[2022] JMSC Civ 70

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. SU2021CV05239**

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| **BETWEEN** | **READING HOLDINGS LIMITED** | **CLAIMANT** |
| **AND** | **SILBERT ANDERSON** | **1ST DEFENDANT** |
| **AND** | **PRUDENCE ANDERSON** | **2ND DEFEMDANT** |

**IN CHAMBERS**

**Mr. Hadrian Christie, Attorney-at-Law instructed by HRC Law for the Claimant/Applicant**

**Mr. Emile Leiba, Attorney-at-Law instructed by DunnCox Attorneys-at-Law for the 1st and 2nd Defendants/1st and 2nd Respondents**

**HEARD: May 19, 2022 and May 27, 2022**

**Application for Freezing Order – Application for extension of freezing order – whether or not applicants have an arguable case – factors that affect whether Applicant has an arguable case – whether claim likely to be struck out as being statute barred – whether claim sufficiently supported by evidence.**

**DALE STAPLE J (Ag)**

**BACKGROUND**

**[1]** The Claimant, a company involved in real estate development and construction services, entered into an agreement with the Defendants to construct a house on a property purchased by the Defendants from the Claimant.

**[2]** The Claimant built the house and it was "completed" in or around 2014. The Claimant presented a final statement of account to the Defendants in 2014. This was when the dispute giving rise to this claim arose. The Defendants did not pay the Claimant the sum they claimed was outstanding. The Defendants cited multiple issues with the quality of the work and having to pay sums out of pocket to remedy the issues as the reason for not paying this sum.

**[3]** Years later, the Defendants attempted to sell the property and the Claimant lodged a caveat to stop them. After the caveat was warned, the Claimant filed this claim and an Application to stop the sale of the property. The Application was resisted.

**[4]** Eventually, the sale was allowed to proceed but it was ordered that a portion of the proceeds of sale would be frozen and the resistance then turned to a resistance of the continued freezing of the proceeds of sale.

**[5]** The Defendants have resisted this application for the continued freezing of the portion of the proceeds of sale and the Court is now tasked with resolving this preliminary issue.

**FACTS**

**[6]** The Claimant and the Defendants entered into an agreement for the construction of a house on a property purchased by the Defendants from the Claimant.

**[7]** The Construction Agreement was signed by the parties on the 6th December 2012. It was conceded by Counsel for the Claimant that the contract was not the best worded contract. That was putting it mildly. It was the type of contract that one would have expected lay persons, not trained in the law, to draft and sign.

**[8]** It was agreed that the construction was to be completed over 10 months. The agreed price was US$420,000.00. It was to have been paid over an agreed schedule, but that payment schedule, though attached, was blank.

**[9]** By clause 2 of the contract, the Claimant was to have executed the works in connection with the said project as listed on the attached "Scope of works". There was no scope of works attached. Counsel for the Claimant submitted that in the absence of this attached scope of works, the scope of works will have to be defined and divined from the evidence of the parties.

**[10]** Mr. Fletcher, the Claimant's Director, in his affidavit, said that the Defendants requested additional work be done and a list was prepared and sent to them. The purported list at PF-4 of his affidavit was not signed by anyone.

**[11]** The house was eventually built, but there was a dispute between the parties on whether or not the Claimant fulfilled the terms of the contract by building the house properly and whether or not the "additional works" claimed by the Claimant were indeed additional works or formed part of the original "scope of works".

**[12]** The Claimant then submitted what Mr. Fletcher in his affidavit called a "Final Statement of Account" which included "additional work" that were verified by a quantity surveyor. This statement was for US$58,934.00. This was in 2014.

**[13]** The Claimant contends that the Defendants have only made a further payment of US$3,000.00. This he purports was made by the Defendants' son on the 15th December 2015. The receipt exhibited was prepared by the Claimant. There is no evidence to say that the writing thereon was from anyone connected to the Defendants or the Defendants themselves.

**[14]** The Defendants have challenged the Claimant's assertion that this sum was in relation to the outstanding contract sum. They say it was for outstanding maintenance payments due under a clause in the Agreement for Sale of the Land which was already completed.

**[15]** The Claimant then sent a revised statement of account of $55,934.00 in January 2016. They asserted that the Defendants have failed to make any payments thereafter.

**[16]** Years later, the Claimant lodged a caveat to the title on the 11th October 2021 on being alerted to a pending sale of the property by the Defendants. Based on the Joint Defence filed by the Defendants, the Defendants contend that the caveat was lodged by the Claimant to secure the outstanding maintenance of US$2,400.00 and interest. There was no mention in the caveat of the contract debt. The Defendants lodged a warning notice dated the 25th October 2021.

**[17]** Thereafter the Claimant filed this claim on the 10th December 2021 and applied for a restraining of the Registrar of Titles from registering the transfer of the land and a freezing order on the Defendants from selling the property.

**[18]** When the matter came for the *inter-partes* hearing before Mrs. Justice Tie-Powell on the 13th December 2021, the sale was allowed to proceed and it was ordered that the Defendants' Attorneys-at-Law were to retain the sum of $125,332.20 from the proceeds of sale until the determination of the Claimant's application for an interim injunction.

**[19]** It was later ordered by the Court that the Claimant file an amended Application for Court Orders restraining the Defendants from receiving the sum of $125,332.20 and DunnCox from disbursing the said sum to the Defendants.

**[20]** The Defendants have opposed this application and the Claim itself. For their part, the Defendants have denied the debt and say in response that they have incurred expenses as a consequence of completing the work that they said was outstanding on the house which the Claimant failed to do at all or failed to do properly. They deny that they owe any specific sum for escalation and they deny that they owe the Claimant the original balance of US$20,000.00 and assert that the amount they have had to pay to finish the work on the house far outstrips the alleged

US$20,000.00 outstanding on the contract. They also denied owing the Claimant any sum for maintenance.

**[21]** The Defendants further assert that the Claimant's claim is statute barred. There has not yet been a reply to this specific claim in the Defence filed by the Defendants. The joint defence was filed and served on the 11th March 2022 and by Order of the Court was permitted to stand as filed. It is important to note that by Rule 10.9(1) any reply to the Defence filed must be filed within 14 days of the date of service of the Defence. Though it is arguable that the Claim Form (with Particulars of Claim included) would, on its face, take the Claim outside of the operation of s. 46 of the **Limitation of Actions Act**.

**THE ISSUES**

**[22]** The Court is grateful for the thoughtful submissions of counsel for the Claimant and Respondent as well as the authorities submitted. They were all thoroughly considered as part of this judgment.

**[23]** The Claimant is applying for a freezing order. He asserted that he has a good arguable case for the claims for the balance under the construction contract as well as the maintenance arrears. He asserted that as the proceeds of sale being held by the Defendant's Attorneys-at-Law represents the only tangible asset for the Defendants in the jurisdiction, refusing the freezing order poses a real risk of dissipation. The rules governing freezing orders are to be found at Rule 17.1(1)(f) of the **Civil Procedure Rules**.

**[24]** The Defendants, on the other hand, assert that at this stage there is no arguable case presented by the Claimant as his case is either statute barred, or in the alternative, it is unsupported by the evidence.

**[25]** The key questions raised in this matter are:

a. Whether or not the Claimant has an arguable case;

b. Whether or not there is a real risk of dissipation of the assets outside the reach of the Court.

**THE LAW**

**[26]** The principles on freezing orders have been well established. In the case of *Jamaica Citizens Bank Limited v Dalton Yap*[1], the Court of Appeal adopted the principles established in *Ninemia Maritime Corp v. Trave Schiffahrtsgesellschaft mbH & Co. K.G. The Niedersachsen*[2] as to what the Applicant must establish to obtain a freezing order.

**[27]** This was also restated in the case of Agro Expro Farms Limited v Rockwill Concrete Services Limited[3].

**[28]** The cases establish two things:

*i) The Applicant must have a case of a certain strength. Rattray P posited in the Jamaica Citizens Bank Limited case that this strength must be "a good arguable case, the standard of which is evidence which is more than barely capable of serious argument…"; and*

*ii) There must be a real risk of dissipation of the asset. This risk must be established by "solid evidence"*

**[29]** In the decision of *Agro Expro Farms Limited,* at paragraph 15, the Court said that the arguable case is not established if the claimant does not have the evidence to

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[1] (1994) 31 JLR 42

[2] [1984] 1 All ER 398

[3] [2010] JMCA App 21

substantiate the case relied upon, or if the case is likely to be struck out and may not be satisfied if there is an arguable defence[4].

**[30]** The next issue concerns whether there is a real risk of dissipation of the Defendants' assets. The authorities make it clear that there must be "solid evidence" of this risk. Suppositions and conjectures are certainly insufficient.

**[31]** The case of *Half Moon Bay Ltd. v Earl Levy*[5] has given specific guidance as to the nature of the evidence required to justify the grant of a freezing order. In this regard the learned Chief Justice, in discharging the freezing order in that case stated:

> *"unsupported statements or expressions of fear by the plaintiff that if a defendant is permitted to sell, the proceeds of the sale could be removed from the jurisdiction is not sufficient to establish the risk factor. Mere intention by the defendant to sell will not suffice either."*

**[32]** It is also important to remember that the standard is a fairly high one. Whilst it is still on a balance of probabilities (as all burdens of proof in civil proceedings are), the evidence required to support the assertion that there is a real risk of dissipation should be quite compelling.

## ANALYSIS

### The arguable case – has it been established?

*The Likelihood of the Claimant's Case Being Barred by Limitation*

**[33]** I will start with this issue first as the limitation defence has been pleaded in the joint defence of the Defendants. If it holds, the Claimant's case is finished and there

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[4] Id at para 15 per Harrison JA

[5] (1997) 34 JLR 215

would have been no purpose in freezing the Defendants' assets for a plainly hopeless claim.

**[34]** I must stress that I am not here determining whether or not the limitation defence has been established. There is not now before me any applications by the Defendants to strike out the Claimant's case or for summary judgment.

**[35]** What I am doing is assessing the likelihood of success of a potential application either for strike out or summary judgment in the context of assessing whether or not the Claimant has an arguable case. If I find that it is not likely that the Claimant's case can survive a challenge, then they do not have an arguable case.

**[36]** Counsel for the Claimant and the Defendant have both accepted that the relevant law is the **Limitation of Actions Act.** In particular section 46. It was accepted from early that this particular contract was a simple contract and not a specialty and so the relevant limitation period would be 6 years.

**[37]** It was accepted by both parties that the time started to run from 2014 when the Claimant submitted the first Statement of Account to the Defendants for payment. It was at this point that the Claimant demanded payment.

**[38]** The sticking point between the parties on the limitation issue concerns whether or not the payment of the US$3,000.00 by the Defendants in 2015 represents an acknowledgment of the construction contract debt in 2015.

**[39]** I find that there is no evidence of a written acknowledgment of the Construction Contract debt by the Defendants. The receipt for the US$3,000.00 was prepared by the Claimant. Section 46 of the **Limitation of Actions Act** makes it clear that it is only a written acknowledgment of the debt **by the Defendants** (emphasis mine) (the person who should make the payment) that would suffice to take the claim outside of the limitation period.

**[40]** In the case of *Surrendra Overseas Ltd v Government of Sri Lanka*[6], it was held that a debtor can only be held to acknowledge the claim if he has in effect admitted his legal liability to pay the debt the claimant seeks to recover.

**[41]** The case of *Dungate v Dungate*[7] makes it plain as well that a written acknowledgment of general indebtedness of the claim will be sufficient acknowledgment so long as the amount owed can be ascertained through extraneous evidence.

**[42]** But the 1st proviso in section 46 provides that nothing in section 46 shall take away or alter or lessen the effect of the payment of any principal or interest by any person whatsoever. This means that if there is a part payment of the debt, then the debt continues and there is no limitation regardless of whether or not there has been a written acknowledgment of the debt.

**[43]** So what is the debt the Claimant seeks to recover? It is really two debts founded upon two different agreements that cover two different things.

**[44]** The Claimant asserted in paragraph 3 of the Particulars of Claim that it was a condition of the agreement for sale of the land that the Claimant would be the property manager and that the Defendants would pay the Claimant a monthly maintenance fee of US$100.00 per month for the Claimants services of managing and maintaining the wider development on which the property was located. The Claimant then asserts at paragraph 12 of the Particulars that the Defendants owe them US$2,400.00 representing 2 years' maintenance **for the past 24 months** as at the date of filing the claim.

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[6] [1977] 2 All ER 481

[7] [1965] 3 All ER 818

**[45]** I find the pleadings a bit curious. The Claimant is asserting in the pleadings that the "maintenance" under the Agreement for Sale was outstanding **for the past 24 months**. That would make it a claim for the periods December 2019/2020 and 2020/2021. Implicit in that is that between 2013-December 2019, the Claimants owed no "maintenance". The argument from the Defendants that the US$3,000.00 paid in 2015 was towards the "maintenance" in the terms they asserted in the joint affidavit, and not the construction contract, would seemingly be strengthened and the case for the Claimant that the US$3,000.00 was towards the Construction Contract debt, would seemingly be undermined. This is especially so where the Agreement for Sale clearly made it a fixed sum of money (US$5,000.00) for a fixed period (no longer than 6 years). This period would have expired by 2019. The Claimant is not contending in the pleadings that the terms had changed.

**[46]** It may lend a measure of credence to an argument that the US$3,000.00 as being towards the Construction Contract debt, was but a ruse to extend a limitation period that may have expired at the time the Claim was filed.

**[47]** The other claim made in the Particulars of Claim was for US$58,934.00 for the balance due at the end of the Construction Contract of US$20,000.00 plus escalation of US$38,934.00 as well as interest at the rate of 20% for late payment.

**[48]** Concerning the Construction Contract debt, the Defendants have not acknowledged this debt in any writing or at all for that matter. The question of the payment of the US$3,000.00 itself (which the Defendants do acknowledge they made) and to which agreement it referred, is going to come down to a question of evidence and credibility of witnesses (if any can be produced by the parties). But at this stage, the Claimant's assertion that it was paid towards the Construction debt seems on shaky footing.

**[49]** Mr. Christie sought to rely on the 2nd proviso in section 46. But I do not find that this assists him at all as the acknowledgment to which this second proviso relates, must, I find, also be a written acknowledgment or a payment from someone else owing on the contract other than the two Defendants whom the Claimant has already sued.

**[50]** So I find that at this stage of the proceedings, the Claimant's case may be highly susceptible to being barred by s. 46 due to the shaky status of the payment of the US$3,000.00 as being capable of referring to the payment towards the construction contract. In the circumstances, I find that the Claimant does not have an arguable case.

*Outside of the Limitation Defence, What of the Evidence to Support the Claim?*

**[51]** I have examined the Affidavit evidence provided by the Claimant and the Defendants. I have looked at the specially endorsed Claim Form and the Joint Defence. I have heard the submissions of counsel. Having looked at the case in the round, I do not find that the Claimant's case for the debts has a solid evidential foundation.

**[52]** The Defendants deny that a maintenance agreement was made in the Agreement for Sale at all. The Agreement for Sale was completed in 2013. The express term of the agreement was that **"on completion"** (emphasis mine) the Defendants were to pay the sum of US$5,000.00 for taking care of the guards and tennis courts for a period of five years. There is nowhere else in the contract that speaks to the payment of maintenance of US$100.00 per month for an indefinite period.

**[53]** Paragraph 3 of the Particulars of Claim makes it clear that the basis of this maintenance agreement is the Agreement for Sale and not any oral agreement or any other written agreement. It is quite arguable that the foundation for the maintenance claim of US$2,400.00 for 2 years outstanding maintenance for 2020

and 2021 does not exist and is therefore liable to be struck out as disclosing no basis for bringing the claim.

**[54]** I examined the Affidavit of Aimee Mitchell sworn on the 4th March 2022. At paragraph 7 she asserts that Mr. Fletcher instructed her that the contract spoke to two options for paying the maintenance: it was either an annual sum of US$1,000.00 or a monthly sum of US$100.00. If this represented the instructions of Mr. Fletcher, then Mr. Fletcher's instructions are in clear contrast with the contract. The Agreement for Sale was exhibited to the Affidavit of Mrs. Helen Evelyn filed by the Defendants from 13.12.21. It is clear that there was nothing in there concerning monthly maintenance or an annual figure for maintenance. Thus, the Court is uncertain and looks askance at the "instructions" of Mr. Fletcher.

**[55]** Concerning the Construction Contract, the first major hurdle for the Claimant is the absence of the scope of works in the contract. This means that there is no objective basis for the trial judge to determine what was or was not included in the scope of works.

**[56]** The bulk of the Claimant's claim is the alleged indebtedness arising from what he terms the "additional work". This is over US$38,000.00. But the Defendants have vehemently contested that any of the works cited by the Claimant were in fact additional work. They assert that these were all works expressly or impliedly contemplated in the original scope of work. In the absence of the actual document that outlined the scope of work as agreed, a trial judge will have a hard time divining what was original work vs what is additional work from the say so of witnesses.

**[57]** There is also the palpable lack of documentary support for the expenditure claimed by the Claimant in the second statement of account which sets out the value of additional work done. I asked counsel about this and he indicated that he received none. He asserted that his client was also not so sophisticated and so documents may not always be kept.

**[58]** I rejected these assertions. The Claimant is not a handcart vendor. The Claimant is a limited liability company. Mr. Fletcher was sophisticated enough to draft two different contracts, the Claimant has multiple properties under its management each valuing $US 100,000.00 at least, and they have written receipts for payments made to them by the Defendants. So the absence of documentary evidence of proof of expenditure by them is far less excusable than a simple man operating a handcart on the streets of Spanish Town.

**[59]** What is more, the contract itself speaks to the Claimant being *reimbursed* for expenses incurred. There is no agreement for the Defendants to be liable for any other expenditure other than those incurred by the Claimant for which the Claimant is to be reimbursed. There is no documentary evidence of any expenditure by the Claimant, its servants and/or agents in the construction of the Defendants home. This significantly undermines the credibility of any such claim.

**[60]** All told the Claimant does not appear to have an arguable case for the US$38,000.00.

**[61]** Then there is the challenge by the Defendants to the workmanship itself. This is a direct challenge to the claim to a balance of $20,000.00 on the contract itself. This also will come down to a question of credibility. There is a palpable lack of any objective evidence such as photographs of the state of affairs as the construction progressed. There isn't even an affidavit of the Contractor hired by the Claimant to do the work in response to the allegations raised by the Defendants in their letters. This lack of objective evidence regarding the quality of the workmanship is on both sides of the claim. But as the Claimant has the more onerous burden at this stage, the lack of proper documentation on their part will weigh more heavily against them.

**[62]** Now all of this may come out at trial, but at this stage, the Claimant needed to have put forward a case that had a greater evidential grounding that it does now in order to demonstrate it had an arguable case. What is more, the issues surrounding the

question of the outstanding maintenance in the face of the Contract undermines the credibility of the Claimant's case and has the effect of severely weakening any good arguable case.

**[63]** In the circumstances, I am not satisfied that it is more likely than not that the Claimant has an arguable case to satisfy the test for the continued imposition of the freezing order.

**Is there a Risk of Dissipation?**

**[64]** I do not believe there is such a risk of dissipation and there has been no "solid evidence" of any sort put forward concerning same. In the circumstances, I find that no such risk exists.

**CONCLUSION**

(1) The Claimant's Amended Notice of Application for Court Orders is refused.

(2) The interim freezing order imposed by Tie-Powell J is hereby lifted.

(3) Costs of the Application to the Defendants to be taxed if not agreed.

(4) The parties are to proceed to mediation in accordance with the CPR.

(5) Leave to appeal granted.

(6) Defendants Attorneys-at-Law to prepare, file and serve this Order.

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**Dale Staple**
**Puisne Judge (Ag)**