

SAINT LUCIA

**IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 1997**

SUIT NO: 722 OF 1996

Between:

CONCRETE AND AGGREGATES LTD

PLAINTIFF

AND

DAMAR ENTERPRISES LTD

DEFENDANT

AND

**C. O. WILLIAMS CONSTRUCTION
(ST LUCIA) LIMITED**

**C. O. WILLIAMS CONSTRUCTION
COMPANY LIMITED**

THIRD PARTIES

Mr Kenneth Monplaisir, QC for the Plaintiff

Miss V. Georgis Taylor for the Defendant

Mr Michael Gordon for the Third Parties

1997: OCTOBER 10
AND 17

JUDGEMENT

FARARA J (Ag) In Chambers

By Writ of Summons Indorsed with Statement of Claim issued
13th August, 1996 the Plaintiff claims against the Defendant the
sum of \$160,000.00 arrears of rental of three pieces of

equipment, including one "Mack" 8Y3 concrete mixer truck, for the period 1st April, 1995 until 1st November, 1995; an order that the Defendant forthwith deliver up to the Plaintiff possession of the said "Mack" concrete mixer truck; damages for its detention; alternatively, damages for its conversion; and costs.

Also, on 13th August, 1996 the Plaintiff by Summons applied for a mandatory injunction for the Defendant to forthwith deliver up possession of the said "Mack" concrete mixer truck with 8 cubic yard concrete mixer. The application is supported by the affidavit of Cyril Rajana, the Financial Comptroller of the Plaintiff company, sworn and filed 13th August, 1996 with some seven exhibits, including what purports to be the purchase order for the said concrete mixer truck (**Exhibit CR1**).

On 20th September, 1996 an appearance to the action was filed by Solicitors representing the Defendant, who on 22nd October, 1996 filed the Defendant's defence to the Plaintiff's claim herein.

On 20th September, 1996 the Defendant's Solicitor also filed a Third Party Notice against C. O. Williams Construction (St Lucia) Limited and C. O. Williams Construction Company Limited. ("the Third Parties").

In its defence, the Defendant, inter alia, denied entering into an agreement oral or otherwise with the Plaintiff for the hire of the said three pieces of equipment; asserted that the equipment were brought on to its premises by the Third Parties as part of a written agreement executed 20th January, 1995 between the Defendant and the Third Parties; and further, that at all material times the Third Parties had expressly or impliedly represented to the Defendant that they (the Third Parties) were the **Owners** of the equipment and that at no time was rental payable under the said written agreement of 20th January, 1995.

In his defence, the Defendant further asserts that having received certain letters from the Plaintiff demanding payment of rental for the said equipment, it wrote to the Third Parties concerning the status of that equipment; that it returned two of the three pieces of equipment to the Third Parties (an allegation which is at variance with the Defendant's then Solicitor's letter to the Plaintiff's Solicitors dated 12th December, 1995 **Exhibit CR 6**), but retained possession of the "Mack" 8Y3 concrete mixer truck; that the said concrete mixer truck had been brought into St Lucia on concessions afforded to the Defendant by the Government of St Lucia; the said truck was used in furtherance of the agreement (dated 20th January, 1995) between the Defendant and the Third Parties; and the Plaintiff's action for breach of contract was unsustainable as no contract existed between the Plaintiff and the Defendant.

By its Third Party Notice the Defendant claims against the Third Parties, a contribution to the extent of such amount as the Court may find the Defendant liable to pay to the Plaintiff and an indemnity in respect of the Plaintiff's claims for damages and costs. One of the grounds on which the Defendant based its claims against the Third Parties, is that the Third Parties held themselves out "**as being the owner of the equipment,**" including the "Mack" 8Y3 concrete mixer truck.

In short, the Defendant denies having any legal relations with the Plaintiff and claims a contribution and indemnity against the Third Parties. It is to be noted that the Defendant in its defence, makes no claim or assertion of ownership of the equipment, including the "Mack" concrete mixer truck.

The Managing Director of the Defendant Company, Mr Daune Yorke, in his affidavit filed 12th November, 1996 in reply to the application of the Plaintiff for a mandatory injunction, Exhibits as **DE 1**, a document headed "**Shareholders Agreement**" dated 20th January, 1995 between the Defendant, the second named Third Party Company and two other individuals. By this document the parties agreed, inter alia, to the purchase of shares by the second named Third Party in the Defendant Company whose principal object is stated therein as "**the operation of a concrete producing factory situate at premises known as Bois d'Orange, Quarter of Gros-Islet.**"

By Daune Yorke's Affidavit it is deposed that the Defendant, having been led to believe by the Third Parties that they were the ones purchasing the "Mack" concrete mixer, "as its contribution to the purchasing of the truck, and for the facilitation of the agreement . . . agreed to allow the truck to be imported into St Lucia on concessions afforded to the Defendant", granted by the Government of St Lucia whereby vehicles can be imported free of importation duties.

In paragraph 9 of the Affidavit of Daune Yorke, it is asserted that the Defendant first became aware the Plaintiff may be the owner of the three pieces of equipment when it received a letter dated 23rd June, 1995 from the Managing Director of the first named Third Party (**Exhibit DE 2**). After the Defendant sought clarification from the Third Parties by letter dated 25th June, 1995 of the terms under which the equipment were to be used by them (**Exhibit DE 3**), it then became apparent to the Defendant that the Plaintiff and the Third Parties are related companies.

However, in paragraph 15 of the Affidavit of Daune Yorke, he deposes that the Defendant allowed the Plaintiff to remove the other two pieces of equipment from its premises, only after realizing that the equipment belonged to the Plaintiff.

In paragraph 20 of the said Affidavit, it is stated that the Defendant is afraid that if it releases the concrete mixer truck to the Plaintiff, it "**will lose its interest in the truck without being properly compensated for it;**" and at paragraph 22 thereof, it is conceded that the Plaintiff "**is a part owner of the truck,**" and the Defendant is willing to release it to the Plaintiff if it is compensated, either by the Plaintiff or the Third Parties, for the loss of its concession.

At this stage of the proceedings it is not disputed that the Plaintiff purchased the "Mack" concrete mixer truck, and same was imported into St Lucia upon concessions granted to the Defendant by the Government of St Lucia. However, the Defendant categorically denies and continues to maintain that it had no dealings and entered upon no legal relations with the Plaintiff Company regarding any of the three pieces of equipment, including the said concrete mixer truck, and asserts that all dealings in relation thereto were between itself and the Third Parties. Indeed, until Mr Yorke's Affidavit filed 12th November, 1996 after the filing and service of the Defence, there was no assertion by the Defendant of ownership of the said concrete mixer truck whether singularly or jointly with the Plaintiff, the Third Parties or anyone else for that matter. His affidavit is therefore, in some material respects, at variance with the pleaded defence.

Learned Queen's Counsel for the Plaintiff in his submissions put the Plaintiff's case for interlocutory mandatory injunctive relief on two footings. Firstly, he submitted that if the Defendant's possession and use of the concrete mixer truck was on the basis of a lease then pursuant to **Article 1530 (2) and (3) of the Civil Code (Chapter 242)** the Plaintiff would be entitled to recover possession of the concrete mixer truck, having by notice rescinded the lease and the Defendant's rights would be limited to a claim for damages. The Plaintiff's pleaded case is that the equipment were the subject of a contract for hire not a lease and, in any event, **Article 1530 (2)** specifically applies to a lease of "**premises**" not of equipment or vehicles, and is, therefore, of no application to the instant matter.

Secondly, Learned Counsel for the Plaintiff relied on **Articles 1695 and 1710 of the Civil Code**, and submitted that if the arrangement between the Plaintiff and Defendant was not that of a lease but a simple gratuitous deposit then the Defendant, as depository, is bound to restore the concrete mixer truck to the Plaintiff as depositor, whenever it is demanded, and such demand was in fact made by letter. It will be recalled that upon written demand being received by the Defendant for the return of the equipment, two of the three pieces were delivered up to the Plaintiff or removed by the Plaintiff from the Defendant's premises at its invitation.

Learned Counsel for the Defendant urged the Court not to accede to the Plaintiff's application for an interlocutory mandatory injunction. She informed the Court (although there was no pleading or evidence to this effect) that since the filing of Mr Yorke's Affidavit on 12th November, 1996 and with particular reference to paragraph 22 thereof, the Defendant's circumstances have changed significantly, in that it has entered into a new "big" contract necessitating the use of the said concrete mixer truck, which it has repaired and put in use in its business; that the contract has a heavy penalty clause for breach; and that the said truck is the only truck that the Defendant has at its disposal, as compared with the Plaintiff Company which, Counsel asserted, is larger and more equipped than the Defendant company.

Counsel for the Defendant continued that, accordingly, the Court ought to find that the balance of convenience lies in favour of the Defendant retaining possession with continued use of the said truck. She relied on the principles of law and the test to be applied by a Court in exercising its discretion whether or not to grant an interlocutory mandatory injunction, set out in the decision of the English Court of Appeal in **LOCABAIL INTERNATIONAL FINANCE LTD v AGROEXPORT AND ANOTHER (1986) 1 WLR 657.**

At page 663 Mustill LJ cited, with approval, the test to be applied by a Court on interlocutory applications for mandatory injunctions, as formulated in Halsbury's Laws of England 4th Edition, Volume 24 (1979) page 534, paragraph 848, thus-

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the Defendant attempts to steal a march on the Plaintiff . . . a mandatory injunction will be granted on an interlocutory application."

I am mindful that while the Court has jurisdiction to grant a mandatory injunction upon an interlocutory application, but it is a very exceptional form of relief (**Paragraph 29/1/5 1995 Supreme Court Practice**).

In closing, Counsel for the Defendant submitted that both the Plaintiff and Defendant have an interest in the concrete mixer truck and the question for determination at the trial, is whose right should take precedence.

Counsel for the Third Party submitted, in essence, that the Defendant cannot, by virtue of making its concession available

for the importation of the concrete mixer truck by someone other than the Plaintiff, acquire part ownership in the said vehicle purchased by the Plaintiff.

In light of the clear assertions in the Defence that the Defendant had no legal or contractual relations with the Plaintiff concerning the said concrete mixer truck, and it being clear that the said truck was not owned or purchased by the Plaintiff, the Defendant's admission that the Plaintiff is at least a part owner of the said truck, and the Defendant having proceeded on the basis of representations allegedly made by the Third Parties (which have turned out to be false) that the Third Parties were the owners of the said truck, it is difficult to determine upon what legal basis the Defendant can claim either to be a part owner with the Plaintiff of the said truck or to have any legal entitlement to retain possession thereof.

I am therefore of the view that the assertion of joint ownership in the Affidavit of Mr Yorke, which is not in any way pleaded in the defence, is wholly unsustainable in law and unlikely to succeed upon a trial even if pleaded.

By contrast, the Plaintiff's claim to sole ownership of the concrete mixer truck having purchased it, is a strong one, and is essentially unchallenged in the Defence.

I am satisfied that this is a clear case where ownership of the concrete mixer truck lies with the Plaintiff. Any claim which the Defendant may have under the Shareholders Agreement or relating to the making available of its concessionary rights for the importation of the said truck, based upon representations allegedly made to by the Third Parties as regards their ownership of the said truck, are matters which are to be decided principally, if not exclusively, as between the Defendant and the Third Parties. Indeed, Learned Counsel for the Third Parties made reference to a pending High Court suit between the Defendant and the Third Parties, Civil Suit No.237 of 1996.

Applying the principles laid down in the leading case on interlocutory injunctions **AMERICAN CYNAMID CO v ETHICON LTD (1975) 1 AER 504** as explained in **SERIES 5 SOFTWARE LTD v CLARKE (1996) 1 AER 853**, I am satisfied that, in this case, the balance of convenience lies in favour of granting the Plaintiff's application. Any new contract (and no evidence of this has been put before me) which the Defendant has entered into after the filing of this action and the application for mandatory injunction are, in my view, matters which I cannot properly take into account. Even if I could properly do so they cannot support any claim by the Defendant to ownership or possession of the said truck, and the balance of convenience would still rest with the Plaintiff, who has been deprived of the use of the said truck without compensation.

Further, there is in my view some force in the submission of Learned Counsel for the Plaintiff, that such post Writ actions on the part of the Defendant, which his Counsel urged were entered into on the assumption of his continued possession and use of the concrete mixer truck, smacks of an attempt by the Defendant to tie the Court's hands so to speak and to steal a march on the Plaintiff. Incidentally, the affidavit evidence on both sides disclosed that at the commencement of this suit, the said truck was in an unusable state having been in need of repairs.

It is also abundantly clear that any claim which the Defendant may have is for damages, and not a right or entitlement to possession of the said truck, which it does not own and which is also not owned by its joint venture partners, the Third Parties. I am satisfied that damages are an adequate remedy for any claim which the Defendant may have and there is no contention or reason to believe that the Plaintiff, if liable at all to the Defendant, will not at the conclusion of the trial, be financially in a position to meet any such sum. Furthermore, the Defendant has made no claim or counter-claim or plea of set-off against the Plaintiff.

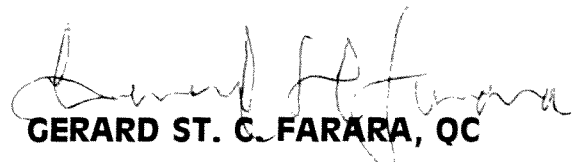
Applying the principles set out in **LOCABAIL INTERNATIONAL FINANCE LTD v AGROEXPORT AND ANOTHER (1986) 1 WLR 657, AT 663**, I am of the view that this is a clear case of sole ownership of the concrete mixer truck by the Plaintiff, which is

not seriously disputed, and ought to be decided at once. Accordingly, the Plaintiff's application for an interlocutory mandatory injunction is granted as prayed.

ORDER

It is the Order of the Court that:

- (1) **The Defendant to forthwith delivering^{up to} possession of the "Mack" concrete mixer truck with 8 cubic yard concrete mixer to the Plaintiff; and**
- (2) **The Defendant to pay the Plaintiff's costs of this application to be taxed unless otherwise agreed.**


GERARD ST. C. FARARA, QC

HIGH COURT JUDGE (ACTING)