COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2017/CLE/gen/00147

BETWEEN

KIM MCDEIGAN

Plaintiff

-and-

BAHAMAS CO-OPERATIVE LEAGUE INSURANCE BROKERS LTD.

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Kahlil Parker and Ms. Roberta Quant of Cedric L. Parker & Co. for the Plaintiff
Mr. Ashley Williams of Alexiou, Knowles & Co. for the Defendant

Hearing Date: 8 March 2017

CATCHWORDS:

Ex parte Injunction – Interlocutory – Principle governing grant – Matters to be considered by court in determining whether balance of convenience lies in favour of granting or refusing relief - Whether damages will be an adequate remedy.

Employment Law - Breach of implied term of mutual trust and confidence- Defamation- Matters to be considered by court in granting an injunction seeking to restrain employer from publishing any notice terminating employee's employment.

HEADNOTE:

The Plaintiff approached the court on an urgent basis seeking an ex parte injunction to refrain the Defendant, her former employer, whether by itself, its servants, agents or officers from threatening to, attempting to or in fact publishing any notice in any local daily newspaper(s) with respect to the Plaintiff's termination of employment by the Defendant on the basis that said publication would be in breach of an implied term of trust and confidence and/or defamatory.

The ex parte injunction was granted with a returnable date. On that date, the Plaintiff applied to continue the injunction. The Defendant resisted the application on the grounds that there is no

serious issue to be tried and/or in any event, any damage(s) suffered by the Plaintiff was compensable. The Defendant next argued that the intended publication could not be considered defamatory and/or was meant to ruin the Plaintiff's reputation but to protect the Defendant and its customers from liability.

HELD, discharging the ex parte injunction with costs:

1. It is an established principle of law that the onus is on the Plaintiff to show that there is a serious issue to be tried. An analysis of the factual and legal evidence shows that there is a serious issue to be tried.

2. The intended publication could not be considered defamatory as it is routinely done to protect Companies and their customers from liability: **Deandra Chung v Future Services International Limited and Yaneek Page**, Supreme Court Civil Appeal No. 104/2012.

3. In any event, damages would be an adequate remedy for the Plaintiff should she succeed at the trial of her action. If damages would be an adequate remedy and the defendant would be in a financial position to pay them, no interim injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage."

Cases referred to and mentioned in the judgment

1. American Cyanamid Co. v Ethicon Limited [1975] AC 396, H.L.
2. Malik v Bank of Credit and Commerce International SA [1998] AC 20.
3. Smith v Inner London Education Authority [1978] 1 All E.R. 411 at 419, CA.
4. Canada Trust v Stolzenberg (No. 2) [1998] 1 WLR 547.
5. Courtauld's Northern Textiles Ltd v Andrew [1979] IRLR 84, 85).
6. Deandra Chung v Future Services International Limited and Yaneek Page, Supreme Court Civil Appeal No. 104/2012.

RULING

Charles J:

[1] At an inter partes hearing on 8 March 2017, I reserved my ruling on whether to continue or discharge an ex parte injunction which I granted on 13 February 2017 refraining the Defendant whether by itself, its servants, agents or officers from threatening to, attempting to or in fact publishing any notice in any local daily newspaper(s) with respect to the Plaintiff's termination of employment by the Defendant, her former employer until further or final order.

[2] On 14 March 2017, I discharged the ex parte injunction giving brief oral reasons. The Plaintiff is aggrieved by my decision and wishes to appeal. I promised that I will reduce my brief reasons to writing. I do so now.

The factual matrix

[3] The Plaintiff, an Insurance Executive, was employed by the Defendant as the General Manager. The Defendant is a limited liability company in the Commonwealth of The Bahamas carrying on business as an insurance brokerage firm.

[4] The Plaintiff commenced employment with the Defendant on 1 June 2015 and held that position until 10 February 2017 when she was terminated. In her letter of termination dated 10 February 2017, the Defendant enumerated two specific grounds of misconduct which led to her termination namely: (1) stealing company equipment or the personal property of fellow employees and (2) wilful neglect of duties.

[5] At paragraph 5 of her affidavit filed on 14 February 2017 in support of the injunction, the Plaintiff stated that she was reliably informed that the Defendant was seeking to publish a notice in the newspapers with respect to her termination of employment. This fact was not disputed by the Defendant. She next averred that "I do not know why the Defendant feels so compelled to assault my character and professional reputation in this way."

[6] At paragraph 6 of the said affidavit, the Plaintiff alleged that she feared that the Defendant appears intent on crippling her in the job market and is attempting to prevent her from even getting her foot in the door elsewhere.

[7] At paragraph 8, the Plaintiff alleged that the lawfulness of her termination and her entitlement to damages will be determined and assessed by the court.

[8] In a nutshell, she alleged that the threatened publication poses a great and material risk to her professional and financial future and no prospect of financial harm to the Defendant.

[9] On 13 February 2017, the Plaintiff approached the court on an urgent basis with an Ex Parte Summons supported by an affidavit of the Plaintiff, a Certificate of Urgency and a Specially Indorsed Writ of Summons. The documents were unfiled but because of its urgency I heard the Summons and directed that all documents be filed as soon as practicable. All documents were filed the following day. On 13 February 2017, I granted an injunction to prevent the Defendant whether by itself, its servants, agents or officers from threatening to, attempting to or in fact publishing any notice in any local daily newspaper(s) with respect to the Plaintiff's termination of employment by the Defendant, her former employer until further or final order.

[10] I further directed that the inter partes hearing be adjourned to 8 March 2017. On that day, the Plaintiff sought a continuation of the injunction. The Defendant vehemently opposed the application. First, says the Defendant, the Plaintiff is unable to demonstrate that there is a serious issue to be tried and secondly, the balance of convenience militates against the grant of an injunction since the action seeks damages for wrongful and/or unlawful dismissal.

[11] In her Specially Indorsed Writ of Summons filed on 14 February 2017, the Plaintiff alleged that she was wrongfully and/or unlawfully dismissed. She seeks the following relief namely: (i) Statutory Notice Pay; (ii) compensation and damages for wrongful dismissal; (iii) compensation and damages for unlawful dismissal; (iv) aggravated damages; (v) damages and (vi) interest at the statutory rate; (vii) costs and (viii) such further or other relief as the court may seem fit.

[12] On 8 March 2017, the Plaintiff filed a Statement of Claim seeking almost identical relief as in her Specially Indorsed Writ. She also seeks an injunction couched in parallel language to that which she obtained at the ex parte hearing.

[13] In response, the Defendant relied upon the two affidavits of its interim Chairman, Hilton Bowleg filed on 6 and 7 March 2017 respectively. The Defendant does not resile from the fact that it wishes to publish notices in the local newspapers to protect itself and its customers from liability. The Defendant says that the advert is nothing more than a notice to the public that the Plaintiff is no longer employed by the Defendant and that she is no longer authorized to act of its behalf.

[14] Unquestionably, the Plaintiff's claim is one of breach of contract and not an action in defamation although, at the ex parte hearing, learned Counsel for the Plaintiff, Mr. Parker submitted that the threatened publication was an attempt by the Defendant to smear the Plaintiff's reputation and defame her. He has since moved away from any allegations of defamation.

Applicable legal principles

[15] The procedure to be adopted by the court in hearing applications for interlocutory injunctions and the tests to be applied were laid down by Lord Diplock in the seminal case of **American Cyanamid Co. v Ethicon Limited** [1975] AC 396, H.L. At page 407, Lord Diplock had this to say:

> **"The Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are questions to be dealt with at the trial…So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory injunction relief that is sought."** [Emphasis added]

[16] According to **American Cyanamid**, when an application is made for an interlocutory injunction, in the exercise of the court's discretion, an initial question falls for consideration, i.e. whether there is a serious issue to be tried? If the answer to that question is yes, then a further question arises: would damages be an adequate remedy for the party injured by the court's grant of, or its failure to

grant, an injunction? If there is doubt as to whether damages would not be adequate, the court then has to determine where does the balance of convenience lie?

[17] Some of the key principles derived from the speech of Lord Diplock in **American Cyanamid** (at pages 406-409) may be listed as follows:

1. The grant of an interlocutory injunction is a matter of discretion and depends on all the facts of the case.

2. There are no fixed rules as to when an interlocutory injunction should or should not be granted. The relief must be kept flexible.

3. The evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination.

4. It is no part of the court's function at this stage to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed and mature considerations. These are matters to be dealt with at the trial.

5. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which <u>he could not be adequately compensated in damages recoverable in the action</u> if the uncertainty was 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 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.[Emphasis added]

6. Some additional factors that the court needs to bear in mind are: (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other to pay; (b) the balance of convenience; (c) maintenance of the status quo, and (d) any clear view the court may reach as to the relative strength of the parties' cases.

7. Unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

8. The court must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious issue to be tried.

[18] The threshold requirement is whether there is a serious issue to be tried. Lord Diplock in **American Cyanamid** said it is sufficient if the court asks itself: is the applicant's action "not frivolous or vexatious"?; is there "a serious question to be tried"?, is there "a real prospect that he will succeed in his claim for a permanent injunction at the trial"? These may appear to be three subtly different questions but they are intended to state the same test: **Smith v Inner London Education Authority** [1978] 1 All E.R. 411 at 419, CA *per Browne L.J.* See also **00** [1994] A.C. 438, H.L., **Canada Trust v Stolzenberg (No. 2)** [1998] 1 WLR 547.

Is there a serious issue to be tried?

[19] The Plaintiff contended that there is plainly a serious issue to be tried. Mr. Parker submitted that the serious issue to be tried is whether or not the publication of the said notice in and of itself is a breach of an implied term of trust and confidence in the contract between the parties. The existence of this implied term received the imprimatur of the House of Lords in **Malik v Bank of Credit and Commerce International SA** [1998] AC 20, a case heavily relied upon by Mr. Parker.

[20] Briefly, the facts are that Mr. Malik and Mr. Mahmud both worked for the Bank of Credit and Commerce International ("BCCI") which went into insolvency due to massive fraud, money laundering and other criminal activity. Both lost their jobs and they sought employment elsewhere. They could not find jobs. They sued the company for their loss of job prospects, alleging that their failure to secure new jobs was due to the reputational damage they had suffered from working with BCCI. They said that nobody wanted to hire people from a massive fraud operation like that at the company. This raised the question of what duty the company had owed to its employees that had been broken. Although there was no express term in their contracts, Malik and Mahmud argued there was an implied term in their employment contract that nothing would be done calculated to undermine mutual trust and confidence.

[21] The House of Lords unanimously held that the term of mutual trust and confidence would be implied into the contract as a necessary incident of the employment relation. This was a term implied by law. At p. 37, Lord Nicholls stated:

> **"Employers may be under no common law obligation, through the medium of an implied contractual term of general application, to take steps to improve their employees' future job prospects. But failure to improve is one thing, positively to damage is another. Employment, and job prospects, are matters of vital concern to most people. Jobs of all descriptions are less secure than formerly, people change jobs more frequently, and the job market is not always buoyant. Everyone knows this. An employment contract creates a close personal relationship, where there is often a disparity of power between the parties. Frequently the employee is vulnerable. Although the underlying purpose of the trust and confidence term is to protect the employment relationship, there can be nothing unfairly onerous or unreasonable in requiring an employer who breaches the trust and confidence term to be liable if he thereby causes continuing financial loss of a nature that was reasonably foreseeable. Employers must take care not to damage their employees' future employment prospects, by harsh and oppressive behaviour or by any other form of conduct which is unacceptable today as falling below the standards set by the implied trust and confidence term.**

[22] At p. 40, the learned law lord continued:

> **"Furthermore, the fact that the breach of contract injures the plaintiff's reputation in circumstances where no claim for defamation would lie is not, by itself, a reason for excluding from the damages recoverable for breach of contract compensation for financial loss which on ordinary principles would be recoverable. An award for damages for breach of contract has a different objective: compensation for financial loss suffered by a breach of contract, not compensation for injury to reputation."**

[23] The short point of this case is that the British courts came to recognize that it is an implied term of the contract of employment that the employers would not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties: see also **Courtauld's Northern Textiles Ltd v Andrew** [1979] IRLR 84, 85).

[24] Learned Counsel for the Defendant, Mr. Williams submitted that even if, as the Plaintiff asserts, there is a serious issue to be tried, on her own authority of **Malik**, damages would be an adequate remedy.

[25] Mr. Williams reminded the court that where damages are an adequate remedy the court ought not to grant an injunction. He submitted that this is one of the fundamental principles of **American Cyanamid**. According to him, damages may not be sufficient if the wrong is (a) irreparable; (b) outside the scope of pecuniary compensation or (c) if damages would be very difficult to assess.

[26] He however cautioned that special considerations apply where the injunction is sought as a result of alleged or apprehended defamation, which he says is the case here. I can dispose of this point briefly. At the ex parte hearing, learned Counsel submitted that he did not see the commercial value as to why her termination has to be publicly advertised and by doing so, the Plaintiff is threatened with a national campaign to smear her reputation and to defame her. But the Specially indorsed Writ of Summons with the Statement of Claim is one of breach of contract. So, it seems plain that the Plaintiff is not pursuing an action in defamation.

[27] By that as it may, Mr. Williams submitted that the intended publication is not defamatory since it is not uncommon for employees to leave their jobs and employers to issue these publications particularly where, as in this case, the employee has been authorized to receive money on behalf of her employer. The wording of the intended publication goes as follow:

ATTENTION

The Bahamas Cooperative League Insurance Brokerage Limited

(BCLIBL)

(PHOTOGRAPH OF PLAINTIFF INSERTED)

wishes to advise its Clients and the General Public

That

MS. KIM McDEIGAN

IS NO LONGER EMPLOYED WITH BCLIBL

and is therefore

NOT AUTHORIZED TO CONDUCT BUSINESS

on its behalf.

The Bahamas Cooperative League Insurance Brokerage Limited

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[28] Mr. Williams cited the Jamaican case of **Deandra Chung v Future Services International Limited and Yaneek Page**, Supreme Court Civil Appeal No. 104/2012. In that case, the Respondents caused to be published on more than one occasion between 9 and 21 March 2012 in the Daily Gleaner, the Sunday Gleaner and the Star newspapers, the following words:

> "**NOTICE** – The public is hereby advised that **Miss Deandra Chung** is no longer employed to **Future Services International Limited** and is therefore not authorized to conduct any business on our behalf."

[29] In an action for libel filed as a result of these publications, the appellant contended that these words were defamatory. McIntosh J dismissed the appellant's claim, with costs, on the basis that the words complained of were not capable of bearing a defamatory meaning. In a well-reasoned judgment, the Court of Appeal of Jamaica dismissed the appeal with costs.

[30] That being said, I am reminded that Learned Counsel Mr. Parker emphasized that the Plaintiff's case is founded in contract not defamation. He might have been well aware of the Jamaican authority of **Deandra Chung** and the line of judicial authority referred in that judgment.

[31] Looking at the Writ of Summons and the Statement of Claim filed on 8 March 2017, there appears to be a serious issue to be tried with respect to the implied term of breach of trust and confidence and I so find. No doubt, that will be determined at trial when the court analyses the contractual arrangement between the parties.

Damages as an adequate remedy

[32] In **American Cyanamid,** Lord Diplock said at page 408:

> **"…The governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be [an] adequate remedy and the defendant would be in a financial position to pay them, no interim injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage."**

[33] Learned Counsel Mr. Parker was at pains to demonstrate that damages would not be an adequate remedy for wrongful and/or unlawful dismissal as well as the implied term of trust and confidence in a contract. The very authority of **Malik** which he relied upon so heavily is against the weight of his submissions. At p. 50, Lord Steyn addressed the availability of the remedy of damages. Referring to the case of **Addis v Gramophone Co. Ltd** [1909] A.C. 488, Lord Steyn continued at p. 51:

> **"…That proposition is that damages for breach of contract may only be awarded for breach of contract, and not for loss caused by the manner of the breach. No Law Lord said that an employee may not recover financial loss for damage to his employment prospects caused by a breach of contract. And no Law Lord said that in breach of contract cases compensation for loss of reputation can never be awarded, or that it can only be awarded in cases falling in certain defined categories. *Addis* simply decided that the loss of reputation in that particular case could not be compensated because it was not caused by a breach of contract: *Nelson Enonchong,* "Contract Damages for Injury to Reputation" (1996), 59 M.L.R. 592, p. 596. So analysed *Addis* does not bar the claims put forward in the present case."**

[34] The House of Lords further held that there was an implied obligation on an employer that he would not carry on a dishonest or corrupt business, and if it could be shown that it was reasonably foreseeable that in consequence of his corruption there was a serious possibility that an employee's future employment prospects were handicapped, damages were recoverable for any such continuing financial losses sustained. **Addis** was not followed.

[35] So, **Malik** appears to be sound authority for the proposition that where a breach of contract gives rise to financial loss which on ordinary principles would be recoverable as damages for breach of contract, such damages does not cease to be recoverable because they might also be recoverable if there is a breach of the implied term of mutual trust and confidence in the contract.

[36] As enunciated in **American Cyanamid**, the object of an 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 was 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 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.

[37] Suffice it to say, the court also needs to bear in mind the following: (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other to pay; (b) the balance of convenience; (c) maintenance of the status quo, and (d) any clear view the court may reach as to the relative strength of the parties' cases.

[38] In the present case, the Plaintiff seeks damages for wrongful and/or unlawful dismissal and damages for breach of the implied term of mutual trust and confidence in the contract.

[39] No matter how strong the Plaintiff's action appeared to be at this stage of the proceedings, the court should not grant an interim injunction since damages would be an adequate remedy. The balance of convenience militates against the grant of an injunction since the action seeks damages in contract which are assessable.

Conclusion

[40] In the premises, I will discharge the ex parte injunction which I granted on 13 February 2017 with costs of this application to be taxed if not agreed. The parties will address me on costs.

Dated this 18th day of April, A.D. 2017

Indra H. Charles

Justice