



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2018: No. 141

BETWEEN:-

YVONNE CACACE
(trading as NIRVANA MAS BERMUDA)

Applicant

-and-

(1) JASON SUKDEO
(trading as JR CONSULTING and PASSION BERMUDA)
(2) BERMUDA HEROES WEEKEND LTD

Respondents

EX TEMPORE RULING

(In Chambers)

Application for mandatory injunction – whether to grant ancillary mandatory injunction against Second Respondent against whom there was no cause of action

Date of hearing: 15th May 2018

Date of ruling: 16th May 2018

Mr Vaughan V Caines, Marc Geoffrey Barristers & Attorneys Ltd, for the Applicant

Mr Bruce Swan, Apex Law Group Ltd, for the Respondents

Introduction

1. The Applicant, Ms Cacace, is the proprietor of a business known as Nirvana Mas Bermuda (“NM”) and other businesses trading under the Nirvana brand.
2. The First Respondent, Mr Sukdeo, is the principal of Passion Bermuda (“PB”), a band which has taken part in Heroes Weekend since its inception.
3. Mr Sukdeo is also the President, and one of four Board members, of the Second Respondent, Bermuda Heroes Weekend Ltd (“BHW”), a company which organises the annual Parade of Bands (“the Parade”) at Heroes Weekend.
4. Ms Cacace seeks a mandatory interlocutory injunction requiring:
 - (1) Specific performance by Mr Sukdeo of a written “Partnership Agreement” between the two of them dated 21st September 2017, pursuant to which a band styled Passion Bermuda Presents Nirvana (“PB/N”) was to participate in the Parade at Heroes Weekend next month, June 2018; and
 - (2) BHW to readmit PB/N to the June 2018 Parade of Bands, Mr Sukdeo having purported to terminate the Partnership Agreement and withdrawn PB from the Parade.
5. I have had the benefit of affidavit evidence from Ms Cacace and Mr Sukdeo. Both of them attended the hearing and were cross-examined. The hearing lasted for one day, and I gave my ruling the following morning.
6. It is regrettable that the parties have been unable to resolve their differences. This is a case which cries out for a negotiated resolution.

Chronology

7. A brief history of the events leading up to this application will be helpful.

8. On 31st July 2017, Ms Cacace applied to BHW for NM to be registered in its own right as a participating band in the Parade.
9. By an email dated 15th August 2017, the application was dismissed. But on 16th August 2017, Mr Sukdeo sent a follow up email to Ms Cacace making a number of constructive suggestions as to how NM could become involved in the Parade.
10. On 21st September 2017, Ms Cacace and Mr Sukdeo entered into the Partnership Agreement. The material terms were as follows:

“This partnership agreement has been made between:

JRS Consulting ... hereafter known as [PB]

AND

Nirvana Mas Bermuda ... hereafter known as [NM]

ON the 21st day of September 2017.

1. The parties voluntarily associate themselves together as general partners for the purposes of conducting the general business of a Mas Band participating in Bermuda Heroes Weekend, and any other type of business that may arise and is agreed on by the partners in writing.

2. The partnership shall be referred to as [PB/N].

3. The partnership shall commence on the 21st of September, 2017 and shall continue until the 30th of June, 2018 or terminated as provided in this agreement. Continuation of the partnership will be evaluated by both partners at the end of this agreement.

.....

5. Both [PB] and [NM] will operate as one and the same. All activities and functions will take the title of [PB/N]. Knowledge of all relevant activities and functions will be shared between both partners.

6. All capital required to carry out the mas band functions of the partnership will be sourced by [NM]. As such all expenses profits and/or losses will be the responsibility of [NM].

.....

8. Both [PB] an [NM] agree to conduct business in an ethical manner ensuring that any reputational damage to either brand is mitigated.”

11. The Partnership Agreement was signed by Mr Sukdeo for PB and Ms Cacace for NM.
12. On 26th September 2017, Mr Sukdeo sent a WhatsApp message about the partnership Agreement to the leaders of the bands participating in the 2018 Parade, including two of the other three members of the BHW Board. The relevant part of the message stated:

“Good night band leaders, as you probably noticed, Passion has not had any official representation in our meetings thus far. We have been contemplating how we proceed with 2018’s presentation, and who can lead the group as we did not want the brand to die.

We believe that we have found a solution that can keep Passion alive, but can also hopefully put to rest the conflict with Passion and BHW. Passion Mas will be run by a new group called Nirvana. They have their own band leaders, ideas and resources. Jumaane and myself have no financial dealings or interest with the new group and the mas function will run completely independent. Juumane and I will, however, continue to run events independent of the mas band functions under the Passion brand throughout the year, such as Return Fete.

Please let us know if there are any issues arising from this and I will add the 2 band leaders to this group in the morning”

13. Unfortunately, Ms Cacace and Mr Sukdeo fell out. By a letter dated 13th March 2018, but delivered by hand on 28th March 2018, Mr Sukdeo purported to terminate the Partnership Agreement. The letter stated:

“This letter is to provide official notice that the partnership between [PB] and [NM] will cease with immediate effect. We have found the relationship to not be in compliance with the signed contract in the following instances:

Clause 1:

[The clause was set out]

We have seen other events and initiatives advertised by [NM] that have not been mentioned to [PB] in writing as agreed.

Clause 5:

[The clause was set out]

This clause has not been upheld as we have several instances of adult carnival costumes and functions being advertised without the agreed [PB/N] heading. The knowledge of activities is not transparent between the two groups. We have requested to have regular meetings to be updated, and this has not happened to date. We have also requested that marketing materials be placed in a Whatsapp group to aid in transparency, and to date this has not been done. Items are placed in the group as they are sent out publicly.

Clause 8:

[The clause was set out]

We have seen reputational damage to the [PB] brand. We have seen loyal supporters move away from [PB] and register with other groups due to poor communication and ineffective marketing of the Passion/Nirvana partnership.

As a result of this partnership dissolving, Passion Bermuda will also remove the band from participating in Bermuda Heroes Weekend 2018. [NM] will need to seek its own approval to participate under the [NM] brand exclusively if you still wish to participate for 2018.”

14. On 17th April 2018, Mr Sukdeo issued a press release announcing that PB had withdrawn from the 2018 Parade and was no longer affiliated with NM.
15. On 5th April 2018, Ms Cacace renewed her application for NM to be admitted to the Parade. By a letter to her dated 19th April 2018 from Mr Sukdeo on behalf of BHW, her application was dismissed.

Injunction

16. It was common ground that, notwithstanding that the injunction sought was a mandatory one, American Cyanamid principles applied. See Continental Grain Co Ltd v Islamic Republic of Iran [1983] 2 Lloyd's Rep 620 EWCA; transcript pages 3 and 4 *per* Ackner LJ (as he then was), and page 5 *per* Oliver LJ (as he then was).

Serious issue to be tried

17. First, I must consider whether there is a serious issue to be tried. I am satisfied that as between Ms Cacace and Mr Sukdeo there is one, namely whether Mr Sukdeo breached the Partnership Agreement by treating it as at an end and consequently withdrawing PB from the Parade. This in turn involves consideration of whether Ms Cacace breached the Partnership Agreement and, if so, whether the breaches were such as to entitle Mr Sukdeo to terminate it.
18. Mr Sukdeo gave evidence of the alleged breaches by Ms Cacace. His evidence was in somewhat general terms, but he exhibited various items of promotional material which he relied upon to support his case that NM was conducting promotions outside of the terms of the Partnership Agreement.
19. Ms Cacace gave detailed evidence answering each of these allegations. In summary, she said that she was not obliged to keep PB informed of activities which, under the Partnership Agreement, were the sole responsibility of NM, eg procuring costumes for the Parade. Further, she said that the Partnership Agreement did not cover the activities of NM regarding other events on Heroes Weekend, or the activities of other brands under the Nirvana label, eg Nirvana Bermuda. In the same way, it did not cover the activities undertaken by PB unrelated to the Parade, eg those mentioned in the WhatsApp message of 26th September 2017 such as Return Fete.

20. Ms Cacace did not accept that NM was responsible for revellers leaving PB for other bands. She said that in most cases revellers only did so once Mr Sukdeo announced that PB was withdrawing from the Parade.
21. Having considered the evidence of Ms Cacace and Mr Sukdeo, both written and oral, I would go so far as to say that not only is there a serious issue between them to be tried, but that Ms Cacace has a good arguable case that Mr Sukdeo was not entitled to terminate the Partnership Agreement.
22. I am not satisfied that there is a serious issue to be tried between Ms Cacace and BHW. I have considered whether, by accepting PB's withdrawal from the Parade and refusing to allow NM to participate in its own right, BHW might be liable for the economic tort of inducing breach of contract and/or causing loss by unlawful means. But having read the headnote and the speech of Lord Hoffmann in OBG Ltd v Allan [2008] 1 AC 1, I do not see how they could be liable. Mr Sukdeo's withdrawal of PB from the Parade did not depend on the consent of BHW; BHW was under no contractual or other obligation to allow NM to take part in the Parade as an independent entity; BHW did not induce Mr Sukdeo to terminate or purport to terminate the Partnership Agreement; and BHW did not use unlawful means to cause economic loss to Ms Cacace.
23. However, I have also considered the Court's Chabra jurisdiction in Mareva cases. As stated by Mummery J in TSB Bank International v Chabra [1992] 1 WLR 231 at 241 H – 242 B:

“In my judgment, the claim to a similar injunction against the company is also ancillary and incidental to the claim against Mr. Chabra and the court has power to grant such an injunction in an appropriate case. It does not follow that, because the court has no jurisdiction to grant a Mareva injunction against the company, if it were the sole defendant, the court has no jurisdiction to grant an injunction against the company as ancillary to, or incidental, to the cause of action against Mr. Chabra: see for example, Vereker v. Choi [1985] 4 N.S.W.L.R. 277 , 283. I agree that such a course is an exceptional one, but I do not accept that it is one that the court has no jurisdiction to take.”

24. The rationale for this jurisdiction is that a Superior Court of Record has inherent jurisdiction, when it makes an order, to make such ancillary orders as are necessary to make that order effective. Eg the disclosure provisions often found in a Mareva injunction. Thus the jurisdiction is not confined to Marevas but is of general application. However, particularly in the case of a mandatory injunction, it is not to be used lightly. As Mummery J stated, the making of a Chabra injunction is exceptional. In the present case, the exceptional circumstance would be that an injunction against BHW would be necessary in order to render an injunction against Mr Sukdeo effective by securing the participation of PB/N in the Parade.
25. As I may be wrong in my assessment that there is no serious issue to be tried between Ms Cacace and BHW, I shall consider how the other limbs of the American Cyanamid test apply in relation to BHW as well as the other parties.

Damages

26. Next, I must consider whether damages would be an adequate remedy, whether in lieu of an injunction or in the event that an injunction is made but the Respondent concerned succeeds at trial. I am satisfied that they would not.
27. Ms Cacace claims for a quantifiable loss to date of \$51,733.41. But she also claims for other, less readily quantifiable loss: reputational damage, not just to NM but to the Nirvana brand generally; damage to existing commercial relationships; loss of sales; and prospective damages payable by her should she be found to be in breach of contract with revellers and sponsors because PB/N is unable to take part in the Parade.
28. Any loss sustained by Mr Sukdeo would be reputational. It would derive from the possible adverse economic consequences for other bands of readmitting PB/N to the Parade. BHW was also concerned about this. Revellers pay to join bands. Mr Sukdeo was concerned that admitting

another band to the Parade would result in existing revellers being distributed more thinly between the bands, with a consequent loss of income to them.

29. Ms Cacace made the point that, insofar as bands have benefited from revellers migrating from PB/N when Mr Sukdeo withdrew PB from the Parade, that benefit was a windfall deriving from what was, on her case, Mr Sukdeo's breach of contract. However, she said that in practical terms it was too late for revellers who had committed to another band to return to PB/N. Eg the costume registry had closed, so revellers would already have got their costumes for other bands, and the price of the costumes was non-refundable.
30. BHW was also concerned about the regulatory burden of factoring in additional revellers if PB/N joined the Parade. BHW would have to notify the authorities, eg in connection with security and liquor licensing, of any increase in numbers. However these logistical tasks do not appear to me to be insurmountable. Notification to the liquor licensing authority of the final numbers of participants is not required until 1st June. The bands provide their own security, although I appreciate that external security is also required. Recent years have seen a decline in the numbers taking part in the Parade, so the admission of PB/N would not swell the participants to an unmanageable number. In any event, BHW had previously expected PB/N to participate.

Balance of convenience

31. As damages would not be an adequate remedy, I must consider where the balance of convenience lies. Guidance on this question in the context of a mandatory injunction was given by Chadwick J (as he then was) in Nottingham Building Society v Eurodynamics Systems plc [1993] FSR 468 at 474:

“In my view the principles to be applied are these. First, this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be ‘wrong’ in the sense described by Hoffmann J.

Secondly, in considering whether to grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo. Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the plaintiff will be able to establish his right at a trial. That is because the greater the degree of assurance the plaintiff will ultimately establish his right, the less will be the risk of injustice if the injunction is granted.

But, finally, even where the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there’ may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted.”

32. In Zockoll Group Ltd v Mercury Communications Ltd (No 1) [1998] FSR 354 EWCA at 366, Phillips LJ (as he then was) commended this concise summary as being all the citation that should in future be necessary to guide the court when considering an application to grant a mandatory interlocutory injunction. At 370, Simon Brown LJ (as he then was) agreed.
33. I am satisfied that the balance of convenience lies in favour of granting the mandatory injunction sought against Mr Sukdeo and that in the exceptional circumstances of this case it is appropriate to grant a mandatory injunction against BHW under the Court’s Chabra jurisdiction as otherwise the injunction against Mr Sukdeo would likely be ineffective. In so finding, I am satisfied that the harm to Ms Cacace if the injunction is not granted and she prevails at trial will be substantially greater than the harm to Mr Sukdeo and BHW if it is granted and Mr Sukdeo prevails at trial. The grant of the injunction sought is therefore the course which involves the least risk of injustice and indeed the one which, in my judgment, best meets the justice of the case.

34. I therefore grant the injunction against both Respondents as prayed, subject to the provision of an undertaking that if the Court later finds that it has caused loss to Mr Sukdeo or BHW, and decides that Mr Sukdeo or BHW should be compensated for that loss, Ms Cacace will comply with any order the Court may make.
35. [The Court heard the parties as to costs and ordered that the costs of the application should be reserved.]

DATED this 16th day of May, 2018

Hellman J