

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Division

[Unreported]

Suit No: CV 1460 of 2006

BETWEEN

CORBEV FOOD SERVICES LIMITED - PLAINTIFF

AND

BOMBSHELLS LIMITED - 1st DEFENDANT
ISLAND BEACH CLUB LIMITED - 2nd DEFENDANT
GEOFFREY ATKINSON - 3rd DEFENDANT

Before The Honourable Madam Justice Maureen Crane-Scott, Q.C.
Judge of the High Court
(In Chambers)

2008: October 2

2009: May 5

Mr. Alair Shepherd, Q.C. for the 1st, 2nd, and 3rd Defendants
Mr. Bryan Weekes for the Plaintiff

DECISION

- [1] **Crane-Scott J:** This is an application by the Defendants brought by Summons filed on July 8, 2008 for an Order that a interim Mareva injunction granted *ex parte* on August 24, 2006 be discharged and/or set aside on the ground that the Plaintiff has failed to prosecute the action in a timely or expeditious manner.
- [2] The interim Mareva injunction was granted *ex parte* before **Richards J.** on August 24, 2006 pursuant to a Certificate of Urgency. After reading the affidavit-in-support of Mr. Kenneth Paul Evelyn and upon the Plaintiff giving the usual undertaking to the Court as to damages, the Court made an order restraining the Second Defendant, from *inter alia*, disposing of or diminishing the value of any of its assets in Barbados up to the value of Bds \$750,000.00.
- [3] The Order contained the usual stipulation to the effect that the injunction was to remain in force until the issue of a final judgment in the matter unless it was specifically varied or discharged by further order of the Court. The Second Defendant or anyone affected by the Order was also declared to be at liberty to apply to the Court to vary or discharge the order on giving 48 hours notice to the Plaintiff's attorneys-at-law.
- [4] The *ex parte* interim injunction has been in place since August 24, 2006 and has never previously been challenged or resisted either by the Second Defendant or anyone affected thereby, up until July 8, 2008 when the current application was filed by the Defendants.
- [5] The application is not one in which the Defendants are seeking at this stage an *inter partes* hearing to fight matters which could have been

fought in 2006 when the *ex parte* application for the grant of an interim injunction was first before the Court. The sole issue for the Court's determination on the application is whether, the Plaintiff, having obtained interim injunctive relief in August, 2006 until trial or further order, has failed to press on expeditiously with the substantive case and is guilty of such inordinate and inexcusable delay in prosecuting the action that the interim injunction should be discharged.

The Submissions:

[6] *The Case for the Applicant/Defendants:* At the hearing of the Summons, Counsel for the Defendants, Mr. Alair Shepherd, Q.C. stated that the application was not supported by an affidavit as it was based on a point of law, namely that the Plaintiff, having obtained interim injunctive relief in August, 2006 until trial or further order, had failed to press on expeditiously with the substantive case.

[7] Mr. Shepherd, Q.C. further submitted that he was relying on the facts which were evident from the Court file. He drew the Court's attention to the chronology of the action as shown by the dates and documents on file as follows:

- i) 14th August 2006 - Writ of Summons and Statement of Claim filed by Plaintiff;
- ii) 14th August, 2006 -Summons for Mareva Injunction filed on behalf of the Plaintiff with a supporting affidavit of Kenneth Paul Evelyn;
- iii) 24th August, 2006 -Mareva injunction heard *ex parte* and granted by ***Richards J;***

- iv) 28th August, 2006 -Order for Mareva injunction perfected and filed;
- v) 27th April, 2007 - Defence of 2nd Defendant filed;
- vi) 11th May, 2007 -Defence of 2nd Defendant filed;
- vii) 14th May, 2007 -Request by the 2nd and 3rd Defendants' for Further & Better Particulars of Statement of Claim filed;
- viii) 1st June, 2007 -Amended Defence of 3rd Defendant filed;
- ix) 6th June, 2007 -Summons for Directions filed by Plaintiff;
- x) 22nd June, 2007 -Defendants' Take Notice seeking Particulars at the hearing of the Summons for Directions;
- xi) 12th July, 2007 -Summons for Directions heard before Deputy Registrar and directions made;
- xii) 25th July 2007 -Reply to Defendants' Request for Further & Better Particulars filed pursuant to order of the Registrar;
- xiii) 26th July, 2007 -Order on the Summons for Directions perfected and filed;
- xiv) 8th July, 2008 -Defendants' List of Documents filed;
- xv) 8th July, 2008 -Defendants' Summons to Discharge interim Mareva injunction filed;
- xvi) 2nd October, 2008 - Plaintiff's List of Documents filed.

- [8] Counsel for the Defendants, Mr. Shepherd, Q.C. submitted that when the Summons for Directions was heard on 12th July 2007 before the Deputy Registrar, both parties had been ordered, *inter alia*, to serve a List of Documents on each other within twenty-eight (28) days of the date of the Order.
- [9] He contended that the Plaintiff had only filed its List of Documents on October 2, 2008, that is, on the very date fixed for the hearing of Defendants' application to discharge the interim injunction.
- [10] He submitted that the Plaintiff had been in breach of the Order for discovery for over 1 year and urged the Court to set aside the interim injunction as prayed on the basis that the Plaintiff had failed to prosecute the action expeditiously.
- [11] *The Case for the Respondent/Plaintiff:* Counsel for the Plaintiff, Mr. Bryan Weekes conceded that Mr. Shepherd, Q.C. was correct on the law and that the Court is duty bound to take these factors into account. He further conceded that there had been a delay by the Plaintiff of at least 1 year as reflected on the Court file. He however submitted that the Plaintiff had not filed its List of Documents within the time stipulated in the Order due to an oversight on the part of the Plaintiff's attorney-at-law.
- [12] Mr. Weekes contended that the delay which had occurred did not rise to the level of being contumelious. He submitted that if the Court accepted this, the Court might inquire whether the delay had caused any prejudice to either party.
- [13] Counsel for the Plaintiff cited the following authorities in support of his submissions: *Newsgroup Newspaper Limited v. The Mirror*

Group Newspapers (1986) Limited [1991] F.S.R 487; Lloyds Bowmaker Ltd v. Britannia Arrow Holding Plc. [1988] 3 All E.R. 178 and Greek City Co. Ltd and Another v. Demetriou and Athanasiou [1983] 2 All E.R. 921.

- [14] Mr. Weekes also submitted that the application before the Court rested solely on the Plaintiff's failure to prosecute the action not on change of circumstances or prejudice. Further, he contended, neither party had obeyed the Order to file their respective Lists of Documents within the stipulated time period. The Defendants themselves had only filed their List of Documents on the same day as they had filed their Summons to set aside the interim injunction.
- [15] He stated that the Plaintiff filed its List of Documents after the Defendants' application was served and as soon as it became apparent to the Plaintiff's attorney-at-law that there had been a failure to do so. Under the circumstances, the Plaintiff was prosecuting its action within reason.
- [16] Counsel for the Defendants in his rebuttal submitted that the delay does not have to be contumelious but it must at least be inordinate. He submitted that a year was inordinate and referred vaguely to a recent High Court matter in which he had been involved where a Defence that had been filed three (3) months out of time had been struck out due to inordinate delay.
- [17] Mr. Shepherd, Q.C. also highlighted extracts from the decision in the *Newsgroup Newspaper case* (cited above) where **Hoffman J.** described a 2^{1/2} year delay by the Plaintiffs in proceeding with the action after having obtained an interlocutory injunction as 'inordinate and inexcusable'.

Exercise of the Court's discretion:

[18] An interlocutory or interim injunction is an order which restricts a Defendant's liberty at a time when there has been no finding of wrongdoing by the Court. It is granted in order to preserve the *status quo*, pending a determination on the merits, in cases when the Court thinks that justice so requires. It is incumbent on a plaintiff whose position has been protected in that way by such an injunction to proceed with the action with due diligence so as to limit as far as possible the period during which the Defendant's liberty is restricted without there having been any determination of the merits. [See per ***Hoffman J.*** in the ***Newsgroup Newspaper case.***]

[19] As ***Hoffman J.*** further stated in the ***Newsgroup Newspaper case:***

A plaintiff who has obtained an interlocutory injunction is not... entitled simply to rest upon that injunction, to assume that in the absence of complaint the defendant is content to treat the injunction as permanent without any further steps having to be taken and to wait until the defendant finds the situation sufficiently burdensome to prompt him to make an application for variation of its terms."

[20] It is a well established principle in the law relating to injunctions that an interim injunction may be discharged where there has been inordinate delay by the Plaintiff who is under a duty to proceed with diligence. A Defendant may also mount an attack on an interim injunction by applying to have the injunction discharged if the Plaintiff, having obtained relief until trial or further order, fails to press on with the substantive case. See ***David Bean, Injunctions, 8th Edition @ pp. 97-98.*** Also: the ***Newsgroup Newspaper case;*** the

Greek City Ltd case; and the *Lloyds Bowmaker Ltd case* (all cited above).

[21] The sole issue for the Court's determination on this application is whether, the Plaintiff, having obtained interim injunctive relief in August, 2006 until trial or further order, has failed to get on with the trial of the substantive case and has been guilty of such inordinate and inexcusable delay in prosecuting the action that the interim injunction should be discharged.

[22] In arriving at its decision, the Court has had regard to the applicable law, the submissions of Counsel for both parties, together with all the documents on the Court file. The Court has determined that the interim injunction granted *ex parte* by **Richards J.** on August 24, 2006 should remain in force "until the issue of a final judgment in this matter unless it is specifically varied or discharged by further order of the Court" for the following reasons:

- a) the interim injunction has been in place since August 24, 2006 and was specifically granted to prevent the property which is the subject matter of the action from being sold or otherwise disposed of by the Second Defendant until the final determination of the action;
- b) the evidential basis on which the interim injunction was granted is set out in particular at paragraphs 55 to 57 of the sworn affidavit of Kenneth Paul Evelyn filed on August 14, 2006 who deposed, *inter alia*, that the property in question had been listed for sale with a real estate agent at a sale price of US\$3,500,000.00 and that unless retrained the Second

Defendant would sell its assets and dissipate the proceeds of sale before the Plaintiff can obtain a judgment in the matter;

- c) the Defendants filed no affidavit evidence to the contrary, nor have they claimed that the continuing effect of the injunction has become oppressive or that they are suffering any hardship or prejudice from the order remaining in place;
- d) the sole ground on which the application is based is the delay of just over 1 year which occurred in the period between July 12, 2007 when *both parties* were ordered to serve a List of Documents on each other within twenty-eight (28) days and October 2, 2008 when the Plaintiff's List of Documents was eventually filed and served;
- e) Perusal of the Court file shows that the Defendants were at one stage also in breach of the Order for discovery and in fact only filed their List of Documents exactly 1 year later on July 8, 2008 when they contemporaneously filed their Summons for the discharge of the interim injunction based on the Plaintiff's delay;
- f) Perusal of the Court file as a whole also reveals that a not inconsiderable portion of the delay which has occurred in the progress of the action since 2006 is attributable to the Defendants;
- g) Accordingly it appears that although the First and Second Defendants were both served with the Writ and Statement of Claim on September 5, 2006, the Defence of the Second Defendant was not filed until some 7 months later on April 27, 2007;

- h) What is even more surprising is that a Defence of the First Defendant is still not seen on the Court file, although a second an identically worded Defence of the Second Defendant was again filed on May 11, 2007;
- i) Additionally, although service of the Writ and Statement of Claim was effected on the Third Defendant on January 30, 2007, the Defence of the Third Defendant was not filed until June 1, 2007 i.e. - approximately 4 months later.
- j) Viewed broadly, the Court is satisfied that the Defendants have not approached the Court on this application without fault of their own and themselves bear a significant degree of responsibility for the lack of progress in the action since August 2006;
- k) In the view of the Court, the Defendants ought not to be permitted to point the finger of blame at the Plaintiff for the delay which has occurred in the progress of the action when they themselves have contributed to the delay;
- l) The Plaintiff has since the application filed its List of Documents. According to its Counsel, the delay was entirely his fault and the oversight was addressed by him at the earliest opportunity;
- m) The Court is satisfied that but for the “missing” Defence of the First Defendant which is not on the Court file and which would still appear to be outstanding, the action is finally nearing a state of readiness for trial;
- n) Finally, given the other delays which have occurred in the action, the Court is satisfied that the Plaintiff’s just over 1 year

delay in filing its List of Documents though lengthy, was neither intentional and contumelious, nor so inordinate or inexcusable as would justify the discharge of the injunction.

Disposal:

[23] In the result, the Defendants' application to discharge the interim Mareva injunction herein is refused, with costs to the Plaintiff to be taxed if not agreed.

**Maureen Crane-Scott
Judge of the High Court**