EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

IN THE FEDERATION OF ST. CHRISTOPHER AND NEVIS

ST. CHRISTOPHER CIRCUIT

(CIVIL)

CLAIM NO. SKBHCV2011/0144

BETWEEN:

ANGUILLA BUSINESS SERVICES LTD.
(On its own behalf as creditor and member
Of the 1st Defendant and on behalf of the
1st Defendant in its derivative capacity
against the 2nd and 3rd Defendants)

Claimant/Applicant

And

ST. KITTS SCENIC RAILWAY LIMITED

First-named Defendant/1st Respondent

and
STEVEN G HITES

Second-named Defendant/2nd Respondent

JEFFERY D. HAMILTON

Third-named Defendant/3rd Respondent

Appearances:

Mr. Damien Kelsick and Mr. Garth Wilkin for the Claimant/Respondent
Mr. Terrence Byron, Mr. Sylvester Anthony, Mr. Fitzroy Eddy and Taliba Byron for the Respondents
Present: Mr. Thomas Raider, Mrs. Anne Raider

2013: May 31st
2013: August 26th

DECISION

[1] **THOMAS J (AG)** On 26th March 2013 the Claimant filed an ex-parte application seeking an amendment to the interlocutory order granted by this court on 6th June 2011 and continued on 1st July 2011.

[2] The grounds advanced are as follows:

"1. The 1st Defendant Company and the 2nd Defendant and the 3rd Defendant have shown wanton disregard for the orders of this Honourable court made on 6th June 2011 and continued on 1st July 2011.

2. The 1st Defendant Company is contracted to (and has scheduled to) pay US$510,000 to the 3rd Defendant and a Company owned by the 3rd Defendant within the next week in contravention of the orders of this Honourable Court made on 6th June 2011 and continued on 1st July 2011.

3. The 3rd Defendant, if notified of this application, may further deplete the assets of the 1st Defendant Company by immediately authorizing the payment of US$510,000 to himself and his company before the hearing of an inter partes application.

4. Giving notice of this application would defeat the purpose of the application.

5. The 2nd Defendant and 3rd Defendant have demonstrated a continued lack of trustworthiness and breach of his duties as a director of the 1st Defendant Company.

6. The 3rd Defendant has fraudulently obtained the payment of significant sums of money to himself from the 1st Defendant Company.

7. The 1st Defendant Company's affairs are being and have been conducted in a manner which is unfairly prejudicial to the interests of the Applicant, a minority shareholder in the 1st Defendant Company.

8. The 3rd Defendant has and continues to authorize capital expenditure which is unnecessary, excessive, self-serving, unprofitable, unbudgeted, uneconomical causing the 1st Defendant Company to become insolvent.

9. The 3rd Defendant continues to mismanage the 1st Defendant Company which has and will continue to result in financial loss.

10. The 2nd Defendant has fraudulently colluded with the 3rd Defendant to obtain priority repayment of loans made by the 2nd Defendant to the 1st Defendant Company, to the prejudice of the Claimant.

11. The Applicant relies on Section 142 of the Companies Act Cap. 21.03 which provides recourse to shareholders of a company when the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the shareholder's interests.

12. The Applicant is humbly seeking to invoke the exercise of the Court of its powers under Section 144 of the companies Act Cap 21.03 in granting relief to an unfairly prejudiced shareholder.

13. There is between the Applicant and all Defendants real issues which are reasonable for this Court to try."

[3] The application is supported by the eight affidavit of Thomas G Raider who deposes that he is a director of the Applicant, Anguilla Business Services Limited and also a director of the 1st Defendant, St. Kitts Scenic Railway Ltd.

[4] Some of the issues deposed to by the affiant are: board meetings of the 1st Defendant, the absence of any unanimous decisions of the board since 6th June 2011, the ex parte application by the Applicant for injunction which was granted on 6th June 2011 and continued until further order on 1st July 2011; judgment granted to the Applicant against the 1st Defendant on 22nd August 2011 in the amount of $3,195,050.00 US; copious details of some of the financial expenditures in terms

of capital and other payments; contempt proceedings against the General Manager of 1st Defendant; failure of the Defendants to disclose any information ordered to be disclosed by the court, the reasons for seeking an amendment to the injunction of 6th June 2011, and the reasons why notice of an application for interim relief in this matter was not given.

[5] At the ex parte hearing of the application filed 26th March 2013, the application was granted. Further hearing was scheduled for 19th April 2013 but if there was no hearing on that date the injunction would remain in force until 26th April 2013.

[6] Between 18th and 19th April 2013 a number of affidavits were filed in relation to the matter of the amended injunction of 26th March 2013.

[7] Steven G. Hites, the 2nd Defendant swore to an affidavit, filed on 1st April 2013. In this affidavit the deponent recites paragraphs 4 – 6 of the order of 6th June 2011 in relation to the 1st, 2nd and 3rd Defendants.

[8] At paragraph 5 the deponents' the obligation to comply with the said order is acknowledged, but goes on to say that the affidavit is made without prejudice to the Defendants contention that:

> "1. The Claimant is in breach of the undertaking it was required to give to this Honourable Court in order to obtain the without notice order of 6th June 2011, in the first place.
>
> 2. The Claimant is in of the Court, as a result.
>
> 3. The Claimant did not provide a sufficient issue for the orders to be made, and the same should be set aside.
>
> 4. The Defendants are anxious for hearing of the application filed on 8th July 2011 for an order that Anguilla Business Services Ltd. The Claimant do state whether it has complied with its said undertaking to this Honourable Court."

[9] Also on 18th April 2013, Steven G. Hites and Jeffrey Hamilton, 2nd and 3rd Defendants, respectively, and two of the three directors of the 1st Defendant swore

to an affidavit in opposition to application to amend order of 6th June 2011, and in support of application to dissolve said order.

[10] The essence of the affidavit is that the affiants seek to give reasons for their objections to the application filed on 26th March 2013 and to explain the capital advanced to the company; the reasons the new shop and administration building and its future value; a 30 year agreement between the Government of St. Kitts and the company to operate passenger trains over the SSMC railway for a period of 30 years.

Oral Submissions

[11] At the inter partes haring on 31st May 2013 there were oral submissions on both sides.

[12] In submissions on behalf of the Applicant, learned counsel, Mr. Damien Kelsick, contends that the interim injunction of 6th June 2011 ought to be continued. He referred to the grounds set out in the application and then reference was made to paragraph 19 of Thomas Rader's 8th affidavit which deals with certain matters relating to the financial records of SNSR Ltd., the 1st Defendant. Reference was also made to paragraphs 27 and 28 of the said affidavit in terms of disclosure of certain information and documents as required by the said order.

[13] In terms of capital expenditure learned counsel submitted to the court that the matter of locomotives constitutes such expenditure. In this connection, also the court was also referred to paragraph 46 of the said joint affidavit.

[14] Regarding the court's jurisdiction to amend the order learned counsel referred the court to the UK Rule 3.1 (7) as well as section 11 of the **Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act**.

[15] Finally, learned counsel for the Applicant examined the matter of a person being in contempt appearing before the court. And in this regard referred the court to

Hadkinson v Hadkinson[1] based on this and other authorities it was submitted that the court should refuse to hear the Respondents on the issue.

[16] In oral submissions on behalf of the Respondents, learned counsel, Mr. Terrence Byron in impugning the order of 6th June 2011 contends that with respect to amending the said order, no clear case had been made out in the context of the "alleged" wanton disregard of the said order. He went on to examine general principles of law and Rule 3.1 (7) of the UK Rules of Court in terms of variation and concluded that, except in two defined cases, there was no authority for variation and questioned the applicability of the UK Rules. Reference was also made to the order of 27th March 2011 in saying that it is not in compliance with the Rules in that there was no notice to the Respondents as required by Rule 11.6 (2) of CPR 2000. Further, that the order is in breach of Rule 17.4 in that it contains no date.

[17] In further submissions learned counsel argued that the application is not one for amendment but an alteration which constitutes a drastic change to the order. Further that the Applicant has not shown any dissipation of assets to warrant an amendment to the order and a mere application does not seek to show this.

[18] In summary, learned counsel said that what was sought was not an amendment of the order of 6th June 2011. There was no dissipation of assets and the court has no jurisdiction to make such an order. Further, the Claimant/Applicant does not have a good cause regarding the repayment of capital as opposed the repayment of a loan. Finally, it is contended that the Claimant/Applicant has not sought to show that the claim is based on dissipation of assets to justify a freezing order.

[19] Learned counsel for the Respondents referred the court to the following authorities:

[1] [1952] P. 285

X. Ltd v Morgan – Grampian Ltd. [1990] 2 All ER 1, Fourie v Le Roux [2007] UKHL 1, per Lord Brightman, Re A Company [1983] 2 All ER 36 Panco Marketing (Agency) v Dixon [1983] 2 All ER 158.

Written Submissions

[20] At the end of the of the inter parties hearing, it was the order of the court that parties written should be filed and exchanged on or before 7th May 2013. Based on this order there were only submissions on behalf of the Applicant in the manner ordered.

Applicant's Submissions

[21] It is submitted on behalf of the Applicant that the court does have the jurisdiction to amend the original order. For this proposition a passage from Commercial Litigation: Pre-emptive Remedies[2], the reception provision in section 6 (3) of the **Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act** and Rule 3.1 (7) of the Civil Procedure Rules of England were cited.

[22] On the matter of the import of amendment/variation, learned counsel submits that there is no distinction. And at the same time it is further submitted that given the issues revised in relation to the original injunction, they constitute an exceptional circumstance.

[23] In terms of the continuance of the amendment to the original injunction, learned counsel referred to sections 142 and 144 (2) of the **Companies Act**[3] and also the question whether there are any material non-disclosure by the Applicant in relation to a contract with the Government of Saint Christopher and Nevis.

[24] In so far as the hearing of the Respondents it is accepted that the court has the discretion to make this determination. In furthering their contention that the Respondents should not be heard, numerous authorities are cited including: **Jorril**

[2] 3rd Ed. at pp. 247 -249
[3] Companies 21.03

Financial Inc Bardie Limited[4], Hadkinson v Hadkinson[5], Michael Wilson and Partners Limited v Temujin International Limited[6]; Joyce Lewis v Vance Lewis[7].

[25] As regards the issue as to whether the Respondents should be granted leave to make an oral application discharge the original injunction; the Applicants say that such leave should not be granted because of, inter alia, the Respondents' blatant disregard of the original injunction and the written submissions.

[26] Finally in considering whether the amended interlocutory injunction should continue, the Applicant refutes the following issues revised by the Respondents: no risk of the dissipation of assets, the Applicant does not have a good case, the failure to include a Rule 11.16 notice and breach of Rule 17.4 of CPR 2000.

Issues

[27] The evidence and the submissions thereon give rise to the following issues:

1. Whether there is distinction between the amendment or the variations of a court order.
2. Whether the Respondents should be heard given the Applicant's contention that they are in flagrant breach of the dealer of the June 2011.
3. Whether the court had jurisdiction to hear the Applicant's application.
4. Whether the interim injunction as amended should continue until a determination of the issues on their merits.

Issue No. 1.

[4] [2007] 71 WIR 280
[5] [1952] P 285
[6] BVIHCV 2006/037 (Unrepresented)
[7] BVIHMT 2008/0062 (Unrepresented)

Whether there is distinction between an amendment or the variation of a court order.

[28] It is contended by learned counsel for the Applicant that there is no distinction between the amendment or variation of an order. On the other hand, learned counsel for the Respondents says that there is and says further that there is no authority for variation of an order. According to Mr. Byron any amendment must be under the authority of Rule 42.10 of CPR 2000.

[29] The court does not consider that this dispute should be taken any further and agrees with the submissions by learned counsel for the Applicants that amendment and variation have the same meaning in this context. In any event the words 'vary and 'change' appear in CPR 2000[8].

Issue No. 2.

Whether the Respondents should be heard given the Applicants' contention that they are in flagrant breach of the Order of 6th June 2011.

[30] This issue falls within a very narrow orbit in that whether or not the Respondents should be heard is a matter wholly within the discretion of the court[9].

[31] Learned counsel for the Applicant is vehemently opposed to the Respondents being heard on account of their actions in relation to the Order of 6th June 2011. But there are other considerations. On the other hand, learned counsel for the Respondent contends that the issue is within the discretion of the court[10].

[32] The rules regarding whether a person in this context should be heard were enunciated in Hadkinson v Hadkinson[11] as follows:

> "[I]f a party was in contempt for disobeying an order, and his disobedience impeded the course of justice, the court might in its discretion refuse to

[8] See for example Part 11.16 and Part 20.1
[9] X Limited v Morgan-Grampian Ltd [1990] 2 ALL ER 1
[10] The case of X Ltd. V Morgan-Grampian Ltd [1990] 2 ALL ER is cited
[11] [1952] P 285, supra

allow him to take active proceedings in the suit until the impediment is removed ...

I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to being heard, but if his disobedience is such that so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."

[33] There are some fundamental reasons why the Respondents will be heard. First is that in their affidavit in addressing the issue of new locomotives gave a pellucid indication as to what the order of 6th June 2011 involves. They deposed in part at paragraph 46 as follows:

"The obvious solution is to purchase a new locomotive. In order to avoid any dispute over possible breach of the Court Order, it was decided to lease a locomotive in order to avoid any dispute over possible breach of the Court Order; it was decided to lease a locomotive in order to avoid any dispute over whether or not this will be a capital cost. It is our contention that the terms of the Agreement may make any acquisition of a new, safer locomotive a part of our ordinary operating cost particularly as we are only leasing the locomotive."

[34] At this stage the purpose of the court is to order the status quo to be maintained, but the foregoing points in a certain direction which may ultimately be important to the court in view of the issues as to payments to the 2nd and 3rd Respondents or to companies bearing their names, as deposed to by Thomas Raider at paragraph 19 of his 8th affidavit.

[35] The affidavit of the Honourable Richard Oliver Skerrit, M.P., J.P., though not critical to the application, puts SKSR in the context of tourism. And as minister holding the portfolio of tourism deposes that: 'There is no doubt that SKSR is an integral and vital part of our Tourism product."

[36] Therefore, the court must regard the Minister of Tourism's evidence as pointing the public importance of SKSR and as such another reason for hearing the Respondents. This reasoning is adopted from a decision of our Court of Appeal[12] in refusing an injunction against a quarry on the ground of its public importance even in the face of its effects from the operation.

[37] In conclusion the Respondents will be heard as the evidence in the affidavit of the 2nd and 3rd Respondents points to their considerations given to the Order of 6th June 2011. Also in the equation is the public importance SKSR as Minister Skerrit has deposed to in elaborate form.

Issue No 3.

Whether the court has any jurisdiction to hear the Applicant's application and grant the order sought.

[38] Learned counsel for the Applicant relies on a reception provision contained in the section 6 (3) of the **Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act** which sets out the jurisdiction of the High Court, in so far as practice and procedure are concerned, to be in accordance with "this Act, the enactment of the legislature and Rules of Court." And in default of the foregoing in accordance with statutes, Orders and Rules governing the practice and procedure of the High Court in England. On the other hand, learned counsel for the Respondents places reliance on the case of MacCarty v Agard[13] which says that an amendment can only be made where there is a slip in clearing up the order or if the court's intention is not correctly represented.

[39] In default of an express and general power to amend or vary contained in any statute or CPR 2000, this lets in Rule 3.1 (7) of the Civil Procedure Rule of England which is in these terms:

> "A power of the court under these Rules to make an order includes a power vary or revoke the order."

[12] See: Northrock Limited v Jardine KC 1992 CA 7
[13] [1933] 2KB 417

[40] In **Civil Litigation**[14] at 519 the issue is taken a step further by this learning:

> "The court also has an interest power to vary its own orders so as to carry out its own meaning and to make its meaning plain (White Book 20/11/1; and see Pearlman v Bernhart Bartels [1954] 1 WLR 1457, amendment of proceedings including the judgment to describe the defendant as 'Josef Bartels trading as Bernhart Bartels'.)"

[41] Either way, by virtue of the reception of the English Rules because of a 'default' or by virtue of its inherent power this court is satisfied with the jurisdiction to entertain the application, to amend and to grant the order prayed exist. Indeed it is safe to say that the jurisprudence in this regard enunciated in MacCarty v Agard[15] is long superseded by statute and rules of court

[42] In the written submission on behalf of the Application certain submissions are tendered in order to show that these circumstances are exceptional to warrant the amendment.

[43] In summary outline these are the submissions:

1. Since the grant of the interim injunction on 6th June 2011 there have been at least twelve instances of breaches of the order as listed in the 8th affidavit of Thomas Rader.

2. It is deposed to by the 2nd and 3rd Respondents in their joint affidavit, infra, that the reasons for the action of leasing rather than purchasing a new locomotive was to avoid any issue with the order as to a capital expenditure.

3. The original purpose of the original injunction was to permit the 1st Respondent to carry out operation in the ordinary course of business but to prohibit capital payments and to procure the repayment of loans to the 2nd and 3rd Respondents.

Purpose of an injunction

[14] John O'Hare and Robert N. Hill (8th Ed.)
[15] [1933] 2KB 417

[44] It is trite law that the purpose of an injunction is to preserve the status quo until determination on the merits. It may be an order by the court to do a specific act or to refrain from doing specific acts. And as regard an interlocutory injunction it is stated that it is:

> "[A] provisional measure taken at an earlier stage in the proceedings, before the court has had an opportunity to hear and weigh fully the evidence on both sides[16]."

[45] In **National Commercial Bank of Jamaica Limited v Olint Corp. Limited**[17] Lord Hoffman speaking for the Privy Council restated basic principles and went further. This is what he said in part:

> "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, but such restrictions on a 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 chances of the court able to do justice after the 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 just result."

[46] It has been said that the court's power in relation to the amendment is to make itself clearer. At the same time the evidence contained in paragraph 19 of Thomas Rader's 8th affidavit lists some twelve expenditures which are regarded by the Applicant as being prohibited by the injunction.

[47] In this case, therefore, the court not only has the jurisdiction to hear the application but also the jurisdiction to hear the application but also the jurisdiction to grant the amendment in an effort to do justice after the determination of the merits at the trial. It is to be noted that this is not a case of an absolute prohibition, but a prohibition as to capital expenditure.

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[16] David Bean, INJUNCTIONS, (7th Ed.) at para. 1.1
[17] [2009] UK PC 16 (28 April 2009

Issue No. 4.

Whether the interim injunction as amended should continue until a determination of the issues on their merit.

[48] In impugning the Order of 6th June 2011 and its subsequent amendment, learned counsel for the Respondent contends that no clear case has been made out.

[49] The nature and purpose of an interim injunction and an amendment of an order of the court has already been examined. But it is necessary to refer to Lord Hoffman's dictum in **National Commercial Bank Jamaica Limited v Olint Corporation**[18] when he enunciated the following principles regarding an ex parte injunction, mutatis mutandis:

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

[50] Learned counsel for the Respondents has submitted that no clear case has been made out to justify the order as amended. This the court does not accept. This is because the court accepts that at the level of an injunction in this case, the Applicant has always sought to show that the Respondents were spending money in a manner that was not agreed to and hence the injunction. And even after that, there is evidence before the court that the spending as before on a building and payments to the Respondents[19]. And midst of the contention as to spending, the Respondents' affidavit in opposition indicates by implication concern for the prohibitions of the order regarding the spending on capital projects and hence the decision to lease a locomotive rather than purchasing the same. Learned counsel for the Applicant has shown the reality of this transaction in view of the quantum of money involved and from whom the locomotive is or to be rented.

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[18] Loc cit

[19] See 8th Affidavit of Thomas Raider at para. 19, supra.

[51] It is necessary to restate the principle that at this stage no finding of fact is involved and it is merely for this court to consider the evidence before it in the context of the application for relief given the further that one of the essential objectives of an injunction is to preserve the status quo until trial.

[52] Without making any finding of fact, the court merely notes that the Respondents have sought to justify the spending on a building and its projected value. The question must be whether the status quo is being maintained.

[53] At the center of this matter is money claimed and it is difficult for the court to understand Mr. Byron's contention that no case has been made out.

[54] Again, it is necessary for the court to re-state that matters of the detailed management of the 1st Respondent and whether the spending are capital in nature or otherwise are matters for trial when there will be findings of fact. However, as learned counsel for the Applicant has noted the Respondents in their Affidavits in response to 8th Affidavit of Thomas Raider do not deny any of the evidence of the said Thomas Raider contained in his 8th affidavit.

[55] It is therefore the determination of the court that the Order of 6th June 2011, as amended will continue in force until trial or until further order of this court.

Costs

[56] Costs will be in the cause.

Order

[57] **IT IS HEREBY ORDERED AND DECLARED** as follows:

1. There is no distinction between the amendment or variation of an order of the court, and, accordingly, have the same meaning in this context.

2. The 2nd and 3rd Respondents will be heard in this matter since their joint affidavit filed on 18th April 2013 points to their consideration of the Order of 6th June 2011. Further the operation of St. Kitts Scenic Railway Limited, of which the 2nd and 3rd

Respondents' are directors, is a matter of public importance and as such a reason for them to be heard.

3. The court has jurisdiction to hear the Applicant's application and grant the order sought by virtue of Rule 3.1 (7) of the English Rules of Court, which grants the court the power to amend an order. This rests on the reception of English Rules governing the practice and procedure where there is a default; in effect; in CPR 2000. The court also has a power to amend or vary an order by virtue of its inherent power.

4. In all the circumstances of the case, including a consideration that the 2nd and 3rd Respondents in their affidavit in response did not deny any of the evidence deposed to by Thomas Raider in his 8th affidavit filed on 26th March 2013 on behalf of the Claimant/Applicant, the Order of the 6th June 2011 will continue in force until further order of the court..

5. Costs in the cause.

Errol L Thomas
High Court Judge (Ag)