[2021] JMCC COMM. 21

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. SU2021CD00309

BETWEEN	**MURRAY HAULAGE LIMITED**	**1ST CLAIMANT**
AND	**RUDOLPH W MURRAY**	**2ND CLAIMANT**
AND	**THE REGISTRAR OF COMPANIES**	**1ST DEFENDANT**
AND	**GILLIAN MURRAY**	**2ND DEFENDANT**
AND	**RUDOLPH A. MURRAY**	**3RD DEFENDANT**

IN CHAMBERS

Ms. Shannon Scott instructed by Henlin Gibson Henlin, Attorneys-at-Law for the 1st and 2nd Claimants

Ms. Heather-Mae Sutherland Attorneys-at-Law for the 1st Defendant

Mr. Matthew Gabbidon instructed by Nigel Jones & Co Attorneys-at-Law, permitted to observe proceedings on behalf of the 2nd Defendant

Injunction - Principles to be applied

Company law - Procedure for removal and appointment of director by sole shareholder -Section 179 of the Companies Act - Procedure for removal of director on the ground of mental incapacity

Heard: 22nd and 26th July 2021

LAING, J

Background

[1] The 1st Claimant is a limited liability company incorporated under the laws of Jamaica ("the Company"). The 2nd Claimant Mr. Rudolph W Murray ("Mr. Murray") subscribed for one hundred shares of the Company and on incorporation he was the sole director. He asserts, and the unchallenged evidence is that he is still the sole shareholder of the Company.

[2] The 2nd Defendant ("Ms. Murray"), is the daughter of Mr. Murray and the 3rd Defendant is his son. A Notice of Appointment of/Change of Company Secretary (Form 20 Notice) was filed with the Registrar indicating that Ms. Murray was appointed the Secretary of the Company on 6th May 2019 replacing Mr. Norman Westley who had been the Company's secretary since its incorporation. A Notice of Appointment of/Change of Director (Form 23 Notice) dated 28th April 2020 shows that as at that date Ms. Murray was also appointed a director of the Company.

[3] Ms. Murray filed a Form 20 Notice dated 15th February 2021 which indicated that she ceased to hold office as Company Secretary on 14th February 2021 and that Ms. Brittany Murray was appointed to that post effective 15th February 2021.

[4] Ms. Murray also filed a Form 23 Notice dated 15th February 2021 which indicated that Mr. Murray ceased to hold office as a director on 15th February 2021 ("the Removal Notice").

[5] Mr. Murray now alleges that the Removal Notice was invalid and that his removal was without his knowledge and was unlawful. He asserts that on becoming aware of the Removal Notice, in his capacity as sole shareholder of the Company he convened an Extra-Ordinary General Meeting. The purpose of the meeting was achieved which was to regularize his appointment as a director and to replace the company secretary. Accordingly, on his instructions, a Form 23 Notice was filed on 23rd February 2021 indicating the removal of Ms. Murray and a Form 20 Notice filed indicating the removal of Ms. Gillian. Both these notices were rejected by the

Registrar on the ground that Mr. Murray was not then a director of the Company and was not authorised to sign the notices.

[6] On 3rd March 2021 Mr. Murray filed a Form 23 Notice of the removal of Ms. Murray and a Form 5. A Form 5 is a general Notice to the Registrar. The Form 5 was rejected on the basis that the Tax Registration Number ("TRN") was incorrect and the resolution to which it referred was not attached. The Form 23 was rejected by the Registrar because the TRN was incorrect. It was also rejected based on the Registrar's position that Mr. Murray was still not authorized to sign these notices on behalf of the Company.

[7] The Form 5 was resubmitted on 18th March 2021. It was rejected on the basis that appropriate Forms 23 and 20 needed to be filed to reflect the information contained therein and that a statutory declaration was also needed in support. On 18th March 2021 a Form 20 Notice signed by Mr. Murray was filed which indicated that Ms. Brittany Murray was removed as company secretary and Ms. Shari Beckford appointed.

[8] An employee of the Registrar indicated in an email to Mr. Murray's Attorneys-at-Law dated 31st May 2021, that the Form 20 Notice filed 18th March 2021 was erroneously accepted for registration and reliance on it would be in contravention of the Companies Act. It was indicated that as a consequence of that error, the appointment of Shari Beckford as Company Secretary was not properly authenticated. Accordingly, that Form 20 Notice of her appointment could not be relied upon to authenticate the Form 23 Notice effecting registration of any change in the officers of the Company. It was on the basis that the Form 23 Notice filed on behalf of the Company and signed by Ms. Shari Beckford, which gave notice of the removal of Ms. Murray and the appoint of Mr. Murray could not be accepted for registration.

The Claim

[9] The Claimants have filed a claim and have joined the Registrar as the 1st Defendant ("the Claim"). The Claimants allege that the Registrar failed to accept and rectify the records of the Company in accordance with the filings submitted and supporting resolution. Instead, the Registrar pursued a course of conduct which has caused the Company's records at the Companies office to be inaccurate. The Claimants also allege that this inaccuracy has caused the Claimants to suffer loss, damage and expense.

[10] The Claimants have particularised the Registrar's conduct of which they complain as follows:

> *a. Failing to accept the Form 20 and Form 23 dated to rectify the Register of the Claimant's Director and Company Secretary.*
>
> *b. Requiring the filing of a Statutory Declaration that is not prescribed under the Companies Act.*
>
> *c. Rejecting the Form 20 and Form 23 on the basis that the sole shareholder is not an authorized officer even though it was in receipt of the Claimant's resolution notifying the Registrar of the authority of the said sole shareholder and his appointment as Director.*
>
> *d. Refusing to act unless Rudolph W. Murray removed the 2nd Defendant in accordance with section 179 which is not applicable.*

[11] The Registrar's position as indicated in the correspondence with her employee and Mr. Murray's Attorneys-at-Law was that confirmation was needed of compliance with section 179 of the Companies Act. This section provides for special notice to be given of the resolution to remove a director and for the director to have the right to be heard on the resolution removing him at the meeting. The material portion of the section being in the following terms:

> *(2) Special notice shall be required of any resolution to remove a director under this section or to appoint somebody instead of a director so removed, and on receipt of notice of an intended resolution to remove a director under this section the company shall forthwith send a copy thereof to the*

director concerned, and the director (whether or not he is a member of the company) shall be entitled to be heard on the resolution at the meeting.

[12] The Claimants allege that Ms. Murray as director of the Claimant owed a fiduciary duty to the Claimant to act in its best interest and failed to do so when she filed the unlawful and unauthorized notices at the Companies Office of Jamaica. It is further alleged that subsequent to her removal as director, she continued to owe a fiduciary duty to the Company not to misuse its confidential information as to its client and supplier information and not to interfere in its contractual relations.

[13] The Claimants have pleaded the particulars of breach of fiduciary duties and interference with contractual relations by Ms. Murray as follows:

a. Unlawfully removing Rudolph W. Murray as Director of the 1st Claimant.

b. Unlawfully appointing Brittany Murray as Company Secretary of the 1st Claimant.

c. Unlawfully removing Rudolph W. Murray as signatory on the 1st Claimant's bank account.

d. Causing false notices to be published in the Gleaner Newspaper on the 13th and 16th June 2021 that Rudolph W. Murray and Shari-Ann Beckford are not authorized to conduct business on behalf of the 1st Claimant.

e. Causing false notices to be published in the Gleaner Newspaper on the 13th and 16th June 2021 that Gillian Murray and Rudolph A. Murray are authorized to conduct business on behalf of the Claimant.

f. Sending WhatsApp messages to customers and/or suppliers of the 1st Claimant advising that the Managing Director Rudolph W. Murray is not authorized to conduct business on behalf of the Company.

g. Failing to act honestly and in good faith with a view to the best interest of the Claimants.

[14] As it relates to the 3rd Defendant, The Claimants have pleaded that on or about the 13th day of June 2021, he conspired and/or colluded with Ms. Murray to cause

notices to be published in the Gleaner newspaper on the 13th and 16th June 2021 falsely indicating that he is authorized to conduct business on behalf of the Claimant.

[15] It is also alleged that on or about the 11th day of June 2021 he received the sum of US$1,300.00 from a party on behalf of the 1st Claimant which he has converted to his own use. It is alleged that on or about the 14th day of June 2021 without reasonable or probable cause he took possession of the titles in the name of the 1st Claimant ("the Titles"), for motor trucks registered CN3475, CN3469, CH3620 and trailers registered at TT5754 and TT138A (the trucks and trailers are referred to together as "the Trucks"). It is further alleged that he has failed and/or refused to deliver same in response to a demand made on 2nd July 2021 on the Claimant's behalf, causing the 1st Claimant to suffer loss and damage.

The Notice of Application

[16] By Amended Notice of Application filed 21st July 2021 ("the Application"), the Claimants sought the following reliefs:

> *1. An interim declaration that:*
>
> *a. Rudolph W. Murray is a Director of the Claimant.*
>
> *b. Shari-Ann Beckford is the Company Secretary of the Claimant.*
>
> *c. Gillian Murray is removed as Director of the Claimant effective the 26th day of February 2021.*
>
> *2. An injunction restraining the 2nd and 3rd Defendants by themselves, their servants or agents or otherwise howsoever from using or misusing the confidential information in relation to the contracts, suppliers, customers and employees of the Claimant or any part thereof for any purpose or otherwise exploiting the information.*
>
> *3. An injunction restraining the 2nd and 3rd Defendants, their servants, and/or agents or otherwise and to prevent them from committing a repetition thereof, inducing or procuring breaches by unlawfully interfering in contracts between the Claimant, and their sub-contractors or suppliers or business relationships.*

4. *An injunction restraining the 2nd and 3rd Defendants from holding themselves out as being Directors or authorized officers of the Claimant.*

5. *An order that the 3rd Defendant immediately deliver up possession up of the titles for motor trucks registered CN3475, CN3469, CH3620 and trailers registered at TT5754 and TT138A to Rudolph W. Murray.*

6. *The Cost of the Application be costs in the claim.*

7. *Such further and/or other relief as this Honourable Court deems just.*

[17] Since the filing of the Claim, Mr. Murray has sworn to a 2nd affidavit filed 16th July 2021 in which he avers that he caused his Attorneys-at-Law to serve Ms. Murray with a Notice of Annual General Meeting for the Company ("the AGM"). On 17th June 2021 Ms. Murray was served with a Notice of Intention to have her removed as a director of the Company. Mr. Murray has further stated that on 15th July 2021 when the AGM was convened at the Courtyard by Marriott hotel at 10:30 AM, he attended along with Ms. Shari Beckford. Resolutions were passed for the removal of Ms. Murray as Director and also for the removal of Ms. Brittany Murray as Company Secretary. Mr. Murray was re-elected a director and Ms. Shari Beckford was elected as Company Secretary.

[18] At the hearing of the Application, Counsel for the Claimants confirmed that the Claimants' Attorneys-at-Law had been advised by the Registrar that the Form 20 Notice and the Form 23 Notice filed the 15th July 2021 were accepted for registration. The Form 20 Notice confirmed the removal of Ms. Brittney Murray and the appointment of Shari Beckford as her replacement, while the Form 23 Notice confirmed the removal of Ms. Murray and the appointment of Mr. Murray as the sole Director. Counsel indicated that the Claimants would no longer be pursuing paragraph 1 of the orders sought in the Amended Notice of Application filed 21st July 2021. This was because these declarations were no longer necessary in light of the changed circumstances.

Principles to be applied

[19] The principles applicable to the grant of an interim injunction have been clearly identified in the House of Lords case of ***American Cyanamid v Ethicon*** *[1975] 1 All ER 504* and the issues to be resolved can be conveniently summarised as follows:

(a) Whether there is a serious issue to be tried;

(b) Whether damages are an adequate remedy for either party; and

(c) Where does the balance of convenience lie.

Is there is a serious issue to be tried?

[20] As Lord Diplock established in ***American Cyanamid*** *(supra)* the Claimant needs to establish to the satisfaction of the Court that "*that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried*". The learned Judge, at page 510 followed this direction with these words of caution:

> *"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. One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that 'it aided the court in doing that which was its great object, viz abstaining from expressing any opinion upon the merits of the case until the hearing' (**Wakefield v Duke of Buccleugh [1865] 12 L.T. 628 at 629**). So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction 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."*

Whether Ms Murray breached her fiduciary duties to the Company

[21] The duties of directors are encapsulated in sections 174 and 174A of the Companies Act, and section 174 provides as follows:

> ***174.***—*(1) Every director and officer of a company in exercising his powers and discharging his duties shall—*
>
> > *(a) act honestly and in good faith with a view to the best interest of the company; and*
> >
> > *(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, including, but not limited to the general knowledge, skill and experience of the director or officer.*
>
> *(2) A director or officer of a company shall not be in breach of his duty under this section if the director or officer exercised due care, diligence and skill in the performance of that duty or believed in the existence of facts that, if true, would render the director's or officer's conduct reasonably prudent.*
>
> *(3) For the purposes of this section, a director or officer shall be deemed to have acted with due care, diligence and skill where, in the absence of fraud or bad faith, the director or officer reasonably relied in good faith on documents relating to the company's affairs, including financial statements, reports of experts or on information presented by other directors or, where appropriate, other officers and professionals.*
>
> *(4) In determining what are the best interests of the company, a director or officer may have regard to the interests of the company's shareholders and employees and the community in which the company operates.*
>
> *(5) The duties imposed by subsection (1) on the directors or officers of a company is owed to the company alone.*
>
> *(6) Where pursuant to a contract of service with a company, a director or officer is required to perform management functions, the terms of that contract may require the director or officer in the exercise of those functions, to observe a higher standard than that specified in subsection (1).*

The Court's assessment of what is the likely defence of Ms. Murray

[22] The explanation for Ms. Murray's conduct is evident in her written communication with Mr. Murray's Attorneys-at-Law. She asserted that Mr. Murray has been diagnosed with Alzheimer's Dementia, and as a consequence, he was incapable

of giving instructions to the Attorneys. Furthermore, because of his mental incapacity he was incapable of doing anything with his shares.

[23] It may be reasonably deduced from these assertions, that Ms. Murray wrongfully concluded that as a director, she was entitled to unilaterally act on medical advice she had received in respect of Mr. Murray's health and mental wellbeing, to remove him as a director. This conclusion was flawed and without any legal basis or authority. Starting on this incorrect premise, Ms. Murray filed a Form 23 Notice inaccurately stating that Mr. Murray was no longer a director of the Company effective 15th February 2021 Ms. Murray's wrongful conduct escalated with the communication to clients of the Company and the public by notice in the newspaper. This notice declared that it was being issued by Ms. Murray as director of the Company and stated that Mr. Murray was no longer a director of the Company effective 15th February 2021.

[24] The Company was incorporated in 2010 and adopted with some modificationTable A of ***the Companies Act*** (brought into operation 1st February 2005). Article 94(c) provides that the office of director shall be vacated if the director becomes prohibited from being a director by reason of an order made under sections 180 and 182 of the Act. Article 94(d) provides that the office of director shall be vacated if the director becomes of unsound mind. Unfortunately, the Articles do not expressly speak to the process for removal should such a situation arise where a director becomes of unsound mind, especially where there are only two directors.

[25] Ms. Murray was the only other director and did not have the advantage of the decision of a quorate board of directors removing Mr. Murray. In such circumstances, it is good sense that a director cannot simply by his or her own initiative assess the mental competence of a co-director, (whether relying on a medical report or not) and determine that the director is of unsound mind. Furthermore, a director in the position of Ms. Murray cannot take an additional step and use this opinion as the basis for the removal of Mr. Murray her co-director and then, acting as sole director, appoint a new Company Secretary.

[26] If there is a question raised as to the mental capacity of a director, the assistance of the Court must be invoked. This is to allow the issue of the director's mental capacity to be considered in an appropriate forum with the admission of evidence. Implicit in the Court's process, are built-in checks and balances integral to which is the assessment of the cogency of the evidence to prevent an injustice to the director in respect of whom the allegations are raised.

[27] ***Section 180 of the Companies Act*** provides that a complaint may be made to the Registrar in writing by, *inter alios*, a director of a company, asserting that a person is "*unfit to be concerned in the management of a company*", and stating the grounds on which it is made. The Registrar upon receipt of such a complaint, shall investigate the matter and afford the complainant an opportunity to be heard. If satisfied that there are sufficient grounds for a hearing of the matter by the Court the Registrar may issue a certificate to the complainant who will then have the right to make an application to the Court on the matter.

[28] In England, the issue of whether a person is "*unfit to be concerned in the management of a company*" is governed by the Company Directors Disqualification Act 1986. In analysing conduct under that Act, the English courts have found that unfitness may be shown by conduct which is dishonest such as conduct showing a want of probity or integrity. However, it may also be established by conduct which is merely incompetent and it is not a prerequisite that there has been some misfeasance or breach of duty (see ***Sevenoaks Stationers (Retail) Ltd*** *[1991] BCLC 325*). I have not identified any local authorities on the point, but in my opinion a similar approach ought to be taken in respect of a complaint pursuant to section 180 of the Companies Act and this provision ought not to be restricted to allegations of dishonesty only, if there is proof of incompetence.

[29] Outside of the remedies available under Company Law, there are also other remedies under the Mental Health Act by which, on the application by the closest relative, such as a son or daughter (in the absence of a husband or wife), the Court may declare a person incapable of managing their own affairs. This requires the

Court to be satisfied by evidence on affidavit that the person is incapable by reason of a mental disorder, of managing his property or affairs. The Court will then appoint a person (or "committee") to manage the affairs of the person and his property.

[30] None of these remedies available through the Court were initially pursued by Ms. Murray. Accordingly, on the evidence, I have little hesitation holding that there is a serious issue to be tried as to whether Ms. Murray has breached her fiduciary duty to the Company by her conduct in purporting to remove Mr. Murray as director by her own initiative and in her communication to clients and the public which, *prima facie*, has caused disruption of the Company's business.

Breach of Fiduciary duty and Unlawful interference with a contract

[31] The elements of the torts of causing loss by unlawful means and unlawful interference with a contract have been settled and applied in the case of ***OGB v Allan (No.3)*** *2007 4 All ER 545 HL*. These principles have been applied locally in the case of ***Akbar Limited v Citibank NA*** *[2014] JMCA Civ 43* in relation to the tort of unlawful interference with contracts.

[32] In **OGB** the House of Lords confirmed that Liability for inducing breach of contract was established by the famous case of ***Lumley v Gye*** *(1853) 2 E & B 216, 118 ER 749* in which the court based its decision on the general principle that a person who procures another to commit a wrong incurs liability as an accessory.

[33] The Claimants have not specifically prayed for damages for interference with contract but have referenced that tort in their pleadings. Evidence has also been presented of difficulties caused to the Company by the uncertainty created by the conduct of Ms. Murray. The Claimants have pointed to the evidence of communication from the National Water Commission ("NWC") that there are two parties stating that they are directors of the Company and that before the NWC can make any payment due to the Company it wished to be certain who is the correct director.

[34] The Claimants have also exhibited a letter dated 12th July 2021 from the Company's banker, First Caribbean International Bank giving notification of the termination of an account of the Company with the bank. Mr. Murray has asserted in his 3rd Affidavit that he is of the view that this decision by the bank is a result of the dispute in relation to the directorship of the Company.

[35] I appreciate the limited exercise being undertaken at this stage and the fact that all the evidence would not now be before the Court. However, I do not find on the evidence that there is a serious issue to be tried as to whether the Company has a claim against Ms. Murray for the tort of unlawful interference with contract. However, her conduct in purporting to remove Mr. Murray and to publicly proclaim that he was no longer authorized to transact business on behalf of the Company appears to have contributed to the position of the NWC and may have contributed to the decision of the bank. Ms, Murray's conduct in this regard is evidence capable of supporting the claim against her for breach of her fiduciary duties, even if they are not adequate to support the tort of unlawful interference with contract.

Detinue and Conversion

[36] In the Court of Appeal case of ***Attorney General of Jamaica and The Transport Authority v Aston Burey*** *[2011] JMCA Civ 6* at paragraph 6 Harris JA confirmed that both torts relate to the wrongful detention and dealing with a chattel inconsistent with possession or right to possession of another and where the claimant seeks only the return of the chattel he is limited to bring his action only in detinue. In this case the Claimant is only seeking the return of the Titles and there is no claim for conversion. It is noted that the Claimants have not alleged that the 3rd Defendant is detaining the Trucks. The complaint is in respect of the Titles, which are property which can be the subject of a claim in detinue. There is no evidence of any lawful ground on which the 3rd Defendant is justified in retaining possession of the Titles to the Trucks after the demand was made for their return. In the circumstances there is a serious issue to be tried as to whether the 3rd Defendant is liable in detinue.

Are damages an adequate remedy?

[37] In **American Cyanamid** (supra) at page 510-511 of the judgment Lord Diplock details the approach to be followed especially in assessing whether damages are an adequate remedy for either party, as follows:

> *"So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction 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.*
>
> *As to that, the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason this ground to refuse an interlocutory injunction.*
>
> *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. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case."*

[38] In this case, it will be difficult to quantify the loss which may be suffered by the Company as a result of Ms. Murray's breach of fiduciary duty. This is because it will be difficult to assess the impact of the exclusion of Mr. Murray from the management of the Company and any potential financial detriment to the Company as a result of clients and/or potential clients becoming aware of the notifications in the newspaper. Similarly, it will be difficult to quantify the loss which may result to the Company from the 3rd Defendant's retention of the Titles. There was no evidence led which suggests that the Trucks cannot be used without the Titles, but at the very least there would be loss of time and inconvenience involved in obtaining replacement Titles if necessary. There was no evidence as to the financial means of Ms. Murray and/or the 3rd Defendant. In the premises, I find that damages would not be an adequate remedy for the Claimants.

The Balance of Convenience

[39] The Court having concluded that damages would not be an adequate remedy for either party, now has to consider the balance of convenience. The ***American Cyanamid*** principles have been endorsed by the Privy Council in ***National Commercial Bank Jamaica Limited v Olint Corp. Ltd.*** *[2009] UKPC 16.* Helpful guidance as to how the Court should approach the determination of the balance of convenience is contained in the Judgement of the Court delivered by Lord Hoffman in particular at paragraph 16-18 where he said as follows:

> *"[16] ...It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in* ***American Cyanamid Co v Ethicon Ltd*** *[1975] 1 All ER 504, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for*

interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.

[17] In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. 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. This is an assessment in which, as Lord Diplock said in American Cyanamid [1975] AC 396, 408:

> *'It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them.'*

[18] Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases."

[40] As it relates to the relative strengths of the parties' case it is also of significance that Ms. Murray and the 3rd Defendant have not presented any evidence to the Court. I find that on the evidence presented to the Court, on a balance of probabilities, the case of the Claimants is stronger than that of Ms. Murray and the 3rd Defendant.

[41] In ***American Cyanamid*** Lord Diplock at paragraph 409C recognised that the grant or refusal of an injunction is ultimately a matter of discretion and the facts of cases

will vary. A measure of flexibility is therefore needed in the courts assessment. He stated the following:

> *I would reiterate that, in addition to those to which I have referred, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.*

[42] In my opinion there are special circumstances in this case. Mr. Murray is the founder of the Company and was its sole director from its incorporation in 2010 on until he appointed Ms. Murray as a co-director in 2020. He was at all material times and still is the sole shareholder. He is the party who ultimately stands to suffer from his decisions as director. Ms. Murray and the 3rd Defendant, notwithstanding their familial connection to Mr. Murray, do not have an interest in the Company or its assets. There is no right or interest of Ms. Murray and/or the 3rd Defendant which competes with the right of Mr. Murray to the control of the Company which he has built. His right is deserving of the Court's protection and in my view, the balance of convenience leans heavily in favour of the grant of an injunction to prevent any improper steps which might affect his loss of or control of his Company and its operations and loss to the Company.

[43] In this case, the Claim in respect of the Trucks is at its core a proprietary claim. The Company may therefore be entitled to a proprietary injunction. The principles applicable to the grant of a proprietary injunction are the same principles as laid down in **American Cyanamid.** However, once it is established that the claimant has shown that there is a serious issue to be tried on the merits, in assessing whether the balance of convenience is in favour of granting an injunction, the authorities seem to suggest that less weight is placed on the question of whether damages are an adequate remedy since the emphasis is on preservation of the asset. The explanation for this lies in the difference between a proprietary claim and a claim for damages as explained by Staughton LJ in ***Republic of Haiti v Duvalier*** [1989] 1 All ER 456 at 465 as follows:

> *'It may be that the powers of the court are wider, and certainly discretion is more readily exercised, if a plaintiff's claim is what is called a tracing claim.*

> *For my part, I think that the true distinction lies between a proprietary claim on the one hand, and a claim which seeks only a money judgment on the other. A proprietary claim is one by which the plaintiff seeks the return of chattels or land which are his property, or claims that a specified debt is owed by a third party to him and not to the defendant. Thus far there is no difficulty. A plaintiff who seeks to enforce a claim of that kind will more readily be afforded interim remedies, in order to preserve the asset which he is seeking to recover, than one who merely seeks a judgment for debt or damages.'*

[44] I accept the evidence of Mr. Murray that the 3rd Defendant has no legal justification for withholding the Titles to the Trucks and there is a serious issue to be tried in respect of his detention of same. Mr. Murray's evidence in this regard is unchallenged. In the circumstances, I am of the view that the balance of convenience lies in favour of ordering the return of the Titles to the Company and it is just and convenient to thereby grant the reliefs sought in respect of the Trucks.

[45] For the reasons stated herein, the Court makes the following orders:

1. The 2nd and 3rd Defendants are restrained from holding themselves out as being directors or authorized officers of the 2nd Claimant.

2. The 3rd Defendant is to immediately and in no event less than three days after the service of this order on him, deliver up possession up of the titles for motor trucks registered CN3475, CN3469, CH3620 and trailers registered at TT5754 and TT138A to Rudolph W. Murray.

3. The orders herein are subject to and conditional upon the Claimants giving an undertaking in damages in the usual form, by an affidavit to be filed and served within three days of the date hereof, failing which the orders shall have no effect.

4. The costs of this application are to be costs in the claim.