



*rights as the franchise holder under the agreement dated September 8, 1995 be continued until the trial of this action or until further order.”*

The Injunction granted by Warner J on 17th November, 1997, it should be noted, was to continue “..... until the hearing and determination of the summons to continue this order or further order”.

The summons is supported by the affidavits of Linda Kendall sworn the 17th and 18th November 1997 and the two affidavits of Herbert Griffith both sworn 3rd December, 1997. In opposition, there is the affidavit of Nicole Richards on behalf of the defendant sworn 25th November, 1997.

In brief, the events leading up to the granting of the *ex parte* order on 17th November, were as follows:

In or about 1992 Linda Kendall who had been an employee of the defendant for some time, ceased to be so employed. Shortly thereafter, she established the plaintiff company with a view to operating the defendant’s “JETPAK service”. The plaintiff and the defendant entered into a written agreement on 15th January, 1993 initially for a term of five years and a further agreement of 15th December, 1993. Finally, the parties entered into the agreement of 8th September, 1995 (Exhibit “L.K. 3” to Linda Kendall’s affidavit of 17th November, 1997) for a fixed term of three (3) years.

The plaintiff operated the JETPAK service at Piarco, Trinidad, and at several other locations. At Piarco, the plaintiff occupies building space made available by the defendant (although the terms of so doing are a matter of dispute) and the consideration payable to the plaintiff in return for it performing its obligations under the agreement is by way of a “revenue split” i.e. a proportion of the revenue brought in from operating the “JETPAK service”. Over the years there has been a growth in the operations and, consequently, in the revenue derived - and “split” between the parties- although the 1997 revenue may not meet the level originally anticipated. Among the plaintiff’s various obligations, obviously, is to supply details of the revenues obtained.

Differences arose between the parties, or so it would appear, over the course of time as to the performance by them of their respective obligations under the agreement. For the most part, these differences appear to have been resolved, or so thought the plaintiff (save for the question of the terms on which it would occupy the office space made available to it by the defendant) until the defendant wrote to it on 27th October, 1997 alleging breaches of “..... practically every material provision of the contract.....” and sought to terminate the agreement as of 17th November, 1997.

A flurry of activity on the part of the plaintiff then followed, all with a view to ensuring continued performance of the agreement. Not having received the reassurance it sought, and having seen the notice published in the “Sunday Express”

of 16th November, 1997, the plaintiff then sought and obtained on 17th November, 1997 the *ex parte* order referred to above.

Although it was not until he was well into the course of his submissions, Mr. Nelson raised the point that the *ex parte* order of 17th November 1997 had lapsed. He made this submission on the bases of: 1. the original order being *ex parte*; 2. the summons itself having no return date; 3. that since the *ex parte* order was expressed to continue until the hearing and determination of the summons to continue, and since no order to continue was made on the return date of the summons, that is the 5th of December, the order expired on midnight of that day. His submission, he said, was nonetheless maintainable or sustainable despite the order being so framed as to continue until “..... hearing and determination.....” of the summons and, indeed, he further submitted that since there was no return date, that the order would have expired at midnight of the 17th of November.

As to these submissions, first, I would have thought that this point would have been taken at the outset of the hearing of the summons, thus possibly saving a great deal of time and trouble for all concerned, not the least of all the court.

Second, and perhaps more germane to the issue, the words “until hearing and determination of the summons” are to my mind quite clear. Those words are, and the order is, different to those expressed in Frank Kerry & Guanapo Readymix Ltd vs Construction Specialists Ltd & Westmoorings Ltd (Civ App.

49/77) and the other decisions to which Mr. Nelson referred me. Although it may well be the practice in this jurisdiction to make an order until a day certain, there is nothing to prevent the court on the making of an order *ex parte* to exercise its discretion and order that the injunction should continue until the hearing and determination of the summons. In the instant case that is what was done and I could find no fault either in the exercise by the court of its discretion or in the formulation of the order. Furthermore, I was not persuaded that the failure to set out a return date was necessarily fatal to the order made on 17th November. And I so concluded despite the reliance by Mr. Nelson to the decision in Ansah v Ansah [1977] 2 All E.R. 638.

Turning to the plaintiff's application itself, it would seem, so far as I understand, that the procedure to be adopted is first to decide whether there is a serious issue to be tried. Assuming that this question is answered in the affirmative, the next matter to be considered is whether damages are an adequate remedy in which the plaintiff might be compensated. If damages are not considered to be an adequate remedy, then there will fall for consideration matters such as the balance of convenience and other special factors which might be taken into account in deciding whether the injunction granted should continue .

In the instant case, there was no doubt in my mind that there are issues to be tried and that those issues are serious. It has been said that nothing more need be done than establish a *prima facie* case, and in my view that has been done

without any doubt. There are clearly allegations of breaches of the contract which require adjudication, whether those breaches are said to have been committed by the plaintiff or by the defendant, or whether they are such as to constitute repudiation or otherwise.

That being so there then falls next for consideration the question of damages being an adequate remedy, but it might be appropriate to first look briefly at the contract existing between the parties, it having been the subject of many submissions by Attorneys for both parties.

Clearly, this was an agreement for the provision of services rather than a contract of service. Whether that contract can be properly classified or categorised as a franchise, an agency, a courier contract or otherwise may or may not have a material bearing on the eventual outcome of the substantive action, but in my view the agreement of September, 1995 cannot safely be taken as expressing all the terms, conditions and provisions of the contract between the parties. Based on what had been placed before me, there may well have been a course of dealings between the parties which should also be taken into account, and it may also be that the 1995 agreement is to be considered together with the prior agreements.

Further, the terms of the contract which are discernible at this juncture, do not necessarily show it to be of a fiduciary nature. It does not contain certain of those stringent terms as are found in Jrna Ltd v Mister Donut of Canada Ltd [1970] Ontario Reports Vol. 3 629 where there was a controlled source of

supply, coupled with a control of the plaintiff's day to day operations by reference to an operating manual, as well as what might be regarded as a rather strict and onerous non-competition clause. It is correct to say that the instant case requires mutual trust and confidence but, based upon what was before me, this did not appear to go any further than would normally be found, for example, in a normal commercial trading relationship of agency, or distributorship or even for the supply of services. Indeed, many of the usual provisions of such an agreement are missing from that which was before this court. One would have thought, for example, particularly given the submissions made, that the agreement would have made express provisions with respect to confidentiality and non-competition, particularly if attorney for the defendant conceding that the defendant would likely take steps to prevent disclosure or use of confidential information, as well as to prevent solicitation of the defendant's clientele if it those events were to occur, or be seen as about to occur. Additionally, there is nothing in this agreement dealing with the cessation of use of the defendant's trade name and logo in the event of the parties going their separate ways. As to the element of strict accounting which was referred to by Attorney for the defendant, it does not seem to me to extend further than an accounting for moneys received therefore enabling the "revenue split" between the parties to be ascertained.

But perhaps one of the more noteworthy features of this agreement is that the plaintiff is answerable to those using the "Jetpak service". This is unusual,

certainly in an instance of a contract of service, and in a distributorship agreement it would be most unusual to find the agent or the distributor made answerable to the customer. What would be more usual is the distributor or agent being prohibited from settling any claims, or even entertaining any claims on behalf of the principal. Indeed the formulation of this agreement, if I may so observe, is loose, and while I am not for these purposes drawing, or coming to, any conclusions, it would appear that the original intention was merely to record as a general statement the manner in which the relationship between the parties would proceed. It is certainly not an attempt to “cross all of the T’s” and “dot all of the I’s” which one would expect if something as weighty as a fiduciary relationship was contemplated. It did on the other hand, necessarily call for a certain degree of mutual trust and confidence at least in so far as the manner in which the plaintiff conducted its day to day operations was concerned. But that is only to be expected in most on-going business relationships.

In short, I was not persuaded that this contract was one which is of either a fiduciary or other special nature so as to either entitle the plaintiff to injunctive relief or to preclude it therefrom.

But of greater materiality to the determination of this summons is that this reality of this case is that the contract is now in the twilight of its existence. There is nothing before me to persuade me, or to persuade me sufficiently, that there still remains now any realistic probability of the 1995 contract being renewed or

extended beyond September, 1998 given the element of obvious antipathy which has arisen in the relationship between the parties, particularly on the part of the defendant. And I came to this conclusion despite the plaintiff's obviously conciliatory approaches to the defendant (to which the defendant exhibits no inclination to accept) and despite there being no avowed or even suggested intention that the defendant's position is that it will not continue to perform the existing contract unless it is compelled to do so by judicial intervention, as was the position in the cases of Films Rover International Ltd v Cannon Film Sales Ltd [1987] 1 WLR 670 and Regent International Hotels (U.K.) Ltd & Regent International Hotels Ltd v Pageguide Ltd (Unreported) to which Mr. Solomon both referred and relied upon in support of his submissions.

This is a relationship which began five odd years ago and can best be regarded, on which was before me, as having only nine months left to run. Any other conclusion at this juncture is in my view nothing better than speculative. And it is this limited life span which sets the instant case apart from Films Rover and Pageguide. The instant case it is markedly different. The termination or attempted termination in the Pageguide case, for example, was an occurrence at the beginning of a twenty-five year relationship, making it difficult in my view, if not impossible, to determine future events and what would occur during that period of time. Certain of the other decisions referred to by Mr. Solomon were much in that mould, or vein,

and in those cases it was to my mind obvious that the damages could not be regarded as an adequate remedy.

The question, when considering the question of damages as an adequate remedy, would seem to be whether the plaintiff should be confined to its remedy in damages. In considering this question, the approach to be taken in my view is one with “.....*the object of making whatever order will likely best to enable the trial judge to do justice between the parties, whichever way the decision of the trial judge may go. Their freedom of action should only be interfered with to an extent necessary to this end .....* Accordingly, if the plaintiff can be compensated in damages for anything he may wrongfully suffer between the date of the application and the trial, the defendant should not be restrained save in exceptional circumstances .....” (Per Buckley L.J. in Polaroid Corporation v Eastman Kodak Co [1977] R.P.C. 379 at 395) nor should the defendant be compelled to perform save in even more exceptional circumstances. If the damages recoverable at common law would be an adequate remedy and the defendant would be in a financial position to pay them, then it has been said that no interlocutory injunction should normally be granted, however strong the plaintiff’s claim appears at that stage. Flowing from this, there are then three further questions to be answered.

The first is, are the damages recoverable an adequate remedy? In my view and on the basis of what was before me, it was my view that the answer to that question was yes.

Second, can those damages be quantified? My answer to that question again was yes, particularly if regard is had particularly to the affidavit evidence which clearly establishes that the ongoing relationship between the parties has resulted in financial information being made available which will form the basis, together with other information which must be available from the plaintiff's records, if not also from the defendant's records, to enable the financial matters of the last five years to be used as the basis for forming an assessment of damages for the sixth year of the agreement.

The third question is, are there exceptional circumstances which would dictate that a remedy other than damages be made available to the plaintiff? There were two submissions in particular, among others, made by Mr. Solomon in this regard. The first was the submission that the sole source of the plaintiff's revenue is purportedly from the carriage of packages on the defendant's aircraft. This gave me some cause for concern. In essence, the plaintiff's position might be likened to that of the retail petrol station operating under the terms of a "solus agreement" and might be regarded as a "special factor" to be considered in deciding whether the injunction should continue. But this is a contract with a "proven track record" of past profitability which can with relative ease provide the foundation for calculating

the revenue expenses and profits of the next nine months, and thus an assessment of damages.

I also considered the question of the plaintiff having expended considerable sums of money on a new building and that this circumstance should weigh in favour of the plaintiff being granted a continuation of the injunction, but it is also a reality that to invest some \$2.5m in the construction of a building which is scheduled for completion perhaps five months prior to the expiry of a contract with no assurance, nor even an indication of an assurance, that the contract will be extended beyond that date, (in this case is September, 1998) is a business or commercial decision of some dubiety.

I came to the conclusion, however, that neither of these matters were sufficient to displace the remedy of damages and consequently my answer to the third question is also in the negative. It being my conclusion that damages are in this case an adequate remedy it is not then necessary for me to decide issues such as the balance of convenience or, as it might preferably be expressed, the balance of justice, as between the parties, or whether there are any special factors to be considered.

In all the circumstances, I came to the conclusion that the injunction should be discharged and I so ordered. Mr. Solomon having given notice of appeal against this order and having applied for, and having been granted an injunction in the same terms as those of the 17th November, 1997, save that it was to continue

to 19th December, 1979 or further order, based on the principle in Erinford Properties Ltd & Anor v Cheshire County Council [1974] 1 Ch. 261, I did not think it appropriate at that juncture to make an order for early trial.

I also ordered that the costs of the application be costs in the cause and when approached by Advocates in the matter on December 19, 1997 for clarification of the orders made on December 12, 1997, I certified that such costs be fit for two counsel.

Dated this 6th day January, 1998

C.V.H. Stollmeyer,  
JUDGE