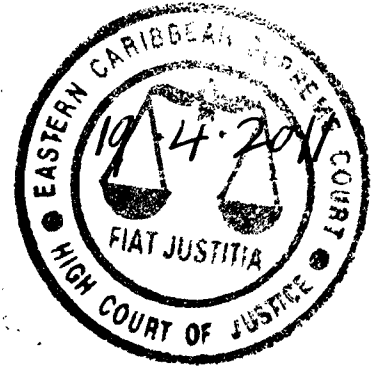


THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
SAINT VINCENT AND THE GRENADINES
HIGH COURT CIVIL CLAIM NO. 301 OF 2010
BETWEEN:



MILLHAWKE HOLDINGS (Bequia) LTD
STOWE CONSTRUCTION (Bequia) LTD
HENRY JOHN MARRIOTT
(also known as Harry MARRIOTT)
HON. DINAH LILIAN MARRIOTT

CLAIMANTS

and

STANLEY JORG DORMIEDEN
TIMOTHY GABRIEL
CARIB CONSTRUCTION
CARIB INTERNATIONAL
LEOMORE MACDONALD
STANLEY'S FOOD AND BEVERAGES LTD

DEFENDANTS

Appearances: Ms. N. Sylvester and Ms. Patina Knights for the Claimants
Mr. Stanley John for the First and Sixth Defendants
Mr. Akin John for the Second Defendant

2010: September 1, September 17;
October 1, October 11;
November 1;
December 15, December 17;
2011: January 11; April 19

JUDGMENT

[1] **THOM, J:** On the 1st day of September, 2010 on an application without notice filed by the First, Second and Third Claimants the Court granted the following interim reliefs:

- (i) A search order in relation to the premises of Stanley Jorg Dormieden situate at Lower Bay Bequia, the premises of Timothy Gabriel situate at Spring Bequia, and the premises of Leomore McDonald situate at Port Elizabeth, Bequia.
 - (ii) An injunction restraining the Defendants from entering onto the properties owned and under the control of the Applicants and situate at Mount Pleasant Bequia and from destroying, tampering with, concealing or parting with possession, power, custody or control of the listed items.
 - (iii) A freezing order in relation to the bank accounts of the First, Second, Third and Fourth Defendants. The First and Second Defendants were permitted to withdraw sums not exceeding EC\$1,000.00 per week towards their ordinary and proper living expenses. The Third and Fourth Defendants were permitted to withdraw sums not exceeding EC\$1,500.00 per week towards their ordinary business expenses.
- [2] By consent the Order was amended on October 1, 2010 to permit the First Defendant to withdraw sums not exceeding EC\$9,000 per month from his accounts at RBTT Bank, the Second Defendant was permitted to withdraw sums not exceeding EC\$20,000 per month and the Third and Fourth named Defendants were permitted to withdraw sums not exceeding EC\$1,500 per week towards their ordinary business expenses. On December 15 the Order was further amended to permit the First Defendant to withdraw sums not exceeding EC\$20,000 per month and the Second Respondent EC\$40,000 per month.
- [3] On the 17th September 2010 the Second Defendant filed an application for a stay of all proceedings and the Applicants filed an application for a continuation of the Order.

BACKGROUND

- [4] The Application for interim relief was made by the First, Second and Third Claimants and was made against the First thru to the Fifth Defendants. The Third Claimant and his wife the Fourth Claimant and the First Defendant negotiated and agreed the terms and conditions on which to purchase property in Bequia and develop and sell such property ("The Project"). The agreed terms are outlined in a Joint Venture Agreement (JVA) which was executed by the Third and Fourth Claimants and the Sixth Defendant through the First Defendant shareholder and director of the Sixth Defendant. A dispute has arisen in relation to the Project and as a result the Applicants sought interim reliefs and filed a statement of claim in which they seek several reliefs against the Defendants.

APPLICATION FOR A STAY

A. Preliminary submission

- [5] At the commencement of the hearing of the application Ms. N. Sylvester made a preliminary submission that the Defendants should not be permitted to proceed with the application since they had not filed an acknowledgment of service pursuant to Part 9.7 of CPR 2000.
- [6] Learned Counsel Mr. S. John acknowledged that an acknowledgment of service was not filed and submitted that the Application was made pursuant to the inherent jurisdiction of the Court and Part 26 of CPR. Learned Counsel referred the Court to the decision of the Privy Council in **Texan Management et al v Pacific Electric Wire and Cable Company Ltd.** 2009 UK PC 46.
- [7] Learned Counsel for the Claimants in reply submitted that where the rule makes special provision as to how a party should proceed then the party must proceed in accordance with the rules. The procedures referred to in sections 76-77 of the **Texan Management** case do not apply to this case.

[8] The provisions of Part 9.7 and Part 26.2(q) were reviewed by the Privy Council in the **Texan Management Case**. The Court summarised the effect of the provisions in paragraph 77 of the judgment in the following manner:

"77. To summarise, the overall position is this: (1) if at the time the proceedings are first served, there are circumstances which would justify a stay, the application should be made promptly under EC CPR r. 9.7, English CPR part 11; (2) any failure to comply strictly with time-limits may be dealt with by an extension of the time-limits, and any formal defect in the application may be cured by the Court; (3) if circumstances arise subsequently which would justify an application for a stay, the application would be made under the inherent jurisdiction of EC CPR 26.2(q); English CPR r. 3.1(2)(f).

[9] The application does not state the specific rule under which it is made. It is not disputed that no acknowledgement of service was filed pursuant to Part 9.7(2). The failure to file an acknowledgment of service is a formal defect which could be cured by a Court as stated in paragraph 77(2) of the **Texan Management Case**. Part 26.9 empowers the Court to make an order to put matters right where no consequence of failure to comply with a rule has been specified by a rule, practice direction or court order. No consequences are specified for a failure to comply with Part 9.7(2), therefore I find that it is appropriate in these circumstances to make an order to put matters right and I so do.

B. Substantive Submissions

[10] The application for stay of all proceedings was filed by the Second Defendant and is supported by the First and Sixth Defendants. The ground on which the Application is based is that the dispute between the parties, the subject matter of these proceedings ought to be determined by an expert in accordance with the provisions of clauses 6.5 and 19 of the JVA, and the determination of the expert is to be conclusive and binding except in a case of mistake of law.

[11] Learned Counsel Mr. S. John submitted that the allegations of the Claimants all relate to breach by the First Defendant in the performance of the duties of the Sixth Defendant under the JVA. Learned Counsel referred the Court to the Claimants statement of case and submitted that the Claimants in their pleaded case alleged breach of contract, breach of fiduciary duties, conversion, deceit and misrepresentation. The first three fall within

clause 6.5 of the JVA and the other two are baseless claims included simply to make it appear that clause 6.5 is not applicable.

- [12] The Claimants were required to submit the dispute to be determined by an expert in keeping with the well establish principle that where an agreement makes specific provisions that a dispute should be determined exclusively by an expert, the Court has no jurisdiction to make a determination on the said dispute. Learned Counsel referred the Court to the case of **Victor International Corporation et al v Spanish Town Development Company and Others** and submitted that the principle applies not only to arbitration but also to mediation or resolution via an expert.
- [13] It was submitted further on behalf of the Second Defendant that even though the Second Defendant is not a party to the JVA the allegations against the Second Defendant are that he colluded with the First Defendant, the claims against him are inseparable from the claims against the First Defendant.

SUBMISSIONS ON BEHALF OF THE CLAIMANTS

- [14] Learned Counsel for the Claimants submitted that the Application for stay was not made by the First and Sixth Defendants but by the Second Defendant and supported by the First and Sixth Defendants. The Second Defendant is not a party to the JVA and therefore cannot rely on clause 6.5 of the JVA to have the proceedings stayed. The JVA is only applicable as it relates to the Third and Fourth Claimants and the Sixth Defendant. The First and Second Claimant and the First, Second, Third, Fourth and Fifth Defendants are not party to the JVA and cannot be compelled to arbitrate in accordance with the JVA. Learned Counsel referred the Court to the case of **Oxford Shipping Company Ltd v Nippon Yusen Kaisha [The Eastern Shear]** No. 2 [1984] 3AER.
- [15] Learned Counsel further submitted that clause 6.5 could only be relied on if the dispute arises over the duties of the Project Manager. Among the reliefs sought by the Claimants in their Claim Form is relief for damages, for deceit, conversion, breach of fiduciary duty by the First Defendant, damages for loss of use of the Second Claimant's labour force and

plant and machinery. These issues are not arbitrable in the context of the JVA. Learned Counsel referred the Court to the case of **Ocean Conversion Ltd v The Attorney General of the Virgin Islands** HCVAP 2007/030 and **Russell on Arbitration** 22nd ed. pp. 26-29. Further under the JVA clause 19.1(2) states that the person appointed as an expert would not be an arbitrator. The expert would not be an appropriate forum for the settling of the disputes in this case see **the Spiliada case**. The allegations against the Project Manager are instances where the Project Manager was acting outside of his duties as outlined in clause 6, thus clauses 6.5 and 19 are not relevant. Learned Counsel referred the Court to the cases of **Felix DaSilva v A-G of Saint Vincent and the Grenadines** No. 356 of 1989; **Public Service Commission v Davis and Others** [1984] 33 WIR p. 113; **Public Service Commission and A-G of the Commonwealth of Dominica v Dornell Shillingford** Civil Appeal No. 10 of 1988.

LAW AND COURT'S ANALYSIS

- [17] The issue to be determined is whether the Court should exercise its jurisdiction to determine the questions raised in the Claimant's statement of case or these questions should be determined by an expert pursuant to clause 6.5 of the JVA.
- [18] Clause 6.5 of the JVA reads as follows:
- "Any difference or dispute between the Parties arising over the duties of the Project Manager is to be submitted for the determination of an expert to be agreed between them (or in the absence of such agreement) to be appointed in accordance with clause 18 of this Agreement on the application of either party; and his determination is to be conclusive and binding on them except in case of a mistake of law."
- [19] It is settled law that where the parties to an agreement have entrusted the power to determine a dispute between them to an expert or arbitrator the Court will not interfere. The matter has to be determined by the expert or the arbitrator.
- [20] It is not disputed that the parties to the JVA have agreed that disputes are to be determined by an expert and how that expert should be appointed.

- [21] It is also not disputed that the full ambit of the expert's authority is outlined in clause 6.5 of the JVA.
- [22] The parties are at variance as to whether the matters raised in the Claimants' statement of case are matters which fall to be determined by the expert pursuant to the JVA.
- [23] The onus is on the Claimant to show that the dispute is not one which falls within the terms of clause 6.5 and even if it does there are sufficient reasons not to have it referred to the expert.
- [24] The approach that should be adopted by the Court when dealing with an application to stay proceedings on the ground that the matters in dispute are covered by an arbitration clause was outlined by Lord Macmillan in **Heymen and Another v Darwin Limited** [1942] AC p. 356 at p. 370:
- "... the first thing to be ascertained is the precise nature of the dispute which has arisen. The next question is whether the dispute is one which falls within the terms of the arbitration clause. Then sometimes the question is raised whether the arbitration clause is still effective or whether something has happened to render it no longer operative. Finally, the nature of the dispute being ascertained, it having been held to fall within the terms of the arbitration clause, and the clause having been found to be still effective, there remains for the Court the question whether there is any sufficient reason why the matter in dispute should not be referred to arbitration."
- [25] This approach was approved by the Eastern Caribbean Court of Appeal in the case of **Ocean Conversion Limited v the Attorney General of the Virgin Islands** HCVAP 2007/030. I will adopt this approach.

What is the precise nature of the dispute?

- [26] The dispute which the Claimants seek to have the Court determine is outlined in their statement of case and can be summarized as follows:
- (i) Whether the First Defendant made fraudulent misrepresentations to the Third and Fourth Claimants and whether the misrepresentations led the

Third and Fourth Claimants to act to their detriment in concluding the JVA and as a result they sustained loss and damage.

- (ii) Whether the First and Second Defendants wrongfully converted materials, plant and machinery belonging to the First Claimant and whether labour contacted by the Second Claimant were used for the benefit of the Second and Fifth Defendants thereby wrongfully depriving the First and Second Claimants of the benefit of their material, plant, machines and labour force.
- (iii) Whether the First Defendant procured the engagement of the Third Defendant as a subcontractor of the project while concealing the fact from the Claimants that he and the Second Defendant were the owners of the Third Defendant and whether this amounted to a breach of contract and or breach of fiduciary duty, the First Defendant being a Director of the First and Second Claimants.
- (iv) Whether the First Defendant had collected secret commissions from subcontractors of the project and whether this amounted to a breach of contract or breach of fiduciary duty.
- (v) Whether the First, Second, Third and Fourth Defendants colluded and made false representations to the Claimants in relation to invoices for materials.

Do the issues fall within the terms of Clause 6.5 of the JVA?

[27] Sir Donald Nicholls VC said in **Norwich Union Life Insurance Society v P&O Property Holdings Ltd & Others** [1993] 1EGLR p.164 at 166:

“On this question of interpretation each agreement must depend on its own terms and read in its own context. Comparing one case and one document with another gives at best, very limited assistance.”

- [28] The ambit of Clause 6.5 is very limited, in that it restricts the issues to be determined by the expert to any difference or dispute between the parties arising over the duties of the Project Manager, not to disputes generally.
- [29] In this case the parties to the JVA are the Third and Fourth Claimants and the Sixth Defendant. It is not disputed that the Sixth Defendant executed the duties of Project Manager through the First Defendant. However the First and Second Claimants, and the Second, Third, Fourth and Fifth Defendants are not a party to the JVA.
- [30] I find that issues (ii), (iii) and (iv) and (v) fall with the ambit of Clause 6.5 they all relate to the discharge of the duties of the Project Manager.
- [31] I find issue No (i) does not fall within the ambit of clause 6.5. While the House of Lords in its decision in **Fili Shipping Co. Ltd and Others v Premium Nafta Products Ltd and Others** held that assertions of invalidity, or rescission of the main contract or that there is no concluded agreement are all disputes or issues which are caught by a general arbitration clause to refer all disputes to arbitration, in the present case Clause 6.5 is not in the terms of a general arbitration clause. As stated earlier it is a very limited clause that only covers disputes relating to the discharge of the duties of the Project Manager. While issues (ii) (iii) (iv) and (v) are within Clause 6.5 the issues relate not only to the Third and Fourth Claimants and the Sixth Defendant who are parties to the JVA but they relate also to the Second, Third, Fourth and Fifth Defendants and the First and Second Claimants who are not parties to the JVA.
- [32] It is settled law that persons who are not parties to an arbitration clause cannot be compelled to submit to arbitration. The same principle applies where it is agreed that disputes are to be settled by an expert. In the case of **Oxford Shipping Co. Ltd v Nipper Yusen Kaisha** the Court held that since arbitration is a private procedure it is an implied term of an arbitration agreement that strangers to the agreement are excluded from the hearing and conduct of arbitration under the agreement. While this case was dealing with

the question of consolidation of arbitration proceedings the general principle is that an arbitrator or expert only has such powers as are stated in the arbitration clause.

Whether Clause 6.5 is still effective or whether something has happened to render it no longer effective.

[33] In this case the Third and Fourth Claimants have raised the issue of the validity of the JVA, which was referred to issue No (i). Learned Counsel for the First and Sixth Defendants submitted that the Claimants statement of case does not disclose sufficient evidence to show that fraudulent misrepresentation was made to the Third and Fourth Claimants prior to them entering into the JVA and the issue in relation to misrepresentation cannot be proved. The application before the Court is an application to stay proceedings not an application to strike out the claim or part thereof.

Whether there is any reason why the matter in dispute should not be referred to the expert.

[34] Since all of the parties in fact the majority of them to the claim are not party to the JVA, I am of the opinion that it would not be in the interest of the parties to refer some issues relating to some parties to the expert. The issues to be referred to the expert relate both to persons who are parties to the JVA and those who are not. The expert can only determine disputes relating to the parties of the JVA. I agree with the submission of Learned Counsel for the Claimants that a multiplicity of proceedings should be avoided.

[35] Having regard to the circumstances of this case I am of the opinion that a stay should not be granted.

INTERLOCUTORY INJUNCTION

Submissions on behalf of the Claimants

[36] Learned Counsel for the Claimants submitted that the principles to be considered by the Court in an application for an interlocutory injunction are outlined in the case of **American Cyanamid v Ethicon**.

- [37] Learned Counsel submitted that there are serious issues to be tried. Damages would not be an adequate remedy. The sums involved are substantial, in excess of EC \$1,000,000. The balance of convenience lies in favour of the Claimants. Learned Counsel referred the Court to the case of **National Corp. v Rochamel Development Company Ltd** and submitted that the requirements for the grant of a freezing injunction are:
- (i) A cause of action justiciable in Saint Vincent and the Grenadines
 - (ii) A good arguable case
 - (iii) The defendants have assets within the jurisdiction
 - (iv) A real risk that the Defendants may dissipate these assets before judgement can be enforced.
 - (v) The defendants will be adequately protected by the claimants undertaking in damages.
- [38] Learned Counsel also submitted that there is a real risk of dissipation by reference to the Defendants proven conduct of fraud, deceit, and breach of fiduciary duties which shows a want of probity or a course of dealing suggesting that the Defendants will deal with their assets to make themselves judgment proof. See **Guinness PLC v Saunders** [1987] the Independent 15th April 1987.
- [39] In relation to the search order Learned Counsel submitted that there was a real risk that material evidence would be destroyed if the application was made on notice. Once a search order has been executed there is a strong argument that it is an unjustified waste of costs and the Court's time to seek its discharge before trial, see **Dormeuil Freres SA v Nicolian International (Textiles) Ltd.** [1988] 1 WLR p. 1362.
- [40] Learned Counsel also submitted that since there are serious issues to be tried the status quo should be maintained pending the hearing of the claim. The inability of the Defendants to meet an award of damages is a critical factor in determining the balance of convenience - see **Dyrlund Smith A/A v Tuberville Smith Ltd** [1998] FSR 774.

Submissions on behalf of the First, Second and Sixth Defendants

[41] Learned Counsel for the Defendants urged the Court to discharge the injunction on the following grounds:

- (a) Material non-disclosure
- (b) The circumstances have changed since the grant of the order.
- (c) Damages will be an adequate remedy in respect of any loss which the Claimants may suffer.
- (d) The balance of convenience is in favour of discharging the order.

Material Non-disclosure

[42] Learned Counsel submitted that it is settled law that where an application is made for an injunction to be granted ex-parte the Applicants have a duty to make full and frank disclosure to the Court of all material facts and present fairly to the Court matters which the Respondents might rely upon by way of defence. Learned Counsel referred the Court to the case of **Fourie v Allan LeRoux and Others** [2005] UKHL.

[43] Learned Counsel submitted that there were several instances of material non-disclosure, and referred the Court to the following instances:

- (i) The Claimants in their submission to the Court on the Without Notice of Application submitted that the First Defendant was in the employment of the Applicant thereby suggesting that the First Defendant was a servant who colluded to defraud his master. In fact the First Defendant had invested US\$112,674.84 in the project and was a Director of the First and Second Claimants.
- (ii) The Third Claimant in his affidavit dated 31st September 2010 stated that the First and Second Defendant owned Carib Construction and Carib International the Third and Fourth Defendants and they were formed to facilitate the presentation of false invoices to the Claimants. In fact both entities were in existence before the execution of the JVA. The Fourth Defendant was in existence some years prior to the JVA.

- (ii) The Third Claimant falsely swore that the JVA was with the First Defendant whereby he agreed to operate and manage the site in the best interest of the Claimants. The JVA was not executed by the First Defendant but by the Sixth Defendant.

- (v) The Third Claimant stated in his affidavit that the First and Second Defendants were not from Saint Vincent and the Grenadines. In fact Defendants are citizens of Saint Vincent and the Grenadines.

Changed Circumstances

[44] Learned Counsel did not make any submissions in relation to this ground.

Damages an Adequate Remedy

[45] Learned Counsel submitted that the claims made in the Claimant's statement of case are - breach of contract, breach of fiduciary duties, deceit, conversion and misrepresentation. The relief for all such claims would be a judgment for money damages. Learned Counsel further submitted that there are no non-pecuniary damage which the Claimants are likely to suffer. Further the First Defendant would be entitled to a substantive return from his investment in the project of US\$112,674.84, which return is estimated to be in excess of US\$200,000.00.

[46] In relation to the Second Defendant, it was submitted that he was a man of means. The Third Claimant acknowledged in his affidavit in support of the claim that the Second Defendant has a house on the Island of Bequia. The Second Defendant is an Engineer, he is gainfully occupied as a contractor.

Balance of Convenience

[47] Learned Counsel submitted that Mareva injunctions were from the beginning and continue to be granted for an important but limited purpose that is to prevent a Defendant dissipating his assets with the intention or effect of frustrating enforcement of a prospective

judgment. They are not a propriety remedy. They are not granted to give the Claimant advance security for his claim, although they may be of that effect.

- [48] Learned Counsel submitted that the Defendants continue to suffer tremendous inconvenience as a result of the freezing orders. It has negatively affected the effective operation of their business.

REPLY BY CLAIMANTS

- [49] Learned Counsel for the Claimants admitted that there were instances of non disclosure but submitted that the non-disclosure was not deliberate but innocent. The material not disclosed would have put the First Defendant in a worse situation. Even if the Court is mindful of discharging the injunction the Court should make a fresh order. Learned Counsel referred the Court to the case of **Edy Gay Addari v Enzo Addari** Civil Appeal No. 2 of 2005.

LAW AND ANALYSIS

Material Non-Disclosure

- [50] **Ralph Gibson LJ in Brink's Mat Ltd v Elcombe et al** [1988] 1 WLR 1350 outlined the principles by which a Court should be guided when considering whether there was material non-disclosure on an application for interlocutory relief. This approach was adopted by the Court of Appeal in **Edy Gay Addari and Enzo Addari** No. 2 of 2005.

"In considering whether there has been non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following:

(1) The duty of the applicant is to make "a full and fair disclosure of all the material facts." See **Rex v Kensington Income Tax Commissions, Ex parte Princes Edward de Poligrac** [1917] 1 KB 486, 514 per Scrutton LJ.

(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the Court and not by the assessment of the applicant or his legal advisors. See **Rex v Kensington**

Income Tax Commissioners, per Lord Cozens-Hardy M.R. at p. 504, citing Dalglish v Jarvie [1850] 2 Mac G 231, 238 and Browne - Wilkinson J. in Thermax Ltd. V Schott Industrial Glass Ltd. [1981] F.S.R. 289,295.

(3) The applicant must make proper inquiries before making the application: see Bank Mellat v Nikpour [1985] F.S.R. 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; (b) the order for which application is made and the probable effect of the order on the defendant: see for example the examination by Scott J. of the possible effect of an Anton Pillar Order in Columbia Picture Industries Inc. v Robinson [1987] Ch. 38, and (c) the degree of legitimate urgency and the time available for the making of inquiries: see per Slade L.J in Bank Mellat v Nikpour p. 92-93.

(5) If material non-disclosure is established the Court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure ... is deprived of any advantage he may have derived by that breach of duty": see per Donaldson L.J in Bank Mellat v Nikpour, at p. 91 citing Warrington L.J. in the Kensington Income Tax Commissioners case [1917] 1 K.B. 486, 509.

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded: per Lord Denning M.R. Bank Mellat v Nikpour p. 87, 90. The Court has a discretion,

notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms:

“when the whole of the facts, including that of the original non-disclosure, are before [the Court, it] may well grant... a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed”: per Glidewell L.J. in **Lloyds Bowmaker Ltd v Britannia Arrow Holdings Plc**; ante...”

- [51] I will now examine the non-disclosures. First, the First Defendant was in the employment of the Claimants - being the First, Second and Third Claimants. The First Defendant was in fact a director of the First and Second Claimants and had invested money into the project. This I find was a material non-disclosure. There is a major difference between someone being an employee and someone who is a director and investor.
- [52] In relation to the non-disclosure that the Third and Fourth Defendants were established after the execution of the JVA, I also find to be a material non-disclosure. It is agreed the Fourth Defendant was established seven years prior to the execution of the JVA. This non-disclosure served to strengthen the case of the Claimants that they were used to defraud the Claimants.
- [53] In relation to submission that a true copy of the JVA was not before the Court, I find that this was not a material non-disclosure. While a signed copy was not exhibited with the Without Notice Application, the copy exhibited contained all of the clauses as in the signed copy which was later exhibited.
- [54] In relation to the submission that the Third Claimant deposed that the First and Second Defendants were not from Saint Vincent and the Grenadines I also find that this was a material non-disclosure. It was a factor in relation to the issue of the risk of dissipation of assets.

- [55] The material non-disclosure identified above were all materials which the Court needed to be aware when considering the Without Notice Application. The material was relevant. The non-disclosure led the Court to believe that the First Defendant was an employee of the Claimants who had colluded with the Second Defendant and formed two companies to defraud the Claimants. Also that the First Defendant was a resident instead of a citizen of Saint Vincent and the Grenadines and the Second Defendant was not a citizen of Saint Vincent and the Grenadines. This was not the correct factual position at the time of the hearing of the Without Notice Application.
- [56] I accept the submission of Learned Counsel for the Claimants that the non-disclosure was innocent. The true nature of the relationship between the First Defendant and the Claimants was within knowledge of the Third Claimant at all material times. The Claimants had a duty not simply to exhibit the certificate of registration of the Third and Fourth Defendants but they had a duty to refer in their affidavit to the relevant information included in the certificate. If the Court had been made aware of the correct factual position the Court would not have made the freezing orders against the Defendants. In view of the above I will discharge the freezing orders.
- [57] I will now consider whether to continue the order granted on September 1, 2010 and amended on October 1, 2010 and December 15, 2010.
- [58] The approach outlined by Lord Diplock in American Cyanamid Co v Ethicon has been accepted as the correct approach to be adopted by a Court hearing an application for an interlocutory injunction. Lord Diplock at p.407 said:
- "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 injunctive relief that is sought.”

[59] Based on the approach outlined in the American Cyanamid Case the Court should consider the following:

- (i) Whether there is a serious issue to be tried. If there is no serious issue to be tried the injunction should not be granted if there is a serious issue to be tried then the Court should consider the item (ii)
- (ii) Whether the Claimants could be adequately compensated in damages by the Defendants for any loss suffered as a result of the Defendant's actions if the Claimants were to be successful at trial. If yes then no injunction should be granted. If no the Court must consider item (iii)
- (iii) Whether the Defendants could be adequately compensated in damages by the Claimants for any loss suffered as a result of the imposition of the injunction if the Defendant were successful at trial. If yes and the Claimants would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.
- (iv) It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. The Court must then assess whether or not to grant an injunction on a balance of convenience. In determining where the balance of convenience lies the Court will weigh the risk of doing an injustice to one side or another.
- (v) Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo.

Serious Issue to be tried

[60] It is not disputed that there is a serious issue to be tried.

Damages an Adequate Remedy

[61] Having examined the Claimants statement of case the Claimants seek the relief of damages for deceit, breach of contract, breach of judiciary duty, conversion, orders for the taking of Accounts of Profits, and a Declaration that JVA be rescinded.

[62] I agree with the submission of the Defendants that the damage alleged is not non-pecuniary. The Claimants allege that damages would be substantial and the Defendants would not be able to pay. It is useful at this stage to examine the loss and damage alleged in relation to the Defendants.

[63] The Claimants in their statement of case allege that the loss and damage is in the sum of EC\$1.5 million and an estimate is provided in Exhibit J. An examination of Exhibit J shows that this loss relates to the First, Second, Third and Fourth Defendants. No loss or damage is alleged in relation to the Fifth Defendant, the loss alleged in relation to Fourth Claimant being EC\$76,226 and Third Claimant EC\$242,897. The remaining approximately \$1.2 million is alleged to be loss in relation to the First and Second Defendants. It is not disputed that the First Defendant invested US\$112,674.84 into the project he has a house on the Island of Bequia and is a business man. It is also not disputed that the Second Defendant has a house in Bequia and is an Engineer engaged in the construction business. There is no evidence to suggest that neither Third or Fourth Defendants would not be able to pay damages if awarded against them. The sum alleged loss in relation to them is not substantial.

[64] The damage that could be suffered by the Claimants if the Defendants are not prohibited from entering the Claimants property would be difficult to assess. In these circumstances, I find that damages would not be an adequate remedy.

Balance of Convenience

- [65] In considering where the balance of convenience lies, the Court must consider what is the risk of injustice that would be done both to the Applicant if the injunction is not granted and to the Respondents if the injunction is granted. It is not disputed that none of the Defendants are shareholders of the First or Second Claimants. It has not been advanced that any of them are entitled to possession or to have access to the Claimants property at Mt. Pleasant and Hope Bequia. I therefore find that they will suffer no harm if the injunction is continued against them that they should not enter the Claimants property at Mt. Pleasant and Hope Bequia.
- [66] On the other hand the Claimants could suffer harm if the Defendants were permitted to continue to have access to the property plant and machinery of the Claimants.
- [67] I find that the balance of convenience lies in favour of the Claimants.

Freezing Orders

- [68] As stated earlier even where there was a material non-disclosure the Court has a discretion to continue the order or to make a new order if the original non-disclosure was innocent and if an injunction could properly be granted had the facts been disclosed.
- [69] The general principles outlined in **Blackstone's Civil Practice** 2002 paragraph 38.3 which the Court should apply when considering whether to grant a freezing injunction are:
- (a) a cause of action justiciable in Saint Vincent and the Grenadines
 - (b) a good arguable case
 - (c) the Defendant having assets within jurisdiction;
 - (d) a real risk that the Defendant may dissipate those assets before judgment can be enforced.
- [70] The sole area of contention is paragraph (d) - whether there is a real risk that the Defendants may dissipate their assets before judgment can be enforced.

- [71] Learned Counsel for the Claimants submitted that there is a real risk of dissipation by the Defendants if unrestrained. This is by reference to the Defendants proven conduct of fraud, deceit and breach of fiduciary duty which tends to show a want of probity or to a course of dealing suggesting that the Defendants will deal with their assets to make themselves judgment proof. See **Guinness PLC v Saunders** [1987].
- [72] Learned Counsel for the First and Second Defendants submitted that there was no evidence of any real risk of dissipation and that the Claimants merely wish to have advanced security in the event that judgment is granted in their favour. Further the freezing orders have handicapped their businesses.
- [73] In **Blackstone Civil Practice** 2002 at paragraph 38.3, the Learned Authors outlined the factors to be considered in relation to the issue of risk of dissipation of assets to include the following:
- (a) Whether the Defendant is domiciled or incorporated in a tax haven or a country with tax company law.
 - (b)
 - (c) Whether the evidence supporting the substantive cause of action discloses dishonesty or a suspicion of dishonesty on the part of the Defendant. This is a weighty factor when it is present, and this is so whether or not it is pleaded as fraud (**Guinness PLC v Saunders** [1987] The Independent 15th April 1987);
 - (d) Whether there is evidence that the Defendant has been dishonest, outside the actual cause of action. This includes matters such as contrivances designed to generate an appearance of wealth;

- (e) Past incidents of debt default by the Defendant, although it is not essential for the Claimant to have such evidence (Third Chandris Shipping Corporation v Urimarine S.A. [1979] Q.B. 645);
- (f) Evidence that the Defendant has already taken steps to remove or dissipate its assets (Aiglon Ltd v Gau Shan Co. Ltd [1993] 1 Lloyd's Rep. 164).

[75] It is not disputed that the Defendants are citizens of Saint Vincent and the Grenadines who are domiciled in Saint Vincent and the Grenadines. There is no evidence that the Defendants have been dishonest outside the actual cause of action, that there has been any contrivances designed to generate the appearance of wealth, or past incidents of debt default, or that the Defendants have taken steps to remove or dissipate their assets. What the Claimants allege is that the evidence supporting the substantive cause of action discloses dishonesty or suspicion of dishonesty on the part of the Defendants. The evidence referred to consist of e-mails and invoices which appear to show markup in the cost of materials. The Defendants have denied any act of dishonesty and have deposed that the Order has inhibited them from effectively carrying on their business.

[76] In Rochamel's case at paragraph 43 and 44 the Court referred to one of the situations in which it would be inappropriate to grant a freezing injunction is the situation referred to in The Angel Bell Q.B. 65 as being where the Defendant would be prevented from carrying on his business even if the effect of the Claimant succeeding in the claim would be to render the Defendant in solvent. Also Cooke J. in Hurrell's case stated at p. 20 that

"In assessing the risk of dissipating, the Court is concerned with the risk of dissipation which is unjustifiable not with the use of assets to pay genuine indebtedness to others... In assessing the risk of dissipation the Court is concerned with the risk of dissipation which if it were to take place would be unjustifiable, not to the overall risk of whether the asset will be preserved intact until judgment in the action, including the risk of proper expenditure."

- [77] In effect the Claimants submission is that because of the evidence in support of the claims show dishonesty or suspicion of dishonesty there is a risk of dissipation which is unjustifiable.
- [78] While this is a weighty factor, I am also reminded that a freezing order has the capacity to impair or restrict the business of the Defendants. It is not disputed that the Defendants have assets other than their bank accounts in Saint Vincent and the Grenadines. It is not disputed that both Defendants have a house in Saint Vincent and the Grenadines. It is also not disputed that the First Defendant invested US\$112,674.84 in the Project. There is no evidence that the Defendants have taken any steps to remove or dissipate their assets in Saint Vincent and the Grenadines. Having regard to all the circumstances in this case I am of the opinion that it would be inappropriate to grant the freezing orders sought.
- [79] In relation to costs both the Claimants and the Defendants have partial success therefore I find that each party should bear their own costs.
- [80] In view of the above the Court makes the following orders:
- (1) The Application to stay all proceedings is dismissed.
 - (2) The Freezing Orders granted on the 1st September 2010 and amended on the 1st October and the 15th December 2010 are hereby discharged.
 - (3) The Order granted on the 1st September 2010 and amended on the 1st October and 15th December 2010 is continued in the following terms until the trial of the claim:
 - (a) The Defendants are hereby restrained from destroying, tampering with, concealing, or parting with possession, power, custody or control of the listed items.

(b) The Defendants are hereby restrained from entering onto the properties owned and under the control of the Claimants situate at Mt. Pleasant and Hope Bequia.

(4) Each party will bear their own costs.


.....
Geriel Thom
HIGH COURT JUDGE