 **(1975]** 1 **AER 504.**

2 **Ibid.**

Save for the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application some disadvantages which his ultimate success at the trial may show he ought to have been spared and the disadvantages may be such that the recovery of damages to which he would then be entitled either in the action or under the plaintiff's undertaking would not be sufficient to compensate him fully for all of them. The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies; and if the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent on the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking on anything resembling a trial of the action on conflicting affidavits in order to evaluate the strength of each party's case."

[22] In **Francome v Mirror Group Newspapers Ltd.** [1984] 2 ALL E.R.408 at 413 Sir John Donaldson MR stated that "the balance of convenience" might be more properly called "the balance of justice".

[23] While Counsel for BCE says that there is no fight with Heineken, Heineken is at the root of the dispute and so the principle applies that he who comes to equity must come with clean hands. As the Court stated prior, the matter of Heineken's position on the dispute and termination was raised by the Court because BCE appeared to only fleeting deal with the issue of termination by Heineken by reference to a telephone call from Mr. Ramjit and it took inquiry from the Court to secure the definitive position under the hand of Mr. Ramjit. The Court believes that BCE is in possession of a written termination notice which it has not disclosed because of an indirect or implicit reference to same by Counsel for BCE. This non-disclosure brings the Court to the issue of full and frank disclosure. Failure to provide full and frank disclosure can have dire consequences. The Court relies on **Brink's Mat Ltd. v.**

Elcombe 3 , Bank Mellat v. Nikpour4 and **Sidhu v. Memory Corporation Plc.5** for its proposition. In the latter case Mummery LJ stated:

"It cannot be emphasised too strongly that at an urgent without notice hearing for a freezing order, as well as for a search order or any other form of interim injunction, there is a high duty to make full, fair and accurate disclosure of material information to the court and to draw the court's attention to significant factual, legal procedural aspects of the case...." (My emphasis)

[24] What was the effect of the notice? Did it bring the contract to an end? Could the notice be retracted s suggested by BCE's counsel once issued? Or would a new contract have to be made between BCE and Heineken if Heineken wanted BCE to continue to be its distribution agent? According to**Stroud's Judicial Dictionary of Words and Phrases6** "Notice' is a direct and definite statement of a thing, as distinguished from supplying materials from which the existence of such a thing may be inferred."

[25] The Court believes that an analogy may be drawn between the notice in the Heineken agreement and a notice to quit between a landlord and tenant in a lease. In that regard the Court refers to**Davies v Bristow7** where **Lush J** said:

"Once the notice is given and received the term automatically comes to an end upon the expiration of the notice, and the position is then precisely the same as it would be if the original lease had provided for the determination of the term on the date mentioned in the notice to quit. There is no room for any election by the landlord. The landlord and the tenant may agree that a new tenancy shall be created on the old terms as to rent, and that is what, in effect, they do when they agree to treat the notice to quit as inoperative, or, to use the expression which is used so often - that they agree to waive the service of the notice to quit...." (My emphasis)

3 (1998]1 WLR 1350 Ralph Gibson LJ at page 1356.

4 (1985] FSR 87 Lord Diplock at page 89

5 (2000] 1 WLR 1443 CA -cited from The Caribbean Civil Practice 2011 at page 181 and 182

6 6th edition.

7(1920]AER 509 at p.513.

[26] The case against Mr. Meyer for trial and for consideration on the application is that of breach of the restrictive covenant in the 21st September 2016, employment contract with BCE, a contract of which he challenges its very existence. The breach of and challenges to the employment contract are matters for trial.

[27] The Court reviewed the several authorities provided by BCE and for the time being refers to **(1) Spafax Ltd v. Harrison, (2) Spafax Ltd. v. Taylor!** as it believes that the statement at the headnote assist in the consideration of whether or not there is a serious issue to be tried between BCE and Mr. Meyer. It states:

"The principles to be applied to restrictive covenants are well established, although each case has to be determined on its own merits in the light of all the relevant facts.

An employer is entitled to take and enforce promises from an employee which the employer can prove are reasonably necessary to protect him, the employer, his trade connection, trade interest and goodwill, not from competition by the employee if he leaves his employment or from his then using the skill or knowledge with which his employment had equipped him to compete, but from his then using his personal knowledge of his employer's customers or his personal influences over them, or his knowledge of his employer's trade secrets, or advantages acquired from his employment, to his employer's disadvantage. A promise not to divulge trade secrets or to use confidential information may express little more than the duty or fidelity implied by law in every contract of employment. The law distinguishes, and apparently expects employees and employers to distinguish between two things, both acquired from the employee's employment (1) his own skill and knowledge which are his and which he may honestly use in competition with

his former employer, and (2) confidential information which is theirs and which he may not honestly use."

Findings and Analysis

[28] An early observation of the Court is that BCE's Heineken agreement only provides that exclusive distribution is at Antigua and not for exclusive distribution at Antigua and Barbuda. It would therefore appear that there was no Heineken agreement at 2003, in relation to Barbuda.

8 [1980] IRLR 442

[29] According Wikipedia, **Heineken N.V.,** shortened to **Heineken,** is a Dutch brewing company, founded in 1864 by Gerard Adriaan Heineken in Amsterdam. As of 2017, Heineken owns over 165 breweries in more than 70 countries. It produces 250 international, regional, local and specialty beers and cider and employs approximately 73,000 people. With an annual beer production of 188.3 million hectolitres in 2015, and global revenues of 20,511 million Euros in 2015, Heineken N.V. is the number one brewer in Europe and one of the largest brewers by volume in the world. Since the merger between the two largest brewing empires in the world, Anheuser-Busch In Bev and SABMiller, in October 2016, Heineken has been the second largest brewer in the world. Against this background the Court believes that it would be fair to say that Heineken is no small player in the beer and ciders business and without more would make its own decision for its financial survival at Antigua and Barbuda.

[30] While BCE is correct that its case is against Mr. Meyer for breach of his employment contract, the Court however, believes that it cannot ignore when considering matters in the round the definitive statement of Mr. Ramjit on termination of the Heineken agreement. The Heineken agreement has been terminated pursuant to the agreement on 90 days' notice and which notice expires on 31st August 2017. The Court relies on **Davies v Bristow!'** for the effect of the notice. The dealings between Heineken and BCE are at an end. There can only be if Heineken so choses, a new agreement with BCE but no recalling of the notice to terminate.

[31] Moving on to the considerations of which the Court must have regard and examining them first in relation to BCE and Mr. Meyer, the first being whether there is a serious issue to be tried.

[32] The Court believes that on the authority of **Spafax Ltd** the contract of employment executed on 21st September 2016, and in particular clause 5 establishes a serious issue to be tried. There is too the challenge as to the circumstances in which the contract came into being. The Court recalling first principles and which include that it is not the Court's duty at this juncture to try to resolve conflicts in evidence nor decide difficult questions of law, is of the view that both are matters for fleshing out at trial. BCE has therefore crossed the first hurdle set out in **American Cyanamid Co.**

[33] The second hurdle is whether or not damages would be an adequate remedy. This matter is strictly of a commercial nature i.e. the financial benefits from the Heineken agreement. BCE aside from saying that the Heineken agreement produced 55 percent of its income, and this statement was not supported by say a balance sheet or other matters of accounts, produced not an

iota of proof of the value of the agreement. Whether it is $10,000.00 or $1m, the Court does not know. The Court being without a single iota of evidence as to the money value of the Heineken agreement to BCE, it cannot of course make an assessment in what is strictly a commercial relationship as to whether or not damages is an adequate remedy.

[34] Looking at it from another angle, as the Court sees it, general damages if awarded to BCE, would take into account BCE's income from the Heineken agreement and so if the Heineken distributorship is as valuable and profitable as BCE says that it is, then there is no reason why if Mr. Meyer and ultimately BMS is Heineken's distributor that they could not pay from a BMS/Heineken agreement any damages awarded from the profit made on a BMS/ Heineken agreement.

[35] Against this background, the Court is not convinced that this is not a case in which damages would not suffice and so there will be no interim injunction restraining Mr. Meyer in his person or acting as director or other officer/employee of BMS.

[36] Referring to BMS and applying the principles of**American Cyanamid Co 10,** on the Court's reading of the order sought, it appears to the Court, that really the only possible interim order could be against Mr. Meyer and not BMS. There is no outright interim order sought against BMS say in circumstances where Mr. Meyer did not figure in that company or was operating in the background and BMS nevertheless continued to deal with Heineken.

[37] Further, on review of the pleadings with reference to BMS, the Court could find no cause of action. This again in the Court's view supports its position that there is no interim order being sought against BMS in its own right.

[38] Without a cause of action against BMS there can be no serious question to be tried. The first hurdle in **American Cyanamid** has not been crossed.

[39] Court's order:

1. The application for interim injunctions against Mr. Meyer and BMS is denied.

2. Costs in the sum of $3,500.00 each to Mr. Meyer and BMS.

3. BMS' application filed 5th July 2017, is to be fixed for hearing before the Master and thereafter the matter shall take its usual course pursuant to CPR 2000.

Rosalyn E. Wilkinson

High Court Judge

By the Court