[2012] JMCC Comm. 19

DELIVERED PARTIALLY AS AN ORAL JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. CD 00108

BETWEEN	**VALLEY SLURRY SEAL CO.**	**1ST CLAIMANT**
AND	**VALLEY SLURRY SEAL (CARIBBEAN) LIMITED**	**2ND CLAIMANT**
AND	**EARL LEWIS**	**1ST DEFENDANT**
AND	**CAROL LEWIS**	**2ND DEFENDANT**

Mrs. M. Georgia Gibson-Henlin, Mr. Marc Jones and Miss Keriann Mitchell, instructed by Brady & Co. for the 1st Claimant.

Mr. Patrick Bailey instructed by Bailey, Terrelonge & Co. for the 2nd Claimant.

Mr. Christopher Dunkley and Mrs. Yualande Christopher-Walker instructed by Phillipson Partners for the 1st and 2nd Defendant.

IN CHAMBERS

Heard: 30th and 31st October, 17th and 19th December 2012.

CIVIL PRACTICE AND PROCEDURE - INTERIM MANDATORY INJUNCTION – COURT TO TAKE COURSE LEAST LIKELY TO CAUSE IRREMEDIABLE HARM - ADEQUACY OF DAMAGES - WHETHER HIGH DEGREE OF ASSURANCE THAT AT TRIAL WILL APPEAR INJUNCTION RIGHTLY GRANTED-

Mangatal J:

[1] The application heard by me was an application for an interim injunction until trial. By Amended Notice of Application for Court Orders filed September 28 2012, the Claimants seek the following orders that:

1. *The Defendants are directed to deliver up (to) the Claimants two Macro Pavers with Serial Numbers **3BPZ00X68F718449** and **3BPZL00X48F718448 ("the said pavers")** by the 2nd October 2012 or such other date as this honourable court deems expedient in the circumstances.*

2. *An injunction restraining the Defendants whether by themselves, their servants and or agents or howsoever from preventing the Claimants or any of them from taking possession of the said pavers or from taking any step to retain possession of the said pavers save with the Claimants' permission.*

3. *An injunction restraining the Defendants whether by themselves, their servants and or agents or howsoever from interfering with the Claimants' contractual relations in any way and in particular from contacting the Claimants' bankers or any of them or purporting to give instructions or information to the Claimants' bankers on behalf of the Claimants or any of them until trial.*

4. *An order compelling the Defendants whether by themselves, their servants and or agents or howsoever otherwise to deliver up to the*

Claimants all the documents necessary to the re-exportation of the said pavers, including the C87 Customs Declaration and original RDR Deposit Receipt.

5. *Such further or other relief as may be just.*

[2] It was agreed that the Claimants would not be pursuing the relief sought at paragraph 3 of the Notice of Application dealing with the Claimants' Bankers at this time.

[3] The stated grounds of the application are as follows:

1. *The First Claimant is the sub-lessor of …*(the said pavers)…
2. *The Defendants despite receiving clear instructions from the managing director of the Second defendant, to deliver up the two macro pavers pursuant to the sublease and the Defendants have refused to return same without any legal basis so to do.*
3. *The continued detention of the two macro pavers has caused and continues to cause the Claimant loss and damage resulting from expenses associated with shipping, custom duties and loss of profits.*
4. *The matter is unusually strong and clear in favour of the Claimant and there is a high degree of assurance that at the trial it will appear that the injunction was rightly granted.*
5. *The damage caused to the Claimants as a result of the defendants' infringement of their rights would be irreparable were it to be allowed to continue until trial and third party rights, including the right of the original owner of the Macro Pavers will be adversely affected.*
6. *More injustice will be caused by the refusal of the injunctions sought than by the granting of them.*
7. *The matter is one of urgency as the Macro Pavers are booked on a vessel which departs Jamaica Port September 14th 2012.*

8. *The Claimant has given full and frank disclosure of all material relating to its claim against the Defendants.*
9. *The Claimants undertake to abide by any order as to damages caused by the granting or extension of this order.*
10. *Rule 64.6(1), the unsuccessful party is to pay the costs of the successful party.*
11. *It is just and convenient and in the interest of dealing* (with) *this case justly that all these orders be granted in the circumstances.*

[4] The 1st Claimant Valley Slurry Seal Co.("Valley Slurry") is a company with registered offices in California in the United States. The 2nd Claimant Valley Slurry Seal (Caribbean) Limited ("Valley Slurry Caribbean") is a company duly registered under and by virtue of the Companies Act of Jamaica with registered offices at Suite 52, Winchester Business Centre Kingston 5 in the Parish of Saint Andrew.

[5] Valley Slurry is the majority shareholder of Valley Slurry Caribbean, holding 60% of its shares. The 1st Defendant Earle Lewis is the minority shareholder of Valley Slurry Caribbean, holding 40% of its shares.

[6] The Defendants Earle and Carol Lewis are two of five directors of Valley Slurry Caribbean.

[7] By virtue of a Shareholders' Agreement between Valley Slurry Caribbean and its shareholders Valley Slurry Seal and Earle Lewis, Jeffrey Reed, the principal and President of Valley Slurry Seal was appointed Chairman of the Board of Directors of Valley Slurry Caribbean and also its Managing Director.

[8] The Particulars of Claim state that Valley Slurry Caribbean is under contract to China Harbour Engineering Co. and the National Works Agency to do certain road works in Jamaica. In order to complete the works, the macro pavers were sub-leased by

Valley Slurry Caribbean from Valley Slurry. Valley Slurry had leased the pavers from that equipment's owner, Reed Leasing Group.

[9] By virtue of the sub-lease it was agreed that Valley Slurry Caribbean should upon the expiry of the Lease return the equipment to Valley Slurry at its own expense. The lease has expired.

[10] The pavers were imported into Jamaica with Valley Slurry as the consignor and Valley Slurry Caribbean as the consignee. The pavers were imported into Jamaica on a temporary import permit. A refundable deposit of Ja. $9,137,297.08 was paid to secure the bond pursuant to section 35 of the Customs Act. This deposit was paid by Valley Slurry Caribbean.

[11] Customs has granted several extensions for the pavers to remain in the island, the last being until December 21st 2012. Customs has indicated that this is the last extension that will be granted.

[12] What has happened is that a dispute has arisen between the Claimants and the Defendants. The Defendants allege that the rental payments agreed under the sub-lease are exhorbitant and not entered into at arms' length. The 1st Claimant denies this. The Defendants rely upon an audit conducted into the operations of the company to say that by operation of transfer pricing principles the operating lease was not at arms' length and was in effect a finance lease which capitalized the micro pavers as an asset of Valley Slurry Caribbean. The Defendants are saying it is Valley Slurry Caribbean that has acquired an interest in the macro pavers and that they are not, in particular, Mr. Earle Lewis, as minority shareholder, claiming any interest in the macro pavers for themselves personally. They say that it is Valley Slurry Caribbean on whose behalf possession of the macro pavers has been maintained. The Defendants' position is that the import duty bond represents customs dutiable on the macro pavers which would simply be retained by the Revenue in the event that the assets, i.e. the pavers stay within the jurisdiction.

[13] The Claimants make a number of claims against the Defendants, including a declaration that the Defendants have no right, title or interest in the pavers, permanent injunctive relief, and damages for detinue, interference with the Claimants' contractual relations and for breach of fiduciary duty as employees and as directors of Valley Slurry Caribbean.

SOME ASPECTS OF THE BACKGROUND TO THE PROCEEDINGS

[14] When I gave my oral judgment on the 19th December 2012, the Attorneys reminded me of aspects of the proceedings which had transpired prior to the hearing of the application on the 30th and 31st of October 2012. This may well be relevant background information and so I have summarized the proceedings. Originally, when this claim was first filed, the firm of Brady & Co, Attorneys-at-Law, appeared for both Defendants. The Claim Form and Particulars of Claim were signed by Jeffrey Reed on behalf of Valley Slurry, in his capacity as President, and on behalf of Valley Slurry Caribbean, in his capacity as Managing Director. .By way of an Amended Notice of Application for Court Orders filed September 25 2012, on behalf of the Defendants, the Defendants had sought the following orders, amongst others, :

1. *The Court's leave:*
    a. *To consolidate Claim No. 2012 CD 00110, Valley Slurry Seal Caribbean Limited and Earle Lewis vs. Valley Slurry Seal Company and Jeffrey Reed with this claim.*
    b. *For either party to proceed in the name of Valley Slurry Limited.*
2. *The Applicants seek the following interim orders and reliefs against the Claimants:*

    a. *A Stay of proceedings pending*
        i) *A change of Attorney for the 2nd Claimant from the present Attorneys-at-Law on the Record, Brady & Co. who represent the sole interest of the 1st Claimant.*

ii) …

c. An order that the financial affairs of the 2nd Claimant be investigated and that an investigator be appointed by the Minister of Commerce pursuant to section 161 of the Companies Act of Jamaica, to investigate the financial affairs of the 2nd Claimant.

[15] On the 25th of September 2012, Mr. Dunkley, on behalf of the Defendants, sought to raise as a preliminary point, the relief sought at paragraph 2(a)(i) i.e. that there be a stay of proceedings pending a change of Attorneys for the 2nd Claimant. Arguments by Mr. Dunkley commenced, and the matter was adjourned to the 26th of September 2012. On the 26th of September 2012, prior to the hearing being resumed, the firm of Bailey Terrelonge Allen filed a Notice of Change of Attorneys indicating that they now appear for the 2nd Claimant. Mr. Bailey attended the hearing and indicated that he now appeared, and that the 2nd Claimant supports the application by the 1st Claimant in so far as the 2nd Claimant was concerned to ensure that it did not end up with the Bond of $9,137,297.08 being forfeited by the Jamaica Customs and further, incurring penalties plus interest.

[16] The amended Notice of Application for Court Orders filed on the 12th September 2012 on behalf of the Claimants and which was the application before me up to the 26th of September had, at paragraph 1, originally sought an order that:

1. *An injunction restraining the Defendants, whether by themselves, their servants and or agents or howsoever otherwise from taking any steps to prevent the 2nd Claimant from re-exporting two Macro Pavers……for a period of..28 days from the date hereof.*

[17] On the 26th of September, an application was made on behalf of the 1st Claimant, by Mrs. Gibson-Henlin, instructed by Brady & Co., and by Mr. Bailey, instructed by Bailey Terrelonge Allen, for paragraph 1 of the Notice of Application for

Court Orders to be amended to read in the form it now appears, and as set out by me at the commencement of this judgment. I granted the application for amendment and adjourned the matter to the 30th and 31st of October 2012. I also ordered the Claimants to file an Amended Notice to reflect the amendments granted.

[18] On the 30th of October 2012, Mr. Dunkley raised the question of whether certain submissions filed on 22nd of October 2012, were filed by Bailey,Terrelonge,Allen as he had reason to believe they were not. Mr. Dunkley also indicated that his client Mr. Lewis had not been involved in the retaining of Mr. Bailey's firm. Mr. Bailey in response, indicated that he was not aware that appointment of Counsel has to be by unanimous approbation. He indicated that based upon the Shareholders' Agreement, it was his view that he had been properly appointed to act for the 2nd Claimant. Mr. Bailey indicated that he would only be making submissions limited to protection of the Bond with Customs. He also indicated that he would not be relying on the submissions filed 22nd of October 2012. I therefore placed these submissions facedown in the file and had no regard to them.

[19] The matter then ensued, with Mrs. Gibson-Henlin making comprehensive submissions on behalf of the Valley Slurry, as did Mr. Dunkley on behalf of the Defendants. Mr. Bailey made brief submissions on behalf of Valley Slurry Caribbean, speaking to the Sub-Lease and the terms upon which the equipment was imported into Jamaica. He referred to the fact that if the equipment is not re-exported as required pursuant to the Customs terms, the 2nd Claimant stands to have the Bond forfeited. Mr. Bailey indicated that it was in that context that his client the 2nd Claimant supported the grant of the injunction sought by the 1st Claimant.

[20] After I had heard all of the submissions on the 30th and 31st of October 2012, I indicated that in light of the urgency of the application, and the 21st December date being not far off, I would give judgment on the 11th of December 2012. I also indicated and ordered that the other applications remaining in the Defendants' Amended Notice of Application filed on September 25 2012 be

adjourned for a date to be fixed after my decision on the injunction application. Mr. Dunkley had indicated that at that time he could not proceed with the application for consolidation as time for service in Claim No. 2012 CD 00110 was still running.

[21] Ultimately, I was not able to hand down my decision on the 11th December because on the 29th of November 2012, a notice of application for court orders was filed on behalf of the 1st Claimant in Claim No. 2012 CD 00110 Valley Slurry Caribbean, seeking, amongst other relief, leave to consolidate with this claim and a stay until that application is determined. That application was filed by Ballantyne, Beswick & Co., who now appeared for the 1st Claimant instead of Mr. Dunkley's firm. As it stands, a number of preliminary points were taken on behalf of the Defendants in that Claim No. 2012 CD 00110 Suit which I heard. I upheld some of those preliminary points and on that basis struck out the claim No. 2012 CD 00110. This is the reason why this matter came back up for consideration over the past few days and why I have now delivered by judgment on the 19th December 2012, after delivery of my judgment in CD 00110.

THE LEGAL PRINCIPLES FOR THE GRANT FOR INTERLOCUTORY INJUNCTION

[22] The principles for the grant of an injunction until trial are pretty well settled as embodied in the well-known decisions of the House of Lords in **American Cynamid v. Ethicon** [1975] 1 All E.R. 504 and in the more recent Privy Council decision in **N.C.B. v. Olint** [2009] U.K.P.C.16. In **N.C.B. v. Olint**, Lord Hoffman at paragraph 19 reminded that "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".

IS THERE A SERIOUS ISSUE TO BE TRIED

[23] In my judgment, there quite clearly is. Valley Slurry claims to have the most immediate right to possession and the sub-lease expressly says that Valley Slurry Caribbean is to return the pavers to the Lessor Valley Slurry at the end of the Lease.

The Defendants are on behalf of Valley Slurry Caribbean asserting that the latter has acquired an interest in the pavers by virtue of transfer pricing.

WHETHER DAMAGES ARE AN ADEQUATE REMEDY

[24] See the **American Cynamid** guidelines. In my judgment, these pavers being chattels, damages would without more be an adequate remedy for Valley Slurry. The matter is complicated by the fact that it is Reed Leasing Group that owns the pavers. However Jeffrey Reed is the principal of both Valley Slurry and Reed Leasing Group. However, the further consideration is whether the Defendants would be in a position to pay damages. There is no evidence whatsoever from the Defendants as to their ability to pay the damages. As Mrs. Gibson-Henlin pointed out, in her submissions, and I accept, the demand for the return of the pavers was made on the Lewises in their personal capacity-see email from Jeffrey Reed to Earl and Carol Lewis sent August 26 2012, exhibited to the Affidavit of Earle Lewis filed September 18 2012.

[25] The difficulty with Mr. Dunkley's argument that the pavers are being retained by Valley Slurry Caribbean and in the Court examining whether Valley Slurry Caribbean could deal with the damages issue is that, unless or until the Court grants leave under section 212 of the Companies Act to maintain a derivative action claiming this interest on behalf of Valley Slurry Caribbean, the company 's official position is that as maintained in this Suit, i.e. as argued by Mr. Bailey, which is that they should cooperate in sending back the pavers to Valley Slurry or delivering them up because that is what they agreed to do under the sub-lease and also that Valley Slurry Caribbean does not wish to lose the over $9 Million deposit.

[26] All told, damages would not provide an adequate remedy, because there is no demonstration of ability for the damages to be paid by the only Defendants before the Court.

[27] As to damages being an adequate remedy for the Defendants, it would quite obviously be, particularly since these are assets, and the Defendants are not even purporting to claim them on their own behalf. Indeed, Mr. Dunkley candidly submitted that damages would be an adequate remedy for either party. I should add, that even if there was a case to be maintained by way of derivative action that Valley Slurry Caribbean had acquired the pavers as its assets by virtue of transfer pricing, and other tenets, I still think that damages would be an adequate remedy. Even the tax liability concerns and other sanctions that the Lewises and the auditors have expressed concerns about, can be addressed either by way of money, or by way of dealing with the nature of the sub-lease transaction itself, and paper entries, as opposed to being wrapped up in, or requiring, the actual physical pavers themselves.

[28] On the question of whether the First Claimant, Valley Slurry would be in a position to pay and undertake to pay those damages, Mr. Reed in his Affidavit filed September 12, 2012, at paragraph 15 states that the Claimants assets fall under their parent company Brisa and financial statements of Brisa were exhibited in proof of the Claimants ability to satisfy any award of damages.

[29] However, as Mr. Dunkley pointed out in his submissions, Valley Slurry is a foreign company and except for the pavers, the court has no jurisdiction over its assets. When the preliminary points application in **Claim No. 2012 CD 00110,** in which there was also an application filed seeking consolidation with this matter, came on for hearing before me on Monday the 17th December, I took the opportunity to raise this matter with Mrs. Gibson-Henlin. An Affidavit of Keriann Mitchell was filed yesterday, the 18th December 2012, exhibiting a copy of the original Affidavit of Jeff Reed which will not reach in time for today's hearing. In that Affidavit, Mr. Reed indicates that Valley Slurry is prepared to fortify its undertaking as to damages by obtaining a guarantee over security from a local commercial Bank in an amount not exceeding US$50,000.00. However, a close reading of the customs documents will show that each paver, was considered to have CIF value of over U.S.$121, 000.00 in December 2011. Whilst therefore, if the pavers are ordered to leave, and therefore Valley Slurry Caribbean

should get back the deposit of over $9 Million Jamaica, in my judgment, subject to hearing further arguments from Counsel, fortification of the undertaking should be required in the order of U.S.$120,000.00.

WHETHER HIGH DEGREE OF ASSURANCE

[30] Another issue that arises here is the nature of the relief sought. This is, to my mind, an application where the Defendants are being required to take some positive step, i.e. to deliver up the pavers, as opposed to simply maintaining the status quo by way of a restraining order. In my judgment, it fits into the usual mold of mandatory interlocutory injunctions, with attendant risks that more harm or prejudice can potentially occur from granting the injunction than refusing it. This is so because the pavers would no longer be available to the Lewises or Valley Slurry Caribbean. In that regard, the court needs to try and see if it feels a high degree of assurance that at the trial it will appear that the injunction was at this interlocutory stage rightly granted. –see **Shepherd Homes Ltd. v. Sandham** [1970] 3 All E.R. 409, **NCB v. Olint** cited by the Attorneys for Valley Slurry. In my judgment, the court can feel that high degree of assurance. There is a strong case for Valley Slurry to argue that the Defendants have no justifiable basis for refusing to deliver up the pavers as requested by Valley Slurry.

[31] In looking at all of the circumstances, including the balance of convenience generally, and specifically the question of the adequacy of damages, I am satisfied that the course least likely to cause irremediable harm or injustice is for the Defendants to deliver up the pavers to Valley Slurry. I am satisfied that the application ought to succeed.

[32] I therefore make orders in terms of paragraphs 1,2 and 4 of the Amended Notice of Application for Court Orders, with the exception that in paragraph 1, the words “the 2nd October 2012 or such other date as this honourable court deems expedient in the circumstances” are deleted, and the words “ forthwith, by 1:00 p.m. today, the 19th December 2012”, inserted. Also, the words “the Claimants” in the first line are removed,

and the words "1st Claimant and/or its authorized agent" substituted therefore. That paragraph 1 therefore now reads:

> 1. The Defendants are directed to deliver up to the 1st Claimant and/or its authorized agent two Macro Pavers with Serial Numbers **3BPZ00X68F718449** and **3BPZ00X48F718448** forthwith, by 1:00 p.m. today, the 19th December 2012.

[33] The orders are made upon the 1st Claimant Valley Slurry giving its undertaking to abide by any order as to damages that the court may make should it hereafter be of the view that the granting of this order may have caused loss to the Defendants for which the 1st Claimant Valley Slurry should be required to pay. I heard further submissions from Mr. Marc Jones on behalf of the 1st Claimant, and Mr. Dunkley on behalf of the Defendants. Mr. Jones cited to me the case of **Re DPR Futures Ltd.** [1989] B.C.L.C. 634 in relation to the question of fortification of the undertaking. I agree with Mr. Jones that the Defendants' evidence as to the losses they are likely to suffer was scant. I upon reflection accepted that a lower sum than the sum of US$120,000.00 would be appropriate as fortification. I considered US$75,000.00, which upon my query Mr. Jones indicated that he thought his client could arrange, was appropriate in all the circumstances. This undertaking is to be fortified by the 1st Claimant providing by 12 Noon on the 20th of December 2012, a written guarantee in the sum of U.S.$75,000.00 to be issued from a reputable commercial bank registered to do banking business, and having its place of business in Jamaica.

[34] Immediately upon issue of the guarantee, a copy is to be exhibited to an Affidavit sworn to on the 1st Claimant's behalf and served on the Defendants Attorneys-at Law forthwith.

[35] Costs are to be costs in the claim.

[36] Mr. Dunkley also made an oral application for a stay of execution pending the filing of an appeal, which was opposed by both Mr. Jones and Mr. Bailey. I refused this application.

[37] Mr. Bailey made an application on behalf of the 2nd Claimant that on receipt of a refund of the money on deposit with Jamaica Customs, the Defendants be ordered not to use or diminish those funds or any portion thereof and to place same into an interest bearing account until the matter is determined. I refused this application on the basis that a formal application should be made, supported by evidence on Affidavit.