

IN THE SUPREME COURT OF FIJI

Civil Jurisdiction

Action No. 643 of 1985

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Between:

BURNS PHILP (SS) CO. LTD.

Plaintiff

V

CANPLAST (FIJI) LIMITED

formerly known and trading as
AHI (South Pacific) Ltd

1st Defendant

AND

LEES TRADING CO. LTD.

2nd Defendant

AND

ALLAN LEE, PETER LEE, EDMUND LEE,
ROBERT LEE, LEE SUI FONG, LEE
WAH YIP

3rd to 8th
Defendants

Mr.S.Parshottam for the Plaintiff
Mr B.C.Patel for the Defendant

DECISION

The plaintiff's claim against the defendants is for damages for breach of contract and for an injunction against the first defendant in the following terms:

"An injunction restraining the first defendant from withholding supplies of biscuit tins as contracted for and to prevent any repetition thereof."

The relief, as regards the injunction claimed is not worded in clear terms. What appears to be the orders sought are a mandatory injunction directing the first defendant to perform his contractual obligations and a prohibitory injunction directing him not to continue any further breach of the alleged contract relating to supply of biscuit tins.

Another injunction sought by the plaintiffs is against the other seven defendants restraining them from doing any of the act complained about in paragraph 23 of the Statement of Claim.

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That paragraph alleges that the second defendant and its six directors, who are defendants in this action, induced the first defendant to break its contract with the plaintiff.

The plaintiff has applied for interim orders seeking injunctions as are sought in the action.

I do not propose to state the facts alleged in the Statement of Claim or in the affidavits which have been filed except to the extent necessary to support my views because I am of the view that this Court should not make an order in mandatory terms ordering the first defendant to perform its obligation under an alleged contract.

Mr Parshottam relies on the case of Sky Petroleum Ltd. v V.I.P. Petroleum Ltd. (1974) 1 W.L.R. 576 a decision by Goulding J.

That was a case where there was some similarity with the facts in this case. The plaintiff had entered into a contract with the defendants to purchase from the defendants, at fixed prices, their entire requirements of motor gasoline and diesel fuel for the plaintiff's filling stations with a minimum annual quantity being stipulated. The defendants purported to terminate the contract.

On a motion for an injunction to restrain the defendants from withholding supplies pending trial of the action it was held as follows:

(1) that to grant an injunction in the terms sought, would be to order specific performance of a contract to sell and purchase non-specific or unascertained chattels, and that such an order would normally be refused because damages would be a sufficient remedy.

(2) That in the unusual circumstances in which the defendants were the only source of supply available to the plaintiffs and the sole means by which the plaintiffs could continue their business damages would not be a sufficient remedy and an injunction would be granted."

Goulding J was of the view that unless the Court intervened the plaintiff would be forced out of business. He stated the general rule which is expressed in (1) above. He stated as follows:-

"Now I come to the most serious hurdle in the way of the plaintiffs which is the well known doctrine that the court refuses specific performance of a contract to sell and purchase chattels not specific or ascertained. That is a well-established and salutary rule, and I am entirely unconvinced by Mr. Christie, for the plaintiffs, when he tells me that an injunction in the form sought by him would not be specific enforcement at all. The matter is one of substance and not of form, and it is, in my judgment, quite plain that I am, for the time being, specifically enforcing the contract if I grant an injunction. However, the ratio behind the rule is, as I believe, that under the ordinary contract for the sale of non-specific goods, damages are a sufficient remedy. That, to my mind, is lacking in the circumstances of the present case. The evidence suggests, and indeed it is common knowledge that the petroleum market is in an unusual state in which a would-be buyer cannot go out into the market and contract with another seller, possibly at some sacrifice as to price. Here, the defendants appear for practical purposes to be the plaintiffs' sole means of keeping their business going, and I am prepared so far to depart from the general rule as to try to preserve the position under the contract until a later date. I therefore propose to grant an injunction."

The case is distinguishable from the instant case.

In that case the existence of a contract was not in dispute. In the instant case the defendants deny there is any contract as alleged by the plaintiff. This fact alone would be sufficient reason for refusing an interim order in the nature of specific performance of a contract the existence of which is in dispute.

Also there were peculiar facts in that case which are absent from the instant case. There the plaintiff could have been forced out of business by the alleged breach of contract.

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No one suggests that the plaintiff would be forced out of business if the injunctions were refused but Mr Parshottan alleges it would seriously affect the biscuit manufacturing business of the plaintiffs.

The nature of the chattels is important. In the Sky Petroleum case the court was concerned with a manufactured product on which no work had to be done by the defendant. In the instant case the plaintiff seeks an order that the first defendant supply the tins which it has to manufacture to given specifications.

In the other case the plaintiff could not obtain supplies elsewhere. In the instant case another company in Fiji, Lees Industries Ltd manufactures biscuit tins and can supply the plaintiff but at a higher price which the plaintiff says makes it uneconomic to pay. In fact it complains the prices "would completely erode any profit margin." Lees Industries Ltd is alleged to be fully controlled by the defendants.

I do not consider this is a case to depart from the doctrine which Goulding J referred to in the extract from his judgment quoted above. Damages in my view is the remedy for the breach of the alleged contract by the parties which is not a formal one committed to writing but one which if it exists appears to be only partly in writing.

The Sky Petroleum case was prior to the House of Lords considering the principles governing the grant of an interlocutory injunction in American Cyanamid Co. v Ethicon Ltd (1975) 1 ALL E.R. 504.

The Cynamid case was not concerned with a mandatory injunction. It concerned a claim to an injunction to restrain a threatened infringement of the plaintiff's patent. Nevertheless, it is the authority which sets out in some detail the principles governing the grant of an interlocutory injunction.

Lord Diplock who delivered the main judgment, approved by all the other law Lords, at page 510 considered the principles governing the balance of convenience. He said:

"I turn to consider what those principles are.

My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made on contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction; but since the middle of the 19th century this has been made subject to his undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where the balance of convenience lies."

The plaintiff has in its statement of claim quantified the special damages it alleges it has suffered at \$72,000 being 3 months loss of profits at \$12,000 a month and \$36,000 cost of efforts to introduce other types of containers.

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The defendants are apparently persons of substance and would I believe be able to pay damages if the plaintiff succeeds.

There is mention in the Statement of Claim that goodwill of the buscuit business is valued at \$1,000,000 and that the defendants actions would destroy that goodwill.

The plaintiff can obtain tins from another source albeit at a higher price but the additional sum they have to pay to protect the goodwill of their biscuit making business would be recoverable as damages if they succeed in this action.

The Court can assist by giving this action priority and will favourably consider an application for speedy trial.

The application is dismissed with costs to the defendants in any event.

R. G. Kermod
(R.G. Kermode)

J U D G E

SUVA,

August, 1985