

20.4 2004



IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS *(Civil)*

CAUSE NO. 268/2003

BETWEEN:

WICKLOW DISTRIBUTORS INC.

Plaintiff

AND:

AIR ATLANTIC DE HONDURAS, S.R.I.

Defendant

BEFORE: THE HON. MADAME JUSTICE LEVERS

Appearances:

Counsel for the Plaintiff: Mr. R. McDonough of Campbells

Counsel for the Defendant: Mr. Norman Hill, Q.C. instructed by Mr. A. S. McField of McField & Associates

Heard: 6th & 11th February, 2004



JUDGMENT

Levers J,

This is a summons taken by the Defendant for the following order:

1. To discharge an injunction granted on the 21st April 2003 and for an order that the Log Book for the said Airplane which was seized, as the result of the injunction, be returned to the airplane.

2. Alternatively that the bond for damages be increased;
3. Costs; and
4. Any other further relief as this Honorable Court shall deem appropriate.

Background

In April 2002, Wicklow Distributors Inc. obtained an ex-parte order that an aircraft with two installed Rolls Royce Dart MK 5T6-2 engines bearing serial numbers 19413 and 15103, be seized whilst within the jurisdiction of the Cayman Islands.

The application was made ex-parte as a matter of urgency, as it was asserted by the Plaintiff that the aircraft was within this jurisdiction only for a brief time. The application was made without any proceedings being commenced, on the undertaking that proceedings would be filed the day subsequent to the hearing of the injunction and on the further undertaking that affidavit evidence would be filed in support and an inter partes hearing was to be scheduled for the 23rd April 2003.

The original injunction was granted on the basis that there was an alleged breach of a Lease Agreement. The injunction was granted on the following terms:

1. An injunction is hereby granted upon the following aircraft, a Hawker Siddeley HS 748 Series 2B Aircraft, bearing serial number 1801, with two installed Rolls Royce Dart MK536-2 engines bearing serial numbers 19413 and 1503, (more particularly described in Exhibit A herein) which is hereby detained within the jurisdiction of the Cayman Islands pending further order of this Court, but in any event this matter shall be further mentioned before this Court on Wednesday, 23rd April 2003;
2. The Defendant, its agents or servants or otherwise are hereby restrained from removing or attempting to remove the said aircraft referred to in paragraph 1 herein pending further order of this Court;
3. The Plaintiff by its Counsel undertaking to abide by any order this Court may make as to damages in case this Court shall thereafter be of the opinion that the Defendant shall have sustained any by reason of this Order which the Plaintiff ought to pay. In any event, the Plaintiff shall lodge with the Clerk of the Court an unlimited banker's guarantee, such guarantee to cover any damage hereinbefore mentioned and indemnify any third parties who may suffer loss as a result of the Plaintiffs action to be filed on or before 4pm Tuesday, 22nd April 2003;
4. That the Plaintiff do file a Writ of Summons by 3pm Tuesday, 22nd April 2003 together with an affidavit(s) in support of this Order herein, failing which this Order shall be discharged in its entirety; and
5. That the Plaintiff do have leave of the Court to serve this Order by facsimile transmission immediately upon the Defendant.

On the 23rd April 2003, the Defendant represented by Polack & Company took out a summons seeking the following relief:

1. A Declaration that the Court had no jurisdiction over the Defendant in respect of the subject matter of this action;
2. The injunction granted herein on 21st April 2003 discharged; and
3. That the Respondent herein shall resume possession of Hawker-Siddeley Aircraft 748-2B Serial Number 1801 and that the Plaintiff shall immediately serve any order herein on all persons and entities served with the Order of 21st April 2003 Defendant be granted possession of the aircraft;
4. Such further order as this Honourable Court deem necessary.

However, it would appear that the attorneys for the Defendant did not pursue that summons. They agreed to a variation of the terms of the undertaking and an adjournment of the matter. Subsequently, a defence was filed to the statement of claim. It is apparently proposed to file an amended defence which has been placed on the Court file but leave to file, has not as yet been obtained.

After change of attorneys on the 31st July 2003, Mr. Steve McField on behalf of the Defendant filed an Amended Summons asking for the following relief:

1. The Writ of Summons be set aside;
2. A declaration that the Court has no jurisdiction over the Defendant in respect of the subject matter of this action;
3. The injunction granted on the 21st April 2003 be discharged;
4. That the Respondent herein shall resume possession of Hawker Siddeley Aircraft 748-2B Serial Number 1801 and that the Plaintiff shall immediately serve any order herein on all persons and entities served with the Order of 21st April 2003;
5. The Defendant be granted leave to file an Amended Defence within fourteen (14) days of the date hereof in terms of the draft attached hereto; and
6. Such further order as this Honourable Court deem necessary.

A date in October was obtained for the hearing of the summons but due to the judge's unavailability, that summons too was adjourned. This summons now comes before this Court some seven months latter.

The Facts

The Plaintiff, Wicklow Distributors Inc. agreed to lease Air Atlantic Honduras S.R.I. two aircrafts. The subject matter of these proceedings is a Hawker Siddeley HS748 series 2B aircraft bearing Serial No. 1801. The aircraft is owned by Dellair Trading Inc. This corporation purchased the aircraft from Liat on 21st May 1996. Wicklow is a wholly owned subsidiary of Dellair Trading Inc. which leased the aircraft to Wicklow as evidenced by a certain Dry Lease Agreement dated 14th August 2002. In turn, Wicklow leased the aircraft to the Defendant, the Lease being a lease agreement with an option to purchase.

Subsequently, the Lease was varied, the amended terms being incorporated in a letter dated 15th April 2002. The Defendant did not perform certain conditions under the lease, alleging that the aircraft was damaged on delivery and proceeded to expend monies on repairing the aircraft. The aircraft was subsequently ready for use on the 5th September, 2002. By notice dated October 2002, the Plaintiff terminated the lease as it alleged that the Defendant was in default

with its payments under the lease. The Lease was terminated by the Plaintiffs and the Plaintiffs brought an action in this jurisdiction to recover payments due to it under the terms of the lease. The writ of summons and statement of claim was presented as an assailable claim. Counsel for the Plaintiff conceded that this is in fact not the case. On the facts, the claim is not as straight forward as that which was presented to this Court at the injunction hearing. The Defendant has contested the quantum claimed by the Plaintiff, contested the jurisdiction and contested the right to forfeiture under the terms of the lease.

The central plank of the defence and its refusal or failure to comply with the payment requirements under the Lease is a crack that is alleged to have occurred to the engine of the aircraft, after the signing of the lease. The Defendant contends that as a result of the crack monies had to be expended by him to make the aircraft airworthy and that there was, in fact, a fundamental misrepresentation, and that the Defendant had no knowledge of the crack. The Plaintiff contends that the Lease Agreement places the obligation on the Defendant to have inspected the aircraft, that the aircraft was leased as is and that the

principle *caveat emptor* applies. These clearly are matters that are serious issues to be tried at trial. For purposes of this application I have to decide whether the *ex-parte* injunction granted in this matter was properly granted, whether the Court had jurisdiction to do so and whether it should now in all the circumstances of the case be extended to the trial of this matter.

Injunction

Ex-parte procedure will only be appropriate, either where the delay occasioned by notifying the Defendant may cause to the Plaintiff irreparable damage or where secrecy is essential. In this case, the Plaintiff submitted to the Court that the application being made *ex-parte* was essential as the aircraft was likely to leave the jurisdiction if it was not seized. It was said to be a case of real urgency where it was impossible to give notice to the Defendant. At the time of the *ex-parte* injunction being granted, the Court had no affidavit evidence before it. The Court in granting the injunction took the view that an undertaking for an unlimited guarantee would compensate any loss for a few days that may be suffered by the Defendant, as a result of

the granting of the injunction. An injunction was granted for seven days. If the case is one of real emergency and time is of the essence, a Court may take the view that the Plaintiff having had no time to issue a writ could get the *ex-parte* injunction on an undertaking that the writ and statement of claim and all other necessary documents including an affidavit be filed as soon as possible after the order was granted.

In granting an injunction, the Court retains the overriding discretion.

That discretion could be guided by three criteria:

1. Is there a serious issue to be tried? If the answer is no, the application fails.
2. Are damages an adequate remedy?
3. Where does the balance of convenience or balance of justice lie?

When applying for an *ex-parte* injunction, the Plaintiff must disclose the nature of his case and any defence which the Defendant has indicated in correspondence or elsewhere. In summary, this duty to disclose must be discharged even if the Plaintiff's case might be prejudiced by such disclosure: Guinness

plc v Saunders [1988] 1 W.L.R., page 863. In Brinks Mat Ltd. v

Elcombe [1988] 1 WLR, page 1350, the following principles were

laid down by the Court of Appeal:

1. It was the duty of the plaintiffs to make full and frank disclosure of the material facts in applying for the injunction;
2. Materiality was to be decided by the court and not the plaintiffs or their advisers;
3. The duty of disclosure applied to material facts known to the plaintiffs and any additional facts, which would have been known had proper inquiries been made;
4. The extent of those inquiries depended on all the circumstances of the case;
5. It must be insured that the party obtaining the injunction was deprived of any advantage derived from a breach of the duty of disclosure;
4. The question whether a fact not disclosed was sufficiently material to justify the immediate discharge of the injunction depended on the importance of the fact to the issues to be decided;
5. The court had a discretion to continue the injunction or grant a new one.”

In this particular case, it has been conceded by counsel for the Plaintiff, Mr. McDonough that there was, in fact, no full and frank disclosure by the Plaintiff to the court on the filing of the first affidavit which was done the day after the injunction was granted.

Indeed, the Defendant's counsel Mr. Norman Hill, Q.C. submits that the same can be said of the second affidavit filed by the Plaintiff's representative, in which he deposes:

"There was no intention on Wicklow's part to mislead the Court, but rather the omission was caused by a failure to fully appreciate Wicklow's obligation to place all relevant material before the Court prior to the making of that application."

That paragraph is revealing and bearing in mind that the question of materiality and non disclosure was not to be decided by the Plaintiff or their advisors but by the Court, this is, in my view, a serious omission. The Plaintiff failed to disclose some very relevant material facts. Mr. Norman Hill, Q.C. submits that the non-disclosure was fundamental. He submits that at no stage did they disclose that the Plaintiff was holding \$200,000 as security deposit. He further submits that the Court was not advised of the defendant's claims nor, indeed, of the fact that there was litigation in Miami in which the Plaintiff had sought an injunction which had been refused. He also submits that evidence should have been lead as to further guarantees and a mortgage given by the

Defendant's representatives to secure the payments under the Lease. The Defendant also submits that full and frank disclosure or the absence thereof, in this matter is not the only ground on which the injunction should be discharged. It submits that under Article 16(1) of the terms of the Lease states:

"The Lease shall be governed and controlled as a validity, enforcement, interpretation, construction, effect and in all other respects by the statutes, laws and decision of the Province of Ontario."

16 (3) states:

"Lessee and Lessor agree that Toronto, Ontario shall be proper venue for any legal actions involving this Lease."

The Plaintiff's counsel Mr. McDonough contends that the Defendant has waived its rights under this clause by virtue of having commenced proceedings in Florida to seek declarations and other remedies under the terms of this lease. Mr. Hill, Q.C. submits that the Florida proceedings were based on fraud, as a result of the securities being in Florida and that as the defendant

was forced to litigate in Florida, those proceedings cannot be considered to be a waiver by the Defendant.

On the question of jurisdiction, the Defendant having submitted to this jurisdiction, Defendant having a place of business here, I am of the view that this Court has jurisdiction to hear this dispute.

On the question of the grant of the *ex-parte* injunction, I am of the view that the Court has now to decide whether the *ex-parte* injunction having been granted without full and frank disclosure should be continued. In order to answer that question, I consider the following:

1. Does the Plaintiff have a serious case to be tried?

The Plaintiff has a serious case to be tried as does the Defendant. There are no special circumstances which would make the case on behalf of the Plaintiff, such a clear one that it can be decided at once. In other words there are several triable issues.

An injunction being discretionary like the grant of other equitable remedies it may be refused or granted subject to conditions or restrictions, notwithstanding that the applicant has established a cause of action. Even if the Plaintiff is entitled to judgment in default of defence, the judge still has the discretion as to the duration and other terms and conditions of the injunction. In this case although the Defendant has submitted that there was not full and frank disclosure, the Court also has to now look at the other elements that should be taken into account in exercising its discretion in granting and or extending an injunction. They are as stated previously, the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay. The claim in this action is for non-payment of monies to be paid under a lease. The lease is specific as to the procedure to be followed when there is non-payment. The claim and counterclaim of the Defendant, if any, is entirely based on a monetary claim. In my view, when assessing the question of damages and whether it would be an appropriate remedy it depends entirely on the nature of the claim, the possibility of repetition and the ability of the defendant to pay. In this case, the Plaintiff would have been

willing to waive his complaint in return for payment and as Lawson LJ said in T.J. Smith & Nephew Ltd. v 3M United Kingdom plc reported at [1983] RPC 92, page 102:

“As a general principle, I accept that if there is clear evidence of a willingness to accept a royalty payment, then that may well entitle the court to infer that damages would be adequate.”

I now have to go on to examine whether this particular Defendant would have sufficient to pay the damages. On the figures put forward by the Plaintiff, the arrears to last year April was some \$300, 000. The Defendant has paid security deposit of \$200,000 and there is a mortgage in place and I am of the view that should I hold that damages would be an adequate remedy then the Defendant has sufficient funds to cover the damages. Does the balance of convenience entitle me to say that the injunction should be continued? Indeed, if I were to hold that damages were an adequate remedy then this issue would be redundant.

But, I need to address the question of the balance of convenience as Counsel for the Plaintiff has submitted that even if I were to

hold that the *ex-parte* injunction should not have been granted, the extension of it should be decided on a balance of convenience. In

Cayne v Global Natural Resources plc [1984] 1 All E.R. 225 at page 237. Sir Robert Megarry V-C said:

“That [the ‘balance of convenience’] is the phrase which, of course, is always used in this type of application. It is, if I may say so, a useful shorthand but in truth, ...the balance that one is seeking to make is more fundamental, more weighty, than mere ‘convenience.’ I think that it is quite clear from both cases that, although the phrase may well be substantially less elegant, the ‘balance of the risk of doing any injustice’ better describes the process involved.”

It is not my function at this stage to determine the final rights of the parties. Either party may succeed and therefore my decision must seek a balance of justice. The circumstances and the facts in each case vary and matters to be taken into account vary in each case. However, as it is my function to preserve the balance of justice, in view of the conflicting claims in this action, it is now my duty to decide whether extending this injunction would be an injustice to the Defendant. Mr. Norman Hill, Q.C. submits that it will be a grave injustice to the Defendant for the reasons below:

1. Denial of the use of a aircraft and thereby suffering business loss;
2. That the defendant still will have to pay rental for the aircraft up to a certain date;
3. That the defendant having expended monies on renovating and repairing the aircraft will now lose that capital subject to seizure; and
4. That the balance of injustice would definitely be in the favour of the refusal of the injunction and in favour of the defendant, as the plaintiff can be compensated in damages should it succeed.

Mr. McDonough on behalf of the Plaintiff submits that the Plaintiff owns the aircraft, that if the injunction is lifted the Defendant would be entitled to use the aircraft and that they will utilize the aircraft and that the aircraft may well be lost to the Plaintiff. He further submits that in all the circumstances of the case, the injunction should be extended because the Plaintiff has a clear strong case. I do not agree. There is no evidence before me that the Defendant will lose the aircraft or indeed that they have in the past endeavored to hide the same.

The *ex-parte* injunction should have been reviewed expeditiously.

The delay in this case cannot be attributable to either party and

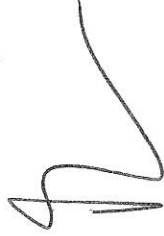
cannot in my view, be a factor in the decision making process for this application.

Having considered the relevant material before me I find:

1. That there was no full and frank disclosure as required by law;
2. That damages would be an adequate remedy in all the circumstances;
3. That the balance of convenience or the balance of justice lies with the Defendant and in all the circumstances of this case even if I was to consider the matter *de novo* it would not lie in favour of me granting a new injunction and/or extending the one in force; and
4. I therefore grant the Defendant's application to discharge the injunction.

The question of damages in my view should be deferred until the trial of this action and costs to the Defendant to be agreed if not taxed.

Dated this 20th day of February, 2004



Justice P. Levers.
Judge of the Grand Court

