IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2015CD00021

BETWEEN	**PORT KAISER OIL TERMINAL S.A.**	**CLAIMANT**
AND	**RUSAL ALPART JAMAICA (A PARTNERSHIP)**	**DEFENDANT**

Injunction- Mareva – Ex Parte Application – Whether full disclosure – Inter Partes Hearing – Undertaking as to damages – Whether evidence of urgency and imminent dissipation satisfactory - Whether Notice of Application ought to have been served – Costs – Whether Full Indemnity basis appropriate.

Nigel Jones, Dr. Velma Brown, Kashima Moore and April Grapine-Gayle instructed by Caribbean Legal Suite for Claimant

Michael Hylton Q.C.and Anna Gracie instructed by Rattray Patterson Rattray for the Defendant

IN CHAMBERS

Heard: April 5th, 2016 and April 7th, 2016.

COR: BATTS J,

[1] On the 7th April, 2016 I made the Orders noted at paragraph 31 below. I promised at that time to put my reasons in writing. This judgment fulfils that promise.

[2] This is the inter partes hearing consequent on the grant ex parte of a freezing order on the 21st March, 2016. The Defendant has applied to discharge that order. The Claimant has also filed a renewed application for a freezing order

which relies substantially on the same evidence filed in support of the original application.

[3] The Claimant relies on :

(a) An affidavit of urgency by Manuel Sanmiguel dated 24th February, 2016 and filed on the 1st March, 2016.

(b) An affidavit of Manuel Sanmiguel dated 24th February, 2016 and filed on the 1st March, 2016.

(c) The second affidavit of Manuel Sanmiguel dated 5th April 216 and filed on the 5th April, 2016.

(d) The affidavit of Velma Brown dated 18th March 2016 and filed on the 18th March, 2016.

(e) The affidavit of Kashina K. Moore dated 21st March 2016 and filed on the 21st March, 2016.

(f) The second Affidavit of Kashina K. Moore dated 4th April 2016 and filed on the 5th April, 2016.

(g) The third Affidavit of Kashina K. Moore dated 4th April 2016 and filed on the 4th April,2016

[4] The Defendant relies on;

(a) The first Affidavit of Michalene Lattore dated 30th March 2016 and filed on the 30th March 2016.

(b) The second Affidavit of Michalene Lattore dated 30th March 2016 and filed on the 30th March 2016.

(c) The second Affidavit of Bevan Shirley dated 5th April, 2016 and filed on the 5th April 2016.

[5] The Claimant and the Defendant each filed written submissions and a bundle of authorities pursuant to directions given by the court on the 31st March 2016. The time for oral submissions was in consequence shortened. I am indeed grateful to Counsel for their assistance. The fact that in this judgment I do not repeat the

detailed evidence or the respective submissions has more to do with my desire to be concise and is no reflection on relevance or quality.

[6] The Claim was filed on the 24th February 2015 for :

(a) A declaration that the Claimant is not obliged to pay rent until the storage tanks and the Port Area are fully operational as per the terms of the lease agreement;

(b) An order directing that the Defendant removes forthwith its Petroleum products from the storage tanks which are the subject matter of the lease agreement;

(c) Damages for breach of contract;

(d) Interest; and

(e) Costs.

That Claim was expanded by an Amended Claim and Amended Particulars of Claim filed on the 16th February 2016. In its amended form the Claim reads:

1. A Declaration that the contract has been unlawfully terminated by the Defendant;

2. Damages for breach of contract in relation to loss of profits in excess of US$398,594,827.00;

3. Alternatively damages for breach of contract in relation to expenses incurred in excess of US$1,240,434.28;

4. Interest; and

5. Costs.

[7] A Defence and Counterclaim was filed on the 10th March 2015 and this was amended on 29th March 2016. More will be said in this regard , suffice it to say,

that although there had been a close of pleadings since the 10th March 2015 neither mediation nor case management orders have been made in the matter.

[8] On the 21st March, 2016 upon an ex parte application, my sister the Honourable Justice Dunbar- Green restrained the Defendants for 14 days from :

> *" removing or taking any steps to dispose of, transfer, withdraw , charge, diminish the value of, part with possession of or in any way howsoever deal with any of their property or assets, whether in their own name or by nominee(s) and whether held solely, jointly, beneficially and in any way whatsoever on their behalf and wherever the same may be situated within the jurisdiction, said assets and property including (but not limited to) bank accounts, investments funds, stocks and shares , real estate and personal property up to a maximum of US$ 398,594,827.00"*

Paragraph 2 of the Order of the Honourable Justice Dunbar- Green restrained the Defendant for a similar 14 day period from:

> *" removing or taking any steps including disposing of, transferring, withdrawing, charging, diminishing the value of, parting with possession of or in any way howsoever dealing with the proceeds of sale from property known as ALL THAT parcel of land part of Lodge situated on the south coast of Jamaica, just south of Bull Savannah in the parish of Saint Elizabeth held in any account whether in the name of any of the Defendants or their Attorneys-at-law Rattray Patterson Rattray."*

The order made provision for the usual disclosure and provided:

> *"b. The Defendant may make such payments as may be necessary in respect of their reasonable legal costs in defending this action and are at liberty to expend such sum or sums for ordinary and proper company expenses as may be reasonable and any other payment with the consent of the Claimant's Attorney-at-law, in any case from a current account or any other source the identity of which has first been notified by them in writing to the Claimant's Attorneys-at-law and their written approval first obtained in relation to such disbursement. To pay the reasonable costs incurred by any party to which notice of this Order may be given in ascertaining whether any assets to which this Order applies are within their power, possession, custody or control and in complying with this order and to indemnify any such third party against any liability which may reasonably flow from such compliance."*

The Claimant gave the usual undertaking as to damages and this was also reflected in the order.

[9] The Defendant's counsel has been critical of the Claimant for obtaining this order for the reasons and in the manner in which they did. The Defendant therefore seeks to have the order discharged and any application for a further such order refused.

[10] The rules relating to freezing orders (popularly called Mareva Injunctions) are to be found in Part 17 of the Civil Procedure Rules 2002 :

> Rule 17.1 *"(1) The Court may grant interim remedies including*
>
> *(a) to (e)*
>
> *(f) an order (referred to as a "freezing order")-*
>
> *(i) restraining a party from removing from the jurisdiction assets located there; and /or*
>
> *(ii) restraining a party from dealing with any assets whether located within the jurisdiction or not;"*

Rule 17.3 provides that applications for interim remedies may be made without giving notice if it appears to the Court that there are good reasons for not giving notice. These reasons must be stated as evidence in support of the application.

Rule 17.4 deals specifically with freezing and other interim orders as follows:

17.4(4)

> *"The court may grant an interim order for a period of not more than 28 days (unless any of these Rules permits a longer period) under this rule on an application made without notice if it is satisfied that –*
>
> *(a) in a case of urgency, no notice is possible ; or*
>
> *(b) that to give notice would defeat the purpose of the application."*

For completeness and in relation to a matter to which I will return, Rule 17.10 provides:

> *"On hearing any application under this Part, the court may exercise any of its case management powers under Parts 26 and 27 and may in particular give directions for an early trial of the claim or any part of the claim."*

[11] A cursory reading confirms that Mr. Hylton Q.C. is correct that applications without notice are to be the exception rather than the rule. It is of cardinal importance that the Claimant demonstrates that either service of notice is not possible or that such service would defeat the purpose of the application. The authority of **National Commercial Bank v Olint** [2009] UKPC 16 was relied on to buttress that point.

[12] The documentation filed and attached to the affidavit in support of the ex parte application does not support the bald assertion in the affidavit that:

> *"26. That this application is being made without notice on the basis that if the Defendant was made known of this application it may lead to a speedy consummation of the sale agreement which would prejudice the Claimant." [Affidavit of Manuel Sanmiguel filed of the 1st March 2016]*

Neither do they support the following assertions:

> *"3. That the Defendant is currently finalizing the sale of the Alpart plant to a top Chinese Company, Jiuquan Iron and Steel (Group) Company (JISCO).*
>
> *4.That the negotiation process has been going on for month (sic) now and I verily believe that the sale will soon be complete. A copy of the newspaper article dated November 5th, 2015 is attached hereto and marked as MS-1.*
>
> *5. That the most recent newspaper article dated February 12, 2016 shows that the Defendant and JISCO has agreed on a sale price and so I verily believe that the sale will soon be complete. A copy of the article dated February 12, 2016 is attached hereto and marked MS-2." [Affidavit of Urgency sworn to by Manuel Sanmiguel, filed on the 1st March, 2016]*

[13] The exhibits referenced, are newspaper reports which, rather than suggesting immediacy, point explicitly to some delay in time. The article of the 8th November 2015 [Exhibit MS1] commences with the words,

> *"Negotiations are ongoing for purchase of the mothballed Alpart alumina plant at Main, St Elizabeth by leading Chinese metals company Jiuquan Iron and Steel (Group) Company (JISCO) from Russian owners Rusal, reliable sources here said. The price of the ageing Alpart plant established in 1969 is said to be the point of disagreement between JISCO and UC Rusal";*

The more recent of the documents, a newspaper article dated 12th February, 2016 [Exhibit MS2] states ,

> *"Owners of UC Rusal have signed an agreement with a Chinese firm for the purchase of Alumina Partners of Jamaica (Alpart) a bauxite mining and alumina processing plant located at Main St Elizabeth, in the south of Jamaica.*
>
> *Reliable sources said yesterday that – in a process likely to be concluded by the third quarter of 2016 – the price had been agreed on and that the Chinese company will now enter into its due diligence phase before the financial close later this year."*

[14] It is manifest that the evidence produced by the Claimant suggests that the Defendant owns a substantial asset in Jamaica that cannot be removed. It is an asset which is being sold but the sale for which will take months to complete. Service of notice of the application on the Defendant's attorneys could not therefore "defeat" the purpose of the freezing order within the meaning of the rules.

[15] The Defendant has filed an affidavit sworn to by Michalene Lattore the Manager of Legal Services of the Defendant. She states:

> *Paragraph (5) "First, the potential transaction will not involve a sale of Alpart's plant. All that is being sold is the shares in the two partner companies. The two partner companies and the partnership will remain in place and will continue to own and operate the plant.",*
>
> *Paragraph 7 "The second inaccuracy is that the second article indicates that the parties have signed an agreement for purchase.*

> *This is not the case. The proposed transaction is at the due diligence stage. The prospective buyer has sent a series of requests and Alpart is in the process of uploading all relevant documents to a data room for the potential buyer's Attorneys and advisors to review. No definitive agreements are being presently negotiated. It is anticipated that this transaction will be completed in the third quarter of 2016." [1st Affidavit Of Michalene Lattore sworn to on the 30th day of March 2016].*

[16] The affidavit therefore underscores the fact that service of notice of the application could not have defeated the purpose of the freezing order as it related to the fixed assets. It also demonstrates why an opportunity to be heard is integral to the course of justice.

[17] There is a further reason why notice of the application ought to have been given. These proceedings as we have seen commenced almost one year ago. The Defendant had filed a defence and was represented by Attorneys. A case management conference as well as an application for an injunction, the records reveal, had come before the court on several occasions in the course of the year. Indeed I was the judge at this case management conference. The records show that the adjournments were generally by consent and that on the 12th October 2015, on the Claimant's application, a case management conference had been adjourned to the 18th January, 2016, with costs to the Defendant. It would, given that history, be a most extraordinary and urgent circumstance which would provoke a party to apply, without notice, for interim relief. The circumstances as I have indicated were to my mind neither extraordinary nor immediate. I therefore discharge the ex parte order.

[18] When regard is had to the evidence of Michalene Lattore as outlined above, I also decline to make an inter partes freezing order. Michalene Lattore asserts, that it is the shares of the contracting entity which are being sold and not its assets. This means that the Claimant's cause of action will remain regardless of who is the new owner of the partnership. On the evidence before me, there is nothing to indicate that assets are being depleted with a view to avoiding an anticipated judgment or lawful debt. The Claimant may seek discovery or specific

disclosures at the interlocutory stages so as to determine if the Defendant as an entity is fleeing the jurisdiction or is taking steps so to do. I therefore decline to make an inter partes freezing order on the evidence before me at this stage.

[19] I also agree with Mr. Michael Hylton's further complaint, which is, that the Claimant failed to make full disclosure at the ex parte hearing. In this regard I respectfully adopt and apply the definition of material facts, as well as the duty to disclose, formulated by my brother Sykes J, in **North American Holdings Company Limited v Androcles Limited** [2015] JMSC Civ 151 Para 4 where he stated:

> *"It is well established that an applicant who makes an ex parte or without notice application is under a very onerous duty to make full and frank disclosure to the court of all material facts. Material facts are those that affect or may affect how the discretion to grant or not to grant the freezing order is exercised. Material facts include the Claimant's case and any fact the Defendant could urge had he been present at the hearing. The nature of this duty is so great that the law requires the applicant to make all reasonable enquiries so that he is fully informed as circumstances allow about his claim before the application is made or heard so that the applicant is in a position to advise the court of all relevant matters, particularly those matters which the Defendant could have raised had he been told about the application and was present. The reason for this is that a without notice application is prima facie a breach of natural justice which requires that a person be heard or be presented with the opportunity to make representations before an order is made, especially an adverse order. This is true of all without notice applications. Of course there are some without notice applications where the full rigour of the rule is mitigated to some extent. An example is an application made by a law enforcement agency to enforce a statute."*

[20] That duty is not discharged by placing documentation before the Court. It is incumbent on the applicant to point out to the Court anything in such documentation which may point in the absent Defendant's favour. Justice Sykes in the judgment cited makes this clear at paragraphs 13 and 14 of **North American Holdings Company Limited v Androcles Limited** [2015] JMSC Civ 151. The duty is not new and was clearly stated by Ross J (as he then was) in

Citibank NA v Office Towers Limited and Adela International Finance Company SA (1979) 16 JLR 502. It is time for all practitioners to recognize the importance and extent of the duty of full disclosure on ex parte applications.

[21] In this case the Claimant fell woefully short of that duty. In the first place, and as we have seen, the Claimant failed to indicate to the court that the documentation did not support the allegation of imminent completion of sale or of what was being sold. Secondly, the Claimant did not bring to the attention of the Court that clause 14.2 of the lease agreement on the face of it, precludes a claim for loss of profits that is consequential relief. This is in circumstances were consequential relief represented the bulk of the claim. Mr Jones for the Claimant submitted that on his client's construction of the clause, it was inapplicable given that the Defendant was refusing to perform the agreement. He relied on **Kudos Catering (UK) Limited v Manchester Central Convention Complex Ltd** 2013 EWCA Civ 38. Mr Hylton QC argues that a failure to give notice as required by the contract may be a wrongful mode of termination but is not a refusal. At this interlocutory stage I express no view on this, nor do I need to. It suffices that there was the possibility of such a defence being raised. The Claimant had a duty to bring the clause to the attention of the Court. This duty was enhanced because the claim for lost profits was inserted by an amended claim filed on the 16th February 2016 and to which no amended Defence had been filed as at the date of the ex parte application.

[22] The third area of material non–disclosure is connected to the second. This is that the paragraph in the Amended Particulars of Claim which introduced the claim for loss of profits was not underlined. The learned judge at the ex parte hearing may therefore have been unaware that the Defence did not speak to loss of profits. The impression could have been created that there was no contest as to the quantum. In fact as indicated above no Amended Defence to the Amended Claim had as at that date been filed.

[23] I do not agree that the failure to disclose or elaborate on information about the Defendant, constituted a material non-disclosure. In the first place, a litigant no matter how large whether Jamaican or expatriate is entitled to the even handed justice of these courts. In the second place, the circumstance of the Defendant may be regarded as somewhat notorious. Rusal Alpart has been in the news many times and I dare say the average literate Jamaican knows of the travails of our bauxite industry. Nor do I agree that the history of this litigation was such that Counsel needed to indicate that the file had been before some other judge. Counsel was entitled to assume that the Registrar of the commercial division had advised herself of these matters before listing the application. I do not in any event agree that the Learned Judge would have directed that the matter be placed before that other judge once she accepted, as she clearly did, that the matter was urgent due to an imminent sale of assets.

[24] Queen's Counsel also submitted that the Claimant placed no evidence before the court of its ability to honour the undertaking as to damages. This certainly is the best practice even if it is not an absolute requirement; see **TPL Limited v Thermo Plastics (Jamaica) Limited** 2014 JMCA Civ 50. I agree that where the Claimant is an overseas entity recently incorporated , and there is no evidence it owns assets in the jurisdiction, the desirability for such evidence is enhanced. In this regard the failure to demonstrate the Claimant's ability to honour their undertaking is also regrettable. Mr Jones submitted that, when regard is had to the subject matter of the claim, all this was unnecessary. He stated that the unchallenged evidence is that the Claimant paid a substantial deposit for the lease. If it turns out the injunction ought not to have been granted, then whatever damages the Defendant claims in consequence could be deducted from that. In any event, submitted Mr Jones, the Claimant's case is so strong on paper that the need for an undertaking is virtually redundant. This is because the purported letter of termination did not contain the requisite notice period. Mr Hylton's response, without conceding that that is so, is that the Defendant's counterclaim exceeds the amount of the deposit. Damages in consequence of the grant of a freezing order are therefore likely to be over and above that deposit. It is not for

the Court, at this interlocutory stage, to resolve factual issues or complex issues of construction of the agreement. Perusal of the respective statements of case reveal that there are several such issues. The Amended Defence filed on the 29th March 2016 avers among other things that :

(a) the payment of the deposit was not in accordance with the agreement

(b) the alleged variations were denied

(c) alleged short payments by the Claimant

(d) alleged that the Claimant unilaterally changed the scope of work

(e) alleged, contrary to the Claimant's assertion, that the port was operational by the 3.8.2014

(f) alleged that the Claimant failed to invoke article 18 provisions

(g) alleged that all storage tanks were available for use by the Claimant.

(h) denied that the Defendant provided a warranty that tanks would be completely empty or free of fuel and/ or ready to use.

(i) alleged that It was the unilateral insertion of a third party by the Claimant to clean/ empty the tanks which lead to discord.

(j) alleged by way of counterclaim that rent is due and owing and that it had completed the works as agreed.

[25] This rather brief review is sufficient to demonstrate that there are considerable issues of fact. At this interlocutory stage and on the evidence before me it is impossible to conclude that the Claimant's case is so strong as to render the need for an effective enforceable undertaking unnecessary. I therefore refuse an injunction at this interlocutory stage on the basis also that the Claimant has put no evidence before me to demonstrate its ability to honour any undertaking as to damages.

[26] Mr Hylton has urged me to order that damages be assessed with regard to the loss suffered in consequence of the ex parte order granted. I agree that such an enquiry is appropriate. However, given that the merits of this matter are yet to be determined, it appears to me only fair that such an assessment be done at the trial. This will enable a set off in the event the Claimant is successful at trial and, will avoid the prospect of the Claimant being prevented from prosecuting its Claim due to an inability to honour its undertaking at this stage.

[27] On the matter of the costs of this application Mr. Hylton Q.C. submitted that costs should be awarded on a full indemnity basis. This is because the Claimant's conduct amounts to an abuse of the court's process that is: non-service of the application, material non disclosures in the course of the application and the delayed service of the ex parte order once obtained. Mr Hylton also relied on the Claimant's refusal to consent to payments pursuant to proviso 'b' of the freezing order, as demonstrating an abuse of process. It was submitted that the purpose was to inflict maximum damage on the Defendant to "secure a tactical advantage". I must confess that having read the order made on the 21st march 2016 it seems pellucid that the intent was to enable such payments,

> *"with the consent of the Claimant's Attorneys at law"* and *" their written approval first obtained in relation to such disbursement."*

The failure of the Claimant to consent on the basis that:

> *"We are of the view that the circumstances in which we need to consent do not arise in the context of the relevant Formal Order. It is the bank which determines however it arrives at that determination, what sums are ordinary and proper company expenses* ,"
>
> is incomprehensible. Mr Jones did however in the same email of the 24th March 2015 [page 42 Judge's bundle] go on to state:
>
> *"In any event we do not have material which allows us to make such a determination."*

[28] It is not at this stage for me to say whether or not the Claimant had information sufficient to lead to a consent. It suffices to indicate that upon the issue being

placed before the court the Claimant made no objection; presumably being content with the relevant assessment being done by the Court. I therefore do not, on the material before me, find the Claimant 's refusal to consent unreasonable.

[29] In all the circumstances however and in particular the non service of the application and the material non disclosures I am minded to order costs on a full indemnity basis. I have perused the authorities cited by both counsel on this issue and respectfully agree with the decision and analysis of my brother Sykes J in **RBTT Bank Jamaica Limited v YP Seaton et al** [2014] JMSC Civ 139 unreported judgment 24 Sept 2014. In the matter at bar the application as I have found, ought not to have been made ex parte. Further the material non disclosures, were likely to or did in fact, adversely impact the result. The decision to apply ex parte and the failure to give full disclosure were such as to amount to an abuse of process. The Defendant was therefore unnecessarily put to expense and the costs were therefore unreasonably incurred. In such circumstances, it is appropriate for the party, who has been unreasonably required to incur those costs, to be compensated on a full indemnity basis. Although not using the words "full indemnity" the rules contemplate that it may be reasonable to award the amount actually paid having regard to the conduct of a party before and during the proceedings. I therefore direct that at taxation the Registrar assess the costs as on an indemnity basis.

[30] Finally it is only right that I underscore the reluctance with which applications without notice to the other side are to be embarked upon. Deprivation of a right or the infringement of a liberty are not to be effected without an opportunity to be heard, save in the most exceptional circumstances. I am moved to remind the profession of Lord Denning's words in **Third Chandris Shipping Corporation and others v Unimarine SA** [1979] 2 All ER 972 at 984 where having set out guidelines for the grant of the Mareva Injunction he stated,

> *" The solicitors of the city of London can, I believe, continue their present practice so long as they do it with due regard to their*

responsibilities; and so long as the judges exercise a wise discretion so as to see that the procedure is not abused."

[31] In the result my orders are as follows:

1. The ex parte freezing order granted on the 21st March, 2016 is discharged.

2. The Defendant is at liberty to enforce the undertaking as to damages given by the Claimant. The assessment of damages in that regard is to be done at the trial of the action.

3. The application for freezing order filed on the 4th April, 2016 is refused.

4. I certify that it is reasonable in the circumstances for costs to be assessed as on an indemnity basis. Such costs to be taxed if not agreed.

5. Certificate for two Counsels granted.

6. Permission to appeal granted.

7. Case Management Conference fixed for the 18th April, 2016 at 10:00 a.m.

8. Application to dispense with mediation fixed for 18th April, 2016 at 10:00 a.m.

BATTS J
PUISNE JUDGE
20th May, 2016