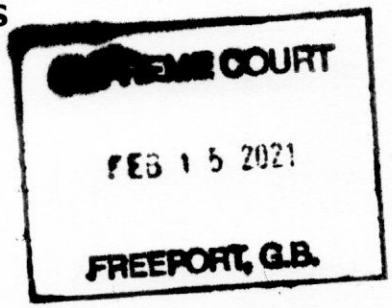
COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Side
2020/CLE/gen/Fp/00043



BETWEEN

ISLAND WIFI LIMITED
Plaintiff

AND

THE BAHAMAS TELECOMMUNICATIONS COMPANY LIMITED
Defendant

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mr. Wendell A. Smith for the Plaintiff
Mr. Renard Rigby for the Defendant

HEARING DATE: November 9, 2020

DECISION

Hanna-Adderley, J

1. This is an application for injunctive relief by the Plaintiff pursuant to a Summons filed herein on September 1, 2020 supported by the Affidavit of Whitney Leon Tripp filed on September 1, 2020 for an order pursuant to Order 29 Rule 1 of the Rules of The Supreme Court ("**RSC**") restraining the Defendants, by themselves, their directors, servants or agents or otherwise howsoever from refusing to provide replacement sims to the Plaintiff; and an injunction to restrain the Defendant by themselves, their directors, servants, or agents or otherwise howsoever from refusing to provide or activate any new sims to the Plaintiff, pending the determination of this matter and that costs be reserved to be dealt with by the Court. The Plaintiff relies on the Plaintiff's Written Submissions filed September 1, 2020.
2. The Defendant opposes the application and relies on the Affidavits of Neisha Butler Chief Finance Officer and Director of Finance for the Defendant and Nicole M. Watkins, Vice

President of Legal, Regulatory and Carrier Services, and Corporate Secretary of the Defendant filed herein on October 29, 2020. The Defendant relies on the Defendant's Skeleton Argument dated November 5, 2020.

Statement of Facts

3. The Plaintiff by its Statement of Claim claims special damages for breach of contract in respect of loss of income/profits between January 2020 and April 2020 in the sum of $43,125.00; loss of business by way of reduction in sales/revenue of sim cards and the refusal to swap out simms cards in an approximate sum of $1,056,240.00, for a total sum of $1,099,365.00, and general damages for damage to reputation in a sum to be assessed.
4. Mr. Whitney Leo Tripp, the Plaintiff's Chief Executive Officer stated in evidence, in part, that by a Contact dated October 25, 2017 ("the Contract") made between the parties the Defendant contracted to sell and the Plaintiff to purchase data only programmed sim cards ("the sim cards") for use in the Plaintiff's portable rental devices. That prior to the signing of the Contact the Plaintiff indicated to the Defendant that the sim cards needed to be incapable of making calls and be barred from international roaming. A letter dated August 29, 2017 was issued by the Defendant to the Grand Bahama Port Authority stating, inter alia, that the Plaintiff is allowed to provide data services to cruise passengers using their mobile network.
5. That the Contact provides, inter alia, that the Defendant would provide the Plaintiff with unlimited data services only, a waiver of the security , an initial deployment of 150 data only sim cards to occur 48 hours after the signing of the Contact, activation of sim cards same day as requested and replacement of sim cards same day as requested.
6. That the Defendant failed to deploy the sim cards until on or about January, 2018; the first indicated that the Plaintiff had been charged for international roaming, international calling, text and regular calling and activation fees. In March 2018 the Plaintiff was credited in the sum of $1,500.00 for these charges.
7. However, the charges continued, and complaints were made in October 2018 to Mawanna Lewis a Senior Associate/Customer Care for the Defendant and in November and December 2018 to Taharji Smith in March 2019 and correspondence were received from Andre Knowles, a Director of the Defendant, but to date the Plaintiff has not been credited for these charges. By correspondence dated May 28, 2019 and February 5,

2020 from Nicole M. Walkins, Vice President of Legal, Regulatory & Carrier Services and Company Secretary for the Defendant informed the Plaintiff, among other things, that the Defendant would no longer provide to activate sims for the Plaintiff and that all sims currently issued (825) would be locked to the Bahamas and would be unable to roam, and that no sim replacements or swap out would be allowed.

8. By letter dated February 5, 2020 Mrs. Walkins informed the Defendant among other things that the Defendant did not have and has never had the capability to provide data cards that are unable to roam. That the Defendant did not have a card product that suited the needs of the Defendant.
9. That pursuant to the Plaintiff's option to renew the Contract after October 25, 2019 the Defendant continued to bill the Plaintiff for services arising out of the Contract but failed to credit the Plaintiff's account and the defendant has ceased all communications with the Plaintiff save for requesting payment its monthly cell account bill. The Defendant in has refused to reactivate sims cards and replace any sim cards resulting in the Plaintiff's stock being reduced from 825 sims cards in May 2019 to 300 sims cards to the present date.
10. That the Defendant has deactivated the sim cards without informing the Plaintiff of the reason and in most instances without the Plaintiff's knowledge. As a result the Plaintiff has suffered reputational damage as its clients are unable to access the internet upon arrival to the Bahamas and during their travel throughout the Bahamas, or update their weather reports, charts etc. The Plaintiff had no additional sim cards and had to refund numerous client money paid for the service.
11. Ms. Neisha Butler states, in part, that she reviewed the Plaintiff's account and was able to extrapolate the billings showing the roaming charges that accrued on the various sim cards. That the credit on the Plaintiff's account is $77,646.93 which would be reflected in the Plaintiff's October billing. That the Plaintiff's account showed a current balance owed of $60,762.82.
12. Ms. Nicole M. Watkins states in evidence, in part, that pursuant to The Communications Act 2009, the Defendant is a licensee subject to the powers of the Utilities Regulation and Competition Authority("URCA").The Defendant was required to obtain URCA's approval for the introduction and pricing of any new mobile. Section 3.4 of the

Consumer Protection Regulations of prohibits a consumer from reselling any service provided by the Service Provider.

13. That when the Defendant submitted the proposal it should have been explained that BTC did not in fact offer a service which allowed for "no roaming" or data only on sim cards. That the proposal was not a contract between the parties. That the product offered and sold to the Defendant was a DNET card which provided data services only and was usually sold to business customers requiring a fleet management tool.
14. That Mr. Cefort was no longer with the Defendant and that he had not been authorized to write the letter of August 29, 2017. That in May of 2019 she was told that the Plaintiff was having billing issues. Upon investigation she she noticed the significant roaming charges and that the Plaintiff's account had 800 numbers attached to it, all red flags. She also discovered that the Plaintiff was reselling/renting the Defendants data services while not authorized to do so which also meant that the Defendant was not in compliance with URCA regulations. The Plaintiffs refusal to pay for roaming services was putting the Defendant at financial risk. Hence, the decision was made to terminate services to any of the Plaintiff's numbers that attempted to roam. But the Plaintiff tried to activate new services and these numbers started roaming. The Defendant then ceased activating new services. The Plaintiff then sought to reactivate numbers which were on "cease and return" and these numbers started roaming. As a consequence employees were told not to reactivate these numbers. This was communicated in a letter to the Plaintiff dated May 28, 2019. Where services were reacted to existing services the Plaintiff was informed that roaming charges would be credited.
15. That on July 24, 2020 the Defendant received permission for the first time from URCA to offer mobile data only plans for boaters and mariners. The Plaintiff has the benefit of enjoying this plan but it appears that it wishes a plan does not exist. She asks that the Court dismisses the application because if granted the Defendant will be prejudiced in its operations and in its dealings with the regulator URCA.

Submissions

16. Mr. Wendall Smith, Counsel for the Plaintiff referred the Court, in part, to the locus classicus in this area of law **American Cyanamid Co. v Ethicon Ltd [1975] A.C. 396** where Lord Diplock identified the principles and guidelines, the court may consider when exercising its statutory power to grant an injunction. where Justice Indra Charles

similarly applied the test laid down by Lord Diplock in **American Cyanamid**, that is, whether (1) there is a serious issue to be tried; (2) whether damages would be an adequate remedy; (3) whether the Balance of Convenience laid with the Applicant, and whether (4) other factors, such as maintaining the status quo, and any clear view the court may reach as to the relative strength of the parties' cases, should be considered. He also referred the Court to the Bahamian case of **In Re: Colin Wright v. Ex Parte The Bahamas Communications and Public Officers Union Pension Plan and Trust Fund (By Averil Clarke, Andrea Culmer and Steve Hepburn in their capacity as Trustees) (A Judgement Creditor) [2018] 1 BHS J. No. 62,** where Justice Indra Charles applied the said test.

17. The Plaintiffs submit that according to the **American Cyanamid**, the Court before exercising its discretion to make an interlocutory injunction, should ask itself the initial question of whether there is a serious issue to be tried ("the threshold requirement"). That it is sufficient from the standpoint of the threshold requirement for the Court to ask itself, firstly is the applicant's action "not frivolous or vexatious", secondly "is there a serious question to be tried", and thirdly "is there a real prospect of success in his claim for a permanent injunction at the trial".
18. Mr. Smith referred the Court to the commentary of Rules of the Supreme Court (White Book) at 29/L/4: "the threshold test states a low test and may not include virtually hopeless claims provided it is honestly brought **(Norman v. Matthews [1916] W.N. 78; (1916) L.J.K.B. 857)**. The prospects of the Plaintiff's success are to be investigated to a limited extent. All that has to be seen is whether he has prospects of success which, in substance and reality exist".
19. Mr. Smith submits that there is a serious issue to be tried with respect to the express and implied terms of the Agreement. That the strength of the Plaintiff's case can be gleaned from the Affidavit evidence of the Plaintiff and Defendant; that the assertions of Nicole Watkins are without merit, as no evidence has been lead to support the assertion that the Defendant's Agreement with the Plaintiff would amount to a violation of the Communication Act or the Regulations of URCA.
20. Mr. Smith submits that the Defendants Defence as particularized does not plead an illegality with respect to the Agreement, and the Agreement *ex facie* is not illegal. That the Defendant has confirmed its ability to provide the services under the Agreement to

the Plaintiff, and in breach of the Agreement has refused to do so. Further, the Defendant pursuant to its 'standard mobile terms and conditions' which governs the Agreement, has never served a notice of termination on the Plaintiff, and to the contrary, has continued to bill the Plaintiff for its services.

21. Mr. Smith further submits that damages would not adequately compensate the Plaintiff for the temporary damage sustained if the injunction is not granted, and that it is in a financial position to give a satisfactory undertaking as to damages and an award of damages pursuant to that undertaking would adequately compensate the Defendant in the event they were to succeed at trial.
22. Mr. Smith submits that the Defendant has not specifically pleaded a Counterclaim herein with respect to any alleged damages. Reference is made to the Affidavit of Neisha Butler at paragraph 4 where the affiant deponed, *inter alia,* "The credit on the Plaintiff's account is $77,646.93. This represents the total roaming charges. The credit will be reflected on the Plaintiff's next billing cycle, which may be issued at the end of October, 2020". Further reference is made to the Affidavit of the Plaintiff, specifically Exhibit "WLT-4" an email dated the 18th of October, 2018 from Ms. Mawanna Lewis on behalf of the Defendant to the Plaintiff stating that the activation fees will be credited to the Plaintiffs account.
23. Further, Mr. Smith referred the Court to the Affidavit of the Plaintiff and Exhibit "WLT-9", and that in an email dated the 17th of July, 2020 from Ms. Kim Douglas on behalf of the Defendant to the Plaintiff, the Defendant advised the Plaintiff that they do not have an agreement with the Plaintiff, due to the same having expired. It is further, submitted that should the injunction not be granted the Defendant as deponed in the Plaintiff's Affidavit at paragraph 6 will continue to systematically deactivate the Plaintiff's sim cards, resulting in reputational damage to the Plaintiff and the possible closure of the Plaintiffs business.
24. Mr. Smith submits that if an injunction is granted against the Defendant, there will be an adequate remedy in damages available to them under the Plaintiffs undertaking in damages, and as such the injunction application should not be refused. Mr. Smith referred the Court to **Fellowes & Sons v Fisher** [1976] 1 Q.B. 122 at 137, CA**; Evans Marshall & Co Ltd v Bertola SA** [1973] 1 W.L.R. 349**; Vine v. National Dock Labour Board** [1956] 1 Q.B. 658, 676.

25. Mr. Smith submits that in the event that the Court is doubtful as to the adequacy of the respective remedies in damages available to either the Plaintiff or the Defendant , or to both the question of the balance of convenience arises. Mr. Smith referred to the commentary of RSC at 29/L/8 which states "The balance is more fundamental, more weighty, than mere convenience, and is better described as the balance of the risk of doing an injustice **(N.W.L. Ltd v Woods [1979] 3 All E.R. 614 at 625 HL per Lord Diplock)".**
26. Mr. Smith further submitted that an example of a balance can be found is where there will be substantial uncompensatable disadvantage to one of the parties, whatever the decision of the Court may be. However, where there is only a risk of unquantifiable damage to the Plaintiff from the refusal of the injunctive relief, as against a certainty of unquantifiable damage to the Defendant from the grant of it, it cannot be held that the scales are unevenly balanced **Walker (John) & Sons Ltd v Rothmans International Ltd [1978] F.S.R. 357**.
27. Mr. Smith submits that if the injunction is not granted there will be a certainty of unquantifiable damage as a result of the Defendant denying the existence of an Agreement with the Plaintiff, and the Defendant systematically deactivating the Plaintiff's sim cards and refusing to replace or swap them. Mr. Smith submits further that it has suffered and will suffer greater reputational harm, which is unquantifiable if the injunction is not granted.
28. The Plaintiff submits further, that there is only a risk of damage to the Defendant if the injunction is granted and it is quantifiable as shown in the Affidavit of Neisha Butler. But, in the event the Court is of the view that other factors are evenly balances it is a counsel of prudence to take such measures as are calculated to preserve the status quo as stated in **American Cyanamid.**
29. Mr. Smith submits that as noted in the commentary of the RSC at 29/L/9 "sometimes it is said that the principal function of the interlocutory injunction is to preserve the status quo ..... the relevant point in time for the purpose of status quo may be difficult to determine and may vary **(Alfred Dunhill v Sunoptic SA [1977] F.S.R. 337 at 376 CA)**." (**See Garden Cottage Foods Ltd v Milk Marketing Board [1984] A.C. 130 at 140 C).**

30. Mr. Smith referred the Court to the Affidavit of Mr. Tripp and specifically Exhibit "WLT-6" the letter from Nicole Watkins dated the 28th May, 2019 on behalf of the Defendant to the Plaintiff. The Defendant states *inter alia* "All currently issued sims (totaling 825 sims) have been locked to the Bahamas and are unable to roam."
31. Mr. Smith submits that as a counsel of prudence as the state of affairs prior to the issue of the Writ and the motion for interlocutory injunction, was that the Defendant was capable of locking sims to the Bahamas, that were unable to roam. Further, that the Defendant by crediting the roaming charges to the Plaintiff's account as evidenced in the Affidavit of Neisha Butler, is a clear statement and admission of the intention of the parties with respect to the Agreement, it is submitted that preservation of the status quo is at the very least the state of affairs at the issuance of the letter dated the 28th May, 2019.
32. With respect to other factors to be considered, Mr. Smith submits that the learned authors of Halsbury Laws of England Fourth Edition Reissue at paragraphs 860 provide several examples of when alleged acquiescence by the Plaintiff in the Defendant's conduct is no bar to the grant of an injunction. Paragraph 860 states:
    "Acquiescence is no bar to an injunction if it can be satisfactorily accounted for, as for example where the plaintiff has assumed that the Defendant, having a right, would not use it so as to injure the Plaintiff and his assumption is justifiable, or has acquiesced in what he has been led to consider was merely a temporary violation of his right, or has endeavored to come to an amicable arrangement with the Defendant (**Innocent v North Midland Rly Co (1839) 1 Ry & Can Cas 242 at 256**)."
33. Finally, Mr. Smith submits that any alleged acquiescence to the conduct of the Defendant should not be a bar to the grant of an injunction, as it has endeavored to come to an amicable agreement with the Defendant. Reference is made to Exhibit "WLT-7 in the Plaintiff's Affidavit an email dated the 5th of February, 2020 from Nicole Watkins on behalf of the Defendant, to Counsel on behalf of the Plaintiff herein. He submits that further submitted that any subsequent delay in filing the Writ of Summons and the motion for injunction herein is attributable to the COVID-19 pandemic.
34. Mr. Raynard Rigby, Counsel for the Defendant submits, in part, submits that the discretionary jurisdiction of the Court, pursuant to section 21 of the Supreme Court Act to grant injunctive relief is well settled. He referred the Court to **O'Brien and another**

v TTT Moneycorp Ltd [2019] EWHC 1491 (Comm) and **Re: Colin Wright v. Ex Parte The Bahamas Communications and Public Officers Union Pension Plan and Trust Fund (By Averil Clarke, Andrea Culmer and Steve Hepburn in their capacity as Trustees) (A Judgment Creditor) - [2018] 1 BHS J. No. 62** where the Courts addressed the legal principles applicable on such an application, essentially the key principles established by **American Cyanamid**.

35. Mr. Rigby submits that when applying these principles to the instant facts, the Court should arrive at a view that the application is misconceived and would amount to a grave injustice if an injunction is granted as it would have the practical effect of forcing the Defendant to sell a product that it does not have and that is not approved by the regulator, URCA . Further, it would also amount to a violation of the Communications Act and the Defendant's licence as the Plaintiff is not expressly authorized by the Defendant to engage in the retail sale of its products.

There is no irreparable harm

36. Mr. Rigby submits that there is no irreparable harm and he referred the Court to the case of **National Commercial Bank Jamaica Ltd v. Olint Corp Ltd [2009] UKPC 16** where the Privy Council confirmed that the jurisdiction to grant an interim injunction demands a balance of the competing interests of the parties along with their legal rights, with the Court assessing where the irreparable harm/prejudice rests. He submits that the Defendant committed no wrong which could be the subject of the exercise of the Court's discretion and jurisdiction under section 21 of the Supreme Court Act. In fact, to grant the relief sought will essentially significantly alter the relationship between the parties and force the Defendant to sell a product that the Plaintiff is not capable or authorize to sell on the Defendant's behalf.

37. Mr. Rigby further submits that the compelling evidence before the Court shows that at the material time the DNET sim card was the product that the Defendant sold to the Plaintiff and it now appears that the Plaintiff did not bargain or wish to have that product. In any event, the evidence confirms that the Defendant is now authorized by URCA to sell the sim cards that the Plaintiff's business model appears to support. The Plaintiff is free to purchase that product from the Defendant and can do without injunctive intervention. That given these circumstances, the better course for the Court is to deny the injunction as requested, particularly in light of the fact that there is no

evidence that the Plaintiff had an exclusive right to receive sim cards with data only and where the evidence is that the product did not exist at the time of the BSP was agreed.

38. The Defendant submits that it will suffer irremediable prejudice/harm if the injunction is grated as sought by the Plaintiff and that the Plaintiff's undertaking in damages will not suffice to avert a violation of its licence (from URCA).

There is no fear of dissipation / Acquiescence

39. Mr. Rigby invited the Court to note that the Plaintiff set out no facts of breach leading to any activity that amounts to a fear of dissipation. That the contrary is true on the facts, that the sim cards are available to the Plaintiff as approved by URCA. See **UL v BK [2013] EWHC 1735 (Fam).**

40. Mr. Rigby submits that even if the Court assumes that the Plaintiff is correct that the BSP was breached by the non-activation or issuance of new sim cards, it has waited some 16 months (from May 2019) before seeking any relief from the Court. That leads to a reasonable conclusion that the Plaintiff was happy or content with the state of affairs. That the Court is invited to accept that a delay of 16 months in seeking equitable relief amounts to acquiescence by the Plaintiff of the Defendant's conduct, thereby barring the relief sought. Given the very nature of the business and the clear terms of the BSP, the Plaintiff cannot seek to now benefit or profit from his delay.

41. Mr. Rigby referred the Court to **Clover v. Royden (1873) L.R. 17 Eq. 190 where** the Court refused to grant an injunction on the ground of acquiescence. That the conduct of the Plaintiff of "sitting on its hands" for 16 months and now seeking to invoke the injunctive jurisdiction of the Court should not be rewarded in circumstances where it adduced no cogent and credible evidence to show that it is prejudiced or will face or sustain irreparable harm if the order is not granted.

Damages is an adequate remedy

42. Mr. Rigby submits that damages are an adequate remedy for the Plaintiff. In **Alstom Transport UK Ltd v London Underground Ltd Transport for London - 174 ConLR 194** the Court refused to grant an injunction based on the adequacy of damages. Stuart-Smith J stated as follows:

> **(iii) In *Covanta* (2013) 151 ConLR 146 at [51]–[54]**
>
> **Coulson J held that damages would not be an adequate**

remedy because (a) there were many errors alleged, each of which would need to be evaluated before any assessment could be made as to the value (if any) of the loss of a chance, (b) it would be difficult to work out what Covanta's actual rate of return might have been, because it would depend on so many variables, (c) the claim that Covanta had been misled would require the court to look at hundreds or even thousands of exchanges to see in relation to each one whether Covanta had been materially misled and, if so, what the aggregate effect had been, and (d) the allegation that important matters were not made clear to Covanta made the case very similar to undisclosed criteria cases such as *Morrison*;

(iv) In *NATS* (2014) 156 ConLR 177 at [81]–[83] Ramsay J treated the case as a case of undisclosed criteria and said that the great difficulty that would be encountered in estimating damages was a factor to be brought into account in determining whether it would be unjust to confine the claimant to a remedy in damages;

[26] So far as can be seen at present, none of the particular complexities that arose in these four cases is likely to arise or to prove particularly difficult in the present case. Nor are other difficulties of analogous complexity identified.

43. Mr. Rigby invited the Court to note that the Plaintiff was content to rest on his right to under and pursuant to BSP for 16 months and thereby should not be expected to approbate from that position without the clearest of evidence of prejudice or irreparable harm to its commercial interests (see **Corporation of Folkestone v. Woodward. - (1872) L.R. 15 Eq. 159** where an injunction was refused due to delay of a few months).

44. The Court should also be satisfied that if the Plaintiff prevails at a trial on the merits that damages will be an adequate remedy. There is no evidence before the Court that

the Defendant will be financially unable to meet any award post the trial and/or that it is financially embarrassed.

No serious issue to be tried

45. The Defendant submits that there is no serious issue to be tried as it has a strong defence to the Plaintiff's claims set out in the Writ of Summons. That Charles J also described the status of quo in **Re: Colin Wright v. Ex Parte The Bahamas Communications and Public Officers Union Pension Plan and Trust Fund** (supra) (see also **Bahamas Electrical Utility Managerial Union v. Bahamas Power and Light Company Limited - [2018] 1 BHS J. No. 44)**

46. The Defendant also submits that the Plaintiff cannot strictly rely on the terms of the BSP due to the fact that it is an impossibility. See **Krell v. Henry [1903] 2 K.B. 740** The Defendant further submits that it is unconscionable for the Plaintiff to seek to rely on the terms of the BSP when it knew and ought to have known based on the course of dealings between the parties that the Defendant could not issue sim cards with data services only at the material time. See the judgment of Winder, J in **KT Mactech Limited v Bahamas Telecommunications Co Ltd CLE/gen/00863 of 2017.**

47. Mr. Rigby submits that the Court can form a preliminary view at this stage that the Plaintiff's case is weak and as such no injunction is justified.

Issues

48. The issues are whether:

    a. There is merit in the Plaintiff's claim;
    b. The Plaintiff can be compensated by damages;
    c. The balance of convenience lies in maintaining the status quo.

Analysis and Conclusions

The Law

49. Section 21 of the Supreme Court Act which states:-

> "The Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the Court to be just and convenient to do so."

50. Additionally, Order 29, Rule 1 of the RSC outlines the procedure by which the Court is to grant such an injunction. In particular it states:-

"(1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.

(2) Where the applicant is the plaintiff and the case is one of urgency such application may be made ex parte on affidavit but, except as aforesaid, such application must be made by motion or summons.

(3) The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the Court thinks fit."

51. It is clear that the Court has the jurisdiction pursuant to Section 21(1) of the Supreme Court Act and Order 29, Rule 1 of the RSC to grant injunctive relief. I am also guided by the principles found in **American Cyanamid Co. v Ethicon Ltd. [1975] 1 All ER** an authority which Counsel for the parties referred the Court to. **American Cyanamid** laid down guidelines as to how the Court's discretion to grant interim injunctions should be exercised thusly: (i) whether there is a serious issue to be tried; (ii) whether the applicant will be adequately compensated by an award of damages at trial; (iii) whether the applicant can provide an undertaking in damages to compensate the opposing party should it be later determined that the injunction was wrongly granted and; (iv) where the balance of convenience lies.

Serious Issue To Be Tried

52. The first consideration that must be given before granting an interim injunction is whether there is a serious issue to be tried.

53. Having considered both parties submissions and the evidence before the Court I accept the Plaintiff's submission that there is clearly a dispute between the parties as to the express and implied terms of the Contract and the legal effect of representations made to the Plaintiff and to the Licensing Department of the Grand Bahama Port Authority, Limited by a servant or agent of the Defendant, whether still employed with the Defendant or not, and conduct and other representations made by servants or agents of the Defendant.

54. I refer to Lord Diplock at paragraph 407 in **American Cyanamid** whereby he stated that **"It is no part of the court's function at this stage of litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration. These are matters to be dealt with at trial."**

55. In the circumstances, on an application for injunctive relief the Court needs only to be satisfied that there is a serious question to be tried on the merits. So, having accepted the Plaintiff's submissions on this issue I therefore conclude that there are triable issues to be determined by the Court.

56. Although the Court may be satisfied that there are triable issues to be determined at trial, in keeping with the principles laid out in **American Cyanamid** the Court must then determine whether damages would be an adequate remedy for the Plaintiffs.

Adequacy of Damages

57. Counsel for the Defendant submits that damages are an adequate remedy for the Plaintiff and Counsel for the Plaintiff argues otherwise.

58. I refer to Lord Diplock at paragraph 408 of **American Cyanamid** whereby he stated that: **"If damages in the measure recoverable at common law would be an adequate remedy and the defendant would be in a financial to pay them, no injunction should normally be granted, however strong the Plaintiff's claim appeared to be at that stage..."**

59. The Plaintiff has in fact already quantified its loss of Income and Profits and loss of Business in its Statement of Claim. Clearly its losses are and will be quantifiable. I accept Counsel for the Defendant's submission that the Plaintiff's claims are quantifiable in monetary terms and damages in the instant case would be an adequate remedy.

60. In the circumstances, I am also satisfied that the Defendant, being the entity that it is, is in a position to compensate the Plaintiff with an award of damages should the Plaintiff be successful at trial.

Balance of Convenience

61. When determining where the balance of convenience lies whether to grant or refuse the injunction, the Court will see if doing so will cause irremediable prejudice and to what extent.

62. I accept Counsel for the Defendant's submissions that on the evidence the balance of convenience does not lie in favour of the Plaintiff in the circumstances, having determined that damages would be an adequate remedy.
63. Further, Counsel for the Defendant submits that the contract between the parties has expired. To grant an interim injunction pursuant to a contract that on its face has expired would clearly be prejudicial to the Defendant.
64. As the factors before the Court are not evenly balanced, and as the balance does not lie in favour of the Plaintiff, it is not necessary to consider whether the status quo should be maintained as outlined by Lord Diplock in **American Cyanamid**.

Conclusion

65. Therefore, having considered all of the relevant facts, having accepted in large part the submissions of Counsel for the Defendant and having applied the principles laid out in **American Cyanamid** I have come to the determination that the Plaintiff's application for injunctive relief ought not to be granted and is hereby dismissed.
66. I will now entertain Counsel on the issue of costs.

Costs

67. Counsel for the Defendant submits that costs should follow the event as no unusual circumstances or exceptions to justify the departure from that rule exist.
68. Counsel for the Plaintiffs submits that the
69. Having considered the submissions of Counsel for both parties, I am not persuaded that the usual costs order should not be granted in favour of the First Defendant.
70. Therefore, the First Defendant is awarded its costs occasioned by the application to be taxed if not agreed.

This 2nd day of February, A.D. 2021

Petra M. Hanna-Adderley

Petra M. Hanna-Adderley
Justice