[2010] JMCA App 13

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 87/2010

APPLICATION NO. 133/2010

BETWEEN	**BRITISH CARIBBEAN INSURANCE COMPANY LIMITED**	**APPLICANT/APPELLANT**
AND	**ADVANTAGE GENERAL INSURANCE COMPANY LIMITED**	**1ST RESPONDENT**
AND	**GUARDIAN INSURANCE BROKERS LIMITED**	**2ND RESPONDENT**

Gordon Robinson and Jerome Spencer instructed by Miss Lynda Mair of Patterson Mair Hamilton for Applicant/Appellant

Michael Hylton, Q.C instructed by Michael Hylton & Associates for the 1st Respondent

August 3 & 11, 2010

IN CHAMBERS

HARRIS, J.A.

[1] This is an application by the applicant/appellant for an order for the preservation of the sum of $3,354,841.46 which it states is due and owing to it by the second respondent.

[2] The applicant and the 1st respondent are companies engaged in the business of insurance. The 2nd respondent is an insurance intermediary involved in the business of the introduction of insurances, among other things. On the 16 March, 2010 the 1st respondent brought an action, against the 2nd respondent seeking to recover from it, among other things, the sum of $123,231,806.79. This action was founded upon a brokerage agreement between them. On the 16 March 2010 an interim freezing order was granted in favour of the 1st respondent over the assets of the 2nd respondent for a period of twenty eight days. The order provides, inter alia, that:

> "The defendant whether by itself or by its servants or agents or otherwise howsoever be restrained from disposing of or transferring, charging, diminishing or in any way howsoever dealing with its assets or assets in its name or held on its behalf, wherever situate, and from withdrawing or transferring any funds from its accounts or accounts in its name or held on its behalf, wherever held, save in so far as the value of such assets exceeds the sum of **$123,231,806.79** until April 13, 2010."

[3] On 13 April, 2010 the order was extended until 13 May 2010. On the 29 April 2010 the 2nd respondent brought an application in which it sought the following reliefs:

> "1 That the interim Freezing Order made herein be lifted from the Defendant's account #211842466 held at the National Commercial Bank and account #381-2014 held at First Caribbean International Bank.

2. Further or in the alternative an Order that this Honourable Court varies the interim Freezing Order herein to specifically permit the Defendant to settle its monthly operating expenses.

3. Further or in the alternative the Interim Freezing Order herein be lifted from current account #135-8068 located at First Global Bank Company Limited

4. Further or in the alternative an Order varying the Interim Freezing Order herein to permit the Defendant to remit a sum not exceeding $23,008,403.43 to those insurance companies on whose behalf these sums were collected.

5. …"

[4] On 14 May 2010 Pusey J refused the 2nd respondent's application to vary the freezing order and further extended the freezing order until trial or further order. On the same date the applicant brought an application to intervene in the action brought by the 1st respondent and for an order to vary the freezing order to allow the 2nd respondent to pay the sum of $3,354,841.46 to it from account #381-2021 held by First Caribbean International Bank and from account #2118422466 held by National Commercial Bank on behalf of the 2nd respondent.

[5] On 6 July 2010, the applicant's application to intervene and to vary the freezing order extended on 14 May 2010 was heard by Anderson J, who, upon a preliminary objection taken by counsel for the 1st respondent, ordered as follows:

"1 British Caribbean Insurance Company Limited is permitted to intervene.

2. British Caribbean Insurance Company Limited's application to vary Freezing Order is dismissed on the Claimant's preliminary objection.

3. Costs payable by British Caribbean Insurance Company Limited to the Claimant to be agreed or taxed.

4. Leave to appeal granted to British Caribbean Insurance Company Limited."

[6] On 12 July 2010, upon a without notice application for an order for attachment of debt dated 7 July, 2010, Anderson J made a provisional order in the following terms:

"IT IS HEREBY ORDERED THAT:

1. The money and investments standing to the credit of the Defendant in the following accounts and with the following institutions are hereby PROVISIONALLY ATTACHED:

   (i) First Caribbean International Bank (Jamaica) Limited current account #381-2014

   (ii) National Commercial Bank Jamaica Limited current account #2118422466

   (iii) National Commercial Bank Jamaica Limited current account #211842415

   (iv) National Commercial Bank Jamaica Limited savings account #214000946

   (v) First Global Bank Limited current account #135-8068

   (vi) First Global Bank Limited current account #135-8142

(vii) UGI Finance and Investments Limited.

2. First Caribbean International Bank (Jamaica) Limited, First Global Bank Limited, UGI Finance and Investments Limited and National Commercial Bank Jamaica Limited (the "Garnishees") are bound by this Provisional Order as soon as the order is served on them (CPR 50.9(2).

3. The Garnishees must not pay any sums to the Claimant until this Provisional Order is made final (CPR 50.9(3).

4. The Garnishees must not pay anything to the Defendant or on its behalf except to the extent that a Garnishee's debt to the Defendant is greater than $102,000,000.00 (CPR 50.9(4).

5. This Honourable Court will consider making a final Attachment of Debt Order on the 9th day of September 2010 at 10 a.m. at the Supreme Court of Judicature for Jamaica, King Street in the parish of Kingston."

[7] The applicant, having been granted leave to appeal, filed the following grounds of appeal:

"1. The Learned Judge erred in determining that the issue to be determined on the Intervening Third Party's/Appellant's application to vary Freezing Order Filed on May 14, 2010 was the same issue determined by the Honourable Mr. Justice Pusey on the Second Respondent's Notice of Application for Court Order filed on April 20, 2010 in the absence of any evidence as to what was determined by the Honourable Mr. Justice Pusey.

2. The learned judge erred in deciding that the Intervener/Appellant's application was barred by virtue of issue estoppel when on the face of it the matter decided by the learned judge the

Honourable Mr. Justice Pusey had been contested by parties other than the Intervener/Third Party who had not participated in that application as it was not then a party to the proceedings.

3. The learned judge erred in barring the Intervener/Appellant's application to vary the Freezing Order based only on vague and generalized submissions made by learned Queen's Counsel for the Claimant/Respondent as to what were the issues raised in the earlier similar application by the Second Respondent and without any specific information being laid before him as to what those specific issues were and how they might differ from the issues raised by this Intervener in its separate application.

4. The Learned Judge erred in refusing to permit the Intervener/Appellant to proceed with its application to vary when, had he enquired or asked for evidence to be adduced on the subject, he would have discovered that the issue being raised by this appellant in its application to vary namely that the funds in question were held in trust by the Second Respondent for the Intervener was not raised by the Second Respondent in its earlier application to vary nor was it considered by the Learned Judge the Honourable Mr. Justice Pusey. The sole issue raised by the Defendant in its earlier application was whether or not a payment to the intervener would be a payment made in the normal course of business.

5. The Learned Judge erred in concluding that (sic) Appellant's application was an abuse of process *ipso facto* that the same issues may have been determined and there was a privity of interest."

[8] On 16 July 2010 the applicant by way of a notice of application sought the following order, that:

> "(1) A sum of $3,354,841.46 standing to the credit of Guardian Insurance Brokers Limited in First Caribbean International Bank Current Account #381-2014 and/or National Commercial Bank Jamaica Limited Current Account Number 2118422466 (being the subject matter of the Intervener's Application to vary the Freezing Order) be preserved pending the hearing of this appeal."

[9] Mr Gordon Robinson submitted that the funds which the applicant seeks to preserve are funds belonging to the applicant, which are being held in trust for the applicant pending the outcome of the appeal. The applicant has a good prospect of success of its appeal and without an order for the preservation of the funds its appeal would be rendered nugatory, he argued. He further submitted that the provisional order made, was against the bank and not against any party. The funds, he argued, which the applicant seeks to recover are the applicant's property and not subject to any of the orders made in the court below.

[10] Mr Hylton argued that the application is premature as neither the 1st nor 2nd respondent has any control or access over the 2nd respondent's accounts and the respondents are therefore unable to receive any payments from the accounts or to interfere with the monies in these accounts. The accounts, he submitted are subject to the provisional attachment of debt order and an injunction. Further, he argued, the provisional order, in keeping with the mandate of Rule 50.9 of the Civil Procedure Rules, specifies that the garnishees cannot pay anything to the

judgment creditor until the provisional order is made final and paragraph 4 of the provisional order expressly provides that the garnishees should not pay anything to the 2nd respondent or on its behalf, save and except a debt to the 1st respondent not exceeding $102,000,000.00, from funds held by the garnishee.

[11] Under Rule 17.1 (1) of the Civil Procedure Rules, the court is empowered to make an order for the preservation of property by way of an interim injunction. This court, in the exercise of it discretion in the grant or refusal of relief for the preservation of assets, may use the approach relating to injunctive relief as prescribed by the dictates of Rule 2.11 (1) (c) of the Court of Appeal Rules which provides:

> "(1) A single judge may make orders –
>
> (a) …
>
> (b) …
>
> (c) for an injunction restraining any party from dealing, disposing or parting with possession of the subject matter of an appeal pending the determination of the appeal;
>
> (d) …
>
> (e) …"

[12] The grant of the relief sought is dependent upon an applicant demonstrating that his appeal has a good chance of success, primarily

that there is material before the court disclosing a serious issue to be tried. The court's approach should be that, if upon finding that there is no serious issue to be tried, then his application should fail – see **American Cyamide Co. v Ethicon Limited** [1975] 1 All ER 504. The real issue in this application is whether the applicant has shown that it has a good arguable appeal. The critical question therefore is whether there is material before the court from which the court could form the view that the appeal could be successfully pursued. Can the applicant surmount this hurdle?

[13] I find great merit in Mr Hylton's submissions as to the applicant's inability to meet the requisite threshold. There is in place a freezing order in respect of the 2nd respondent's current accounts held by First Caribbean International Bank and National Commercial Bank from which accounts the applicant seeks to recover the funds allegedly due from the 2nd respondent. These accounts are not only subject to the freezing order but also to the provisional attachment of debt order. There is no evidence that any of these orders was irregularly or improperly obtained. The terms of the orders are clear. The freezing order imposes a restraint upon the 2nd respondent in dealing with the assets in its name or those held on its behalf and as mandated by the provisional order, neither of the two respondents is empowered to make any payment from the 2nd respondent's funds held by the banks.

[14] It is without doubt that in obedience to the provisional order no payments from any of the accounts can be made by or on behalf of the 2nd respondent save and except a payment of $102,000,000.00 to the 1st respondent as ordered by the court.

[15] Mr Robinson also urged that it may be that at the final hearing there may be insufficient funds to satisfy the 2nd respondent's indebtedness and the order preserving the status quo would in fact guarantee the applicant's entitlement to the funds due to it. With this submission, I am constrained to disagree. The applicant is now a party to the action, it having been granted permission to intervene. As rightly contended by Mr Hylton, the applicant having filed a notice of claim giving notice of its entitlement to a debt from the accounts, at the time of the final hearing of the order of attachment of debt order, consideration would have to be given to its interest. The circumstances dictate that the status quo would remain intact until the hearing of the order of attachment. Therefore there would be no necessity for this court's intervention.

[16] The application is misconceived. All parties are clearly bound not only by the freezing order but also by the provisional order of attachment. There are no circumstances which would in fact warrant the grant of the order sought. To grant an order preserving the sum allegedly due from the 2nd respondent to the applicant would be an exercise in futility.

[17] The application is refused with costs to the 1st respondent to be agreed or taxed.