IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
GRENADA

HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV 2007/0045

BETWEEN:

GRENADA TECHNICAL AND ALLIED WORKERS UNION
Claimant

and

LIBERTY CLUB LIMITED
(Trading as La Source)
Defendant

Appearances:
Mrs. Celia Edwards QC and Mrs. P. Nicola Byer for the Claimant
Mr. Dickon Mitchell for the Defendant

2013: February 28;
April 24.

Introduction

[1] MOHAMMED, J.: The Defendant has applied for permission to appeal ("the instant application") to the Court of Appeal against a decision rendered by this court on the 5th December, 2012 ("the December order") which varied the terms of an injunction order granted by Rhudd J on the 24th October, 2012 ('the October order").

[2] The October order restrained the Defendant, its servants/or agents *"from disposing of, alienating, selling, mortgaging, removing from the jurisdiction assets or cash in the equivalent of EC$2,000,000.00 until 14th December 2012 or further order in the meantime."* It also directed the Defendant to "*deposit into Court or such place as*

This Honourable Court shall direct the said sum of EC$2,000,000.00 until trial and determination of this action or further order in the meantime."

[3] The December order did not discharge the October order but it varied it by reducing the sum from EC$2,000,000.00 to EC$1,100,000.00 and directed that the said sum be deposited into court on or before the 6th December 2012. It also ordered the injunction to continue until trial and determination of the action unless furthered ordered and assessed the costs of the application in the sum of $2,500.00.

[4] The instant application is based on five grounds, namely

(a) The court failed to adequately take into account that the substantive claim was for damages;

(b) The court failed to adequately consider the effect the injunction would have on the Defendant paying its genuine trade creditors;

(c) The court failed to adequately consider that there had been material non-disclosure by the Claimant when it obtained the October order;

(d) The court failed to adequately consider that there was no reason given by the Claimant for making the application without notice; and

(e) The December order failed to reflect any undertaking in damages given by the Claimant.

[5] Counsel for the Claimant opposed the instant application on the basis that all the grounds (which I will later address) would fail in law.

[6] The issue to be determined is whether the Defendant has demonstrated that the intended appeal has a realistic prospect of success. For the reasons set out hereafter I was not persuaded that the Defendant had discharged this burden. The Defendant's application is dismissed with the Claimant's costs to be assessed if not agreed.

The applicable test for leave to appeal

[7] The Court will only grant leave to appeal an interlocutory decision where the Applicant establishes that the intended appeal has a realistic prospect of success[1]. In Othneil Sylvester v Faellesje, A Danish Foundation[2], Barrow JA described the burden on the appellant as "The appellant needs to show that the intended appeal has a realistic prospect of success[3] which is a heavier burden than showing only that he has an arguable appeal". In The Attorney General of Grenada v Andy Redhead and Ors[4] Edwards JA at paragraph 15 was of the view that a realistic prospect of success is more than a fanciful prospect of success. I will now address the five grounds of the instant application.

The substantive claim was for damages

[8] Counsel for the Defendant submitted that the court failed to adequately consider that the substantive claim is for damages and that a litigant should not be granted an injunction to restrain actionable wrongs for which damages are an appropriate remedy. As such the court erred in law when it varied the terms of the October order since the injunction ought to have been discharged.

[9] Counsel for the Claimant contended that the nature of the injunction sought was a freezing order under the inherent jurisdiction of the court and Part 17 of the CPR. The freezing order is a specific type of injunction to preserve a Defendant's assets in the jurisdiction, and as such the principle of whether damages are an adequate remedy does not apply.

[1] Sylvester v Faellesje, A Danish Foundation, St Vincent and the Grenadines, Civil Appeal No 5 of 2005, 20 February, 2006.
[2] Ibid
[3] Practice Note – Smith v Cosworth Casting Processes Ltd [1997] 4 All ER 840
[4] Civil Appeal No. 10 of 2007

[10] I agree with Counsel for the Defendant that according to the principles set out by Lord Diplock LJ in American Cyanamid Co v Ethicon Ltd. [5], a court should not grant an injunction if damages are an adequate remedy. In this action it is undisputed that the substantive claim is for general damages for wrongful dismissal and special damages for loss of income, meal allowance, overtime pay and payment in lieu of termination notices. Paragraph 3 of the affidavit of Bert Patterson filed on 23rd October 2012 confirmed this position and he has even given an estimate of the measure of damages which the Claimant is seeking to recover in the sum of EC$1,097,539.14. However, the nature of the injunction granted in the October order was to preserve the Defendant's assets in the event the Claimant succeeds, the Defendant has property available to satisfy the judgment.

[11] In Third Chandris Shipping Corporation and others v Unimarine SA [6] Lord Denning MR set out the guidelines which a court should follow in granting freezing orders. They are:

(i) The applicant should make full and frank disclosure of all matters in his knowledge which are material for the judge to know;

(ii) The applicant should give particulars of his claim against the Defendant, stating the grounds of his claim and the amount thereof, and fairly stating the points made against it by the Defendant;

(iii) The applicant should give some grounds for believing the assets are in the jurisdiction;

(iv) The application should give some grounds for believing that there is a risk of the assets being removed before the judgment or award is satisfied; and

(v) The applicant must give an undertaking in damages in case it fails or the injunction turns out to be justified.

[5] [1975] 1 All ER 504
[6] [1979] 2 All ER at page 984 g- 985 f

[12] In explaining the nature of the non-proprietary freezing order (which is the nature of the October order) the authors of the Caribbean Civil Court Practice[7] stated that "if an actual or intending claimant can establish a good arguable case against a defendant and can also establish that there is a real risk that the defendant will dissipate or conceal his assets so as to defeat any judgment, a non-proprietary order freezing some, or even all of the defendant's assets may be granted."

[13] The freezing order is a subset of the injunctive orders which the court can grant. However, noticeable absent from the guidelines which the court must consider when exercising its discretion is the question of whether damages is an appropriate remedy.

[14] I have no doubt that damages are an adequate remedy in the instant action, however, I agree with Counsel for the Claimant that this was not a relevant factor to be considered by the Court when it made the October order and the December order. I therefore find no merit with this ground.

The Defendant's ability to pay its "genuine trade creditors"

[15] The Defendant contended that the failure by the court to discharge the October order and instead to vary it in the December order prevented it from paying its "genuine trade creditors" and placed the Claimant in a preferential position over the Defendant's other genuine trade creditors. Paragraph 32 of the affidavit of Leon Taylor filed 13th November 2012 sets out some of the "several outstanding creditors of the Defendant" as "immediate staff of the Defendant who are owed salaries and other benefits, its trade creditors, utility companies (including water, telephone and electricity), guests who are to be refunded booking money as a result of closure of the hotel, the Government of Grenada and the NIB for insurance contributions for the staff. The total outstanding sums payable to these respective creditors of the Defendant totals approximately $7.8 million EC".

[7] 2011 edition at page 167

[16] The Claimant disagreed with this submission on the basis that the evidence before the court was the secured creditors were paid, the court has retained jurisdiction over the sum of $1,100,000.00, and it is open to the unsecured creditors to apply to the court to access the sum deposited in court.

[17] A party who has obtained a freezing injunction does not acquire a proprietary interest in the assets frozen nor is given any preference over creditors[8]. In Boeing Capital Corporation v Wells Fargo Bank Northwest[9] the Claimant had judgment for delivery-up on its security claim on a Boeing 737, but was not allowed to enforce the order for delivery-up on the aeroplane until after first obtaining a variation to the Mareva injunction obtained by a third party. Similarly in Iraqi Ministry of Defence v Arcepey Shipping Co SA (The Angel Bell)[10] a third party who was owed £200,000 by the Defendant before the Mareva Order was made, was able to have the order varied to allow the Defendants to repay the loan from the enjoined assets. Notably, in both cases the freezing orders were varied *after* successful applications by creditors and not the Defendant.

[18] There was no evidence before the court of any secured creditors who would be prejudiced by the freezing order. According to the Defendant, its secured creditors the Bank of Nova Scotia ("the BNS" and the National Insurance Board) ("the NIB") have been paid[11]. There is no evidence that there are undisputed liabilities due to secured creditors. In my view "genuine trade creditors" cannot be equated with secured creditors and cannot be afforded the same protection of the law. Further, I agree with Counsel for the Claimant that there is nothing preventing the "genuine trade creditors" from applying to the court for a variation of the freezing order if they require payment of their debts. In any event, the sum which has been deposited into court is within the Court's jurisdiction. Accordingly, I was not

[8] Bean on Injunctions 9th edn at page 143
[9] [2003] EWHC 1364
[10] [1981] QB 65
[11] Paragraph 7 of the affidavit of Leon Taylor filed November 26, 2012

persuaded by the Defendant that he has demonstrated a realistic prospect of success in pursuing an appeal with this ground.

Material non-disclosure by the Claimant

[19] Counsel for the Defendant contended that the court failed to consider that there was material non-disclosure by the Claimant in obtaining the October order and that material non-disclosure is a proper ground for discharging an injunction.

[20] Counsel for the Claimant was of the view that this ground was irrelevant.

[21] Paragraphs 18, 19 and 20 of the affidavit of Leon Taylor filed on the 13th November 2012 set out the elements of material of non-disclosure which the Defendant relies on. Paragraph 18 states:

> "I state that had the Claimant made a cursory inquiry or search at the Deeds and Lands Registry that it would have discovered that the Defendant's hotel and all the fixtures, fittings, receivables, goods, goodwill and all its assets tangible and intangible are mortgaged under a general debenture and mortgage and several deeds of further charges to the Bank of Nova Scotia to secure the loan and overdraft facilities."

At paragraph 19 he states:

> "In addition, had the Claimant continued in making such basic inquiries at searches at the Deeds and Land Registry the Claimant would also have observed and found that the National Insurance Board of Grenada (NIB) holds a second mortgage over the hotel's property to secure an additional loan which was advanced to the Defendant by the NIB."

And paragraph 20 states:

> "An examination of the NIB Second Mortgage would also reveal that the potential proceeds of the Beacon Insurance Limited Litigation referred to in paragraph 9 of the affidavit of Bert Patterson is also assigned to the NIB as security for its loan."

[22] One of the guidelines set out in the Third Chandris Shipping which a court must consider in granting a freezing order is the duty by the applicant to make full and frank disclosure of all matters in his knowledge which are material for the judge to know.

[23] Ralph Gibson LJ in Brink's Mat Ltd v Elcombe[12] explained the extent of the applicant's duty of disclosure, which I paraphrase as:

(a) The duty of the applicant is to make a full and fair disclosure of all material facts. The material facts are those which are 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 advisers.

(b) The applicant must make proper inquiries before making the application. The duty of disclosure applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(c) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (i) the nature of the case which the applicant is making when he makes the application; (ii) the order for which the application is made and the probable effect of the order on the defendant; and (iii) the degree of legitimate urgency and the time available for the making of inquiries.

[12] [1988] 1 WLR 1350

(d) If material non-disclosure is established the court will be astute to ensure that an applicant who obtains an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty.

(e) 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 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 reasons of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(f) The court has discretion notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, to continue the order, or to make a new order.

[24] In this jurisdiction in Edy Gay Addari v Enzo Addari[13] the Court of Appeal held that the Court has a discretion to discharge an interim injunction granted at a without notice hearing for failure by the applicant to give full and frank disclosure, but this is not the inevitable consequence of every non-disclosure. The court must have regard to all the circumstances of each case and will assess the gravity of the alleged breach, the degree and extent of culpability with regard to the non-disclosure, the importance and significance of the facts not disclosed to the outcome of the application, any excuse or explanation offered, the severity and duration of any prejudiced caused to the respondent and whether the non-disclosure can be and, if so, has been remedied.

[13] BVI Civil Appeal; No 2 of 2005

[25] The Claimant's application for the freezing order was based on 3 grounds (i) the written correspondence[14] from the Defendant that it would pay the Claimant its damages from any money received in High Court Action GDAHCV 409/2005 between Liberty Club v Beacon Insurance Company ("the Beacon litigation") (where the Defendant is seeking to recover damages for breach of contract due to failure by the insurance company to settle its claim after Hurricane Ivan); (ii) reports in the national media that the La Source Hotel, the main asset of the Defendant was to be sold and (iii) the information received by the President General of the Claimant from the Defendant that its liabilities exceeded its assets.

[26] I accept the Defendant's position that if the Claimant had made the proper inquiries required under its duty of disclosure, it would have been aware of the mortgage of the Defendant's assets firstly to the BNS and secondly to the NIB and that under the second mortgage and any potential proceeds from the Beacon litigation was also assigned to the NIB.

[27] However, I do not accept that if this information was disclosed, the court would not have made the October order since the sum claimed in the Beacon litigation was EC$16,000,000.00 and the sum assigned under the mortgage to the NIB was EC$5,200,000.00. In any event, by the time the December order was made the court was aware that the Defendant's asset was sold by the BNS and that the proceeds from the sale had satisfied the debt of the BNS, the NIB and other creditors, leaving an excess of US $1,616,515.49 or EC $4,345,516.95[15].

[28] Having regard to the facts which were not disclosed initially, but which were disclosed by the date of the return hearing, on which the December order was premised, I was of the view that the non-disclosure did not have any material prejudice on any of the Defendant's secured creditors since only EC $1,100,000.00 of the residue of EC $4,345,516.95 was frozen by the December

[14] Exhibit BP 3 to the affidavit of Bert Patterson filed October 23, 2012
[15] Paragraph 3 of the affidavit of Leon Taylor filed on the 23rd November 2012

order. In this regard, the Defendant has failed to convince me that this ground of appeal has any realistic prospect of succeeding.

Failure to advance a reason for making the application without notice

[29] The Defendant submitted that there was no evidence before the court when the October order was granted to establish that the giving of notice to the Defendant would have caused it to take steps to defeat the purpose of the injunction and to prevent the threatened wrongful act.

[30] This position was vehemently opposed by the Claimant on the basis that stealth was critical in the pursuit of a freezing order and if notice had been given it may have defeated the relief sought.

[31] The importance of speed and the lack of notice in applying for a freezing order was recognized by Lord Denning MR in Third Chandris Shipping when he stated:

> "In it speed is of the essence. Ex parte is of the essence. If there is delay, or if advance warning is given, the assets may well be removed before the injunction can bite".

[32] The issue of notifying a party against whom an interim relief order is sought was more recently addressed by their Lordships of the Judicial Committee of the Privy Council in National Commercial Bank Jamaica Ltd v Olint Corp. Ltd.[16] who advised that:

> "…a judge should not entertain an application of which no notice has been given unless either giving of notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a Mareva or Anton Pillar order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act." (emphasis mine)

[16] [2009] UKPC 16

[33] It is clear to me that the courts have long recognized that the giving of notice for applications for freezing orders would serve to assist in defeating the purpose of the order. The reasons for the urgency in seeking the freezing order ex parte can be found at paragraphs 5,8,9,10,11,12,13 and 14 of the affidavit of Bert Patterson filed on 23rd October 2012 in support of the ex parte application which I have summarized above in paragraph 25. In my view, even if the Claimant was aware of the mortgages in favour of the BNS and to the NIB, the Claimant cannot be faulted for failing to give notice for the hearing of the application for the freezing order. For these reasons the Defendant has no realistic prospect of success on appeal with this ground

Failure by the December order to reflect any undertaking in damages given by the Claimant.

[34] Both parties agreed to abide by the court's record with respect to this contention. I have perused the December order as perfected by the court and there is no undertaking in damages by the Claimants. However, there is an undertaking in damages by the Claimant in the October order. The December order only varied certain aspects of the October order which was to reduce the sum of money to be deposited into court from EC $2,000,000.00 to EC $1,100,000.00. While I accept that it is clearer to include the undertaking expressly in the perfected December order, in my view all other aspects of the October order, including the Claimants undertaking with respect to damages remained unchanged. As such the Defendant has failed to persuade me that this is a proper ground on which it has a realistic prospect of success on appeal.

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Order

[1] The instant application is dismissed with costs to the Claimant to be assessed if not agreed.

Margaret Y. Mohammed
High Court Judge