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THE HIGH COURT

BETWEEN:

REX PET FOODS LIMITED
(IN RECEIVERSHIP) AND
CHARLES RUSSELL MURPHY

Plaintiffs

and

LAMB BROTHERS (DUBLIN) LIMITED,
LAMB BROTHERS (MARKETING) LIMITED,
LAMBS FOODS LIMITED, W.H. LAMB AND
COMPANY LIMITED AND LAMBS (IRELAND)
LIMITED

Defendants

Judgment delivered on the 26th day of August 1982 by Finlay P.

Appearances

For Plaintiffs: Mr. Kelly

Instructed by: D.F. Jones & Co., Solicitors

For Defendants: Mr. McCracken, S.C.

Mr. Keane

Instructed by: A. and L. Goodbody, Solicitors

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The President delivered judgment as follows.

This is an application by the first-named Plaintiff, Rex Pet Foods Limited, who are in receivership and the receiver, Mr. Murphy, against Lamb Brothers (Dublin) Limited, Lamb Brothers (Marketing) Limited, Lambs Foods Limited, W. H. Lamb & Co. Limited and Lambs (Ireland) Limited. It is a claim for an interlocutory injunction by the Plaintiffs restraining the Defendants from disposing of certain scheduled goods produced by the first-named Plaintiffs and presently in the possession of one or other of the Defendants, or in the alternative for an order by way of interlocutory injunction that such goods should not be disposed of pending the hearing of the action, otherwise than on terms that the proceeds of the sale of the goods should be held on a suspense or trustee account preserved to await the outcome of the action.

It is clear that on the facts stated in the affidavits the action is in truth maintainable only against two of the named limited companies who are Defendants and that the other limited companies do not

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appear to be involved in the dispute.

On an application for an interlocutory injunction the principles upon which I must decide it are, in my view, clear and well settled. They are to be found set out by the Supreme Court in the Educational Publishing Company .v. Fitzpatrick, 1961 I.R. and most recently in the House of Lords in the American Cynamid Company .v. Citric 1975 1 A.E.R.

The statement of principles contained in these two decisions do not differ but to some extent each complements the other in certain aspects of the questions raised. The principles upon which I am obliged to decide this application are therefore in my view as follows.

The first enquiry must be as to whether the claim in aid of which the Plaintiffs seek this injunctic on the affidavits raises a fair or serious question to be tried. If it does not, or to put the matter in the negative form in which it is contained in the decision of Diplock L.J. in the Cynamid case, if it

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is vexatious or frivolous or an implausible claim then no question of an injunction arises.

If, however, it does raise a fair or serious question to be tried in the action then I must necessarily enquire, the onus of proof being on the Plaintiff, as to whether the balance of convenience is in favour of the granting of an injunction.

That enquiry involves, inter alia, a consideration on the facts before me of the damage or disadvantage arising to the Plaintiffs if the injunction were not granted and if they were successful in the final hearing of the action. It also involves the disadvantage arising to the Defendants if the injunction were granted and they were successful in establishing at the hearing of the action that the claim against them was unsustainable. The disadvantage or damage to be considered in balancing the convenience, as it is stated in the authorities, is necessarily damage or

disadvantage which is irreparable by giving money damages in the one case the damages to which the Plaintiffs would be entitled if they succeeded and in the other case the damages which would be payable by the Plaintiff to the Defendants on the undertaking as to damages which is necessarily a pre-condition to the granting of an injunction.

The only other principle which has affected my mind and which I have taken into consideration as a legal principle in seeking to apply the law to the facts of this difficult case is that I would follow with approval the remarks made in the judgment of Diplock L.J. in the American Cynamid case, that it may not be improper where the balance of convenience appears to be relatively finally met to tip the balance by the relative strength of the cases shown on affidavit by the Plaintiff and the Defendant.

Applying these principles of law which I believe to be the correct principles to the facts of this case the position is as follows:

The claim made by the Plaintiffs and significantly and substantially speaking the cause of action in aid of which they seek this interlocutory injunction is, firstly, for a declaration that the assets of the Defendant companies form part of the assets of the first-named Plaintiff and should be aggregated therewith and, secondly, for a declaration that at all material times the first-named Plaintiff and the Defendants were trading and carrying on business as one single entity. The Plaintiffs claim that if they are successful in obtaining these two declarations then the finished products presently in the possession of the Defendants, which were manufactured or produced by the first-named Plaintiff company and have not yet been sold or converted into monies by the Defendants are part of the assets which the receiver is entitled to have access to for the purpose of his receivership and that it is necessary in order to preserve that situation until the hearing of the action that either of the two

forms of injunction which I have outlined should be granted to the Plaintiff.

In relation to the onus of proof which lies on the Plaintiffs that this is a serious question to be tried in the action, they rely on a number of factors some of which it is necessary to identify. Firstly, they rely on the fact that the relevant Defendant companies are at present and were at the time of the receivership 100% owners of the Plaintiff company. Secondly, they rely on two distribution and management agreements, one of which is distribution and the other of which is a management agreement, very shortly and broadly the effect of which is to bind the Plaintiff company exclusively to sell all its products to the Defendant company and which permitted the Defendant company to fix the price at which those products would be resold to retail outlets; which provided for the total management of the Plaintiff company by servants or employees or by persons with a consultancy duty acquired by the Defendant companies

and in particular permitted the financial, book-keepir and other organisational and administrative tasks of the Plaintiff company to be under that control. They also rely upon the consequential book-keeping entries and financial transactions between the companies since these agreements came into operation in March of 1981 up to the time of the receivership.

Broadly speaking, they rely upon the fact that there does not appear to have been entered into the books of the Plaintiff's company regular payments relating in either times or amount to specific invoice for goods delivered and sold but rather that over a significant period in 1981 at least in two months in June and July the payments that are now claimed by the Defendants to have been payments for goods sold by the Plaintiff to the Defendants appeared as loans.

Secondly, in a very great number of instances payments made by the Defendant companies to the Plaintiff's company have not been related either in time or amount to goods produced and delivered as

between the two companies but rather had been related to what were clearly urgent and essential disbursements by the Plaintiff company in order to deal with those creditors in relation to raw materials and other necessary services for the manufacture of these goods.

They place particular reliance also on the fact that the control of the prices at which these goods would ultimately be sold which determined entirely the prices which would be received by the Plaintiff company for them was in the apparent decision of the Defendant company. In my view, these and other facts which it is unnecessary for me to enumerate in the affidavits before me and the exhibits referred to in them clearly raise a serious question to be tried as to whether the three companies involved did not trade and carry on business as a single entity and whether as a consequence the assets of the Defendant companies concerned do not form part of the assets of the first-named Plaintiff.

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It then becomes necessary to consider the question of the balance of convenience. The Plaintiff's case on this aspect is short and to an extent somewhat baldly stated in the affidavit. The second-named Plaintiff says in his affidavit that it has been indicated to him that the Defendant companies are imminently going to go into liquidation and if they do, no amount will be recovered in the event of a successful conclusion by the Plaintiff of this claim in this action or that some extremely diminished amount is all that will be available if the goods are sold by the Defendant company when the proceeds go into their ordinary funds.

The Defendants on the other hand in their affidavit state that the Defendant companies are not imminently insolvent provided that they can dispose of and apply the monies constituted in these products or arising from the sale of these products, but that if they were forced to freeze or hold in

suspense these monies or the products that they would be put into a condition of insolvency.

The statement by the Plaintiff with regard to his information and belief concerning the state and condition of the Defendant companies and the chance of recovering in the event of a successful conclusion of the action is baldly stated in the affidavit but is not without support on the individual facts which arise from the exhibits and certain matters which are uncontested in the affidavits filed on behalf of the Defendants.

It seems clear that the relevant Defendants ceased to deal in jams and allied foods in 1981 and I infer from the affidavits quite clearly that since that time their sole trading and commercial occupation has been associated with the first-named Plaintiff company. It is clear on the facts and figures available that the first-named Plaintiff company is markedly insolvent looking at its assets

isolated to the assets in its own books and this fact lends support in my view to the statement of belief and information made by the receiver that if the Defendant companies are permitted to sell and absorb the proceeds of the sale of these goods that there would not be available for the satisfaction of a judgment the amounts appropriate were the Plaintiffs to succeed in the action. In that situation and with that additional strength behind the expression of belief by the receiver, I feel that the onus of proof to an extent has shifted to the Defendants and it is only those who are involved in the Defendant companies who are persons peculiarly with the knowledge and informati at their disposal to make any detailed or even quasi detailed assertion of the capacity of the Defendant companies to pay the amount of these clai if the Plaintiffs were successful in their action. The Defendant companies on the other hand assert

that they would be forced from a situation of solvency into a situation of insolvency were the goods or the proceeds of the sale of the goods to be frozen or not available to them. I must have regard to the fact that that general statement or assertion is not in any way supported by even the most localised view or account of the state of the assets and liabilities of the Defendant companies or of their future trading projections.

Having regard to the appointment of a receiver too and the clear insolvency of the trading company if it were necessary to do so I would be inclined to take in aid the fact that in the affidavits the amount of dispute as to facts as distinct from the inference to be drawn from facts and documents is very limited.

Indeed, I would take the view that the Plaintiffs in asserting a single trading entity and an enterprise in which the assets effectively had

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become aggregated have a relatively stronger case than the case made by the Defendants that these were two companies trading at arms length.

Bearing these considerations in mind, I have come to the conclusion that I am forced to grant the interlocutory injunction in this case. I will grant it either in the form of a total restraint on the sale of these products but would prefer to grant it in the form of some effective and simple and heavily supervised method of sale and the suspense and preservation of the proceeds pending the outcome of the action. I would hear Counsel on both sides in relation to those provisions.

approved
J. A. Finlay