EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA
COMMERCIAL DIVISION

CLAIM NO. SLUHCV2009/1067

BETWEEN:

FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED

Claimant/ Respondent

And

(1) THE ROSERIE COMPANY LIMITED
(2) THOMAS ROSERIE
(3) SONIA ROSERIE
(4) CHEMICAL MANUFACTURING AND INVESTMENT COMPANY LIMITED

Defendants/ Applicants

AND

CLAIM NO. SLUHCV2010/0121

FIRST CARIBBEAN INTERNATIONAL BANK (Barbados) LIMITED

Claimant/ Respondent

And

(1) CHEMICAL MANUFACTURING AND INVESTMENT COMPANY LIMITED
(2) THE ROSERIE COMPANY LIMITED

Defendants/ Applicants

Appearances:

Mr. Deale Lee for the Claimant/Respondent
Mrs. Cynthia Hinkson-Ouhla with Mrs Esther Green-Ernest for the Defendants/Applicants

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2017: March 02
March 16

Application for interim injunction - whether there is a serious issue to be tried - whether damages would be an adequate remedy – where does the balance of convenience lie – material non-disclosure – is an undertaking in damages sufficient for granting an interim injunction

DECISION IN CHAMBERS

BACKGROUND

[1] **ST ROSE-ALBERTINI, J. [Ag]:** In 2009 and 2010 respectively the respondent First Caribbean International Bank (Barbados) Limited (FCIB) filed two civil claims against the applicants The Roserie Company Limited (TRCL), Chemical Manufacturing And Investment Company Limited (CHEMICO), Thomas Roserie and Sonia Roserie for recovery of various debts and interest, in excess of $6.8 million.

[2] The applicants vigorously defend the claims on the basis that (i) the debts are prescribed; (ii) in the alternative FCIB contrary to its banking arrangements and without their permission caused large sums of money to be paid to a third party, while the sums were still being disputed and for this reason they are not liable to repay such sums; (iii) further sums were debited to their operating account causing it to enter overdraft, contrary to the contractual arrangement with FCIB and they have no knowledge of the origin of these sums; and (iv) that additional sums claimed by FCIB have been paid in full, based on information in their ledgers.

[3] FCIB says on the contrary, all the sums are due and owing by the applicants.

[4] While the claims were still at case management and the parties were dealing with interlocutory applications, including striking out of pleadings by either side, as well as

mediation, FCIB proceeded to appoint Mr Richard Surage as receiver /manager, pursuant to hypothecs and mortgage debentures between the parties.

[5] The deeds of appointment (the deeds) were executed on August 18, 2014 and filed[1] at the Companies Registry. The receiver /manager commenced duties under the appointments which precipitated the filing of two applications in each claim on September 24 and October 19, 2014 opposing the appointments and requesting that each be stayed and the receiver/ manager be restrained from acting under the appointments.

[6] Shortly thereafter the receiver/ manager filed an application in each claim requesting that TRCL and CHEMICO provide indemnity for prescribed costs in the substantive claims, as well as the costs of his applications.

[7] Before the court on this occasion are the applications filed by the applicants, in each of the claims, seeking injunctive relief to restrain the receiver /manager from acting. To progress the matters the court determined that they should be heard together, as the parties are the same and the applications were similar in the grounds and relief being sought.

[8] Counsel for the applicants Mrs Ouhla informed the court that the applicants also seek an order that the appointments be set aside as being premature, because the debts which formed the basis of the respondent's claims are disputed on several grounds. Since these issues have not been determined the power of appointment under the mortgage debentures was not exercisable by FCIB at the time the deeds were executed. Counsel for the FCIB, Mr Lee, opposed on the ground that the applications were not in keeping with an application for setting aside the deeds.

[9] The reliefs sought in both applications were *that (i) FCIB is prevented from exercising its powers to appoint a receiver /manager under the respective mortgage debentures* (which power had already been exercised by on August 18) and (ii) *the receiver /manager be restrained from acting under these appointments until determination of the substantive claims.* The draft orders which accompanied both applications requested that *"the*

[1] On August 20 and September 18, 2014

appointment of the receiver /manager be stayed until determination of the proceedings".

The affidavits in support of the applications filed on September 24 contained an undertaking as to damages, for any injunction granted and the affidavits in support of the applications filed on October 19 requested that the appointments be set aside and gave no undertaking.

[10] In my view the applications were conflated and the setting aside issue was not stated with clarity. It is incumbent upon a party invoking the jurisdiction of the court on particular issues to identify such issues with clarity and specificity. The courts have often emphasized that a party must know the case that he has to meet so that he has a fair opportunity to address it.[2]

[11] I determined that the applications were styled more as applications for injunctive relief and the parties were directed to address the court on that issue.[3]

THE ISSUES

[12] The issues for determination are:

1. Whether the applicants have satisfied the tests established in **American Cyanamid v Ethicon**[4] for granting injunctive relief.

2. Was there material non-disclosure by the applicants to warrant refusal of injunctive relief.

3. Is an undertaking in damages sufficient for granting the interim injunction.

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[2] Moses Joesph v Alicia Francois SLUHCVAP 2011/0025 unreported, delivered on August 21, 2015 at para 15

[3] CPR 26.2 (j)

[4] [1975] AC 396

ANALYSIS

[13] The principles derived from the **American Cyanamid** case continue to guide the courts in this jurisdiction on the correct approach when dealing with applications for interim injunctions. The first question is whether there is a serious issue to be tried. If there is, the court is required to consider a second question, whether damages would be an adequate remedy for the parties. If the court is uncertain about the adequacy of damages then it must consider a third question, where does the balance of convenience lie, relative to granting the injunction.

Is there a serious issue to be tried?

[14] Mr Lee argued on behalf of FCIB that the applications and the defences have not disclosed any serious issues to be tried. The applicants cannot rely on the defence of prescription because they are estopped by certain actions which they have taken in relation to the debts. He says that in reality there is no issue to be determined between the receiver and the applicants, because the mortgage debentures give FCIB the power to appoint a receiver /manager where demand has been made and the debts are not satisfied. He further says there is no dispute that demands were made and in any event the prescription issue can still be determined notwithstanding the appointments. In addition a receiver/ manager in under a duty to act in a commercially reasonable manner, which means in the best interest of all parties and not simply the appointing party, which is FCIB.

[15] Mrs Ouhla submits that the defence of prescription is a good and arguable one because the demand letters in relation to all the debts were issued more than 6 years prior to the filing of both claims. In addition FCIB is attempting to rely on a letter from the applicants which attempted to settle disputes over the debts, as evidence of acknowledgment of the debts. The question whether or not that letter could interrupt prescription and is an unequivocal acknowledgment of the debt would necessitate a trial to determine that issue. Interruption is not automatic and every case turns on its own peculiar circumstances. The applicants have also put forward the defence that some of the debts have been paid off

based on their records. Also a substantial portion of the debts arose from an overdraft facility for which FCIB had no mandate from the applicants. The applicants say this had the effect of nullifying the debts and they are not liable. These are all live issues which go to the core of the dispute over the existence of debts, which can only be resolved at trial. Mrs Ouhla contends that these are obvious indications of real and serious issues which must be tried.

[16] The authorities are clear on the role of the court at this stage. All that is required is for the court to be satisfied that there is a serious issue to be tried between the parties. This is done by looking at the whole case and undertaking a preliminary assessment of the respective positions of the parties, to determine whether there is a question to be tried. It is not the courts function at this time to try to resolve conflicts in affidavit evidence, concerning the facts on which the position of either party may ultimately depend. Neither is it the place to decide questions of law which call for detailed argument and mature consideration.[5] All that the applicants need to show is that the defences raised have substance to warrant trial of the issues. Beyond that it does not matter the strength or probability of success at trial.

[17] On the evidence FCIB must have been aware, prior to appointing the receiver /manager that the claims were heavily contested and a previous application to strike out the defence or parts of it had been disallowed before a Master. On examining the statements of case it is clear to me that there are several issues to be tried in relation to the existence of the debts on which the claims are premised. FCIB has since filed an application requesting that the court address prescription as a preliminary issue. I consider this indicative of acceptance that at least on this point, there is a triable issue. I am not at all persuaded by the arguments advanced on behalf of FCIB on this point. The affidavit evidence demonstrates that the parties have conflicting positions which can only be resolved through trial.

[18] On that basis I find that there are serious issues to be tried in both claims.

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[5] Blackstone Civil Practice 2016 at para 37.21 to 37.22

[19] Mrs Ouhla took the point that the deed of appointment relating to TRCL was executed on August 18, 2014 and registered some 21 days later on September 8, 2014. She submits that this nullified the deed because section 264 the Companies Act (the Act) is mandatory and requires that notification of such appointment be given to the Registrar within 10 days of the appointment date. Mr Lee's counter position was that the Act creates no offence nor does it provide a sanction for non-compliance with this section. Counsel did not provide any authority to substantiate that assertion of nullity. The point was not raised in relation to CHEMICO, as the parties agreed that the deed was lodged at Companies Registry within the prescribed time. I made no finding on that issue.

Will damages be an adequate remedy?

[20] On this point FCIB submits that damages would be an adequate remedy, if the receiver /manager is permitted to act, because such an appointee has a duty not only to the one who appoints but also to the companies and other persons having an interest. That duty of care is set out in section 294 of the Companies Act[6] (the Act) and the officer is obligated to act in a manner which does not negatively affect the companies. On that basis, the applicants concern over the destruction of the company is unfounded and damages would be adequate, in the event that any loss is occasioned by the appointment of the receiver/ manager.

[21] The applicants argue on the contrary, that damages would not be an adequate remedy as the companies stood to lose their goodwill and would become dismantled and completely destroyed through the premature disposal of their assets. In addition this would lead to adverse publicity for the applicants who now enjoy excellent trading relations with their suppliers. They assert that FCIB is only seeking to preempt the court in adjudicating on the real issues and justice requires that the receiver is prevented from exercising any of his powers or functions, until the court has had the opportunity to adjudicate on the merits of the claims. Simply because FCIB might be in a position to pay damages does not mean

[6] CAP 13.01 of the Revised Edition of the Laws of Saint Lucia

that damages would be an adequate remedy, to compensate for loss of the companies and lost opportunities.

[22] The principle emanating from **American Cyanamid**[7] is that if damages in the measure recoverable at common law would be an adequate remedy and a respondent would be in a position to pay such damages, an interim injunction should not be granted. In determining whether damages will be an adequate remedy the question for the court is whether the applicants are likely to suffer irreparable harm in the absence of an injunction, which damages would not sufficiently compensate.

[23] In my view it is not at all possible at this time to qualify or quantify the sort of damages which could flow, in the event the applicants' assets are disposed by the receiver before the substantive issues are fully resolved. Moreover if the applicants are successful at trial, it would mean that such steps if taken by the receiver, to the extent that they are irreversible, would be so injurious that damages could not adequately compensate the applicants. The mere fact that FCIB is a bank does not in any way guarantee that it can pay damages of any quantum. Even banks are not immune from collapse occasioned by adverse banking and financial trends, insolvency or receivership.

[24] While FCIB's claims are more readily quantifiable, it is also difficult to say whether damages would be an adequate remedy; if it turns out that upon success at trial the applicants' liabilities at that time grossly exceeds the assets. To arrive at a just outcome in such circumstances, the court must go on to determine where the balance of convenience lies.

Where does the balance of convenience lie?

[25] On this issue Mr Lee argued that the receiver/manager had already done a precursory inventory and concluded that the liabilities of both TRCL and CHEMICO far exceed their

[7] At page 408

assets, albeit that he was unable to determine whether any trade debts existed and the quantum. He submits that it is not a case where a receiver/ manager simply walks in and immediately commences sale of assets. The statutory duty requires that one engages in a more considered approach. The applicants only see one outcome which is a sale of their assets but the law demands more than this. He again argues that the receiver/ manager's obligations are to both parties and personal liabilities may attach if he exceeds the remit of his powers. He must act not purely on instruction of FCIB or the sums identified by any party. Rather he has a duty to verify what debts exist and to pay only such debts as are due. He contends that a receiver/ manager has greater responsibility than a mere receiver and is required to act for the benefit of the applicants also.

[26] He submits that no evidence has been led to show any detriment done to the goodwill of TRCL or CHEMICO. There is no compulsion on the part of the receiver/ manager to undertake an immediate sale and this is supported by the fact that the appointments have been made for some time now and there has been no sale. There is no evidence on which to conclude that appointing a receiver equates to the destruction of the companies. The applicants rely on a cheque[8] issued to one Roger Williams which the FCIB refused to honor, stating that the company was in receivership.[9] FCIB says this evidence is inadmissible as it relies on the information given by a third party concerning why the cheque issued by the applicants was returned and ought not to be relied upon to show that the mere appointment of the receiver/ manager is detrimental to the companies. In the absence of this there is no evidence of any perceived negative impact on goodwill, operations or any other aspect of the applicants' business since the appointments.

[27] Finally he submits that no evidence has been adduced to show loss of opportunities for TRCL or CHEMICO. It is incumbent on the receiver/ manager to exploit opportunities which may benefit the applicants in servicing their debts and the appointments may also have the effect of leaving the companies in a reduced debt position, when compared to continued indebtedness, interest and cost to FCIB. For these reasons FCIB claims that the

[8] Exhibit TR11 at page 61 of 2010 Bundle
[9] Paragraph 9 of Supplementary Affidavit of Thomas Roserie filed on October 19, 2014 at page 48 of 2010 Bundle

balance of convenience favors allowing the receivers/ manager to continue to act under the deeds.

[28] Mrs Ouhla argues that what should be considered is whether if TRCL or CHEMICO succeeds at trial, an award of damages would adequately compensate them for any loss occasioned by the appointment of the receiver/ manager. The court must consider not just the effect if the properties are wrongly sold but also the effect that the receivership itself could have on the image, operations, goodwill and future opportunities for the companies.

[29] She submits that the receiver/manager should be restrained because his mandate is to dismantle and sell the assets. In support of this assertion the applicants rely on a letter[10] dated June 26, 2014 sent to the receiver/manager by a senior manager of FCIB seeking a proposal outlining how he would approach the applicants' circumstances, with a view to the disposal of the assets through a receivership sale. They believe that if the receiver/ manager if not restrained the assets will be sold almost immediately and if they are successful at trial, they fear that there will be no companies left. The companies are still in good standing and continue to enjoy an excellent relationship with their suppliers. On that basis the appointment of the receiver/manager could only serve to undermine and destroy their goodwill.

[30] Mrs Ouhla argued further that the statutory duties of the receiver/manager as outlined in his affidavits contain nothing to show independence of thought or disassociation from FCIB. There is nothing in his actions which show independence and thus far they appear to be based solely on what FCIB says. The applicants disagree with the formula for computation of the value of the companies which they say is simplistic. It makes no allowance for amounts which may be prescribed or off-set. The credit worthiness of a company requires that revenue inflows be taken into account and there are established ratios for arriving at such determination. Whereas the law states how a receiver/ manager should carry out his functions, there is no evidence that he will act accordingly. The manner in which the proceedings have been conducted to date has caused the applicants to believe that FCIB and the receiver/ manager will not act fairly or follow the law in

[10] Exhibit RS19 at pages 431- 433 and in particular para 3 on page 432 of 2009 Bundle

seeking to recover the sums claimed, which sums are disputed. They reiterate that there are contentious issues to be decided through trial.

[31] On the issue of inadmissibility Mrs Ouhla drew the courts attention to CPR 30.3 (2) (b) which deals with contents of affidavits in relation to interlocutory applications. This rule allows hearsay evidence and assertions made by a third party, once the source is disclosed. The source here is the individual who attempted to deposit the cheque and his name is disclosed.

[32] Finally Mrs Ouhla submits on this point that under section 293 of the Act a receiver/ manager appointed under instrument acts in accordance with that instrument and upon application to the court directions may be given under section 295. The section gives the court broad powers including restraining or causing a receiver to abstaining from acting in the face of pending court action. She cited **Tillett v Nixon**[11] in support of the principle that even if a mortgagee had a right to appoint a receiver without coming to the court, it was desirable where an action was pending; such appointment should be made by the court.

[33] The applicants are only entitled to the interim relief sought if they can show that there would be injustice if the receiver/ manager is left unfettered and that a serious risk of irreparable damage exists. It has not been ascertained that the debts are payable and there are in fact serious issues to be ventilated through trial. The applicants' perception that the assets of the companies may be sold before the matters come to trial is not unfounded. In addition the applications filed by the receiver/ manager seeking indemnity from TRCL and CHEMICO, do not convey an appearance of impartiality. The law is clear that a receiver/ manager although acting as an agent of a company, have as a primary responsibility, realization of the security of the appointing creditor. I also agreed with Mrs Ouhla's position on the law relating to admissibility of information from third parties, in interlocutory applications.

[34] I have considered the competing arguments and believe that there are good reasons why the status quo should be preserved. I conclude that the balance of convenience weighs in

[11] 49 LT 598

favor of restraining the receiver/ manger and allowing TRCL and CHEMICO to be operated by the directors, pending determination of the substantive claims.

Was there material non-disclosure by the applicant

[35] In written submissions put forward by FCIB it was canvassed that the applicants failed to make full and frank disclosure in their application. Mrs Ouhla's response was that the assertion was vague and no indication was given of the material non-disclosure complained of. She submits that there was no such conduct on the part of the applicants, and in any event it is settled law that not all non-disclosures are material and the court has a discretion in determining whether any perceived non-disclosure is material at all, to warrant not granting an interim injunction.

[36] What is required in such instances is for an applicant to make full and frank disclosure of all facts known to him or which should have been known to him had he made all such inquiries as were reasonable and proper in the circumstances.[12]

[37] In my view this issue was raised without any basis in fact or law. I am satisfied that there was full and frank disclosure on the part of the applicants. It was therefore not surprising that Mr Lee elected to make no further submissions on the point, when he suggested that the issue was not of much import at this time, though it was included in written submissions. It is my finding that the assertion remained unsubstantiated and must fail.

Is an undertaking in damages sufficient

[38] The applicants relied on dicta of Lord Denning MR in **Allen v Jumbo Holdings Limited**[13] when he said without reservation that "*there was no reason why a poor plaintiff should be*

[12] Brink's Mat Ltd v Elcombe And Others [1988] 1 WLR 1350

denied a marava injunction just because he is poor, where as a rich plaintiff would get it. One has to look at these matters broadly". They argue that even if that case concerned an *exparte* application for a marava injunction the principle is equally applicable to an *inter partes* application for interim injunction. Evidence of inability to pay is not a perquisite to granting an injunction and one must recognize that these were proceedings brought by FCIB, whose actions are now creating financial obstacles to prevent the applicants from asserting and proving their defence. FCIB elected one mode of pursuing its claim through litigation and in mid-stream decides on a different option (receivership) thus trying to deny the applicant their day in court. In the circumstances whether an undertaking as to damages is inadequate, should not be a reason to refuse the injunction.

[39] FCIB argues that the applicants have not provided any evidence of their ability to pay an undertaking in damages if required. Even if an undertaking has been given it must be real and of some worth. While the the principle in the **Allen Case** is accepted, similar circumstances do not exist here. The receiver/ manager has clearly stated the illiquid status of the applicants which calls into question their ability to fund an undertaking in damages bearing in mind that the sums claimed by the respondent are in excess of $6.0 million.[14] The court is in a position to weigh the adequacy of damages in a highly deserving case and whereas the applicants are not placed to pay damages, FCIB would be able to make good any losses suffered by the applicants and occasioned by the appointment of the R/M.

[40] The starting point on this issue is CPR 17.4 (2) which states:-

> *"Unless the court otherwise directs, a party applying for an interim order under this rule must abide by any order as to damages caused by the granting or extension of the order'*

[41] The rational for the rule is that since an interim injunction is granted before trial and before the merits of a case has been finally determined an applicant is required to give a promise called an undertaking to pay compensation to a respondent if the applicant fails to

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[13] [1980] 1 WLR 1952

[14] Supplementary Affidavit of Richard Surage filed on November 18, 2014 at page 316 of 2010 Bundle

establish his right to the injunction. In other words an undertaking as to damages is the price of an interim injunction. It is only if the applicant is unable to show sufficient assets to provide substance to the undertaking that security may be required to fortify the undertaking. There are also instances where the court may even exempt an applicant from giving an undertaking, if the circumstances warrant it.

[42] I wish to adopt the reasoning of Blenman JA in ***Lucita Angeleve Walton et al v Leonard George De LaHaye***[15] where she said:-

> "***The general rule is to require the claimant to undertake to pay any damages subsequently found due to the defendant as compens*ation** *if the injunction that was previously granted cannot be justified at trial providing there is proof that the defendant has suffered loss as a consequence of the grant of the injunction. However, the law is clear, that in certain circumstances, the court has a discretion to grant an injunction without requiring an undertaking as to damages.* ***As a general rule, the court requires an undertaking as to damages*** *as occurred in this case at first instance.* ***This usually suffices" (my emphasis)***

[43] If a respondent is convinced that an undertaking is insufficient, the proper course is to apply for fortification of damages and to satisfy the tests to be applied by the court, on such applications.

[44] The applicants possess substantial immovable assets within the jurisdiction, over which FCIB has first charge by way of hypothecs and mortgage debentures which precludes these assets from being disposed of without its consent. I find that all that is required and sufficient in the circumstances is an undertaking for damages.

[15] BVIHCVAP2014/0004 delivered on August 15, 2015 at para 42

CONCLUSION

[45] The applicants having giving an undertaking to abide by any order as to damages which the court may make, in the affidavit of Thomas Roserie sworn on September 23, 2014, the interim injunction is granted and I make the following order:-

1. The deeds of appointment dated August 18, 2014 registered at the Companies Registry on September 2 & 8, 2014 respectively are hereby stayed and the receiver/ manager Mr Richard Surage whether by himself, his servants or agents is hereby restrained and prohibited from taking any steps or actions under these deeds until determination of the substantive claims or further order of the court.

2. The applications filed by the receiver/manager in the respective claims, on October 23, 2014 are stayed until further order of the court.

3. Cost is reserved until determination of the substantive claims.

4. The matters are adjourned to **April 5, 2017** for hearing of the Claimant's applications on the preliminary issue of prescription.

[46] I am grateful to Counsels for their submissions.

Justice Cadie St Rose-Albertini
Commercial Court Judge