JUDGMENT [2012]JMCC Comm.18

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2012 CD00110

IN THE MATTER OF SECTION 160-165 OF THE COMPANIES ACT

AND

IN THE MATTER OF SECTION 213 OF THE COMPANIES ACT

AND

IN THE MATTER OF THE INCOME TAX ACT

BETWEEN	**VALLEY SLURRY SEAL CARIBBEAN**	**IST CLAIMANT**
AND	**EARL LEWIS**	**2ND CLAIMANT**
AND	**VALLEY SLURRY SEAL COMPANY**	**1st DEFENDANT**
AND	**JEFFREY REED**	**2ND DEFENDANT**

Mr. Paul Beswick, Mr.Kayode Smith and Ms. Carissa Bryan, instructed by Ballantyne Beswick & Co, Attorneys-at-Law for the 1st Claimant.

Mr. Christopher Dunkley and Mrs. Youlande Christopher-Walker, instructed by Phillipson Partners, Attorneys-at-Law for the 2nd Claimant.

Mrs. M.Georgia Gibson-Henlin and Ms. Kerrian Mitchell instructed by Brady & Co. Attorneys-at-Law for the Defendants.

COMPANY LAW - DERIVATIVE ACTION - SECTION 212 OF THE COMPANIES ACT - NEED TO SEEK COURT'S LEAVE-WANT OF JURISDICTION WITHOUT LEAVE-SERVICE ON DEFENDANTS ABROAD - NEED FOR STRICT COMPLIANCE WITH RULES – RULES 11.15, 9.6, 7.7 AND 5.12 OF THE CPR

CIVIL PRACTICE AND PROCEDURE-STRIKING OUT-RULE 26.3 OF THE CPR

IN CHAMBERS

Heard: 17th, 19th December 2012.

Mangatal J:

[1] This claim was filed on the 18th September 2012. At the time both Claimants were represented by the firm of Phillipson Partners. On the 29th of November 2012 a Notice of Change of Attorneys was filed by Ballantyne Beswick & Co. on behalf of the 1st Claimant Valley Slurry Seal Caribbean Limited ("Valley Seal Caribbean").On the 30th of November 2012 a Notice of Application was filed on behalf of Valley Slurry Seal Caribbean, supported by the Affidavit of Carol Lewis, sworn to on the 30th of November 2012, who, along with her husband Earle Lewis, is a director of Valley Seal Caribbean. The Claimants were seeking the following relief that:

1. *The time for service of this Notice of Application for Court Orders be abridged if necessary to the actual date of service.*
2. *The Court's leave to consolidate* ***Claim No. 2012 CD 00108****, Valley Slurry Seal Company and Valley Slurry Seal Caribbean Limited v. Earle Lewis and Carol Lewis with this Claim.*
3. *An interim injunction restraining the Defendants whether by themselves, their servants and or agents or howsoever otherwise, from taking possession of or exporting from this jurisdiction, two macro pavers with serial numbers* ***3BPZL00X68F718449*** *and* ***3BPZ00X48F718448****, for a period of twenty eight (28) days from the date of this Application.*

4. *A stay of proceedings in **Claim No. 2012 CD 00108**, Valley Slurry Seal Company and Valley Slurry Seal Caribbean Limited v. Earle Lewis and Carol*

   Lewis pending the determination of this application.

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

1. *That this Application for Court Orders in general is made pursuant to Part 11 and 17.1 and 41.2 and Part 26, Rule 26.1(2)(b) of the Civil Procedure Rules 2002.*
2. *That there is a pending Application in **Claim No. 2012 CD 00108** to consolidate these two Claims.*
3. *Claim Nos. **CD 00108 of 2012** and **CD 00110 of 2012** arise from a common dispute between the same or related parties with overlapping issues and reliefs, and consolidation would result in a more expeditious and fair hearing and disposal of both Claims.*
4. *That by operation of transfer pricing, an operating lease between the 1st Defendant and the 1st Claimant was not at arms length, and was in effect a finance lease which capitalized macro pavers bearing Serial Numbers …., the subject of a relation claim, as an asset of the 1st Claimant.*
5. *By Amended Notice of Application for Court Orders dated September 12 2012 and filed September 28,2012 **Claim No. 2012 CD 00108**, Valley Slurry Seal Company and Valley Slurry Seal Caribbean Limited v. Earle Lewis and Carol Lewis, the 1st Claimant has sought to remove the two(2) macro pavers bearing Serial Numbers …., the subject of dispute from the jurisdiction.*
6. *That in **Claim No. 2012 CD00110(2012 CD 00108?**), the 1st Claimant was represented at that Application by Attorneys at Law engaged by the 2nd Defendant for the expressed purpose of aiding the 1st Defendant's Notice of Application, to the clear and obvious prejudice of the 1st Claimant.*
7. *That judgment on the 1st Defendant's Notice of Application is due to be handed down by this Honourable Court on December 11, 2012, without the benefit of any proper representation of the 1st Claimant's interests.*

8. *That the 2nd Defendant, as Managing Director of the 1st Claimant is in breach of his fiduciary duty owed to the 1st Claimant.*

[3] Valley Slurry Caribbean's application came on for hearing on the 10th of December, the day before judgment was scheduled to be handed down by me in **Claim No. 2012 CD 00108**. I indicated to the parties that in light of all of these developments, I would no longer be able to hand down judgment on the 11th December. I also pointed out that although it is true that in **Claim No. 2012 CD 00108** an application had been filed on behalf of the Defendants in that Suit to consolidate the Claim with **Claim No. 2012 CD 00110**, at the time when the application by the Claimants in **Claim No. 2012 CD 00108** for amongst other relief, that the Defendants be directed to deliver up to the Claimants the subject pavers was heard, it was accepted that an application for consolidation could not be heard since service had not been effected in **Claim No. 2012 CD 00110**. In response, whilst Mr. Dunkley conceded that this was so, he indicated that at the time it was thought that there had been adequate representation of Valley Slurry Caribbean on that hearing, and further, that things have now changed since the Defendants have now been served.

[4] On the 10th of December, 2012, the day when the application on behalf of the Claimants in this Claim was fixed to be heard, a Notice of Application For Court orders to Decline Jurisdiction was filed on behalf of the Defendants Valley Slurry Seal Company and Jeff Reed. The application, which is supported by the Affidavits of Kerrian Mitchell, sworn on December 10, 2012, and Affidavit of Jeffrey Reid, sworn on December 10, 2012, seeks the following relief:

1. *A declaration that this Honourable Court has no jurisdiction in the matter.*
2. *Alternatively a declaration that this Honourable Court declines to exercise its jurisdiction in the matter.*
3. *That the Claim Form and Particulars of Claim herein be struck out.*
4. *In the alternative that there be a stay of proceedings pending arbitration in accordance with the Shareholders Agreement.*
5. *Costs to the Defendants on an indemnity basis.*

6. …..

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

In relation to Orders 1 and 2:

1. *Rule 9.6 of the Civil Procedure Rules 2002 provides that a defendant who disputes the Court's jurisdiction to try the claim or argues that the Court should not exercise its jurisdiction may apply to the Court for a declaration to that effect or strike out or stay the claim.*
2. *Rule 11.15 requires a successful applicant on an application made without notice to serve a copy of the application and any evidence in support on all other parties.*
3. *The Defendants are domiciled and resident in the United States of America. They are therefore not present within the jurisdiction of this Court.*
4. *The Claimants applied for and obtained permission to serve the claim on the defendants outside the jurisdiction.*
5. *However in breach of Rule 11.15 aforesaid the 1st Defendant was not served with the application or the evidence in support thereof or even the order permitting the service.*
6. *The 2nd Defendant has not been served with the claim at all.*

In relation to Order 3

7. *Rule 26.3(b) and (c) the Court may strike out a statement of case where it is an abuse of process or discloses no reasonable grounds for bringing the claim.*
8. *The claim herein is a derivative action.*

9. *However the claim was commenced in breach of the mandatory requirements of section 212 of the Companies Act.*

10. *In those circumstances the claim is unlawful and an abuse of the process of the court.*

In relation to Order 4

11. *The Claimants and Defendants are all parties to a Shareholders Agreement dated March 8, 2010.*
12. *The said Agreement contains an arbitration clause at 14.10*
13. *The claim herein falls within the scope of the arbitration clause.*
14. *The claim herein has been filed in breach of the said clause.*
15. *Section 5 of the Arbitration Act allows the Defendants to apply for a stay of proceedings to uphold the arbitration agreement between the parties.*
16. *The Defendants have taken no steps in the proceedings since filing an Acknowledgement of Service.*
17. *The Defendants are and were ready and willing at the commencement of the claim to do everything necessary for the proper conduct of the arbitration.*
18. *In all the circumstances it is just for the court to decline jurisdiction in the matter.*

[6] In my view, the application filed on behalf of the Defendants was really in the nature of preliminary points, and thus I made some orders as to skeleton arguments and authorities and adjourned the matter to the 17th of December 2012. I had tried to get the Attorneys to agree to an earlier date, in light of the urgency of the matter, at least on the case of the Defendants in this claim, and the Claimants in **Claim No. 2012 CD 00108**, but unfortunately they were not all available until the 17th. I also set the matter of **Claim No. 2012 CD 00108** before me at the same time.

RESOLUTION OF THE ISSUES

DERIVATIVE ACTION

[7] In relation to the arguments directed at the fact that the action is in essence a derivative action, this objection is based upon the rule in *Foss v. Harbottle* (1843) 2 Hare 461, as well as section 212 of the Companies Act.

[8] In our Court of Appeal's decision in **Pan Caribbean Financial Services Ltd. v. Cartade, Koonce, Shakespeare et al** , S.C.C.A. 115,116, and 117 of 2008, judgment delivered January 28, 2011, Harrison JA discussed the rule in *Foss v. Harbottle*, and indicated that in that case it was held that in seeking redress for a wrong done to a company, the company was the only proper claimant in an action to recover in respect of the wrong. I agree with Mrs. Gibson-Henlin that the authorities suggest that the rule applies in circumstances where:

(a) A wrong is done to a company, for example where a breach of duty owed to the company is alleged,
(b) The company suffers loss in consequence of the alleged wrong;
(c) An action is commenced to recover for that loss.

[9] In those circumstances, either the company has to sue or a member such as a minority shareholder must be authorized to sue in the name of the company. There were a number of exceptions at common law that would allow a member to sue in the company's name.

[10] However, those common law exceptions are no longer relevant in light of section 212 of the Companies Act. Section 212 reads as follows:

Complainant Remedies

Derivative actions

212-(1) Subject to subsection (2),a complainant may, for the purpose of prosecuting, defending or discontinuing an action on behalf of a company, apply to the Court for leave to bring a derivative action in the name and on behalf of the company or any of its subsidiaries, or intervene in an action to which any such company or any of its subsidiaries is a party.

(2) No action may be brought, and no intervention in an action may be made under subsection (1) unless the Court is satisfied that-

(a) the complainant has given reasonable notice to the directors of the company or its subsidiary of his intention to apply to the Court under subsection (1) if the directors of the company or its subsidiary do not bring, diligently prosecute or defend, or discontinue the action;

(b) the complainant is acting in good faith;

(c) it appears to be in the interests of the company or its subsidiary that the action be brought, prosecuted, defended or discontinued.

(3) In this section and section 213 and 213A, "complainant" means-

(a) a shareholder or former shareholder of a company or an affiliated company;

(b) a debenture holder or former debenture holder of a company or affiliated company;

(d) a director or officer or former director or officer of a company or an affiliated company.

[11] It is not in issue that in fact in this case no application was made by the Second Claimant Earl Lewis, who is the minority shareholder in the 1st Claimant Valley Slurry Seal Caribbean Limited. It is common ground between all the parties concerned that the Shareholder Agreement entered into on the 8th of March 2010 in respect of Valley Slurry Caribbean describes the ownership of shares in the company as being 60% owned by Valley Slurry Seal Company and 40% Earl Lewis.

[12] I should point out that on the date of this hearing Mr. Beswick indicated that he had filed an amended application on behalf of the 1st Claimant, seeking leave under section 212 of the Companies Act. Neither the Court nor Mrs. Gibson-Henlin had had sight of this very tardy application. As Mrs. Henlin objected to it, and it would throw out the entire timetable set by the Court for resolving the issues previously formulated and ventilated, I refused the application by Mr. Beswick. In my view, it was too late in the day, after an objection was already being taken by the Defendants that leave had not been obtained, and in all of the circumstances, including the potential urgency of the

application that I had already reserved judgment on in **Claim No. 2012 CD 00108,** for such an application to be maintained.

[13] It was Mr. Beswick's submission that section 212 does not indicate that a failure to obtain the Court's leave requires the striking out of the Claim. Mr. Dunkley referred to the Nigerian case of **Agip (Nigeria) Ltd. v. Agip Petroli International & Ors & 7 Ors** (2010) 1 CLRN 1. More specifically, Mr. Dunkley relied upon a Commentary appearing in **ThisDay Newspaper of June1, 2010** which criticized the decision as allowing technicalities to suppress substance over form. Mr. Dunkley also referred to letter dated September 5, 2012 from Earle Lewis, the 2nd Claimant, to Jeff Reed, exhibited to the Affidavit of Earle Lewis in **Claim No. 2012 CD 10080** , as in substance constituting notice to the Directors of the intention to bring this claim i.e. **Claim No. 2012 CD 10010**. However, I agree with Mrs. Gibson-Henlin that this Nigerian decision supports the Defendants/Applicants' case that the conditions precedent to the filing of the derivative action have not been met. As such the non-compliance goes to jurisdiction in so far as it is a statutory condition precedent to the commencement of the Claim. An important point also seen from the case is that in a properly brought derivative action, the Company is the Defendant so that it can be bound by the action. The Defendants relied upon the case of **R. v. Monica Stewart** (1971) 17 W.I.R. 381, 384 B as authority for the proposition that proceedings for corporate relief brought in breach of the section are a nullity. I also agree that subsection 212(2)(a) does not just require notification, but in fact requires that notice be given to the directors of the company specifically in relation to an intention to apply to the Court under subsection(1).That was not done in this case. In **Agip**, the Court held that the application for leave to bring the derivative action must be on notice to the company – page 13.

SERVICE

[14] In my judgment, the Affidavit of Service of Karen Clarke, filed on November 6 2012, and upon which the Claimants rely, does not prove service on the Defendants by FAX because it does not comply with the requirements of Rule 5.12 of the CPR. Further, exhibits KM1 and KM2, exhibited to the Affidavit of Keriann Mitchell, and being

the only documents exhibited indicating what documents were served, and at what facsimile numbers, does support the assertion of the 1st Defendant that it was served with the Claim Form and Particulars of Claim on the 18th of October 2012, but not with the application for permission or the order permitting the service. It also supports the claim of the 2nd Defendant that he was served only with the Order of the Court on the 23rd of October 2012 but was not served with the Claim Form and Particulars of Claim. Although the 2nd Defendant has not acknowledged service, since his position is that he has not been served with the claim, Mrs. Gibson-Henlin indicates that he joins in this application because he disputes the jurisdiction of the Court in any event.

[15] I agree with the Defendants' Attorneys that the evidence is that the Claimants did not comply with the rules for service of process. As the Defendants are domiciled and resident outside of the jurisdiction of this Court, i.e. in the United States of America, I agree that the law is that in these circumstances the Court can only assume jurisdiction over the Defendants if process is served upon them in the manner prescribed by the rules. See **Dicey, Morris and Collins on Conflict of Laws** , Sweet & Maxwell, London 2006, Volume 1, Chapter 11, 305, cited by the Defendants. Also, in **Agip (Nigeria Ltd v. Agip Petroli International & Ors.** cited by Mr. Dunkley, the Nigerian Supreme Court held that the requirement of obtaining leave to serve originating process out of the jurisdiction, is a condition precedent to be fulfilled before a court can exercise jurisdiction. Both the matter of leave to commence a derivative action, and leave to serve out of the jurisdiction are described as threshold issues. Service of process is described as "the door to the inner chamber of adjudication". See pages 10, and 13 of the Judgment. It is particularly important for Defendants who are not within the jurisdiction of the Court to be served, not only obviously, with the Claim and Particulars of Claim themselves, but also with the order permitting service, and the copy of the application and any evidence in support. The person outside of the jurisdiction has the right under Rule 7.7 of the CPR to apply to set aside service on him out of the jurisdiction and in order to properly advise himself, it is imperative that he see the order and the evidence filed in support of the application. In this case, the Claimants have not satisfied these conditions precedent, and have therefore not passed the threshold to access the court's jurisdiction. In my judgment, on this basis the Court has no

jurisdiction to entertain this claim or any application by the Claimants against these Defendants.

[16] Whilst I agree that in essence this claim is a derivative action, particularly having regard to the terms of the Claim as amended on November 30, 2012, in so far as there may be any separate claim by Mr. Lewis the 2nd Claimant which is not a claim for corporate relief, such a claim cannot proceed because the Defendants have not been served and are therefore not amenable to the personam jurisdiction of the Court.

ARBITRATION CLAUSE

[17] There is an arbitration clause at clause 14.10 of the Shareholders Agreement. In light of that clause the Court would if certain conditions are established, decline jurisdiction pursuant to section 5 of the Arbitration Act. – see **Cable and Wireless Jamaica Ltd (t/a Lime) v. Digicel (Jamaica) Ltd.** Claim No. 2009HCV04656, delivered November 6, 2009, and **Douglas Wright (t/a Douglas Wright & Associates) v. The Bank of Nova Scotia Jamaica Ltd.** , (1994) 31 J.L.R. 351, cited by the Defendants' Attorneys.

1. In the **Douglas Wright** case, Orr J. at page 359 stated that "there is now a very strong bias in favour of enforcing arbitration agreements. A strong cause for refusing a stay must be shown"
2. I agree with the Defendants Attorneys that no such cause has been shown. Although at the hearing on December 10 2012, Counsel for the Claimants made the point that here the Defendants are relying upon the arbitration clause in the Shareholders Agreement. However, they have not done so in relation to the arbitration clause in the Master Equipment Lease in **Claim No. 2012 CD 00108**. However, I think the point is well made by Counsel for the Defendants that the claim in **Claim No. 2012 CD 00108** does not concern a dispute *under* the lease. Consequently that woud not be a basis for refusing a stay in this claim. However, I agree with Mr. Beswick that, although the Defendants rely on their Attorneys letter dated November 16 2012 enquiring as to the availability of Mr. Hugh Small as an arbitrator, section 5 of the Arbitration Act is not fulfilled because there is no

evidence that the Defendants were, at the time when this claim was commenced, ready and willing to do all things necessary for the proper conduct of the arbitration. I therefore am not minded to accede to the Defendants' application under Order 4.

DISPOSITION

[18] All told, I am of the view that the defendants are entitled to the relief set out at paragraphs 1 and 3 of the Notice of Application for Court Orders filed December 10 2012, on the basis of grounds 7-10 (which means the Court simply has no jurisdiction in relation to the claim as no leave was obtained to bring derivative action), and grounds 1-6 (which means the Court has no jurisdiction over the Defendants since they have not been properly served). I therefore grant relief as follows:

(a) A Declaration that this Honourable Court has no jurisdiction in the matter
(b) The Claim Form and Particulars of Claim are struck out.
(c) Costs are awarded to the Defendants to be taxed if not agreed.

[19] I also wish to make it clear that the principal basis upon which I have struck out the Claim is that it was commenced in breach of the statutory requirements of section 212 of the Companies Act. This in no way affects or prohibits the minority shareholder Earle Lewis from making a properly constituted application to the Court for leave as required under section 212 to bring a derivative action in the name or on behalf of Valley Slurry Seal (Caribbean) Limited for what he alleges are wrongs done to the company in which he and his wife Carol Lewis have clearly been integrally involved.