IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

SAINT LUCIA

CLAIM NO. SLUHCV2008/0261
SLUHCV2008/0262

BETWEEN:

QUALITY MOTORS LIMITED

Claimant/Respondent

And

1. **CLARKE INVESTMENTS LIMITED**
2. **HUNTER JOSEPH FRANCOIS**
3. **BLUE ROCK QUARRIES LIMITED**

Defendants/Applicants

Appearances:

Mr. Alvin St. Clair with Ms. Lorraine Jolie for Claimant/Respondent
Mr. Peter Foster with Ms. Renee St. Rose for 1st named Defendant/Applicant
No appearance for 2nd named Defendant/Applicant
Mr. Geoffrey DuBoulay for 3rd named Defendant/Applicant

2009: September 24;
October 15.

DECISION

[1] **GEORGES, J (Ag.):** This is an application by the First and Third Applicants/Defendants (the defendants) for an order:

(a) That the order of her Ladyship the Honourable Justice Sandra Mason Q.C. dated 14th April 2008 be discharged or alternatively;

(b) That the Order of her Ladyship the Honourable Justice Sandra Mason Q.C. dated 14th April 2008 be varied as follows:-

(i) That until further order the First and Third Named Defendants be restrained whether by themselves their servants and/or agents from drilling or blasting outside the area defined "Proposed Variation for Injunction Area: 1.30 Acs. 5,261 sm" in the Plan of Survey attached to the Affidavit of Stephen Shingleton-Smith filed herein on 01September 2009 and

(ii) The Claimant is ordered to fortify the undertaking in damages and unless the sum of $4,125,000.00 is paid into court by the Claimant within 7 days the injunction is discharged. The sum of $4,125,000.00 representing an estimate of the accumulated income that but for the injunction the Defendants would have otherwise generated from the sale of rock stone aggregates and other quarry products on the Quarry and payment of the lease and sublease from 14th April 2008 to 18th march 2010.

[2] The grounds of the application are:

1. That the Rock Platform has been extinguished and as a result of the current injunction Bluerock Quarries Limited is unable to continue quarrying blasting and/or mining;

2. The inability to quarry blast and/or mine caused by the extinction of the Rock Platform and injunction will result in breach of contract/frustration of the Sub-Lease between Bluerock Quarries Limited and Clarke Investments Limited and breach of contract/frustration of the Lease between Clarke Investments Limited and Hunter J. Francois and other third party contracts.

3. The trial of the substantive matter is scheduled for 17th and 18th March 2010 and the area defined as "Proposed Variation for Injunction Area: 1.30 Acs. 5,261 sm" would yield insufficient material to facilitate the maintenance of the status quo until the determination of the issues between the parties.

4 Should the defendants be unable to operate the Quarry the defendants will suffer incredible and irreparable loss which will have a domino effect resulting in loss of jobs and frustrations of contracts and will affect the completion of building contracts for the consumers of the Third Named defendant.

5. The interim injunction granted to the claimant was never fortified and is the price the claimant ought to pay for the injunction. The claimant has never demonstrated that it is able or capable of paying damages in accordance with its undertaking in damages in the event the injunction was wrongly granted. It has always been the contention of all the defendants that the claim herein is compIetely wrong in law and ought to be dismissed. The chances of success of the claimant herein is entirely remote.

[3] In his affidavit filed September 03 2009 Stephen Shingleton-Smith the General Manager of the third defendant avers that since the injunctive order of Mason J dated 14th April 2008 the third defendant had only drilled and blasted the Rock Platform referred to in the Plan of Survey of Dunstan Joseph dated 10th April 2008 and as at 31st August 2009 the Rock Platform was almost extinguished or depleted. He opined that by the trial of the matter (which has been rescheduled form 14th July 2008 to 17th and 18th March 2010 there would be insufficient material in the rock platform to allow the quarry to operate until such time. Hence a variation of the injunction was sought to continue the quarry operation.

[4] At paragraph 10 of his affidavit Shingleton-Smith further deposed that:

> At this stage we are not quarrying (i.e. drilling and blasting) we are using the stockpile of between 20,000 to 25,000 tonnes of boulders which had been

earmarked for other purposes. Over the last five months we have had to break these boulders using additional equipment to make feedstock to keep the crusher going for sized aggregate production. This stockpile is now almost depleted.

[5] The deponent finally concluded at paragraph 13 that:

> *Should we be forced to close down the quarry because of the failure to speedily vary the injunction we will suffer a loss of revenue in the order of approximately EC$300,000.00 a month. There will also be an effect on the C. O. Williams Group of Companies and the Saint Lucia economy in general because jobs will be lost: i) directly within the quarry and ii) indirectly because contractors will be unable to obtain material.*

[6] Mr. Goddard Darcheville General Manager of the claimant/respondent in his affidavit filed September 22 2009 at paragraph 2 complained that not only has the Rock Platform been depleted or extinguished but so too has the quarry as defined in the original lease the only lease to which the sale to the claimant/respondent is subject.

[7] Darcheville went on to complain that notwithstanding the depletion of the Rock Platform and the quarry the third defendant (Blue Rock Quarries) had extended their operations beyond the rock platform and had excavated and carried away for crushing about 5,000 tons of material and had filled the area with waste material to avoid detection.

[8] There are other complaints of drilling beyond the rock platform with a view to blasting in violation of the court order. Most of those allegations are disputed by Mr. Shingleton-Smith and are clearly matters for trial. The true extent/area of the defendants' sub-leases is another matter for trial as well as the interpretation of certain clauses of the Headlease and subleases.

[9] At the root of the matter is the fact that operations of the quarry existed for a number of years (decades) but the limits appear to have never been surveyed or defined However

aerial photographs exhibited by Mr. Darcheville in support of his affidavit filed September 22 2009 (QML1) which were taken in November 2006 show quite clearly the area of land upon which the mining and quarrying of stones were then taking place to the extent where a sizeable section of the hillside had been quarried.

[10] It is not disputed that when the claimant purchased the land that there existed in full view a massive quarrying operation and that the land that had been conveyed to the claimant company was the subject of a Headlease for a term of 4 years.

[11] Whether the vendor had sold the entire property to the claimant or as he did in the instant case reserve the usufruct the purchaser took the property subject to the lease.

[12] Learned Counsel for the first defendant (Mr. Peter Foster) submitted that the injunction was completely misconstrued on the basis that the claimant has some rights that are being infringed.

[13] In his original application Counsel continued the claimant's fear and claim was that the defendants had been quarrying beyond an area of 4 acres and that created his cause of action. Interestingly and curiously the claimant had now changed tack by saying that if the mining and quarrying were allowed to continue there would be no stone for the claimant to mine after he had taken over the property when the usufruct has ended.

[14] Paragraph 19 of the claimant's affidavit filed September 22 2009 sworn by Mr. Darcheville reads:

> *Should the injunction be lifted our investment in purchasing the property will be ruined with the defendants removing as much materials as possible and leaving the carcass which would in turn cause loss of jobs within the claimant company. We won't be able to realize a return on our investment. Our creditors may then move to foreclose on the Claimant's company because of our inability to honor our commitments to them.*

[15] This simply did not make sense Counsel pointed out when read with paragraph 2 of his said affidavit where he deposed that:

> *The third defendant states through its Manager in his application to discharge or vary the order of Justice Mason that the rock platform has almost extinguished or depleted. It is a fact that not only has the rock platform been depleted or extinguished but so too has the quarry as defined in the original lease the only lease to which the sale to the claimant company is subject to.*

[16] I fully agree that it is difficult to reconcile the contents of those two paragraphs. The quarry counsel submitted was not limited to the rock platform but the entire area as depicted by the aerial view show in photo QML7.

[17] The obvious aim of the claimant Counsel stressed was an attempt to try to preserve a perceived right to effectively stop the defendants from carrying on their mining and quarrying operations so that there will be enough material for the claimant to work when the usufruct expires.

[18] The fact of the matter was that the claimant had no such rights in law capable of being protected Counsel asserted pointing out further that although the extent of the quarry is shown by QML7 the defendants were in actual fact restricted to the small area known as the rock platform and are not allowed to drill or blast outside that area.

[19] According to Singleton-Smith the material or rock in existence measured approximately 6.800 tons which was only sufficient to sustain the operations of Blue Rock Quarries (BRQ) for about a month and did not come to the maximum level of production.

[20] If the injunction is not discharged Counsel emphasized BRQ would go out of business retrench its 18 employees terminate its contracts for the supply of stones and other quarry products resulting in irreparable harm. This would have a domino effect of disastrous

proportions Counsel pointed out – all in an effort by Mr. Darcheville to protect and preserve his perceived and misconceived interests in the quarry. In sum Counsel submitted the claimant is under a misapprehension of his rights as owner of the nuda proprietus and consequently labours under a misapprehension that he has a right in the preservation of the property

[21] Turning therefore to learned Counsel for the claimant/respondent's submissions Mr. Foster submitted that the claimant had an incorrect understanding of what the real issues were in this case since in his legal submissions he expounded on the concept and relevance of the loss of usufruct and the right of the claimant to protect and preserve it where there was danger of its being dissipated

[22] In any case Mr. Foster pointed out that law protects the right of the owner to continue mining in the same manner and way he had prior to the creation of the usufruct referring to Article 460 of the Civil Code. This was not an issue in this case he contended and I fully agree. What matters is the lease which was in existence prior to the purchase by the claimant of the property.

[23] Mr. Foster further contended that Mr. Darcheville well knew the extent of the quarry which he was purchasing. There was no misunderstanding or any argument which could limit the operations of the defendants in an area smaller than that shown in QML7.

[24] If the quarry operations ceased then the first defendant's livelihood would be in jeopardy BRQ's ability to pay the lease would cease and the first defendant would have no income and would not be able to pay the second defendant Hunter Francois – all because the claimant wishes to preserve the rock for himself from the year 2012.

[25] The quarry had been in existence since 1988 documentary exhibits reveal and in all the leases there was no restriction as to depth except for the last sublease. The issues raised by the claimant re depth of mining was something new Counsel for the defendants pointed out and did not form part of the claim. I concur. For his part Mr. Geoffrey DuBoulay

Counsel for Blue Rock Quarries the third defendant sensibly adopted Mr. Foster's comprehensive submissions generally.

[26] As I see it a bare undertaking in damages on the grant of an injunction in a case of this nature would be wholly insufficient because the claimant has not demonstrated in any form or manner its ability to pay damages in the likely event that it is shown that the injunction was wrongly granted.

[27] The defendants operations have been stymied for over a year and that issue has now come to a head. When the interim order was granted by Mason J on 14th April 2008 the trial of the matter was then fixed for Monday 14th July 2008. This did not materialize for no satisfactory or explicable reason. Hearing of the case has now been rescheduled to 17th and 18th March 2010.

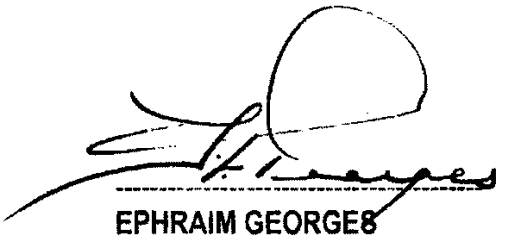
[28] Applications by the claimant for disclosure by the defendants of their assets and for a freezing order of revenue derived from their mining operations were deferred by order of the Court until after trial. Nothing happened until November 2008 when Counsel for the claimant M. Alvin St. Clair sua motu filed a fresh application in respect of those matters which was heard on 1st October 2009 and decision rendered today. Meanwhile the injunction has remained in full force and effect for well-nigh a year and a half whilst the defendants continue to labour under its restrictions.

[29] A visit to the site by the Court brought the full picture to the fore. I entertain little doubt that the continuing effect of the injunction in those circumstances has become oppressive and justifies its variation in the terms sought by the defendants subject to the modifications made by the Court in respect of fortification of the claimant's undertaking in damages.

[30] For to request that the claimant be ordered to fortify its undertaking in damages by paying into court within 7 days the sum of $4,125,000.00 failing which the injunction is discharged is to my mind just as oppressive. I would therefore order and direct in substitution that unless security in the sum of $1,000,000.00 by way of bankers guarantee or an insurance

bond is lodged in court in favour of the defendants' attorneys within 14 days the injunction is discharged.

[31] With regards to costs having regard to all the circumstances I would order and direct that the claimant pay the defendants' assessed costs in accordance with CPR 65.12.



EPHRAIM GEORGES
HIGH COURT JUDGE (Ag.)