

JAMAICA

IN THE COURT OF APPEAL

SCCA NO. 91 OF 2007

BETWEEN JEWELERAMA LIMITED APPELLANT
(Formerly Issor Jewellers Limited T/A Jewelerama)

AND ROCK INVESTMENTS LIMITED RESPONDENT

PROCEDURAL APPEAL

Written submissions by Gordon Robinson instructed by Winsome Marsh for the Appellant

Written Submissions by Karene Stanley instructed by Sharon Usim & Company for the Respondent

September 28, 2007 and October 19, 2007

SMITH, J.A.:

This is an appeal pursuant to Rule 2.4 of the Court of Appeal Rules 2002, (CAR). The grounds of appeal indicate that the respondent has filed a claim, for mesne profits, against the appellant – in respect of the appellant’s occupation of the respondent’s property. There were applications by the respondent for the interim remedies of a Freezing Order and Interim Payment.

At the case management conference before Pusey J. on the 16th August, 2007, the learned judge refused the application for the said interim remedies. However, among the orders he made is the following:

- "3. Jewelerama Limited should file an affidavit setting out assets and liabilities on or before 30th August, 2007".

This order appears on its face to be a consent order and as such may not be appealed without the leave of the judge or of the Court of Appeal. Leave to appeal was granted by the learned judge. The parties in their submissions made no mention of the circumstances which led to the making of this "consent order". I will make no further mention of the fact that it was an order made with the consent of the parties.

On the 17th August, 2007 the day after the order was made, the appellant filed a Notice of Appeal supported by written submissions. This was in compliance with Rule 1.11 (1) (a) and Rule 2.4 (1) of the CAR.

"The grounds of Appeal are:

1. The Learned Judge in Chambers erred in ordering the Appellant to file an Affidavit of Assets when there is no authority in the Civil Procedure Rules 2002 for such an Order to be granted other than with respect to property which is the subject of
 - (a) the claim; and
 - (b) an application for a Freezing Order and then only as a collateral order to a Freezing Order. The subject matter of this claim is Mesne Profits for the occupation of the Respondent's (sic) property by the Appellant and no property of the Appellant is subject to any claim of right or otherwise by the Respondent in this action.
2. The Learned Judge in Chambers erred in ordering the Respondents (sic) to file an Affidavit of Assets despite the fact that the Respondent's Application for a Freezing Order was refused by the Learned Judge

therefore making the Order inappropriate, unnecessary and wrong in Law.

3. Insofar as the Judgment of the Learned Judge included an Order for the Appellant to disclose its liabilities in the Affidavit to be filed the Learned Judge erred in Law as nowhere in Part 17 is any jurisdiction to order the disclosure of liabilities to be found.
4. The decision of the Learned Judge in Chambers was unreasonable in light of the evidence particularly the evidence that the two Directors of Jewelerama Limited are in a dispute over the ownership of the Company thus making it unlikely that the Company's Directors would be able to agree on the Terms of the Affidavit to be given to the Order. Accordingly and in light of the extensive enforcement provisions of the CPR available to the Respondent after the Assessment including but not limited to the Appointment of a Receiver, this Order is manifestly unreasonable and an exercise in futility by the Learned Judge."

The relevant provision is Rule 17.1 which states:

- "17.1 (1) The court may grant interim remedies including –
- (a) an interim injunction;
 - (b) an interim declaration;
 - (c) an order
 - (i) for the detention, custody or preservation of relevant property;
 - (ii) for the inspection of relevant property;
 - (iii) for the taking of a sample of relevant property;
 - (iv) for the carrying out of an

- experiment on or with relevant property;
- (v) for the sale of relevant property (including land) which is of a perishable nature or which for any other good reason it is desirable to sell quickly; and
 - (vi) for the payment of income from a relevant property until a claim is decided;
- (d) an order authorizing a person to enter any land or building in the possession of a party to the proceedings for the purposes of carrying out an order under sub-paragraph (c);
- (e) an order to deliver up goods;
- (f) an order (referred to as a "freezing order") –
- (i) restraining a party from removing from the jurisdiction assets located there;
- and/or
- (ii) restraining a party from dealing with any assets whether located within the jurisdiction or not;
- (g) an order directing a party –
- (i) to provide information about the location of relevant property or assets; or
 - (ii) to provide information about relevant property or assets, which are or may be the subject of an application for a freezing

order;

- (h) an order (referred to as a "**search order**") requiring a party to admit another party to premises for the purpose of preserving evidence etc.;
 - (i) an order (referred to as an "order for **interim payment**") under rules 17.5 and 17.6 for payment by a defendant of a sum on account of any damages debt or other sum which the Court may find the defendant liable to pay;
 - (j) an order for interim costs;
 - (k) an order for a specified fund to be paid into court or otherwise secured where there is a dispute over a party's right to the fund;
 - (l) an order permitting a party seeking to recover personal property to pay a specified sum of money into court pending the outcome of the proceedings and directing that, if that party does so, the property shall be given up to that party; and
 - (m) an order directing a party to prepare and file account relating to the dispute.
- (2) In paragraph (1) (c) and (g), "**relevant property**" means property which is the subject of a claim or as to which any question may arise on a claim.
- (3) The fact that a particular type of interim remedy is not listed in paragraph (1) does not affect any power that the court may have to grant that remedy.

- (4) The court may grant an interim remedy whether or not there has been a claim for a final remedy of that kind.
- (5) The Chief Justice may issue a practice direction as to the procedure for applying for an interim order including, in particular, interim injunctions, search orders and freezing orders."

The contention of the appellant is that the learned judge, having refused the application for a Freezing Order, had no power to make a "stand alone" order for information in respect of the appellant's property or assets. The appellant submits that Rule 17.1 (1) (g), empowers the court to direct a party "to provide information about the location of relevant property or assets which are or may be the subject of an application for a freezing order". The appellant contends that the words "which are or may be the subject of an application for a freezing order" of subparagraph (ii) of paragraph (g) were intended by the Legislature and ought to be interpreted as governing both subparagraphs (i) and (ii) of paragraph (g). The appellant further submits that in so far as the order purports to direct the appellant to file an affidavit disclosing not only its assets but also its liabilities, the order is ultra vires Rule 17.1(1).

The respondent, in its written submissions, contends that Rule 17.1 (1) (g) refers not only to relevant property but also to assets. The judge's focus, the respondent contends, was on the filing of an affidavit of assets and liabilities. The respondent submits that Rule 17.1 contemplates not only the provision of information about assets which are the subject of a freezing order but also assets which may become the subject of a freezing order at a later date.

In response to the appellant's submission that the order is ultra vires Rule 17.1 (i), the respondent submits that the list of interim remedies detailed in the Rule is not exhaustive.

In my view, the part of the judge's order which directs the appellant to file an affidavit setting out its assets and liabilities, cannot stand. I agree with the appellant's submissions that the judge, having refused the application for a freezing order, had no power to order the production by the appellant of an affidavit of assets and liabilities pursuant to Rule 17.1 (1) (g).

Subparagraph (i) of paragraph (g) concerns the provision of information about the location of relevant property or assets. This suggests a situation where the party seeking such information already has a list of the property and assets and wishes to have information about their location. This apparently is not the situation here. Thus subparagraph (i) is not applicable.

Now subparagraph (ii) empowers the judge to direct a party "to provide information about relevant property or assets, which are or may be the subject of an application for a freezing order". In his order the judge directs that the appellant should disclose "assets and liabilities..." Under Rule 17.1 (1) (g) (ii) the judge may make such an order in respect of "...assets, which are or may be the subject of an application for freezing order".

Having dismissed the application for a freezing order, the assets are no longer the subject of a freezing order application. It seems to me also that it cannot, without more, be argued that the assets may be the subject of another such application. The appellant in its submissions stated that the learned judge refused the application for a freezing order on the basis that the evidence before him did not establish any conduct by the appellant which gave rise to a real risk of dissipation of assets. This has not been refuted by the respondent. The respondent has not referred to any material before the judge which could lead him to believe, as the respondent submitted, that the assets may become the subject of an application for a freezing order at a later date.

In any event, as the appellant submitted, Rule 17.1 (1) (g) does not empower the judge to direct a party to provide information about assets and liabilities. The rule refers to property or assets.

The order of the judge is accordingly ultra vires and void. It cannot be saved by severing the words "and liabilities". To do this would result in the making of a completely new and different order. Counsel for the respondent no doubt appreciates the force of this argument and consequently proffers the submission that the remedies detailed in Rule 17.1 (1) are not exhaustive. For this contention counsel relies on the fact that the rule states:

"17.1 (1) The court may grant interim remedies including (emphasis supplied) – ..." Counsel contends that the word "including" makes it clear that the list of

remedies which follows, is not exhaustive. Counsel also relies on paragraph (3) of the Rule which states:

"The fact that a particular type of interim remedy is not listed in paragraph (1) does not affect any power that the court may have to grant that remedy".

Counsel for the respondent concluded that "It was therefore well within the purview of the learned Judge's authority to make the Order for the filing of an Affidavit of Assets and Liabilities by the appellant in furtherance of the overriding objective in all of the circumstances of the case before him".

The written submissions of counsel do not make reference to any other rule or law which gives the judge power to make such an order in the circumstances of this case. Counsel seems to be saying that the learned judge "in the exercise of the overriding objective" was empowered to make the order. At para. (iv) of Response to Ground 1, counsel submits:

"It is submitted therefore that the Learned Judge in the exercise of the overriding objective in all of the circumstances of the case was empowered to order the Appellant to file an Affidavit of Assets and Liabilities."

This is certainly not so. The 'overriding objective' of the rules as stated in Pt. 1 of the CPR are intended to enable the judge to deal with cases justly when applying or interpreting the rules. It does not empower the judge to do anything which the rules do not authorize. Part 1 (1) merely provides that the discretion of the court under these rules must be exercised in accordance with the overriding objective.

For the above reasons I am inclined to agree with the appellant that in the circumstances of this case the learned judge erred in directing that the appellant should file an affidavit setting out its assets and liabilities. Accordingly the appeal is allowed. Para. 3 of the Order made on 16th August, 2007 is hereby set aside. The respondent must pay the appellant's costs of this appeal.

SMITH, J.A:

ORDER:

The Appeal is allowed. Paragraph 3 of the Order made on the 16th of August, 2007 is hereby set aside. The Respondent must pay the appellant's cost of this appeal.