

11/11/08

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2008 HCV 05596

BETWEEN WINSTON WALTERS
T/A LAKESIDE TRUCKING & CONSTRUCTION CLAIMANT
AND JOSE CARTELLONE
CONSTRUCCIONES CIVILES S.A. DEFENDANT

IN CHAMBERS

Denise Senior Smith instructed by Oswest Senior Smith and Company for the claimant

Barrington Frankson instructed by Barrington Frankson and Company for the defendant

February 9 and 20, 2009

FREEZING ORDER - DELAY IN COMMENCING CLAIM - WHETHER FATAL TO
APPLICATION FOR FREEZING ORDER - FOREIGN DEFENDANT - RISK OF
DISSIPATING ASSETS

SYKES J.

1. On November 26, 2008 Mr. Winston Walters applied, without notice, for a freezing order. Williams J. (Ag) granted the order on December 1, 2008 in the following terms:

1. *That there be an injunction restraining the respondent/defendant Jose Cartellones (sic) Civiles S.A. from removing from the jurisdiction assets located here and in particular assets located at the National Commercial Bank Jamaica Ltd (NCB) and the Republic Bank of Trinidad and Tobago (RBTT) Bank Jamaica Ltd. amounting to three million nine hundred and thirty-five thousand five hundred and eighty four dollars and twenty five cents (\$3,935,584.25) and restraining the respondent/defendant from dealing with any assets located within the jurisdiction amounting to three million nine hundred and thirty-five thousand five hundred and eighty four dollars and twenty five cents (\$3,935,584.25) for a period of 14 days.*

2. *The claimant gives his usual undertaking as to damages.*

3. *The inter partes hearing is set for the 16th day of December 2008 at 10:00am for one (1) hour.*

4. *Injunction to expire on the 16th day of December 2008 unless further extended.*

5. *Costs to be costs in the claim.*

2. The order was for an initial period of 14 days with the contested hearing set for December 16, 2008. On December 16, the order was further extended to December 23. On December 23, by consent, the order was extended to January 19, 2009.

3. On January 19, 2009, case management orders were made. Out of this case management two important dates were set: June 12, 2009 for the construction of the written contract which forms the basis of the dispute between the parties; and January 14 and 15, 2010, for the matter to be tried in the event that the construction point does not resolve the issues between the parties.
4. The injunction was further extended to January 22, 2009, and from January 22 to January 27, then to February 3 and finally to February 9, when the inter partes hearing commenced. The injunction was extended over various days because another inter partes hearing concerning a freezing order secured by the claimant against the defendant in another claim, was being heard (see CLAIM NO. 2008 HCV 05597, *Walters v Cartellone*).
5. This is the inter partes hearing to determine whether the freezing order should be discharged or remain in place until trial.

The dispute

6. The claimant alleges that he and the defendant entered into an oral agreement in June 2002 under which the claimant would transport material to be used by the defendant in the construction of what is now known as the North Coast Highway. It is common ground that there was a written agreement executed between the parties in October 2002. It is agreed that this written agreement superseded the oral agreement made in June 2002. Both sides have agreed that the agreement had schedules attached to it, which set out the applicable rate of payment for transporting different types of raw materials.

7. According to Mr. Walters, he was underpaid in respect of materials transported between June 2002 and December 2003. Mr. Walters further alleges that when he brought to Cartellone's attention, that it had underpaid him, the company accepted his contention, and agreed to pay him the outstanding balance. This agreement to pay the balance was arrived at in December 2003. This latter agreement, which forms the basis of this claim, was never reduced to writing. The company has not done this, and so this claim was filed.

8. Mr. Walters has stated, in affidavit, that he filed the claim in November 2008 because (i), he and Cartellone were pursuing discussions through their attorneys to settle the matter; and (ii) he had evidence that Cartellone, a foreign company, was disposing of its assets. This led Mr. Walters to form the view that the company's departure from Jamaica was imminent, and he was compelled to file the claim and seek a freezing order.

The test to be applied

9. The law is not in doubt. The test to be applied in order to determine whether the freezing order should be extended, is two fold. First, there must be a good arguable case. A good arguable case is one which is more than barely capable of serious argument. The claimant does not have to prove that success is assured, or even that his probability of success is more than fifty percent. Secondly, there must be solid evidence that there is the risk of dissipation of assets. These two points were decided in the case of *Jamaica Citizens Bank v Yap* (1994) 31 J.L.R. 42.

10. It is important to note that two judges in that case, Rattray P., and Forte J.A. (as he then was), did not indicate that there must be evidence that the

defendant is dealing with his property with the intention of defeating any judgment that may be awarded against him. Only Downer J.A. expressed himself in terms that suggested that there must be this intention on the part of the defendant. The issue of whether the defendant should have the intention suggested by Downer J.A., appeared to have been put to rest by the court in *Wheelabrator Air Pollution Control v FC Reynolds* (1995) 32 JLR 74. It should be observed that it appears that this point did not arise for decision, but despite this the tone and text of the decision do not suggest that the court regarded the intention suggested by Downer J.A. as a necessary condition for the grant of a freezing order.

11. What I am to determine is stated Kerr L.J. in *Ninemia Corp. v Trave Schiffahrts* [1984] 1 All ER 398. Kerr LJ said at page 419h:

In our view the test is whether, on the assumption that the plaintiff has shown at least 'a good arguable case', the court concludes, on the whole of the evidence then before it, that the refusal of a Mareva injunction would involve a real risk that a judgment or award in favour of the plaintiff would remain unsatisfied.

The Submission

12. Mr. Frankson is challenging the freezing order on the following grounds:
- a. the claimant does not have a good arguable case;
 - b. the claimant has acquiesced;
 - c. the claimant delayed in bringing the claim.

13. Mr. Frankson submitted that the claimant does not have a good arguable case, because the action is based on an alleged oral agreement made in December 2003, when the contractual relationship between the parties, is governed exclusively by the written contract of October 2002. According to Mr. Frankson, on a proper interpretation of the contract, the claimant does not have a good arguable case, and so the freezing order should be discharged. He also added that there was no term in the written contract permitting the parties to vary the terms of the agreement, and so Mr. Walters is not permitted to rely on the alleged oral agreement of December 2003.
14. This submission misunderstands Mr. Walters' case. He is not denying the efficacy of the written contract. Indeed, like Cartellone, he is relying on the contract. What he is saying is, that his arithmetic after a proper construction of the contract, will show that he was underpaid. On the other hand, Cartellone is contending that its arithmetic after a proper construction of the contract, will show that Mr. Walters has been fully paid. Therefore, Mr. Walters is not relying on any variation of the terms of the written contract. It is because of this understanding of the issues in the claim, why June 12 was set for the court to determine the proper meaning of the contract.
15. At this stage, there is nothing to indicate that Mr. Walter's case is doomed to fail and neither is there anything in the proposed evidence that would tend to show that Mr. Walter's will have severe difficulties in proving his case. I am not saying that he is bound to win, or even that his prospects of success are more than 50%. What I am saying is that there is nothing before me at this stage to tilt the balance away from Mr. Walters, to the extent suggested by Mr. Frankson.

16. Mr. Frankson next submitted that even if the claimant has established a good arguable case, which is not conceded, the order should be discharged because he has maintained a business relationship with the defendant, and thereby acquiesced to Cartellone's non-payment of the outstanding balance.
17. I should point out that I understand this submission to be based on the fact, that in this claim, the freezing order is an equitable remedy being used in support of a common law action for breach of contract. That is, equity, acting in its auxiliary jurisdiction, is assisting a common law action. Acquiescence, as I understand it, does not apply to common law actions and certainly has no application when the claim is brought within the limitation period. Acquiescence is a peculiarly equitable doctrine that a court takes into account, in determining whether an equitable remedy, whether interim or final, is denied. Therefore, the submission of Mr. Frankson is to the effect that the equitable interim remedy of a freezing order, ought to be denied, because Mr. Walters has acquiesced in the conduct of Cartellone.
18. The background to this submission is that the claimant and the defendant had a business relationship going on for approximately 5 to 6 years. The alleged underpayment occurred in 2002 and 2003. The claimant declined to bring a claim against the defendant since he wanted to benefit from other contracts he had with the defendant. According to Mr. Frankson, this conduct by the claimant, meant that he was no longer making the underpayment an issue between the parties, and therefore he must be taken to have tacitly accepted that he would not be paid the balance allegedly owed.

19. There are two things which stand in the way of Mr. Frankson's submissions.

The first is that Mr. Walters is not pursuing an action that is equitable. It is a common law action where limitation of actions statutes govern the time within which a claim can be brought. Historically, equitable suits were not subject to limitation statutes which led to the development of the equitable doctrines of laches and acquiescence. These doctrines apply to equitable remedies, and not to common law actions.

20. For the doctrine of acquiescence to apply, Mr. Frankson would have had to show that Mr. Walters was entitled to the equitable remedy, and also that Cartellone engaged in a particular conduct, or incurred expenses in reliance on Mr. Walters' behaviour which would make it inequitable to grant the freezing order.

21. The equitable remedy in view here is the freezing order, and not the claim for damages. Mr. Walters could not properly claim a freezing order without a proper basis. The fact that the defendant is a foreign company is not in and of itself, a basis to grant a freezing order. The law is not xenophobic. The basis for claiming the freezing order, did not properly arise, in Mr. Walters' case, until he had information suggesting that Cartellone may leave the island. If this is so, it was only when that information came to the knowledge of Mr. Walters, that he could, in equity, claim the equitable remedy of a freezing order. If this is so, then it is difficult to see how acquiescence can be established in this case.

22. The second impediment to Mr. Frankson's submission is that there is evidence of correspondence between attorneys for the parties, on this issue of the

alleged underpayment. These letters were exchanged in 2007. This is some evidence that the claimant did not acquiesce. This submission therefore fails.

23. Finally, Mr. Frankson submitted that there was delay in commencing the action, and that this should be fatal to the claimant's case for a freezing order. This submission, to a large extent, has been disposed of under the second submission made by learned counsel. As I have said, the action in this case is a common law action, which is drawing on equity's auxiliary jurisdiction to assist the litigant. Any delay in bringing the action, would have to be established by reference to the Limitations of Actions Act of Jamaica but that would only be a defence to the claim and, in the context of this case, has no bearing on the equitable remedy. Having dealt with the submission, I turn to the law.

Resolution

24. In this very case, Mr. Walters is alleging that there is evidence that Cartellone has been selling its equipment with a view to departing from the island. There is no evidence from the defendant denying that it has sold some or most of its assets. What it says is that it is looking for other business opportunities, and has established an office on the north coast of Jamaica.

25. There is no evidence from the defendant that it intends to remain in Jamaica for an extended period of time. It seems that if it does not find "other business opportunities" then it would leave the jurisdiction. Significantly, at this hearing, Cartellone has not said that it has found any business opportunities which I take to mean that, at present, there is nothing keeping it here. Therefore, when viewed objectively, there is indeed a real risk that if Mr. Walters is successful in his claim then no assets will be available in

Jamaica to satisfy any judgment awarded against it. Let me reiterate that there is no evidence that the defendant is embarking on a deliberate course of conduct which is designed to frustrate any judgment awarded against him. There need not be this type of evidence but if it exists then it strengthens the hand of the claimant. All that is necessary is that there is real risk that the assets may be dissipated.

26. It would seem to me that in this case, the freezing order ought to continue because (i) the claimant has a good arguable case; (ii) there is indeed evidence that the defendant is disposing of its assets; (iii) the defendant is a foreign company that came to Jamaica solely for the purpose of working on the North Coast Highway which is now completed; (iv) on the face of it there is no reason for the defendant to remain in Jamaica; (v) there is no evidence that Cartellone has any business reason to remain in the island; and (vi) there is indeed the risk that all the assets may be sold leaving nothing to satisfy the judgment if one is made against it.

27. For these reasons the freezing order is continued until trial or further order. The claimant gives his undertaking to the court to abide by any award of damages that may arise from the continuation of the freezing order. Costs of this application to be costs in the claim.