



[2013] JMCC COMM. 20

JUDGMENT NO. 2

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE COMMERCIAL DIVISION
CLAIM NO. CD 00108 OF 2012**

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

IN CHAMBERS

Mr. Harold Brady and Ms. Keri-Ann Mitchell, instructed by Brady & Co., Attorneys-at-Law for the 1st Claimant.

Mr. Patrick Bailey, instructed by Bailey, Terrelonge & Allen, Attorneys-at-Law for the 2nd Claimant.

Mr. Christopher Dunkley, instructed by Phillipson Partners, Attorneys-at-Law, for the 1st and 2nd Defendants.

HEARD: The 3rd July, 27th December 2013.

CIVIL PRACTICE AND PROCEDURE-SUMMARY JUDGMENT

Mangatal J:

[1] This is a matter in which there have been a number of previously intensely contested interlocutory applications. The application which I have for consideration is also contested, and is by way of Notice filed on behalf of the 1st Claimant Valley Slurry Seal Co. on May 3rd 2013. The application seeks the following orders, that:

1. The Defendants' Statement of Case be struck out pursuant to CPR 2002 Rule 26.3(1)(c).
2. Summary judgment in favour of the First Claimant against the Defendants pursuant to CPR 2012 Rule 15.2(b).
3. Interest on any award of damages at 1% above the commercial banks' prime lending rate for such time as the court shall deem just.
4. Costs of this application to be awarded to the Claimant to be taxed if not agreed.

[2] The 1st Claimant is a company incorporated in the United States and has its registered offices in California. The 2nd Claimant is a company duly incorporated in Jamaica and has its registered offices in the Winchester Business Centre, Saint Andrew, Jamaica. The Defendants are 2 of the 5 Directors of the 2nd Claimant. The 1st Defendant is a minority shareholder of the 2nd Claimant, owning 40 % of its shares, and the 1st Claimant is the owner of the other 60%. There is in existence an agreement headed "Shareholders' Agreement", dated 8th March 2010 which appears to be between the 2nd Claimant and its shareholders, the 1st Claimant and the 1st Defendant. That Agreement is subject to an arbitration clause.

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

- "1. The First Claimant is the sub-lessor of two Macro pavers with Serial Numbers 3BPZLOOX488718449 and BPZL00X48F718448 that were unlawfully detained by the Defendants.**
- 2. The Defendants have no real prospect of successfully defending the claim. The Defendants have no right, title or**

interest in the pavers; Defence filed on October 12, 2012 discloses no argument to support the Defendants detention of the pavers- CPR 2002, Rule 15.2(b).

3 The First Claimant entered into a “Master Lease” with the Second Claimant in respect of the said equipment for a period of one (1) year. The lease is dated 1st November 2010. The lease has expired.

4 It is a condition of the Master Lease aforesaid that upon its expiration or earlier termination the lessee “shall return the Equipment to the Lessor...” The Defendants refused to return the Pavers and the Claimants were successful in obtaining a mandatory injunction on December 19th 2012 for the return of the pavers to the Claimants for re-exportation.

5 The detention of the two macro pavers has caused the Claimant loss and damage resulting from expenses associated with shipping, custom duties and loss of profits.

6 . Upon the Claimants application for an injunction for the return of the pavers made by way of Notice of Application filed on September 12, 2012, the Honourable Ms. Justice Mangatal granted the injunction on December 19, 2012.

7 . The Defendants appeal was refused by a Single Judge in the Court of Appeal, the Honourable Mr. Justice Patrick Brooks, JA. In the judgment Justice Brooks further stated that “it was clear that the Defendants had no basis to retain possession of the pavers.”

.....”

[4] An Affidavit sworn to by Jeffrey Reed, President of the 1st Claimant, was filed on the 3rd of May 2013 in support of the application. No Affidavit was filed by the Defendants in opposition to the application. However, at the hearing, Mr. Dunkley, on

behalf of the Defendants, sought the Court's permission to refer to and rely upon an Affidavit of Earle Lewis, which was filed only on the 1st July 2013 and served at 4:23 p.m. Mr. Lewis' Affidavit was filed in respect of an application by the Defendants for a stay of proceedings, pending the determination of an application for leave to bring a derivative action, made in Claim No. 2013 CD 00010, which I also have had for consideration and which I intend to deliver shortly. Neither the application for the stay nor the Affidavit were properly before me, and in light of Mr. Brady's objection to the use of the affidavit, which did not comply with the requirements of Rule 15.5(2) of the CPR, I refused Mr. Dunkley's application to rely upon it.

[5] In the Amended Particulars of Claim, filed September 21 2012, the Claimants claim the following at or after paragraph 12:

“(1) A Declaration that the Defendants have no right, title or interest in the Claimants' said pavers.

(2) 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 the Claimants' said pavers.

(3) An injunction restraining the Defendants whether by themselves, their servants and or agents or howsoever otherwise 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.

(4) An injunction restraining the Defendants whether by themselves, their servants and or agents or howsoever otherwise from interfering with the Claimant's contractual relations in any way and in particular from contacting the Claimants' bankers or any of them or purporting to give instructions to the Claimants' bankers on behalf of the Claimants or any of them.

(5) An order that the Defendants return the Claimants' said pavers to the Claimants.

(6) Damages for detinue.

(7) Damages for interference with the Claimants' contractual relations.

(8) Damages for breach of duty of fidelity as employees of the second-named Claimant and for breach of fiduciary duty as directors/shareholders of the second-named Claimant.

(9) Aggravated or exemplary damages

(10) Interest on any award of damages at 1% above the commercial banks prime lending rate for such time as the court shall deem just.

(11) Such further or other relief as the court shall deem just.”

[6] The Defendants filed a Defence dated the 11th of October 2012. Amongst the matters raised in that Defence were the following:

“2..... the Defendants will say that the 2nd Defendant asserts that the audit conducted on its operations determined that by operation of *transfer pricing*, the operating lease between the Claimants, which was not at *arms length*, was in effect a finance lease which capitalized the macro pavers at issue as an asset of the 2nd Claimant....

5 The Defendants will say that they were never in dispute with the 2nd Claimant which at all material times retained possession of the macro pavers at issue....

9. The Defendants say that it is the 2nd Claimant and not the 1st Defendant (its 40% shareholder) who has acquired any interest in the macro pavers at issue; and the 2nd Defendant not at all....

10 The Defendantssay that it is the 2nd Claimant who directed correspondence to its bankers for its own protection.....

11 The Defendants.....will say that at all material times it is the 2nd Claimant who has acted in its own defence having regard to its acquisition of the macro pavers at issue....”

[7] On the 19th December 2012, amongst other orders made by me, was the grant of an order for an interlocutory mandatory injunction, requiring the Defendants to deliver up the pavers to the 1st Claimant and or its authorised agent by 1:00 p.m. on the 19th December 2012. I was advised by learned Counsel Mr. Brady, who appears for the 1st Claimant, that after much back and forth, acrimony and controversy, the pavers had finally, many months later, been delivered up to the 1st Claimant and have left the island.

[8] Part 15 of the CPR deals with the Court's power to order summary judgment. Rules 15.2(b) and 15.6 state as follows:

“Grounds for summary judgment

15.2 The court may give summary judgment on the claim or on a particular issue if it considers that-

.....

(b) the defendant has no real prospect of successfully defending the claim or the issue.

Powers of the court on application for summary judgment

15.6 (1) On hearing an application for summary judgment the court may-

(a) give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;

(b) strike out or dismiss the claim in whole or in part;

(c) dismiss the application;

(d) make a conditional order; or

(e) make such other order as may seem fit.

(2) Where summary judgment is given on a claim, the court may stay execution of that judgment until after the trial of any ancillary claim made by the defendant against whom summary judgment is given.

(Ancillary claim is defined in Rule 18.1)

(3) Where the proceedings are not brought to an end the court must also treat the hearing as a case management conference.”

[9] As pointed out by learned Counsel Mr. Dunkley, who appeared for the Defendants, the judgment of Brooks J.A., referred to in ground 7 of the 1st Claimant’s application, was not a ruling on the Defendants’ appeal in respect of the order for interim/interlocutory mandatory injunction; it was a judgment refusing an application made by the Defendants to the Court of Appeal seeking an injunction pending appeal. Brooks J.A. stated in his concise and thorough judgment in these earlier proceedings, in which he refused the Defendants’ application, reported at [2012] JMCA Civ App 39, at paragraphs 6 and 8:

“[6]. It is clear to me that the applicants have no basis to retain possession of the pavers. As directors of the company, they have no claim of right which they can properly assert over the pavers. In addition to that, even if they are correct in asserting that VSS Caribbean has acquired an interest in the pavers, Mr. Earle Lewis, as a shareholder of that company, which is a separate legal entity, has no entitlement to possession of the company’s property. Nor does he have any entitlement to assert any right on behalf of the company(see Foss v. Harbottle (1843) 2 Hare 461).

....

[8]....The Lewises have no likelihood of success in their defence to the claim, as it is presently framed, and therefore there is no basis for preventing delivery of the pavers to the companies.”

[10] I completely agree with the views voiced by the learned Judge of Appeal. In my view, the defence put forward by the Defendants and the entire manner in which they initially set about holding onto, and laying claim to the pavers was misconceived. Before claiming the pavers or seeking to detain them, the Defendants ought to have sought and obtained, the court’s leave to bring a derivative action on behalf of the 2nd Claimant pursuant to section 212 of the Companies Act. This the Lewises have now sought to do,

in Claim No. CD 00010 of 2013, Earl Lewis and Carol Lewis, applicants, and Valley Slurry Seal Company and Jeffrey Reed, Respondents. I will be delivering judgment in respect of that application shortly.

[11] As a consequence of the manner in which the Lewises proceeded, they had no proper basis in law for claiming or retaining possession of the pavers, in their personal capacity, as directors, Mr. Lewis as shareholder, or at all. The 1st Claimant is also entitled to hold the Defendants liable to it in detinue, since the owner or person entitled to possession is entitled to demand the return of the goods. See my judgment in **Gretel Smith v. Ingram** Claim No. 2005 HCV 00723, delivered 28th September 2009, and the judgment of my brother Sykes J., in **Anwar Wright v. The Attorney General of Jamaica**, Claim No. 2009 HCV 2875, delivered November 26, 2010, and the cases therein cited. Further, as Brooks J.A stated, even if the 2nd Claimant has acquired an interest in the pavers, the Defendants were not entitled to assert a claim to possession on its behalf in the manner that they did, and particularly given the position taken by the 2nd Claimant in this claim, and in the correspondence that preceded it. In my judgment, the Defendants therefore have no real prospect of their defence succeeding in respect of the claims at paragraphs (1), (2), (3), (5), and (6) of the Amended Particulars of Claim. As a result of the grant of the interlocutory mandatory injunction, and the pavers having been delivered up into the possession of the 1st Claimant and re-exported from Jamaica, the permanent injunction orders sought at (2) and (3) and the order for return of the pavers sought at (5) are unnecessary at this stage. I will therefore make the Declaration sought at (1) and give summary judgment for the 1st Claimant on the issue of liability for detinue, with damages to be assessed. Unless the 1st Claimant advises that it does not wish to proceed regarding the claims at (4),(7), and (8), i.e .injunction and damages for interference with contractual relations, and for breach of duty of fidelity and fiduciary duty, those matters will have to proceed to trial as there has not been any sufficient material placed before me by the 1st Claimant to raise/support the case that the Defendants have no realistic prospect of succeeding in relation to their defence on those aspects of the claim.

[12] I should add, that in the course of his submissions in opposition to the application for summary judgment, Mr. Dunkley had asked that in the event that the court was minded to grant summary judgment, judgment not be granted until the determination of the 2013 application under section 212 of the Companies Act. As it turns out, that is, as a practical matter, almost what has happened. However, even if the application for leave is granted, that would not affect the grant of summary judgment at this time and on the state of the proceedings and applications heard to date. If leave is granted, a claim pursuant to leave would have to be filed, but it would also not in any event constitute an ancillary claim on the basis of which the court could consider a stay of the judgment on the claim pursuant to Rule 15.6(2) of the CPR.

[13] There will therefore on the 1st Claimant's Notice of Application for Summary Judgment, filed May 3rd 2013, be summary judgment entered as follows:

Summary Judgment is entered against the Defendants in favour of the 1st Claimant.

(A) It is hereby declared that the Defendants have no right, title or interest in the Macro-Pavers Serial Numbers 3BPZL00X48F718449 and BPZLOOX48F718448.

(B) Judgment for the Lessor the 1st Claimant on the issue of liability for detinue, with damages to be assessed.

(C) Costs to the 1st Claimant against the Defendants to be taxed if not agreed.

(D) Permission to appeal is refused.

(E) Claimants attorney-at-law to prepare, file and serve Formal Order.

[14] The claim is to proceed to trial on the issues as to interference with contractual relations and breach of duty of fidelity and breach of fiduciary duty, referred to in particular, in paragraphs 11 and 12, and or the relief claimed at subparagraphs (4), (7) and (8) of the 4th page of the Amended Particulars of Claim.

[15] Case Management Conference fixed for, 27 January 2014 at 10.00 a.m. for 1 hour. In light of the fact that the Claimant has obtained summary judgment/declarations in relation to the pavers, one of the things that may arise for consideration at the Case

Management Conference, may be the question of whether the 1st Claimant should now be released from its fortified undertaking as to damages and guarantee.

[16] Permission to appeal is refused.

Claimants attorney-at-law to prepare, file and serve the Formal Order.