[2014] JMCA Civ 16

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 40/2013

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MRS JUSTICE LAWRENCE-BESWICK JA (Ag)

BETWEEN	**TRI-STAR ENGINEERING COMPANY LIMITED**	**APPELLANT**
AND	**ALU PLASTICS LIMITED**	**1ST RESPONDENT**
AND	**PAMELA JOSEPHS**	**2ND RESPONDENT**
AND	**JUDITH JOSEPHS**	**3RD RESPONDENT**

Jerome Spencer instructed by Patterson Mair Hamilton for the appellant

Maurice Manning and Miss Michelle Phillips instructed by Nunes Scholefield Deleon & Co for the respondents

5, 7, 28 February and 11 April 2014

PANTON P

[1] I agree with the reasoning of Lawrence-Beswick, JA (Ag) in dismissing this appeal, and I have nothing to add.

MORRISON JA

[2] I have had the advantage of reading in draft the judgment prepared by Lawrence-Beswick JA (Ag). I agree with it and there is nothing that I can usefully add to it.

LAWRENCE-BESWICK JA (Ag)

[3] After an ex-parte application by the appellant, an order was made to freeze the assets of the respondents. Subsequently, at a continuation of the hearing, after submissions of all the parties and re-considering the issue, the learned judge refused to extend the order. This is an appeal from that refusal.

[4] On 28 February 2014, after considering arguments in respect of the appeal, we made the following orders: The appeal is dismissed. The order of Mangatal J is affirmed. Costs to the respondents to be taxed if not agreed. We promised to put our reasons in writing. This is a fulfillment of that promise.

Background

[5] On 21 December 2011, Tri-Star Engineering Company Limited (Tri-Star) contracted with ATL Automotive Limited to construct two separate showrooms - an "Audi Showroom" and a "Volkswagen Showroom". The project was to be completed by 31 October 2012. The contract stipulated severe penalties against Tri-Star if it did not meet the completion date.

[6] On 20 March 2012, Tri-Star sub-contracted with Alu-Plastics Limited (Alu), which agreed to purchase and install curtain walls, aluminium windows and doors for the showrooms in the building for an amount of $40,434,505.00.

[7] Tri-Star paid Alu an amount of $20,217,252.50 as mobilization payment. The agreement was that that sum would be repaid to Tri-Star by equal deductions from the sums which Alu was to be paid under the sub-contract. As time passed, Tri-Star formed the view that Alu would not be in a position to fulfill the sub-contract. The material for installation had not arrived from abroad and Aluver, the suppliers, had refused to ship them without payment being made for them. Alu had not paid. Also, Alu refused to repay to Tri-Star the balance of money which had not been spent on the purchase of material.

[8] Tri-Star contacted Alu's overseas suppliers to ascertain the details of the arrangements and between 25 October and 30 November 2012, Tri-Star claims that it paid $10,488,141.80 for the remaining material.

[9] Alu eventually provided Tri-Star with the invoices with payment amounts obliterated. They offered no assistance to Tri-Star to complete the necessary work. Neither did they account for the manner in which the mobilization payment had been spent. The items were not supplied and no money was returned to Tri-Star. The completion date was not met. Tri-Star alleged that it incurred a liability of $87,000.00 per day from 23 December 2012 and continuing as liquidated damages for the overrun from the completion date.

[10] Thereafter, on 25 February 2013, Tri-Star filed suit against Alu and its two directors, Pamela Josephs and Judith Josephs. Tri-Star claimed against Alu, inter alia:

> "(a) The sum of $10,488,141.80 for breach of trust.
>
> (b) Alternatively, the sum of $10,488,141.80 for breach of contract.
>
> (c) The sum of $5,133,000.00 and continuing at the rate of $87,000.00 per date [sic] being further damages for breach of contract."

[11] In the suit, Tri-Star claimed further against Ms Pamela Josephs and Ms Judith Josephs, inter alia:

> "(a) The sum of $10,488,141.80 for the dishonest assistance of the 1st Defendant's breach of trust."

[12] The next day, on 26 February 2013, Tri-Star filed an "Urgent Without Notice Application for Freezing Order". On 1 March 2013, at the conclusion of the hearing, the learned judge made an order that:

> "1. The 1st Defendant is restrained from removing, disposing of and/or dealing with its assets in Jamaica whether by itself, its servants and/or agents or howsoever insofar as this does not exceed the sum of J$15,621,141.80 until March 7, 2013.
>
> 2. The 2nd and 3rd Defendant [sic] are restrained from removing, disposing of and/or dealing with their assets in Jamaica whether by themselves, their servants and/or agents or howsoever insofar as this does not exceed the sum of $10,488,141.80 until March 7, 2013 …"

[13] The order also provided that it did not prohibit the defendants from spending reasonable sums towards their ordinary business expenses or a reasonable sum on legal advice and representation as agreed with the claimant's attorney-at-law. The application would be further considered on 7 March 2013.

[14] On 7 March 2013, an order was made that the further consideration of the freezing order was adjourned until 18 March 2013 and that variations of 1 March order were allowed to permit withdrawal of specified sums from the Bank in respect of legal fees; ordinary business and living expenses. The hearing on 18 March 2013, was adjourned until 21 March 2013, when the inter partes hearing on the application for further consideration of the freezing order commenced. On 24 April 2013, the learned judge refused Tri-Star's application for an extension or continuation of the freezing order until trial.

Appeal

[15] On 6 May 2013, Tri-Star filed a notice of procedural appeal, appealing against that order of 24 April and thereby seeking an extension until trial of the freezing order which had been granted ex parte on 1 March 2013 (as varied and extended). This appeal is therefore against the manner in which the learned judge exercised her discretion in refusing to extend the freezing order.

[16] In addition to an order to set aside the freezing order, Tri-Star sought to obtain additional orders to restrain Alu from removing, disposing of and/or dealing with its assets in Jamaica, whether by itself, its servants and/or agents or howsoever insofar as

this does not exceed the sum of J$15,621,141.80 until the determination of the claim. Also Tri-Star sought an Order for Ms Pamela Josephs and Ms Judith Josephs to be similarly restrained insofar as the assets did not exceed the sum of J$10,488,141.80, until 7 March 2013.

The law

[17] It is well established that the appellate court will not lightly interfere with the exercise of discretion by a judge of the lower court on an interlocutory hearing.

[18] This court encapsulated the principles guiding any such interference when, in **Attorney General of Jamaica and John McKay** [2012] JMCA App 2, Morrison JA said:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference-that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

It is with these principles in mind that I approach the consideration of this matter.

The judgment

[19] In her judgment, the learned judge detailed the reasons for the manner in which she exercised her discretion. She regarded her concern as being primarily with the question as to whether or not to continue the freezing order until trial and not so much whether she should discharge it. She considered firstly, if there had been non-

disclosure and said that non-disclosure would be relevant to the former question and would contribute to her assessment of Tri-Star's conduct when she determined how to exercise her discretion (para [36] of judgment).

Non-disclosure

[20] In the subcontract was a clause stating that the parties would refer their disputes to arbitration. That had not been brought to the attention of the learned judge. Consequently, she stated:

> "However, the fact of the existence of an arbitration clause was plainly a point that ought to have been brought to my attention specifically in the Affidavit. Indeed, that point ought to have been accompanied with an explanation as to why the Claimant Tri-Star, the party who expressly agreed to go to arbitration in the Sub-Contract, should now be approaching the Court for resolution of its disputes with the other party to the Sub-Contract Alu-Plastics. Alternatively, the Affidavit could have gone on to spell out why the claim does not fall within the ambits of the arbitration clause or that could have been addressed in submissions." (para [38] of the judgment]

[21] The learned judge stated further that the court had been given the impression that Tri-Star did not know how to contact Alu, and that it was uncertain whether it was still operating when the attorneys-at-law for both companies had been conducting "without prejudice" negotiations via telephone (para [42] of judgment).

[22] The learned judge found that there had been no attempt by Tri-Star to address the issue of non-disclosure, although the respondents had filed an application for the freezing order to be discharged on the ground of non-disclosure.

[23] After examining the issue of non-disclosure, the learned judge concluded:

> "However, in this case, I do not see any evidence of conscious impropriety. Some omissions may simply have been as a result of an error of judgment." (para [44] of judgment)

[24] She regarded the non-disclosure as facts to be considered in what she described as:

> "the 'melting pot' of considerations to be stirred before deciding how justly to exercise [her] discretion and in deciding whether the freezing order should be extended or continued until trial." (para [45] of judgment)

Breach of trust

[25] The next issue with which the learned judge treated was whether Tri-Star had a good arguable case against the respondents. As it concerns the claim for breach of trust by Alu, the judge rejected the submission that the payment under the mobilization clause was a loan through an advanced payment which should have been repaid to Tri-Star. She dismissed the argument that the payment had created a trust for the sole purpose of Alu as trustee, procuring materials for the beneficiary, Tri-Star.

[26] The learned judge reasoned that there was

> "nothing to indicate that the sum was to be used exclusively for the purpose of procuring materials" (para [50] of judgment).

[27] In that event, she concluded, no trust had been created, and therefore Tri-Star had not established a good arguable case based on breach of trust.

[28] The learned judge went on to consider whether there was a good arguable case against the respondents Pamela and Judith Josephs concerning their assistance of breach of trust. She opined that: without the trust argument there can be no claim against the second and third defendants for dishonest assistance of the first defendants breach of trust.

[29] The learned judge placed reliance on a line of cases including those discussed in **Barclay's Bank Limited v Quistclose Investments Limited** [1970] AC 567 and also **Twinsectra Limited v Yardley and others** [2002] UKHL 12, concerning breach of trust and concluded that there was no good arguable case against Alu or the other respondents in that regard.

Liquidated damages

[30] The learned judge further concluded that there was no evidence of Tri-Star being liable for liquidated damages for failing to complete the works by the prescribed date. The main agreement provided that before there could be a claim for liquidated damages on Tri-Star itself, there had to be an architect's certificate to show that there had been a failure to complete the project in time. In any event, the project was completed by early February, so the learned judge was of the view that a claim for liquidated damages could not be sustained beyond the date of completion of the work. Consequently, the subcontractor Alu, would also not be liable for any such liquidated damages, and Tri-Star's claim for liquidated damages was thus not sustainable.

Breach of contract

[31] The learned judge then considered Tri-Star's claim that Alu had breached its contract with it by failing to install the windows, walls and other items by the completion date of 31 October 2012. This failure, it was claimed, resulted from Alu's failure to submit its purchase order to the supplier of the material and to pay for it.

[32] However, Alu explained that the failure was due to Tri-Star's failure to provide in a timely manner, the drawings which were integral to the manufacture of the items. In addition, Alu alleged that Tri-Star interfered with the arrangement which Alu had been enjoying with the supplier and that this caused the supplier to introduce a payment schedule. Up until then, Alu states, it had been up-to-date with its payments.

[33] Alu's argument was that in any event the completion date had been extended to 22 December 2012, and that the installation under the sub-contract was completed by 30 November 2012. Tri-Star had thus unlawfully terminated the contract between them.

[34] The learned judge considered the submission of Tri-Star that, despite those arguments, Tri-Star had a good arguable case because:

> "a. Alu-Plastics failed to pay over the mobilization money as required;
>
> b. It failed to employ reasonable skill, care and diligence in its work and as such the shop-drawings were delayed between May and July 2012;
>
> c. Tri-Star's delay of a week was minor;

d. Despite the shop drawings being approved in July, Alu-Plastics failed to pay down on the Audi showroom materials until September 21st and that no good explanation has been forthcoming for this;

e. When the materials were ready to be shipped, Alu-Plastics ignored Aluver's email and then failed to address the issue of the outstanding amounts due to Aluver; and

f. Most importantly, up to the termination of the contract on November 6th 2012, the completion date for the contract had passed and not one piece of material was even in Jamaica." (para [58] of judgment)

[35] The learned judge concluded:

> "In my judgment, based upon the facts and circumstances of this case, Tri-Star has made out a good arguable case against Alu-Plastics for breach of contract. As to whether such disputes would in fact be covered by the Arbitration Clause agreed to by the parties is quite another matter…" (para [61] of judgment)

[36] She also recognized that Tri-Star could not make any claim against the second and third respondents contractually because it was the company Alu and not the second and third respondents who had made the contract with Tri-Star.

Dissipation of assets and hardship

[37] In concluding the analysis of the case, the learned judge went on to consider the risk of dissipation of assets by Alu. She accepted that Tri-Star need not prove "nefarious interest" of Alu and she examined the evidence as a whole in order to make that determination. She considered Alu's position that Tri-Star was not due a

repayment because it viewed the original payment as being for administrative expenses and any costs associated with starting the subcontract.

[38] Alu had proffered an explanation for each allegation made by Tri-Star to show dishonesty and the explanations caused the judge to conclude at para [71] of the judgment that:

> "… in the circumstances, the position taken by Alu-Plastics cannot be used to demonstrate dishonesty or a real risk that it will dissipate its assets…"

[39] The learned trial judge, in coming to that conclusion, relied on **Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft m.b.H.Und Co.K.G.** [1984] 1 All ER 398 [1983] 1 WLR 1412, there Mustill J (as he then was) stated:

> "It is not enough for the plaintiff to assert a risk that the assets will be dissipated. He must demonstrate this by solid evidence. This evidence may take a number of different forms. It may consist of direct evidence that the defendant had previously acted in a way which shows that his probity is not to be relied on. Or the plaintiff may show what type of company the defendant is (where it is incorporated, what are its corporate structure and assets, and so on), so as to raise an inference that the company is not to be relied on. Or, again, the plaintiff may be able to found his case on the fact that inquiries about the characteristics of the defendant have led to a blank wall. Precisely what form the evidence may take will depend on the particular circumstances of the case. But the evidence must always be there." (at page 406)

[40] At para [75] of her judgment the learned judge said:

> "[I]t cannot be said that Alu Plastics has no defence at all and thus there would be no basis on that ground to find any greater risk of dissipation of assets."

[41] The learned judge did however, make reference to the evidence that there seemed to be intermingling of Alu's funds with the funds of the other two respondents. She observed that:

> "[O]n balance, it seems to me that this is but one of the factors to be taken into account along with others in considering how to resolve this application justly." (para [76] of judgment)

[42] The learned judge acknowledged the hardship being experienced by Alu as a result of the freezing order. Its efforts to conduct business and to service its debts were hampered. She expressed the view that:

> "… the more just course, and the course likely to cause the least injustice, is to refuse an extension or continuation of the freezing order until trial." (para [79] of judgment)

Discussion

[43] Did the judge exercise her discretion wrongly? The grounds of appeal indicate the aspects of the judgment which, it is being argued, are demonstrably wrong.

Ground one

> **"The Learned Judge misunderstood the nature of the evidence led in relation to [sic] nature of the mobilization payment and erred as [sic] matter of law in ruling that the mobilization payment was not held on trust by the 1st Respondent."**

[44] All parties agree that Tri-Star paid the disputed sum to Alu. What is in dispute is the purpose for which it was paid. Tri-Star states that it was paid as mobilization for the specific purpose of procuring and installing the required curtain wall, aluminium windows and doors. Alu also regarded the sum it received as being for mobilization, but included as mobilization the more general costs associated with administration, necessary to start the performance of the sub-contract.

[45] Counsel for Tri-Star argued that, on either account, the payment had been for a particular purpose. The function of the judge was therefore to determine if Tri-Star had a good arguable case that the mobilization payment was held on trust by Alu.

[46] Alu's argument on this ground was that there was no evidence to support Tri-Star's argument that the mobilization payment was for the exclusive purpose of procuring materials.

[47] It is my view that the evidence could properly justify the learned judge's finding that a trust does not exist. She considered that the mobilization payment of 50% of the monies due clearly showed that it was not for a particular purpose of purchasing material. The coincidence would have been too great to result in the cost of the material being exactly 50% of the monies due. She regarded as weak, the argument that the 50% payment was for the precise purpose of procuring material or for another specific purpose. Her reasoning and conclusion cannot be faulted.

Ground two

> "**The Learned Judge erred in concluding that the presence of the freezing order was the cause of any prejudice or hardship to the 1st Respondent."**

[48] Counsel for Tri-Star argued that Alu had failed to provide evidence of enduring any hardship whatsoever and that the learned judge had therefore erred in so finding. On the other hand, Alu's counsel submitted that there was clear evidence that the contracts of Alu were being affected because of the order freezing their assets.

[49] The evidence was that because of the freezing order, Alu was unable to service its debts quickly and to withdraw funds. This effectively stifled its business in what is a small construction industry. This was unchallenged and provided a firm basis on which the learned judge could properly conclude that Alu was experiencing hardship as a result of the freezing order. This ground also fails.

Ground three

> **"In assessing the matter of hardship to the 1st Respondent, the Judge failed to consider the protection conferred by the freezing order which mitigate [sic] any hardship caused by its imposition."**

[50] Tri-Star's counsel argued that the evidence before the judge showed that Alu was being protected from hardship by the presence of the proviso in the freezing order, allowing the release to it of reasonable sums for ordinary business expenses and for legal advice and representation. The undertaking as to damages would also serve to

mitigate any hardship. The decision of the judge that Alu was suffering hardship was therefore wrong.

[51] Alu countered however that despite the purported relief of the proviso, the banks were making detailed enquiries of it before releasing funds and that the hardship was indeed real.

[52] It is true that the evidence is that Alu was to be allowed reasonable sums for ordinary business expenses and for legal expenses. Indeed the order was:

> "This Order does not prohibit the 1st defendant from spending reasonable sums towards its ordinary business expenses or a reasonable sum on legal advice and representation as agreed with the claimant's attorneys-at-law."

[53] This would provide some amount of relief from a total absence of access to funds. However, where an entity has been operating and conducting its business, it is small comfort for it to be permitted only specified expenses, moreso when the amounts of the expenses to be permitted have to be with the agreement of the claimant's attorneys-at-law.

[54] In assessing this matter of hardship to Alu, the judge considered whether the freezing order provided protection and mitigation against any hardship caused by its imposition. She referred to what she described as "the clear hardship that is being experienced by Alu Plastics as a result of the Order" (para [79] of judgment). She reminded herself of the principles referred to by Steven Gee QC in Commercial

Injunctions (5th edn). There, the learned author said (at para [12.050]) that, in deciding whether to grant mareva relief, an important factor to take into account is whether the relief is likely to prevent the defendant from continuing his business or trade. The judge's consideration of the protection provided in the order was thorough and cannot be faulted.

Ground four

> **"In exercising her discretion to refuse the continuation of the Freezing Order against the 1st Respondent, the Learned Judge failed to consider the various omissions and default of the 1st Respondent."**

[55] Evidence of what was described as Alu's consistent acts of default in meeting its payment obligations, and omission to disclose some business affairs, formed the substratum of the fourth ground of appeal. Counsel for Tri-Star referred to the judgment being devoid of any of these "material considerations" in deciding if the order should be discharged.

[56] Counsel for Alu countered that the judgment had in fact made reference to these purported defaults and omissions which showed that the learned judge had given adequate weight to them. Where she had failed to consider difficulties that Alu might have been experiencing with other contracts, she had been correct in so approaching the matter as those instances had no bearing on this matter.

[57] In analyzing the various acts of omissions and default committed by Alu, the learned judge again relied on Gee's Commercial Injunctions. At paragraph [74] of her

judgment, she referred to the author "[making] the point that indebtedness, especially recent default in paying debts, may not signify more than that a defendant is going through a rough financial period".

[58] She continued, at paragraph [74] of her judgment, to quote from the work:

> "The possibility of insolvency does not justify Mareva relief. As a factor it may weigh against it, on the grounds that an injunction would be oppressive because it might deprive the defendant of a last opportunity to put his business affairs in good order again. The fact that a Mareva injunction has been granted over the Defendant's assets may well discourage a bank or other company from lending him money or otherwise coming to his aid." (para 12.039 (iii) (6) at page 355)

[59] The judgment shows a careful consideration of the defaults and omissions of Alu. In any event the freezing order is not a method of punishment. Rather, it is a means to protect resources in circumstances adjudged as being necessary.

Delay

[60] Counsel for Alu buttressed his argument that the order was properly made, by reference to the fact that Tri-Star had not applied for an interim injunction pending appeal. Counsel for Alu pointed out that the order refusing to extend the freezing order had been made on 1 March 2013, and it was not until now, many months after, that the appeal is being heard. This, counsel submitted, showed that there was in fact no real or genuine perceived risk of dissipation of Alu's assets.

[61] The time that has elapsed since the order refusing to extend the freezing order until now, with no evidence of actual dissipation of Alu's assets, supports the correctness of the order.

Conclusion

[62] The learned trial judge engaged in a careful discussion of the law concerning the circumstances in which a court may discharge or extend a freezing order. She considered the principle that there should be full and frank disclosure of all material facts known to a claimant, or facts which he would have known if he had made proper enquiries.

[63] The learned judge, in applying the law, relied on several relevant authorities, including the **Half Moon Bay Limited v Levy** CL 1996/H012 delivered 7 May 1997 and also **JamCulture Limited v Black River Morass Development Company Limited** (1989) 26 JLR 244.

[64] In my view, she has demonstrated a clear understanding of the law and of the evidence which was before her and this underpinned her decision to exercise her discretion by not extending the freezing order.

[65] The judgment demonstrates, in my view, that the learned trial judge took into account the interest of all parties and the likely effects of the freezing order on the respondents. She had a basis to conclude as she did and she supported her decision by a full reference to the evidence which was before her and by applying the pertinent law.

[66] The exercise of that discretion was not shown to be demonstrably wrong, nor was it so aberrant that it must be set aside on the ground that the judge was not regardful of her duty to act judicially in coming to that decision. It follows therefore that, in my view, her decision ought not to be disturbed. In these circumstances, we made the order as stated in paragraph [4].