

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

CV No. 1736 of 2015

BETWEEN:

PREMIER EVENT SERVICES INC.

CLAIMANT

AND

**MICHAEL AIKEN
SPRING LCC**

**FIRST DEFENDANT
SECOND DEFENDANT**

Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High Court.

2016: January 20

March 03

Mr. Hal Gollop Q.C. in association with Mrs. S. Griffith, Attorneys-at-Law for the Claimant.

Mr. Shane Thompson, Attorney-at-law for the First and Second Defendants.

DECISION

Introduction

[1] This is an application by the Defendants for the discharge of an interlocutory mareva injunction granted to the Claimant on 10 December 2015.

Background Information

- [2] By a Fixed Date Claim Form filed on 07 December 2015, the Claimant sought:
- (1) damages for breach of contract;
 - (2) the sum of \$28,699.96 due and owing for services rendered by the Claimant; and
 - (3) such further or other relief as the Court deems just.
- [3] Mr. Jerome Ishmael, a director of the Claimant, filed a supporting affidavit in which he alleged that the Claimant provided services to the Second Defendant on 12 and 13 December 2015. These services were rendered pursuant to a written contract deemed to have commenced on 10 November 2014. The contract expired on 15 December 2014. (See Exhibit PES1).
- [4] The contract or service fee was \$14,687.50, inclusive of VAT at the rate of 17.5 per cent. The fee was to be paid to the Claimant in three tranches.
- [5] According to the agreement, disputes arising under the contract were to be settled by arbitration. The contract was governed by the laws of Barbados.
- [6] Mr. Ishmael alleges that after the Claimant provided the services, a detailed Statement of Account was forwarded to the First Defendant. (See Exhibit PES2). This Statement refers to an outstanding balance of \$24,035.76 as at 01 June 2015. However, correspondence to the First Defendant, as manager of

the Second Defendant, claimed \$46,248.48. (See Exhibits PES3 and PES4). Notwithstanding the sum mentioned in the correspondence, Mr. Ishmael averred that the Claimant was owed \$26,699.96 as claimed in the Fixed Date Claim Form.

[7] The Claimant also made an urgent ex parte application for a mareva injunction, on the basis that its rights were under serious threat. The application was certified by the Honourable Chief Justice as urgent, on the same day that it was filed.

The Applicable Law

[8] In the recent case of **Ansa McAl (Barbados) Limited v. Banks Holdings Limited et al (Civ.Ap.No.21 of 2015; decision dated 08 June 2016)**, the Court of Appeal reiterated that:

“[7].....the general law on the grant and discharge of interlocutory injunctions in Barbados is now well settled. Section 44 (b) of the Supreme Court of Judicature Act, Cap. 117A.....confers a general discretionary power on the High Court to “grant a mandatory or other injunction.....where it appears to the court to be just or convenient to do so for the purposes of the proceedings before it”. Inherent in this conferment is a discretionary power to discharge or not discharge any injunction so granted. This Court in its decisions in **Williams v. Canadian Bank of Commerce Trust Co. (Caribbean) Ltd (1979) 36 WIR 111**.....and **Toojays Ltd v. Westhaven Ltd [2012]** has accepted the principles laid down by Lord Diplock in.....**American**

Cyanamid Co. v. Ethicon Ltd [1975] AC 396

.....as establishing the guidelines to be applied in determining whether to grant or discharge an interlocutory injunction pursuant to section 44 (b) of Cap.117A”.

[9] The Court of Appeal confirmed in **Ansa** that:

“[88] The general test which governs the grant or discharge of an interim injunction is now accepted in our courts to be the **American Cyanamid** test as interpreted by this court in **Toojays**. That test has two limbs, namely: (1) Whether there is a serious issue, in the sense of not being frivolous or vexatious, to be tried; and (ii) Whether the balance of justice lies in favour of granting or refusing interlocutory relief”.

[10] This Court notes that the two pronged test, as expounded by the Court of Appeal in **Ansa**, is a general test. This acknowledges that there may be deviations from the general test. One such deviation must be the several tests applicable to the grant or discharge of an interim freezing order.

[11] The Mareva injunction has evolved since the 1975 landmark decision in which it was first granted. Because of the potentially devastating effect of this particular injunction, the courts have crafted specific tests to be considered in the context of an application for a freezing order. These tests are whether:

- (1) there is a cause of action;
- (2) there is a good arguable case;
- (3) the defendant has assets in the jurisdiction;

(4) there is a real risk of dissipation of the assets by the defendant before judgment; and

(5) the defendant will be adequately protected by the claimant's undertaking in damages.

(See **Internet Experts S.A. DBA Insta Dollar v. Omni Networks Limited, Money Exchange Int'l Ltd et al, Suit No. 803 of 2010, Sup. Ct. Belize, decision dated 30 May 2014**, per Young J. at para.8).

The Application To Discharge

[12] On 10 December 2015, after hearing counsel for the Claimant on the *ex parte* application, the Court granted the injunction. The Claimant was required to serve notice on the Defendants forthwith, or as soon as was practicable.

[13] The Defendants filed their urgent application for the discharge of the injunction on 18 December 2015. The grounds for the application are that:

(1) the claim form did not comply with certain requirements of the Civil Procedure Rules 2008 ("the CPR");

(2) Mr. Ishmael's affidavit failed to give an undertaking in damages, and/or any evidence of the Claimant's ability to meet any order for damages;

(3) the Claimant failed to give full disclosure of the relevant facts;

(4) there was no evidence of irreparable harm to the Claimant; and

(5) damages would be an adequate remedy.

[14] The First Defendant also swore to an affidavit in support of the application.

Mr. Aiken attached an agreement to that his affidavit (Exhibit MA 1), which he claimed replaced the agreement exhibited by the Claimant in its entirety.

The Contractor in this agreement is a locally registered company, Spring Caribbean Latin America.

[15] Having compared this agreement with the agreement exhibited by the

Claimant, the Court noted that the agreements are undated replicas of each other, but with different contractors. An essential feature of both agreements is the Financial Provisions clause which refers to a Vat inclusive service fee of \$14,687.50.

[16] Therefore, the Claimant was only entitled to \$14,687.50. This conclusion is

buttressed by the Rights And Obligations clause which provides that:

“The rights and obligations of this Consultancy are strictly limited to the terms and conditions of this Agreement. Accordingly, the Consultant shall not be entitled to any benefit, payment, subsidy, compensation, entitlement, or other expenses, except as expressly provided in this Agreement”.

[17] There is another clause that suggests the possibility of a modification to the agreement. The Modification Or Amendments To Agreement clause states that:

“If circumstances arise which require modification or amendments to be made to this Agreement, such modification or amendments shall be made only with the consent of the parties given in writing. Proposals for modification or amendment from one party shall be given due consideration by the other party”.

[18] There is nothing before the Court which indicates that there was any modification or amendment to either agreement. There is no evidence that the contract sum was increased from \$14,687.50. And, more fundamentally, both agreements cannot coexist because of the Effect Of Agreement clause. This clause provides that:

“This Agreement together with any modification or amendments agreed upon between the parties hereto constitutes the entire agreement between the parties hereto and shall supersede all previous negotiations, commitments documents or other agreements whether written or verbal with respect to the subject matter”.

[19] Because the two agreements are undated, it is difficult for the Court to determine from these documents which agreement was superseded by the other. However, at paragraph 6 of his affidavit, Mr. Akin alleges that the agreement with Spring Caribbean Latin America superseded the agreement

with Spring LLC. He also points to the fact that the Claimant's Statement of Account was directed to this company.

The Amended Fixed Date Claim Form

[20] Prior to the completion of the hearing of the Defendant's application, there was an interesting turn of events. The Claimant filed an Amended Fixed Date Claim Form on 24 February 2016. Spring Caribbean Latin America Inc. was added as a Third Defendant, and the First Defendant was now described as "acting herein as Director of the Second and Third Defendants".

[21] A Statement of Claim was included in the amended claim. At paragraph 2 of the Statement of Claim, the Claimant alleged that:

"The First Defendant subsequently requested that the Claimant enter into a second agreement with the Third Defendant.....with all the terms of the initial agreement in tact in order to facilitate local payments for the provision of the said services. This subsequent agreement commenced on 10 November 2014".

[22] The Effect of Agreement clause belies the coexistence of the two agreements. And there is nothing in the agreement with Spring Caribbean Latin America that refers to the facilitation of local payments to the Claimant.

[23] Based on the documentation before the Court, there is a dispute as to which company is the appropriate defendant. It cannot be said with certainty that the

Second Defendant was a proper party to the original claim. And if it turns out that the Second Defendant was not a proper party, there would have been no cause of action against that company.

[24] Under the original claim, the First Defendant was not sued in a representative capacity. And as there was no demonstrated contractual relationship between Mr. Aiken and the Claimant, the interim injunction should have been restricted to the Second Defendant.

[25] The Court also notes that the claim is for \$28,699.96, whereas the value of either of the executed contracts is only \$14,687.50. Mr. Ishmael's affidavit confirms payments to the Claimant that exceed the contract sum. And even if the Court was to be persuaded that both contracts are valid, the payments received by the Claimant exceed the combined value of the two agreements. There does not appear to be a cause of action for breach of contract or monies due and owing to the claimant under either written agreement.

[26] The original claim is predicated on the alleged breach of a written agreement. There is nothing before the Court from which to infer that the scope of services was extended, or that the value of the contract was increased. And there is no allegation of an oral agreement between the parties for the provision of additional or other services by the Claimant. Without a cause of action there is no good arguable case.

[27] It is neither just nor convenient for the injunction to continue. Therefore, the injunction granted on 10 December 2015 is discharged with immediate effect.

Sonia L. Richards
Judge of the High Court