AIR PACIFIC LTD and 3 Ors v AIR FIJI LTD (ABU0066 of 2006S)

COURT OF APPEAL — CIVIL JURISDICTION

WARD P, EICHELBAUM and PENLINGTON JJA

6, 10 November 2006

Practice and procedure — appeal — interim injunction — aviation — breach of agreement and misrepresentation — fraud — passing off — breach of the Fair Trading Decree — Fair Trading Decree 1992 ss 33, 33A, 125.

This was an appeal against an order granting an interim injunction. The Plaintiff (now the Respondent) Air Fiji Ltd commenced proceedings against the first Defendant/Appellant Air Pacific (D1/A1), the second Defendant/Appellant Sun Air (Pacific) Ltd (D2/A2), the third Defendant/Appellant Fiji Airlines Ltd (D3/A3), and the fourth Defendant/Appellant Attorney General (D4/A4). The claim contained five causes of action: breach of agreement and misrepresentation (against D1/A1 and D4/A4), fraud and passing off (against D1/A1, D2/A2 and D3/A3), and breach of Fair Trading Decree 1992 (against D1/A1 and D3/A3). Simultaneously, the Plaintiff (now the Respondent) took out an inter partes notice of motion for injunctive relief.

Facts showed that D1/A1 announced its intention of re-entering Fiji's domestic airline market where the Plaintiff would be its competitor. Through its subsidiary (D3/A3), D1/A1 would acquire the business of D2/A2, the only operator in the domestic market apart from the Plaintiff. The Plaintiff relied on an agreement allegedly reached in 1971, when the Plaintiff agreed to renounce its then name of Air Pacific which was taken over by D1/A1. The Plaintiff alleged that D1/A1 agreed not to compete with the Plaintiff on domestic routes within Fiji.

On 9 June 2006, the High Court granted an injunction in the terms of the first order sought in the motion. The court said that it was not in a position to grant the second order, while in respect of the third, the judgment stated that it was not within its jurisdiction to act on an application for interim relief. The court referred to the prospect that the new airline to be operated in the name of D2/A2 would cut local airfares by as much as half. The risk to the Plaintiff was not so much that it might suffer substantial damage, but its business might fail altogether, with the loss of many livelihoods. However, the court did not believe that the Plaintiff could be adequately compensated in damages.

In its position, D1/A1 averred that the court considered it was "almost foolhardy and … even reckless" of the Plaintiff to commit itself to its proposals when it knew of the possibility that it would be subjected to legal challenge. The first three Appellants (the Appellants) presented written and oral submissions in support of the appeal. D4/A4 supported the Appellants' case and did not present any separate argument.

Held — (1) There was no question that the Plaintiff changed its name from Air Pacific to Fiji Air Services Ltd, and shortly after, the first Defendant previously known as Pacific Island Airways Ltd, changed its name to Air Pacific Ltd. Those facts alone pointed to some arrangement between the companies, but beyond that, evidence of the existence of an agreement, and its terms, was exiguous. The Appellants contended that the question of a serious issue related not merely to the existence of an agreement of some kind, but also to the parties to it, its terms and enforceability.

(2) As to a serious question regarding the existence of an agreement, Mr D S Robertson, the principal deponent for the Plaintiff, had no personal knowledge of the 1970–71 events. He became an officer of the company only recently. He deposed that the surrender of the existing company name was made in consideration of the representation, promises and inducements set out above. The only contemporary documentary evidence produced to support his assertion was a note by Mr Crompton, the company secretary supporting the resolution concerning the change of name and Minutes of shareholders' meeting which

recorded a resolution that the company relinquished its name to the Fiji Government. There was no evidence of any protest by the Plaintiff that years after the 'Accord', Air Pacific was continuing to fly domestic routes and it eventually phased out these routes on economic grounds. The court concluded that on the existence of an agreement, there was insufficient material to allow the judge to find there was a serious issue.

(3) The Plaintiff relied on the provisions of the Fair Trading Decree on misuse of market power and anti-competitive conduct. The court went on to say that it was the Plaintiff's contention that on entering the domestic market, Air Pacific intended to offer lower domestic fares, based in part on add-ons and through fares, in combination with Air Pacific's international services. The Plaintiff asserted that in the case of combined international and domestic travel, the international fares would subsidise the domestic sector, so that the latter might be running at a loss. Lacking an international business, the Plaintiff would not be in a position to compete. The court held, however, that the evidence to support the contention was limited. An Air Pacific staff circular referred to lower promotional fares and add-on, and through fares created in combination with Air Pacific's international services. In submissions to the Air Transport Licensing Board, D3/A3 stated that 'as with most aviation start-ups' it expected to incur losses in the first two years of operations. These statements were not sufficient foundation for the contention that there was a serious issue that the Appellants intended to engage in predatory pricing. The Appellants also contested whether the first Appellant has a substantial degree of power in a market, within the meaning given to that expression in authorities. The court further said that whatever the Plaintiff's evidence may establish, it cannot justify an injunction prohibiting Air Pacific from entering the market. If Air Pacific obtained the necessary licences, there may be bases on which it can enter the domestic market which do not infringe the Fair Trading Decree. If in entering the domestic market, it engaged or proposed to engage in conduct which infringed the decree, the Plaintiff may have recourse to legal remedies, including invoking the extensive injunctive powers under s 125.

Appeal allowed.

Cases referred to

Ansell v NZ Insurance Finance Ltd Wellington (unreported, A434/83); *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191; [1982] 1 All ER 1042; *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 110; *Natural Waters of Viti Ltd v Crystal Clear Mineral Waters (Fiji) Ltd* [2004] FJCA 59, cited.

American Cyanamid Ltd v Ethicon Ltd [1975] AC 396; [1975] 1 All ER 504, considered.

J. S. Kos and *N. Barnes* for the first, second and third Appellants

M. Rakuita for the fourth Appellant

N. Lagendra for the Respondent

[1] Ward P, Eichelbaum and Penlington JJA. This is an appeal against an order granting an interim injunction. By writ issued on 10 May 2006 the plaintiff (now Respondent) Air Fiji Ltd commenced proceedings against Air Pacific Ltd (first Defendant (D1)/Appellant (A1)), Sun Air (Pacific) Ltd (second Defendant (D2)/Appellant (A2)), Fiji Airlines Ltd (third Defendant (D3)/Appellant (A3)) and the Attorney-General (fourth Defendant (D4)/Appellant (A4)). The statement of claim contained five causes of action: breach of agreement and misrepresentation (against D1 and D4), fraud and passing off (against D1, D2 and D3) and breach of the Fair Trading Decree (against D1 and D3). Simultaneously, the plaintiff took out an inter partes notice of motion for injunctive relief, as follows:

> 1. An Order restraining the First Defendant and the Third Defendant or their subsidiaries or related companies from directly or indirectly engaging in or

carrying out domestic passenger flights or services within Fiji until further Order of the Court or until determination of this action.

2. An Order restraining the merger or acquisition of the Second Defendant by the First Defendant or the processing of such merger or acquisition until further order of the Court.
3. An Order restraining the First, Second or Third Defendants or their agents from using the name Fiji Airlines Limited until further order of the Court.

[2] Briefly, the main thrust of the application for an interim injunction was as follows. The D1, which for many years had not participated in Fiji's domestic airline market, had announced its intention of re-entering that field, where the plaintiff would be its competitor. Through its subsidiary, the D3, the D1 would acquire the business of the D2, which previously had been the only operator in the domestic market apart from the plaintiff. The plaintiff relied on an agreement allegedly reached in 1971, when the plaintiff agreed to renounce its then name of Air Pacific, which was taken over by the D1. In return, according to the plaintiff, the defendant agreed, among other things, not to compete with the plaintiff on domestic routes within Fiji.

[3] The application was heard on 9 June 2006 and in a decision given the same day the High Court granted an injunction in the terms of the first order sought in the motion. The court said "it was not in a position" to grant the second order, while in respect of the third, the judgment stated this was not within its jurisdiction on an application for interim relief.

The High Court judgment

[4] In dealing with the application, the court followed the well-known steps under *American Cyanamid Ltd v Ethicon Ltd* [1975] AC 396; [1975] 1 All ER 504 (*American Cyanamid*). It dealt with the existence of a serious issue to be tried in the following terms:

> There is no doubt in my mind after reading both parties affidavits, that the Plaintiff has satisfied the first stage or phase of the law ie it has raised a serious issue which is neither frivolous nor vexatious. The existence of an agreement or "accord" between the Plaintiff and the first Defendant may earnestly be doubted by the latter as its affidavits clearly intend to establish, but the fact that the Plaintiff has been able by exhibiting documentary evidence, in the attempt to show that such an agreement was clearly reached, even if and notwithstanding the fact that the 1st Defendant may have been represented by proxy is enough in my view to raise and meet the "serious issue" qualification. The question as to the capacity of the Fiji Government, to deal or treat on behalf of the 1st Defendant is equally relevant in considering the seriousness of the issue raised. This is in addition to the question of unfair trading practices which is argued by the Plaintiff.

[5] Then, turning to the balance of convenience, the court referred to the prospect that the new airline to be operated in the name of the D2 would cut local airfares by as much as half. The risk to the plaintiff, in the court's opinion, was not so much that it might suffer substantial damage, but its business might fail altogether, with the loss of many livelihoods. In such light the court did not believe the plaintiff could be adequately compensated in damages.

[6] Turning to the position of the D1, the court considered it was "almost foolhardy and … even reckless" of the Defendant to commit itself to its proposals when it knew of the possibility its actions would be the subject of legal challenge. So the D1's potential losses arising out of the disruption of its plans were largely of its own making. Thus the court discounted the D1's case that the plaintiff's

financial standing was insufficient to meet a claim for the D1's damages, should the defence ultimately succeed. The court considered therefore that the balance of convenience lay with the plaintiff. It concluded:

> I hasten to add that in the end this action is not about snuffing out open market competition. It is simply about legal and binding obligation to be honoured should there exist an agreement to do so. Whether the accord or understanding may be illegal and/or amounts to unfair trading practice which the 1st Defendant's Counsel contends is something that can be argued later at the substantive hearing.

[7] The first three Appellants (for convenience we refer to them as the Appellants) presented written and oral submissions in support of the appeal. The A4 supported the Appellants' case and did not present any separate argument. For the Respondent, counsel had been asked to appear at the last minute owing to the illness of counsel previously engaged. He relied on extensive written submissions.

A serious issue?

[8] In its statement of claim the plaintiff alleged that following an approach by the Government of Fiji, the majority shareholder in the D1, the plaintiff agreed to surrender its name to the government, for use by the D1. The statement of claim asserted this was in consideration of the following representation, promises and inducements:

> That the Plaintiff agreed to surrender its name to the Government of Fiji so that it could allocate the same to the First Defendant in consideration of the following representations, promises and inducements (hereinafter collectively referred to as "the 1971 Accord") made to it by the Government of Fiji and the First Defendant.
>
> (a) That there would be a better commercial relationship and closer co-operation between the Plaintiff and the First Defendant.
> (b) The First Defendant would progressively phase out its domestic air travel operations and not apply for any of the routes that the Plaintiff was flying at the time and in future.
> (c) The First Defendant would reimburse all the expenditure incurred for changing the Plaintiff's name ie for stationery, sign writing etc.
> (d) Gratitude by the Government of Fiji and the goodwill associated with it.

[9] The statement of claim continued that the plaintiff "implicitly understood" the D1 would not compete with the plaintiff on domestic routes within Fiji.

[10] The plaintiff refers to what took place as "the 1971 accord". It has yet to emerge whether whatever was transacted was generally referred to by that title or whether this is merely a description attached by the plaintiff.

[11] There is no question that at the time, the plaintiff changed its name from Air Pacific Ltd to Fiji Air Services Ltd and that shortly after, the D1, previously known as Pacific Island Airways Ltd, changed its name to Air Pacific Ltd Those facts alone point to some arrangement between the companies, but beyond that, evidence of the existence of an agreement and its terms, is exiguous. Of course, as the Appellant contends the question of a serious issue relates not merely to the existence of an agreement of some kind, but also the parties to it, its terms and their enforceability.

[12] In their written submissions (although not in their oral presentation) the Appellants contended there was an absence of evidence that the A1 was a party to any agreement there may have been. The government then held the great majority if not all the shares in the company. For purposes of an interim

injunction there is sufficient to support a finding that there is a serious question that it may have been acting on the company's behalf as well as its own.

[13] We turn to the issue of a serious question regarding the existence of an agreement. Mr D S Robertson, the principal deponent for the plaintiff, had no personal knowledge of the 1970–71 events, having become an officer of the company only recently. He deposed to information he had gathered from company files including, he maintained, that the surrender of the existing company name was made in consideration of the representation, promises and inducements set out above. The only contemporary documentary evidence produced to support his assertion was a note by Mr Crompton, the company secretary dated 11 January 1971, headed "Explanations supporting the resolution concerning the change of name", and minutes of shareholders' meeting held 5 February 1971, recording a resolution that the company relinquish its name to the Fiji Government "for allocation at its discretion". The secretary's note stated "while we are not receiving definite written values and conditions" the directors and the secretary believed a number of benefits would result, the only one of immediate relevance reading:

> Acceptance by [the first defendant] that they will not apply for any of the routes we are listing for current and future operations.

[14] The deponent continued:

> That it was implicitly understood by our Board of Directors at the time that the First defendant would not compete with the Plaintiff in so far as flying domestic routes within Fiji was concerned whether directly or indirectly

but (except to the extent that this may be inferred from the statement quoted previously) he did not give any grounds for that belief. Mr Robertson also stated the "Accord" was acted on by both parties and that the D1 eventually phased out all its domestic operations and concentrated on international flights. Other evidence was to the effect that the D1 continued their domestic operations until 1991. There is no evidence, as one might have expected, of any protest by the plaintiff that years after the "Accord", Air Pacific was continuing to fly domestic routes. Air Pacific's evidence was that it eventually phased out these routes on economic grounds.

[15] On behalf of the D1, Mr T A Drysdale provided an affidavit in which he stated that between 1988 and 1997 he was Managing Director and Chief Executive of the D1. In those capacities he attended board meetings, was aware of all major economic and regulatory issues affecting the company and had ultimate responsibility for liaison with the government on matters of civil aviation policy and pertaining to the Fiji Government's shareholding which then was above 75 per cent. Mr Drysdale deposed that at the time of his appointment the D1 was operating two domestic services, Suva-Nadi and Suva-Labasa. The latter was phased out because it was uneconomic, while the Suva-Nadi route was sustained for a period because of its importance as a feeder route for international travellers. Notwithstanding that discontinuance of the Suva-Labasa service required many meetings with government officials, Mr Drysdale stated he was never made aware of any arrangement, accord or agreement by which the D1 was said to be bound to discontinue domestic services in favour of the plaintiff.

[16] The further affidavit on behalf of the D1 by Mr R M Grierson is significant in that he had been a director of the plaintiff during the years 1971–75, commencing at about the time of the name change. Mr Grierson held his

directorship as a nominee of a company which had subscribed for a 25% stake in the plaintiff. He held numerous discussions with the chairman and the company secretary, Mr Crompton, regarding the future of the plaintiff and was aware of the proposal to relinquish the Air Pacific name. His recollection is that there was no binding agreement of the kind Mr Robertson alleged. He stated his recollection was totally consistent with the impressions recorded by the secretary in his note of 11 January 1971.

[17] In his affidavit in reply Mr Robertson stated his company's records showed file notes of a number of meetings between the government and the plaintiff's directors where matters relevant to the "Accord" were discussed. He said the plaintiff's position was that by the time the resolution for change of name was passed, the issues set out in the secretary's note had been discussed with the government "and were indeed promised to the plaintiff". No file notes have been produced.

[18] Mr Robertson also referred to 2004 discussions between the plaintiff and the D1 exploring "partnership opportunities". In a confirming letter, under the heading "common routes" the plaintiff's chief executive wrote:

> As discussed we will not pursue any purposed (sic) Air Fiji routes that you are currently servicing and would appreciate the same reciprocal approach from Air Pacific.

[19] Commenting on this letter Mr Robertson stated:

> For Mr Campbell to now claim ignorance about this non-compete understanding between the Plaintiff and Air Pacific is a matter of great concern to us. In so far as we are concerned this standing arrangement between us has stood from 1971 and in 2004 we again confirmed this fact about not competing with Air Pacific and we expected the same respect to be accorded by Air Pacific to us.

[20] However, it appears to us that what the plaintiff wrote does not fit readily with the existence of a binding agreement made in 1971 and remaining in effect. If what was being under discussion in 2004 was pursuant to the "Accord" one might have expected some reference to that, but in fact the correspondence proceeds as if there was no earlier context.

[21] We appreciate, as the Respondent's submissions emphasise, that to the extent the grant of an interim injunction involves the exercise of a discretion, the jurisdiction of this court is limited by the well-known grounds for interfering, see *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191 at 220; [1982] 1 All ER 1042 at 1046. That consideration applies with particular force to the balancing of convenience. If there is no sufficient material to justify the finding of a serious issue, then the appellate court can and should intervene.

[22] Overall, the evidence of the existence of any agreement is slight in the extreme. The terms of Mr Crompton's note are against the existence of any agreement at that stage. Some 3 weeks elapsed before the plaintiff's board agreed to the change of name, but there is no evidence at all as to what if any exchanges took place in that period. Although the plaintiff's affidavit hints at the existence of further evidence none was produced. That the plaintiff in fact changed its name when requested to do so by the government is scant evidence of an agreement by the D1 not to compete. The pleading that the critical provision rests on something the plaintiff "implicitly understood" does not increase confidence in the plaintiff's assertions.

[23] If there is a contest of evidence, a court dealing with such an interlocutory application should not attempt to make an assessment, on affidavits, of where the preponderance of evidence might lie, a point Lord Diplock made strongly in *American Cyanamid* at AC 406–7; All ER 509–10. The Respondent's submissions endeavour to present the issue as a conflict of evidence. But in this respect this is an extreme case. Not only is there a paucity of evidence on the plaintiff's side, the defence has produced evidence from persons in a much better position to be aware of the existence of any "Accord" saying categorically that they had no knowledge of any such agreement.

[24] The two stages in *American Cyanamid* are not to be regarded as an inflexible process, and in the end the question is where overall justice lies: *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 110 at 128. However, as the High Court of New Zealand has said, the establishment of a serious issue is not a step to be brushed over lightly: "It is not sufficient for a plaintiff just to say there is a tenable cause of action from a legal point of view and a conflict of evidence on the facts": *Ansell v NZ Insurance Finance Ltd Wellington* (unreported, A434/83), judgment 30 November 1983, Eichelbaum J. In the present case the judge dealt with the facts relating to this issue in a single sentence and, with respect, may not have appreciated that despite the considerable quantity of material, on analysis the evidence gave little if any support for the assertions made by the plaintiff in its statement of claim and affidavits. We conclude that on the existence of an agreement, there was insufficient material to allow the judge to find there was a serious issue.

[25] When we look at the terms of any agreement, the plaintiff faces another significant difficulty. Any agreement was made more than 30 years ago and the plaintiff's contention must be it was to continue in perpetuity. It has not been suggested it might be subject to termination on reasonable notice. If as the plaintiff contends it contained a provision to the effect that the D1 would not compete with the plaintiff on domestic routes, plainly it was an agreement in restraint of trade. To be enforceable, it would need to pass the test of reasonableness. An agreement preventing Air Pacific from competing in perpetuity cannot be regarded as reasonable. It is quite contrary to current concepts of legitimate free competition that a trader's entry into a market should be constrained by vague assertions of an agreement in restraint of trade made such a length of time ago. On this ground too the plaintiff's case for an interim injunction, based on the alleged "Accord", must fail.

Fair Trading Decree

[26] Although the judge made only brief reference to the cause of action under the decree, it seems possible he intended to base his decision to grant an injunction on that ground also. It has been the subject of full written submissions and in the absence of any reasons given by the court below, we can proceed to express our own opinion on it.

[27] The plaintiff relies on the following provisions of the Fair Trading Decree 1992:

> 33. Misuse of market power
>
> (1) A person that has a substantial degree of power in a market, shall not take advantage of that, power for the purpose of—
>
> (a) eliminating or substantially damaging a competitor of such person or of a body corporate that is related to such person in that, or any other market;

(b) preventing the entry of a person into that, or any other market; or

(c) deterring or preventing a person from engaging in competitive conduct in that, or any other market

33A Anti-competitive conduct

(1) A person engages in prescribed anti-competitive conduct if the person—

(a) has a substantial degree of power in a market; and

(b) takes advantage of that power with the effect, or likely effect, of substantially lessening competition in that or any other market.

(2) a person must not engage in prescribed anti-competitive conduct.

[28] The plaintiff's case is that on entering the domestic market, Air Pacific intends to offer lower domestic fares, based in part on add-ons and through fares, in combination with Air Pacific's international services. In effect (so the plaintiff asserts) in the case of combined international and domestic travel, the international fares would subsidise the domestic sector, so that the latter might be running at a loss. Lacking an international business, the plaintiff would not be in a position to compete.

[29] The evidence to support the contention is limited. An Air Pacific staff circular referred to lower promotional fares and add-on and through fares created in combination with Air Pacific's international services. And in submissions to the Air Transport Licensing Board, the A3 stated that "as with most aviation start-ups" it expected to incur losses in the first 2 years of operations. We do not consider these statements to be a sufficient foundation for the contention that there is a serious issue that the Appellants intend to engage in predatory pricing. The Appellants also contest whether the first appellant has a substantial degree of power in a market, within the meaning given to that expression in authorities. We can however decide this branch of the case on the single point counsel for the appellants emphasised in his oral submissions, namely that whatever the plaintiff's evidence may establish, this cannot justify an injunction prohibiting Air Pacific from entering the market. If Air Pacific obtains the necessary licences clearly there may be bases on which it can enter the domestic market which do not infringe the Fair Trading Decree. If in entering the domestic market it engages or proposes to engage in conduct which infringes the Decree, the plaintiff may have recourse to legal remedies, including invoking the extensive injunctive powers under s 125.

[30] For these reasons we reject the plaintiff's argument supporting the interim injunction on the footing of the Fair Trading Decree.

Other issues

[31] Given our conclusions, we do not need to examine Air Pacific's challenge to the way the judge dealt with balance of convenience. However, we are not to be taken as endorsing the judge's view that it was foolhardy if not reckless of Air Pacific to enter on financial commitments in pursuance of its proposed entry into the domestic market. Nor do we need to deal with a further submission of the Appellants, as to the sufficiency of the plaintiff's undertaking regarding damages. As an important point of practice we wish to repeat however that where a party gives an undertaking to pay damages, there must be adequate information to allow an assessment of the worth of the undertaking. This court laid that down in *Natural Waters of Viti Ltd v Crystal Clear Mineral Waters (Fiji) Ltd* [2004] FJCA 59.

[32] Finally we record that the Appellants withdrew their request for an inquiry into damages at this stage.

Orders

(1) Appeal allowed, interim injunction set aside;
(2) Costs to A1–A3 against Respondent, $2000.

Appeal allowed.