



THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO. 1 OF 2005

BETWEEN:

**ANDREW POPELY**  
(Representing the interests of the beneficiaries of  
Blue Ridge Trust)

Claimant/Respondent

v

**AYTON LIMITED**  
**CORPORATE DIRECTORS LIMITED**  
**ST. VINCENT TRUST SERVICES LIMITED**  
**LEX SERVICES LIMITED**

Defendants/Applicants

**Appearances:** Mr. G. Bollers and Mr. P.R. Campbell Q.C. for the Applicants.  
Mr. Stanley John for the Respondent.  
Mr. Akin John for Cosmos Trust Ltd.

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2012: November 30  
December 3, 12, 18  
2013: January 9  
May 5  
June 6  
July 29  
October 11  
November 21, 28

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### JUDGMENT

[1] **THOM, J.:** On October 31, 2012 this Court gave judgment in favor of the Respondent and made the following orders:

- (a) That the powers of the Director of Ayton Limited have been exercised in a manner that is oppressive and that unfairly disregarded the interest of the

beneficiaries of the Blue Ridge Trust which is the sole shareholder of the First Defendant.

- (b) No sums are due to the Third Defendant from either the beneficiaries of the Blue Ridge Trust or from the Blue Ridge Trust in respect of services rendered and expenses incurred by the Third Defendant as Trustee of the Blue Ridge Trust in relation to Casterbridge Properties Limited. Neither the Blue Ridge Trust nor the beneficiaries of the Blue Ridge Trust are liable for any of the expenses incurred in the Casterbridge Properties Limited litigation.
- (c) The Third Defendant must account and indemnify the Blue Ridge Trust thirty per cent (30%) of the distributable assets of Casterbridge Properties Limited including thirty per cent (30%) of the £3.67 million settled by Mars Trust Limited by the Third Defendant and thirty per cent (30%) of the price of the timeshare welks that were transferred by Casterbridge Properties Limited to Pono Finance Limited.
- (d) The Third Defendant is hereby removed as Trustee of the Blue Ridge Trust with immediate effect.
- (e) Cosmos Trust Limited is appointed Trustee of the Blue Ridge Trust with immediate effect and all assets of Blue Ridge Trust are hereby vested in Cosmos Trust Limited with immediate effect.
- (f) The resolution to wind up Ayton Limited is set aside.
- (g) The sum of £15,000 being security for the Defendant's costs and is held at the Scotia Bank, Kingstown, Saint Vincent and the Grenadines be paid forthwith to the Claimant.
- (h) The Second, Third and Fourth Defendants to pay the Claimant's costs, such costs to be prescribed costs.

[2] The Defendants have filed an appeal and seek a stay of execution of the judgment and an injunction against Cosmos Trust Limited and the Directors of Ayton Limited being the Claimant and John Anthony Popely.

- [3] The Claimant opposed the application for a stay of execution and the application for an injunction. John Anthony Popely and Cosmos Trust also opposed the application for an injunction.

### **STAY OF EXECUTION**

- [4] The application for a stay of execution is supported by two affidavits of Ms. Juliana Keizer dated the 12<sup>th</sup> and 29<sup>th</sup> days of November 2013. The grounds of application for the stay of execution are:

- (i) Having regard to the terms of the said judgment, the Defendants urge the Court to rule that it would be just and convenient to make the Order for a stay of execution of the judgment pending the hearing and determination of the intended appeal in order to prevent undue prejudice to the Defendants in that without a stay, the appeal would be rendered nugatory and if successful the loss which the Defendants would suffer could not be compensated in damages. The Claimant is in any event impecunious.
- (ii) The Defendants believe that their appeal would have a realistic prospect of succeeding if not on all of the issues then at least on some of the issues to be contested in the proposed appeal in all the circumstances of the case.

At the hearing Mr. Bollers stated that having regard to the events which occurred since the judgment as outlined in the affidavit of Hermie Miller dated November 30, 2012 on behalf of the Respondent the Applicants only seek a stay of paragraph (c) of the Order.

- [5] Mr. Bollers submitted that the Court has an inherent jurisdiction to grant a stay of proceedings pending the hearing of an appeal. An application for leave to appeal or the filing of an appeal does not operate as a stay unless an order granting a stay is obtained from the Court of Appeal or a single judge of the Court of Appeal or a judge of the Court below. Mr. Bollers referred the Court to CPR 2000 Part 62.19.

- [6] Mr. Bollers further submitted that the jurisdiction is discretionary and is exercisable in cases where the Court thinks that it is just and convenient to make the order to prevent undue prejudice to the parties or prevent an abuse of process of the Court. The Court will likely grant a stay pending an appeal if the appeal would otherwise be rendered nugatory or the appellant would suffer loss which could not be compensated in damages.
- [7] The Court will also consider whether the appeal has a realistic prospect of succeeding. In this case the evidence shows that the Applicants have a reasonable prospect of success in their appeal. The issues of res judicata, the rule in **Foss and Harbottle** and the issue of the monetary award against the Applicant St. Vincent Trust Services are matters that should be ventilated before the Court of Appeal. Mr. Bollers relied on the cases of **Enzo Addari v Edy Gay Addari**<sup>1</sup>; and **Ipoc International Growth Fund Limited v L V Finance Group Ltd. et al**<sup>2</sup>.
- [8] Mr. Stanley John in response submitted the power of a judge at first instance to hear an application for a stay of execution instead of the Judge of the Court of Appeal can only be exercised where it would otherwise cause inconvenience or delay not to do so. Mr. John relied on Section 33 of the Eastern Caribbean Supreme Court Act and Sections 27 and 28 of the Eastern Caribbean Court of Appeal Rules. He further submitted that there is no evidence of inconvenience or delay therefore there is no basis upon which this Court can proceed to hear the application for a stay of execution.
- [9] Mr. John next submitted that the power to grant a stay of execution is discretionary and an applicant must establish that there are special or exceptional circumstances justifying the grant of a stay of execution. This is because a successful party ought not to be deprived of the fruits of a judgment given in his favor. Mr. John relied on the cases of **Marie Makhoul v Cecily Foster**<sup>3</sup>; **Courtesy Taxi Co-operative Society Ltd v Lucien Joseph**<sup>4</sup>;

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<sup>1</sup> BVIHCVA No. 21/2005

<sup>2</sup> BVIHCV No. 140/2003

<sup>3</sup> SLUHCVA No. 14/2009

<sup>4</sup> SLUHCVA No. 43/2008

and *1st National Bank of St. Lucia Limited v Universal Fishing and Trading Co. Ltd*<sup>5</sup>.

Mr. John then submitted that there is no evidence in the affidavit of Ms. Keizer to establish that there are exceptional circumstances upon which the court should exercise its discretion. Further the Defendants' appeal has little chance of succeeding.

## **FINDINGS**

[10] Section 33 of the Eastern Caribbean Supreme Court Act read as follows:

"Where an appeal has been brought under the provisions of Section 32 and is pending in the Court of Appeal a Judge of the High Court may hear and determine such application incidental to the appeal and not involving the decision thereof as may be prescribed by rules of court; but an order made on any such application may be discharged or varied by the Court of Appeal."

[11] Sections 27(1) and 28(1) of the Eastern Caribbean Court of Appeal Rules read as follows:

"27(1) In any cause or matter pending before the court a single Judge of the Court may upon application make orders for –

- (a) giving security for costs to be occasioned by any appeal;
- (b) leave to appeal in forma pauperis;
- (c) a stay of execution on any judgment appealed from pending the determination of such appeal;
- (d) an injunction restraining the defendant in the action from disposing or parting with possession of the subject matter of the appeal pending the determination thereof;
- (e) extension of time;

and may hear and determine and make orders on any other interlocutory application."

"28(1) Applications referred to in the preceding rule shall ordinarily be made to a Judge of the Court, but, where this may cause undue inconvenience or delay, a Judge of the Court below may exercise the powers of a single Judge of the Court under that rule."

[12] The effect of the above provisions is that a judge of first instance may hear and determine an application for a stay of execution where undue inconvenience or delay would result if the application is made to a single Judge of the Court of Appeal. I agree with Mr. Stanley John that the Applicants did not adduce any evidence of undue inconvenience or delay.

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<sup>5</sup> SLVHCV No. 31/2010

However, I take into consideration that the Eastern Caribbean Court of Appeal is an itinerant Court with its Headquarters in St. Lucia. At the time of the filing of this appeal being November 12, 2012, the Court of Appeal was not sitting in Saint Vincent and the Grenadines (St. Vincent) and the Court was not due to sit in St. Vincent until February 2013. I therefore find in the circumstances it was appropriate for the application to be made to the Court below in St. Vincent.

[13] The approach to be adopted by the Court on an application for a stay of execution is outlined in several decisions of the Court of Appeal including the cases of Marie Makhoul and Marguerita Desir v Sabina James Alcide<sup>6</sup>. In Marie Makhoul Madam George-Creque JA (as she then was) stated the principles in paragraph 3 to 5 of the judgment as follows:

- “3. The general rule is for no stay, as a successful litigant is entitled to the fruits of his judgment without fetter. Accordingly, there must be good reasons advanced for depriving or in essence enjoining a successful litigant from reaping the fruits of a judgment in his favor, particularly after a full trial on the merits.
4. The modern authority on the guiding principles the court employs in exercising its discretion to grant a stay is the case of Linotype-Hell Finance Ltd v Baker where Staughton L.J. opined that a stay would normally be granted if the appellant would face ruin without the stay and that the appeal has some prospect of success. It must be emphasized that it is not enough to merely make a bald assertion to the effect that an applicant will be ruined. Rather what is required is evidence which demonstrates that ruination would occur in the absence of a stay.
5. The authority of Hammond Suddard Solicitors v Agrichem International Holdings is grounded in the same principle though formulated differently. In that case the court pointed out that the evidence in support of a stay needs to be full, frank and clear. They went on to state the principle thus:  
“... whether the court should exercise its discretion to grant a stay will depend on all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other

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<sup>6</sup> SLUHC VAP No. 30/2011

hand if a stay is refused and the appeal succeeds and the judgment is enforced in the meantime what are the risks of the appellant being able to recover any monies paid from the respondent?"

[14] Similarly, in the *Marguerite Desir* case the court held inter alia as follows:

"The court's jurisdiction to grant a stay is based upon the principle that justice requires that the court should be able to take steps to ensure that its judgments are not rendered valueless. The essential question for the court is whether there is a risk of injustice to one or both parties if it grants or refused a stay. Further, the evidence in support of the application for stay of execution should be full, frank and clear. The normal rule is for no stay and if a court is to consider a stay, the applicant has to make out a case by evidence which shows special circumstances for granting one. The mere existence of arguable grounds of appeal is not by itself a good enough reason."

[15] Applying the above principles, the court is required to look at all of the circumstances of the case in considering whether there is a risk of injustice to one or other or both parties, and whether the appeal has some prospect of success. The onus is on the applicant to adduce evidence to show that there is a risk of injustice to the applicant if the stay is not granted. This evidence must be adduced in the affidavit(s) in support of the application and must be full, frank and clear. The applicant cannot seek to do so by way of its submissions.

[16] The applicant's application for a stay of execution was supported by two affidavits of Ms. Juliana Keizer, a solicitor's clerk. The affidavits are dated November 12 and 29, 2013. The affidavit of November 29, 2013 merely states that an appeal has been filed. The relevant parts of the November 12 affidavit are paragraphs 4 and 5 (there is an error in the numbering of the paragraphs and as such there are two paragraphs numbered 5).

"4. I have also been advised by counsel for the Defendants and verily believe that having regard to the terms of the said judgment it would be just and convenient to make the order for a stay of execution of the judgment pending the hearing and determination of the intended appeal in order to prevent undue prejudice to the Defendants in that, without a stay, the appeal would be rendered nugatory and if successful, the loss which the defendants would suffer could not be compensated in damages.

5. I have been further advised by counsel for the Defendants and verily believe that the Defendants' appeal would have a realistic prospect of succeeding if not on all of the issues then at least on some of the issues to be contested in the proposed appeal, in all the circumstances of the case. The Defendants say that there is a reasonable prospect of success as: (The deponent sets out the grounds of the appeal as outlined in the application.) The defendants also seek an interim stay of execution pending the hearing and determination of this application, for the same reason as those given above."

[17] The above paragraphs contain no evidence of any risk of injustice that the Applicants would suffer if a stay of execution is not granted. The bald statement of Ms. Keizer that the appeal would be rendered nugatory if a stay is not granted and the loss the Defendants would suffer could not be compensated in damages is not a sufficient basis on which the court can exercise its discretion to grant a stay. Having reviewed the grounds of appeal I am of the opinion that the Applicants have an arguable case. However, the fact that an applicant has an arguable case is not enough; the applicant must show by way of evidence in its affidavit that there is a risk of injustice if a stay of execution is not granted. This the Applicants have failed to do. I therefore find that this is not an appropriate case for the court to exercise its discretion to grant a stay of execution.

## **INJUNCTION**

### **SUBMISSIONS:**

[18] Mr. Bollers submitted that the Court has an inherent jurisdiction to preserve the status quo so that if an appeal is successful the judgment would not be rendered nugatory. Mr. Bollers relied on David Bean on Injunction and the cases of Polini v Grey; Orion Property Trust Ltd; and Erinford Properties and Another v Cheshire. Mr. Bollers also referred to the following as outlined in Stephen Gee – Commercial Injunctions:



- (1) There is an inherent jurisdiction in the Court to grant an interlocutory injunction pending an appeal to preserve the status quo so that in the event that the appeal is successful it would not be rendered nugatory.
- (2) There is no need for a new action to be filed to determine an interlocutory injunction; the main action does not come to an end while an appeal is pending.
- (3) One does not need to apply directly to the Court of Appeal and an injunction could be granted by the trial judge.
- (4) In determining whether to grant or refuse an injunction pending appeal, the Court looks and examines which party would suffer the greater inconvenience.

[19] Mr. Bollers further submitted that there is a reasonable prospect of success of the appeal, and unless an injunction is granted the appeal if successful would be nugatory.

[20] Mr. Akin John submitted that the court has no jurisdiction to grant an injunction pending an appeal. The court's authority is based on statute law being the Application of English Law Act, the Eastern Caribbean Supreme Court Act in particular sections 11 and 33 which deals specifically with the jurisdiction of the court to grant an injunction pending appeal. Also the Eastern Caribbean Supreme Court Rules gives jurisdiction to a single judge of the Court of Appeal to make an order for an injunction pending appeal. Further, CPR 2000 Part 62 (1) (b) (a) provides for a judge at first instance to grant a stay of execution but there is no provision for the grant of an injunction pending appeal.

[21] Mr. Akin John further submitted that Cosmos was neither a party to the action at first instance nor is it a respondent to the appeal proceedings and it does not fall within the definition of party in Part 2.4 of CPR 2000 against whom an interlocutory injunction may be granted pending appeal. The learning in David Bean on Injunctions relate to defendants and to no other party. The jurisdiction exercised in Erinford Properties is the subject of Rules of Court which does not contain a provision similar to section 33 of the Eastern Caribbean Supreme Court Act.

- [22] Mr. A. John further submitted that relief would not be granted under the inherent jurisdiction if the matter is covered by statutory provisions (see Belize Alliance). In the present case the matter is covered by statutory provisions thus the Applicants cannot seek relief under the inherent jurisdiction of the Court.
- [23] Mr. Stanley John submitted that the court does not have an inherent jurisdiction to grant an injunction pending appeal. The matter is dealt with by statute. Pursuant to section 4 of the Application of the English Law Act the application of common law and equity are subject to the provisions of the Eastern Caribbean Supreme Court Act.
- [24] Mr. S. John also submitted that the case of Polini v Grey is not applicable since the U.K. Judicature Act did not contain a provision similar to section 33 of the Eastern Caribbean Supreme Court Act or sections 27(1) and 28(1). Even if the Court has jurisdiction, it is an equitable jurisdiction and the court has a discretion whether to grant it. Neither the Claimant nor the Director of Ayton Limited has the assets of Blue Ridge Trust and therefore they cannot dispose of the assets. The affidavit of the Applicants makes no mention of the assets of Blue Ridge Trust. There is nothing in the Applicant's affidavit that suggests that the Claimant or the Director of Ayton are dealing with the Assets of Blue Ridge Trust.
- [25] Mr. S. John also submitted that the affidavit of the Applicants does not show that any prejudice would be suffered by the Respondents if an injunction is not granted.

## FINDING

### INJUNCTION

- [26] The findings at paragraphs 10 to 12 above apply equally to the jurisdiction of the High Court to grant an injunction pending appeal.
- [27] The Defendants seek two injunctive orders against the Claimant and John Anthony Popely. The orders sought are:

- "(1) To prevent the Claimant and John Anthony Popely from acting as directors of Ayton Limited.
- (2) To restrain the Claimant and John Anthony Popely from selling, disposing of, mortgaging, letting or otherwise dealing with any of the assets of Blue Ridge Trust wherever situate."

[28] Ayton Limited is an International Business Company registered pursuant to the International Business Companies Act 1996 Laws of Saint Vincent and the Grenadines. The affidavit evidence shows that the Claimant and John Anthony Popely are the two directors of Ayton Limited. Under section 89 of the International Business Companies Act Chapter 149 every company registered under the Act is required to have at least one director.

[29] The injunctive orders against the Claimant and John Anthony Popely were sought in the Amended Application for an injunction filed on the 7<sup>th</sup> December 2012. In that application the Applicants allege at paragraph 10 that there is a real risk that the assets of Ayton Limited will be sold, distributed or otherwise lost by the actions or conduct of the Directors of Ayton Limited and/or the Directors of Ayton Limited will act to the detriment of the Defendants prior to the determination of the appeal. Therefore the Defendants will suffer irreparable harm and that damages will not be and is not an adequate remedy.

[30] The Defendants stated in their notice that they intend to rely on the affidavits of Giselle Millington filed on 22<sup>nd</sup> November 2012, Juliana Keizer filed on 29<sup>th</sup> November 2012 and Hermie Miller filed on 30<sup>th</sup> November 2011.

[31] The International Business Companies Act Chapter 149 outlines the duties of directors. The relevant sections are sections 96(1) and 97-99. They read as follows:

"96(1) Subject to this section, a director of a company, in exercising his powers or performing his duties, shall act honestly and in good faith and in what the director believes to be in the best interests of the company.

97. The directors have all the powers of management of an international business company that are not reserved to the members under this Act or by the articles or by-laws.

98. A director shall exercise his powers as a director for a proper purpose and shall not act, or agree to the company acting, in a manner that contravenes this Act or the articles or by-laws of the company.
- 99(1) Every director, officer, agent and liquidator of an international business company in performing his functions shall act honestly and in good faith with a view to the best interests of the company and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
- (2) No provision in the articles or by-laws of an international business company or in any agreement entered into by the company relieves a director, officer, agent or liquidator of the company from the duties to act in accordance with this Act.

[32] The affidavit of Giselle Millington filed on the 22<sup>nd</sup> November 2012 contains no evidence which suggests that the Claimant and/or John Anthony Popely in the exercise of their duties as directors have acted contrary or in breach of any of the provisions of the International Business Companies Act or that there is any likelihood that they would do so.

[33] The affidavit of Juliana Keizer simply states that the Notice of Appeal has been filed.

[34] Ms. Hermie Miller in her affidavit deposed at paragraph 12 that Ayton Limited has taken steps in the United Kingdom in the conduct of litigation in relation to White Owl Barn. The Third Defendant/Applicant is a party to the proceedings in the United Kingdom.

[35] I agree with the submission of Mr. John that if there is a proper reason why those proceedings should be restrained the Third Defendant should make an application in the English Court.

[36] In relation to the second injunctive order there is no evidence in the affidavits relied on by the Defendants that the Claimant and/or John Anthony Popely are in possession of any of the assets of Blue Ridge Trust. The assets of Blue Ridge Trust are outlined in paragraph 40 of this judgment. There is no evidence of risk of dissipation of the assets.

[37] In relation to Cosmos, the Defendants seek three injunctive orders being:

Restraining Cosmos from --

- (i) acting as trustee;
- (ii) selling, mortgaging or encumbering etc. the assets of Blue Ridge Trust;
- (iii) acting as registered agent of Ayton Limited.

[38] Blue Ridge Trust is an international trust registered pursuant to the International Trust Act 1996 Laws of Saint Vincent and the Grenadines. The Claimant along with his brother Mr. John Anthony Popely and any living grandchildren of John Henry Popely and his wife Ann Popely were named as the beneficiaries of the Trust.

[39] The Claimant in his affidavit in response being the affidavit of Hermie Miller dated November 30, 2012 outlined the actions taken by Cosmos as trustee of Blue Ridge Trust. They are as follows:-

- “(i) Filed a copy of the Judgment with the Registrar of International Trusts whereby upon payment of the relevant fees, Blue Ridge Trust has been restored to the Register of International Trusts with Cosmos as the registered trustee.
- (ii) Removed Corporate Directors Limited (the Second Defendant) as the director of Ayton, and appointed the Claimant and his brother John Anthony Popely as directors in its place, as envisaged by paragraph 88 of the said judgment.
- (iii) Arranged with the directors of Ayton Limited to appoint Cosmos as Ayton’s registered agent under the International Business Companies Act 2007 in place of Saint Vincent Trust Services, with its registered office at 78 Halifax Street.
- (iv) Paid all arrears of annual dues and have Ayton restored in good standing with the International Business Companies Registry.”

[40] Hermie Miller also outlined in her affidavit the assets of Blue Ridge Trust as follows:

- "(i) the share capital in Ayton Limited;
- (ii) the Trust's money claim against Saint Vincent Trust Services (which is the subject of the Order at paragraph 89(3) of the said Judgment).;
- (iii) the claim currently being made by the beneficiaries of the Trust in England..."

It must be noted that the Applicants also relied on this affidavit of Hermie Miller.

[41] There is no evidence that since Cosmos became the trustee of Blue Ridge Trust that Cosmos has acted contrary to the International Trust Act or that Cosmos acted in breach of trust.

[42] The Applicants in their affidavit in support being the affidavit of Giselle Millington dated the 22<sup>nd</sup> day of November 2012 filed on the same day at paragraph 17 outlined the following acts which they fear Cosmos may take and which will be to their prejudice, being:

- (i) set aside the resolution and actions legitimately taken by the Applicants and Peter Keiser in relation to Ayton, in particular, the sale of White Owl Barn by Peter Keiser. It will prejudice the rights of a bona fide purchaser as well as the Applicant Saint Vincent Trusts Services Limited who is the main creditor of Ayton.
- (ii) Cosmos will seek to have the charge against White Owl Barn registered in England in favour of Peter Keiser be dispensed with and Peter Keiser would not be able to fulfill his undertaking to pay Saint Vincent Trusts Services Limited.
- (iii) Cosmos is likely to seek restoration to the Register of Casterbridge Properties Limited and Resort Holdings Limited in which Blue Ridge Trust

held 30 shares each before the companies were wound up and dissolved. If the companies are restored Cosmos will use the companies against the interests of the former majority shareholders and the Applicants.

- (iv) Cosmos will allow the Claimant and his family to pursue a double derivative action in England in which Saint Vincent Trust Services Limited is joined as a defendant. The proceedings should not be permitted to proceed as the claims are false.

[43] In relation to paragraph (i) at the time the application was filed Ayton was already restored to the Register. The issue of the sale of White Owl Barn is presently being litigated in the English Court by Ayton Ltd as stated in paragraphs 21 and 22 of the affidavit of Hermie Miller on which the Applicants also rely.

[44] In relation to paragraph (ii) Hermie Miller at paragraph 35 stated that the charge is registered in favour of Ayton Limited, the relevant entries of the Land Registry in England were exhibited which shows that the charge payment of £495,500 together with 50% of the proceeds of sale over £495,000 to Ayton Limited. I agree with the submission of Mr. John that if the sale of White Owl Barn is set aside by an order of the English Court it would not affect Saint Vincent Trust Services Limited's rights as creditor of Ayton.

[45] In relation to paragraph (iii) the Applicants are effectively asking the court to restrain Cosmos from causing Casterbridge Properties Limited and Resort Holdings Limited from bringing any action against the former majority shareholder (who is not a party to these proceedings and who is not a party to this application) and the Applicants. The court is being asked to restrain the institution of claims of which there are also no details. This would be in effect to restrain Casterbridge and Resort from instituting any legitimate claims which they may have against the Applicants and/or the former majority shareholder.

[46] In relation to paragraph (iv) the Applicants are effectively seeking to have Cosmos restrained from pursuing the Claim in England which Hermie Miller stated in her affidavit at

paragraph 46 was stayed by the English Court. In my view it is for the English Court to determine whether those proceedings should proceed and not for this court to determine that the allegations in the claim before the English Court are false and therefore Cosmos should not be allowed to pursue them.

[47] The principles which should be applied by the court when considering an application for an interlocutory injunction are outlined in the *American Cyanamid* case. These principles were crystallized by the Privy Council in *National Commercial Bank (Jamaica) Limited v Olint Corporation Limited*. Lord Hoffman in delivering the judgment of the court stated at paragraphs 16 to 18 as follows:

"16. ... It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in *American Cyanamid Co. v Ethicon Ltd.* [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.

17. In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the Court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the *American Cyanamid* case [1975] AC 396, 408:

"It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them."



18. Among the matters which the court may take into account are prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' costs.

[48] Having regard to my findings above I am not satisfied that the Applicants would suffer irreparable harm if an injunction is not granted. I am not satisfied that if an injunction is not granted the appeal would be rendered nugatory.

[49] In conclusion, I find that this is not an appropriate case in which the court should exercise its discretion and grant an injunction.

[50] While hearing of these applications commenced in November 2012 the hearing was not completed until November 21, 2013. This was due to the fact that adjournments were sought by both sides to which there were no objections by either side.

[51] It is hereby ordered that:

- (i) The application for a stay of execution is hereby dismissed.
- (ii) The application for an injunction is hereby dismissed.
- (iii) The Applicants shall pay the Claimant and Cosmos Trust Ltd such costs as is agreed by the parties, failing agreement to be assessed by the court.

  
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Gertel Thom  
HIGH COURT JUDGE