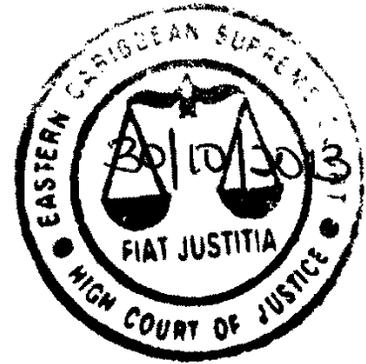


THE EASTERN CARIBBEAN SUPREME COURT

SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL CLAIM NO. SVGHCV2010/0301



BETWEEN:

[1] MILLHAWKE HOLDINGS (BEQUIA) LTD
[2] STOWE CONSTRUCTION (BEQUIA) LTD
[3] HENRY JOHN MARRIOTT a.k.a. HARRY MARRIOTT
[4] HON. DINAH LILLIAN MARRIOTT

Claimants

v

[1] JORG "STANLEY" DORNEIDEN
[2] TIMOTHY GABRIEL
[3] CARIB CONSTRUCTON
[4] CARIB INTERNATIONAL
[5] LEOMORE MACDONALD
[6] STANLEY'S FOOD AND BEVERAGES LTD

Defendants

Appearances:

Mr. Joseph Delves for the Claimants

Mr. Stanley K. John for the First and Sixth Defendants

2013: February 27

June 18

October 30

JUDGMENT

[1] **THOM, J:** The First Defendant (Mr. Dorneiden) and the Sixth Defendant ("Stanley's Food") apply for a freezing injunction against the First Claimant ("Millhawke) to restrain it from removing from Saint Vincent and the Grenadines ("St. Vincent") or disposing or diminishing the value of its assets in St. Vincent to the value of US\$2.6 million until the Defendant's counterclaim has been finally adjudicated or further order of the court.

BACKGROUND

- [2] The Third and Fourth Claimants ("Mr. and Mrs. Marriott") who are shareholders of Millhawke negotiated with Mr. Domeiden a proposal to purchase property in Bequia, and to develop and sell the property. A Joint Venture Agreement ("JVA") was prepared and executed by Millhawke and Stanley's Food. Mr. Domeiden is a major shareholder and Director of Stanley's Food.
- [3] A dispute has arisen in relation to the project and as a result the Claimants instituted proceedings against the Defendants in which they seek several reliefs including:
- (a) Damages for deceit and or special damages in the sum of E.C.\$1.5 million.
 - (b) Damages for breach of fiduciary duties.
 - (c) Damages for detention and/or conversion.
- [4] The Defendants filed a defence denying the claim and a counterclaim in which they seek several reliefs including the following reliefs:
- (a) The sum of US\$200,000.00 being its capital investment in the Project.
 - (b) One-fifth of the equity in Millhawke and or the Second Claimant, alternatively one-fifth of the beneficial interest in the property which constitutes the Project.
 - (c) Various management fees and investment profit.
 - (d) Damages for repudiation of contract and conversion.

APPLICATION

- [5] The grounds of the application are:
- (a) They have a good chance of obtaining judgment in their favor on their counterclaim.
 - (b) Millhawke has been advertising the property for sale which is its sole asset and which is the subject matter of the claim.

- (c) Mr. and Mrs. Marriott who are the controlling minds of Millhawke have demonstrated their capabilities in easily moving large sums of money across international borders.
- (d) Upon realization of a sale of the project unless restrained by the Court Millhawke on the direction of Mr. and Mrs. Marriott will transfer all of the proceeds of sale out of this State and ultimately outside the jurisdiction of this Court. There is a real danger of the Claimant dissipating such assets by the time the counterclaim is determined in favor of the Applicants which will have the effect of defeating such judgment.

[6] The Claimants oppose the application on the following grounds

- (a) There was significant delay in making the application.
- (b) The Defendants do not have a good arguable case.
- (c) They have not adduced any or any sufficient evidence of a real risk of dissipation of assets.
- (d) They have not demonstrated that it is just or convenient to issue an injunction in the circumstances.
- (e) They have not offered or provided a cross-undertaking in damages.
- (f) They will be unable, given the admitted impecuniosity of the Sixth Defendant and the refusal of the First Defendant to undertake to meet the Sixth Defendant's own costs, to meet any cross-undertaking they may provide.
- (g) They have not provided any evidence of means to pay damages, pursuant to any undertaking ordered by the Court.
- (h) A freezing order would cause more prejudice to the First Claimant than harm to the Defendants.

[7] While a freezing order is often viewed as a draconian measure because of its effect, nevertheless where the circumstances so warrant Courts have always issued freezing

orders. In Z Ltd v A and Others,¹ Kerr LJ in warning against the abuse of the jurisdiction to grant a freezing order stated:

"In particular, I would regard two types of situations as an abuse of it. First the increasingly common one, as I believe, of a Mareva injunction being applied for and granted in circumstances in which there may be no real danger of the defendant dissipating his assets to make himself "judgment proof": where it may be invoked, almost as a matter of course, by a plaintiff in order to obtain security in advance for any judgment which he may obtain; and where its real effect is to exert pressure on the defendant to settle the action. The second, and fortunately much rarer, illustration of what I would regard as an abuse of this procedure, is where it is used as a means of enabling a person to make a payment under a contract or intended contract to someone in circumstances where he regards the demand for the payment as unjustifiable; or where he actually believes or even knows, that the demand is unlawful; and where he obtains a Mareva injunction ex parte in advance of the payment, which is then immediately served and has the effect of freezing the sum paid over."

And further at p. 571:

"...Mareva injunctions should be granted, but granted only when it appears to the court that there is a combination of two circumstances. First, when it appears likely that the plaintiff will recover judgment against the defendant for a certain sum or approximate sum. Second, when there are also reasons to believe that the defendant has assets within the jurisdiction to meet the judgment; in whole or in part, but may well take steps designed to ensure that these are no longer available or traceable when judgment is given against him."

The Learned Authors of Blackstone Civil Procedure outline the following as the requirements that must be fulfilled for the granting of a freezing order:

- (a) A course of action justiciable in England and Wales (St. Vincent).
- (b) A good arguable case.
- (c) The Defendant (Respondent) having assets within the jurisdiction.
- (d) A real risk that the Defendant (Respondent) may dissipate those assets before judgment can be enforced.

DELAY

[8] It is settled law that an applicant seeking equitable relief must do so promptly, if he does not he must give an explanation.

¹ [1982] 1 ALL ER 556

[9] Mr. Delves referred the Court to Bean on Injunctions and the cases of Z Ltd; Black Swan Investment I.S.A. v Harvest View Ltd et al²; and submitted that delay defeats an interim injunction even if the Respondent gives no evidence of prejudice. The Application was filed 24 months after the JVA was terminated, 17 months after their application for a stay was rejected by the Court, 15 months after the defence and counterclaim was filed and nearly six months after the Claimants applied for security for costs. The Applicants have given no reason or explanation for their delay in bringing their application. This suggests that there is really no risk of dissipation of assets or otherwise, Mr. Delves referred to the case of First Montana Services Ltd et al v Best Concrete Corporation³ where Justice George Creque (as she then was) in referring to the case of Bates v Lord Harlsham of St. Marylbome stated at paragraph 26 that:

“... in the absence of a most cogent explanation or unless the applicant had an overwhelming case on the merits, the injunction ought to be refused as apart from other considerations an inference to be drawn from insufficiently explained tardiness is that the urgency and gravity of the applicant's case are less than compelling.”

[10] Mr. John in response submitted that there was no delay in the application in that advertisement of the sale of the property was only recently being made. Thus the issue of dissipation has only now arisen.

[11] I agree with Mr. Delves that the fact that a Respondent does not adduce any evidence of prejudice does not mean that the Court cannot refuse to grant the relief on the ground of delay. However, I do not find that there was delay in making the application. While I agree with the various time periods mentioned by Mr. Delves, the property at that time was not yet being advertised for sale. The project, the subject matter of the JVA, was for the purchase, development and sale of property. With the property now being advertised for sale the issue of dissipation of the proceeds of sale prior to the final determination of the claim and counterclaim has indeed now arisen.

² BVIHCV 2009/0348

³ AXAHCV 2007/0053

[12] Having reviewed the affidavit of Mr. Marriott I also do not find that the Respondents would suffer prejudice. Mr. Marriott in his Eighth Affidavit deposed at paragraph 18.2 as follows:

"Having a Restraining Order would impede the Claimants from pursuing the development. Prospective purchasers would be put off trying to buy a property or properties subject of such an order as they would be understandably unwilling to get involved in a legal dispute."

An order is not being sought to restrain the Respondents from selling the property nor is an order being sought to freeze all of the proceeds of sale of the property, but only a portion which represents less than one-third of the prospective sale proceeds. In view of the above, I do not find that the application should be refused on the ground of delay.

CAUSE OF ACTION / ASSETS WITHIN THE JURISDICTION

[13] It is not disputed by the parties that there is a cause of action justiciable in St. Vincent and that the Respondents have assets within St. Vincent.

GOOD ARGUABLE CASE

[14] Mr. John submitted that the Applicants' counterclaim has a strong likelihood of success. The basis on which the Respondents sought in their letter of October 6, 2010 to terminate the JVA amounted to a breach of Clauses 8.1 and 8.2 of the JVA. Mr. Domeiden was not acting in the capacity as a Director of and the Project Manager of the Second Claimant. The Claimants' allegations that Stanley's Food is responsible for alleged dishonesty, and breaches of fiduciary duties of Mr. Domeiden, and hence their reason for terminating the JVA for breach, is unsustainable.

[15] Mr. John submitted alternatively that none of the duties under the JVA require Mr. Domeiden or Stanley's Food to become engaged and function as a director of Millhawke or the Second Claimant, nor was it necessary for Mr. Domeiden to be appointed as such in order for Stanley's Food to fulfill its obligations as Project Manager under the JVA. The

allegations made against Mr. Dorneiden of breach of fiduciary duties, by him whilst acting in the capacity as a Director of the Second Claimant and upon which the Claimants proceeded to terminate the JVA even if they can be established, do not as a matter of law amount to default by Stanley's Food under Clause 14.1(2) of the JVA since they are not breaches of obligations under the JVA by Stanley's Food which can be considered to be individually or cumulatively of such seriousness as to permit the Claimants to treat the JVA as repudiated by the breach.

- [16] Mr. John further submitted that Mr. Dorneiden's actions were carried out in his capacity as Director or Project Manager on behalf of Stanley's Food pursuant to the terms of the JVA. Mr. Dorneiden and therefore Stanley's Food acted neither as the Claimant's servant nor agent and could not therefore in either of these capacities owe the Claimants the duties of fidelity, trust and confidence as alleged. The Claimants procured Mr. Dorneiden's removal from the project prior to the purported notice dated 6th October 2010.
- [17] Mr. John also submitted that the Claimants at paragraph 18 of their Statement of Claim admitted that the Applicants contributed US\$200,000.00 to the project. The Applicants' counterclaim must therefore succeed.
- [18] Mr. Delves in response submitted that a good and arguable case means a case with something more than being barely capable of serious argument, but not necessarily where the judge considers it will have a better than fifty per cent chance of success. Mr. Dorneiden's counterclaim is too weak to meet the requisite threshold since he was the agent of Stanley's Food and not a party to the JVA, and therefore had no contractual or other entitlement to any remuneration from Millhawke or any of the Claimants. Mr. Dorneiden has not placed before the Court any facts to sustain his counterclaim, his alleged loss of, or loss by, Stanley's Food. The reliefs sought in the counterclaim all relate to rights and obligations under the JVA. Mr. Dorneiden's claim must fail as a result of the rule in *Foss v Harbottle*. Mr. Dorneiden not being a party to the JVA, he cannot sue under it, see *Lee v Lee Air Farming Ltd.*⁴

⁴ [1960] 3 All ER 420

[19] Mr. Delves further submitted that the JVA does not provide for Stanley's Food to be a twenty per cent (20%) shareholder of Millhawke or the Second Claimant and in any event shareholders do not have an equitable interest in the company's assets.

[20] In relation to section 241, Mr. Delves submitted that the section gives relief to a restricted class of complainants. There is no evidence that Millhawke and the Second Claimant are being conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interest of the shareholders.

[21] Mr. Dorneiden is not a proper person to make a section 241 application. Stanley's Food not being a shareholder of Millhawke or the Second Claimant an order cannot be made under Section 241(3) for financial statements. In any event the financial statements are filed in the Company Registry and are available to the Defendants.

[22] Mr. Delves also submitted that while Mr. Dorneiden agreed on behalf of Stanley's Food to contribute five per cent (5%) of the capital funding, which amounted to \$200,000.00, in fact only US\$112,674.84 was contributed.

[23] Mr. Delves also argued that the JVA is void ab initio as a result of the dishonest misrepresentations of Mr. Dorneiden prior to the execution of the JVA. The Claimants in their statement of claim pleaded as follows:

"PARTICULARS OF FRAUD

- (a) The First Named Defendant induced the Third and Fourth Named Claimants to enter into a joint venture agreement with him as servant and/or agent of the Sixth Named Defendant based on his representations of his experience and skills.

- (b) The First Named Defendant represented to the Claimants, whether orally, in writing or by his actions and deeds that he was acting as project

manager on behalf of the Sixth Named Defendant of the Development in the best interest of the Joint Venture.

- (c) The First Named Defendant represented to the Third Named Claimant (and thereby the Fourth Named Claimant) whether orally, in writing or by his actions and deeds that the cost of the Project would come in under the Quantity Surveyor's report, due to his expertise in managing developments and sourcing materials."

[24] The principle which emanates from the cases referred to by both Counsel is that an applicant does not need to show that its case against the respondent is so strong that it is likely to succeed. The test is whether the applicant has a good arguable case. In *Ninemia Maritime Corporation v Trave GmbH (The Niedersachsen)*⁵ Lord Mustil described a good arguable case in the following manner:

"One which is more than barely capable of serious argument but not necessarily one which the judge considers would have a better than fifty per cent (50%) chance of success."

[25] In determining whether the Applicant has a good arguable case the Court will take into account the apparent strength and weaknesses of the case.

[26] I agree with the submission of Mr. Delves that Mr. Dorneiden is not a party to the JVA. However, the application for the freezing order was not made by Mr. Dorneiden solely, it was also made by Stanley's Food who is a party to the JVA. All of the reliefs sought in the counterclaim were by Mr. Dorneiden and/or Stanley's Food.

[27] Mr. Dorneiden in his defense denied that he made the representations as alleged by the Claimants.

⁵ (1983) 1WLR 1412

[28] Mr. Dorneiden pleaded⁶ that in the first place it was Mr. Marriott who insisted that he should take on the role of Project Manager since he (Mr. Marriott) would not be able to manage the Project from England. He made no representation of having expertise in managing construction of houses but rather he informed Mr. and Mrs. Marriott that he had experience in the sourcing and importation of materials. Further, Mr. Marriott is a Chartered Surveyor by profession and had for fourteen (14) years been in the business of development of properties ranging in the value of £1 million to over £10 million and he had the benefit of access to expert advice and support at all material times. Further, the project did not come in under the alleged Quantity Surveyor's Report as a result of the decisions of Mr. Marriott where he made several changes to designs.

[29] When the pleadings are examined, the issue raised in relation to the validity of the JVA, whether the alleged representations were made and if so whether the alleged representations were dishonest misrepresentations are questions of facts to be determined at trial.

[30] The Applicants' case as set out in their counterclaim is that they are entitled to receive from Millhawke approximately US\$2.6 million as a result of participation in the JVA. The Applicants identified the sums in the following reliefs which they claim as follows:

- (i) A sum of US\$200,000.00 being 5% of the capital investment in the Project.
- (ii) US\$248,330.56 being management fees under clause 7.11 of the JVA or 7.5% of all the building costs as of the end of August 2010.
- (iii) Project Manager's fee under clause 7.3.1 of the JVA amounting to 1% on each disposal of property in the said development.
- (iv) 11.5% of the Development Profit by virtue of Clause 1.1 of the JVA to be calculated pursuant to Clause 12.1.2 in accordance with Clause 14.4 of the JVA.
- (v) 1/5% of the beneficial interest in the property which constitutes the Project.

⁶ Paragraphs 9, 11, and 12 of the Applicant's Defence and Counterclaim.

[31] The Claimants do not dispute that certain sums are payable under the JVA. Indeed in paragraph 16 of the Statement of Claim the Claimants pleaded as follows:

"16. It was the express understanding of the parties to the Joint Venture Agreement that although the Joint Venture Agreement provided specifically for the Sixth Named Defendant to be responsible for the project management, the person who would carry out the Sixth Named Defendant's de facto duties as Project Manager and to act as its agent was to be its director and shareholder, the First Named Defendant. The Joint Venture Agreement set out the detailed terms of the duties which he was performing through and the remuneration which he was to receive via the Sixth Named Defendant. Under this agreement the First Named Defendant stood to gain a commission of 7.5% on the building costs (i.e. all materials and labor) used for the Development; a 1% commission on the sale of any of the property within the Development, and 11.5% of the net profit under the Joint Venture Agreement. Under this arrangement the disparity between the 7.5% and the 11.5% would mean that the First Named Defendant should profit more were he to keep a tight rein on the building costs, which was in the interests of each of the joint venturers. One of the terms of the Joint Venture Agreement was that the Sixth Named Defendant (in reality the First Named Defendant) had to find US\$200,000.00 to invest in the joint venture. The purpose of this was to ensure that the First Named Defendant had a vested interest in the success of the joint venture."

{32} It is not disputed that Stanley's Food did not pay the full capital investment sum of US\$200,000.00, but rather it paid the sum of US\$112,674.84. It was also acknowledged by the Parties that the outstanding sum would be paid by deduction of Project Management Fees due to Stanley's Food. Under Clause 10.2 of the JVA this capital investment is to be repaid on the disposal of the property after repayment to any creditors have been made.

[33] Having regard to the provisions of the JVA and the Claimants' acknowledgement that various sums are payable to Stanley's Food under the JVA, I find that there is a good and arguable case. The Applicants also made other claims in their counterclaim for damages for repudiation of contract and for conversion. On an application for a freezing order the Applicant is not required to prove that there is a good and arguable case in relation to each claim, therefore I find that it is not necessary for the Court to determine whether they have a good and arguable case in relation to each and every claim.

RISK OF DISSIPATION

[34] Mr. John referred the court to the Eight Affidavit of Mr. Marriott which was filed in opposition to the application for an interim freezing order where the Claimants admitted that they are marketing the properties of the project and they intend to repay all capital invested by the JVA Partners all of whom live in the United Kingdom except Stanley's Food. Mr. John also referred to paragraph 19.2 of the Affidavit where Mr. Marriott deposed that himself and Mrs. Marriott are willing to abide to retain sums up to a sum of US\$113,000.00. Mr. John submitted that therefore the only issue is the amount which should be restrained and whether such restraint should be by way of a freezing order or otherwise. The making of the freezing order would result in the Claimants suffering lesser irremediable prejudice than the Applicant would suffer in the event that the order is not granted.

[35] Mr. Delves in response submitted that there is no evidence in the Defendant's affidavit that the Claimants will dissipate their assets. Paragraphs 6 and 19 of the Defendants' affidavit do not provide the requisite evidence. The jurisdiction to grant a freezing order is triggered by evidence that a respondent is wrongfully attempting or is likely to attempt to make itself judgment-proof, see Z Ltd v A. Mr. Delves also referred to the case of Calefaccion Ventilación SA DE.C.V. v Flag Luxury Properties (Anguilla LLC)⁷ and submitted that the fact that Millhawke and Second Claimant have filed the requisite documents at the Companies Registry shows that the First and Second Claimants are conducting

⁷ AXAHCV 2010/0001

businesses in the normal way. A company acting in its normal course of business is not to be seen as attempting to spirit its assets away.

[36] Mr. Delves also submitted that a freezing order would prejudice the Claimants as prospective purchasers would be put off. The purpose of the Court's injunctive powers is not to give security for a judgment which the applicants hope will be in their favor. The Applicants have not adduced any evidence of dishonesty, fraud or discreditable conduct on the part of the Defendants. Also the Applicants have not adduced any evidence to show that they are entitled to US\$2,600,000.00 which they claim. The Directors of Millhawke and the Second Claimant, being Mr. and Mrs. Marriott live at a known address in the United Kingdom; judgment can therefore be easily enforced.

[37] The legal authorities such as Z Ltd and Rochamel⁸ have all reiterated that the purpose of a freezing order is not to provide a claimant with security in the event that judgment is granted in his favor. Rather the purpose of a freezing order is to prevent a defendant from dissipating his assets prior to judgment so as to make the judgment granted against him futile. An applicant for a freezing order is therefore required to show that there is a real risk that the Defendant would dissipate his asset and any judgment granted in his favor would be futile.

[38] In the Angel Bell the Court stated that a freezing order would not be appropriate should the Defendant be prevented from carrying on his business even if the effect of the Claimant succeeding would be to render the Defendant insolvent.

[39] The evidence of the Applicants of the risk of dissipation is to be found at paragraphs 7 to 19 of Mr. Domeiden's affidavit in support of the application. In essence the Applicants allege that the property at Bequia is the only asset of Millhawke and the intention of Millhawke is to sell the property. The property is being marketed internationally. Mr. and Mrs. Marriott who are the shareholders and the Directors of Millhawke are not resident in St. Vincent and they intend to distribute the proceeds upon sale.

⁸ SLUHCV 2006/0638

[40] Mr. Marriott in his affidavit in response deposed at paragraph 19:2 -

"19.2 As for putting the proceeds beyond the First and Sixth Defendants' reach, it would only be our intention to repay the JV Investors what is owed to them in terms of capital investment as provided for in the JVA, albeit this has not been dissolved, that would include the Sixth Named Defendant if we stand to lose both our claims that the JVA was void ab initio and our claim for damages against the Sixth Named Defendant which is responsible as principal for the First Named Defendant's dishonesty in the Project management and breaches of fiduciary duty. In this respect, my wife and I are very happy to continue to ... up to a level of US\$113,000.00 by the undertaking which was provided in Annexure 4 to the JVA pending the conclusion of the trial or further order of the Court."

[41] There is no evidence in the affidavits to show that Millhawke has any other asset in SVG other than the properties of the Project which are for sale. Further, there is no evidence that Millhawke is engaged in any other business other than the Project. Having reviewed the evidence in this matter, while I agree that there is no evidence of dishonesty on the part of the Respondents, I am satisfied that there is a real risk that Millhawke acting through its shareholder and directors Mr. and Mrs. Marriott do intend to remove and dissipate the assets of Millhawke upon the sale of property. Given the circumstances of this case where the Respondents have acknowledged that capital investment in the JVA was made by the Applicants and also that Project Management fees were payable, I find it would be unjustifiable if the Respondents were to dissipate all of the proceeds of the sale prior to the determination of the claim and counterclaim. The evidence shows that the only business Millhawke is involved in is the vehicle used by Mr. and Mrs. Marriott for the purposes of the JVA which are outlined in the recital of the JVA as follows:

"(A) Contracts for the purchase of property at Mount Pleasant and Hope Bay, Bequia, St. Vincent and the Grenadines are to be entered into by the Developer (a copy of which shall be provided by the Developer to the Project Manager as soon as practicable) but in the meantime substantially in the form annexed hereto in Annexure 1.

- (B) The Developer and the Project Manager have agreed to enter into this Agreement to reflect the terms pursuant to which they intend to complete and fund the purchase of, carry out the Development of, and then procure a Disposal of the Property.
- (C) The intention is to build approximately 6 houses on this land for resale at a profit."

[42] In view of the above I am satisfied that this is an appropriate case for the grant of a freezing order.

ORDER

[43] It is ordered that:

- (i) The First Claimant whether by itself, agents, employees, directors, servants or otherwise are hereby restrained from removing from St. Vincent and the Grenadines or in any way dispose of, deal with or diminish the value of its assets which are in Saint Vincent and the Grenadines up to the value of US\$500,000.00 or its equivalent in Eastern Caribbean Dollars until the final determination of the claim and counterclaim or further order of the Court.
- (ii) Upon the sale of the property, the First Claimant shall deposit with the Supervising Solicitor Mr. Richard Williams the sum of US\$500,000.00 to be held by him until the final determination of the claim and counterclaim or further order of the Court.
- (iii) The First Claimant shall pay the costs of this application in the sum of EC\$3,000.00.


.....
Gerfel Thom
HIGH COURT JUDGE