8 pages.

ROYAL COURT

55.

24th April, 1991

Before: The Bailiff, and
Jurats Vint and Hamon

Between:	Jose Lora	Plaintiff
And:	Svend Erik Pedersen	Defendant
And:	Royal Bank of Scotland (Jersey) Limited	First Party Cited
And:	Travelsphere (Harborough) Limited	Second Party Cited

Advocate P.C. Sinel for the Plaintiff.
Advocate T.J. Le Cocq for the Defendant.
Advocate A.D. Robinson for the Second Party Cited.

JUDGMENT

BAILIFF: In this case the plaintiff is the part owner of six hotels. The defendant runs a transport company, Waverley Coaches, and is likewise part owner of the same hotels. Travelsphere (Harborough) Limited is the second party cited and is a United Kingdom Travel Agent business selling holidays to people in specified hotels, including the six owned by the parties. Two of the hotels, The Chippings and the Villa Isis, are subject to specific share agreements. There is a separate agreement governing a third hotel, the Sunshine Hotel, in which Travelsphere owns one third of the shares, and the remaining three

hotels are not governed by any specific agreement. These remaining hotels are, the Glen Hotel, Grosvenor House Hotel and Hotel Suisse. Travelsphere entered into solus agreements to fill the hotels and put up some of the money for the purchase of the hotels enabling the plaintiff and the defendant to put sufficient deposits down to secure them. Travelsphere then took a second priority charge to bank loans by the first party cited, the Royal Bank of Scotland. The arrangements are that the loans to Messrs. Lora and Pedersen should be repaid over nine years, no interest is to be charged, but at the end of that period they are to receive fifteen per cent of the value of the hotels.

Until difficulties arose between the plaintiff and the defendant, one firm of advocates and solicitors, Messrs. Crills, acted for all the parties. The plaintiff became the full-time manager of all six hotels in August 1988. About that time, on the instructions of the defendant, Messrs. Le Gallais and Luce prepared an agreement between the parties in order to register a new company to be known as Inn Harmony Hotels Limited, in which they would have equal shares, and which made provision for dealing with any deadlock which could arise as a result of the particular arrangements of equality in the shareholding existing between them. The agreement was not signed nor was the company incorporated. There were a number of reasons for this; one of them being that the defendant was engaged in some litigation in the United Kingdom which he wished to have completed first. The result was that in order for a valid meeting of the Directors to be effective, both the plaintiff and the defendant had to be present in each case. Later relationships between the plaintiff and the defendant deteriorated and on the 26th February, 1991, the plaintiff obtained an Order of Justice from the Bailiff containing a number of injunctions. In his supporting affidavit, as is also clear from the body of the Order of Justice, the plaintiff alleged that whilst he was out of the Island attempts were made to remove him from his Directorships of the various companies controlling the hotels. This summons has been brought by the defendant seeking variations in three of the interim injunctions. These interim injunctions are as follows:-

1. Service of this Order of Justice upon the defendant and the First and Second Parties cited shall operate as an immediate

interim injunction restraining them, their servants, trustees, agents, appointees or proxies from:

(a) attempting by any means whatsoever to procure the dismissal of the plaintiff from his position as Director or General Manager of any of the companies of the joint venture or from holding or purporting to hold any meeting of the Companies or their Directors without the sanction of the Court. For the avoidance of doubt, the companies of the joint venture include Sunshine Hotel (1989) Limited.

2. Service of this Order of Justice upon the defendant shall operate as an immediate interim injunction restraining him, his servants or agents from:-

(a) interfering with or obstructing the Plaintiff in the performance of his role as General Manager of the Group Hotels.

(b) Appropriating any monies or goods whatsoever belonging jointly to the plaintiff and the defendant and to the Group Hotels otherwise than for the bona fide benefit of the joint venture.

(c) Interfering with, molesting, obstructing or abusing the plaintiff or the staff of the Group Hotels on the course of their operation of the hotels.

(d) Diverting custom from the Group Hotels or otherwise obtaining or attempting to obtain a personal benefit to the detriment of the joint venture.

The variations sought in respect of 1 (a) are the deletion of the words "or general manager" and the deletion of the last part of the second sentence "or from holding or purporting to hold any meeting of the companies or their directors without the sanction of the Court".

The second amendment sought is the total deletion of 2 (a) and the third amendment is an addition to 2 (c) in the following terms:

> " provided always that nothing herein shall prevent either the Board of Directors of any company within the Group and/or Director authorised by his/her Board of Directors from exercising all and any rights conferred upon any one or more of them either by the Articles of Association of any such company or by law".

In the course of the hearing the defendant admitted that the notices convening meetings of the various companies had indeed been served and in respect of Villa Isis and the Chippings Hotel might well have been legally ineffective and in respect of the other three ought not, in the sense of fairness, to have been served, and accepted that injunction 2 (a) could remain, with the insertion of the word "unreasonably" between the words "interfering" and "with". Similarly in respect of 2 (c) the defendant did not press for the additional paragraph provided the word "unreasonably" was inserted between the words "interfering" and "with" in that paragraph. This therefore left the amendments to paragraph 1 (a).

There were three other matters originally before the Court during this application. The first was a summons by the plaintiff to vary the injunctions concerning the Bank mandate. The second was an application by Mr. Robinson to be heard on behalf of Travelsphere, and the third was an application by the plaintiff to cross-examine the defendant on his affidavit. In the event Mr. Robinson was allowed to intervene and address the Court in support of the application of Mr. Le Cocq on behalf of the defendant, and having heard the application and the arguments submitted by both sides in support of the plaintiff and the defendant, the application to cross-examine Mr. Pedersen on his affidavit was not proceeded with.

It appears to us that the defendant, having withdrawn his attempt to remove the plaintiff as a Director of the six hotels, does not wish him to continue as General Manager of the Group. Travelsphere supports the defendant. In order to be able to remove him from this post the

defendant would need the amendment to injunction 1 (a). Nevertheless he is prepared, if the injunction were to be amended, to add the following proviso - ".... provided that should the plaintiff be dismissed or required to resign as General Manager of the Group, the defendant shall pay, or cause to be paid, or procure that it shall be paid, his salary as General Manager until the resolution of the dispute between the parties, or until further Order of the Court". If the plaintiff continues as a director of the various hotel companies as at present, but does not co-operate with the defendant, (and possibly Travelsphere) in running them according to his wishes, the present impasse will continue. The plaintiff cannot be expected to co-operate to secure his own dismissal as General Manager but, on the other hand, the position has now been reached when both parties agree that they must part and all that remains to be settled are the financial arrangements. Likewise the plaintiff cannot be expected to acquiesce in any decision of the Directors that would, in his opinion, reduce the value of his shares, but unless the defendant is more of a knave than a fool, and we have heard no evidence to suggest that he is either, he would be unlikely willingly to inflict financial injury on himself as well as upon the plaintiff.

Mr. Sinel wants us to keep the status quo, that is a position in which Mr. Lora can block the day-to-day running of the group if any proposals of the defendant do not please him. The Royal Court has applied the principles of the American Cyanamid case in a number of cases so that there may be said to be settled law here as well as in England. So far as a defendant seeking to remove (and we include a defendant as in this case seeking to amend) an injunction, the burden is on him to show that the balance of convenience favours the discharge (or amendment) Walter -v- Bingham 1985/86 JLR 439. The phrase "balance of convenience" has been considered by Sir John Donaldson (as he then was) M.R. in Francome -v- Mirror Group Newspapers [1984] 1 WLR 892 at page 898E (not cited in the Bingham case) -

> "I stress once again, that we are not at this stage concerned to determine the final rights of the parties. Our duty is to make such orders, if any, as are appropriate pending the trial of the action. It is sometimes said that this involves a weighing of the balance of convenience. This is an unfortunate expression. Our business is justice, not convenience. We can and must disregard fanciful claims by either party. Subject to that, we must

contemplate the possibility that either party may succeed and must do our best to ensure that nothing occurs pending the trial which will prejudice his rights. Since the parties are usually asserting wholly inconsistent claims, this is difficult, but we have to do our best. In so doing we are seeking a balance of justice, not convenience".

This Court has endeavoured to do the same and to avoid injustice, having regard to the matters considered and laid down in the American Cyanamid case.

Since adequate compensation for the loss of his post as General Manager could be met by the award of damages, and the business of the Group cannot be held up indefinitely, we are going to allow the amendment with additional provision. We are supported in our decision by the proposals in the unsigned agreement between the parties to deal with what they rightly described as "deadlock" should that have occurred between them in the course of running the business. These proposals, which we do not need to consider in detail, were designed to end such a state of "deadlock" to allow the business to function properly. The defendant has given an undertaking that, although he did not sign the same agreement in respect of Villa Isis, as he did in the case of the Chippings Hotel, he will be bound by the draft.

Accordingly the amended injunction will now read as follows:-

"(a) Attempting by any means whatsoever to procure the dismissal of the plaintiff from his position as Director of any of the companies of the joint venture, provided that, should the plaintiff be dismissed or required to resign as General Manager of the Group, the defendant shall pay, or procure that it shall be paid or cause to be paid, his salary as General Manager pending the resolution of the dispute between the parties, or until further Order of the Court; for the avoidance of doubt the companies of the joint venture include the Sunshine Hotel (1989) Limited".

Provided further:

(1) that no exceptional items of expenses be incurred without the joint consent of the plaintiff and defendant;

(2) the shares structure of the all the holding companies shall not be altered nor additional shares be issued without further Order of the Court.

An additional injunction shall be added to those already in force as follows:

"(e) Dealing with the bank accounts of the Group Hotels, or any funds or monies owned by the Group Hotels in any manner whatsoever without the express written consent of the Plaintiff".

We think the arrangements we have made should protect the plaintiff's interests sufficiently at the same time encouraging the defendant and the second party cited to make acceptable proposals to the plaintiff for the running of the Group and, as seems likely, the eventual division of the assets between the parties.

If the second party cited votes in matters in which the plaintiff considers it does not have the right to do so, he can always apply to the Court to have the decision annulled.

The plaintiff will have his costs up to three o'clock in the afternoon of the first day of the hearing; thereafter the costs will be in the cause.

Authorities

R.S.C. (1991 Ed'n) Order 29.

American Cyanamid -v- Ethicon Limited (1975) AC 396.

Goldrein & Wilkinson Commercial Litigation: pp. 79 - 96 (Cyanamid's four criteria).

Walters -v- Bingham (1985-86) JLR 439.

Francome -v- Mirror Group Newspapers (1984) 1 WLR 892.