[2010] JMCA App 21

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 99/2010

APPLICATION NO 148/2010

BETWEEN	**AGRO EXPO FARMS LIMITED**	**APPLICANT**
AND	**ROCKWILL CONCRETE SERVICES LIMITED**	**RESPONDENT**

Miss Carol Davis for the applicant/appellant

Mrs Georgia Gibson-Henlin instructed by Henlin Gibson Henlin for the respondent

28 September and 16 November 2010

IN CHAMBERS

HARRISON, JA

[1] In this case, Agro Expo Farms Limited (the applicant) has brought a claim against Rockwill Concrete Services Ltd. (the respondent) seeking damages totaling $18,986,128.00 in respect of breach of a commercial lease agreement between the parties. The application before me is one in which the applicant is seeking the grant of a freezing order pending hearing of an appeal from the decision of Straw J., who on 27 July 2010 discharged a freezing order made by Rattray J.

[2] The grounds on which the applicant seeks the Order are:

> "1. The Appellant has filed appeal against the Order of the Honourable Ms. Justice Straw discharging the Freezing Order made by Rattray J.
>
> 2. The Applicant has a good chance of success in the appeal, and the appeal will be made nugatory if the application is not granted.
>
> 3. The Learned Judge in Chambers discharged the injunction although she found that the Appellant had a good arguable case, and indeed the Defendant virtually admitted that substantial sums were due to the Claimant for outstanding rent, for mine taxes not paid, and for equipment. The Learned Judge however said that there was insufficient evidence that there was a real risk that a judgment awarded in favour of the Respondent would remain unsatisfied.
>
> 4. The Learned Judge in chambers erred in discharging the injunction, because the evidence before her included that the Respondent was in fact disposing of its equipment. In particular it was not denied that the Respondent was selling its crushing plant, which is the main piece of equipment used in its business. In circumstances where the main equipment is being sold, a reasonable inference is that the Defendant was going to be going out of business, such that any judgment which the Defendant would obtain would be unsatisfied if the said equipment (which is the only realizable assets of the Defendant) was sold off."

[3] I turn now to give a brief summary to the background of the application. The claim form alleges inter alia, that there is breach of the lease agreement with respect to the applicant's real property and equipment located at land known as Burlington Estate registered at Volume 1284 Folio 360 of the Register Book of Titles. The applicant seeks inter alia, orders for possession of the land on which an aggregate plant is located, a

freezing order to restrain the respondent from disposing of, transferring, charging, or in any way whatsoever dealing with or removing the equipment located on the property without the consent of the applicant, damages and special damages for breach of contract.

[4] An exparte notice of application for a freezing order was filed by the applicant in the Supreme Court. It was supported by an affidavit sworn to by Davis Phillipson on 16 June 2010, and he deponed inter alia:

> "1 …
>
> 5. The Defendant has paid rent spasmodically, such that he is in arrears. In breach of the agreement the Defendant is in arrears for 7 months, from 1st December 2009 to 1st June 2010 and continuing. The total sum due for rent is $4,853,625 and continuing. Further the sum of $849,384.37 is due for GCT.
>
> 6. Further by the schedule attached to the lease the Defendant agreed to maintain in serviceable condition the equipment leased to it. In breach of the said agreement the Defendant has permitted the said equipment to become unserviceable, such that it is in need of repairs, and in some instances replacement.
>
> 7. Further at Article VI of the said agreement the Defendant was to pay all applicable taxes including quarry taxes with respect to the leased property, including quarry taxes in the name of the Claimant.
>
> 8. In breach of the agreement the Defendant has failed to pay the quarry tax as agreed, such that quarry tax for 1 year and 1 quarter being $1,490,621.93 is due from the Claimant to the Ministry of Mines and Geology for outstanding quarry taxes up to 31st December 2009. A further sum of $496,874 at an average rate of $124,218.49 and continuing is due for

the period up to 30th April, 2010. The total outstanding quarry taxes are therefore $1,987,496.00. A copy of letter received from the Ministry of Mines is attached marked 'DP3.'

9. Further by failing to pay the quarry tax, the Defendant has caused the Claimant (in whose name the quarry license is registered) to lose its said quarry license, thus causing it further loss and damage.

10. In further breach of the agreement, the Defendant has failed to keep the equipment rented by it in serviceable condition. I have been involved in the mining industry for in excess of 15 years, from my experience I am familiar with the cost of repairing the equipment, which I estimate as follows:

    ….

    In the circumstances I verily believe that the Defendant owes my company in excess of $18,000,000 with respect to all outstanding items.

11. The Defendant owns equipment which is currently located on the Claimant's property at Burlington Estate aforesaid. On 14th April, 2010, at a meeting between Mr. Phillipson and Mr. Arthur Williams at the Golden Bowl Restaurant the Defendant's Managing Director, Mr. Arthur Williams threatened that in the event that the Claimant served the Defendant with Notice to Quit, the Defendant would remove and dispose of all of its equipment located on the leased premises such that the Claimant would be unable to recover any judgment it obtains against the Defendant. Mr. Williams told me that he had already identified buyers.

    …

13. I have now served a Notice to Quit on the Defendant, [sic] The Notice to Quit was served on 29 May, 2010, and was received by Mr. Young, who is the Security Guard at the premises. A copy of the Notice to Quit was also nailed on to the office door. I am

informed by Mr. Michael Mangaroo, who is the Manager at Defendant's plant, that a copy of the said Notice to Quit was given to Mr. Arthur Williams. I have since spoken to Mr. Williams, and he told me that he did not intend to leave in the 30 days I attach marked "DP4" Notice to Quit and document signed by Mr. Young acknowledging receipt of same.

14. Since receiving the Notice to Quit, in accordance with his threat, Mr. Williams has been seeking to make arrangements to move the equipment. I am informed by Mr. Mangaroo the Defendant's manager that Mr. Williams has started to dismantle the bases on which certain of the equipment is mounted, so that they can be removed. I believe that this is in accordance with his threat that he would remove and dispose of the equipment in the event that I terminated his lease, such that my company would not be in a position to recover anything on any judgment that it might obtain.

15. I verily believe that the Defendant has no other assets within the jurisdiction, other than the equipment located on the leased premises.

16. The Claimant owns property herein known as Burlington Estate herein [sic] which is in excess of 400 acres. The said property is valued at in excess of US$9m. In the circumstances the Claimant has resources more than sufficient to give an undertaking to abide by any order as to damages caused by the granting or extension of this injunction, and I so undertake on behalf of the Claimant.

..."

[5] On the basis of material contained in the affidavit (supra), Rattray J., granted the freezing order with liberty to apply to vary or discharge this order.

[6] A notice of application to discharge Rattray J's exparte order, was filed 9 July

2010. The affidavit filed in support, joined issue with the allegations deponed to in the affidavit of Mr Phillipson. Mr Arthur Williams, managing director of the respondent, deponed inter alia:

> "1 …
>
> 7. The Defendant agreed to pay an increased monthly rental of $645,000.00 per month in December of 2007. I am not aware of any further review or agreement to increase the rent to $693,375.00 per month as alleged.
>
> 8. Accordingly, the Defendant is not in arrears of rent in the amount alleged in Paragraph 5 of the said Affidavit.
>
> …
>
> 10. In relation to Paragraph 8 of the Affidavit of David Phillipson, the Defendant has not paid quarry tax for one (1) year and one (1) quarter but does not otherwise admit the contents of the said Paragraph.
>
> 11. In answer to Paragraph 9 of the said Affidavit, I say that the Defendant has not caused the Claimant to lose its quarry licence or to incur any loss or damage. The Defendant is otherwise unable to say what the reason is for the loss of the licence. Further, about two (2) months ago the Defendant and the Ministry of Mines and Geology orally agreed a payment plan in relation to the quarry taxes and the Defendant as already paid the sum of $400,000.00 to the Ministry of Mines and Geology. A copy of the receipt for payment of the quarry tax is being shown to me and marked "A.W. 1"
>
> 12. I do not agree with Paragraph 10 of the Affidavit of David Phillipson, and I say that the Defendant received the 50 HP water pump from the Claimant in a state of disrepair, and the cost of repairing it is estimated at approximately $95,000.00. Further in

relation to paragraph 10, I say that the Defendant does not owe the Claimant $18,000,000.00 or any sum in excess thereof.

13. It is true that the Defendant owns equipment that is located on the Claimant's property as stated in Paragraph 11 of the Phillipson Affidavit. However, I did not threaten the Claimant's representative as alleged. I met with Mr. Phillipson on 14th April 2010 at the Golden Bowl Restaurant. The meeting was called by Mr. Phillipson. The purpose of that meeting was to discuss changing from a landlord and tenant relationship to a partnership because of some of the issues raised herein including the quarry taxes. In this regard, Mr. Phillipson proposed to acquire 50% ownership interest in the Defendant Company. I refused to accede to his proposal. I did not threaten to remove or dispose of my company's equipment that is on the Claimant's property. In addition to this, at the time of the meeting there was no discussion about the selling of the equipment because the discussion included our joint interest that is Mr. Phillipson and I (on behalf of the Defendant) in acquiring export orders for the aggregate produced from the Claimant's property. The equipment is necessary for that arrangement to work and as such I did not and could not have told him that I have identified buyers for the equipment. Mr. Phillipson was upset because I refused to agree to fifty (50%) but I told him to calm down and we would discuss the percentage at a later date. He left the meeting in a huff. If I had agreed to a fifty (50) percent interest this application would not have been filed because the intention was to terminate the lease and continue as 'partners.' I did not threaten the Claimant as alleged.

14. The values ascribed to the Defendant's equipment that are on the Claimant's property is inaccurate. I crave leave of this honourable court to refer to the Affidavit of Assets that is filed herein.

15. The Defendant denies that there is any intention to sell or transfer the equipment to avoid any judgment.

> The discussion was as stated above and I fully intended to have further discussions with Mr. Phillipson regarding the percentage.
>
> …
>
> 17. I have not as alleged in Paragraph 14 of the Affidavit of David Phillipson, made attempts to remove or dispose of my company's equipment which is on the Claimant's land for the reasons aforesaid in terms of the time that it would take for me to remove from the premises.
>
> …
>
> 21. That I have no intention of removing or disposing of the Defendant's equipment with a view to avoiding judgment in this matter.
>
> 22. That in the ordinary course of business we sell and purchase equipment from time to time. It is always in our contemplation in the ordinary course of business. This is because we do so to assist with our operational costs, servicing debt and recurring obligations such as rent and to the bank or other third party suppliers or simply to fund the acquisition of new equipment. In this case any sale will be in the ordinary course of business and not to avoid judgment as alleged by the Claimant.
>
> …"

[7] The respondent filed an affidavit on 15 July 2010, in response to the above affidavit filed by Mr Williams and has really joined issue with the allegations relied on by Mr Williams in the above affidavit.

[8] On 16 July 2010, Morrison J., after hearing the attorneys at law for the parties, extended the order of Rattray J., until 26 July 2010. The matter came on hearing before Straw J., on the latter date, and as I have said before, the exparte freezing order was

discharged. Leave to appeal this decision was granted. I have not had the benefit of a written or recorded oral judgment from Straw J. Miss Davis has stated in her written submissions that the learned judge did give oral reasons for her decision. The main reason she said for granting the discharge is that the learned judge did not consider that there was sufficient evidence before her that the respondent was disposing of its assets such that the applicant would be unable to recover any judgment that it might obtain against the defendant.

[9] The mareva injunction (now known as a freezing order), is an extraordinary remedy and in the exercise of granting such an order, a court should be mindful of the burden it would cast upon a defendant at a stage when there was no final adjudication of the plaintiffs' rights. So far as concerns defendants who are within the jurisdiction of the court and have assets here, it is well-established that the court should not, in advance of any order or judgment, allow the creditor to seize any of the money or goods of the debtor or to use any legal process to do so.

[10] In **Ninemia Maritime Corp v. Trave Schiffahrtsgesellschaft mbH & Co. K.G. The Niedersachsen** [1984] 1 All E.R. 398, Mustill, J., after examining and considering statements in a number of cases cited in arguments, at pages 402-3 said:

> "These cases are not easily reconciled, but to my mind they establish that the strength of the plaintiff's case is relevant in two distinct respects: (i) the plaintiff must have a case of a certain strength, before the question of granting Mareva relief can arise at all. I will call this the 'threshold'; (2) even where the plaintiff shows that he has a case which reaches the threshold, the strength of his case is to be weighed in

> the balance with other factors relevant to the exercise of the discretion. It seems to me plain that the second proposition is justified by common sense and by the authorities."

[11] It is also not enough for the claimant to assert a risk that the defendant's assets will be dissipated. He must demonstrate this by solid evidence - see **Jamaica Citizens Bank Limited v Yap** (1994) 31 JLR 42. In discussing the requirements for the grant of a freezing order the court held in that case that the following must be established:

> "... first, that the plaintiff has a good arguable case, the standard of which is evidence which is more than barely capable of serious argument...and second, by "solid evidence", that there is a real risk that the assets will be dissipated, either by removal or in some other way and that consequently a judgment or award in favour of the plaintiff would remain unsatisfied."

[12] In **Barclay-Johnson v. Yuill** [1980] 3 All E.R. 190, a mareva injunction was granted and the court held inter alia, that the grant of such an injunction was not barred merely because the defendant was not a foreigner or a foreign-based person, although the defendant's nationality, domicile and place of residence could be material to a greater or lesser degree in determining whether there was a real risk that the assets would be removed from the jurisdiction. The essence of the jurisdiction was the existence of a real risk that the defendant would remove his assets from the jurisdiction and thereby stultify the judgment sought by the plaintiff.

[13] In the course of his judgment Sir Robert Megarry, V.C., said (page 194):

> "It seems to me that the heart and core of the Mareva injunction is the risk of the defendant removing his assets

> from the jurisdiction and so stultifying any judgment given by the courts in the action. If there is no real risk of this, such an injunction should be refused; if there is a real risk, then if the other requirements are satisfied the injunction ought to be granted. If the assets are likely to remain in the jurisdiction, then the plaintiff, like all others with claims against the defendant, must run the risk, common to all, that the defendant may dissipate his assets, or consume them in discharging other liabilities, and so leave nothing with which to satisfy any judgment. On the other hand, if there is a real risk of the assets being removed from the jurisdiction, a Mareva injunction will prevent their removal. It is not enough for such an injunction merely to forbid the defendant to remove them from the jurisdiction, for otherwise he might transfer them to some collaborator who would then remove them; accordingly, the injunction will restrain the defendant from disposing of them even within the jurisdiction."

and later:

> "Naturally the risk of removal of assets from the jurisdiction will usually be greater or more obvious in the case of foreign-based defendants, and so the jurisdiction has grown up in relation to them. But I cannot see why this should make some requirement of foreignness a prerequisite of the jurisdiction. If, for example, an Englishman who has lived and worked all his life in England is engaged in making arrangements to emigrate and remove all his assets with him, is the court to say 'He is not a foreigner, nor is he yet foreign-based, and so no Mareva injunction can be granted'?"

[14] In **Yap's** case (supra) Rattray P. stated at page 50:

> "If the grant of the Injunction inflicts hardship on the defendant, his legitimate interests must prevail over the interest of the plaintiff. However, these legitimate interests must be established by the defendant not just as an allegation, but by an identification of these interests and the hardship which he is suffering, or, is likely to suffer since these are most likely within the peculiar knowledge of the defendant himself."

[15] Regarding the merits of the substantive claim, the minimum threshold for the exercise of the discretion is the establishment of a 'good arguable case'. According to Kerr LJ in the **Ninemia** case, the expression means "a case which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50 per cent chance of success". This test will not be satisfied if the claimant does not have the evidence to substantiate the case relied upon, or if the case is likely to be struck out and may not be satisfied if there is an arguable defence.

[16] In **Erinford Properties Limited & Another v. Cheshire County Council** [1974] Ch. 261 Megarry J., stated at page 268:

> "There will, of course, be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on. But subject to that, the principle is to be found in the leading judgment of Cotton L.J. in **Wilson v. Church** (No. 2), 12 Ch.D. 454, where, speaking of an appeal from the Court of Appeal to the House of Lords, he said, at p. 458, "... when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory."

[17] Such being the law, I will now consider the submissions in the matter before me.

[18] Miss Davis submitted that the applicant has a good arguable case. There is a claim in which the respondent is said to be indebted to the applicant in the sum of $4,853,872.00 and continuing in respect of rent arising from the lease. There is also an

amount of $11.1M which is due for equipment that has been rented and which equipment the respondent has failed to keep in serviceable repair. There is also an outstanding sum of $1.4M for outstanding quarry taxes which the respondent admits but says that he has paid $400,000.00 of that sum.

[19] Miss Davis argued that there is evidence which clearly indicates the probability of dissipation of disposal of assets. The respondent, she said, had threatened that if he was served with notice to quit, he would remove his equipment from the leased premises. In fact, Miss Davis argued that since the respondent has been served with notice to quit, there has been the dismantling of bases in order to facilitate removal of the equipment. The respondent, on the other hand, has responded to say that it has not made attempts to remove the equipment for the reasons stated by the appellant. Its managing director has stated at paragraphs 21 and 22 respectively in his affidavit (supra):

> "21. That I have no intention of removing or disposing of the Defendant's equipment with a view to avoiding judgment in this matter.
>
> 22. That in the ordinary course of business we sell and purchase equipment from time to time. It is always in our contemplation in the ordinary course of business. This is because we do so to assist with our operational costs, servicing debt and recurring obligations such as rent and to the bank or other third party suppliers or simply to fund the acquisition of new equipment. In this case any sale will be in the ordinary course of business and not to avoid judgment as alleged by the Claimant."

[20] Mr Williams further deponed that on 14 April 2010, there was discussion

between the parties to change the status of landlord and tenant between them to one of a partnership. According to him, this has not been achieved because there was disagreement regarding the percentage ratio. He further deponed that had he agreed to a 50 percent holding between them, this application would not have been filed.

[21] However, in an affidavit sworn to on 15 July 2010, Mr Phillipson deponed:

> "11 … since the filing of my previous affidavit I am informed by Mr. Leo Cousins of Lyndford Mining Limited, that the Defendant has been speaking to him with respect to the sale of the Defendant's crushing plant. No sale price was agreed, But I am informed by Mr. Cousins that the Defendant is to date still pursuing the sale."

[22] Miss Davis submitted that in the circumstances, there is no question that the appellant has a good arguable case. In fact, she submitted that the claimant has a strong case, and this should be considered in determining whether the injunction should be granted.

[23] Mrs Gibson-Henlin, for the respondent, has submitted that no 'solid evidence' has been adduced by the applicant to show that there is a real risk that the assets will be dissipated either by removal or in some other way so as to frustrate a judgment. She referred to **Yap's** case (supra). She further argued that the decision in **Half Moon Bay Ltd. v Earl Levy** (1997) 34 JLR 215 has given specific guidance as to the nature of the evidence required to justify the grant of a freezing order. In this regard the learned Chief Justice in discharging the freezing order in that case stated:

> "unsupported statements or expressions of fear by the plaintiff that if a defendant is permitted to sell, the proceeds of the sale could be removed from the jurisdiction is not sufficient to establish the risk factor. Mere intention by the defendant to sell will not suffice either."

[24] Mrs Gibson-Henlin argued that the idea of the respondent who is said to be moving in face of a notice to quit is too far reaching a proposition in support of a freezing order. She submitted that the value of the respondent's equipment is a factor that would have been open to Straw J., to have taken into consideration and that it was also a factor that this court should consider. In the circumstances, she argued that there is no basis for this court to grant a freezing order pending the appeal and that the application should be refused with costs to the respondent.

[25] There is no question that the respondent has assets within the jurisdiction and that its main assets are the equipment, with respect to which the applicant seeks the freezing order. There is no evidence which suggests that the respondent is taking steps to remove its equipment out of the jurisdiction so the real issue therefore, is whether there is a real risk of dissipation or disposal of assets within the jurisdiction by the respondent before the appeal is heard.

[26] There is no doubt that the crushing plant, (the aggregate processing plant) is the most expensive piece of machinery that is owned by the respondent. Miss Davis has argued that once this equipment is sold, the company would no longer be in a position to crush aggregate, and would therefore have no continuing source of income. Mr Phillipson has deponed however, that this piece of equipment "is likely to be very

difficult to sell, and further the defendant has himself informed me that the bank has a lien on this equipment". The fact that it may prove difficult to sell is an important factor to bear in mind.

[27] Of course, I will also have to consider the assertion made by Mr Williams that it is normal for the respondent in the course of business, to sell and purchase equipment from time to time in order to assist in payment of its obligations such as rent.

[28] Another factor for consideration is the respondent's indebtedness to the applicant. The sum claimed in respect of loss and damages is stated to be $18,986,128.00 but in my judgment, this sum must be weighed against the total value of the respondent's assets as set out in its affidavit of assets sworn to by Mr Williams on 9 July 2010. Mr Williams has stated that the Gator Crushing plant is valued at $51,000,000.00. Mr Phillipson has deponed at paragraph 12 of his affidavit sworn to on 16 June 2010 on the other hand, that the approximate value of the stone crushing equipment is $40,050,000.00. The respondent has also listed other valuable assets which are valued at approximately $49,000,000.00. The applicant has however put a further value of approximately $9,000,000.00 on motor vehicles which it says, are owned by the respondent.

[29] Whether it is right or just to exercise this particular jurisdiction must depend on all the circumstances of the case and not, in my judgment, on any single factor. However, when one takes all of the above factors into consideration, it is in my judgment impossible to say that this is a case in which it would be proper to order a

freezing order in respect of the respondent's assets pending the appeal. Although I have not had the benefit of a written or recorded oral judgment from Straw J., it is my view that there was ample evidence to support the order made by her. I would say that the 'solid evidence' which is required to support the real risk of dissipation, is lacking in this application. I adopt the dicta of the learned Chief Justice in the **Half Moon Bay** case (supra) when he said, "mere intention by the defendant to sell, will not suffice…" in matters concerning the grant of a freezing order. Moreover, it would appear from the evidence before me, that if one were to reduce the value of the stone crushing equipment from the overall value of its assets, the respondent seems to have more than sufficient assets to cover its indebtedness to the applicant.

[30] In the circumstances, the application is dismissed with costs to the respondent to be taxed if not agreed.