[2014] JMCA Civ 9

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 101/2013

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (AG)

BETWEEEN	**JADE OVERSEAS HOLDINGS LIMITED**	**APPELLANT**
AND	**PALMYRA PROPERTIES LIMITED (In Receivership)**	**1st RESPONDENT**
AND	**SANCTUARY SYSTEMS LIMITED (In Receivership)**	**2nd RESPONDENT**
AND	**KENNETH TOMLINSON**	**3rd RESPONDENT**

Mrs Denise Kitson QC and Mrs Trudy-Ann Dixon Frith instructed by Grant Stewart Phillips and Co for the appellant

Kwame Gordon and Miss Nadine Amos instructed by Samuda and Johnson for the respondents

3 and 14 February 2014

PANTON P

[1] This appeal is from a refusal by Mangatal J (as she then was) to grant an injunction pending the trial of a suit filed by the appellant (Jade) seeking several declarations and orders in respect of the status of a management agreement signed by Jade, Palmyra Properties Limited and Sanctuary Systems Limited. The need for the

declarations arose from the fact that Palmyra Properties Limited and Sanctuary Systems Limited executed debentures in favour of certain banks. The 3rd respondent is in the picture because the banks appointed him as receiver pursuant to the debentures. As receiver, he has assumed the management and control of the 1st and 2nd respondents.

[2] Jade's application for an injunction was filed on 2 September 2013. The affidavit of Mr Kwang Sim, one of Jade's officers, formed the basis for the application. After hearing comprehensive arguments, Mangatal J dismissed the application on 29 November 2013.

The evidence

[3] Mr Sim's affidavit disclosed that on 25 May 2009 Jade had entered into the management agreement referred to earlier for Jade to hire solicitors on their behalf, and to generally bear the costs incurred while they brought suits for fraud in various jurisdictions against certain persons. Jade was guaranteed recovery of its costs and fees if there were no recoveries or awards arising from those actions during a 10 year period.

[4] On the basis of this agreement, Jade expended approximately US$6,000,000.00 "in pursuing and funding the aforesaid litigation in Jamaica, Canada and Hong Kong". Consequently, summary judgment was obtained in the litigation in Jamaica wherein the 1st and 2nd respondents was granted order for US$2,270,000.00 made in their favour. After some deliberation, a decision was taken not to appeal against this order. Instead,

the respondents entered into a settlement agreement for the proceeds of the funds from the summary judgment to be divided among the parties.

[5] Prior to the signing of the management agreement, the first respondent had, in April 2007, executed a debenture in favour of National Commercial Bank Jamaica Limited and RBTT Bank Jamaica Limited. The second respondent also executed a debenture in favour of RBTT Bank Jamaica Limited on 11 August 2009. These debentures were security for loans obtained by the respondents for the purpose of constructing and developing Palmyra Resort and Spa.

[6] On 23 July 2011, the banks appointed the 3rd respondent as receiver pursuant to the debentures. Thereupon, the receiver assumed management and control of the 1st and 2nd respondents. The receiver was informed by letter dated 23 September 2011 that Jade had up to then paid all costs and disbursements arising from the legal proceedings that had been undertaken worldwide on behalf of the 1st and 2nd respondents.

[7] The receiver filed an affidavit in response on 8 October 2013. He said that he has been trying to sell the assets of the 1st and 2nd respondents and to recover monies that are owed to the debenture holders. The operations of the respondents cost the debenture holders US$320,000.00 per month, resulting in "a continuous increase in the amount owed to the Debenture Holders". It is, the receiver said, in the immediate interest of the respondents and the debenture holders that any funds that can be

derived from the assets be used to cover the operating expenses and so reduce the indebtedness to the debenture holders.

The judge's decision

[8] Mangatal J in refusing the application for an injunction until trial of the issues, handed down a detailed judgment. In it, she stated the contrasting positions of the parties, the principles governing the grant of an interlocutory injunction, and made certain findings which led her to the decision at which she arrived. One of those findings was that Jade had been guilty of delay in making its claim. The most significant finding, however, in my view, was in relation to the issues to be tried. The learned judge listed five "serious issues that at first blush seem to arise for trial". These issues, as listed by her, include the status and validity of the management agreement, the effect of restrictions in the debentures and whether Jade had notice of those restrictions.

[9] In considering whether damages would be an adequate remedy, the learned judge found that damages would not prove an adequate remedy for either Jade or the respondents "and the extent of the uncompensatable disadvantages to the parties do not differ widely". She quoted from Lord Diplock's speech in ***American Cyanamid Co v Ethicon Ltd*** [1975] 1 All ER 504 at 511b: "Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo". She then said that in the instant case the status quo is that the receiver is free to sell or deal with the assets of the respondents in such a way as to see to the interests of the debenture holders in recovering monies owed to them and

reducing the indebtedness to them. "Preserving the status quo would point in the direction of refusing the injunction", she concluded.

[10] It was the learned judge's view that this is a case where substantial hardship could be experienced by either party if she did not "form at least a provisional view as to the applicable law in order to adopt the course that seems likely to cause the least irremediable harm". Having taken that position, the learned judge then considered and expressed her opinion on:

> a) whether the management agreement was void on the grounds of public policy as offending against the rules of champerty and maintenance;
>
> b) whether the management agreement fell within the ordinary course of business; and
>
> c) whether the respondents could have entered into a debenture as worded and then without the consent of the debenture holders enter into a management agreement that creates an indebtedness or charge in favour of Jade.

[11] The learned judge ended her reasons for judgment by reiterating that:

> a) "there are serious issues raised, but preliminarily, when examined closely, it is [her] assessment that the case of the Defendants is far stronger than that of Jade;
>
> b) [d]amages do not appear to be an adequate remedy for either party, from the point of view of no demonstrable ability to pay;

c) [t]he status quo would favour a refusal of the injunction, and the strengths of Jade's case seems to me to be on shaky ground; and

d) Jade has been guilty of … delay that has not been properly accounted for."

[12] The appellant filed thirteen grounds of appeal. They challenge almost every aspect of the judgment, and may be summarized thus:

a) the learned judge erred in making "provisional determinations" and or findings of facts and or applicable law in the instant case, and failed to apply the correct test of whether there are triable issues and or serious issues to be tried between the parties;

b) the learned judge erred in finding that damages would not prove to be an adequate remedy for the respondents in the event that the injunction was wrongly granted;

c) the learned judge having found that damages would not be an adequate remedy for Jade, erred in not granting the injunction in its favour;

d) the learned judge erred in finding that to maintain the status quo which existed prior to the issuing of the claim form, was for the receiver to be free to sell or deal with the assets of the other respondents in the interest of the debenture holders, without having regard to the entire evidence in the case and the need to preserve the funds and prevent dissipation;

e) the learned judge erred in finding that the debenture holders would suffer the greater irremediable harm if the injunction were to be granted;

f) the learned judge erred in finding that there had been delay by Jade in commencing its claim; and

g) the learned judge erred in failing to take into account that Jade had given an undertaking as to damages.

The submissions

[13] Mrs Denise Kitson QC submitted that by making provisional determinations, the learned judge had applied a more stringent test of reasonable prospect of success, rather than the proper test of whether there is a serious issue to be tried. She said that the relevant authorities do not support the judge's approach of making provisional findings as to the issues raised upon the pleadings. This manner of conducting a mini trial and making certain findings has been specifically disapproved, said Mrs Kitson. She listed several issues in relation to the management agreement and the debentures that she said were serious and required a trial. In my view, it is unnecessary to set out all the issues described by Mrs Kitson. It is sufficient to say that they arise on the affidavits on both sides. However, among them is whether the legal effect of the management agreement is a valid equitable assignment of a chose in action in all the proceeds of litigation of the local claim by the first and second respondents to Jade.

[14] In his oral argument before us, Mr Kwame Gordon for the respondents said that the judge did not conclude that there are serious issues to be tried. This argument flies in the face of the judge's reasons for judgment. It is noted further that in the written submissions presented by Miss Nadine Amos, who also appears for the respondents, it is stated that Jade had not established that there is a serious issue to be tried. With

regret, I cannot say that either Mr Gordon's argument or Miss Amos' submission is in keeping with reality. If the written submission were to be given any consideration on this score, a counter notice of appeal would have been necessary, seeing that the learned judge did find that there were serious issues to be tried. The failure to file a counter notice of appeal therefore makes it a non-issue. This is not to say that such a counter notice would have increased the respondents' chances of success.

[15] Mrs Kitson submitted that the learned judge did not have proper regard for the fact that damages would prove to be an adequate remedy to the respondents in the event that an interim injunction was granted in favour of Jade. On the other hand, she said, the converse was true for Jade as should it be successful at trial, it would be unable to be compensated in damages due to the financial condition of the first and second respondents.

[16] Mrs Kitson said that damages would be an utterly inadequate remedy for Jade because the receiver has clearly stated that he will disburse the funds the subject of the settlement agreement, and it is common ground, she said, that none of the respondents is in a position to repay same. It is therefore Jade which would suffer "irremediable prejudice" if the injunction is not granted, said Mrs Kitson. Indeed, she said, Jade's claim would be defeated and rendered nugatory. On the other hand, she said that the receiver will not sustain any loss as a result of the placement of the funds in an interest bearing escrow account pending the determination of the issues at trial of the claim. This would be so as the entire sum with interest would then be available to the receiver in the event he succeeds at the trial. The interest accrued thereon

would compensate the receiver for not having immediate use of the funds, and so there would be no prejudice to him. In making these submissions, Mrs Kitson relied on ***American Cyanamid*** and ***National Commercial Bank Jamaica Ltd v Olint Corp Ltd*** [2009] UKPC 16.

[17] In their written submissions, the respondents say that the idea that monies being put in an interest bearing account should suffice does not answer the case. In addition to the funds which would be frozen, the respondents say that the receiver would have to incur additional principal and interest payments to the debenture holders for money advanced to cover operational costs which could have been paid out of the frozen funds and/or additional interest payments on the original loan. The respondents also submitted that the interest likely to be earned in an interest bearing account, however reasonable or competitive, will be insufficient to cover the losses incurred by the receiver.

[18] Jade contends that the learned judge misconstrued the applicable law and the facts relating to status quo. Mrs Kitson submitted that since it appears that the learned judge felt that the parties were on even ground as to whether damages were an adequate remedy, she ought to have examined more closely the issue of preservation of the status quo. Mrs Kitson said that the status quo becomes important where there are serious issues to be tried and damages are not an adequate remedy for either side. In defining the status quo, she quoted from Lord Diplock's judgment in the case ***Garden Cottage Foods Ltd v Milk Marketing Board*** [1983] 2 All ER 770 at 774i:

> "The status quo is the existing state of affairs; but since states of affairs do not remain static this raises the query: existing when? In my opinion, the relevant status quo to which reference was made in the *American Cyanamid* case is the state of affairs existing during the period immediately preceding the issue of the writ claiming the permanent injunction …"

In her written submissions, Mrs Kitson itemized the following as the state of affairs which existed prior to the commencement of the instant claim:

> a) the money which is the subject of the settlement agreement was in the hands of the receiver;
>
> b) the money had not been dissipated by the receiver; and
>
> c) the money had not been accessed, utilized or in any way applied to the benefit of the receiver and or debenture holders towards the debts owed by the respondents.

[19] On this issue of the status quo, the respondents, understandably, embraced the findings of the learned judge as set out in paragraph [9] hereof.

[20] Mrs Kitson submitted that there had been an error on the part of the learned judge so far as it concerned the giving of an undertaking by Jade. She said that Jade had on all occasions when the matter came up for hearing, given an undertaking. This misapprehension by the judge had unduly affected her assessment of whether an interim injunction should be granted. The response by the respondents is that, in any event, an undertaking as to damages would not be sufficient as Jade is a company

incorporated in a foreign jurisdiction and there is no evidence of any assets it owns which could support an undertaking.

The law

[21] I think it is safe to say that the relevant law for the purpose of the disposition of this appeal may be gleaned from two cases which featured prominently in Mangatal J's judgment as well as in the submissions by both parties to the appeal – ***American Cyanamid*** and ***National Commercial Bank Jamaica Limited v Olint Corp Limited***. Both cases provide the guidance necessary in a matter of this nature. Seeing that the ***Olint*** case restates much of what is in the ***American Cyanamid*** case, my references will be to the latter only.

[22] Lord Diplock, in delivering the judgment of the House of Lords in ***American Cyanamid***, said that when there is an application for an interlocutory injunction to restrain someone from doing something that is alleged to be in violation of a claimant's legal right, and there is a contest on the facts, a decision whether to grant it has to be made at a time when there is uncertainty as to the existence of the right claimed and that uncertainty will remain until there has been a trial and judgment entered. He stated the object of the interlocutory injunction thus:

> "The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected

> against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where 'the balance of convenience' lies." [page 509 c-d]

[23] As regards what the judge should look for in respect of the claimant's case, when considering an application for an interlocutory injunction, Lord Diplock said:

> "The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
>
> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial." [page 510d-e]

Lord Diplock continued:

> "… unless the material available to the court at the hearing of the application … fails to disclose that the plaintiff has any real prospect of succeeding … at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought." [page 510f]

[24] Lord Diplock then discussed the pros and cons related to the adequacy of an award of damages as compensation flowing from the decision to grant or refuse the application. He continued:

> "It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises." [page 511a]

He cautioned against any attempt to list all the various matters which may require consideration in deciding where the balance lies, and added:

> "Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark on a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial." [page 511b-c]

The decision

[25] In the instant case, the learned judge found that there are serious issues to be tried. In addition, she found that damages would not be an adequate remedy for either side. These findings, to my mind, made it obligatory for the learned judge to make such order that would preserve the status quo. And this was what she said she did. However, I differ from her in respect of how the status quo is to be maintained in this case. In my view, it may only be maintained by preventing the receiver from accessing the fruits of the summary judgment. I agree with Mrs Kitson's submission as to what is

the status quo. In the circumstances, I am of the view that the learned judge erred in refusing the application.

[26] I would allow the appeal and grant the injunction sought in the notice of application for court orders dated 2 September 2013.

MORRISON JA

[27] I have read in draft the judgment of my brother Panton P. I agree with his reasoning and conclusion and have nothing to add.

LAWRENCE-BESWICK JA (AG)

[28] I too have read the draft judgment of Panton P and agree with his reasoning and conclusion.

PANTON P

ORDER

1. Appeal allowed. Injunction granted in keeping with the notice of application for court order dated 2 September 2013.

2. The respondents are restrained whether by themselves, their officers, servants or agents or any of them or otherwise howsoever from:

i. Dealing with, disposing and/or otherwise dissipating any property or other valuable security or benefit paid, frozen, held or otherwise obtained including the property held by MML known as Mango Manor, pursuant to Summary Judgment by the 1st and 2nd Defendants in Claim Number 2009 HCV 04344 on the 13th January 2011 by Mangatal J and the 1st to 3rd Defendants be restrained from utilizing any such sums of money received pursuant to the said judgment otherwise than by payment into a fixed deposit US currency account at First Global Bank issued in the joint names of the parties hereto pending the determination of this claim or further order.

ii This account is to be opened by 4 March 2014.

iii. This injunction is granted on the secured undertaking of Grant Stewart Phillips & Co as to damages in the amount of US$51,500.00, in substitution for the undertaking previously given on 10 January 2014.

3. Costs in the court below are to be costs in the claim. Costs in this court are to be the appellant's, to be agreed or taxed.